



Organisation for Economic Co-operation and Development

DAF/COMP/AR(2019)48

Unclassified

English - Or. English

3 May 2019

Directorate for Financial and Enterprise Affairs  
COMPETITION COMMITTEE

## Annual Report on Competition Policy Developments in Malta

-- 2018 --

5-7 June 2019

This report is submitted by Malta to the Competition Committee FOR INFORMATION at its forthcoming meeting to be held on 5-7 June 2019.

JT03447006

## *Contents*

<b>Malta.....</b>	<b>3</b>
Executive Summary .....	3
<b>1. Changes to competition law and policies, proposed or adopted.....</b>	<b>3</b>
1.1. Amendments to the Competition Act .....	3
<b>2. Enforcement of competition laws and policies.....</b>	<b>5</b>
2.1. Action against anticompetitive practices .....	5
2.1.1. Extension of Interim Measures on four Insurance Companies .....	5
2.1.2. Commitments decision in the school uniforms retail market.....	5
2.2. Courts.....	6
2.2.1. The First Hall of the Civil (Constitutional Jurisdiction) .....	6
2.2.2. Competition and Consumer Appeals Tribunal .....	6
2.2.3. Report issued in terms of Article 27 of the Competition Act.....	6
2.3. Mergers and Acquisitions .....	6
<b>3. The role of competition authorities in the formulation and implementation of other policies...</b>	<b>7</b>
<b>4. Resources of the Competition Authority .....</b>	<b>8</b>
4.1. Resources overall.....	8
4.1.1. Annual budget .....	8
4.1.2. Number of employees .....	8

## *Malta*

### **Executive Summary**

1. The Office for Competition (hereinafter ‘the Office’) has been at the forefront at foreseeing and promoting sound competitive practices to further the attainment and maintenance of well-functioning markets for the benefit of consumers, businesses and the economy within Malta. Effective competition increases consumers’ welfare by inciting businesses to improve their quality of goods and services through innovation, be more efficient and encourage price and cost reductions. This leads to better value for money and to higher productivity, effectively contributing towards economic performance.

2. The Office continued to adopt an integrated approach to its work, prioritizing its resources and efforts towards law enforcement against prohibited anti-competitive agreements and abusive practices and investigating mergers to achieve the maximum positive impact for consumer, businesses and the Maltese economy. Effectively, the Office is responsible for the enforcement of the Competition Act and Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). In each and every investigation, enforcement actions, advocacy initiatives and reports issued, the Office strives for excellence and endeavours to deliver high quality, robust, effective and efficient outcomes by striving to level the playing field for undertakings in order to ensure a fair, competitive and healthy market where both businesses and consumers are safeguarded.

3. In 2018, the Office focused on the investigations of alleged infringements of the Competition Act in various sectors, including education, energy, financial and insurance activities, human health and social work activities, arts, entertainment and recreation and transportation and storage. Most of these investigations were initiated following a complaint by the aggrieved party.

4. Following the landmark constitutional judgment of 2016, the Office was affected in the extent to which it could practice its responsibilities efficiently and effectively. As a result, this called for the commencement of necessary legislative changes which became even more immediate with another judgment delivered by the Constitutional Court in October 2018. In light of these landmark judgments, this exhausted the majority of the legal resources of the Office to make the necessary revisions in the applicable legislation and to ensure the effective operation of the Office.

5. Notwithstanding this, the Office still operated arduously within this challenging environment. The Office through its investigative, enforcement and advocacy functions remained committed in fulfilling its mission to make markets work well for consumers and businesses.

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

#### **1.1. Amendments to the Competition Act**

6. Implementing changes to the current Competition Act became necessary following the judgment of the Maltese Constitutional Court in the names Federation of Estate Agents vs Director General (Competition), where the Court concluded that the competition

proceedings as currently found in the Competition Act were of a criminal nature and should therefore comply with Article 39(1) of the Constitution.

7. In order to address the considerations made by the Constitutional Court, amendments to the current Competition Act were proposed and a draft Bill was published for consultation on 10th August 2018, which consultation continued until 28 September 2018.

8. The salient features of the draft bill included the following amendments:

- Abrogation of the Competition and Consumer Appeals Tribunal and extension of the competence of the Civil Court (Commercial Section) to hear Competition and Consumer cases.
- Full Review of the decision of the Director General by the Civil Court (Commercial Section) on both points of law and fact.
- Appeal before the Court of Appeal on both points of law and fact.
- Settlement no longer limited to cartel cases but applies to all competition law infringements including abuse of dominance cases and other types of restrictive practices.
- Inspections are to be conducted solely following a warrant issued by the Court of Magistrates.

9. The proposed amendments had a positive feedback and a number of stakeholders actively participated in the process.

10. In view of a further judgement of the Constitutional Court in the names *Thake Rosette noe et vs Electoral Commission et* delivered on 8th October 2018, few weeks after the public consultation, several proposed amendments became inapplicable, and several provisions contemplated in the proposed amendments had to be redrafted.

