



Sustainability and Competition Law in Malta

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10.1 The Concept of Sustainability

The concept of “sustainability” is not defined under Maltese law, but there are a number of acts of parliaments and subsidiary legislation for different sectors that use the term “sustainability”.

The closest definition in the law is found in the Sustainable Development Act, which defines “sustainable development” as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”.¹ This definition has been lifted from the *Report on the World Commission on Environment and Development* of 1987.²

The Constitution of Malta does provide for a positive obligation on the Government of Malta to “protect and conserve the environment and its resources for the benefit of the present and future generations and shall take measures to address any form of environmental degradation in Malta, including that of air, water and land, and any sort of pollution problem and to promote, nurture and support the right of action in favour of the environment”.³ Unfortunately, this “positive obligation” is not judicially enforceable, but it remains “fundamental to the governance of the country and it shall be the aim of the State to apply these principles in making laws”.⁴

¹(Chapter 521 of the Laws of Malta), Article 3(1).

²Available at <https://digitallibrary.un.org/record/139811?ln=en>. Accessed 16 August 2022.

³Constitution of Malta, Article 9(2).

⁴Constitution of Malta, Article 21.

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This provision was only introduced in 2018,⁵ and prior to that, the Constitution of Malta had no provision on environmental protection or sustainable development; however, a similarly worded obligation of the State has already been imposed by an act of parliament since 1991.⁶

Further, sustainable development is specifically mentioned in the Treaty of the European Union as an objective of the European Union,⁷ and it is also mentioned in the Treaty on the Functioning of the European Union (TFEU)⁸ and the Charter.⁹ Malta, as a Member State of the EU, has a duty of sincere cooperation in the pursuit of Union objectives.¹⁰

There is a general consensus that “sustainability” is relevant to all sectors and industries, and more recently, there is much talk of “ESG” factors of sustainability being the (i) environmental, (ii) social, and (iii) governance factors—the concept of ESG has been expressly endorsed by the Government of Malta in its policy¹¹ but not in its law.

10.2 Competition Law and Sustainability

10.2.1 Complementary Objectives

The Competition Act does not make any express reference to “sustainability” or “sustainable development”.¹² Neither does any other law in Malta.

It is submitted that sustainable development, environment protection and the protection of competition in the markets are not concepts and objectives that are necessarily incompatible with each other. Rather, there are objectives pursued by sustainable development and competition law that are complementary to each other.¹³

In practical terms, it is submitted that sustainability can be a part of the assessment to be made by the Office for Competition within the Malta Competition and

⁵ Act XXII of 2018. There is no mention of “competition law” or “markets” in the parliamentary debates leading up to the adoption of this amendment to the Constitution.

⁶ Act V of 1991, entitled *An act to protect the environment*, promulgated on 26 February 1991. Interestingly, and at this time, there was no mention that such an obligation imposed on the State was not judicially enforceable. However, later, iterations of the “Environment Protection Act” qualified that such an obligation on the State was not judicially enforceable.

⁷ Treaty on the European Union, Article 3(3).

⁸ Article 11 TFEU.

⁹ Charter of Fundamental Rights of the European Union, Article 37.

¹⁰ Treaty on the European Union, Article 4(3).

¹¹ See <https://sustainabledevelopment.gov.mt/esg-reports-2020/>. Accessed 16 August 2022.

¹² Chapter 379 of the Laws of Malta.

¹³ For example, the breach of environmental legislation by dominant undertakings can be classified as an abuse within Article 9 of the Competition Act and/or Article 101 of the TFEU.

Consumer Affairs Authority (hereinafter the “Malta NCA”),¹⁴ and by the Civil Court (Commerce Section) and other courts and tribunals where applicable (hereinafter the “Malta courts”), when assessing claims of breaches of competition law and proposed concentrations—as illustrated below. For the readers’ benefit, the public enforcement of competition law is vested in Malta NCA, as the prosecutor, and in Malta courts, specifically the Civil Court (Commerce Section), which will decide on whether there is a competition law infringement, as well as on the extent of any fines.¹⁵

However, there may be instances where the conduct of undertakings and even laws or government policies are anti-competitive, and their effect is capable of undermining the objectives pursued by competition law.

