

**SUBSIDIARY LEGISLATION 379.08****CONTROL OF CONCENTRATIONS REGULATIONS**

1st January, 2003

*LEGAL NOTICE 294 of 2002, as amended by Legal Notice 299 of 2002.*

1. The title of these regulations is the Control of Concentrations Regulations.

Citation.  
Amended by:  
*L.N. 299 of 2002.*

2. In these regulations, unless the context otherwise requires -

Interpretation.

(a) "Act" means the Competition Act;

Cap. 379.

(b) "association of undertakings" means a body of persons (whether incorporated or not) which is formed for the purpose of furthering the trade interest of its members or of persons represented by its members;

(c) "Commission" means Commission for Fair Trading established under article 4 of the Act;

(d) "concentration" means -

- (i) the merging of two or more undertakings that were previously independent from each other; or
- (ii) the acquisition by one or more undertakings or by one or more persons already controlling at least one undertaking, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings,

whether within Malta or outside Malta when the aggregate turnover in Malta of the undertakings concerned in the preceding financial year exceeded Lm 750,000:

Provided that the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity referred to hereafter as a "full-function joint venture" shall also constitute a concentration:

Provided further that the following shall not be deemed to give rise to a concentration:

- the holding on a temporary basis by credit or financial institutions or insurance companies, the normal activities of which include transactions and dealings in equity securities for their own account or for the account of others, of equity securities which they have acquired in an undertaking with a view to reselling them, provided that they do not exercise voting rights in respect of those equity securities with a view to determining the competitive behaviour of that undertaking or provided that they exercise such voting rights only with a view to preparing the disposal of all or part of that undertaking or of its assets or the

disposal of those equity securities and that any such disposal takes place within two years of the date of acquisition or such longer period as the Director may determine upon request by the institution or company concerned where it is shown that the disposal was not reasonably possible within two years;

- control is acquired by the person or entity competent according to law to conduct liquidation, winding up, insolvency, cessation of payment, compositions or analogous proceedings;
- control is acquired by a company the sole object of which is to acquire holdings in other undertakings and to manage such holdings and turn them to profit without involving itself directly or indirectly in the management of those undertakings, without prejudice to their rights as shareholders, provided however that the voting rights in respect of the holding are exercised, in particular in relation to the appointment of members of the management and supervisory bodies of the undertakings in which they have holdings, only to maintain the full value of those investments and not to determine directly or indirectly the competitive conduct of those undertakings;

(e) "control" means having the possibility of exercising decisive influence on an undertaking, in particular -

- (i) through ownership or the right to use all or part of the assets of an undertaking; or
- (ii) through rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking; provided that even persons or undertakings not holding such rights or entitled to such rights under the contract concerned are deemed to have acquired control if they have the power to exercise the rights deriving therefrom;

(f) "Director" means the public officer heading the Office for Fair Competition established under article 3 of the Act who has the power to delegate in terms of article 3(2) of the Act;

(g) "relevant market" means the market for the products or services whether within Malta or limited to any particular area or locality within Malta or outside Malta, and whether or not restricted to a particular period of time or season of the year;

(h) "undertaking" means any person whether an individual, a body corporate or incorporate or any other entity, pursuing an economic activity, and includes a group of undertakings in the sense given to this term by article 2 of the Act.

Calculation of turnover.

**3.** (1) Aggregate turnover within the meaning of regulation 2(d) shall comprise the amounts derived by the undertakings concerned in the preceding financial year from the sale of products and the provision of services to other undertakings or consumers falling under the undertakings' ordinary activities after deduction

of sales rebates and of value added tax and other taxes directly related to turnover:

Provided that the aggregate turnover of an undertaking concerned shall not include the sale of products or the provision of services between any of the undertakings referred to in sub-regulation (5).

(2) Where the concentration consists in the acquisition of parts, whether or not constituted as legal entities, of one or more undertakings, only the turnover relating to the parts which are the subject of the transaction shall be taken into account with regard to the seller or sellers:

Provided that where two or more such transactions take place within a two-year period between the same persons or undertakings they shall be treated as one and the same concentration arising on the date of the last transaction.

(3) In the case of credit institutions and other financial institutions, as regards regulation 2(d), the turnover of such institutions shall comprise the sum of the following income items, after deduction of value added tax and other taxes directly related to such items, where appropriate, that are received by the institution or its branch in Malta:

- (i) interest income and similar income;
- (ii) income from securities;
  - income from shares and other variable yield securities,
  - income from participating interests,
  - income from shares in affiliated undertakings;
- (iii) commissions receivable;
- (iv) net profit on financial operations;
- (v) other operating income.

(4) In the case of insurance undertakings, the turnover of such undertakings shall consist of the value of gross premiums written which shall comprise all amounts received and receivable in respect of insurance contracts issued by or on behalf of the insurance undertakings, including also outgoing reinsurance premiums and after deduction of taxes and parafiscal contributions or levies charged by reference to the amounts of individual premiums or the total volume of premiums.

(5) Without prejudice to subregulation (2), the aggregate turnover of an undertaking concerned within the meaning of regulation 2(d) shall be calculated by adding together the respective turnovers of the following;

- (i) the undertaking concerned;
- (ii) those undertakings in which the undertaking concerned, directly or indirectly:
  - owns more than half the capital or business assets, or

- has the power to exercise more than half the voting rights, or
  - has the power to appoint more than half the members of the board of directors or other body or bodies legally representing the undertakings, or
  - has the right to manage the undertakings' affairs;
- (iii) those undertakings which have in the undertaking concerned the rights or powers listed in paragraph (ii);
- (iv) those undertakings in which an undertaking as referred to in paragraph (iii) has the rights or powers listed in paragraph (ii);
- (v) those undertakings in which two or more undertakings as referred to in paragraphs (i) to (iv) jointly have the rights or powers listed in paragraph (ii).

(6) Where undertakings concerned by the concentration jointly have the rights or powers listed in subregulation (5)(ii), in calculating the aggregate turnover of the undertakings concerned for the purposes of regulation 2(d), no account shall be taken of the turnover resulting from the sale of products or the provision of services between the joint undertaking and each of the undertakings concerned or any other undertaking connected with any one of them, as set out in subregulation (5)(ii) to (v) but account shall be taken of the turnover resulting from the sale of products and the provision of services between the joint undertaking and any third undertakings, this turnover being apportioned equally amongst the undertakings concerned.

Appraisal of concentrations.

4. (1) Subject to subregulation (4), concentrations that might lead to a substantial lessening of competition in the Maltese market or a part thereof are prohibited.

(2) It shall be the duty of the Director to determine whether a concentration is compatible with subregulation (1) and in making this appraisal the Director shall take into account, *inter alia*:

- (a) the need to maintain and develop effective competition in the Maltese market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or outside Malta;
- (b) whether the business, or part of the business, of a party to the concentration has failed or is likely to fail;
- (c) the nature and extent of development and innovation in a relevant market;
- (d) the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and

ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.

(3) To the extent that the creation of a joint venture constituting a concentration has as its object or effect the coordination of the competitive behaviour of undertakings that remain independent, such coordination shall be appraised in accordance with the criteria of articles 5 and 7 of the Act with a view to establishing the lawfulness of the operation under these regulations:

Provided that in making this appraisal, the Director shall take into account in particular:

- (i) whether two or more parent companies retain to a significant extent activities in the same market as the joint venture or in a market which is downstream or upstream from that of the joint venture or in a neighbouring market closely related to this market;
- (ii) whether the coordination which is the direct consequence of the creation of the joint venture affords the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products or services in question.

