Kluwer Competition Law Blog

Main Developments in Competition Law and Policy 2024 – Malta

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The year 2024, in Malta, has seen the first (ever) merger control prohibition decision, a number of ongoing antitrust investigations, and the overturning of a 'margin squeeze' judgement by the Competition and Consumer Affairs Appeals Tribunal (an appeals body that has since been abolished) ("Competition Appeals Tribunal") dating back to 2014. In September 2024 the Office for Competition ("OC") – Malta's National Competition Authority – also organized training on dawn raids, in cooperation with the Academy of European Law (ERA), which was the first of its kind in Malta. The OC has also been recruiting for a new Director General for Competition, with the post having been vacant for over a year.

Legislative Framework

The legislative framework for competition law regulation in Malta is governed by the Competition Act (Chapter 379 of the Laws of Malta) ("Competition Act") and the Control of Concentrations Regulations (Chapter 379.08 of the Laws of Malta ("Merger Control Regulations") which govern merger control in Malta. Other subsidiary legislation is in place as regards immunity and reduction of penalties in cartel investigations (leniency), Regulations implementing the ECN+ Directive, and Regulations to support investigations in the digital sector, aiding the enforcement of the EU's Digital Markets Act. The Malta Competition and Consumer Affairs Authority Act ("MCCAA Act") governs the establishment of the Malta Competition and Consumer Affairs Authority, and the Office for Competition which sits within its structure. A Collective Proceedings (Competition) Act (Chapter 520 of the Laws of Malta) is also in place to facilitate collective proceedings to rectify the consequences and, or allow for compensation for harm resulting from an infringement of the Competition Act.

Public Enforcement Overview

The OC together with the Maltese courts are responsible for the public enforcement of competition law in Malta. It is the Civil Court (Commercial Section) ("Court") that will decide on whether an infringement of the Competition Act has taken place and impose any fines, following a sworn application being filed by the Director General of the OC. This followed the Maltese Constitutional

Court's finding in 2016 (See *Federation of Estate Agents v Director General (Competition) et* (Constitutional application number 87/2013/2)) that the OC's powers to issue decisions and impose fines (as was the case until an overhaul of the OC's public enforcement powers within the Competition Act in 2019) were in breach of the right to a fair trial under Article 39(1) of Malta's Constitution. An appeal from the Court's decision may then be brought on points of law and, or fact before the Court of Appeal.

Since 2022, the OC has started the practice of issuing warning letters to undertakings where it has reasonable grounds to suspect an infringement of the Competition Act. Such a warning letter is not a finding of a breach but merely a way to encourage compliance. The OC has noted (see MCCAA Annual Report 2022), however, that failure of an undertaking to comply with a warning letter will be considered a serious aggravating factor that could result in an increase of at least 25% in the penalty requested by the OC, should Court proceedings be instituted following an investigation.

Antitrust Investigations

As on 11.10.2023 there were 10 ongoing investigations regarding alleged breaches of articles 5 and/or 9 of the Competition Act being carried out by the OC in the following sectors: entertainment, energy, telecommunications, health, domesticated animals and maritime. This was made public in a response to a Parliamentary Question (Question 11429, XIV Legislature). There have been no developments made public on any of these investigations in the course of 2024.

Merger Control

This year has marked the first ever prohibition decision since the coming into force of the Merger Control Regulations on the 01.01.2003. This involved the proposed acquisition by Lidl (a major player in the groceries retail sector in Malta) of immovable property owned by Said Investments Limited and leases belonging to another major supermarket chain (Scott's). The prohibition decision has not yet been published and has now been appealed. An overview of the assessment undertaken by the Office based on its press release and the decision published by the Office deciding to initiate an in-depth (Phase II) investigation may be found here.

A further 6 decisions were issued by the Office in 2024, all providing clearance to merger control notifications. These decisions were all deemed to meet the conditions for assessment under the simplified procedure provided for within the Merger Control Regulations (regulation 12).

Judicial Review

On the 28.03.2024, the Court overturned a judgement by the Competition Appeals Tribunal dating back to the 29.01.2014 that had found Go plc to have abused its dominant position, infringing article 9 of the Competition Act, due to a 'margin squeeze'. The case *(Go p.l.c. (C-22334) formerly Datastream Limited v Camline Internet Services (C-26528), Director General (Competition) and Attorney General* (application number 660/14 JRM)) was brought before the Court as an application for judicial review of a decision taken by judicial or a quasi-judicial body governed by

law (under article 32 of the Code of Organization and Civil Procedure, Chapter 12 of the Laws of Malta).

The plaintiff raised various points as a basis for its application, including based on the lack of a detailed economic assessment by the Competition Appeals Tribunal. However, such arguments were dismissed due to the review being limited to arguments relating to the Competition Appeals Tribunal acting within the powers conferred on it by law and not an appeal revisiting the substance of the Competition Appeals Tribunal's decision (it must be noted that under the pre-2011 legal regime, that was applicable to this case, no appeal on the merits from the decisions of the Competition Appeals Tribunal – before any court – was possible).

The arguments which led the Court to overturn the decision by the Competition Appeals Tribunal were based on the procedure that had been followed, and such procedure being under a legal regime that was not applicable to the case being decided upon. The background to this was that the case had initially started being heard under a previous body – the Commission for Fair Trading ("CFT") – and following revisions to the law with the coming into force of the MCCAA Act in 2011 the CFT was abolished and replaced by the Competition Appeals Tribunal. However, the legal regime for cases that were ongoing, such as this, was to continue to be that in place prior to the coming into force of the MCCAA Act (as set out in the transitory provisions under article 70 of the MCCAA Act). The Competition Appeals Tribunal was found to have erred in law in having referred to article 14(7) of the Competition Act (as amended by the MCCAA Act) and in directing the Director General (Competition) to take every measure he determined necessary with respect the breach that had taken place, pursuant to that provision. This led the Court to conclude that the judgement of the Competition Appeals Tribunal is not valid, should be revoked and ordered the case to be re-heard before the (now-defunct) Competition Appeals Tribunal, whose powers now vest in the Civil Courts.

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