

## **OFFICE FOR COMPETITION**

25 August, 2011

### **Comp-CCD/28/11 – SMS Group Ltd/Mondial Investments Ltd**

**Decision on acquisition in terms of regulations 6 (1) (ii) of the Control of Concentrations Regulations (LN 294 of 2002 as subsequently amended)**

**The Office for Competition,**

**Having considered the notification of 14 July, 2011 pursuant to regulation 5 of the Control of Concentrations Regulations,**

**Having considered the provisions of the Control of Concentrations Regulations,**

**Whereas,**

#### **A. FACTS**

1. On 14 July, 2011, SMS Group Ltd and Mondial Investments Ltd jointly notified the Office for Competition (hereinafter referred to 'the OC') with a draft Shareholders' Agreement, whereby SMS Group Ltd and Mondial Investments Ltd (hereinafter referred to as 'Notifying Parties'), established a jointly controlled company, namely Orange Cruises Ltd (hereinafter referred to as "JV") to which S. Mifsud & Sons Ltd and Allied Travel Services Ltd (both respective subsidiaries of the Notifying Parties) outgoing travel business has been contributed.
2. The filing and the acceptance of such notification was notified to the public through a public notice in the Government Gazette number 18,780 on 19 July, 2011 and a notice that appeared in a local newspaper on 18 July, 2011.

#### **B. PARTIES**

3. SMS Group Ltd is a limited liability company registered in Malta, with registration number C30343 having its registered office at 27, Birkirkara Hill, St. Julian's. The business activities of the SMS group of companies include, shore operations, ship chandling, and insurance services. Through its subsidiary, S. Mifsud & Sons Ltd, it operated an outbound travel business in Malta.
4. Mondial Investments Ltd is a limited liability company registered in Malta with registration number C32332 and having its registered office at 8, Republic Square, Valletta. It is the ultimate

holding company of the interests of the Mondial group of companies. The business activity of the Mondial group of companies, is primarily involved in the travel sector having offices in Cyprus, Ukraine, and Turkey. It is also involved in management services, agency and marketing services. Through its subsidiary, Allied Travel Services Ltd, it operated an outbound travel business in Malta.

5. Orange Cruises Ltd is a company incorporated under the laws of Malta having its company registration number C 41701 and its registered address at 27, Birkirkara Hill, St. Julian's. It is the vehicle through which the Notifying Parties have participated in the outbound travel business in Malta since January 2011.

### **C. THE TRANSACTION**

6. Under the terms of the draft Shareholders Agreement, the Notifying Parties are to use the JV, in order to market and sell overseas travelling, including accommodation, transport and related services on a group as well as on an individual basis for vacation, business and sport purposes. Essentially, the JV, therefore, will take on the outbound travel businesses of S. Mifsud & Sons Ltd and Allied Travel Services Ltd and each of the Notifying Parties will hold 50 percent of the share capital of the JV.

### **D. JOINT VENTURE**

7. The JV is owned equally by each of the Notifying Parties. Further to the Shareholders' Agreement and as stipulated in the Memorandum & Articles of Association of the JV, each of the Notifying Parties has an equal number of shares bearing equal rights, including equal voting rights, and each of them is entitled to appoint an equal number of the members to the Board of Directors which adopts decisions by majority. The Board of Directors determines the general policy of the company and has reserved to itself major decisions such as the business plan and the budget. Moreover, joint control is also evidenced by the possibility of a deadlock situation, as per the draft Agreement, on matters relating to the affairs of the JV.
8. Hence, in view of the above, it can be concluded that the Notifying Parties have joint control of the JV.

