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The International Comparative Legal Guide to:
Merger Control 2012

A practical cross-border insight into merger control issues

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Country Question and Answer Chapters:

EDITORIAL

Welcome to the eighth edition of The International Comparative Legal Guide to: Merger Control.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of merger control.

It is divided into two main sections:

Four general chapters. These are designed to provide readers with a comprehensive overview of key issues affecting merger control, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in merger control in 54 jurisdictions.

All chapters are written by leading merger control lawyers and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Nigel Parr and Catherine Hammon of Ashurst LLP, for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The International Comparative Legal Guide series is also available online at www.iclg.co.uk.

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1 Relevant Authorities and Legislation

1.1 Who is/are the relevant merger authority(ies)?

A notification for a merger is notified to the Service of the Commission for the Protection of Competition ('CPC') and the CPC is the relevant merger authority making decisions on the compatibility of concentrations with the applicable legislative framework. Powers are also vested in the Minister of Commerce, Industry and Tourism to declare a concentration as being one of 'major importance' on the grounds of public interest, even if a concentration does not meet all the threshold requirements laid down by the relevant law.

1.2 What is the merger legislation?

The Control of Concentrations between Undertakings Laws 1999 to 2000, Law 22(I)/ 1999 (as amended) ('the Law') is the relevant governing national law on the control of concentrations.

Given that Cyprus is a member of the EU, the CPC also has competence to apply the EC Merger Regulation 139/2004.

1.3 Is there any other relevant legislation for foreign mergers?

Certain restrictions apply as regards the participation of non-EU persons (natural or legal) in local mass media, where an individual non-EU person cannot have participation over 5% (the corresponding permitted participation for EU persons is 25%) and such participation is possible only on the basis of a permit of the Ministerial Council, whilst the total percentage participation of all non-EU persons (natural or legal) in each individual media company cannot exceed 25% (the corresponding permitted participation for EU persons is 39%). (Law on Radio and Television Stations, Law 7(I)/1998 (as amended).)

1.4 Is there any other relevant legislation for mergers in particular sectors?

Media Sector

See question 1.3 above regarding applicable restrictions in cases of acquisition of a participatory interest in radio and TV stations in the Republic of Cyprus.

Banking Sector

According to the Law on the Regulation of Banking Business, Law 66(I)/1997 (as amended), the prior approval of the Cyprus Central Bank is required before any Cypriot or non-Cypriot person (natural or legal) may acquire 10% or greater of a bank incorporated in Cyprus.

Insurance Sector

The Law on Carrying out of Insurance Business and Other Relevant Issues, Law 35(I)/2002 (as amended) includes certain provisions which require the permission of the Insurance Superintendent prior to the acquisition of a percentage over 10% in an insurance company by any person (natural or legal), or in case of the acquisition of a participatory interest in an insurance company which would result in the possibility of the exercise of substantial influence in the running of the insurance company in question.

Financial Services Sector

The Law on Investment Services and Activities and of Regulated Markets, Law 144(I)/2007 stipulates that the prior permission of the Cyprus Securities and Exchange Commission is required for any acquisition of over 10% of the share capital or of the voting rights of a licensed Cyprus enterprise providing investment services, or in cases where the acquisition of a participatory interest would lead to the ability to exercise substantial influence in the running of the said entity.

Law on Public Take-Over Bids, Law 41(I)/2007 (as amended)

According to the said Law, an offer for a public take-over may be revoked or rendered null and void, in case a relevant approval by the CPC is not granted.

2 Transactions Caught by Merger Control Legislation

2.1 Which types of transaction are caught – in particular, how is the concept of "control" defined?

According to the provisions of the Law, any 'concentration [of enterprises] of major importance' is caught within the ambit of the Law. A 'concentration' is defined as follows:

(i) if two or more previously independent undertakings merge;

(ii) if one or more persons already controlling at least one undertaking, or, one or more undertakings, 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 undertakings; or

(iii) if a joint venture is established which permanently carries out all the functions of an autonomous economic entity.

