

Competition Law in Malta: Overview

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A Q&A guide to competition law in Malta.

The Q&A provides a high-level overview of the antitrust and competition law rules for restraints of trade and dominance, merger control and the legal approach to joint ventures.

The section on restraints of trade and dominance covers the regulatory framework applicable to horizontal and vertical restraints, monopolistic behaviour and abuses of dominance; the regulatory authorities; exemptions and exclusions; penalties; third-party claims; and appeals.

The section on merger control covers the relevant rules for acquisitions; notification requirements; the timelines and rules regarding publicity and confidentiality; the substantive test; remedies, penalties; third-party claims; and appeals.

Regulatory Framework

1. What is the competition law framework?

The competition law framework in Malta is regulated under the *Competition Act 1994 (Chapter 379)* (CA). The CA sets out the relevant prohibitions concerning restrictive agreements and practices (see [Question 3](#)) and abuses of dominance (see [Question 4](#)).

Merger control is dealt with by the *Control of Concentration Regulations 2003 (Subsidiary Legislation 379.08)* (CCR) which is adopted under the CA (see [Question 13](#)).

The *Malta Competition and Consumer Affairs Authority Act 2011 (Chapter 510)* established the *Office for Competition* (NCA) which forms part of the *Malta Competition and Consumer Affairs Authority* (MCCAA) (see [Question 2](#)).

Regulatory Authority

2. Which authority or authorities regulate competition?

The enforcement of competition law in Malta is split between the NCA and the *Civil Court (Commercial Section)* (Court).

The NCA is headed by the Director General (Competition). The NCA carries out the following functions:

- Investigating alleged breaches of competition law and instituting proceedings before the Court when it considers that an infringement has taken place.
- Conducting market sector inquiries and keeping under review markets and commercial activities relating to the supply of goods and services and to recommend action where necessary.
- Performing an advocacy role, which involves advising public authorities on any anti-competitive effects that may arise because of legislation, policy or administrative practices or action.

The decision finding an undertaking in breach of competition law is made by the Court. The Court is also responsible for imposing penalties and remedies. It is the Court that determines the penalty to be imposed on the undertaking or association of undertakings (see *Question 10, Fines and Monetary Remedies*).

The NCA is responsible for merger control in Malta. The NCA will examine a transaction where the proposed concentration falls within the scope of the CCR (see *Question 13*).

Restrictive Agreements and Practices

3. What is the basic legal framework governing restrictive agreements and practices?

Agreements and practices which restrict, prevent, or distort competition in Malta are prohibited under Article 5 of the CA. Article 5 is modelled on Article 101 of the *Treaty on the Functioning of the European Union* (TFEU), except that unlike Article 101 of the TFEU, it does not require an effect on trade between EU member states. If the agreement or practice has an effect on trade between EU member states, it will be subject to Article 101.

Article 5(1) of the CA prohibits any agreement between undertakings, any decision by an association of undertakings and any concerted practice between undertakings that has the object or effect of preventing, restricting or distorting competition within

Malta or any part of Malta. Article 5(1) further provides a non-exhaustive list of agreements, decisions or practices which are to be prohibited. These include any agreement, decision, or practice which:

- Directly or indirectly fixes the purchase or selling price or other trading conditions.
- Limits or controls production, markets, technical development, or investment.
- Shares markets or sources of supply.
- Imposes the application of dissimilar conditions to equivalent transactions with other parties outside such agreement, placing them at a competitive disadvantage.
- Makes the conclusion of contracts subject to the acceptance by the other parties of supplementary obligations which, by their very nature or according to commercial usage, have no connection with the subject of such contracts.

There are no block exemption regulations promulgated under Maltese law and there are no guidelines issued by the NCA in relation to horizontal or vertical restraints.

The NCA and the Court are, by law, required to have recourse to EU block exemption regulations and to guidelines and interpretative notices issued by the European Commission (EC).

Monopolies and Abuses of Dominance

4. Are there specific rules that apply to monopolistic or dominant companies?

Article 9 of the CA prohibits any abuse by one or more undertakings of a dominant position within Malta or any part of Malta. Article 102 of the TFEU prohibits such abuse in cases where they affect trade between EU member states.

Article 9 of the CA provides a non-exhaustive list of behaviour which amounts to an abuse of a dominant position (see [Question 6](#)). Article 9 of the CA is modelled on Article 102 of the TFEU, except there is no requirement for the abuse to have an effect on trade between EU member states.

5. How is dominance/monopoly power determined?

The CA defines a "dominant position" as a position of economic strength held by one or more undertakings, which enables the undertakings to prevent effective competition being maintained on the relevant market by affording the undertakings the power to behave, to an appreciable extent, independently of its or their competitors' suppliers or customers.

