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**24 November 2017****Directorate for Financial and Enterprise Affairs  
COMPETITION COMMITTEE****Cancels & replaces the same document of 22 November 2017****Annual Report on Competition Policy Developments in Malta****-- 2016 --****5-6 December 2017**

This report is submitted by Malta to the Competition Committee FOR INFORMATION at its forthcoming meeting to be held on 5-6 December 2017.

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**Note by Turkey**

The information in this document with reference to “Cyprus” relates to the southern part of the Island. There is no single authority representing both Turkish and Greek Cypriot people on the Island. Turkey recognises the Turkish Republic of Northern Cyprus (TRNC). Until a lasting and equitable solution is found within the context of the United Nations, Turkey shall preserve its position concerning the “Cyprus issue”.

**Note by all the European Union Member States of the OECD and the European Union**

The Republic of Cyprus is recognised by all members of the United Nations with the exception of Turkey. The information in this document relates to the area under the effective control of the Government of the Republic of Cyprus.

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## 1. Executive Summary

1. The Office for Competition (hereinafter “the Office”) is the national competition authority responsible to ensure the contribution towards 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. The Office is vested with the powers to apply and enforce Articles 5 and 9 of the Competition Act by investigating, determining and suppressing practices which restrict competition on the market. Article 5 of the Competition Act prohibits any agreement between undertakings, any decision by an association of undertakings and any concerted practice between undertakings having the object or effect of preventing, restricting or distorting competition within Malta or any part of Malta. Article 5 proceeds to give examples of the said prohibited conduct. On the other hand, article 9 of the Competition Act prohibits any abuse by one or more undertakings, of a dominant position within Malta or any part of Malta. Both articles 5 and 9 of the Competition Act mirror Articles 101 and 102 of the Treaty on the Functioning of the European Union (hereinafter “the TFEU”). 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 of the European Union. In 2016, the Office focused on the investigations of alleged infringements of the Competition Act in various sectors, including the sectors of education, communications, entertainment, insurance, transport, energy, gaming and beverages. Most of these investigations were initiated following a complaint by the aggrieved party.

3. It is also the faculty of the Office to conduct an inquiry into a particular sector of the economy or into a particular type of agreement across various sectors, where the trend of trade, the rigidity of prices or other circumstances suggest that competition may be restricted or distorted within the Maltese market, as contemplated in Article 11 of the Competition Act. In 2016, the Office has made a follow up on the sector inquiry, carried out the previous year, on interest rates charged on loans to small and medium sized enterprises in Malta to see whether the recommendations by the Office have been implemented by the market players.

4. Moreover, by virtue of the Control of Concentrations Regulations, 2003, Subsidiary Legislation 379.08, the Office 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. In 2016, the Office received eight notifications concerning several markets, including IT services, storage, flour distribution, flooring and furniture, investment services, sports betting, motor vehicles and insurance services.

5. The Office also performs an advocacy role by advising public authorities on the potential competition constraints which can occur through legislation, policy and administrative practices and to encourage undertakings and associations of undertakings to comply with competition law.

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

6. The Office drafted regulations and a bill to transpose the Antitrust Damages Directive. The Directive establishes the right of victims of competition law infringements to claim damages when harm is suffered as a result thereof. Claims for damages may be filed before any court in the EU, and subsequent to a decision of any competition authority in the EU concerning an infringement in any Member State(s), or of the European Commission. While the Competition Act already provides for such right and the manner of it being exercised, the Directive lays down such rights in much greater detail and increases the prescriptive period from two years to a minimum of five years. The draft bill would repeal Article 27A of the Competition Act, retaining only the establishment of the right of injured parties to claim damages as a result of infringements under the Act. The draft regulations are geared at establishing procedural rules, rights and obligations of the parties and of the competition authority which found an infringement, that apply to such claims for damages before the civil courts in Malta. These subsequently came into force in 2017.

## 3. Enforcement of competition laws and policies

### 3.1. Action against anticompetitive practices

#### *3.1.1. Investigation in the school transport fees charged*

7. In April 2016, the Office investigated an increase in the church school transport fees charged by a particular transport service provider. In determining whether the tariffs charged were excessive, the Office analysed in particular the percentage increase in the price over a five-year period and the prices charged by other school transport providers in Malta. In September 2016, the Office issued a decision concluding that there was no sufficient evidence to demonstrate that such prices were excessive, and therefore the Office did not find that there was an abuse of a dominant position, in breach of Article 9 the Competition Act.

