Merger Control

The international regulation of mergers and joint ventures in 71 jurisdictions worldwide

Consulting editor
John Davies

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GETTING THE DEAL THROUGH

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Malta

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Legislation and jurisdiction

1 What is the relevant legislation and who enforces it?

The principal legislation governing mergers is the Control of Concentrations Regulations (CCRs). The CCRs have been issued as subsidiary legislation (SL 379.08) under the Competition Act (CA, chapter 379 of the Laws of Malta), which is the main legislation regulating competition in Malta, together with the relative provisions of EU law.

Merger control is regulated exclusively by the CCRs, with the exception of partial-function joint ventures regulated by the relevant provisions of the CA, including articles 5 and 9 that implement articles 101 and 102 of the Treaty on the Functioning of the European Union (formerly articles 81 and 82 of the EC Treaty).

The relevant regulatory body is the Director General (DG) who heads the Office for Competition, which is the major key player in all stages. Concentrations must be notified to the DG, who then has the obligation of conducting the prescribed assessment within the established time frames. The undertakings concerned and interested third parties may request the DG to submit his or her decision for review by the Competition and Consumer Appeals Tribunal (the Appeals Tribunal), and the DG must comply with the request.

2 What kinds of mergers are caught?

The CCRs apply to a 'concentration' defined as follows: the merging of two or more undertakings that were previously independent of each other; or the acquisition by one or more undertakings or the acquisition by one or more persons or undertakings already controlling at least one undertaking, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more undertakings, whether occurring in Malta or outside Malta when in the preceding financial year the aggregate Maltese turnover of the undertakings concerned exceeded €2.3 million 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.

3 What types of joint ventures are caught?

The CCRs specifically provide that the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity, namely a 'full-function joint venture', is considered to be a 'concentration'. Accordingly, such joint ventures, or the acquisition of control of joint ventures are also caught by the CCRs and the CA.

4 Is there a definition of 'control' and are minority and other interests less than control caught?

'Control' is defined as having the possibility of exercising decisive influence on an undertaking, in particular:

- through ownership or the right to use all or part of the assets of an undertaking; or
- through rights or contracts that confer decisive influence on the composition, voting or decisions of the organs of an undertaking, provided that even persons or undertakings not holding such rights or entitled to such rights under the contract concerned are deemed to have acquired control if they have the power to exercise the rights deriving therefrom.

Minority and other interests are not specifically mentioned in the legislation, but if they bring about a change in control, there will be a concentration within the meaning of the CCRs.

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The CCRs establish a series of thresholds that have to be met in order for a concentration to be notifiable to the DG. Such thresholds are based on turnover.

In the case of mergers or takeover bids occurring in or outside Malta, in the preceding financial year the aggregate turnover in Malta of the undertakings concerned exceeded €2.3 million and each of the undertakings concerned had a turnover in Malta equivalent to at least 10 per cent of the combined turnover of the undertakings concerned. The Office for Competition has always interpreted the 'aggregate turnover' threshold to relate solely to turnover in Malta.

In the case of concentrations consisting of the acquisition of parts, whether or not constituted as legal entities, of one or more undertakings, only the turnover relating to the parts that are the subject of the transaction are taken into account with regard to the seller or sellers. Nonetheless, where two or more such transactions take place within a two-year period between the same persons or undertakings, they are treated as one and the same concentration arising on the date of the last transaction.

In the case of credit institutions and other financial institutions, the turnover includes the sum of the following income items, after deductions of value added tax and other taxes directly related to such items, where appropriate, that are received by the institution or its branch in Malta:

- interest income and similar income;
- income from securities;
- income from shares and other variable yield securities;
- income from participating interests;
- income from shares in affiliated undertakings;
- commissions receivable;
- net profit on financial operations; and
- other operating income.

In the case of insurance undertakings, the turnover consists of the value of gross premiums written. This comprises all amounts received and receivable in respect of insurance contracts issued by or on behalf of the insurance undertakings, including outgoing reinsurance premiums and after deduction of taxes and parafiscal contributions (payments made by the employer to family compensation funds) or levies charged by reference to the amounts of individual premiums or the total volume of premiums.