Clause 4(3) of the Law defines 'control' as follows:

'Control' for the purposes of this Law means control constituted by

rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:

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

(b) rights or contracts which confer the possibility of decisive influence on the composition, meetings or decisions of the organs of an undertaking.

Further, the Law stipulates that control is acquired by persons or undertakings which:

(a) are holders of the rights or entitled to rights under the contracts concerned; or

(b) while not being holders of such rights or entitled to rights under such contracts, have the power to exercise the rights deriving therefrom.

A 'concentration of major importance' is determined by reference to the jurisdictional thresholds applicable in each case (please refer to question 2.4 below for the applicable thresholds), with the exception of a concentration which does not meet the jurisdictional thresholds, but which however is declared as one of 'major importance' by virtue of a ministerial order on the grounds of public interest (please refer to question 2.7 below).

The Law does not consider the following cases as ones where a concentration of enterprises occurs:

(a) credit institutions or other financial institutions or insurance companies, the normal activities of which include transactions and dealings in securities for their own account or for the account of third parties, hold on a temporary basis securities which they have acquired in an undertaking with a view to reselling them, provided that they do not exercise voting rights in respect of those securities with a view to determining the competitive behaviour of that undertaking or provided that they exercise such voting rights only with a view to preparing 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;

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

(c) where the operations referred to in paragraph (b) of subsection (1) of this question are carried out by investment companies; and

(d) where property is transferred due to death under a will or by intestate devolution.

Finally, the ambit of the Law is limited to the extent that it does not apply to cases where the concentration occurs between two or more enterprises, each of which is a subsidiary of the same enterprise.

2.2 Can the acquisition of a minority shareholding amount to a "merger"?

The framing of the term 'control' in the Law does not make any reference to a 'majority' shareholding or to a 'minority' shareholding. The Law merely stipulates that one occasion where a 'concentration' occurs is where one or more enterprises gains 'control' – directly or indirectly – over the whole or part of one or more enterprises. The test therefore, is not an arithmetic one ('majority' or 'minority'), but rather one of whether one enterprise is able – as a result of the concentration – to exercise substantial influence over the activities of another company, irrespective of whether this is the result of the acquisition of a 'majority' or of a 'minority' shareholding.

2.3 Are joint ventures subject to merger control?

Joint ventures may be caught by the Law, provided that the joint venture permanently fulfils the functions of an autonomous economic entity and it does not align its behaviour on the market with any of the parties to the joint venture.

2.4 What are the jurisdictional thresholds for application of merger control?

A concentration of major importance is considered to be one which meets cumulatively the following thresholds:

(a) the aggregate turnover achieved by at least 2 of the participating undertakings exceeds, in relation to each one of them, 3,417,202 EUR;

(b) at least one of the participating undertakings engages in commercial activities within the Republic of Cyprus; and

(c) at least 3,417,202 EUR out of the aggregate turnover of all the participating undertakings relate to the disposal of goods or the supply of services within the Republic.

Appendix II of the Law contains provisions regarding the method of calculating the 'turnover'. Aggregate turnover is calculated with reference to the sums resulting from the sale of goods and provision of services by the enterprises in question during the last financial year and which correspond to their usual activities, after deducting any discounts over sales, VAT and other taxes relating directly to turnover. There are certain special rules as regards the calculation of aggregate turnover of banks and insurance companies.

When calculating the 'aggregate turnover' of an interested enterprise, internal transactions between enterprises which are mentioned in the immediately following paragraph are not taken into account.

