

## V

(Ogłoszenia)

## POSTĘPOWANIA ZWIĄZANE Z REALIZACJĄ POLITYKI KONKURENCJI

## KOMISJA EUROPEJSKA

## POMOC PAŃSTWA – MALTA

## Pomoc państwa C 32/10 (ex N 520/09)

## Projekt dotyczący ochrony środowiska dla elektrowni Delimara

## Zaproszenie do zgłaszania uwag zgodnie z art. 108 ust. 2 Traktatu o funkcjonowaniu Unii Europejskiej

(Tekst mający znaczenie dla EOG)

(2011/C 52/03)

Pismem z dnia 17 listopada 2010 r., zamieszczonym w autentycznej wersji językowej na stronach następujących po niniejszym streszczeniu, Komisja powiadomiła Maltę o swojej decyzji o wszczęciu postępowania określonego w art. 108 ust. 2 Traktatu o funkcjonowaniu Unii Europejskiej dotyczącego wyżej wspomnianej pomocy.

Zainteresowane strony mogą nadsyłać swoje uwagi na temat pomocy, w odniesieniu do której Komisja wszczęła procedurę, w terminie do jednego miesiąca od daty opublikowania niniejszego streszczenia oraz towarzyszącego mu pisma. Uwagi te należy kierować do Kancelarii ds. Pomocy Państwa w Dyrekcji Generalnej ds. Konkurencji Komisji Europejskiej na następujący adres lub numer faksu:

European Commission  
Directorate-General for Competition  
State Aid Greffe  
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1049 Bruxelles/Brussel  
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Otrzymałe uwagi zostaną przekazane Malcie. Zainteresowane strony zgłaszające uwagi mogą wystąpić z odpowiednio uzasadnionym pisemnym wnioskiem o objęcie ich tożsamości klauzulą poufności.

## STRESZCZENIE

## 1. PROCEDURA

W dniu 15 września 2009 r. Malta zgłosiła Komisji środek pomocy. W dniu 28 lipca 2010 r. odbyło się spotkanie z władzami maltańskimi, ponadto przesłano cztery wnioski o udzielenie informacji, na które udzielono odpowiedzi do dnia 21 września 2010 r. i tym samym zakończono proces zgłoszenia.

## 2. OPIS

Malta zamierza wesprzeć modyfikację dwóch kotłów w elektrowni Delimara, należącej do spółki publicznej Enemalta i przez nią zarządzanej. Całkowity koszt projektu szacuje się na 18,3 mln EUR. Władze maltańskie planują sfinansować kwotę

15,5 mln EUR (tj. 84,7 %) z EFRR na lata 2007–2013, a pozostałą część w wysokości 2,8 mln EUR – zaciągając pożyczkę komercyjną. Projekt pozwoli Malcie wypełnić zobowiązania dotyczące ograniczenia emisji NOx i cząstek stałych w celu osiągnięcia zgodności z dyrektywą 2001/80/WE w sprawie dużych obiektów energetycznego spalania oraz, w miarę możliwości, wypełnienia norm określonych w dyrektywie 2008/1/WE w sprawie zintegrowanego zapobiegania zanieczyszczeniom i ich kontroli. Projekt zostanie zakończony w 2014 r., tj. dwa lata przed rozpoczęciem obowiązywania tych norm w 2016 r.

Obecnie nie istnieje żadne połączenie międzysystemowe między EU kontynentalną a Maltą, gdzie przedsiębiorstwo Enemalta jest

jedynym operatorem systemu przesyłania i dystrybucji energii elektrycznej, któremu udzielono stosownego zezwolenia, i niemal w pełni pokrywa zapotrzebowanie na energię elektryczną. Sytuacja w zakresie konkurencji powinna się zmienić do 2012 r., kiedy uruchomiona już będzie nowa, sfinansowana przez UE linia międzysystemowa łącząca Maltę z Sycylią. Tym samym możliwa stanie się wymiana handlowa na rynku energii elektrycznej między Maltą a innymi państwami.

Władze maltańskie są zdania, że z racji monopolistycznej pozycji Enemalty na wyspie oraz stałych i bezwarunkowych odstępstw przyznawanych Maltce, jeżeli chodzi o kwestie otwarcia rynku i dostępu do rynku stron trzecich ustalone w przepisach UE dotyczących rynku wewnętrznego energii elektrycznej, pomoc nie powinna zakłócić (i tak nieistniejącej) konkurencji. W kwestii zgodności ze wspólnym rynkiem władze maltańskie twierdzą, że pomoc stanowi rekompensatę za świadczenie usług w ogólnym interesie gospodarczym („UOIG”) i powinna być poddana ocenie na podstawie przepisów UE zgodnie z art. 106 ust. 2 TFUE.

### 3. OCENA

W przeciwieństwie do planowanej gwarancji kredytowej udzielanej na warunkach rynkowych i niezaliczającej się do pomocy państwa finansowanie publiczne w wysokości 15,5 mln EUR stanowi pomoc państwa w rozumieniu art. 107 ust. 1 TFUE, jako że przynosi ono korzyści Enemalcie, co zakłóca konkurencję i handel między państwami członkowskimi lub grozi ich zakłóceniem. Enemalta prowadzi ożywioną działalność w zakresie zaopatrzenia w gaz i produkty naftowe, a w 2012 r. linia międzysystemowa łącząca Maltę z Sycylią pozwoli na wymianę handlową w zakresie energii elektrycznej między Maltą a innymi państwami.

Dokładne zasady zezwalające na udzielenie pomocy państwa dla tego rodzaju projektów po wypełnieniu pewnych warunków są wyraźnie określone w wytycznych w sprawie pomocy na ochronę środowiska zgodnie z art. 107 ust. 3 lit. c) TFUE, których Malta nie uznaje za podstawę prawną zgodności z rynkiem wewnętrznym. Według tych zasad możliwe jest udzielenie pomocy państwa w wysokości wynoszącej do 10–15 % kosztów kwalifikowalnych w przypadkach, gdy pomoc jest przeznaczana na szybsze wdrażanie przyszłych norm wspólnotowych. Przepisy dotyczące pomocy państwa na ochronę środowiska mają na celu stworzenie równych szans na uzyskanie pomocy dla tego rodzaju inwestycji. Władze maltańskie zamierzają jednak udzielić pomocy w wysokości prawie 85 % całkowitych kosztów projektu, nie spełniając tym samym warunków określonych w wytycznych.

Uznanie zabezpieczenia dostaw przez Enemaltę za UOIG byłoby wydarzeniem bez precedensu i zaprzeczałoby zasadom polityki w tym sektorze. W obecnej, drugiej i w przyszłej, trzeciej dyrektywie w sprawie rynku wewnętrznego energii elektrycznej obowiązki użyteczności publicznej zostały ograniczone do zapewnienia bezpieczeństwa dostaw, ich regularności, jakości i ceny.

Dotychczas nie stwierdzono istnienia żadnego z tych szczególnych obowiązków ani ich definicji w prawie maltańskim w odniesieniu do niniejszego projektu. W celu zapewnienia zgodności z ramami UE dotyczącymi UOIG należy sprawdzić, czy definicja UOIG w odniesieniu do bezpieczeństwa dostaw (np. ryzyko zakłócenia dostaw, możliwości dostaw rezerwowych) nie zawiera rażących błędów lub wymagań dotyczących ochrony środowiska (szczególnych zobowiązań dotyczących ochrony środowiska, wykraczających poza zwykłą zgodność z normami UE w zakresie ochrony środowiska). W ramach

UOIG wymagane jest także przeprowadzenie pełnej oceny kosztów i korzyści wynikających ze świadczenia usług w ogólnym interesie gospodarczym, wyliczenie rekompensaty na tej podstawie oraz uruchomienie mechanizmów kontroli i odzyskiwania nienależycie wypłaconych rekompensat. Jak dotąd władze maltańskie nie wykazały, że spełniono wyżej wymienione warunki.

### TEKST PISMA

„The European Commission wishes to inform Malta that, having examined the information supplied by your authorities on the planned notified measure Environmental Project for Delimara Power Station, it has concluded that the planned government guarantee on loans worth EUR 2,8 million does not involve State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union<sup>(1)</sup>. Meanwhile, as regards planned aid through resources from the European Regional Development Fund up to EUR 15,5 million to cover part of the investment costs of the project, the European Commission has decided to initiate the procedure laid down in Article 108(2) of the Treaty.

