



Ministry for
Competitiveness and
Communications

The Effective Enforcement of Competition Law in the Communications Sector

Providing for concurrent *Ex Post* Powers

Consultation Paper

5th April 2007

In conjunction with:



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Executive Summary

The fostering of competition in the communications sector¹ has always been one of the priorities of this Ministry and of Government. It is this Ministry's belief that the satisfactory growth, both in the number and quality of services provided, of this sector experienced over the past years is largely attributable to the increase in the level of sector competition.

The sector's regulatory framework, with its light-touch though effective approach, provides the operating parameters for sector undertakings. In the Maltese context, it can be safely said that it has played an important part in the development of the sector. The strength of this framework lies in its basic premise that healthy competition and consequently, market forces, are the most effective way of regulating a highly dynamic sector without stifling development.

As a result of competition, coupled with manifest technological developments, we are now experiencing a host of new products being offered to the end-user in the attractive form of bundles. This is the natural result of the long-heralded phenomenon of triple and quadruple play that has now become a reality.

In view of these developments and in accordance with the philosophy that underpins the regulation of this sector, as outlined above, it is this Ministry's obligation to ensure that fair competition is constantly observed by all players in the sector.

With the gradual relaxation of *ex ante* obligations on undertakings as a result of greater competition and planned changes to the European regulatory framework aimed at reducing further the degree of regulation, it is of fundamental importance that breaches of competition law by players in the sector are dealt with by the responsible authorities in an effective and expeditious manner. In the absence of suitable remedies for breaches of competition rules, the sector's development and the benefits of quality and choice enjoyed by the consumer may be jeopardised.

It is an incontrovertible fact that the communications sector is highly complex and dynamic in technical terms. This implies that the authorities empowered to address abuses of competition in the sector have the necessary expertise and sector know-how to deal with the issues that will inevitably crop up from time to time.

The imposition of such a burden on the National Competition Authority (the Consumer and Competition Division), the body entrusted to ostensibly address all competition issues in all sectors, is a tall order indeed. This responsibility is rendered all the more challenging in a small jurisdiction positing particular diseconomies of scale when one considers that Malta already has a sector specific National Regulatory Authority (the Malta Communications Authority). This latter agency is entrusted with fostering effective sector competition, albeit in a forward-looking manner, thus to some extent already replicating to some degree the work conducted by the National Competition Authority.

The Malta Communications Authority has today built a significant degree of expertise with respect to competition in the communications sector and has been successful in promoting a competitive environment through the application of competition law principles. It is therefore on the basis of these factors, that is the sector specific expertise, challenges of economies of scale, together with the objective of providing

¹ For the purposes of this document the communications sector comprises the Electronic Communications and Postal Services sectors.

coherent competition oversight, that this consultation posits the merit of merging the *ex ante* and *ex post* responsibilities for sector competition in the Malta Communications Authority. This would serve to alleviate the considerable burden the determination of issues of competition law in the communications sector is placing on the Consumer and Competition Division, thus affording it the opportunity to focus its capacity efforts on other economic priority areas of competition.

It is with this specific purpose in mind that the Ministry of Competitiveness and Communications, in conjunction with the Malta Communications Authority and the Consumer and Competition Division, is launching this consultation, seeking comments and input from interested parties. Submissions will be analysed with a view to recommending the best way forward to Government.

Structure of this Document

The remainder of this document comprises the following:

Part 1 provides a brief outline of the purpose of this consultation.

Part 2 provides a short background to the publication of this Consultation Document.

Part 3 provides a description of the issues that this proposed change is seeking to address.

Part 4 provides an exposition of the Cabinet's Deliberations leading to this Consultation.

Part 5 sets out the way forward to address the issues identified in Part 3 above.

Part 6 articulates a set of principles underpinning the proposed way forward, including details of how these principles will be implemented through the necessary legislative intervention.

An **Appendix** of the Draft Bill implementing the various provisions of law mentioned in Part 6 is included at the end of the document.

Consultation Period and Method of Response

For this purpose, respondents to this Consultation are requested to submit their input by no later than Friday the 27th April 2007. Responses are to be sent in writing or by e-mail to the following address:

Permanent Secretary
Ministry for Competitiveness and Communications
Casa Leoni,
St Joseph High Road,
Santa Venera.

e-mail: permsec.mcmp@gov.mt

1. Purpose

The purpose of this consultation document is to elicit inputs into proposed legislative amendments intended to extend the jurisdiction of the Malta Communications Authority to competition law for the communications sectors it regulates, i.e. electronic communications and postal.

2. Background

The communications markets, in particular those of electronic communications, have in the past years experienced a healthy growth in the levels of competition. This is owed, to a large extent, to exciting technological developments and to a regulatory framework that aims to promote effective competition through a light touch oversight approach.

As the communications markets develop and mature becoming more competitive, the scope for *ex ante* regulatory intervention diminishes. This notwithstanding, the European regulatory framework, which is currently in the process of being reviewed to ensure its continued relevance will, for the time being, remain the main reference to ensure effective competition. However, the need to adopt best and most efficient and effective practices in curbing breaches of competition law assumes more prominence. This is to ensure that, where such breaches occur, fair and equitable competition is restored in the shortest time possible. It is about responding to competition breaches quickly and effectively in the interest of reducing potential market upheavals that can cause serious damage to both consumers and sector interests.

The communications sector, in particular that of electronic communications, is dynamic, complex and highly specialised. It also constitutes the underpinning of much of a country's social and economic development in our contemporary global milieu. It is what connects us to the rest of the world, affording us the opportunity to participate as fully-fledged members of a global information society. It is these factors, foremost amongst others, which led the European Commission to require Member States to set up sector specific regulatory agencies to implement the related Directives². The Malta Communications Authority was precisely set up for this purpose, firstly to oversee a sector liberalisation programme and secondly, to realise and sustain competition in the various elements of the sector which, up until then, had operated as monopolies. This had been the case with fixed telephony, mobile telephony as well as the provision of Cable TV services.

Malta has come a long way during the last five years and telecommunications have been one of the major elements at the core of this development. Competition has greatly contributed to better access to all services, a reduction in costs, a mind-boggling array of service options and a significant leap in the quality of some, albeit not all, of these services. This has all been to the benefit of the consumer. Coincident with these, we have witnessed considerable sector investment, a wide array of technologies, new market entrants in the face of increasingly blurring distinctions between communications media, most particularly traditional telephone communications, the Internet and broadcasting.

² namely the Framework Directive (2002/21/EC) and the 'Specific Directives' listed in preamble 5 thereto.

All this serves to make for more complex oversight, on the one hand ensuring that fair competition prevails, whilst at the same time maintaining an environment that is conducive to investment and encourages innovation. In such a fast moving universe, it is vital to ensure that our institutions are able to face up to these new challenges effectively and remain relevant. This is the purpose of this consultation.

Very specifically, this document seeks to elicit comments from market players, consumer groups and other interested parties on the best way forward to ensure effective and sustainable competition in the communications sector through the efficient application and enforcement of competition law at an *ex post* level.

