

# MALTA

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## **I      Introduction**

Maltese competition rules are contained in the Competition Act<sup>1</sup> - Chapter 379 of the Laws of Malta. Section 5 of the Act prohibits restrictive practices between undertakings while section 9 prohibits the abuse by an undertaking of a dominant position. The authority responsible for the investigation and suppression of restrictive practices is the Office for Fair Competition ("*l-Ufficcju tal-Kompetizzjoni Gusta*") headed by the Director for Fair Competition.<sup>2</sup> The Act also establishes the Commission for Fair Trading ("*il-Kummissjoni għall-Kummerc Gust*") which is a judicial organ having the power, *inter alia*, to review decisions of the Director for Fair Competition and to determine whether the conduct of undertakings is in breach of competition law.

The rules contained in the Maltese Competition Act are to a large extent based on Community competition rules, namely articles 81 and 82 of the EC Treaty. Moreover, Rule 13 of the Schedule to the Competition Act states that in the interpretation of the Act the Commission for Fair Trading shall have recourse to its previous decisions, judgements of the Court of First Instance and the Court of Justice of the European Community. It shall also have recourse to relevant decisions and statements of the European Commission including interpretative notices on the relevant provisions of the EC Treaty and secondary legislation relative to competition.

Under Maltese law there is no legislation that deals 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 Maltese 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.

It is to be noted that the private enforcement of the prohibitions contained in the Competition Act through actions for damages by third parties harmed by anti-competitive behaviour is to date inexistent in Malta. Indeed, although an action for damages is theoretically 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. To our knowledge, since the enactment of the Competition Act in 1994 there has been no judgement of the Courts of Malta which deals with an action for damages by a third party for a breach of competition law. Moreover, to our knowledge, there is no such case which is now pending before the Maltese Courts. Since Malta only became a member of the European Union on the 1<sup>st</sup> May 2004 there is still no local case law that deals with an action for damages consequent to a breach of the EC Treaty. It follows that the case-law referred to in this report does not deal with actions for damages for breaches of competition rules.

It should be noted that there is a lack of local literature on the subject and it has therefore not been possible to refer to the views of local commentators on the subject.

It is also important to point out that on the 20<sup>th</sup> April 2004 a Bill was published in the Government Gazette<sup>3</sup> - Bill Number 26 of 2004 (hereinafter referred to as Bill 26/2004) -

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1      Act XXXI of 1994 as subsequently amended.  
2      Section 3 of the Competition Act.  
3      Malta Government Gazette, Number 17,570.

with the aim of amending the provisions of the Competition Act, particularly "to enable the application of Council Regulation (EC) 1/2003." The provisions of Bill 26/2004 with slight modifications became law by means of Act III of 2004 which was published in the Government Gazette on the 14<sup>th</sup> May 2004.<sup>4</sup> The amendments to the Competition Act brought about by virtue of Act III of 2004 were given a retroactive effect and are deemed to have come into force on the 1<sup>st</sup> May 2004 which is the date when Malta became a member of the EU. Although the amendments to the Competition Act did not introduce an express provision regulating actions for damages for breaches of competition law, Act III of 2004 made considerable changes to a number of provisions of the Competition Act. The Competition Act now takes into account the fact that Malta is a member of the EU and enables the application of Council Regulation (EC) 1/2003.

Sections 5 and 9 of the Competition Act now include an express reference to Articles 81 and 82 of the EC Treaty. Section 5(5) reads as follows: -

"Article 81 of the EC Treaty, shall also apply, where any agreement between undertakings, any decision by an association of undertakings or any concerted practices may appreciably affect trade between Malta and one or more Member States."

Similarly, section 9(5) provides that: -

"Article 82 of the EC Treaty, shall also apply, where any abuse by an undertaking may affect trade between Malta and any one or more Member States."

## **II Actions for damages - status quo**

### **A What is the legal basis for bringing an action for damages?**

#### **(i) Is there an explicit statutory basis, is this different from other actions for damages and is there is a distinction between EC and national law in this regard?**

As indicated above, although there is no express provision of law dealing specifically with actions for damages caused by breaches of EC and/or national competition law, such an action may be founded upon the general provisions of Maltese law relating to 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 as a consequence of a breach of competition law, the action will be founded in tort. However, before discussing the relevant provisions dealing with tortious liability, a brief description of contractual liability will first be given.

Liability in contract is based upon the non-performance of an obligation. According to section 1125 of the Civil Code, where any person fails to discharge an obligation which he has contracted, he shall be liable in damages. The degree of diligence to be exercised in the performance of an obligation, whether the object thereof is for the benefit of only one of the parties or of both is that of a *bonus paterfamilias* (i.e. a reasonable man).<sup>5</sup> This degree of diligence, however, may be of a greater or lesser degree in certain cases specified by law as, for example, in the case of a contract of deposit. It is also possible for the contracting parties to agree on a greater or lesser degree than that of the *bonus paterfamilias*. The damages due to the creditor for non-performance of an obligation are generally in respect of the loss which he has sustained, and the profit of which he has been deprived.<sup>6</sup> A distinction is made between what was foreseeable at the time of the contract and what was not foreseeable. The debtor is only liable for such damages as were or could have been foreseen at the time of the agreement, unless non-performance of the obligation was due to fraud on his part.<sup>7</sup> In all cases, even where the non-

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4 Malta Government Gazette, Number 17,584.

5 Sections 1132 and 1032 of the Civil Code

6 Section 1135 of the Civil Code

7 Section 1136 of the Civil Code

performance of the obligation is due to fraud on the part of the debtor, the damage suffered must be the immediate and direct consequence of non-performance.<sup>8</sup>

Liability in tort, on the other hand, 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 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* (i.e. a reasonable person). Section 1033 of the Civil Code 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 law, if notwithstanding such prohibition an undertaking commits breaches of the Competition Act and a third party suffers damages as a consequence, the undertaking would be liable towards the third party for those damages. Similarly, since Articles 81 and 82 of the EC Treaty are directly applicable in Malta as of the 1<sup>st</sup> May 2004, an undertaking which acts in breach of those provisions may be held responsible for all resulting damages incurred by a third party.

In the case of liability in tort, the amount of damages due to the plaintiff is calculated regard being had to the loss actually suffered by the plaintiff, including expenses incurred and loss of earnings, and loss of future earnings. The manner in which such damages are assessed will be discussed in greater detail below under section G of this report.

## **B Which courts are competent to hear an action for damages?**

### **(i) Which courts are competent?**

Subject to what shall be said in B (ii) below, there are no specialised courts for bringing competition-based damages. Under Maltese law, actions for damages fall within the competence of the Courts of Civil Jurisdiction. Where the plaintiff's claim exceeds five thousand Maltese liri (Lm5000) the competent Court is the First Hall Civil Court. Where the claim does not exceed five thousand Maltese liri (Lm5000) but exceeds one thousand five hundred liri (Lm1500) the competent Court is the Court of Magistrates (Malta). Claims not exceeding one thousand five hundred Maltese liri (Lm1500) fall within the competence of the Small Claims Tribunal.

Where the defendant resides or has his ordinary abode in the Islands of Gozo or Comino, actions which fall within the competence of the First Hall Civil Court must be filed in front of the Court of Magistrates (Gozo) in its superior jurisdiction and actions which fall within the competence of the Court of Magistrates (Malta) must be filed in front of the Court of Magistrates (Gozo) in its inferior jurisdiction.

Judgments of the First Hall Civil Court and of the Court of Magistrates (Gozo) in its superior jurisdiction are subject to appeal to the Court of Appeal composed of three judges. Judgments of the Court of Magistrates (Malta) and of the Court of Magistrates (Gozo) in its inferior jurisdiction are subject to appeal to the Court of Appeal composed of one judge.

There are no specialised courts dealing exclusively with actions against public authorities (see also section J (iii) of this report).

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8 Section 1137 of the Civil Code

For the purposes of competence it is irrelevant whether the parties are undertakings or individuals. Whether the action for damages is based on contract or tort is also irrelevant.

**(ii) Are there specialised courts for bringing competition-based damages actions as opposed to other actions for damages?**

Although there are no specialised Courts which deal with actions for damages for breaches of competition law, in such actions it appears that the Commission for Fair Trading may become involved in the proceedings. The reason for this is the following. As shall be explained in greater detail below, one of the essential elements which must be proved by the plaintiff in an action for damages flowing from a breach of competition law is that the act of defendant which has caused him the damage is illegal (i.e. that the act is in breach of EC and/or national competition law). Under the Maltese Competition Act it appears that it is the Commission for Fair Trading that is the organ which is empowered to decide whether the conduct of undertakings is in breach of the Competition Act<sup>9</sup> and not the ordinary courts (although it is the ordinary courts that are competent to hear actions for damages and not the Commission for Fair Trading).

Section 27 of the Competition Act deals with the interaction between the Commission for Fair Trading and the ordinary courts. Following the amendments made by Act III of 2004, section 27 reads as follows: -

“Where before any court of civil jurisdiction it is alleged that any agreement or decision is null and unenforceable in accordance with article 5 or where it is alleged that there is an abuse of a dominant position in accordance with article 9, that court shall, unless the allegation is admitted by all the parties to the case, stay the proceedings and refer the matter to the Commission which shall have the right to determine the question and the court shall decide the matter in accordance with the decision of the Commission.”

The above provision indicates that it is the Commission for Fair Trading that is competent to decide 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 and not the ordinary courts. Thus, where such a question arises before an ordinary court the proceedings will have to be stayed and a reference will have to be made to the Commission for Fair Trading.