### PROCEDURE

- (1) By letter dated 15 September 2009, Malta notified to the Commission the abovementioned measure. On 5 October 2009, the Commission deemed the notification to be incomplete and requested additional information, which Malta supplied by letter dated 30 November 2009, registered on 10 December 2009.
- (2) By letter dated 21 December 2009, the Commission still deemed the notification to be incomplete and requested additional information, part of which was supplied by Malta by letter dated 11 January 2010, registered on 29 January 2010.
- (3) On 24 March 2010, the Commission requested additional information, which Malta supplied by letter registered on 28 May 2010.
- (4) On 15 July 2010, the Commission requested additional information. A meeting with the Maltese authorities was held on 28 July 2010. By letter registered on 21 September 2010, Malta supplied the information requested.

### DETAILED DESCRIPTION OF THE MEASURE

#### Legal basis

- (5) The national legal basis of the measure is the Enemalta Act (CAP 272 of the Laws of Malta) — Article 3.

#### Objective of the aid and project description

- (6) Malta envisages to support the upgrade of two boilers at the Delimara power station, which is owned and operated by Enemalta, a public corporation further described below. The notification alleges that the project is vital to enable Malta to meet its European obligations to reduce emissions as required by environmental legislation, in order to achieve compliance with

<sup>(1)</sup> With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the TFEU; the two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty where appropriate.

the Large Combustion Plants Directive 2001/80/EC<sup>(1)</sup> ("LCP") and, when possible, with the Integrated Pollution Prevention and Control Directive 2008/1/EC<sup>(2)</sup> ("IPPC"). The notification also refers to the proposal for a Directive of the European Parliament and of the Council on industrial emissions under which stricter emission limit values for existing large combustion plants will apply from 2016 on but under which Malta claims to have a derogation until 31 December 2019.

- (7) Pursuant to the notification, the purpose of the project is to reduce the nitrogen oxide ("NOx") and dust emissions in boilers 1 and 2 at the power plant by application of the best available techniques. The units under consideration are conventional heavy fuel oil fired boiler steam turbine units. According to Malta, the emissions of NOx from these two units (60 MW electricity output/166 MW rated thermal input each) are not in full compliance with LCP Directive limits. As regards dust emissions, the boilers are currently compliant, owing to the quality of the fuel delivered to the station. Following a technical feasibility study commissioned by Enemalta Corporation, the existing burners should be replaced for the purposes of NOx reductions and electrostatic precipitators with induced draught fan or forced fan upgrade should be installed for the purposes of dust reductions on each boiler, so that reductions of dust emissions are warranted for all fuel deliveries. The initial modifications are expected to be completed by 2011, with further modifications planned for 2013-2014. This phasing in two steps is necessary to ensure the continued availability of generation capacity that meets the requirements Enemalta has to comply with.
- (8) According to the notification, the objectives of the project were set to comply at least with the required standards in the LCP Directive, and when possible to also comply with the requirements of the IPPC Directive, as set out in the relevant best available techniques ("BAT") reference document (LCP BREF), in anticipation of the stricter standards that shall apply under the new Industrial Emissions Directive. In particular, Malta expects that the project will reduce the amount of NOx generated from these two boilers by over 30 % amounting to a total of 500 tonnes per annum and reduce the amount of dust by 83 % amounting to a total of 308 tonnes per annum.
- (9) Malta has carried out a cost-benefit analysis following the EU Guide to Cost-Benefit analysis of investment projects<sup>(3)</sup>, on the premise that these reductions in emission levels would improve the quality of life of the citizens and lead to improved health levels and that not installing any emissions abatement/collection equipment is not an option as compliance with environmental

standards is mandatory. The study quantifies those benefits using reference values that comprise a shadow price for both direct and indirect effects. Apart from the direct environmental and health benefits associated with reduced emissions, the reference values are also assumed to cover other indirect effects, such as wealth (e.g. higher house prices), tourism receipts (cleaner environment attracts more tourists) and avoided fines for lack of compliance with environmental standards.

- (10) With the necessary caveats about the difficulty of monetising health and aesthetic effects, the cost-benefit analysis concluded that the project produces a positive ENPV and an ERR greater than an assumed social discount rate of 5,5 %. The project is, therefore, positive for society.

### Budget and duration

- (11) The total cost of the Delimara project is estimated to EUR 18,3 million<sup>(4)</sup>. Malta plans to finance EUR 15,5 million (i.e. 84,7 %) from the European Regional Development Fund 2007-2013. Malta issued on 16 October 2009 a public call for proposals to enhance the eco-friendliness of the power plant, which showed the notified project to be the most suitable. The project will now go through the normal selection process as stipulated in Malta's Operational Programme I (Cohesion Policy 2007-2013).
- (12) Enemalta Corporation will cover the investment costs not covered by the EU financial assistance as well as the annual incremental operation and maintenance costs. The remaining balance of EUR 2,8 million of investment costs will be financed by loan taken by Enemalta from financial institutions, yet to be determined. Enemalta seeks loan financing up to 2025, that is 15 years from the investment. The loan will be guaranteed during its life-time by the Government of Malta, which is prepared to charge Enemalta an annual fee of 60 basis points. The fee is set based on a study from a third party consultant, which concludes that 60 basis points is a reasonable estimate of the market value of the government guarantee<sup>(5)</sup>.

<sup>(1)</sup> Directive 2001/80/EC of the European Parliament and of the Council of 23 October 2001 on the limitation of emissions of certain pollutants into the air from large combustion plants (OJ L 309, 27.11.2001, p. 1).

<sup>(2)</sup> Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control (OJ L 24, 29.1.2008, p. 8).

<sup>(3)</sup> Available at: [http://ec.europa.eu/regional\\_policy/sources/docgener/guides/cost/guide2008\\_en.pdf](http://ec.europa.eu/regional_policy/sources/docgener/guides/cost/guide2008_en.pdf)

<sup>(4)</sup> The project had initially been identified in Malta's Operational Programme I (Cohesion Policy 2007-2013) as "a project which consists in the modification and application of best available technologies to the boilers at the existing Delimara Power Station, with a view to improving air quality". However, the estimated costs do not reach the minimum threshold for a major project, i.e. EUR 25 million for environment and EUR 50 million for other projects, pursuant to Article 39 of Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999 (OJ L 210, 31.7.2006, p. 25).

<sup>(5)</sup> The study of 16 November 2009 by PriceWaterhouseCoupers analyses interest rate spreads of ongoing government-guaranteed debt of EUR 339 million and non-guaranteed debt of EUR 68 million, incurred at different points in time. The study notes examples of quotes at the same rates irrespective of whether the loan was secured by a guarantee. If atypical transactions are set aside, the conclusion of the study is that, historically, the presence of a government guarantee has not impacted materially Enemalta's debt cost. According to the study, the reason is the banks' assessment of the government ownership and its monopoly utility service, which the government would not permit to fail.

**Activities of the beneficiary**

(13) The sole beneficiary of the planned support is Enemalta Corporation, a public enterprise. By virtue of Article 3(2) of the Enemalta Act (Cap. 272 of the Laws of Malta), Enemalta is vested with the following functions, all of which are carried out exclusively within the Maltese territory:

- the generation, purchase, acquisition, transmission, transfer, distribution and supply of electricity,
- the importation, purchase, acquisition, manufacture, bottling, holding, storage, distribution, sale, export or any other disposal of petroleum products in any

form thereof, namely liquefied petroleum gas (LPG) and liquid fuels,

- the delivery of energy services, energy efficiency improvement programmes and other energy efficiency improvement measures to the final consumer and
- the promotion of efficiency in the use of energy.

