e-Competitions Report

by Adrian Mallia

1. Institutions

1. Which are the institutions responsible for the enforcement of competition policy? *[Please provide links towards the relevant institutions]*

   Enforcement of the Competition Act (Cap 379 of the Laws of Malta) (the "Act") is entrusted to the Office for Fair Competition ("OFC"), which is a government department, as well as the Commission for Fair Trading ("CFT") which is in effect an independent tribunal composed of a magistrate, an economist and a certified public accountant.

   The CFT and OFC's website is <www.mcmp.gov.mt/consumer_fairtrade.asp>

   The OFC and the CFT are not themselves empowered to impose penalties for infringements of the Act. Since an infringement of the Act is a criminal offence, this means that the penalties contemplated by the Act can only be imposed following successful prosecution by the Executive Police before the Court of Magistrates.

2. What is the role of each institution?

   In cases where the OFC finds an infringement of the Act it may issue a decision finding an infringement together with a cease and desist order. Any undertaking notified with any such decision may request that the OFC submit the decision for review before the CFT. In cases where the OFC finds that a serious infringement of the Act has taken place, the OFC is to make a report to the CFT, and the CFT is to issue a decision thereon.

3. Is there concurrent jurisdiction with sectoral regulators? Which sectors are these?

   No, although some other Authorities (such as the Malta Resources Authorities) have as one of their general duties the duty "to ensure fair competition."

4. What is the process of decision making in a typical case?

   Currently the Act does not provide a standard procedure, although in practice the OFC does give the parties to a case the opportunity to be heard, whether orally or in writing. Following this, and any investigation the OFC may consider adequate, the OFC either reaches a decision itself (which is then, if requested by the parties, subject to review by the CFT) or alternatively prepares a report for the CFT which then decides the issue itself.

   A recent consultation paper issued in July 2007 by the Ministry of Competitiveness and Communications has proposed the insertion of a procedure into the Act whereby, prior to initiating proceedings relating to an infringement,

the Director of the OFC will be obliged to notify the party concerned in writing of the objections raised against him and set a time limit within which he may inform the Director in writing of all facts known to them which are relevant to his defence, and the Director is to base his decisions only on objections contained in the statement of objections.

5. Are there any recent/forthcoming changes with the institutions?

A consultation paper issued by the Ministry for Competitiveness and Communications on the 5th April 2007 proposed an amendment of the Act to permit certain specialised authorities (such as the Malta Communications Authority in the electronic communications sector, and the Malta Resources Authority in the energy sector) to take over from the OFC the obligations of the OFC in terms of the Act in certain specific sectors of the economy. This proposal has not, to date, resulted in an amendment to the Act.

2. Anticompetitive practices

2.1. Legislation

1. What is the relevant legislation dealing with anticompetitive practices? What is the main wording? *[Please provide a copy of the relevant texts or a link]*

Article 5(1) of the Act deals with anticompetitive practices. This Article provides as follows:

"Subject to the provisions of this Act, the following is prohibited, that is to say any agreement between undertakings, any decision by an association of undertakings and any concerted practice between undertakings having the object or effect of preventing, restricting or distorting competition within Malta or any part of Malta and in particular, but without prejudice to the generality of this subarticle, any agreement, decision or practice which:

a. directly or indirectly fixes the purchase or selling price or other trading conditions; or

b. limits or controls production, markets, technical development or investment; or

c. shares markets or sources of supply; or

d. imposes the application of dissimilar conditions to equivalent transactions with other parties outside such agreement, thereby placing them at a competitive disadvantage; or

e. makes the conclusion of contracts subject to the acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

2. Which types of infringements are considered to be *per se*, if any? Please provide examples of case law (with ref.), if possible, *e-Competitions* case law.

Rule 13 of the Schedule to the Act directs the CFT to have regard, in the interpretation of the Act, to judgements of the Court of First Instance and the

Court of Justice of the European Community, as well as to decisions and statements of the European Commission including interpretative notices related to competition law. In effect, this has led to both the OFC and the CFT adopting an approach which is similar to that adopted by the European Commission and the European Courts.

In particular, the CFT has considered, *inter alia*, the following to be per se infringements:

a. **Agreements to fix prices (*Supermarkets*, Case 2/2004);**
b. **Collusive tendering (*Hot Asphalt*, Case 3 of 2000).**

In addition to the above, in *Buxom Poultry Ltd vs Koperattiva tat-Tjur Limited et*, Case 3/2005 the CFT has – perhaps contrary to current thrust of EC competition law – characterised as anticompetitive "*by its very nature*" an agreement between an undertaking involved in the breeding, slaughtering and processing of broilers, and several undertakings involved in the breeding of broilers whereby the latter undertakings were obliged to sell their reared and fattened broilers exclusively to the former.

3. Is there any "Guidelines"/"Notices" specific to anticompetitive practices? *[Please provide a copy of the relevant texts or a link]*

   No.