## **E. NOTIFIABLE CONCENTRATION**

9. The proviso to regulation 2(d)(ii) provides that the creation of a joint venture performing on a lasting basis all the functions of an economic entity referred to as a “full function joint venture” shall also constitute a concentration.
10. The JV is a fully fledged company endowed with all necessary resources to carry out its activities in the market (such as, assets, own management, financial resources, permits and staff). Moreover, the JV is autonomous in an operational respect. It has its own business policy independent from that of its parent companies. It is free to decide on its customers and the prices of the goods and services being offered and deals directly with its own third party customers. Hence, the JV performs on a lasting basis all the functions of an autonomous economic entity. Moreover, its duration is unlimited.
11. According to the notification, each Party has withdrawn from the outbound travel sector and will not compete with the JV. Although each of the Parties has retained activities in the tourism and travel sector, they operate in different geographic markets (United Kingdom, Cyprus, Ukraine and Turkey). Therefore, none of the parents has activities in the same market as the joint venture or in a market which is up- or downstream from that of the joint venture or in neighbouring markets closely related to this market. It is considered, therefore, that the present operation does not have as its object or effect the coordination of the competitive behaviour of undertakings which remain independent.
12. In this case, the notified operation is a concentration within the meaning of the proviso to regulation 2 (d) (ii) of the Regulations on the Control of Concentrations whereby the Notifying Parties have established a full function joint venture.

## **F. THRESHOLD FOR NOTIFICATION**

13. The aggregate turnover of the undertakings concerned in the preceding financial year exceeds €2.33 million in Malta and each of the undertakings concerned had a turnover in Malta equivalent to at least ten per cent of the combined aggregate turnover of the undertakings concerned.

14. The notified concentration, therefore, meets the notification threshold as set out in regulation 2(d) of the Regulations.

## **G. THIRD PARTY OBJECTIONS**

15. There were no Third Party Objections.

## **H. THE RELEVANT MARKET**

16. The parties are involved and accordingly overlap in the provision of outbound travel services to customers. The parties offer packaged tours, dynamic packages and cruise packages.

17. As explained below, the OC explored a number of ways of defining the relevant product market. One approach to define the market is through the ‘hypothetical monopolist’ test. This test provides a framework within which to establish the set of products that provide competitive constraints on the merging firms and the geographic area in which this occurs. An empirical application of the test is difficult to perform as the necessary data is not available. Nevertheless, the OC carried out a consumer survey for the purpose of this concentration and used its findings as a benchmark against which to compare views on customers’ likely response to price changes.

18. In defining the relevant market, the OC took into consideration:

- i. Submissions of the Notifying Parties;
- ii. Submissions of other tour operators/travel agencies;
- iii. Consumer Survey; and
- iv. National Statistics Office (hereinafter ‘NSO’) data.

### **H.1 PRODUCT MARKET DEFINITION**

#### *Production and Distribution: Tour Operators and Travel Agencies*

19. The European Commission has described tour operators as suppliers of package holidays, combining accommodation and possibly other services in a given destination with return travel to and from it and travel agents as retailers supplying various services to leisure and business travellers such as flight booking, hotel and other related services<sup>1</sup>.

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<sup>1</sup> See for example, Case No IV/M.1341 Westdeutsche Landerbank Carlson / Thomas Cook of 8 March 1999, paragraphs 10 and 11.

20. The Notifying Parties submitted that tour operators and travel agencies should be considered to fall under one market. According to the Notifying Parties, although in certain countries there is a clear distinction between the two, whereby a tour operator will only package holidays and then sell to a travel agent, who in turn sells to the final consumer, in Malta, the distinction is less marked. This is because tour operators compete with travel agents in that they package travel services at a wholesale level and sell them at the retail level to the final consumer.
21. Tour operators and travel agencies were divided in their replies as to whether travel services *via* tour operators and travel agencies form part of the same market.
22. Indeed, in the Maltese context, tour operators package travel services and either sell them directly to the consumers themselves, or sell them through other independent travel agents. On the other hand, most of those which operate principally as travel agents may also offer their own packages. Moreover, both travel agencies and tour operators provide a number of other services, including but not limited to, scheduled flights, hotel bookings and insurance. Tour operators in Malta are in direct competition with independent travel agencies and tour operators and independent agencies have substantial purchase and sales relations with one another. A particular operator will, on the one hand, sell some of its packages through its competitors and on the other hand, buy packages from its competitors.
23. On this basis the OC considered that it would not be helpful in practice to determine the effects of the proposed concentration in the context of a market of tour operators separate from the market of travel agencies, as in the case of the local market such a fine distinction would not be appropriate.

