



MCCAA

MALTA COMPETITION AND
CONSUMER AFFAIRS AUTHORITY

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FINAL REPORT ON THE SECTOR INQUIRY ON THE SUPPLY OF INFANT MILK FORMULA IN THE PUBLIC HEALTH SECTOR AND THE IMPACT OF THAT SUPPLY ON THE PRIVATE RETAIL MARKET FOR: A) FROM BIRTH INFANT FORMULA, B) FOLLOW-ON FORMULA AND C) TODDLER MILK OR OTHER FORMULA FOR THE PERIOD 2013 -2019

OFFICE FOR COMPETITION – CASE COMP/MCCAA/7/2020

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In accordance with Article 28 of the Malta Competition and Consumer Affairs Authority Act, any information which the inquiry group considered to be confidential and/or revealing business secrets has been redacted from this version. All omissions are indicated by [X] while sensitive market data has been replaced by a range in square brackets.

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Executive Summary

On 4 June 2019, the Office for Competition received a letter from one of the local suppliers of infant formula and similar products alleging that the public contract for the supply of infant formula to Mater Dei Hospital is distorting competition in the private retail market for the focal product.

The World Health Organisation recognises breastfeeding as the best feeding practice to nourish an infant. However, this inquiry focuses on the competitive aspects of the market in cases where the parents use and purchase infant formula in the first years of their infant's life. If for any reason, an infant is not breastfed, then infant formula is the only appropriate alternative milk source from the age of zero to one year.

Following preliminary investigations, the Office for Competition initiated a sector inquiry on the supply of infant milk formula in the public health sector covering the 2013 – 2019 period, in terms of Article 11A (1) of the Competition Act (Cap. 379 of the Laws of Malta). The sector inquiry assessed whether the procurement process adopted by the Central Procurement and Supplies Unit is distorting competition in the secondary markets.

On 28 April 2021, the Office for Competition published a preliminary report in terms of Article 11A (3) of the Competition Act, which contained the findings of the Office for Competition and concluded that the procurement process adopted by the Central Procurement and Supplies Unit at Mater Dei Hospital is distorting competition in the secondary markets.

The Director General of the Office for Competition invited interested parties to submit their comments on the preliminary report. The public consultation ran from 28 April 2021 until 31 May 2021.

Following the public consultation period, the Office for Competition is publishing this final sector inquiry report, recommending actions to the Central Procurement and Supplies Unit to better its procurement process for the well-functioning of the secondary markets. The Office has formulated specific recommendations that it considers absolutely necessary, appropriate, and in accordance with the principle of proportionality to create conditions of effective competition.

FINDINGS OF THE OFFICE FOR COMPETITION

on the Sector Inquiry on the Supply of Infant Milk Formula in the Public Health Sector and the Impact of that Supply on the Private Retail Market for: (i) from Birth Infant Formula, (ii) Follow-On Formula, and (iii) Toddler Milk or other Formula for the Period 2013-2019

The Office for Competition,

Having heard the submissions made by the Central Procurement and Supplies Unit and market operators,

Having considered the provisions of the Competition Act (Chapter 379 of the Laws of Malta),

Having recourse to the judgements of the Court of Justice of the European Union, and to relevant decisions and statements of the European Commission,

Having regard to foreign case law,

Whereas:

1. Introduction

1.1 The Role of the Office for Competition

1. The mission statement of the Malta Competition and Consumer Affairs Authority (henceforth 'MCCAA') is *"the attainment and maintenance of well-functioning markets for the benefit of consumers and economic operators"*¹. To this end, the Authority is entrusted with a number of functions amongst which is *"to promote and enhance competition"*². This function is carried out by the Office for Competition (hereinafter referred to as the 'Office') which is empowered by law to apply and enforce the Competition Act, Cap. 379 of the Laws of Malta.
2. In addition to its enforcement role, the Office also has the responsibility to resort to non-enforcement measures. In fact, Article 14(1) of the MCCAA Act explicitly provides that the Office has the responsibility to *"keep under review markets and commercial activities relating to the supply of goods and services and to collect information and evidence for the purpose of ascertaining whether such markets and activities may adversely affect the interests of consumers"*³ and *"to study markets and recommend action where required"*⁴. These provisions are backed by the possibility to undertake market sector inquiries under the Competition Act⁵.
3. The MCCAA Act also empowers the Office to act as an advisor to public authorities on matters related to competition. Both the World Bank and the OECD noted that *"...Competition may be lessened significantly by various public policies and institutional arrangements as well. Indeed, private restrictive business practices are often facilitated by various government interventions in the marketplace. Thus, the mandate of the competition office extends beyond merely enforcing the competition law. It must also participate more broadly in the formulation of its country's economic policies, which may adversely affect competitive market structure, business conduct, and economic performance. It must assume the role of competition advocate, acting proactively to bring about government policies that lower barriers to entry, promote deregulation and trade liberalization, and otherwise minimize unnecessary government intervention in the marketplace"*⁶.

[Emphasis Added]

¹ Article 4(1) of the Malta Competition and Consumer Affairs Authority Act (henceforth 'MCCAA Act'), Chapter 510 of the Laws of Malta.

² Article 4(2)(a) of the MCCAA Act.

³ Article 14(1)(d) of the MCCAA Act.

⁴ Article 14(1)(e) of the MCCAA Act.

⁵ Article 11A. (1) of the Competition Act.

⁶ The World Bank, OECD: *A Framework for the Design and Implementation of Competition Law and Policy*, Chapter 6, at 93, 1998.

In this respect, the MCCA Act empowers the Office as being responsible to “provide advice to public authorities about the competition implications of proposals for legislation”⁷, “provide advice to public authorities on the competition issues which may arise in the performance of their functions”⁸ and “provide advice on the competition constraints imposed either by legislation, policy or administrative practices”⁹.

1.2 Aim of the Study

4. On 4 June 2019, the Office received a letter from one of the suppliers of infant formula, follow-on formula, other formula and milk products for older infants or toddlers (hereinafter referred collectively as the ‘Focal Product’) in the private market alleging that the public contract for the supply of infant formula to Mater Dei Hospital is distorting competition in the private retail market for the focal product. This is attributed to the procurement process adopted by the Central Procurement & Supplies Unit (henceforth ‘CPSU’) at Mater Dei Hospital which, due to lock-in effects between the primary and secondary markets, is having a negative effect on the private retail market for the focal product.
5. The supplier presented data which shows that between 2015 and 2017, its level of sales experienced a gradual decline relative to previous periods and even took a turn for the worse in the latter period, i.e. 2017 to the date of the complaint.
6. The primary market refers to the public procurement by Mater Dei Hospital to cater for those parents whose newborn is fed infant formula at the state hospital and is strictly bounded to the time spent at the hospital, i.e. from childbirth up until discharge. On the other hand, the secondary market (also referred to as the ‘private retail market’) refers to the private retail market for the focal product in Malta.
7. The complainant argued that individuals whose children are born at the state hospital develop what is known as *state dependence*¹⁰, i.e. the tendency of consumers in the market for formula to stick to the same brand that their baby would have been fed (and adapted to) at the state hospital. In part, this is due to the parents’ fear that their newborn will find it difficult to adapt to another formula brand after their baby would have adapted to the initial brand. This creates a sense of inertia and a barrier for customers to switch between different formula brands, thereby creating a lock-in effect that provides an unfair competition advantage on the secondary market to the supplier of formula to Mater Dei Hospital.

⁷ Article 14(1)(g) of the MCCA Act.

⁸ Article 14(1)(h) of the MCCA Act.

⁹ Article 14(1)(i) of the MCCA Act.

¹⁰ The term “**state dependence**” – This refers to situations in which the consumer’s initial choice affects his or her future choices.

8. The complainant further argued that such lock-in effects do not only affect the market for birth infant formula that is consumed by babies between the ages 0 – 6 months old, but also the other formula products consumed by older infants and toddlers namely, follow-on formula consumed by infants between the 6-12 month age bracket and toddler milk and other formula products consumed by infants aged 1 year and over. In fact, the complainant furnished the Office with evidence highlighting that paediatricians never recommend their consumers to switch formula brands if the infant is responding well to that brand.
9. Following this complaint, the Office launched a fact-finding mission to:
 - better understand the procurement process adopted by CPSU,
 - assess in broad terms the primary and secondary markets for the focal product in Malta,
 - review empirical studies and evidence on the argument put forward by the complainant on the lock-in effects between the primary and secondary markets, and
 - carefully examine national and international regulations and practices governing these markets.

Following its preliminary investigation, the Office opined that the complaint warrants a deeper investigation and as a result, on 7 April 2020, the Director General of the Office for Competition initiated a sector inquiry on the supply of infant milk formula in the public health sector covering the 2013 – 2019 period, in terms of Article 11A (1) of the Competition Act.

10. The primary objective of the sector inquiry was to assess whether the procurement process adopted by CPSU in the primary market is distorting competition in the secondary market for the focal product and if so, exercise its advocacy role and suggest recommendations to CPSU for the betterment and well-functioning of markets.

2. Facts of the Case

11. Following the complaint received by the Office on 4 June 2019, the Office opined that the crux of the supplier's arguments hinges on whether the alleged lock-in effects are supported by empirical evidence. As a result, in the initial stages, the Office focused its efforts on reviewing studies on state dependence, i.e. whether the infant formula brand consumed in the primary market affects consumption patterns in the secondary market for the focal product.
12. The Office refers to market studies conducted by the Competition Commission of Singapore (2017) and by the Antitrust Authority of Israel (2018)¹¹ whereby it was observed that there is a

¹¹ See in this regard: Competition Commission of Singapore 2017 - Market Inquiry into the Supply of Formula Milk for Infants and Young Children in Singapore, available at: <https://www.cccs.gov.sg/media-and-consultation/newsroom/media-releases/formula-milk-market-inquiry-findings> and Israel Antitrust Authority 2018 - Impact Study: Infant Formula Industry.

link between the formula brand consumed by newborns at the hospital and the formula brand purchased by parents in secondary markets¹². It was observed that, in general, parents do not switch brands except in cases of digestive problems caused to the baby and, to a much lesser extent, in cases where the market price for the brand offered by the hospital is high.

13. These studies also highlighted that most babies consume formula for the first time in the hospital maternity ward. The presence of a formula brand in the hospital is viewed by consumers as a signal of *medical legitimacy* that further strengthens the perception of the quality and reliability of the product. Due to this, these studies found evidence of strong affinity between the formula products offered to the parents in hospital, and especially the product given to the baby, and the formula product fed to the infant after being discharged from the hospital. This creates significant barriers to entry for new brands and barriers for expansion for existing brands on the secondary markets.
14. On 10 July 2019, the Office met with representatives of the CPSU and the Contracts Department to discuss the matter further and obtain their views on the subject of the complaint. Given that CPSU is a public authority, the Office exercised its advocacy functions as laid down in Article 14(1) of the MCCA Act.
15. Following that meeting, the Office sent a letter to CPSU on 17 July 2019 to inform in writing the arguments put forward by the Office in the aforementioned meeting. The letter sent to CPSU is being reproduced hereunder:

Reference is being made to the meeting held on the 10th July 2019 between the Office for Competition ("hereinafter the Office") and representatives from the Central Procurement and Supplies Unit (hereinafter "the CPSU") and the Contracts Department concerning the tender for the supply of infant formula at Mater Dei Hospital.