11. This judgement brought about important legal implications which had an impact on the model proposed in August. In its judgement, the Constitutional Court held that the Electoral Commission after investigating any complaint brought to its attention, could not decide upon the issue since the Commission was not a Court in terms of Article 39 (1) of the Constitution. The Constitutional Court confirmed that only Courts have the power to decide cases of a criminal nature. The Court clarified that the fact that there were two possibilities to contest the decision before two courts on both points of law and fact did not render the system constitutional since the Constitution requires that the entire procedure determining a criminal charge should be brought before a Court.

12. This judgement meant that the proposed legislative amendments, which retained the powers of the DG (Competition) to issue decisions finding an infringement of Competition law were still considered unconstitutional despite the fact that the proposed amendments introduced a review on both points of law and fact on the decision of the Director General before a Civil Court and an appeal on both points of law and fact before the Court of Appeal.

13. In the light of this judgement, the present unitary administrative model by which the Director General investigates potential infringements and takes a decision finding (or otherwise) an infringement and imposes fines had to be replaced by a dual system model in which the Director General conducts an investigation and initiates proceedings before

the Civil Court (Commercial Section) by sworn application for a final judgement to be taken and fines and/or remedies to then be imposed solely by the Court.

## 2. Enforcement of competition laws and policies

### 2.1. Action against anticompetitive practices

#### *2.1.1. Extension of Interim Measures on four Insurance Companies*

14. In terms of Article 15(2) of the Competition Act, on 16th March and 14th September, the Office renewed the interim measures decision which had been issued in the previous year on four insurance companies, concerning the repair of motor vehicles and motorcycles sector.

15. Article 15(2) of the Competition Act states that the decision issued by the Director General may be renewed in so far as it is necessary and appropriate. The Office considered that the extension of the decision is necessary and appropriate given that the investigation of the Office is still ongoing and in the absence of such interim measures, there remains a serious risk of irreparable damage to competition. The Office also considered that the extension of the decision is required to ensure that the existing competitive situation is maintained and protected pending the final outcome of the case.

#### *2.1.2. Commitments decision in the school uniforms retail market*

16. On 29th May of 2018, the Office issued its first commitments decision since the introduction of the commitments procedure in 2011. The Competition Act allows the Office to conclude competition law proceedings by accepting commitments offered by undertakings if they address the competition concerns raised by the Director General. The assessment of the Office is based on a preliminary evaluation which includes market investigation and analysis and assessment of third-party objections, pursuant to Articles 12C(2)(a) and (b) of the Competition Act. Such a decision does not reach a conclusion on whether competition law has been infringed, but legally binds the undertakings concerned to respect the commitments.

17. The Office issued a decision which renders legally binding the commitments offered by St Edward's College and In Design (Malta) Limited. The commitments addressed the preliminary competition concerns of the Office relating to an agreement on the supply of school uniforms which was concluded between the parties concerned. In its preliminary assessment, the Office expressed its preliminary views and concerns that the agreement concluded between the parties may in fact raise concerns of market foreclosure which hinder and restrict competition because the exclusivity agreement was valid for five years, the duration of which was to be further prolonged through automatic renewal for further years.

18. The commitments consisted in:

- Amendment of the current agreement by completely removing the clause providing for automatic renewal.
- A new Request for Quotations had to be issued at the end of the term of the agreement by the school and the new agreement must not have a duration longer than four years.

- The school had to place a notice on its website and send an email to all parents whereby the latter are informed that the school does not in any way prohibit parents from purchasing uniforms from other suppliers, as long as these are in line with the specifications provided.

## 2.2. Courts

19. The Office engages regularly in judicial litigation and is responsible for defending its antitrust cases before the Competition and Consumer Appeals Tribunal and before the Maltese courts.

### *2.2.1. The First Hall of the Civil (Constitutional Jurisdiction)*

20. On 8th November, the First Hall of the Civil Court in its constitutional jurisdiction delivered a partial judgment in the case in the names Falzon Group Holdings Limited (C1731) Et Vs Direttur Generali (Kompetizzjoni) Et where it was held that although the Office did not impose any fine in its infringement decision, the proceedings before the Office against the undertakings concerned are still to be considered criminal in nature and the provisions of article 39(1) of the Constitution still apply. The judgement is currently being appealed before the Constitutional Court.

### *2.2.2. Competition and Consumer Appeals Tribunal*

21. The Office is in the process of defending its antitrust report in the case Ufficcju Ghall-Kompetizzjoni vs Korporazzjoni Enemalta wara l-Ilment ta' Attard Services Limited after the Office presented a report with its findings of an infringement of the Competition Act in the market for the provision of storage and throughput facilities for Jet A1 fuel. The report is not binding and the Tribunal will decide whether an infringement or otherwise of the Competition Act has taken place.

### *2.2.3. Report issued in terms of Article 27 of the Competition Act*

22. 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. Before deciding the case, the court shall take into consideration such expert report, and any subsequent submissions made by the parties and the Director General.

