An effective regulatory enforcement and sanctions regime post the Federation of Estate Agents Case: the issues

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In this article, originally published on the XVIII Edition of Id-Dritt, Dr Paul Edgar Micallef discusses the Federation of Estate Agents Case, as well as the significant impact that it may have on the enforcement and sanctioning powers that various regulatory authorities in Malta currently have

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1. Introduction

One of the key components of any regulatory regime responsible for competition is that the competent regulatory authority has, as part of its toolbox, adequate enforcement and sanctioning powers. There are generally two options which may be considered when providing regulatory authorities with such powers. One option is to enable the regulatory authority to impose sanctions itself, generally in the form of punitive administrative fines, with a right of review before an independent adjudicative body from any decision taken by the regulatory authority to impose such sanctions. A second option is that the regulatory authority applies to an independent adjudicative body, either a court or a specialised adjudicative forum - requesting that body to impose appropriate sanctions against the non-compliant person. In turn, this second option can be subdivided into two. The regulatory authority may ask for the imposition of criminal sanctions consisting of fines of a criminal nature or imprisonment, or both such fines and imprisonment.[1] Alternatively, the regulatory authority may ask for the imposition of civil fines.[2] The main difference between these two procedures is the standard of proof required. Hence, in the case of the former the prosecuting authority must prove its case beyond reasonable doubt, whereas in the case of the latter, the standard of proof in civil litigation based on the balance

[1] Under Maltese law a fine of a criminal nature is described as '*multa*' even in the English language version to denote that that fine is of a criminal nature.

[2] One needs to distinguish between 'administrative fines' and 'civil fines'. 'Administrative fines' are fines imposed by a regulatory authority, whereas 'civil fines' are fines imposed by a court following the completion of civil proceedings before it. In the instance being considered a civil fine would be imposed by a court after a request for the imposition of such a fine has been made by the competent regulatory authority in accordance with the applicable legislation.

of probabilities applies.

In Malta, the option followed depends on the nature of the infringement. If the infringement is considered to be a criminal offence, then the regulatory authority is normally required to make a formal request to the Police asking them to initiate criminal proceedings before the competent court of criminal jurisdiction. If, on the other hand, the infringement is considered to be administrative in nature, then the regulatory authority is in many instances empowered to impose administrative fines itself.[3] The line of demarcation between what constitutes a criminal offence and what constitutes an administrative offence is not always clear cut, and at law there are no clear guidelines which serve to determine if an infringement falls under one or the other category. This said, it is relevant to note that under Maltese law, the instances where a regulatory authority may request an adjudicative body to impose civil fines, as distinct from criminal fines, are few in number.[4]

On the 3 May 2016, the Constitutional Court decided the case in the names of **Federation of Estate Agents vs Direttur Ġenerali (Kompetizzjoni), l-Onorevoli Prim Ministru u l-Avukat Ġenerali('the Federation of Estate Agents Judgement')**[5] following an appeal by respondents

[3] In extreme cases another sanction is the suspension or withdrawal of the authorisation or licence to operate in a given sector. See for example the Malta Communications Authority Act, Chapter 418 of the Laws of Malta, article 31(2).

[4] One such instance is provided for under the Schedule to the Competition Act. The Schedule, which is entitled "Competition Law Infringements (Actions for Damages) Regulations", provides that the competent court of civil jurisdiction may following an action for damages, impose penalties consisting of punitive fines in certain specified instances, including notably where a person fails or refuses to comply with a disclosure order issued by the Court. See regulation 8 of the aforesaid Schedule.

[5] 87/2013/1 Federation of Estates Agents vs Direttur Ġenerali (Kompetizzjoni) et, Constitutional Court 3 May 2016.

from an earlier judgement in the same case.[6] The **Federation of Estate Agents** judgement may have a significant impact on the enforcement and sanctioning powers that various regulatory authorities in Malta currently have, even though the judgement Itself only relates to the exercise of such powers by the Director General (Competition) (hereinafter referred to as 'the DG Competition ') within the Malta Competition and Consumer Affairs Authority (hereinafter referred to as 'the MCCAA') .[7] In substance, this judgement has resulted in a situation where, unless amendments to the law are made, the DG Competition cannot impose or even request the imposition of a fine if he considers that there is a breach of the competition laws which he enforces.

This is a situation which, to put it mildly, is of concern since it is unacceptable that the national competition watchdog — the DG Competition — is effectively toothless in curbing anti-competitive practices, especially when one considers that the main tool in ensuring compliance is precisely the imposition of punitive fines. The situation is, if anything, even more worrying since to date matters have been in such a sorry state of affairs for well over a year. As things stand the DG Competition is unable to impose administrative fines if there is a breach of the substantive provisions of the Competition Act, articles 5 or 9[8], since according to the **Federation of Estate Agents** judgement, the imposition of punitive fines by the DG Competition by virtue of the ap-

[6] 87/2013Federation of Estate Agents vs Direttur Ġenerali (Kompetizzjoni) et Civil Court First Hall (Constitutional Jurisdiction) 21 April 2015.

[7] The First Hall in its judgement voiced its concern about what it described as the 'slippery slope' in downsizing human rights and civil liberties, referring amongst others to the powers that the Malta Communications Authority has in imposing similar sanctions under article 33 of the Malta Communications Authority Act (Chapter 418 of the Laws of Malta). See Federation of Estate Agents vs Direttur Generali (Kompetizzjoni) etCivil Court First Hall (Constitutional Jurisdiction) 21 April 2015 p 34.