The subject of the meeting concerned a letter received from the Office from a supplier of infant formula, follow-on formula and other formula or milk products for older infants or toddlers in the private retail market, whereby it was alleged that the public contract of supply of infant formula at the Mater Dei Hospital is causing a distortion of competition on the supply in the private retail market for infant formula, follow on-formula and other formula or milk products for older infants or toddlers.

After hearing the views of all the parties concerned, the Office is hereby exercising its advocacy role on the competition issues concerning the subject in caption in terms of Article 14(1)(h) and

¹² Huang, Y., Labiner-Wolfe J, Huang H, Choiniere CJ, Fein SB (2013). "Association of health profession and direct-to-consumer marketing with infant formula choice and switching." *Birth*, 40(1), 24-31: In their study, mothers were asked about the reasons that led them to choose a particular formula until the baby was one month old and then switch the formula when the baby was 2, 5, 7 and 9 months old. The research findings show that the two most common reasons for the mother's choice of formula in the first month were the formula used to feed the baby at the hospital and the doctor's recommendation. It was also found that a small number of mothers switched formula during the first 9 months of the baby's life; see also Reiff, M.I. and Essock-Viatle, S.M (1985). "Hospital Influences on Early Infant-feeding Practices", *Pediatrics*, 76(6), 872-879: The study found that the practice of a "home brand" formula in the hospital greatly influences mothers who gave birth in the hospital to continue selecting that brand after leaving the hospital - even if the price is higher than the prices of competitors.

(i) of the Malta Competition and Consumer Affairs Authority Act (Chapter 510 of the Laws of Malta). Competition advocacy is defined by the International Competition Network (ICN) as “all those activities conducted by the competition agency that have to do with the promotion of a competitive environment by means of non-enforcement mechanisms, mainly through its relationships with other governmental entities and by increasing public awareness of the benefits of competition.

The Office considers that the tendering process for the supply of infant formula at Mater Dei Hospital whereby one supplier wins the tender for the procurement of infant formula in the public health service is distorting competition in a number of secondary markets in the private retail market (i.e. retail shops and pharmacies selling infant formula, follow on formula and other formula or milk products for older infants or toddlers), creating barriers to entry and expansion for other suppliers of infant formula, follow on formula and other formula or milk products for older infants or toddlers. The Office conducted its research on other foreign markets on the supply of formula milk for infants and young children. From these studies carried out by competition authorities, it transpires that for a number of years, parents have the tendency to continue purchasing the same brand which was provided to their children at the hospital, in the belief that this is the best brand since it is being offered at hospital. These studies demonstrate how unlike other products where switching is common, the majority of parents do not typically switch between different brands of formula milk unless their children experience adverse reactions with that brand. This happens because naturally, mothers who are offered one brand of infant formula at the hospital will gain a strong loyalty towards the brand which was supplied in the hospital.

The Office has also reviewed The Infant Feeding: Bottle Feeding and the Use of Formula Milk Policy and Guidelines prepared by the Mater Dei Hospital Breastfeeding Steering Committee and the Office considers that the Policy does not specify that only one operator should be able to offer the infant formula at the hospital. The Policy also makes it clear that there are several brands of infant formula and there is no evidence that one is better than another. The emphasis of this Policy is to ensure that mothers are informed of the benefits of breastfeeding and it also specifies that breastfeeding is preferred than infant formula. However, regarding infant formula, the Policy states that it is important for all brands to offer the required nutritional content - and this is also safeguarded and guaranteed in the Subsidiary Legislation 449.52 – Infant Formula and Follow-on Formulae Regulations, which specify the nutritional content of infant formula.

Moreover, this product market also faces legal barriers to entry/expansion for suppliers of infant formula as the law clearly prohibits all advertising and other forms of promotion of infant formula. In fact, Regulation 10 of the abovementioned Regulations provides that:

10.(1) Advertising of infant formulae shall be restricted to publications specialising in baby care and scientific publications. Such advertisements for infant formulae shall be subject to the conditions laid down in regulation 9(5) to (9) and regulation 9(10)(b) and contain only information

of a scientific and factual nature. Such information shall not imply or create a belief that bottle-feeding is equivalent or superior to breast feeding.

(2) There shall be no point-of-sale advertising, giving of samples or any other promotional device to induce sales of infant formula directly to the consumer at the retail level, such as special displays, discount coupons, premiums, special sales, loss-leaders and tie-in sales.

(3) Manufacturers and distributors of infant formulae shall not provide, to the general public or to pregnant women, mothers or members of their families, free or low-priced products, samples or any other promotional gifts, either directly or indirectly via the health care system or health workers.

The Office took also into consideration the views put forward by both representatives of the Department of Contracts and the representatives of the CPSU.

In view of the above, the Office advocates towards a system where a choice of product is offered to the parents at Mater Dei Hospital and at the same time, suppliers must always guarantee security of supply of infant formula to the public health service in a timely manner.

16. Following this correspondence, a reply was received from CPSU where *inter alia*, they argued that they have different legislations to follow and that the process that is chosen by the department according to the said legislation does not have any such intention to distort competition.
17. On 23 July 2019, the Office sent a reply re-stating its views that the conclusions raised by the Office were also supported by the market inquiries undertaken by foreign competition authorities and academic papers in the field. Furthermore, the Office supported its views by arguing that the significantly low marginal prices quoted by the winning bidders to supply the primary market are in themselves evidence of the substantial advantages enjoyed in the secondary markets by the single-dominant supplier (N.B. singular since CPSU does not allow multiple suppliers to operate at the state hospitals) furnishing the primary market. The abnormally low marginal prices quoted by different market operators to supply infant formula to the primary market demonstrates the operators' understanding that any financial losses incurred in the primary market can be easily recouped and more than offset by the lock-in effects with the private retail market.
18. Following this correspondence, CPSU highlighted that the tendering process is currently being evaluated and as a result, there can be no interference from their part on the outcome of the process as this is required by law to be an autonomous process. CPSU further noted that the Public Procurement Regulations provide channels through which economic operators can object and file in an appeal, should they deem the process or outcome objectionable. As a result, CPSU recommended to allow the evaluation process to take its course and in the event of an objection, the party can raise its arguments before the Public Contracts Review Board or before a Maltese Court of Law.

3. Legal Basis

19. The Office understood that the matter raised by the complainant merits further investigation and indeed, on 7 April 2020, the Director General of the Office for Competition initiated a sector inquiry on the supply of infant milk formula in the public health sector covering the 2013 – 2019 period, in terms of Article 11A(1) of the Competition Act.
20. Article 11A(1) of the Competition Act states that, “[W]here the trend of trade, the rigidity of prices or other circumstances suggest that competition may be restricted or distorted within the Maltese market, the Director General may conduct an inquiry into a particular sector of the economy or into a particular type of agreements across various sectors”.
21. The importance of conducting a sector inquiry is also reflected on EU level. The European Commission carries out sector inquiries into sectors of the economy and into types of agreements across various sectors when it believes that a market is not functioning properly.
22. As aforementioned, in terms of Article 14 of the MCCA Act, the Office is responsible for keeping under review markets and commercial activities relating to the supply of goods and services and to collect information and evidence for the purpose of ascertaining whether such markets and activities may adversely affect the interests of consumers. Where required, the Office is also requested to recommend actions for the betterment of markets.
23. Since CPSU does not qualify as an ‘*undertaking*’ within the meaning of Article 2 of the Competition Act since it is not engaged in any form of economic activity, automatically precluded the Office from investigating the matters under Articles 5 and/or 9 of the Competition Act and/or Articles 101 and/or 102 of the Treaty on the Functioning of the European Union. Notwithstanding this, in view that CPSU as a public authority may be engaging in administrative practices or having functions and responsibilities that could restrain competition in the market, the Office considered the assessment of the complainant under Article 11A(1) of the Competition Act.
24. The subject matter of the sector inquiry is to assess whether the supply of infant milk formula in the public health sector between 2013 and 2019 distorted competition in the secondary markets of the focal product. The secondary market encapsulates:
 - a. From Birth Infant Formula consisting in the market for infant formula formulated in order to best meet the nutritional requirements for newborns aged 0-6 months;
 - b. Infant formula consisting in the market for follow-on formula formulated to meet the nutritional requirements of infants from 6 to 12 months of age; and
 - c. Toddler milks or other formula products consumed by infants aged over 1 year

and sold across different retail channels, i.e. grocery retail shops, pharmacies, other retail outlets, and vending machines.

4. Methodology

25. In terms of Article 12 of the Competition Act, the Office sent requests for information (henceforth 'RFI') to a number of market operators operating in the secondary market of the focal product. A copy of the RFI can be found in Appendix A. The following undertakings were requested by the Office to answer the RFI:

- Nestlé Malta
- Vivian Corporation Limited
- Alfred Gera & Sons Limited
- V.J. Salomone Pharma Limited
- AM Mangion Limited
- Pemix Distributors Limited
- Cherubino Limited

26. As highlighted in Appendix A, the undertakings were requested to identify the competitors in the market, and to provide all the formula products supplied by their respective company, segregated by brand, weight, type, age and form. To conduct market shares analysis, the Office requested the volume of sales in kilograms (hereinafter referred to as "Kgs") and the net turnover (value of sales net of value added tax, sales rebates and other revenues related taxes) on an annual basis for the years 2013-2019.

27. Furthermore, the RFI requested all respondents to list all the mediums through which their products were sold over the past ten years, including supermarkets and pharmacies.

28. The market players' views regarding the procurement process adopted by CPSU were also solicited. To this end, the Office asked the market operators to provide their views as to whether they deem the tendering process adopted by CPSU for the supply of infant formula in the public sector as causing competition distortions in the private retail market and whether they were experiencing adverse economic effects as a result of the tender.

29. The RFIs were sent by the Office on 7 April 2020. The deadline for responding to the Office's RFI was 6 May 2020. Following a query from one of the suppliers, the Office clarified that data on the volume of sales and net turnover, refers to sales in kgs realised in Malta and turnover realised in Malta net of exports in private retail markets, i.e. turnover related to the primary

market should be excluded from these figures. The data requested covers the period subject to this sector inquiry, i.e. 2013 – 2019.

30. Since one of the contacted suppliers was not present in the retail and pharmaceutical channels for supplying the focal product in the secondary markets, the Office decided to exclude this supplier from its analysis, hence only six suppliers were considered for concentration analysis.

