MRA
MALTA RESOURCES AUTHORITY

Decision 02/ED of 9th June 2005
in virtue of Malta Resource Authority Act (Cap. 423)
on the Complaint of Shell, as represented in Malta by Attard Services Limited,
against Enemalta Corporation
with regard to providing of fuel and oil handling services

I. Determination

Whereas

(a) Shell, as represented in Malta by Attard Services Limited ("ASL/Shell") has filed a complaint to the Malta Resources Authority ("MRA") on 26th September 2004 requesting MRA to issue a ruling on the matters raised in the complaint as stated in Section II. of this Decision;

(b) MRA has taken note of the complaint and has thoroughly investigated the matters raised in the complaint whereby the parties were given the opportunity to present and explain their respective positions.

Now, therefore, on the basis of the facts provided and for the reasons stated in Section II of this Decision, the Malta Resources Authority hereby determines as follows:

1. With regard to the first, second and third complaint of ASL/Shell:

(a) as to whether the airport depot is Centralised Infrastructure ('CI') as defined by Council Directive 96/67/EC of 15 October 1996 on access to the ground handling market at Community airports ("Dir 96/67");

(b) so as to ensure appropriate access to same;

(c) so as to establish that the conditions placed on such access are fair, transparent, objective, relevant and non-discriminatory and do not hinder access or competition or frustrate the aims of Dir. 96/67;

In terms of Articles 8 and 16 of Dir 96/67/EC, the Authority is of the opinion that the determination and declaration of whether a facility is a centralised infrastructure and/or what amounts to CI are matters within the competence of the body managing the airport or public authority responsible for the airport and acting on the request of the managing body of the airport. Accordingly, as the MRA is not such managing body or authority, these matters are outside the competence of the MRA.

This notwithstanding, it appears that the issue of whether the facilities in question constitute CI or not and, consequently, whether the access to these

facilities should be granted, is not disputed, since the parties seem to have reached a *prima facie* agreement that the access shall be granted and proceeded, in the course of their negotiations, to negotiate prices for ASL/Shell's access to the Enemalta's facilities.

2. With regard to the fourth complaint as to the establishing of appropriate market and efficient industry practices allowing for fair competition, the Authority has been made aware that following an inspection and audit on Enemalta's operations as commissioned by ASL/Shell, a number of potential inefficiencies were brought to the attention of Enemalta and we understand that the principal elements thereof were addressed by Enemalta in their preparation of revised cost calculations so as not to burden ASL/Shell with the costs thereof.

   While this Authority does not condone blatant inefficiencies being adsorbed in cost-based prices, it accepts that a restructuring exercise necessitates time. Accordingly, the MRA hereby instructs Enemalta to report back to this Authority at regular intervals as to the progress of such agreed restructuring.

3. With reference to the fifth complaint as to whether Enemalta's price for the services requested by ASL/Shell is either not relevant, or non-transparent or non-objective or discriminatory, this Authority determines that notwithstanding that Enemalta's price is based on its current operating costs and not on open market considerations, the pricing method employed by Enemalta is not in violation of the provisions of Directive 96/67/EC. Moreover, with regard to whether Enemalta's prices for the services requested amount to an entry barrier for newcomers to the sector and as such are an abuse of Enemalta's monopolistic position, this Authority, while it notes that it is not competent to rule of matters falling under the Competition Act proper, determines that provided Enemalta's price seeks to compensate for current incurred costs well as for reasonable profit, adjusted for the effect of significant potential operational inefficiencies as noted in 2 above, Enemalta's pricing method does not constitute unfair competition and is not per se tantamount to an entry barrier.

4. With reference to ASL/Shell's sixth and final complaint, this Authority, on the basis of the above and without prejudice to all other legal means available to the parties, directs the parties to negotiate in good faith to arrive at mutually agreeable fair, costs-based charge for the services in question within and not later than 4 weeks from the date of this Decision, failing which to give this Authority or other mutually acceptable competent entity a mandate to establish such charge.

II. <u>Considerations</u>

1. FACTS OF THE CASE

1.1. Following a call for tender by Tender Advert No. MIA/06/04 for Providing Fuel and Oil Handling Services (Airside) in March 2004 by the Malta International Airport, Shell, in association with Attard Services Ltd as their Malta agents, ("ASL/Shell") became the second licensed operator for aviation fuels at the airport as of June 2004 and were requested to negotiate directly with Enemalta for use of the centralised infrastructure.