[8] Competition Act, Chapter 379 of the Laws of Malta, articles 5 and 9.

plicable provisions of Chapter 379[9] is in breach of the Constitution.[10] Moreover, Chapter 379[11] does not, in the absence of the capability of the DG Competition to exercise such powers, alternatively empower the DG to apply to a court or to another adjudicative body to seek the imposition of appropriate punitive sanctions, since as the law now stands such an option is not contemplated under the said law .[12] In practice this means that persons can act in flagrant breach of competition law with the knowledge that no punitive fines can be imposed upon them. The most the DG can do given such circumstances, is to publicise that a person has been found to have acted in breach of competition law or to issue a cease and desist order. However even in the case of a cease and desist order, if the undertaking against which the order is addressed chooses to ignore such an order, the DG Competition does not have any effective means of punishing non-compliance with such an order once as things stand, he cannot impose any punitive fines.[13]

In October 2016, matters came to a halt when the DG Competition concluded that though he had the intention of imposing an administrative fine on the offending undertaking, given the **Federation of Estate Agents** judgement, he decided not to impose any fine.[14] This conclusion by the DG Competition should have set off alarm bells for the Govern-

[9] ibid.

[10] The articles in question are 12A, 13, 13A and 21 of the Competition Act.

[11] Competition Act, Chapter 379 of the Laws of Malta.

[12] Article 5 of the Competition Act deals with prohibited agreements and practices whereas article 9 of the same Act deals with the abuse of a dominant position.

[13] See articles 17 and 21 of the Competition Act.

[14] See the Decision of the Office for Competition dated 4 October 2016 Case Comp-MC-CAA 3/2015. This case related to the energy sector. The DG Competition concluded that two undertakings - Falzon Group and M & N Camilleri Petrol Station - had infringed article 5(1)(a) of Chapter 379 of the Laws of Malta when they entered into a resale price maintenance agreement which had as its object the prevention, restriction or distortion of competition by indirectly fixing the selling price of diesel.

ment to take remedial measures in short order. Moreover, the impact of this judgement does not necessarily stop with the DG Competiton , and may also negatively affect the powers of other regulatory authorities which have enforcement and sanctioning powers similar to those of the DG Competition, including the Director General (Consumer Affairs) within the MCCAA itself.

At the time of writing, the Government has yet to definitively address the issues arising as a result of this judgement. A proposal was made by Government to amend article 39(1) of the Constitution.[15] However, this proposal did not see the light of the day due to the lack of consensus from the Opposition. The proposal by Government consisted of an amendment of article 39(1) of the Constitution which required a two-thirds majority of Parliament and therefore the support of the Opposition.[16] The Opposition seemed to have had some reservations about the amendment proposed by Government wherein it argued that rather than amending the Constitution, it is the applicable provisions of Chapter 379[17] and other applicable laws which should be amended.[18] The Federation of Estate Agents Judgement has stirred a hornets' nest impacting, what until some months ago, was an undisputed process as to how various regulatory authorities in Malta could ensure regulatory compliance by imposing substantial punitive fines on non-compliant persons. In this context, it is important first to understand what the issues raised

[15] Constitution of Malta, article 39(1).

[16] The amendment to the Constitution proposed by the Government was not made public. Up to the writing of this contribution no draft bill providing for such amendments have been published.

[17] Competition Act (n 12).

[18] Clyde Puli, 'Safeguarding Consumers' rights' *Times of Malta* (Malta, 18 January 2017) <https://www.timesofmalta.com/articles/view/20170118/opinion/Safeguarding-consumers-rights.636839>

in the judgement are and, what the Constitutional court ultimately decided. The next step, is then to consider what effective measures should be taken to address matters in the light of what that court decided.

2. The Federation of Estate Agents case - the judgement of the First Hall[19]

This case arose following the contestation by the Federation of Estate Agents ('the Federation') of investigations conducted by the DG Competition under Chapter 379.[20] The Federation filed a constitutional application against the DG Competition, the Prime Minister, and the Attorney General ('respondents') before the First Hall of the Civil court sitting in its constitutional jurisdiction ('First Hall').[21] In its application to the First Hall, the Federation argued that investigative proceedings instituted by the DG Competition against the Federation under Chapter 379[22] in relation to the alleged breach by the Federation of article 5(1) of the said law[23] and of article 101(1) of the Treaty on the Functioning of the European Union ('TFEU')[24], amounted to a breach of the fundamental rights of the Federation protected under the Constitution of Malta ('the Constitution') and, under the European Convention for the Protection of Human Rights and Fundamental Liberties ('the European Convention').

The Federation said that, under Chapter 379[25], the DG Competition has the power, after concluding his investiga-

[19] Federation of Estate Agents vs Direttur Ġenerali (Kompetizzjoni) et (n 7).
[20] Competition Act (n 12).
[21] The lawsuit was filed on the 11 November 2013.
[22] Competition Act (n 12).
[23] Competition Act (n 12) article 5(1).
[24] The Treaty on the Functioning of the European Union [2012] OJ C326/47, article 101.
[25] Competition Act (n 12).

tions, to decide if there is a breach of articles 5 and, or 9 of Chapter 379[26], and, or of articles 101 and, or 102 of the TFEU.[27] In the event that he does conclude that there is a breach, to issue orders as provided for in article 13 of Chapter 379[28], with the faculty of imposing administrative fines, which fines can be as much as ten per cent of the total turnover of the undertaking or of the association of undertakings concerned in the preceding business year.[29] The Federation added that there is a right of appeal before the CompetCompetition and Consumer Appeals Tribunal (hereinafter referred to as 'CCAT') from any such decision that the DG Competition may make, and a further right of appeal on a point of law from decisions of the CCAT before the Court of Appeal sitting in its superior jurisdiction. The Federation noted that the power of the DG Competition to impose what it described as severe fines — 'multi severi' — intended to have a deterrent effect, actually rendered such charges as criminal in nature, and therefore criminal offences according to article 39(1) of the Constitution[30], and criminal offences according to article 6(1) of the European Convention.[31]