The aggregate turnover of an enterprise participating in a concentration is calculated by using the sum of the turnover of the following enterprises:

(a) the undertakings participating in the concentration;

(b) undertakings in which the undertakings participating in the concentration hold, directly or indirectly:

  (i) more than half of the capital or business assets;

  (ii) more than half of the voting rights;

  (iii) the power to appoint more than half of the members of the supervisory or administrative board or the bodies which legally represent the undertaking concerned; or

  (iv) the right to manage the affairs of the undertaking;

(c) the undertakings which hold in a participating undertaking the rights or powers referred to in subparagraph (b) of this paragraph;

(d) the undertakings in which an undertaking referred to in subparagraph (c) of this paragraph holds the rights or powers referred to in subparagraph (b) of this paragraph; or

(e) the undertakings in which more [than one] undertakings – as referred to in subparagraphs (a) to (d) of this paragraph – hold jointly the rights or powers referred to in subparagraph (b) of this paragraph.

2.5 Does merger control apply in the absence of a substantive overlap?

Merger control applies provided a 'concentration of major importance' comes about as a result of a concentration between undertakings.

2.6 In what circumstances is it likely that transactions between parties outside Cyprus ("foreign to foreign" transactions) would be caught by your merger control legislation?

The Law does not make any exceptions from notification as regards 'foreign to foreign' transactions, the rules apply as described hereinabove (i.e. application of the test as to whether there is a concentration and whether the concentration is one of 'major importance').

2.7 Please describe any mechanisms whereby the operation of the jurisdictional thresholds may be overridden by other provisions.

According to clause 8 of the Law, in cases where the jurisdictional thresholds are not met, the Minister of Commerce, Industry and Tourism has the powers to declare a concentration as being one of 'major importance' on the grounds of major public interest owing to the consequences brought about by a concentration upon economic and social development, technical progress or employment or the provision of goods and services which are necessary to the public security of the Republic as a whole or parts thereof.

The relevant provisions in the EC Merger Regulation regarding the referral of a notification to a national competition authority, as well as the examination of a notified concentration by the European Commission, apply.

2.8 Where a merger takes place in stages, what principles are applied in order to identify whether the various stages constitute a single transaction or a series of transactions?

Clause 6 of the Law stipulates that a concentration of undertakings which takes place in stages, within a period of time not exceeding four years, and which results in the acquisition of control of an undertaking from another, shall be considered to fall within the scope of application of the Law and be deemed to have occurred on the occurrence of the final event as a result of which control is acquired.

3 Notification and its Impact on the Transaction Timetable

3.1 Where the jurisdictional thresholds are met, is notification compulsory and is there a deadline for notification?

Where the jurisdictional thresholds are met, notification is compulsory and must be lodged with the Service of the CPC in writing, at the latest within a week from the date of conclusion of the relevant agreement or the publication of the relevant take-over bid or exchange or acquisition of a participatory interest which secures control over an enterprise, whichever of the foregoing occurs first.

3.2 Please describe any exceptions where, even though the jurisdictional thresholds are met, clearance is not required.

There are no exceptions.

3.3 Where a merger technically requires notification and clearance, what are the risks of not filing? Are there any formal sanctions?

The CPC may impose an administrative fine for a failure to notify a concentration in accordance with the rules laid down in the Law and specifically it may impose a fine up to 85,430 EUR in case of omission to notify a concentration as required by section 13 and an additional fine up to 8,543 EUR for each day on which the contravention continues.

Further, in cases where a concentration is put into effect without obtaining approval from the CPC, the CPC may impose a fine up to ten per cent of the total turnover of the participating undertakings in the financial year immediately preceding the concentration and in addition a fine up to 8,543 EUR for each day on which the contravention continues.

3.4 Is it possible to carve out local completion of a merger to avoid delaying global completion?

Any concentration of major importance (as this is defined in the Law) must be notified and cleared by the CPC prior to it being put into effect. The Law does not provide any exceptions or special provisions for a carve-out as regards the part of the concentration which is to be assessed by the CPC. It may be possible for an applicant to request from the CPC a temporary approval of a concentration (the whole or parts of it), on the grounds that the parties involved stand to suffer serious damages should there be further delay in putting into effect a concentration.