4. To what extent the legislation covers public undertakings?

   The actions of public or state-owned entities are not immune from the provisions of the Act. Indeed, Article 30(1) of the Act provides that the provisions of the Act apply to any Government departments, or to any body corporate established by law, or to any company or other partnership in which the Government, directly or indirectly, holds a controlling interest, or to which the Government has granted special or exclusive rights in any field.

   Nonetheless, it should be emphasised that it is only insofar as any such Government department or public body is pursuing an economic activity that it would fall to be regulated by the Act and, therefore, anti-competitive vertical restraints included in agreements would be prohibited. Hence, activities carried out in the exercise of official authority would not fall within the scope of the Act.

5. Are there any recent/forthcoming changes to the anticompetitive practices legislation?

   No.

2.2. De Minimis - Exemptions

6. Is there a *de minimis* provision? What are the thresholds? Does it apply to certain markets? What are the relevant provisions?

Article 6 of the Act contains a general *de minimis* principle to the effect that an agreement does not infringe the Act if the impact of the agreement on the relevant market at issue is minimal. In determining whether the impact is minimal, consideration is to be given to all relevant circumstances including the aggregate share of all the undertakings concerned of the relevant market. There are no stated thresholds.

7. Are there sectoral exemptions or specificities [outside EC law]? What are the relevant provisions?

There are no sector specific offences or exemptions, though the Minister does have the as yet unutilised power by means of Article 33(1) of the Act to promulgate subsidiary legislation "*exempting any agreement, decision or practice in connection with agriculture and fisheries from the provisions of article 5 under such conditions as he may prescribe*."

8. Are there block exemptions? Is there a system for individual exemption? What are the relevant provisions?

Yes, the following block exemptions are currently in force: Specialisation Agreements (Block Exemption) Regulations (LN 178/2002) and the Research and Development Agreements (Block Exemption) Regulations (LN 177/2002). Two other block exemptions existed, but these have now expired and have not yet been replaced or renewed. These are the Technology Transfer Agreements (Block Exemption) Regulations (LN 176/2002) and the Vertical Agreements and Concerted Practices (Block Exemption) Regulations (LN 271/2001).

The Act also contains, in Article 5(3), a provision which permits individual exemption of agreements and which is, in substance, similar to Article 81(3) EC.

9. What are the criteria for granting an exemption? What is the trend? What are the relevant provisions? Please provide examples of case law (with ref.), if possible, *e-Competitions* case law.

The criteria for obtaining an exemption are provided in Article 5(3) of the Act:

"The provisions of subarticle (1) shall not apply in the case of -

(a) any agreement between undertakings; or
(b) any decision by an association of undertakings; or
(c) any concerted practice,

which contributes towards the objective of improving production or distribution of goods or services or promoting technical or economic progress and which allows consumers a fair share of the resultant benefit and which does not:

(i) impose on undertakings concerned any restriction which is not indispensable to the attainment of the said objective; or

(ii) give the undertakings concerned the possibility of eliminating or significantly reducing competition in respect of a substantial part of the products to which the agreement, decision or concerted practice refers."

See also the response to question 11 below.

10. Who carries the burden of proof for an exemption to be granted?

    The burden of proof lies, in accordance with Article 5(4) of the Act, with the undertaking claiming the applicability of the exemption.

11. Which body if any supervises compliance with an exemption? What are the relevant provisions?

    As such, undertakings are required to make a self-assessment of their agreements to determine whether they fall within the parameters of Article 5(1) of the Act and, if they do, whether they can benefit from the exemption set forth in Article 5(3) of the Act. It is not possible to notify an agreement to the OFC and obtain an individual exemption, though in practice the OFC is generally willing to provide informal, non-binding, advice and guidance.

3. Unilateral practices

3.1. Legislation

1. What is the relevant legislation dealing with conducts of dominant firms? What is the exact wording? *[Please provide a copy of the relevant texts or a link]*

   Article 9 of the Act regulates the conduct of dominant firms. This Article provides the following:

   "(1) Any abuse by one or more undertakings of a dominant position within Malta or any part of Malta is prohibited.

   (2) Without prejudice to the generality of the provisions of subarticle (1), one or more undertakings shall be deemed to abuse of a dominant position, where it or they:

   a. directly or indirectly impose an excessive or unfair purchase or selling price or other unfair trading conditions;
   b. charge prices which are below the average variable cost price of a product in order to drive rival competitors out of the market;
   c. limit production, markets or technical development to the prejudice of consumers;
   d. refuse to supply goods or services indiscriminately in order to eliminate a trading party from the relevant market to the prejudice of consumers;
   e. apply dissimilar conditions, including price discrimination to equivalent transactions with different trading parties, thereby placing any or some of the trading parties at a competitive disadvantage;

f. make the conclusion of contracts subject to the acceptance by the other party of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

2. Which types of infringements are considered to be *per se*, if any? Please provide examples of case law (with ref.), if possible, *e-Competitions* case law.

   Rule 13 of the Schedule to the Act, referred to above, is also relevant in this context and, therefore, should in effect lead to both the OFC and the CFT adopting an approach which is similar to that adopted by the European Commission and the European Courts.