The aggregate turnover of an undertaking concerned is calculated by adding together the respective turnovers of the following:

(i) the undertaking concerned;
(ii) those undertakings in which the undertaking concerned, directly or indirectly:

- owns more than half the capital or business assets;
- has the power to exercise more than half the voting rights;
- has the power to appoint more than half the members of the board of directors or other body or bodies legally representing the undertakings; or
- has the right to manage the undertakings' affairs;

(iii) those undertakings that have in the undertaking concerned the rights or powers listed in (ii);
(iv) those undertakings in which an undertaking as referred to in (iii) has the rights or powers listed in (ii); and
(v) those undertakings in which two or more undertakings as referred to in (i) to (iv) jointly have the rights or powers listed in (ii).

Where undertakings concerned by the concentration jointly have the rights or powers listed in (ii) above, in calculating the aggregate turnover of the undertakings concerned, no account shall be taken of the turnover resulting from the sale of products or the provision of services between the joint undertaking and each of the undertakings concerned or any other undertaking connected with any one of them, as set out in (ii) to (v) above, but account shall be taken of the turnover resulting from the sale of products and the provision of services between the joint undertaking and any third undertakings, this turnover being apportioned equally among the undertakings concerned.

The CCRs bestow numerous powers upon the DG to be able to carry out his duties and undertake all necessary investigations into undertakings and associations of undertakings. Thus the DG has the power:

- to examine the books and other business records;
- to take or demand copies of or extracts from the books and business records;
- to ask for oral explanations on the spot; and
- to enter any premises, land and means of transport of undertakings.

The undertakings and associations of undertakings must in turn submit to such investigations, ordered by decision of the DG.

Similar investigative powers are also provided in the Competition Act. In such cases the DG may request any undertaking or association of undertakings to furnish him or her with any information or document in its possession that he or she may have reason to believe is relevant to the matter under investigation, within such time as in the circumstances of the investigation the DG may consider reasonable. The DG's power is only limited with respect to documents or the disclosure of information subject to the duty of professional secrecy.

To date, the Maltese national authorities have not referred any cases below these thresholds to the European Commission.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

The filing of a notification to the DG is mandatory for all types of concentrations. The CCRs contain a concentration notification form (Form CN) that must be followed in all cases. Regulation No. 1269/2013 of 5 December 2013 amending Regulation No. 802/2004 has also aimed to simplify and expedite the examination of concentrations that are unlikely to raise competition concerns by requiring notification through a short form.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects test?

Although no specific reference to foreign mergers is made in the relevant laws, it is nonetheless quite clear that foreign-to-foreign mergers are also caught. This, inter alia, emerges from the inclusive definition of 'concentration', which catches mergers and takeovers 'whether these occur within or outside Malta', thereby including foreign-to-foreign mergers. In addition, the definition of concentration requires each of the undertakings concerned to have a turnover in Malta as specified in question 5.

The CCRs adopt a local effects test in prohibiting concentrations that might lead to a substantial lessening of competition in the Maltese market or part thereof.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

Apart from tax rules, money laundering and the legislation on collective investment schemes, there are no rules or provisions concerning foreign investment or foreign direct investment.

Notification and clearance timetable

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

Concentrations shall be notified to the DG prior to their implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest, within 15 working days. For a concentration to be considered as notified, the notification must be carried out in accordance with the rules set out in the schedule to the CCRs and the notification fee specified in the same schedule must be paid on notification. In default, the DG will declare the notification to be incomplete and hence invalid.

Penalties for failure to file a notification before implementation are a fine of between €1,000 and €10,000.

Penalties for putting into effect a concentration before its notification are a fine up to 10 per cent of the turnover of the undertaking that benefits from the transaction.

Where a director, manager, secretary or other similar officer of the aforesaid undertaking is responsible for the premature concentration of his or her undertaking and another undertaking, said person will be deemed to be vested with the legal representation of the undertaking and will be jointly and severally liable for the payment of the fine.

