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# Competition upgrade

Roderick Zammit Pace and Mark Refalo of Refalo & Zammit Pace Advocates examine recent changes to the Competition Act in Malta

While competition in Malta has been regulated since its Commercial Code was enacted in the mid-19th century, modern competition law is based principally on EU legislation. Indeed, the Competition Act (Cap 379 of the Laws of Malta) which was first enacted in 1994 has since been regularly updated to ensure compliance with the relevant EU legislation. Since the Competition Act is based on European Competition law, the jurisprudence of the Court of Justice of the European Union is an important source of its interpretation as are the relevant decisions and statements of the European Commission.

Malta has recently enacted the Malta Competition and Consumer Affairs Authority Act (Act VI of 2011) (MCCAA Act). It came into force on May 23 2011 and introduces a number of important changes to the Competition Act and to the Maltese competition and consumer law framework generally. The MCCAA Act establishes the Malta Competition and Consumer Affairs Authority (MCCAA) and brings together the functions of the Office for Fair Competition, the Department of Consumer Affairs, the Malta Standards Authority and the Malta National Laboratory Company under one single Authority. The MCCAA Act redefines the investigative powers and procedures of the Office for Competition, which replaces the Office for Fair Competition, and enhances the legal and procedural safeguards afforded to undertakings in line with EU rules. The MCCAA Act also establishes the Competition and Consumer Appeals Tribunal to replace the Commission for Fair Trading.

## The Malta Competition and Consumer Affairs Authority

The MCCAA has as its purpose the attainment and maintenance of well functioning markets for the benefit of consumers and economic operators. Its principal functions include:

- promoting and enhance competition;
- safeguarding consumers' interests and enhancing their welfare;
- promoting voluntary standards and providing standardisation-related services;
- promoting the national metrology strategy; and
- promoting the smooth transposition and adoption of technical regulations.

The MCCAA consists of a Board of Governors, a Co-ordination Committee and four entities, namely the:

- Office for Competition (OFC);
- Office for Consumer Affairs;
- Technical Regulations Division; and
- Standards and Metrology Institute.

The Board of Governors is tasked with determining the policies of the Authority and seeing to their proper and effective implementation by the four entities, ensuring that the entities execute their responsibilities and guaranteeing their functional independence. The Co-ordination Committee acts as the point of contact and the principal channel of communication and co-ordination between the Board of Governors and the entities.

The OFC, headed by the Director General (Competition), is established as the guardian of competition. Its responsibilities include:

- investigating, determining and suppressing restrictive practices;
- examining and controlling concentrations between undertakings in terms of their effect on the structure of competition on the market;
- acting as the national competition authority in Malta as designated by virtue of art. 35(1) of Council Regulation (EC) No 1/2003;
- keeping under review markets and commercial activities relating to the supply of goods and serv-

“The law enhances the legal and procedural safeguards afforded to undertakings in line with EU rules”

ices and collecting information and evidence for the purpose of ascertaining whether such markets and activities may adversely affect the interests of consumers;

- studying markets and recommending action where required;
- promoting compliance with competition law and sound trading practices;
- providing advice to public authorities, among other matters, on the competition issues arising in the performance of their functions; and
- exercising its powers under the MCCA Act and the Competition Act.

Pursuant to the MCCA Act, the Director General is assisted by the following Directorates:

- Inspectorate and Cartel Investigations Directorate with the responsibility to carry out inspections in terms of the Competition Act and to detect and curtail cartels;
- Communications, Energy, Transport and Financial Services Markets Directorate focusing on competition concerns, infringements and concentrations in regulated markets; and
- Primary, Manufacturing and Retail Markets Directorate focusing on restrictive practices and concentrations in other sectors of the economy.

The main focus of the Competition Act is to avoid the creation of cartels and to prevent abuse by dominant undertakings as detailed in Articles 101 and 102 of The Treaty of Lisbon [“TFEU”].

#### Prohibited agreements and practices

Article 5 of the 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, including (but not limitedly to) any agreement, decision or practice which:

- directly or indirectly fixes the purchase or selling price or other trading conditions;
- limits or controls production, markets, technical development or investment;
- shares markets or sources of supply;
- imposes the application of dissimilar conditions to equivalent transactions with other parties outside such agreement, thereby placing them at a competitive disadvantage; or

“The Act has strengthened the legal safeguards for information protected by professional secrecy and information containing business secrets”

- 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.

Article 5 prohibits cooperation between independent undertakings which prevents, restricts or distorts competition. This prohibition is not limited to formal agreements or decisions but includes also other forms of collusion and understandings referred to as “concerted practices”, such as where two or more undertakings act in a particular way through a tacit or informal understanding between the parties whether consensus is achieved in writing, verbally or otherwise. As with EU competition law, the prohibition in question applies both to horizontal arrangements as well as to vertical arrangements.

