Competition compliance in Malta

Achieving compliance with the competition rules
As markets become increasingly competitive, scrutiny from competition regulators is also on the increase. Ensuring adequate measures are in place to achieve compliance with the competition rules helps to avoid the consequences of infringement and protects your long term competitive strategy.
Foreword

The fight against anti-competitive behaviour is increasing in Malta, the EU and globally. Significant fines imposed by competition regulators, civil actions for damages and the reputational damage resulting from enforcement are just some of the consequences of breaching the competition rules. A number of recent developments in Maltese competition law and policy have heightened the risks associated with non-compliance.

Effective competition compliance can only be achieved if the Board and senior management are committed to it and set the ‘tone from the top’. Employees also need to understand that compliance is important to the business and they need to follow the procedures the company has in place to help them manage the risk. By having an adequate competition compliance framework, management and employees are able to compete confidently within the competition rules, avoid the consequences of infringement and maintain a strong reputation. They also have a better understanding of how competitors and trading partners should be behaving, and are able to challenge others’ unfair practices.

Competition compliance is an important business issue and the arguments for investment in a competition compliance culture are compelling. Competition compliance is increasingly being integrated into the daily business practices of companies throughout the EU and worldwide. Maltese businesses should consider their competition risk profile and the implementation of a compliance framework that is tailored to the needs of their business.

This publication provides an overview of the competition rules, discusses the consequences of infringement and the recent developments in Malta. It also considers the positive steps that companies can take to identify, assess and mitigate the competition risks they face through the implementation of an effective and bespoke competition compliance framework.

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10 Reasons for investing in a competition compliance framework

1. The European Commission and the Maltese Office for Competition can impose fines of up to 10% of total turnover on companies that breach the competition rules.

2. The powers of the Maltese Office for Competition have recently increased. Any person who has suffered damage as a result of a competition law infringement may institute a civil action for damages before the Maltese courts. Class actions have also been introduced in Maltese legislation.

3. Competition regulators welcome compliance efforts by companies. The Maltese Office for Competition is expected to introduce a leniency programme, which means that there would be attractive incentives to blow the whistle on competitors.

4. Business disruption resulting from regulatory attention can be considerable. Damage to the brand and reputations of the organisation and its officers can be the most harmful consequence of regulatory enforcement.

5. Global co-operation by competition regulators is becoming more commonplace. Agreements that are incompatible with the EU or Maltese competition rules are automatically null and unenforceable.

6. An informed workforce can deliver tangible value to the business when its employees are able to compete confidently without fear of infringing the competition rules, and are able to recognise when competitors and trading partners are acting anti-competitively. Moreover, a compliant business can attract ethically conscious trading partners, consumers and investors.
Summary of competition rules

Maltese businesses are subject to both Maltese and EU competition rules. These rules are aimed at protecting market competition for the benefit of consumers.

“The competition is the driving force of a market economy. It encourages price and cost reductions, innovation and improvement in quality”

Maltese Office for Competition

The Maltese competition rules are principally contained within the Competition Act1, whilst the EU rules are largely contained in the Treaty on the Functioning of the European Union (TFEU). Maltese competition law is modelled on EU competition law. The amendments to the Competition Act in 2011 strengthened its deterrent effect by widening the decision-making powers of the Office for Competition2 and further aligned both the substantive and procedural rules with those existing under EU law.

There are two main areas of prohibition:
• Anti-competitive agreements; and
• Abuses of a dominant position.

It is the responsibility of all companies, regardless of their size, to comply with the competition rules.

“All companies are subject to competition rules, with no differentiation according to their size. Being small is no excuse for not complying with the applicable EU or national competition rules”

European Commission

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1 Chapter 379, Laws of Malta
2 Ministry of Finance, the Economy and Investment, ‘Malta’s National Reform Programme under the Europe 2020 Strategy’, April 2012
**Anti-competitive agreements**
The first prohibition (Article 5 of the Competition Act /Article 101 of the TFEU) concerns agreements or concerted practices between “undertakings”, which may affect competition in Malta or trade between EU member states, and which prevent, restrict or distort competition.

In broad terms, this prohibition tends to capture situations where businesses have softened the competition they face through agreements or concerted practices. The most serious infringements of the competition rules are cartels, for example price-fixing, bid rigging/collusive tendering or market sharing. Other forms of horizontal cooperation – for example joint production, R&D, purchasing, or commercialisation (selling, distribution or promotion) agreements – should also be assessed for competition implications.

