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THE INTERFACE BETWEEN COMPETITION AND CONSUMER POLICIES

Contribution from Malta

-- Session IV --

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THE INTERFACE BETWEEN COMPETITION AND CONSUMER POLICIES

-- Malta --

1. Introduction

1. In Malta one and the same government entity, the Consumer and Competition Division at the Ministry for Competitiveness and Communications, is responsible for the formulation and enforcement of both competition and consumer policies. The Division embraces the Office for Fair Competition and the Department of Consumer Affairs.

2. Office for Fair Competition

2. The Office for Fair Competition (OFC) investigates complaints from competitors as well as consumers and their associations or related bodies and carries out *ex officio* investigations in relation to alleged breaches of the Competition Act¹ which prohibits anti-competitive agreements and concerted practices and abuse of dominance. Under this Act, the OFC is empowered to find infringements and to issue cease and desist or compliance orders against the undertakings concerned in order to remedy the infringement, which decisions and orders are then appealable to the Commission for Fair Trading (CFT), an independent administrative tribunal presided by a magistrate. Where the infringement concerned is a serious infringement or involves a breach of Articles 81 or 82 of the EC Treaty, the Office may only issue a report with its findings and must then remit the case to the CFT for a decision and any orders for remedial action that it may deem appropriate. The OFC and the CFT are the administrative bodies in the country competent to apply and enforce the antitrust rules.

3. The OFC is set to take on an even more pivotal role in the enforcement of competition law under newly proposed amendments to the Competition Act drawn up by the Office and recently submitted for public consultation.² Under these amendments it is proposed that not only would the OFC become the administrative body empowered to decide on any infringement of the Maltese and EC competition rules (subject to a right of appeal to the CFT in all cases) but it would also acquire the power to impose hefty administrative fines for such infringements, apart from the remedial orders for cease and desist and compliance.

4. The OFC is also entrusted with the appraisal of notifiable concentrations under the Control of Concentrations Regulations³ issued under this Act to ensure that such concentrations do not lead to the substantial lessening of competition in the market and in this capacity it is empowered to block concentrations that are deemed likely to have this effect or to force changes to these concentrations to remove the competition concerns. These decisions are likewise appealable to the Commission for Fair Trading.

¹ Chapter 379 of the Laws of Malta.

² See <http://www.mcmp.gov.mt/pdfs/Consultations/ConsultCompAct2007.pdf>

³ LN 294 of 2002 as subsequently amended.

3. Department of Consumer Affairs

5. The Department of Consumer Affairs is responsible for providing information and guidelines to the public on matters affecting the interests of consumers and for the enforcement of a number of consumer laws, foremost amongst which is the Consumer Affairs Act⁴ that empowers the Department to investigate consumer complaints in respect of various consumer concerns and to issue compliance orders for the deletion or alteration of unfair contract terms or the discontinuation or prevention of misleading advertising or illicit comparative advertising as well as in respect of distance selling contracts,⁵ price indication⁶ and consumer credit⁷ when the relative information requirements and other obligations are not fully complied with; apart from the general power to issue public statements and warnings about trading practices detrimental to the interests of consumers and about the persons who engage in such practices. In relation to doorstep selling activities, the Department is also empowered to withdraw, suspend or withhold the renewal of the seller's licence if he breaches the provisions of the Doorstep Contracts Act⁸ which provides for a number of safeguards to protect consumer interests. The Department is also responsible for the administration of the Product Safety Act⁹ in terms of which it is vested with extensive powers to ensure the safety of products on the market. By virtue of wide-ranging amendments to the Consumer Affairs Act that are currently before Parliament, the Department's powers are set to increase in terms of scope as they will extend to all forms of unfair commercial practices detrimental to consumer interests and in terms of sanctions as the power to impose administrative fines will be added to the power to issue compliance orders.

4. Dual-function Agency

6. Both the Competition Act and the Consumer Affairs Act and the regulations issued under them vest all these powers in the hands of the 'Director' of the Office for Fair Competition and the 'Director' of the Department of Consumer Affairs respectively, but, in practice, since 2001, when both offices were joined together to form the Consumer and Competition Division and thereby became a dual-function agency, these powers have been exercised by the Director General of the Consumer and Competition Division. Moreover, the Director General sits as an *ex officio* member of the Consumer Affairs Council that has the function *inter alia* of advising government on the formulation of consumer policy, monitoring and keeping under review business practices and the working and enforcement of consumer laws and undertaking or commissioning studies or research that may be necessary to promote consumer protection.

