



MALTA RESOURCES AUTHORITY

**Decision 001/02/ED of  
the 24<sup>th</sup> September 2002  
in virtue of Malta Resources Authority Act (Cap. 423)  
on the Complaint by Hompesch Company Ltd**

**I. Determination**

**Whereas**

1. Hompesch Company Limited (“Hompesch” or “Complainant”) has filed a complaint to the Malta Resources Authority (“MRA”) on 13<sup>th</sup> September 2001 whereby the Complainant requested MRA to issue a ruling on the issues raised in the complaint as stated in Section II.B. of this Decision;
2. MRA has taken note of the complaint and has thoroughly investigated the matters raised in the complaint;
3. MRA had separate hearings on the matters raised in the complaint with Hompesch, Enemalta Corporation (“Enemalta”) and the General Retailers and Traders Union (“GRTU”) in which questions were put to the parties and in which the parties involved were invited to give a full exposition of the facts and issues associated with the complaint, and to state and explain their position;

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

1. As the competent authority to rule on issues of fair competition in the energy sector, MRA, in this particular instance, in view of the fact that the Office for Fair Competition had already issued a ruling on this matter at a time when the Malta Resources Act was not yet in force, and the Malta Resources Authority was not yet constituted, adopts as an integral part of this Decision the ruling of the Office for Fair Competition of 2<sup>nd</sup> December 1999 with regard to the agreement between the petrol stations owners – members of GRTU. In view of the particular circumstances of this case indicated above, MRA is also communicating this Decision to the Office for Fair Competition.

2. MRA declares that GRTU has no authority to act as regulator of the energy sector since this function is allocated to MRA exclusively in terms of law. Therefore GRTU's letter of 11<sup>th</sup> December 2001 addressed to Hompesch Station Ltd is *ultra vires* and without any regulatory legal effect. MRA undertakes to communicate this position to GRTU and to take all measures available to it at law to ensure that GRTU does not seek to carry out a function which by law is attributed solely to the Malta Resources Authority.
3. With regard to the regulation of opening hours, MRA reiterates the argumentation laid out in the body of this Decision and therefore states that the licence conditions issued by Enemalta were within its legal powers. A new development has occurred following the conclusion of the hearings and deliberations with regard to this matter. This new development relates to LN102/2002 issued under the Trading Licences Act by the Minister of Economic Services. This Legal Notice reiterates the opening hours indicated in the licence modification issued by Enemalta on the 17<sup>th</sup> January 2001. This Legal Notice therefore consolidates the existing legal situation.
4. With regard to the matter of the commission, Enemalta, acting in its regulatory capacity, did not carry out any discriminatory action insofar as the condition for the increase in commission was the provision by the station owners of a fully automated cash card acceptors as determined in the letter amending the licence. Withholding of this commission was a penalty associated with the breach of licence condition, and applied indiscriminately to whoever did not provide a fully automated service.
5. With regard to the matter of the mode of distribution, as a matter of regulatory policy, MRA does not agree that tying an increase in commission to *one particular method* of distribution to the public is the correct technology-neutral approach that should be taken to encourage improvements in fuel distribution for the benefit of consumers.
6. Accordingly, as the regulator of the sector, and in accordance with its powers under the law, MRA is undertaking a full review of the licensing conditions of this sector seeking to ensure better service to the public without imposing technology-specific requirements, and ensuring that, as long as the policy objectives are met, there is no withholding of commission on the basis of method of distribution.
7. In partial execution of its reviewing of the licensing conditions of this sector, as indicated in 6 above, MRA, as regulator of the Energy sector, hereby directs Enemalta, as an operator in this sector, with immediate effect, to pay the Complainant the commission at the same rate as it pays other petrol station operators offering a twenty-four hour service to the consumer, for as long as the Complainant offers a twenty-four hour service to the consumer, irrespective of the mode of operation of such a service.