The document is structured in a way that it identifies specific issues, then goes on to posit options for addressing these, while at the same time raising questions aimed at eliciting reactions.

3. Issues

The European Directives that lay down the regulatory framework for the electronic communications sector, quite apart from their underlying vision of a single European market, have at their core the objective of achieving and sustaining competition in the specified relevant markets. The methodology advocated in these Directives is through the conduct of forward-looking reviews in each of the markets defined (*ex ante*). Following the conduct of each review and in the event of a finding of effective competition, obligations historically imposed by the Malta Communications Authority on undertakings having Significant Market Power are removed. Such obligations have, in the past, entailed the imposition of infrastructure access, accounting separation, cost accounting, transparency and non-discrimination.

This regulatory framework does not replace the competition law framework emanating primarily from Articles 81 and 82 of the EC Treaty and further developed by European Court of Justice (ECJ) case law. The enforcement of competition law is entrusted to the Member States' National Competition Authorities (NCAs), in Malta's case the Office of Fair Competition (OFC) within the Consumer and Competition Division.

3.1 Lack of Comprehensive Ex Ante control

The MCA's role as it is presently constituted is circumscribed by the relevant communications Directives. Thus, the Authority's role is confined to the analysis of the specified markets under these directives³ with attendant remedies as they apply. The focus of these market reviews is to evaluate, in a forward-looking fashion, the extent to which competition prevails or otherwise in a given market.

These narrow market definitions represent an obstacle to the MCA's intervention where an undertaking with a dominant position in a specific market (generally a wholesale market) indulges in anti-competitive behaviour in a related but distinct market (generally a retail market) which is unregulated due to the way the markets

³ these markets are listed in Recommendation 2003/311/EC

are defined. Such situations are bound to increase as a result of the further liberalisation of the communications market.

3.2 Future regulatory framework

Moreover, the proposed framework for electronic communications that is currently being discussed at European Commission level, advocates a relaxation in the level of *ex ante* regulatory intervention through a reduction in the number of markets which may be analysed by the NRAs. This would result in an even larger number of electronic communications services being unregulated, thus leaving it totally up to the enforcement of competition law at an *ex post* level to ensure that the unregulated markets are effectively competitive.

3.3 Parallel enforcement procedures

The application of the electronic communications regulatory framework and its *ex ante* protection of competition alongside *ex post* competition law has not always been simple and clear cut. The possibility of parallel interventions under the two frameworks which may give rise to a host of issues (such as forum shopping, the imposition of double penalties, as well as conflicting interpretations and conclusions with respect to one and the same issue or infraction and consequently, a lack of legal certainty) has been of concern to all Member States. The lack of a harmonised EU approach to resolve this issue has led Member States to seek the best possible means of collaboration between their NRAs and National Competition Authorities (NCAs). In some jurisdictions both in Europe and internationally, National Regulatory agencies for telecommunications have traditionally been responsible for competition law as it applies to their sector.

To date, the MCA and the Office of Fair Competition (OFC) have collaborated on the basis of a Memorandum of Understanding (MoU) which sets out a *modus operandi* for the ongoing collaboration of the two Authorities. This MoU, amongst others, seeks to reduce the possibilities of parallel investigations with respect to one and the same issue, together with all potential conflicting consequences, quite apart from the wasted efforts of two agencies.

Notwithstanding this MoU, sector interests are frequently faced with a situation of uncertainty as to which Authority to turn to in the event of some sector infringement or dysfunction and effectively, which legal framework to invoke when filing a complaint. Undertakings have long expressed their dissatisfaction with this state of affairs, even in some instances ascribing negative outcomes for their enterprises, simply because they could either not decide which organisation they should turn to, or that the existing ambiguity made for more complex and prolonged attempts at resolution of a competition issue. In such circumstances, some undertakings opt to file concurrent separate complaints with both the MCA and the OFC. This, in turn, gives rise to jurisdictional pleas in front of the two Authorities and a prolongation of the resolution of the dispute.

3.4 Effective sectoral competition enforcement

Another issue encountered in all Member States is that the competition issues related to the communications sector are most often highly technical in nature. An effective and timely remedy and reinstatement of fair competition often requires a

thorough understanding of the sector and of the technical and other complexities that form the basis of a dispute. The need for timely intervention is even more critical in the current stages of liberalisation of the Maltese communications sector, where competition can best be described as fragile. This is because of the reality that achieving healthy and sustainable competition is a long process, with the constant threat of derailment and thus, the criticality of incisive, effective and early intervention.

This need is intensified in view of the fast technological developments, including convergence, that characterise the sector.

It is generally felt that the NRA entrusted with a sector specific role of ensuring and promoting effective competition, has that in-depth knowledge of the sector it regulates that is necessary to enforce competition law effectively. On the other hand, a NCA that is entrusted with implementing the competition framework across all sectors cannot be expected to have the same level of sector specific knowledge.

3.5 Economies of Scale

This issue is further magnified in the Maltese context where, as a result of our small size and limited human resources, economies of scale render it unreasonable to provide for sectoral expertise to reside in two distinct public authorities that carry out closely related tasks. In this context, it is unreasonable to have the two Authorities duplicate, to a considerable extent, the work carried out by each other, where no legal impediment to a solution as contemplated in this document exists.

3.6 Summary

To sum up, one may hold that the issues relating to the effective enforcement of competition law in the communications sector stem mainly from two factors:

1. The imperative of effective and timely intervention and thus resolution of anti-competitive allegations; and
2. The need to provide legal clarity and certainty in those instances where, by one single conduct, an undertaking breaches both *ex ante* regulatory obligations imposed upon it by the NRA under the communications regulatory framework and, at the same time, general competition law.

Questions

1. Do you agree with the above exposition of the issues?
2. Are there other issues in relation to the effective implementation of competition law in the communications sector that have not been highlighted?

4. Cabinet Deliberations

This government has long placed market competition at the top of its policy agenda. In the present administration this is reflected in the portfolio of this Ministry which is tasked with the very specific mandate of achieving free market competition.

In the face of these issues relating to the communications sector outlined in this document, Cabinet recently approved the proposal of the Minister to seek reactions and responses from interested parties with respect to the proposal made in the next part of this Consultation Document.

The feedback derived from these consultations will be analysed, enabling government to determine whether it should propose appropriate legislative amendments to Parliament.

5. Solution

The issues mooted in Part 3 above are not particular only to Malta; they are factors inherent in the communications sector, largely as a result of its dynamics. The particularity lies however, in Malta's size and thus, its constraint on human resources.

Whereas no harmonised solution to these issues has been adopted across Member States, a number of countries⁴ have sought to address these issues by vesting the telecommunications' NRAs with *ex post* competition powers. This solution enables these agencies to capitalise on their sector in-depth knowledge to intervene in an effective manner in competition law breaches.

The NRAs' concurrent competition powers are limited to investigations of cases of Articles 81 and 82 of the EC Treaty and their counterpart national provisions. NRA concurrent powers hence do not extend to merger regulation and the conduct of other competition law functions apart from those resulting from Articles 81 and 82 EC and their counterpart national provisions.

