

MERGER NOTIFICATION AND PROCEDURES TEMPLATE

MALTA

JAN. 2006

IMPORTANT NOTE: This template is intended to provide initial background on the jurisdiction's merger notification and review procedures. Reading the template is not a substitute for consulting the referenced statutes and regulations.

1. Merger notification and review materials (please provide title(s), popular name(s), and citation(s)/web address)

A. Notification provisions	Reg. 5 of the Regulations on Control of Concentrations 2002 (L.N. 294 of 2002)
B. Notification forms or information requirements	Form CN
C. Substantive merger review provisions	Reg. 4 of the Regulations on Control of Concentrations 2002 (L.N. 294 of 2002)
D. Implementing regulations	None
E. Interpretive guidelines and notices	Guidelines on Efficiencies Guidelines on Assessment of Failing Firms and Exiting Assets Commission Notice on Calculation of Turnover Commission Notice on the Concept of Concentration

	<p><u>Commission Notice on the Concept of full-function joint ventures under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings</u></p> <p><u>Commission Notice on the concept of undertakings concerned</u></p> <p><u>Commission Notice on the definition of the relevant market for the purposes of Community competition law.</u></p> <p><u>Commission notice regarding restrictions ancillary to concentrations</u></p>
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2. Authority or authorities responsible for merger enforcement.

A. Name of authority. If there is more than one authority, please describe allocation of responsibilities.	Consumer and Competition Division, Office for Fair Competition.
B. Address, telephone and fax (including country code), e-mail, website address and languages available.	Office for Fair Trading Cannon Road, St. Venera CMR 02, Malta Tel: 00356 446258 Fax: 00356 446257 Email: fair.trading@gov.mt Website: www.mes.gov.mt Languages: English
C. Is agency staff available for pre-notification consultation? If yes, please provide contact points for questions on merger filing requirements and/or consultations.	Yes, Dr Stefan Vella Tel: 00356 21440193 Email: stefan.a.vella@gov.mt

3. Covered transactions

A. Definitions of potentially covered transactions (*i.e.*, concentration or merger)

(i) the merging of two or more undertakings that were previously independent from each other; or

(ii) the acquisition by one or more undertakings or by one or more persons already controlling at least one undertaking, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings; or

(iii) the creation of a full-function joint venture, *i.e.* a joint venture performing on a lasting basis all the functions of an autonomous economic entity

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

excluding the following:

- the holding on a temporary basis by credit or financial institutions or insurance companies, the normal activities of which include transactions and dealings in equity securities for their own account or for the account of others, of equity securities which they have acquired in an undertaking with a view to reselling them, provided that they do not exercise voting rights in respect of those equity securities with a view to determining the competitive behaviour of that undertaking or provided that they exercise such voting rights only with a view to preparing the disposal of all or part of that undertaking or of its assets or the disposal of those equity securities and that any such disposal takes place within two years of the date of acquisition or such longer period as the Director of the Office for Fair Competition may determine upon request by the institution or company concerned where it is shown that the disposal was not reasonably possible within two years;

- control is acquired by the person or entity competent according to law to conduct liquidation, winding up, insolvency, cessation of payment, compositions or analogous proceedings;

- control is acquired by a company the sole object of which

	is to acquire <i>holdings</i> in other undertakings and to manage such <i>holdings</i> and turn them to profit without involving itself directly or indirectly in the management of those undertakings, without prejudice to their rights as shareholders, provided however that the voting rights in respect of the holding are exercised, in particular in relation to the appointment of members of the management and supervisory bodies of the undertakings in which they have <i>holdings</i> , only to maintain the full value of those investments and not to determine directly or indirectly the competitive conduct of those undertakings
B. If change of control is a determining factor, how is control defined?	<p>“Control ” means having the possibility of exercising decisive influence on an undertaking, in particular</p> <p>(i) through ownership or the right to use all or part of the assets of an undertaking; or</p> <p>(ii) through rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking; provided that even persons or undertakings not holding such rights or entitled to such rights under the contract concerned are deemed to have acquired control if they have the power to exercise the rights deriving therefrom.</p>
C. Are partial (less than 100%) stock acquisitions/minority shareholdings covered? At what levels?	They are not specifically mentioned in the legislation, but if they bring about a change in control, there will be a concentration within the meaning of the Regulations.
D. Do the notification requirements cover joint ventures? If so, what types (e.g., production joint ventures)?	They cover all full-function joint ventures