1.2. At a meeting held on the 10th September 2004 at the MRA offices Mr Kenneth Attard and Dr Simon Busuttil for ASL/Shell informed the MRA that negotiations with Enemalta on the availability and use of the common fuelling infrastructure from the port to delivery at the airport, as well as the price structure and consequent price of such, were ongoing.

1.3. In view of the lack of agreement between the parties as aforementioned the MRA was formally requested, by an email from Dr Simon Busuttil of the 26th September 2004, to intervene in the matter as the regulatory authority for energy, in particular to ensure the process of liberalisation of the services of fuel provision at Malta's airport terminal were conducted in accordance with Directive 96/67/EC on access to the groundhandling market at Community airports.

1.4. PriceWaterhouseCoopers ("PWC"), as commissioned by Enemalta to carry out the relevant fiscal exercise and arrive at a determination of a fair charge for the use of the common facilities, in their report of the 4th October 2004 made reference to their draft report of the 23rd July 2003. Their advocated charge for mere delivery in the initial report was 4c/US gallon, which charge was revised to 2c25/US gallon in 2004 (equivalent to USD22.27/MT at Lm1 = USD3.0).

1.5. Following the visits of their auditor Denys Denant during July 2004 Shell/ASL submitted an operations inspection and audit report relating to Enemalta's activities. The purpose of the report of September 2004 was twofold:

'1) To identify the current Enemalta Aviation Operations (from importing vessel/parcel, through the various stages of storage facilities, quality and quantity controls, certification and delivery of the product at the fueller loading gantry inside Malta International Airport) and

2) To identify the alternative optimised infrastructure and manning levels Shell Aviation would require and expect in order to supply jet fuel from the jetty to the fueller loading gantry inside Malta International Airport.'

The report advocated a reduced use of infrastructure (ie. no requirement for Has Saptan and the second airside facility known as Bulk Fuel 2), as well as a reduction in manning levels achieved by a reduced use of facilities, a clear understanding of the actual time required on aviation operations and a revised organisation of tasks. Such reduction was also advocated to ensure cost efficiency.

The report concludes: *'In terms of costs it should be Enemalta's own decision and cost if it wishes to maintain its current facilities, operations, processes and*

manning levels. Those costs associated with these operations should not be on-charged to commercial users of Malta's infrastructure'.

1.6. In an email dated 4th November 2004 Dr Simon Busuttil clarified the Shell/ASL position as follows:

'In establishing rates for the use of centralised infrastructure, Enemalta and the Maltese Government are bound by law to ensure that ***"the management of these infrastructures is transparent, objective and non-discriminatory and, in particular, that it does not hinder the access of suppliers of ground handling services."*** *It is evident that the rates that you quote for the use of centralised infrastructure fall foul of this provision because they are based on your current operating costs and not on open market considerations. As such, they present an entry barrier for newcomers. Furthermore your rates are contradicted by normal rates that you quote for storage and pumping services to other companies. The only difference appears to be that, this time round, the company concerned (our clients will enter the market that had hitherto been held exclusively by Enemalta as a monopoly. But your monopoly status or the prospect of competition, you will appreciate is not a justifiable reason to quote higher rates for the use of centralised infrastructure. Furthermore, by quoting these rates Enemalta is effectively dictating to the market that any prospective competitor can only enter if it burdens itself with a similar cost structure. But this too falls blatantly foul of the law.'*

1.7. On the 3rd January 2005 the MRA informed both ASL/Shell and Enemalta that it had engaged the services of Deloitte & Touche ("D&T") to assist in its intervention with regard to the pending dispute between the parties.

1.8. By means of a letter dated 9th February 2005, following a meeting with D&T and the MRA, Enemalta summarised its position as follows : '*Without going into the legalities as to whether Enemalta's infrastructure can be considered as common infrastructure in terms of the law, Enemalta … is willing to offer its services to ASL/Shell. … However, Enemalta is only prepared to do so at a fair, transparent price that adequately remunerates Enemalta for the services it is providing and the investment it has made'.*

Adding that the infrastructure which ASL/Shell was requesting the utilisation of went beyond the installation at the airport but extended to those at Birzebbugia, Wied Dalam and Has–Saptan.

Enemalta was prepared to offer these services at the charge advocated in the PWC report of 2004.

1.9. ASL/Shell submitted a similar summary of its position stating *ab initio* that it had acted in good faith and based its project assumptions on its good understanding of the industry and on the fuel storage rates being charged by Enemalta to other users.

