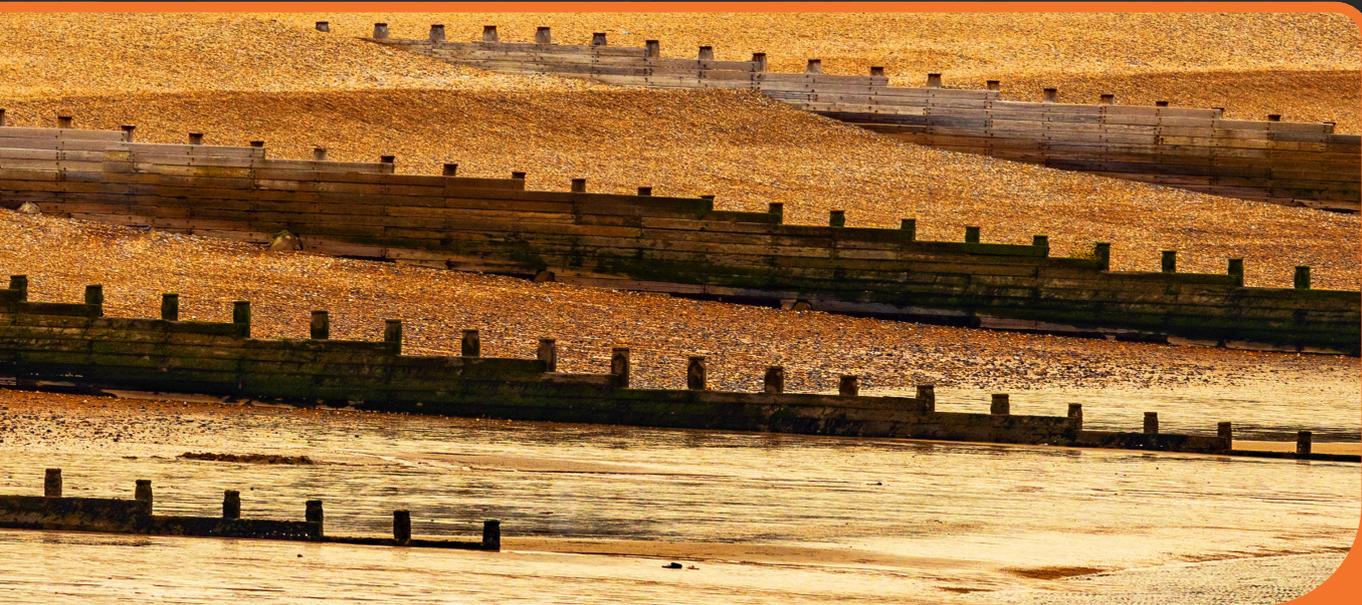


# International Comparative Legal Guides



Practical cross-border insights into merger control issues

## Merger Control 2023

19<sup>th</sup> Edition

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# Cyprus

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Dr Panayiotis Agisilaou

## 1 Relevant Authorities and Legislation

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

The competent authority responsible for the enforcement of merger control legislation is the Cyprus Commission for the Protection of Competition (“CPC”).

### 1.2 What is the merger legislation?

The relevant legislation concerning merger control is the Control of Concentrations between Undertakings Law of 2014 (Law 83(I)/2014) (“Law”).

### 1.3 Is there any other relevant legislation for foreign mergers?

There is no other relevant legislation concerning foreign mergers. Foreign mergers fall within the scope of the Law when the conditions described in question 2.4 for the notification requirement of concentrations of major importance are cumulatively met.

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

There is no other relevant legislation concerning mergers in particular sectors.

### 1.5 Is there any other relevant legislation for mergers which might not be in the national interest?

There is no other relevant legislation concerning mergers that might not be in the national interest.

## 2 Transactions Caught by Merger Control Legislation

### 2.1 Which types of transaction are caught – in particular, what constitutes a “merger” and how is the concept of “control” defined?

The Law covers concentrations, which are defined as transactions that result in the change of control on a lasting basis.