4. Thresholds for notification

A. What are the general thresholds for notification?	Aggregate turnover in Malta of the undertakings concerned in the preceding financial year exceeding Lm750,000 (equivalent to 1.8m Euro). Not subject to adjustment.
B. To which entities do the merger notification	<p>The undertakings considered for threshold purposes are the following:</p> <p>(i) the undertaking concerned by the merger;</p>

<p>thresholds apply, i.e., which entities are included in determining relevant undertakings/firms for threshold purposes? If based on control, how is control determined?</p>	<p>(ii) those undertakings in which the undertaking concerned, directly or indirectly:</p> <ul style="list-style-type: none"> -owns more than half the capital or business assets, or -has the power to exercise more than half the voting rights, or -has the power to appoint more than half the members of the board of directors or other body or bodies legally representing the undertakings, or -has the right to manage the undertakings ' affairs; <p>(iii) those undertakings which have in the undertaking concerned the rights or powers listed in (ii)</p> <p>(iv) those undertakings in which an undertaking as referred to in (iii) has the rights or powers listed in (ii)</p> <p>(v) those undertakings in which two or more undertakings as referred to in (i) to (iv) jointly have the rights or powers listed in (ii).</p>
<p>C. Are the thresholds subject to adjustment: (e.g. annually for inflation)? If adjusted, state on what basis and how frequently.</p>	<p>NO</p>
<p>D. To what period(s) of time do the thresholds relate (e.g., most recent calendar year, fiscal year; for assets-based tests, calendar year-end, fiscal year-end, other)?</p>	<p>Preceding financial year</p>
<p>E. Describe the methodology for identifying and calculating any values necessary to determine if notification is required, including the value of the transaction, the relevant sales or turnover, and/or</p>	<p>(1) The “Aggregate turnover” of the undertakings concerned comprises the amounts derived by the undertakings concerned in the preceding financial year from the sale of products and the provision of services to other undertakings or consumers falling under the undertakings’ ordinary activities after deduction of sales rebates and of value added tax and other taxes directly related to turnover:</p>

the relevant assets.

Provided that the aggregate turnover of an undertaking concerned shall not include the sale of products or the provision of services between any of the undertakings referred to in B above.

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

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

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

(i) interest income and similar income;

(ii) income from securities:

-income from shares and other variable yield securities,

-income from participating interests,

-income from shares in affiliated undertakings;

(iii) commissions receivable;

(iv) net profit on financial operations;

(v) other operating income.

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

	<p>premiums.</p> <p>(5) Where undertakings concerned by the concentration jointly have the rights or powers listed in B(ii) above, in calculating the aggregate turnover of the undertakings concerned, no account is taken of the turnover resulting from the sale of products or the provision of services between the joint undertaking and each of the undertakings concerned or any other undertaking connected with any one of them, as set out B(ii) to (v) above but account is taken of the turnover resulting from the sale of products and the provision of services between the joint undertaking and any third undertakings, this turnover being apportioned equally amongst the undertakings concerned.</p>
<p>F. Describe methodology for calculating exchange rates.</p>	
<p>G. Do thresholds apply to worldwide sales/assets, to sales/assets within the jurisdiction, or both?</p>	<p>Turnover within Malta only</p>
<p>H. Can a single party trigger the notification threshold (e.g., one party's sales, assets, or market share)?</p>	
<p>I. How is the nexus to the jurisdiction determined (e.g., sales or assets in the jurisdiction)? If based on an "effects doctrine," please describe how this is applied. Is there a requirement of local presence (local assets/affiliates/subsidiaries) or are import sales into the jurisdiction sufficient to meet an "effects" test?</p>	<p>By means of turnover</p>
<p>J. If national sales are relevant, how are they allocated geographically (e.g., location of</p>	<p>By the location of seller</p>

customer, location of seller)?	
K. If market share tests are used, are there guidelines for calculating market shares?	There are no market share tests for the purpose of notification.
L. Are there special threshold calculations for particular sectors (e.g., banking, airlines, media) or particular types of transactions (e.g. joint ventures, partnerships, financial investments)?	NO
M. Are any sectors excluded from notification requirements? If so, which sectors?	
N. Are there special rules regarding jurisdictional thresholds for transactions in which both the acquiring and acquired parties are foreign?	NO
O. Does the agency have the authority to review transactions that fall below the thresholds?	