The vesting of concurrent competition powers on the NRA is done through clear legislative intervention which, amongst others, provides certainty as to how duplication of proceedings between the NRA and the NCA would be avoided, whilst at the same time decreasing the bureaucratic burden placed on complainants by providing for a form of one-stop shop.

In view of the issues faced by the MCA and OFC as outlined above, which issues are exacerbated by Malta's size and in the interest of early effective intervention, it is believed that vesting the MCA with concurrent, albeit limited, *ex post* competition powers, is both desirable and beneficial.

The solution being proposed is one whereby the MCA, as the NRA entrusted with the regulation of the communications sector, is vested with powers that currently reside exclusively with the Director of the OFC, and limitedly with respect to the investigation of alleged breaches of Sections 5 and 9 of the Competition Act⁵, as well as of Articles 81 and 82 of the EC Treaty, in the communications sector. This solution

⁴ Most notably the UK and, of late, Ireland who has passed a Bill to this effect

⁵ Cap. 379 of the Laws of Malta

aims at merely allowing the MCA to replace the OFC with respect to such investigations where it is determined that the former body is better placed to carry out a particular investigation. In such cases, the MCA will act under the purview of the Competition Act to the exclusion of the regulatory framework particular to the communications sector.⁶ In accordance with this, parties to an investigation by the MCA will, from the outset, be clearly informed of the framework under which the said Authority is acting.

When the MCA decides to exercise the concurrent powers in a particular case, it will limit itself to exercising such powers under, and in accordance with, the Competition Act with respect to the said case. The MCA's decision pursuant to an investigation under the Competition Act will then be subject to review by the Commission for Fair Trading in accordance with one's rights under the Competition Act.

In the event that the MCA is granted concurrent, albeit limited, status of NCA, the European Commission will be notified, so as to allow for the MCA to conduct investigations with respect to Articles 81 and 82 of the EC Treaty in the communications sector.

The adoption of this solution is expected to achieve, amongst others, the following results:

1. A competition issue would be dealt with by that authority which is best equipped to do so, hence rendering intervention more effective and timely;
2. Stakeholders would have a clear focal point to which to refer competition issues in the communications sector, hence minimising jurisdictional contentions between the public authorities concerned, and attendant risks of conflicting decisions, and the imposition of dual remedies and, or sanctions with respect to the same case;
3. This would make for a timely and cost effective resolution of issues.

Questions

3. Do you agree in principle with the solution mooted above? If not, please provide detailed reasons.
4. Do you agree with the perceived advantages of this solution?
5. Are there issues that have not been identified or should be considered in greater detail?

⁶ namely the Electronic Communications (Regulation) Act (Cap. 399 of the Laws of Malta), the Electronic Communications Networks and Services (General) Regulations (LN 412 of 2004), the Postal Services Act (Cap. 254 of the Laws of Malta) and Postal Services (General) Regulations (LN 328 of 2005)

6. Way Forward

The adoption of the solution proposed in Part 5 above, requires legislative intervention.

Although this solution is being proposed in the context of the communications sector, it may be replicable to other sectors where there are sector specific regulatory institutions such as energy, environment etc. as has been demonstrated in other jurisdictions adopting this approach. With this in mind, the legislative intervention proposed below is, to the greatest extent possible, not sector specific. A number of sector specific provisions are however necessary and these are inserted, where appropriate, to accompany the non-sector specific provisions in providing a comprehensive framework.

The required legislative intervention necessarily cuts across the competition law framework and the regulatory framework for the communications sector. In order to provide respondents to this Consultation with a clear vision of the legislative interventions being proposed, these are grouped together below in accordance with the principles they are intended to implement.

6.1 Group A – Introducing and defining the concept of Concurrent Powers

This group of legislative interventions is intended to introduce the concept of concurrent powers. Whereas the concept is introduced in a non-sector specific fashion, the sectors with respect to which the concept will be applied must be listed in the law for legal certainty.

6.1.1 Intervention A.1

It is proposed that a definition of concurrent powers be introduced in the Competition Act stating:

“concurrent powers” means the powers referred to in Article 3B of this Act”

Article 3B of the Act will then read:

“(1) A competent regulatory authority⁷ shall be entitled to exercise concurrently with the Director, the powers that the Director has under this Act in relation to the investigation and determination of any breach of articles 5 and 9 of this Act and, or of articles 81 and 82 of the EC Treaty.”

6.1.2 Intervention A.2

Introduce a new Schedule to the Competition Act (Second Schedule) in which the NRAs that will have concurrent powers will be listed, together with the areas with respect to which they will be authorised to exercise concurrent powers.

⁷ “competent regulatory authority will be defined in the Act as a regulatory authority listed in the new Schedule of the Act to be introduced as per Intervention A.2

It will be proposed that this Schedule may be amended by Order of the Minister. A new provision (Article 3A) will be introduced in the Competition Act for this purpose and will state:

- “3A. (1) *The Minister may, from time to time, by Order designate regulatory authorities to be competent regulatory authorities for the purposes of this Act.*
- (2) *The said regulatory authorities shall be listed in the Second Schedule to this Act.*
- (3) *The Minister may, from time to time, amend the Second Schedule to this Act.”*

6.1.3 Intervention A.3

This legislative intervention will define the area with respect to which the MCA will be authorised to exercise the concurrent powers. It is crucial to note that this provision does not state that the MCA **will** exercise concurrent powers in all the cases listed but solely that it **may** do so. Whether the MCA will, in actual fact, exercise concurrent powers in a particular case will be decided on a case by case basis in accordance with the provisions laid down under “Group C” below. In view of this observation, the list of instances in which the MCA may exercise concurrent powers ought to be rather wide, so as to comprise any case that may bear a significant effect on a communications market. This notwithstanding, it is believed that having a clear list of activities with respect to which the MCA may exercise concurrent powers gives a degree of clarity and certainty.

Article 2 of the Second Schedule introduced in Intervention A.2 above would read:

“The Malta Communications Authority shall exercise its concurrent powers under this Act in relation to commercial activities connected with:

- i) The provision of electronic communications networks*
- ii) The provision of electronic communications services; and*
- iii) The provision of postal services*
- iv) The provision, or making available, of services or facilities which are provided or made available:*
 - a) by means of, or in association with the provision (by the same person or another) of, an electronic communications network or electronic communications service; or*
 - b) for the purpose of facilitating the use of any such network or service (whether provided by the same person or another)*
- v) The supply of apparatus used for providing or making available anything mentioned in the preceding paragraphs*
- vi) The provision of television or audio content.”*

It would be made clear in the definitions of the Second Schedule that the terms “electronic communications networks” and “electronic communications services” shall have the meaning given to them under the Electronic Communications (Regulation) Act and where the term “postal services” shall have the meaning given to it under the Postal Services Act.

