

Malta - Application Number 1/2011

*The Honourable Joe Mizzi v Enemalta
Corporation and Water Services Corporation,*
21 March 2012, Competition and Consumer
Appeals Tribunal
The Role of the Office for Competition

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On 21 March 2012 the Competition and Consumer Appeals Tribunal (Tribunal) handed down a decree in the ongoing litigation in the names *Mizzi v Enemalta Corporation and Water Services Corporation*. For the first time since the enactment of the Competition Act¹ parties involved in litigation in front of the Tribunal raised a question regarding the role of the Office for Competition (OFC), the national competition authority, in proceedings in front of the said Tribunal, and the extent of its participation in such proceedings. The Tribunal in this partial judgment held that the OFC should always be the legitimate defendant in review proceedings in front of it, and should therefore be made a defendant in cases in front of the Tribunal both where the OFC has taken a decision subject to review and where it issues report subject to a decision. However the active participation of the OFC is not unlimited, and is subject to the restrictions described in the decree. In reaching its decision, the Tribunal also considered the role and functions of the OFC more generally.

I. Legal Background

Act VI of 2011, by amending the Competition Act and enacting the Malta Competition and Consumer Affairs Act,² modified the Maltese competition law regime, overhauling procedural competition rules in Malta. One of the by-products of this overhaul was the establishment of the Tribunal; an administrative court

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¹ Laws of Malta 2011, ch 379 (Competition Act).

² *ibid* ch 510 (MCCAA).

which has jurisdiction³ over all the matters assigned to it in terms of the MCCA Act, the Competition Act and Consumer Affairs Act.⁴ Prior to the creation of the Tribunal, the Commission for Fair Trading (CFT), established by Act XXXI of 1994, had jurisdiction to review infringement decisions, non-infringement decisions, cease and desist orders and compliance orders issued by the OFC.⁵ Article 70(3) of the MCCA Act vests the Tribunal with the powers of the CFT, meaning that cases commenced in front of the CFT, like the case being presently analysed, are now determined by the Tribunal.

The amendments to the Competition Act necessitated a transitory provision. Article 70 of the MCCA Act provides that cases which have already commenced under the old regime continue to be regulated by the law prior to the amendments. The Tribunal commences its decree by referring to this provision and noting that since these proceedings were commenced prior to the entry into force of Act VI of 2011, the provisions of the Competition Act as they stood prior to the enactment of the said Act were applicable. Therefore any reference made to the Competition Act in the decree refers to the Competition Act prior to the amendments which came into force in 2011.

II. The Facts

The facts of this case, in brief, are as follows. Joe Mizzi lodged a complaint with the OFC regarding increases in utility tariffs by Enemalta Corporation, the electrical power provider in Malta, and the Water Services Corporation, the water service provider in Malta. From court records it appears that the complainant is, *inter alia*, claiming that his right to a fair hearing was breached since allegedly the OFC never contacted him regarding the merits of his complaint after it was lodged.⁶

³ *ibid*, article 31.

⁴ Laws of Malta (n 1), ch 378 (Consumer Affairs Act).

⁵ Competition Act (n 1) (prior to amendment), articles 13A, 14. Prior to amendment, the Competition Act provided for review of such decisions, and not appeal therefrom. On the issues raised by the use of such a term, see Complaint No. 1/2009 *Hompesch Service Station Ltd v Enemalta Corporation et*, 29 March 2010 (Commission for Fair Trading); see also Complaint No 2/2003 *Carmel Mifsud vs Malta Transport Authority*, 5 July 2004; *Federated Mills*, 28 April 2008; Complaint No 1/2004 *Bargain Holidays Ltd et v Malta Tourism Authority*, 17 October 2006; *Medical Laboratory Services Ltd et*, 9 October 2006; Complaint No 5.2006 *Cassar Fuels Ltd v Enemalta Corporation*, 20 April 2007; Complaint No. 2/2007 *S&D Yachts v Government of Malta et*, 6 October 2008 (all Commission for Fair Trading).