The competition rules also apply to vertical agreements – for example with suppliers or distributors – that contain restraints such as territorial, customer and resale price restrictions. Any agreements in contravention of the competition rules are null and unenforceable.

However it is possible for a restrictive agreement to fall within a legal exception or within block exemption regulations prescribed by the Minister responsible for Competition or by the European Commission. Exemptions tend to apply where an agreement contributes to improving production or distribution or promotes technical or economic progress, while allowing consumers a fair share of the resulting benefit, i.e. their benefits outweigh their anti-competitive effects.

**Abuse of a dominant position**
The second prohibition (Article 9 of the Competition Act /Article 102 of the TFEU) concerns conduct by one or more undertakings which amount to the abuse of a dominant position in a market which may affect trade within Malta/the EU or a substantial part of it.

The relevant product and geographic markets must be identified in order to assess dominance. A relevant market share in excess of 40% is usually indicative of dominance, although the assessment is made on other factors of competitive conditions and not just market share. Special rules apply to dominant companies.

Conduct that could constitute abuse includes predatory pricing, exclusivity arrangements, excessive pricing, and tying or bundling products. There are no exemptions – abusive conduct can never be beneficial.

**Typical competition risk areas**

**Anti-competitive agreements**
- Price fixing
- Fixing other trading conditions
- Market sharing
- Collusive tendering/ bid rigging
- Limiting or controlling production or investment
- Collective boycotts
- Joint purchasing
- Joint selling
- Information sharing
- Resale price maintenance

**Abuse of dominance**
- Predatory pricing
- Exclusive dealing
- Tying/bundling
- Refusal to supply
- Export bans
- Excessive pricing
- Rebates, discounts, bonuses
- Margin squeeze
- Price discrimination
- Discriminatory terms & conditions
Competition enforcement

Competition regulators
The European Commission is empowered by the Treaty to apply the competition rules contained in Articles 101 and 102. It is consistently active in the promotion and enforcement of the EU competition rules and has issued guidance to help companies develop a proactive compliance strategy.4

The Office for Competition within the Malta Competition and Consumer Affairs Authority (MCCAA)4 is central to Maltese competition law enforcement and is Malta’s national competition authority. The Office for Competition has the power to apply and enforce the competition rules contained in the Competition Act. It also has the power to enforce the EU competition rules where the agreement or conduct in question has the potential to affect trade between EU member states.

The powers of the Office for Competition, like those of the European Commission, are extensive and include:

• Issuing requests for information.
• Carrying out the spot investigations (so-called ‘dawn raids’), which can include entering and searching business or domestic premises, copying hard copy and electronic documents, sealing premises and questioning employees.
• Imposing interim measures to prevent suspected anti-competitive behaviour pending the outcome of an investigation.
• Issuing cease and desist orders, compliance orders, or making commitments binding on a company.
• Imposing administrative fines of up to 10% of total turnover on companies that violate the competition rules. The power to issue administrative fines was introduced by the 2011 amendments.
• Imposing daily penalty payments of up to 5% of average daily turnover on non-compliant companies.

In 2012, the Office for Competition investigated over 30 competition cases, 10 of which were instituted after the 2011 amendments to the Competition Act6. The investigations concern various sectors, including communications, energy, transport, finance, property, health insurance, and food. Apart from its investigative role, the Office for Competition has also been conducting advocacy work and providing informal advice on the competition rules. In July 2012, the MCCAA launched a new website7, which will enable both businesses and consumers to keep up to date with a number of consumer-related issues, including competition matters.

The European Commission, the Maltese Office for Competition and the other national authorities in the EU cooperate with each other through the European Competition Network (ECN), particularly on cases involving cross-border anti-competitive practices. ECN members also exchange their experience and views regarding particular sectors in order to enhance the common competition culture throughout the EU. For example, the ECN has recently published a report on the food sector showing that the competition authorities in the EU, including Malta, have enhanced their activity in the sector8.

Personal Liability
The Competition Act also provides for the following instances where individuals can be personally liable:

• Any person who, during a competition investigation gives false or incomplete information, or obstructs the investigation, could be liable to an administrative fine of up to €10,000.
• If a director, manager, company secretary or similar officer of a

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3 European Commission, ‘Compliance Matters: What companies can do better to respect EU Competition rules’, November 2011
4 The Office for Competition was set up in 2011 when the MCCAA Act came into force, replacing the Office for Fair Competition within the Consumer and Competition Department
5 As at April 2012
6 Answer to parliamentary question 33657, Parliamentary Sitting 464, 25 April 2012
7 Available at: http://www.mccaa.org.mt/
8 European Competition Network, ECN Subgroup Food, ‘ECN activities in the food sector: Report on competition law enforcement and market monitoring activities by European competition authorities in the food sector’, May 2012
company fails, without reasonable cause, to comply with a request for information within the stipulated time, then such person will be liable to an administrative fine of up to €2,400 for each day in default.