*Packaged Travelling (Group Tour Travelling) and Dynamic Packaged Travelling (Independent Travelling)*

24. Packaged holidays have previously been found by the European Commission to constitute a separate market from holidays where the consumer purchases the various elements individually.<sup>2</sup> The Notifying Parties submitted that the distinction made by the European Commission is continuously becoming more blurred and that independent travelling has gained more ground on the former type of travelling. According to them, this can be attributed to the internet which has revolutionised travel *via* what is referred to as 'dynamic packaging' meaning

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<sup>2</sup> Case M.1524 Airtours/First Choice, of 22 September 1999.

that a prospective traveller can create his/her own package by adding flights, hotels, and other travel arrangements. This practice has greatly reduced the size and influence of the tour operating industry since the internet allows an unlimited choice of travel options at what are frequently lower rates than what tour operators can offer. The Notifying Parties, therefore, considered that the market should be the market for the retail of travel services, comprising the activities of traditional and online operators, other online travel intermediaries, direct-selling airlines and direct selling accommodation providers.

25. The majority of tour operators and travel agencies consider packaged travelling and dynamic packaged travelling as forming part of the same market.
26. The OC accepts the change of business model that traditional operators in this sector have undergone, now offering to customers both packaged holidays and single components such as flights, accommodation and travel services. Moreover, the OC acknowledges the growth of independent holidaymaking. This is evidenced by 2010 NSO statistical data whereby 68,169 passengers (23 percent) and 225,884 passengers [excluding Malta to Malta cruises] (77 percent) opted for packaged and non-packaged services respectively.<sup>3</sup> From the consumer survey carried out by the OC, it was found that for those who travelled in the past five years, 22 per cent opted for packaged services, 56 per cent opted for non-packaged services and 22 per cent opted for a combination of packaged and non-packaged services.
27. Moreover, the OC accepted that the distinction between packaged travelling and dynamic packaged travelling has become less marked following the introduction of low-cost airlines that have established direct routes to destinations that could have in the past only been reached through connecting flights or charter flights through traditional operators. Suffice to say that 30 per cent of total passenger movements to and from Malta are attributed to low cost airlines. Moreover, there is a general tendency that many of those who travel with traditional airlines book directly with airlines online.
28. The OC considered that the precise definition of the relevant market as to packaged travel and non-packaged travel could be left open as there will be no competition concerns irrespective of how the market is defined.

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<sup>3</sup> News Release 028/2011 – Outbound Tourism: December 2010.

*Leisure travel and corporate travel services*

29. The parties overlap in the provision of leisure travel services and corporate travel services. The parties considered leisure and corporate travel as forming part of the same market as in practice any travel agency can provide both services and therefore, the product involved is the same for both types of consumers. Tour operators and travel agencies were divided in their replies as to whether leisure and corporate travel services form part of the same market.
30. From its market investigation, the OC found that there is a tendency for operators on this market to concentrate on one service as opposed to the other, without, however, the offer of corporate or leisure travel services excluding the other. The OC acknowledged that although a tour operator/travel agency can provide both services to some extent, leisure travel and corporate travel attract different consumers and are marketed differently. Substitutability from a demand-side and supply-side perspective is limited.
31. The OC, however, considered that the precise definition of the relevant market as to leisure travel and corporate travel could be left open as there are no competition concerns irrespective of how the market is defined.