Where the infringement occurred prior to the coming into force of the Malta Competition and Consumer Affairs Authority Act in 2011, the provisions relating to fines and periodic penalty payments as existing prior to the coming into force of the Act are deemed to apply.

10 Who is responsible for filing and are filing fees required?

Notification is to be effected by the person or undertaking acquiring control of the whole or parts of one or more undertakings. This means that in the case of the acquisition of a controlling interest in one undertaking by another, the acquirer must complete the notification; in the case of a public bid to acquire an undertaking, the bidder must complete the notification. However, in the cases where the concentration consists of a merger or the acquisition of joint control, the notification is to be made jointly by the parties to the merger or by those acquiring joint control as the case may be. Each party completing the notification form is responsible for the accuracy of the information that it provides. The notification fee, which was introduced in 2007 by Legal Notice 49 of 2007, must be paid by the notifying party or parties on submission of the duly completed notification form and such fee amounts to €163.06.

It is also relevant to point out that although pre-notification meetings with the DG are not mandatory, they are recommended. In fact, the Form CN explicitly states that pre-notification meetings are extremely valuable to both the notifying parties and the DG in determining the precise amount of information required in a notification and, in the large majority of cases, will result in a significant reduction of the information required. Accordingly, notifying parties are encouraged to consult the DG regarding the possibility of dispensing with the obligation to provide certain information.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

Following the submission of all the required information, the DG has to take a decision regarding the applicability of the CCRs to a concentration within six weeks. Where he or she finds that the notified concentration falls within the scope of the CCRs, the DG will initiate proceedings. The law, however, allows the extension of this period to two months in cases where at any time during the first five weeks, the undertakings concerned submit commitments aimed at modifying the concentration in such a way as to make it compatible with the CCRs. Up until the fifth week, the notifying party may also request a moratorium of three weeks to discuss and present substantially revised

commitment proposals. However, it is up to the DG to decide whether or not to accede to such a request. If, following modifications, the DG finds that the concentration does not infringe the CCRs, the DG shall issue a decision declaring such concentration to be lawful. The decision is also considered to cover restrictions that are directly related and necessary for the concentration's implementation. The DG may also choose to attach conditions and obligations to ensure that the undertakings comply with the commitments they entered into.

Where the DG finds that a concentration raises serious doubts as to its lawfulness in terms of the CCRs and decides to initiate proceedings, he or she shall, save in the case of modifications, issue a decision declaring that the concentration is unlawful within not more than four months from the date on which proceedings were initiated. However, when the undertakings concerned submit commitments with a view to rendering the concentration lawful in terms of the CCRs, following the DG's initiation of the said proceedings and within three months of the initiation of the said proceedings, they may request that this four-month period be suspended for up to one month for proper consideration of such commitments, thereby extending it to a possible five months. In cases of concentrations deemed not to raise serious doubts as to their legality in terms of the CCRs and falling within the ambit of the simplified procedure, the DG shall issue a short form decision to that effect within four weeks of notification. The simplified procedure applies to the following categories of concentrations that are deemed not to raise serious doubts as to their legality in terms of the provisions of the CCRs, unless the DG, in exceptional cases and in view of the economic conditions pertaining to the market and the parties to the concentrations, deems otherwise:

- two or more undertakings acquire joint control of a joint venture, provided that the joint venture has no, or negligible, actual or foreseen activities within the territory of Malta because the turnover of the joint venture or the turnover of the contributed activities, or both, is less than €698,812.02 in the territory of Malta and the total value of assets transferred to the joint venture is less than €698,812.02 in the territory of Malta;
- two or more undertakings merge, or one or more undertakings acquire sole or joint control of another undertaking, provided that none of the parties to the concentration are engaged in business activities in the same product and geographical market, or in a market that is upstream or downstream of a product market in which any other party to the concentrations is engaged; or
- two or more undertakings merge or one or more undertakings acquire sole or joint control of another undertaking and two or more of the parties to the concentrations are engaged in business activities either in the same product and geographical market and their combined market share is less than 15 per cent or in a product market which is upstream or downstream of a product market in which any other party to the concentration is engaged and their combined market share is less than 25 per cent.