These transactions are referred to as “concentrations” in the Law and are deemed to arise from:

- mergers of two or more previously independent undertakings or parts of them;
- acquisitions by one or more persons already controlling at least one undertaking, or by one or more undertakings, of direct or indirect control of the whole or parts of one or more undertakings, whether by purchase of securities or assets, by contract, or by any other means; or
- the creation of a joint venture that performs all functions of an autonomous economic entity on a lasting basis.

According to the definition given by the relevant Law, “control” refers to direct or indirect control resulting from rights, contracts or any other means that either separately or collectively grant the *possibility* of exercising decisive influence on an undertaking, by:

- a) ownership or enjoyment of all or part of the assets of an undertaking; and/or
- b) rights or contracts conferring the possibility of exercising decisive influence over the composition, voting or decisions of an undertaking’s bodies.

### 2.2 Can the acquisition of a minority shareholding amount to a “merger”?

The change of control on a lasting basis determines whether a transaction amounts to a concentration. Therefore, the acquisition of a minority shareholding amount may give rise to a concentration, provided that it confers control on a lasting basis to the acquirer and fulfils the jurisdictional thresholds.

In examining this issue, the CPC draws guidance from the European Commission’s Consolidated Jurisdictional Notice under Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings (see para. 57).

### 2.3 Are joint ventures subject to merger control?

Joint ventures are subject to merger control as applied on the basis of the Law, provided that they carry out all functions of an autonomous economic entity on a lasting basis and satisfy the jurisdictional thresholds for applying the Law.

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

The Law applies to concentrations of major importance, which

are deemed to arise when the following conditions are cumulatively met:

- a) the aggregate turnover achieved by each of at least two of the participating undertakings is over €3.5 million;
- b) at least two of the participating undertakings achieve a turnover in Cyprus; and
- c) at least €3.5 million of the aggregate turnover of all participating undertakings is achieved in Cyprus.

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

Merger control does apply in the absence of a substantive overlap. Substantive overlap is related to the “Affected Markets” section in the notification document. An affected market occurs when two or more participating undertakings have a horizontal relationship and the concentration leads to a combined market share of at least 15%. Where the relationship is vertical, an affected market occurs if any of the individual or combined market shares amount to at least 25%, regardless of whether there is an existing supplier-customer relationship.

Nonetheless, the existence of a substantive overlap is not relevant to whether a concentration must be notified. The obligation to notify arises where the jurisdictional thresholds are cumulatively met.

#### 2.6 In what circumstances is it likely that transactions between parties outside your jurisdiction (“foreign-to-foreign” transactions) would be caught by your merger control legislation?

Foreign-to-foreign transactions would fall within the scope of the Law in the case where the jurisdictional thresholds as described in question 2.4 were met.

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

The Law provides that the minimum turnovers described in question 2.4 may be amended by Order of the Council of Ministers following a reasoned opinion by the CPC.

#### 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?

Where a concentration is materialised in stages, over a period not exceeding four years, and results in the acquisition of the control of an undertaking from another, that concentration is caught under the Law and is considered to have arisen at the time of occurrence of the final stage, resulting in the acquisition of control.

### 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?

According to the Law, the notification of concentrations of major importance, subject to the exceptions referred to in

question 3.2, is compulsory. The Law does not provide a deadline *per se*, but stipulates that notification must be made prior to the implementation of the concentration and following the conclusion of the agreement, the announcement of the public bid or the acquisition of a controlling interest.

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

The Law describes the following specific situations that are deemed not to give rise to a concentration and, therefore, their notification and subsequent clearance is not required:

- a) Credit institutions or other financial institutions or insurance companies, the normal activities of which include transactions and dealing in securities for their own account or for the account of third parties, hold on a temporary basis securities that they have acquired in an undertaking with a view to reselling them, provided that:
  - i) they do not exercise voting rights in respect of those securities with a view to determining the competitive behaviour of that undertaking; or
  - ii) 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. This period may be extended by request to the CPC, where such institutions/companies can demonstrate that the disposal was not possible within the set time-frame.
- b) Control is acquired by a person mandated by legislation relating to liquidation, bankruptcy, or other similar proceedings.
- c) The acquisition of direct or indirect control by one or more persons already controlling at least one undertaking, or by one or more undertakings, is carried out by investment companies, provided that the voting rights in respect of the holding (in particular concerning the appointment of management and supervisory bodies’ members of the undertakings in which they have holdings) are exercised only to maintain the full value of those investments and not to directly or indirectly determine the competitive conduct of those undertakings.
- d) Property is devolved due to death by will or intestate succession.