Dominance is determined through a process which considers the market structure and identifies the competitive constraints on the dominant undertaking, by considering principally:

- The undertaking's and any competitors' market shares.
- Barriers to entry and expansion.
- Countervailing buyer power.

In assessing dominance/market power, the NCA and the Court are guided by the case law of the Court of Justice of the European Union (CJEU) and the guidance issued by the EC.

6. Are there any recognised categories of behavior that may constitute abusive conduct?

Article 9(2) of the CA provides an indicative list of the conduct covered by the prohibition, (as does Article 102 of the TFEU). This includes:

- Directly or indirectly imposing an excessive or unfair purchase or selling price or other unfair trading conditions.
- Limiting production, markets or technical development to the prejudice of consumers.
- Applying 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.
- Making 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.

EC decisions and CJEU case law have identified broad categories of behaviour that constitute abusive conduct. Several national decisions finding breaches of Article 9 have relied on these other categories of abusive behaviour. The broader split is between:

- Price-based conduct. This includes predatory pricing, discriminatory pricing, excessive pricing, and margin-squeeze.
- Non-price based conduct. This includes refusal to supply, exclusive dealing (and rebates), and tying and bundling.

Exemptions and Exclusions

7. Are there any exemptions from the competition laws? If so, what are the criteria for individual exemption or block exemptions?

Article 5(3) of the CA, which is modelled on Article 101(3) of the TFEU, provides that a restrictive agreement or practice will not be prohibited under Article 5(1) if it can satisfy all of the following cumulative criteria:

- It contributes towards the objective of improving production or distribution of goods or services or promoting technical or economic progress.
- It allows consumers a fair share of the resultant benefit.
- It does not impose on the undertakings concerned any restriction which is not indispensable to achieving the above-mentioned objective.
- It does not give the undertakings concerned the possibility of eliminating or significantly reducing competition in respect of a substantial part of the products to which it refers.

The provision must be interpreted in line with the CJEU's case law as well as the *EC's Guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08)*. The undertaking seeking to rely on Article 5(3) of the CA and/or Article 101(3) of the TFEU therefore has the burden of proving that the above four conditions are fulfilled.

Restrictive agreements or practices which have the potential to affect trade between EU member states cannot be prohibited under Malta's national competition laws when they:

- Are covered under the EU Block Exemption Regulations.
- Are covered by the cumulative criteria of Article 101(3) of the TFEU.
- Do not violate the general provision of Article 101(1).

There are no Malta-specific block exemption regulations that would be applicable when a restrictive agreement or practice would be caught by Article 5 of the CA but would not affect trade between EU member states. However, it is possible for the minister responsible for competition policy to prescribe that certain categories of restrictive agreements and practices are exempt from the Article 5(1) prohibition (following consultation with the Board of Governors of the MCCA), provided they meet the cumulative requirements of Article 5(3) above (Article 8, CA).

8. Is it possible to obtain guidance from the authority as to whether an agreement or practice is likely to restrict competition?

The NCA is generally open to provide informal (non-binding) guidance when requested by undertakings. However, there is no general practice for undertakings to seek guidance from the NCA on whether an agreement or practice is likely to restrict competition and since July 2019, the NCA is no longer empowered to issue guidance providing direction on strictly novel questions upon an undertaking's request.

9. Is any conduct excluded from the scope of the competition laws?

Restrictive agreements and practices may be excluded from the Article 5(1) prohibition when the agreement or practice would have a minimal impact on the relevant market (Article 6, CA). To determine whether the *de minimis* threshold has been met, consideration is given to all relevant circumstances, including the aggregate share of all the undertakings concerned of the relevant market. This exclusion does not apply where competition in a relevant market is restricted by the cumulative effect of parallel networks of similar agreements established by several undertakings.

In relation to abuse of dominance under Article 9 of the CA, although there is no explicit exemption provision, conduct will not be found to be abusive when both:

- The undertaking can demonstrate an objective justification for the behaviour, or it can show that it would lead to substantial efficiency gains which consumers would benefit from as a result.
- The conduct is necessary and proportionate to realise the efficiencies and does not substantially eliminate competition.

Undertakings will also not breach Malta competition laws when both the restriction on competition or dominant practice is required by national legislation and the national legal framework has itself eliminated any possibility of competitive market activity for the sector.

This is generally known as the "state action defence." In these cases, the anti-competitive conduct is not attributable to the undertaking.

The NCA may investigate breaches that occurred in the past. However, the NCA can only impose penalties when judicial proceedings concerning anti-competitive conduct are instituted within five years after the termination of the infringement. This period is interrupted if formal investigative measures in respect of the infringement have been initiated.