3. Is there any "Guidelines"/"Notices" specific to unilateral practices? *[Please provide a copy of the relevant texts or a link]*

   No.

4. To what extent the legislation covers public undertakings? Please provide examples of case law (with ref.), if possible, *e-Competitions* case law.

   As is mentioned above, the actions of public or state-owned entities are, in accordance with Article 30(1) of the Act, not immune from the provisions of the Act. Thus, for example, in *Bargain Holidays – European Air Bargains/ Malta Tourism Authority* the CFT indicated that the Malta Tourism Authority could be subject to the Act; similarly, in *Cassar Fuels/Enemalta*, the CFT asserted that Enemalta Corporation – a public corporation – was subject to the Act.

   The Act further provides that undertakings entrusted with the operation of services of a general economic interest or having the character of a revenue producing monopoly are subject to the provisions of this Act insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.

5. Are there any recent/forthcoming changes to the unilateral practices legislation?

   No.

6. What is the objective of the legislation? Is it consumer welfare or total welfare?

   The Act itself does not give any indication as to its objective other than to "*provide for fair trading in Malta*." The objective behind the legislation has, to our knowledge, never been expressly articulated by the CFT in these explicit terms. However, it is clear from several judgements of the CFT that significant emphasis is placed by the CFT on the welfare of the consumer.

3.2. Dominance

7. What is the definition of dominance? Please provide examples of case law (with ref.), if possible, *e-Competitions* case law.

The Act does not define dominance, however the CFT has quoted with approval the definition given to this concept by the European Court of Justice, i.e. that dominance is a position of economic strength enjoyed by an undertaking which enables it to hinder the maintenance of effective competition on the relevant market by allowing it to behave to an appreciable extent independently of its competitors and customers and ultimately of consumers. (see *RGM Limited,* case 2 of 1998).

8. What is the definition of collective dominance? Does the definition exist in the legislation?

   The Act does not provide a definition of collective dominance, however the CFT has in *Bulcon/Sea Malta Company*, quoted with approval the test set forth by the ECJ in *Europemballage v Commission and Compagnie maritime belge a.o.* and *Dafra-Lines v Commission*.

9. Has a market share threshold been defined in legislation or case law, which determines whether an undertaking is dominant?

   Yes, the Act provides in Article 9(3) that:

   "For the purpose of determining whether one or more undertakings are in a dominant position, an undertaking which alone or in conjunction with others has a share of at least forty per cent of the relevant market shall, in the absence of proof to the contrary, be deemed to be in a dominant position:

   Provided that one or more undertakings which alone or in conjunction with others have a share below forty per cent of the relevant market may, notwithstanding the above, be determined to be in a dominant position."

10. Does legislation apply to conducts of non-dominant firms which are nearly as powerful as the dominant firm in the market? Does the case law cover such conducts?

    No. Article 9 only applies to dominant firms, although the Act expressly contemplates the possibility of an undertaking being determined to be dominant even if it has a market share which is below 40% of the relevant market.

3.3. Abuse

11. Is there causality between the creation of dominant position and its abuse?

    To the best of our knowledge, this issue has never arisen before the CFT. It is highly likely that the CFT would adopt the same approach taken under EC Competition law, i.e. that there is no need for there to be a causal link between a firm's dominance and the abuse for an infringement to exist.

12. What is the definition of abuse of a dominant position? Please provide examples of case law (with ref.), if possible, *e-Competitions* case law.

The Act does not provide a definition of dominance but, rather, provides an illustrative, non-exhaustive list of exploitative and exclusionary abuses.

13. Does the legislation/case law cover attempts of firms to become dominant?

The CFT held in *Supermarkets* (Case 1 of 1998) that it was possible for an undertaking to abuse of its dominance by acquiring other undertakings. However, on the basis of the facts of the case – i.e. that the acquiring entity was not dominant at the moment of acquisition – the CFT held that an abuse of dominance had not occurred

14. Do economics play an important role in the assessment of conducts of dominant firms?

Generally, the OFC attempts to soundly ground its decisions on economics. Decisions of the CFT tend not to make explicit and/or extensive reference to economic theory.

15. Are exploitative abuses captured? Please provide examples of case law (with ref.), if possible, *e-Competitions* case law.

Yes, in fact Article 9(2) of the Act makes explicit reference to exploitative abuses such as excessive pricing.

16. Are exclusionary abuses captured? Please provide examples of case law (with ref.), if possible, *e-Competitions* case law.

Yes. Again Article 9(2) makes explicit reference to exclusionary abuses such predatory pricing.

In *Bulcon/Sea Malta Company*, the CFI found that Sea Malta had abused of its dominance by charging discriminatory prices with the intention of eliminating a competitor. In *MDP* (Case 1 of 1999), the CFI held that Malta Dairy Products tying the sale of its fodder products to the purchase of milk was an abuse.

17. What is the most frequent type of abuse that the authorities investigate? What is the least frequent? Please provide examples of case law (with ref.), if possible, *e-Competitions* case law.

