

Market
Intelligence

MERGER CONTROL 2022

Global interview panel led by White & Case LLP



LEXOLOGY

Getting the Deal Through

Publisher

Edward Costelloe
edward.costelloe@lbresearch.com

Subscriptions

Matthew Bridgewater
matthew.bridgewater@lbresearch.com

Head of business development

Adam Sargent
adam.sargent@gettingthedealthrough.com

Business development manager

Dan Brennan
dan.brennan@gettingthedealthrough.com

Published by

Law Business Research Ltd
Holborn Gate, 330 High Holborn
London, WC1V 7QT, UK

Cover photo: shutterstock.com/g/f9photos

This publication is intended to provide general information on law and policy. The information and opinions it contains are not intended to provide legal advice, and should not be treated as a substitute for specific advice concerning particular situations (where appropriate, from local advisers).

No photocopying. CLA and other agency licensing systems do not apply. For an authorised copy contact Adam Sargent, tel: +44 20 3780 4104

© 2022 Law Business Research Ltd
ISBN: 978-1-83862-560-3

Printed and distributed
by Encompass Print
Solutions

MERGER CONTROL 2022

Introduction	3
Australia.....	13
Brazil.....	27
China	41
Czech Republic	57
European Union	65
France	81
Germany	95
Greece.....	115
Italy.....	125
Japan.....	137
Malta	149
Mexico	161
Poland	173
Russia	189
Slovakia.....	201
Thailand	213
Turkey.....	223
United Kingdom.....	241
United States	255
Vietnam	273



Malta

Dr Ian Gauci is managing partner at GTG Advocates. He focuses on fintech, technology, media and telecommunications, financial services, data protection, e-commerce, competition, intellectual property, and mergers and acquisitions.

Dr Gauci is active on corporate and commercial matters mostly of an information technology or fintech nature. He was appointed as the legal expert on the National Blockchain Taskforce and co-authored Malta's blockchain and virtual currency laws.

Dr Gauci lectured legal futures and technology law and communications law, as well as the master's in blockchain, at the University of Malta. He has also tutored and examined master's and doctoral dissertations in fintech, regtech, data protection and ICT and has authored various journals and publications on technology law, especially on virtual currencies and blockchain. He is also a frequent international headline speaker on technology law and is considered one of the go-to thought leaders in this sphere locally.

Dr Cherise Abela Grech is a senior associate within GTG Advocates. Her main areas of focus are fintech, corporate law, financial services, compliance and anti-money laundering. She regularly advises on investment funds, investment services, financial institutions, and pension and share option schemes. She also regularly assists clients in matters relating to virtual currencies and distributed ledger technologies. Dr Abela Grech also provides legal assistance to the firm's corporate services department with regard to company incorporation, compliance matters and general corporate assistance.

1 | What are the key developments in the past year in merger control in your jurisdiction?

Bearing in mind Malta's size, there were no key developments in this particular sector in the past year.

The national competition authority, the Malta Competition and Consumer Affairs Authority (the Authority), has a good track record in merger reviews. The number of transactions notified annually remains relatively consistent. According to the merger registry of the Authority, 15 concentrations were assessed and granted clearance during the past year. The notifications concerned different markets, including insurance, pharmaceuticals, gaming, furniture, corporate service provider services, and the retail and groceries market.

2 | Have there been any developments that impact how you advise clients about merger clearance?

The Authority has always encouraged notifying parties to hold pre-notification meetings with it. Although this has never been mandatory, it serves to discuss issues such as the information required for the notification and identification of key issues, as well as possible competition concerns. Pre-notification meetings are considered useful because they facilitate open discussion of both jurisdictional and substantive issues.

Despite the restrictions and measures posed throughout the covid-19 pandemic, we were pleased to note that ease of communication with the Authority was not negatively impacted, and an open channel of communication was maintained by its officials, although this had to be moved completely remotely.

This level of communication with the Authority helps ensure that the clearance process is a smoother one overall. Indeed, the notification form itself notes that pre-notification meetings are extremely valuable to both the notifying parties and the director general 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. Notifying parties are thus encouraged to consult the director general of the Authority regarding the possibility of dispensing with the obligation to provide certain information. This is also particularly important bearing in mind that most requests for clearance are particularly time-sensitive.

