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Directorate for Financial and Enterprise Affairs
COMPETITION COMMITTEE

Annual Report on Competition Policy Developments in Malta

-- 2021 --

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

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Executive Summary

1. The Office for Competition (hereinafter ‘OC’) is the national competition authority responsible to ensure effective competition in terms of the Malta Competition and Consumer Affairs Authority Act and the Competition Act
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3. The 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.
4. 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.
5. In 2021, Malta introduced a leniency programme as part of its legislation. The programme is another important step to uncover and put to an end cartel conduct behaviour. Last year was also characterised by the introduction of a series of amendments to the Maltese Competition Act, which aim to bolster the effectiveness of the investigations of the OC.
6. The OC witnessed record-breaking growth in merger notifications with a total of 17 transactions investigated by the OC and an unprecedented number of in-depth Phase II investigations initiated in a single year.
7. The OC believes in the importance of proactive enforcement, particularly in markets where circumstances suggest that competition may be restricted or distorted. To this end, in 2021 the OC focused its efforts by unveiling its findings, publishing the final report on the sector inquiry related to the Supply of Infant Milk Formula in the Public Health Sector and the impact of that supply on the private retail market for infant formula and similar products.
8. The OC examined and investigated alleged infringements of the Competition Act in various sectors, including the financial, maritime and transport, entertainment and recreational, energy and professional services sectors. These investigations are still ongoing. The majority of these investigations were initiated following a complaint by an aggrieved party.

1. Changes to competition laws and policies, proposed or adopted

1.1. Summary of new legal provisions of competition law and related legislation

9. The latest amendments to the Maltese Competition Act entered into force on 31st August 2021. The changes were mostly based on Directive 2019/1 (the “ECN+ Directive”), which aims to guarantee that competition law is enforced more effectively across EU member states. The ECN+ Directive, which amends principally the provisions of the Competition Act, has now been transposed into national law and provides the OC with further enforcement tools to investigate alleged competition breaches and introduces tougher penalties for undertakings that infringe the Competition rules. These are some highlights of the amendments.

1.1.1. The investigation powers of the OC have been strengthened by giving it the power to conduct interviews

10. The OC may request an interview with anyone who may possess information relevant to the application 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 European Union (TFEU) to appear for an interview at a place and time specified by the Director General to answer questions with respect to any matter relevant to the investigation.

11. The interviewees are obliged to appear at the interview and must refrain from providing any false, misleading, incomplete or incorrect information in response to any question asked. Otherwise, the OC shall request the Court to impose a penalty. Moreover, the law provides that the Director General may record the interview in any manner and form deemed appropriate by him, which means that, besides having the interview carried out in person, the OC may for instance carry out the interview through digital means. The interviewee has the right not to self-incriminate and may be assisted by a legal counsel.

1.1.2. The OC has the power to reject complaints based on its enforcement priorities

12. Until the amendments which transposed the ECN+ Directive came into force, the OC was – in theory – compelled to investigate all complaints lodged before it. The OC may now reject complaints that are not considered an enforcement priority, such as when the potential market impact of the alleged anti-competitive conduct is small or modest, or when the OC is unlikely to prove the infringement even if it investigates it.

13. As a result, the OC will now be able to better allocate its resources since it can decide on priority grounds whether to investigate the complaints submitted to it.

1.1.3. The maximum penalty that may be imposed on infringing undertakings has increased

14. The maximum penalty for infringing the substantive competition rules has increased to 10% of a company’s total worldwide turnover from the previous upper limit of 10% of the turnover generated in Malta in the affected market. Regarding penalties for breaches of procedural rules, the previous provisions of the Competition Act provided for maximum penalties of €30,000 and €50,000, according to the type of procedural infringement.

15. In conformity with the requirements set out in Article 13(2) of the ECN+ Directive, that the penalty must be effective, proportionate and dissuasive, the maximum amount of the penalty that can be imposed for procedural infringements under the Competition Act is

now set at €50,000 or a penalty not exceeding 1% of the total worldwide turnover of the undertaking in the business year preceding the judgment imposing the penalty.