7. Although within the Division the consumer lawyers and competition lawyers work separately, they regularly liaise and collaborate both in the formulation of policies and drafting of legislation as well as in the investigation of cases that involve both competition and consumer issues. Thus, in the recent drafting of the amendments to the Competition Act and the Consumer Affairs Act, the lawyers drew upon each other's experiences in order to draft amendments that will boost the enforcement capabilities of the Division in relation to both the competition and the consumer laws. The Division strives to give equal importance and to provide equal resources to the implementation of both policies.

⁴ Chapter 378 of the Laws of Malta.

⁵ Distance Selling Regulations, LN 186 of 2001.

⁶ Consumer Affairs Act (Price Indication) Regulations, LN 283 of 2002.

⁷ Consumer Credit Regulations, 2005, LN 84 of 2005.

⁸ Chapter 317 of the Laws of Malta.

⁹ Chapter 427 of the Laws of Malta.

8. Although the two agencies were joined only in 2001, the complementarity of competition law and consumer law was appreciated from the very beginning because the two laws that introduced the competition and consumer regimes in Malta, the Competition Act and the Consumer Affairs Act that were both enacted in 1994, were launched together through a single white paper on fair trading in 1993 that stated that the two regimes ‘deal with two matters which though distinct are actually complementary and inter-related through their common objective of promoting fair trading practices and the welfare of consumers.’¹⁰

5. Synergy between Competition and Consumer Policies

9. The Consumer and Competition Division believes that while it is true that competition policy benefits consumers indirectly, as the indirect beneficiaries of a policy that induces market operators to strive towards economic efficiency, competition policy alone without a robust consumer policy would not achieve the desired result of fully safeguarding consumer interests.

10. By curbing all forms of collusive anti-competitive behaviour on the market and abusive conduct by dominant or monopolistic firms that exploit their market power to make monopoly profits or to drive out meritorious competition and by preventing the acquisition of market strength through mergers and acquisitions that substantially lessen competition, competition policy ensures that markets work well for consumers. In this way not only does the consumer enjoy the most competitive prices, cutting edge innovation and the widest choice but he can also exercise fully his right of ‘economic self-determination’.¹¹ Moreover, in recent years, competition policy has sought market liberalisation by opening up to competition certain sectors that were previously run by monopolies such as the telecommunications sector, thereby bringing in new competitors and resulting in more and better services at lower prices for consumers.

11. However, the Division believes that competition policy alone will not fully safeguard consumer interests. It is useless having the lowest prices in the market and quality products if these products are unsafe and may harm consumers; or if having suffered personal injury or damage to property as a result of the product the consumer is unable to obtain adequate compensation and redress. It is also useless to have a wide choice for consumers if the consumer cannot make a properly informed choice because of a lack of price information on the shelves or a lack of clear and adequate labelling on the products or because misleading advertising or claims by salesmen lead consumers to make the wrong choices. Competition policy provides no safeguards against these market failures or imperfections. Nor does it provide protection against unfair terms in standard consumer contracts accepted unknowingly or reluctantly by the consumer or against contracts concluded by consumers at a distance from the supplier (e.g. over the Internet) on the basis of incomplete information on the product and on the trustworthiness of the supplier. Nor does it safeguard against practices such as doorstep selling and aggressive timeshare selling which surprise and pressure consumers into making the wrong choices.

12. This is where consumer policy comes in. Through laws that more directly intervene and regulate the relationship between trader and consumer, they ensure that in a competitive market the consumer can make a well-informed choice, that his weaker position in the market vis-à-vis the supplier does not prejudice his interests and that effective remedies exist when his economic interests are prejudiced.

¹⁰ ‘Fair Trading: The next step forward ...’ DOI November 1993 at 2.

¹¹ In the sense that he can, through his purchases, choose the products and services that best accord with his needs and thereby send a signal to the producer as to what he values and needs most. In markets where the prices and the output and choice of products is not dictated by traders through their collusive behaviour and exercise of market power, the producer must ‘listen’ to the consumer and be sensitive to his demands resulting in producers supplying the market with the products that are most valued and needed by consumers.