(4) Concentrations that bring about or are likely to bring about gains in efficiency that will be greater than and will offset the effects of any prevention or lessening of competition resulting from or likely to result from the concentration shall not be prohibited if the undertakings concerned prove that such efficiency gains cannot otherwise be attained, are verifiable and likely to be passed on to consumers in the form of lower prices, or greater innovation, choice or quality of products or services.

5. (1) Concentrations shall be notified to the Director not more than one week after the conclusion of the agreement, or the announcement of the public bid, or the acquisition of a controlling interest, whichever is the earliest.

Prior notification  
of concentrations.

(2) A concentration shall be notified by the person or undertaking acquiring control of the whole or parts of one or more undertakings but where it consists of a merger or the acquisition of joint control it shall be notified jointly by the parties to the merger or by those acquiring joint control as the case may be.

(3) A concentration shall not be deemed to have been notified if the notification is not carried out in accordance with the rules set out in the Schedule and in such a case the Director shall declare the notification to be incomplete and hence invalid.

(4) The Director shall on notification publish in the Government Gazette and a daily newspaper the fact of the notification, the names of the parties, the nature of the concentration and the economic sectors involved.

(5) The Director shall take account of the legitimate interest of

undertakings in the protection of their business secrets.

Examination of the notification and initiation of proceedings.

**6.** (1) The Director shall examine the notification within the time-limits set in regulation 9 and -

- (i) where he concludes that the concentration notified does not fall within the scope of these regulations, he shall record that finding by means of a decision;
- (ii) where he finds that the concentration notified, although falling within the scope of these regulations, does not raise serious doubts about its lawfulness in terms of the provisions of these regulations, he shall decide not to oppose it and shall declare it to be a lawful concentration and such a declaration shall also cover restrictions directly related and necessary to the implementation of the concentration;
- (iii) where he finds that the concentration notified falls within the scope of these regulations and raises serious doubts as to its lawfulness in terms of the provisions of these regulations, he shall decide to initiate proceedings.

(2) Where the Director finds that, following modification by the undertakings concerned, a notified concentration no longer raises serious doubts within the meaning of subregulation (1)(iii), he may decide to declare the concentration to be a lawful concentration pursuant to subregulation (1)(ii):

Provided that he may attach to his decision under subregulation (1)(ii) conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-a-vis the Director with a view to rendering the concentration lawful in terms of the provisions of these regulations.

(3) The Director may revoke the decision he has taken pursuant to subregulation (1)(i) and (ii) where -

- (i) the decision is based on incorrect information for which one of the undertakings is responsible or where it has been obtained by deceit, or
- (ii) the undertakings concerned commit a breach of a commitment attached to the decision,

and in such a case he may then take a decision under subregulation (1) without being bound by the deadlines referred to in regulation 9(1).

(4) The Director shall notify his decision to the undertakings concerned without delay.

Suspension of concentrations.

**7.** (1) A concentration shall not be put into effect either before its notification or until it has been declared lawful pursuant to a decision under regulation 6(1)(ii) or regulation 8(2) or on the basis of a presumption according to regulation 9(7).

(2) Subregulation (1) shall not prevent the implementation of a public bid which has been notified to the Director provided that the acquirer does not exercise the voting rights attached to the

securities in question or does so only to maintain the full value of those investments and on the basis of a derogation granted by the Director under subregulation (3).

(3) The Director may, upon a reasoned request before notification or after the transaction, after taking into account *inter alia* the effects of the suspension on one or more undertakings concerned by a concentration or on a third party and the threat to competition posed by the concentration, grant a derogation from the obligations imposed in subregulation (1):

Provided that the derogation may be made subject to conditions and obligations in order to ensure conditions of effective competition.

(4) The validity of any transaction carried out in contravention of subregulation (1) shall be dependent on a decision pursuant to regulation 6(1)(ii) or regulation 8(2) or (3) or on a presumption pursuant to regulation 9(7):

Provided that this regulation shall have no effect on the validity of transactions in securities including those convertible into other securities admitted to trading on a market which is regulated and supervised by the competent authorities appointed under the law and that operates regularly and is accessible directly or indirectly to the public, unless the buyer and seller knew or ought to have known that the transaction was earned out in contravention of subregulation (1).

**8.** (1) All proceedings initiated pursuant to regulation 6(1)(iii) shall be closed by means of a decision as provided in subregulations (2) to (5).

Powers of decision  
of the Director.

(2) Where the Director finds that, following modification by the undertakings concerned if necessary, a notified concentration does not infringe regulation 4(1) and, in the cases referred to in regulation 4(3), fulfils the criteria laid down in article 7 of the Act, he shall issue a decision declaring the concentration lawful in terms of these regulations and such a decision shall also cover restrictions directly related and necessary to the implementation of the concentration:

Provided that he may attach to his decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-a-vis the Director with a view to rendering the concentration lawful in terms of these regulations.

(3) Where the Director finds that a concentration infringes regulation 4(1) or, in the cases referred to in regulation 4(3), does not fulfil the criteria laid down in article 7 of the Act, he shall issue a decision declaring that the concentration is unlawful in terms of the provisions of these regulations.

(4) Where a concentration has already been implemented, the Director may, in a decision pursuant to subregulation (3) or by a separate decision, require the undertakings or assets brought together to be separated or the cessation of joint control or any other action that may be appropriate in order to restore conditions

of effective competition.

(5) The Director may revoke the decision he has taken pursuant to subregulation (2) or take a decision pursuant to subregulation (3) without being bound by the deadline referred to in regulation 9(3) where -

- (i) the decision is based on false, misleading or incomplete information for which one of the undertakings is responsible, or
- (ii) the undertakings concerned commit a breach of a commitment attached to the decision.

Time limits for  
initiating  
proceedings and  
for decisions.

**9.** (1) The decisions referred to in regulation 6(1) must be taken within six weeks from the day following that of the receipt of a notification or, if the information to be supplied with the notification is incomplete, from the day following that of the receipt of the complete information:

Provided that this period shall be increased to two months if, after notification of a concentration and not later than the end of the fifth week following the day of the receipt of the notification of the concentration, the undertakings concerned submit commitments pursuant to regulation 6(2) which are intended by the parties to form the basis for a decision pursuant to regulation 6(1)(ii):

Provided further that following the end of the five-week period for submission of commitments, the undertakings concerned may request that the running of the periods mentioned above be suspended for a period of three weeks to discuss a new or substantially revised commitment proposal but it shall be at the discretion of the Director whether or not to accede to this request.

(2) Decisions taken pursuant to regulation 8(2) concerning notified concentrations must be taken as soon as it appears that the serious doubts referred to in regulation 6(1)(iii) have been removed, particularly as a result of modifications made by the undertakings concerned, and at the latest by the deadline set in subregulation (3):

Provided that when the undertakings concerned submit commitments with a view to rendering the concentration lawful in terms of these regulations following the initiation of proceedings envisaged by regulation 6(1)(iii) and by not later than the end of the third month following initiation of proceedings, they may request that the time limit prescribed in subregulation (3) be suspended for a period of up to one month for proper consideration of such commitments, which request the Director may only refuse in exceptional circumstances.