6.1.4 Intervention A.4

The ability of the MCA to exercise concurrent powers will be clearly stated in a new set of Regulations⁸ (the 'Regulations'). In addition, it would be specified that the concurrent powers cannot be exercised simultaneously by more than one of the authorities having concurrence in a particular case ("competent persons"⁹). Hence a proviso to paragraph 2 of the new Article 3B of the Competition Act (refer to Intervention A.1 above) would state:

"Provided that in relation to any one case, such concurrent powers shall only be exercised at any one time by a single competent person."

6.1.5 Intervention A.5

This is self-explanatory. It is required for completeness sake and so as to avoid any inconsistencies that may arise. A proviso to the current definition of "Director" in the Competition Act will be inserted and would read:

" Provided that any reference to the Director in or under this Act shall also be construed as referring to a competent regulatory authority insofar as that authority is exercising the powers granted to it in accordance with article 3B of this Act".

Questions

6. Do you agree with the principles reflected in Legislative Interventions Group A?
7. Do you agree with the manner in which the principles are reflected in legislation?
8. Are the proposed provisions sufficiently clear?

6.2 Group B – Power to make regulations

In accordance with general legislative practice, it is felt that the procedural aspects relating to the *modus operandi* to be adopted between the MCA and OFC in determining which of them is to exercise concurrent jurisdiction is to be laid down by virtue of subsidiary legislation, rather than primary legislation. The objective of laying

⁸ refer to 'Group B' below

⁹ The term "competent person" would be defined in Article 2 of the Act, in the following manner:

"competent person" means the Director (of Fair Trading) and, or any of the regulatory authorities listed in the Second Schedule to this Act.

down these provisions is to provide the necessary degree of legal certainty with respect to the processes to be adopted by the MCA and OFC in determining which of them is to exercise the concurrent powers.

6.2.1 Intervention B.1

The Minister must, primarily, be given the power to make regulations in this respect. Hence a new paragraph will be introduced in Article 33(1) of the Competition Act and will state the following:

(33. (1) The Minister may by regulations:)

(c) provide for the manner as to how concurrent powers shall be exercised by the Director and competent regulatory authorities:

Provided that without prejudice to the generality of paragraph (c), such regulations may, in particular, provide –

- (a) for the procedure to be followed by competent persons when determining who is to exercise concurrent powers in any given case;*
- (b) for the steps to be taken before a competent person exercises, in a particular case, concurrent powers;*
- (c) for the procedure for determining, in a particular case, questions arising as to which competent person is to exercise concurrent powers;*
- (d) for the extent to, and manner in, which the concurrent powers may be transferred from one competent person to another, when such powers are being, or have been, exercised by a competent person; and*
- (e) for notification as to which competent person is exercising concurrent powers in respect of a particular case;*

Provided further that before making any regulations under this paragraph the Minister shall consult the Minister or Ministers responsible for the competent regulatory authorities to whom such regulations may apply.”

Questions

- 9. Do you agree with the principles reflected in Legislative Interventions Group B?
- 10. Do you agree with the manner in which the principles are reflected in legislation?
- 11. Are the proposed provisions sufficiently clear?

6.3 Group C – Determining which of the Authorities is to exercise the concurrent powers in a given case

For the sake of clarity, proposed legislation will list the grounds on which the Authorities competent to exercise concurrent powers shall determine which of them will, in actual fact, exercise such powers in a particular case. The fundamental principle to be borne in mind in making such determination is that of ensuring that the better-placed authority will investigate a particular case. The powers will be exercised in accordance with the Competition Act and be subject to the same rights and restrictions granted to the Director of the OFC in the said Act.

Thus, whether the concurrent powers are exercised by one authority or another will not, in any way whatsoever, affect the rights of the interested parties. In this light, the law seeks to limit any unreasonable contentions being raised by the interested parties as to whether the concurrent powers should have been exercised by one authority instead of another.

6.3.1 Intervention C.1

The grounds on which a determination will be made between the two authorities will be listed in the Regulations. Hence Regulation 6 thereof would state:

Paragraph 1:

In determining which competent person shall deal with a case, competent persons concerned shall give utmost regard to the following:

- a. the sectoral knowledge of a competent person;*
- b. whether the case affects more than one regulatory sector;*
- c. previous contact relating to the case between any of the parties or complainants involved and a competent person;*
- d. experience in dealing with similar issues relating to the case to be, or being, investigated; and*
- e. the need to prevent the duplication of procedures concerning identical market issues*

Paragraph 2:

Without prejudice to the generality of the foregoing, where a particular case may impact significantly on the level of competition in a sector or market regulated by a competent regulatory authority, the said competent regulatory authority shall, unless otherwise agreed to by the competent persons concerned, exercise the concurrent powers.

6.3.2 Intervention C.2

Since, as held above, the exercise of the concurrent powers by one competent authority instead of another as proposed herein, does not in any way whatsoever impact the rights of the interested parties to a case, so as to avoid any unreasonable

contentions being raised, the law prohibits objections to this effect. Hence, a new provision to the Competition Act will be introduced stating the following:

No objection shall be taken to anything done under, by, or in relation to a competent person under this Act on the grounds that it should have been done under, by, or in relation to another competent person.

Questions

12. Do you agree with the principles reflected in Legislative Interventions Group C?
13. Do you agree with the manner in which the principles are reflected in legislation?
14. Are the proposed provisions sufficiently clear?

6.4 Group D – Modus Operandi to be adopted by Authorities in determining who is to exercise concurrent powers

The *modus operandi* to be adopted by the two Authorities in determining which of them is to exercise the concurrent powers in a particular case will be laid down in law for the sake of clarity.

6.4.1 Intervention D.1

Regulation 4 in the new set of regulations will read:

Upon becoming aware of a case with respect to which concurrent powers may be exercised, whether by virtue of a complaint being lodged before a competent person, or otherwise, the competent person concerned shall, within five working days from the acquisition of such information, notify the other competent person which may exercise concurrent powers of the said case.

In doing so, the notifying competent person may send to the other competent person any information received with respect to the particular case.

6.4.2 Intervention D.2

Regulation 5 in the new set of Regulations will read:

Upon notification as prescribed in regulation 4, the competent persons concerned shall without delay, agree which of them shall exercise concurrent powers.

Provided that until agreement is reached a competent person shall not take any further steps with respect to the said case without the prior approval of the other competent person.

Questions

15. Do you agree with the principles reflected in Legislative Interventions Group D?
16. Do you agree with the manner in which the principles are reflected in legislation?
17. Are the proposed provisions sufficiently clear?

6.5 Group E – Sharing of Information

The ability of the MCA and the OFC to exchange relevant information is a cornerstone of the ongoing relationship between the two Authorities. This principle, which is so fundamental to an effective *ex ante* regulation and *ex post* enforcement of competition principles in the communications sector and which is enshrined in the Framework Directive¹⁰, ought to be better reflected in the Competition Act.

In view of the solution mooted in Part 5 of this document, the principle of sharing of information between the MCA and OFC gains further importance. In principle, when applying concurrent powers, it should not make any difference whether the information is requested by the MCA or the OFC, as long as the request is made in accordance with the provisions and for the purposes of investigating a breach of the Competition Act. In this sense, when exercising concurrent powers, the MCA and OFC should be in possession of the same amount of information that the other authority would have had, had it been exercising the concurrent powers.

