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**Directorate for Financial and Enterprise Affairs  
COMPETITION COMMITTEE**

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

**-- 2015 --**

**29-30 November 2016**

*This report is submitted by Malta to the Competition Committee FOR INFORMATION at its forthcoming meeting to be held on 29-30 November 2016.*

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## 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 2015, the OC concentrated its resources to decrease a number of pending cases. These cases covered various sectors, including carriage of passengers, sale of fuel, excessive parking rates, renting of graduation gowns, a yacht marina concession and an exclusive agreement of food services. Most of these investigations were initiated following a complaint by the aggrieved party.

5. The OC also concluded a sector inquiry on bank loan interest rates for SMEs in accordance with the relevant provisions of the Competition Act. A set of recommendations were issued to promote and enhance competition on the market.

6. The OC approved seven concentrations and 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**

7. The Office for Competition of Malta (OC) is the main 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.

8. Formerly, the two main institutions that were entrusted with the enforcement of competition law were the Office for Fair Competition (OFC) and the Commission for Fair Trading (CFT) as 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 to the CFT if it resulted to the Director that there was a serious infringement. Following the submission of the report, the CFT was endowed with the judicial responsibility to issue a decision.

9. 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 part 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.

## **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 accordingly. 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 2015, the OC concentrated its resources to decrease a number of pending cases. These cases covered various sectors, including ferry service for the carriage of passengers, sale of fuel, alleged excessive parking rates at the Malta International Airport, renting of graduation gowns, a yacht marina concession and an exclusive agreement of food services. Most of these investigations were initiated following a complaint by the aggrieved party.

16. 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.

17. 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 carried out a sector inquiry on bank loan interest rates for SMEs in accordance with the relevant provisions of the Competition Act. The sector inquiry which was initiated in 2014, examined the prevailing competition conditions on the market, in particular with respect to interest rates charged on loans to SMEs. Pursuant to the inquiry, the OC proposed a number of recommendations to address structural or behavioural competition concerns to enhance competition in the market.

18. 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

19. The OC had consulted the main core banks, representatives of SMEs, the Central Bank of Malta, and the Malta Financial Services Authority, and a public consultation was carried out.

20. The final report issued a set of recommendations addressed to commercial banks, the Central Bank of Malta and the Planning & Priorities Coordination Department as well as SMEs, all of which are conducive to encouraging more competition on the market. The recommendations put forward by the OC address the following issues: free of charge quotations for SMEs, more information on business loans (even in the Maltese language), charges to be listed on bank websites, restricted information on future pricing, access to EU-funding packages via more than one bank, and encouraging SMEs to shop around. Another recommendation is the setting up of a central credit register by the Government.

#### 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 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.

23. 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.

24. In 2015, the Appeals Tribunal pronounced two judgments, consequent to an appeal by the parties concerned. In one of the judgments, the Appeals Tribunal confirmed the OC’s position that where a government entity is exercising a regulatory function, it is not considered to be an ‘undertaking’ and thus cannot be investigated under the Competition Act. In another judgment, the Appeals Tribunal annulled the decision of the Office because, according to the presiding Judge, there was lack of conformity to the principles of natural justice and consequently the rights of the complainant to ensure a proper defence were violated. These decisions involved the tourism and fuel sectors.

## 2.2 *Mergers and acquisitions*

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

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

26. 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.

27. 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.

28. In 2015 the OC received twelve notifications of concentrations in several markets, including importation and distribution of food products, business advisory services, pharmaceuticals, installation of industrial machinery and equipment, hotel accommodation, storage systems, IT services and distribution of flour.

29. The OC issued seven consequent decisions, all of which qualified under the simplified procedure and were declared lawful. Two other notifications did not satisfy the turnover threshold as established by the Regulations and were thus deemed not notifiable. Three other notifications were still under consideration by the end of the calendar year. Hereunder is a summary of the concentration decisions issued in 2015 which were all 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:

#### 2.2.2 *Sector: Importation and Distribution of Food Products*

30. Pursuant to a Sale and Purchase Agreement, Brait CM1 Limited, an investment company, proposed to acquire negative sole control of Iceland TopCo Limited, a company that sells frozen and chilled food as well as grocery products. The sale and purchase of shares was conditional upon approval of the said transaction, by *inter alia*, the OC.

31. Pursuant to a Share Purchase Agreement, Food Trading Ltd purchased all of the shares in Vahlmor Borg (Import/Export) Ltd and Miracle Foods Ltd which among others, sell frozen and fresh meat and fish. The sale and purchase of shares was conditional upon approval of the said transaction, by the OC.

#### 2.2.3 *Sector: Business Advisory Services*

32. Grant Thornton International, an internationally recognised audit, accounting and advisory firm proposed to merge with EMCS Holdings Limited, an independent advisory and tax services firm in Malta, via its subsidiary in Malta.

#### 2.2.4 *Sector- Pharmaceuticals*

33. Pursuant to a Share Purchase Agreement, BC Partners, a private equity firm advising on and comprising the establishment of a number of equity funds proposed to acquire a majority shareholding of Pharmathen S.A., a niche pharmaceutical company that develops, manufactures and out-licences complex generic drugs. The sale and purchase of shares was conditional upon approval from the relevant authorities.

#### 2.2.5 *Sector- Hotel Accommodation*

34. International Hotel Investments plc that carries out the business of an investment company in connection with the ownership, development and operation of hotels, leisure facilities and other activities related to the tourism industry proposed to acquire all of the issued share capital in Island Hotels Group Holdings plc, which business *inter alia* comprises the ownership and operation of a 5- Star hotel in Malta as well as, the provision of timeshare ownership marketing services.

#### 2.2.6 *Sector- Importation and Distribution of fast moving consumer goods*

35. P. Cutajar and Co. Ltd, a company that specialises in the importation and distribution of fast moving consumer goods (including high profile brands of chocolates, coffee, wines, mineral water and ice cream) proposed to acquire and purchase a set of brands of Paul Anthony Bonnici Limited and Paul

Bonnici and Son Limited, a company which also specialises in the importation of fast moving consumer goods (including confectionary products, beverages, and household cleaning products).

2.2.7 *Sector- ICT services*

36. The OC also approved an acquisition by MIDI plc, which businesses is to acquire, develop and dispose of the immovable property, of Solutions & Infrastructure Services Ltd, which provides ICT related services.

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

37. 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.

38. 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.

39. 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).

**4. Resources of the Competition Authority**

**4.1 Resources overall**

**4.1.1 Annual budget**

40. The OC does not have a specific budget but there is one for the whole Authority. In 2015, the Authority was allocated €5.3 million (US\$ 5.8 million).

**4.1.2 Number of employees**

	<b>2013</b>	<b>2014</b>	<b>2015</b>
Economists	2	3	3
Lawyers	4	5	5
Other Professionals	0	0	0
Support staff	1	1	1
All staff combined	7	9	9