(3) Decisions taken pursuant to regulation 8(3) concerning notified concentrations must be taken within not more than four months of the date on which proceedings are initiated subject to the proviso to subregulation (2).

(4) The periods set by subregulations (1) and (3) shall be suspended where the Director has had to request information by decision pursuant to regulation 10 or to order an investigation by



decision pursuant to regulation 11 because:

- (i) information which the Director has requested pursuant to regulation 10 from one of the notifying parties or another involved party, as defined in regulation 10, is not provided or not provided in full within the time limit fixed by the Director;
- (ii) information which the Director has requested pursuant to regulation 10 from a third party, as defined in regulation 10, is not provided or not provided in full within the time limit fixed by the Director owing to circumstances for which one of the notifying parties or another involved party, as defined in regulation 10, is responsible;
- (iii) one of the notifying parties or another involved party, as defined in regulation 10, has refused to submit to an investigation deemed necessary by the Director on the basis of regulation 11 or to cooperate in the carrying out of such an investigation in accordance with that regulation;
- (iv) the notifying parties have failed to inform the Director of material changes in the facts contained in the notification.

(5) The periods set by subregulations (1) and (3) shall be suspended in the cases referred to in subregulation (4)(i) and (ii) for the period between the end of the time limit fixed in the request for information and the receipt of the complete and correct information required by decision; in the cases referred to in subregulation (4)(iii) for the period between the unsuccessful attempt to carry out the investigation and the completion of the investigation ordered by decision; and in the cases referred to in subregulation (4)(iv) for the period between the occurrence of the change in the facts referred to therein and the receipt of the complete and correct information requested by decision or the completion of the investigation ordered by decision.

(6) Where the Commission in a decision annuls the whole or part of a decision of the Director taken under these regulations, the periods laid down in these regulations shall start again from the date of the Commission decision.

(7) Where the Director has not taken a decision in accordance with regulation 6(1)(ii) or (iii) or regulation 8(2) or (3) within the deadlines set in subregulations (1) and (3) respectively, the concentration shall be deemed to have been declared lawful in terms of the provisions of these regulations.

**10.** (1) In carrying out the duties assigned to him by these regulations, the Director may obtain all necessary information from undertakings and persons controlling such undertakings and associations of undertakings.

Requests for  
information.

(2) When sending a request for information to a person, an undertaking or an association of undertakings, the Director shall state in the request the legal basis and the purpose of the request

and also the penalties provided for in regulation 13 for supplying incorrect information.

(3) Where a person, an undertaking or an association of undertakings does not provide the information requested within the period fixed by the Director or provides incomplete information, the Director shall by decision require the information to be provided, specifying what information is required, fixing an appropriate period within which it is to be supplied and stating the penalties provided for in regulation 13.

Investigative  
powers of the  
Director.

**11.** (1) In carrying out the duties assigned to him by these regulations, the Director may undertake all necessary investigations into undertakings and associations of undertakings and to this end he shall have all the powers conferred on him by article 12 of the Act including the power -

- (i) to examine the books and other business records;
- (ii) to take or demand copies of or extracts from the books and business records;
- (iii) to ask for oral explanations on the spot;
- (iv) to enter any premises, land and means of transport of undertakings.

(2) Undertakings and associations of undertakings shall submit to investigations ordered by decision of the Director, which decision shall specify the subject matter and purpose of the investigation, appoint the date on which it shall begin and state the penalties provided for in regulation 13.

Simplified  
procedure.

**12.** (1) The simplified procedure will apply to the following categories of concentrations that are deemed not to raise serious doubts as to their legality in terms of the provisions of these regulations, unless the Director in exceptional cases and in view of the economic conditions pertaining to the market and the parties to the concentration deems otherwise:

- (i) two or more undertakings acquire joint control of a joint venture, provided that the joint venture has no, or negligible, actual or foreseen activities, within the territory of Malta because the turnover of the joint venture and/or the turnover of the contributed activities is less than Lm 300,000 in the territory of Malta and the total value of assets transferred to the joint venture is less than Lm 300,000 in the territory of Malta;
- (ii) two or more undertakings merge, or one or more undertakings acquire sole or joint control of another undertaking, provided that none of the parties to the concentration are engaged in business activities in the same product and geographical market, or in a product market which is upstream or downstream of a product market in which any other party to the concentration is engaged;
- (iii) two or more undertakings merge, or one or more

undertakings acquire sole or joint control of another undertaking and two or more of the parties to the concentration are engaged in business activities either in the same product and geographical market and their combined market share is less than 15% or in a product market which is upstream or downstream of a product market in which any other party to the concentration is engaged and their combined market share is less than 25%.

(2) In assessing whether a concentration falls into one of these categories the Director shall ensure that all relevant circumstances are established with sufficient clarity:

Provided that if the relevant markets or the parties' market shares cannot be established with sufficient clarity, he shall not apply the simplified procedure.

(3) The simplified procedure shall not be applicable to concentrations involving coordination in terms of regulation 4(3).

(4) If the Director is satisfied that the concentration qualifies for the simplified procedure, he shall issue a short-form decision declaring the concentration lawful in terms of the provisions of these regulations within four weeks from the date of notification pursuant to regulation 9(1) and (7):

Provided that in the period leading to the four weeks deadline, the option of reverting to a normal first phase merger procedure and thus launching investigations and/or adopting a full decision remains open to the Director, should he judge such action appropriate in the case in question.

(5) Unless otherwise decided by the Director, the simplified procedure for the approval of concentrations shall also apply to restrictions directly related and necessary to the implementation of the concentration.

**13.** (1) The provisions of article 23 of the Act shall *mutatis mutandis* apply to persons, undertakings or associations of undertakings that intentionally or negligently - Fines.

- (i) fail to notify a concentration in accordance with regulation 5;
- (ii) supply incorrect or misleading information in a notification pursuant to regulation 5;
- (iii) supply incorrect information in response to a request made pursuant to regulation 10 or fail to supply information within the period fixed by a decision taken pursuant to regulation 10;
- (iv) produce the required books or other business records in incomplete form during investigations under regulation 11 or refuse to submit to an investigation ordered by decision pursuant to regulation 11.

(2) The provisions of article 21 of the Act shall *mutatis mutandis* apply to persons, undertakings or associations of undertakings that intentionally or negligently -

- (i) fail to comply with an obligation imposed by decision pursuant to the provisos to regulations 7(3) or 8(2);
- (ii) put into effect a concentration in breach of regulation 7(1);
- (iii) put into effect a concentration declared unlawful in terms of the provisions of these regulations by decision pursuant to regulation 8(3) or do not take the measures ordered by decision pursuant to regulation 8(4);

Periodic penalty payments.

**14.** (1) The provisions of article 22A of the Act shall *mutatis mutandis* apply to persons, undertakings or associations of undertakings in order to compel them:

- (i) to supply complete and correct information requested by decision pursuant to regulation 10;
- (ii) to submit to an investigation ordered by decision pursuant to regulation 11;
- (iii) to comply with an obligation imposed by decision pursuant to the provisos to regulations 7(3) or 8(2);
- (iv) to apply the measures ordered by decision pursuant to regulation 8(4).

Professional secrecy.