10.2.2 Sustainability and the Enforcement and Advocacy of Competition Law

Firstly, and as a matter of principle, coordinated conduct that pursues a sustainability objective has the potential to fall within the scope of Article 101(1) TFEU and its national counterpart, Article 5(1) of the Competition Act. However, sustainability can be invoked by undertakings as a defence against an allegation or claim of coordinated conduct as an efficiency under subparagraph 3 of both Article 101 TFEU and Article 5 of the Competition Act.

This is the line that the position the European Commission took in the *Guidelines on vertical restraints*¹⁶ and the one which it appears to be taking with the draft *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements*.¹⁷ Once the latter guidelines are implemented, it is envisaged that they would apply to Malta NCA and the Malta courts. The Competition Act also imposes a duty as such by requiring that either Malta NCA or the Malta courts, as the case may be, “shall have recourse [...] to relevant decisions and statements of the European Commission including interpretative notices on the relevant provisions of the TFEU and secondary legislation relative to competition [...]”.¹⁸

Secondly, sustainability may also be invoked as a defence against claims of abuse of dominance conduct under Article 102 TFEU and its national counterpart, Article 9 of the Competition Act, by way of an “objective justification”. Elsewhere, the case

¹⁴See <https://mccaa.org.mt/Section/index?sectionId=1060>. Accessed 16 August 2022.

¹⁵The decision of the Civil Court (Commerce Section) is subject to a second and last stage of review before the Court of Appeal.

¹⁶European Commission, Commission Notice Guidelines on vertical restraints, JO2022, C 248, p.1), para 9.

¹⁷Para 555. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022XC0419%2803%29>. Accessed 16 August 2022.

¹⁸Competition Act, Articles 12A (7) and 13(7).

was made for Article 102 TFEU to be used as an enforcement tool where a dominant undertaking engages in unsustainable business practices¹⁹—it is submitted that the same case can be made for Article 9 of the Competition Act to the extent that they can be characterised as “abuses”.

Thirdly, sustainability may also be invoked as an efficiency gain in merger control cases where the Malta NCA is reviewing a notifiable concentration in terms of the law.²⁰

Fourthly, Malta NCA may also promote a competitive environment where sustainability and ESG measures are proposed and implemented by engaging in its advocacy role²¹ with the State and public authorities in the exercise of its public powers or functions or otherwise with persons who are not undertakings. Although Malta NCA can only issue non-binding recommendations through its advocacy role, as a matter of practice, public authorities heed Malta NCA’s advice and recommendations. In any case, in one reported case, the Malta courts have directed public authorities to give considerable weight to such recommendations made by Malta NCA by way of advocacy.²²

There are no reported cases of competition law infringements or advocacy or merger control involving sustainability in Malta. Although the Office for Consumer Affairs, within the same Malta Competition and Consumer Affairs Authority, has reported in the Authority’s annual report for 2020 that they carried out checks on 344 claims on misleading sustainability claims,²³ and this on the basis of consumer protection legislation, not competition law.

However, it is submitted that sustainability should not be relegated to a mere “sword” or “shield” in competition law enforcement. There is a greater likelihood that the 17 sustainable development goals are achieved through engagement by undertakings, in particular, where there is a market failure that has not been addressed by regulation and law. Undertakings should be given precise written

¹⁹M. Iacovides and C. Vrettos, ‘Falling through the cracks no more? Article 102 TFEU and sustainability: the relation between dominance, environmental degradation and social injustice’, *Journal of Antitrust Enforcement* 2022, 10, 32-63. Available at <https://academic.oup.com/antitrust/article/10/1/32/6352604>. Accessed 16 August 2022.