Penalties

10. What penalties or sanctions are available for breaching the competition laws?

Orders

When delivering a judgment on an antitrust violation, the Court is authorised to issue:

- An order for an undertaking to cease and desist participating in the infringing agreement or practice.
- A compliance order, setting behavioural or structural remedies for the purpose of bringing the infringement to an immediate and effective end.

(Article 13A, CA.)

However, the Court can only impose behavioural or structural remedies which are proportionate to the infringement and necessary to bring the infringement to an end. Structural remedies may only be imposed by the Court where there is no equally effective behavioural remedy or where any equally effective remedy would be more burdensome for the undertaking concerned than the behavioural remedy.

The Court may, as an alternative to finding an infringement, issue a judgment declaring that the commitments offered by the undertaking to remedy the infringement, as binding. This is possible provided the commitments are sufficient to bring the alleged infringement to an end and address the NCA's competition concerns.

Furthermore, following an amendment to the CA in 2021, it is now possible for the NCA to issue a decision which would make the undertaking's commitments binding without the need to initiate judicial proceedings before the Court. Following this amendment, it is also possible for the NCA to market test the commitments prior to making them binding.

Fines and Monetary Remedies

The Court can impose monetary penalties of up to 10% of the infringing undertaking's total worldwide turnover (or the turnover of the association of concerned undertakings) in the financial year preceding the judgement imposing the penalty, in relation to each infringement that the undertaking and, or association of undertakings, intentionally or negligently:

- Breached Malta or EU competition law.
- Failed to comply with a cease-and-desist order and/or compliance order.
- Failed to comply with an interim measure.

- Failed to comply with a commitment that was made binding upon it.

(Article 21, CA.)

When determining the applicable penalty, the Court will give due regard to the gravity and the duration of the infringement and to any aggravating or attenuating circumstances.

The CA provides a non-exhaustive list of aggravating and mitigating factors. The Court may consider aggravating circumstances to be a factor when:

- The Court has already imposed a penalty on the same undertaking (or association of undertakings) for the same or a similar infringement.
- The undertaking (or association of undertakings) has already been found to be in breach of competition law by a final decision or final judgement (*res judicata*).
- The undertaking (or association of undertakings) had a leading role or acted as a direct perpetrator or instigator in relation to the infringement.
- The undertaking took retaliatory or other coercive measures against other undertakings, which were intended to ensure continuation of the infringement.

Conversely, the Court may consider the following to be examples of attenuating/mitigating circumstances:

- Where the undertaking's (or association of undertakings') involvement in the infringement was substantially limited.
- Where the undertaking (or association of undertakings) ended the infringement on its own accord.
- Where the undertaking (or association of undertakings) significantly contributed to the uncovering of the infringement.
- Where the undertaking involved in the infringement acted under severe pressure or duress.

The Court can also issue monetary penalties for failure to properly co-operate with the NCA's inspections and investigations (procedural violations). Therefore, the Court can impose penalties of up to EUR50,000 or up to 1% of the total worldwide turnover of the undertaking (or association of undertakings) in the financial year preceding the judgment imposing the penalty, when any person, undertaking and, or association of undertakings in the course of any investigation or sector inquiry, intentionally or negligently:

- Provides false, misleading, incomplete, or incorrect information in response to a request for information or question or if the information is not provided within the specific time limit.

- Produces, provides, or causes or knowingly allows to be produced or provided, any document or information which they know to be false in any particular manner.
- Fails to comply with an inspection or obstructs an inspection.
- Breaks the seals affixed by the NCA during an inspection.
- Gives an incorrect, misleading answer or fails to provide a complete answer when asked to provide an explanation about any documentation.
- Discloses information to any third party that is not party of the relevant proceedings.
- Fails to appear to an interview.
- Prevents or hinders any investigation or sector inquiry.

The Court can also impose a sanction requiring the undertaking under investigation to make periodic penalty payments (within time limits fixed by the Court) when it fails to:

- Comply with a cease-and-desist order and/or a compliance order.
- Comply with interim measures.
- Comply with any commitment made binding upon it.
- Submit to an inspection and produce the required objects, documents or other records.
- Supply complete information in response to a request for information.
- Supply correct information and to produce the requested documents following a request for information.
- Appear to an interview.
- Cease pursuing any other conduct that hinders the NCA's investigation or sector inquiry and fails to rectify any acts or omissions.

The amount of periodic payments imposed are determined in proportion to the undertaking's (or association of undertakings') average daily total worldwide turnover for the previous financial year, for each day of delay calculated from the date set in the Court's judgement or NCA's decision, with the required measure.

The Court must ensure that the penalties it imposes are effective, proportionate and dissuasive.