## **II. Explanatory memorandum**

### **II.A. Facts**

The facts of the case are as follows:

- 1 In 1997, a verbal agreement was concluded among the petrol station operators, members of the GRTU, to the effect that no attendant is to be present at petrol stations after the closing times (after 6 p.m. and on Sundays and public holidays) and that the only way a service could be provided to customers at these times is by means of automated acceptors.
- 2 On the 18<sup>th</sup> March 1997, GRTU and Enemalta concluded an agreement whereby Enemalta raised its commission from 1c1 to 1c67 for owners operating (new) automated acceptors, in accordance with this same agreement.
- 3 Hompesch (at the time Velga Brothers Limited) installed an automated pump, but since it was faulty, a cashier (although not a petrol attendant) was present.
- 4 As a consequence of the presence of this cashier, Enemalta withheld the increase in commission to Hompesch.
- 5 Hompesch complained to Enemalta, and to the Office for Fair Competition, about this matter.
- 6 On the 1st October 1999, the chairman of Enemalta wrote to Hompesch that Enemalta would '*take into consideration* any eventual ruling by the Office of Fair Trading and act accordingly'.
- 7 On the 2<sup>nd</sup> December 1999 the Office for Fair Competition ("OFC") gave a ruling stating that "any action, decision or practice which in any way hinders or distorts the freedom in the mode of operation of petrol stations and in the way these choose to offer a service to their customers is anti-competitive and is prohibited by section 5 of the Competition Act."
- 8 Furthermore, the OFC stated that "Given the GRTU's undertaking not to engage in any such practice again and given that you (Hompesch) agreed during the meeting held at this Office that in the light of the GRTU's undertaking no further action is necessary, this Office is not going to proceed with the case before the Commission. Nevertheless, the Office will continue to monitor the issue to ensure that no violation of the Competition Act takes place."
- 9 On the 10<sup>th</sup> May 2000, Hompesch purchased Velga petrol station from Velga Brothers Ltd.
- 10 On the 17<sup>th</sup> January 2001, Enemalta inserted a new clause in licence Ps45 which regulates opening hours of petrol stations to the effect that outside normal hours

petrol station may operate their pumps using the automated mode pumps *only*, without any assistance of any attendant or the owner of the pump.

- 11 Hompesch claim that Enemalta reduced commission for Hompesch station by 0.3 cents on the basis that Hompesch sell petrol in violation of the ‘regulations’.
- 12 GRTU repeatedly report to the police that Velga petrol station operates in violation of the regulations (i.e. operate petrol station during prohibited hours), the pump was forced to close on several occasions.
- 13 The company is not a member of GRTU.
- 14 On the 11<sup>th</sup> December 2001, GRTU wrote to Hompesch informing it that it “The Petrol Stations owners committee” granted a special concession to Hompesch to open the station up to 10pm on weekdays while operating manually and enjoying the extra commission available for automated pumps. This special concession did not extend to Sundays and public holidays, and would be withdrawn if Hompesch does not abide by these parameters.

## **II.B. The Complaint**

Hompesch Company Limited presented its complaint to the Malta Resources Authority in its letter of 13<sup>th</sup> September 2001. It asserted that:

1. The decision of the OFC was not followed, although Enemalta’s chairman had previously agreed to abide by it.
2. Enemalta discriminated against Hompesch by refusing an increase in commission on the basis of non-availability of the non-automated pump system. It also refused a subsequent increase offered to others.
3. Enemalta’s decision to reduce commission to Hompesch is *ultra vires* as it constitutes an abuse of powers in terms of Cap 272 (Enemalta Act)
4. According to Cap.155 (Shops and Hawkers (Business Hours) Ordinance), ‘serving of customers’ is defined without distinguishing automated and non-automated means of selling, so if Velga petrol station is held to contravene the provision of the Cap 155 – all other petrol stations opening after 6 p.m. contravene this law, but the action was only taken against the Velga petrol station. Consequently, this action is discriminatory and gives a commercial advantage to members of GRTU who would prefer to have a ‘closed market’, the approach that was declared as anticompetitive by the OFC.
5. Velga petrol station is regularly visited by the police who physically close the station and send clients away.

6. The actions of Enemalta and GRTU, as well as the Police, are discriminatory and anti-competitive.

Hompesch Company Ltd. asked the Malta Resources Authority to give its ruling on the matter and to stop these ‘draconian and monopolistic measures’.