The Federation argued that the Constitution requires a person who is accused of a criminal offence, is to be tried before an independent and impartial court, adding that the word 'Court' for the purposes of the Constitution refers only to the Constitutional Courts, and to the Criminal and Civil Courts whether of superior or inferior jurisdiction. The Federation noted that the term 'Court' did not include the CCAT or the DG Competition, and therefore for the purposes of the

[26] Competition Act (n 12) articles 5 and 9.
[27] The Treaty on the Functioning of the European Union (n 24) articles 101 and 102.
[28] Competition Act (n 12) article 13.
[29] Competition Act(n 12) article 21(1).
[30] Constitution of Malta (n 15).
[31] ECHR article 6(1).

Constitution it couldn't be considered as a 'Court' either.

The respondents in their reply to the application of the Federation, argued in the first instance that the lawsuit initiated by the Federation was premature given that the DG Competition had not issued a final decision as to whether the Federation had acted in breach of the law, and that no decision had been made by the DG Competition imposing any administrative fines. The respondents argued that decisions taken by the DG Competition could be overturned by the CCAT and, subsequently, by the Court of Appeal. Interestingly, the Respondents did not contest that the administrative fines the DG Competition may impose under Chapter 379[32] could be considered as a penalty of a criminal nature — 'forom ta' pieni ta' natura kriminali'.[33]

However, the respondents argued that a distinction must be made between those penalties belonging to what they described as 'hard core of criminal law' and 'cases not strictly belonging to the traditional categories of the criminal law'. According to the respondents, the administrative fines provided for under Chapter 379[34] belong to the latter category and therefore, are not incompatible with the right of fair hearing, whereby administrative fines may in the first instance be imposed by administrative bodies which have the power to both investigate and to issue decisions. The respondents noted that once the decision of the administrative body — in this case the DG Competition — was subject to review by an authority empowered with judicial functions — namely the CCAT — then there should be no issue with the

[32] Competition Act (n 12).
[33] Federation of Estate Agents vs Direttur Ġenerali (Kompetizzjoni) et (n 7) p 8 et seq. .
[34] Competition Act (n 12).

requirements ensuring a fair hearing.[35]

Significantly, the First Hall in its judgement noted that prior to May 2011, whilst the (then) Director for Fair Competition was responsible for investigating a breach of competition law, the power to impose any fines for any such breach resided within the court of Magistrates.[36] The First Hall in its evaluation of the case listed three points which it said needed to be analysed, namely: if the procedures under Chapter 379[37] have the features of a criminal offence; if the DG Competition or CCAT can be considered as a 'court'; and if the DG Competition or the CCAT are an independent and impartial tribunal.

The First Hall observed that whilst under Chapter 379[38] the offence in question — in this case a breach of article 5 of that law — is classified as being of an administrative nature, the nature of the offence and the nature and severity of the penalty changed matters completely to the extent that the offence had to be considered as being criminal in nature.[39] The First Hall said that the fine was intended as a deterrent and not as pecuniary compensation, and that the amount of fine was substantial, adding that the proceedings initiated under Chapter 379[40] did not relate to civil rights and obligations, but

[35] Federation of Estate Agents vs Direttur Ġenerali (Kompetizzjoni) et (n 7) p 15 et seq.
[36] Federation of Estate Agents vs Direttur Ġenerali (Kompetizzjoni et)(n 7) p 21 et seq. Act VI of 2011 amended Chapter 379 creating the position of the DG Competition in lieu of the Director of Fair Trading. Until then infringements of competition law, including notably of articles 5 and 9 of Chapter 379, were considered criminal offences, and neither the former Director of Fair Trading nor the former Commission for Fair Trading had any power to impose administrative fines or civil fines.
[37] Competition Act (n 12).
[38] Competition Act (n 12).
[39] Federation of Estate Agents vs Direttur Ġenerali (n 7) p 4 et seq. The Federation argued that it was liable to an administrative fine which could reach up to 1.25 million euro.
[40] Competition Act (n 12).

to enforcement by a public authority. The First Hall, accordingly, held that the infringements of which the Federation was being accused were offences of a criminal nature and that consequently the requirements under article 39(1) of the Constitution[41] and article 6(1) of the European Convention[42] applied. The First Hall specifically referred to article 39(1) of the Constitution[43] which states that any person accused of a criminal offence must be given a fair hearing within a reasonable time before an independent and impartial court.[44] The First Hall said that the DG Competition certainly cannot be considered to be an impartial and independent court set up by law. With regard to the CCAT, the First Hall noted that this tribunal is composed of a judge and two ordinary members nominated by the President of Malta which ordinary members are not judges, adding that such members are appointed for a three year term and may be removed at the end of the term and are paid by the Prime Minister. The First Hall accordingly held that the tribunal was not an impartial and independent court enjoying the guarantees provided by the Constitution.

The First Hall further noted that appeals to the Court of Appeal from decisions of CCAT were limited to appeals on point of law and did not extend to contestations on point of fact.[45] The First Hall decided that for the above reasons the relevant enforcement provisions of Chapter 379[46] which in substance empowered the DG Competition to impose administrative fines, were both in breach of article 39(1) of the

[41] Constitution of Malta (n 15).
[42] ECHR (n 31).
[43] Constitution of Malta (n 15).
[44] Federation of Estate Agents vs Direttur Ġenerali (Kompetizzjoni) et (n 7) p 26 et seq.
[45] Federation of Estate Agents vs Direttur Ġenerali (Kompetizzjoni) et (n 7) p 30 et seq.
[46] Competition Act (n 12).