**15.** (1) Information acquired as a result of the application of regulations 10, 11 and 16 shall be used only for the purposes of the relevant request, investigation or hearing.

(2) Without prejudice to regulations 5(3), 16 and 17, the Director and public officers employed with or attached to his department and consultants contracted by the department shall not disclose information they have acquired through the application of these regulations of the kind covered by the obligation of professional secrecy.

(3) Subregulations (1) and (2) shall not prevent publication of general information or of surveys which do not contain information relating to particular undertakings or associations of undertakings.

Hearing of the parties and of third parties.

**16.** (1) Before taking any decision provided for in regulation 7(3) and the proviso to regulation 8(2) and regulation 8(3), (4) and (5), the Director shall give the persons, undertakings and associations of undertakings concerned the opportunity, at every stage of the procedure, of making known their views on the objections against them.

(2) By way of derogation from subregulation (1), a decision to grant a derogation from suspension as referred to in regulation 7(3) may be taken provisionally, without the persons, undertakings or associations of undertakings concerned being given the opportunity to make known their views beforehand, provided that the Director gives them that opportunity as soon as possible after having taken his decision.

(3) The Director shall base his decision only on objections on which the parties have been able to submit their observations with the rights of the defence being fully respected in the proceedings.

(4) Access to the file shall be open to the parties directly involved, upon their written request, subject to the legitimate interest of undertakings in the protection of their business secrets.

(5) In so far as the Director may deem it necessary, he may also hear other persons or undertakings showing a sufficient interest and in particular members of the administrative or managerial bodies of the undertaking concerned and the recognized representatives of their employees shall on request be entitled to be heard.

**17.** (1) The Director shall publish the decisions which he takes pursuant to regulation 6(1) to (3), regulation 8(2) to (5) and regulation 12. Publication of decisions.

(2) The publication shall state the names of the parties and the main content of the decision but regard shall be had to the legitimate interest of undertakings in the protection of their business secrets.

**18.** (1) The undertakings or association of undertakings concerned and any third party entitled to a hearing under regulation 16(5) may within fifteen days of the notification of the Director's final decision pursuant to regulations 6, 7 and 8 or in the case of third parties within fifteen days of its publication, request him to submit the same for review by the Commission and the Director shall forthwith comply with such request: Review by the Commission.

Provided that the submission of a decision for review by the Commission shall not suspend the decision of the Director unless the Commission in exceptional circumstances otherwise directs.

(2) The decision of the Commission shall be final.

**19.** Concentrations shall be exclusively regulated by these regulations and articles 5 to 10 of the Act shall not be applicable thereto except in relation to full-function joint ventures which have as their object or effect the coordination of the competitive behaviour of undertakings that remain independent in terms of regulation 4(3). Application of the regulations.

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## SCHEDULE

(Regulation 5)

## CONCENTRATION NOTIFICATION FORM (Form CN)

## INTRODUCTION

## A. The purpose of this Form

This Form specifies the information that must be provided by an undertaking or undertakings when notifying the Director of a concentration falling under the Regulations on Control of Concentrations.

Your attention is drawn to the provisions of the Regulations on Control of Concentrations, and the Competition Act as subsequently amended.

It should be noted that pre-notification meetings are extremely valuable to both the notifying parties and the Director in determining the precise amount of information required in a notification and, in the large majority of cases, will result in a significant reduction of the information required. Accordingly, notifying parties are encouraged to consult the Director regarding the possibility of dispensing with the obligation to provide certain information (see Section B(g) on the possibility of dispensation).

## B. The need for a correct and complete notification

All information required by this Form must be correct and complete. The information required must be supplied in the appropriate Section of this Form. Annexes to this Form shall only be used to supplement the information supplied in the Form itself.

In particular you should note that:

- (a) The time-limits of the Regulations on Control of Concentrations linked to the notification will not begin to run until all the information that has to be supplied with the notification has been received by the Director. This requirement is to ensure that the Director is able to assess the notified concentration within the strict time-limits provided by the Regulations on Control of Concentrations.
- (b) The notifying parties should check carefully, in the course of preparing their notification, that contact names and numbers, and in particular fax numbers, provided to the Director are accurate, relevant and up-to-date.
- (c) Incorrect or misleading information in the notification will be considered to be incomplete information.
- (d) If a notification is incomplete, the Director will inform the notifying parties or their representatives of this in writing and without delay. The notification will only become effective on the date on which the complete and accurate information is received by the Director.
- (e) Regulation 13(1) of the Regulations on Control of Concentrations provides that incorrect or misleading information, where supplied intentionally or negligently, can make the notifying party or parties liable to fines of up to one thousand liri or to imprisonment for a term of up to six months or to both such fine and imprisonment. In addition, pursuant to regulation 8(5) of the Regulations on Control of Concentrations the Director may also revoke his decision on the compatibility of a notified concentration where it is based on incorrect information for which one of the undertakings is responsible.

- (f) You may request that the Director accept that the notification is complete notwithstanding the failure to provide information required by this Form, if such information is not reasonably available to you in part or in whole (for example, because of the unavailability of information on a target company during a contested bid).

The Director will consider such a request, provided that you give reasons for the unavailability of that information, and provide your best estimates for missing data together with the sources for the estimates. Where possible, indications as to where any of the requested information that is unavailable to you could be obtained by the Director should also be provided.

- (g) You may request that the Director accept that the notification is complete notwithstanding the failure to provide information required by this Form, if you consider that any particular information requested by this Form, in the full or short form version, may not be necessary for the Director's examination of the case.

The Director will consider such a request, provided that you give reasons why that information is not relevant and necessary to its inquiry into the notified operation. You may explain this during your prenotification contacts with the Director and/or in your notification and ask the Director to dispense with the obligation to provide that information.

#### C. Notification in short form

- (a) In cases where a joint venture has no, or *de minimis*, actual or foreseen activities within the Maltese territory, the Director shall allow notification of the operation by means of short form. Such cases occur where joint control is acquired by two or more undertakings, and where:
- (i) the turnover<sup>\*</sup> of the joint venture and/or<sup>†</sup> the turnover of the contributed activities, is less than Lm 300,000 in the Maltese territory; and
  - (ii) the total value of assets<sup>‡</sup> transferred to the joint venture is less than Lm 300,000<sup>§</sup> in the Maltese territory.
- (b) If you consider that the operation to be notified meets these qualifications, you may explain this in your notification and ask the Director to dispense with the obligation to provide the full-form notification, and to allow you to notify by means of short form.

<sup>\*</sup>The turnover of the joint venture should be determined according to the most recent audited accounts of the parent companies, or the joint venture itself, depending upon the availability of separate accounts for the resources combined in the joint venture.

<sup>†</sup>The expression "and/or" refers to the variety of situations covered by the short form; for example:

- in the case of the joint acquisition of a target company, the turnover to be taken into account is the turnover of this target (the joint venture),

- in the case of the creation of a joint venture to which the parent companies contribute their activities, the turnover to be taken into account is that of the contributed activities,

- in the case of entry of a new controlling party into an existing joint venture, the turnover of the joint venture and the turnover of the activities contributed by the new parent company (if any) must be taken into account.