Following a hearing with MRA on the 11<sup>th</sup> December 2001, Hompesch summarised, as follows, its contentions in a letter of the 28<sup>th</sup> December 2001:

1. All petrol stations operating the “cash acceptor” system are operating illegally and in contravention of Chapter 155 Laws of Malta. However the Police are prosecuting only Hompesch.
2. The agreement reached between GRTU and Enemalta with regard to the hours and mode of operation of automated pumps and the relevant commission was an agreement with a view of restricting trade practices and imposing a situation on station owners to install one system of distribution. GRTU keeps this practice in place by reporting any petrol station which does not use this system to the Police.
3. Enemalta forwards the increase in commission only if GRTU gives its consent. This practice is illegal.
4. Enemalta does not have the authority to discriminate between station owners by basing its increase of commission on the method of distribution. This has been confirmed by the Office for Fair Competition.
5. The Chairman of Enemalta Corporation wrote that he would follow the ruling of OFC but later reneged his commitment.

Consequently Hompesch, while admitting that “discriminatory police measures being provoked by the GRTU do not fall within the parameters of MRA”, requested MRA “to declare that Enemalta Corporation cannot discriminate in the award of commissions between fuel station owners especially in view of the fact that as the law stands such action are both in breach of the Competition Act and Chapter 155 of the Laws of Malta.”

Hompesch further requested MRA “to stop any trade practices being carried out by GRTU in the payment of commission to fuel station owners.”

## **II. C. Reasoning of the Decision**

### Alleged discrimination by the Police

1. The first issue raised by Hompesch was that the Police were acting in a discriminatory manner towards them. Clearly MRA has no jurisdiction to take

cognisance of this complaint, to investigate it, and to effect a decision. In fact this lack of competence on the part of MRA to handle this complaint was recognised by the complainant itself in its letter of the 28<sup>th</sup> December 2001.

### GRTU-Enemalta Agreement

2. The second issue raised by the complainant related to the agreement reached between GRTU and Enemalta with regard to the hours and mode of operation of automated pumps and the relevant commission. The complainant regards this agreement as an agreement with a view of restricting trade practices and imposing a situation on station owners to install one system of distribution. It holds that GRTU keeps this practice in place by reporting any petrol station which does not use this system to the Police.
3. This issue requires careful examination.

### The opening hours issue and the mode of distribution issue

4. GRTU and Enemalta agreed to increase the commission to petrol pump owners who offer the customer a 24-hour service by operating, outside the hours when there is a manual attendant, an automated cash acceptor system. This agreement stated that no petrol station was to have an attendant within it after 18.00 hrs, and on Sundays and on Public Holidays.
5. Before the 17<sup>th</sup> January 2001, this ‘imposition’ of opening hours in virtue of the GRTU-Enemalta agreement was not consonant with the law. The law regulating opening hours of petrol stations is Cap 155. The law does not distinguish between automated and non-automated means of serving customers. Section 8 of Cap 155 states that

*“Every petrol kiosk shall be closed for the serving of customers (i) on Sundays and on Public Holidays, and (ii) not later than 7pm on any other day during the period from 1<sup>st</sup> day of October of any year to the 31<sup>st</sup> day of May of the next succeeding year and not later than 8pm on any such day during the period from the 1<sup>st</sup> day of June to the 30<sup>th</sup> day of September of any year, in either case both days inclusive, and no serving of customers shall be permitted before 5am of the next following day.”*

6. However, is serving yourself by using the automated cash acceptors considered to be “serving of customers”? Cap. 155 states that the “ ‘serving of customers’ means selling goods to customers or rendering to customers such services as are appropriate to the art or trade carried on at a shop; and ‘to serve customers’ shall be construed accordingly;” Is a petrol kiosk “a shop”? The law states that “ ‘shop’...includes petrol kiosks”. Therefore Section 8

applies to all kinds of serving of customers whether manually or by automated means.