The prohibition in article 5 applies to “undertakings” which is defined to mean “any person whether an individual, a body corporate or unincorporate or any other entity, pursuing an economic activity, and includes a group of undertakings”.

The Competition Act is wide-ranging in that it applies to both the private and public sectors. In the latter case the Act applies not only to government-controlled entities but also to government departments (with the proviso in article 30(2) that such rules will not obstruct the performance of services declared to be in the general economic interest or being revenue producing monopolies). All actions taken by an undertaking, in the widest sense of the term, are therefore open to scrutiny under the Act for their potentially damaging effect on competition.

#### Abuse of a dominant position

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, including (but not limitedly to) where one or more undertakings:

- directly or indirectly impose an excessive or unfair purchase or selling price or other unfair trading conditions;
- limit production, markets or technical development to the prejudice of consumers;
- apply dissimilar conditions, including price discrimination to equivalent transactions with different trading parties, thereby placing any or some of the trading parties at a competitive disadvantage; or
- make the conclusion of contracts subject to the



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acceptance by the other party of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

The MCCA Act amends article 9(2) of the Competition Act to bring this in line with art. 102 TFEU by removing the reference to abusive conduct consisting of:

- charging of prices which are below the average variable cost price of a product in order to drive rival competitors out of the market; and
- refusing to supply goods or services indiscriminately in order to eliminate a trading party from the relevant market to the prejudice of consumers.

This is not to say that such conduct is not capable of constituting an abuse of a dominant position. Indeed it is important to bear in mind that article 9(2) does not purport to be exhaustive and abusive behaviour may well include other practices which are considered to be harmful to the market structure.

The prohibition under article 9 applies only where an undertaking has a “dominant position”. As with European competition law, the Competition Act is directed towards the conduct of a dominant undertaking which acts in an abusive manner. The law does not prohibit an undertaking from becoming dominant but only the abuse of that dominant position. In deciding whether an undertaking is abusing its dominant position in breach of article 9, the OFC is required to consider that undertaking’s behaviour and to come to a conclusion after it has made a detailed examination of the relevant market and the effects of that undertaking’s conduct on that market.

For the purpose of determining whether an undertaking is dominant, it is necessary for the OFC to be able to carry out the necessary economic analysis of geographic and product markets to define the “relevant market”. Previously, the lack of sufficient resources to conduct relevant, accurate and up to date market research has been one of the major challenges faced by the Office for Fair Competition, the predecessor of the OFC. Indeed experience shows that when carrying out investigations the Office for Fair Competition has tended to require the undertakings concerned to provide gen-

eral market information and analysis as well as to process certain information before making their submission. The MCCA Act seeks to strengthen the MCCA Act including by consolidating the resources of various departments. While this should enhance the resources available to the MCCA, it remains to be seen whether in practice the resources available will be sufficient for the OFC to carry out its own market research and economic analysis and whether as a result requests for information by the OFC will be more focused and less burdensome on the undertakings concerned than they may have been in the past.

The MCCA Act has also eliminated the rebuttable presumption formerly existing under the Competition Act that an undertaking having, alone or in conjunction with others, a relevant market share of at least 40% is deemed to be in a dominant position. Henceforth the relevant market share required to establish dominance will not depend on a presumption of dominance but on the circumstances of the relevant market. This brings the Competition Act further in line with European competition law.

#### Investigations

The OFC is the front-line body which acts as the main investigatory body. All allegations regarding a breach of competition law are investigated by the OFC represented by the Director General who has wide powers of investigation under article 12 of the Competition Act when investigating possible infringements, including the power to request any information or document, conduct interviews and enter into and search premises. As amended, the Act requires the Director General to justify the legal basis and purpose of any request for information, to specify the subject-matter and purpose of any inspection and to indicate the administrative fines or penalties for non-compliance. As a safeguard against the arbitrary or excessive use of the Director General’s powers, apart from being authorised by the Director General, a search in the private homes of directors, managers and other staff must also be authorised by a warrant issued by a magistrate. On the other hand, the Act does not require authorisation by a magistrate for a search conducted by OFC officials on the premises of the

undertaking being investigated, a written authorisation signed by the Director General being sufficient for this purpose. The MCCA Act has however strengthened the legal safeguards for information protected by professional secrecy and information containing business secrets or other confidential information.

Should the Director General consider that an infringement has taken place, he or she will issue a statement of objections against the parties concerned who will have the opportunity to make both written and verbal submissions. The MCCA Act has also introduced the right for the undertaking(s) concerned to be given access to the file concerning its/their case. However, secret or confidential information held on file may be withheld from them by the Director General.