5. Assessing the Impact of the Tender in the Maltese Market

31. To assess the impact of the tender issued by the CPSU on the supply of infant milk formula in the public health sector on the private retail market and to develop our findings on whether or not the procurement process and other features of the market are harming competition, the Office assessed the timeline of the tenders and the tender awards. Market characteristics including the evolution of market shares of different market operators and the presence of any barriers to entry and expansion for the period 2013-2019 were also assessed.

5.1 Market Players operating in the infant formula and follow-on markets

32. The Office found that there are only a few suppliers on the secondary markets of the Infant formula and the Subsequent Formula Markets in Malta. Until the end of 2019, only six suppliers were actively operating in the private retail market. These were:

- Nestlé Malta
- Vivian Corporation Limited
- Alfred Gera & Sons Limited
- AM Mangion Limited
- Pemix Distributors Limited
- Cherubino Limited

5.2 Market Definition

5.2.1 Product Market

33. The product markets identified by the Office are the following:

- (i) *Primary Market*: this market consists of infant formula supplied in ready-to-feed 70-100ml bottles and suitable for infants aged 0-6 months. This product is almost exclusively purchased by the public health service. The product is not readily available on the private retail market.
- (ii) *From Birth Infant Formula*: infant formula formulated to best meet the nutritional requirements for newborns aged 0-6 months. Infant formulae are defined as “...foodstuffs intended for particular nutritional use by infants during the first months of life and satisfying by themselves the nutritional requirements of such infants until the introduction of appropriate complementary feeding”¹³.

This means that non-breastfed infants and/or infants not wholly dependent on breastfeeding between the 0-6 months age bracket should only consume infant formula or infant formula along with breast-milk save for the latter months, i.e. between the fourth and the sixth month, where it is usually advised to start introducing small proportions of baby food. Notwithstanding this, even in the latter months, infants would still be largely dependent on the formula product as their main source of food intake. It is noteworthy that at that age, ordinary milk and/or other food do not satisfy the required nutritional requirements and, as a result, are not regarded to be substitutable to formula.

- (iii) *Follow-on Formula*: follow-on formula is formulated to meet the nutritional requirements of infants between the 6-12 months age bracket. Follow-on Formula is defined as “...foodstuffs intended for particular nutritional use by infants when appropriate complementary feeding is introduced and constituting the principal liquid element in a progressively diversified diet of such infants”¹⁴.

As was the case with the previous age bracket, ordinary milk does not satisfy the required nutritional requirements for infants aged between 6-12 months and is therefore not regarded to be substitutable to the formula product.

- (iv) *Toddler milk or other formula from 1 year onwards*: this market consists of other formula products for infants/toddlers over the age of one year. While infants over the age of 12 months may consume ordinary milk, mothers may still choose to continue using formula since this product is specifically targeted to meet the nutritional requirements of young children up to 3 years of age.

¹³ Regulation 4(2)(c) of the Infant Formulae and Follow-On Formulae Regulations, Subsidiary Legislation 449.52.

¹⁴ Regulation 4(2)(d) of the Infant Formulae and Follow-On Formulae Regulations, Subsidiary Legislation 449.52.

5.2.2 Geographic Market

34. The European Commission defines the geographic market as “*comprising the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous, and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area*”¹⁵.
35. For the purposes of this sector inquiry, the Office defines the geographic market as consisting of the sales of infant formula, follow-on formula and toddler milk and other formula within the national territory of Malta.

5.3 Timeline of Tenders issued by CPSU

5.3.1 The First Tender

36. CPSU/CPU/1035/2012 (hereinafter referred to as “Tender 1”) titled ‘*Supply of Ready to Feed Feeds*’ was the first tender issued by CPSU on 18 October 2012 covering the period between April 2014 and April 2015. The award criteria was solely based on the cheapest price and subject to satisfy a number of administrative and technical conditions as follows:
- a. Bottles must be sterile and ready to use;
 - b. Bottles should be made of glass to avoid potential contamination;
 - c. Capacity of bottles should be between 90-100ml;
 - d. Bottle must be able to be used at least twice (for two feedings) in order to reduce waste;
 - e. Bottles must have disposable teats which allow two feeds per bottle;
 - f. Bottles must have metal pop-up lid which reseals the bottle after opening in order to make it useable for at least two feeds;
 - g. The Ready-To-Feed Formula must be suitable for infants aged between 0-6 months;
 - h. Average nutritional content: energy 60-70 kCal, cow’s milk protein:1.8-3 grams per 100 kCal, fat content:4.4-6 grams per 100 kCal, carbohydrate 9-14 grams per 100 kCal;
 - i. The product must be gluten-free;

¹⁵ Commission Notice on the definition of the relevant market for the purposes of Community competition law (97/C 372/03), paragraph 8.

- j. Any other specific nutrient, mineral or vitamin must be in line with Directive 2006/141/EC or equivalent to LN 304/2007 on infant and follow-on formulae;
- k. Delivered product must contain expiry date and manufacture date on each bottle;
- l. The label on the product is to contain information in English or Maltese;
- m. The delivered Ready-To-Feed feeds must have a shelf life of at least 9 calendar months from date of delivery;

5.3.2 The Second Tender

- 37. CPSU/MDH/1029/2015 (hereinafter referred to as “Tender 2”) titled ‘*Tender for the Supply of Ready To Feed Feeds*’ was the second tender issued by CPSU on 21 April 2015 following the expiration of the first tender. This tender was awarded to a different supplier from the one which had won the first tender and its duration was for a period of three years, i.e. the contract of supply spanned the period mid-2015 to mid-2018.
- 38. Tender 2 essentially included the same terms and conditions of Tender 1 with minor exceptions in the bottle capacity range and bottle material. The main difference was that the time period covered increased from one year to three years. Tender 2 reflected the same award criteria as in Tender 1 *ergo* lowest price.

5.3.3 Subsequent Tenders

- 39. On 17 July 2018, CPSU published another tender titled ‘*Tender for the Supply of Ready to Feed Feeds - 70-100 ML*’. As the case with the previous two, this tender covered the primary market and spanned a period of three years with an option to further extend it by a further 6 months. However, this tender was cancelled on 20 July 2018 by CPSU to make amendments in the technical specifications for supply.
- 40. On 23 April 2019, CPSU issued another tender titled ‘*Tender for the Supply of Ready Made Preterm Formula and Ready Made Formula suitable for 0-6 months*’. This tender covered two separate lots. Lot 1 for Ready Made Preterm Formula and Lot 2 for Ready Made Formula Suitable for 0-6 months. Again, this tender through Lot 2 covered the primary market for a period of 18 months with an option to extend it further by 6 months.
- 41. On 12 December 2019, the Public Contracts Review Board issued a decision on this tender. The Public Contracts Review Board found that the offers submitted by the successful bidder for Lot 1 (Preterm Babies) and 2 (Newborn Babies), and by another economic operator for Lot 2

(Newborn Babies), were, as a matter of fact, abnormally low and the Public Contracts Review Board ordered that the evaluation committee investigates further these offers by obtaining the necessary explanations and documentation from these bidders, and to this end directed that a fresh evaluation process is carried out. On 9 October 2020, CPSU cancelled the Fourth Tender.

42. It is the understanding of the Office that between the commencement date of Tender 2, i.e. mid-2015 up until 2019, CPSU only effected purchases of ready-to-feed feeds from the supplier who was awarded Tender 2. This means that even though Tender 2 expired in mid-2018, the supplier continued to enjoy single dominance in supplying its product to public hospitals after the lapse of the second tender till the year 2019.

5.4 Barriers to Entry for New Brands and Barriers to Expansion for Existing Brands

43. Barriers to entry concern the difficulties for new market operators to gain access to the market. On the other hand, barriers to expansion refer to factors that may restrict the ability of a new entrant or an existing competitor, that is equally if not more efficient than an incumbent, to grow its market share. The Office assesses such barriers to entry and expansion in the markets covered by this sector inquiry.
44. The Competition and Markets Authority (UK) notes that “...*entry or expansion by firms, or the prospect of entry or expansion by firms within a short time, will often stimulate competition and can sometimes countervail against features which might otherwise give rise to an adverse effect on competition. A significant source of competitive discipline may therefore be eliminated or reduced if there is any barrier to market entry and/or expansion, whether an absolute barrier or some other form of restriction such as aspects of the market that deter entry*”¹⁶.

5.4.1 Procurement Process – One-Brand Policy at State Hospital

45. Except for one market player which decided not to submit its views before the Office, all market players concurred that the procurement process adopted by CPSU since October 2012 has distorted competition in the secondary markets. According to the respondents, the procurement process adopted by CPSU in the last years acted as a significant barrier to entry and expansion.
46. The suppliers contended that while they understand the importance that state hospitals need to offer from birth infant formula, the procurement of one brand to the exclusion of all others,

¹⁶ Competition and Markets Authority (2015). *Retail banking market investigation – Barriers to entry and expansion: capital requirements, IT and payment systems. Paragraph 2*. See also *Guidelines for market investigations: Their role, procedures, assessment and remedies* (CC3 (Revised)), paragraphs 205 - 236. This guidance was originally published by the Competition Commission (CC) and adopted by the CMA Board.

gives the wrong impression that the brand supplied at the state hospital is ‘medically superior’ when compared to the other brands since it is ‘chosen’ by health authorities.

47. Indeed, the Office considers that the fact that the hospital uses one particular brand of infant formula is acting as an important barrier to entry and expansion. This is evidenced from the market shares analysis present below which shows that the brand of the supplier which was awarded Tender 2, experienced significant increases in its market shares in the secondary markets. Notwithstanding that all formulas are nutritionally interchangeable and that there is no evidence to recommend one brand over another, the fact that the hospital provides one brand, serves as an implicit endorsement of a particular brand of formula by the hospital, making the entry of new and existing brands that are unfamiliar with parents more difficult. This is limiting the ability of other suppliers to compete in the secondary markets.

5.4.2 Advertising

48. To further strengthen and promote breastfeeding, advertisement of infant milk formula is prohibited. In fact, way back in 1981, the World Health Assembly of the WHO presented the International Code on Marketing of Breastmilk Substitutes – a global public health strategy aimed towards restricting the marketing and promotion of infant formula, in turn inducing to *“regulating inappropriate sales of infant foods that can be used to replace breast milk”*¹⁷.
49. The European Directive 2006/141/EC¹⁸ was introduced in 2006 by the EU to regulate the marketing of breastmilk substitutes. This Directive was embedded in the Maltese Legislation by the introduction of The Infant formulae and Follow-on Formulae 2007 Regulations, L.N. 304 of 2007 Subsidiary Legislation 449.52¹⁹. As per regulation 10, of the Maltese Legislation, any form of advertising or any form of marketing strategies at the point of sale, promotions, discounts of infant formulae at retail level is prohibited. This means that no supplier active on the market can promote and advertise infant formula to potential customers.
50. This means that the restrictions prevent any competitor that is bound by the WHO Code and the Regulations to overcome the advantage gained by the successful bidder in the procurement process through advertising and marketing. Thus, the successful bidder has the advantage of having its product present to all potential users at a very crucial point (i.e. to mothers having just given birth at the hospital).