The simplified procedure is available where there is not going to be a substantial lessening of competition.

Generally, implementation of the transaction must be suspended until clearance. However, the law specifically allows the implementation of a public bid that has been notified, provided that the acquirer does not exercise the voting rights attached to the security or does so only to maintain the full value of those investments and on the basis of a derogation granted by the DG. Furthermore, in all cases the DG may, upon a reasoned request and after having taken into account the effect of a suspension (eg, major financial risks) and the threat of competition, grant a derogation from the obligation to suspend transactions prior to clearance and this derogation may be subjected to conditions and obligations to safeguard effective competition. The Office for Competition has to date never received such a request.

The DG shall examine the notification and shall determine within a six-week period whether to proceed with one of the following methods:

- conclude that the concentration notified does not fall within the scope of these regulations and record that finding by means of a decision;
- conclude that the concentration notified, although falling within the scope of these regulations, does not raise serious doubts about its lawfulness in terms of the CCRs and decide not to oppose it; the DG shall declare it to be a lawful concentration and such a declaration shall also cover restrictions directly related and necessary to the implementation of the concentration; or
- initiate proceedings after concluding that the concentration notified falls within the scope of these regulations and raises serious doubts as to its lawfulness in terms of the provisions of these regulations. All proceedings are deemed to be closed by means of a decision, which, subject to certain exceptions, must be taken within not more than four months of the date on which proceedings are initiated.

Where the DG finds that, following modification by the undertakings concerned, a notified concentration no longer raises serious doubts as to its lawfulness, the DG may decide to declare the concentration to be a lawful concentration.

The CCRs state that all the aforementioned time periods shall be suspended in a number of cases where, inter alia, the information given is not provided in full.

Where the DG has not taken a decision within the time limits set in the CCRs, the regulations state that the concentrations shall be deemed to be lawful.

The general rule states that a concentration shall not be put into effect either before its notification or until it has been declared lawful. However, the CCRs contain the following exceptions. The above rule does not apply in cases of a public bid which has been notified to the DG and on the basis of a special derogation granted by the DG, provided that the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of those investments.

The DG will grant, at his or her discretion, said derogation upon a reasoned request before notification or after the transaction, after taking into account, inter alia, the effects of the suspension on one or more undertakings concerned in a concentration or on a third party, and the threat to competition posed by the concentration. Furthermore, such derogation may be made subject to conditions and obligations to ensure conditions of effective competition.

The approach of the relevant authorities has not been affected by the economic crisis.

12 What are the possible sanctions involved in closing before clearance and are they applied in practice?

If a transaction is carried out before clearance, apart from any penalties that may be levied for this breach, its validity will depend on whether clearance is eventually granted. If the result is that the concentration is allowable under the CCRs, then it is likely that the transactions will be deemed valid.

The CCRs contain special rules regarding securities. The provisions discussed in questions 11 and 12 shall have no effect on the validity of transactions in securities, including those convertible into other securities admitted to trading on a market, which is regulated and supervised by the competent authorities appointed under the law and that operates regularly and is accessible directly or indirectly to the public, unless the buyer and seller knew or ought to have known that the transaction was carried out in contravention of the provisions of the CCRs.

A concentration shall not be put into effect either before its notification or until it has been declared lawful pursuant to a decision under regulation 6(1)(ii) or Regulation 8(2) or on the basis of a presumption according to Regulation 9(7).

Nevertheless, severe penalties apply for breaches of the provisions of the CCRs. The CA stipulates that a person found guilty of a breach is liable in solidum with the undertaking in whose interests he or she was acting to a fine up to 10 per cent of the turnover of the said undertaking.