Moreover, the exchange of information between the MCA and OFC is a crucial part of the principle of the transfer of pending investigations between the two Authorities mooted in “Group G” below.

The current Group of Interventions is intended to do away with the legislative obstacles that may exist with regard to the sharing and exchange of information between the MCA and OFC and this, in respect of the rights of interested parties.

6.5.1 Intervention E.1

Primarily, a new provision will be added to Article 12 of the Competition Act, which would replicate a principle already laid down in the MCA Act¹¹ (Article 4(9)), hence allowing for its application even in case of investigations under the Competition Act. The need for this new provision is felt, irrespective of the solution mooted in Part 5 of this Consultation Document. It is suggested that the new provision would read:

¹⁰ Preamble 35 and Article 3(5).

¹¹ Cap. 418 of the Laws of Malta

Competent persons shall provide each other with the information necessary for the application of the provisions of this Act which information shall be provided within an appropriate timeframe taking into consideration the particular circumstances of the issues involved. In respect of the information exchanged, the receiving competent person shall ensure the same level of confidentiality as the originating competent person.

6.5.2 Intervention E.2

An exchange of information between the two Authorities in consonance with the requirements of the Framework Directive, as held above, should not be impaired. In saying this, it is understood that the level of confidentiality binding the OFC would also bind the MCA were an exchange of information to take place. Moreover, the exchange of information between the MCA and OFC is a crucial part of the principle of the transfer of pending investigations between the two Authorities mooted in “ Group G” below, and should hence not be impaired. In accordance with this, it is suggested that two provisos be added to Article 12(10) of the Competition Act which would state the following:

Provided that subarticle (10) shall not apply to a disclosure of information between the Director and a competent regulatory authority where such disclosure is made for the purpose of facilitating the performance of concurrent powers or the performance of the regulatory functions at law by that competent regulatory authority:

Provided further that in respect of any information as may be disclosed, the receiving competent regulatory authority shall ensure the same level of confidentiality as the Director.

Questions

18. Do you agree with the principles reflected in Legislative Interventions Group E?
19. Do you agree with the manner in which the principles are reflected in legislation?
20. Are the proposed provisions sufficiently clear?

6.6 Group F - Right of Referral to Minister

Though unlikely to occur, consideration must be given to the possibility of the competent authorities not agreeing as to which of them is better placed to deal with a particular case. In such case, the measure that is being proposed is to allow for the decision to be taken by the Minister responsible for competition or another person appointed by such Minister to act in his stead for this purpose.

6.6.1 Intervention F.1

In accordance with the above, it is proposed that a provision be inserted in the Competition Act giving the Minister the vires to decide on matters of concurrence. It is proposed that the provision will read:

If any question arises between two or more competent persons as to which of them should exercise concurrent powers in a particular case, such question shall be referred to and determined by the Minister in accordance with any Regulations as may be made in this regard;

Provided that the Minister may appoint another person to act in his stead with respect to the above.

6.6.2 Intervention F.2

The above provision of the Act will then be complemented by provisions in the new set of regulations providing for the *modus operandi* to be applied by the competent Authorities in referring the matter to the Minister for determination. It is proposed that the regulations would state the following:

Regulation 7(1)

Where the competent persons fail within a reasonable time to reach an agreement in accordance with Regulation 5¹², they shall in accordance with Article 3B of the Act¹³ jointly refer the matter to the Minister. In doing so, each of the competent persons concerned shall make their submissions on the matter.

Provided that prior to a determination being made and communicated to the competent persons in accordance with this regulation none of the competent persons shall take any further steps with respect to the case in relation to which concurrent powers are to be exercised.

Regulation 7(2)

Upon receiving such a referral, the Minister shall, within 8 working days of receipt of a communication in terms of paragraph 1 of this regulation, determine which competent person is to exercise the concurrent powers and the Minister shall communicate his decision to the competent persons concerned.

¹² Refer to Intervention D.2 above

¹³ Intervention F.1

Questions

21. Do you agree with the principles reflected in Legislative Interventions Group F?
22. Do you agree with the manner in which the principles are reflected in legislation?
23. Are the proposed provisions sufficiently clear?

6.7 Group G – Transfer of case from one authority to another

So as to ensure that the authority that is best placed to investigate an alleged breach of competition law is in fact the one that is investigating the case, the framework for concurrent powers allows for the possibility of a case being transferred from one competent person¹⁴ to another. The purpose of this is to ensure that, if during an investigation, it is established that another competent person is better placed to investigate the case than the authority that had already commenced the investigation, the better-placed authority would not be precluded from taking over the investigation. It is noted that experience in other countries that resort to concurrent jurisdiction¹⁵ indicates that this occurrence has not materialised. Notwithstanding this, making an allowance for this occurrence at law is still advisable.

6.7.1 Intervention G.1

In order to implement this right of transfer, it is proposed that the following provision be inserted in the new regulations.

Regulation 9(1)

A competent person who has exercised concurrent powers (the ‘transferor’¹⁶) may, during the course of an investigation, upon reaching agreement with another competent person (the ‘transferee’¹⁷), transfer the case to the transferee if, in the opinion of the competent persons concerned, it transpires that the transferee is better placed, in accordance with the criteria listed in Regulation 6¹⁸, to conduct the investigation and determine the outcome of the case.

6.7.2 Intervention G.2

It is proposed that the competent persons’ obligation to notify the interested parties to an investigation as to which authority is to take cognisance of a particular case prior

¹⁴ i.e. any of the regulatory and competition authorities competent to exercise concurrent powers

¹⁵ most notably the UK

¹⁶ this term will be defined in the definitions regulation

¹⁷ *ibid.*

¹⁸ see intervention C.1 above

to the exercise of concurrent powers (see “ Group H” below) should be extended to the context of a transfer of a case, too. The parties will however not be given the right to object to a decision by the competent persons to transfer the case, for the same reasons as discussed under Intervention C.2. The following proposed provision aims at capturing the principles explained.

Regulation 9(2)

Upon the transferor and the transferee proposing to agree to a transfer in accordance with subregulation 1, but prior to the transfer being completed, the transferor shall, as soon as is practicable, notify in writing, where applicable, the complainant and, or the undertaking that is the subject of the investigation, of the agreement reached between the competent persons and invite the said parties to the investigation to make written submissions within a reasonable timeframe to be set by the transferor.

Provided that prior to effecting the transfer of the case, the competent persons shall take into consideration the submissions made by the parties to the investigation:

Provided further that no right of objection will rest with the complainant or with any other person, with respect to the competent persons’ decision to transfer the case or otherwise.

Questions

- 24. Do you agree with the principles reflected in Legislative Interventions Group G?
- 25. Do you agree with the manner in which the principles are reflected in legislation?
- 26. Are the proposed provisions sufficiently clear?

6.8 Group H – Informing the interested parties

In creating a form of one-stop shop for complaints relating to anti-competitive conduct in the communications sector in the way proposed in Part 5 of this document, it is important that interested parties be kept constantly informed of decisions taken by the competent Authorities with respect to which of them is to exercise concurrent powers.