Furthermore, following the coming into force of Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, we also provide assistance to clients whose merger triggers the notification requirements under



Ian Gauci



Cherise Abela Grech

this new screening process. Under this cooperation mechanism, EU member states are required to carefully examine transactions by foreign (non-EU) companies that target the EU's strategic interests.

Foreign direct investment that originates from third countries (ie, involving investors who are non-EU nationals) may require prior approval from the national foreign direct investment screening office, depending on the relevant sector of the particular concentration. These include entities relating to the provision of critical infrastructure, critical technologies and dual use items; the supply of critical inputs; those with access to sensitive information, including personal data, or the ability to control such information; and the freedom and pluralism of the media. The screening office must also be notified in case of companies that own intellectual property such as patents and any other incorporeal rights resulting from such activities.

“The Malta Competition and Consumer Affairs Authority may look at more local concentrations with a higher level of scrutiny.”

3 | Do recent cases or settlements suggest any changes in merger enforcement priorities in your jurisdiction?

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.

On the other hand, the Authority may look at more local concentrations with a higher level of scrutiny, most particularly because concentrations, particularly of certain large (by Maltese standards) entities in Malta, could more easily have an impact on competition law, given the size of the Maltese market.

In November 2021, the Authority released a decision stating that a potential retail and grocery market merger warrants a deeper analysis due to concerns of market domination. This was decided because, on a prime facie level, there was the possibility of substantial lessening of competition when defining the relevant geographical market at a local level. Therefore, this required a more in-depth

investigation of the competition within the affected area. This analysis was discontinued, however, since the companies abandoned the merger in February 2022.

However, another Phase II investigation was initiated in the past year. In October 2021, the decision was reached to conduct a deeper analysis through Phase II investigations regarding a joint venture between several companies relating to the provision of fast ferry services and its effects on local competition. In coming to this determination, the Authority noted that 'the undertakings forming part of this concentration may have the ability and incentive to engage in an input foreclosure strategy', which would inevitably increase competitor prices, resulting in concerns relating to competition.

More recently, in September 2022, these Phase II investigations were concluded with the final determination that the notification does not raise serious doubts about its lawfulness and effects on competition, and the Authority thus declared it a legal concentration. The Authority's concerns were alleviated through steps taken by the parties themselves, being two major commitments relating to the operation of the concentration and the appointment of a monitoring trustee that will ensure compliance with these final commitments. The Authority, after reviewing these proposed commitments, came to the decision that proper steps were taken to eliminate unfair competition within the fast ferry market, and therefore accepted the concentration.

4 | Are there any trends in merger challenges, settlements or remedies that have emerged over the past year? Any notable deals that have been blocked or cleared subject to conditions?

Although there have not been any new trends that have emerged, over the past year, the Authority maintained its scrupulous approach towards requests for clearance relating to the supermarkets and groceries sector. This in-depth analysis is not owed due to the particular sector but rather because the concentrations in question related to Malta-to-Malta mergers where the parties are of particular prominence in Malta and whose concentration could thus more easily have an impact on competition law and Maltese consumers. The Authority's approach in these types of scenarios is to be expected, bearing in mind Malta's size and the limited number of large players in any particular sector on the island. This in-depth scrutiny resulted in one Phase II investigation into a proposed groceries sector concentration due to concerns about market domination in its locality and negative effects on competition. However, this investigation could not be concluded effectively as the entities involved withdrew the concentration notification.

For the first time, a fast ferry passenger service notification was submitted, with Phase II investigations being initiated to ensure compliance with competition

laws due to the increasing companies offering ferry services in Malta. The Authority expressed concerns that 'the undertakings forming part of this concentration may have the ability and incentive to engage in an input foreclosure strategy', effectively suffocating competition due to competitors being forced to raise prices. Therefore, the director felt that an in-depth investigation was warranted to decide on the lawfulness of the concentration. The Phase II investigation concluded that the concentration is legal and does not negatively affect the competition market due to two commitments undertaken by the entities, which eliminated the Authority's main concerns.

5 | Have the authorities released any key studies or guidelines or announced other significant changes that impact merger control in your jurisdiction in the past year?

In October 2020, the Authority issued a consultation on the national implementation of Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (the ECN+ Directive) into Maltese competition law, as well as other proposed amendments to the Maltese Competition Act. The public consultation also had the objective and purpose to seek views on the introduction of two new subsidiary legislations under the Competition Act: the Immunity from Penalties and Reduction of Penalties in Cartel Investigation Regulations and the Mutual Assistance between National Competition Authorities Regulations, which implement the provisions on leniency programmes for secret cartels and mutual assistance between competition authorities as found in the ECN+ Directive.