- Failure to pay an administrative fine or daily penalty payment is a criminal offence, and any key officers of the company concerned could be personally liable to a fine of up to €20,000.

**Private Enforcement**

Apart from submitting a complaint to the Office for Competition, a person who has suffered damage as a result of an infringement may bring a claim for damages before the Maltese courts. The 2011 amendments to the Competition Act introduced a specific right to damages in the context of competition law.

In 2012, the Collective Proceedings Act also came into force. This Act introduces class actions in respect of infringements of the Maltese or EU competition rules, as well as of the Consumer Affairs Act and the Product Safety Act.

**Leniency**

The European Commission’s leniency policy offers companies that self-report and provide evidence about a cartel in which they are involved, either total immunity or a substantial reduction of fines which the European Commission would have otherwise imposed on them.

Malta is so far the only EU member state which does not have a leniency policy. Once similar leniency regulations are introduced in Malta, there will be an attractive incentive for Maltese businesses to blow the whistle on their competitors.

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**Examples of Maltese competition cases**

**Cigarette Exclusivity**

In 2009, the then Commission for Fair Trading decided that a cigarette manufacturer had abused its dominant position in the cigarette market by entering into exclusivity agreements which restricted commercial outlets from stocking cigarettes produced by other manufacturers. The Commission for Fair Trading ordered the dominant company to reserve part of the capacity of its vending machines for other cigarette brands.

**Hot asphalt collusion**

Following investigations carried out by the Office for Competition in 2001, the Commission for Fair Trading declared that the operations of a number of road construction and asphalt companies were in breach of the competition rules as their collusive behaviour manipulated the market and enabled them to prevent, restrict and distort competition.

**Poultry exclusivity**

In 2006, the Commission for Fair Trading held that an agreement whereby a number of undertakings involved in the breeding of broilers were obliged to sell their broilers exclusively to an undertaking involved in the processing of broilers was anti-competitive.

**Exclusivity in the beverages distribution sector**

In 1996, a Maltese beverages company applied to the Office for Fair Competition for an exemption in relation to agreements binding resellers to exclusively sell its products. The Commission for Fair Trading refused to grant such exemption as it found that the agreements in question illegally restricted competition. In 1997, an exemption was similarly refused in relation to a local company that had entered into exclusivity agreements in the soft drinks distribution sector.

**Price-fixing in the retail sector**

The Office for Fair Competition found that a number of supermarkets were involved in price-fixing and other forms of collusion and ordered the supermarkets to put an end to such behaviour. In 2005, the Commission for Fair Trading confirmed this cease-and-desist order.

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9 Chapter 520, Laws of Malta
10 Case 3/2005
11 Case 2/2004
12 Case 3/2000
13 Request No 2/1996; Request No 1/1997
Examples of EU competition cases

**EU car glass market sharing cartel** – €1.38 billion in fines

In 2008, the European Commission imposed fines totalling €1.38 billion on car glass producers for market sharing and exchange of commercially sensitive information. This is the highest fine imposed on all members of a single cartel. The Commission found that these companies participated in numerous meetings and had frequent contacts in order to allocate customer contracts through coordination of prices and supplies, as well as through exchanges of commercially sensitive information. This led to a distortion of competition as regards the supply of car glass to motor vehicle manufacturers. The fine imposed on Saint-Gobain, one of the cartel members, was increased by 60% because it was a repeat offender and amounted to €896 million – the largest fine imposed on a single company for a cartel infringement.

**E.ON - GDF collusion** – €640 million in fines

In 2009, the European Commission imposed a fine of €553 million on each of E.ON and GDF Suez for infringing EU competition law by concluding a market sharing agreement. The Commission found that when Ruhrgas AG (now part of the E.ON group) and Gaz de France (now part of GDF Suez) decided in 1975 to jointly build the MEGAL pipeline across Germany to import Russian gas into Germany and France, they agreed not to sell any gas transported over this pipeline in each other’s national markets. This market-sharing agreement was maintained even after the European gas markets were liberalised. In its judgment of June 2012, the General Court confirmed the main points of the decision but reduced the fine imposed on each company to €320 million.

