

The International Comparative Legal Guide to:

Cartels & Leniency 2009

A practical insight to cross-border Cartels & Leniency



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1 The Legislative Framework of the Cartel Prohibition

1.1 What is the legal basis and general nature of the cartel prohibition, e.g. is it civil and/or criminal?

The basis of cartel prohibition in Malta, which is applicable to both companies and individuals, is Article 5 of the Competition Act (Cap. 379 of the Laws of Malta) (the “Act”). The regime is criminal in nature since an infringement of Article 5 of the Act (or of Article 81 of the EC Treaty) is an 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, subject to the proviso that the fine is never to be less than Euro 6,988.12. 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 rendered liable in solidum with the person found guilty for the payment of the said fine.

1.2 What are the specific substantive provisions for the cartel prohibition?

The basis of cartel prohibition in Malta is Article 5 of the Act, which contains an Article 81 EC-like prohibition of agreements and concerted practices between undertakings, and decisions by an association of undertakings, having the object or effect of preventing, restricting or distorting competition within Malta or any part of Malta.

1.3 Who enforces the cartel prohibition?

Enforcement of the Act is entrusted to the Office for Fair Competition (“OFC”), which is a government department. Despite this, the OFC claims to be autonomous and not subject to any ministerial interference in its investigations and decision making.

In cases where the OFC finds an infringement of the Act (including the existence of a cartel) it may select one of two courses of action: (i) it may issue a decision finding an infringement together with a cease and desist order, and any undertaking notified with any such decision may request that the OFC submit the decision for review before the Commission for Fair Trading (“CFT”); or (ii) 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.

The CFT is an independent administrative tribunal presided by a magistrate, with the other members being an economist and an accountant.

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

1.4 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions?

Currently the Act does not provide for a set procedure for the carrying out of investigations of potential breaches of competition law, including breaches relating to cartels, although in practice the OFC does give the parties to the case the opportunity to be heard, whether orally or in writing.

A consultation paper issued in July 2007 by the Ministry of Competitiveness and Communications proposed setting up a procedure whereby, prior to initiating proceedings relating to an infringement of the Act, the Director of the OFC would be obliged to notify each of the parties concerned in writing of the objections raised against them and set a time limit within which they could inform the Director in writing of all facts known to them which are relevant to their defence. The proposal also suggested an amendment to the Act to the effect that the Director would be obliged to base his decisions only on objections contained in the statement of objections. These proposed amendments have not as yet been promulgated.

1.5 Are there any sector-specific offences or exemptions?

The Act does not contemplate 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”.

1.6 Is cartel conduct outside Malta covered by the prohibition?

There is, to our knowledge, no decision by the OFC, the CFT or the Maltese Courts which specifically addresses this issue, and accordingly it is not possible to provide a definitive answer to this question.

Article 5(1) of the Act provides that the relevant criterion for determining whether an agreement or concerted practice will be

subject to the Act is whether the restraint has an effect on competition within Malta.

It should be noted that though the Act does not explicitly state that the CFT is to follow the rules on jurisdiction followed by Maltese Courts, it is highly likely that the CFT would do so. This means that the CFT would be likely to assert jurisdiction to decide an issue in the cases set forth in Article 742 of the Code of Organisation and Civil Procedure, namely, to try actions concerning:

- citizens of Malta, provided they have not fixed their domicile elsewhere;
- any person as long as he is either domiciled or resident or present in Malta;
- any person, in matters relating to property situate or existing in Malta;
- any person who has contracted any obligation in Malta, but only in regard to actions touching such obligation and provided such person is present in Malta;
- any person who, having contracted an obligation in some other country, has nevertheless agreed to carry out such obligation in Malta, or who has contracted any obligation which must necessarily be carried into effect in Malta, provided in either case such person is present in Malta;
- any person, in regard to any obligation contracted in favour of a citizen or resident of Malta or of a body having a distinct legal personality or association of persons incorporated or operating in Malta, if the judgment can be enforced in Malta; or
- any person who expressly or tacitly, voluntarily submits or has agreed to submit to the jurisdiction of the court.

From a criminal perspective, however, the jurisdiction of the Maltese courts is somewhat more limited. The Criminal Code (Cap 9 of the Laws of Malta) provides that the Criminal Courts can exercise jurisdiction, *inter alia*, “against any person who commits an offence in Malta, or on the sea in any place within the territorial jurisdiction of Malta”. This would seem to imply that prosecution and imposition of fines could only occur for a breach of Article 5(1) if the agreement concluded in Malta.