In the light of the above provision it appears that if in an action for damages before the ordinary courts the plaintiff alleges that he has suffered damages as a result of a breach of sections 5 and/or 9, the court dealing with the action for damages would not be competent to decide this issue (i.e. whether there has been a breach of competition law) and a reference will have to be made to the Commission for Fair Trading. The court hearing the action for damages would be able to continue hearing the case only after a decision on this point is given by the Commission. In our view, however, it is not clear whether a reference to the Commission for Fair Trading will also be required where it is alleged that the act of defendant is in breach of articles 81 and/or 82 of the EC Treaty. On the one hand one may argue that no reference will be required since section 27 of the Act speaks only about sections 5 and 9 of the Act and does not expressly mention articles 81 and 82 of the EC Treaty. However, in our view the position is rather uncertain since sections 5 and 9 of the Competition Act now also make reference to articles 81 and 82 (see sections 5(5) and 9(5) quoted above). One will therefore have to wait and see how the issue will be decided by the Maltese courts. Ultimately it will be the civil court hearing the action for damages which will decide whether to decide the issue itself or whether to make a reference to the Commission. The Court will most likely adopt that interpretation which is most consistent with Regulation 1/2003. It is to be noted that in terms of article 6 of Regulation 1/2003 national courts have the power to apply Articles 81 and 82 of the EC Treaty.

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9 On this point refer also to our comments on section 12A of the Maltese Competition Act under section E (a)(iv).

In our view nor is it completely clear whether, in an action instituted by a third party for damages suffered as a result of a violation of section 5(1) of the Competition Act by two or more other undertakings, the Court is obliged to stay proceedings and make a reference to the Commission. This is because in an action for damages instituted by a third party the plaintiff need not necessarily demand the Court to declare the agreement etc. to be null and unenforceable but may simply demand the Court to declare that the conduct of the undertakings is in breach of section 5 and that he has suffered damages as a result of the breach. It may therefore possibly be argued that in such a scenario the Court would not be obliged to stay proceedings but may itself decide whether the agreement etc. is in breach of section 5. On the other hand, however, it may perhaps more strongly be argued that the intention of the legislator is to give the Commission for Fair Trading exclusive competence to decide whether the provisions of the Competition Act have been breached.

It should be noted that in terms of section 27 of the Competition Act, a reference to the Commission is not required where it is admitted by all the parties to the case that the act in question is in breach of competition law.

Where a reference to the Commission is made by the ordinary courts the Commission is obliged to decide the issue referred to it and therefore, the person claiming damages before the ordinary courts would have no problem in gaining access to the Commission.

Where a decision that the act of defendant is anti-competitive already exists (i.e. the fact that the act of defendant is illegal has already been determined in previous proceedings before the Commission) we are of the view that no reference is required. The court hearing the action would only have to determine whether the other elements of an action for damages such as causation and damage exist. It is important to point out, however, that except in cases where a reference is ordered by the court in terms of section 27, a complainant cannot access the Commission for Fair Trading directly since a referral by the Director for Fair Competition is required. Regulation 7(a) of the Schedule to the Competition Act entitled 'Rules of Procedure relative to the Commission for Fair Trading' provides that: -

"Procedures before the Commission shall be commenced by a request in writing made by the Director, or by an undertaking or complainant through the Director according to the provisions of the Act."

It is to be noted that in terms of section 14 of the Competition Act the Director is not required to investigate a complaint if he considers it to be *prima facie* inadmissible. However, if the complainant does not agree with the decision of the Director that the complaint is *prima facie* inadmissible, he may, within fifteen days of the notification of the Director's decision request the Director to submit the same for review by the Commission for Fair Trading and the Director is obliged to comply with such a request forthwith. Where the Commission does not agree that the complaint is inadmissible it shall inform the Director accordingly and the Director is obliged to commence or resume the investigation. The same remedy is available to a complainant where, after carrying out an investigation, the Director is of the opinion that the complaint is not justified.

## **C Who can bring an action for damages?**

### **(i) Which limitations are there to the standing of natural or legal persons, including those from other jurisdictions? What connecting factor(s) are required with the jurisdiction in order for an action to be admissible?**

#### **Standing**

An action for damages may be instituted either by a natural or legal person, provided such person has an interest. It is a basic principle of Maltese law of procedure that interest is an essential requisite for the grounding of an action, including actions for damages. Following the teachings of traditional Italian doctrine, the Maltese Courts have repeatedly stated that the plaintiff's interest

must be juridical, personal, direct and actual. These requirements imply that there must be a nexus between the right asserted and the person asserting it and that therefore it is not possible to institute an action in respect of an interest that cannot be directly connected to the plaintiff.

A body having a distinct legal personality may sue and be sued in its own name. However, where the law requires any declaration or pleading to be sworn it shall be sworn by the person or persons vested with the legal or judicial representation thereof or by the company secretary or by any other person authorised in writing by such body to file judicial acts on its behalf or to make any such declaration, statement or pleading.<sup>10</sup>

Subject to what shall be said in the following paragraph, 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/attorney to act on his behalf (usually his lawyer). On the other hand, where the defendant is absent from Malta, the Court will appoint a curator to represent the absentee.

### Jurisdiction

As a preliminary comment we would like to point out that we are not discussing the implications of Regulation 44/2001 since this is dealt with in the comparative report.

For the Maltese Courts to take cognizance of an action it is essential that the action falls within their jurisdiction. To date the connecting factors which establish the jurisdiction of the Courts of Malta are listed in section 742(1) of the COCP. According to the latter provision, save as otherwise expressly provided by law, the civil courts of Malta shall have jurisdiction to try and determine all actions, without any distinction or privilege, concerning the following persons: -

- (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 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 judgement 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.

With regard to the question whether the Maltese Courts have jurisdiction in terms of the internal rules to take cognizance of actions in tort committed in Malta we can confirm that the Maltese courts do have such a jurisdiction provided that defendant is either domiciled or resident or present in Malta.

It is to be noted that the jurisdiction of the Maltese Courts is not excluded by the fact that a foreign court is seized with the same cause or with a cause connected with it. However, where a foreign court has concurrent jurisdiction, the courts may in their discretion, declare defendant to be non-suited or stay proceedings on the ground that if the action were to continue in Malta it would be vexatious, oppressive or unjust to the defendant.<sup>11</sup>

It is also important to point out that the Legal Procedures (Ratification of Conventions) Act (Chapter 443 of the Laws of Malta) has enabled Malta to ratify

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10 Section 181A(2) of the COCP.

11 Section 742(2) of the COCP.

the 1965 Hague Convention on the service abroad of judicial and extra-judicial documents in civil or commercial matters, the 1970 Hague Convention on the taking of evidence abroad in civil or commercial matters, the 1980 Hague Convention on international access to justice, and the 1988 Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters. However, the Legal Procedures (Ratification of Conventions) Act has not yet come into force and the aforesaid conventions are not therefore part of Maltese domestic law as yet.

It is also worth mentioning that the Act of Accession introduced some amendments and provisions to complete the annexes to Council Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. In Malta, the rules of national jurisdiction, in particular those contained in sections 742, 743 and 744 of the COCP and section 549 of the Commercial Code (Chapter 13 of the Laws of Malta), will no longer apply as against *persons domiciled in a Member State*. As against *defendants not domiciled in a Member State*, the jurisdiction of the courts of each Member State are in principle determined by the law of that Member State; as against such a defendant, any person domiciled in a Member State may, whatever his nationality, avail himself in that State of the rules of jurisdiction there in force, and in particular those specified in Annex I (for Malta the provisions indicated above), in the same way as the nationals of that State (see articles 3(2) and 4(2) of the Regulation).

**(ii) Is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation?**

Although the Maltese Courts have been willing to relax the requirements of interest in order to allow associations such as trade unions to institute actions which are effectively carried out for the benefit of their members, the concepts of 'class actions,' 'collective claims' and 'public interest litigation' as defined in the comparative report are alien to Maltese law of procedure and we are not aware of any body of opinion which suggests that such forms of collective action are available in Malta in actions for damages. Moreover, the requirements of interest imply that a 'representative action' would not be allowed in the case of an action for damages suffered as a result of a breach of competition law. The party suffering the damage would have to institute the action himself.

Under Maltese law consumer associations may not institute actions for damages suffered by consumers as a result of breaches of competition law. In terms of section 37(1) of the Consumer Affairs Act (Chapter 378 of the Laws of Malta), a registered consumer association may only make reports or complaints to the competent authority on breaches of the Consumer Affairs Act and any other law administered by the Director of Consumer Affairs or any other laws and regulations which may be prescribed by notice in the Government Gazette. In any prosecution by the competent authority made following a report or complaint by a consumer association, a representative of the consumer association is called to give evidence on the facts known to the association and to indicate to the court any evidence of which it might be aware. Moreover, regulation 7(b) of the Schedule to the Competition Act allows a consumer association registered in accordance with the Consumer Affairs Act to request the Commission for Fair Trading to be admitted to intervene in proceedings before the Commission at any stage thereof. However, this provision simply gives the right to consumer associations to participate in proceedings (not as a party) and does not allow consumer associations to institute proceedings before the Commission for breaches of the Competition Act.

With respect to the concept of 'joint actions,' section 161(3) of the COCP provides that it is possible for two or more plaintiffs to bring their action by one writ of summons or by one application as the case may be. However, this procedure is only allowed if the actions are connected in respect of the subject matter thereof or if the decision of one of the actions might affect the decision of the other action or actions and the evidence in support of one action is, generally, the same to be produced in the other action or actions. Moreover the law provides that the cause and subject matter of the actions shall be clearly and specifically stated in respect

of each plaintiff. It is to be noted that section 161(3) of the COCP in no way endorses the concept of a class action.