**Ice cream exclusivity case**

Van den Bergh Foods (formerly HB Ice Cream), provided freezer cabinets free of charge to ice cream retailers in Ireland on condition that they use the freezers exclusively for the stocking of its ice creams. In 1998, the European Commission decided that this was both anti-competitive and abusive, and it ordered HB Ice Cream to release the retailers from the exclusivity provision. This decision was upheld by the EU Courts.

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14 Case COMP/99.125 – Carglass
15 Case COMP/39.401 — E.ON/GDF
17 Cases IV/34.073/35.395 and IV/34. 436 – Van den Bergh Foods Limited
18 T-65/98, Van den Bergh Foods v Commission [2003]; Case C-552/03, Unilever Bestfoods (Ireland) Ltd v Commission [2006]
**EU elevators and escalators cartel**\(^{19}\) - €832 million in fines

In 2007, the European Commission fined five undertakings €992 million for operating four cartels in the market for elevators and escalators in Belgium, Germany, Luxembourg and the Netherlands. The Commission found that these companies rigged bids for procurement contracts, fixed prices and allocated projects to each other, shared markets and exchanged commercially sensitive information in relation to the installation and maintenance of lifts and escalators. Kone subsidiaries received full immunity in respect of the cartels in Belgium and Luxembourg, while Otis Netherlands received full immunity in respect of the Netherlands cartel, as they were first to provide information about these cartels. The fines imposed on the ThyssenKrupp companies were increased by 50%, due to recidivism. However in 2011 the General Court reduced this from €480 million to €320 million,\(^{20}\) bringing the total fines imposed in this case down to €832 million.

**Microsoft non-compliance cases**\(^{21}\) – €1.64 billion in fines

In 2004, the European Commission imposed a €497 million fine on Microsoft, which has abused its dominant position in PC operating systems by refusing to disclose certain interoperability information and tying Windows Media Player with its Windows operating system. Microsoft was also ordered to disclose the interoperability information to rival work group servers and to offer a version of Windows without Media Player. The Commission’s decision was upheld by the General Court\(^{22}\). In 2006, the Commission imposed on Microsoft a penalty payment of €280.5 million for not complying with its obligations concerning the completeness and accuracy of the information. In 2008, a further penalty of €899 million was imposed on Microsoft for charging unreasonable prices for access to interoperability documentation. In June 2012, the General Court upheld the Commission’s decision on non-compliance, while reducing the penalty payment to €860 million\(^{23}\).

In 2009, the Commission made legally binding on Microsoft commitments to address competition concerns relating to the tying of Microsoft’s Internet Explorer to Windows. Microsoft committed to offer Windows users a “choice screen” enabling them to choose which web browsers they wanted to install. Following information received from third parties, in July 2012 the Commission opened proceedings to investigate whether Microsoft has failed to comply with these commitments and in October 2012, the Commission issued its statement of objections.

**MasterCard and Visa excessive payment card fees**\(^{24}\)

In 2007, the European Commission decided that MasterCard’s EEA multilateral interchange fee (MIF) breached the EU competition rules as it restricted price competition between acquiring banks. MasterCard’s MIF applied to almost all EU cross-border card payments made with MasterCard and Maestro branded cards and to domestic card payments in some EU countries, including Malta. The Commission threatened MasterCard with severe penalties if it did not repeal or reform its MIF. MasterCard temporarily repealed its MIF in 2008, and in 2009 it undertook to amend the methodology for calculating cross-border MIFs, leading to substantially lower fees.

The European Commission also investigated Visa for similar practices relating to the MIFs set by Visa for point of sale transactions using Visa branded consumer payment cards. These MIFs applied to all EU cross-border transactions, as well as to domestic transactions in Malta and some other EU Member States. In 2010, the Commission made legally binding commitments offered by Visa to significantly cut its MIFs for consumer debit cards, as well as to maintain and further develop measures to increase transparency and competition in the payment cards market. In July 2012, the Commission sent out a supplementary statement of objections to Visa setting out further objections in relation to the MIFs for transactions with consumer credit cards in the EEA.

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19 Case COMP/E-1/38.823 – PO/Elevators and Escalators
21 Case COMP/37.792 – Microsoft; and Case COMP/C-3/39.530 – Microsoft (tying)
22 T-201/04, Microsoft v Commission [2007]
23 T-167/08, Microsoft v Commission [2012]
Corporate action required

The consequences of infringing competition rules are serious. Competition regulators currently have a keen focus on preventing anti-competitive behaviour and promoting compliance. The risks of fines, civil damages actions, adverse publicity, and wasted management time more than justify the investment required in promoting a culture of competition compliance.