#### *3.1.2. Investigation in the supply of diesel*

8. In October 2016, the Office issued a decision finding an infringement of Article 5 of the Competition Act. From an analysis of all the gathered evidence, the Director General found that there was demand by a fuel supplier through indirect means, for a particular line of conduct to be pursued by the fuel retailer. The Office gathered evidence that proved that the fuel supplier enforced resale price maintenance by exerting pressure on the fuel retailer. The supplier warned the fuel retailer that the promised increase in the profit margin would be withdrawn. The fuel retailer had no other alternative but to respond to this pressure, by reverting to the maximum retail price. The Office issued a decision concluding that the undertakings concerned have infringed Article 5(1) (a) of the Competition Act, by entering into an agreement involving resale price maintenance, which has as its object the prevention, restriction or distortion of competition in Malta or parts of Malta, by indirectly fixing the selling price of diesel. The decision of the Office is not final since one of the undertakings against whom the Decision was issued, lodged an appeal before the Competition and Consumer Appeals Tribunal and concurrently filed an application before the First Hall of the Civil Court in its Constitutional Jurisdiction.

### ***3.1.3. Communication proposing commitments in an investigation concerning school uniforms***

9. In December 2016, the Office published a communication pursuant to Article 12(C)(2)(a) and (b) of the Competition Act regarding proposed commitments offered by two undertakings operating in the retail market for school uniforms. The proposed commitments were offered to meet the competition concerns identified by the Director General. The communication, which consisted of a concise summary of the case and the main content of the commitments, was published so that interested third parties would be able to submit their observations on the proposed commitments within the time-limit fixed by the Director General.

### ***3.1.4. Investigation in the entertainment industry***

10. During the year 2016, the Office also issued a Statement of Objections in the entertainment industry. A complaint was lodged later last year whereby it was alleged that there was a *prima facie* infringement on the basis of Article 15 of the Competition Act. Article 15 states as follows: *in cases of urgency due to the risk of serious and irreparable damage to competition, the Director General, acting on his own initiative, may by decision, on the basis of a prima facie finding of an infringement of articles 5 and, or 9 of this Act and, or Articles 101 and, or 102 of the TFEU, order interim measures.*

11. The Office issued a Statement of Objections against the undertaking concerned and in response to this Statement of Objections, the undertaking concerned removed the restrictions which were being previously imposed. Consequently, the Office issued a decision to the effect that the element of urgency no longer subsisted and therefore the need for interim measures was removed. The Office is presently in the process of investigating the merits of the case.

### ***3.1.5. Courts***

#### ***Consumer and Competition Appeals Tribunal***

12. 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.

13. 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.

14. 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.

15. In 2016, the Tribunal confirmed that, in one particular case, the Office had in fact provided fair hearing to the complainant. In delivering this judgement, the Appeals Tribunal referred to EU judgements and Commission Notices and amongst other things, it took into consideration the fact that the Office had examined the complaints in detail,

held a meeting with the said Complainant and obtained the necessary clarifications from the complainant. The Appeals Tribunal did not find any breach of the principles of natural justice and no breach of the right to a fair hearing resulted. In another case it upheld four of the five conclusions reached by the Office for Competition in its report. The report had concluded inter alia that a Standard Agreement between a number of gas distributors and Enemalta plc (then Enemalta Corporation) breached competition law and was ipso jure null and unenforceable in terms of Article 101(2) TFEU and Article 5(2) of the Competition Act. This agreement used to allocate an exclusive area for distribution to each gas distributor in Malta.

### *Civil Court*

16. The Office also prepared a report in terms of Article 27 of the Competition Act, to respond to a request consequent to an allegation concerning an infringement of the Competition Act in the energy sector. In terms of Article 27 of the Competition Act:

*Where before any court of civil jurisdiction it is alleged that any agreement or decision is null and unenforceable in accordance with article 5 of this Act and, or Article 101 of the TFEU, or where it is alleged that there is an abuse of a dominant position in accordance with article 9 of this Act and, or Article 102 of the TFEU, that court shall stay the proceedings and request the Director General to submit a report on the competition questions raised before it and the court shall take into consideration such report, and any submissions thereon made by the parties and the Director General, before deciding the case: Provided that where the competition question raised before the court has already been decided upon under the provisions of this Act and the decision thereon has become res judicata, the court shall abide by such decision.*

17. The report drawn up by the Office is considered by the Court when the latter decides a case. Even though the Court is not bound by this report and is not obliged to agree in full with the findings of the Office in its report, the Court proved time and time again that the findings of the Office are given vital importance. The preparation of this report entailed a number of meetings with stakeholders, namely the parties to the case as well as their legal and technical advisors. The report was filed in court towards the end of the year.

