

Competition - Malta

Look out for concentrations! Steps to take when structuring M&A transactions

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When structuring M&A transactions, particular attention must be given to competition controls. Under the Control of Concentration Regulations (294/2002, as amended), which implement the EU Merger Regulation (139/2004), concentrations that might lead to a substantial lessening of competition in the Maltese market or a part thereof are prohibited. However, multiple issues arise from the wording of this prohibition.

Prohibition on concentrations

In principle, the prohibition is addressed towards concentrations. Among other things, this term refers to:

- all full-function joint ventures;
- mergers between two or more previously independent undertakings; or
- the acquisition by one or more undertakings of direct or indirect control in the whole (or part of) one or more other undertakings.

Control

The notion of 'control' is central, referring to the possibility of exercising a decisive influence on an undertaking, in particular through either:

- the ownership or the right to use all or part of the assets of an undertaking; or
- rights or contracts that confer decisive influence on the composition, voting or decisions of the organs of an undertaking.

As mentioned in the Commission Consolidation Jurisdictional Notice under the EU Merger Regulation, the assessment of control is qualitative rather than quantitative.

Arrangements leading to temporary control (eg, in order to liquidate) are excluded from the remit of the Control of Concentration Regulations. Furthermore, an internal restructuring of group companies would typically involve no change of control and accordingly would likely fall outside the remit of the regulations.

Turnover test

Notwithstanding the existence or otherwise of control, a concentration is deemed to arise only where, during the preceding financial year:

- the aggregate turnover in Malta of the undertakings concerned exceeded €2,329,373.40; and
- each of the undertakings concerned had a turnover in Malta equivalent to at least 10% of the combined aggregate turnover of the undertakings concerned.

These criteria are jointly referred to as the 'turnover test'. The components of the test are cumulative. Therefore, for a notification procedure to be triggered, both the acquirer and the target must generate turnover in Malta at least equivalent to 10% of the aggregate turnover in Malta of the undertakings concerned. By way of example, if the aggregate turnover in Malta is €85 million, each of the undertakings concerned must have a turnover in Malta equivalent to at least €8.5 million.

However, when defining as a concentration a joint venture established to perform on a lasting basis all the functions of an autonomous economic entity (ie, a full-function joint venture), the turnover test need not apply. Accordingly, a full-function joint venture is deemed a concentration for the purpose of the Control of Concentration Regulations,

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irrespective of the turnover test.

Calculating aggregate turnover

The aggregate turnover required for the turnover test should comprise the amounts derived by each of the undertakings concerned in the preceding financial year from the sale of products and the provision of services to other undertakings or consumers falling under the undertakings' ordinary activities, net of sales rebates and value added tax and other taxes directly related to turnover. The calculation must be made on a consolidated basis. Accordingly, among other things, it must include not only the undertaking concerned, but also:

- those undertakings in which the undertaking concerned directly or indirectly exercises control in the manner set out in the Control of Concentration Regulations; and
- those undertakings that have, in the undertaking concerned, the rights or powers listed in the regulations.

Where the concentration consists of the acquisition of part of one or more undertakings (whether constituted as legal entities or not), only the turnover relating to the parts that are the subject of the transaction need be taken into account with regard to the seller or sellers. However, where two or more such transactions take place within a two-year period between the same persons or undertakings, they shall be treated as the same concentration.

Specific rules on the calculation of aggregate turnover apply with respect to credit and financial institutions, and to insurance undertakings.

Substantial lessening of competition

On receipt of notification, in accordance with the procedure referred to below, the director general (competition) must assess whether the concentration may lead to a substantial lessening of competition in Malta. In so doing, the director general must take into consideration, among other things:

- the need to maintain and develop effective competition in the Maltese market;
- the market position of the undertakings concerned and their economic and financial power; and
- the nature and extent of development and innovation in the relevant market.

Notification procedure

A concentration will not take effect either before its notification or before it has been declared lawful, following a decision of the director general.

Notification of a concentration must be submitted to the director general within 15 days of the trigger event that brought about the concentration - this could be the conclusion of an agreement or the announcement of a public bid, among other things. On receipt of notification, the director general must determine whether the concentration falls within the parameters of the Control of Concentration Regulations, including the prohibition on concentrations established therein. In principle, a determination at the Phase 1 stage must be issued within six weeks of the day following receipt of a notification.

A simplified notification procedure applies to concentrations that are deemed to raise no serious doubts as to their legality in terms of these regulations.

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