6.8.1 Intervention H.1

Interested parties should be informed as to which of the Authorities is to exercise concurrent powers prior to the exercise of said concurrent powers by any of the Authorities. It is proposed that this principle will be reflected in law through the introduction of a provision in the new set of regulations which will read:

Regulation 8 (1)

Upon agreement being reached between the competent persons concerned in accordance with Regulation 5, the competent person who is to exercise the concurrent powers shall, as soon as is practicable and prior to taking any further steps with respect to the particular case, inform the complainant of the agreement reached between the competent persons concerned.

6.8.2 Intervention H.2

Even in the event that the Authorities fail to agree as to which of them is to exercise concurrent powers and a referral is to be made to the Minister for this purpose, in accordance with “Intervention F” above, the interested parties are to be informed as to which of the Authorities is to exercise the concurrent powers from the outset. Hence, a provision in the new set of regulations will be introduced stating:

Regulation 8(2)

Upon a determination being made and communicated to the competent persons in accordance with Regulation 7¹⁹, the competent person who is to exercise the concurrent powers shall, as soon as is practicable and prior to taking any further steps with respect to the particular case, inform the complainant of the determination made.

6.8.3 Intervention H.3

The same principle will apply when the two Authorities decide to transfer a case in accordance with that stated under “Intervention G” above. Hence, the same regulation allowing for the transfer of cases would state the following:

Regulation 9(3)

Upon the case being transferred, and prior to the transferee exercising any concurrent powers, the transferor shall, where applicable, notify the parties to the investigation that the transfer has been effected.

¹⁹ refer to Intervention F above

Questions

27. Do you agree with the principles reflected in Legislative Interventions Group H?
28. Do you agree with the manner in which the principles are reflected in legislation?
29. Are the proposed provisions sufficiently clear?

6.9 Group I - Least intrusive form of intervention

Quite apart from the solution mooted in part 5 of this Consultation Paper, the need has been felt to reflect in law the principle that, where a particular anti-competitive conduct may be effectively remedied through more than one form of intervention, the least intrusive intervention should be allowed to be applied to the exclusion of the other forms of intervention. This principle is of particular importance to the communications sector. In this sense, *ex ante* obligations are imposed to promote competition in a particular market and enforcement procedures in relation to such obligations are deemed to be less cumbersome than an *ex post* investigation of a breach of competition law. Hence, it is believed that, where a breach of an *ex ante* obligation may also give rise to a breach of *ex post* competition law and an enforcement action with respect to the *ex ante* obligation may effectively remedy the anti-competitive conduct and its effect on the market, then such action should take precedence over an *ex post* investigation. This is held bearing in mind that parallel investigations with respect to a particular case should, where possible, be avoided.

In accordance with this, it is proposed that the following provision be inserted in the Competition Act:

The Director may desist from, or suspend, any investigation if he considers that the case being, or to be, investigated may be effectively resolved through the adoption of other remedial measures. In doing so, where applicable, the Director shall inform the person lodging the complaint of his action giving his reasons therefor:

Provided that the Director may resume or commence the investigation at any time after having desisted or suspended an investigation where he has reason to believe that the circumstances of the case so warrant.

Questions

30. Do you agree with the principles reflected in Legislative Interventions Group I?
31. Do you agree with the manner in which the principles are reflected in legislation?
32. Are the proposed provisions sufficiently clear?

6.10 Group J – Keeping the regulatory and competition law frameworks distinct

In view of the distinct rights and obligations, as well as procedures, linked to the two frameworks, namely the regulatory framework for communications and the Competition Act, it is of fundamental importance that, once it may exercise the concurrent powers, the MCA specifies from the outset under which framework it is acting with respect to a particular case.

6.10.1 Intervention J.1

In order to clearly reflect the above in law, it is proposed that a new provision be introduced in the MCA Act, which would state the following:

The Authority shall when exercising its concurrent powers under the Competition Act, notify in writing the parties to a case under which legal framework it is acting.

6.10.2 Intervention J.2

Closely linked to the principle in Group I above, i.e. that the MCA will always aim at least intrusive effective means of intervention, and in accordance with the principles that underpin the communications regulatory framework, it would aim at resorting to the Competition Act only where, in its view, the enforcement of regulatory obligations will not settle the anti-competitive issue effectively. Hence, a new provision to Part VII of MCA Act would be introduced to reflect this principle and would read:

The Authority shall not exercise its powers under this Act if it has notified the parties to a case that it is acting under the Competition Act with respect to the infringement in question.

6.10.3 Intervention J.3

It ought to be specified also that the powers of the MCA, the procedures for investigation and the administrative fines under the MCA Act will not apply when the MCA is exercising the concurrent powers. Hence, it is proposed to introduce a new provision at the beginning of Part VII of the Competition Act, which would state the following:

The provisions of Part VII of this Act shall not apply when the Authority acts in accordance with its concurrent powers under the Competition Act.

This provision will be complemented by a provision in the Competition Act reading:

A competent regulatory authority shall exercise concurrent powers strictly in accordance with this²⁰ Act.

²⁰ the Competition Act

6.10.4 Intervention J.4

Finally, it ought to be clearly specified that decisions issued by the MCA under their concurrent powers will not be appealable to the Communications Appeals Board. They would, however, be subject to the ordinary right of recourse laid down in the Competition Act. To this end, it is proposed that a new provision be inserted at the top of Part VIII of the MCA Act stating the following:

The provisions of Part VIII of this Act shall not apply in relation to any decisions that the Authority may take in accordance with its concurrent powers under the Competition Act.

Questions

33. Do you agree with the principles reflected in Legislative Interventions Group J?
34. Do you agree with the manner in which the principles are reflected in legislation?
35. Are the proposed provisions sufficiently clear?

7. Conclusion

By virtue of the solution proposed in Part 5 of this Consultation Document, this Ministry seeks to overcome the various hurdles that could impair an effective comprehensive resolution of competition-related issues in the communications sector. It is deemed that the solution mooted in this document, whereby the better placed Authority investigates a competition case, is the most efficient one even in view of Malta's size and limited financial and human resources.

The various legislative interventions proposed in Part 5 above seek to achieve the desired level of legal clarity required to allow for a smooth implementation of the proposed solution. In laying down the proposed legislative interventions, great attention was paid not to affect the rights of parties to an investigation under the Competition Act.

This Ministry trusts that respondents to this Consultation will recognise the need for the reform being proposed and, in doing so, will induce relevant responses which can be analysed by this Ministry to enable it to make appropriate recommendations on the way forward to Government.

Appendix – Proposed Legislative Amendments

Insert Date

A BILL entitled

An Act to amend various laws relating to competition and to make provision with respect to matters ancillary thereto or connected therewith.

BE IT ENACTED by the President, by and with the advice and consent of the House of Representatives, in this present Parliament assembled, and by the authority of the same, as follows:

Title and commencement

1. (1) The short title of this Act is the Competition Laws (Amendment) Act, 2007.