3.5 At what stage in the transaction timetable can the notification be filed?

Please refer to question 3.1 hereinabove.

3.6 What is the timeframe for scrutiny of the merger by the merger authority? What are the main stages in the regulatory process? Can the timeframe be suspended by the authority?

The CPC has 1 month from the moment that the notification of the concentration is considered complete, to inform the applicant in writing as to whether the concentration may be put into effect (both in cases where it is considered that the concentration does not fall within the ambit of the law, or in case it does, where it is considered that the concentration would not raise serious doubts as to its compatibility with the competitive market). The decision of the CPC is issued on the basis of a proposal submitted to it by the Service of the CPC, which carries out a preliminary assessment of the notified concentration. This 1-month period may be extended by up to 14 days on the grounds of the exceptional volume of information or of the complexity of the information filed. This extension is notified to the notifying party at least 7 days prior to the lapse of the 30-day period. Should the CPC fail to issue its decision within the one month period, the concentration is deemed to be compatible with the requirements of the competitive market.

In the opposite case where the notified concentration raises serious doubts as to its compatibility with the competitive market, the CPC sets in motion a procedure for full investigation of the concentration. During this period, the Service of the CPC may collect additional information from the involved parties and/or from other persons which it deems necessary for the completion of its investigation. It examines if there is a need to vary the notified concentration after deliberations with the undertakings involved. The CPC takes into account the views of third parties who may have a legitimate interest as far as the notified concentration is concerned. At the end of its investigation, the Service submits to the CPC a relevant report, at the latest within 3 months from the

date of receiving the complete notification.

The CPC then examines the report of the Service and within 4 months from the date of receipt of the complete notification, declares the notification either in line with the demands of the competitive market, at times under the proviso that certain terms and commitments would be undertaken by the parties involved, or declares the concentration incompatible with the demands of the competitive market. Should the CPC request any additional information, this would stop time from running until the requested information is submitted.

3.7 Is there any prohibition on completing the transaction before clearance is received or any compulsory waiting period has ended? What are the risks in completing before clearance is received?

A notified concentration cannot be put into effect prior to a relevant decision of the CPC. In case of contravention of this rule, there is a risk of imposition of a fine by the CPC, as mentioned in question 3.3 hereinabove.

3.8 Where notification is required, is there a prescribed format?

The notification of a concentration must be lodged in a form which complies with all the information which is stipulated in Schedule III of the Law in order for it to be considered complete. The language of filing is Greek, however, any supporting documentation may be filed in English.

The full text of the Law which includes Schedule III may be found in the form of an unofficial translation into English at the following address: http://www.competition.gov.cy/competition/competition.nsf/dmlbusiness_en/dmlbusiness_en?OpenDocument.

3.9 Is there a short form or accelerated procedure for any types of mergers?

There are no short form or accelerated procedures for particular types of mergers.

3.10 Who is responsible for making the notification and are there any filing fees?

In cases where undertakings merge or acquire joint control, notification must be made jointly by the undertakings or by each of the undertakings separately.

In the rest of the cases, the undertaking acquiring control is burdened with the obligation to notify the concentration.

Currently, there are no filing fees.

4 Substantive Assessment of the Merger and Outcome of the Process

4.1 What is the substantive test against which a merger will be assessed? Are non-competition issues taken into account?

A concentration is assessed by reference to the question as to whether it would create or strengthen a dominant position in the relevant markets within the Republic of Cyprus. If there is a finding that that is the case, the concentration would be declared to be incompatible with the requirements of the competitive market.

In carrying out this assessment, the CPC looks at the following factors:

(a) the structure of the affected markets;

(b) the market position of the participating undertakings and the undertakings;

(c) the economic power of all the participating undertakings;

(d) the alternative sources of supply of the products and services which are traded in the affected markets and of their substitutes;

(e) the supply and demand trends for all the products and services in the relevant market(s);

(f) any barriers to entry to the affected markets; and

(g) the interests of the intermediate and final consumers of the products and services.

