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**Directorate for Financial and Enterprise Affairs  
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## **Annual Report on Competition Policy Developments in Malta**

**-- 2017 --**

**27-28 November 2018**

This report is submitted by Malta to the Competition Committee FOR INFORMATION at its forthcoming meeting to be held on 27-28 November 2018.

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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 2017, the Office focused on the investigations of alleged infringements of the Competition Act in various sectors, including the sectors of education, energy, entertainment, gaming, insurance, sports and transport. Most of these investigations were initiated following a complaint by the aggrieved party. The Office issued a decision imposing interim measures on four insurance companies to suspend the anti-competitive practices which was under investigation.

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.

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 2017, the Office received six notifications concerning communications, insurance, shipping, education and retail sector. In one of these notifications which went into Phase 2 investigation, the notifying parties chose to withdraw the notification and abandon the concentration.

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

### 2.1. The transposition of the EU Directive on antitrust damages actions

6. The law that implements Directive 2014/104/EU on actions of antitrust damages has been approved by Parliament and entered into force on the 13th October 2017. Amendments to the Competition Act were made by means of Act XXV of 2017. The amendments made to the Competition Act included the insertion of a schedule entitled “Competition Law Infringements (Actions for Damages) Regulations”. This law will make it easier for victims who have suffered harm caused by an infringement of competition law, to claim full compensation. Key provisions transposed into Maltese law include a rebuttable presumption that cartels cause harm, greater disclosure of evidence and a joint and several liability for the harm caused by the undertakings which infringed competition law through joint behaviour.

### 2.2. Amendments to the Competition Act

7. Following the Constitutional judgement in the names of Federation of Estate Agents vs Director General (Competition) et, delivered by the Constitutional Court on the 3rd May 2016, the Office for Competition together with the Office for Consumer Affairs sought to provide the necessary amendments to the relevant laws affected to make them compliant with the Constitutional judgement.

8. From a competition law perspective, the new amendments drafted by the Office focus their attention mainly on the powers of the Director General (Competition) and the rights of the undertakings subject to the investigation of the Office. The decision imposed by the Director General of the Office will be subject to further checks and balances with a view to protect the fundamental rights of the undertakings involved in the investigation, primarily to ensure their full right to a fair hearing. The Competition and Consumer Appeals Tribunal was found to be independent and impartial but this was still not considered a “Court” in its classical meaning. In light of this, the Constitutional judgement reiterated the fact that the decision of the Director General must be appealed before a proper court and not just before a tribunal.

9. The amendments are now in their final drafting stages so that the functions of the Office would remain in line with the Constitution, whilst guaranteeing that the rights of the undertakings concerned are ensured at every step of the procedure undertaken by the Office. The main laws which required amendments were the Maltese Competition Act (Chapter 379 of the Laws of Malta), the Malta Competition and Consumer Affairs Authority Act (Chapter 510 of the Laws of Malta). These amendments were necessary to the point that these would not violate the fundamental rights of the undertakings/entities under investigation, in such a way that the provisions therein would be in line with the fundamental rights provided for in the Maltese Constitution.

### 3. Enforcement of competition laws and policies

#### 3.1. Action against anticompetitive practices

##### 3.1.1. Decision imposing interim measures on four insurance companies

10. In February 2017, the Office reviewed a number of complaints from the vehicle repair sector leading the launch of an investigation into the Quality Vehicle Repair (“QVR”) Scheme operated by four insurance companies. On 18th September 2017, the Office adopted interim measures under the new Interim Measures Procedure. By virtue of this interim decision, the Office ordered Atlas Insurance PCC Limited, Elmo Insurance Ltd, GasanMamo Insurance Limited and MAPFRE Middlesea plc to take the necessary steps to protect those non-QVR garages, namely panel beaters and spray painters which are able to compete effectively on the market and whose freedom to compete was severely restricted. The purpose of the interim measures was to ensure that those repairers negatively affected will not be put out of business pending the final outcome of the administrative procedure of the Office.

11. According to the Competition Act, the Director General may adopt interim measures intended to suspend the alleged anti-competitive practices under investigation. On the basis of the preliminary results of the investigation, the Office held that the behaviour of the four insurers amounts to a *prima facie* infringement of competition law. The Office also established the existence of a risk of serious and irreparable damage to competition. The Office considered that the four insurers entered into a horizontal anti-competitive agreement with a view to restrict competition in the motor vehicle repair market.

12. The interim measures required the said undertakings to:

- Cease and desist from making a distinction on the method of payment of repair bills, between claimants who choose a QVR repairer and claimants who choose a non-QVR repairer;
- Stop circulating any leaflets or adverts of any type which disparage the non-QVR approved garages;
- Send a letter to those policyholders who submitted a claim, since February 2017 onwards, informing them that no distinction in payment shall be made between those claimants who choose a QVR repairer and those who do not choose a QVR repairer; and
- Publish a clearly visible notice on the websites of Atlas Insurance PCC Limited, Elmo Insurance Ltd, Gasan Mamo Insurance Limited and MAPFRE Middlesea plc stating that no distinction in payment shall be made by the four insurance companies between those claimants who choose a QVR repairer and those who choose a non-QVR repairer.

13. The measures were limited to six months and in terms of Article 15(2) of the Competition Act, the decision may be renewed in so far as is necessary and appropriate.

### ***3.1.2. Commitments offered by two undertakings operating in the school uniforms retail market***

14. The Office may take a commitment decision based on Article 12C of the Competition Act. Article 12C allows companies to offer commitments that are intended to address the competition concerns identified by the Office. A commitments decision makes legally binding those commitments offered by the undertakings under investigation and concludes that there are no longer grounds for action by the Office.

