

Guidance on Mergers & Acquisitions

Office for Competition

Introduction

There are certain concentrations, or as they are more commonly known mergers and acquisitions, which require mandatory notification under the Control of Concentrations Regulations, 2002¹ and can only be implemented once they have been authorized by the Office for Competition, hereinafter 'Office'. These Regulations apply the Substantial Lessening of Competition test to a given merger or acquisition. The Office may clear or prohibit a concentration depending on whether or not it is satisfied that the acquisition will not have the effect of substantially lessening competition in a given market.

What is a Concentration?

The first step in the assessment of whether a transaction must be notified to the Office is determining whether it is a concentration as defined by the Regulations. According to the Regulations a concentration occurs where:

Two or more previously independent undertakings *merge* or one or more undertakings *acquire control* of the whole or parts of one or more other undertakings. The latter may take place through the purchase of securities or assets, by contract or by any other means.

The second step in this assessment is ascertaining the turnover thresholds. In this regard the Regulations require that:

The combined aggregate turnover in Malta in the preceding financial year of the undertakings concerned exceeds €2,329,273.40 and each of the undertakings concerned has a turnover in Malta equivalent to at least 10% of the combined aggregate turnover

The creation of a full functioning joint venture, that is a joint venture performing on a lasting basis all the functions of an autonomous economic entity, may also be considered a concentration for the purposes of these Regulations.

What is acquisition of control?

Control is acquired when an undertaking has the possibility of exercising decisive influence on another undertaking. The most common means for the acquisition of control is the acquisition of shares, however, for the purposes of the Regulations, control may be achieved through other means such as, on the

¹ Subsidiary Legislation 379.08

basis of rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking. Control may be in the form of exclusive or joint control and direct or indirect control. Internal restructuring between a group of companies, for example, would not constitute a concentration as there is no change in control.

Who are the undertakings concerned for the purposes of establishing turnover?

The undertakings concerned are those participating directly in the merger or acquisition. Furthermore, even though in an acquisition or merger the undertakings concerned will be the acquiring undertaking and the target undertaking or each of the merging entities respectively, the Regulations also require that the turnover of all the undertakings which have a link as specified in regulation 3(5) with the undertakings concerned is taken into account. Regulation 3(5) refers to those other undertakings forming part of the same group of undertakings as the undertakings concerned in the merger or acquisition, such as for example, subsidiaries of the undertakings concerned and their parent companies.

A concentration must be notified by the person/undertaking acquiring control in the case of an acquisition or by the parties to the merger or joint venture prior to its implementation and within 15 working days from the:

i.	Conclusion of the agreement,
ii.	Announcement of the public bid, or
iii.	The acquisition of a controlling interest

Is there an exception to the rule?

Although, the Regulations require that a concentration is notified to the Office before it is implemented, the Office may, upon a reasoned request before notification or after the transaction, grant a derogation from this rule and allow the concentration to be implemented.

How do I notify?

A concentration must be notified by providing the information in the Concentration Notification Form (CN Form) together with the notification fee of €163.06. The Office will not accept notification unless the information required by the CN Form is correct and complete and the fee is paid. There may be instances, however, where notifying parties may be authorised to dispense with the obligation to provide certain information. Notifying parties, therefore, are encouraged to consult with the Office with regard to what information is required from them.

A concentration may, in certain instances, be notified in short form. This means that the notifying parties are required to provide less information than they are required according to the full CN Form. A notification in short form is made by filling in that information expressly stipulated in the CN Form, to the exclusion of other information. Short form notifications, can only be made in the following instance:

The category of concentrations to which the short form notification applies:

Acquisition of joint control by two or more undertakings and the turnover of the joint venture and/or the turnover of the contributed activities, is less than €698,812.02 in the Maltese territory and the total value of assets transferred to the joint venture is less than €698,812.02 in the Maltese territory.

All other concentrations require the long CN Form.

May I contact the OC prior to notification?

The OC encourages pre-notification meetings as it considers them extremely valuable to both the notifying parties and the Office. Pre-notification meetings are often useful because they enable open discussion on issues, such as:

- determining the precise amount of information required in a notification
- understanding the undertakings' products or services, competitors and customers
- whether the concentration may be notified under the Simplified Procedure
- identifying key issues and possible competition concerns
- ascertaining deadlines

- understanding the Office's procedure

Publication of the concentration notification

When the Office receives a notification, it will publish this in the Government Gazette and a daily newspaper and call interested parties to give comments within 7 days from publication.

Assessment of a Concentration

In order for it to establish whether the concentration will lead to a substantial lessening of competition in Malta, the Office will take into account, *inter alia*, the following factors:

- the need to maintain and develop effective competition in the Maltese market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or outside Malta
- whether the business of a party to the concentration has failed or is likely to fail
- the nature and extent of development and innovation in a given market
- the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, 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, and the development of technical and
- economic progress

Time Limits for the assessment of concentrations

The Regulations provide strict time limits for the assessments of concentrations. The Office's procedure is divided into 2 phases. During Phase I, a regulation 6 decision must be taken within **6 weeks** from the date of complete notification; or within **2 months** from the date of complete notification where the undertakings concerned offer commitments:

Regulation 6 Decision
6(1)a : the concentration does not fall within the scope of the Regulations
6(1)b : the concentration does not raise serious doubts as to its lawfulness: approval
6(1)c : the concentration raises serious doubts: Phase II of procedure

If the Office's investigations in Phase I warrants further in-depth investigations of the market, then the concentration will be subject to a Phase II investigation. During Phase II a regulation 8 decision must be taken at the latest within **4 months**:

Regulation 8 Decision
8(2) : the concentration is lawful: may be approved with conditions and obligations
8(3) : the concentration is unlawful
8(4) : dissolution of the merger in case of premature implementation
8(5) : revocation of a clearance decision in case of incorrect information or breach of obligation

The Regulations also provide for a simplified procedure in the case of certain concentrations which are listed below. These concentrations are deemed not to raise serious doubts as to their legality. It is necessary, therefore, that the Office receives adequate information in the CN Form which substantiates that the concentration will not lead to any competition problems. If the Office considers that the concentration qualifies for a simplified procedure it shall issue a regulation 12 short-form decision within **4 weeks** from notification.

Categories of concentrations to which the simplified procedure may be applied:

Acquisition of joint control by two or more undertakings and the turnover of the joint venture and/or the turnover of the contributed activities, is less than €698,812.02 in the Maltese territory and the total value of assets transferred to the joint venture is less than €698,812.02 in the Maltese territory,

Mergers or acquisitions that do not involve horizontal overlap or vertical links between the parties to the concentration,
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Mergers or acquisitions that involve horizontal overlaps or vertical links but their combined market share does not exceed 15% or 25% respectively.

Once the Office has issued its decision it will, barring confidential information, publish a summary thereof in the Government Gazette and the full length decision on the website of the Malta Competition and Consumer Affairs Authority.

What are the consequences of not notifying?

If the Office becomes aware of a completed acquisition which is found to be in breach of these Regulations, it may adopt its administrative procedures under these Regulations and impose various remedies including penalties and divestment.

Contacting the Office

The Office welcomes enquiries about the Regulations that control mergers and acquisitions in Malta including the process adopted by the Office in assessing them.

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This Guidance note is not a substitute for legal advice and should be read in conjunction with the Competition Act and the Control of Concentrations Regulations made under this Act.