

**Directorate for Financial and Enterprise Affairs  
COMPETITION COMMITTEE****Annual Report on Competition Policy Developments in Malta****-- 2019 --**

This report is submitted by Malta to the Competition Committee FOR INFORMATION.

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## *Malta*

### Executive Summary

1. The Office for Competition (hereinafter ‘OC’) is one of the four entities within the Malta Competition and Consumer Authority. The OC aims to facilitate the smooth operation of well-functioning markets by promoting sound, competitive practices for the benefit of consumers, businesses and the economy.
2. This aim has been thoroughly pursued by the OC primarily by its enforcement directed towards the curtailment of anti-competitive agreements and abusive practices in terms of the Competition Act and the Treaty on the Functioning of the European Union and the appraisal and assessment of concentrations according to the Control of Concentrations Regulations.
3. In 2019, the OC assessed a record number of concentrations concerning several economic sectors including life insurance, property development, printing and the pharmaceutical retail market. These concentrations were assessed in an expedite manner and within the time limits stipulated in the Control of Concentrations Regulations.
4. The OC continued with its investigations in various sectors including arts, entertainment and recreation, transportation and storage, the financial and insurance activities sector as well as the commencement of an ex officio investigation concerning the manufacturing and the wholesale and retail trade sector.
5. On 29<sup>th</sup> July 2019, Legal Notice 179 brought the Competition Act and Consumer Affairs Act and other Laws (Amendment) Act into force. The Act introduced extensive amendments to the Competition Act and the Consumer Affairs Act to ensure that the procedure adopted by the relevant administrative authorities in competition and consumer cases comply with the right to a fair hearing enshrined in the Constitution of Malta and to strengthen the competition law enforcement system in Malta.
6. The OC is responsible for providing expert competition law advice to public authorities to promote the elimination of restrictive public restraints emanating from laws, regulations and policies. In this respect, the OC has actively exercised its responsibilities and acted as an advocate of competition with various Government entities and authorities.

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

#### 1.1. Amendments to the Competition Act

7. The Competition Act and the Consumer Affairs Act and other Laws (Amendment) Act, 2019 implemented radical changes to the Competition Act that became necessary following landmark Constitutional Court judgments. In these judgements, the Court considered that the fines imposed in competition law proceedings that served as a deterrent, could also be quite severe and were intended as punishment and not as compensation for damages.
8. In view of this, the Constitutional Court concluded that the competition law proceedings leading to the imposition of a fine were of a criminal nature and despite being

fully compliant with the European Convention on Human Rights, the proceedings fell foul of Article 39(1) of the Constitution which 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”.

9. These judgements confirmed that only Courts and not any other adjudicating body, including a Tribunal, could determine cases of a criminal nature and clarified that, since, there are two possibilities to contest a decision before two Courts on both points of law, this did not render the system anti-constitutional. This is because the Constitution of Malta requires that the entire procedure determining a criminal charge should be brought before a Court.

10. Consequently, these judgements rendered the previous system ineffective and are the main reason behind the reforms of the Maltese Competition Act passed as law on 31 May 2019, as Act XVI of 2019, with the assent of the President of Malta.

11. The amendments provide for a definitive separation of powers whereby both the OC and the Civil Court (Commercial Section). The OC is the investigative arm, being able to request the Court to impose remedies and penalties and recommending the quantum of such penalties, and the Court takes decisions after hearing submissions from both sides.

12. In this scenario, the OC retains its powers of investigating suspected infringements of competition law and to institute proceedings before the Civil Court (Commercial Section) when the Director General considers that there is an infringement of articles 5 and/or 9 of the Competition Act and/or Articles 101 and/or 102 of the Treaty on the Functioning of the EU.

13. Furthermore, the amendments brought other important changes, which further consolidate the Maltese competition law enforcement system. For instance, inspections are now conducted following a warrant issued by the Court of Magistrates both for business premises as well as for non-business premises. Prior to the introduction of these amendments, a warrant was required only in the case of inspections of non-business premises, but the OC considered this amendment to be essential due to its potential constitutional implications.