#### **D What are the procedural and substantive conditions to obtain damages?**

Before addressing the individual questions forming part of this section it is worth pointing out that for an action for damages to be successful the following conditions must be satisfied: -

(a) *the act must be unjust/unlawful*

This requisite is satisfied if it is shown that the act complained of is in breach of one or more competition rules.

(b) *the act must cause damage*

The unlawful act committed by the agent must have actually caused damage to the victim (please refer to section E (c) of this report).

(c) *the act must be imputable to the person committing it*

For the agent of the act to be held responsible for damages arising from tort it is not only necessary that damage has ensued, but it is also necessary that such damage ensues as a consequence of the agent's unlawful act (please refer to section E (d)).

(d) *the act must have been committed through 'dolus' or 'culpa'*

This requirement will be discussed below in section D (iii).

#### **(i) What forms of compensation are available?**

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

#### **(ii) Other forms of civil liability (e.g. disqualification of directors)?**

##### Disqualification of directors

The concept of disqualification of directors is contemplated in the Companies Act (Chapter 386 of the Laws of Malta). However, in our view, it cannot be classified as a form of civil liability. Section 142 of the Companies Act provides that a person shall not be qualified for appointment or to hold office as director of a company or company secretary if, inter alia,

- he is interdicted or incapacitated or is an undischarged bankrupt;
- he has been convicted of any of the crimes affecting public trust or of theft or of fraud or of knowingly receiving property obtained by theft or fraud;
- he is subject to a disqualification order under section 320<sup>12</sup>

The fact that a director has been involved in breaches of competition law does not alone feature as a ground for disqualification in terms of section 320 of the Companies Act. Such fact may however be taken into account as one of the factors

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12 Section 320 of the Companies Act provides that the court, upon the application of the Attorney General or the Registrar, may make a disqualification order against any person who is found guilty of an offence under the Companies Act, other than an offence punishable only with a fine, or who has infringed any requirement of this Act with the consequence that the person becomes liable to contribute to the assets of a company or becomes personally liable for the debts of the company. The court, upon the application of the Attorney General or the Registrar, may also make a disqualification order against any person if it is satisfied - (a) that such person is or has been a director of a company which at any time has become insolvent, whether while he was a director or subsequently; and (b) that his conduct as a director of that company, either taken alone or taken together with his conduct as a director of any other company or companies, makes him unfit to be involved in the management of a company. A disqualification order made under this article may be for a minimum period of one year and a maximum period of fifteen years



leading to a disqualification (provided always that in any case the company is also insolvent).

It is worth noting that in terms of section 16 of the Competition Act any person who acts in breach of section 5 and/or 9 of the Act and/or Articles 81 and/or 82 of the EC Treaty is guilty of a criminal offence and liable to a fine (*multa*). According to section 21, where the person found guilty is the Director, manager, secretary or other similar officer of the undertaking he shall be deemed to be vested with the legal representation of the undertaking which accordingly shall be liable *in solidum* with the person found guilty for the payment of the fine. The fine is recoverable as a civil debt in favour of the Government.

**(iii) Does the infringement have to imply fault? If so, is fault based on objective criteria? Is bad faith (intent) required? Can negligence be taken into account?**

According to section 1033 of the Civil Code,

“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. ”

From this provision of law it is evident that the act causing damage must have been committed through ‘*dolus*’ (i.e. intentionally or voluntarily) or at least ‘*culpa*’ (i.e. negligently). Section 1032 of the Civil Code provides that a person is responsible for ‘*culpa laevis in abstracto*’ -

“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*” (i.e. that of a reasonable man).

Therefore, the degree of diligence which the law requires is that of a reasonable man. The criterion is therefore objective in the sense that the judge must not look at what the agent of the act actually foresaw, but he must try to envisage what a reasonable man would have foreseen. 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.

Section 1032(2) excludes ‘*culpa laevissima*’ as a basis of tortious responsibility: -

“No person shall, in the absence of an express provision of law, be liable for any damage caused by want of prudence, diligence, or attention in a higher degree.”

Section 1033 of the Maltese Civil Code expressly provides that the act may be committed “with or without intent to injure” and therefore the specific intention of causing damage to the victim (the so-called ‘*animus nocendi*’) is not required.

In our view, where it is shown that the conduct of an undertaking is in breach of competition law, this should be sufficient to found an action for damages against such undertaking (where causation and damage are proved). In other words, the fact that the defendant acted in breach of competition law should be sufficient to show that he is at fault. Due to the lack of case-law on this point it is not possible to express a more objective view but we are pretty confident that this is the approach that will be adopted by the Maltese courts.

## **E Rules of Evidence**

### **(a) General**

#### **(i) Burden of proof and identity of the party on which it rests (covering issues such as rebuttable presumptions and shifting of burden to other party etc.)**

Under section 562 of the COCP, without prejudice to any other provision of the law, the burden of proving a fact shall, in all cases, rest on the party alleging it. There is no rule to the contrary in the case of actions for damages for breaches of competition law, and therefore, the rule in section 562 of the COCP is applicable.

With respect to the notion of shifting the burden of proof the following comments may be made. Although the general rule is that it is up to the plaintiff to bring proof of negligence on the part of the defendant, in some cases the Maltese Courts have admitted that certain facts may give rise to 'prima facie' proof of negligence. In the case *S. Caruana vs Kaptan E. Skapinakis noe* (Volume XXXV Part II page 548) the Court held that the non-observance of regulations is 'prima facie' proof of negligence.

As indicated above, in our view, if in an action for damages caused by a breach of competition law plaintiff proves that defendant's act was illegal this should be sufficient to found an action for damages against the defendant. It would then be up to the defendant to rebut the presumption that he was at fault by showing, for example, that he was compelled to act illegally.

## **(ii) Standard of proof**

### Civil proceedings

The standard of proof required in civil proceedings is that the plaintiff's claim is justified on a balance of probabilities.

### Criminal proceedings

In criminal proceedings proof beyond reasonable doubt is required to find the accused guilty.

### Injunctions

The notion of an injunction is regulated by the provisions of the COCP on the warrant of prohibitory injunction which is one of the precautionary acts/warrants available under Maltese law of procedure. In terms of section 873(1) of the COCP the object of a warrant of prohibitory injunction is to restrain a person from doing anything whatsoever which might be prejudicial to the person suing out the warrant. Under Maltese procedural law precautionary warrants are issued and carried into effect on the responsibility of the person suing out the warrant, but in the case of the warrant of prohibitory injunction the person suing out the warrant must show that *prima facie* he has the right which he wants to preserve by means of the warrant. Indeed, section 873(2) of the COCP expressly provides that the court shall not issue the warrant unless it is satisfied that the warrant is necessary in order to preserve the right of the person suing out the warrant, and that *prima facie* such person appears to possess such right. The standard of proof required for the purpose of an injunction is therefore lower than that required in ordinary civil proceedings since proof on a *prima facie* basis is sufficient.

## **(iii) Limitations concerning form of evidence**

All evidence must be relevant to the matter in issue between the parties. In all cases the court will require the best evidence that the party may be able to produce. The court will disallow any evidence which it considers to be irrelevant or superfluous, or which it does not consider to be the best which the party can produce (sections 558-560 of the COCP).

Both oral and documentary evidence may be produced. Such a classification, however, should not be considered as a limitation on the forms of evidence that can be produced.

There are no limitations as to which witnesses may be called to give evidence, provided the witness is of sound mind and the evidence to be tendered by him is

relevant. Any of the parties to a suit, whatever his interest therein, is competent to give evidence, either at his own request, or at the request of any of the other parties to the suit, or if called by the court *ex officio* (section 565 of the COCP). However, a spouse of a party to the suit may not be compelled to disclose any communication made to him by the other spouse during the marriage. Neither may a spouse of a party to the suit be compelled to answer any question tending to incriminate his wife or her husband (section 566 of the COCP). No objection to the competence of a witness may be admitted on the ground that he is interested in the issue in regard to which his evidence is required or in the event of the suit, saving any objection touching his credibility (section 567 of the COCP).

Witnesses from other jurisdictions are admitted. If the witness gives evidence *viva voce* and an interpreter is required, one will be appointed by the Court.<sup>13</sup>

Where the evidence of a person who is absent from Malta is indispensable the examination of the witness is carried out by means of letters of request (or letters rogatory). This procedure is regulated in sections 613-622 of the COCP.

It is also possible for a witness from a foreign jurisdiction to give evidence by affidavit. In fact section 622A of the COCP provides that where the evidence of a witness residing outside Malta is required and such person has made an affidavit about facts within his knowledge before an authority or other person who is by the law of the country where the witness resides empowered to administer oaths, or before a consular officer of Malta serving in the country where the witness resides, such affidavit may be produced in evidence before a court in Malta. The affidavit must be served on the other parties and any party to the proceedings desiring to cross-examine the witness may apply to the court for the examination of such witness by letters of request not later than twenty days from the service of the affidavit. The Court may also, if it deems it proper, allow for the audio-recording or for the video-recording of any evidence required from a witness outside Malta.<sup>14</sup>

It should also be noted that as indicated previously, the Legal Procedures (Ratification of Conventions) Act (Chapter 443 of the Laws of Malta) has enabled Malta to ratify a number of conventions including the 1970 Hague Convention on the taking of evidence abroad in civil or commercial matters. However, as pointed out previously, the Legal Procedures (Ratification of Conventions) Act has not yet come into force.