5. Notification requirements and timing of notification

A. Is notification mandatory pre-merger?	Concentrations shall be notified to the Director not more than one week after the conclusion of the agreement, or the announcement of the public bid, or the acquisition of a controlling interest, whichever is the earliest.
B. Is notification mandatory post-merger?	see above point A

<p>C. Can parties make a voluntary merger filing even if filing is not mandatory? If so, when?</p>	<p>NO</p>
<p>D. What is the earliest that a transaction can be notified (e.g., is a definitive agreement required; if so, when is an agreement considered definitive?)?</p>	<p>Either on conclusion of the agreement or the announcement of the public bid or the acquisition of a controlling interest, whichever is the earliest.</p>
<p>E. Must notification be made within a specified period following a triggering event? If so, describe the triggering event (e.g., definitive agreement) and the deadline following the event. Do the deadline and triggering event depend on the structure of the transaction? Are there special rules for public takeover bids?</p>	<p>Within one week from the events mentioned in A, whichever is the earliest.</p>
<p>F. Can parties request an extension for the notification deadline? If yes, please describe the procedure and whether there is a maximum length of time for the extension.</p>	

6. Simplified procedures

<p>Describe any special procedures for notifying transactions that do not raise competition concerns (e.g., short form, simplified procedures, advanced ruling certificates, discretion to waive certain responses,</p>	<p>The simplified procedure applies to the following categories of concentrations that are deemed not to raise serious doubts as to their legality in terms of the provisions of the Regulations, unless the Director of the Office for Fair Competition in exceptional cases and in view of the economic conditions pertaining to the market and the parties to the concentration deems otherwise:</p>
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etc.).

(i) two or more undertakings acquire joint control of a joint venture, provided that the joint venture has no, or negligible, actual or foreseen activities within the territory of Malta because the turnover of the joint venture and/or the turnover of the contributed activities is less than Lm 300,000 in the territory of Malta and the total value of assets transferred to the joint venture is less than Lm 300,000 in the territory of Malta;

(ii) two or more undertakings merge, or one or more undertakings acquire sole or joint control of another undertaking, provided that none of the parties to the concentration are engaged in business activities in the same product and geographical market, or in a product market which is upstream or downstream of a product market in which any other party to the concentration is engaged;

(iii) two or more undertakings merge, or one or more undertakings acquire sole or joint control of another undertaking and two or more of the parties to the concentration are engaged in business activities either in the same product

and geographical market and their combined market share is less than 15% or in a product market which is upstream or downstream of a product market in which any other party to the concentration is engaged and their combined market share is less than 25%.

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

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

(3) The simplified procedure shall not be applicable to the creation of full-function joint ventures involving coordination of competitive behaviour of undertakings that remain independent in terms of the Regulations.

(4) If the Director is satisfied that the concentration qualifies for the simplified procedure, he shall issue a short-form decision declaring the concentration lawful in terms of the provisions of the Regulations within four weeks from the date of notification:

	<p>Provided that in the period leading to the four weeks deadline, the option of reverting to a normal first phase merger procedure and thus launching investigations and/or adopting a full decision remains open to the Director, should he judge such action appropriate in the case in question.</p> <p>(5) Unless otherwise decided by the Director, the simplified procedure for the approval of concentrations shall also apply to restrictions directly related and necessary to the implementation of the concentration.</p>
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7. Documents to be submitted

<p>A. Describe the types of documents that parties must submit with the notification (e.g., agreement, annual reports, market studies, transaction documents).</p>	
<p>B. Are there any document legalization requirements (e.g., notarization or apostille)?</p>	
<p>C. Are there special rules for exemptions from information requirements (e.g. information submitted or document legalization) for transactions in which the acquiring and acquired parties are foreign?</p>	