Moreover, the Law renders itself inapplicable to concentrations taking place between undertakings that are subsidiaries of the same entity.

#### 3.3 Is the merger authority able to investigate transactions where the jurisdictional thresholds are not met? When is this more likely to occur and what are the implications for the transaction?

The Law vests the Minister of Energy, Commerce, Industry and Tourism (“**Minister**”) with the power to declare a concentration notified to the CPC as one of major public interest considering the potential effects it may have on the public security, the pluralism of the media and the principles of sound administration even if the jurisdictional thresholds are not met.

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

Failure to notify does not in itself result in the imposition of sanctions; however, the partial or full implementation of a concentration to which the notification obligation applies without prior clearance by the CPC may lead to an administrative fine of up to 10% of the aggregate turnover achieved by the undertaking under obligation to notify in the financial year immediately preceding the concentration. Additionally, a fine of €8,000 may be imposed for every day the said infringement continues. The administrative sanctions are determined after taking into account the gravity and duration of the infringement.

Moreover, where it is ascertained by the CPC that a concentration has been implemented without prior notification, it may order its partial or full dissolution.

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

The Law does not provide this possibility. Participating undertakings can, however, request the CPC to grant temporary approval to their concentration. Such a request must be reasoned and demonstrate that further delay in the concentration's materialisation is likely to cause severe damages to the participating undertakings. When deciding whether to grant such a request, the CPC takes into account, among other things, the effects of the suspension on the participating undertakings or on third parties and the threats posed by the concentration to competition. In the case where such a derogation is granted, it may be made subject to conditions and obligations imposed by the CPC in order to ensure the conditions of effective competition.

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

Concentrations to which the notification requirement applies ought to be notified to the Service of the CPC ("**Service**") prior to their implementation and after the conclusion of the agreement or publication of the public bid or acquisition of a controlling interest.

A notification may also be filed in the case where the participating undertakings demonstrate their good-faith intention to conclude an agreement or, in the case of public bids, where the intention or final decision to make such a bid has been announced.

### 3.7 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 regulatory process comprises the preliminary investigation stage (Phase I) and the full investigation stage (Phase II).

The notifying undertaking must be given notice of the decision resulting from the preliminary investigation stage (Phase I) within a month of the date of receipt of the notification by the Service, provided that all the necessary information as specified in Schedule III of the Law has been submitted and the relevant fees have been paid on the said date ("**complete notification**").

In the case where the notified concentration does not receive clearance at the preliminary investigation stage, and a full investigation is ordered, the Service must submit the report of its findings to the CPC within three months of receipt of the complete

notification. The CPC's final decision with regard to the concentration following the submission of the findings report must be notified to the notifying party within four months from the date of receipt of the complete notification (i.e., one month after receipt of the Service's findings report).

In exceptional circumstances, where the above timeframe cannot be met by the Service due to the exceptional volume or complexity of the information contained in the notification, it is obligated, without delay and within seven days at the latest prior to the deadline, to inform the notifying undertaking of the extension of the timeframe by 14 days.

### 3.8 Is there any prohibition on completing the transaction before clearance is received or any compulsory waiting period has ended? What are the risks of completing before clearance is received? Have penalties been imposed in practice?

The Law prohibits the implementation of a concentration prior to clearance by the CPC. A concentration is deemed cleared if no decision or notice is delivered within the specified timeframe.

Additionally, a concentration may be implemented following approval by Order of the Council of Ministers.

The risks of implementing the concentration before receiving clearance are mentioned in question 3.3. Penalties have been imposed in practice for failure to comply with the prohibition to implement a concentration prior to the receiving clearance.

Implementation may be possible following a granting of a temporary approval by the CPC at the full investigation stage (Phase II) (see question 3.4).

### 3.9 Is a transaction which is completed before clearance deemed to be invalid? If so, what are the practical consequences? Can validity be restored by a subsequent clearance decision?