¹⁷ WHO. (1981). *International Code of Marketing of Breast Milk Substitutes*. Available at https://www.who.int/nutrition/publications/code_english.pdf.

¹⁸ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006L0141&from=EN>

¹⁹ <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=11129&l=1>

5.4.3 Brand Loyalty and resistance to switch brands.

51. In their replies, most suppliers outlined that another major challenge faced by suppliers in this market is consumer brand loyalty. According to the suppliers, mothers' brand loyalty and the mother's resistance to switching brands also constitute significant barriers to expansion. In general, parents tend to develop consumer loyalty towards the brand provided at the national state hospital, as very often they associate it to be of premium quality. As a result, save for health reasons, parents do not switch between brands out of fear that a change in formula may cause adverse reactions in their infants even though all brands of infant formula available on the Maltese market are of equal quality and nutrition. Also, paediatricians advise against brand switching if the child is doing well on the infant formula provided. As a result, the brand provided in the primary market also affects the secondary market - lock-in effects between markets.
52. The suppliers also stated that second-time mothers are more likely to resort to using the brand used for the first child if their experience of using the Infant formula for their first child was a positive one.
53. The fact that brand loyalty acts as a high barrier to entry and expansion is also supported by other competition authorities such as the Competition Commission of Singapore.²⁰ In its market inquiry into the supply of formula milk for infants and young children in Singapore, it is stated that brand loyalty and the reluctance of parents to switch to a new brand are described as *"formidable barrier"*²¹ to entry for new Formula milk brands. In fact, it was stated that:
- "Unlike other products where switching is prevalent and common, it appears that majority of parents do not typically switch between different brands of Formula Milk, unless their babies or children experience problems when consuming the Formula Milk. Hence, once babies use a particular brand of RTF Formula Milk in hospital and do not show any adverse reactions to it, it is very likely that parents will continue to use the same brand of Formula Milk after leaving the hospital"*²².
54. In its consideration of an acquisition in the health industry in 2013,²³ the Australian Competition and Consumer Commission (hereinafter 'ACCC') formed the view that barriers to entry and expansion are high for infant formula, follow-on formula and formula given to older toddlers because of brand loyalty formed by marketing through the health system:
- "Retail consumers exhibit a high degree of brand loyalty to their preferred brand which continues throughout the lifecycle of a consumer's use of Infant Formula and Follow-on***

²⁰ Market Inquiry into the Supply of Formula Milk for Infants and Young Children in Singapore. Available at: <https://www.cccs.gov.sg/media-and-consultation/newsroom/media-releases/formula-milk-market-inquiry-findings>

²¹ Ibid. par. 146, page 49.

²² Ibid. para. 125, page 43.

²³ Australian Competition and Consumer Commission. (2013). *Nestlé proposed acquisition of Pfizer Nutrition*. Available at: <https://www.accc.gov.au/system/files/public-registers/documents/MER13%2B3744.pdf>

*Milk and Growing up Milks. The ACCC considered that the **primary barrier to entry and expansion is the high degree of brand loyalty attached to the brands of the major incumbent suppliers***²⁴.

[Emphasis Added]

55. Indeed, the ACCC concluded that because advertising or promotion direct to consumers was restricted,

“...the reputation and credibility of a brand of infant formula is established over many years through suppliers actively engaging in building relationships with healthcare professionals and through a history of supply to, and association with, the hospital channel”.

56. The market share analysis presented in the next section of the report provides evidence that consumers tend to continue purchasing the brand provided by the hospital. This is not just for infants aged 0-6 months, but also for the other products suitable for other categories of infants aged 6-12 months and 1-3 years.

5.4.4 First-mover advantage

57. From the data gathered by the Office, it is evident that the bidder winning the tender has a first-mover advantage due to the significant winner-takes-all effects in the secondary markets. This enables the winning bidder to gain a competitive advantage by establishing a strong brand recognition and customer loyalty when compared to the other competitors which are left out of the primary market.

58. When considered together with the high barriers to entry and expansion, the first-mover advantage of the winning bidder makes disruptive competition nearly impossible.

59. This view is also shared by the Singapore Competition Authority:

“Given that majority of parents who use Formula Milk in hospitals do not have a preferred brand and tend not to switch brands of Formula Milk after leaving the hospital, manufacturers have invested significant efforts and resources into the marketing activities in the hospital channel to gain a ‘first-mover’ advantage”²⁵).

5.4.5 Winner-takes-all effects

²⁴ Ibid.

²⁵ Competition Commission of Singapore. (2017). *Market Inquiry into the Supply of Formula Milk for Infants and Young Children in Singapore*. Available at: <https://www.ccs.gov.sg/media-and-consultation/newsroom/media-releases/formula-milk-market-inquiry-findings>

60. The Office considers that the way the procurement process is devised leads to a winner-takes-it-all scenario, favouring one player at the expense of the rest of all other market players. Indeed, the market shares analysis presented in the next section of this report highlights that all the suppliers operating outside the primary market did not gain any market share - they either experienced declines in their market shares or were only able to marginally increase them by 1 to 2 percentage points. On the other hand, the winning bidder was able to significantly raise its market share since 2015. This confirms that the formula brand given at the state hospital is again chosen by parents in the secondary market.
61. This winner-takes-all market is hard to disrupt and the procurement process is acting as a barrier to expansion for other market players. The Office opines that the procurement process is causing an economic moat, with distinct advantages enjoyed by the supplier operating in the primary market. This type of advantage which is being conferred by the procurement process on one undertaking in the public sector is creating an effective and substantial barrier against competition from other undertakings in the supply of infant formula in the private retail market, creating a disproportionate advantage in capturing the consumers in the supply of infant formula in the private market.
62. The market share analysis highlights serious foreclosure effects, effectively further suppressing competition. Due to the interdependency of the private and public markets, it could be that few suppliers will remain in the private market in the long-term. This could potentially lead to less consumer choice and higher prices, both hampering consumer welfare.

5.4.6 Overall conclusions on barriers to entry and expansion

63. The small number of market players reflects the existence of several barriers that are present in the secondary markets. These barriers stem from the current procurement process, the nature of the market and the pattern of consumption in this industry.
64. The Office finds that the procurement process adopted by CPSU coupled with the traits that characterize these markets, i.e.
- (i) the policy of having just one brand of formula supplied at the state hospital,
 - (ii) the lengthy duration of the contract for the provision of the formula product to the state hospital (Tender 2 effectively covered mid-2015 till mid-2018),
 - (iii) the inability to advertise, and
 - (iv) consumers' brand loyalty,

make it difficult for new entrants and existing suppliers to enter and expand their market shares. This means that the winning bidder is also a “sure” winner in the secondary market – hence, the winner-takes-all effect.

6. Market shares

65. The Office calculated the market shares of the market players based on sales volumes and values for the product and geographic markets delineated for the period 2013-2019.
66. As explained in the methodology section, the suppliers of infant milk were requested to provide the Office with data on the volume of sales in (Kgs) and sales turnover (€) for the period 2013-2019. Data was requested separately for the three age groups, i.e. 0-6 months, 6-12 months, and 1 year and over. Given that not all suppliers were in a position to provide the data from 2010, for uniformity purposes, the Office opted to examine market shares for the period 2013-2019.
67. The Office decided to analyse this period because it considered that the relevant period of the sector inquiry should include within it both a period of time when the hospital provided different brands at the hospital (i.e., pre-2014) and the time the hospital started being supplied by the successful bidder following a procurement process (i.e., post-April 2014) to 2019. This is important for the Office to compare the situation pre-tender with the situation post-tender.
68. As highlighted in paragraph 32, market share analysis is conducted based on six suppliers. It is noteworthy that one of the suppliers entered in the market in 2016. As a result, the Office could not conduct trend analysis for the brand supplied by this supplier, yet it was still included in the market share calculations as it provides the Office with hard evidence as to how new entrants are being effected by the current market mechanisms.

6.1 Market share analysis (0-6 months)

Table 1 - Market Shares (0 - 6 months) based on Sales in Kgs for the period 2013-2019.

[✂].

Source: Office calculations based on data provided by the undertakings in response to the request for information

Table 2 - Market Shares (0 - 6 months) based on Sales Turnover (€) for the period 2013-2019.

[X].

Source: Office calculations based on data provided by the undertakings in response to the request for information

69. The above market share analysis confirms the supplier that won Tender 2 has been the market leader since 2013, enjoying a [0-10] percentage points lead from the next largest brand in 2013. The gap between the market leader and the next largest brand further increased by [20-30] percentage points in 2019 when compared to 2013.
70. The effect of the tender emerges from that fact that, between 2013 and 2015, the brand supplied by the winner of Tender 1, registered an increase in its market share of between of [0-5] percentage points. However, the same brand registered a gradual decrease in market share of between [10-20] percentage points during the period 2015 and 2019.
71. As soon as Tender 2 was awarded to another supplier in 2015, the winning bidder registered a significant increase in its market share in 2016 which market share kept on increasing year after year. Between 2015 and 2019, the brand supplied at the hospital experienced significant positive changes with an increase in market shares of [20-30] percentage points. By 2017, the Office estimates the market share of the winning bidder to be twice as large as that enjoyed by the brand of the second largest competitor. Moreover, by the end of 2019, the winning bidder enjoyed a market share which according to EU case law points towards a presumption of dominance.
72. The existence of significant barriers to entry and expansion is also evidenced from the market shares of the remaining market players. The Office notes that, during the period under review, the market shares of the other brands increased marginally by 1 to 2 percentage points. The second largest competitor did not make any inroads; instead experiencing a decline of [0-10] percentage points during the period covered by this inquiry. Moreover, a new brand that came on to the private retail markets only managed to acquire insignificant market shares between 2016 and 2019.

6.2 Market share analysis (6-12 months)

Table 3 - Market Shares (6-12 months) based on Sales in Kgs for the period 2013-2019.

[X].

Source: Office calculations based on data provided by the undertakings in response to the request for information

Table 4 - Market Shares (6-12 months) based on Sales Turnover (€) for the period 2013-2019.

[✂].

Source: Office calculations based on data provided by the undertakings in response to the request for information

73. The same trend observed for the 0-6 months age category is also evident for the 6-12 months age group.
74. Considering the barriers identified in section 5 of the report, as a priori expected, the brand which was being supplied at the hospital since 2015 managed to substantially increase its market share between 2015-2019 by [10-20] percentage points. The brand supplied at the hospital is the only brand which market share managed to continue growing at an increasing rate in the follow-on formula market. The market shares are clear evidence that considering that the same brand has been the only choice available at national state hospital since 2015, parents have continued using the same brand of formula in subsequent years.
75. Overall, the remaining brands all experienced a decrease in the market share with two brands registering a decrease of between [10-20] percentage points. The second largest competitor experienced a decline in market shares of between [0-10] percentage points. Moreover, the new entrant in the market only managed to increase its market share marginally in three years.

