

## **OFFICE FOR COMPETITION**

# **Decision to accept binding commitments offered by St Edward's College and In Design (Malta) Limited**

**(Case COMP-MCCAA 27/2014)**

**29 May 2018**

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## 1. Introduction

1. In this decision made under article 12C(1) of the Competition Act (the 'Act'), the Director General of the Office for Competition (the 'Office') accepts the binding commitments offered by St Edward's College and In Design (Malta) Limited.
2. As a result of accepting the commitments, the Director General considers that there are no longer grounds for action and the proceedings in this case should therefore be brought to an end. The Director General of the Office has made no final decision regarding the investigation on whether there have been any infringements of article 5(1) of the Act, as a result of the agreement entered into between St Edward's College and In Design (Malta) Ltd.
3. However, acceptance of the commitments does not prevent the Director General from reopening the investigation where it results to him that:
  - a) There has been a material change in any of the facts on which the decision was based; or
  - b) The undertaking or association of undertakings concerned acted contrary to its commitments; or
  - c) The decision was based on incomplete, incorrect or misleading information provided by the parties.<sup>1</sup>

## 2. The investigation of the Office

4. A complaint was lodged with the Office on the 16<sup>th</sup> September 2014 by a uniform supplier. The uniform supplier argued that St Edward's College (the 'school') informed the parents of students by an email dated 10<sup>th</sup> September 2014, that the school uniforms must be bought from In Design (Malta) Limited, which was indicated in the email as "the approved official sole distributor".
5. Upon receiving the complaint, the Office contacted St Edward's College (the 'school') to inform it regarding the said complaint and invited the school to a meeting at the Office to discuss this matter.
6. Following a meeting which was held on the 23<sup>rd</sup> October 2014, the College and the legal representatives were informed *via* an email from the Office dated 31<sup>st</sup> October 2014, that the school was to send an email or circular to the parents of students

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<sup>1</sup> Proviso to Article 12C(1) of the Act.

attending the school to address the competition concerns initially expressed by the Office.

7. Subsequently, no further feedback was received from the school and consequently, the Office informed the school by a letter dated 17th December 2014 that the Office had opened an investigation in this regard in terms of the Act. It also reminded the school that the Office had requested a circular to be issued by the school whereby the latter would inform the parents of students attending the school on the fact that the parents themselves on their own initiative can approach other uniform suppliers and purchase uniforms from these same suppliers. The Office considered that such a remedy was capable of being implemented effectively and within a short period of time.
8. Another meeting was held with the school on the 13th April 2015 and a Request for Information ('RFI') was sent on the 16th April 2015.
9. In the meantime, the school responded to the concerns initially expressed by the Office and informed the latter that an email dated 1st May 2015 was forwarded to all parents whose children attend the school, stating as follows:

*As you are by now well aware, school uniforms as per St. Edward's College's specifications are produced and sold by In Design (Malta) Limited.*

*We however been instructed by the Malta Competition and Consumer Affairs Authority to draw your attention to the fact that whilst insisting on the necessity of students attending school in full uniform, the College does not in any way prohibit parents from purchasing uniforms from other suppliers, as long as these are in line with specifications provided.*
10. The Office considered that the above correspondence did in fact address the issues raised in the abovementioned complaint. This notwithstanding, the Office subsequently decided on its own motion to further investigate the case and in view of this, it requested the parties to provide the Office with a copy of the agreement which was entered into between the school and In Design (Malta) Limited.
11. An additional RFI was sent to the school on the 26th October 2015, for further clarification on the previous RFI.
12. On the 19th November 2015, the Office received the replies from the school to the RFI. These replies contained copies of the agreement concluded between the school and In Design (Malta) Limited.
13. Consequently, the Office sent a letter to the school dated 7<sup>th</sup> March 2016 requesting St Edward's College to explain why does it consider that the agreement entered into between the school and In Design (Malta) Limited does not infringe competition rules.

14. On the 7<sup>th</sup> March 2016, a letter was also sent to In Design (Malta) Limited where the latter was informed on the complaint lodged against the school and was requested to provide a reply on the said complaint and to also explain why does it consider that the agreement concluded between In Design (Malta) Limited and the school does not infringe competition rules.
15. After analysing the agreement between the school and In Design (Malta) Limited and the replies of both parties, the Office conducted a preliminary assessment and reached a preliminary conclusion that there may have been a restriction of competition as a result of the agreement entered into between In Design (Malta) Limited and the school.
16. In a meeting dated 27<sup>th</sup> July 2016, the school and In Design (Malta) Limited indicated their intention to offer commitments to address the competition concerns of the Office.