The CCRs also provide for penalties in situations where clearance or derogations from suspension are granted subject to certain conditions or obligations, which are then breached by the undertakings. In these cases, as in the case where the DG orders the cessation or dissolution of the concentration, the applicable punishment under the CA shall be a fine ranging between €1,000 and €10,000.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

No specific reference is made to foreign-to-foreign mergers in the relevant laws and the normal provisions are applicable.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

Local authorities are empowered to take the necessary remedial action in the case of a foreign-to-foreign merger that is in breach of the CCRs. Naturally such a merger would be acceptable if it has a minimal effect on the Maltese market. 'Hold-separate' arrangements may be used, but, nevertheless, the merger is likely to be caught under the CCRs if, notwithstanding the arrangement, it results in a lessening of competition in the Maltese market.

15 Are there any special merger control rules applicable to public takeover bids?

A public bid that has been properly notified is not suspended before clearance, provided that the acquirer does not exercise the voting rights attached to the security or does so only to maintain the full value of those investments and on the basis of a derogation granted by the DG in terms of the CCRs.

The CCRs stipulate that the bidder acquiring an undertaking or part thereof must submit the notification. Furthermore, in such cases, Form CN specifically requires:

- a declaration of whether any public offer for the securities of one party by another party has the support of the former's board of directors or other bodies legally representing that party; and
- a copy of the offer document, which, if unavailable at the time of notification, should be submitted as soon as possible and no later than when it is posted to shareholders.

16 What is the level of detail required in the preparation of a filing?

The notification of concentrations is to be made in accordance with the provisions of the Form CN contained in a schedule attached to the CCRs. This form requires the applicants to supply details about, inter alia:

- the notifying party and all parties to the concentration;
- the nature of the concentration;
- the extent to which the parties are involved in the concentration;
- the economic and financial structure of the concentration;
- the proposed structure of ownership and control;
- the worldwide and Maltese turnover;
- details on product and market descriptions (including structure of supply and demand, market entry and pre-existing agreements in the market) together with all supporting documentation; and
- all ancillary restraints entered into by the parties to the concentration and other involved parties (including the seller and minority shareholders).

Until all the required information is supplied, the notification will be deemed to be incomplete and no time frames shall commence until all the necessary information and details are supplied.

17 What is the statutory timetable for clearance? Can it be speeded up?

See question 11.

18 What are the typical steps and different phases of the investigation?

The investigative process can be broadly divided into two separate phases. The first phase commences from notification and lasts until the initial decision is issued, whereby the DG determines whether to start proceedings. The second phase comes into effect when, upon finding that a concentration raises serious doubts as to its lawfulness in terms of the CCRs, the DG initiates proceedings to further investigate and, if need be, induce modification by the applicants of the said concentration to bring it within the parameters of the CCRs.

Within this second phase, undertakings may submit commitments with a view to rendering the concentration lawful and the DG may in turn request the supply of certain additional information as well as order certain investigations to be carried out. At the end of this phase, the DG either declares the concentration to be in breach of the CCRs and therefore prohibits it, or else finds it to be allowable subject to the imposition of certain conditions, restrictions or modifications and issues a decision to that effect.

In the case of concentrations deemed not to raise serious doubts as to their legality in terms of the CCRs and falling within the ambit of the simplified procedure, the DG shall issue a short-form decision to that effect within four weeks from notification.

Substantive assessment

19 What is the substantive test for clearance?

To determine whether a concentration is deemed to be legal, the CCRs require the DG to take into account, inter alia, the need to maintain and develop effective competition in the Maltese market, the geographical and product markets and potential competition from other undertakings. The test for product markets stipulates, inter alia, the need to give regard to issues of substitutability, conditions of competition, prices and cross-price elasticity of demand. The geographic market test comprises an analysis of the area in which conditions of competition are sufficiently homogeneous and distinct from neighbouring areas. In this regard, one must comment that the Maltese market, when distinct from the EU market, is generally considered as one single geographic area.