6.3 Market share analysis (12 months and over)

Table 5 - Market Shares (12 months and over) based on Sales in Kgs for the period 2013-2019.

[✂].

Source: Office calculations based on data provided by the undertakings in response to the request for information

Table 6 - Market Shares (12 months and over) based on Sales Turnover (€) for the period 2013-2019.

[✂].

Source: Office calculations based on data provided by the undertakings in response to the request for information

76. The highly positive trend witnessed in the previous age groups is also witnessed here. The market share of the brand which was available in the state hospital increased substantially over the years with an increase of between [10-20] percentage points. This is clear evidence that consumers continue to purchase the brand provided in hospital not just for infants aged 0-6 months, but also for the other products suitable for other categories of infants aged 6-12 months and 1-3 years.
77. Two brands registered a substantial decrease in market shares of between [10-20] percentage points between 2015 and 2019. The second largest competitor only managed to increase its market share by a marginal amount. The entrant on the market only registered a superfluous increase in its market share.

6.4 Conclusion on the market shares

78. Based on the above analysis, it is evident that the winning bidder can maintain high and stable market shares on the secondary markets in all age groups. This reduction in market shares observed in all three age groups for the remaining market players inevitably indicates the benefits stemming for the supplier winning the tender and the long-term effects arising from its sole presence on the primary market.
79. The new entrant has found difficulties to penetrate the secondary markets. Although entry has occurred, market penetration has been minimal.
80. Based on the Office's analysis, the infant milk formula market in Malta is dominated by one brand in all three stages of the infant milk market. The effect of the tender is evidently present, and as seen here, the longer the tender, the greater is the impact on the private retail market. This is evidenced by the fact that Tender 1, covering supply for only one year, did not significantly increase the market share of the winning bidder.

7. The Position of CPSU

81. On 23 November 2020, CPSU replied *inter alia* that following discussions with MCCAA, they decided to reduce the contract period in order to promote frequent brand changes. It was also stated that it was not in the interest of the Health Department to manage different brands for the same item since tenders are awarded to the cheapest, technically compliant offer. According to CPSU, this methodology fully adheres with local and EU legislation.

82. On 26 November 2020, CPSU sent another reply stating *inter alia* that while it can reduce the tender timelines, it will stick to current specifications where breast-feeding is promoted and that CPSU cannot have multiple suppliers for various reasons. It was also stated that for the past two years, CPSU's procurement process was halted and as a result, risked of not having milk in the state hospital – unideal for a variety of clinical reasons. CPSU also stated that they could not change the current process *inter alia* as this goes against the relevant policies and regulations.

83. On 3 December 2020, the Office replied:

"In your email it is stated that the CPSU risked of having no milk in hospital and this is not ideal for different clinical reasons. If CPSU is facing or have 'risked having no milk in hospital', the Office believes that relying on one supplier does not help on this front hence the said 'clinical need' to mitigate risks by having alternative choices".

84. On 31 March 2021, CPSU sent a reply to the Office stating that, as already mentioned in previous correspondence, it must abide by all the policies in force at Mater Dei Hospital, when procuring items to be used within this entity. The current policy at Mater Dei Hospital dictates that breast-feeding is to be the primary source of feeding for infants, especially since Mater Dei Hospital abides by its breast-feeding policy and is considered as a breast-feeding hospital.

7.1 Meeting held with representatives of the MCCA

85. CPSU referred to a meeting held with MCCA, whereby it was stated that when it comes to Public Procurement, CPSU procures on behalf of the NHS (National Health Sector) and not the private sector.

86. CPSU further stated that it is obliged to abide by numerous pieces of legislation currently in force, and when issuing procurement cycles, the Public Procurement Regulations further dictate and regulate the procedures which need to be followed.

87. CPSU also held that the contract period was shortened as per MCCA suggestions, as well as widened the Technical Specifications, whilst also ensuring conformity with the relevant legislations in force. These changes were implemented to promote brand circulation and to enable more potential economic operators to submit their offers for the said call.

7.2 Possible alternatives

88. CPSU held that whilst re-affirming its position that the Contracting Authority has always abided by the Legislations in force, CPSU would have no 'prima facie' objection with the possibilities

of re-packaging or de-branding of the products being supplied to the primary market. However, this needs to be discussed further to determine whether this breaches any other policies or legislation currently in force as well as to determine the potential repercussions ensuant thereof. Furthermore, this would need to be discussed between all market players relevant to the product in question.

7.3 Customer choice

89. CPSU also explained that procuring infant formula from multiple suppliers is not possible, although there exists the possibility of procuring a different brand of milk formula in the eventuality that the need arises for particular babies.
90. CPSU made it clear that it does not compel, force nor suggest products to the parents of babies born in hospital, nor is it present in the hospital wards or in contact with the parents in any manner.

7.4 Conclusion

91. Therefore, CPSU holds that, in exercising its rights as a Contracting Authority when publishing procurement cycles, it has always acted in line with the Public Procurement Regulations as well as all other relevant legislation in force as confirmed by the Court of Appeal judgements dated 17 March 2021²⁶.
92. Furthermore, CPSU submits that they have always co-operated with the Office for Competition, so much so that the contract period was reduced, and technical specifications were opened to further encourage economic operators to participate in the tendering process, thereby ensuring fair and open competition.

²⁶ *Vivian Corporation Limited vs Central Procurement and Supplies Unit Et*

8. Recommendations by Market Participants

93. In the views submitted to the Office, the market participants highlighted a number of recommendations which CPSU could implement in order to alleviate competition distortions in the secondary market. These are synthesized below²⁷:

I. Customer Choice and Market Accessibility in the Primary Market

94. Market players advocated the availability of multiple brands at the state hospital, thereby offering 'from birth infant formula' choice to the parents during the post-natal period. CPSU could achieve this by establishing a reasonable price and offering the possibility for all suppliers to provide their products at the set price.

95. One such method is for CPSU to establish a reasonable price after conducting market research and all competitors should match this price if they want to operate in the primary market.

96. This would eliminate the brand loyalty barrier in the secondary market and offers choice to parents in the primary market. Market players highlighted that before 2014, multiple brands were available at the hospital and that such system should be reintroduced.

97. To safeguard a level playing field without distorting the private retail market and offer choice to parents, the suggestion is to reintroduce a system whereby multiple brands are available at the hospital as it was before 2014, with the difference that instead of powder format, from birth infant formula would be available in RTD format (Ready-to-drink).

98. The suppliers stated that all brands should have an equal presence in the primary market, thereby ensuring that the parents' decision is based on choice of brand rather than limited to availability of supply.

99. It was further recommended that if all brands are made available within the Post Natal department each economic operator should be responsible to closely monitor stock levels and expiry dates so as to minimise wastage and take on the stock management if this remains an issue for CPSU/ Mater Dei.

²⁷ The views, thoughts, and opinions expressed in section 8 of this report belong solely to the market players and should not be interpreted as being the views of the Office for Competition or MCCA. The Office may or may not agree with the views proposed by the market players.

II. Duration of Contract

100. Duration of the public contract should be limited to 12-24 months without the possibility of auto-renewal. It was suggested that this proposal could be easily implementable by CPSU and one which will guarantee that every 12-24 months, there will be fresh competition between the undertakings on the market and also allowing new entrants on the market to participate in the tender. Moreover, it was recommended that CPSU should also manage, with advance and diligent planning, to issue a competitive tender process in the appropriate time and always before the expiry of the then current public contract.

III. No Brand Labels

101. Should the CPSU decide to stick with the current policy, then the winning bidder should not be allowed to brand package its products in the primary market. The importance of infant formula products at the state hospital is one of necessity and therefore, should not serve as a promotional platform for locking-in parents in the secondary market. Literature²⁸ shows that parents interpret the brand being supplied at the state hospital as being superior to the other brands available in the secondary market, thereby distorting competition in the private retail market.

9. Results from the Sector Inquiry

102. Based on the market study carried out by the Office and the views submitted by the market participants, the following points emerged:

- (i) With the exception of the one market player that failed to submit its views before the Office, all market players concurred that the procurement process adopted by CPSU since October 2012 has distorted competition in the secondary markets identified above.
- (ii) Based on the market shares calculated by the Office, it is evident that the tendering process adopted by CPSU at Mater Dei Hospital is providing an unfair advantage to the winning bidder in the secondary markets. This is due to a number of factors:
 - a. Due to internal policies, CPSU limits 'from birth infant formula' provided at Mater Dei Hospital to only one brand, hence restricting consumer choice.

²⁸ Vide footnote 1.

The fact that parents of newborn babies are only exposed to one brand without being offered any choice gives the impression that the brand offered at Mater Dei Hospital is the best brand. Given the high degree of consumer brand loyalty present in the sector, this is providing the winning bidder with a competitive advantage in the secondary markets;

- b. Restrictions on advertising and promotions for 'from birth infant formula' products are further solidifying the market position of the winning bidder; and,
- c. The lengthy duration of the contract awarded through the tender enjoyed is exacerbating the distortion of competition in the secondary markets.

103. There is clear market evidence showing a direct positive relationship between the tendering process and the market position gained by the winning bidder. The Office considers that such relationship is mainly attributable to the above factors.

104. As reported in section 6 of this report, the winning bidder gains significant market share in the secondary markets.

105. The changes in the market share of the winning bidder have been observed to increase significantly over the years, with accelerations observed in cases where the awarded tender is protracted. The Office opines that the market characteristics and barriers identified in section 5 of the report are acting as barriers to expansion for the remaining brands.

10. Conclusion reached in the Preliminary Report

106. Based on the above, the Office is of the view that the procurement process adopted by CPSU is restricting and distorting competition in the relevant sector, particularly because of state dependence and high barriers to entry and expansion. This is the same view expressed by the market operators.

107. Based on the information in its possession, the Office is of the view that CPSU has not provided a justified reason as to why multiple suppliers cannot operate at the National State hospital. If CPSU risked of not having milk in the state hospital, the Office considers the reliance on one supplier as not contributing to this end. This risk could be mitigated by allowing more than one supplier to render services at the state hospital, thereby providing consumer choice.

108. The Office does not understand how the current system adopted by CPSU, which is favouring a presumably single-dominant player in the primary market is alleviating the mentioned health issues. Single dominance is not a necessary nor a sufficient condition for

security of supply or to address the mentioned health issues but a critical factor for distorting competition.