Personal Liability

Personal liability may not be imposed on the undertaking's directors or managers for breach of the substantive competition rules but may be imposed for procedural violations, either in the instances already outlined (see above, *Fines and Monetary Remedies*) or in cases provided for under Article 21(6) of the CA.

Article 21(6) provides that a person acting in the capacity of director, manager, secretary or any similar officer of an undertaking (or association of undertakings), or any other person required to provide information to the NCA, will be subject to personal liability if they knowingly or recklessly:

- Give any false, incorrect, or misleading information.
- Supply incomplete information.
- Prevent or hinder any investigation.
- Produce, provide, cause, or knowingly allow to be produced or provided, any document or information which they knows to be false in relation to any particular material.
- Fails without reasonable cause to supply the information requested.

In such cases the person concerned will be subject to personal liability for fines ranging from EUR1,500 to EUR10,000, and may also be liable for up to EUR2,400 for each day of default.

Immunity/Leniency

The *Immunity from Penalties and Reduction of Penalties in Cartel Investigation Regulations 2021 (Subsidiary Legislation 379.10)* (Leniency Regulations) establish the leniency framework in Malta. The Leniency Regulations transpose the provisions of Chapter VI of the *ECN+ Directive ((EU) 2019/1)*.

The Leniency Regulations establish a leniency programme in relation to the application of Article 5 of the CA (and Article 101 of the TFEU). The programme permits a leniency applicant that is a participant of an alleged secret cartel to co-operate with the NCA by volunteering their knowledge and disclosing their role in the alleged cartel. The participant would receive immunity from, or a reduction of, penalties in return (see *Fines and Monetary Remedies*).

Third Party Damages Claims

11. Can third parties claim damages for losses suffered as a result of a prohibited restrictive agreement or abuse of dominance? Are collective/class actions possible?

Follow-on/Standalone Actions

Individuals or undertakings that can show that they have, or are likely to, suffer loss or harm due to the infringer's anti-competitive conduct can bring actions for breaches of competition laws. Both stand-alone and follow-on actions can be brought before the Court.

A third-party claimant can bring an action before the Court to request the restriction of competition to be declared null and unenforceable in accordance with Article 5 of the CA/Article 101 of the TFEU and/or alleging an abuse of a dominant position under Article 9 of the CA/Article 102 of the TFEU.

Claimants can also make an application to the court to request interim measures before or during proceedings, including seizure of assets and prohibitory injunctions.

Procedures or Rules

Where there is an action before any court of civil jurisdiction, other than the Court, raising issues relating to Article 5 of the CA/101 of the TFEU and, or a breach of Article 9 of the CA/Article 102 of the TFEU, that court must stay the proceedings and request the NCA to submit a (non-binding) report on the competition questions raised before it.

In principle, the same procedure applies to follow-on and stand-alone damages actions. However, if the follow-on action is based on a final decision from the EC, or a judgment which is *res judicata* (already judged), it will be (irrefutably) deemed that the alleged infringement of competition has already been established. The claimant would therefore simply need to prove the extent of the harm suffered in accordance with the law.

If the competition law infringement was found initially by a final decision of a national competition authority of another EU member state, that final decision may be presented before the court seized of an action for damages as *prima facie* evidence that an infringement has occurred, and may, at the discretion of the court, be assessed along with other evidence adduced by the parties. This is in line with the Maltese provisions transposing the Antitrust Damages Directive (2014/104/EU).

In a judgment delivered by the First Hall Civil Court on 27 June 2019, it was held that the NCA's report, having been drawn up by the authority established by law to investigate competition law breaches, constitutes a piece of significant probative value independent from the parties.

The limitation period for an action for damages is five years. This limitation period starts to run from the date the infringement ceased and the claimant became aware or could reasonably have been expected to have become aware of the illegal conduct, the harm suffered and the identity of the perpetrator.

This limitation period is, in principle, suspended when the EC, the NCA, or the national competition authority of another EU member state takes action for the purpose of the investigation or its proceedings in respect of an infringement of competition law to which the action for damages relates. The suspension ends one year from the date the infringement decision become *res judicata* or after the proceedings are otherwise terminated.

Class/Collective Actions

Collective actions are possible in relation to antitrust infringements in Malta. Article 3 of the [Collective Proceedings \(Competition\) Act 2012 \(Chapter 520\)](#) (CPCA) provides that collective proceedings can be instituted for the purposes of:

- Stopping an infringement of competition law.

- Remedying the consequences of an infringement.
- Obtaining compensation for the harm suffered.

Collective proceedings may be instituted as a group action or a representative action. A group action is brought on behalf of the class members by a class representative, who has a claim which falls within the proposed collective proceedings. A representative action is brought on behalf of the class members by a registered consumer association or a constituted body representing undertakings.