(14) As portrayed in Enemalta's latest available annual report (2008), the corporation is structured in three divisions active in three different activities: electricity, gas and petroleum. The latest audited accounts of the corporation for the three divisions portray the following results in recent years:

Table 1

**Profit and loss account of Enemalta per division (FY 2003-2004 to 2006-2007 — Lm million)**

		2003-2004	2004-2005	2005-2006	2006-2007
Enemalta Corporation	Turnover	131,8	155,8	195,8	193,9
	Operating profit	- 5,7	- 1,3	7,8	5,1
	Profit/loss after tax	- 11,2	- 6,5	2,6	- 7,1
of which:					
Electricity division	Turnover	54,8	63,6	88,5	87,0
	Operating profit	- 12,8	- 10,0	1,0	3,2
Petroleum division	Turnover	73,9	88,9	103,9	103,8
	Operating profit	8,5	8,6	7,9	2,4
Gas division	Turnover	3,0	3,3	3,3	3,2
	Operating profit	- 1,4	0,2	- 1,1	- 0,5

(15) Table 1 above shows that the operations of Enemalta Corporation have been consistently loss-making in recent years, except in 2005-2006. Among operational divisions, the electricity division has been accounting for less than half of the total turnover of Enemalta and has been profitable only since 2005-2006, albeit modestly in proportion to its turnover (1 % to 3,6 %). Those figures are roughly conform to the management accounts of Enemalta Corporation for 2009, which also display an operating loss overall and a predominant proportion of turnover in activities other than in the electricity division, as follows:

Table 2

**Profit and loss account of Enemalta per division (last 12 months to December 2009)**

		EUR million	2009
Enemalta Corporation	Turnover		469,6
	Operating profit		- 44,6
	Profit/loss after tax		- 59,3
Electricity division	Turnover		253,6
	Operating profit		- 38,8
	Profit/loss after tax		- 58,6

	EUR million	2009
Petroleum division	Turnover	375,1
	Operating profit	- 1,3
	Profit/loss after tax	- 2,6
Gas division	Turnover	10,6
	Operating profit	- 0,9
	Profit/loss after tax	- 1,6

(16) Up to December 2009, the turnover of the petroleum and gas division exceeded that of the electricity division. Since then, between January and March 2010, the turnover of Enemalta on petroleum products and gas amounted to EUR 59 million, in the same order of magnitude as its electricity generation activities, which had a turnover of EUR 58 million. It follows that Enemalta is still significantly active on other product markets than the supply of electricity.

(17) According to Malta, the gas and petroleum divisions are in the process of being commercialised, in order to focus the corporation on the generation and distribution of electricity:

— As concerns the petroleum division, Enemalta plans to retain only the import of fuel for running its own electricity generation plants. Whilst the divestiture of the rest of the business is at an advanced stage of negotiations according to Malta, Enemalta is still active on the market, with other private players such as Island Petroleum Services Ltd, Fuel Energy Ltd and Cassar Petroleum Services Ltd. The relevant market shares are, according to Malta, not available.

— Enemalta currently imports, stores and bottles LPG on behalf of Liquigas which, since 1 February 2010, won a 30-year concession. These activities of Enemalta are allegedly carried out for a maximum period of three years or until a new bottling plant is constructed by Liquigas. Malta declares that the market for importation and distribution of petroleum products in Malta is liberalised and a number of companies are active therein.

#### Generation and distribution of electricity in Malta

(18) Malta declares that the local electricity market was technically and legally liberalised in Malta by virtue of Electricity Regulations, 2004 (LN511/04). Enemalta operates two power stations in Malta, the one at Delimara, which is subject to the notified measure, and another one at Marsa, with a total nominal installed capacity of 571 MW. The only other generators are very small renewable energy source generators that produce an insignificant amount of electricity.

(19) Malta is at present a small isolated electricity system within the meaning of Article 44(1) of Directive 2009/72/EC<sup>(1)</sup>. Moreover, under Article 44(2) thereof, Malta has a permanent and unconditional derogation

from unbundling of transmission and distribution system operators (Articles 9 and 26), third party access to its transmission and distribution system (Article 32) and market opening (Article 33). It follows that Malta can lawfully oppose to third party electricity transiting through its distribution network.

(20) Malta claims that Enemalta allegedly retains its monopoly due to Malta's geographical profile and size of the local electricity market, which do not allow for new entries. In any event, the aforementioned Enemalta Act and the Electricity Regulations, 2004 (specifically regulation 3 and Schedule IV) designate Enemalta as the Distribution System Operator, in application of Directive 2003/54/EC, now replaced by Directive 2009/72/EC. Enemalta is also the sole entity in Malta for which a licence to generate, distribute and supply electricity may be granted. Under the regulations, other generators may, however, be licensed to produce electricity for their own use or to supply Enemalta.

(21) The market situation in Malta is expected to change in the near future. At present, Malta's isolated electricity system is not interconnected with the European electricity grid. However, an interconnector and related infrastructure is being constructed, partly funded by the EU<sup>(2)</sup>. The project being implemented concerns the construction of one high voltage subsea interconnector between Pembroke in Malta and Marina Di Ragusa in Sicily, with an option for a second similar interconnector to be installed at a later date, for a total capacity of 400 MW. The first interconnector is required to be in service before the end of 2012. The project was the object of a Commission decision raising no objections under State aid rules, essentially on the grounds that the EU funds concerned were not State resources and a planned government guarantee on a commercial loan was priced at market conditions<sup>(3)</sup>.

(22) In its latest submission of 21 September 2010, Malta claims that, whilst improving their environmental performance, the modifications of the boilers will also extend their lifetime so that they can eventually serve as reserve plant to the planned subsea electricity interconnector. According to the evaluation of the cost-benefit analysis submitted by Malta, the planned modifications shall extend the economic life of the boilers by six years.

<sup>(1)</sup> Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (OJ L 211, 14.8.2009, p. 55).

<sup>(2)</sup> Regulation (EC) No 663/2009 of 13 July 2009 of the European Parliament and of the Council establishing a programme to aid economic recovery by granting Community financial assistance to projects in the field of energy (OJ L 300, 31.7.2009, p. 31).

<sup>(3)</sup> Commission Decision of 13 January 2010 in case N 419/09 Malta — Investments in electricity transmission and interconnector infrastructure.

(23) Upon completion of the interconnection, electricity trade between Malta and the mainland grid shall become technically possible both ways and electricity generated in the EU from various sources and transiting through the Italian part of the grid could be supplied to Malta, without prejudice to the derogations granted to Malta under Directive 2009/72/EC, notably as to third party access to its distribution system. Malta claims that, in practice, the interconnection will mainly be used for the purposes of importing electricity into Malta, given the allegedly higher costs and tariffs borne by Enemalta. Local production plants, including Delimara, will generate electricity allegedly for domestic consumption only.

(24) The electricity supplied by EU producers can be deemed to be supplied at prices which incorporate the costs incurred in meeting the environmental or other standards applied to electricity generation throughout the EU. In that respect, the Commission notes that, at the retail level, the electricity prices free of tax in Malta for industrial and residential consumers (EUR 0,17 and EUR 0,23 per KWh) are slightly higher than EU average (EUR 0,14 and EUR 0,19 per KWh) and roughly at a par, taxes included (EUR 0,18 and EUR 0,25 per KWh)<sup>(1)</sup>. This differential suggests that, for electricity produced in Member States at prices below EU average, it might be potentially profitable to export to Malta.

#### IEWS OF MALTA AS TO THE ASSESSMENT OF THE MEASURE

(25) Malta claims it has notified the measure for alleged reasons of legal certainty, as a non-aid measure, which has a primary objective to support the provision of a service of general economic interest and the secondary objective of environmental protection.

#### Alleged lack of adverse effects on competition and trade

(26) Malta submits that the geographical realities and market size in Malta present a nearly absolute barrier to entry and make thus virtually impossible to have more than one operator in electricity generation in Malta. As Enemalta is allegedly vested with exclusive rights as to distribution and supply of electricity and is therefore the only operator which supplies the market, there is allegedly no competition as to electricity supply in Malta. Malta also contends that, further downstream at the retail level, electricity cannot compete with the combustion of other fuels, except possibly with LPG for cooking and heating. In that respect, the conversion efficiency of heat to electricity in Malta's fuel-fired power plants is much less than 100 % and the choice to use electricity for heating rather than other fuels is based on non-cost factors, such as convenience.

(27) Malta contends that the derogation as to market opening and third party access to its distribution system granted by the EU would allegedly recognise and endorse the natural monopoly from which Enemalta benefits. Moreover, exports of electricity from Malta are

impossible at present and, in any event, economically unrealistic in the future, given the production costs of Enemalta for its fuel-fired generation capacity, which are much higher than elsewhere in the Union. Local plants shall thus only generate electricity for domestic consumption in Malta. Malta therefore considers that the public financing of part of the Delimara project does not distort competition or have an effect on trade.

(28) Moreover, given that Enemalta Corporation is a State-owned allegedly natural monopoly, Malta considers that public support for this project also implies that the Maltese State would be acting as a private shareholder when supporting Enemalta. Malta draws no further conclusions from this statement.

#### Provision of a service of general economic interest

(29) The planned finance of EUR 15,5 million from the European Regional Development Fund 2007-2013 would, in Malta's submission, constitute a compensation for the provision of a service of general economic interest within the meaning of the *Altmark* case-law<sup>(2)</sup>. Malta submits that the criteria set out by the Court of Justice in the *Altmark* case-law for considering that, if fulfilled, a compensation for service provision does not amount to State aid within the meaning of Article 107(1) TFEU, are met. The arguments of Malta with respect to the four cumulative conditions of such case-law are portrayed below.

