



GOVERNMENT OF MALTA

Government response to the Consultation on the National implementation of the ECN+ Directive (2019/1) into Maltese Competition law and other proposed amendments to the Competition Act

10th November 2020

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Executive Summary

Introduction and overview

1. A brief introduction about the subject.

Directive 2019/1 (the ECN+ Directive) aims at empowering national competition authorities in the European Union to become more effective enforcers by introducing certain common investigative and enforcement powers.

The national implementation of the ECN+ Directive will take place through the introduction of amendments to the Competition Act (Chapter 379 of the Laws of Malta), the Malta Competition and Consumer Affairs Authority Act (Chapter 510 of the laws of Malta) and the introduction of two new subsidiary legislations, the *Immunity from Penalties and Reduction of Penalties in Cartel Investigation Regulations* and the *Mutual Assistance between National Competition Authorities Regulations*.

The scope of the above-mentioned draft laws is to mainly transpose and implement the ECN+ Directive and to introduce other amendments to the Competition Act. The ECN+ Directive, which was published in the Official Journal of the European Union on 14 January 2019, 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.

2. The public consultation date.

Include the objective and purpose of the public consultation.

On the 2nd October 2020 the Government published a consultation regarding an Act to amend the Competition Act, Cap. 379 and the Malta Competition and Consumer Affairs Authority Act Cap. 510 with the objective and purpose to:

- *implement Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market*
- *provide for such matters ancillary or incidental thereto or connected therewith*

The Public consultation had also the objective and purpose to seek views on the introduction of two new subsidiary legislations under the Competition Act, the *Immunity from Penalties and Reduction of Penalties in Cartel Investigation Regulations* and the *Mutual Assistance between National Competition Authorities Regulations* which implement the provisions on leniency programmes for secret cartels and mutual assistance between competition authorities as found in *Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market*.

3. This consultation sought views on:

- The implementation of *Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market* into national legislation
- Other amendments to the Competition Act.

The following are the main amendments on which the consultation sought views on:

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.

Responses to the consultation and process used to seek stakeholder views

This document is the Government Response to this consultation and sets out the Government's decisions on these matters.

4. The closing date of the public consultation. Which methods were used to receive the feedback. The total amount of responses. From whom you received the feedback.

The consultation closed on 30 October 2020. The consultation document and the reply form were available online and responses were accepted electronically and on paper. The Office also informed a number of stakeholders of this public consultation. The Office also sent questions to DG COMP which provided its feedback on these questions. In total, there were 2 responses: 1 from a private individual and 1 from DG COMP. DG COMP provided feedback as a result of questions sent by the Office for Competition. A list of respondents can be found at Annex A (optional).

5. Include (if any) meetings with stakeholders and list who the stakeholders were.

No meetings were held during the consultation period.

Summary of responses and decisions

The following is a summary of the consultation responses received. We would like to thank all those who took the time to respond to the consultation and participate in stakeholder meetings around the consultation exercise.

6. Statistics.

- Total feedback received: 2
- Total feedback received by individuals: 1
- Total feedback received by organisations: 0
- Total feedback received through email: 2
- Total feedback received through online form: 0
- Total feedback received by post: 0

7. Summary of feedback received.

One comment from a private individual made reference to the business year which should be taken into consideration when imposing a penalty for a breach of the procedural rules. Views were sought from DG COMP on this matter and on the reference year to be taken into consideration for infringements of national competition rules and articles 101 and, or 102 of the Treaty on the Functioning of the European Union (TFEU). Feedback was received from DG COMP.

Regarding infringements of national competition rules and articles 101 and, or 102 TFEU DG COMP made reference to article 15 of the ECN+ Directive which refers to the business year preceding the decision imposing the penalty, which in Malta's case would be the judgement imposing the penalty. Regarding procedural infringements DG COMP considers that while the penalty can be calculated by reference to the business year preceding the procedural infringement, the penalty should also be calculated by reference to the business year preceding the decision to impose the procedural penalty.

8. Your assessment and the Government's decision (list the Government's decisions).

Having reviewed the responses and further to an updated assessment of the draft laws some amendments will be included. In view of this and the opinions from the consultation exercise, the Government has decided to introduce the following amendments:

- Turnover to be calculated by reference to the business year preceding the judgement imposing the penalty
- Inclusion of a transitory provision
- During the course of the investigation the Director General may also have recourse to other sources as long as they are consistent with the competition law judgements of the Court of Justice of the European Union and to decisions and statements of the European Commission

Implementation

9. When you intend to implement the decisions

Revisions to the bill will be implemented prior to the Parliamentary process.

Contact Details

If you have any questions regarding this response, please contact:
publicconsultation.mccaa@mccaa.org.mt

Annex A: List of respondents

Private Individual
DG COMP