If upon the conclusion of an investigation the Director General finds an infringement, he or she will make a reasoned decision to this effect. Subject to appeal a decision of the Director General constitutes an executive title enforceable in terms of the Code of Organization and Civil Procedure. In the course of its investigation of a cartel and before issuing a statement of objections, the Director General is also empowered to engage in settlement discussions with the undertakings concerned if he or she believes that procedural efficiencies may be achieved as a result of settlement submissions and the admission of an infringement. When this occurs, the Director General may reduce the fine to be imposed on the undertakings concerned by 10% and will indicate the fact that the undertaking(s) cooperated with the Director in settlement procedures in his final decision. The Director General is also empowered to receive commitments from the undertaking(s) concerned in a breach in response to a preliminary assessment of an investigation and to make those commitments binding by a decision.

#### Special orders

When finding an infringement, the Director may issue a cease and desist order to the undertaking(s) concerned and/or a compliance order setting behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement to an immediate and effective end. Structural remedies, however,



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may only be imposed where there is no equally effective behavioural remedy or where the latter would be more burdensome for the undertaking concerned. In urgent cases the Director General may also order interim measures on the basis of a prima facie finding of an infringement to avoid the risk of serious and irreparable damage to competition.

#### Consequences of infringement

Apart from exposure to administrative sanctions and damages, a breach of competition law may also give rise to the risk of criminal liability. A breach of articles 5 and 9 of the Competition Act and articles 101 and 102 of the TFEU, failure to comply with any commitment as well as any non-compliance with a cease and desist order, a compliance order or an interim measure imposed by the Director General constitute an infringement under the Competition Act and will render the undertaking(s) responsible liable to the payment of an administrative fine, depending on the gravity and duration of the infringement and of any aggravating or attenuating circumstances, of up to 10% of the total turnover of the undertaking(s) concerned in the preceding business year. Also, any person who in the course of an investigation or in the course of proceedings before the Appeals Tribunal knowingly or recklessly gives any false, inaccurate or misleading information is liable to the payment of an administrative fine of not less than €1,000 (\$1,400) and not more than €10,000. Moreover, failure to pay an administrative fine will constitute a criminal offence and liability extends to any person who is a director, secretary, manager or similar officer of the undertaking(s) concerned who will be liable on conviction to the payment of a fine of not less than €1,000 and not more than €20,000 for which the undertaking(s) concerned shall also be liable jointly and severally.

Subject to the causes which interrupt prescription, criminal action for an offence under the Competition Act is time-barred by the lapse of five years. Similarly, the prescriptive period for administrative fines for infringements is five years with the exception of infringements concerning requests for information or the conduct of inspections which are time-barred by the lapse of three years.

The MCCA Act has also introduced a specific action for civil damages under the Competition Act where any person has suffered damages as a result of a cartel or the abuse of a dominant position. The plaintiff in such an action may demand both actual damages and loss of profit together with interest. In establishing the quantum of damages the Courts are required to take into account the counter-factual scenario that would have prevailed had the infringement not taken place.

An action for civil damages under the Competition Act will be time-barred by the lapse of two years (which is consistent with the general rule on prescription in tort cases under Maltese Civil law) commencing from the day when the plaintiff became aware or should reasonably have become aware of the damage, the infringement and the identity of the undertaking(s) responsible for the infringement, subject to the lawful causes which suspend prescription.

Before the enactment of the MCCA Act, an undertaking desiring to contest a finding of the Office for Fair Competition had the opportunity to defend its case,

“Apart from exposure to administrative sanctions and damages, a breach of competition law may also give rise to the risk of criminal liability”

including to cross-examine the experts relied upon by the Office in reaching its conclusions, before the Commission for Fair Trading. The undertaking's right to a fair hearing before an independent tribunal is enhanced under the MCCA Act which has replaced the Commission with the Appeals Tribunal, presided by a judge, to hear and determine appeals from decisions, orders or measures of the Director General under the Competition Act. An appeal does not automatically suspend the order appealed from but upon a reasoned request of the appellant, the Appeals Tribunal may, if it deems fit, suspend such an order pending the final determination of the appeal. Any party to an appeal who feels aggrieved by a decision of the Appeals Tribunal, including the Director General, may appeal to the Court of Appeal on points of law only.

#### Guidance letters

The MCCA Act also introduces the notion of guidance letters, whereby the Director General may provide written guidance upon the request of undertakings on novel questions concerning articles 5 and 9 of the Competition Act and articles 101 and 102 of the TFEU for which there is no explanation in the existing Maltese and EU legal framework, in publicly available general guidance, in previous guidance letters or in case law. Guidance letters are only issued in response to a request subject to it meeting certain additional parameters provided under the Act itself.