As yet, from the few cases that have been decided by the CFT, no trend is immediately evident.

18. In which sectors are abuse of dominance cases more likely? Please provide examples of case law (with ref.), if possible, *e-Competitions* case law.

The small number of cases decided to date by the CFT is not sufficient to establish a clear trend in this respect. To date, findings of abuse of dominance by the CFT have been found in the following sectors:

a. **the agricultural feeds sector;**
b. **the beverages sector;**
c. **the sea transport sector;**
d. **the energy sector;**
e. **the health sector.**

3.4. Justifications

19. What justifications, if any, for an abuse of dominant position are acceptable?

It is likely that the OFC and CFT would adopt the same general view taken under EC Competition Law that an abuse of dominance does not exist if an objective justification for the dominant undertaking's conduct exists. Thus, for example, in *National Lotteries,* the OFC accepted that a refusal by a company running the national lottery to supply additional sets of sales equipment to re-sellers of lottery tickets was justified on the basis, *inter alia*, of capacity constraints.

4. Mergers

4.1. Legislation and institutions

1. What is the substantive test for mergers? What are the relevant provisions? *[Please provide links towards the relevant provisions]*

The Regulations on Control of Concentrations (Legal Notice 294 of 2002) ("the Regulations") provide at Regulation 4(1) that *"concentrations that might lead to a substantial lessening of competition in the Maltese market or a part thereof are prohibited."*

The Regulations can be downloaded from
http://docs.justice.gov.mt/lom/Legislation/English/SubLeg/379/08.pdf

2. What types of mergers does the legislation cover? What are the relevant provisions? *[Please provide links towards the relevant provisions]*

The Regulations apply to "concentrations" as defined by the Regulations. This concept is defined as follows:

"concentration" means -
(i) the merging of two or more undertakings that were previously independent from each other; or
(ii) the acquisition by one or more undertakings or by one or more persons already controlling at least one undertaking, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings,

whether occurring in Malta or outside Malta when in the preceding financial year the aggregate turnover in Malta of the undertakings concerned exceeded Euro 2329373.40 and each of the undertakings concerned had a turnover in Malta equivalent to at least 10 percent of the combined aggregate turnover of the undertakings concerned:

Provided that the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity referred to hereafter as a "full-function joint venture" shall also constitute a concentration.

3. Does the merger legislation cover joint ventures? What are the relevant provisions? *[Please provide links towards the relevant provisions]* Please provide examples of case law (with ref.), if possible, *e-Competitions* case law.

   Yes. See answer to question 2 above.

4. Are there specific provisions/exceptions for markets of insufficient importance?

   No.

5. Which institutions have the burden of merger enforcement?

   Merger control is a function which is entrusted to the OFC. Concentrations must be notified to the OFC, which then has the obligation of conducting the prescribed assessment with the established time frames.

   The Regulations provide at Regulation 18 that the undertakings concerned and interested third parties may request the Director of the OFC to submit his decision for review by the CFT, and the Director must in any such case comply with the request.

6. What is the role of each institution?

   See answer to question 5 above.

4.2 Investigation

7. What is the process of decision making in a merger case?

   Following notification of the concentration by the notifying parties, the OFC publishes a notice in the Government Gazette and in local newspapers, inviting third parties to make submissions. The Director may also require third parties or the notifying parties to submit any additional information he requires, as well as utilise any of his investigative powers set forth in response to question 9 below.

   The process followed then depends on whether the investigation remains a Phase I investigation or escalates to a Phase II investigation.

8. What are the investigative powers used in merger assessment? Are third parties obliged to answer questions set by the authorities? What are the relevant provisions? *[Please provide links towards the relevant provisions]*

   The Director of the OFC may, in terms of Regulation 11 of the Regulations, undertake all necessary investigations into undertakings and associations of undertakings and has, for these purposes, all of the powers granted to him by the Act including the power;

   (i) to examine the books and other business records;
   (ii) to take or demand copies of or extracts from books and business records;
   (iii) to ask for oral explanations on the spot;
   (iv) to enter any premises, land and means of transport of undertakings.

   The Director is also permitted, in terms of Regulation 10 of the Regulations, to request information from third parties, who are obliged by law to provide the information requested.

9. What are the stages of the investigation? Which bodies are responsible for each of these stages?

   The Act does not define any specific order in which the Director of the OFC is to carry out the different stages of investigation and, accordingly, the manner in which an investigation is undertaken is an issue that is within his discretion.

10. What are the thresholds/tests for asserting jurisdiction? What are the relevant provisions? *[Please provide links towards the relevant provisions*

    Please see response to question 2 below.

11. What types of Guidelines/Notices are there? *[Please provide links towards the relevant provisions]*

    The Regulations contained Guidelines on the assessment of Efficiencies as well as Guidelines on the Assessment of Failing Firms and Existing Assets, however these were repealed by means of Legal Notice 49 of 2007. Legal Notice 49 of 2007 included a provision to the effect that the Director, in the assessment of failing firms and existing assets as well as the assessment of efficiencies, is to have recourse to:

    a. the CFT's and his own previous Decisions;
    b. judgments of the Court of First Instance and the Court of Justice of the European Community;
    c. relevant decisions of the European Commission;
    d. interpretative Commission notices and guidelines on the relevant provisions of the EC Treaty and secondary legislation relative to competition; and
    e. other pertinent foreign jurisprudence.