### Hearsay Evidence

As a rule hearsay evidence is not admissible. However, in terms of section 599 of the COCP the court may, according to the circumstances, allow and take into consideration any testimony on the relation of third persons, where such relation has of itself a material bearing on the subject-matter in issue or forms part thereof; or where such third persons cannot be produced to give evidence and the facts are such as cannot otherwise be fully proved, especially in cases relating to births, marriages, deaths, absence, easements, boundaries, possession, usage, public historical facts, reputation or character, words or deeds of persons who are dead or absent and who had no interest to say or write a falsehood, and to other facts of general or public interest or of public notoriety.

### Professional Secrecy

In terms of section 588 of the COCP, no advocate or legal procurator without the consent of the client may be questioned on such circumstances as may have been stated by the client to the advocate or legal procurator in professional confidence in reference to the cause. Unless by order of the court, no accountant, medical practitioner or marriage counsellor may be questioned on such circumstances as may have been stated by the client to the said person in professional confidence or as may have come to his knowledge in his professional capacity.

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13 Section 596 of the COCP.  
14 Section 622B of the COCP.

Similarly, section 642 of the Criminal Code provides that advocates and legal procurators may not be compelled to depose with regard to circumstances knowledge whereof is derived from the professional confidence which the parties themselves shall have placed in their assistance or advice. The same rule shall apply in regard to those persons who are by law bound to secrecy respecting circumstances on which evidence is required.

It is to be noted that detailed rules on professional secrecy are also contained in the Professional Secrecy Act (Chapter 377 of the Laws of Malta). This Act applies to those persons who by reason of their calling, profession or office are bound to keep information secret, and deals with the various instances when such persons may be compelled to disclose information which is otherwise covered by professional secrecy. A court of law, for example, may release a witness from his duty of professional secrecy but in such case the evidence tendered by the witness shall be held *in camera* and shall only be accessible to the court and to the parties.

**(iv) Rules on (pre-trial or other) discovery within and outside the jurisdiction of the court vis-à-vis defendants, third parties and competition authorities (national, foreign, Commission)**

The notion of pre-trial or discovery proceedings does not feature in current laws of Maltese civil procedure before the ordinary courts. However, it is worth pointing out that in terms of section 156 of the COCP all documents as may be necessary in support of the claim should be produced by the plaintiff together with the writ of summons and a copy of such documents are to served on the defendant. However, it is common practice that the parties also submit documents during the hearing of the case.

Summoning of witnesses during the trials

A witness may be summoned to appear by means of a subpoena to be issued on the application of the party interested (section 568 of the COCP). In the subpoena the witness may also be required to bring forward any relevant documents or other things in his possession (section 570 of the COCP). If the subpoena has been duly served and the witness fails to appear he may be found guilty of contempt of court and punished accordingly. It is also lawful for the court, by means of a warrant of escort or arrest, to compel such witness to attend for the purpose of giving evidence (section 575 of the COCP).

In terms of section 573A of the COCP, any officer or employee of a body having a distinct legal personality may be authorised by the person subpoenaed to give evidence in his stead on any matter relating to the body about which he is more knowledgeable and on which the person subpoenaed was required to give evidence, unless the subpoena states that the person subpoenaed is to give evidence personally.

Save as otherwise provided by law witnesses are examined in open court at the trial of the action and *viva voce* (section 577 of the COCP). The examination is carried out by the party producing the witness but in practice the judge also asks questions where he feels that he requires further information. In fact, section 582 of the COCP expressly provides that it is lawful for the court, at any stage of the examination or cross-examination, to put to the witness such questions as it may deem necessary or expedient.

A witness is bound to answer any question that the court may allow to be put to him, and the court can compel him to do so by committing him to detention until he answers (section 587 of the COCP). However, a witness cannot be compelled to answer any question the answer to which may subject him to a criminal prosecution (section 589 of the COCP).

As indicated previously a party to the suit may be called to give evidence by the court *ex officio* (section 565 of the COCP). However, third parties are not called to give evidence by the court *ex officio*; they must be summoned on the application of the party interested as stated previously.

### Rules on the production of documents during the trial

In terms of section 637 of the COCP, it shall be lawful to demand the production of documents which are in the possession of other persons: -

- (a) if such documents are the property of the party demanding the production thereof;
- (b) if such documents belong in common to the party demanding their production and to the party against whom the demand is made;
- (c) if the party demanding the production of the documents, although he is not the owner or a co-owner thereof, shows that he has an interest that such documents be produced by the other party to the suit;
- (d) if the person possessing the documents, not being a party to the suit, does not declare on oath that, independently of any favour for either side, he has special reasons not to produce the documents;
- (e) if the documents are public acts, or acts intended to constitute evidence in the interest of the public in general.

With respect to paragraph (c) it should be pointed out that it is up to the court to decide as to the interest of the party demanding the production of the document, regard being had to the nature of the case and to the nature of the document the production of which is demanded (section 638(3) of the COCP).

With respect to how precisely the document requested needs to be identified we would like to point out that according to section 639 of the COCP, the demand for the production of documents must state the nature of the documents, and all the particulars which may be known to the party making the demand. If a particular document is requested it should be clearly identified. However it is possible also to demand the production of classes of documents provided the nature of the documents is stated together with all the particulars known to the party making the demand. The demand may be made at any stage of the cause so long as evidence may still be adduced (section 642 of the COCP). It is worth noting also that in all cases the party demanding the production of the document must prove that the document is in the possession of the person from whom the production is demanded (section 641 of the COCP).

In terms of section 643 of the COCP, it is lawful for the court to consider the contents of a document to be as averred by the party demanding its production, if the opposite party, notwithstanding the order of the court, refuses to produce such document.

With respect to whether the competition authorities would grant access to their file in an action for damages before the civil courts we would like to point out that since competition legislation does not specifically cater for this issue, it will be in the court's discretion whether to compel the competition authorities to disclose the contents of their file.

### Investigations by the Director for Fair Competition

It is worth noting that in terms of section 12(1) of the Competition Act it is possible for the Director for Fair Competition to carry out investigations. According to the latter provision,

"It shall be the duty of the Director to ensure that the provisions of this Act are observed by all, and to gather information that may be necessary for him or the Commission to carry out their functions; and for such purpose he shall have the power to carry out investigations of his own motion or at the request of the Minister<sup>15</sup> or upon a reasonable allegation in writing of a breach of the provisions of this Act, by a complainant or at the request of any designated National Competition Authority of any other Member State or the European Commission."

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15 The Minister responsible for commerce.

In terms of section 14 of the Competition Act, the Director may only refuse to carry out an investigation upon a complaint in writing if he considers the complaint to be *prima facie* inadmissible but in such case the complainant has the right to demand that the Director's decision not to investigate be reviewed by the Commission for Fair Trading. If the Commission does not agree with the Director, the latter is obliged to commence an investigation. It is not possible to identify *a priori* the circumstances when a complaint would be considered inadmissible but we are of the opinion that this would be the case where the complaint is manifestly unfounded, frivolous or vexatious. We are not aware of any decision where the Director declared a complaint to be inadmissible. It should be noted that such decisions of the Director are not made public.

Where the Director has carried out an investigation he may be subpoenaed during the proceedings dealing with an action for damages before the ordinary courts to give evidence on his findings, if such evidence is required (the Director also gives evidence before the Commission for Fair Trading).

It is also worth noting that section 12 of the Competition Act confers wide investigatory powers upon the Director. During the course of an investigation, for example, the Director may request any person to furnish him with any information or document in his possession which the Director has reason to believe is relevant to the matter under investigation, within such time as in the circumstances of the investigation the Director may consider reasonable. The Director may also receive written or verbal statements from witnesses as well as make copies of any document produced to him, and the record of such statements and such copies duly attested by the Director are producible as evidence before the Commission for Fair Trading. According to section 12(5) of the Competition Act, upon being authorised by a warrant issued by the chairman of the Commission for Fair Trading the Director may also enter into and search any premises and any other place, or search any means of transport where he has reason to believe that information relevant to the investigation may be found, and in the course of any such search may seize any object or document, or order the non-removal of any object from any such premises, and in connection with any such order may close and seal any or all parts of any premises and any other place, or means of transport, or put any object under seal. Searches may also be carried out in private homes but in such case, the Director must be accompanied by a Police officer not below the rank of inspector.<sup>16</sup>

According to section 12(10) any information disclosed to the Director or any document produced to him during an investigation shall be secret and confidential and may only be disclosed before the Commission in any matter before it, or before a competent court in relation to the prosecution of any offence against the Act.

By virtue of the amendments made by Act III of 2004, the procedure following the conclusion of an investigation by the Director is as follows. According to section 12A,

“(1) Where, upon the conclusion of an investigation, it results to the Director that the agreement, decision, concerted practice or abusive conduct investigated is in breach of the provisions of subarticle (1) of article 5 and, or subarticle (1) of article 9, he shall issue a decision finding an infringement, giving his reasons therefor.

(2) Where it results to the Director that a serious infringement of subarticle (1) of article 5 and, or of subarticle (1) of article 9 has taken place due to the gravity and duration of the agreement, decision, concerted practice or abusive conduct which have been investigated, the Director shall make a report to the Commission of the conclusions arrived at by him in the said investigations, giving his reasons therefor and making reference to the evidence in support thereof, which evidence shall at the request of the

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16 Section 12(6) of the Competition Act.

Commission be produced before it, following which the Commission shall issue a decision thereon.