10.1 Judgement of the Court of Appeal

109. Noteworthy is a judgement delivered by the Court of Appeal on the 17 March 2021²⁹ which referred to the recommendation of the Director General of the Office for Competition on the matter. Indeed, the Court directed CPSU to evaluate and give proper weight to the advocacy of the Director General. In the judgement the Court of Appeal held *inter alia* that,

“Dan, fil-fehma tal-qorti, juri illi l-iskrutinju ma għandux ikun limitat għall-ambitu tas-sejha nfisha u tal-proċess tal-għażla, iżda wkoll jestendi, kif tippretendi l-appellanti, għal kontest usa’ biex iqis jekk fost l-effetti tas-sejha u tal-għażla tal-prodott għall-akkwist pubbliku jkunx hemm konsegwenzi bi ksur ta’ dak li tgħid u trid il-liġi li tirregola l- kompetizzjoni, fosthom dawk li jistgħu de facto jwasslu għall-ħolqien ta’ monopolju.

Ċertament huwa desiderabbli li ma jitteħdux inizjattivi li jistgħu jwasslu għal sitwazzjoni fejn operatur ekonomiku jkollu dominanza fis-suq. Relevanti f’dan il-kuntest ix-xieħda mogħtija mid-Direttur Ġenerali (Kompetizzjoni) quddiem il-Bord ta’ Reviżjoni fis-sens illi “having one sole supplier is distorting competition in the secondary market and creating barriers to entry of other suppliers”, u l-parir tiegħu “to have all products available in hospitals and let the mothers chose their brand” u “to have an open procedure with a choice of brands”.

[...]

*“Din il-qorti iżda tkun qiegħda tonqos jekk – kompatibilment mad-dmir u s-setgħa tagħha li tara li titħares il-liġi, u li titħares il-liġi kollha mhux biss dik tal-akkwist pubbliku għalkemm dan il-każ tnissel fil-qafas ta’ din il-liġi – **ma tgħidx li tkun għaqlija l-awtorità kontraenti jekk tqis u tagħti piż xieraq lill-fehma u parir tad-Direttur Ġenerali (Kompetizzjoni) dwar l-effetti potenzjalment anti-kompetitivi tal-għażla tagħha**”.*

[Emphasis Added]

110. In this report, the Office presented a summary of the findings that emerged out of the investigation. It can be concluded that the market being studied is characterised by few players as the market is endowed with several barriers. A new entrant that would be able to overcome the listed barriers may still not be able to gain a significant market share due to the nature of the market itself.

²⁹ 12/2021/1 Vivian Corporation Limited vs Central Procurment and Supplies Unit Et

11. Response to the public consultation

111. Following the publication of the Preliminary Report on 28 April 2021, the Director General of the Office for Competition initiated a public consultation process to provide the opportunity to interested third parties to submit their comments on the outcome of the investigation conducted by the Office and to recommend appropriate actions to be taken by the competent authority to address any competition distortions in the primary and secondary markets which are occurring as a result of the procurement process adopted by the CPSU.

112. During the public consultation, the Office received the views from five stakeholders, one from the CPSU and four from different market operators. For reasons of confidentiality, the identity of the market operators has been suppressed. The public consultation ran from the 28 April 2021 until the 31 May 2021.

113. The Office wishes to thank all the parties who submitted their observations and feedback. The subsequent paragraphs outline the comments received.

114. All the market players that participated in the public consultation agreed with the findings of the Office submitted in the Preliminary Report and considered them to reflect their concerns on the procurement process adopted by the CPSU for the supply of infant formula in the public health sector. The parties concurred that the tendering process adopted by CPSU is distorting and restricting competition in the secondary retail market of infant formula, follow-on formula and toddler milk or other formula due to particular features, namely:

- i. the brand consumed in hospital (the primary market) affects consumption patterns in the secondary retail market. This is due to two reasons. First, parents perceive the brand provided by the state hospital as being the best possible brand for their baby; and second, once discharged, parents tend to continue using that same brand as long as the baby is doing well on the brand provided by the hospital (which is generally the case). As a result, parents develop a strong brand loyalty towards the brand provided by the hospital. One party noted that even in cases where the baby is not doing well on the type of infant formula provided by the hospital (e.g., due to digestive problems), parents do not usually switch brand but switch to a special type of infant formula of the same brand (e.g., lactose-free formula).
- ii. significant barriers to entry and expansion, these being the promotion by Mater Dei Hospital of one particular brand, the legal prohibition of advertising of infant formula (Subsidiary Legislation 449.52), consumer brand loyalty and lock-in effects, and first-mover advantage, together with other barriers to entry and expansion listed in subsequent paragraphs. On the point of advertising, one market player noted that whilst all operators are prohibited by

law from engaging in advertising of infant formula, the successful bidder's presence in hospital serves in itself as a strong advertising mechanism, overcoming the legal barrier on advertising whilst at the same time further disadvantaging the other operators.

115. Those submitting their views, save for CPSU, also agreed with the Office's conclusions that the tendering process adopted by CPSU at Mater Dei Hospital is providing an unfair advantage to the winning bidder, enabling it to gain significant market share in the secondary retail markets and that the longer the duration of the tender favouring one supplier, the greater the harmful effects on competition.

116. The arguments put forward by CPSU that were reported in the Preliminary Report were reiterated by CPSU itself and lambasted by the parties that participated in the public consultation process. The views received by the Office are synthesized in the next section on a per argument basis.

a. Assessing the Impact of the Tender in the Maltese Market

117. **CPSU:** In the Preliminary Report, the Office used the period 2013-2019 without giving due importance to the Public Procurement Regulations enacted in 2016 (Subsidiary Legislation 601.03). CPSU noted that the pillars of public procurement are threefold: competitiveness/equal playing field, transparency and proportionality, and accountability. CPSU strives to reach and respect these principles in all public procurement cycles published by them.

118. Furthermore, CPSU disagrees with the submission that there is a direct relationship between the tendering process and the market position gained by the winning bidder. Various factors affect the volume of sales, be it an increase or decrease; therefore, the fault of such declines in sales volumes should not be attributed to the procurement procedures as adopted by CPSU.

119. **Market Player/s:** In a market already characterised by few market players, as now confirmed by the Office in the Preliminary Report, foreclosure is a serious threat, which the Office must imminently address. When one considers the importance of the focal product, protecting the parameters of competition and the structure of the market becomes even more imperative.

b. Procurement Process – One Brand Policy at State Hospital

120. **CPSU:** Contrary to what is being alleged, CPSU has always acted in line with legislation, including but not limited to the public procurement regulations and the rules and

guidelines issued by the Department of Contracts. It must be noted that the procurement procedures and policies adopted by CPSU are in line with the aforementioned legislation and, therefore, such procurement procedures cannot be deemed as acting as barriers to entry and expansion. Furthermore, CPSU is not against the option of having unbranded products, provided that such an option does not run counter or go against any other relevant legislation and policies.

121. Furthermore, CPSU submits that the different brands option posed logistical and administrative issues on the Contracting Authority and the increased likelihood of cross contamination between products. The suppliers may also allege an indirect negative effect on their sales by claiming that one product is favoured over another by members of the staff.

122. **Market Player/s:** Due to internal policies, CPSU limits birth infant formula provided at Mater Dei Hospital to only one brand, restricting consumer choice. The fact that parents of newborns are exposed to one brand without being offered any choice, gives the impression that the brand offered at Mater Dei Hospital is the best. Moreover, once out of hospital, if a parent sees that his or her newborn is doing well on the milk provided at MDH, they will not switch to another brand when out of the hospital.

123. Moreover, we feel the need to comment that the current system is abusive because it acts as a promoter of one brand. All operators understand that they have to work within the regulatory and ethical framework offering the formula milk within 0-12 months. So, everybody must ensure that competition and compliance to the regulatory constraints are adhered to at the end of the day.

124. **Market Player/s:** There is no provision in the public procurement regulations that obliges CPSU to adhere to its current practice and refrain from making various brands available in hospitals.

125. CPSU claims that whilst it is not possible to procure infant formula from multiple suppliers, the possibility of procuring a different brand of infant formula where the need arises exists. It is submitted that if it is possible to make arrangements for different brands in particular circumstances, it should be possible to generally make arrangements for different brands. Indeed, this exposes the limitations of the current situation, which necessitates special arrangements in particular cases as opposed to a situation where no such special arrangements are necessary as alternative brands are already readily available in the hospital.

126. CPSU also argues that the current procurement process is in line with Mater Dei's breast-feeding policy. Whilst the market players agree with the policy that 'breastmilk is best' as advocated by the WHO, it is noteworthy that Mater Dei's breast-feeding policy contains no prohibition on making available multiple brands of formula in the hospital. Indeed, for mothers

who are unable to breastfeed, infant formula is an essential product that must be provided by hospital. In the circumstances, it therefore makes sense to give the mothers choice. Whether one or multiple brands are offered is not going to detract from the fact that breastmilk is best or induce mothers to shift away from breast-feeding to bottle-feeding, as CPSU is implying. Indeed, nowhere does the Preliminary Report advocate that Mater Dei should detract from its policy or encourage bottle-feeding over breast-feeding.

127. Furthermore, we also agree with the observation made by the Office that the presence of one brand in hospital is putting Mater Dei in a vulnerable position in terms of security of supply as it is relying on only one source when in reality it has the option to avail itself of multiple sources.

c. Advertising

128. **CPSU:** In the latest Procurement Cycles for the focal product, CPSU has shown and proven their support for open and fair competition, so much so that to enhance open competition, the technical specifications have been widened, as well as the duration of the contract decreased to provide for a rotation of products. CPSU wish to submit that whilst the report indicates that bidders are against the procurement procedures adopted by CPSU, wherein they allege that the said procedure limits competition and distorts the private market, the said bidders nonetheless choose to submit their bids with the sole intention of being awarded the said contract and having their product stocked at the State Hospital.

129. **Market Player/s:** CPSU has considered that reducing the contract period will promote brand changes. However, reducing the contract period alone will not address the consumer welfare problems and the harmful effects on competition identified with CPSU's current practice. In particular, it will not eliminate the problem of lack of choice for parents and the risk of foreclosure and marginalisation of the unsuccessful bidders. Indeed, there is no guarantee that all the suppliers will at any one point win the tender, and it is more likely that the incumbent, which apparently can afford to bid at abnormally low prices, will continue to win the tender.

d. Customer Choice, Brand Loyalty and Resistance to Switch Brands

130. **CPSU:** CPSU submit that they agree with the views of the Office in paragraphs 89-90.
131. When CPSU purchased a product, which was not available in the private market, CPSU did not receive any requests or information or complaints from the parents about the fact that the product was not available in the private market.