Other factors taken into account in making an assessment of a notified concentration include:

- whether the business or part of the business of a party to the concentration has failed or is likely to fail (to the best of our knowledge, there have not been any instances where this failing-firm defence has been raised);
- the market position of the undertakings concerned and their economic and financial power;
- the alternatives available to suppliers and users and their access to supplies or markets;
- any legal or other barriers to entry;
- supply and demand trends for the relevant goods and services;
- the interests of the intermediate and ultimate consumers;
- the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition; and
- the nature and extent of development and innovation in a relevant market.

The approach of the relevant authorities has not been affected by the economic crisis.

20 Is there a special substantive test for joint ventures?

As explained previously, certain joint ventures fall under the CCRs. In addition to a general substantive test applicable to concentrations in general (see question 19), in case of a joint venture the DG should have particular regard as to whether two or more parent companies retain significant activities in the same market as the joint venture or in a market which is neighbouring, downstream or upstream from that of the joint venture, and as to whether the coordination resulting from the joint venture affords the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products or services in question.

21 What are the 'theories of harm' that the authorities will investigate?

The Office for Competition would request all the information as set out in Form CN for the purposes of assessing a concentration. This would include an investigation and determination of:

- its market share thresholds;
- whether or not there is overlap between the relevant geographic market and relevant product market;
- market power; and
- whether there is an effect on the competition in the Maltese market.

It will also consider whether the benefits derived from the merger outweigh the effects on competition in Malta. However, the company has to prove that these efficiency gains cannot otherwise be attained, are

verifiable and likely to be passed on to consumers in the form of lower prices, or greater innovation, choice or quality of products or services.

The Office for Competition is concerned with mergers that have horizontal effects (where two or more parties to the concentration are engaged in business activities in the same product market and where the concentration will lead to a combined market share of 15 per cent or more) and vertical effects (where one or more of the parties to the concentration are engaged in business activities in a product market which is upstream or downstream of a product market in which any other party to the concentration is engaged, and any of their individual or combined market share is 25 per cent or more, regardless of whether there is or is not any existing supplier or customer relationship between the parties to the concentration). Mergers having vertical effects will most probably create barriers to entry in the market or will increase the possibility of parties colluding in the market.

The Office for Competition is also concerned with the following issues:

- supply and demand, including supply and distribution structures, maintenance of service networks and the identity of major suppliers and customers;
- existing cooperative agreements within the market; and
- certain cases of conglomerate mergers especially where the merger creates or enhances portfolio power.

22 To what extent are non-competition issues relevant in the review process?

The CCRs grant the DG discretion to hear other persons or undertakings showing a sufficient interest in the concentration. Apart from representatives of the administrative or managerial bodies of the undertaking concerned, the representatives of the employees of such undertakings shall on request be entitled to be heard. It appears that concentrations that may have the effect of terminating employment will almost certainly not be looked upon favourably by the authorities.

Other issues that may be taken into consideration are the effects of the concentration on research and development.

The approach of the relevant authorities has not been affected by the economic crisis.

23 To what extent does the authority take into account economic efficiencies in the review process?

The CCRs lay down the framework for various economic considerations to be made. In determining whether a concentration is prohibited or not, the DG is obliged to take into account, inter alia, whether the business or part of the business, or a party to the concentration has failed or is likely to fail; and the economic and financial power of the undertakings concerned.

Concentrations that bring about or are likely to bring about gains in efficiency that will be greater than and will offset the effects of any prevention or lessening of competition resulting from or likely to result from the concentration are allowed if the undertakings prove that such efficiency gains cannot be attained otherwise and are verifiable in the form of lower prices, greater innovation and choice or quality of service to consumers.

Remedies and ancillary restraints

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The merger control legislation in Malta allows the relevant authority to perform the following:

- the imposition of conditions and restrictions upon the applicants when granting clearance, thereby regulating the transactions to be performed;
- a revocation of clearance where:
- the decision is based on information supplied by the undertakings which turns out to be incorrect or obtained by deceit; or
- the undertakings concerned commit a breach of a commitment attached to the decision;
- the imposition of fines on the undertakings concerned where such undertakings are in breach of any of the provisions of the CCRs; and
- a declaration of invalidity of concentrations.