²⁰Control of Concentrations Regulations (Subsidiary Legislation 379.08), Regulation 4(4): “Concentrations that bring about or are likely to bring about gains in efficiency that will be greater than and will offset the effects of any prevention or lessening of competition resulting from or likely to result from the concentration shall not be prohibited if the undertakings concerned prove that such efficiency gains cannot otherwise be attained, are verifiable and likely to be passed on to consumers in the form of lower prices, or greater innovation, choice or quality of products or services.”

²¹Malta Competition and Consumer Affairs Authority Act (Chapter 510 of the Laws of Malta), Article 14(1) (g) (h) and (i).

²²*Vivian Corporation Limited vs Central Procurement and Supplies Unit et al*, Court of Appeal decided on 17 March 2021 (Ref. 12/2021/1) para 24.

²³MCCAA Annual report 2020. Available at https://mccaa.org.mt/media/6963/2020-annual-report-mccaa_one-page.pdf. Accessed 16 August 2022.

guidance on whether proposed cooperation, standards, or conduct is likely to be justified or fall foul of competition rules.

Malta NCA did not follow suit with other national competition authorities, and no guidance has been issued on sustainability and competition law. This issue of such guidance should be considered to provide for a degree of legal certainty, in particular, within the context of the publicly documented increase of initiatives of horizontal cooperation taken by the private sector in Malta on the basis of “sustainability” and “ESG” objectives.

Malta NCA has not been active in exploring the relationship between sustainability and competition law, but it is understood that Malta NCA is closely following, through the European Competition Network, the workings of other national competition authorities, and those of the European Commission.

The Malta NCA must probably consider ad hoc block exemption regulations or re-introducing negative clearance, at least, where conduct does not affect the internal market and is to be regulated purely by national counterparts of Articles 101 and 102 TFEU. The latter was revoked from the Competition Act upon Malta’s entry into the European Union in 2004.

10.2.3 Competence and Cooperation

Having said all this, it is submitted that it is not Malta NCA’s function to verify whether Malta is meeting the sustainable development goals.²⁴

In fact, the Sustainable Development Directorate within the Ministry for the Environment, Energy and Enterprise was specifically designated²⁵ as the competent authority, in terms of the Sustainable Development Act, “to ensure the development and implementation of Malta’s sustainable development strategy”.²⁶ However, there are other regulators and public authorities that are specifically vested with the competence to monitor and enforce specific sectorial legislation that may have sustainability objectives—such as the Environment Resources Authority.²⁷

This is for good reason. The resources, knowledge and proper delegated authority lie with the Ministry and other specific regulators and public authorities and not with Malta NCA.²⁸ However, Malta NCA must retain its competence to decide on competition law infringement or to advocate where there are distortions on the market as a result of sustainability-driven measures and conduct.

²⁴No reference to “sustainability” or “sustainable development” can be found in the operative allocating functions and responsibilities to the Malta NCA. Malta Competition and Consumer Affairs Authority Act (Chapter 510 of the Laws of Malta), Article 14.

²⁵Government Notice 472 of 4 June 2013 published in the 19,095th edition of *The Malta Government Gazette*.

²⁶Sustainable Development Act (Chapter 521 of the Laws of Malta), Article 5(a).

²⁷Environment Protection Act (Chapter 549 of the Laws of Malta).

²⁸See Malta Competition and Consumer Affairs Authority Act (Chapter 510 of the Laws of Malta), Article 13.

Malta NCA can pursue cooperation with other regulators and public authorities through its advocacy role, as explained above, and generally through good relationships maintained in public administration.

10.2.4 Laws, Guidance and Policies

At the time of writing, there are no laws, guidance or policies that expressly address the relationship between sustainability and competition law.

However, it is submitted that the promulgation of laws, the establishment of standards and regulatory rules by public authorities and the issuance of policy documents in the name of sustainability have the potential to impact market dynamics and increase or restrict competition. Moreover, such laws and policies have the potential to be used as a point of reference in competition law enforcement.