Class actions may be instituted as stand-alone or follow-on actions. Collective proceedings are permitted on an opt-in basis, so that, in order to be represented, claimants must individually choose to be included as a member of the class by registering their claim with the class representative.

Article 4 of the CPCA provides that where a class representative has filed a claim for damages arising from an infringement of the CA or Articles 101 or 102 of the TFEU, any action for private enforcement will be regulated by the provisions under the CA which transposed the Antitrust Damages Directive into Maltese law.

Appeals

12. Is there a right of appeal against any decision of the authority? Are rights of appeal available to third parties, or only to the parties to the agreement or practice?

A right to appeal is afforded to the NCA and any party to the proceedings before the Court. These parties can lodge an appeal on points of law or fact before the Court of Appeal within 20 days of the delivery of the Court's judgment. The Court of Appeal is generally presided by three senior judges.

The Court of Appeal is duty bound to appoint the case for hearing no later than six months from the date of service of the appeal application on all parties to the first instance proceedings.

There is no right of appeal for third parties unless these joined the proceedings at first instance. An interested third party is able to join the proceedings also at appeal stage.

Merger Control

13. What merger control rules apply to mergers and acquisitions in your jurisdiction?

In Malta, merger control is regulated under the CCR. Malta adopts a system of mandatory prior notification of concentrations which fall within the scope of the CCR. Therefore, a concentration which its scope must not be implemented or closed prior to clearance from the NCA.

In the application of the CCR, recourse is made to the EC's guidelines, notices and decisions and the judgements of the CJEU for guidance and interpretation purposes. These include (among others):

- [Commission Consolidated Jurisdictional Notice on the Control of Concentrations between Undertakings \(2008/C 95/01\)](#) (Consolidated Jurisdictional Notice).
- [Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings \(2004/C 31/03\)](#).
- [Guidelines on the Assessment of Non-horizontal Mergers on the Control of Concentrations between Undertakings \(2008/C 265/07\)](#).
- [Commission Notice on Acceptable Remedies \(2008/C 267/01\)](#).
- [Commission Notice on a Simplified Procedure for Treatment of Certain Concentrations \(2013/C 366/04\)](#).
- [Commission Notice on Restrictions Directly Related and Necessary to Concentrations \(2005/C 56/24\)](#).

The MCCA has also issued its own [Guidance Notes on Mergers and Acquisitions](#).

14. What are the relevant jurisdictional triggering events?

Jurisdiction is triggered when there is a concentration within the meaning of the CCR.

Concentration

A concentration occurs where both of the following result:

- There is a transaction, in or outside Malta, by which:

- two or more previously independent undertakings merge; or
 - one or more undertakings (or one or more persons already controlling at least one undertaking) acquire direct or indirect control of the whole or parts of one or more other undertakings by the purchase of securities or assets, by contract or by any other means.
-
- The turnover threshold is satisfied.

The creation of a full-function joint venture is considered a concentration (see [Question 23](#)).

The transaction must bring about a lasting change in the control of the undertaking concerned.

Control

This is defined as "having the possibility of exercising decisive influence on an undertaking." Control may be:

- Sole control, when acquired by one undertaking that is able to alone determine the undertaking's strategic decisions.
- Joint control, when acquired by two or more undertakings which need to co-operate to influence the strategic behaviour of the undertaking.

Under the CCR, control is exercised, in particular, through:

- Ownership or the right to use all or part of the assets of an undertaking.
- Rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking. Undertakings (or persons) not holding such rights or entitled to such rights under the contract concerned are considered to have acquired control if they have the power to exercise those rights.

It is possible to acquire control not only by law, but also on a de facto basis. The acquisition of a minority interest can be considered a concentration if the minority shareholder will be able to exercise decisive influence, for example by vetoing strategic decisions in an undertaking.

The acquisition of a minority interest that does not lead to an acquisition of control is not caught by the CCR.

Transactions leading to changes in the quality of control, such as a change between sole and joint control scenarios or an increase in the number or change in the identity of controlling shareholders, are covered by the CCR.

In interpreting the concept of control and in determining whether the transaction brings about a lasting change in control, the NCA is guided by the Consolidated Jurisdictional Notice.

For details of the latest jurisdictional thresholds see, [Merger Control Quick Compare Chart: Malta](#).

To compare jurisdictions, see the [Merger Control Quick Compare Chart](#).

For details of the latest thresholds from the Malta competition authority's website, see page 3 of the [MCCAA Guidance Notes on Mergers and Acquisitions](#).

