

CARTELS AND LENIENCY – Q&A FORMAT

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THE CARTEL PROHIBITION

1 The legislation

1.1 What is the basis and general nature of the cartel prohibition?

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 Competition 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 MTL 3000 (Approx EUR 7200). 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 any decision 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 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 Commission for Fair Trading (“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.

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 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.

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 standard 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. Having said this, 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 must notify each of the parties concerned in writing of the objections raised against them and set a time limit within which they may inform the Director in writing of all facts known to them which are relevant to their defence, and the Director is to base his decisions only on objections contained in the statement of objections.

1.5 Are there any sector-specific offences or exemptions?

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.*”

1.6 Is cartel conduct outside your jurisdiction covered by the prohibition?

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. This is the only criterion which is specified by the Act and as far as we are aware, to date, there have been no decisions by the OFC or the CFT shedding light on the precise meaning of this criterion.

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:

- a. citizens of Malta, provided they have not fixed their domicile elsewhere;
- b. any person as long as he is either domiciled or resident or present in Malta;
- c. any person, in matters relating to property situate or existing in Malta;
- d. any person who has contracted any obligation in Malta, but only in regard to

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actions touching such obligation and provided such person is present in Malta;

e. 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;

f. 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;

g. any person who expressly or tacitly, voluntarily submits or has agreed to submit to the jurisdiction of the court.

2 Investigative Powers

2.1 Summary of general investigatory powers

Please use an “” after your “yes” answer to indicate that a power can, as a general rule, only be exercised with external authorisation (i.e. with the authorisation of a court or independent supervisory body).*

Table of General Investigatory Powers

Investigatory power	Civil / administrative	Criminal
Order the production of specific documents or	Yes	Yes

information		
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
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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)?

No.

2.4 Other powers of investigations

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

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 in connection with a cartel investigation?

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; or
- (b) supply incomplete information; or
- (c) being an owner, Director, officer, administrator or manager of an undertaking fail, without reasonable cause, to supply information requested within the time given; or
- (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 MTL 100 (approx. EUR 240) one hundred liri and not more than MTL 1000 (approx. Eur 2400) 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 3.2 below).

3.2 What are the sanctions for individuals?

As is mentioned in 1.1, 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 MTL 3000 (Approx EUR 7200). 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 for the imposition of sanctions for cartel conduct?

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

3.4 Is cartel conduct by individuals potentially an extraditable offence?

As explained above, an infringement of Article 5 of the Act is punishable by means of a fine and not by a prison term. In terms of the Extradition Act (Cap 276 of the Laws of Malta) a person can only be extradited for an offence which is punishable by a term of imprisonment of at least 12 months. Consequently, cartel conduct in Malta is not, currently, an extraditable offence.

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

Yes. See the answer to 3.2 above. Also, the Act provides that any fines imposed are recoverable by the Director 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.

LENIENCY / WHISTLE-BLOWING

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?

N/A

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

N/A

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

N/A

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

N/A

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.

No.

6 Plea Bargaining Arrangements

6.1 Are there 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 has been entered is extinguished.

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

APPEALS AND DAMAGES ACTIONS

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 Do courts frequently adjust the level of penalty imposed by the competition authority? If so, on what grounds.

To our knowledge there is as yet no instance in which a fine has been imposed upon a person as a result of that person infringing the Act. As is mentioned above, the imposition of fines is carried out by the Court of Magistrates and therefore must be preceded by a successful criminal conviction before the Court of Magistrates. It is likely that difficulties in producing sufficient proof to ensure that the level of proof required in criminal proceedings is satisfied has dissuaded the Executive Police from pursuing prosecutions.

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). An action for damages brought by a third party would be based on the provisions of the Civil Code relating to tort.

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 Have there been successful civil damages claims in the past?

We are not aware of any successful civil damages claims as a result of an infringement of the Act.

OTHER MATTERS

9 Miscellaneous

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

A recent consultation paper issued by the Ministry for Competitiveness and Communications towards the end of July of this year 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 is 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 your jurisdiction not covered by the above.

None

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