15. The Office published the proposed commitments for third party observations in the school uniforms sector on both the Government Gazette and on the website of the MCCA in 2017. The Office then proceeded to analyse the observations received. Subsequently, the Office communicated with the undertakings concerned in 2017 so that it would be in a position to issue the commitments decision.

### ***3.1.3. 3.1.3 Courts***

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

16. 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.

17. The Appeals Tribunal may confirm wholly or partially any decision and/or order of the Director General and it may also quash the decision and/or order.

18. Over the past years, the vast majority of cases investigated by the Office have been decided in its favour by the Appeals Tribunal. This positive trend continued in 2017. These judgments are an important step in the enforcement of competition law to ensure a level playing field for businesses.

19. On the 21st February 2017, the Appeals Tribunal upheld the decision of the (then) Office for Fair Competition. The Office had found a vertical agreement between Central Cement Ltd and the members of the Burdnara Bulk Cargo Group and a horizontal agreement between the same members of the Burdnara Bulk Cargo Group, in breach of article 5(1) of the Competition Act as they constitute agreements or concerted practices having as their object the prevention of competition on the cement market concerned. In its decision, the Office had ordered the members of Central Cement Ltd and the members of the Burdnara Bulk Cargo Group to cease and desist from participating in the agreement or concerted practice on the cement market concerned. The Office had also issued a compliance order whereby Central Cement Ltd was ordered not to refuse to supply its cargo without objective justification and as a consequence, the non-exclusive supply of its cargo to any cargo clearance and customs agent that may request it and this without prejudice to Central Cement Ltd choosing to transport its own cargo. The abovementioned decision delivered by the Appeals Tribunal has been appealed before the Court of Appeal.

## **3.2. Mergers and Acquisitions**

20. Mergers and acquisitions are regulated by the Control of Concentrations Regulations, 2003 which 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. In 2017, the Office received a total of six notifications on proposed concentrations which cover different markets. Following the internal assessment of the proposed concentrations, two notified concentrations did not fall within the scope of the Control of Concentrations Regulations, as the turnover of the undertakings concerned did not meet the threshold established by the Regulations.

23. The other four notifiable concentrations involved various markets, namely the assurance market, maritime services providers, the apparel retail sector and the telecommunications market. The following were the four notifiable concentrations:

- Acquisition by Fairfax Financial Holdings Limited of Allied World Assurance Company Holdings
- Joint Venture Between Marlow and Schoeller Group
- Acquisition by Camilleri Holdings Limited of CYKA Limited
- Acquisition by Apax Partners Midmarket S.A.S of Vodafone Malta Limited

24. The first three above mentioned concentrations qualified for the simplified procedure. The Office examined and cleared these three concentrations.

25. The other case, the acquisition by Apax Partners Midmarket S.A.S. of Vodafone Malta Ltd involved the proposed concentration of two significant market players in the Maltese telecommunications sector. In June 2017, the Director General of the Office informed the public for general information that a notification of a concentration between Apax Partners Midmarket SAS (Paris, France) and Vodafone Malta Limited (Luqa, Malta) was received. The transaction would have resulted in the integration of Vodafone Malta in MelitaLink Limited, the current holding company of Melita Limited which is currently controlled by Apax.

26. The concentration concerning the acquisition by Apax Midmarket S.A.S of Vodafone Malta Limited, entailed Phase 1 and Phase 2 competitive assessments. In July 2017, the Office decided to open an in-depth investigation after it had serious concerns that the concentration could *prima facie* limit competition mainly in the mobile telephony market and possibly in the fixed markets, without providing sufficient pro-competitive effects. During the second phase, the Office investigated the market further in order to determine what effects such a concentration could potentially have on the said market. The notifying parties proposed a number of commitments (remedies) to the concentration in order for the Office not to oppose the concentration. Similar to what happens in antitrust cases, the Office follows closely the European Commission notices and decisions together with judgments of the EU courts when examining a proposed concentration and when assessing the types and forms of remedies which are acceptable to resolve the competition problems identified.

27. Following a thorough investigation, the Office issued a Statement of Objections wherein it expressed serious competition concerns. The Office concluded that the commitments proposed by the parties did not sufficiently address its competition

concerns and the notifying parties chose to withdraw the notification and abandon the concentration a few days before a final decision was issued.

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

28. The Office 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 the competition law.

29. In pursuit of its advisory role, the Office provided advice to a public authority notably in respect to an extension of ship towing service.

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

30. As part of Malta's EU presidency activities, the Office for Competition and the Office for Consumer Affairs organised the Consumer and Competition Day on 24th April 2017. The Conference, attended by around 200 participants from EU member states, focused on e-commerce from a competition and consumer protection perspective. Discussions by expert speakers in the field focused around three specific topics namely, digital skills and consumer vulnerability; business practices in e-commerce and enforcement for the digital age.

31. The Office participated in and contributed to the Council of the European Union working group meetings concerning the EU Commission's Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market. Under the Maltese Presidency of the Council of the European Union, in the first half of 2017, the Office chaired the first two competition working parties whereby the impact assessment and the first articles of the Directive were discussed.

32. The Office puts emphasis in intensifying international cooperation by attending the various European Competition Network working groups. The working groups are diverse and involve *inter alia* issues related to Cartels, Mergers, Chief Economist, Cooperation Issues, Horizontal issues and Abuse of Dominance. The Office also participated in sectoral subgroups dealing with particular sectors such as telecommunications, banking and financial services.

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

#### **6.1. Overall resources**

##### ***6.1.1. Annual budget***

33. 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**

34. At the end of 2017, 9 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