Notification

15. What are the notification requirements for mergers? Are they mandatory or voluntary?

Once the transaction qualifies as a concentration as defined by Regulation 2 of the CCR, it is mandatory to notify the concentration. Notification of the transaction must be made to the NCA prior to its implementation. There are no exceptions to this obligation per se. The only possible exceptions to the definition of a concentration under the CCR correspond to those provided for in Article 3(5) of [Regulation \(EC\) 139/2004 on the control of concentrations between undertakings](#) (Merger Regulation).

With regards to which party must make the notification, the following rules apply:

- Where the transaction involves the acquisition of a controlling interest by one undertaking (sole control), the concentration must be notified by the acquirer.
- Where the transaction consists of a merger or the acquisition of joint control, it must be notified jointly by the parties to the merger or by those acquiring joint control.
- In the case of a public bid to acquire an undertaking, notification must be made by the bidder.

Concentrations must be notified by using the [Concentration Notification Form \(Form CN\)](#) found in the Schedule to the CCR. The Form CN guides notifying parties as to which sections should be completed.

There is only one form which applies for all concentrations that need to be notified. However, if the concentration qualifies under the simplified procedure, some of the information requested in the Form CN is not required.

One original and two copies of the notification along with all the supporting documents must be submitted to the NCA. However, following the COVID-19 pandemic in 2020, the NCA also accepts an electronic submission of the notification for the purposes of satisfying the notification requirement and triggering the statutory timeline with an original copy being submitted physically subsequently.

Procedure and Timetable

16. What are the procedures and timetable?

The NCA issues its decision on the concentration within:

- For the simplified procedure: four weeks from the date of receiving a completed (as determined by the NCA) notification from the parties. See below, *Simplified Procedure*.
- For the standard procedure: six weeks from the NCA initiating the standard Phase I procedure. However, if the parties need to submit commitments to obtain clearance, the six-week time frame in Phase I will be extended to two months. Further, these timeframes may be suspended for a period of three weeks to discuss new/revised commitments.

If the concentration raises serious competition concerns (so that the NCA deems it necessary to follow its Phase I review with a Phase II investigation), the decision will be taken within four months from the initiation of Phase II proceedings. This period can be suspended by up to one month where commitments are offered by the parties.

Pre-Notification Discussions

There are no fixed procedures or timetable for pre-notification discussions as these are voluntary discussions held upon the request of the parties. Typically, the parties approach the NCA two to six weeks prior to notification, depending on the issues that they would like to discuss with the NCA and the complexity of the transaction.

Where the NCA does not take a decision within the time limits set in the CCR, the concentration will be deemed unconditionally cleared.

Phase I

Following notification, the procedure before the NCA initiates with Phase I.

During Phase I, the NCA can decide that the concentration:

- Does not fall within the scope of the CCR.
- Is cleared without any conditions.
- Is cleared subject to conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into to render the concentration lawful.
- Raises serious doubts as to its lawfulness in terms of the provisions of the CCR. In this case, the NCA will initiate proceedings by launching an in-depth investigation (Phase II).

The NCA, after giving the parties the opportunity to be heard, can revoke a decision declaring that the concentration falls outside the scope of the CCR or that the concentration is lawful where the:

- Decision is based on incorrect information for which one of the undertakings is responsible.
- Decision is obtained by deceit.
- Undertakings concerned commit a breach of a commitment attached to the decision.

In such a case, the NCA can take any Phase I decision without being bound by the deadlines set out above.

Phase II

Where the concentration is subject to a Phase II investigation, any one of the following decisions must be taken:

- The concentration is lawful.
- The concentration is cleared subject to conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into to render the concentration lawful.
- The concentration is prohibited. In this case, if the concentration has already been implemented, the NCA can require the undertakings or assets brought together to be separated or he can require the cessation of joint control or any other action to restore conditions of effective competition.

Before clearing a concentration subject to conditions or prohibiting a concentration or ordering actions intended to restore the status quo or revoking an earlier decision clearing the concentration, the NCA must inform the parties of the objections raised against them and give the parties concerned the opportunity to be heard (by submitting their observations in writing and, if requested in their written submissions, by developing their arguments in an oral hearing).

The NCA, after giving the parties the opportunity to be heard, can revoke a positive decision taken in Phase II or take a decision that the concentration is unlawful without being bound by the Phase II timeframe where the decision is based on false, misleading, or incomplete information for which one of the parties is responsible or where the parties breach a commitment attached to the decision.