<sup>‡</sup>The total value of assets of the joint venture should be determined according to the last regularly prepared and approved balance sheet of each parent company. The term "assets" includes: (1) all tangible and intangible assets that will be transferred to the joint venture (examples of tangible assets include production plants, wholesale or retail outlets, and inventory of goods), and (2) any amount of credit or any obligations of the joint venture which any parent company of the joint venture has agreed to extend or guarantee.

<sup>§</sup>Where the assets transferred generate turnover, then neither the value of the assets nor that of the turnover may exceed Lm 300,000.

- (c) Short-form notification allows the notifying parties to limit the information provided in the notification to the following sections and questions:
- Section 1,
  - Section 2, except questions 2.1 (a), (b) and (d),
  - Section 3, only questions 3.1 and 3.2 (a),
  - Section 5, only questions 5.1 and 5.3,
  - Section 6,
  - Section 10,
  - Section 11 (optional for the convenience of the parties), and
  - Section 12,
  - the five largest independent customers, the five largest independent suppliers, and the five largest competitors in the markets in which the joint venture will be active. Provide the name, address, telephone number, fax number and appropriate contact person of each such customer, supplier and competitor.
- (d) In addition, with respect to the affected markets of the joint venture as defined in Section 6, indicate for the Maltese territory and where different, in the opinion of the notifying parties, for the relevant geographic market, the sales in value and volume, as well as the market shares, for the year preceding the operation.
- (e) The Director may require full, or where appropriate partial, notification under the Form CN where:
- the notified operation does not meet the short-form thresholds, or
  - this appears to be necessary for an adequate investigation with respect to possible competition problems.

In such cases, the notification may be considered incomplete in a material respect. The Director will inform the notifying parties or their representatives of this in writing and without delay and will fix a deadline for the submission of a full or, where appropriate, partial notification. The notification will only become effective on the date on which all information required is received.

#### D. Who must notify

In the case of a merger or the acquisition of joint control in an undertaking within the meaning of regulation 2(d) of the Regulations on Control of Concentrations, the notification shall be completed jointly by the parties to the merger or by those acquiring joint control as the case may be.

In case of the acquisition of a controlling interest in one undertaking by another, the acquirer must complete the notification.

In the case of a public bid to acquire an undertaking, the bidder must complete the notification.

Each party completing the notification is responsible for the accuracy of the information which it provides.

#### E. How to notify

The information requested by this Form is to be set out using the sections and paragraph numbers of the Form, signing a declaration as provided in Section 12, and annexing supporting documentation.

Supporting documents may be originals or copies of the originals. In the



latter case, the notifying party must confirm that they are true and complete.

One original and 5 copies of the Form CN and all supporting documents must be provided.

The notification must be delivered to the Director on working days at the following address:

Consumer and Competition Division  
Office for Fair Trading  
Cannon Road  
Sta. Venera CMR 02  
Malta

F. Confidentiality

Regulation 15 of the Regulations on Control of Concentrations requires the Director and public officers employed with or attached to his department and consultants contracted by the Department not to disclose information they have acquired through the application of the regulations of the kind covered by the obligation of professional secrecy. The same principle must also apply to protect confidentiality between notifying parties.

If you believe that your interests would be harmed if any of the information you are asked to supply were to be published or otherwise divulged to other parties, submit this information separately with each page clearly marked "Business Secrets". You should also give reasons why this information should not be divulged or published.

In the case of mergers or joint acquisitions, or in other cases where the notification is completed by more than one of the parties, business secrets may be submitted under separate cover, and referred to in the notification as an annex. All such annexes must be included in the submission in order for a notification to be considered complete.

G. Definitions and instructions for purposes of this Form

Notifying party or parties: in cases where a notification is submitted by only one of the undertakings party to an operation, "notifying parties" is used to refer only to the undertaking actually submitting the notification.

Party (parties) to the concentration: these terms relate to both the acquiring and acquired parties, or to the merging parties, including all undertakings in which a controlling interest is being acquired or which is the subject of a public bid.

Except where otherwise specified, the terms "notifying party (parties)" and "party (parties)" to the concentration include all the undertakings which belong to the same groups as those "parties".

Affected markets: Section 6 of this Form requires the notifying parties to define the relevant product markets, and further to identify which of those relevant markets are likely to be affected by the notified operation. This definition of affected market is used as the basis for requiring information for a number of other questions contained in this Form. The definitions thus submitted by the notifying parties are referred to in this Form as the affected market(s). This term can refer to a relevant market made up either of products or of services.

Year: all references to the word "year" in this Form should be read as meaning calendar year, unless otherwise stated. All information requested in this Form must, unless otherwise specified, relate to the year preceding that of the notification.

All references contained in this Form are to the relevant regulations of the Regulations on Control of Concentrations, unless otherwise stated.

#### H. Commitments after notification

The notifying parties may after notification, up to the end of the fifth week following the day of the receipt of notification, submit commitments to the Director with a view to rendering the concentration lawful in terms of the provisions of these regulations. Following the end of this five-week period they may request that the clock be stopped for a period of three weeks to discuss a new or substantially revised commitment proposal but it shall be at the discretion of the Director whether or not to accede to this request. They may also submit commitments to the Director during the second phase of investigations after he decides that the concentration raises serious doubts as to its lawfulness in terms of the provisions of these regulations and initiates proceedings but by not later than the end of the third month following the initiation of proceedings. During this period they may also request that the clock be stopped for up to one month for proper consideration of such commitments, which request the Director may only refuse in exceptional circumstances.

### SECTION 1

#### Background information

##### 1.1. Information on notifying party (or parties)\*

Give details of:

- 1.1.1. name and address of undertaking;
- 1.1.2. nature of the undertaking's business;
- 1.1.3. name, address, telephone number, fax number and/or telex of, and position held by, the appropriate contact person.

##### 1.2. Information on other parties to the concentration

For each party to the concentration (except the notifying party or parties) give details of:

- 1.2.1. name and address of undertaking;
- 1.2.2. nature of undertaking's business;
- 1.2.3. name, address, telephone number, fax number and/or telex of, and position held by the appropriate contact person.

##### 1.3. Address for service

Give an address to which all communications may be made and documents delivered.

##### 1.4. Appointment of representatives

Where notifications are signed by representatives of undertakings, such representatives must produce written proof that they are authorized to act.

If ajoint notification is being submitted, has ajoint representative been appointed?

If yes, please give the details requested in Sections 1.4.1 to 1.4.4.

If no, please give details of information tpf any representatives who have

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\*This includes the target company in the case of a contested bid, in which case the details should be completed as far as is possible.

been authorized to act for each of the parties to the concentration, indicating whom they represent:

- 1.4.1. name of representative;
- 1.4.2. address of representative;
- 1.4.3. name of person to be contacted (and address, if different from 1.4.2);
- 1.4.4. telephone number, fax number and/or telex.

## SECTION 2

### Details of the concentration

- 2.1. Describe the nature of the concentration being notified. In doing so state:
  - (a) whether the proposed concentration is a full legal merger, an acquisition of sole or joint control, a full-function joint venture within the meaning of the first proviso to regulation 2(d) of the Regulations on Control of Concentrations or a contract or other means of conferring direct or indirect control within the meaning of regulation 2(d) of the Regulations on Control of Concentrations;
  - (b) whether the whole or parts of parties are subject to the concentration;
  - (c) a brief explanation of the economic and financial structure of the concentration;
  - (d) whether any public offer for the securities of one party by another party has the support of the former's board of directors or other bodies legally representing that party;
  - (e) the proposed or expected date of any major events designed to bring about the completion of the concentration;
  - (f) the proposed structure of ownership and control after the completion of the concentration;
  - (g) any financial or other support received from whatever source (including public authorities) by any of the parties and the nature and amount of this support.
- 2.2. List the economic sectors involved in the concentration
- 2.3. For each of the undertakings concerned by the concentration provide the following data for the last financial year:
  - 2.3.1. world-wide turnover;
  - 2.3.2. turnover in Malta.