1.10. In its submission of February 2005, with regard to rates ASL/Shell stated: *"Rates to be applied for access to the existing infrastructure dedicated to Jet*

fuel should be based on current market rates in use by other users of Enemalta's infrastructure for white products, including Jet fuel. Shell Aviation's assumptions, when compared with existing rates being charged to others are detailed as : Storage rental for receipt and storage of Gasoil/Kerosene cargoes at 2.00 USD/MT per month of product plus 0.5 USD/MT for pumping in and 0.5 USD/MT for pumping out. Shell Aviations' assumptions consider the pumping out rate of 0.5 USD/MT to replace the pumping out to vessels, as the distance from storage to vessel Jetty and to the airport are relatively equal and that this would not penalize our request. Shell Aviation also acknowledges that the use of the airport depot BF1 facilities, including filtration and the use of the loading gantry are additional activities, which need to be included separately in the overall objective, relevant and transparent costings.

On the basis of the above Shell requested the MRA's intervention to conclude the matter without further delay.

1.11. By their letter of 4th April 2005 Enemalta clarified the position with regard to the prices currently charged by Enemalta for similar services provided to other companies as follows: *"The services being requested by Shell for the receipt, storage, transferring and loading of refuellers at Luqa airport are very much different from the contracts that Enemalta has up to now entered with third parties for the storage of fuel at Has-Saptan."*

"…international procedures … require also that all tests and quality control practices are properly recorded and that the operator must have a proper audit trail of the fuel such that every litre of fuel put onto an aircraft can be traced back to the refinery from where it originated."

"Also in handling third party aviation fuel Enemalta would be shouldering a lot of responsibility which needs to be compensated".

2. THE COMPLAINT

2.1. On the basis of ASL/Shell submissions to the Authority, in particular of November 2004 and February 2005, the complainant submits and requests the MRA to establish the following:

2.1.1. To confirm that the airport depot is Centralised Infrastructure as defined by EU Groundhandling Directive and declare it so.

2.1.2. To ensure appropriate access to associated dedicated jet fuel infrastructure in Malta that may be used to store and supply product from jetty to the airport.

2.1.3. To establish access and conditions to the dedicated jet fuel infrastructure in a fair, transparent, objective and non-discriminatory way that does not hinder access or competition and does not frustrate the aims of the Groundhandling Directive.

2.1.4. To establish appropriate market and efficient industry practices that exclude out dated practices and unnecessary costs and allow for the non-discriminatory and relevant use of these assets, whose proximity, cost or environmental impact does not allow for division or duplication.

2.1.5. To establish fair, competitive and non-discriminatory pricing or the receipt, storage, transmission and delivery of jet fuel using the dedicated jet fuel infrastructure operated by Enemalta Corporation on criteria, which are relevant, objective, and transparent.

2.1.6. To give effect to the international obligations entered by the Government in relation to the resources regulated by the Malta Resources Authority.

2.2. In particular with regard to Enemalta's prices, ASL/Shell submitted that:

2.2.1. Enemalta's prices for the services requested by ASL/Shell are either non-transparent or non-objective or discriminatory or a combination thereof due to being based on Enemalta's current operating costs and not on open market considerations; and

2.2.2. Enemalta's prices for the services requested amount to an entry barrier for newcomers to the sector and as such are an abuse of Enemalta's monopolistic position.

3. ASSESSMENT OF LEGAL POSITION

3.1. Matters relating to the Centralised Infrastructure ("CI") and access to CI

3.1.1. In terms of Articles 8 and 16 of Dir 96/67/EC, the Authority is of the opinion that the determination and declaration of whether a facility is a centralised infrastructure and/or what amounts to CI are matters within the competence of the body managing the airport or public authority responsible for the airport and acting on the request of the managing body of the airport. Accordingly, as the MRA is not such managing body or authority, these matters are outside the competence of the MRA.

3.1.2. This notwithstanding, it appears that the issue of whether the facilities in question constitute CI or not and, consequently, whether the access to these facilities should be granted, is not disputed, since the parties seem to have reached a *prima facie* agreement that the access shall be granted and proceeded, in the course of their negotiations, to discuss prices for ASL/Shell's access to the Enemalta's facilities.

3.1.3. Moreover, the Authority is of the opinion that regardless of whether the facilities in question are considered as CI or not, the conditions to access such facilities should be relevant, objective, non-discriminatory and transparent; and it is a duty of the Authority to ensure fair competition in the resources sector.

3.1.4. The Authority, therefore, proceeds with the determination of the complaint as to the conditions of access to Enemalta's facilities.

3.2. Matters relating to pricing

3.2.1. The dispute under consideration is focused on the price discrepancies for the services to be provided by Enemalta to ASL/Shell as follows:

3.2.1.1. Enemalta maintains that the price should be based on a cost build-down from the total Enemalta costs minus those charges not relating to aviation fuel including an amendment in view of the non-use of Has-Saptan and BF2 as requested by ASL/Shell following their 'operations audit' and, therefore, USD22.27/MT.

3.2.1.2. On the other hand, ASL/Shell maintains that the price should be based on the starting price of USD2/MT/month, as the price quoted for other operators, with a cost build-up for additional services and, therefore, USD8.25/MT.

3.2.2. In terms of the Malta Resources Authority Act (cap. 423) the functions of the Authority include the regulation of the price structure for any activity regulated by the Act and where appropriate the establishing of the mechanisms whereby the price to be charged for the acquisition, production, manufacture, sale, storage and distribution thereof is determined (Art. 4(1)(i) of the Act) at the same time ensuring fair competition in all such practices, operations and activities (Art. 4(1)(d) of the Act).

3.2.3. In the preamble to Council Directive 96/67/EC of 15 October 1996 on access to the ground handling market at Community airports ("Dir 96/67") reference is made to the fact that although, in light of the principle of subsidiarity, it is essential that access to the market is allowed, Member States are also allowed the possibility to take into consideration the specific nature of the sector[1] and such free access must be introduced gradually and must be adapted to the requirements of the same sector.[2] Moreover, whereas such access must be granted to ensure fair and genuine competition, it must be possible for such access to give rise to the collection of a fee.[3]

3.2.4. Furthermore, in terms of Art. 16 of Dir 96/67, where conditions are placed upon access to airport installations, the conditions must be: *relevant, objective, transparent and non-discriminatory*. Similarly, where such access to airport installations gives rise to a fee, such fee shall be determined in accordance with: *relevant, objective, transparent and non-discriminatory criteria.*

[1] Recital 6 of Dir 96/67
[2] Recital 10 *ibid*.
[3] Recital 25 *ibid*.

3.3. Is Enemalta's <u>USD22.27/MT</u> price as offered to ASL/Shell discriminatory?

3.3.1. It is settled law that: '*discrimination can arise only through the application of different rules to comparable situations or the application of the same rules to different situations'*.[4]

3.3.2. In relation to *price* discrimination it has been held that: '*price discrimination only exists where goods are sold or purchased at prices which are not related to differences in costs.'*[5] This factor has as its corollary that '*non-cost-related price differences are always to be deplored and outlawed,'*[6] however price differences based on incurred costs are acceptable.

3.3.3. On the application of the above to the case under examination, firstly, in the Authority's view, the starting price of the USD2/MT/month, being cited by ASL/Shell as the current international market rate which should be used in the local scenario, cannot be invoked in this case due to the objective differentiating circumstances of the local market, both in terms of its size and market structures.

3.3.4. Accordingly, it would be discriminatory in this case to compel Enemalta to offer its services locally to ASL/Shell at internationally established rates when the two markets, that is local and international, cannot be compared.

3.3.5. Secondly, as to the ASL/Shell's submission that Enemalta supplies the same service as requested by ASL/Shell to third parties at a fee based on USD 2 /MT / month which is substantially less than the amount claimed from ASL/Shell, on the basis of the information provided to the MRA, the Authority is satisfied that the services as supplied to third parties are not the same as requested by ASL/Shell, since:

3.3.5.1. the services supplied to third parties are:

(a) are limited to mere discharge, storage and loading services and, moreover, do not incur any responsibility on behalf of Enemalta beyond the strict parameters of the service provided; and

(b) are so provided on the basis of relatively short-term agreements (eg. 15 to 90 days); and

3.3.5.2. on the other hand, the services as being requested by ASL/Shell are long-term and much broader and incorporate receipt, storage, transferring, loading, fuel testing at every transfer stage, filtering and recording services, as well as the general onerous responsibility associated with handling third party aviation fuel by Enemalta at the appropriate qualitative levels required by the civil aviation industry.

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[4] Case C-279/93 *Finanzamt Koln-Altstadt v Schumacher* [1995] ECR I-225

[5] Craig, Paul, De Burca, Grainne, *EC Law. Text, Cases, & Materials,* p. 962

[6] *ibid.* p. 963

3.3.6. Consequently, on the basis of the above, as the service package requested from Enemalta by ASL/Shell is different from that supplied by the Corporation to third parties, there cannot be a 'like with like' comparison and, hence, Enemalta is not precluded from charging different fees nor can any such charging be held to amount to discriminatory treatment.

3.4. Is the build-down costing method employed by Enemalta in violation of the requirements of Dir 96/67?

3.4.1. The criteria for the imposition of a charge for access to airport installations are stipulated by Art. 16 of Dir 96/67, where such imposition is conditioned by the fact that the fee must be determined in accordance with: *relevant, objective, transparent and non-discriminatory criteria*. And *a contrariu sensu* must not be arrived at arbitrarily or be discriminatory.

3.4.2. The fact that the charge for services provided by Enemalta is not being applied in a discriminatory manner has already been established in the preceding sub-section.

3.4.3. With regard to the *relevant, objective and transparent* criteria, the Authority has noted the following:

3.4.3.1. In accordance with Dir 90/377,[7] a charge can be referred to as *transparent* when it is a direct result of the operating costs that do not hide subsidies or state aids which could cover anti-competitive behaviour.

3.4.3.2. In its Vth Report on Competition Policy,[8] the European Commission observed that "in proceedings against abuse consisting of charging of excessively high prices, it is difficult to tell whether in any given case an abusive price has been set for there is no objective way of establishing exactly what price covers cost plus a reasonable profit margin".

3.4.3.3. It was held in Case C-298/83 that the relationship between the price and the economic value of the goods or services supplied cannot be reduced to a simplistic cost-plus formula.[9]

3.4.4. In the case under examination, the Authority has been made aware that following an inspection and audit on Enemalta's operations as commissioned by ASL/Shell, a number of potential inefficiencies were brought to the attention of Enemalta and we understand that the principal elements thereof were addressed by Enemalta in their preparation of

[7] Council Directive 90/377/EC of 29th June 1990 on Community procedure to improve the transparency of gas and electric prices charged to industrial end users.
[8] Vth Report on Competition Policy (1975), point 3.
[9] Case C-298/83 *CICCE v Commission*, [1985] ECR 1105.

revised cost calculations so as not to burden ASL/Shell with the costs thereof.

3.4.5. On the basis of the above, therefore, the Authority is of the opinion that:

3.4.5.1. the principle of cost-based pricing is an objective way of establishing a charge, and there can be more than one method of arriving at a cost-based charge;

3.4.5.2. the cost-based method employed by Enemalta , does not hide any subsidies or state aid;

3.4.5.3. Based on criteria 3.4.5.1 and 3.4.5.2. above, Enemalta has provided reasonable justification for the structure of the resulting charge.

3.5. Is Enemalta's charge for the services requested by ASL/Shell an entry barrier to new entrants?

3.5.1. The Authority notes that the Office of Fair Trading is the competent authority to deal with issues arising under the Competition Act (Cap. 379) and to enforce Article 82 of the EC Treaty in Malta.

3.5.2. This notwithstanding, the MRA's duties under Cap. 423 include ensuring fair competition in the energy market, which notion is wider than that of 'abuse of dominant position' under the Competition Act.

3.5.3. The relevant considerations in determining anti-competitive behaviour of Enemalta in the case under consideration is whether the charge for the services requested by ASL/Shell is excessive which, in turn, requires consideration of both whether the charge is cost-based and whether any mark-up is abusive.

3.5.4. As was stated previously, it is understood that Enemalta's charges are cost-based. With regard to mark-up, this may justifiably seek to compensate for incurred cost, as well as for reasonable profit.

3.5.5. It is the Authority's opinion that provided that the above-listed principles are adhered to in Enemalta's pricing method, such method is not anti-competitive and the charge arrived at is not excessive. Accordingly, such charge could not amount to an entry barrier to new entrants to the market.

3.5.6. However, while it is MRA's function in terms of law to regulate price structures and mechanisms, it is not within the functions of this regulatory authority to stipulate actual prices for the services in question. Consequently, in the absence of a specific mandate of the parties, this Authority is delivering its Decision within the constraints of its enabling Act.

3.5.7. The Authority, therefore, on the basis of the above and without prejudice to all other legal means available to the parties, directs the parties to negotiate in good faith to arrive at mutually agreeable fair cost-based charge for the services in question within 4 weeks, failing which to give this Authority or other mutually acceptable competent entity a mandate to establish such charge.

A Walker
Chairman