Both Phase I and Phase II timeframes will be suspended in certain circumstances, as where the NCA:

- Requests the information again after the notifying party or another involved party fails to provide the information requested within the time limit set (the timeframe is suspended from the end of the time limit fixed in the first request of information and the receipt of the complete and correct information).
- Requests information or orders an investigation because the notifying parties have failed to inform the NCA of material changes in the facts contained in the notification (the timeframe is suspended for the period between the occurrence of the change in the facts and the receipt of complete and correct information or completion of the investigation).
- Orders another investigation after the notifying party or another involved party refuses to submit to an investigation or to cooperate in an investigation (the timeframe is suspended for the period between the unsuccessful attempt to carry out the investigation and the completion of the second investigation).

Simplified Procedure

The CCR also provides for a simplified procedure for concentrations which are considered as not raising serious concerns, unless the NCA considers otherwise in exceptional cases and in the light of the economic conditions relating to the market and the parties concerned.

Under the simplified procedure, the NCA issues a short-form decision declaring the concentration lawful within four weeks from complete notification. Concentrations can benefit from the simplified procedure where:

- Two or more undertakings acquire joint control of a joint venture and the turnover of the joint venture and/or the turnover of the contributed activities is less than EUR698,812 in Malta and the total value of assets transferred to the joint venture is less than EUR698,812 in Malta.
- None of the business activities of the parties to the concentration overlap horizontally or vertically.
- The activities of the parties to the concentration overlap horizontally and the parties' combined market share is less than 15%.
- The parties' activities are linked vertically and their combined market share is less than 25%.

The simplified procedure may only be used in cases where the NCA is able to ensure that all relevant circumstances are established with sufficient clarity.

The simplified procedure will not be applied when:

- The relevant markets or the parties' market shares cannot be established with sufficient clarity.
- The concentration has, as its object or effect, the co-ordination of the competitive behaviour of undertakings that remain independent.

In addition, during the four-week deadline, the NCA retains the option of reverting to the ordinary Phase I procedure.

For an overview of the notification process, see [Malta Merger Notifications Flowchart](#).

Publicity and Confidentiality

17. How much information is made publicly available concerning merger inquiries? Is any information made automatically confidential and is confidentiality available on request?

Publicity

Upon notification, the NCA publishes in the *Government Gazette* and a daily newspaper the fact that a notification has been made, the names of the parties, the nature of the concentration, and the economic sectors involved. This is also published on the NCA's website. The NCA is obliged to state in any publication concerning the notification, the right of third-party objectors to submit their objections in writing within seven working days from the publication of the fact of notification in the *Government Gazette* or the daily newspaper (whichever is earliest).

Once a decision is issued, whether it is in Phase I or Phase II or under the simplified procedure, the NCA publishes a non-confidential version of the decision on its website.

Automatic Confidentiality

The CCR require the NCA to pay due attention to the legitimate interest of undertakings in the protection of their business secrets when publishing the fact of notification and its decisions.

Confidentiality on Request

The parties can request that certain information be kept confidential. Except where the information is clearly a business secret, the parties must give reasons as to why the information should not be divulged or published.

Substantive Test

18. What is the substantive test?

Concentrations that might lead to a substantial lessening of competition (SLC) in a relevant market in Malta are prohibited. In applying the SLC test, the NCA carries out an economic analysis, considering, in particular:

- The need to maintain and develop effective competition in Malta in the light of the structure of the markets concerned and actual or potential competition within or outside Malta.
- The actual or likely failure of the business of a party to the concentration.
- The nature and extent of development and innovation in a relevant market.

- The market position of the undertakings concerned and their economic and financial strength.
- The alternatives available to suppliers and users and access to supplies and markets.
- The barriers to entry.
- The supply and demand trends.
- The interests of customers.
- The development of technical and economic progress.

Merger Remedies

19. What are the types of remedies that can be required as conditions of merger clearance?

Commitments can be offered by the parties to address competition concerns and secure clearance (even if conditional). The remedies offered by the parties can be structural or behavioural. They can be offered during either Phase I or Phase II (see [Question 16](#)).

In *Case COMP/MCCAA/09/2021* decided on 21 June 2022, the NCA accepted behavioural remedies in a Phase II case involving passenger ferry services. A monitoring trustee was appointed to report on the joint venture's compliance with the behavioural commitments.

Penalties

20. What are the penalties for failing to comply with the merger control rules?

Failure to Notify Correctly

The intentional or negligent failure to notify a transaction in time under Regulation 5 of the CCR and the intentional or negligent submission of incorrect or misleading information in a notification gives rise to monetary fines of EUR1,000 to EUR10,000.

Implementation Before Approval or After Prohibition

A penalty of up to 10% of the total worldwide turnover of the undertaking concerned in the business year preceding the judgement imposing the penalty can be imposed where the concentration is implemented, intentionally or negligently:

- Before it has been notified or before it is cleared.
- After it has been declared unlawful.