This consultation was subsequently followed by the issuing of the final report, which also took into consideration feedback received from respondents. This consultation ultimately led to the publication of two pieces of subsidiary legislation entitled the Mutual Assistance Between National Competition Authorities Regulation and the Immunity from Penalties and Reduction of Penalties in Cartel Investigations Regulations, and amendments to the Competition Act and the Consumer Affairs Authority Act. The main reason for such legislation is to transpose and implement the ECN+ Directive, to introduce other amendments to the Competition Act and to improve the overall legislative framework Malta offers, with specific focus on consumer protection. The director general also published the final report on the sector inquiry into the supply of infant milk formula in the public health sector and the impact of that supply on the private retail market for infant formula and similar products. In terms of the Maltese Act, the Authority has the responsibility



to study markets and recommend action where required and to provide advice to public authorities on the competition issues that may arise in the performance of their functions, and to provide advice on the competition constraints imposed by legislation, policy or administrative practices. The outcome of the inquiry confirmed that the policy of having a single supplier servicing Malta's general public hospital is creating unnecessary risks of security of supply, restricting consumer choice for patients and creating significant barriers to entry into and expansion in the secondary markets. The Authority opined that the current procurement process adopted by the hospital is distorting competition in the private retail markets, possibly leading to foreclosure effects in an already highly concentrated market. Following a public consultation process, the Authority is recommending actions to the hospital to better its procurement process for the good functioning of the private retail market.

In September 2021, the Authority released a guidance note on mergers and acquisitions, providing a document on the requirements and useful links. It explains in detail what mergers and acquisitions are, how to identify whether or not a notification is required and when such notification is to be done. It provides step-by-step

guidance on how notifications are to be done, whether the Authority can be contacted before such notification and how the assessment will be held, providing a timeline for the progression of the assessment. This serves as an incredibly informative note for those planning to undertake a merger or acquisition.

In December 2021, a public consultation was released on the proposed bill entitled An Act to amend the Consumer Affairs Act, Cap. 378 (The Consumer Affairs (Amendment No. 2) Act 2021). This Bill intends to transpose Directive 2019/2161 of the European Parliament, commonly known as the Omnibus Directive. The consultation explains that the proposed bill would amend the penalties that the Civil Court can impose, particularly on unfair commercial practices and illicit schemes. It includes provisions on the minimum fine being that of 4 per cent of the trader's annual turnover and the maximum being €2 million. A list of penalties will be provided relative to each infringement of the Consumer Affairs Act, such as infringements causing misleading omissions or information. The Directive's goal is to further protect the interests of consumers from the dangers of aggressive or misleading marketing and selling practices. The result of the consultation led to positive feedback, allowing Parliament to review such Bill for it to be approved and implemented. The coming into force of the amended Act was further supplemented by guidelines issued by the Authority, which state that such amendment is one of the key building blocks for the 'New Deal for Consumers', reinforcing the protection granted to consumers. It strengthens requirements on online marketplace transparency, enforcing the same consumer rights for 'free' digital services while allowing consumers to search for products offered by different traders from a single keyword through an online, easily accessible interface. It also ensures transparency regarding consumer reviews by enlisting practices that are considered unfair and misleading. The Act prohibits the reselling of event tickets bought through bots and ensures genuine reduction claims. A continued strength to consumers is given through compensation for victims of commercial practices while also providing more effective penalties for cross-border infringements. Finally, it tackles dual quality of consumer goods while offering better protection against unfair practices regarding doorstep selling and commercial excursions.

- 6 | Do you expect any significant changes to merger control rules? How could that change your client advocacy before the authorities? What changes would you like to see implemented in your jurisdiction?

Directive (EU) 2019/1 was transposed into Maltese law through amendments to the Competition Act (Chapter 379 of the Laws of Malta), the Malta Competition and Consumer Affairs Authority Act (Chapter 510 of the laws of Malta) and the

“In December 2021, a public consultation was released on the proposed bill entitled An Act to amend the Consumer Affairs Act.”

creation of two new pieces of subsidiary legislation: the Mutual Assistance between National Competition Authorities Regulations and the Immunity from Penalties and Reduction of Penalties in Cartel Investigations Regulations. The latter specifically cater to participants of alleged secret cartels that are cooperating with official investigations and voluntarily providing information within their knowledge and role within the alleged cartel. It offers immunity from any penalty if such individual satisfies specific conditions, including (1) the application is the first to submit evidence that enables the director to request a warrant or provide sufficient evidence, (2) the person ends involvement in the cartel immediately following their application, (3) they cooperate fully and genuinely, and (4) they must not have destroyed or concealed any evidence relating to the alleged secret cartel or divulged any intention or information of the application to third parties.