Businesses should be considering their specific risks and formulating and implementing a compliance framework that is proportionate, yet adequate to address those risks. There is also a need to implement these procedures across the business and ensure they are working in practice. A comprehensive competition compliance programme can take some time to implement, and businesses that have not yet considered the risks should be acting now to address potential gaps in their competition compliance activities.

Gain commitment to competition compliance at board and senior management level

The board must indicate the importance of competition compliance by committing adequate resources to its development. Senior management involvement and support is also crucial. Where necessary, board members and managers should undergo training themselves to ensure they have appropriate knowledge of the relevant legislation and its implications and to set an appropriate ‘tone from the top’.

Risk identification, assessment and mitigation

According to the European Commission’s guidance, a successful company’s compliance strategy would be based on a comprehensive analysis of the areas in which it is most likely to run a risk of infringing the competition rules. The risk assessment should consider all business activities and identify those which give rise to risks associated with both inappropriate agreements and dominance. The risks should then be assessed in terms of seriousness.

Where areas of weakness or gaps in competition compliance are identified, remedial compliance measures should be designed to address the risks. The most serious risks should be mitigated first.

Develop a competition compliance programme

Some businesses may find that they do not currently have a systematic competition compliance programme in place. For these organisations, considerable effort may be required in order to achieve compliance with the competition rules. Prioritising high risk areas is essential, as implementing a comprehensive competition compliance programme will be time consuming.
For the sake of internal clarity, the European Commission suggests that a company's competition compliance strategy should be laid down in writing and plainly worded so that it is understood by everyone. It could take the form of a competition compliance policy manual which, in turn, could be part of a wider code of ethical conduct. The overarching aim should be to make competition compliance part of “business as usual”.

**Develop an implementation plan and instil an appropriate culture in the business**

The plan for implementation of the compliance framework should be set out in sufficient detail to allow effective monitoring of the implementation status. The plan also allows the business to demonstrate its commitment to establishing an effective competition compliance programme.

Embedding a competition compliance culture begins with the communication of the competition compliance policy. Employees will require training to help them understand how anti-competitive issues can arise and to identify those practical situations when they and the business may be at risk.

Face-to-face training will be necessary, particularly for staff in riskier roles (for example, employees who frequently interact with competitors as part of their job or through trade associations), because of the need for training to be tailored to reflect realistic dilemmas that staff may face. Individuals do not all need to be expert in the legal detail, but do need to be able to spot possible risk issues and know how to go about making the right decision. This includes knowing where to go for help and advice on competition issues.

**Provide appropriate internal reporting facilities and review internal disciplinary procedures**

As stated in the European Commission’s guidance, a successful competition compliance programme requires provision of internal reporting facilities. This involves establishing a mechanism whereby employees can report any suspicions of inappropriate behaviour confidentially. The processes need to be robust to instil employee confidence. They should also establish an appropriate response plan, including their escalation to senior levels, and follow-up and investigation processes. Internal whistleblowing facilities should be recognised as an important source of information for the company in its compliance programme, both to identify individual issues and to enhance the programme. For the business, there are clear benefits if the whistle is blown to them rather than to a competition regulator.

Early detection of a competition issue will enable a company to take appropriate measures without delay and may prevent issues from arising in the future. Moreover, once the Office for Competition introduces its leniency programme, early detection may allow a company to receive immunity from, or a reduction of, fines.

Companies also need to ensure they have appropriate disciplinary procedures in place. They should consider developing express internal disciplinary sanctions for employees involved in competition law infringements.

**Monitoring and review**

Once implemented, it is important for the business to revisit its compliance activities regularly to ensure that developing risks continue to be addressed adequately. This involves periodic consideration of the risks and how existing measures address those risks, continual improvement and updating of the designed compliance framework and a regular audit of the components of the compliance framework to ensure that it is operating as intended and is effective in the prevention of anti-competitive behaviour.
**Typical elements of a competition compliance framework**

- Tone/behaviours at the top
- Compliance governance
- Risk assessment
- Code of conduct/ethics
- Policies and guidelines
- Procedures/internal controls

- Compliance
- Legal
- Internal Audit
- Finance
- HR

- Communications
- Training
- Compliance consultation
- Whistleblower facilities
- Disciplinary procedures

- Contact with competitors
- Review of contracts & agreements
- Dominance considerations
- Pricing and tendering processes

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**Making change stick**

**Corporate ownership**

**Corporate gatekeepers**

**Staff support**

**Operating frameworks**

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**Embedded Process**
Competition compliance contacts in Malta

If you would like to discuss any of the issues raised in this paper in more detail then please contact one of the following:

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