

Executive summary and overview of the national report for Malta

Section I – Summary of findings

The private enforcement of competition rules through actions for damages by third parties harmed by anti-competitive behaviour is to date inexistent in Malta. Although an action for damages is possible, private persons in Malta who feel harmed by anti-competitive behaviour usually report the matter to the Office for Fair Trading rather than instituting proceedings themselves.

Under Maltese law there is no express provision of law dealing specifically with actions for damages for breaches of competition law. However, it would be possible for a third party who suffers damages consequent to a breach of EC and/or national competition law to rely on the general provisions of the Maltese Civil Code (Chapter 16 of the Laws of Malta) dealing with the concept of damages.

Under Maltese Law, liability in damages may arise either in contract or in tort. In the case of a private action instituted by a third party for damages suffered in consequence of a breach of competition law the action will usually be founded on tort. Liability in tort is based on the concept of fault and there is therefore no necessity of showing any existing contractual relationship between the parties. Section 1031 of the Maltese Civil Code lays down the fundamental principle that every person shall be liable for the damage which occurs through his fault. According to section 1032, a person shall be deemed to be in fault if, in his own acts, he does not use the prudence, diligence and attention of a bonus paterfamilias. Section 1033 further provides that any person who, with or without intent to injure, voluntarily or through negligence, imprudence, or want of attention, is guilty of an act or omission constituting a breach of the duty imposed by law, shall be liable for any damage resulting therefrom. It may therefore be argued that since undertakings have a duty imposed by law not to act in breach of competition rules, if notwithstanding such prohibition an undertaking commits an unlawful act and a third party suffers damages as a result of such an act, the undertaking is liable towards the third party for all damages suffered as a result of the unlawful act.

There are no specialised Courts that deal with actions for damages consequent to a breach of competition law, and therefore the ordinary courts are competent. However, the Commission for Fair Trading may become involved in the proceedings because in terms of section 27 of the Maltese Competition Act the question whether there has been an abuse of a dominant position by an undertaking in terms of section 9 or whether an agreement is null and unenforceable in terms of section 5 must be referred to the Commission for Fair Trading. Although the position is unclear and the question has not yet been decided, in the case where plaintiff alleges that he has suffered damages as a result of a breach of Articles 81 and/or 82 of the EC Treaty it may be argued that no reference to the Commission for Fair Trading is required and the civil court hearing the action for damages may itself decide whether there has been a breach of Articles 81 and 82 of the EC Treaty. This is because section 27 of the Competition Act mentions only sections 5 and 9 and does not expressly mention Articles 81 and 82 of the EC Treaty. Moreover, in terms of the above-quoted Article 6 of Regulation 1/2003 the Maltese civil courts have the power to apply Articles 81 and 82 of the EC Treaty.

An action for damages may be instituted either by a natural or legal person, provided such person has an interest. The Maltese Courts have held that the interest of plaintiff must be juridical, personal, direct and actual. A body having a distinct legal personality may sue and be sued in its own name. A person from another jurisdiction may sue or be sued in front of the Maltese Courts. However, where the plaintiff is absent from Malta he is to institute an action by appointing a mandatory to act on his behalf. On the other hand, where the defendant is absent from Malta, the Court appoints a curator. For the Maltese Courts to take cognisance of an action it is essential that the action falls within their jurisdiction. The connection factors which establish the jurisdiction of the Courts of Malta are listed in section 742(1) of the COCP. It is important to point out, however, that the Legal Procedures (Ratification of Conventions) Act (Chapter 443 of the Laws of Malta) has enabled Malta to ratify a number of international conventions including the 1988 Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters. However, the said Act has not yet come into force and the aforesaid convention is not therefore part of Maltese domestic law as yet.

Due to the strict requirements of interest, the concepts of 'class actions,' 'collective claims' and 'public interest litigation' are alien to Maltese law of procedure. The concept of 'joint actions' features in section 161(3) of the COCP.

For an action for damages to be successful the following requisites must be satisfied: (i) the act must be unlawful; (ii) the act must cause damage; (iii) the act must be imputable to the person committing it; and (iv) the act must have been committed through 'dolus' or 'culpa.' The specific intention of causing damage to the victim is not required. In our view, where it is shown by the plaintiff that the conduct of the defendant is in breach of competition law, this should be sufficient to found an action for damages against the defendant (where causation and damage are proved), although it must be said that there still is no case-law that confirms such interpretation.