4.2 What is the scope for the involvement of third parties (or complainants) in the regulatory scrutiny process?

Any third party (or complainant) may be involved during the investigation stage of Phase II, either on their own volition or following a request addressed to them by either the Service of the CPC or the CPC itself.

In particular, the Service during the course of its investigation may request and obtain information from third parties and may also discuss any proposed measures designed to render a notified concentration compatible with the demands of the competitive market with third parties.

During the stage of full investigation third parties with a legitimate interest may submit an application containing their views on the notified concentration.

Further, the CPC, prior to its issuing any decision at the end of Phase II, may engage in negotiations, hearings, discussions with any third parties.

4.3 What information gathering powers does the regulator enjoy in relation to the scrutiny of a merger?

The Law grants the authorised officers of the CPC powers to ask for access to any premises, vehicles, books or documents which are in the possession of any of the undertakings involved in the concentration, or to which the undertakings have reasonable access to. In addition, any authorised officer of the CPC may request orally or in writing any additional information in the form of clarifications or reports which at his/her discretion are necessary for examination of the matters before the CPC. In case of refusal of any undertaking to cooperate to such requests, the Service of the CPC may make an application to Court to request the issue of an order for the provision of access or for the furnishing of further information.

The Law provides for an administrative fine in cases of failure of any undertaking to provide the requested information, whereby the CPC may impose an administrative fine up to 86,650 EUR in the case of failure to provide any requested information or where the information provided is misleading or false.

Finally, any decision of the CPC taken on the basis of misleading or false information provided may be revoked.

4.4 During the regulatory process, what provision is there for the protection of commercially sensitive information?

Any authorised officer of the Service of the CPC or a civil servant who receives in the course of exercising his/her duties, either directly

or indirectly, knowledge of any matter regarding the concentration, is not allowed to divulge it to any person, other than when it is necessary to do so for the purposes of exercising his/ her professional duties. Non-observance of this rule by an authorised officer of the CPC or a civil servant constitutes a criminal offence which is punishable by imprisonment of up to 6 months or with a monetary penalty up to 1,780 EUR. Confidential information may be redacted from the final text of the decision which is published, save for the copies of the decision which are distributed to the immediate parties involved in the procedure. Parties may make a petition to the CPC, asking for certain information to be considered confidential and thus be redacted from any final text of a published decision.

5 The End of the Process: Remedies, Appeals and Enforcement

5.1 How does the regulatory process end?

The regulatory process usually ends with a decision of the CPC within the stipulated time frame, whereby the decision of the CPC is announced to the parties and is also published in the Official Gazette of the Republic. In cases where the CPC does not make a decision within the stipulated time frames (1 month for Phase I and 4 months for Phase II), the concentration is deemed to be compatible with the demands of the competitive market.

The CPC may take a decision declaring the concentration to be either compatible (Phase I and Phase II), or incompatible with the demands of the competitive market (Phase II).

5.2 Where competition problems are identified, is it possible to negotiate "remedies" which are acceptable to the parties?

It is possible to discuss/negotiate remedies acceptable to the parties and such remedies may be discussed not only with the undertakings involved in the concentration but with other interested parties. Such remedies may be of a structural or a behavioural character and may be included in the decision of the CPC as conditions which must be fulfilled in order for the concentration to be cleared.

5.3 At what stage in the process can the negotiation of remedies be commenced? Please describe any relevant procedural steps and deadlines.

The negotiation of remedies may be commenced at the point where the CPC makes a decision to open a full investigation of the notified concentration and move to Phase II. The Service of the CPC may discuss such measures with the undertakings involved, as well as with any third parties.

5.4 If a divestment remedy is required, does the merger authority have a standard approach to the terms and conditions to be applied to the divestment?