(2) This Act shall come into force on such date as the Minister responsible for competition may by notice in the Gazette appoint, and different dates may be so appointed for different provisions and different purposes of this Act.

PART I

AMENDMENT OF THE COMPETITION ACT

Amendment of the Competition Act, Cap.379

2. (1) This Part amends the Competition Act, and it shall be read and construed as one with the Competition Act, hereinafter in this Part referred to as “the principal Act”.

(2) This Part shall come into force on such date as the Minister responsible for competition may by notice in the Gazette appoint and different dates may be so appointed for different provisions and different purposes thereof.

Amendment of article 2 of the principal Act

3. Article 2 of the principal Act shall be amended as follows:

(a) Immediately after the definition of the word “Commission” there shall be added the following new definitions:

“ “competent person” means the Director and, or any of the regulatory authorities listed in the Second Schedule to this Act;

“competent regulatory authority” means a regulatory authority listed in the Second Schedule to this Act and which authority regulates those commercial activities as may be stated in the aforesaid Schedule;

“concurrent powers” means the powers referred to in article 3B of this Act;”.

(b) in the definition of “Director” after the words “under article 3;” there shall be added the following proviso:

“ Provided that any reference to the Director in or under this Act shall also be construed as referring to a competent regulatory authority insofar as that authority is exercising the powers granted to it in accordance with article 3B of this Act;”.

Addition of new articles 3A and 3B to the principal Act

4. Immediately after article 3 of the principal Act there shall be added the following new articles:

“Designation of competent regulatory authorities

3A. (1) The Minister may, from time to time, by Order designate regulatory authorities to be competent regulatory authorities for the purposes of this Act.

(2) The said regulatory authorities shall be listed in the Second Schedule to this Act.

(3) The Minister may, from time to time, amend the Second Schedule to this Act.

“Exercise of concurrent powers

3B. (1) A competent regulatory authority shall be entitled to exercise concurrently with the Director, the powers that the Director has under this Act in relation to the investigation and determination of any breach of article 5 and, or of article 9 of this Act and, or of article 81, and, or of article 82 of the EC Treaty.

(2) A competent regulatory authority shall exercise concurrent powers strictly in accordance with this Act:

Provided that in relation to any one case, such concurrent powers shall only be exercised at any one time by a single competent person.

(3) If any question arises between two or more competent persons as to which of them should exercise concurrent powers in a particular case, such question shall be referred to and determined by the Minister, in accordance with any Regulations as may be made in this regard:

Provided that the Minister may appoint another person to act in his stead with respect to the exercise of the power referred to above.

(4) No objection shall be taken to anything done under, by or in relation to a competent person under this Act on the ground that it should have been done under, by, or in relation to another competent person.”

Amendment of article 12 of the principal Act

5. Article 12 of the principal Act shall be amended as follows:

(a) The following proviso shall be added to sub-article (10) thereof:

“ Provided that sub-article (10) shall not apply to a disclosure of information between the Director and a competent regulatory authority where such disclosure is made for the purpose of facilitating the performance of concurrent powers or the performance of the regulatory functions at law by that competent regulatory authority:

Provided further that in respect of any information as may be disclosed, the receiving competent regulatory authority shall ensure the same level of confidentiality as the Director.”

(b) Immediately after sub-article (10) there shall be added the following new sub-article:

“(11) Competent persons shall provide each other with the information necessary for the application of the provisions of this Act which information shall be provided within an appropriate timeframe taking into consideration the particular circumstances of the issues involved. In respect of the information exchanged, the receiving competent person shall ensure the same level of confidentiality as the originating competent person.”

Addition of new article 14A of the principal Act

6. Immediately after article 14 of the principal Act there shall be added the following new article:

Investigations by another public regulatory authority relating substantively to the same case

14A. The Director may desist from, or suspend, any investigation if he considers that the case being, or to be investigated may be effectively resolved through the adoption of other remedial measures. In doing so, where applicable, the Director shall inform the person lodging the complaint of his action giving his reasons therefore:

Provided that the Director may resume or commence the investigation at any time after having desisted or suspended an investigation where he has reason to believe that the circumstances of the case so warrant.”

Amendment of article 33 of the principal Act

7. Article 33 of the principal Act shall be amended as follows:

(a) Immediately after paragraph (b) of sub-article (1) of article 33 of the principal Act there shall be added the following new paragraph:

“(c) provide for the manner as to how concurrent powers shall be exercised by the Director and competent regulatory authorities:

Provided that without prejudice to the generality of paragraph (c), such regulations may, in particular, provide:

- i) For the procedure to be followed by competent persons when determining who is to exercise concurrent powers in any given case;
- ii) For the steps to be taken before a competent person exercises, in a particular case, concurrent powers;
- iii) For the procedure for determining, in a particular case, questions arising as to which competent person is to exercise concurrent powers;
- iv) For the extent to, and manner in, which the concurrent powers may be transferred from one competent person to another, when such powers are being, or have been, exercised by a competent person;
- v) for notification as to which competent person is exercising concurrent powers in respect of a particular case;

Provided further that before making any regulations under this paragraph the Minister shall consult the Minister or Ministers responsible for the competent regulatory authorities to whom such regulations may apply.”

- (b) In paragraph (a) of subarticle (2) thereof, the words “the power to the Office for Fair Competition” shall be substituted with the words “the power to the Office for Fair Competition or a competent regulatory authority”.

Renumbering of the Schedule to the principal Act

8. The Schedule to the principal Act shall be renumbered as the “First Schedule” and all references to the “Schedule” under any law shall be read and construed as references to the “First Schedule”.

Addition of a new Schedule to the principal Act

9. After the First Schedule to the principal Act there shall be added the following new schedule:

**“SECOND SCHEDULE
(Article 3A)**

1. Competent regulatory authorities listed for the purposes of Article 2 of this Act:

- Malta Communications Authority.

2. (1). The Malta Communications Authority shall exercise its concurrent powers under this Act in relation to commercial activities connected with:

- (a) The provision of electronic communications networks;
- (b) The provision of electronic communications services;
- (c) The provision of postal services;

- (d) The provision, or making available, of services or facilities provided or made available:
- (i) by means of, or in association with the provision, by the same person or another of, an electronic communications network or electronic communications service; or
 - (ii) for the purpose of facilitating the use of any such network or service, whether provided by the same person or another;
- (e) The supply of apparatus used for providing or making available anything mentioned in the preceding paragraphs;
- (f) The provision of television or audio content.

Cap. 254
Cap. 399

(2) The term “postal services shall have the meaning given to it under the Postal Services Act, whereas the terms “electronic communications networks” and “electronic communications services” shall have the meanings given to them under the Electronic Communications (Regulation) Act.

Transitory provision

10. The provisions of the Competition Act as in force prior to the coming into force of the Competition Laws (Amendment) Act 2007, shall continue to apply in respect of anything done or omitted to be done by any person prior to the coming into force of Part I the said Act.