(30) First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined. Malta explains that the Enemalta Corporation Act (Cap 272), which serves as national legal basis for the measure, vests in Enemalta the exclusive exercise and performance of the acquisition, manufacture, distribution and sale of sources of energy and the production, generation distribution and sale of energy as listed in Article 3 of the same Act. Malta also argues that the notified measure supports the enhancement and environmental friendliness of the existing electricity system and will supply parts of the required electricity needs in the whole territory of Malta, within which Enemalta is virtually the only operator. The planned modifications to the boilers will not only improve their environmental performance but also extend their economic lifetime. Given that the planned interconnector with Sicily shall provide with alternative and most likely cheaper electricity supplies to Malta, the boilers will thus be available for producing back-up capacity, should the need arise.

(31) Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favor the recipient undertaking over competing undertakings. According to Malta, financing of this project will cover a capital investment which the corporation will be carrying out as part of its investment programme in order to be able to continue its energy provision to the Maltese territory.

<sup>(1)</sup> Market observatory for Energy, Volume 2, issue 4 — October-December 2009, DG Energy, pp. 22-23.

<sup>(2)</sup> Judgment of the Court of 24 July 2003, C-280/2000, *Altmark Trans GmbH*, ECR I-7747, paragraphs 88-93.

(32) The energy regulator in Malta, the Malta Resources Authority, supervises the operator and provides the market parameters within which Enemalta is bound to operate, which, as concerns electricity tariff reviews, may be summarised as follows:

- processes and methodologies must conform to applicable legislation, including an obligation not to operate as a loss,
- the tariffs should provide Enemalta with an acceptable rate of return on capital employed and allow for the payment of debt service and sustain the maintenance and replacement of assets,
- the tariffs must be transparent, non unjustifiably discriminatory whilst avoiding cross-subsidies between user groups.

(33) Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit. Malta declares that, at present, apart from providing State guarantees to cover finance for capital investment purposes, the only public service compensation paid to Enemalta concerns street lighting, based on metered consumption and maintenance of the system with amounts periodically reviewed to reflect actual costs, as follows: EUR 4,5 million in 2007, EUR 4,5 million in 2008 and EUR 5,5 million in 2009.

(34) As regards the regulated revenues Enemalta derives from electricity generation, transmission and distribution, Malta submits that, contrary to the past situation where tariffs were not cost reflective and Enemalta was in need of government subsidies, the evolution of full cost-reflective tariffs providing a regulated return on capital investment is now agreed with the Malta Resources Authority through a new tariff system since November 2008. The total variable retail tariffs should henceforth equal the sum of relevant fuel costs, salaries, overheads and a return on EUR 406 million of capital employed which reflects a pre-tax weighted average cost of capital of 8,4 %. The computation also takes into account deductions in respect of public service obligation recoveries, fixed income charges, other service revenues as well as the cost of identified inefficiencies.

(35) Malta also declares that electricity tariffs in Malta are high due to unavoidably high production costs by virtue of the small scale of operation. Such tariffs have undergone significant increases over the past year and, in the medium term, could absorb 4,1 % of household disposable income, despite lower consumption per capita than EU average. If the planned investment were to be fully financed through bank financing, the ensuing EUR 1,5 million ROCE on the increased capital (EUR 18 million with 8,4 % ROCE) would require annual increases of EUR 0,08 per kWh on tariffs which are allegedly at the limits of affordability.

(36) Fourth, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs

which a typical undertaking, well run and adequately provided so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations. In that respect, Malta claims that the Malta Resources Authority monitors the natural monopoly and the tariffs charged by Enemalta, reviews assumptions and data on tariff proposals, deducts the cost of inefficiencies from tariffs and carries out public reviews and impact assessments on residential and non-residential consumers, which are publicly available.

(37) Finally, Malta submits as a subsidiary argument that, should Article 107(1) TFEU nonetheless apply, the most appropriate legal basis for the assessment of this case is Article 106(2) of the TFEU.

(38) Oppositely, Malta considers that the legal basis provided by Article 107(3)(c) TFEU, as further spelled out by the Commission in its “Community Guidelines on State Aid for Environmental Protection”<sup>(1)</sup>, is not appropriate for the assessment of the compatibility of the project with the internal market.

#### ASSESSMENT OF THE MEASURE

##### Existence of aid within the meaning of Article 107(1) of the TFEU

(39) Article 107(1) of the TFEU provides that “[s]ave as otherwise provided in th[e] Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market”.

(40) It follows that, in order to be qualified as State aid within the meaning of Article 107(1) TFEU, the following cumulative conditions have to be met: (i) the aid has to be granted by an act of a Member State or out of State resources; (ii) it has to confer an economic advantage to undertakings; (iii) the advantage has to be selective; and (iv) the aid distorts or threatens to distort competition and affect inter-state trade.

(41) In the case at hand, the examination concerns the public financing of part of the project through ERDF resources up to EUR 15,5 million and the government guarantee on the planned loan to be taken by Enemalta for the outstanding balance of the investment.

##### *Aid granted by an act of a Member State or out of State resources*

(42) As concerns the guarantee of the Government of Malta on the loans, the public resources of Malta back the commitment of the beneficiary to reimburse the loan and are susceptible to be called upon by the lender(s) in case of default. Moreover, any shortfall of revenues accruing from the price at which the guarantee is issued, as compared to market prices for it, would reduce the public resources of Malta. It follows that the State resources of Malta are involved in this part of the financing.

<sup>(1)</sup> OJ C 81, 1.4.2008, p. 1.

(43) Likewise, as concerns the ERDF funding, the aid is granted from State resources within the meaning of Article 107(1) of the TFEU. The aid is granted from State resources within the meaning of Article 107(1) of the TFEU because the ERDF resources are paid to the Member State before being paid by the latter to the beneficiary of the State aid. Therefore, the money is at the control of the Member State at the moment of payment to the beneficiary and constitute State resources. Moreover, the choice of the project at hand and the transfer of ERDF resources from the EU budget to finance the project are imputable to a decision and request of Malta.

*Selective economic advantage to undertakings*

(44) It is also necessary to examine whether the use of State resources from the ERDF to cover part of the costs of the project and the government guarantee confer an economic advantage to the beneficiary. Should the presence of an economic advantage be established in the present case, that advantage would be selective as it is granted to a single beneficiary, namely Enemalta.

(45) As regards the government guarantee, the Notice on the application of Articles 107 and 108 of the Treaty to State aid in the form of guarantees (“the guarantee Notice” hereinafter) lays down the principles on which the Commission bases its interpretation of the said articles in individual cases<sup>(1)</sup>. The Commission considers that “If an individual guarantee or a guarantee scheme entered into by the State does not bring any advantage to an undertaking, it will not constitute State aid”<sup>(2)</sup>.

(46) Section 3.2 of the guarantee Notice sets out the sufficient conditions applicable to individual guarantees such as the one at hand, which, if fulfilled, rule out the presence of State aid, that is:

- (a) the borrower is not in financial difficulty;
- (b) the guarantee must be linked to a specific financial transaction, for a fixed maximum amount and limited in time;
- (c) the guarantee does not cover more than 80 % of the outstanding loan or, if that is not the case, there is justification for a higher coverage;
- (d) a market-oriented price is paid for the guarantee.

(47) These conditions appear to be met in the current case. Firstly, Enemalta does not appear to be a firm in financial difficulty within the meaning of the guidelines on State aid for rescuing and restructuring firms in difficulty<sup>(3)</sup>. Secondly, the extent of the guarantee will be limited in object, amount and time. Thirdly, Enemalta is a publicly owned undertaking entrusted with the operation, maintenance and development of the electricity distribution system within Malta. A guarantee requested on the parent company of a corporation is common practice in financial markets, the shareholder being, in this case, the government. In its capacity as shareholder, the

Government of Malta cannot easily limit to 80 % or defer to a commercial guarantor the issuance of a guarantee without putting in doubt its commitment to the company or the project. The behaviour of the State as shareholder of Enemalta is, therefore, in accordance with that of a market economy investor as regards the scope and conditions of the guarantee. It is therefore sufficiently justified that the guarantee is not limited to 80 % of the outstanding amount of the loan<sup>(4)</sup>. Fourthly, Malta has consistently demonstrated that the envisaged price which shall be charged on the guarantee is market-oriented. The Commission reached recently an analogous conclusion on a similar government guarantee to Enemalta<sup>(5)</sup>.

(48) It follows that the government guarantee cannot be deemed to provide an economic advantage to the beneficiary and, therefore, does not entail State aid within the meaning of Article 107(1) TFEU, without any need to further examine whether this guarantee can affect trade between Member States.

