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In what context can a stand-alone license agreement trigger the need for a merger control filing.

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Merger control in Cyprus is currently regulated by *the Control of Concentrations Between Undertakings, Law 83(I) of 2014.* As with every merger control regime, the purpose is to identify and prevent the creation of a dominant position of an undertaking in a market which would lead to a substantial lessening of or significant impediment to effective competition. Therefore, effective checks and balances are in place in order to review mergers and acquisitions. An interesting question which arises and has recently been in the spotlight in some jurisdictions but not yet in Cyprus, is whether a transaction concerning a stand-alone licensing agreement can trigger the need for a merger control filing. Moreover, whether a license agreement could affect the market structure and as such make it necessary for the relevant regulatory authority to review the transaction before its implementation. Therefore, assessing such a possibility can provide a useful insight for the Cyprus Commission for the Protection of Competition and build solid foundations for even greater protection of competition within the Cyprus market.

A decisive factor which determines whether a transaction will be notifiable is whether the transaction in question results in the acquisition of control of one undertaking by another. According to *section 6 of The Control of Concentrations Between Undertakings Law 2014*, "control shall be 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". *Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No. 139/2004 on the control of concentration between undertakings (2008/ C95/01)* states that control can also be acquired on

a contractual basis. In order to confer control, the contract must lead to a similar control of the management and the resources of the other undertaking as in the case of acquisition of shares or assets. Additionally, *article 3(2)* specifies that control may also be constituted by a right to use the assets of an undertaking, as proven also by the case of *COM/M.2060 – Bosch/Rexroth*, where a contract in combination with a business lease amounted to an acquisition of control of the undertaking.

A transaction, concerning the transfer of a license of intangible assets such as know-how, brands, trademarks, patents may constitute a concentration under certain criteria, where:

(a) the business that is being transferred has a market presence to which a market turnover can be clearly attributed i.e., the licenses shall transfer the turnover-generating activity;

(b) the license is exclusive; and

(c) it is for a long-term duration.

When forming an exclusive license agreement, which usually concerns innovation-driven industries, such as tech or healthcare companies, the licensor grants to the licensee the right to use intellectual property rights (intangible assets) owned by the licensor. Examples of such agreements include the granting of the right to use a trademark, brand-name, patented technology, and/or the ability to manufacture and sell goods owned by the licensor. Traditionally, in the eyes of the law, the licensor remained the owner of the goods/products in question, and therefore, a distinctive line was drawn between transactions that were automatically notifiable, such as mergers and acquisitions, and licensing agreements.

Nonetheless, by applying the definition of control as provided in the relevant legislative provisions, and provided that the aforementioned criteria are in place, the granting of a license as a stand-alone transaction may result in the licensee acquiring sufficient control and full exploitation of the intangible assets/products in question, thus, triggering the requirement for a merger filling. An additional level of complexity that needs to be assessed regarding the acquisition of control is whether the license agreement is exclusive. To explain further, in cases where the licensee acquired by the agreement the right to '*make, use and sell*', but the licensor retained some limited manufacture rights, even if it was for the exclusive use by the licensee, such agreement was not reportable. Even so, and as it has been rightly spotted recently by the relevant authority in the USA (Federal Trade Commission), if the licensor retained limited manufactured rights, it cannot automatically be concluded that true exclusivity is defeated, and if most of the commercially significant rights have actually been transferred to the licensee, such agreements can still be notifiable.

Crucially, a license agreement will attract the attention of the competition regulatory authorities when it can lead to a structural change in the market, as also highlighted by the case *of Microsoft/ Yahoo! Search Business Case No. COMP/M.5727* which concerned the acquisition of a 10-year exclusive license to Yahoo's core search technologies. The Commission found that the agreements entail a concentration on the grounds that (i) the transferred assets constitute the whole or a part

of an undertaking, that is a business with a market presence to which a turnover can be attributed and (ii) there is change of control over these assets which occurs on a lasting basis.

Consequently, the duration of a license agreement is of great essence, meaning that license agreements of a very long duration are more likely to influence permanently the structure of the market. Although difficult to determine if an agreement is considered to be of a long duration, in the cases of COMP/M.3858 and COMP/M.2632, the management agreements that had a duration of 10-15 years and a contract which had a duration of 8 years were respectively considered by the court to be of a long duration. Importantly, although these cases provide useful information as to when an agreement is of long-duration, in the era of highly innovative and fast-changing markets, technology or healthcare agreements with even shorter durations could result in a structural change of the market, especially if it involves technological healthcare products/assets, and should, therefore, be carefully reviewed if these could trigger the need for a merger filing.

On the same note, license agreements that are structured as short-term, but with the possibility to renew, can lead to long-lasting market impacts and therefore, require to be notified. Importantly, this view is in line with the new German merger control thresholds on licensing agreements.

Lastly, what has also been heavily discussed as an essential criterion for triggering the need for filing, is the condition that the acquirer, by obtaining the license, has entered into an existing market position of the seller. In simple words, and as decided by the Federal Supreme Court of Germany in *National Geographic I*, the grant of a license did not constitute a concentration because the licensors had not yet marketed the magazine in the German language and as a result there was no existing market position which the licensee could enter.

Nevertheless, different jurisdictions including Germany and Austria have moved away from this position and have recognized that, especially in a research & development context, a transaction shall still be notifiable if the acquirer will gain a future market position.

Taking everything into consideration, the current use of sophisticated but complex transactions leads to an increasing need for the relevant competition authorities to assess and ensure that the protection of competition is safeguarded. Indeed, stand-alone licensing agreements, in Cyprus subject to the criteria discussed above, may constitute a concentration that needs to be notified in order to be appropriately reviewed. Therefore, a balance should be struck between ensuring that the market is properly protected and, that the management of the merger review process does not add significant layers of complexity and expense to deal-making.

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