Constitution[47] and of article 6(1) of the European Convention. [48]

3. The Federation of Estate Agents case - the judgement of the Constitutional Court[49]

The DG Competition and the Attorney General lodged an appeal from the judgement of the First Hall before the Constitutional Court.[50] The Constitutional Court confirmed the judgement of the First Hall[51] other than with regard to alleged breach of article 6 of the European Convention[52], whereby it determined that was no breach of article 6.[53] In this regard, the Constitutional Court held that the fact that the fine could be imposed by an administrative authority which is not an independent and impartial tribunal, is not necessarily incompatible with article 6[54] provided that the decision of the said authority imposing the fine is also subject to review by a tribunal which has full jurisdiction to determine both points of law and of fact. The Constitutional Court said that the CCAT does have such full jurisdiction.[55] The Court, in relation to the arguments raised by the Federation vis-a-vis the ordinary members of the CCAT, dismissed these since it considered that there are enough guarantees at law to dispel

[47] Constitution of Malta (n 15).

[48] ECHR (n 31).The provisions in question of Chapter 379 are articles 12A (finding of an infringement by the DG), 13 (cease and desist order and compliance order), 13A (appeals before the CCAT) and 21 (administrative fines).

[49] Federation of Estate Agents vs Direttur Ġenerali (Kompetizzjoni) et (n 6).

[50] The First Hall decided that the Prime Minister should not have been sued, and therefore dismissed all claims against him.

[51] Federation of Estate Agents vs Direttur Ġenerali (Kompetizzjoni) et(n 7).

[52] ECHR (n 31).

[53] Federation of Estate vs Direttur Ġenerali (n 6) p 65 et seq. .

[54] ECHR (n 31).

[55] Federation of Estate vs Direttur Ġenerali (Kompetizzjoni) et (n 6) p 56 et seq. The Constitutional court referred to article 13A of Chapter 379.

any doubts about the impartiality and independence of the ordinary members of the CCAT.[56]

4. The position following the Federation of Estate Agents Case[57]

As things stand, following the conclusion of the **Federation of Estate Agents** case[58] with the judgement of the Constitutional Court of the 3 May 2016, unless the law is changed the DG Competition cannot impose any fines or request the imposition of any fines if there is a breach of competition law. This position was confirmed in a decision by the DG Competition issued last October when the DG stated that the Office for Competition had the intention to impose an administrative fine on a non-compliant undertaking who allegedly acted in breach of article 5 of Chapter 379.[59] However, in the light of the judgement given by the Constitutional court in the **Federation of Estate Agents** case[60], the office decided not to do so, taking also into account the interpretation given by the CCAT in various cases subsequent to the aforesaid judgement.[61] The logical next step given such a position, is for Government to enact the necessary amendments to the law to ensure that there are effective sanctions if there is no compliance with the requirements under competition law. At the time of writing such amendments have not yet been enacted.

[56] Federation of Estate vs Direttur Ġenerali (Kompetizzjoni) et (n 6) p 63 et seq.
[57] Federation of Estate vs Direttur Ġenerali (Kompetizzjoni) et (n 6)
[58] Federation of Estate vs Direttur Ġenerali (Kompetizzjoni) et (n 6)
[59] Competition Act (n 12) article 5.
[60] Federation of Estate vs Direttur Ġenerali (Kompetizzjoni) et (n 6).
[61] Decision of the Office for Competition Case COMO-MCCAA 3/2015issued on the 4 October 2015, at page 71 et seq thereof.

5. The impact on other regulatory authorities

A consequence of the **Federation of Estate Agents** judgement is the impact on the enforcement and sanctions powers of other regulatory authorities. The First Hall in its judgement in the **Federation of Estate Agents** case[62], had referred to the submissions of the respondents who in support of their case referred to various laws enacted in recent years empowering various regulatory authorities to impose substantial fines. The First Hall in its reaction to these submissions, said that giving such powers to other regulatory authorities did not give more legitimacy to the power of the DG Competition to impose fines as provided for under Chapter 379.[63] If anything, according to the First Hall, such powers afforded to other authorities only served to fuel the concern of the First Hall that such measures could lead to what that Court described as the 'slippery slope' undermining fundamental human rights and liberties.[64] In making its observations the First Hall referred in particular to article 33 of the Malta Communications Authority Act[65], article 31(1) of the Malta Resources Authority Act[66], article 16A of the Investment Services Act[67] and article 68(1) of the Lotteries and other Games Act.[68] This observation by the First Hall implies that the power to impose sanctions consisting of punitive fines enjoyed by other regulatory authorities such as the Malta Communications Authority (hereinafter referred to as 'the MCA') may also be impacted as a result of the judgement in the Federation of Estate Agents case.

[62] Federation of Estate Agents vs Direttur Ġenerali (Kompetizzjoni) et (n 7).
[63] Competition Act (n 12).
[64] Federation of Estate Agents vs Direttur Generali Kompetizzjoni et (n 7)p 34.
[65] Malta Communications Authority Act, Chapter 418 of the Laws of Malta, article 33.
[66] Malta Resources Authority Act, Chapter 423 of the Laws of Malta, article 31(1).
[67] Investment Services Act, Chapter 370 of the Laws of Malta, article 16 A.
[68] Lotteries and other Games Act, Chapter 438 of the Laws of Malta, article 68(1).