### *Constitutional Court*

18. On the 3<sup>rd</sup> May 2016, the Constitutional Court delivered a judgement upon an appeal lodged by the Director General (Competition) and the Attorney General, in a case in the names *Federation of Estate Agents v Direttur Generali (Kompetizzjoni) u L-Onorevoli Prim Ministru u L-Avukat Generali*. In this judgement, the Constitutional Court confirmed that even though the procedure as contemplated in the Competition Act did not violate Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the procedure still violated the right to a fair hearing as contemplated in Article 39 of the Constitution of Malta. Article 39 of the Constitution of Malta states that: *whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law*. The Court held amongst other issues, that competition law serves as a deterrent to the behaviour contemplated in the Competition Act and the fines imposed by the Director General can be rather severe. As a result, the Court declared that the proceedings contemplated in the present Competition Act are of a criminal law nature and therefore fall within the parameters of Article 39 of the Constitution of Malta. The Constitutional Court held that both the Director General

and the Appeals Tribunal cannot be considered a “court” as the one referred to in Article 39 of the Constitution of Malta, even though the Constitutional Court deemed the Tribunal as being both independent and impartial and with full jurisdiction to hear appeals from decisions of the Director General. Therefore, the Director General and the Tribunal cannot impose fines as only a “court” in its traditional meaning, can impose fines.

### ***3.1.6. Sector inquiry – follow up***

19. As a follow-up to the sector inquiry report on interest rates charged on loans to small and medium-sized enterprises in Malta, the Office convened individual meetings with the core domestic banks to ensure that banks were indeed implementing the recommendations put forward by the Office in its report. The banks presented the actions taken to implement the recommendations. There were various recommendations proposed by the Office, including amongst others, the recommendation for banks to provide further information on business loans to SMEs, the recommendation for the setting up of an SME loan calculator, the recommendation for banks to provide examples of a typical SME loan and costs involved, the provision of a list of frequently asked questions, the recommendation to provide information on business loans in the Maltese language and finally the proposal recommending banks to provide quotations on loans to SMEs free of charge.

## **3.2. Mergers and Acquisitions**

20. Mergers and acquisitions are regulated by the Control of Concentrations Regulations, 2003, Subsidiary Legislation 379.08. These Regulations apply the ‘Substantial Lessening of Competition’ test to a concentration. The Office may clear or prohibit a concentration depending on whether or not it is satisfied that the transaction will not have the effect of substantially lessening competition in a given market.

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

22. The Regulations 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.

23. In 2016, the Office received eight notifications concerning several markets, including IT services, storage, flour distribution, flooring and furniture, investment services, sports betting, motor vehicles and insurance services.

24. Hereunder is a summary of the concentration decisions issued in 2016 which were in their majority approved *via* the simplified procedure as they were deemed not to raise serious doubts as to their legality in terms of the provisions of the Control of Concentrations Regulations:

### **3.2.1. Sector: IT Services**

25. GO Data Services Limited proposed to acquire fifty-one per cent (51%) of the total issued share capital of Kinetix IT Solutions Limited pursuant to a Share Purchase agreement made between the parties on 13 November 2015.

### **3.2.2. Sector: Storage**

26. Whilst the proposed transaction satisfied the requirement of a change in control of Storage Systems Limited and whilst the aggregate turnover of the undertakings concerned in the preceding financial year exceeds €2,329,373.40 million, the turnover in Malta of one of the parties to the concentration is not equivalent to at least 10 percent of the combined aggregate turnover of the undertakings concerned as set out in the Control of Concentrations Regulations.

27. For this reason, and in terms of regulation 6(1)(i) of the Control of Concentrations Regulations, the Director General of the Office decided that the notified concentration did not fall within the scope of these Regulations.

### **3.2.3. Sector: Distribution of Flour**

28. In this concentration, due to the low barriers to entry in the market for the transportation and distribution of flour and the significant buyer power of its customers, the proposed transaction was unlikely to raise competition concerns. In addition, the efficiency gains brought about by the acquisition outweigh any *prima facie* competitive concerns.