(3) Where it results to the Director that an infringement of Article 81 and, or Article 82 of the EC Treaty has occurred, subarticle (2) shall *mutatis mutandis* apply.”

On issuing a decision finding an infringement under article 12A(1), the Director shall serve a copy of the decision on the undertaking or undertakings concerned (section 13 of the Competition Act). The undertaking or undertakings concerned may within fifteen days from the notification of the decision request the Director to submit the same for review by the Commission (section 13A(1)) of the Competition Act).

Section 13 of the Competition Act provides for the issuing of Cease and Desist orders and Compliance orders. While a Cease and Desist Order orders the undertaking/s concerned to cease and desist immediately from participating in an agreement, decision, practice or conduct, a Compliance Order sets out behavioural or structural remedies for the purpose of bringing the infringement to an immediate and effective end.

According to rule 8 of the Schedule to the Competition Act in proceedings before the Commission it is possible for the relevant undertaking and the complainant to make submissions as well as to present any documents or other evidence that may be relevant to the matter. By virtue of the amendments made by Act III of 2004 the European Commission in all cases involving the application of articles 81 and/or 82 of the EC Treaty shall also have a right to make submissions on any matter before the Commission, as well as to present any documents or other evidence that may be relevant to the matter.

The Commission also has the power to summon witnesses, to appoint expert witnesses and referees and the power to administer oaths.

**(b) Proving the infringement**

**(i) Is expert evidence admissible?**

Generally, an expert is appointed to give evidence on points that require specific knowledge or technical expertise.

An expert (or referee) may be appointed by the court on the demand of the parties or one of them, or by the court of its own motion (section 644 of the COCP). Where the parties agree on the submission of a name of a referee, the court appoints the referee agreed upon by the parties. Where the parties fail to agree, the court appoints a referee of its own choice (section 646 of the COCP).

Once an expert has been appointed the court will make an order of reference stating the date of the order and the date on which the referee is to file his report. The report of the referee constitutes proof. It must state the inquiries made and the findings of the referee together with the grounds of such findings (section 665 of the COCP).

With respect to the evidence-gathering power of the court-appointed expert we would like to point out that this is determined by the court in its decree. The court may grant authority to the expert to receive documents and to examine witnesses. The court may also order the referee to attend the hearing of the trial and to put to the witnesses any questions he may deem necessary or relevant to enable him to complete his report (section 645(4) of the COCP). Witnesses may also be subpoenaed to appear before the referee (section 664 of the COCP). Any documents produced by the parties and the depositions of the witnesses must be annexed to the expert's report.

The expert does not generally have the power to compel the parties to supply information or produce documents. In the case of a refusal by a party to supply

requested information the expert would have to go to the court for an order that such information be made available.

The parties or their advocates or legal procurators, as the case may be, may, in the course of the proceedings before the referee, make such submissions as they consider to be in their interest, and a mention thereof shall be made by the referee in his report (section 660 of the COCP).

Once the report of the court-appointed expert has been filed the parties have the right to consider the report and make their submissions thereon (section 673 of the COCP). A party may also ask for the appointment of additional referees (section 674 of the COCP).

It is important to point out that in terms of section 681 of the COCP the court is not bound to adopt the report of the referee/s against its own conviction.

Evidence by an *ex parte* expert is also admissible provided the person called to give his opinion on any relevant matter on which he is qualified to give expert evidence is in the opinion of the court suitably qualified in the relevant matter (section 563A of the COCP). It should be pointed out that witnesses may not be summoned before an *ex parte* expert. In fact an *ex-parte* expert has no evidence gathering powers.

While expert evidence on a foreign law is allowed, expert evidence on domestic law is not.

**(ii) To what extent, if any, is cross-examination permissible?**

A party has the right to cross-examine a witness produced by the other party.<sup>17</sup> While leading or suggestive questions may not be put without the special permission of the court during an examination in chief, in cross-examination leading or suggesting questions are allowed. However, in cross-examination a witness may only be questioned on the facts deposed in his examination, or on matters calculated to bring into question his credit.<sup>18</sup> When the party cross-examining the witness desires to prove by the same witness any circumstance not connected with the facts deposed in the examination, he must, unless the court directs otherwise for a just cause, produce such witness in due time and examine him as his own witness.

As indicated previously, during the cross-examination the judge may also ask questions if he feels it is necessary or expedient so to do.

**(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?**

In terms of section 628 of the COCP, the acts of any foreign Government, or of any department of a foreign Government, or of foreign courts of justice, or of any foreign establishment, authenticated by the diplomatic or consular representative of the Government of Malta in the country from which they emanate, or by a person serving in a diplomatic, consular or other foreign service of any country which by arrangement with the Government of Malta has undertaken to represent the Government's interests in that country, or by any other competent authority in the country from which they emanate, are admissible as evidence without the necessity of any proof of their authenticity other than that which appears on the face them, and are, until the contrary is proved, evidence of their contents.

In our view this 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 those facts in a Maltese Court. Nevertheless such decision would be afforded persuasive evidential value.

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17 Section 579 of the COCP.

18 Section 580(1) of the COCP.



**(c) Proving damage**

**(i) Are there any specific rules for evidence of damage?**

There are no specific rules for evidence of damage and therefore, the ordinary rules are applicable. Under Maltese law, in an action for damages, the damage caused must have the following characteristics:

- i. it must be certain in the sense that it is inevitable, either because it has already happened or because the causes exist which will inevitably produce it. Future damage (i.e. damage which has not yet verified itself but will inevitably do so) is therefore included.
- ii. it must be proved
- iii. it must be patrimonial. Under Maltese law moral damages (i.e. damages for pain and suffering) may not be recovered except in those cases where the law expressly says so.

Please refer also to section G (a)(i) of this report.

It is to be noted that it is possible for the court to give a partial judgment on the question of responsibility and leave the quantum of damages to be decided at a later date. In such case the court will first hear the evidence dealing with the question of responsibility. Once this question is determined and it is found that defendant is responsible the Court will then hear the evidence on the quantum of damages and proceed to give final judgment.

**(d) Proving causation**

**(i) Which level of causation must be proven: direct or indirect?**

The Maltese Courts have, as a rule, required the act to be the immediate and direct cause of the damage. In the case of *G. Cefai vs. G. Attard* (Volume XXV, Part 1, page 811) the Court held that for an act to give rise to tortious responsibility, it must have been the

“... causa diretta e immediata del danno” (direct and immediate cause of the damage).

This means that the court will assess whether the defendant’s behaviour was a necessary cause of the damage i.e. whether the damage would have occurred in the absence of defendant’s behaviour.

However, in some cases, the Maltese Courts have held that the act may also be the indirect cause of the damage provided that the act has led to a state of affairs which would have never verified itself if not because of the act. This principle was endorsed in *Brookes vs Sare`* (Volume XL, Part II, page 815).

In the case *A. Mallia vs C. Moore* (Volume XXXVIII) the Court referred to Halsbury (Vol X paragraph 131) who holds that

“in determining whether damages are too remote, it is necessary to consider whether the original cause so far continued to operate that it was the proximate cause of the damage.”

The Maltese Courts have repeatedly held that the onus of proving the existence of the link of causality between the unlawful act committed by the agent and the damage suffered by the victim lies on the person alleging responsibility i.e. the victim.

## **F      Grounds of Justification**

### **(i)      Are there grounds of justification?**

It is a recognised principle that the agent is not responsible if the victim consents to the commission of the act. In such case it cannot be said that the act was unjust, and this on the strength of the maxim "volenti et consentienti not fit injuria." It is not however likely that this principle - which applies in the context of claims in tort - would find application in actions for damages arising out of breaches of competition rules. However, in the cases of a party to an illegal contract, it appears that a contracting party would not be able to claim compensation from the other contracting party for damages caused through fulfilment or non-fulfilment of a clause which is in breach of competition law, and this due to the unlawful causa underlying the contract. It is to be noted that under Maltese law an agreement or clause that breaches competition law should be considered as having an unlawful causa. The effect would be that such agreement or clause would be held null and void. Section 991(2) of the Civil Code then provides that

"If the consideration is unlawful in regard to both contracting parties neither of them, unless he is a minor, may recover the thing which he may have given to the other party..."

In the light of *Courage vs Crehen* the above principle may have to be reconsidered in those cases where one of the parties is significantly responsible for the breach.

The defendant is also not responsible if the damages suffered by the plaintiff were due to force majeure or irresistible force. Damage caused by force majeure is to be borne by the victim. According to section 1029 of the Civil Code: -

"Any damage which is produced by a fortuitous event, or in consequence of an irresistible force, shall, in the absence of an express provision of the law to the contrary, be borne by the party on whose person or property such damage occurs."

In those cases where the defendant relies on section 1029 in his defence it would be up to him to prove that he was forced to act unlawfully. In our view, a government act imposing certain anti-competitive behaviour should be sufficient to constitute force majeure in terms of section 1029.

It is also a recognised principle that plaintiff is under a duty to mitigate damages, and if he does not do so he cannot recover those damages which could have been mitigated if he acted diligently. In our view the obligation to mitigate damages would not include the passing on of higher costs to customers.