However, it is pertinent to note that there are certain important differences between the enforcement and sanctioning powers enjoyed by the different authorities. Hence, to take the example of the MCA, decisions imposing administrative fines taken by the MCA may be contested before the Administrative Review Tribunal ('ART') whose decisions are taken by a magistrate.[69] This is in contrast to contestations of similar decisions imposing fines taken by the DG Competition before the CCAT — the decisions of which body are taken by a judge together with two ordinary members who are not members of the judiciary.[70] A further consideration which serves to highlight the difference in procedure, is that in the case of a final decision taken by ART, following a contestation of an MCA decision, there is a further right of appeal on both points of law and of fact to the court of Appeal (Inferior Jurisdiction). Conversely, in the case of a decision taken by the CCAT following the contestation of a decision by the DG Competition imposing a fine, there is only a right of appeal on a point of law to the court of Appeal (Superior Jurisdiction).[71] Arguably these substantial differences may have led to different conclusions in the Federation of Estate Agents case if the process under contestation was similar to that as established under Chapter 418[72], given that both at the first level and second level of review the final decision on issues

[69] Administrative Justice Act, Chapter 490 of the Laws of Malta, article 8. Two assistants may be appointed to 'assist' the Tribunal, however these assistants have no voting powers and the final decision of the Tribunal is the sole responsibility of the presiding magistrate. In this regard see Administrative Justice Act, Chapter 490 of the Laws of Malta, article 10.

[70] This was precisely one of the issues mentioned by the Federation where it raised doubts about the impartiality and independence of the ordinary members of the CCAT given that they are not members of the judiciary and are appointed by the President of Malta acting on the advice of the Prime Minister for a fixed three year term.

[71] See Malta Communications Authority Act, Chapter 418 of the Laws of Malta, article 38 and Administrative Justice Act, Chapter 490 of the Laws of Malta, article 8.

[72] Administrative Justice Act (n 69).

of fact and law is taken exclusively by either a magistrate or a judge. Notwithstanding such considerations, the paramount issue that punitive fines are considered to be of a criminal nature and, therefore, should be determined only by a court as recognised for the purposes of article 39(1) of the Constitution[73], remains. Therefore, the importance of addressing the issues raised in the Federation of Estate Agents judgement, need to be seen to in short order, otherwise, there is a real risk that the whole edifice underlying the enforcement and sanctions powers of various regulatory authorities, may be undermined with serious consequences for the effective regulation of the market in general and, of different sectors in particular.

6. The Irish experience

The consideration of the procedures followed in other countries may indicate the route to follow and the pitfalls to avoid in addressing matters post the **Federation of Estates Agents** judgement. The preferred procedure in various European Union (EU) Member States is to empower the competent national regulatory authority to impose administrative fines with a right of review for the aggrieved undertaking before an independent adjudicative body.[74] However, it is pertinent to note that even in those Member States whose regime

[73] Constitution of Malta (n 15).

[74] This for example is the procedure followed in Italy where the Autorita' Garante della Concorrenza may impose fines in the case of abuse of a dominant position and of agreements restricting competition. Depending on the seriousness of the infringement, such fines can reach up to ten per cent of the gross turnover of the non-compliant undertaking for the previous year of business. There is a right of appeal to the Tribunale Amministrativo del Lazio and subsequently to the Consiglio di Stato. See AGCM, 'Penalties and Fines' (2011) 6 <http://www.agcm.it/en/2015-07-24-16-06-24/penalties-and-fines.html>accessed 6 August 2017>A similar procedure as discussed in this paper is followed in the UK.

is based primarily on the imposition of administrative or civil fines, a distinction is made between the sanctions which may be imposed on undertakings and on individuals — with the latter in more serious cases being liable to criminal sanctions including even imprisonment.[75] It is interesting to note that under United States (US) Federal law, in stark contrast to the approach taken by the EU, a strong emphasis is made on the criminal liability of the individual for competition law infringements, where for example, an individual who takes part in a cartel in the US is liable up to ten years imprisonment. Increasingly however, in various EU Member States, criminal penalties for individuals for serious infringements of competition law are being introduced.[76] One practical consideration as to why various EU Member States have introduced such measures, is that employees of undertakings will think twice before being party to anti-competitive practices if then they may be personally liable to severe criminal sanctions.

The Irish experience in the realm of regulatory sanctions and enforcement, in relation to competition law, is an eye-opener about the problems that can arise if the procedure is tied almost exclusively to sanctions of a criminal nature, whereby the regulatory authority is required to apply to court for the imposition of punitive fines. As has now happened in Malta, constitutional law considerations have conditioned

[75] Keith Jones and Farrin Harrison, 'Criminal Sanctions: An overview of EU and national case law' e-Competitions National Competition Laws Bulletin No64713, 3ff <http://awards.concurrences.com/IMG/pdf/keith_jones> accessed 6 August 2017.

[76] Hence in 2011 for example some 40 individuals received an average prison sentence of 17 months in the US for their involvement in cartel activities. This contrasts with the approach by the EU which only caters for administrative fines in relation to infringements by undertakings. See Marco Slotboom, 'Individual Liability for Cartel Infringements in the EU: An Increasingly Dangerous Minefield' (*Kluwer Competition Law Blog*, April 25 2013) < http://kluwercompetitionlawblog.com/2013/04/25/individual-liability-for-cartel-infringements-in-the-eu-an-increasingly-dangerous-minefield/> accessed 6 August 2017.