## SECTION 3

### Ownership and control

For each of the parties to the concentration provide a list of all undertakings belonging to the same group.

This list must include:

- 3.1. all undertakings or persons controlling these parties, directly or indirectly;
- 3.2. all undertakings active on any affected market that are controlled, directly or indirectly:

- (a) by these parties;
- (b) by any other undertaking identified in 3.1.

For each entry listed above, the nature and means of control should be specified.

The information sought in this section may be illustrated by the use of organization charts or diagrams to show the structure of ownership and control of the undertakings.

## SECTION 4

### Personal and financial links and previous acquisitions

With respect to the parties to the concentration and each undertaking or person identified in response to Section 3, provide:

4.1. a list of all other undertakings which are active on affected markets (affected markets are defined in Section 6)\* in which the undertakings, or persons, of the group hold individually or collectively 10% or more of the voting rights, issued share capital or other securities;

in each case identify the holder and state the percentage held;

4.2. a list for each undertaking of the members of their boards of directors who are also members of the boards of directors or of the supervisory boards of any other undertaking which is active on affected markets; and (where applicable) for each undertaking a list of the members of their supervisory boards who are also members of the boards of directors of any other undertaking which is active on affected markets;

in each case identify the name of the other undertaking and the positions held;

4.3. details of acquisitions made during the last three years by the groups identified above (Section 3) of undertakings active in affected markets as defined in Section 6.

Information provided here may be illustrated by the use of organization charts or diagrams to give a better understanding.

## SECTION 5

### Supporting documentation

Notifying parties must provide the following:

5.1. copies of the final or most recent versions of all documents bringing about the concentration, whether by agreement between the parties to the concentration, acquisition of a controlling interest or a public bid;

5.2. in a public bid, a copy of the offer document; if it is unavailable at the time of notification, it should be submitted as soon as possible and not later than when it is posted to shareholders;

5.3. copies of the most recent annual reports and accounts of all the parties to the concentration;

5.4. where at least one affected market is identified:

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\*See Section 6 for the definition of affected markets.

copies of analyses, reports, studies and surveys submitted to or prepared for any member(s) of the board of directors, the supervisory board, or the shareholders' meeting, for the purpose of assessing or analysing the concentration with respect to competitive conditions, competitors (actual and potential), and market conditions.

## SECTION 6

### Market definitions

The relevant product and geographic markets determine the scope within which the market power of the new entity resulting from the concentration must be assessed.

The notifying party or parties must provide the data requested having regard to the following definitions:

#### I. Relevant product markets

A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use: A relevant product market may in some cases be composed of a number of individual products and/or services which present largely identical physical or technical characteristics and are interchangeable.

Factors relevant to the assessment of the relevant product market include the analysis of why the products or services in these markets are included and why others are excluded by using the above definition, and having regard to, for example, substitutability, conditions of competition, prices, cross-price elasticity of demand or other factors relevant for the definition of the product markets.

#### II. Relevant geographic markets

The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of relevant products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring geographic areas because, in particular, conditions of competition are appreciably different in those areas.

Factors relevant to the assessment of the relevant geographic market include the nature and characteristics of the products or services concerned, the existence of entry barriers, consumer preferences, appreciable differences in the undertakings' market shares between neighbouring geographic areas or substantial price differences.

#### III. Affected markets

For purposes of information required in this Form, affected markets consist of relevant product markets where, in the Maltese territory or a relevant part thereof:

- (a) two or more of the parties to the concentration are engaged in business activities in the same product market and where the concentration will lead to a combined market share of 15% or more. These are horizontal relationships;
- (b) one or more of the parties to the concentration are engaged in business activities in a product market, which is upstream or downstream of a product market in which any other party to the concentration is engaged, and any of their individual or combined market shares is 25% or more, regardless of whether there is or is not any existing supplier/

customer relationship between the parties to the concentration. These are vertical relationships.

On the basis of the above definitions and market share thresholds, identify each affected market within the meaning of Section III.

IV. Markets related to affected markets within the meaning of Section III

6.2. Describe the relevant product and geographic markets concerned by the notified operation, which are closely related to the affected market(s) (in upstream, downstream and horizontal neighbouring markets), where any of the parties to the concentration are active and which are not themselves affected markets within the meaning of Section III.

V. Non-affected markets

6.3. In case there are no affected markets in the meaning of Section 6.1, describe the product and geographic scope of the markets on which the notified operation would have an impact.

## SECTION 7

### Information on affected markets

For each affected relevant product market, for each of the last three financial years, provide the following:

7.1. an estimate of the total size of the market in terms of sales value (in Lm) and volume (units)\*. Indicate the basis and sources for the calculations and provide documents where available to confirm these calculations;

7.2. the sales in value and volume, as well as an estimate of the market shares, of each of the parties to the concentration;

7.3. an estimate of the market share in value (and where appropriate volume) of all competitors (including importers) having at least 10% of the geographic market under consideration. Provide documents where available to confirm the calculation of these market shares and provide the name, address, telephone number, fax number and appropriate contact person, of these competitors;

7.4. an estimate of the total value and volume and source of imports into Malta and identify:

- (a) the proportion of such imports that are derived from the groups to which the parties to the concentration belong;
- (b) an estimate of the extent to which any quotas, tariffs or non-tariff barriers to trade, affect these imports, and
- (c) an estimate of the extent to which transportation and other costs affect these imports;

7.5. the manner in which the parties to the concentration produce and sell the products and/or services; for example, whether they manufacture locally, or sell through local distribution facilities;

7.6. the nature and extent of vertical integration of each of the parties to the concentration compared with their largest competitors.

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\*The value and volume of a market should reflect output less exports plus imports for the geographic areas under consideration.

## SECTION 8

## General conditions in affected markets

8.1. Identify the five largest independent\* suppliers to the parties and their individual shares of purchases from each of these suppliers (of raw materials or goods used for purposes of producing the relevant products). Provide the name, address, telephone number, fax number and appropriate contact person, of these suppliers.

## Structure of supply in affected markets

8.2. Explain the distribution channels and service networks that exist on the affected markets. In so doing, take account of the following where appropriate:

- (a) the distribution systems prevailing on the market and their importance. To what extent is distribution performed by third parties and/or undertakings belonging to the same group as the parties identified in Section 3?
- (b) the service networks (for example, maintenance and repair) prevailing and their importance in these markets. To what extent are such services performed by third parties and/or undertakings belonging to the same group as the parties identified in Section 3?

8.3. Where appropriate, provide an estimate of the total Malta-wide capacity for the last three years. Over this period what proportion of this capacity is accounted for by each of the parties to the concentration, and what have been their respective rates of capacity utilisation.