⁶ *Vide* Court records (*verbal*) of the sitting on 24 April 2012.

This decision, however, focuses solely on the role of the OFC in review proceedings in front of the Tribunal. It therefore does not go into the substantive merits of the case and makes no reference to the particular facts of the case.

III. Legal Bases

As it stood prior to 2011, the Competition Act assigned to the OFC the functions relating to investigation, determination and suppression of restrictive practices (article 3). The OFC could undertake investigations *ex officio* or upon the request of the relevant Minister, a complainant, a designated national competition authority of another European Union (EU) Member State or the European Commission (article 12). In order to carry out investigations, the OFC was given wide powers and was also empowered with executive search powers. Once an investigation was completed, it also had the right to issue the sanctions allowed by law where the breach of the Competition Act involved was not, in terms of the said Act, a serious breach (articles 12A(1) and 13(1)). In cases involving a serious breach of the Competition Act or a breach of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), the OFC was only empowered to issue a report; the final decision was taken by the CFT (article 12A(2) and (3) and article 13(2)).

A party aggrieved from a decision of the OFC finding a (non-serious) infringement of the competition rules had the possibility to request a review of the decision. These review proceedings were commenced by a letter to the OFC, whereby the aggrieved party informed the OFC that it desired a review of the OFC's decision (article 13A), rather than an appeal, application or a letter sent directly to the Tribunal. The OFC was then obliged in terms of law to bring to the Tribunal's attention the opening of the review proceedings.

In its deliberations the Tribunal considered the First Schedule of the Competition Act which contained the Rules of Procedures applicable to the CFT. It focused particularly on Rule 8:

Meetings of the [CFT] shall be held in camera provided that:

- (a) the Director [of the OFC] shall have a right to be present during all meetings;
- (b) the relevant undertaking and any complainant shall have a right to make submissions on any matter before the [CFT], as well as to present any documents or other evidence that may be relevant to the matter;
- (c) the European Commission in all cases involving the application of Article [101] and, or Article [102] of the [TFEU] shall have a right to make submissions on any matter before the [CFT], as well as to present any documents or other evidence that may be relevant to the matter.

IV. The Merits of the Decision

The Tribunal first notes that the function of the OFC is the objective and indiscriminate application of the competition rules in the public interest, whether with respect to an individual, association or undertaking. In addition, the OFC is an administrative authority with quasi-judicial powers and has the exclusive right to undertake and conclude investigations regarding competition matters. Such investigations are of a public nature in the sense that investigations must be carried out in the public interest and in certain instances in the EU's interest.

The Tribunal then considers Rule 8 of the First Schedule. It points out that it is significant that Rule 8 does not give the same rights to the complainant and the undertaking concerned as it does to the OFC. It specifies that had the legislator wanted to grant the complainant, the undertaking and the OFC the same rights, it would have done so explicitly. On the contrary, Rule 8 makes a clear distinction, granting the OFC only the right to be present during review proceedings. Therefore, the Appeals Tribunal needed to examine the effect to be given to the OFC's 'presence' in proceedings in front of it.

Proceedings by the OFC, whether commenced *ex officio* or after a complaint, are not adversarial. The OFC's role is to ensure fair competition and to safeguard the general interests of undertakings, associations and ultimately consumers. The OFC investigates and concludes investigations with the finding of a breach or no breach. In this role, the OFC is not a party to the cause since it does not have a personal interest or an interest in the name of a third party in the cause. The OFC is *supra partes*, acting in the interests of commerce and fair competition. Its role is to act as watchdog to ensure there is no abuse or infringement of the competition rules and to intervene if that is the case. Although its decisions are subject to review, the OFC is still bound to build every investigation on the rule of law and the principles of natural justice to ensure it has the necessary, adequate, creditable and certain information to arrive to its conclusions.