23. In November 2018, following a rigorous investigation in the airline industry, the Office submitted an in-depth report with its findings to the First Hall of the Civil Court in Federated Association of Travel and Tourism Agents vs Deutsche Lufthansa Ag (Malta) Et concerning allegations of a concerted practice and an abuse of a dominant position.

## 2.3. Mergers and Acquisitions

24. The Office is also responsible in accordance with the Control of Concentrations Regulations, to examine and control concentrations between undertakings in terms of their effect on the structure of competition in the market. The Control of Concentrations

Regulation bestow upon the Office the power to intervene and prohibit mergers that have the potential to lead to substantial lessening of competition.

25. A concentration has to be notified to the Office if the aggregate turnover in Malta of the undertakings concerned in the preceding financial year exceeded €2,329,373.20 and each of the undertakings concerned had a turnover in Malta equivalent to at least 10 per cent of the combined aggregate turnover of the undertakings concerned.

26. In 2018, the Office received ten notifications on proposed mergers, concerning several markets, both locally and abroad. Following a number of pre-notification meetings with the parties concerned and internal assessment of the proposed concentrations, six notifications did not fall within the scope of the Regulations, as they failed to meet the turnover thresholds as established by the Control of Concentrations Regulations. These concentrations were in the financial, banking, insurance and gaming sectors.

27. The other four notifiable notifications were mainly in the wholesale and retail trade sector and involved various markets, namely consumer goods, gaming, perfumery, toiletry & cosmetics and food products. The following were the four notifiable concentrations:

1. Acquisition by Francis Busuttill & Sons (Marketing) limited of Charles Darmanin
2. Joint Venture between V J Salamone Marketing Limited and Vivian Corporation Limited
3. Joint control in a newly created company Sutters and Co Ltd
4. Acquisition of Ladbrokes Coral Group plc by GVC Holdings Plc

28. Three of the above concentrations were declared lawful after qualifying for the simplified procedure. The simplified procedure is the process adopted by the Office when the concentration is deemed not to raise serious doubts regarding the lessening of competition in the Maltese market that results from the concentration. These concentrations were cleared and declared lawful within the four-week period as established by the Regulations.

29. For one of the above concentrations, the acquisition of Landbrokes Coral Group plc by GVC Holdings plc, the Office conducted a Phase 1 investigation which resulted in the Office to unconditionally declare the concentration lawful within the six weeks period as mandated by the Regulation.

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

30. As part of its responsibilities, the Office also plays an important role as advocate of competition by providing expert competition law advice to public authorities to promote the elimination of restrictive public restraints through law, regulations and policies. Three provisions in the Malta Competition and Consumer Affairs Authority Act focus on the essential role of advocacy. Articles 14 (g) to (i) empower the Office to provide advice to public authorities about the competition implications of proposals for legislation on the competition issues which may arise in the performance of their functions and to provide advice on the competition constraints imposed either by legislation, policy or administrative practices.

31. During the year, the Office provided advice regarding a call for quotations issued by the central procurement and supplies unit with respect to the procurement of human milk fortifier. The Office also provided testimony before the Public Contracts Review Board in this regard.

32. The advice provided by the Office addressed the situation where the price offered by the undertaking is disclosed on the Opened Tender Details during the first Call for Quotes. The Call for Quotes is then subsequently cancelled and a new call for quotes is issued soon after. The Office considered that in the above-mentioned situation, given the fact that the price submitted by the undertaking in the first Call for Quotes is disclosed, positions such undertaking in a competitive disadvantage relative to the other competitors in the case where that undertaking would later submit an offer for the second Call for Quotes. Competitors can easily align their prices to submit a better offer than the disclosed price of the undertaking in the first Call for Quotes, since they would become aware of the quoted price in the first Call for Quotes. In view of this, the element of secrecy which is essential for sound competition in bidding processes would have been uncovered, thus putting the undertaking which would have competed in the first Call for Quotes at a competitive disadvantage and thus, distorting the level playing field on the market. The decision of the Public Contracts Review Board is publicly available.

33. In addition to its advocacy role, the Office replied to queries raised by market players on an array of issues. The Office provided its expert opinion to two major telecommunications providers regarding their collaboration to provide a joint sports network. Through this agreement subscribers can now watch the sports content on one network without having to pay two separate subscriptions with more than one service provider. The Office provided its expert opinion in other cases regarding best parity clauses, competition issues in the hairdressing market, car warranties and exclusivity agreements in the educational sector.

## 4. Resources of the Competition Authority

### 4.1. Resources overall

#### 4.1.1. Annual budget

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

#### 4.1.2. Number of employees

35. At the end of 2018, nine employees were engaged with the Office:

	2017	2018
Economists	2	3
Lawyers	4	3
Other Professionals	1	1
Support staff	1	1
<b>Total Number of Employees</b>	<b>8</b>	<b>8</b>