1.1.4. Independence

16. The new dispositions reinforce the OC's autonomy and independence which were already enshrined in the Malta Competition and Consumer Affairs Authority Act and which now expressly provides that the OC must act independently from political and external influence when exercising its powers and enforce competition law.

17. The amendments introduced also strengthens the independence of the OC through safeguards of the criteria regulating the dismissal of the persons who take decisions under the Competition Act by explicitly providing for clear grounds for dismissal.

1.1.5. Inspections

18. The Competition Act already provided that the OC may access any technological device to seize evidence of competition infringements. It is now codified in the law that this includes also external servers and cloud services, that are accessible from the premises, land or means of transport of the undertaking being inspected.

19. In addition, to minimise the unnecessary prolongation of inspections, searches for information can continue at the premises of the OC or in other designated premises.

1.1.6. Leniency Programme

20. Under the leniency programme, which was introduced on 18 June 2021 through Legal Notice 264 of 2021 – Immunity from Penalties and Reduction of Penalties in Cartel Investigations Regulations, potential applicants can submit a leniency application to the Director General of the OC to seek immunity or a reduction of the penalties. The OC may grant immunity from penalties by refraining from requesting the Court to impose a penalty on an applicant for leniency following the disclosure of participation in a secret cartel to the OC.

21. Alternatively, the OC may request the Court to impose a reduced penalty on the leniency applicant which submits evidence of the alleged secret cartel that, in the view of the Director General, represents significant added value to the evidence already in the possession of the OC at the time of the leniency application.

22. The applicant undertaking has to co-operate genuinely, fully, on a continuous basis and expeditiously with the OC during the entire duration of the investigation before the OC and during Court proceedings. If the undertaking does not fulfil these requirements fully and unconditionally, the leniency programme will not be applicable.

23. Another requirement to be met for immunity from penalties to be granted is the fact that the applicant undertaking must not have coerced other undertakings to participate in an infringement

24. The Competition Act has been amended to include a new Article 16, which provides immunity or reduces penalties for violations (other than secret cartels) of Article 5 of the Competition Act and/or Article 101 of the TFEU. Pursuant to the article, the provisions of the Immunity from Penalties and Reduction of Penalties in Cartel Investigations Regulations shall also apply to any undertaking and, or an association of undertakings that co-operates with the OC to uncover agreements between undertakings and, or decisions of an association of undertakings and, or a concerted practice that infringes Article 5 of the Competition Act and/or Article 101 of the TFEU.

1.1.7. Enhanced co-operation between Maltese and other EU competition authorities.

25. European co-operation between national competition authorities has been bolstered through the introduction of the Mutual Assistance between National Competition Authorities Regulations 2021. The Maltese competition authority can actively assist other competition authorities in the EU when, among other things, the new rules enable the OC to notify procedural documents and enforce cross-border decisions on fines taken by other European competition authorities in Malta.

2. Enforcement of competition laws and policies

2.1. Action against anticompetitive practices, including agreements and abuses of dominant positions

26. The OC examined and investigated alleged infringements of the Competition Act in various sectors, including the financial, maritime and transport, entertainment and recreational, energy and professional services sectors. These investigations are still ongoing. The process of assessing the alleged infringements included a literature review of case in the European Union and other jurisdictions. The investigation also included a number of Requests for Information that were sent to the Parties involved in the investigation, and to other undertakings within the sector being assessed, with a view to better analyse and examine the alleged infringements. The majority of these investigations were initiated following a complaint by an aggrieved party.

2.2. Mergers and acquisitions

2.2.1. Statistics on number of mergers notified and/or controlled under the competition laws

27. 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 on 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.

28. In 2021, the OC mainly concentrated its resources on the assessment of concentrations notified to it. The OC issued 18 decisions on proposed concentrations that impacted both the local and foreign markets. Concentrations between foreign companies are referred to the OC as their turnover in Malta exceeds the threshold established in the Control of Concentrations Regulations and thus must be assessed on whether these concentrations lead to a substantial lessening of competition in the local market.

29. The decisions covered a wide variety of sectors, including the retail and grocery market, on-line gaming and gambling, insurance, professional services and passenger fast ferry services. All concentrations were assessed within the time limits stipulated by the Control of Concentrations Regulations.