12. Do all mergers need to be notified? Are there any exceptions?

All transactions creating a concentration within the meaning of the term set forth in question 2 above must be notified.

13. Are there pre-notifications discussions?

Pre-notification meetings with the OFC are not mandatory but are recommended. The Form CN (i.e. the form used to effect a notification of a concentration to the OFC) which is attached to the Regulations explicitly states that pre-notification meetings are extremely valuable to both the notifying parties and the OFC and that they can result in a reduction of the information required to be submitted to the OFC.

14. How many types of notifications are there? (e.g. short-form, merger notice)

There are two forms of notification, i.e. the standard form and the short form notification. The latter allows the notifying party to submit less information than is usually required and, furthermore, requires the OFC to issue a decision within 4 weeks from the date of notification. The short form notification can only be used in limited circumstances.

15. Which party notifies and what is the deadline for notification?

Concentrations are to be notified by the person/undertaking acquiring control of the whole or parts of one or more undertakings. In cases where the concentration consists of a merger or the acquisition of joint control it is to be notified jointly by the parties to the merger or by those acquiring control.

A notification must be made within 15 days following the earliest of:

(i) the conclusion of the agreement; or
(ii) the announcement of the public bid; or
(iii) the acquisition of a controlling interest.

16. Who pays for the notification and how much?

A notification fee of Euro 163.08 is payable by the notifying party or parties upon notification.

17. Can the merger complete prior to clearance? If not, what is the penalty for completing prior to the decision?

Yes, provided that a request, in terms of Regulation 7(3) of the Regulations, is made for a derogation from the obligation not put into effect the concentration prior to clearance and provided, naturally, that the derogation is actually granted.

Putting a concentration into effect prior to clearance is a criminal offence in terms of Regulation 13(2) of the Regulations. This offence may entail the

imposition of a fine equal to one to ten per centum of the turnover of the undertaking in the economic interests of whom the person found guilty of the offence was acting.

18. How long does a Phase I investigation take? Please provide examples of case law (with ref.), if possible, *e-Competitions* case law.

    Once a concentration is notified to the Director of the OFT, the Director must examine the notification within 6 weeks. If the Director determines that the concentration does not fall within the scope of the Regulations or does not raise serious doubts about its lawfulness, he must make a decision to this effect and proceedings are terminated. In cases where, following modifications by the undertakings concerned, the Director deems that a notified concentration no longer raises serious doubts as to its lawfulness, he may decide to declare the concentration to be lawful and to terminate proceedings. In this latter case the time period within which the Director must make a decision is two calendar months. Also, after the end of the 5th week following notification, the notifying party or parties may request a suspension of periods for a period of 3 weeks to discuss commitments.

    If the Director finds that the notification falls within the scope of the Regulations and raises serious doubts as to its lawfulness, the Director initiates proceedings and Phase II commences

19. How long does a Phase II investigation take? Please provide examples of case law (with ref.), if possible, *e-Competitions* case law.

    The Director may in this case make a finding either that the concentration is unlawful and therefore not permissible or that, following commitments by the parties, the concentration is permissible. The Director must decide Phase II proceedings within a maximum of 4 calendar months.

20. How is the merger investigation structured? Is it done by one authority or more?

    The merger investigation is carried out by the OFC only, though the OFC may at times request other government authorities or departments to provide it with information it requires for the purposes of carrying out its assessment.

21. How effective is the authority in rendering decisions within the time limits it has?

    The OFC complies strictly with the time limits set by the Regulations.

22. Are these time limits set by statute *[Please provide links towards the relevant provisions]* or are they administrative?

    The time limits are set by statute, i.e. by the Regulations.

23. Can time limits be extended? Under what conditions?

The clock cannot be started anew, however it can be stopped by the OFC if the OFC makes a request for additional information or upon the request of the notifying parties following submission of commitments by the notifying parties.

24. Are there any penalties in relation to a merger investigation? *[Please provide links towards the relevant provisions]*

    Yes, in accordance with Regulation 13 of the Regulations it is a criminal offence punishable by a fine of between Euro 232.93 and Euro 2329.30 and/or imprisonment for a period from 3 to 6 months, for a person to intentionally or negligently supply incorrect information in response to a request made by the Director of the OFC or to fail to supply information within the period fixed by the Director, or to produce the required books or other business records in incomplete form during an investigation or refuse to submit to an investigation.

25. Are ancillary restrictions covered by the decision? Please provide examples of case law (with ref.), if possible, *e-Competitions* case law.

    Yes, ancillary restrictions are covered by the decision. See, for example Decision CCD/40/04 (*Simonds Farsons Cisk plc/Law Quintano*) where the decision covered a non-compete clause of a duration of two years.