29. Although post transaction the notifying party had a high market share, this concentration only aided in preserving the market position of the notifying party as the latter is still facing strong competition from other leading competitors in this market. This ensured a competitive balance in the supply of flour as a valuable commodity.

### **3.2.4. Sector: Flooring and Furniture**

30. Pursuant to a share purchase agreement which was signed on the 5<sup>th</sup> February 2016, KKR & Co. L.P. proposed to indirectly acquire, through special acquisition vehicles Golvviken Holdco AB, Golvviken Newco AB and Golvviken Buyco AB (all with registered office in Stockholm, Sweden), 49.9% of the shares in and joint control over Valinge International AB (Viken, Sweden) (together with all affiliated companies 'Valinge').

31. KKR & Co. L.P. intended to acquire a total of 49.9% of the shares from Valinge's current shareholders: Valinge Flooring Technology AB (Viken Sweden) that used to hold at the time of the transaction, 60% of the shares, Kronospan Technical Holdings Limited (Nicosia, Cyprus) that used to hold at the time of the transaction, 20% of the shares and Flooring Technologies Limited (Pieta', Malta) – (C36387) that used to hold at the time of the transaction 20% of the shares in Valinge. Post-acquisition, KKR and Co. L.P. intended to hold 49.9% of the shares in Valinge while Valinge Flooring Technology AB intended to hold the remaining 50.1% of the shares.

### **3.2.5. Sector: Investments**

32. Pursuant to a sale and purchase agreement dated 5<sup>th</sup> April 2016, the notifying party proposed to acquire the entire issued share capital of the acquired party. The

completion of the transaction was conditional upon, inter alia, the clearance of the proposed concentration by the Office and in fact it was cleared since it did not raise serious doubts as to its lawfulness.

### **3.2.6. Sector: Sports Betting**

33. Pursuant to a share sale and transfer agreement which was signed on 19<sup>th</sup> April 2016, the notifying party acquired 100% of the outstanding share capital in the Sportsman Media holding GmbH.

### **3.2.7. Sector: Motor Vehicles**

34. The concentration consisted of an acquisition of joint control by the notifying parties of a fully functioning joint venture to be formed and named Motors Inc. Limited, whereby UCIM and CIL were to transfer and/or procure to transfer, sell, assign and deliver to Motors Inc. Limited all rights, title and interest in and to all the assets and interests forming part of the parties' automotive businesses. Specifically, UCIM and CIL, for the purpose of carrying out the joint venture, transferred their respective automotive business which included the distribution, sale and dealing as merchants of motor vehicles, the servicing, maintenance and repairs of such goods and the supply and sale of all components, spare parts, accessories and tools relative to such goods. Motors Inc. Limited proposed to be jointly controlled by the notifying parties, with each of the notifying parties holding 33.3% of its issued ordinary shares.

### **3.2.8. Sector: Insurance**

35. Pursuant to a sale and purchase agreement dated 31<sup>st</sup> May 2016, the notifying party, acquired all the issued shares of Island Insurance Brokers Limited with effect from completion, free from all encumbrances and with all rights attaching to them.

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

36. 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.

37. 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 and to encourage undertakings and associations of undertakings to comply with competition law.

38. The OC participated in meetings organised by the European Competition Network (ECN), the Competition Committee within the Organisation for Economic Cooperation and Development (OECD) and the Euro Mediterranean Competition Forum (EMCF).

## 5. The role of the competition authority in the participation of European and international fora

39. In late January 2016, the Office hosted the 4th Euro-Med Competition Forum, bringing together high-level representatives of countries from across the Mediterranean region, under the auspices of the United Nations Conference on Trade and Development (UNCTAD). A number of interesting debates were held, to the benefit of participating countries and some very useful interventions were made by leading experts in the area from across the Euro-Med area. The scene was set for continued future cooperation between participant countries.

40. The Office participated in meetings organised by the European Competition Network (ECN) and the Competition Committee within the Organisation for Economic Cooperation (OECD).

## 6. Resources of the Competition Authority

### 6.1. Overall resources

#### 6.1.1. Annual budget

41. The Office is one of four entities forming part of the Consumer and Competition Authority. The Office does not have a specific budget but a global budget is allocated to the whole Authority.

#### 6.1.2. Number of employees

42. At the end of 2016, nine employees were engaged at the Office:

**Table 1.**

	2015	2016	2017
Economists	3	3	2
Lawyers	4	4	4
Other Professionals	0	0	1
Support staff	1	1	1
All staff combined	9	9	9