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**ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN MALTA**

-- 2014 --

27-28 October 2015

*This report is submitted by Malta to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 27-28 October 2015.*

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**TABLE OF CONTENTS**

Executive Summary .....3

1. Changes to competition law and policies, proposed or adopted.....3

2. Enforcement of competition laws and policies .....4

    2.1 Action against anticompetitive practices, including agreements and abuses of dominant positions .....4

    2.2 Mergers and acquisitions.....6

        2.2.1 Statistics on number, size and type of mergers notified and/or controlled under competition laws .....6

3. The role of competition authorities in the formulation and implementation of other policies .....7

4. Resources of the Competition Authority .....7

    4.1 Resources overall .....7

## Executive Summary

1. The Office for Competition of Malta (OC) is the national competition authority in Malta entrusted to promote and enhance effective competition in terms of the Malta Competition and Consumer Affairs Authority Act, Chapter 510 of the Laws of Malta and the Competition Act, Chapter 379 of the Laws of Malta.

2. Pursuant to the relevant provisions of the law, the OC is entrusted to apply and enforce Articles 5 and 9 of the Competition Act by investigating, determining and suppressing practices which restrict competition on the market. Apart from its antitrust investigations, the OC may undertake market sector inquiries where it results that competition on particular markets may be restricted. The OC also has the responsibility to examine and assess mergers and acquisitions to see if they might lead to a substantial lessening of competition.

3. In addition, the OC can foster competition through non-enforcement measures by virtue of its advocacy role. Thus, the OC has the obligation to provide advice to public authorities on the competition constraints imposed by legislation, policy and administrative practices and to encourage undertakings and associations of undertakings to comply with competition law.

4. In 2014 the OC closed nine cases in all following a complaint by the concerned parties. Additionally, a sector inquiry on bank loan interest rates for Small and Medium sized Enterprises was also initiated following allegations of high interest rates charged by domestic banks on loans to SMEs. In 2014, the OC also dealt with seven notified concentrations which were all acquisitions. All concentrations were approved thereby declared to be lawful.

5. The OC may also promote competition through non-enforcement measures by virtue of its advocacy role. As a result, the Office provided advice to public authorities particularly with regard to calls for tenders to encourage wide participation by different potential bidders thereby guaranteeing transparency, equal opportunities to effective competitors, better prices and quality.

### 1. Changes to competition law and policies, proposed or adopted

6. The Office for Competition of Malta (OC) is the entity that promotes and enhances effective competition by virtue of the provisions of the Competition Act, Chapter 379 of the Laws of Malta, as well as the Malta Competition and Consumer Affairs Authority Act, Chapter 510 of the Laws of Malta.

7. Formerly, the two institutions entrusted with the enforcement of competition law were the Office for Fair Competition (OFC) and the Commission for Fair Trading (CFT), set up by the Competition Act. Following an investigation by the OFC after a complaint was issued or at the request of any designated national competition authority of any other Member State or the European Commission, the OFC had to draw up a report with its findings and conclusions and submit it to the CFT if the Director deemed that there was a serious infringement. Following the submission of the report, the CFT was endowed with the judicial responsibility to issue a decision.

8. After the entry into force of the Competition and Consumer Affairs Authority Act on the 23<sup>rd</sup> of May 2011, the Authority took over, *inter alia*, the responsibilities previously pertaining to the Consumer and Competition Department, with specific provisions setting up the Office for Competition as one of the Authority's four entities, alongside the Office for Consumer Affairs, the Standards and Metrology Institute and the Technical Regulations Division. Whilst the Board of Governors of the Authority is responsible for policy-making, the entities are exclusively competent to apply and enforce the law under their remit. Hence the Office for Competition which is headed by the Director General now has the exclusive competence to investigate and decide upon breaches of the competition rules.

9. The OC issued a guidance note on mergers & acquisitions which includes step by step guidelines on the notification procedure and all that is required out of the notifying parties. The Guidance note should be read in conjunction with the Competition Act, Chapter 379 of the Laws of Malta, and the Control of Concentration Regulations (Subsidiary Legislation 379.08).

## **2. Enforcement of competition laws and policies**

### **2.1 Action against anticompetitive practices, including agreements and abuses of dominant positions**

#### *2.1.1 Summary of activities of:*

##### 2.1.1.1 Competition authorities

10. Pursuant to the provisions of the Competition Act and the Competition and Consumer Affairs Authority Act, the Office for Competition of Malta is the responsible entity for the enforcement of competition rules in Malta.