Transactions falling under the scope of the Law must receive a clearance notification prior to their implementation. Therefore, a concentration of major importance that is completed before obtaining clearance is deemed a general principle to be invalid; the validity of such concentration may, however, be ultimately restored subject to the issuance of a subsequent clearance decision by the CPC.

If the concentration does not receive clearance by a subsequent decision by the CPC, the CPC has the power to impose an administrative fine of up to 10% of the aggregate turnover achieved during the immediately preceding financial year to the notifying undertaking. Moreover, the CPC may impose administrative fines of €8,000 for each day the infringement persists. Finally, the CPC has the power to order the partial or complete dissolution of a concentration implemented without obtaining clearance by the CPC.

An exception to the above general principle of invalidity applies to transactions concerning securities that fall under the scope of the Law, which shall be presumed as valid, provided the participating parties (seller and acquirer) prove that they did not know or ought to have known that the implementation of the transaction contravened the Law.

### 3.10 Where notification is required, is there a prescribed format?

The Law does not prescribe a specific format for the notification but lays down the information that is required to be included therein.

Specifically, the notification of a concentration must contain the documents and information referred to in Schedule III of the Law, including:

- A statement containing information on the participating undertakings.
- Supporting documents, such as copies of the final or most recent documents giving rise to the concentration either by agreement or public bid, public bid document (if applicable), copies of the most recent annual reports and audited financial statements of all participating undertakings, copies of reports or analyses that have been prepared for the purposes of the concentration, and a list and short description of the contents of all the other analyses, reports, studies and surveys prepared for the concentration's assessment or analysis with regard to the conditions of competition and of the market, and the actual and potential competitors.
- Details of the concentration, including but not limited to the summary of its nature and scope, an explanation of its purpose, its financial and structural details, turnover and profits details.
- Details of ownership and control relationships.
- Details of personal and economic links.
- Description and analysis of all relevant markets and affected markets.
- In the case of a joint venture, whether two or more parent undertakings retain to a significant extent activities in the same market as the joint venture or in a downstream or upstream market, or a closely related neighbouring market.
- Marking any information included in the notification that is considered confidential or a business secret, along with justification.
- Final signed statement.

#### 3.11 Is there a short form or accelerated procedure for any types of mergers? Are there any informal ways in which the clearance timetable can be speeded up?

The Law does not provide for a short form or accelerated procedure for any type of concentrations.

#### 3.12 Who is responsible for making the notification?

Concentrations arising from a merger or acquisition of joint control must be notified in writing jointly or separately by the participating undertakings. In all other cases, the obligation to notify is borne by the person or undertaking acquiring control.

#### 3.13 Are there any fees in relation to merger control?

The fee for the notification of the concentration is €1,000. In cases where the CPC decides to initiate a full investigation (Phase II) with regard to a notified concentration, an additional fee of €6,000 is payable.

#### 3.14 What impact, if any, do rules governing a public offer for a listed business have on the merger control clearance process in such cases?

Rules governing public offers on listed businesses do not affect the merger control clearance process.

#### 3.15 Will the notification be published?

The fact of the notification is published in the Official Gazette of the Republic of Cyprus, along with the names of the participating undertakings, the nature of the concentration, and the economic sectors involved. In publishing the said information, the CPC takes into account, to the extent possible, the legitimate interests of the affected undertakings in protecting their business secrets.

## 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?

The substantive test against which the CPC assesses a concentration consists of appraising the concentration's compatibility with competition in the market by examining whether it would significantly impede competition in Cyprus or a substantial part of it, particularly as a result of the creation or strengthening of a dominant position.

#### 4.2 To what extent are efficiency considerations taken into account?

In assessing the merger, efficiency considerations are taken into account in order to be weighed against any potential adverse effects on competition.

#### 4.3 Are non-competition issues taken into account in assessing the merger?

When examining a proposed concentration, the CPC only considers competition. The Minister may, however, declare by reasoned order a notified concentration as one of major public interest with regard to the effect it may have on public security, the pluralism of the media and the principles of sound administration.