*Land-based holidays and Cruises*

32. The parties overlap in the provision of land based holidays and cruises. The OC proceeded to further assess whether land-based holidays and cruises are part of the same market. The parties submitted that land-based holidays and cruises form part of the same relevant market. This is because their prices are comparable, they cater for all customer types and age groups, they are marketed and distributed in the same way, often in the same brochure, and all operators in the market, be they tour operators and travel agents, sell both products.
33. On average tour operators and travel agencies tend to regard cruises and land-based holidays as part of the same market.
34. To determine the degree to which cruises and land based holidays are interchangeable, the OC referred to the consumer survey conducted for the purpose of this operation. From the survey, it resulted that 63 percent of the respondents that went on land-based holidays in the past five years would consider a cruise the next time they would travel, while, 36 percent would not. Moreover, 48 percent of the respondents that went on a land-based holiday in the past five

years and would consider a cruise the next time they travelled would opt for a land-based holiday if the price of the cruise increases between five to ten percent, while, 32 per cent would not.

35. In addition, 54 percent of the respondents that went on a cruise holiday in the past five years would go on a cruise again next year if they had to, while, 46 percent would not. Furthermore, 62 percent that went on a cruise holiday in the past five years would shift to a land-based holiday if the price of the cruise increases between five to ten percent, while 38 percent would not shift.

36. Also, 32 percent that went on a land-based and cruise holiday in the past five years would go on a cruise next year if they had to. On the other hand, 50 percent would not. In addition, 64 percent that went on a land-based holiday and cruise holiday in the past five years would shift to a land-based holiday if the price of the cruise increases between five to ten percent, while eighteen percent would not.

37. This shows that those who travelled on a cruise as well as on a land-based holiday are more likely to shift to land-based holidays if the price of cruises increases five to ten percent, than those who travelled on a cruise holiday only, suggesting some degree of substitutability.

38. However, a point to note is that 49 percent of cruise customers in the past five years decided to go on a cruise before contacting a travel agent (the majority a year before) while other customers decided to go on a cruise upon advice of the operator, upon visiting a cruise fair and for other reasons, such as honeymoon, and graduation celebrations, amongst others. This indicates that there is only limited substitutability between cruises and land-based holidays at the point when customers make contact with operators. In addition, the major reason for which customers booked a cruise was because of the attraction of the itinerary and the sequence of the destinations. Sometimes, the itineraries of cruises and the experience associated with them may be impossible to replicate through land-based holidays.

39. Moreover, the OC acknowledged that there are similarities in the marketing and distribution of land-based holidays and cruise holidays. However, the OC also noted that with regard to cruise holidays a cruise fair is held in November to showcase the products on offer for the prospective year. In some instances, with regard to Malta to Malta cruises, some operators acting as agents

for cruise liners have to issue a separate brochure promoting only a specific type of cruise pertaining to a particular cruise liner.

40. The above elements show that although some tour operators and travel agencies offer both cruises and other packaged holidays, from the point of view of the consumer the result is that some substitutability exists, but it may be limited. Therefore, the analysis of the present concentration will focus on the narrowest possible market, that is cruises. While such definition may be limited, the OC acknowledged that if competition concerns are not identified within a narrowly defined market, they are unlikely to arise in a more broadly defined market.

#### *Different types of Cruises*

41. The OC also considered whether the cruise market can be further subdivided by itineraries and whether the Mediterranean itinerary can be further subdivided between Malta to Malta cruises and Mediterranean cruises, other than Malta to Malta where a passenger has to catch a flight to arrive at the point of departure.
42. The Notifying Parties expressed the view that if the cruise market is to be considered separate from the land based holidays market then the cruise market should be defined as one whole because itineraries are substitutable to one another. Moreover, most operators on the market consider the different cruise itineraries as forming part of the same market. The analysis of the notified operation focused on the narrowest possible market that is the Malta to Malta cruises. However, since this did not lead to any competition concerns, the precise definition of the market was left open.

#### **H.2 GEOGRAPHIC MARKET DEFINITION**

43. The Notifying Parties submitted that the market should be defined as national. Moreover, there is a general consensus amongst travel agents and tour operators that the market is national.
44. The market definition should refer to the area where conditions of competition are homogeneous from the demand point of view. This implies that the definition should centre on the options available to consumers when making the booking. It is at a national level that operators compete for consumers, regardless of the itineraries. Moreover, different types of itineraries are offered in different countries and prices vary accordingly.

45. Whilst the OC acknowledged that the internet has changed the way travel services are offered and that the market may therefore be wider than national, it noted that preferences of consumers are not the same in each country both as to the types of holidays and destinations. For example, consumers in certain countries may prefer cruise holidays, while, in others they may prefer land-based holidays. Operators need to adapt to consumers residing in a particular country in terms of a geographic point of departure and undertake advertising campaigns to target consumers in a particular country.

46. In view of the above, the OC considered that the geographic market is predominantly national.

**I. ASSESSMENT**

**I.1 MARKET SHARES**

47. Having delimited a number of possible ways in which to define the relevant market, on the basis of the data submitted by the parties and collected by the OC, market shares under each possible definition were estimated as provided in Table 1 below. With regard to all possible market definitions, besides cruise holidays, the OC considered that there is no affected market and therefore proceeded to analyse the hypothetical cruise market.

Hypothetical Market Definitions	Market Share <sup>4</sup>
<b><i>Packaged travel services and Non-packaged travel services</i></b>	%
<b><u>Market Definition</u></b>	
<i>Packaged and Non-packaged travel services</i>	[confidential]
<i>Packaged travel services</i>	[confidential]
<b><i>Leisure and Business travel services</i></b>	
<b><u>Market Definition</u></b>	
<i>Leisure and Corporate travel services</i>	[confidential]
<i>Leisure travel services</i>	[confidential]
<i>Corporate travel services</i>	[confidential]
<b><i>Land-based holiday and Cruise Holiday</i></b>	
<b><u>Market Definition</u></b>	
<i>Land-based and cruise holiday</i>	[confidential]
<i>Land-based holiday</i>	[confidential]
<i>Cruise holiday</i>	[confidential]

<sup>4</sup> OC's calculations.

<b>Different types of itineraries</b>	
<b><u>Market Definition</u></b>	
All Cruise	[confidential]
Mediterranean cruises	[confidential]
Malta to Malta cruises	[confidential]

Table 1: Approximate market shares under each possible market definition

Source: OC's Calculation

48. It can be noted that irrespective of how the market for cruises is defined, the JV enjoys a strong position on the market. In the Malta to Malta cruise market, the only competitor is Hamilton Travel (hereinafter referred to 'Hamilton') which also enjoys a significant market position. Market shares provide a preliminary assessment of the Notifying Parties' position on the market. However, the OC will proceed to analyse coordination in the market, constraints from other competitors, potential competition, access to the JV products, efficiency gains and the failing firm principle to provide a more complete assessment of the proposed concentration.

## **I.2 COORDINATED EFFECTS**

49. *Prima facie*, the JV's market share, on the narrowest possible market of cruises, together with the reduction of the number of the major competitors on the cruise market, would seem to raise competition concerns. These concerns would exist in particular in relation to the Malta to Malta itinerary, since for the other itineraries, the remaining number of small operators together with Hamilton, can act as a constraint on the JV.

50. With regard to Malta to Malta cruises, the number of major players was reduced from three to two. Such a situation in general would make it easier for competitors to reach a common understanding.<sup>5</sup>

51. In the case of wider product markets, which would include Mediterranean itineraries and all cruises, an assessment of coordinated effects would not be necessary, given the number of competitors which reduce the risk of coordination. The OC, therefore, proceeded to analyse coordinated effects on the narrowest product market – the Malta to Malta itinerary.

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<sup>5</sup> Guidelines on the assessment of horizontal mergers under the council Regulation on the control of concentrations between undertakings, OJ C 31/5 [2004], paragraph 48.

52. Generally, the less complex and the more stable the economic environment, the easier coordination amongst companies. The OC recognised that although the demand for cruises has been relatively stable over the past years, the supply of cruises was not. The Malta to Malta itinerary market has been rather unstable in the past years, with cruise lines considering this itinerary at times and pulling out at others. Suffice to say, that the Malta to Malta itinerary had a high turnover with only Costa and MSC calling year after year till 2011, whilst other cruise lines did not include Malta as their regular destination. Indeed, the operators are highly dependent on whether cruise lines include Malta in their itinerary for a particular year or not.
53. With regard to possible coordination on capacity, the OC noted that capacity planning for the next season, which is a characteristic for the cruise market, is likely to constitute a major obstacle to coordination between the two remaining operators, the JV and Hamilton, given the sporadic environment in which they operate. The capacity planning process begins as early as the year before and the crux of the planning lies in predicting both supply and demand considering the macro-economic and micro-economic levels. Moreover, the planning process may be hindered by other factors external to the companies such as political unrest, as was the case of the North African uprising, and unpredictable changes in consumer preferences.
54. With regard to monitoring, the OC noted that it is effectively difficult to monitor competitors' behaviour. The market investigation confirmed that the capacity planning procedures of operators lack transparency and are unpredictable given the cruise liners' policy decision on whether to call at Malta or not and the conditions they negotiate with the tour operators. It is therefore only at a relatively late stage, following the publication of the brochures and programmes, that competitors become aware of the decisions taken by their competitors.
55. Considering the characteristics of the market and the limited degree of transparency, the OC was satisfied that it would be difficult for the two cruise operators to coordinate on the Malta to Malta itinerary.

### **I.3 UNILATERAL EFFECTS - CONSTRAINTS FROM OTHER COMPETITORS**

56. The OC considered whether SMS and Mondial were each other's closest competitors prior to the operation. First, both parties offered a similar product. Secondly, each possessed a good brand image at a national level. The OC noted that Hamilton also enjoys a good brand image on the same market.

57. Price competition in the Malta to Malta itinerary appears to be predominantly in place, with the JV and Hamilton competing fiercely on price. Competition also occurs on a number of qualitative factors including the ship size and facilities on board, the itineraries and marketing activities.

58. For the above-mentioned reasons, although the Notifying Parties used to be competitors on both price and non-price factors and to a certain extent competition arising from this relationship was lost following the concentration, it is difficult for the JV to raise prices unilaterally due to the significant position of Hamilton on the cruise market. Moreover, the way the market operates makes it difficult for the parties to engage in an economically profitable predatory pricing policy.

#### **I.4 POTENTIAL COMPETITION: ENTRY AND EXPANSION**

59. The parties argued that barriers to entry and expansion are low, pointing to, amongst other things, the absence of regulatory constraints and the occurrence of entry and exit and expansion in the past years.

60. The OC noted that barriers to entry in the cruise market do not seem to be very high. With regard to Malta to Malta cruises, the only set up cost required is the financial commitments that need to be undertaken to buy cabin space in advance. Moreover, operators in the market with a sufficient good customer base not specialising in Malta to Malta cruises which are ready to undertake financial commitments, can enter the market. The OC observed that with the advent of the internet, a physical presence is not necessary as an entrant can offer its product online, saving on upfront costs. The OC also considered that expansion is possible at a national level at least for existing operators with a wide distribution network and sufficient financial resources. Once established in the market, it is likely that an efficient operator could source additional cruise lines.

#### **I.5 ACCESS TO OTHER TOUR OPERATORS AND INDEPENDENT TRAVEL AGENCIES**

61. The OC also investigated whether the JV would foreclose other competitors, be they tour operators or travel agencies, from selling Malta to Malta itineraries of the JV.

62. The Notifying Parties submitted that it is the JV's policy to distribute its product to tour operators and travel agencies. Moreover, the JV distributes a different brochure with no promotion of its brand to let the operator keep its identity with its clientele.
63. The OC noted that, considering the interdependence in the market between tour operators and agencies whereby each sell the product of its competitors and considering that it is in the JV's interest to maximise sales, it is unlikely that the JV would refrain from selling through third parties.
64. In view of the foregoing, it was concluded that the concentration would not lead to any foreclosure of independent tour operators and travel agencies by reducing access to the JV's products.

#### **I.6 EFFICIENCY GAINS**

65. The OC noted that to further assess the impact of the concentration on competition, it is appropriate to consider any substantiated and likely efficiencies put forward by the JV since it is possible that the efficiencies brought about by the concentration counteract the *prima facie* concern on competition.
66. Efficiencies have to benefit the consumers, be concentration-specific and verifiable. The relevant benchmark in assessing efficiency is that consumers will not be worse off as a result of the JV. The types of efficiency gains include lower prices and other benefits, such as more choice to the consumer.
67. According to the parties, the necessity of the JV arose due to the unstable market conditions. None of the cruise lines represented by either SMS or Mondial has shown a 100 percent consistency, apart from one. In 2009, the only cruise line, which [confidential], pulled out of the Malta to Malta itinerary. This coupled with the fact that the [confidential] and that upfront financial commitments were necessary, compelled it to join forces with [confidential].
68. According to the parties, [confidential]. The parties argued that the JV brought about more choice for the consumers as Hamilton would have been the only operator on a Malta to Malta itinerary [confidential]. In addition, the parties contended that the efficiencies from the JV

were passed onto the consumer in terms of reduced fares and better quality products and services.

69. The market investigation showed that there are two different prices - the 'normal price' and the 'early booking price'. Whilst the 'normal price' increased, the 'early booking price' decreased. Overall, around 80 to 90 percent benefit from the 'early booking price' with regard to all itineraries, while 60 percent of customers booking a Malta to Malta cruise, benefit from the 'early booking price' by booking prior to January. Therefore, the OC considered it appropriate to use the 'early booking prices' as its benchmark to assess whether the efficiency gains were transferred to the consumers in terms of lower fares. The OC was satisfied that prices declined in 2010 when compared to the previous year for a Malta to Malta itinerary.

70. The OC also noted that in the absence of the JV, there would have been only one player in the market, namely Hamilton. Hence, consumer choice would have been severely restricted for the Malta to Malta itinerary.

71. In view of the above, the OC was satisfied that the JV has indeed achieved efficiency gains.

#### **I.7 FAILING FIRM DEFENCE**

72. The Notifying Parties submitted that *[confidential]*. This would have further reduced competition on the market.

73. The OC examined *[confidential]* by referring to the company's audited financial statements in terms of profitability, liquidity and solvency and verified its financial difficulties.

74. The OC considered that there was no less anticompetitive solution available and that had the parties not joined forces, *[confidential]*.

#### **J. ANCILLARY RESTRICTIONS**

75. The Notifying Parties submitted that contractual obligations exist in the draft Shareholders' Agreement that they consider to be directly related to and necessary for the implementation of the concentration. These relate to a non-compete obligation and a non-solicitation obligation imposed on the Notifying Parties or a shareholder in the Notifying Parties whilst they/he are/is

beneficially interested in the shares of the JV and for a period of [*confidential*] from when they/he cease/s to be beneficially interested in the shares of the JV. The OC noted that these two obligations refer solely to the same economic activity and territory of the JV. The OC considered these restrictions as directly related to and necessary for the implementation of the concentration and are therefore cleared by this decision.

## **DECISION**

76. For the above mentioned reasons and in terms of regulation 6 (1) (ii) of the Regulations on Control of Concentrations, it is therefore decided:

- (1) that the Concentration falls within the scope of the Regulations on Control of Concentrations;
- (2) that the Concentration does not raise serious doubts as to its lawfulness;
- (3) not to oppose the notified Concentration and to declare it a lawful Concentration.

**Dr Sylvann Aquilina Zahra**  
Director General (Competition)