14. Another example that further consolidates the Maltese legal system in the field of competition law is the right of persons, undertakings or associations of undertakings not to answer questions which may lead to self-incrimination. Importantly, this right was always observed by the OC, but it has now been enshrined into law and serves as an important safeguard in the investigations carried out by the OC.

15. Under the new amendments, the settlement procedure has been strengthened when compared to the procedure which was introduced in the Competition Act in 2011 as this is no longer limited to cartel cases but can be applied to all competition law infringements, including abuse of dominance cases and other types of restrictive practices. In addition, the current 10% fixed reduction in the fine is changed to a range of between 10% and 35% in order to encourage out-of-court settlements.

## **1.2. Transposition of Directive (EU) 2019/1 into Maltese Law**

16. The main aim of the Directive is to ensure that when applying EU antitrust rules, national competition authorities have the appropriate enforcement tools in order to bring about a genuine, uniform competition enforcement area. To that end, the proposal provides

for minimum guarantees and standards to empower national competition authorities to reach their full potential.

17. Some of the key measures that feature in this Directive include ensuring that national competition authorities have proper and sufficient resources to enforce national and EU competition law and that they are able to do so independently.

18. The Directive also provides for national competition authorities to have an effective leniency procedure, as well as the necessary framework to enable mutual cooperation between one national competition authority and another. This system ensures that authorities can rely on each other to carry out fact-finding measures on each other's behalf in order to foster co-operation and mutual assistance among the EU member states.

19. In 2019, the OC started the process of transposing the Directive into national legislation.

## 2. Enforcement of competition laws and policies

### 2.1. Action against anticompetitive practices

20. The OC focused in 2019 on investigating alleged infringements of the Competition Act in wholesale and retail trade, manufacturing, the arts, entertainment and recreation, financial and insurance activities, transportation and storage, and professional, scientific and technical activities sectors, amongst others.

21. The majority of these investigations were initiated following a complaint by the aggrieved party. While the OC has undertaken investigatory work on a number of allegations, below the OC is reporting only those allegations where the OC issued a decision in 2019.

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

22. On 12 February, the OC for the third time renewed the interim measure decision which had been issued in 2017 on four insurance companies concerning the repair of motor vehicles and motorcycles sector. This measure was renewed on 16 March and 14 September of 2018.

23. This extension was carried out in terms of article 15(2) of the Competition Act prior to the amendments introduced in 2019 that allowed for interim measure decisions issued by the OC to be renewed by the Director General in so far as this was necessary and appropriate.

24. In its decision, the OC noted that an extension of the Decision was necessary and appropriate given that the investigation was still being carried out and in the absence of such interim measures, there remained a risk of serious and irreparable damage to competition.

25. The OC added that the extension of the Decision was required to ensure that the existing competitive situation would be maintained to protect competition on the market pending the final outcome of the case. The OC decided to renew its decision for a further period of five months till 11 July 2019. The OC reassessed the situation and considered that, after that date, the conditions for interim measures no longer subsisted.

### ***2.1.2. Investigation concerning the Sports Sector***

26. On 27 February 2017, the OC received a complaint from two Water Polo Clubs alleging an infringement by Aquatic Sports Association (ASA) of Articles 5 and/or 9 of the Maltese Competition Act regarding its rules on the maximum number of players of non-Maltese nationality who each team may have in a senior match organised by or played under the aegis of the ASA.

27. After opening an in-depth investigation, the OC concluded that on the basis of the information gathered during the investigation there were insufficient grounds to act on the complaint.

28. The complainants requested the OC to reconsider its conclusion. On 19 September 2019, the OC reaffirmed its initial conclusions and informed the complainants accordingly in terms of the new amended provisions under article 14(2) of the Competition Act.

## **2.2. Courts**

29. The OC engages regularly in judicial litigation and is responsible for defending its antitrust cases before the Maltese courts.

### ***2.2.1. Uffiċċju Ghall-Kompetizzjoni vs Korporazzjoni Enemalta wara l-Ilment ta' Attard Services Limited***

30. The OC is in the process of defending its antitrust report in this case after the OC 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.