The compensation awarded to the plaintiff takes the form of monetary compensation equivalent to the loss sustained by plaintiff as a result of the breach by defendant.

The burden of proving a fact rests on the party alleging it. The standard of proof required in civil proceedings is that the claim of the plaintiff is justified on a balance of probabilities. The standard of proof is lower in the case of an injunction. Evidence may be oral or documentary provided it is relevant and is the best evidence the party can produce. Expert evidence is also admissible. A party against whom a witness is produced has the right to cross-examine the witness. The judge may ask the witness questions during the examination or cross-examination if he considers it expedient or necessary so to do. Professional secrecy is safeguarded. There are also rules on the production of documents.

There are no specific rules for evidence of damage. The ordinary rules are applicable. Damages are assessed on the basis of the injury suffered by the plaintiff. The fundamental principle regulating the quantum of damages is that the plaintiff is to be restored in the position he would have been if the defendant had not caused the damage by the unlawful conduct complained of. Since case-law dealing with damages consequent to breaches of competition law is practically inexistent to date, the Maltese Courts have as yet not developed any sophisticated models to calculate damages.

Section II – status quo and forthcoming reforms – action for damages

A. Legal Basis	
(i) Is there an explicit statutory basis?	No. The general provisions of Maltese law relating to damages are applicable.
(ii) Is this statutory basis different from other actions for damages?	No.
(iii) Is there a distinction between EC and national law in this regard?	No.
B. Competent court	
(i) Which courts are competent?	The ordinary courts are competent - First Hall Civil Court or Court of Magistrates depending on the amount claimed.
(ii) Are there specialised courts for private enforcement of competition rules?	No, but please refer to our comments made in section B (ii) of our report in connection with the involvement of the Commission for Fair Trading.
C. Standing	
(i) Limitations on standing of natural or legal persons, including those from other jurisdictions?	Actions for damages may be instituted by a natural or legal person, provided such person has an interest. A person from another jurisdiction may sue or be sued. When plaintiff is absent from Malta the action is instituted by appointing a mandatory. When defendant is absent a curator is appointed.
(ii) What are the connecting factor(s) required with the jurisdiction in order for an action to be admissible?	The connecting factors are listed in section 742 of the COCP. However, the Legal Procedures (Ratification of Conventions) Act has enabled Malta to ratify a number of international conventions including the 1988 Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters. The said Act has not yet come into force and the aforesaid convention is not therefore part of Maltese domestic law as yet.
(iii) Is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation?	The concepts of class actions, collective claims and public interest litigation are alien to Maltese law. The concept of joint actions features in section 161(3) of the COCP but this provision in no way endorses the concept of a class action and it is rarely utilised.
D. Procedural and substantive conditions	
(i) What forms of compensation are available?	Pecuniary compensation to make good the loss sustained

		by plaintiff.
(ii)	What are the other forms of civil law liability (if any)?	None.
(iii)	Does the infringement have to imply fault?	Yes.
(iv)	If so, is fault based on objective criteria?	The criterion of diligence which the law requires is that of a reasonable man. The criterion is therefore objective. But the criterion is in a sense also subjective in that the judge must envisage what a reasonable man would have foreseen in the particular circumstances in which the agent of the act found himself.
(v)	Is bad faith (intent) required?	No.
(vi)	Can negligence be taken into account?	Yes.
E. Rules of evidence		
a. General		
(i)	Burden of proof and identity of the party on which it rests?	The burden of proving a fact rests on the party alleging it.
(ii)	Standard of proof	In civil proceedings the claim of plaintiff is to be justified on a balance of probabilities. In criminal proceedings proof beyond reasonable doubt is required to find the accused guilty.
(iii)	Limitations concerning form of evidence	Evidence can be oral or documentary provided it is relevant and the best evidence the parties can produce. Witnesses must be competent according to law. There are rules on professional secrecy.
(iv)	Rules on (pre-trial or other) discovery within and outside the jurisdiction of the court vis-à-vis parties	The notion of discovery does not exist in terms of Maltese procedural law, but in terms of section 156 of the COCP all documents in support of the claim should be produced with the writ of summons. There are also rules on the production of documents during the trial.
(v)	Rules on (pre-trial or other) discovery within and outside the jurisdiction of the court vis-à-vis third parties	Third parties may be summoned during the court proceedings to give evidence.
(vi)	Rules on (pre-trial or other) discovery within and outside the jurisdiction of the court vis-à-vis competition authorities (national, foreign, Commission)	The Director for Fair Competition has wide investigatory powers facilitating the collection of evidence (refer to report for details).
b. Proving the infringement		
(i)	Is expert evidence admissible?	Yes.
(ii)	To what extent, if any, is cross-examination permissible?	It is the right of a party to cross-examine a witness produced by the other party. During the examination and cross-examination the judge may also ask questions.