Update and trends

There are currently no proposals to amend the laws relating to mergers and acquisitions in Malta. However, it is important to note that the European Commission recently conducted a consultation process which ended in January 2017, whose aim was to evaluate the procedural and jurisdictional aspects of EU merger control. It remains to be seen what changes to the merger regulations may be proposed.

The credit crisis has left the Maltese economy relatively unscathed and it has therefore not particularly affected M&A activity in Malta. The regulatory regime in place has withstood all the tests and proven to be sound.

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Notifying parties that are informed by the DG that the concentration they notified raises serious doubts as to its lawfulness under the CCRs, may, within the prescribed time frames (see question 11), enter into negotiations with the DG and effect modifications or otherwise submit commitments and restrictions to which the concentration will be subjected in case of clearance. There are no restrictions as such as to the method to be proposed by the notifying parties and the undertakings concerned are given adequate opportunities to remedy the situation by proposing a remedy, including divestments. Clearance will only be given, however, if the remedies have been agreed to by the DG and the concentration will not lessen effective competition.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

No specific conditions for such remedies are established by law. The conditions would generally be stipulated by the DG and may include a time frame within which divestments or other remedies must be implemented.

The approach of the relevant authorities has not been affected by the economic crisis.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

Although there are foreign-to-foreign mergers which, from time to time, are notified to the Maltese authorities, so far no occasions have arisen where such mergers were objected to in Malta. Generally, where the Maltese authorities may have had cause to object to any such merger, this would also have been stopped or objected to by authorities elsewhere, foremost among which is the European Commission.

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

If the parties to a concentration or other involved parties (including seller and minority shareholders), or both, enter into ancillary restraints that are directly related to and necessary to implement the concentration, these restrictions may be assessed in conjunction with the concentration itself.

Involvement of other parties or authorities

29 Are customers and competitors involved in the review process and what rights do complainants have?

The CCRs place a considerable emphasis on customers and the preservations of their rights. In fact, Form CN requires the provision of details of the five largest independent customers of the parties to the concentration in each affected market. Within this framework, it may be envisaged that the DG will consult these customers to determine the effect that the proposed concentration will have upon them. Moreover, the notification is required to be published and upon such publication, any interested third party, including competitors, may come forward and present their objections to the DG.

Furthermore, before taking any second-phase decision (see question 18), the DG may, if he deems it necessary, request information from or hear other persons or undertakings that show a sufficient interest in the concentration. A request of information to a third party by the DG, which, in the course of his or her investigations has not been

answered, operates to suspend the running of time within which the DG is bound to give a decision, although this shall not extend the maximum allowable time frame for a decision.

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

Following notification, the proposed concentration is published in a local daily newspaper and in the government gazette, inviting third parties to make submissions. The information given concerns the actual notification, the names of the parties, the nature of the concentration and the economic sectors involved.

The CCRs do, however, oblige the DG, who is bound by professional secrecy, to take account of the legitimate interests of the undertakings concerned in the protection of their confidentiality and business secrets. Furthermore, information acquired by the DG during hearings or following a request made to the parties for an investigation shall be used only for the purposes of that hearing and information requested may not be disclosed.

Finally, decisions taken by the DG are published, but the CCRs once again oblige the DG to have regard for the legitimate interests of undertakings in the protection of their business secrets.

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

Although there is no provision to this effect, there is little doubt that, where necessary, the Office of Competition will cooperate with foreign authorities. The Office for Competition is the designated competition authority under article 35 of EC Regulation 1/2003 and, as such, must cooperate with the European Commission. The Office for Competition is also a member of the European Competition Network, and is often involved in cooperation relating to various matters including investigations, interpretations and liaison with foreign authorities.

Judicial review

32 What are the opportunities for appeal or judicial review?

Throughout the investigation process preceding the decision, all parties may make new submissions and proposals to remedy any situation that may raise doubts as to the lawfulness of the concentration.