the competition law sanctions regime in Ireland, undermining to some extent, the effectiveness of the said regime.[77] The current position under Irish Competition law in relation to the imposition of sanctions somewhat resembles the position as it was under Maltese Competition law prior to the April 2011 amendments to Chapter 379.[78] The core substantive provisions under the Irish Competition Act are sections 4 and 5[79], regulating respectively prohibited agreements and abuse of a dominant position.[80] Under the Irish Competition Act, it is a criminal offence if a person acts in breach of either sections 4 or 5, or of Articles 101 or 102 of TFEU.[81] The responsibility of investigating infringements under the Irish Competition Act lies with the Competition and Consumer Protection Commission ('CCPC') which depending on the gravity and nature of the infringement, may either lead to a summary prosecution before the District Court, or if serious infringements are involved refer the case to the Director of Public Prosecutions for prosecution on indictment.[82]

The current system of criminal prosecution under Irish Competition law has been described, by the former Irish Competition Authority (which preceded the CCPC), as being

[77] This issue was discussed at some length in an article entitled "'Filling a gap in Irish competition law enforcement: the need for a civil fines sanction'. See Gerald FitzGerald and David McFadden, 'Filling a gap in Irish competition law enforcement: the need for a civil fines sanction' (2011) The Competition Authority <https://www.ccpc.ie/business/wp-content/uploads/sites/3/2017/05/2011-06-09-Filling-a-gap-in-Irish-competition-law-enforcement-the-need-for-a-civil-fines-sanction.pdf> accessed 6 August 2017.

[78] Competition Act (n 12). Act VI of 2011 was enacted on 29 April 2011 and its provisions, including those amending Chapter 379 were brought into force on the 23 May 2011 as per L.N. 190 of 2011.

[79] Competition Act 2002 (ISB), articles 4 and 5.

[80] These sections are in substance similar to articles 5 and 9 of Chapter 379.

[81] Competition Act (n 79) articles 6 and 7.

[82] Until 2014 the competent national competition authority in Ireland was the (Irish) Competition Authority. In 2014 a new body – the Competition and Consumer Protection Commission - was established with joint responsibilities for competition and consumer protection. See <http://www.ccpc.ie/about/who-we-are> accessed 6 August 2017.

'neither appropriate nor practical for non-hardcore infringements', the said Authority arguing that the absence of civil sanctions is 'a serious weakness in the Irish Competition law enforcement regime'.[83] Interestingly, initially, Irish Competition law did not even envisage public enforcement powers or sanctions of any kind, relying on private parties who suffered a loss as a result of anti-competitive practices to seek redress before the competent court of civil jurisdiction. This lacuna was eventually addressed when amendments were introduced giving the then Irish Competition Authority extensive investigative powers, whilst providing that infringements of prohibitions of anti-competitive behaviour constitute criminal offences. At a later stage new laws were enacted introducing severe criminal sanctions for what are described as hardcore offences, drawing a distinction between the penalties for such offences as distinct from those for the non-hardcore infringements.[84] The issue remains that, in relation to what are described as non-hardcore infringements, the current criminal sanctions are not seen as being the appropriate solution — the argument being made in favour of the introduction of civil fines for such infringements.[85]

7. The United Kingdom experience

The United Kingdom ('UK') Competition Act[86] provides both for criminal, and, civil sanctions. The former sanctions relate mainly to the investigative functions of the Competi-

[83] FitzGerald'Filling a gap in Irish competition law enforcement: the need for a civil finessanction' (n 77) 2ff

[84] ibid 5ff. The hardcore offences relate mainly to cartel activity related in particular to price-fixing, restricting output or limiting production, bid-rigging, and market allocation.

[85] ibid 13ff.

[86] Competition Act 1998 (UK).

tion Market Authority (hereinafter referred to as 'the CMA'), where for example false or misleading information is knowingly provided or else, CMA officers investigating alleged infringements are obstructed in the performance of their duties.[87] The core substantive competition provisions under UK law are dealt with in Chapters I and II of the Competition Act.[88] In the case of an individual who commits a competition law infringement, the CMA may apply to court for his disqualification as a director of the undertaking concerned. Significantly, a breach of a disqualification order is a criminal offence and may even lead to imprisonment of up to two years and, or a criminal fine. The CMA does not generally apply for such an order, unless there has been a prior finding that the said undertaking committed a breach of competition law. Moreover, under the UK Enterprise Act 2002, an individual who participates in a cartel is on conviction liable to criminal sanctions including imprisonment.[89]

An undertaking which acts in breach of either Chapter I or II of the UK Competition Act, is liable to administrative fines of up to a maximum level of ten per cent of its worldwide turnover in the previous business year. In imposing the fine, the CMA must be satisfied that the infringement was committed either intentionally or negligently.[90] The undertaking concerned may contest the fine itself or the amount of the fine before the Competition Appeal Tribunal ('CAT').[91] The Tribunal may confirm, set aside, or vary the decision

[87] ibid section 42. In serious cases such as wilful destruction of documents or providing false information, the sanctions include imprisonment of up to two years.

[88] Chapter I prohibits any agreement or concerted practice which has the object or effect of preventing, restricting or distorting competition, whereas Chapter II prohibits the abuse of a dominant position.

[89] Enterprise Act2002 (UK),sections 188 and 190.

[90] Competition Act (n 86) section 36.

[91] See Competition Appeal Tribunal, 'About the Tribunal' (2017) <http://www.catribunal.org.uk/242/About-the-Tribunal.html>accessed 7 August 2017

taken by CMA, or remit the matter to the CMA, or make any other decision that the CMA could have made. A further appeal from decisions of the CAT lies to the competent Court of Appeal either, on a point of law or, in the case of a fine from the imposition or the amount of the fine.[92]

8. The options available

Leaving matters as they currently are is not an option. Certainly, one cannot accept a situation where those who act in breach of competition law - are not liable to any punitive sanctions as a result of the present deplorable situation.[93] There should be no argument about this point. Those who breach the law should not be permitted to act with impunity. Ancillary to this point is the equally important consideration that an individual, as distinct from an undertaking, should incur some form of criminal liability if he intentionally is party to serious anti-competitive practices. As things stand, Chapter 379[94] is seriously deficient in this regard. Possibly measures might be taken under general criminal law provisions in relation to other offences proscribed there under. The issue however is that as things stand there are no express provisions which punish individuals who engage in serious cartel related practices. The criminal sanctions under Chapter 379[95] do not apply to infringements of articles 5 and 9 of the said Act, and address only specific issues tied with the payment of fines imposed, the provision of information and the obstruction of investigations. Chapter 379 provides that 'any person

[92] The competent appellate forum varies according to which part of the UK the CAT proceedings relate to.