2.2.2. Summary of significant cases

Proposed acquisition by Lidl Immobiliare Malta Limited of buildings belonging to Said Investments Limited

30. On 12 January 2021, the OC received notification of a proposed concentration from Lidl Immobiliare Malta Ltd for the purchase of three grocery retail outlets operated by Scotts Limited in Burmarrad, Sliema and Żabbar.
31. During the initial market investigation, the OC expressed serious doubts on the compatibility of the proposed concentration with the Control of Concentrations Regulations. It stated that, on a *prima facie* basis, the proposed acquisition could substantially limit competition in the grocery retail market.
32. Primarily, the OC highlighted that the acquisition of the Żabbar grocery retail outlet could lead to horizontal unilateral effects, both existing and future constraints, relating to the elimination of a competitive constraint, thereby restricting customer choice. This would harm competition and consumer welfare in the process. In line with the Control of Concentrations Regulations, the OC initiated an in-depth (Phase II) investigation on 15 February.
33. The OC gathered and used a broad range of information and evidence to delineate the relevant markets and conduct its competitive assessment, including:
- a representative survey of grocery shoppers covering in-store groceries that was conducted in 2020. This survey helped the OC to properly capture and delineate the demand side of the grocery market in Malta;
 - a request for information was sent to the main supermarkets in Malta to obtain the necessary information to assess the supply side of the market. The information requested covered turnover, sales area, average spend per customer visit, percentage of sales related to food and beverages, product substitutability, price, range, quality, service and online shopping, among others; and
 - in the same correspondence, the OC invited the interested parties to submit their views on the impact that the proposed concentration could have on competition in the grocery market in Malta.
34. The analysis of this data formed the basis of the OC's definition of the relevant product and geographical markets, and the competitive assessment conducted in this concentration.
35. Following its competitive assessment, the OC concluded that the acquisition of the Burmarrad outlet and the leases of the Sliema outlet and Burmarrad's parking area by Lidl Immobiliare Malta Ltd from Said Investments Ltd and Scotts Ltd are not expected to lead to a substantial lessening of competition in the grocery retail market in Malta.
36. On the other hand, following several meetings convened between the OC and the notifying party, it was agreed by the parties that they would modify the original notified transaction and terminate the promise of sale agreement insofar only as it concerns the Żabbar properties. The parties duly signed the modified agreement on 10 May.
25. As a result, since the serious doubts referred in the initiation of proceedings decision were removed, the OC declared the modified concentration lawful on 9 June.

Proposed Joint Venture in Gozo Fast Ferry service

37. In the proposed full-function joint venture between Bianchi and Sons Limited, Merrill Invest Limited and Ziti Technologies Limited (Phase I Decision), the OC assessed that the concentration could limit competition in the market for passenger fast ferry services between Valletta, Malta, and Mġarr, Gozo.

38. *A priori*, the OC opined that this concentration could lead to adverse non-horizontal competition effects, arising through input foreclosure whereby the undertakings forming part of this concentration may have the ability and incentive to engage in an input foreclosure strategy related to the supply of tallinja ticketing technology services to competitors in the downstream Valetta to Mġarr fast ferry market.

39. These practices could result in harming competition and consumer welfare. However, the OC concluded that, at that stage of the assessment, a more detailed investigation was warranted to verify any concerns that this concentration may lead to a substantial lessening of competition in the aforementioned market.

40. The decision is expected to be published in 2022.

2.3. Sector Inquiry

41. In September 2021 the OC published the final report of the Sector Inquiry on the Supply of Infant Milk Formula in the Public Health Sector and the Impact of that Supply on the Private Retail Market. The sector inquiry assessed whether the procurement process for the supply of infant milk formula for new-born babies adopted by the Central Procurement and Suppliers Unit (CPSU) in the public health sector between 2013 and 2019 distorted competition in the secondary markets of infant milk formula products.