The persons, undertakings or association of undertakings concerned or any third party entitled to a hearing in accordance with the CCRs (see question 22) may, within 20 days of notification or publication of the decision, request that the DG submit his or her decision for review by the Appeals Tribunal and the DG shall forthwith comply with this request. The submission for review shall not, however, automatically suspend the decision unless the Appeals Tribunal, upon a reasoned request by a party to the appeal, and after considering the submissions of the DG, suspends the decision, administrative fine or daily penalty payment under such conditions it deems fit, stating its reasons. The decision of the Appeals Tribunal shall be final.

The Appeals Tribunal may annul the whole or part of a decision taken by the DG under the CCRs and in such cases, the periods referred to in question 11 shall recommence from the date of the decision of the Appeals Tribunal, or if a decision from such Tribunal is filed, from the date of the judgment of the Court of Appeal. The CA also provides for a situation where the DG may revise or alter his or her decision where the information on which it was based had been false, misleading or incomplete, or the market conditions had changed significantly.

At present, there is no appeal to a higher authority from a decision of the Appeals Tribunal. However, this does not preclude an appeal to the Civil Court on grounds of a breach of the principles of natural justice by the Appeals Tribunal. See, for example, *Simonds Farsons Cisk plc v Agent Direttur ta' L-Ufficju tal-Kompetizzjoni Gusta et*, decided by the First Hall of the Civil Court on 27 October 2004, and *Imnara Limited v Ufficju ghall-Kompetizzjoni*, decided by the Appeals Tribunal for Competition and Consumer Matters, on 20 March 2013. The case of *S&D Yachts Limited v Direttur tal-Ufficju tal-Kompetizzjoni Gusta et*, decided by the First Hall of the Civil Court on 20 April 2010, is regarding a matter of judicial review.

33 What is the usual time frame for appeal or judicial review?

See question 32.

Enforcement practice and future developments

34 What is the recent enforcement record and what are the current enforcement concerns of the authorities?

To date there have been no foreign-to-foreign merger cases that have been objected to in Malta. Generally, where the Maltese authorities may have had cause to object to any such merger, this would also have been stopped or objected to by authorities elsewhere, foremost among which is the European Commission.

During 2015 and 2016, the Maltese Competition Authority continued to focus primarily and carried out investigations on matters that affect consumer welfare. The Authority specifically focused on promoting further competition to have a wider choice of products as well as ensuring consumers' rights are adequately protected. In 2015, the Authority introduced the User Guidelines for the Consumer Alternative Dispute Resolution (General) Regulations and maintained its enforcement initiatives in ensuring that no additional charges are incurred by consumers for different payment methods. In 2016 a consultation document was presented in relation to Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property; the Authority subsequently issued the User Guidelines for the Home Loan (Amendments) Regulations. The Authority also issued an online public consultation on antitrust damages in relation to Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the member states of the European Union. Furthermore, it issued a public consultation on the Consumer Alternative Dispute Resolution (Residual ADR) Regulations.

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35 Are there current proposals to change the legislation?

The CCRs were amended in 2011, primarily by amending the appeals procedure, notification of the DG's decision and fines and penalties that may be imposed. Implementing Regulation 1269/2013 was passed on 5 December 2013 amending Regulation 802/2004 on the control of concentrations between undertakings. Since this is directly effective, the Maltese relevant regulations have not been amended to reflect such changes.

The Malta Competition and Consumer Affairs Authority Act came into force in 2011. By virtue of this Act, the Malta Competition and Consumer Affairs Authority has been created. The Office for Competition is now part of this Authority. One of the responsibilities of this Office is the examination and control of concentrations between undertakings in terms of their effect on the structure of competition on the market.

Within the Office for Competition, the Inspectorate and Cartel Investigations Directorate is responsible for detecting and curtailing cartels and carrying out inspections in terms of the CA. The Communications, Energy, Transport and Financial Services Market Directorate shall be responsible for concentrations in regulated markets. The Primary, Manufacturing and Retail Markets Directorate focuses on restrictive practices and concentrations in other sectors of the economy.

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