Consumer laws impose safety, accountability, market transparency and information and fairness requirements on traders in their transactions with consumers such as the laws on product safety, product liability, labelling, unfair contract terms, unfair commercial practices and so forth. Thus, in tandem, the application of competition law and consumer law can guarantee adequate protection for the consumer. And this complementarity is manifested in the dual function played by the Consumer and Competition Division.¹²

6. Consideration of Consumer Interests in Competition Policy

13. It was stated above that consumers are merely the *indirect* beneficiaries of competition policy. However, there are three instances where the competition rules in Malta take specific and direct account of consumer interests. In the case of anti-competitive agreements and concerted practices, the Competition Act provides that restrictive agreements or practices would not infringe the provisions of the Act if they generate enough efficiency gains to outweigh the negative effects on competition, provided that 'consumers' get 'a fair share' of these benefits.¹³ In the application of this 'pass-on' requirement the Consumer and Competition Division resorts to the European Commission's Notice on the Application of Article 81(3) EC for guidance.¹⁴

14. The same consumer welfare approach is to be found in the Control of Concentrations Regulations that require the Office for Fair Competition to take into account *inter alia* 'the interests of the intermediate and ultimate consumers' in appraising the legality or otherwise of notified concentrations.¹⁵ Moreover, in its appraisal of the concentration's effect on competition the Office may take into account the development of technical and economic progress only to the extent that this is 'to consumers' advantage'.¹⁶ Furthermore, though an anti-competitive merger may be 'saved' by claims that it will (or is likely to) generate efficiency gains that will be greater than and will offset the effects of any prevention or lessening of competition resulting (or likely to result) from the concentration, these claims will be successful in clearing the merger only if the undertaking concerned proves to the satisfaction of the Office that such efficiency gains *inter alia* are 'likely to be passed on to consumers in the form of lower prices, or greater innovation, choice or quality of products or services'.¹⁷ This ensures that mergers that create a national champion but confer no concomitant benefits for consumers would not be approved on the basis of this efficiencies defence.

15. Thirdly, the Competition Act specifically includes as an abuse of a dominant position (i) the limitation of 'production, markets or technical development to the prejudice of consumers'; (ii) the refusal 'to supply goods or services indiscriminately in order to eliminate a trading party from the relevant market to the prejudice of consumers' and (iii) the charging of excessive or unfair prices taking into account *inter alia* of 'the importance of the product to consumers'.¹⁸ Thus, in the latter case, the degree of satisfaction that consumers expect from a product and the extent to which it meets their needs might determine whether the price is deemed to be excessive or not.

¹² E. Buttigieg 'Consumer and Competition Policies: Synergy Needed' (2005) 15 Consumer Policy Review 192.

¹³ Article 5

¹⁴ Guidelines on the Application of Article 81(3) of the Treaty [2004] OJ C101/97.

¹⁵ Regulation 4(2).

¹⁶ *Ibid.*

¹⁷ Regulation 4(4).

¹⁸ Article 9.

16. In respect of exclusionary abuses, it is felt that it is important that the long-term consumer interests rather than the short-term consumer gains be taken into account in assessing practices such as below-cost pricing, fidelity rebates or bundling of products/services that might appear attractive to the consumer in the short term but may result in higher prices and lesser consumer choice in the long term.

17. Unfortunately, private enforcement of competition law in Malta remains virtually non-existent. The competition law provisions do not contemplate an action for damages for breach of the competition rules when this results in damages for competitors or consumers. Thus, consumers may only have recourse to the general tort provisions of the Civil Code¹⁹ which of course do not cater for the particular difficulties that a damages action in the competition law field may give rise to. So to date there has been no case where an action for damages was instituted for breach of competition law. Moreover, class actions and representative actions are not possible under Maltese law and consumers shun from seeking relief individually.²⁰

7. Interaction between Consumer Policy and Competition Policy in Malta

18. Consumer policy in Malta really took off only with the enactment of the comprehensive Consumer Affairs Act in 1994. This Act not only set up the existing consumer related bodies, namely the Department of Consumer Affairs, the Consumer Affairs Council and the Consumer Claims Tribunal, but has also served as a kind of consumer code because over the past 13 years new provisions have been regularly added to it to extend the scope of consumer protection to new areas. Likewise, competition policy is also relatively young as the competition regime was also introduced in Malta in 1994 with the enactment of the Competition Act that set up the Office for Fair Competition and the Commission for Fair Trading. Throughout these thirteen years there have not been any notable instances of conflict between the decisions taken by the enforcement agencies or between the policies formulated by them and after the two agencies were joined in 2001 the likelihood of conflict is even more remote.