7. Consequently while the law clearly laid out that petrol stations could remain open till 7pm/8pm depending on the season (whether with an attendant or not), the GRTU-Enemalta Agreement laid down that petrol stations could not have an attendant after 6pm whatever the season. Moreover, while the law states that customers cannot be served after 7pm/8pm, the GRTU-Enemalta agreement laid out the rules for the 24hour operation of service to the customer, after 6pm only by means of the cash receptor mechanism. This agreement therefore was inconsonant with the legal provisions.
8. On the 17<sup>th</sup> January 2001, the legal situation was altered with the issue of licence conditions by Enemalta. This illegality of the situation was enshrined in the Enemalta licence Ps45, ironically rendering it legal.
9. In Hompesch's judicial protest the point is made that the Enemalta condition states that *"fi Hdud, Festi Pubblici u bejn is-siegħat tas-6.00pm sa 6.00am mit-Tnejn sal-Gimgha u bejn it-3pm sas-6am is-Sibt, il-pompi jridu jkunu miftuħa għall-qadi tal-konsumatur fuq sistema ta' 'automated mode pumps' biss u li "Automated mode pumps" tfisser pompi li permezz tagħhom il-konsumatur jista' jixtri l-prodott mingħajr in-neċessita' li sid il-pompa jew xi mpjegat tiegħu jew xi hadd imqabbad mill-istess sid, ikun preżenti fil-pompa."* Making reference to this rule Enemalta stated in its communication of 17<sup>th</sup> January 2001 that, if Hompesch Station were not to follow such a condition, its commission on sale of fuel should be reduced.
10. The law mentions that petrol kiosks should not open before 5am and not be open after 7pm/8pm, for all days –including Saturday - other than Sundays and Public holidays. The Enemalta condition states that the petrol station may not open normally (with normal attendants present) between 6pm and 6am and on Saturday between 3pm and 6am. Enemalta therefore is taking away from the petrol station operator a right granted to him by law during these hours:
  - (1) 5am to 6am (for six days a week), and
  - (2) 6pm to 7pm/8pm (according to the season) (for Monday to Friday), and
  - (3) 3pm to 7pm/8pm (according to the season) (for Saturday)
11. On reading the law, it would seem that Enemalta has taken away what had originally been guaranteed to each petrol kiosk operator by the legislator. So was Enemalta acting *ultra vires*?
12. Section 12 of Cap 155 provides as follows:

*'The provisions of this Act shall be deemed to be in addition to and in no way in derogation of any provision contained in any other law or regulation from time to time in force, nor shall they be deemed to affect any condition which*

*may have been or may be imposed by the issuing authority in connection with any licence.'*

13. Had it not been for section 12, the new licence condition would be in breach of the law to the extent that it deprives the operators from certain specific hours as granted to him by law. But in virtue of section 12, the condition imposed in the licence by Enemalta, which was at the time the 'issuing authority', prevails over the provisions of Cap. 155.
14. Therefore, the licence condition imposed by Enemalta has legitimised the GRTU-Enemalta Agreement conditions with regard to Cap. 155 dealing with opening hours.
15. Does this licence condition, however, also legitimise the situation with regard to mode of distribution, and therefore with regard to the Competition Act?
16. Over and above the lack of consonance of the GRTU-Enemalta agreement with Cap, 155, was the additional issue of whether this agreement was also in breach of the Competition Act. In other words, whether this agreement whereby the increase in commission was tied to the introduction and operating of automated cash acceptors was in breach of competition law.
17. The Office for Fair Competition has already ruled that "any action, decision or practice which in any way hinders or distorts the freedom in the mode of operation of petrol stations and in the way these choose to offer a service to their customers is anti-competitive and is prohibited by section 5 of the Competition Act." MRA adopts this ruling as an integral part of its Decision with regard to this matter.
18. However, the issue now no longer relates to an agreement between GRTU and Enemalta but only to licence conditions issued solely by Enemalta. However anti-competitive one may consider Enemalta's licence conditions, since Enemalta was exempt at the time from the operation of the Competition Act its imposition in the licence of the exclusive use of the automated cash acceptor system could not be challenged under Competition Law. Enemalta is currently still exempt from the operation of the Competition Act.
19. Irrespective of the Competition Act, did Enemalta act *ultra vires* by imposition of these licence conditions? Enemalta was the regulator of the sector and exempt from the operation of the Competition Act, and, in virtue of this, was in a position to attach licence conditions including anti-competitive conditions, as long as it did not act contrary to administrative law principles. The Malta Resources Authority, however, is not the competent authority to enquire whether Enemalta - as *the regulator* of the sector at that time – acted contrary to administrative law principles. It is for the competent courts to rule on this *regulatory* issue in an action for judicial review in accordance with s.469A of COCP (Cap 12).