11. The provisions in the Competition Act (Chapter 379 of the Laws of Malta) on substantive matters are modelled on EU competition rules and applied to all sectors and undertakings. The Competition Act was last amended by virtue of Act VI of 2011. The amendments came into force on 23 May 2011. The Competition Act, as it existed prior to these amendments remains, by virtue of Article 70 of Act VI of 2011, applicable with respect to investigations that were initiated by the Director of the Office for Fair Competition prior to the 23 May 2011, to proceedings before the Commission for Fair Trading that were still pending at the time of coming into force of Act VI of 2011 and to decisions and judgements which were not yet *res judicata* on the 23 May 2011.

12. The OC is entrusted to apply and enforce Articles 5 and 9 of the Competition Act by investigating, determining and suppressing practices which restrict competition on the market. The Office is also empowered to apply Articles 101 and 102 of the TFEU concurrently with the national substantive competition law provisions where the agreement, practice or conduct may have an effect on trade between Member States.

13. In the field of anticompetitive agreements and concerted practices, Article 5 of the Competition Act prohibits any agreement between undertakings, any decision by an association of undertakings or any concerted practice between undertakings which have as their object or effect the prevention, restriction or distortion of competition within Malta or any part of Malta. The prohibition applies in particular to agreements, decisions or practices that: (a) directly or indirectly fixes the purchase or selling price or other trading conditions; or (b) limits or controls production, markets, technical development or investment; or (c) shares markets or sources of supply; or (d) imposes the application of dissimilar conditions to equivalent transactions with other parties outside such agreement, thereby placing them at a competitive disadvantage; or (e) makes the conclusion of contracts subject to the acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. The listed examples are modelled on the provisions of Article 101 TFEU; the same applies for the requisite conditions for exemptions mirroring Article 101(3) TFEU.

14. Article 9 of the Competition Act, which is modelled on Article 102 TFEU, prohibits any abuse of a dominant position by one or more undertakings within Malta or any part of Malta. A dominant position is defined as a position of economic strength held by one or more undertakings that enables it/them to prevent effective competition on the relevant market by affording it/them the power to behave (to an appreciable extent), independently of its/their competitors, suppliers or customers. In determining dominance, the OC

also takes into consideration other factors apart from market shares, including *inter alia*, barriers to entry (both actual and legal) as well as existing and potential competition.

15. In 2014, the OC closed nine cases in all. These cases concerned various sectors, including the educational, communications, financial, insurance, transport, energy, environmental, agricultural, gaming, property sectors, food and beverages. Most of these investigations were initiated following a complaint.

16. The majority of the cases were either out of the OC's competence (with two of the cases dealing with misleading advertising) or amicable settlements were reached between the parties thereby resolving matters prior to the conclusion of the investigation period by the OC.

17. Apart from its antitrust investigations, the OC is legally empowered to carry out sector inquiries in terms of Article 11A of the Competition Act. Specifically, where the trend of trade, the rigidity of prices or other circumstances suggest that competition may be restricted or distorted within the Maltese market, the Director General of the Office for Competition may conduct an inquiry into a particular sector of the economy or into particular type of agreements across various sectors. In the course of that inquiry, the Director General may request the undertakings or association of undertakings concerned to supply the information necessary for the application of Articles 5 and 9 of the Competition Act and Articles 101 and 102 of the Treaty on the Functioning of the European Union and may carry out any inspections necessary for that purpose.

18. Due to allegations of excessive charges and high interest rates on loans by domestic banks to small and medium sized enterprises (hereinafter SMEs), the Director General of the OC initiated a sector inquiry on bank loan interest rates for SMEs in accordance with the relevant provisions of the Competition Act to examine the prevailing competition conditions on the market, in particular with respect to interest rates charged on loans to SMEs.

19. Specifically, on the 16<sup>th</sup> April 2014, the OC launched a state of play document on the inquiry titled 'State of Play on the Sector Inquiry by the Office for Competition on bank loan interest rates for Small and Medium Sized Enterprises, interchange fees and merchant service charges' and invited interested parties to send their comments.

20. The objectives of the sector inquiry were the following:

- To study the market, in particular interest rates issued by core domestic banks on loans to SMEs;
- To identify competition concerns relating thereto, if any; and
- To address such competition concerns

#### 2.1.1.2 Courts

21. Pursuant to the relevant provisions of the Competition Act, the undertaking or association of undertakings concerned may, by means of an application, file an appeal before the Competition and Consumer Appeals Tribunal (hereinafter 'the Appeals Tribunal'). The role of the Appeals Tribunal, as an independent body established by law, is to perform and exercise the functions assigned to it *inter alia*, by the Competition and Consumer Affairs Authority Act and the Competition Act.

22. The undertaking or association of undertakings may file an appeal application before the Appeals Tribunal from:

- An infringement decision
- Cease and desist or compliance order
- Administrative Fine and/or
- Daily Penalty Payment

23. as imposed by the Director General within twenty days from notification of any decision or order of the Director General in accordance with the provisions of the Competition Act.