### **(ii)      Are the 'passing on' defence and 'indirect purchaser' issues taken into account?**

#### **Passing on defence**

Although the 'passing on' defence *per se* does not exist we will try to address the question whether the defendant in an action for damages can argue that the plaintiff was not injured due to the fact that he has passed on overcharges attributed to abusive or anti-competitive behaviour to a subsequent purchaser. It must be said, however, that given the uncertainty of the law in this area, the following comments are merely an opinion and are not intended to be an authoritative statement on the position at law. In our view, since the object of an action for damages under Maltese law is to reintegrate the patrimony of the plaintiff with the loss which he has suffered as a result of the illegal act of the defendant, in the above circumstances defendant's defence may be successful. This is because by 'passing on' the overcharge to a subsequent purchaser the plaintiff would not have suffered an actual loss, in other words, his profit would have remained the same. As indicated above it is the plaintiff who must prove that

he actually suffered a loss due to the illegal act of the defendant, and before bringing such proof defendant need not bring any proof to the contrary.

Where the plaintiff has lost customers as a result of the higher prices charged by the defendant, he may try to argue that he has suffered damages representing the loss of profit which he could have made from these customers, but in our view it may be difficult for the plaintiff to prove causation and the quantum of damages in such a case.

#### Indirect purchaser issue

The 'indirect purchaser' concept *per se* does not exist under Maltese law and we are not aware of any local judgements which deal with a similar concept. However, applying general principles, in our opinion, although in the case of actions based on tort there is no need to show any pre-existing juridical relation between the parties it would be difficult for an indirect purchaser to succeed in such a scenario since it would be up to him to prove the link of cause and effect between the illegal act of the defendant and the damage he has sustained.<sup>19</sup> In our view this will have to include proof that the higher prices were passed on to him by the direct purchaser as a result of the illegal act of defendant. There is no presumption that the higher price would have been passed on. Moreover, the fact that the direct purchaser had the choice as to whether to pass on these higher costs or not would most probably be deemed by a court to break the causal chain.

Please refer also to section III (i).

**(iii) Is it relevant that the plaintiff is (partly) responsible for the infringement (contributory negligence leading to apportionment of damages) or has benefited from the infringement? Mitigation?**

The concept contributory negligence is dealt with in section 1051 of the Civil Code which states as follows:

"If the party injured has by his imprudence, negligence or want of attention contributed or given occasion to the damage, the court, in assessing the amount of damages payable to him, shall determine, in its discretion, the proportion in which he has so contributed or given occasion to the damage which he has suffered, and the amount of damages payable to him by such other persons as may have maliciously or involuntarily contributed to such damage, shall be reduced accordingly."

Thus, the fact that there has been contributory negligence on the part of the victim does not exonerate the agent from responsibility but it operates to diminish his liability to pay damages. The Maltese Courts have held that mere imprudence on the part of the victim is sufficient for the purposes of section 1051. Moreover, it is not necessary that the victim's act caused the damage; it is sufficient if his act merely contributed to the damages he has sustained.

The fact that the plaintiff benefited from the infringement should also be taken into account because under Maltese civil law damages are assessed on the basis of the actual loss which the plaintiff has incurred as a result of the act (see also section G below).

#### **G Damages**

**(a) Calculation of damages**

**(i) Are damages assessed on the basis of profit made by the defendant or on the basis of injury suffered by the plaintiff?**

Under the Maltese Civil Code damages are assessed on the basis of the injury suffered by the plaintiff and not on the basis of the profit made by the defendant.

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<sup>19</sup> The fact that it is up to plaintiff to prove the link of causation was stressed in various cases such as *David Gatt vs Peter Calleja* (First Hall Civil Court, 30 May 2002) but this case did not deal with the concept under examination.

The profit made by the defendant is taken into account under the Copyright Act but while in the case of breaches of copyright, neighbouring rights or *sui generis* rights there is a specific provision of law which allows the Court to award such damages,<sup>20</sup> under the Maltese Civil Code there is no similar provision.

The quantum of damages which may be awarded in terms of the Maltese Civil Code in the case of tortious responsibility is regulated by section 1045:

“The damage which is to be made good by the person responsible in accordance with the foregoing provisions shall consist in the actual loss which the act shall have directly caused to the injured party, in the expenses which the latter may have been compelled to incur in consequence of the damage, in the loss of actual wages and other earnings, and in the loss of future earnings arising from any permanent incapacity, total or partial, which the act may have caused. The sum to be awarded in respect of such incapacity shall be assessed by the court, having regard to the circumstances of the case, and particularly, to the nature and degree of incapacity caused, and to the condition of the injured party.”

The actual loss which the act directly causes to the injured party together with the expenses which the injured party has to incur as a consequence of the damage and the loss of actual wages and other earnings are referred to collectively as ‘*damnum emergens*.’ The loss of future earnings, on the other hand, are referred to as ‘*lucrum cessans*.’

The following rules apply in the case of damages arising from breach of contract. According to section 1135 of the Civil Code, the damages due to the creditor are generally in respect of the loss which he has sustained, and the profit of which he has been deprived. A distinction is made between what was foreseeable at the time of the agreement and what was not foreseeable. In terms of section 1136 the debtor is only liable for such damages as were or could have been foreseen at the time of the agreement, unless non-performance of the obligation was due to fraud on his part. In all cases, even where the non-performance of the obligation is due to fraud on the part of the debtor, the compensation in respect of the loss sustained by the creditor and the profit of which he was deprived, shall only include such damages as are the immediate and direct consequence of the non-performance.<sup>21</sup>

It is worth noting that in terms of section 1139 where the subject matter of the obligation is limited to the payment of a determinate sum, the damages arising from the delay in the performance thereof shall only consist in the interests on the sum due at the rate of eight per cent per annum. Such interest is due without the creditor being bound to prove any loss.

It is also worth noting that, as indicated previously, under Maltese law moral damages (i.e. damages for pain and suffering) are not awarded except in the cases expressly provided for by law. The concept of ‘damages for loss of chance’ is also unknown to Maltese law.

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20 Section 43 of the Copyright Act provides that where any person infringes the copyright, neighbouring rights or *sui generis* rights in respect of a work, he shall be liable, at the suit of the copyright owner or right holder to be condemned by the Civil Court, First Hall to the payment of damages or to the payment of a fine to be determined in accordance with a scale of fines to be prescribed by the Minister, as the said Court, having regard to the circumstances of the case, may deem proper and to the restitution of all the profit derived from the infringement of the copyright, neighbouring rights or *sui generis* rights: Provided that where the defendant proves to the satisfaction of the Court that at the time of the infringement he was not aware and could not reasonably be expected to be aware that copyright, neighbouring rights or *sui generis* rights subsisted in the work to which the action relates, the Court shall not condemn him to the restitution of the profit. The Civil Court, First Hall may in an action for infringement of copyright, neighbouring rights or *sui generis* rights having regard to all the circumstances and in particular to the flagrancy of the infringement and any benefit accruing to the defendant by reason of the infringement, award such additional damage as the justice of the case may require. The Court may, moreover, in a suit instituted under this article, on the application of the plaintiff, order that all the infringing articles still in possession of the defendant be delivered to the plaintiff.

21 Section 1137 of the Civil Code.

**(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 not only for injuries suffered on the national territory but more widely, provided always that the Court has jurisdiction to deal with the case at issue [on jurisdiction see section C (i)].

**(iii) What economic or other models are used by courts to calculate damages?**

Since case-law dealing with damages consequent to breaches of competition law is inexistent to date, the Maltese Courts have not developed any sophisticated models to calculate damages. Sophisticated rules for the quantification of damages have only been developed by the Courts in the sphere of personal injury and traffic cases. The principle which will be applied by the Court is that the plaintiff is to be restored in the position he would have been if defendant had not injured him by the unlawful conduct complained of. Indeed this principle which is referred to as *restitutio in integrum* is the underlying notion of Maltese law on tort, as explained in numerous cases such as that of *Elmo Insurance Agency Limited noe et vs Martin Saliba* (First Hall Civil Court, 31 May 2001).

**(iv) 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.

There is no particular provision for inflation under Maltese law, but there is nothing which prevents the Courts from taking inflation into account when assessing damages.

**(v) Are there maximum limits to damages?**

No.

**(vi) Are punitive or exemplary damages available?**

No.

**(vii) Are fines imposed by competition authorities taken into account when settling damages?**

Since damages under Maltese law are based on the concept of *restitutio in integrum*, fines imposed by competition authorities should not be taken into account when quantifying damages. This is because such fines are paid to the Government and not to the injured party.

**(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 those cases based on tortious responsibility where the damages suffered by the plaintiff are to be quantified/liquidated by the Court (i.e. the plaintiff does not ask for a specific sum in his writ of summons), the Maltese Courts award interest on the sum due as damages to the plaintiff from the date of the judgement. This approach is based on the principle *in liquidandis non fit mora* and has been adopted in numerous cases (see for example *Carmelo Galea vs Kenneth Mizzi pro*, Court of Appeal, 5 October 2001; *Spiridione L. Mizzi pro et noe vs Emmanuele Falzon*, Commercial Court, 16 February 1954, Vol. XXXVIII.iii.642; *Simon Spiteri vs Lawrence Farrugia*, 27 June 2003, First Hall Civil Court; *Renato Ellul vs Emmanuel Delicata noe et*, 30 May 2003, Court of Appeal).

On the other hand, where the sum claimed by plaintiff for the damages he has suffered is determined in his writ of summons, the Maltese Courts award interest not from the date of the judgment but from the date of the writ of summons. Indeed, the principle *in liquidandis non fit mora* is not applicable where the sum due to plaintiff is certain, or if the debtor knows or can easily determine the sum due to plaintiff. The legal position was explained clearly by the Court of Appeal (Commercial Division) in the case *Anthony Mercieca vs Nobbli Salvino Testaferrata Moroni Viani* (16 December 1991, Vol. LXXV.ii.643). The Court made the following observation.

"A creditor who has suffered damages may demand to the Court either a determinate sum, determined by himself, or an indeterminate sum which has to be determined by the Court or as usually said in legal jargon a sum to be liquidated... It is the plaintiff who fixes the parameters of his action and it is he who decides whether to demand a sum determined by himself or an indeterminate sum to be determined by the Court."

In this case the plaintiff's claim was for a certain and liquidated sum, and therefore the Court awarded interest from the date of the writ of summons.

Where the plaintiff's action for a certain and liquidated sum is preceded by a judicial act whereby the debtor is requested to pay such certain and liquidated sum interest begins to run from the day of the intimation by judicial act (see, for example, *Citadel Insurance plc vs Johann Ciantar*, 20 June 2002, First Hall Civil Court).

It is to be noted also that where the claim is of a commercially contractual nature interest is due as from the day on which the obligation should have been performed.

**(ii) What are the criteria to determine the levels of interest?**

Where applicable, interest is awarded at the rate of 8% per annum.

**(iii) Is compound interest included?**

The Maltese Courts do not award compound interest. However section 1142 of the Civil Code provides that

"The interest fallen due may bear other interest either, in virtue of the foregoing provisions, from the day of a judicial demand to that effect, or by virtue of an agreement entered into after the interest has fallen due, provided, in either case, interest be due for a period not less than one year."

## **H Timing**

**(i) What is the time limit in which to institute proceedings?**

Section 2153 of the Civil Code provides that damages arising out of tort are prescribed by the lapse of two years. However this applies where the act of the defendant does not constitute a criminal offence. Section 2154(1) of the Civil Code provides that where the act in question constitutes a criminal offence, that is the civil action for damages arises from a criminal offence, the rules laid down in the Criminal Code (Chapter 9 of the Laws of Malta) shall be observed. The latter rule is of particular importance since a breach of the provisions of the Competition Act may constitute also a criminal offence. Indeed, following the amendments to the Competition Act by Act III of 2004, section 16 expressly provides that any person who acts in breach of articles 5 and, or 9 of the Act, and, or Articles 81 and, or 82 of the EC Treaty shall be guilty of an offence under the Act. Moreover, the Competition Act contemplates a number of other criminal offences<sup>22</sup> (see foot note) related to breaches of the rules contained therein.

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22 It is an offence for a person to act contrary to a Cease and Desist Order or a Compliance Order (section 17), and to make an act contrary to an interim measure ordered by the Commission in accordance with section 15 after the

It is to be noted that in terms of section 26 of the Competition Act, "notwithstanding the provisions of the Criminal Code or of any other law, criminal action for offences under this Act is prescribed by the lapse of five years." This means that in the case of criminal offences under the Competition Act, the rules of prescription contained in the Criminal Code are not applicable. Instead a five-year prescriptive period is applicable. This raises the question whether the prescription of civil actions for damages arising out of criminal offences in terms of the Competition Act is regulated by the rule contained in section 2154(1) of the Civil Code. The question arises because section 2154(1) of the Civil Code speaks only about the rules of prescription contained in the Criminal Code and not about the rules regulating the prescription of the criminal action generally. Thus, it is not clear whether the five-year prescriptive period imposed by section 26 of the Competition Act is applicable also to a civil action for damages arising from a criminal offence.

Although the position is not entirely clear, in our opinion the Maltese Courts will probably come to the conclusion that although section 2154(1) of the Civil Code only makes reference to the rules of prescription contained in the Criminal Code, the principle that the prescription of civil actions for damages arising from criminal offences is governed by the prescription of the criminal action is to remain applicable, and therefore, if the prescriptive period of a particular offence is regulated by a law other than the Criminal Code, such prescriptive period is to apply also to the civil action for damages arising out of the criminal offence. If this interpretation is adopted by the Maltese Court, an action for damages consequent to a breach of the Competition Act which constitutes also a criminal offence in terms of the said Act will be prescribed by the lapse of five years.

A five-year prescriptive period applies in the case of an action for damages arising from contract.

The running of prescription may be interrupted in one of the ways provided for by law<sup>23</sup> (for example by means of judicial act) in which case the prescriptive period commences to run anew.

The lack of knowledge of the victim has no effect on the running of prescription. This principle has been applied in a number of cases such as *Dr. Louis Cassar Pullicino noe vs. Angelo Xuereb pro et noe* (First Hall Civil Court, 3<sup>rd</sup> July 2003).

## **(ii) On average, how long do proceedings take?**

Court proceedings in Malta, particularly those falling within the jurisdiction of the First Hall Civil Court may take a relatively long time 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. From our experience 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.

## **(iii) Is it possible to accelerate proceedings?**

In the case of actions for the recovery of a debt which is certain, liquidated and due and which exceeds Lm5000 there is a procedure referred to as 'special summary proceedings' where the plaintiff demands in his writ of summons that the court proceeds to give judgement allowing his demand without proceeding to trial, provided the plaintiff declares under oath that in his belief defendant has no defence to his action.<sup>24</sup> If the defendant fails to appear following the writ of summons or is not successful in impugning the proceedings on any of the grounds allowed by law, the court will forthwith deliver judgment allowing the claims of plaintiff.<sup>25</sup> However, in our view, such a procedure would not be applicable in the

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measure has been published (section 18). There are also some other offences in connection with investigations and proceedings before the Commission, for example, the giving of false information and the hindering of an investigation (section 23).

23 Sections 2127 to 2136 of the Civil Code.

24 Section 167 of the COCP.

25 Section 170 of the COCP.

generality of cases for damages consequent to breaches of competition law for the following reasons:

- the procedure cannot be resorted to unless the amount claimed is certain, liquidated and due and in most actions for damages this requirement is missing due to the fact that the damages still have to be quantified;
- it is difficult to argue and declare on oath that the defendant has no possible defence to the claim, and this in the light of the complexity of the issues involved in actions of this nature.

There is no other procedure available under Maltese law in order to accelerate Court proceedings. However delays may be avoided by complying without delay with all Court orders and procedures, attending all Court sittings, not asking for postponements and by objecting to postponements demanded by the other party without just cause.

**(iv) How many judges sit in actions for damages cases?**

An action for damages may be assigned to any of the judges who ordinarily sits in the First Hall Civil Court. Similarly, an action for damages within the jurisdiction of the Court of Magistrates may be assigned to any magistrate who ordinarily sits in this Court. This is because there is no particular division of the First Hall Civil Court or the Court of Magistrates which deals exclusively with actions for damages.

The Court of Appeal, when hearing appeals from judgments of the First Hall Civil Court is composed of three judges [refer also to section B (i)].

The Commission for Fair Trading is composed of a magistrate who acts as chairman and two other members, an economist and a certified public accountant.

**(v) How transparent is the procedure?**

The procedure before the ordinary courts is transparent. All causes are tried in public but it is lawful for the court to order that a case be heard with closed doors, should decency or good morals so require. In any other case the court may, at the request of both parties and upon good reason being shown, order that the case be heard with closed doors.<sup>26</sup>

Section 115 of the COCP states that the acts of every court shall be accessible to all persons, and copies thereof shall be given out at the request of any person. However, the Court may order that commercially sensitive documentary evidence be kept out of public inspection. The parties' submissions before the ordinary courts are also public but the Court may order that they be kept out of public inspection. It is also worth noting that a witness cannot avoid disclosure on the ground of protection of business secrets if the evidence is deemed by the Court to be relevant. However, in practice, the Court may order commercially sensitive evidence to be available only to the parties and not open to public inspection.

As opposed to the procedure before the ordinary courts, according to rule 8 of the Schedule to the Competition Act, meetings of the Commission for Fair Trading are held *in camera* but the Director for Fair Competition has the right to be present during all meetings and the relevant undertaking and any complainant has the right to make submissions on any matter before the Commission, as well as to present any documents or other evidence that may be relevant to the matter. Moreover, the European Commission, in all cases involving the application of articles 81 and/or 82 of the EC Treaty, shall have a right to make submissions on any matter before the Commission as well as to present any documents or other evidence that may be relevant to the matter. In terms of rule 10, where a report is sent to a complainant, the chairman of the Commission must ensure that any confidential business information on the undertaking subject of the proceedings is not included in the report. Moreover, in terms of rule 12, decisions of the Commission shall be published in such manner as the chairman of the Commission

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26 Section 22 of the COCP.



with the concurrence of the Director may determine, provided that the chairman shall ensure that no business secret of any undertaking shall be disclosed.

## **I Costs**

### **(i) Are Court fees paid up front?**

Court registry fees must be paid up front. In the case of professional fees, the mode in which payment is to be made depends on the arrangement reached between the lawyer and his client. Most lawyers ask for a payment on account in respect of legal fees.

### **(ii) Who bears the legal costs?**

In the generality of cases legal costs are borne by the party who loses the case. In fact section 223(1) of the COCP provides that every definitive judgement shall award costs against the party cast. However, 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. Section 223(2) of the COCP states that in all cases, it shall be lawful for the Court to order that the costs shall not be taxed as between party and party, when either party has been cast in some of the points at issue, or when the matter at issue involves difficult points of law, or where there is any other good cause. For example, the Court may feel that although defendant lost the case he should not bear all the costs due to the fact that plaintiff demanded much more than that to which he was entitled at law.

Where two or more persons are condemned in costs, each person shall be deemed to be condemned in solidum or in proportion to his interest in the cause according to the decision on the merits.<sup>27</sup>

### **(iii) Are contingency fees permissible? Are they generally available for private enforcement of EC competition rules?**

Contingency fees as defined in the comparative report are not permissible. Section 986 of the Civil Code expressly provides that stipulations *quotae litis* are void. Similarly, the Code of Ethics for Advocates provides that an advocate shall not, either directly or indirectly, enter into any agreement or stipulation *quotae litis*. This rule certainly prohibits contingency fees and bonus fees as defined in the comparative report since such arrangements are calculated according to the size of the award. However, it appears that conditional fee agreements and uplifts as defined in the comparative report are not prohibited since they are not calculated according to the size of the award.

It is worth noting that the Code of Ethics for Advocates also provides that an advocate's fee shall be reasonable and may be established either by the advocate himself or by agreement between the advocate and the client. The Code also lists the factors to be considered in determining the reasonableness of a fee (whether agreed or otherwise).

### **(iv) Can the plaintiff/defendant recover costs? Are there any excluded items?**

The party who wins the case may recover the costs incurred from the other party. The costs that can be recovered include court registry fees, lawyer's fees and the fees of court-appointed experts, which costs are calculated by the court registry itself. Extra-judicial costs cannot be recovered.

### **(v) What are the different types of litigation costs?**

Litigation costs are calculated according to the sum claimed by the plaintiff. The higher the amount the higher the costs.

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27 Section 224 of the COCP.

**(vi) Are there national rules for taxation of costs?**

The calculation of the costs incurred by the parties in the proceedings is carried out by the Court itself which prepares a bill of judicial fees at the request of either of the parties. The various tariffs are contained in Schedule A to the COCP.

**(vii) Is any form of legal aid insurance available?**

Maltese insurance companies do not provide legal aid insurance.

**(viii) What are the likely average costs in an action brought by a third party in respect of a hard-core violation of competition law?**

As indicated above, the costs depend on the amount claimed by plaintiff. The following are examples of the costs involved in respect of claims for damages of Lm10,000, Lm100,000 and Lm1000,000: -

Lm 10,000 claim

- registry fees circa Lm 300
- legal costs circa Lm 450 (+VAT)

Lm 100,000 claim

- registry fees circa Lm 1400
- legal costs circa Lm 1700 (+VAT)

Lm 416,700 claim (circa 1,000,000 Euros)

- registry fees circa Lm 3742
- legal costs circa Lm 5869 (+VAT)

Lm 1,000,000 claim

- registry fees circa Lm 8300
- legal costs circa Lm 14000 (+VAT)

Where the damages claimed by plaintiff are not quantified at the time of the filing of the action (i.e. the amount of damages has to be quantified by the Court) registry fees amount to Lm 300 while legal costs are calculated on the amount which is actually awarded to the plaintiff by the Court.

**J General**

**(i) Are some of the answers to the previous questions specific to the private enforcement of competition rules? If so, in what way do they differ from the general private enforcement rules?**

Since the general rules in the Maltese Civil Code and Code of Organization and Civil Procedure are also applicable to cases for the private enforcement of competition rules the answers given above are not specific to the private enforcement of competition rules.

However, as indicated in greater detail in section B (ii) of this report, in actions for damages for breaches of competition law, a reference to the Commission for Fair Trading may be required for a determination on whether the act of defendant is in breach of national competition law (unless such an issue has already been determined by the Commission prior to the institution of an action for damages by plaintiff).

**(ii) EC competition rules are regarded as being of public policy. Does that influence any answers given?**

In terms of Maltese law rules of public policy override any rule to the contrary and any agreement to the contrary. Competition rules are considered to be rules of public policy.

**(iii) Are there any differences according to whether defendant is a public authority or natural or legal person?**

The Competition Act is now also applicable to government departments, bodies corporate established by law and to companies or partnerships in which the Government, directly or indirectly, holds a controlling interest or to which the Government has granted special or exclusive rights in any field.<sup>28</sup> This means that the latter may also be held responsible in damages for breaches of the Act.

However it is to be noted that section 30(2) of the Competition Act provided that the Minister may by order in the Government Gazette exempt any or all of the operations of an undertaking from the operation of the Act. The latter provision was substituted by the following provisions:

“(2) Undertakings entrusted with the operation of services of a general economic interest or having the character of a revenue producing monopoly shall be subject to the provisions of this Act insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.

(3) The Minister may by order in the Gazette declare a specific service entrusted to a particular undertaking to be a service in the general economic interest.”

These provisions were introduced by section 24 of Act IV of 2003 and brought into force by Legal Notice 332 of 2004.

As from the 1<sup>st</sup> May 2004, government bodies etc may also be held responsible for breaches of EC Competition rules (subject to the provisions of Article 86 of the EC Treaty).

The comments in the previous sections of this report apply also where defendant is a public authority but it is to be noted that according to Maltese procedural law the government enjoys certain ‘privileges’ in litigation. The most important is that no proceedings may be filed against the government except after the expiration of ten days from the service against the Government of a judicial letter or protest in which the right claimed or the demand sought is clearly indicated.<sup>29</sup>

It is also worth pointing out that under Maltese procedural law it is more difficult to obtain the issue of a warrant of prohibitory injunction against a public authority. In terms of section 873(3) of the COCP the court shall not issue any such warrant against a public authority or person holding a public office in his official capacity unless the authority or person against whom the warrant is demanded confirms in open court that the thing sought to be restrained is in fact intended to be done and the court is satisfied, after hearing the explanations given, that unless the warrant is issued the prejudice that would be caused would not be capable of remedy.

It is worth noting also that in terms of section 28 of the Competition Act it is not lawful to issue a precautionary warrant (including a warrant of prohibitory injunction) against the Director or Commission for Fair Trading in respect of the exercise of their functions under the Act.

**(iv) Is there any interaction between leniency programmes and actions for claims for damages under competition rules?**

There is no specific legal provision under Maltese law on the interaction between leniency programmes and actions for claims for damages under competition rules. No reason exists under general principles for such an interaction.

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28 Section 30(1) of the Competition Act.  
29 Section 460 of the COCP.

- (v) **Are there differences from region to region within the Member State as regards damages actions for breach of national or EC competition rules? [NB this point is intended to cover any key differences, substantial or procedural]**

There are no differences from region to region as regards actions for breaches of national or EC competition rules. The only thing to be borne in mind is that as indicated previously, where the defendant resides or has his ordinary abode in the Islands of Gozo or Comino, actions which fall within the competence of the First Hall Civil Court must be filed in front of the Court of Magistrates (Gozo) in its superior jurisdiction and actions which fall within the competence of the Court of Magistrates (Malta) must be filed in front of the Court of Magistrates (Gozo) in its inferior jurisdiction.

- (vi) **Please mention any other major issues relevant to the private enforcement of EC competition law in your jurisdiction**

Section 15 of the Competition Act provides that the Commission for Fair Trading may, at the request of the Director or of an undertaking or of a complainant, through the Director, take interim measures intended to suspend any restrictive practice under investigation if it is urgently necessary to avoid a situation likely to cause serious, immediate and irreparable prejudice to the interests of any undertaking or the general economic interest.

In terms of rule 7(b) of the Schedule to the Competition Act, any undertaking which shows that its operations are directly affected by the proceedings before the Commission for Fair Trading and any person claiming to be the victim of, or to be adversely affected by, any breach of the provisions of the Act constituting the merits of those proceedings, including a consumer who so claims or a registered consumers association acting on behalf of consumers generally may request in writing to be admitted to intervene in the proceedings before the Commission at any stage thereof.

In the case of tortious claims, according to Maltese rules of private international law, the applicable law is *the lex loci delicti commissi* (the law of the place where the tort was committed).

- (vii) **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**

Since EC Competition rules became applicable as from 1<sup>st</sup> May 2004 there still are no local cases based upon the violation of EC Competition rules in which the issue of damages was decided upon. Moreover, we are not aware of any local judgments which decided upon the issue of damages for a violation of the Competition Act.

### **III Facilitating private enforcement of Articles 81 and 82 EC**

- (i) **Which of the above elements of claims for damages (under sections II) provide scope for facilitating the private enforcement of Articles 81 and 82 EC? How could that be achieved?**

In our view the private enforcement of competition rules may be facilitated and 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.

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. To render the concept of private enforcement more attractive 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.

Given the problems that an indirect purchaser is likely to face (see section F (ii) of this report) when claiming damages caused by breaches of competition law it is also worth considering the introduction of a provision which relaxes the causation requirements in actions filed by indirect purchasers.

We believe that national judges and magistrates may lack the required expertise to deal with cases relating to breaches of EC Competition rule since most judges and magistrates have never worked in this field. We also believe that due to limited budgets and experience the Office for fair Competition may find it difficult to investigate all complaints made by private parties who feel that their rights are being infringed by breaches of competition rules by other undertakings.

**(ii) Are alternative means of dispute resolution available and if so, to what extent are they successful?**

An alternative means of dispute resolution is arbitration proceedings in terms of the Arbitration Act (Chapter 387 of the Laws of Malta). However, this would require that both plaintiff and defendant agree that the matter be taken to arbitration.

Although we do not consider mediation as an alternative means of dispute resolution it may be considered as an informal means whereby disputes in connection with competition claims in Malta may be settled. However, there is no formal mediation procedure under Maltese law and it must be said that mediation is not frequently utilised in Malta.

**IV Bibliography**

Caruana Scicluna, Joseph, *Notion of responsibility for Tort*, Thesis presented for the Degree of Doctor of Laws, 1977

Ellul, Charisse, *An evaluation of Council Regulation 1/2003 Modernising Competition Law Enforcement within the European Union*, Thesis presented for the Degree of Doctor of Laws, 2003.

**V National case law summaries**

As indicated above there is no national case-law.