26. Are mergers involving companies headquartered in other jurisdictions caught? Under what circumstances? Please provide examples of case law (with ref.), if possible, *e-Competitions* case law.

    Yes. Provided the conditions set forth in Regulation 2(d) of the Regulations (see question 2 above) are met, then the concentration will be caught and require notification in terms of the Regulations.

    See for example Decision CCD 42/06 (*Terra Firma/AWAS*).

27. What are the theories of harm (unilateral, coordinated effects etc.)? Who has the burden of proof?

    To our knowledge the OFC has not to date blocked any concentration and, therefore, has not had the opportunity to date to elaborate on theories of harm.

    It is up to the notifying parties to satisfy the OFC that there will be no substantial lessening of competition.

28. Are Courts involved in the merger investigation? Please provide examples of case law (with ref.), if possible, *e-Competitions* case law.

    No, though the CFT may be involved if a review of the decision taken by the OFC is sought.

4.3 Undertakings

29. What types of undertakings are available? (structural, behavioural etc.) Please provide examples of case law (with ref.), if possible, *e-Competitions* case law.

The Regulations do not specify which types of commitments can be offered by the parties to the concentration, so presumably both structural and behaviour commitments can be offered by the parties.

As yet, there has only been one case where the OFC has conditionally approved a concentration following the submission of commitments by the parties. In *Maltacom/Multiplus Ltd*, the OFC conditionally approved the acquisition by Maltacom Ltd (a company providing fixed line telephony and other telecommunications services) of Multiplus Ltd (a company providing Digital Terrestrial Television services). The acquisition was approved subject to Maltacom surrendering a license it held enabling it to provide Digital Terrestrial Television services as well as the corresponding block of eight frequencies held by it.

30. Can undertakings be offered in Phase I? What are these? Please provide examples of case law (with ref.), if possible, *e-Competitions* case law.

Yes, it is possible for undertakings to be made, in accordance with Regulation 9(1) of the Regulations, during Phase I.

31. Can undertakings be offered in Phase II? What are these? Please provide examples of case law (with ref.), if possible, *e-Competitions* case law.

Yes, it is possible for undertakings to be offered in Phase II.

32. How are undertakings implemented? Are there monitoring provisions? What happens if an undertaking is not fulfilled?

The Director of the OFC has a general right, in accordance with Regulation 8(1) of the Regulations, to attach to his decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into.

If an undertaking is not fulfilled, then the Director may revoke his decision.

4.4 Efficiencies

33. Are efficiencies taken into account in merger assessment? Have there been cases where efficiencies played an important role?

Yes. Regulation 4(5) provides that:

"Concentrations that bring about or are likely to bring about gains in efficiency that will be greater than and will offset the effects of any prevention or lessening of competition resulting from or likely to result from the concentration shall not be prohibited if the undertakings concerned prove that such efficiency gains cannot

otherwise be attained, are verifiable and likely to be passed on to consumers in the form of lower prices, or greater innovation, choice or quality of products or services."

We are not aware of any cases to date where efficiencies have played a major role in the OFC's reasoning.

34. What are the relevant criteria?

As is mentioned in response to question 11, the Regulations previously contained a set of guidelines on efficiencies, however these have been repealed so the position at law is unclear.

35. In which industries do you normally see efficiencies arguments being raised?

See question 33 above.

4.5 Failing Firm Defence

36. Are there failing firm defence provisions in the legislation?

Yes, Regulation 4(2) of the Regulations provides that "*whether the business, or part of the business, of a party to the concentration has failed or is likely to fail*" is an issue which is to be taken into account by the OFC in making an assessment of a notified concentration.

37. What are the criteria that need to be satisfied for the failing firm defence to apply?

As is mentioned in response to question 11, the Regulations previously contained a set of guidelines on failing firms, however these have now been repealed so the position at law is unclear.

38. Has failing firm defence arguments been successfully used in any cases?

We are not aware of any instances in which this defence has been raised.

39. Are there failing division defence provisions in the legislation?

Yes, see answer to question 36 above.

40. What are the criteria that need to be satisfied for the failing division defence to apply?

See answer to question 37 above.

41. Has failing division defence arguments been successfully used in any cases?

We are not aware of any instances in which this defence has been raised.

42. Are there failing industry defence provisions in the legislation?

No.

43. What are the criteria that need to be satisfied for the failing industry defence to apply?

N/A.

44. Has failing industry defence arguments been successfully used in any cases? Please provide examples of case law (with ref.), if possible, *e-Competitions* case law.

We are not aware of any instances in which this defence has been raised.

5. Procedure

5.1 Investigation

1. What are the powers of investigation? What are the relevant provisions? *[Please provide links towards the relevant provisions]*

Stated briefly, the Director of the OFC has the power to

- **a. Order the production of documents and information;**
- **b. Carry out any searches on premises, both residential and business, as well as on means of transport;**
- **c. Seal premises in the course of a search;**
- **d. Order the non-removal of objects from any premises or means of transport;**
- **e. Receive written or verbal statements from witnesses.**

2. What are the stages of the investigation? Which bodies are responsible for each of these stages? How long an average investigation take? Please provide examples of case law (with ref.), if possible, *e-Competitions* case law.