31. In 2019, the process of examinations and respective cross-examinations was concluded, and the OC submitted the note of submissions in relation to this case. Based on the evidence submitted, the Civil Court (Commercial Section) has to decide whether an infringement or otherwise of the Competition Act and the Treaty on the Functioning of the European Union has taken place.

### ***2.2.2. Falzon Group Holdings Limited Et vs Direttur Ġenerali (Kompetizzjoni) Et***

32. The OC's decision, issued in October 2016, finding resale price maintenance in the fuel market, an infringement of article 5 of the Competition Act, has now become final.

33. In July 2019, the Constitutional Court rejected the arguments raised by Falzon Group Holdings Limited alleging that the investigative process adopted by the OC breached the right of the undertaking to a fair hearing, as protected by article 39(1) of the Constitution of Malta and Article 6 of the European Convention on Human Rights. Therefore, the investigative procedure carried out by the OC in the case was confirmed to be within the parameters of the law.

34. Subsequently, Falzon Group Holdings Limited discontinued the case that was instituted against the OC before the First Hall of the Civil Court in its Constitutional Jurisdiction, and also discontinued the appeal proceedings that were instituted against the OC on the merits of that decision, before the Competition and Consumer Appeals Tribunal, today the Civil Court (Commercial Section).

### ***2.2.3. Federated Association of Travel and Tourism Agents vs Deutsche Lufthansa Aktiengesellschaft Et***

35. In November 2018, following a rigorous investigation on the airline industry, the OC submitted an in-depth report with its findings to the First Hall of the Civil Court on Association's allegations of a concerted practice and an abuse of a dominant position. This report was prepared following a request by the Courts, in line with the terms of Article 27 of the Competition Act, to stay the proceedings and request the Director General to submit a report on the competition questions raised before it when these relate to Article 5 of the Competition Act and/ or Article 101 of the TFEU, or when it is alleged that there is an abuse of a dominant position in accordance with Article 9 of the Competition Act and/or Article 102 of the TFEU. In its findings, the OC concluded that it does not find any infringement of Article 5 and Article 9 of the Competition Act.

36. In 2019, the First Hall of the Civil Court requested the OC to reply to technical questions on its findings. In its judgement delivered on 27 June 2019, the Court concluded that it found no evidence that proves any breach of Article 5 and/or Article 9 of the Competition Act and therefore confirmed the OC's findings.

## **2.3. Mergers and Acquisitions**

37. The OC 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. These regulations empower the Director General to prohibit any concentrations that have the potential to lead to a substantial lessening of competition in the Maltese market or part thereof.

38. A concentration has to be notified to the OC if the aggregate turnover in Malta of the undertakings concerned in the preceding financial year exceeded €2,329,373 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.

39. In 2019, the OC received an unprecedented 12 notifications on proposed concentrations concerning several markets operating both locally and abroad. These markets include those within the financial and insurance sector, the manufacturing sector, the information and communication sector, the arts, entertainment and recreation sector, the construction sector, the wholesale and retail trade sector and the professional, scientific and technical activities sector.

40. Following an initial assessment of the proposed concentrations, all notifications of the undertakings concerned met the turnover threshold as defined in regulation 2 of the Control of Concentrations Regulations. The following were the 12 concentrations examined by the OC:

- Centerbridge Partners L.P.'s Acquisition of certain software assets from International Business Machines Corporation
- Acquisition of Abaco S.p.A. by Dea Capital Alternative Funds s.g.r. S.p.A.
- Acquisition of joint control of Costa Edutainment S.p.A. by Oaktree Capital Management L.P.
- Joint venture between M&Z Group Limited and BPM Limited
- Acquisition of De La Rue Identity Solutions Limited by HID Corporation Limited

- Acquisition of CKV Marketing by CKV Central Limited
- Acquisition of Vungle Ltd by Redbird Parent Holdings Inc.
- Acquisition of Watch Topco Limited by Quad US BidCo Inc.
- Acquisition of La Poste SA by Caisse des dépôts et Consignations
- Acquisition of Velprint Limited by Giov. Muscat Co Limited
- Acquisition of FirstUnited Insurance Brokers Limited by Argus Group Holdings Ltd
- Acquisition of JP Pharma Operations by Brown's Pharma Limited

41. The first 10 concentrations were declared lawful after qualifying for the simplified procedure, since the proposed concentrations did not give rise to serious doubts on the lessening of competition in the Maltese market. These concentrations were cleared and declared lawful within the four-week period as stipulated in regulation 12(4) of the Control of Concentrations Regulations.