(iii) Under which conditions does a statement and/or decision by a national competition authority, a national court, an authority from another EU Member State have evidential value?	The COCP establishes the circumstances when this is possible in section 628. However, in our view this provision does not mean that as a matter of Maltese law the decision of a foreign competition authority describing certain facts will be considered as conclusive proof of these facts. Nevertheless, such decision would be afforded persuasive value.
c. Proving damage	
(i) Are there any specific rules for evidence of damage?	There are no specific rules. The ordinary rules are applicable.
d. Proving causation	
(i) Which level of causation must be proven: direct or indirect?	Direct.
F. Grounds of justification	
(i) Are there grounds of justification?	Yes.
(ii) Is the 'passing on' defence taken into account?	In our view a similar defence may be raised since the object of an action for damages under Maltese law is to reintegrate the patrimony of the plaintiff with the loss he has actually incurred.
(iii) Are 'indirect purchaser' issues taken into account?	In our view it would be difficult for an indirect purchaser to succeed in an action for damages.
(iv) Is it relevant that plaintiff is (partly) responsible for the infringement (contributory negligence leading to apportionment of damages) or has benefited from the infringement?	Yes, in fact the concept of contributory negligence is dealt with expressly in section 1051 of the Civil Code.
G. Damages	
a. Calculation of damages	
(i) What economic or other models are used by courts to calculate damage?	Since case-law dealing with damages consequent to breaches of competition law is practically inexistent to date, the Maltese Courts have as yet not developed any sophisticated models to calculate damages. The principle which will be applied by the Court is that plaintiff is to be restored in the position he would have been if defendant had not injured him by the unlawful conduct complained of. This principle is referred to as <i>restitutio in integrum</i> and is the underlying notion of Maltese law on damages.
(ii) Are damages awarded for injury suffered on the national territory or more widely (EC or otherwise)?	Since there is no limitation damages may be awarded more widely provided the Court has jurisdiction.
(iii) Are ex ante (time of injury) or ex post (time of trial) estimates used?	In our view the distinction between ex-ante and ex-post estimates does not fit well under Maltese law. Although the loss is usually that suffered by the plaintiff at the time of the injury, intervening events that may influence the amount of damages suffered by plaintiff may be taken into account by the court when assessing damages.

(iv) Are there maximum limits to damages?	No, provided the link of cause and effect is proved.
(v) Are damages assessed on the basis of profit made by the defendant or on the basis of injury suffered by the plaintiff?	On the basis of the injury suffered by plaintiff.
(vi) Are punitive or exemplary damages available?	No.
(vii) Are fines imposed by competition authorities taken into account when settling damages?	No.
b. Interest	
(i) Is interest awarded from the date the infringement occurred the date of the judgment or the date of a decision by a competition authority?	In actions founded on tort, where the damages suffered by the plaintiff are to be quantified/liquidated by the Court, interest is awarded on the sum due as damages from the date of the judgement. Where the sum claimed is determined in the writ interest is awarded from the date of the writ. Where plaintiff's action for a certain and liquidated sum is preceded by a judicial act whereby the debtor is requested to pay a certain and liquidated sum interest begins to run from the day of the intimation.
(ii) What are the criteria to determine the levels of interest?	Interest is awarded at the rate of 8% per annum.
(iii) Is compound interest included?	No
H. Timing	
(i) What is the time limit in which to institute proceedings?	Damages arising out of tort are prescribed by the lapse of two years. However where the act in question constitutes a criminal offence, the rules of prescription laid down in the Criminal Code apply. The prescription period for contractual damages is five years.
(ii) On average, how long do proceedings take?	Actions for damages before the First Hall Civil Court followed by an appeal to the Court of Appeal take approximately five to six years to be concluded, but this depends to a large extent on the complexity of the case, the evidence to be produced, and the attitude of the judge and lawyers involved in the case.
(iii) It is possible to accelerate proceedings?	It is generally not possible to accelerate proceedings in such cases.
(iv) How many judges sit in actions for damages cases?	An action for damages may be assigned to any one of the judges who ordinarily sits in the First Hall Civil Court.
(v) How transparent is the procedure?	The procedure before the ordinary courts is transparent but the court can order that commercially sensitive information be kept out of public inspection. Proceedings before the Commission for Fair Trading are held in camera.
I. Legal costs	
(i) Are Court fees paid up front?	Yes.