(49) However, as further shown below, that conclusion cannot be extended to the use of resources from the ERDF up to EUR 15,5 million to cover part of the investment costs of the project. Enemalta will be in a position to finance part of its investment with lower funding costs than it would obtain from other market-based sources of funding, such as the loans planned to be taken for the outstanding balance of EUR 2,8 million. Contrary to other undertakings active in the generation of electricity in the EU which must bear themselves the costs of compliance with EU environmental standards laid down in the LCP and IPPC Directives, Enemalta will be capable of reducing its investment and operating costs, thereby obtaining an economic advantage within the meaning of Article 107(1) TFEU.

(50) Moreover, by saving financial resources which it would otherwise need to meet such environmental standards, Enemalta can also fund its current and future activities on other product and/or service markets on which it is currently active and/or not precluded from being active, such as the supply of gas and petroleum products in Malta or other Member States.

(51) A compensation for discharging the costs for the provision of a service of general economic interest (“SGEI”) does not confer an economic advantage to the recipient if the four conditions laid down by the Court of Justice in its *Altmark* case-law are all met. However, assuming that Enemalta is indeed charged with a SGEI and properly entrusted according to the first *Altmark* condition (further discussed in the context of Article 106(2) TFEU) the arguments and evidence adduced by Malta do not indicate that *Altmark* is fulfilled as concerns the second and the fourth conditions:

— As regards the second condition, the compensation that is allegedly linked to the provision of the SGEI does not appear to be established on the basis of objective and transparent parameters set in advance.

<sup>(1)</sup> OJ C 155, 20.6.2008, p. 10.

<sup>(2)</sup> Notice, Section 3.1.

<sup>(3)</sup> OJ C 244, 1.10.2004, pp. 2-17, points 10 and 11.

<sup>(4)</sup> Applicable guidelines, Section 3.1.

<sup>(5)</sup> Commission Decision of 13 January 2010 in case N 419/09 Malta — Investments in electricity transmission and interconnector infrastructure.



Whilst such parameters undoubtedly exist for the setting of electricity tariffs — which are not in themselves a compensation but regulated revenue in consideration of a service —, the alleged compensation appears to be established on a totally ad hoc basis, i.e. an apparently arbitrarily fixed part (84,7 %) of the costs of a single investment project with respect to an environmental purpose and not related to the provision of the service of general economic interest. Moreover, the compensation is not defined by reference to the SGEE as entrusted to Enemalta but only with respect to some of the costs that could be incurred in the future for providing it, not taking into account any possible benefits linked to the planned investment and the revenues accruing to Enemalta.

— As regards the fourth condition, whilst it is common ground that the provision of the service by Enemalta has not been subject to tender, Malta provides no evidence backing its assertion that the amount of compensation has been determined on the basis of an analysis of the costs which a typical and well run undertaking active in the sector would have incurred. Quite the contrary, the amount of compensation linked to the investment project seems to have been determined instead on the basis of a seemingly arbitrary part of the investment costs which Enemalta plans to incur for the project, based on Enemalta's and not a typical and well run undertaking's costs.

(52) On that basis, it appears at this stage that the public financing of part of its investment costs for the purposes of complying with EU environmental legislation confers an economic advantage to Enemalta.

*Aid distorting or threatening to distort competition and affect trade between Member States*

(53) The General Court has held that Article 107 TFEU applies only to sectors open to competition, having regard to the requirements set out in that provision regarding effect on trade between Member States and repercussions on competition<sup>(1)</sup>. The Commission has also considered in the past that if a national service market is not open to competition, notably as a result of regulatory restrictions, the criterion for potential distortion of competition is not met and Article 107(1) TFEU does not apply<sup>(2)</sup>.

(54) However, contrary to Malta's contention, the planned aid distorts or threatens to distort competition and is likely to affect trade between Member States, on various counts, further explained below.

(55) It is true that, at present, Enemalta does not compete as to supply to end consumers with other electricity suppliers in Malta or from other Member States than

Malta. In addition to the lack of physical interconnection until 2012, under Article 44(2) of Directive 2009/72/EC, Malta has a permanent and unconditional derogation from market opening and third party access to its distribution system, which Enemalta operates. It follows that Malta can lawfully oppose under EU law to distribution through Enemalta's network of electricity generated by other companies than Enemalta.

(56) Nonetheless, the electricity supplied by Enemalta competes, however minimally or potentially, with other heating fuels used by business and households and supplied by other companies active in Malta for uses such as air conditioning, cooking and heating. As regards the possible effects on the supply of electricity, without the planned aid, if the planned investment as to electricity generation were to be entirely financed at market terms, e.g. through loans, Enemalta would normally need to recover its costs through increased electricity tariffs, as documented by Malta. It follows that, if Enemalta funded its planned investment entirely at market terms, contrary to the plans of Malta, the increase of electricity tariffs would (further) improve the competitive position of fossil fuels supplied by competitors vis-à-vis electricity. An artificially low electricity price resulting from the aid can, for instance, act as disincentive for investment in oil or LPG fired combined heat and power applications by some large consumers in Malta, such as hotels and food processing industry. Such applications can achieve combined efficiencies close to 90 %, well above that of the boilers planned to be modified. The same disincentive effect is also likely to play as regards LPG powered air conditioners purchased by households. It follows that the planned aid distorts or threatens to distort the conditions of competition between electricity and other fuels in Malta.

(57) Likewise, Malta acknowledges that several operators supply electricity from renewable sources to Enemalta at present, however minimal the quantities concerned. Those operators compete between them to supply Enemalta, whilst their electricity is also in competition with that Enemalta supplies to end-consumers. It follows that the ability of Enemalta to artificially reduce its production costs and potentially supply electricity generated at Delimara at artificially low prices affects, however minimally, the competitive position of these operators vis-à-vis the supply to Enemalta, on the one hand, and the patterns of competition between the electricity Enemalta generates from fossil fuels and that these operators generate from renewable sources, on the other. Artificially low prices for electricity generated from Delimara acts as a disincentive to invest in renewable energy sources, which have higher generation costs.

(58) Finally, according to Malta, the project — and, therefore, ensuing payments —, would only be completed by 2013-2004. By 2012, the planned interconnection of Malta's grid with Sicily is expected to be completed. It follows that aid potentially affecting the prices at which Enemalta is capable of selling its electricity can have an impact on competition between electricity generated in Delimara and imported electricity generated in other Member States and, likewise, on the competitive position of electricity which Enemalta could in theory export. As regards the former, artificially lower

<sup>(1)</sup> Joined Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to T-607/97, T-1/98, T-3/98 to T-6/98 and T-23/98 *Alzetta and Others v Commission* [2000] ECR II-2319, paragraph 143, indirectly upheld on appeal by judgment of the Court of Justice in Case C-298/2000 *P Italy v Commission* [2004] ECR I-4087, paragraphs 66 to 68.

<sup>(2)</sup> Commission Decision (C(2007) 1434) of 4 April 2007 in case N 588/06 NL "Subsidy measure vital Gederland", concerning the market for drinking water in the Netherlands (points 12, 27).

generation costs can act as a disincentive to import more electricity through the interconnector. As regards the latter, although Malta rightly contends that electricity prices in Malta are, as a rule, higher than in the EU, the possibility of exports from Malta is not theoretical. For instance, prices in Italy are often high compared to the EU and prices in Sicily seem to be much higher and move away from prevailing Italian prices since spring 2008, reaching peaks as high as EUR 157 MWh in summer 2008 or EUR 107 MWh in February 2010 <sup>(1)</sup>. In such circumstances, exports from Malta would help to mitigate price hikes and be commercially viable without the planned aid. The planned aid would, therefore, further improve the competitive position of Enemalta's prices vis-à-vis Italian or other competitors.

- (59) Moreover, as regards competition on other product markets on which Enemalta is active at present — and not precluded in the future from being active on — such as gas and petroleum products, Malta acknowledges that these markets are open to competition and several companies are active in Malta. Since the planned State resources invested in Delimara allow Enemalta to divert its own financial resources to competing more actively on those markets, the measure distorts or risks distorting competition also on those markets.
- (60) Given that gas and oil products are subject to trade between Malta and other Member States and electricity will be subject to trade between Malta and other Member States, the planned aid is liable to affect the patterns of trade between Member States.
- (61) In conclusion, contrary to the planned government guarantees on loan financing up to EUR 2,8 million, the public financing through ERDF resources up to EUR 15,5 million of part of the Delimara environmental project could constitute possible State aid within the meaning of Article 107(1) TFEU.