There is no standard approach to the terms and conditions to be applied to a divestment. Any terms imposed would depend on the nature of the particular circumstances of the case. For example, conditions may be imposed as to when/how an increase in price will occur within any given time period, that the undertakings involved in the concentration will divest certain assets to enable a new competitor to enter the market, etc.

5.5 Can the parties complete the merger before the remedies have been complied with?

In cases where the concentration is cleared on the proviso that conditions ('the remedies') are fulfilled first, it is not possible for the merger to be completed prior to compliance with the remedies.

5.6 How are any negotiated remedies enforced?

The Law provides powers to the CPC to recall any decision it took to clear a merger on the fulfilment of certain conditions, in cases where the conditions in question have not been fulfilled or have ceased to be observed.

In addition, a monetary penalty of up to 10% of the aggregate turnover of the undertakings participating in the concentration during the immediately preceding financial year may be imposed in cases where a concentration is put into effect without the fulfilment of a condition(s) imposed by the CPC and additionally a monetary fine of 8,543 EUR per day may be imposed for every additional day during which the infringement persists.

5.7 Will a clearance decision cover ancillary restrictions?

Ancillary restrictions are not covered by any decision of the CPC.

5.8 Can a decision on merger clearance be appealed?

A decision on merger clearance may be appealed within 75 days of its date of issue at the Supreme Court of Cyprus, acting in its administrative authority. The Supreme Court does not examine the decision of the CPC on its merit but rather carries out a judicial review.

5.9 Is there a time limit for enforcement of merger control legislation?

The Law does not set down any time limit for the enforcement of merger control legislation. Further, the Law grants powers to the Service of the CPC to notify the persons who are responsible for notifying a concentration in cases where such a concentration is not notified to the CPC immediately upon the time the Service acquires knowledge of the concentration.

6 Miscellaneous

6.1 To what extent does the merger authority in Cyprus liaise with those in other jurisdictions?

The CPC is a member of the ICN and the ECN and participates in their deliberations.

In addition, the CPC may liaise with other national competition authorities and the European Commission within the ambit of the EC Merger Regulation.

6.2 Please identify the date as at which your answers are up to date.

21 October 2011.

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Maria H. Kyriacou specialises in corporate law, competition and EU law. Maria obtained a Bachelor of Laws (LL.B. Honours-Upper Second) from the London School of Economics and Political Science (LSE), London University, as well as a Master of Laws (LL.M.- Merit Award) from LSE, with a specialisation in International and Comparative Intellectual Property Law. She further obtained a Master of Laws (LL.M.) from Utrecht University, the Netherlands with a specialisation in EU law. Maria was admitted to the Cyprus Bar Association in 2002. Prior to joining the firm, she completed a traineeship ('stage') with the Second Board of Appeals of OAMI, the EU agency for the registration of European trademarks, in Alicante, Spain, she worked in one of the leading law firms in Cyprus and also acted as a legal advisor to the President of the Cyprus Competition Commission for a year.

Maria joined the firm in 2007 as a member of the Corporate Department. She is leading a group of seven lawyers and paralegals dealing with company, commercial and competition law. In particular, the group handles commercial transaction work, carries out review and drafting of commercial agreements and engages in opinion-writing and in the administration of companies.

Maria is a member of the Cyprus Bar Association and the Nicosia Bar Association.

She speaks fluent Greek and English and has elementary knowledge of French and Spanish.

CHRISTODOULOS G. VASSILIADES & CO. LLC
Advocates - Legal Consultants

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The firm sets uniformly high standards of quality services from its base in Nicosia, with coordinated teams in its branch office in Limassol and representative offices in Greece, Russia, Hungary, Belize, and Seychelles. The firm also has an extensive international network of correspondent law firms worldwide and is a member of a number of prestigious lawyer associations. Through these networks the firm is able to call on the expertise of financial and legal professionals worldwide to tailor its services to specific client needs.

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