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

The Law provides that the CPC may involve third parties in the full investigation stage (Phase II), either to collect additional information it considers necessary or to provide the ability to those with a legitimate interest to express their views with regard to the concentration.

There is no provision ruling out the possibility of third parties submitting their views with regard to a concentration at the preliminary investigation stage (Phase I).

#### 4.5 What information gathering powers (and sanctions) does the merger authority enjoy in relation to the scrutiny of a merger?

During the examination of a proposed concentration, the CPC may collect the information necessary to perform its duties through addressing written requests to undertakings, other natural or legal persons, or public or private entities. Recipients of such written requests must promptly, in full and accurately, provide the required information within the timeframe set.

The CPC has the power to impose an administrative fine of up to €50,000 in the case that false or misleading information is supplied, or where information is omitted.

The CPC also has the power to conduct unannounced on-the-spot inspections and enter offices, premises, land and means of transport of undertakings (except residences) and inspect archives, books, accounts and any other records of business activities and receive or acquire copies/extracts thereof. It additionally may, to the extent necessary, seal any of the abovementioned premises belonging to the undertakings for the duration of the inspection, and conduct interviews with the executive staff and personnel in relation to the facts or other information concerning the subject matter and purpose of the inspection.

The CPC may also inspect residences and locations other than those mentioned above following the issuance of a duly reasoned judicial warrant.

The CPC may impose a fine of up to €50,000 in case of refusal to comply with the order for inspection by the CPC or intentional or negligent provision of incomplete or altered evidence sought. Additionally, for every day the omission continues, the CPC may impose an administrative fine of up to €17,000.

The CPC has the power to impose such administrative measures as described herein on participating undertakings and undertakings or associations of undertakings, natural or legal persons or private entities that infringe or omit to comply with the relevant provisions of the Law.

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

The Law provides participating undertakings with the ability to indicate to the CPC which information submitted is of a confidential nature, both at the time of filing a notification, as well as at the stage of a full investigation (Phase II).

Moreover, the CPC's officials have a statutory duty of confidentiality and are bound not to disclose/publicise information on business secrets and information of a confidential nature which is obtained by reason of their post or in the performance of their duties, except where it is necessary (a) for the purpose of proving an infringement of the Law, and (b) for applying the Law.

The duty of confidentiality also binds any other natural or legal person who obtains such information in applying the Law and the procedures prescribed in it.

A violation of the duty of confidentiality constitutes a disciplinary offence that is punishable under the relevant disciplinary provisions. Moreover, such violation constitutes a criminal offence punishable with imprisonment of up to six months, or a fine of up to €1,500, or both such penalties.

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

### 5.1 How does the regulatory process end?

The regulatory process may end at the preliminary investigation stage (Phase I), following a decision by the CPC declaring that a concentration falls outside the scope of the Law or providing clearance due to compatibility with competition in the market.

In the case that, upon preliminary investigation of the notification competition, concerns are identified, and therefore a full investigation (Phase II) is initiated and concluded, the regulatory process ends with the issuance of a decision either clearing the concentration subject to any terms and commitments or declaring its incompatibility with competition in the market.

The CPC's decisions are published in the Official Gazette of the Republic of Cyprus.

It is noted that the regulatory process may also end when the timeframes for providing notice to the notifying party with regard to the CPC's decision in either phase lapses without such notice being provided.

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

The Law provides participating undertakings with the ability to negotiate remedies with the CPC during the full investigation stage (Phase II) (see question 5.4).

### 5.3 To what extent have remedies been imposed in foreign-to-foreign mergers?

There are no decisions imposing remedies in foreign-to-foreign mergers.

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

Negotiations may take place at the full investigation stage (Phase II).

Specifically, if, following the submission of modifications or commitments by the participating undertakings, the Service's concerns with regard to compatibility with the functioning of competition in the market are not alleviated, the latter may invite the said undertakings to negotiate if it deems that certain differentiations or modifications to the circumstances giving rise to the concentration may alleviate such concerns.

Additionally, following the submission of the Service's findings report and before adopting a decision, the CPC may deem it appropriate to conduct negotiations (as well as hearings or discussions) with any person that may help in the concentration's appraisal.