132. **Market Player/s:** Reference is made to page 9 of the Preliminary Report whereby it is stated: *"It was observed that, in general, parents do not switch brands except in cases of digestive problems caused to the baby and, to a much lesser extent, in cases where the market price for the brand offered by the hospital is high."*
133. Our comments to this observation are that when parents switch due to digestive issues, the speciality milk of the same brand is usually switched to. On top of that, parents are highly unlikely to switch due to price and not *'to a much lesser extent'*.
134. **Market Player/s:** In the case of the relevant products, once parents are locked into a particular brand, the parents' primary concern to preserve the wellbeing of their baby ousts any desire to make savings and significantly deters parents from switching brands even if the price they may be paying is higher than that of other brands. The risk that their baby may not do well or as well on another brand is perceived as too high of a risk, a risk that by the very fact that they are parents, parents generally are not willing to take. This risk acts as a significant switching cost for the parents that prevents them from shifting to another brand even if the latter is cheaper. This factor, i.e., that price competition is ineffectual, continues to preserve the strong market position obtained by the successful bidder and acts as a barrier to expansion and entry, making it harder for existing competitors to survive on this market and potential competitors to attempt to penetrate this market.
135. Furthermore, we feel that due to the procurement process adopted by CPSU, brand loyalty is unfairly earned by the successful bidder as it is not the result of healthy competition or superior efficiency on the secondary retail markets but merely the result of CPSU's procurement processes.

e. First Mover Advantage & Winner-takes-all Effects

136. **CPSU:** Not all babies born at Mater Dei Hospital make use of such products for various reasons, and thus it must be noted that the number of consumers falling within the Primary Market is already minimal.
137. Again, when CPSU purchased a product that was not available in the private market, CPSU did not receive any requests of information or complaints by parents about the fact that the product was not available in the private market. Therefore, such fact alone proves that such allegation and assumption is unfounded.
138. **Market Player/s:** There is a strong ripple enduring effect on this market in that, once the demand for a particular brand is growing, the popularity of that brand will automatically continue to grow at a rapid pace with little effort from the supplier. This is a good example of a

market where demand for a particular brand spontaneously triggers further demand. This is because parents, once they use a brand for one child, are likely to reuse the same brand for subsequent offspring. Furthermore, demand is driven by word-of-mouth recommendations, where friends and relatives recommend to each other the brand they have used, especially since influence through advertising is restricted. Statistics show that 99% of all births are born at public hospitals and that approximately 50% of these babies are bottle-fed upon discharge. These figures provide a sufficiently wide base to highly influence the potential demand coming from the originally breastfed babies when switched to bottle-feeding to switch to the most used brand once the mothers stop breast-feeding. Again, this enables the successful bidder to effortlessly increase its market share, making it difficult for other suppliers to capture any residual share of the market. This factor again makes expansion and penetration into this market more unlikely.

f. Market Shares

139. **CPSU:** In paragraph 65, the Office referred to the 2013-2019 period as the reference points of their inquiry, whereby CPSU once again reiterate that the situation today is different since the public procurement regulations were enacted in 2016 (Subsidiary Legislation 601.03) as well as the fact that the call in question as published more recently has been drafted to further enhance open competition.

140. Furthermore, CPSU submit that many variables affect sales, for example, the number of births and the number of persons that actually require formula milk. Furthermore, cultural choices, education, marketing, prices, and accessibility of the products are some of the variables affecting the choice of products to be used by consumers. Therefore, such assumption that the reason for any decline in sales is a direct or indirect result of CPSU's public procurement cycles is entirely unfounded.

g. Procurement Process – Cheapest Technical Offer

141. **CPSU:** CPSU submit that they cannot be held liable for respecting legislation. The procurement cycles as published by CPSU wholly comply with the award criteria for the cheapest technically compliant offer indicated in the public procurement regulations.

142. **Market Player/s:** CPSU argues that it is not in the interest of the Health Department to manage different brands for the same item since tenders are awarded to the cheapest, technically compliant offer and that CPSU procures on behalf of the national health sector and not private customers. CPSU here appears to be arguing that the current procurement system works well for the Health Authorities as it guarantees the cheapest offer and that CPSU's

ultimate concern is the public health sector, not the private market. While procurement is generally intended to guarantee the best prices by technically compliant offers, CPSU does not realise that this market requires different considerations due to particular characteristics.

143. CPSU also seem to hint that administratively managing different brands is an onerous task for the Health Department. Administrative problems can never justify the failure by public authorities to do what is best in the public interest. The over-riding public interest to have well-functioning markets must always prevail, and it is up to the Health Authorities to resolve any administrative burdens that they may have to avoid irreparable harm ensuing on the market.

h. Recommendations by Market Participants

144. **CPSU:** Reference is made to paragraph 95 whereby CPSU agrees with the recommendation, provided that the approvals from the relevant authorities are obtained and such method does not run counter to any legislation or policies.
145. With regard to multiple brands, CPSU submit that the different brands option proposed by the Office posed logistical and administrative issues on the Contract Authority and could potentially increase the likelihood of cross contamination between products, including risks of hygiene and sanitising procedures. In addition, the suppliers may also allege an indirect negative effect on their sales by claiming that one product is favoured over another by members of the staff.
146. CPSU submit that the suggestion of multiple brands at the hospital creating the offer choice to parents will harm competition. It must be noted that not all companies offer the same format of milk formula, as some companies offer Ready-To-Feed (RTF) and Powder milk, whilst other companies offer either-or.
147. CPSU further submit that all the products which comply with the technical specification of the Tender are all allowed to compete in the said call, and this as is requested and stated by the public procurement regulations.
148. Furthermore, CPSU noted that they have already reduced the contract period to further enhance open competition.
149. It was also noted that CPSU is not against having unbranded products, provided that such an option does not run counter or go against any other relevant legislation and policies. However, CPSU contends that it has always acted in line with Legislation and at no point has it acted in any manner which distorts competition.

150. **Market Player/s:** We recommend having more than one brand available at Mater Dei Hospital and having a procurement procedure not based on tenders but rotations of donations from approved suppliers instead, say every three months.
151. **Market Player/s:** Reference is being made to paragraph 17 of the Preliminary Report whereby it is stated: "...CPSU does not allow multiple suppliers to operate at the state hospitals." This is factually incorrect.
152. There are several tenders that were published by CPSU which allows for multiple suppliers, e.g.
- CT 2096/2014: Tender for the Supply of total knee replacement (issued on the basis of splitting the award 60/40 between the first and second cheapest compliant offers).
 - RFP 020-6100/20: Request for Participation for the supply of Point of Care Rapid Qualitative Tests for the Detection of SARS-CoV-2 Antigen in Human Nasopharynx (award split 60/40 between 2 bidders).
 - RFP 020-6052/20: Request for Participation for the Supply of Sutures (award to be shared between multiple bidders).
 - RFP 020-6001/20: Request for Participation for the Supply of Staplers & Loading Units (award to be shared between multiple bidders).
 - RFP 021-60001/19: Request for Participation for the provision of treatment services for HIV-positive patients (awarded to all four participants).
153. Citing the above, one can assume that CPSU willingly does have an option to allow multiple suppliers to operate simultaneously, on a level playing field at the hospital level.
154. **Market Player/s:** As an economic operator, we strongly recommend to the CPSU that administrative problems are not a justifiable excuse. Economic Operators such as us are more willing to support them with stock management solutions.
155. Economic operators and the Office agree that the procurement is wrong and that CPSU needs to come up with a solution. The Court of Appeal has also directed the CPSU to follow the recommendations of the Office for Competition.
156. **Market Player/s:** The concept of multiple brands available at the hospital is not alien to the public health system as prior to the tenders mentioned in the Preliminary Report, the public health sector used to procure infant formula through direct orders from various distributors and all brands were readily available in what was known as the milking room.
157. Furthermore, whilst *prima facie*, CPSU does appear to be adhering to the public procurement rules, a closer look at these rules would show that CPSU is, acting in flagrance of

the spirit of the public procurement rules. Accordingly, CPSU should follow the direction ordered by the Court of Appeal and adopt the recommendations put forward by the Office.

158. With respect to the possibility of repackaging or de-branding the products supplied to the primary market, we feel that this route should be avoided as it would deprive parents of essential information. Parents are entitled to know what brand they are using. In this respect, regard must also be made to the relevant laws on labelling and presentation of foodstuffs.

159. We agree with a system as outlined in paragraphs 94 to 99 of the Preliminary Report where multiple brands of Ready-to-Drink format is available at the hospital promoting choice for mothers. A reasonable commercial price applicable to all interested suppliers will need to be set with every tender. To relieve the hospital from monitoring stock levels, this could remain the suppliers' responsibility. One can further add as a proposal that, given that demand is dependent upon the parents' choice, CPSU need not guarantee any minimum number of purchases from the suppliers and that suppliers will be paid the price fixed in the tender on a pay-per-use basis. Therefore, we also agree with the recommendation proposed in paragraph 100 of the Preliminary Report.

12. Final Conclusions and Recommendations

160. After having considered the views of the market players and the CPSU, the Office has reached the following conclusions and recommendations:

161. The Office has considered the unique characteristics of both the primary and secondary markets of infant formula and follow-on formula and their interdependency as discussed in the report. The Office opines that the current procurement process adopted by the CPSU distorts competition in the secondary markets, possibly leading to foreclosure effects in an already highly concentrated market.

162. The Office opines that the policy of having a single supplier servicing the primary market is creating unnecessary risks of security of supply, restricting consumer choice for parents, creating significant barriers to entry and expansion in the secondary markets. This distorts competition in the secondary markets by providing an unfair advantage to the winning bidder by enabling it to gain significant market share in the secondary retail markets. While the Office is not debating the compliance of the current procurement process adopted by the CPSU vis-à-vis the Public Procurement Regulations as well as with the Rules and Guidelines issued by the Department of Contracts, whereby the tender is awarded to the cheapest bidder, the Office believes that considerations must also be given to the fact that due to particular market characteristics, this is curtailing market supplier diversity in the secondary markets.

163. The Office opines that there are two-pronged over-riding public interest considerations at stake. The first is that the proper functioning of the secondary retail markets must be preserved for the sake of protecting consumer welfare. It is in the public interest that effective conditions of competition on any market are preserved and not eliminated by the administrative practices of public authorities. Secondly, foreclosure effects in the secondary markets could in turn hamper CPSU itself as once competitors have been fended off, the incumbent would have ample opportunity to raise its bidding prices to supra-competitive levels.

164. The Office opines that multiple brands should be available at the state hospital, thereby offering ‘from birth infant formula’ choice. The Office understands that there is no provision in the public procurement regulations that oblige CPSU to adhere to its current practices and to refrain from making various brands available in hospital.