## The Commission Issue

20. The Complainant alleges that Enemalta forwards the increase in commission only if GRTU gives its consent, and that this practice is illegal.
21. Furthermore, the Complainant affirms that Enemalta does not have the authority to discriminate between station owners by basing its increase of commission on the method of distribution. This, according to the complainant, has been confirmed by the Office for Fair Competition.
22. The factual issue of whether Enemalta acts or not on GRTU's advice/consent does not alter the fact that the issue of the commission is raised in a letter from Enemalta of 17<sup>th</sup> January 2001 which states that the commission would be deducted from the commission payable if the pump owner were not to adhere to the licence conditions (as amended) issued by Enemalta. The legal issue to be considered here is exactly this, and not whether factually Enemalta consults or not GRTU vis-à-vis the implementation of the conditions of the licence by any particular petrol pump.
23. We therefore now focus our attention on the second complaint on this matter raised by the complainant, that is, that Enemalta exceeded its authority by discriminating between station owners by basing its increase of commission on the method of distribution.
24. Let us consider the historical development of this issue. In the GRTU-Enemalta agreement the basis for the increase was clearly to encourage the introduction of fully automated pumps with a view of providing the consumer with a 24-hr service with regard to the provision of petrol and diesel for vehicles. Therefore the reason behind the increase agreed upon in the GRTU-Enemalta agreement was to provide a *better* service to the public and to allow the public to use evening and night fuel services, and an increase of commission was meant as an incentive for the station operators to invest in, and provide the use of, the automated cash card acceptors.
25. Subsequently Enemalta introduced as a licence condition this particular method of provision of fuel to the customers from the petrol pumps after 'normal' hours. It also implemented a "penalty" of a reduction from the fuel commission, if a petrol pump did not adhere strictly to the method of provision of fuel laid out in the licence condition. This penalty was introduced by Enemalta in the same letter in which it also introduced the new licence condition.
26. Insofar as no station without a fully automatic pumps received an increase, one can state that there was no discriminatory action. However, was Enemalta entitled to discriminate between one type of automation and another (semi-automation, as provided by Hompesch) with regard to the increase in

commission as a financial incentive for change? The condition for the increase was the provision of automated cash card acceptors, as stated in the GRTU-Enemalta agreement, and as determined in the letter amending the licence. In our view this course of action by Enemalta, acting in its regulatory capacity cannot be described as discriminatory insofar as it is based on the provision of an increase in commission on the station owners providing a fully automated service.

### The Retraction by the Chairman Issue

27. The complainant states that notwithstanding the ruling of the OFC and the Enemalta's Chairman commitment to honour it, Enemalta did not adhere to the ruling of OFC. However, the OFC's ruling was given with regard to 'an agreement entered into various petrol station owners, within the GRTU, whereby it was agreed that no petrol station was to have an attendant within it after 18.00 hours and on Sundays and public holidays and that the only way a service could be provided for customers after this time and on such days was by means of automated cash-card acceptor pumps'.
28. In other words, the OFC ruling (a) concerned the mode of operation of petrol stations distribution to the public – not the issue of commission - and (b) was directed at GRTU – not at Enemalta.
29. Even Enemalta's (and GRTU's) combination of an increase in commission to the introduction of only *one* type of distribution method to the public (excluding therefore all other methods of distribution to the public achieving the same result, including semi-automated systems requiring a cashier, or even, manual systems) can be considered as anti-competitive behaviour, as the law stands, Enemalta is not subject to the Competition Act and, therefore, is under no obligation to adhere to any ruling effected under the said Act.

J N Tabone  
Chairman

24<sup>th</sup> September 2002