## 2.1 The Addressees

17. This Decision is addressed to:
  - **In Design (Malta) Limited and;**
  - **St Edward's College**
18. In Design (Malta) Limited is a limited liability company which supplies schools with uniforms and it also supplies enterprises with corporate wear suitable for their particular industry.
19. St Edward's College is a private school which caters for students from the ages of 5 to 15. It also features a sixth form programme.
20. The relationship between In Design (Malta) Limited and St Edward's College is regulated by a contract, wherein In Design (Malta) Limited performs the sourcing and retail sales services of the school uniforms and any other accessories or items which the school may instruct it to sell from time to time<sup>2</sup>.
21. For the purposes of EU law, the Commission explains that any entity engaged in an economic activity, that is an activity consisting in offering goods or services on a given

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<sup>2</sup> Information obtained from the replies to the RFI of St Edward's College, dated 19<sup>th</sup> November 2015.

market, regardless of its legal status and the way in which it is financed, is considered an undertaking.

22. Article 2 of the Act states that: *Undertaking means any person whether an individual, a body corporate or unincorporate or any other entity, pursuing an economic activity, and includes a group of undertakings.*
23. In the case of St Edward's College, the Office considers that this school is engaged in an economic activity, namely the provision of educational services for payment and, as such it is to be considered an undertaking for the purposes of the Act.
24. Therefore, for the purposes of this decision, In Design (Malta) Limited and St Edward's College both qualify as undertakings within the meaning contemplated in Article 2 of the Act.

## 2.2 The Agreement

25. St Edward's College and In Design (Malta) Limited entered into an agreement dated 2<sup>nd</sup> July 2013, granting In Design (Malta) Limited the exclusive right to perform the sourcing and retail services of the school uniforms and other such items and accessories as instructed from time to time by St Edward's College. The agreement is valid for a period of 5 years and was to be further renewed through automatic renewal for further years.

## 2.3 The competition concerns of the Office

26. The Office informed the undertakings concerned regarding the identified competition concerns by a letter dated 20<sup>th</sup> July 2016. The competition concerns related to the duration of the agreement and the automatic renewal clause.
27. In its preliminary assessment, the Office expressed its preliminary views and concern that the agreement concluded between In Design (Malta) Ltd and the school may in fact raise concerns of market foreclosure which hinder and restrict competition because the exclusivity agreement was valid for five years, the duration of which was to be further prolonged through automatic renewal for further years.
28. In its preliminary assessment, the Office was of the view that a five year agreement of this kind was too long and may hinder competition. Moreover the automatic renewal clause makes this agreement further restrictive.
29. In Design (Malta) Limited responded by stating that it cannot reduce the length of the current agreement from five years to four, claiming that with two scholastic years until

the end of the current term of the agreement, they still have some remaining stock and it will be left with massive surplus if the agreement would terminate a year earlier than that agreed upon by the parties. In Design (Malta) Limited also argued that this stock was ordered much before these amendments were suggested by the Office.

30. In view of the abovementioned competition concerns, the Office requested a meeting to discuss these concerns and the way forward. Consequently, a meeting with In Design (Malta) Limited and the school was convened with the Office on the 27<sup>th</sup> July 2016.

## 2.4 The proposed commitments

31. On 3rd October 2016, for the purpose of addressing the competition concerns of the Office, In Design (Malta) Limited and the school submitted formal commitments pursuant to Article 12 (C) (1) of the Act. The parties did so without any admission of any liability/responsibility. The offering of commitments does not constitute an admission of infringement of the Act by the parties.
32. The Commitments were as follows:
  1. The parties agreed that the current agreement needs to be amended, completely removing the clause providing for automatic renewal.
  2. Moreover, a notice identical to the one approved by the Office, which the school had sent to all parents, was inserted with the same text on the school website in the uniform section which indicates the following: *“School uniforms as per St Edward's College's specifications are produced and sold by In Design (Malta) Limited. Kindly note that whilst insisting on the necessity of students attending school in full uniform, the College does not in any way prohibit parents from purchasing uniforms from other suppliers, as long as these are in line with specifications provided”*.

This notice can be accessed on the following link:

<http://www.stedwards.edu.mt/en/uniformsupplier>

3. St Edward's College has also agreed and has committed itself to issue a new Request for Quotations at the end of the term of the agreement, such agreement not having a duration longer than four years.

## 2.5 Publication of Commitments

33. According to Articles 12(C)(2)(a) of the Act, where the Director General intends to adopt a decision under sub article (1), he shall publish a concise summary of the case

and the main contents of the commitments or of the proposed course of action. In terms of Articles 12 (C)(2)(b), interested third parties may submit their observations within the time-limit fixed by the Director General in the publication.