The Tribunal, however, then comments that although the OFC is not a party, every request for review is made in relation to what is decided by the OFC, and in this sense, the legitimate defendant of every request for review must be the OFC since every request must be made against the entity carrying out the investigation and taking a decision. Therefore the active participation of the OFC is required in front of the Tribunal so that if so required or requested, it can explain and clarify what led it to its conclusions or decision. In this manner, the OFC can concretely sustain its decision.

Although the OFC's role at the stage of review by the Tribunal or a decision by the Tribunal following an OFC report is not passive, and it defends what has been

concluded and clarifies and aids the Tribunal and the parties in the search for the truth, the OFC is *not* a party to proceedings in the ordinary sense. This means it cannot bring forward new evidence of its own accord, nor subpoena witnesses. Its role in front of the Appeals Tribunal is to act as watching of the Tribunal's proceedings to ensure that what it has concluded is construed in the sense concluded and, as the entity against whose decision a review is requested, to defend and clarify its position in the ambit of what has already been concluded. The Tribunal concludes that it is in this sense that the OFC needs to be present in review proceedings. It highlights that the OFC cannot be allowed to bring other evidence or substantiate its conclusions with ulterior evidence or documents which had not been examined during the OFC's proceedings. It would be inimical to the review if the OFC were not bound only to what it had gathered and led it to its decision or report. However, the Tribunal also notes that since every case is particular, there is no obstacle to the Tribunal itself, either *ex officio* or upon a specific demand, requesting or allowing the OFC to bring new evidence which the Tribunal deems necessary and required in the interests of justice for a just and equitable solution of the case. This, however, is a prerogative of the Tribunal and not a right of the OFC.

V. Commentary

Since the extent of the OFC's role in front of the Tribunal was raised in a case commenced in front of the CFT, the Tribunal limited its pronouncement to the role of the OFC in proceedings for review of decisions in terms of Articles 13A and 14 of the Competition Act prior to amendment. Section 5.1 below will comment on the decision on this basis. The extent to which this decision is applicable to cases commenced after the introduction of Act VI of 2011 will be examined in Section 5.2 below.

1. The Role of the OFC in Review Proceedings

This decision of the Tribunal is ground-breaking, if uncontroversial, in that it specifically lays down what the OFC's position in review proceedings is, as well as its position in proceedings following its report, avoiding any possible argument as to what the OFC is meant to do, or indeed allowed to do, during proceedings in front of the Tribunal. The decision also examines the primary role of the OFC, that is, the nature of its investigative and quasi-judicial functions.

The Tribunal examines the OFC's primary functions in order to determine the extent of its functions in review proceedings. The Tribunal's assessment of the OFC's main functions is noteworthy not because it is particularly revolutionary, but because it specifically delineates the OFC's responsibility to supervise the state of competition on the market, and by so doing, the Tribunal specifies what market-

players and consumers are to expect from the OFC. The OFC's ultimate focus should be safeguarding competition, and therefore by keeping the interests of commerce and fair competition in mind, ensure that no infringement of the competition rules occur and to act when it does. It is somewhat unfortunate that the Tribunal comments that the OFC's function is to safeguard the general interests of undertakings, associations and ultimately consumers, as this may imply that the competition rules are there to protect (inefficient) competitors; however when taken within the context of the whole judgment, it appears clear that rather than *competitors*, the Tribunal was highlighting the fact that the OFC is to safeguard the interests of *competition*.

The most important pronouncement made by the Tribunal however, is that the OFC is to be cited as defendant in all review proceedings. This ensures that the OFC is indeed present during sittings of the Tribunal, as required by Rule 8. Moreover, it ensures that the decision-making authority is part of proceedings in order to justify the position taken in its decisions. In the Tribunal's view however, the OFC is not a party to proceedings in the normal sense; its role is limited to explaining its position and to aid the Tribunal to arrive at the correct conclusion. Importantly, no new evidence is to be brought forward by the OFC. In essence therefore, the OFC's role in review proceedings, or in proceedings following a report, is limited to justifying its decision or conclusions and defending its position as specified in the contested decision/report.