42. On the other hand, the acquisition of FirstUnited Insurance Brokers Limited by Argus Group Holdings Ltd required the OC to conduct a Phase I investigation. This was due to the horizontal overlaps that existed between the activities of the notifying parties in the insurance brokerage market, specifically in the classes of the provision of life insurance and accident and health, where the combined market share based on gross written premiums stood at [25-35%] and [35-45%], respectively.

43. The OC concluded that the proposed transaction would not lead to substantial lessening of competition in the market for the provision of insurance services since the parties would have a combined market share of [0-5]% in the whole distribution of life insurance market and [10-20]% with a minimal increment brought about by the acquired party in the whole accident and health insurance market and therefore declared the concentration lawful.

44. Similarly, the assessment of the acquisition of JP Pharma Operations by Brown's Pharma Limited necessitated a Phase I investigation. This was because the combined horizontal market share at one of the local geographical markets was estimated to be 33%, therefore being 18 percentage points higher than the threshold stipulated in regulation 12(1)(iii) for examining concentrations under the simplified procedure.

45. Following its assessment, the OCFE concluded that at the retail level, the proposed transaction would not substantially lessen competition in the sale of prescription and non-prescriptions medicines in retail pharmacies within the defined local geographic markets. Furthermore, the OC estimated the combined market share of the notifying parties post transaction to be between 5-10% of the pharmaceutical retail outlet market in Malta and therefore considered the notifying party's ability to exert pressure on its suppliers to be limited. As a result, the OC declared the concentration lawful.

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

46. Three provisions in Article 14 of the Malta Competition and Consumer Affairs Authority Act empower the OC to act as advocate of competition by providing expert

competition law advice to public authorities to promote the elimination of restrictive public restraints through regulations, laws and policies. Competition advocacy complements competition law enforcement. The OC provided advice to a number of public authorities.

47. Amongst others, the OC provided advice to the Central Procurement and Supplies Unit (Ministry for Health) on the supply of infant formula at Government General Hospital. The OC felt the need to provide advice to the Central Procurement and Supplies Unit after the OC was informed by a supplier of infant formula, follow-on formula and other formula or milk products for older infants or toddlers in the private retail market that the public contract of supply of infant formula at Government Hospital was causing a distortion of competition on the supply in the private retail market for infant formula, follow on-formula and other formula or milk products for older infants or toddlers. After assessing the allegations made and convening meetings with the parties concerned, the OC decided to exercise its advocacy role on the competition issues concerned.

48. Through an advocacy letter sent in July 2019, the OC informed the CPSU that the tendering system adopted in the public health service was distorting competition in a number of secondary markets in the private retail market, creating barriers to entry and expansion for other suppliers of these products.

49. In conclusion, the OC advocated a system where a choice of products is offered to the parents of babies at the Government Hospital and, at the same time, suppliers must always guarantee security of supply of infant formula to the public service in a timely manner.

## 4. Resources of the Competition Authority

### 4.1. Resources overall

#### 4.1.1. Annual budget

50. 34. The OC is one of the four entities forming part of the Malta Competition and Consumer Affairs Authority. The Office for Consumer Affairs, Standards and Metrology Institute and Technical Regulation Division are the other entities. The OC though being independent in its decision does not have a specific budget, but a global budget is allocated to the whole Authority.

#### 4.1.2. Number of employees

51. As at the end of year, there were nine employees with the OC:

**Table 1.**

	2019	2018
Economists	3	3
Lawyers	4	3
Other Professionals	1	1
Support Staff	1	1
<b>Total number of employees</b>	<b>9</b>	<b>8</b>