42. On 28 April, the OC published a preliminary report outlining the findings of the inquiry. In accordance with article 11A(3) of the Competition Act, the OC invited interested third parties to submit their views and feedback on the inquiry before publishing the final report. The OC received feedback from the various market players operating in the secondary markets of infant milk formula products and from the CPSU.

43. Following the investigation, the OC concluded that the procurement process adopted by the CPSU at the state hospital gave the winning bidder an unfair advantage in the secondary markets, creating barriers to entry for new companies and barriers to expansion for established businesses. This was also evidenced by the considerable increase in the winning bidder's market share, the decrease in the market shares of the other brands or the modest to negligible gain in the market shares of the other brands.

44. The OC considered that the state hospital's procurement process clearly distorted secondary market competition and caused foreclosure consequences in an already highly concentrated market. Indeed, having a single supplier serving the state hospital limits customer choice, causes unnecessary supply security risks, and creates considerable barriers to entrance and expansion in secondary markets.

45. As a result of the findings, the OC put forward recommendations to the CPSU to better its procurement process for the well-functioning of the secondary markets. The OC formulated specific recommendations that it considered necessary, appropriate and in accordance with the principle of proportionality to create conditions of effective competition.

46. The OC's first recommendation is the 'Simultaneous Multi-Supplier Agreement', which proposes a procurement procedure with multi-winner tenders (i.e., the tender is awarded to multiple bidders). This will ensure supplier diversity while also ensuring a sufficiently diverse range of brands.

47. The OC advised allocating the primary market of infant formula through lots, and cyclical rotations as a second-best alternative, allowing multiple brands into the State Hospital and therefore ensuring that multiple brands will be present throughout the year.

48. The OC considered it of vital importance to study the market of infant milk formula since, through the OC's intervention, it wanted to ensure that, through fair and healthy competition, consumers are not exploited and their rights both in terms of quality and prices are protected, especially for goods and services that are considered essential, such as infant formula milk.

49. After the publication of the sector inquiry, the OC noted with utter disappointment that the CPSU, notwithstanding the findings and recommendations of the OC in the final report, proceeded with awarding the full tender for the supply of readymade feeds for newborn babies to only one supplier, with the result that the procurement process adopted by the CPSU at Mater Dei Hospital is distorting competition in the private retail market.

50. As a result, in November, the OC decided to intervene in appeal proceedings before the Public Contracts Review Board (PCRB) and filed a reply. In its reply, the OC made it clear that the interest of the OC in the proceedings before the PCRB stems from the OC's continuous efforts in the past two years to promulgate a fair and open market by creating a level playing field for suppliers of infant formula to fairly compete in a number of secondary markets in the private retail market (i.e., retail shops and pharmacies selling infant formula, follow on formula and other formula or milk products for older infants or toddlers).

51. Moreover, the OC underlined that, as guardian of competition in the Maltese market, it has an interest to intervene in the proceedings because the practices adopted by the CPSU seriously disrupt the competitive structure or functioning of the market, affecting the public interest protected by the OC.

3. The role of competition authorities in the formulation and implementation of other policies, e.g. regulatory reform, trade and industrial policies

52. As part of its responsibilities, the OC plays an important role as an advocate of competition by providing expert competition law advice to public authorities to promote the elimination of restrictive public restraints through drafting legislation, regulations and policies. The Malta Competition and Consumer Affairs Authority Act (Chapter 510 of the Laws of Malta) empowers the OC to provide advocacy on competition law.

53. Amongst others, the OC held meetings with both the Environment and Resources Authority and Circular Economy Malta Agency and issued a letter to the Agency providing advice on competition matters concerning the draft Waste Management Regulations on Tyres and End-of -Life Tyres.

4. Resources of Competition Authorities

4.1. Resources overall (current numbers and change over previous year)

4.1.1. Annual budget

54. 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 acting independent and autonomous in respect to the prioritisation, investigation and determination of cases and enforcement, does not have a specific budget, but a global budget is allocated to the whole Authority.

4.1.2. Number of employees

55. As at the end of year, there were 9 employees with the OC:

Table 1. Number of employees (person-years)

	2021	2020
Economists	4	3
Lawyers	3	3
Other Professionals	1	1
Support Staff	1	1
Total number of Employees	9	8