The Act does not define any specific order in which the Director of the OFC is to carry the different stages of investigation and, accordingly, the manner in which an investigation is undertaken is an issue that is within his discretion. The OFC is the body responsible for conducting the investigation, although searches can only be carried out on residential premises when officers from the OFC are accompanied by a Police officer not below the rank of inspector.

The length of an investigation varies significantly depending on the complexity of the issues involved, as well as the priority given to the particular case by the OFC.

3. Who enforces these powers? Are Courts involved? Are interim measures available? What are the relevant provisions? *[Please provide links towards the relevant provisions].* Please provide examples of case law (with ref.), if possible, *e-Competitions* case law.

The CFT is involved in so far as the Director must request and obtain a warrant from the CFT prior to carrying out a search on any premises or means of transport.

The Act allows the OFC, in terms of Article 15 of the Act, to request the CFT to issue interim measures. Interim measures have, in fact, been issued on a few occasions. See for example measure 4/2006 (interim measures issued against Melita Cable plc).

4. What are the sanctions for non-compliance? What are the relevant provisions? What are the relevant provisions? *[Please provide links towards the relevant provisions]*

   In terms of Article 23 of the Act it is a criminal offence for a person to knowingly or recklessly hinder or prevent an investigation. This offence is punishable by a fine of between Euro 232.93 and Euro 2329.30 and/or imprisonment for a period from 3 to 6 months,

5. What is the extent of the legal privilege?

   Advice given by external counsel is privileged. As to advice given by in-house counsel, there is no clear answer to this question as to our knowledge this issue has never been decided by the Maltese Courts. Traditionally the Maltese Courts have interpreted legal privilege widely, and therefore it is likely that the Maltese Courts would consider in-house legal advice to be privileged.

6. Can personal premises (home, car…) be searched?

   Yes. The Act provides that searches can be carried out by the Director of the OFC (or his delegates). The Director may request the assistance of the Executive Police; however, in the case of a search which is to be carried out in residential premises, the Director must always be accompanied by a Police officer not below the rank of inspector.

   The OFC may also search any means of transport and may, during any search, order the non-removal of any objects from any searched premises or means of transport, or place any objects under seal.

5.2 Fines - Sanctions

7. What is the maximum level of fines? What are the relevant provisions? *[Please provide links towards the relevant provisions]*

   An infringement of Article 5 or of Article 9 of the Act amounts to a criminal offence which is punishable, on conviction, by a fine of from one to ten per cent of the turnover of the undertaking in the economic interests of whom the person found guilty was acting. Where a person convicted of this offence is the Director, manager, secretary or other similar officer of an undertaking the said person is deemed to be vested with the legal representation of the same undertaking which accordingly is considered to be liable in solidum with the person found guilty for the payment of the said fine.

8. How is the fine calculated?

   See question 7 above.

9. What is the trend of the NCA in terms of sanctions?

   Imposition or otherwise of a sanction is not an issue which is within the competence of the NCA since the sanction to be imposed is an issue which is determined by the Court of Magistrates following prosecution by the executive police.

   To the best of our knowledge, since the promulgation of the Act in 1994, no person has ever been charged with an infringement of the Act.

10. Are there criminal sanctions? What are these? What are the relevant provisions? *[Please provide links towards the relevant provisions]*

    An infringement of Article 5 or Article 9 of the Act is a criminal offence which may result in a fine. However the Act provides for other offences (such as hindering investigations or supplying incomplete information) which are punishable by a fine of between Euro 232.93 and Euro 2329.30 and/or imprisonment for a period from 3 to 6 months.

11. Can the appellate bodies review the sanctions and/or amount of the fine? What is the trend of the case law?

    Yes, an appeal from a decision of the Court of Magistrates lies to the Court of Criminal Appeal in accordance with Article 413 of the Criminal Code. Furthermore, Article 25 of the Act also grants the Attorney General a right of appeal.

5.3 Leniency

12. How can an undertaking apply for leniency? What are the relevant provisions? *[Please provide links towards the relevant provisions]*

    At present there is no provision in the Act that provides for leniency, though Article 33 of the Act empowers the Minister for Competitiveness and Communications to issue regulations provided for "*the power to waive or reduce the applicable fine in cartel investigations*."

    Nonetheless, a plea bargaining/compromise penalty procedure is provided for by Article 26B of the Act.

13. What are the reductions in the fines for the first leniency applicant? How do the reductions in the fines change for the second applicant? For the following ones?

    N/A.

14. What are the obligations of the leniency applicant?

N/A.

15. What is the policy of the NCA in terms of leniency?

N/A.

5.4. Judicial review and enforcement

16. What is the deadline to lodge an appeal against a decision from the NCA? What are the relevant provisions? *[Please provide links towards the relevant provisions]*

The Act provides in Article 13A (1) that it is possible to request the Director of the OFC to submit a decision taken by him for review by the CFT, within 15 days from the notification of the decision.