Failure to Observe

A penalty of up to 10% of the total worldwide turnover of the undertaking concerned in the business year preceding the judgement imposing the penalty can be imposed on an undertaking for any:

- Failure to observe an obligation imposed on the undertaking by the NCA in a decision clearing the concentration.
- Failure to abide by an order of the NCA that was intended to restore the conditions of competition (such as an order to separate the assets brought together or requiring the cessation of joint control) following the early implementation of a concentration declared unlawful.

Furthermore, in these cases, the Court may impose periodic penalties (determined in proportion to the average daily total worldwide turnover of the concerned undertaking in the preceding business year and calculated from the date set in its judgment) for each day the undertaking fails to observe any obligations imposed by the NCA or to implement the measures ordered by the NCA.

Appeals

21. Is there a right of appeal against the regulator's decision and what is the applicable procedure? Are rights of appeal available to third parties or only the parties to the decision?

Rights of Appeal

The parties to the transaction and third parties showing a sufficient interest have a right of appeal on both points of law and fact before the Court against the following decisions of the NCA:

- Phase I and Phase II decisions.

- Decisions concerning the possibility to derogate from the standstill obligation.

The judgments of the Court are subject to a further appeal on both points of law and fact before the Court of Appeal.

A full right of appeal also lies from a judgment of the Court imposing a fine under the CCR before the Court of Appeal.

Procedure

An application for appeal from the NCA's decisions can be filed before the Court by the parties within 20 days of the notification of the decision or by interested third parties within 20 days from the publication of the decision.

The NCA may reply to the appeal within 20 days from the date of notification of the appeal application.

The appeal application does not have the effect of suspending the NCA's decision, unless the Court, on a reasoned request by a party to the appeal and after considering the submissions of all the parties, suspends the said decision under such conditions as it may deem fit pending the final determination of the appeal.

The Court can confirm, modify, or quash totally or partially the decision of the NCA. However, where the Court quashes the whole or part of the decision of the NCA, the Court has the discretion to refer the matter back to the NCA to take a new decision.

The NCA and any party to an appeal before the Court can appeal before the Court of Appeal within 20 days from the Court's judgement.

Where a fine has been imposed by the Court under the CCR, the NCA and any party to the proceedings before the Court may appeal before the Court of Appeal within 20 days from the Court's judgement. The Court of Appeal must appoint the case for hearing within six months from service of the appeal application on the parties.

Third Party Rights of Appeal

Third parties showing a sufficient interest have a right of appeal as described above.

22. Has the regulatory authority issued guidelines or policy on its approach in analysing mergers in a specific industry?

The NCA has not published any sector-specific guidelines.

Joint Ventures

23. How are joint ventures analysed under competition law?

The CCR apply to joint ventures in the following scenarios:

- Where there is a change from sole control to joint control in an existing undertaking.
- In already existing joint control situations where, as a result of the transaction, there is an increase in the number of controlling shareholders or a replacement of a controlling shareholder by a new controlling shareholder.
- Two or more undertakings create a jointly controlled, full-function joint venture performing on a lasting basis all the functions of an autonomous economic entity.

In determining whether an undertaking is a full-function joint venture, the NCA relies on the guidance provided by the EC in the Consolidated Jurisdictional Notice.

The substantive test applies equally to joint ventures. However, in the case of joint ventures, the NCA must also assess whether the concentration has as its object or effect the co-ordination of the competitive behaviour of undertakings that remain independent. In making this assessment, the NCA must consider, in particular, whether:

- Two or more parent companies retain, to a significant extent, activities in the same market as the joint venture or in a market which is upstream, downstream or neighbouring that of the joint venture.
- The co-ordination enables the undertakings concerned to eliminate competition on the relevant market.

Such co-ordination, should it result, will be assessed under the competition rules on restrictive agreements.

More recently, the NCA has taken the position that the turnover test does not apply to joint ventures, so that all new joint ventures must be notified.

Joint ventures which are not full-function are subject to the competition rules on restrictive agreements.

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Publications

- *Public Procurement Guide, Malta Chapter (co-authored with Antoine Cremona) – Lexology Getting the Deal Through (2017, 2018, 2019, 2020 and 2021 editions).*
- *Malta: Equal Treatment and Incumbents in Neighbouring Markets – European Procurement & Public Private Partnership Law Review, Volume 11, Issue 3, 2019.*
- *Merger Control Service Malta Chapter (co-authored with Sylvann Aquilina Zahra) – Legal Cross Border (2019, 2020 and 2021 editions).*
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- *Merger Control Malta Chapter (co-authored with Sylvann Aquilina Zahra) – Thomson Reuters Practical Law, 2020.*
- *COVID-19 Global Competition Measures (co-authored with Sylvann Aquilina Zahra) – Lex Mundi, 2020.*
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