



MALTA COMPETITION AND
CONSUMER AFFAIRS AUTHORITY

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Public Consultation on the National implementation of the ECN+ Directive (2019/1) into Maltese Competition law

NOTE: This background note highlights in summary form the most significant changes of the proposed amendments to Maltese Competition law and makes no claim to be comprehensive. It cannot, therefore, be seen as a substitute for the proposed law itself, nor can it be cited as a definitive interpretation of the proposed amendments. The laws accompanying the background note are in draft form, intended solely for consultation purposes, are not final and may be subject to changes.

Proposed amendments to Maltese Competition Law

SOME KEY HIGHLIGHTS

Immunity from penalties

Increase in the maximum penalty which can be imposed on undertakings for infringements of competition law to 10% of a company's worldwide turnover

Rejection of complaints when they are not considered an enforcement priority

The main aim of these proposed amendments is to transpose the ECN+ Directive (2019/1) which was published in the Official Journal of the European Union on 14 January 2019 and which must be transposed into national law by 4 February 2021. Although a number of requirements of the ECN+ directive were already incorporated in the new Competition Act which entered into force on 29 of July 2019, the proposed amendments have the aim of strengthening and enhancing the efficiency of Malta's competition law enforcement system and further align Malta's competition rules to the European Union's competition law.

This background note summarises the most significant changes that will be brought about by the new proposed amendments:

- **Leniency** - The Director General (DG) may refrain from requesting the imposition of penalties or may request a reduction of penalties for undertakings and associations which due to their cooperation with the Office for Competition contribute to the detection of secret cartels.
- **Immunity and reduction of penalties not limited to secret cartels-** The DG may also refrain from requesting the imposition of penalties or may request reduction of penalties also to those undertakings and, or association of undertakings which due to their cooperation with the Office for Competition contribute to uncover infringements other than secret cartels covered by article 5 of the Competition Act and, or Article 101 TFEU.
- **Increase in the maximum penalty for competition law infringements** - As required by article 15 of the ECN+ directive, the upper limit on competition penalties for infringements of the competition rules will be increased to 10% of a company's worldwide turnover, whereas currently the upper limit of 10% is currently based on the turnover generated in Malta on the affected market.
- **Closer Cooperation between Competition Authorities** - The new proposed amendments will enable cross-border notification and enforcement of fines and periodic penalty payments. The competition authorities will be able to request the service of documents in another member state or request assistance regarding the enforcement of fines and periodic penalty payments imposed in their decisions. Enhanced cooperation with other competition authorities will be possible through assistance of officials from other competition authorities during inspections conducted on their behalf.
- **Priority setting** - Introduction of the power of the DG of the Office for Competition to reject complaints when such complaints are not considered an enforcement priority in conformity with the requirement stipulated in Article 4(5) of the ECN+ Directive.

- **Dawn raids** - The Competition Act already provided that the Office may access any technological device to seize evidence of competition infringements. The Act now makes it clearly that this includes also external servers and cloud services which is accessible from the premises, land or means of transport of the undertaking being inspected. Moreover, in order to minimise the unnecessary prolongation of inspections, searches for information can continue at the premises of the Office or in other designated premises.
- **Periodic penalty payments** - Removal of the current maximum amount which is set at 5% of the average daily turnover of the undertaking concerned achieved in the preceding business year. The Office will request the imposition of periodic penalty payments which will be determined in proportion to the average daily total worldwide turnover, taking into account the requirements set out in article 16 of the ECN+ Directive that such periodic penalty payments must be effective, proportionate and dissuasive.
- **Independence** - Building on the existent provisions on independence, the amendments describe in greater detail the independence of the Office for Competition in particular that it acts independently from political and external influence when exercising its powers and enforce competition law, acts impartially and does not seek nor take instructions from any public or private entities when carrying out its duties. Moreover the independence of the Office for Competition is also ensured through safeguards regarding the criteria regulating the dismissal of the persons who take decisions under the Competition Act by explicitly providing for the clear grounds for dismissal.
- **Requests for information** - Currently requests for information can only be sent to undertakings and association of undertakings. Under the new proposed amendments, the Office for Competition can require any person to provide information for the application of articles 5 and, 9 of the Competition Act and, or Articles 101 and, or 102 TFEU. This means that the Office can send requests for information to persons which include individuals which are or were concerned in the management or control of the undertaking or association of undertakings concerned but also includes for example any individual which used to work for the undertaking under investigation including temporary or permanent employees, consultants, volunteers and professional advisors.
- **Interviews** - The Competition Act already provided that during any investigation the DG may receive written or verbal statements from any person. Now there will be the express introduction of the power of the DG to conduct interviews. This tool is important to collect evidence and to assist the Office to assess the value of already-collected evidence. During an interview any person may be called to answer any question on any matter relevant to the investigation for the application of articles 5 and, or 9 of the Competition Act and, or Articles 101 and, 102 TFEU. During the interview the DG can also take statements.
- **Penalties for breaches of procedural rules** - Currently, the penalties for procedural infringements contained in the Competition Act provides for maximum penalties of €30,000 and €50,000 according to the type of procedural infringement. In conformity with the requirements set out in article 13(2) of the ECN+ Directive, that the penalty must be effective, proportionate and dissuasive, the maximum amount of the penalty which can be imposed for procedural infringements under the Competition Act is €50,000 or a penalty not exceeding 1% of the total worldwide turnover of the undertaking whichever is the highest achieved in the preceding business year.
- **Accountability** - Accountability is already achieved through a requirement for the Office to report on an annual basis its activities to Parliament. Under the proposed amendments which transposes and implements the provisions of the Directive, such report shall also include information about the appointments and dismissals of the DG and the Directors, the amount of resources that were allocated in the relevant year to the Office, and any changes in that amount compared to previous years.

- **Financial autonomy** - Without prejudice to national budgetary rules and procedure, the Office for Competition shall be granted independence in the spending of the allocated budget for the purpose of carrying out its duties.
- **Transparency** - In view of the Office's commitment to be open and transparent about the work it does, the amendments introduce a clear power to publish any information in connection with the duties

of the Office for Competition while seeking to maintain the confidentiality of the information it obtains in the exercise of its functions.

- **Commitments** - Instead of instituting Court proceedings to initiate a commitments procedure the DG shall have the option to issue commitments decisions declaring commitments binding on undertakings and, or association of undertakings.