165. The Office is of the understanding that public procurement must not be seen as separate and distinct from the competitive effects it may create on the market. Indeed, the public procurement rules were inspired by the desire to promote competition and are built on the principle of competition. As Sanchez-Graells explains:

“Therefore, the clear competition objective guiding public procurement rules and the ensuing obligation of contracting authorities to protect competition as an institution – if not to develop competition in the public procurement field – was synthesised in the principle of competition embedded in EU public procurement directives, and now consolidated in Article 18(1) of Directive 2014/24.”³⁰

166. Therefore, public procurement practices should complement competition rules, something which in the Office’s interpretation is absent in this case. In this spirit, Sanchez-Graells explains:

*“From this perspective, competition requirements should be understood as determining that public procurement rules have to be designed and implemented in such a way that existing competition is not distorted. In other words, it is submitted that public procurement rules cannot generate distortions in the dynamic competition processes that would take place in the market in their absence. Or, even more clearly, **public procurement rules must not distort competition between undertakings.**”³¹*

[Emphasis Added]

167. Following the above, the Office urges the CPSU to change its current procurement practices to avoid harming competition any further. The following recommendations aim to promulgate a fair and open market by creating a level playing field for suppliers to fairly compete in the secondary markets. These recommendations are in preferential order, and unless CPSU

³⁰ A. Sanchez-Graells, ‘Competition Law and Public Procurement’ in JA Moreno Molina & E Diaz Bravo (eds), Contratacion Publica Global: visions comparadas (Valencia, Tirant lo Blanch, 2020).

³¹ Ibid.

proves otherwise, the Office advocates adopting the first recommendation. Nonetheless, all recommendations seek to promote consumer choice, diversity of supply and sustainable market competition.

Preferred Option: Simultaneous Multi-Supplier Agreement

168. Primarily, the Office supports a procurement process consisting of multi-winner tenders (i.e., the tender is awarded to multiple bidders) which fosters diversity of suppliers and ensures a sufficiently broad choice of brands that would meet non-exclusionary and non-discriminatory technical requirements as stipulated by CPSU. Hence, a multi-sourcing approach is advocated in view of the unique characteristics of the primary and secondary markets in question; single supplier and winner-takes-all tenders should be avoided.

169. The Office considers that CPSU has not brought forward a compelling reason why different milk brands cannot be available concurrently and why multiple suppliers cannot operate simultaneously, on a level playing field at the state hospital. In this regard, the Office considered the arguments of CPSU stating that the different brands option posed logistical and administrative issues on the Contracting Authority, as well as the increased likelihood of cross contamination between products. With regards to the former, the Office opines that administrative issues and practices can never justify neglecting public interest and that the overriding interest to have well-functioning markets must always prevail. Furthermore, when one considers past procurements adopted by CPSU for the products under consideration³² and other products and services³³, the Office considers that simultaneous multiple suppliers are feasible and possible, and it is not uncommon for CPSU. Regarding the latter, the Office understands that cross contamination should not be an issue if using 70ml ready-made sealed infant formula bottles that are disposed of upon consumption.

170. To adopt this recommendation, the CPSU may at first identify economic operators interested in the supply of infant formula on the basis of indicated *pay-per-use* prices and on a *no guaranteed demand* basis and enter into an agreement with eligible and technically compliant economic operators that can supply infant formula at the State Hospital. CPSU may set a capped price, and any supplier that accepts the set price and is considered technically compliant, is awarded the contract. CPSU is to award multiple contracts to all bidders that fulfil the above conditions.

³² The public health sector used to procure infant formula through direct orders from various distributors and all brands were readily available in what was known as the milking room.

³³ For instance, RFP 020-6052/20 – Request for Participation for the Supply of Sutures and RFP 020-6001/20 – Request for Participation for the Supply of Staplers & Loading Units - According to the request for participation the health department will award multiple contracts to all bidders that fulfill the technical specifications and that can offer the prices as indicated.

171. As indicated in the letter of the Office dated 17 July 2019, the Office “advocates *towards a system where a choice of product is offered to the parents at Mater Dei Hospital and at the same time, suppliers must always guarantee security of supply of infant formula to the public health service in a timely manner*”. To this end, each economic operator should be held responsible to ensure adequate stock levels and monitor expiry dates so as to minimise wastage. The Office considers that the contract should stipulate any applicable penalties and even immediate disqualification from the supply contract should any of the suppliers be unable to supply the infant formula due to circumstances clearly attributable to the supplier.

Second-Best Option: Allocation of the primary market of infant formula through lots and cyclical rotation to enable multiple brands at the State Hospital

172. Alternatively, the contract could be split into lots in ways that promote effective competition. CPSU should endeavour that throughout the year, multiple brands should be available at the State Hospital. This could be achieved by for example, having a maximum of two suppliers supplying the State Hospital on a three-month interval. The aim of having only two suppliers is for the Office to address CPSU’s concerns of any logistical and administrative issues caused by having multiple brands. The Office considers that two suppliers supplying the state hospital with different brands every three months should not pose insurmountable administrative issues. The Office considers that the envisaged system will guarantee that multiple brands will be present at the State Hospital throughout the year.
173. CPSU can set up a framework agreement and invite economic operators to apply to be appointed to the framework. CPSU shall award the framework lot agreement to all the eligible economic operators after receipt and evaluation of the information received from the various suppliers. As stated in the first example, CPSU may at first identify economic operators interested in the supply of infant formula on a *pay-per-use* and on a *no guaranteed demand basis* and enter into an agreement with eligible and technically compliant economic operators that can supply infant formula at the State Hospital. CPSU may set a capped price, and any supplier that accepts the price as indicated by CPSU and is considered technically compliant will be awarded the agreement under a contract lot basis.
174. Contract Lots will be allocated by cyclical rotation amongst the suppliers appointed to the Framework Lot agreement in accordance with objective, fair and transparent principles while promoting non-exclusionary and non-discriminatory terms and conditions. The way in which the ranking order for the Lots is assigned will be managed through a transparent ballot.
175. For example, there will be a number of lots throughout the year for the periods January – March, April - June, July - September and October - December and the contract for the first lot (January – March) will be rotated first to suppliers 1 and 2, next (April-June) to 3 and 4, the

next (July-September) to 5 and 6, the next (October – December) back to 1 and 2 again, the next (January – March) to 3 and 4 and the next (April-June) to 5 and 6. Under this system, it is to be made clear that each supplier will be awarded a maximum of a single lot to be divided with another supplier for three months per cyclical rotation to prevent all contract quantities from being awarded to a single supplier. Thus, there shall be two cyclical rotations.

176. This system wants to avoid a situation where a single economic operator is awarded all the contract quantities, which would result in over-dependency on a single economic operator.

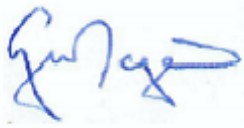
177. The Office considers that this system would promote equal access to opportunities to all eligible economic operators. The duration of the lot framework agreement will depend on the number of eligible suppliers with a maximum duration of two cyclical rotations. Nearing the end of the second cyclical rotation, a new invitation for existing and new potential suppliers to register under a new framework agreement should take place.

178. The Office considers that this system promotes ongoing competition amongst suppliers. By adopting this method, the Office considers that the selection of each supplier in the primary market would provide equal opportunity for all suppliers to be present in the primary and secondary markets. Moreover, given the limited duration of the lot contract divided between two suppliers, the Office considers this would not give rise to any competitive advantage to any supplier.

179. The tender would have to stipulate conditions for adequate security of supply by each supplier through the whole duration of the lot agreement and any applicable sanctions.

180. Moreover, the Office considers that by adopting any of the above two solutions, CPSU can achieve cheap prices while promulgating open and fair competition and a level playing field for all suppliers. In this way, the market will do away with creating strong dominant players which is leading to significant barriers to entry and expansion.

Signed by the following:



Mr. Godwin Mangion,
Director General,
for and on behalf of the Office for Competition.

The leading investigator of this case is Dr. Aloysius Bianchi. The report has been compiled by Dr. Aloysius Bianchi and Mr. Gilmour Camilleri.

For any questions on the contents of this case, do not hesitate to send any comments on competition@mccaa.org.mt

Appendix A: Request for Information - Sector inquiry on the Supply of Infant Milk Formula in the Public Health Sector and the impact of that supply on the private retail market for a) Birth Infant Formula, b) Follow-On Formula, and c) Toddler milk or other formula.

1. Based on the above formula definitions list all formula products supplied by your company in Malta. Information has to be segregated by brand/size/type/age and form (By type e.g. lactose free formula or anti-reflux, etc), by form (e.g. powder).
2. List all suppliers which your company considers to be competitors in the supply of formula products in Malta in the markets mentioned above.
3. Provide the volume of sales (sales in kilograms) on an annual basis starting from year 2010 up to 2019, if available, registered by your company for each market above delineated. Kindly provide this information disaggregated by brand and for each respective age bracket i.e. 0 – 6 months, 6-12 months, 1 year and over in the following format.

Sales in kilograms			
Year	Brand A – 0 to 6 months	Brand A – 6 to 12 months	Brand A – 1 year and over
2010			
2011			
2012			
2013			
2014			
2015			
2016			
2017			
2018			
2019			

N.B Please note that if a particular brand has different products within the same age bracket please group the results together.

4. Provide the sales turnover ("net" value of sales, after deduction of sales rebates, VAT and other revenues related taxes,) on an annual basis starting from year 2010 up to 2019, if available, registered by your company for each market delineated above. Kindly provide this information disaggregated by brand and for each respective age bracket i.e. 0 – 6 months, 6-12 months, 1 year and over in the format described in question 3.

N.B Please note that if a particular brand has different products within the same age bracket please group the results together.

5. i) List the names all retail outlets (supermarkets/pharmacies/other retail outlets/vending machines, etc.) for the past seven years (2013- 2019) through which the formula products supplied by your company were sold.

ii) In your answer, please indicate if a supermarket/pharmacy or other retail store ceased to supply or started to sell the formula products between 2013-2019.

iii) If a supermarket, pharmacy or other retail store ceased to sell the products supplied by your company between 2013 and 2019, please provide the reasons if known for such discontinuance.

6. For the period between 2015 till 2019, provide a list of retail prices of each respective formula product (by brand/size/type/age and form) supplied by your company and found in each respective outlet in Malta (supermarkets/pharmacies/vending machines, etc.).
7. Do you consider that the procurement of infant formula for the Maltese public health sector by CPSU and the tenders issued by CPSU in such regard from October 2012 is distorting competition in the markets identified above in the private retail market?

Based on research conducted by other foreign competition authorities, by distortion of competition the Office means a degree of market foreclosure which suppliers of formula products experience due to the fact that for a number of years, parents have the tendency to continue purchasing the same brand which was provided to their children at the hospital in the belief that this is the best brand since it is being offered at the hospital. These studies demonstrate how, unlike other products where switching is common, the majority of parents do not typically switch between different brands of formula milk unless their children experience adverse reactions to that brand. This happens because naturally, mothers who are offered one brand of infant formula at the hospital will gain a strong loyalty towards the brand supplied in the hospital.

8. a) Provide your views on the procurement of infant formula for the Maltese public health sector by CPSU and the tenders issued by CPSU in such regard from October 2012 and its impact and effects on the products supplied by your company in the markets identified above.

b) Please elaborate and provide any exhaustive suggestions if you consider that the procurement process of infant formula for the Maltese public health sector should change.
9. Please list all the barriers to expansion (barriers which limit the ability of the undertaking to increase market shares by increasing sales) if any which you can identify in the markets identified above.