(ii)	Who bears the legal costs?	The general rule is that legal costs are borne by the party who loses the case, but the Court has discretion to decide that the costs of the case are not to be borne solely by the party who loses the case due to the circumstances of the particular case.
(iii)	Are contingency fees permissible?	No.
(iv)	Are contingency fees generally available for private enforcement of EC competition law?	No.
(v)	Can the plaintiff/defendant recover costs?	Yes.
(vi)	What are the different types of litigation costs?	Litigation costs depend on the sum claimed - the higher the claim the higher the costs. See report for examples.
(vii)	Are there any national rules for taxation of costs?	Yes.
(viii)	Is any form of legal aid insurance available?	No.
(ix)	What are the likely average costs in an action brought by a third party in respect of a hard-core violation of competition law?	Please see report for examples.
J. General		
(i)	Are some of the answers to the previous questions specific to the private enforcement of competition rules?	No.
(ii)	If the answer to the previous question is yes, in what way do they differ from general private enforcement rules?	
(iii)	EC competition rules are regarded as being of public policy. Does that influence any answers given?	Rules of public policy override any rule to the contrary and any agreement to the contrary.
(iv)	Are there any differences according to whether defendant is public authority or natural or legal person?	No, but the government enjoys certain 'privileges' in litigation, for example, court proceedings against the government or public body must be preceded by a judicial letter or protest.
(v)	What are the key differences, if any, from region to region <u>within</u> the Member State as regards damages actions for breach of national or EC competition rules?	No difference.
(vi)	Is there any interaction between leniency programmes and actions for claims for damages under competition rules?	No.
(vii)	Please mention any other major issues relevant to the private enforcement of EC competition law in your jurisdiction	The Commission for Fair Trading may take interim measures at the request of the Director for Fair Trading, an undertaking or complainant.

(viii) Please provide statistics about the number of cases based upon the violation of EC competition rules in which the issue of damages was decided upon	None.
Section III: Means to facilitate private enforcement of Articles 81 and 82 EC	
(i) Which of the above elements of claims for damages as applied in each Member State and accession country provide scope for facilitating the private enforcement of Articles 81 and 82 EC?	<p>In our view the private enforcement of competition rules may be rendered more uniform through the formulation of a model national competition law which may then be incorporated in the national law of the Member States.</p> <p>It may also be useful for the Maltese legislator to include provisions regulating the type of damages that can be recovered and how the damage is to be quantified. It may also be beneficial to introduce an express provision dealing with actions for damages consequent to breaches of competition law rather than relying on the more general provisions on damages contained in the Civil Code. In our view, such a provision should expressly state that the requirement of fault is satisfied where a violation of a competition rule is established. Although, we have expressed the view that the Maltese Courts are likely to come to such a conclusion even in the absence of such a provision, the introduction of such provision would eliminate any uncertainty that may exist.</p>
(ii) How could that be achieved?	See previous answer.
(iii) Are alternative means of dispute resolution available?	Arbitration proceedings in terms of the Arbitration Act – Chapter 387 of the Laws of Malta. Mediation is possible but there is no formal mediation procedure under Maltese law and it must be said that mediation is not frequently utilised in Malta.
(iv) If so, to what extent are they successful?	Arbitration proceedings are generally efficient.