8. Translation

<p>A. In what language(s) can the notification forms be submitted?</p>	<p>Documents can be submitted either in English or in Maltese.</p>
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<p>B. Describe any requirements to submit translations of documents with the initial notification, or later in response to requests for information, including the categories or types of documents for which translation is required, requirements for certification of the translation, language(s) accepted, and whether summaries or excerpts are allowed in lieu of complete translations.</p>	<p>The law does not say anything on requirements for certification, but as a matter of policy, certification may be required</p>
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9. Review periods

<p>A. Describe any applicable review periods following notification.</p>	<p>1st phase – 6 weeks but shall be increased to 2 months if after notification and not later than the end of the 5th week the undertakings concerned submit commitments.</p> <p>2nd phase – 4 months</p>
<p>B. Are there different rules for public tenders (e.g. open market stock purchases or hostile bids)?</p>	<p>Yes. Notification does not prevent the implementation of a public bid which has been notified to the Director provided that the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of those investments and on the basis of a derogation granted by the Director in terms of the Regulations.</p>
<p>C. What are the procedures for an extension of the review periods, if any (e.g., suspended by requests for additional information, suspended at the authority's discretion or with the parties' consent)? Is there a statutory maximum for extensions?</p>	

<p>D. What are the procedures for accelerated review of non-problematic transactions, if any?</p>	<p>Under the simplified procedure duration of 1st phase is 4 weeks instead of 6 weeks.</p>
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10. Waiting periods / suspension obligations

<p>A. Describe any waiting periods/suspension obligations following notification, including whether closing is suspended or whether the implementation of the transaction is suspended or whether the parties are prevented from adopting specific measures (e.g., measures that make the transaction irreversible, or measures that change the market structure), during any initial review period and/or further review period.</p>	<p>In the 1st phase, after the end of the 5th week the undertakings concerned may request suspension of periods for a period of 3 weeks to discuss a new commitment proposed but would be granted at the discretion of the Director of the Office for Fair Competition.</p> <p>In the 2nd phase suspension for a period of up to one month may be requested by the undertakings concerned when they submit commitments and request will be generally acceded to. But concentration is suspended only during the 1st phase.</p>
<p>B. Can parties request a derogation from waiting periods/suspension obligations? If so, under what circumstances?</p>	
<p>C. Are the applicable waiting periods/suspension obligations limited to aspects of the transaction that occur within the jurisdiction (e.g., acquisition or merger of local undertakings/business units)? If not, to what extent do they apply to the parties' ability to proceed with the transaction outside the jurisdiction? Describe any procedures available to permit consummation</p>	<p>Under the Regulation, no distinction is made as to whether the transaction occurs within or outside the jurisdiction.</p>

<p>outside the jurisdiction prior to the expiration of the local waiting period and/or clearance (e.g. request for a derogation from the suspension obligations, commitment to hold separate the local business operations, escrow agents.)</p>	
<p>D. Are parties allowed to close the transaction if no decision is issued within the statutory period?</p>	
<p>E. Describe any provisions or procedures available to the enforcement authority, the parties and/or third parties to extend the waiting period/suspension obligation.</p>	<p>See A above but these periods may be suspended by the Office where information is lacking or incorrect or incomplete or parties do not cooperate during the investigation as established by the Regulations.</p>
<p>F. Describe any procedures for obtaining early termination of the applicable waiting period/suspension obligation, and the criteria and timetable for deciding whether to grant early termination.</p>	<p>Upon a reasoned request before notification or after the transaction, after taking into account inter alia the effects of the suspension on one or more undertakings concerned by a concentration or on a third party and the threat to competition posed by the concentration, the Director of the Office may grant a derogation from the obligation to suspend the concentration during the first phase. But such a derogation may be made subject to conditions and obligations in order to ensure conditions of effective competition.</p>
<p>G. Describe any provisions or procedures allowing the parties to close at their own risk before waiting periods expire or clearance is granted (e.g., allowing the transaction to close if no "irreversible measures" are taken).</p>	<p>No such provision exists.</p>

11. Responsibility for notification / representation

A. Who is responsible for notifying – the acquiring person(s), acquired person(s), or both? Does each party have to make its own filing?	The acquiring person(s).
B. Do different rules apply to public tenders (e.g. open market stock purchases or hostile bids)?	No. If it is a public bid, it is the bidder.
C. Are there any rules as to who can represent the notifying parties (e.g., must a lawyer representing the parties be a member of a local bar)?	No. The only requirement is that the representative must produce written proof of authorisation.
D. How does the validity of the representation need to be attested (e.g., power of attorney)? Are there special rules for foreign representatives or firms? Must a power of attorney be notarized, legalized or apostilled?	Written proof of authorisation. No special rules for foreign representatives or firms, but legalisation maybe required.