The Mutual Assistance between National Competition Authorities Regulations allow one member state's national competition authority to request another member state's national competition authority to carry out an inspection or interview on its behalf. The requested authority shall service preliminary objections and other documents to the person or entity under investigation. It may also impose

finances and penalties at the request of the applicant authority. In general, it improves the level of cooperation between member states to ensure that unfair competition is properly investigated and penalised, effectively removing any cross-border abuse that could have been facilitated with the lack of member state cooperation.

By virtue of these amendments, the Authority gained additional powers when carrying out an investigation, including the seizure and confiscation of any object or document and the delivery of any information, including any information stored on external servers and cloud services. These new amendments have also led to an increase in the penalties that a court may impose as a result of a breach or as a result of hindering an investigation.

The Consumer Affairs Act was amended in 2021 with the introduction of additional powers granted to the director general. Under this amendment, the director general is empowered to hold investigations of their own motion or following reasonable allegations of any infringement of the Act. If the conclusion of the investigation shows *prima facie* evidence of an infringement, the director general is empowered to institute judicial proceedings against such persons concerned. To conduct such investigations, the director general is authorised to enter and search any premises used for the trader's business and inspect, test and take any goods, books, data or documentation.

In 2021, the Malta Competition and Consumer Affairs Authority Act was also amended to be able to enhance the Authority's operations and resources. The amending act described the obligations placed on the director general and officers of the Authority, catering for the newly introduced power of the director general to investigate restrictive practices or allegations of improper conduct.

Although the coming into force of these amendments does not, in itself, impact on the specific advice given to clients who are seeking to obtain clearance, it ensures that the Authority can continue its work with further authority and powers to investigate those instances that infringe Maltese and EU competition law.

Ian Gauci

igauci@gtgadvocates.com

Cherise Abela Grech

cabelagrech@gtgadvocates.com

GTG Advocates

Valletta

www.gtgadvocates.com

The Inside Track

What should a prospective client consider when contemplating a complex, multi-jurisdictional transaction?

In complex, multi-jurisdictional transactions, aside from concentration clearance, which might be required from multiple competition authorities across the relevant jurisdictions, a prospective client should also consider national direct investment screening requirements in the target jurisdictions. If a transaction falls within a specified list of factors or activities in terms of Regulation 2019/452, then notification to the national direct investment screening office(s) might also be required, together with possible prior approval.

Further, among other things, a prospective client should also consider that certain sector-specific regulation, such as in the gaming and the financial services industries, might also impose that the respective authority approves the transaction prior to its closure.

In your experience, what makes a difference in obtaining clearance quickly?

Particularly when dealing with a time-sensitive request for clearance, early communication with Maltese legal counsel (as much as possible) is vital. This will help in establishing an early channel of communication with the Malta Competition and Consumer Affairs Authority, and pre-notification meetings can be held, initially on a no names basis, to ensure that only the essential information and documentation need to be collected and submitted to the Authority. These meetings are also important to discuss and clarify any potentially complicated issues that could otherwise delay clearance.

What merger control issues did you observe in the past year that surprised you?

There were no particular issues that particularly stood out from our years of advising and assisting clients in this sector. However, we were pleased to note that despite the changes that the Authority had to face with covid-19 restrictions in place over the past two years, communication with the Authority remained smooth and its officials always remained available for meetings, albeit on a remote basis. With all restrictions having now been lifted, the efficiency of remote meetings has been noted and considered for future dealings.

Lexology GTDT Market Intelligence provides a unique perspective on evolving legal and regulatory landscapes.

Led by White & Case LLP, this *Merger Control* volume features discussion and analysis of emerging trends and hot topics within key jurisdictions worldwide.

Market Intelligence offers readers a highly accessible take on the crucial issues of the day and an opportunity to discover more about the people behind the most significant cases and deals.

Legislative reform
Enforcement priorities
International cooperation
Sector focus