[93] See for example the decision of the Office of Competition of 4 October 2016 in case COMP-MCCAA 3/2015 pages 73 and 74.

[94] Competition Act (n 12).

[95] Competition Act (n 12).

being a director, secretary or manager or other similar officer of the undertaking or association of undertakings concerned' is, if the undertaking or association of undertakings fails to pay any administrative fine imposed, liable on conviction to a fine (multa) of not less than 1,000 euro and not more than 20,000 euro.[96] I question the fairness of holding individuals criminally liable simply on the basis of the post they have, if the undertaking with whom they work fails to pay an administrative fine. Criminal liability should arise if it is shown that the individual concerned deliberately acted in such a manner as to be an active participant in the non-payment of the administrative fines due by the undertaking, and not simply because the individual happens to be a high-ranking official of the non-compliant undertaking. As a minimum, there should be an element of clear intention and of the active and conscious participation of the individual involved. Conversely, individuals who intentionally participate in anti-competitive practices should be liable for their wrong doing.

The issue ultimately is to determine what means should be employed to ensure that there are in place effective enforcement procedures and sanctions, whilst ensuring that there is adherence with the requirements of the Constitution in the light of the **Federation of Estate Agents** judgement. The obvious sanction in instances of non-compliance with the core provisions of competition law is to impose punitive fines which are sufficiently dissuasive. The issue is whether such sanctions should be imposed by the competent regulatory authority - namely the DG Competition - or else whether

[96] Competition Act (n12) article 21A. For the sake of completeness, it is pertinent to note that individuals are criminally liable under Chapter 379 in certain given circumstances such as where they provide false or misleading information, hinder or prevent investigations, or without reasonable cause do not provide requested information in good time. See Competition Act, Chapter 379 of the Laws of Malta, article 21(5) and (6).

the DG Competition should be required to apply to a court or an adjudicative forum, which in turn determines if a fine should be imposed and, where applicable, the quantum of such a fine. A subset of this latter option is whether the fines that a court may impose should be in the form of sanctions of a criminal nature or alternatively of a civil nature. The fundamental issue brought forth as a result of the **Federation of Estate Agents** judgement is that a person who is accused of a serious infringement of the law which is sanctioned by punitive fines should be guaranteed a fair hearing by an impartial and independent court. Should this per force[97] exclude the possibility that such fines are imposed by an independent regulatory authority if there is the added safeguard that a decision taken by the aforesaid authority cannot be enforced if it contested within a determined period before a court or an independent adjudicative body?

The **Federation of Estate Agents** judgement raises another issue. Strictly speaking, if once the punitive fines in question are considered to be criminal in nature, then such fines may only be imposed by a court with the competence to determine criminal sanctions. This in turn, means that the degree of proof in dealing with such cases would be that required in criminal cases – namely that the burden of proof is beyond reasonable doubt. In reality therefore if one were to strictly adhere to the **Federation of Estate Agents** judgement, the only option is to empower a court which at law is empowered to impose sanctions of a criminal nature.

9. Conclusion

The point of departure in determining what should be

[97] By force of circumstances.

done following the Federation of Estate of Agents judgement is to identify what the end-goals are. There must be punitive and dissuasive fines in place both with regard to non-compliant undertakings and individuals. Non-compliance with articles 5 and 9 of Chapter 379[98] can have a serious and negative on the well-being of a competitive market. There are three issues which need to be addressed. The first is whether the fines should be administrative or civil fines on the one hand or, alternatively, criminal fines. The second, is whether such fines should be imposed by the competent regulatory authority — in Malta's case, the DG Competition — or by a court or a special adjudicative body composed of a judge or magistrate. Finally, and this seems to be a point which does not appear to have been discussed at length in Malta, is the question of whether individuals who intentionally participate in serious anti-competitive practices should be held criminally liable.

My suggestion is to amend current competition law whereby, the DG Competition whilst empowered to issue punitive administrative fines against non-compliant undertakings as distinct from individuals, will only be able to proceed with the collection of such fines after the lapse of the period during such decisions can be contested before an independent adjudicative body. If the decision imposing the fine on the undertaking is contested, then the liability of the undertaking concerned to pay the fine should only arise following the final determination of the appeal by the competent adjudicative body confirming the decision of the DG Competition. One practical consideration which militates in favour of such a decision being taken by the DG Competition, relates to those instances where the decision taken provides

[98] Competition Act (n 12) articles 5 and 9.

for the imposition of daily fines which continue until there is compliance with the applicable competition law provisions. Even in a scenario where the decision of the DG Competition imposing daily fines is not implemented pending the final outcome of an appeal before an adjudicative body, the fact that the non-compliant undertaking may if it persists in its allegedly anti-competitive practices for the duration of the appellate proceedings, end up facing hefty fines, should in most instances serve an effective measure to ensure immediate compliance. If on the other hand, the decision to impose daily fines lies not with the DG Competition but with a court or a similar adjudicative body acting following an application for the imposition of such sanctions by the DG Competition, then there is a real risk that for the duration of the time it takes for the court or adjudicative body to issue a final decision, the undertaking may persist with its alleged anti-competitive practices to the detriment of the market.