2 Investigative Powers

2.1 Summary of general investigatory powers.

Table of General Investigatory Powers

Investigatory power	Civil / administrative	Criminal
Order the production of specific documents or information	Yes	Yes
Carry out compulsory interviews with individuals	No	Yes
Carry out an unannounced search of business premises	Yes*	Yes*
Carry out an unannounced search of residential premises	Yes*	Yes*
■ Right to ‘image’ computer hard drives using forensic IT tools	Yes (in the course of a search)	Yes
■ Right to retain original documents	Yes (in the course of a search)	Yes
■ Right to require an explanation of documents or information supplied	No	Yes
■ Right to secure premises overnight (e.g. by seal)	Yes (in the course of a search)	No

Please Note: * indicates that the investigatory measure requires the authorisation by a Court or another body independent of the competition authority.

2.2 Specific or unusual features of the investigatory powers referred to in the summary table.

As a general rule, the OFC cannot conduct a search on any premises after 19.00 hrs or before 07.00 hrs unless it has reason to believe that the delay could cause the loss of necessary information and it is expressly authorised in the warrant authorising the search to conduct a search between 19.00 hrs and 07.00 hrs.

2.3 Are there general surveillance powers (e.g. bugging)?

There are no general surveillance powers.

2.4 Are there any other significant powers of investigation?

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.

The Executive Police, in criminal investigations, have the powers that are normally granted to Police officers such as the power of arrest, and so forth.

2.5 Who will carry out searches of business and/or residential premises and will they wait for legal advisors to arrive?

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 Director is not obliged to wait for legal advisors to arrive prior to commencing the search.

2.6 Is in-house legal advice protected by the rules of privilege?

There is no clear answer to this question as to our knowledge this issue has never been decided by the Maltese Courts. As a general rule, legal advice is protected by the rules of privilege. Traditionally the Maltese Courts have interpreted this rule widely, and therefore it is likely that the Maltese Courts would consider in-house legal advice to be privileged.

2.7 Other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals under investigation.

Any information disclosed to the Director or any document produced to him during an investigation is to be treated as secret and confidential and may only be disclosed before the CFT in any matter before it, or before a competent court in relation to the prosecution of any offence against the Act.

2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used?

Article 23 of the Act provides that it is a criminal offence for any person, in the course of an investigation under the Act, to knowingly or recklessly:

- (a) give any false, inaccurate or misleading information;
- (b) supply incomplete information;
- (c) being an owner, Director, officer, administrator or manager of an undertaking, fail, without reasonable cause, to supply information requested within the time given;
- (d) prevent or hinder any investigation; or
- (e) produce or furnish, or cause or knowingly allow to be produced or furnished, any document or information which he knows to be false in any material particular.

The offence is punishable by the imposition of a fine of not less than Euro 232.94 and not more than Euro 2,329.37 or to imprisonment for a term from three to six months, or to both such fine and imprisonment.

To our knowledge these sanctions have never yet been imposed during a cartel investigation.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

Since the sanctions for an infringement of Article 5 of the Act are criminal in nature, it is only natural individuals who can be found guilty of this infringement, though a company is liable in solidum for the payment of a fine (see question 3.2 below).

3.2 What are the sanctions for individuals?

An infringement of Article 5 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, subject to the proviso that the fine is never to be less than Euro 6,988.12. 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.

3.3 What are the applicable limitation periods?

Article 26 of the Act provides that criminal action for offences under the Act is prescribed by the lapse of five years.

3.4 Can a company pay the legal costs and/or financial penalties imposed on a former or current employee?

Yes. See the answer to question 3.2 above. Also, the Act provides that any fines imposed are recoverable by the Director of the OFC as a civil debt in favour of the Government, and the undertaking in the economic interests of whom the person found guilty was acting is liable in solidum with the person found guilty for the payment of the said fine. Once paid by a company, the debt in favour of the Government would be extinguished.

4 Leniency for Companies

4.1 Is there a leniency programme for companies? If so, please provide brief details.

No, there is currently no leniency programme in place for

companies, though the Minister responsible for commerce is empowered by the Act to promulgate regulations to set up a leniency programme.

4.2 Is there a 'marker' system and, if so, what is required to obtain a marker?

This is not applicable - please see question 4.1 above.

4.3 Can applications be made orally (to minimise any subsequent disclosure risks in the context of civil damages follow-on litigation)?

This is not applicable - please see question 4.1 above.