2. Applicability of This Decision to Proceedings Commenced in Term of the New Competition Regime

By virtue of Act VI of 2011, parties involved in investigations carried out by the OFC may now appeal from decisions taken by the OFC, rather than request a review. The Tribunal is empowered to hear appeals from the undertakings and/or associations of undertakings concerned from infringement decisions, cease and desist orders and compliance orders, as well as administrative fines and any penalty payments imposed.⁷ Complainants may also appeal to the Appeals Tribunal, either from decisions of the OFC rejecting the complaint or from decisions of the OFC finding that there was no infringement.⁸ The procedure for filing an appeal has now changed; article 13A of the Act specifies that an appeal is filed by application before the Tribunal which is then notified to the Director General (Competition), who may file a reply.

⁷ Competition Act (n 1), article 13A(1).

⁸ *ibid*, article 14(3).

Although the provisions on the functions of the OFC have changed,⁹ and the OFC has been granted wider executive and quasi-judicial powers (including the power to take a decision even in cases of a serious breach of the competition rules or of the TFEU¹⁰) the OFC in essence is still the authority empowered to conduct investigations into breaches of the competition rules. Therefore, any comments made by the Tribunal as regards the primary role and function of the OFC still hold true and it can still be said that:

- the OFC's function is the objective and indiscriminate application of competition law in the public interest;
- investigations carried out by the OFC are of a public nature;
- the OFC's role is to ensure competition and to safeguard the interests of the market players and consumers;
- the OFC is not a party to the cause, but should act *supra partes* and act as a watchdog to ensure respect for competition law.

What remains to be determined then, is to what extent the OFC's role in appeal proceedings is similar to the OFC's role in review proceedings. The First Schedule of the Competition Act referred to by the Tribunal is now the Second Schedule of the MCAA Act; what was Rule 8 has been amended and is now Rule 5. Rule 5 does not provide for the rights of any of the parties in competition proceedings; it simply provides that the Director General (Competition) and other officers duly authorised by the same have the right to be present in all proceedings. Articles 13A and 14 of the Competition Act, besides stating that the appeal application is to be notified to the Director General (Competition), do not specify whether other parties or entities are to be notified. Therefore it appears that with amendment, although the rights of the OFC have been consolidated, the rights of the undertakings/associations concerned and the complainant have been somewhat ignored.

This notwithstanding, the rule that the OFC is to be present at all proceedings in front of the Tribunal has been re-affirmed. As a result, the Tribunal's rule that the OFC has to be cited as legitimate defendant in proceedings in front of the Tribunal likely stands. What is not so clear is whether the OFC's role in review proceedings is limited to justifying the position taken in the decision/report, and in particular whether the OFC can bring forward new evidence.

⁹ Article 3 of the Competition Act is now supplemented with Article 14 of the MCAA Act.

¹⁰ See Competition Act (n 1), article 12A.

In terms of the Code of Organization and Civil Procedure¹¹, new documents and witnesses may be brought forward in appeal proceedings in certain specified circumstances. It may be argued that the OFC is now party to proceedings in a wider sense, in particular since it is *de jure* notified of appeals and has a right to reply, and that therefore the OFC has the right to bring forward new evidence in the circumstances delineated in the COCP. On the other hand, it can equally be argued that the OFC is *not* a party to appeal proceedings in the ordinary sense of the word, much as the OFC is not considered a full party in review proceedings. Specifically, since under the un-amended Competition Act the OFC was in practice still notified of review proceedings and was allowed to make submissions in response to the request for review the OFC now has in essence the same rights it had under the Competition Act prior to amendment. If this latter view is taken, the OFC will not be able to bring forward new evidence, and is limited to defending its position as specified in the decision being appealed. Although one may speculate, this question remains to be determined by the Tribunal, and no conclusive answer can be given until the question is raised by parties in appeal proceedings under the amended Competition Act.

¹¹ Laws of Malta (2011), ch 12 (COCP).