

**Decision 01/ED of the 21st April 2005
in virtue of the Malta Resources Authority Act (Cap. 423)
on the request of Enemalta and
Malta Freeport Terminals Limited
for a clarification ruling**

1. Determination

Whereas

1. The Malta Resources Authority (“MRA”) received a request from Enemalta Corporation (“Enemalta”) and Malta Freeport Terminals Limited (“Freeport”, “MFT”) to give a ruling to clarify the interpretation of the decision of the Authority 004/03/ED;
2. MRA has taken note of this request, and also took note of the correspondence between MRA, MFT and Enemalta;

Now, therefore, for the reasons stated in Section II C of this Decision, the Malta Resources Authority hereby determines as follows:

1. In paragraph I.1 of Decision 004/03/ED, the Authority declared the charge by Enemalta to Malta Freeport Terminals Limited to be abusive in its selling price, in being a misrepresentation of the elements which are to be included in the selling price of duty free fuel. MFT is entitled to duty free fuel by virtue of the Malta Freeport Act, Chapter 334 of the Laws of Malta. However, Enemalta is entitled to cover its costs incurred in the provision of the service that it renders and consequentially the mark-up may justifiably seek to compensate for incurred cost and for reasonable profit. The selling price of fuel in absolute terms is established by a formula determined by Cabinet Committee, which formula contains an element of cost, duty and profitability. Enemalta should apply this to all customers in a non-discriminatory manner. The price to Freeport, with regard to its constituent elements, should not be different from the price Enemalta charges to other customers. Enemalta only has to deduct the element of duty from this formula.
2. In paragraph I.2 of the Decision 004/03/ED, MRA requested Enemalta to apply its decision with immediate effect. This means that any price that Enemalta charges following the issue of the Decision should be duty-free. The Decision’s statement that the actions of Enemalta were abusive *ab initio* has a declaratory effect with

regard to the actions taken prior to the issue of the Decision, that is that the duty was unlawfully charged by Enemalta during the whole period within which such duty was charged.

II. Considerations

II.A. Facts

The facts of the case are as follows:

1. Malta Freeport Terminals Limited claimed in its letter of 25th August 2004 that ‘the MRA ruling states that the price should consist of the purchase price and not the other costs for distribution and administration’, and that in regard to profit loading ‘our market enquiries have established that a fair and non abusive mark – up would be 0.007 c/litre’.
2. Enemalta, on the other hand, in its letter of 12th August 2004, stated that ‘In our opinion, the Malta Freeport have erroneously interpreted the MRA ruling to be retroactive’. It adds that ‘Enemalta currently prices its fuel by adding a fixed element (that includes transport, duty, commissions and Corporation profit) to the variable product cost’ and advocates that ‘Selling Price = CIF + 4c384/litre’ where 2c384/litre consists of costs and 2c/litre is Corporation profit’.

II.B. The Request

Enemalta and MFT disagree as to the interpretation of the Decision 004/03/ED and request MRA to provide a ruling on the following issues

1. What constitutes a non-abusive mark up?
2. Since what date should Enemalta refund to MFT the amount that was overpaid as duty?

II.C. Reasoning of the Decision

1. Non-abusive mark-up

In the Decision 004/03/ED, it was stated that the selling price cannot include any element of duty whatsoever. This does not, however, mean that Enemalta is not entitled to cover its costs incurred in the provision of the service that it renders and consequentially the mark-up may justifiably seek to compensate for incurred cost (eg transportation, storage), as well as for reasonable profit.

The entitlement of MFT to duty free fuel has been established beyond doubt and accepted by all parties concerned. The ultimate consumer price of fuel is established by a formula

determined by Cabinet Committee, which formula contains an element of cost, duty and profitability (or mark up). MFT makes a number of claims that appear to be unilateral to their claim, most important of which is the claim that a “Non abusive mark up would be USD 20 per metric tonne, equivalent to LM 0.004 per litre”.

The mark up is established by Cabinet Committee and is applicable to all consumers in a non-discriminatory manner. MFT’s reasoning in this regard does not seem to be logical or on a level playing field to other consumers and thus discriminatory and unilateral. The matter of mark up element should be that as it is established in the formula.

The price to Freeport, with regard to the constituent elements, should not be different from the price Enemalta charges to other customers. If Enemalta believes that, as a result to refunds of duty to Freeport, the Corporation becomes disadvantaged, any such disadvantage is not due to any fault of Freeport and cannot be remedied through Enemalta claims against Freeport. Freeport’s position is clearly ‘duty-free’ in terms of primary legislation and Freeport cannot be responsible for any adverse effect that such legislative provisions may have caused to Enemalta. Enemalta, if it deems fit, may discuss any resulting disadvantage with the Government

2. Retrospectivity of the Decision

As provided in the MRA’s Decision 004/03/ED, in terms of Section 16(1) of the Malta Freeport Act, all goods imported into Freeport are exempt from customs duty; if a price is ‘duty free’ it cannot include duty.

The Authority issued Decision 004/03/ED and requested Enemalta to apply it with immediate effect. In other words, any price that Enemalta charges following the issue of that Decision should be duty-free.

The Decision’s statement that the actions of Enemalta were abusive *ab initio* does not mean that that Decision is retroactive *per se*, but has a declaratory effect with regard to the actions taken prior to the issue of the Decision. In other words, from the first day to the last day when duty was charged, Enemalta’s actions had not been in accordance with the law. Accordingly, the party that has been aggrieved as a result of unlawful actions may seek remedy, such as compensation and / or award of damages.

MRA however does not have jurisdiction to award compensation or damages to injured parties. In case the parties do not manage to resolve their differences through negotiation, the injured party (Freeport) is free to seek remedy through the Courts, invoking, if it deems fit, MRA’s Decision in support of its claims.

A Walker
Chairman