#### Compatibility with the internal market

- (62) As further described below, the Commission has assessed the possible compatibility of the planned State aid with the internal market on the basis of the derogations to Article 107(1) of the TFEU provided in Article 107(3)(a) and (c) of the TFEU on its own motion and, following the submission of Malta in that respect, Article 106(2) of the TFEU.

#### Article 107(3)(a) of the TFEU

- (63) Article 107(3)(a) TFEU states that: “aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious under-employment, and of the regions referred to in Article 349, in view of their structural, economic and social situation” may be considered to be compatible with the internal market.
- (64) Although the area covered by the measure is eligible under the ERDF, as well as under Article 107(3)(a)

TFEU assisted areas within the meaning of the Guidelines on national regional aid for 2007-2013 <sup>(2)</sup>, the aid is not primarily designed to contribute to regional development by supporting investment and job creation through the expansion and diversification of the economic activities located in the less-favoured regions, in particular by encouraging firms to set up new establishments there. As is apparent from the description provided by Malta, the main objective of the project planned to be supported with State aid is to improve the environmental performance of the boilers 1 and 2 operated at the Delimara power station, thereby improving the economic activity of electricity generation.

- (65) The Commission therefore doubts that the planned aid can be declared compatible with the internal market pursuant to Article 107(3)(a) TFEU, based on the conditions laid down in the Guidelines on national regional aid for 2007-2013.

#### Article 107(3)(c) of the TFEU

- (66) Article 107(3)(c) TFEU states that: “aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest” may be considered to be compatible with the internal market.
- (67) As is apparent from the description provided by Malta, the project aims at improving the environmental performance of the boilers operated at the Delimara power station, notably with a view to reducing current NOx and dust emissions. Indeed, the technical description provided by Malta indicates that the investments are solely aimed at improving the environmental performance of the boilers. The calculations undertaken by Malta on the social value of the project are based on environmental and health effects, more than on purely financial indicators for a productive investment whilst, on the other hand, the amount of avoided fines for non-compliance with environmental law, is taken into account as a benefit from the project. The State aid in question aims to support environmental protection as it is granted, in Malta's admission, with a view to meeting environmental standards set out in EU legislation (LCP and IPPC Directives), thereby falling within the scope of the guidelines <sup>(3)</sup>.
- (68) Given the main — if not the only — objective of the project, the Commission deems it appropriate to assess the possible compatibility of the planned aid with the internal market pursuant to Article 107(3)(c) TFEU on the basis of the rules and criteria set out in the “Community Guidelines on State Aid for Environmental Protection” <sup>(4)</sup> (hereinafter “the guidelines”).
- (69) Pursuant to the guidelines, State aid for investment that is necessary to meet EU standards that are already in force cannot be justified since the company should have to carry it out in any event, so that the aid lacks any incentive effect <sup>(5)</sup>. Such aid is therefore incompatible

<sup>(1)</sup> Quarterly Report on Electricity Prices, Volume 3, Issue 1: January 2010-March 2010, p. 17. [http://ec.europa.eu/energy/observatory/electricity/doc/qreem\\_2010\\_quarter1.pdf](http://ec.europa.eu/energy/observatory/electricity/doc/qreem_2010_quarter1.pdf)

<sup>(2)</sup> OJ C 54, 4.3.2006, p. 13.

<sup>(3)</sup> Guidelines, points 43 and 59.

<sup>(4)</sup> OJ C 81, 1.4.2008, p. 1.

<sup>(5)</sup> Guidelines, point 29.

with the internal market. The guidelines furthermore define EU standards not only as mandatory limit values to be met by individual undertakings but also as the obligation under the IPPC Directive for such undertakings to use the best available techniques as set out in the most recent relevant information published by the Commission pursuant to Article 17(2) of that Directive, i.e. the relevant BAT reference document (BREF) <sup>(1)</sup>.

- (70) However, pursuant to the guidelines, State aid for complying with EU standards not yet in force and which increases the level of environmental protection can be considered compatible with the internal market provided the EU standards have been adopted and the investment is implemented and finalised at least one year before the entry into force of the standard. In that case, the maximum aid intensities for large enterprises such as Enemalta are 15 % if the implementation and finalisation take place more than three years before the mandatory date of entry into force of the standard and 10 % if it takes place at least one year before such date <sup>(2)</sup>. Moreover, eligible costs must be limited to the extra investment costs needed to meet the future standard and be calculated net of any operating benefits and costs related to the extra investment and arising during the first five years of its life <sup>(3)</sup>. These provisions and the relatively low aid intensity thresholds aim at ensuring the proportionality of the amount of planned aid with the relatively low incentive effect of aid aimed at meeting standards that shall shortly become binding and enforceable.
- (71) In respect of EU environmental law, the Commission understands that the more efficient burners and the electrostatic precipitators planned will allow permanent compliance with the NO<sub>x</sub> and dust standards set forth already in the LCP Directive. Those standards apply to Malta as from the date of accession to the EU regarding NO<sub>x</sub> and as from 1 January 2006 regarding dust. Compliance with such standards of the LCP Directive is, therefore, mandatory for the Delimara power plant run by Enemalta, whereas the Court of Justice has already found that Malta is in breach of its obligations under such Directive regarding phase one steam boilers of the plant <sup>(4)</sup>. As regards dust standards, Malta declares that the fulfilment of the requirements set forth in the IPPC Directive will become mandatory by 2016. The Commission understands that Malta refers to the application of relevant best available techniques (“BAT”) under the IPPC Directive — which itself does not set concrete limit values — as set out in the reference document for large combustion plants (LCP BREF), such as Delimara. However, the provisions of the IPPC Directive apply for all installations within its scope since 30 October 2007 and the LCP BREF has been adopted by the Commission on 16 August 2006 (decision published in Official Journal of 25 October 2006).
- (72) The stricter EU wide emission limit values for large combustion plants set out in the new Industrial

Emissions Directive shall apply in principle from 1 January 2016 on for existing plants. However, Article 34 of that Directive provides that until 31 December 2019, combustion plants being part of a small isolated system — such as Malta, see point 19 above — shall be exempted from the emission limit values set forth therein, provided in particular, that the emission limit values as set forth in permits issued in application of the LCP and IPPC Directives on 31 December 2015 shall at least be maintained. It follows that the Delimara power plant has already and shall have to comply until 2019 with the emission limit values laid down in the LCP Directive and the obligation under the IPPC Directive to use the best available techniques as set out in the relevant BREF.

- (73) Based on the technical description of the planned investment provided by Malta, it is doubtful that the planned techniques are going beyond BAT as set out in the BREF for large combustion plants under the IPPC Directive. In Malta’s own admission, the project shall ensure compliance with the IPPC Directive, where possible. If the project only ensures compliance with the LCP Directive and, partly, with the IPPC Directive, it is doubtful that any possible State aid to finance it would be compatible with the internal market under Article 107(3)(c) TFEU, based on the conditions set out in the guidelines.
- (74) Nonetheless, Malta refers to the project as allowing early compliance with future EU mandatory limit values for NO<sub>x</sub> and dust which, as shown above, can only be those laid down in the new Industrial Emissions Directive, which will be applicable in Malta as of 1 January 2020. In that respect, the project will be structured in two phases, one by 2011, that is nine years before the entry into force, and the other one by 2013-2004, that is between seven and six years before. Malta has not supplied information allowing to discern whether the construction phase intended to end by 2011 concern both or only one of the electrostatic precipitators envisaged and, in any event, whether the progress achieved by 2011 will already allow to meet in advance any of the relevant standards. Meanwhile, it transpires from the information provided that the investment project will only be fully implemented and finalised by 2013-2004. In any event, Malta has not so far provided information allowing to demonstrate that the project would allow early compliance with future EU standards for NO<sub>x</sub> and dust — or other pollutants-applicable in Malta as of 2020.
- (75) Likewise, Malta has not provided a calculation of the investment costs of possibly meeting EU environmental standards in advance, if appropriate, after deduction of the costs of a reference counterfactual investment of meeting the currently applicable environmental standards set out in the LCP and the obligation to apply BAT under the IPPC Directive. Malta has also failed to provide estimates of possible financial operating benefits and costs derived thereof, e.g. more efficient burners reducing fuel consumption and/or allowing the use of cheaper qualities of heavy fuel oil. In the circumstances, the amount of eligible costs as defined in the guidelines is not documented.

<sup>(1)</sup> Guidelines, point 70, 3).

<sup>(2)</sup> Guidelines, points 87-88.

<sup>(3)</sup> Guidelines, points 89-90.