### 5.5 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?

The CPC may, after the completion of a due investigation and report submission by the Service, order the dissolution or partial dissolution of the concentration in order to ensure that the functioning of competition in the market is restored.

To that end, the CPC determines the reasonable timeframe within which the measures must be implemented by the participating undertakings, taking into account the nature and extent of the said measures.

The CPC notifies the participating undertakings and any other interested party in writing and takes all necessary measures in order to ensure that the measures are complied with.

It is noted that the CPC must only impose such measures as necessary for the restoration of competition in the market.

The dissolution or partial dissolution of the concentration is achieved through the deprivation of any participation, shares, or assets or rights acquired or with the cancellation of any agreements causing the concentration or that ensued, or through both means mentioned above.

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

Unless otherwise specified by the CPC, completing a concentration without having complied with the remedies is prohibited. The CPC has the power to impose an administrative fine of up to 10% of the aggregate turnover achieved in the financial year immediately preceding the concentration by the notifying undertaking if the latter fails or refuses to comply within the timeframe set by the CPC with regard to the measure imposed. Additionally, for each day the infringement persists, the CPC may impose an administrative fine of up to €8,000 to the notifying party of the concentration.

### 5.7 How are any negotiated remedies enforced?

The negotiated remedies are enforced by the decision of the CPC declaring the concentration as compatible with the functioning of competition in the market and containing specific terms that its implementation is subject to and the relevant commitments made by the participating undertakings for adherence.

### 5.8 Will a clearance decision cover ancillary restrictions?

There is no specific provision in the Law concerning the inclusion of ancillary restrictions in a clearance decision.

### 5.9 Can a decision on merger clearance be appealed?

Decisions of the CPC, including decisions with regard to concentrations, may be brought by parties having a legitimate interest before the Administrative Court of Cyprus for judicial review through administrative recourse based on Article 146 of the Constitution of the Republic of Cyprus.

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

An administrative recourse may be filed within 75 days from the date of publication of the relevant decision or the date on which the undertaking was notified of it.

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

There is no time limit with regard to the enforcement of the Law. If a concentration is not notified despite the fact that it falls within the scope of the Law and the notification requirement applies to it, the Law may be applied to it at any time it comes to the knowledge of the Service. In such an event, the Service immediately informs the parties under obligation to notify concerning the said obligation.

Moreover, in the case where the CPC ascertains that a concentration has been implemented without being notified, it may, at any time, order such concentration's partial or full dissolution.

## 6 Miscellaneous

### 6.1 To what extent does the merger authority in your jurisdiction liaise with those in other jurisdictions?

The Law provides that the CPC shall cooperate with the European Commission and the Competition Authorities of other EU Member States for issues concerning the control of concentrations between undertakings.

### 6.2 What is the recent enforcement record of the merger control regime in your jurisdiction?

The CPC publishes an annual report containing, among other things, its decisions concerning concentration notifications.

According to the most recent annual reports, the CPC issued 40 decisions in 2020, and 57 decisions in 2019 concerning concentration notifications.

### 6.3 Are there any proposals for reform of the merger control regime in your jurisdiction?

There have been no proposals for reform of the merger control regime.

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

The answers contained herein are up to date as at 24 August 2022.

## 7 Is Merger Control Fit for Digital Services & Products?

### 7.1 Is there or has there been debate in your jurisdiction on the suitability of current merger control tools to address digital mergers?

There has not been debate on the suitability of the current merger control tools to address digital mergers.

### 7.2 Have there been any changes to law, process or guidance in relation to digital mergers (or are any such changes being proposed or considered)?

There have not been any changes in relation to digital mergers.

### 7.3 Have there been any cases that have highlighted the difficulties of dealing with digital mergers, and how have these been handled?

There have not been any cases that have highlighted such difficulties.



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Trojan Economics is an economics consultancy in Cyprus specialising in the application of economic theory and quantitative methods to competition law, state aid, market regulation, and mergers and acquisitions.

Its team of experts have considerable experience in completing pre-merger risk assessments for merging parties and have provided expert economic analysis to merging and other interested parties and their legal advisers for Phase I and Phase II merger cases in Cyprus.

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