19. Since 2000, consumer policy in Malta has been largely driven by EC initiatives and so it cannot be said that consumer policy measures have been overprotective of consumers, such as to themselves create barriers to trade for competition. Indeed, the consumer yardstick used in most instances has been the 'average consumer' benchmark rather than the 'vulnerable consumer' benchmark. Still, in some sectors, such as the liberal professions, restrictions, traditionally justified on the grounds of ensuring the integrity of the profession and protection of clients' interests, continue to mute competition in these sectors. The Division is in fact conducting an inquiry into such sectors to determine whether and to what extent such restrictions may be justifiable, with a view to striking the right balance.

20. A consideration that is particular to Malta, given the very small size and insularity of its market, is that in some economic sectors high levels of minimum efficient scales of operation might be required for survival or efficiency and so opening such sectors to unbridled competition might not be in the interests of consumers. It can be argued that, in a small market economy as that of Malta, competition law should attempt to strike an optimal balance between structural efficiency and competition so that firms may operate at efficient scales and pass some or all of the benefits arising from efficiency on to consumers. For small economies productive and dynamic efficiency considerations need to be given major importance,

¹⁹ Chapter 16 of the Laws of Malta.

²⁰ See Malta report by Muscat and Cachia in Ashurst (D Waelbroeck, D Slater and G Even-Shoshan), 'Study on the Conditions under National Law of Claims for Damages in Case of Infringement of EU Competition Rules' 31 August 2004:

http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/national_reports/malta_en.pdf

given their small size. Some form of consolidation and concentration may be a necessary evil in order to attain efficiency.²¹

21. It could also be argued that, in small economies, in some cases, letting joint dominant oligopolists indulge in discriminatory practices may be to the advantage of the consumer. As Gal opines, in oligopolistic markets discriminatory pricing may work against rigid oligopolistic price structures and could result in lowering prices to the benefit of the consumers.²² Indeed, Gal is also of the opinion that in such economies discounts are generally to be encouraged and she argues that: ‘To forbid them would often reduce efficiency and slow reactions to changed market conduct ... Discrimination in small economies, thus, merits a deeper analysis of its real effects on the market.’²³

22. It has been noted²⁴ that while in large economies, structural remedies such as vertical and horizontal disintegration are generally resorted to in order to increase competition in the market and avoid market power, in smaller economies because of the high incidence of market failure and problems associated with economies of scale, structural remedies may not be appropriate and therefore small jurisdictions should not slavishly pursue such policies. Small economies may have to tolerate a smaller number of players in the market and hence some amount of market power. Therefore, the focus of competition policies in such economies should be on conduct behaviour, to ensure that firms do not operate in such a way as to reduce consumer welfare.

23. In small market economies, acknowledging efficiency claims and properly weighing them against perceived anti-competitive effects in all aspects of competition oversight is essential. Collaborative or unilateral action or consolidation through external growth might be crucial for operators in small economies to reach the minimum efficient scale of operation and thereby operate efficiently and optimally for the benefit of consumers. Thus, it has been observed that it is advisable for competition agencies in small market economies to recognise the importance of the realisation of scale economies to increase productive and dynamic efficiency while balancing this with the need for competitiveness. In such economies, competition policy should be sensitive to the constraints facing operators in such small markets and if and where necessary even trade off competition for improved efficiency.²⁵

²¹ See OECD Third Global Forum on Competition 2003 and M.S. Gal *Competition Policy for Small Market Economies*, Harvard University Press.

²² M.S. Gal ‘Size does matter: The Effects of Market Size on Optimal Competition Policy’ (2001) 74 *University of Southern California Law Review* 1437, 1467.

²³ *Ibid.* See also E. Buttigieg ‘The Notion of Dominance and the Control of Abusive Pricing under Maltese Competition Law’ (1999) 19 *Bank of Valletta Review* 1.

²⁴ L. Briguglio and E. Buttigieg ‘Competition Policy in Small Jurisdictions’, paper presented at the Research Symposium ‘Political Economy Constraints in Regulatory Regimes in Developing Countries’, New Delhi India, March 2007.

²⁵ *Ibid.*