<sup>(4)</sup> Judgment of the Court of 1 October 2009 in Case C-252/08, *Commission v Malta*, ECR 2009, p. I-00159.

- (76) In any event, even if the Commission were to assume that the planned investment costs are all aimed at meeting not yet applicable standards, are net of operating costs and benefits for a five-year period and constitute, therefore, the amount of eligible costs, the maximum aid intensity would be no more than 15 %, that is EUR 2,75 million, depending on the time span between completion and entry into force of the future mandatory standards. Such maximum threshold would be 10 % if the project is completed between three and at least one year before such date. The maximum aid intensities under the guidelines are, therefore, well below the EUR 15,5 million amounting to 84,7 % aid intensity planned by Malta.
- (77) It follows that it is doubtful that the plan to grant State aid totalling EUR 15,5 million to the environmental project for Delimara power station described above meets the conditions of the guidelines. A fortiori, the Commission is not in a position to carry out a detailed economic assessment of the project, pursuant to Chapter V of the guidelines. Such assessment must demonstrate that the polluter pays principle is respected and that the aid is necessary, has an incentive effect, is proportionate and has sufficiently low effects on competition and trade between Member States.
- (78) The Commission therefore doubts that the planned amount of State aid can be declared compatible with the internal market pursuant to Article 107(3)(c) TFEU, based on the conditions laid down in the Guidelines on State Aid for Environmental Protection. These doubts concern notably the following:
- the extent to which the project aims at merely meeting already applicable EU environmental standards or, alternatively, at supporting the early compliance with future, not yet applicable EU standards,
  - the amount of eligible investment costs after deduction of the reference investment needed to meet already applicable standards and of the possible financial operating benefits and costs,
  - whether the planned amount of State aid totalling EUR 15,5 million would represent no more than the maximum thresholds of 15 % or 10 % of the eligible costs as set out in the guidelines and, if such were the case, whether a detailed economic assessment under the criteria laid down in the guidelines would allow to conclude that the polluter pays principle is respected and that the aid is necessary, has an incentive effect, is proportionate and has sufficiently low effects on competition and trade between Member States.

#### Article 106(2) of the TFEU

- (79) Article 106(2) TFEU states that: “Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not

be affected to such an extent as would be contrary to the interests of the Union”.

- (80) The contention of Malta to the effect that Article 106(2) TFEU would be the correct legal basis to examine the planned State aid implies that the application of Article 107(3)(c) TFEU, by totally excluding or, at least, curtailing the planned amount of aid, would obstruct the performance of the particular task of Service of General Economic Interest (“SGEI”) entrusted to Enemalta as to the supply of electricity. However, so far, the observations of Malta fail to demonstrate that such would be the case.
- (81) The rules which the Commission follows for the assessment of State aid under Article 106(2) TFEU are set out in the Community framework for State aid in the form of public service compensation (“the SGEI framework”) <sup>(1)</sup>. As indicated in the SGEI framework, where the four criteria of the Altmark case law are not met and the general criteria of Article 107(1) TFEU are met, public compensation constitutes State aid <sup>(2)</sup>. As further shown above, at this stage, the Commission considers that the Altmark criteria are not met and that the general criteria of Article 107(1) TFEU are met <sup>(3)</sup>.
- (82) It follows that the planned amount of aid of EUR 15,5 million allegedly set as public compensation could fall in the scope of the SGEI framework and the assessment be made under the conditions set out therein. Such conditions include, among others: (i) the existence of a genuine SGEI in compliance with the EU rules governing the matter in this sector and (ii) the need for a legal instrument specifying, inter alia, the parameters for calculating, controlling and reviewing the compensation and arrangements for avoiding and repaying any overcompensation <sup>(4)</sup>.

The existence of a genuine SGEI in compliance with the EU rules

- (83) As regards the existence of a SGEI in compliance with the current EU rules governing the matter, Article 3(2) of Directive 2003/54/EC allows Member States to impose on undertakings operating in the electricity sector, in the general economic interest, public service obligations which may relate to security, including security of supply, regularity, quality and price of supplies and environmental protection, including energy efficiency and climate protection. Such obligations shall be clearly defined, transparent, non-discriminatory, verifiable and shall guarantee equality of access for EU electricity companies to national consumers <sup>(5)</sup>.
- (84) Directive 2003/54/EC shall be repealed as of 3 March 2011 and replaced by Directive 2009/72/EC concerning common rules for the internal market in electricity. Article 3(2) of Directive 2009/72/EC contains analogous provisions as Article 3(2) of Directive 2003/54/EC.

<sup>(1)</sup> OJ C 297, 29.11.2005, p. 4.

<sup>(2)</sup> SGEI framework, point 7.

<sup>(3)</sup> Paragraphs 51 and 61.

<sup>(4)</sup> SGEI framework, points 9, 11 and 12.

<sup>(5)</sup> Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC (OJ L 176, 15.7.2003, p. 37).

- (85) Moreover, whilst Article 3(4) of Directive 2003/54/EC provide for financial compensations or exclusive rights for SGEI, the rules laid down in Directive 2009/72/EC and applicable as of 3 March 2011 allow Malta to refuse the access of electricity generated by third parties other than Enemalta to its distribution system, thereby vesting on Enemalta an exclusive right to distribute electricity within Malta, which must be done with due regard to applicable environmental requirements, pursuant to the entrustment under Maltese law. As a matter of fact, Enemalta is today the sole producer capable of ensuring continued supply of electricity to meet the needs of Malta as to base load and reserve capacity supply to meet the service needs of Maltese business and residential consumers. The specificity of the island of Malta as a small and isolated electricity system with peculiar characteristics which make it distinct from that of other Member States is also recognised in EU law.
- (86) It follows that the current and future rules governing the EU internal market for electricity do not oppose in principle to the entrustment of the provision of a SGEI imposing public service obligations as regards security of electricity supply, taking into account environmental protection. The Commission must verify however, whether there is a manifest error in the entrustment of the SGEI.
- (87) In the short term, it could be considered that Enemalta is entrusted with an SGEI in compliance with EU rules laid down in the SGEI framework as regards the guarantee of electricity supply in Malta, which only the generation capacity of Enemalta is capable of ensuring. However, Malta has so far not supplied evidence that the environmental improvements aimed at in the project are concretely and expressly an integral part of the SGEI entrustment, which does not require Enemalta to over-perform the applicable environmental standards. In particular, the relevant acts of entrustment are much broader than the narrow purpose of the planned subsidy, that is the improvement of the environmental performance as to NOx and dust emissions of two boilers in one of the two plants operated by Enemalta. Malta has failed to provide legal acts or plans thereof linking the planned subsidy and the environmental improvements over and/or faster than the mandatory EU standards to the acts of entrustment.
- (88) It follows that, as regards the environmental improvements stemming from the project and their link with the SGEI obligations imposed to Enemalta, the Commission is not in a position to check whether there is a manifest error in the definition and entrustment of the SGEI.
- (89) With respect to the security of supply argument raised by Malta, the situation might change in the future as soon as Malta's grid is interconnected with Sicily and imported electricity be capable of meeting supply requirements, depending on the technical capacity of the interconnection, from 2012 onwards.
- (90) Malta claims that the modifications shall extend the lifetime of the boilers and, therefore, their availability for supplying back-up capacity to possible imports through the planned interconnection with Sicily. So far, Malta has failed to show that the future imports of electricity through the 400 MW interconnection planned for this very purpose will not be capable of ensuring additional capacity to the current MW 570 installed, of which 120 MW come from the boilers in question, in order to meet security of supply requirements to a sufficient extent.
- (91) Indeed, Malta has not supplied evidence allowing the Commission to check whether, for how long and to which extent there is a need for such capacity in the light of the need to maintain the security of supply of electricity in Malta from 2012 onwards, i.e. before the planned modifications of the boilers are completed (2013-2014). Likewise, the relationship between the project and the alleged security of supply objective appear to be tenuous. For instance, no relationship between the electrostatic precipitators to be installed for the purposes of dust reductions on each boiler and the contribution to security of electricity supply is argued, let alone established.
- (92) The Commission notes the contention of Malta as to the affordability of electricity tariffs in the island, which would allegedly be compromised if Enemalta financed the planned investment entirely through commercial loans at market based conditions. The regular supply of electricity at prices which are affordable to the population, especially those most in need, is a legitimate objective for a SGEI. Based on the figures submitted by Malta, it appears that the tariff increase that would be needed to absorb the full financing of the planned investment at market conditions would be in the region of 30 % for households (taxes included).
- (93) However, whilst noting the increase in electricity tariffs since 2008 in order to ensure the remuneration and replacement of Enemalta's assets, that increase appears to have been cushioned for households. Malta has introduced several measures including notably energy benefits and energy allowances so that 97 % of households would be receiving some sort of financial help to cushion the impact of higher energy prices<sup>(1)</sup>.
- (94) Moreover, by 2012, i.e. well before the completion of the investment project at Delimara power station, the planned interconnection with Sicily partly funded from the EU budget is planned to be operational. The very purpose of this interconnection sponsored and supported by the EU is to improve the functioning of the internal electricity market, thereby partly remedying the geographical disadvantages of Malta and addressing the alleged higher generation costs incurred therein. In Malta's own admission, the main flow of electricity trade is expected to be towards imports in Malta, given the allegedly higher generation costs incurred by Enemalta.
- (95) In that respect, the central position of electricity tariffs in Malta compared to EU average suggests that electricity could often be imported from the EU grid at significantly