34. The Office analysed the proposed commitments and on the basis of Article 12C(2)(a) of the Act, it decided to proceed with a publication on the Government Gazette and on the Website of the Malta Competition and Consumer Affairs Authority (“MCCAA”)<sup>3</sup>.
35. The Communication of the Office which was published on the Government Gazette and on the MCCAA website, included an invitation to third parties to submit comments on the abovementioned commitments.
36. The Office received third party comments on 19<sup>th</sup> January 2017. The Office analysed thoroughly these comments but concluded that the commitments offered by the parties were clear and precise and capable of being implemented effectively to meet the competition concerns expressed in the preliminary assessment. The Office maintains the position that it took in the notice pursuant to Article 12C(2)(a) of the Act, namely that the Commitments are adequate to meet the competition concerns expressed in the preliminary assessment.

## 2.6 Proportionality of the Commitments

37. In terms of article 12A (7) of the Act, in the interpretation of the Act and in the exercise of his responsibilities, in particular in the formulation of his decisions, orders and reports, the Director General shall have recourse *inter alia* to the judgements of the Court of Justice of the European Union, and to relevant decisions and statements of the European Commission
38. According to settled case law, the principle of proportionality requires that the measures adopted by Community institutions must be suitable and not exceed what is appropriate and necessary for attaining the objectives pursued<sup>4</sup>. Where there is a choice between several appropriate measures, recourse must be had to the least onerous one, and the disadvantages caused must not be disproportionate to the aims pursued. For the assessment of the proportionality of Commitments submitted within the framework of Article 9 of Regulation (EC) No 1/2003, the Commission takes into account that the Commitments are not imposed by the Commission to remedy an infringement established under Article 7(1) of Regulation (EC) No 1/2003, but

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<sup>3</sup> Publication dated 20th December 2016.

<sup>4</sup> Case T-260/94 *Air Inter v Commission* [1997] ECR II-997, paragraph 144, and Case T-65/98 [2003] ECR • - 4653 *Van den Bergh Foods v Commission*, paragraph 201.

voluntarily proposed by the party concerned with a view to bring the Commission procedure to an end without a formal decision on the existence of an infringement.

39. The Office considered settled case law of the Court of Justice of the European Union when it considered commitments which were made binding by the Commission in its cases. According to the case law of the Court of Justice of the European Union<sup>5</sup>, the Commission has a margin of appreciation in examining whether the commitments are appropriate and necessary, also in view of ensuring an efficient handling of competition cases. Specifically, the Court states that, in connection with the acceptance of commitments given by undertakings, compliance with the principle of proportionality requires the Commission only to ascertain that those commitments address the problems it has identified and expressed to the undertakings, and that they have not offered less onerous commitments that also address those concerns adequately. The Commission is not obliged to seek out less onerous or more moderate solutions than the commitments offered to it, or to compare the commitments offered by an undertaking with the (potential) measures it would itself have imposed in an Article 7 decision under Regulation (EC) No 1/2003, and to regard as disproportionate any commitment which goes beyond these (potential) measures.
40. It is the opinion of the Office that the Commitments proposed by the parties are necessary and sufficient to address the concerns identified by the Office in its preliminary assessment, without being disproportionate. Notably, it was the view of the Office that the parties entered into an agreement which may have restricted competition, in particular market foreclosure, given the long duration of the agreement and the automatic renewal clause inserted in that agreement. Moreover, had it not been for the notice which was published on the website of the College, the parents of students attending the college would have been given the impression that the school attire should be purchased solely from In Design (Malta) Limited.
41. The Commitments are suitable to remove the competition concerns expressed by the Office and are considered proportionate for the following reasons. The duration of any future agreements are to be made no longer than four years and this ensures that after the four years, another supplier would be able to acquire the rights to supply the school uniform. A period of four years would ensure that other uniform suppliers would be able to compete after the termination of the agreement. Moreover, the automatic renewal clause was prohibiting other suppliers from entering the market of supply of St Edward's College school uniforms and with the removal of this clause, the Office is rest assured that upon the termination of the agreement, the agreement is effectively terminated and the school would therefore have to issue a fresh Request for

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<sup>5</sup> Judgment in Case C-441/07 P Commission v Alrosa Company Ltd.

Quotation. In addition to the above, the notice published on the school website also made it clear that parents can still shop around and compare prices of school uniforms.

### **3. The decision of the Office**

42. By adopting a decision pursuant to Article 12C(1) of the Competition Act, the Office makes Commitments offered by the undertakings concerned binding upon them, since these commitments meet the concerns of the Office expressed in its preliminary assessment. This Decision does not conclude whether or not there has been or still is an infringement. The assessment of the Office of whether the Commitments offered are sufficient to meet its concerns is based on its preliminary assessment, representing the preliminary view of the Office based on the underlying investigation and analysis, and also taking into account the observations received from third parties, following the publication of the notice in the Government Gazette and on the website of the MCCAA, pursuant to Article 12C(2)(a) of the Competition Act.
43. In the light of the commitments offered, the Office considers that there are no longer grounds for action and, without prejudice to the proviso of Article 12C(1) of the Act, the proceedings in this case should therefore be brought to an end.

Godwin Mangion

Director General