17. Is there a specialist tribunal for appeals? *[Please provide links].* Do Courts hear the appeals?

As mentioned above, review of decisions is conducted by the CFT, which is specifically set up by the Act for the purposes of reviewing decisions taken by the OFC, and which is composed of a Magistrate, an economist and a certified accountant.

18. What can the appellate bodies examine in an appeal? Can they go to the merits of the case? Or do they limit their review to procedural issues? Please provide examples of case law (with ref.), if possible, *e-Competitions* case law.

No appeal lies from a decision of the CFT. However, it is possible to file an application in the First Hall Civil Court to have a decision reviewed. In these cases, the Civil Court will only grant a remedy where it is satisfied that there has been a breach of the audi alteram partem rules, if the CFT's decision is ultra vires, if the CFT has acted contrary to the rules of natural justice, or if the CFT's decision is contrary to some written rule of law.

See, for example *Simonds Farsons Cisk plc v Agent Direttur ta' L-Ufficju tal-Kompetizzjoni Gusta et*, decided by the First Hall of the Civil Court on the 27th October 2004.

19. What happens upon the annulment of a decision? Is the decision remitted? Please provide examples of case law (with ref.), if possible, *e-Competitions* case law.

In these cases, the decision is struck down.

20. How long does the appeal process usually take? Please provide examples of case law (with ref.), if possible, *e-Competitions* case law.

The length of the judicial process varies depending on the complexity of the issues under determination. The case referred to above in question 18 took just over 8 years.

21. How many stages are there in the appeal process, until the case is heard by the highest appellate body? What is the role of the Supreme Court? Is there any trend in the Supreme Court policy? Please provide examples of case law (with ref.), if possible, *e-Competitions* case law.

A judgement by the First Hall of the Civil Court could then be appealed from to the Court of Appeal.

22. Are interim measures available? What is the trend in granting interim measures? What are the relevant provisions?

No. The Act provides that it is not possible to obtain the issue of precautionary warrants against the OFC or the CFT.

23. Which Courts are in charge of judicial review of investigations?

The Civil Courts.

24. Can private actions occur? Are there such cases? What is the trend?

Private enforcement of the Act is possible, in that a person who has suffered damages as result of an infringement of the Act can bring an action for damages. Any such action would be based on the provisions of the Civil Code (Chapter 16 of the Laws of Malta).

To the best of our knowledge, no such actions have been filed before the Maltese Courts to date.

25. What about follow-up actions? What is the trend? Please provide examples of case law (with ref.), if possible, *e-Competitions* case law.

It is possible to bring an action in two stages, i.e. first by seeking a declaration of responsibility from the Courts and, in the event that this is successful, a request for the liquidation of damages.

26. What about class actions? What is the trend?

Article 161(3) of the Code of Organisation and Civil Procedure (Cap 12 of the Laws of Malta) provides that two or more plaintiffs may bring their actions by one sworn application, if the actions are connected by their subject matter or if the decision of one of the actions might affect the decision of the other action, or if the evidence in support of one action is, generally, the same to be produced in the other action or actions.

To our knowledge, no such action has as yet been filed before Maltese Courts on the basis of Articles 5 or 9 of the Act.

6. Europe & International

1. What is the trend for the NCA and Courts to enforce EC competition provisions? Please provide examples of case law (with ref.), if possible, *e-Competitions* case law.

   To our knowledge, there has not as yet been an instance in which the OFC, the CFT or the Courts have applied Articles 81 or 82 of the EC Treaty.

2. Is there any case of competition related Art. 234 EC preliminary requests to the ECJ?

   To the best of our knowledge there has been, as yet, no instance when a request for a preliminary reference has been acceded to by the CFT though we are aware of at least one instance in which such a request has been made and denied.

3. Is there any case where the Courts and/or the NCA asked for the assistance of the EC Commission? Is the outcome of this/these case(s) known? Is there a case where the EC Commission applied for amicus curiae?

   The Schedule to the Act grants the European Commission, in all cases involving the application of Article 81 and 82 of the EC Treaty, the right to make submissions on any matter before the CFT, as well as to present any documents or other evidence that may be relevant to the matter. This notwithstanding, to the best of our knowledge as yet there has been no instance in which the European Commission has exercised this right or where it has been asked to so intervene.

4. Is there cooperation with the other NCAs in cross border anticompetitive practices cases? How developed is this cooperation? Is there any Guide-lines or text?

   The OFC is part of the European Competition Network (ECN). The annual report issued by the Ministry of Competitiveness and Communications in 2005 indicates that "*The Office has on various occasions liaised with other competition authorities on matters concerning Maltese Competition law and the Office's decisions and investigations.*"

   Other than this, there is no official indication of cooperation with other NCAs. No guidelines on this issue exist.

5. Is there extraterritorial application of anticompetitive practices enforcement?

   To our knowledge there has not as yet been an instance of extraterritorial application of the Act.