Following such a route however does not address the main issue raised by the **Federation of Estate Agents** judgement — namely, that once such sanctions are punitive and therefore, criminal in nature, the person concerned[99] must be given a fair hearing before a court. The obvious solution to address this is to amend article 39(1) of the Constitution[100] to ensure that the current adjudicative fora have the power to issue punitive fines. Even if this route is taken, Chapter 379[101] should be reviewed to ensure that there are effective measures including criminal liability in the case of the more serious infringements.

Alternatively, the other option is to revisit both the role

[99] The person concerned in this case would be the non-compliant undertaking.
[100] Constitution of Malta (n 15).
[101] Competition Act (n 12).

and the composition of the DG Competition and of the CCAT. In the case of the former in relation to enforcement, the role of the DG would then be to investigate infringements and where applicable, to apply for the imposition of sanctions to a court or a similar adjudicative body. If such a route is followed the better option would be to establish a specialised competition court composed of a judge or magistrate. A possible model for such a court could be the ART, whose decisions are taken by a magistrate who is assisted by lay experts with no vote in the final decisions.

Whatever legislative solution is adopted, one measure that should be included as part of the overall measures following the **Federation of Estate Agents** judgement is the introduction of criminal liability of individuals who intentionally take part in serious anti-competitive practices including notably cartels. This is a serious lacuna in Maltese law and, should be addressed in short order. There is no valid reason why an individual who intentionally participates in serious anti-competitive infringements should not be answerable for his actions and therefore, subject to criminal sanctions, if convicted by the competent court of criminal jurisdiction.

Irrespective of the issues brought forth as a result of the Federation of Estate Agents judgement, the relevant provisions of Chapter 379[102] relating to enforcement and sanctions need to be revisited. The enforcement and sanctions history of the DG Competiton within the MCCAA following the amendments to Chapter 379[103] in 2011 is not one of glowing success. Very few fines have been imposed and, subsequently, collected. There is some irony in the fact that the **Federation of Estate Agents** initiated its constitutional law case

[102] Competition Act (n 12).
[103] Competition Act (n 12).

on the grounds that it might end up on the receiving end of a hefty one million euro fine, when in the entire life span of the Office of the DG Competition, commencing from May 2011 (now six years to date), the fines in their totality actually imposed and collected throughout this period amount to a few thousand euro — which is hardly the hallmark of an overzealous competition watchdog imposing fines in a cavalier fashion. The criticism that should be levelled at the Office of the DG Competition is that it has been too cautious and not proactive enough.[104] The **Federation of Estate Agents** judgement should be seized as an opportunity to address matters, and ensure that there is in place a regulatory regime, which effectively does dissuade potential wrong-doers from infringing competition law.

In addressing matters in a comprehensive manner, one should not, in absolute terms, exclude the possibility of amending the Constitution, if this is what it takes to ensure that there is in place an effective regulatory regime whilst ensuring that fundamental human rights and liberties are safeguarded. Recourse to such amendments should be considered as a matter of last resort but, certainly, should not be excluded. The bottom line in taking forward the required amendments to existing competition law should be motivated by the importance and necessity of having a regime which is effective and, is able to address possible infringements in short order, whilst ensuring that both undertakings and individuals under investigation have adequate means of redress at law in protecting their legitimate interests. There is no simple clear cut solution however, whatever route is taken, it

[104] Reply to Parliamentary Question no. 27947 given on the 25 October 2016 whereby the Minister responsible for competition was asked about the number of administrative fines imposed and paid since 2011. In her reply the Minister stated that during this period two fines were imposed and paid one of €1000 and another of €2000.

is imperative that any changes to the law are complemented with the will-power at both political and administrative levels to ensure that the competent regulatory authorities are properly staffed and equipped to perform their functions. Amending laws to improve the existing regulatory regime is positive. However, to achieve the desired goals there must be the willingness to ensure the efficiency of the regime adopted. If such a willingness does not exist, then it is futile to propose legislative changes.

Errata Corrige

In the version of this article which was published on the XVIII Edition of Id-Dritt, the following errors were made:

The name of the author was incorrectly attributed to "PAUL EDGAR MICALLEF GRIMAUD," instead of "PAUL EDGAR MICALLEF"

The biography of the author, incorrectly, read as follows:

Paul Edgar Micallef Grimaud is a senior visiting lecturer at the University of Malta. He's currently the Head of the Intellectual Property & Telecoms, Media, Technology (IP&TMT) team at Ganado Advocates, and is a former Senior Legal Advisor to the Malta Communications Authority.

The correct version of the biography should read:

Paul Edgar Micallef was appointed as Chief Legal Adviser with the Malta Communications Authority in 2004. He studied law [LL.D.] at the University of Malta graduating in 1984. Subsequently he obtained the degree of Master of Jurisprudence from the University of Birmingham (UK). In 2014 he was appointed as visiting senior lecturer at the University of Malta. He has specialised in consumer law, telecommunications law, postal services law, travel law and town planning law and has drafted various laws on consumer protection, travel and the leisure industry, telecommunications, e-commerce and postal services for the Government of Malta. He has previously worked in private practice (1985-6), as a judicial assistant with the Law Courts (1987-1990), as legal counsel with the Department of Consumer Affairs in Malta [1992-97] and with the Planning Authority [1997-2001]. Between 2001 to 2007 he was a member of the Malta Consumer Affairs Council a statutory advisory body to the Government of Malta. Over the years he has published numerous papers in various legal journals and books on the subjects of his expertise notably consumer law and communications law.