8.4. If you consider any other supply-side considerations to be relevant, they should be specified.

## Structure of demand in affected markets

8.5. Identify the five largest independent customers of the parties in each affected market and their individual share of total sales for such products accounted for by each of those customers. Provide the name, address, telephone number, fax number and appropriate contact person, of each of these customers.

8.6. Explain the structure of demand in terms of:

- (a) the phases of the markets in terms of, for example, take-off, expansion, maturity and decline, and a forecast of the growth rate of demand;
- (b) the importance of customer preferences, in terms of brand loyalty, products differentiation and the provision of a full range of products;
- (c) the degree of concentration or dispersion of customers;
- (d) segmentation of customers into different groups with a description of the "typical customer" of each group;
- (e) the importance of exclusive distribution contracts and other types of long-term contracts;
- (f) the extent to which public authorities, government agencies, State enterprises or similar bodies are important participants as a source of demand.

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\*That is suppliers which are not subsidiaries, agents or undertakings forming part of the group of the party in question. In addition to those five independent suppliers the notifying parties can, if they consider it necessary for a proper assessment of the case, identify the infra-group suppliers. The same will apply in 8.5 in relation with customers.

#### Market entry

8.7. Over the last five years, has there been any significant entry into any affected markets. If the answer is "yes", where possible provide their name, address, telephone number, fax number and appropriate contact person, and an estimate of their current market shares.

8.8. In the opinion of the notifying parties are there undertakings (including those at present operating only outside the Maltese market) that are likely to enter the market. If the answer is "yes", please explain why and identify such entrants by name, address, telephone number, fax number and appropriate contact person, and an estimate of the time within which such entry is likely to occur.

8.9. Describe the various factors influencing entry into affected markets that exist in the present case, examining entry from both a geographical and product viewpoint. In so doing, take account of the following where appropriate:

- (a) the total costs of entry (R&D, establishing distribution systems, promotion, advertising, servicing, etc.) on a scale equivalent to a significant viable competitor, indicating the market share of such a competitor;
- (b) any legal or regulatory barriers to entry, such as government authorization or standard setting in any form;
- (c) any restrictions created by the existence of patents, know-how and other intellectual property rights in these markets and any restrictions created by licensing such rights;
- (d) the extent to which each of the parties to the concentration are licensees or licensors of patents, know-how and other rights in the relevant markets;
- (e) the importance of economies of scale for the production of products in the affected markets;
- (f) access to sources of supply, such as availability of raw materials.

#### Research and development

8.10. Give an account of the importance of research and development in the ability of a firm operating on the relevant market(s) to compete in the long term. Explain the nature of the research and development in affected markets carried out by the parties to the concentration.

In so doing, take account of the following, where appropriate:

- (a) trends and intensities of research and development\* in these markets and for the parties to the concentration;
- (b) the course of technological development for these markets over an appropriate time period (including developments in products and/or services, production processes, distribution systems, etc.);
- (c) the major innovations that have been made in these markets and the undertakings responsible for these innovations;
- (d) the cycle of innovation in these markets and where the parties are in this cycle of innovation.

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\*Research and development intensity is defined as research development expenditure as a proportion of turnover.



#### Co-operative Agreements

8.11. To what extent do cooperative agreements (horizontal or vertical) exist in the affected markets?

8.12. Give details of the most important cooperative agreements engaged in by the parties to the concentration in the affected markets, such as research and development, licensing, joint production, specialization, distribution, long term supply and exchange of information agreements.

#### Trade associations

8.13. With respect to the trade associations in the affected markets:

- (a) identify those in which the parties to the concentration are members;
- (b) identify the most important trade associations to which the customers and suppliers of the parties to the concentration belong.

Provide the name, address, telephone number, fax number and appropriate contact person of all trade associations listed above.

### SECTION 9

#### General market information

##### Market data on conglomerate aspects

Where any of the parties to the concentration hold individually a market share of 25% or more for any product market in which there is no horizontal or vertical relationship as described above, provide the following information:

9.1. a description of each product market and explain why the products and/or services in these markets are included (and why others are excluded) by reason of their characteristics, prices and their intended use;

9.2. an estimate of the value of the market and the market shares of each of the groups to which the parties belong for each product market identified in 9.1 for the last financial year:

- (a) for the Maltese territory;
- (b) and, where different, for the relevant geographic market.

##### Overview of the markets

9.3. Where applicable, describe the world wide context of the proposed concentration, indicating the position of each of the parties to the concentration outside of the Maltese territory in terms of size and competitive strength.

9.4. Describe how the proposed concentration is likely to affect the interests of intermediate and ultimate consumers and the development of technical and economic progress.

### SECTION 10

#### Co-operative effects of a joint venture

10. For the purpose of regulation 4(3) of the Regulations on Control of Concentrations please answer the following questions:

- (a) Do two or more parents retain to a significant extent activities in the same market as the joint venture or in a market which is downstream or upstream from that of the joint venture or in a neighbouring market

closely related to this market\*?

If the answer is affirmative, please indicate for each of the markets referred to here:

- the turnover of each parent company in the preceding financial year;
- the economic significance of the activities of the joint venture in relation to this turnover;
- the market share of each parent.

If the answer is negative, please justify your answer.

- (b) If the answer to (a) is affirmative and in your view the creation of the joint venture does not lead to coordination between independent undertakings that restricts competition within the meaning of article 5 of the Competition Act, give your reasons.
- (c) Without prejudice to the answers to (a) and (b) and in order to ensure that a complete assessment of the case can be made by the Director, please explain how the criteria of article 7 of the Competition Act apply.

Under article 7, the provisions of article 5 may be declared inapplicable if the operation:

- (i) contributes to improving the production or distribution of goods or services, or to promoting technical or economic progress;
- (ii) allows consumers a fair share of the resulting benefit;
- (iii) does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; and
- (iv) does not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

## SECTION 11

### General matters

#### Ancillary restraints

11.1. If the parties to the concentration, and/or other involved parties (including the seller and minority shareholders), enter into ancillary restrictions directly related and necessary to the implementation of the concentration, these restrictions may be assessed in conjunction with the concentration itself.

- (a) Identify each ancillary restriction in the agreements provided with the notification for which you request an assessment in conjunction with the concentration; and
- (b) explain why these are directly related and necessary to the implementation of the concentration.

#### Conversion of notification

11.2. In the event that the Director finds that the operation notified does not constitute a concentration within the meaning of regulation 2(d) of the Regulations on Control of Concentrations, do you request that it be treated as an application for negative clearance from, or a notification to obtain an exemption from article 5 of

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\*For market definitions refer to Section 6.

the Competition Act?

## SECTION 12

### Declaration

Where notifications are signed by representatives of undertakings, such representatives must produce written proof that they are authorized to act. Such written authorization must accompany the notification.

The notification must conclude with the following declaration which is to be signed by or on behalf of all the notifying parties:

The undersigned declare that, to the best of their knowledge and belief, the information given in this notification is true, correct, and complete, that complete copies of documents required by Form CN, have been supplied, and that all estimates are identified as such and are their best estimates of the underlying facts and that all the opinions expressed are sincere.

They are aware of the provisions of regulation 13(1) of the Regulations on Control of Concentrations.

Place and date:

Signatures:

Names:

On behalf of:

### Guidelines on Efficiencies

#### (Regulation 4(4))

This part of the schedule shall not be construed as giving rise to legal rights or obligations but as a document intended to provide general guidance as to the meaning of regulation 4(4).