24. The Appeals Tribunal may confirm wholly or partially any decision and/or order of the DG and it may also quash the decision and/or order. It may also confirm, vary or revoke any daily penalty payment and/or administrative fine imposed by the DG in accordance with the provisions of the Competition Act.

25. Both the Director General and any party to the appeal who feels aggrieved by a decision of the Appeals Tribunal may subsequently file an appeal application to the Court of Appeal, solely on a point of law, within twenty days from the decision of the Appeals Tribunal.

26. In 2014, the Appeals Tribunal pronounced three judgments in all, consequent to an appeal by the parties concerned. In two of the judgments, the Appeals Tribunal rejected the plaintiffs' claims and confirmed the OC's decisions in their entirety. In another judgment, the Appeals Tribunal partially rejected the OC's decision thereby remitting it to the Director General to take any measure it deems appropriate in accordance to the provisions of the Competition Act. These decisions dealt with the entertainment and communications sectors.

## **2.2 Mergers and acquisitions**

### **2.2.1 Statistics on number, size and type of mergers notified and/or controlled under competition laws**

27. The creation of certain concentrations, specifically mergers and acquisitions, requires mandatory notification to the OC and subsequent implementation only after authorisation by the OC.

28. Mergers and acquisitions are regulated by the Control of Concentrations Regulations, 2003 (SL379.08 of the Laws of Malta)- ('the Regulations'). These Regulations apply the 'Substantial Lessening of Competition' test to a given merger or acquisition. The OC may clear or prohibit a concentration depending on whether or not it is satisfied that the acquisition will not have the effect of substantially lessening competition in a given market.

29. In merger control, the OC's point of departure is to determine whether the concentration is one which qualifies for the application of the provisions of the Regulations. Pursuant to the relevant provisions of the Regulations, a concentration occurs when:

- Two or more previously independent undertakings merge;
- One or more persons already controlling at least one undertaking, or one or more undertakings, acquire whether by purchase or securities or assets or by contract or by other means, direct or indirect control of the whole or parts of one or more undertakings;
- Two or more undertakings create a joint venture performing on a lasting basis all the functions of an autonomous economic entity, also referred to as 'a full function joint venture'

30. The second step is the assessment of turnover thresholds. In this regard, the Regulations require that: the combined aggregate turnover in Malta in the preceding financial year of the undertakings concerned exceeds €2.3 million and each of the undertakings concerned has a turnover in Malta equivalent to at least 10% of the combined aggregate turnover of the undertakings concerned.

31. The Regulations further require that a concentration must be notified by the person/undertaking acquiring control in the case of an acquisition or by the parties to the merger or joint venture prior to its implementation and within 15 working days from the: (i). conclusion of the agreement, (ii). announcement of the public bid, or (iii). the acquisition of a controlling interest

32. In 2014 the OC dealt with seven notified concentrations, all of which were acquisitions. These concentrations concerned different markets, including insurance, IT advisory services, online payment services, the importation and sale of food stuffs, the recruitment and supply of care workers, hotel accommodation, and frozen and chilled products.

33. The OC issued seven consequent decisions, all of them dealing with concentrations on the national level which had no international implications. All concentration notifications qualified under the simplified procedure and were declared to be lawful.

### **3. The role of competition authorities in the formulation and implementation of other policies**

34. The OC can foster competition through non-enforcement measures by virtue of its advocacy role. Thus, it has an obligation to provide advice to public authorities on the competition constraints imposed by legislation, policy and administrative practices and to encourage undertakings to comply with competition law.

35. In pursuit of its advocacy role, the OC provided advice to public authorities notably with respect to calls for tenders to ensure as wide a participation as possible by potential bidders thereby guaranteeing equal opportunities to effective competitors, better prices and quality. It also continued in its pursuit to promote sound trading practices.

## **4. Resources of the Competition Authority**

### **4.1 Resources overall**

#### *4.1.1 Annual budget*

36. The OC does not have a specific budget but there is one for the whole Authority. In 2014, the Authority was allocated €4.9 million (US 5.5 million), an increase of 20% on the previous year.

#### *4.1.2 Number of employees*

	<b>2012</b>	<b>2013</b>	<b>2014</b>
Economists	3	2	3
Lawyers	4	4	5
Other Professionals	0	0	0
Support staff	1	1	1
All staff combined	8	7	9

37. The Authority, as part of its capacity building exercise, has commissioned a study to identify the personnel required for each entity. The Authority has issued a call for applications and is in the process of recruiting additional staff in order to be in a better position to perform its responsibilities.