An example is *Malta's Sustainable Development Vision for 2050*, which is a policy document published by the Ministry for the Environment, Energy and Enterprise in September 2018 pursuant to the Sustainable Development Act. This document espouses the Government of Malta's vision and strategy to promote sustainable development in Malta's economy, and in various instances, the document encourages the private sector to engage with the public sector to achieve this vision—specific proposals for the establishment of cooperatives and public-private partnerships are made. It is submitted that, within the context of potential competition law enforcement, any claims or arguments made on sustainable development may be corroborated with this document to verify whether such is aligned with this vision for sustainable development.

Outside the realm of Malta NCA and competition law, the Government of Malta has promulgated a number of laws and even created agencies in the name of sustainability that may impact competition on the market.

A noteworthy example is the following: in 2018, Circular Economy Malta (previously known as the Resource Recovery and Recycling Agency) was established. The primary function of this agency is “to foster a transition towards, and implement measures, for the growth and development of the circular economy”, but it has also been tasked to issue to private operators a licence to run a scheme for a beverage container refund system under the Beverage Containers Recycling Regulations.²⁹ These Regulations are essentially a transposition of Directive 94/62/EC on packaging and packaging waste, and essentially, the scheme is an application of the extended producer responsibility principle. The European Commission has classified such “producer responsibility organisations” as undertakings.³⁰

²⁹Subsidiary Legislation 549.134.

³⁰DG Competition Paper Concerning Issues of Competition in Waste Management Systems, para 6-7. Available at https://ec.europa.eu/competition/sectors/energy/waste_management.pdf. Accessed 16 August 2022.

Earlier in 2022, Circular Economy Malta issued a 10-year licence to BCRS Malta Ltd—a limited liability company established and owned by the majority of producers and importers of single-use beverage containers in Malta.³¹ It is not clear whether this licence confers exclusivity, but the licensed operator is the only one running such a scheme in Malta, and Circular Economy opted for a direct grant of this licence rather than through a competitive bid.³² The Regulations impose that participation in the scheme is permitted on a fair, reasonable and non-discriminatory (FRAND) basis.³³ Within this context, it is submitted that competition on the market has and will continue to be taken into account in any interventions made by the State to address perceived market failure, even when such interventions are legislative and where such laws encourage or even require coordination between undertakings.

10.3 Conclusion

It is obvious that the relationship between sustainability and competition law in Malta has not been investigated and that competition law is not featured in the discussion in Malta on sustainable development. It is submitted that this is the case because competition law is not necessarily seen as an obstacle to the pursuit of agreements, measures, policies and legislation inspired by sustainability. However, competition law has the potential to deter, rightly so, such agreements, measures, policies and legislation in view of perceived risks of competition law infringements and concerns of harm to markets.

The reality is that competition law must be taken into account by both undertakings and public authorities when pursuing sustainability measures, and therefore, guidance on what is permitted and what is not might encourage that such measures, which are not harmful to competition, are adopted. It is submitted that the guidance issued and to be issued by the European Commission will go a long way in providing clarity on this, and perhaps Malta NCA should look into providing ad hoc and specific guidance with respect to the provisions of the Competition Act. This guidance has the potential to provide a degree of certainty that can allow competition law and sustainable development to coexist and complement each other in the pursuit of their objectives. It is further submitted that even though Malta NCA is not competent *ex lege* to verify or ensure the achievement of sustainable development goals in Malta, Malta NCA should, in compliance with the State's "positive obligation" in the Constitution of Malta, explore whether there is a need for such ad hoc and specific guidance.

³¹ See <https://bcrcsmalta.mt/about-us/>. Accessed 16 August 2022.

³² Subsidiary Legislation 549.134, Regulation 4(2) and (3).

³³ *Ibid.*, Regulation 11(1).

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