Competition usually drives undertakings to achieve efficiencies internally. Nevertheless, concentrations have the potential to generate significant efficiencies by permitting a better utilization of existing assets, enabling the combined undertaking or joint venture to achieve lower costs in producing a given quantity and quality than either undertaking could have achieved without the proposed transaction. Indeed, the primary benefit of concentrations to the economy is their potential to generate such efficiencies.

Efficiencies generated through concentration can enhance the undertaking's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products. In the context of a concentration that carries the risk of generating harmful unilateral behaviour by the merged undertaking, marginal cost reductions may reduce the merged undertaking's incentive to raise price. Efficiencies also may result in benefits in the form of new or improved products, and efficiencies may result in benefits even when price is not immediately and directly affected. Even when efficiencies generated through concentration enhance an undertaking's ability to compete, however, a concentration may have other effects that may lessen competition and ultimately may make the concentration anticompetitive.

The Director shall consider only those efficiencies likely to be accomplished with the proposed concentration and unlikely to be accomplished in the absence of either the proposed concentration or another means having comparable anticompetitive effects. These are termed concentration-specific

efficiencies. Only alternatives that are practical in the business situation faced by the undertakings concerned will be considered in making this determination; the Director shall not insist upon a less restrictive alternative that is merely theoretical.

Efficiencies are difficult to verify and quantify, in part because much of the information relating to efficiencies is uniquely in the possession of the undertakings concerned. Moreover, efficiencies projected reasonably and in good faith by the undertakings concerned may not be realized. Therefore, the undertakings concerned must substantiate efficiency claims so that the Director can verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the undertaking's ability and incentive to compete, and why each would be concentration-specific. Efficiency claims shall not be considered if they are vague or speculative or otherwise cannot be verified by reasonable means.

Cognizable efficiencies are concentration-specific efficiencies that have been verified and do not arise from anticompetitive reductions in output or service. Cognizable efficiencies are assessed net of costs produced by the concentration or incurred in achieving those efficiencies. The Director shall not prohibit a concentration if cognizable efficiencies are of a character and magnitude such that the concentration is not likely to be anticompetitive in any relevant market.

To make the requisite determination, the Director considers whether cognizable efficiencies would likely be sufficient to reverse the concentration's potential to harm consumers in the relevant market, e.g., by preventing price increases in that market. In conducting this analysis, the Director shall not simply compare the magnitude of the cognizable efficiencies with the magnitude of the likely harm to competition absent the efficiencies. The greater the potential adverse competitive effect of a concentration as indicated by the factors mentioned in regulation 4(2) the greater must be cognizable efficiencies in order for the Director to conclude that the concentration will not have an anticompetitive effect in the relevant market. When the potential adverse competitive effect of a concentration is likely to be particularly large, extraordinarily great cognizable efficiencies would be necessary to prevent the concentration from being anticompetitive.

Efficiencies are most likely to make a difference in merger analysis when the likely adverse competitive effects, absent the efficiencies, are not great. Efficiencies almost never justify a merger to monopoly or near-monopoly.

The type of efficiencies that are more likely to be cognizable and substantial than others are efficiencies resulting from shifting production among facilities formerly owned separately, which enable the undertakings concerned to reduce the marginal cost of production as these are more likely to be susceptible to verification, concentration-specific, and substantial, and are less likely to result from anticompetitive reductions in output. Other efficiencies, such as those relating to research and development, are potentially substantial but are generally less susceptible to verification and may be the result of anticompetitive output reductions. Yet others, such as those relating to procurement, management, or capital cost are less likely to be concentration-specific or substantial, or may not be cognizable for other reasons.

The Director shall not deem efficiencies to be concentration-specific if they could be preserved by practical alternatives that mitigate competitive concerns, such as divestiture or licensing. If a concentration affects not whether but only when an efficiency would be achieved, only the timing advantage is a concentration-specific efficiency.

Regulation 4(1) prohibits concentrations that might lead to a substantial

lessening of competition "in the Maltese market or a part thereof". Accordingly, the Director shall normally assess competition in each relevant market affected by a concentration independently and normally will challenge the concentration if it is likely to be anticompetitive in any relevant market. In some cases, however, the Director shall consider efficiencies not strictly in the relevant market, but so inextricably linked with it that a partial divestiture or other remedy could not feasibly eliminate the anticompetitive effect in the relevant market without sacrificing the efficiencies in the other market(s). Inextricably linked efficiencies are most likely to make a difference when they are great and the likely anticompetitive effect in the relevant market(s) is small.

The Director shall also consider the effects of cognizable efficiencies with no short-term, direct effect on prices in the relevant market. Delayed benefits from efficiencies (due to delay in the achievement of, or the realization of consumer benefits from, the efficiencies) will be given less weight because they are less proximate and more difficult to predict.

#### Guidelines on Assessment of Failing Firms and Exiting Assets

##### (Regulation 4(2)(b))

This part of the schedule shall not be construed as giving rise to legal rights or obligations but as a document intended to provide general guidance as to the meaning of regulation 4(2)(b).

A merger is not likely to create or enhance market power or to facilitate its exercise, if imminent failure, as defined below, of one of the merging undertakings would cause the assets of that undertaking to exit the relevant market. This means that in exceptional cases the disappearance of the failing company can be unavoidable whether or not the concentration takes place; in those cases there is thus no causality between the concentration itself and a substantial lessening of competition in the relevant market(s). In such circumstances, post-merger performance in the relevant market(s) may be no worse than market performance had the merger been blocked and the assets left the market.

A merger is not likely to create or enhance market power or facilitate its exercise if the parties to the merger prove that the following circumstances are met:

1. The allegedly failing firm would be unable to meet its financial obligations in the near future to the point of becoming insolvent;
2. It would not be able to reorganize itself successfully;
3. It has made unsuccessful good faith efforts to elicit reasonable alternative offers of acquisition of the assets of the failing firm that would both keep its tangible and intangible assets in the relevant market and pose a less severe danger to competition than does the proposed merger (any offer to purchase the assets of the failing firm for a price above the liquidation value of those assets, the highest valued use outside the relevant market or equivalent offer to purchase the stock of the failing firm, shall be regarded as a reasonable alternative offer); and
4. Absent the acquisition, the assets of the failing firm would exit the relevant market if not taken over by another firm.
5. If the failing firm were to exit the market, the acquiring firm would take over its market share;
6. There is no less anti-competitive alternative purchase.

A similar argument can be made for "failing" divisions as for failing firms. First, upon applying appropriate cost allocation rules, the division must have a

negative cash flow on an operating basis. Second, absent the acquisition, it must be that the assets of the division would exit the relevant market in the near future if not sold. Due to the ability of the parent firm to allocate costs, revenues, and intra-company transactions among itself and its subsidiaries and divisions, the Director will require evidence, not based solely on management plans that could be prepared solely for the purpose of demonstrating negative cash flow or the prospect of exit from the relevant market. Third, the owner of the failing division also must have complied with the competitively-preferable purchaser requirement mentioned above (point 3).

However, it should be noted that the burden of proof for a successful failing division defence is particularly heavy for the merging parties. Otherwise, every merger involving the sale of an allegedly unprofitable division could be justified under merger control law by the seller declaring that, without the merger, the division would cease trading.

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