



16th November 2021

Public Contracts Review Board
Notre Dame Ditch
Floriana
FRN 1061

Re: Tender for the Supply of Ready Made Feeds for Preterm and Newborn Babies – Ref. CFT019-1174/20 (CPSU 3648/20)

Reply of the Office for Competition

1. The Office for Competition (hereinafter 'the Office') is intervening in these proceedings as an interested party in terms of Regulation 276(c) of the Public Procurement Regulations and is hereby filing its reply.
2. The Office within the Malta Competition and Consumer Affairs Authority (hereinafter 'MCCAA') is an independent and autonomous entity established under the Malta Competition and Consumer Affairs Authority Act¹ (hereinafter 'the MCCAA Act') and assigned with the task of protecting competition back in 1995 with the coming into force of the Competition Act². The mission of the Office is to promote and enhance effective competition in furtherance of the very purpose of the MCCAA to attain and maintain well-functioning markets for the benefit of consumers and economic operators³.
3. The interest of the Office in these proceedings stems from its continuous efforts in these past 2 years to promulgate a fair and open market by creating a level playing field for suppliers of infant formula to fairly compete in a number of secondary markets in the private retail market (i.e., retail shops and pharmacies selling infant formula, follow on formula and other formula or milk products for older infants or toddlers). The Office conducted these efforts both through its advocacy role⁴ in terms of the MCCAA Act and through the conduct of a sector inquiry⁵ in terms of the Competition Act.
4. Moreover, the Office has an interest to intervene in these proceedings, since the Office is the guardian of competition in the Maltese market and as it will be outlined in this reply, the practices adopted by the Central Procurement and Supplies Unit (hereinafter 'the CPSU') seriously disrupt the competitive structure or functioning of the market, affecting the public interest protected by the Office.

¹ Chapter 510 of the Laws of Malta

² Chapter 379 of the Laws of Malta

³ Vide Article 4 of Chapter 510 of the Laws of Malta

⁴ Vide Article 14(1)(g) –(i) of Chapter 510 of the Laws of Malta

⁵ Vide Article 11A of Chapter 379 of the Laws of Malta

5. The Office conducted a sector inquiry in terms of the Competition Act precisely on the market which is the subject matter of these appeal proceedings, i.e. on the supply of infant milk formula for new born babies in the public health sector. The sector inquiry conducted by the Office clearly concluded that the tendering process for the supply of infant formula at Mater Dei Hospital whereby one supplier wins the tender for the procurement of infant formula in the public health service is distorting competition in a number of secondary markets in the private retail market.
6. As the Director General of the Office, I am deeply concerned and disappointed that notwithstanding the conclusions contained in the sector inquiry, the CPSU is continuing with the policy and practice which has been going on for a number of years to award the tenders for the supply of readymade feeds to new-born babies to only one supplier with the result that the procurement process adopted by the CPSU at Mater Dei Hospital is distorting competition in the private retail market.
7. As stated in the report of the sector inquiry⁶, the Office considers that public procurement must not be seen as separate and distinct from the competitive effects it may create on the market. Indeed, the public procurement rules were inspired by the desire to promote competition and are built on the principle of competition. As Sanchez-Graells explains:

"Therefore, the clear competition objective guiding public procurement rules and the ensuing obligation of contracting authorities to protect competition as an institution – if not to develop competition in the public procurement field – was synthesised in the principle of competition embedded in EU public procurement directives, and now consolidated in Article 18(1) of Directive 2014/24⁷.

8. Therefore, public procurement practices should complement competition rules, something which according to the Office is absent in the procurement practice adopted by the CPSU. In this spirit, Sanchez Graells explains:

"From this perspective, competition requirements should be understood as determining that public procurement rules have to be designed and implemented in such a way that existing competition is not distorted. In other words, it is submitted that public procurement rules cannot generate distortions in the dynamic competition processes that would take place in the

⁶ Final report on the Sector Inquiry of Infant Milk Formula in the Public Health Sector and the Impact of that Supply on the private retail market for a) from birth infant formula, b) follow-on formula and c) toddler milk or other formula for the period 2013-2019 – Paras. 166 and 167.

⁷ A. Sanchez-Graells, 'Competition Law and Public Procurement' in JA Moreno Molina & E Diaz Bravo (eds), Contratacion Publica Global: visions comparadas (Valencia, Tirant lo Blanch, 2020).



*market in their absence. Or, even more clearly, public procurement rules must not distort competition between undertakings*⁸.

[Emphasis added]

9. In its sector inquiry the Office has urged the CPSU to change its current procurement practices to avoid harming competition any further and adopt one of the recommendations of the Office which recommendations seek to promote consumer choice, diversity of supply and sustainable market competition.
10. The sector inquiry is publicly available online on <https://mccaa.org.mt/media/6851/oc-final-report-sector-inquiry-infant-formula-130921.pdf> and a copy of which was sent on the 13 September 2021 to CPSU and to all suppliers of infant milk formula present in the private retail market.



Godwin Mangion

Director General



Dr Aloysius Bianchi

⁸ Ibid.