12. Filing fees

A. Are any filing fees assessed for notification? If so, in what amount and how is the amount determined (e.g., flat fee, fees for services, tiered fees based on complexity, tiered fees based on size of transaction)?	NO
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B. Who is responsible for payment?	
C. When is payment required?	
D. What are the procedures for making payments (e.g., accepted forms of payment, proof of payment required, wire transfer instructions)?	

13. Confidentiality

A. To what extent, if any, does your agency make public the fact that a pre-merger notification filing was made or the contents of the notification?	The Director of the Office for Fair Competition on notification publishes in the Government Gazette and a daily newspaper the fact of the notification, the names of the parties, the nature of the concentration and the economic sectors involved. In so doing he/she shall take account of the legitimate interest of undertakings in the protection of their business secrets.
B. Do notifying parties have access to the authority's file? If so, under what circumstances can the right of access be exercised?	Access to the file shall be open to the parties directly involved, upon their written request, subject to the legitimate interest of undertakings in the protection of their business secrets.
C. Can third parties or other government agencies obtain access to notification materials? If so, under what circumstances?	NO
D. Are procedures available to request confidential treatment of the fact of notification and/or notification materials? If	When notifying, if the parties believe that their interests would be harmed if any of the information being supplied were to be published or otherwise divulged to other parties, they may submit this information separately with each page clearly marked "Business Secrets" giving also the reasons

so, please describe.	why this information should not be divulged or published.
E. Is the agency or government a party to any agreements that permit the exchange of information with foreign competition authorities? If so, with which foreign authorities? Are the agreements publicly available?	No though the Competition Act specifically authorizes the Office to enter into such agreements.
F. Can the agency exchange documents or information with other reviewing agencies? If so, does it need the consent from the parties who have submitted confidential information to exchange such information?	

14. Transparency

A. Does the agency publish an annual report? Please provide the web address if available.	
B. Does the agency publish press releases related to merger policy or investigations?	
C. Does the agency publish decisions on why it cleared / blocked a transaction?	

15. Sanctions/penalties

<p>A. What are the sanctions/penalties for failure to file a notification and/or failure to observe any mandatory waiting periods/suspension obligations?</p>	<p>Fine of Lm100 – Lm1000 (equivalent to 240 – 2400 Euro) or imprisonment for a term from 3 to 6 months or both – for failing to notify and fine from 1 to 10% of turnover not being less than Lm3000 (7200 Euros) for breaching mandatory waiting period.</p>
<p>B. Which party/ies are potentially liable?</p>	<p>Parties obliged to notify.</p>
<p>C. Can the agency impose/order these sanctions/penalties directly, or is it required to bring judicial action against the infringing party? If the latter, please describe the procedure and indicate how long this procedure can take.</p>	

16. Judicial review

<p>Describe the provisions and timetable for judicial review or other rights of appeal/review of agency decisions on merger notification and review.</p>	<p>The undertakings or association of undertakings concerned and any third party entitled to a hearing under the Regulations may within fifteen days of the notification of the Director’s final decision or in the case of third parties within fifteen days of its publication, request him/her to submit the same for review by the Commission for Fair Trading and the Director is obliged to comply with such request:</p> <p>Provided that the submission of a decision for review by the Commission shall not suspend the decision of the Director unless the Commission in exceptional circumstances otherwise directs.</p> <p>The decision of the Commission is final.</p>
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17. Additional filings

Are any additional filings/clearances required for some types of transactions, e.g., sectoral regulators, securities regulator?

NO

18. Closing deadlines

When a transaction is cleared or approved, is there a time period within which the parties must close for it to remain authorized?

NO

19. Post merger review of transactions

Can the agency reopen an investigation of a transaction that it previously cleared or allowed to proceed with conditions? If so, are there any limitations, including a time limit on this authority?