4.4 To what extent will a leniency application be treated confidentially and for how long?

This is not applicable - please see question 4.1 above.

4.5 At what point does the 'continuous cooperation' requirement cease to apply?

This is not applicable - please see question 4.1 above.

4.6 Is there a 'leniency plus' or 'penalty plus' policy?

This is not applicable - please see question 4.1 above.

5 Whistle-blowing Procedures for Individuals

5.1 Are there procedures for individuals to report cartel conduct independently of their employer? If so, please specify.

There are no procedures for individuals to report cartel conduct independently of their employer.

6 Plea Bargaining Arrangements

6.1 Are there any early resolution, settlement or plea bargaining procedures (other than leniency)?

Yes, a plea bargaining procedure is provided for by Article 26B of the Act. This Article basically provides that it is permissible for the Director of the OFC to enter into an agreement in writing with an offender whereby the offender pays or gives security to the satisfaction of the Director for the payment of a sum being not less than fifty per cent of the minimum penalty applicable for the offence and not more than seventy per cent of the maximum penalty applicable for the offence as the Director of the OFC may, with the concurrence of the CFT, establish. Upon the signing of the agreement by the Director of the OFC and the offender, all criminal liability of the offender under the Act with regard to the offence in relation to which the agreement is concluded is extinguished.

To our knowledge, this procedure has yet been used by the Director of the OFC.

7 Appeal Process

7.1 What is the appeal process?

As is mentioned above, decisions taken by the OFC can, at the request of interested parties, be submitted to the CFT for review. Decisions of the CFT, on the other hand, are not subject to appeal, but may be reviewed by the superior courts on very limited grounds, such as a failure by the CFT to comply with the rules of natural justice.

On the other hand, decisions taken by the Court of Magistrates imposing a fine for an infringement of Article 5 of the Act are subject to appeal to the Court of Criminal Appeal.

7.2 Does the appeal process allow for the cross-examination of witnesses?

The cross-examination of witnesses is permitted during the review process before the CFT, but not generally permitted during the appeal hearings before the Court of Criminal Appeal.

8 Damages Actions

8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct?

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), in particular on the provisions in the Civil Code relating to torts.

Any actions for damages would be brought either before the Small Claims Tribunal, the Court of Magistrates or the First Hall Civil Court, depending on the value of the claim. Proceedings take a relatively long period of time, ranging from one year (in proceedings before the Small Claims Tribunal) to four years or more (in proceedings before the First Hall Civil Court), depending on the complexity of the case and the evidence produced.

In so far as costs are concerned, the general rule is that legal costs are borne by the party losing the case, though the Courts have the discretion to vary this rule. Maltese courts do not award “punitive damages”.

8.2 Do your procedural rules allow for class-action or representative claims?

Yes. 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.

8.3 What are the applicable limitation periods?

The applicable prescription period in actions for damages of this nature is two years.

8.4 What are the cost rules for civil damages follow-on claims in cartel cases?

The general rule is that legal costs are borne by the party losing the case, though the Courts have the discretion to vary this rule

8.5 Have there been any successful follow-on or stand alone civil damages claims for cartel conduct?

To our knowledge there have as yet been no cases brought before the Maltese courts for damages arising as a breach of the Act.

9 Miscellaneous

9.1 Provide brief details of significant recent or imminent statutory or other developments in the field of cartels and leniency.

A consultation paper issued by the Ministry for Competitiveness and Communications towards the end of July 2007 has sought feedback from the public on a proposal to the effect that the enforcement of Competition Law should change from the criminal sphere to the administrative sphere meaning, in effect, that if the proposal becomes law the imposition of fines will no longer require prosecution before a Criminal Court but, rather, simply a decision to that effect by the Director of the OFC.

9.2 Please mention any other issues of particular interest in Malta not covered by the above.

None.

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After reading a degree in law at the University of Malta, as well as a Masters in the Economics of Competition Law, Adrian joined the firm as a trainee in 2003, was made an Associate in 2004, and a Senior Associate in 2008. He is actively involved in matters concerning competition law, electronic communications law, data protection, public procurement IT and e-commerce Law.

Adrian has acted for one of the major players in the electronic communications market in open access issues as well as in litigation before the Commission for Fair Trading and the Electronic Communications Appeals Tribunal. He represents clients regularly before the Office for Fair Competition in competition law issues. Adrian has acted as examiner of law students submitting their thesis in the final year of the LLD course, and the Majister Juris (European Law) at the University of Malta.

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