PART II

AMENDMENT OF THE MALTA COMMUNICATIONS AUTHORITY ACT

Amendment of the Malta Communications Authority Act, Cap.418

11. (1) This Part amends the Malta Communications Authority Act, and it shall be read and construed as one with the Malta Communications Authority Act, hereinafter in this Part referred to as “the principal Act”.

(2) This Part shall come into force on such date as the Minister responsible for communications, with the concurrence of the Minister responsible for competition, may by notice in the Gazette appoint and different dates may be so appointed for different provisions and different purposes thereof.

Renumbering of article 29

12. Article 29 of the principal Act shall be renumbered as article 29A

Addition of a new article 29

13. There shall be added the following new article 29 immediately before article 29A:

“Exercise of concurrent powers under the Competition Act
Cap.379

29. (1) The provisions of Part VII of this Act shall not apply when the Authority acts in accordance with its concurrent powers under the Competition Act.

(2) The Authority shall when exercising its concurrent powers under the Competition Act, notify in writing the parties to a case under which legal framework it is acting.

(3) The Authority shall not exercise its powers under this Act if it has notified the parties to a case that it is acting under the Competition Act with respect to the infringement in question.”

Renumbering of article 36

14. Article 36 of the principal Act shall be renumbered as article 36A

Addition of a new article 36

15. There shall be added the following new article 36 immediately before article 36A:

**“Part VIII does not apply to decisions of the Authority under the Competition Act
Cap.379**

36. The provisions of Part VIII of this Act shall not apply in relation to any decisions that the Authority may take in accordance with its concurrent powers under the Competition Act.”

Transitory provision

16. The provisions of the Malta Communications Authority Act as in force prior to the coming into force of the Competition Laws (Amendment) Act 2007, shall continue to apply in respect of anything done or omitted to be done by any person prior to the said coming into force of Part II of the said Act.

Objects and reasons

The object of this Bill is to amend various laws relating to competition law and to regulate the exercise of concurrent powers under the Competition Act by different public regulatory authorities.

L.N. of 2007

**COMPETITION ACT
(CAP. 379)**

IN exercise of the powers conferred by article 33 of the Competition Act, the Minister for Competitiveness and Communications, has made the following regulations:-

Citation and commencement

1. (1) The title of these regulations is the Competition Act (Concurrency) Regulations, 2007.

(2) The regulations shall come into force on such day as the Minister responsible for competition may by notice in the Gazette prescribe, provided that different dates may be prescribed for different provisions or purposes of these regulations.

Interpretation

2. (1) Any reference in these regulations to the "Act" is a reference to the Competition Act, and unless provided otherwise in these regulations the provisions of article 2 of that Act shall apply to these regulations.

(2) In these regulations unless the context otherwise requires:

"competent persons concerned" means the competent persons which in accordance with the provisions of the Act, may be entitled to exercise concurrent powers in relation to a particular case;

"transferor" means the competent person who has exercised concurrent powers with regard to a particular case and agrees with another competent person to transfer that case to another competent person; and

"transferee" means the competent person to whom the transferor has transferred a case for investigation in accordance with these regulations."

Exercise of concurrent powers

3. A competent regulatory authority shall exercise concurrent powers in accordance with the provisions of the Act:

Provided that it shall do so only in relation to the activities with respect to which it has been empowered to exercise concurrent powers in the Second Schedule thereto.

Obligation to notify

4. (1) Upon becoming aware of a case with respect to which concurrent powers may be exercised, whether by virtue of a complaint being lodged before a competent person, or otherwise, the competent person concerned shall, within five working days from the acquisition of such information, notify the other competent person which may exercise concurrent powers, of the said case.

(2) In doing so, the notifying competent person may send to the other competent person any information received with respect to the particular case.

Agreement on the exercise of concurrent powers

5. Upon notification as prescribed in the regulation 4, the competent persons concerned shall without delay, agree which of them shall exercise concurrent powers:

Provided that until agreement is reached a competent person shall not take any further steps with respect to the said case without the prior approval of the other competent person.

Criteria in determining which competent persons deals with a case

6. (1) In determining which competent person shall deal with a case, the competent persons concerned shall give utmost regard to the following:

- (a) the sectoral knowledge of a competent person,
- (b) whether the case affects more than one regulatory sector,
- (c) previous contact relating to the case between any of the parties or complainants involved, and a competent person,
- (d) experience in dealing with similar issues relating to the case to be or being investigated, and,
- (e) the need to prevent the duplication of procedures concerning identical market issues.

(2) Without prejudice to the generality of the foregoing, where a particular case may impact significantly on the level of competition in a sector or market regulated by a competent regulatory authority, the said competent regulatory authority shall, unless otherwise agreed to by the competent persons concerned, exercise the concurrent powers.

Failure to agree and determination as to which competent person shall exercise concurrent powers

7. (1) Where the competent persons fail within a reasonable time to reach an agreement in accordance with regulation 5, they shall in accordance with article 3A of the Act jointly refer the matter to the Minister. In doing so each of the competent persons concerned shall make their submissions on the matter:

Provided that prior to a determination being made and communicated to the competent persons in accordance with this regulation none of the competent persons concerned shall take any further steps with respect to the case in relation to which concurrent powers are to be exercised.

(2) Upon receiving such a referral, the Minister shall, within 8 working days of receipt of a communication in terms of paragraph 1 of this regulation, determine which competent person is to exercise the concurrent powers, and the Minister shall communicate his decision to the competent persons concerned.

Notification of the competent authority exercising concurrent powers

8. (1) Upon agreement being reached between the competent persons concerned in accordance with regulation 5, the competent person who is to exercise the concurrent powers shall, as soon as is practicable and prior to taking any further steps with respect to the particular case, inform the complainant of the agreement reached between the competent persons concerned.

(2) Upon a determination being made and communicated to the competent persons in accordance with Regulation 7, the competent person who is to exercise the concurrent powers shall, as soon as is practicable and prior to taking any further steps with respect to the particular case, inform the complainant of the determination made.

Transfer of case from one competent person to another

9. (1) A competent person who has exercised concurrent powers may, during the course of an investigation, upon reaching agreement with another competent person, transfer the case to the transferee if, in the opinion of the competent persons concerned, it transpires that the transferee is better placed, in accordance with the criteria listed in Regulation 6, to conduct the investigation and determine the outcome of the case.

(2) Upon the transferor and the transferee proposing to agree to a transfer in accordance with sub-regulation 1, but prior to the transfer being completed, the transferor shall, as soon as is practicable, notify in writing, where applicable, the complainant and, or the undertaking that is the subject of the investigation, of the agreement reached between the competent persons and invite the said parties to the investigation to make written submissions within a reasonable timeframe to be set by the transferor.

Provided that prior to effecting the transfer of the case, the competent persons shall take into consideration the submissions made by the parties to the investigation:

Provided further that no right of objection will rest with the complainant or with any other person, with respect to the competent persons' decision to transfer the case or otherwise.

(3) Upon the case being transferred, and prior to the transferee exercising any concurrent powers, the transferor shall, where applicable, notify the parties to the investigation that the transfer has been effected.