<sup>(1)</sup> See declarations to Malta Independent on 26 July 2010 (<http://www.independent.com.mt/news2.asp?artid=109607>), description of the energy benefit (<http://www.msp.gov.mt/services/sif/service>), energy allowance: <http://www.independent.com.mt/news.asp?newsitemid=109639> and eco-reductions (<http://www.timesofmalta.com.mt/articles/view/20100313/letters/how-the-electricity-eco-reduction-works>).

lower tariffs, for the benefit of consumers. Meanwhile, Enemalta is vertically integrated. By virtue of the interconnection with the EU market, the sourcing of cheaper electricity according to Malta from non-local power plants in substitution of electricity generated in Malta normally should, at current end-user prices, free financial resources allowing Enemalta to upgrade the environmental performance of its power plant, in keeping with EU environmental law standards.

- (96) At this stage, Malta has therefore failed to demonstrate that the expected supply from the interconnection would be insufficient to compensate to an acceptable extent a tariff increase possibly prompted by the compliance of Enemalta with EU wide standards. It appears therefore that the legitimate objective of affordable electricity tariffs has not been shown to be impossible or at least, unlikely to be met with the normal operation of the internal market once the interconnection is in operation by 2012.
- (97) It follows that the Commission is not in a position to check whether the project relates and contributes to enhancing security of supply and, therefore, whether the public service obligations imposed on Enemalta have been defined without manifest error in this respect.

Legal instrument specifying the parameters for calculating, controlling and reviewing the compensation

- (98) The specific responsibilities of Enemalta are laid down in official acts such as the Enemalta Act and the Electricity Regulations, 2004. The tariffs applied by Enemalta are set following principles enshrined in Regulation and also subject to ex ante and ex post regulatory scrutiny by the Malta Resources Authority. However, Malta has failed to provide legal acts or plans thereof linking the planned subsidy for the planned environmental project to the acts of entrustment.
- (99) Malta has not provided information on the parameters established in advance for the calculation of the amount of the compensation corresponding to the investment at stake. The planned compensation appears to be granted on a purely ad hoc basis for the investment project at hand, based on unknown and seemingly ex post criteria, such as the investment costs planned for one single environmental project.
- (100) Nor is the planned subsidy for the investment structured as a payment for the provision of back-up capacity service sustaining the provision of the SGEI on security of supply grounds, again, on the basis of objective parameters set out in advance. For instance, the costs of the electrostatic precipitators to be installed for the purposes of dust reductions on each boiler appear to be unrelated to the alleged security of electricity supply. The objective and transparent criteria for the calculation are therefore missing.
- (101) In the same vein, Malta has failed to indicate possible operating benefits derived from the measure, such as a reduction in fuel costs derived from more efficient boilers

as well as the net earnings which accrue and are planned to accrue to Enemalta from the operation of the alleged SGEI.

Arrangements for avoiding and repaying any overcompensation

- (102) So far, Malta has not supported its contention with sufficient evidence showing the mechanisms by which it could be ensured that the alleged compensation would not exceed what is necessary to discharge its mission, account taken of all the net revenues and other advantages granted by the State or through State resources in any form whatsoever. By way of illustration, in Malta's own admission, a number of loans taken by Enemalta have been guaranteed by the government for which Malta has failed to indicate, contrary to the planned guarantee which is the object of the present decision, the conditions applied. Likewise, Malta has failed to clarify if the modification of the assets resulting from the planned investment would trigger additional depreciation for tax purposes, thereby reducing the amount of company tax.
- (103) Finally, the specific arrangements by which the correctness of the amount of compensation would be reviewed ex post and any excess thereof recovered are also unknown at this stage.
- (104) In conclusion, Malta has failed to supply evidence allowing the Commission to verify whether there is a manifest error in the entrustment of the alleged SGEI be it for security of supply, for environmental reasons or for both. Likewise, whilst the alleged compensation does not appear to be suited for the provision of additional capacity services, Malta has also not supplied a complete overview of the costs and benefits for Enemalta in connection to the alleged compensation, the net revenues and other advantages granted by the Maltese State, as well as the mechanisms for setting the amount of compensation and reviewing ex post the correctness thereof, following the rules set out in the framework for State aid in the form of public service compensation.
- (105) At this stage, Malta appears therefore not to have discharged its burden of proof that the application of State aid rules laid down in Article 107 TFEU would obstruct the performance, in law or in fact, of the particular tasks assigned to Enemalta.
- (106) Moreover, in the absence of evidence to the contrary, the electricity likely to be imported in Malta can be presumed to bear the costs of complying with environmental or other standards applicable throughout the EU and, therefore, not to lead to higher environmental pressure than the one produced by Enemalta. Supported with EU funding, the isolation of the Maltese electricity market shall be brought to an end, thereby allowing benefits of the internal market to Malta, which will obtain access to presumably cheaper supplies than those of Enemalta. Artificially diminishing the generation costs of Enemalta at the time were competition starts to develop by virtue of the interconnector could compromise the competitive position of other electricity suppliers wishing to sell electricity to Malta.

(107) Subject to the comments of Malta, it could therefore be doubtful at this stage that the improvement of the competitive position of Enemalta vis-à-vis the electricity generated by other EU competitors which incur the environmental costs Malta wishes to discharge Enemalta from could be held not to affect the development of trade to such an extent as would be contrary to the interests of the Union, within the meaning of Article 106(2) TFEU.

(108) The Commission therefore doubts that the possible State aid present in the use of resources from the European Regional Development Fund up to EUR 15,5 million to cover part of the investment costs of the Environmental Project for Delimara Power Station can be declared compatible with the internal market pursuant to Article 106(2) TFEU, based on the conditions set out in the EU framework for State aid in the form of public service compensation. These doubts concern notably the following:

- whether the project relates and contributes to enhancing security of supply and, therefore, whether the public service and environmental obligations allegedly included in the entrustment of the alleged service of general economic interest of Enemalta have been defined without manifest error in connection with the project,
- whether the parameters for setting the amount of the alleged compensation for the performance of the service are objective and transparently set in advance,
- whether there exist adequate mechanisms of review ex post of the correctness of the amount of the alleged compensation and recuperation of possible overcompensation, taking into account all the net revenues and other advantages granted by the State or through State resources derived from the provision of the alleged service of general economic interest.

## CONCLUSION

On the basis of the foregoing assessment, the Commission has decided that the planned government guarantee on loans worth EUR 2,8 million does not involve State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

However, in the light of the foregoing considerations, the Commission, acting under the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union, requests Malta to submit its comments and to provide all such information as may help to assess the planned State aid through the use of resources from the European Regional Development Fund up to EUR 15,5 million to cover part of the investment costs of the Environmental Project for Delimara Power Station, within one month of the date of receipt of this letter. The information should include, in particular, the fulfilment of the criteria for compatibility of the planned aid with the internal market pursuant to the Community Guidelines on State Aid for Environmental Protection in application of Article 107(3)(c) TFEU and/or pursuant to the Community framework for State aid in the form of public service compensation in application of Article 106(2) TFEU. It requests your authorities to forward a copy of this letter to the potential recipient of the aid immediately.

The Commission wishes to remind Malta that Article 108(3) of the Treaty on the Functioning of the European Union has suspensory effect, and would draw your attention to Article 14 of Council Regulation (EC) No 659/1999, which provides that all unlawful aid may be recovered from the recipient.

The Commission warns Malta that it will inform interested parties by publishing this letter and a meaningful summary of it in the *Official Journal of the European Union*. It will also inform interested parties in the EFTA countries which are signatories to the EEA Agreement, by publication of a notice in the EEA Supplement to the *Official Journal of the European Union* and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication."