MALTA

QORTI TA' L-APPELL

ONOR. IMHALLEF
PHILIP SCIBERRAS

Seduta tad-9 ta' Jannar, 2008

Appell Civili Numru. 6/2007

Attard Services Limited bhala rapprezentanti lokali tas-socjeta` Shell Aviation Limited

vs

Awtorita` ta' Malta dwar ir-Rizorsi

Il-Qorti,

Fil-21 ta' Frar, 2007, il-Bord ta' l-Appelli dwar ir-Rizorsi ppronunzja s-segwenti decizjoni fl-ismijiet premessi:-

> **"**Il-Bord,
>
> **L-EWWEL PARTI - L-ATTI TA' L-APPELL U D-DIVERSI SOTTOMISSJONIJIET**
>
> Ra illi fi Frar tas-sena 2005, Shell Aviation Limited kienet baghtet sottomissjoni lill-Awtorita` Maltija dwar ir-Rizorsi li kienet tirrigwarda "Access to

Centralised Infrastructure for the Receipt, Storage, Transmission & Supply of Jet fuel from Enemalta Port Jetty to Airport Depot Loading Gantry". F'din is-sottomissjoni Shell kienet spjegat illi wara li ippartecipat f' tender appozitu, hi kienet intghazlet bhala *second operator for aircraft refueling services.* L-iskop tas-sottomissjoni kien li titlob lill-Awtorita` sabiex bhala regolatur, din tirregola l-istruttura tal-prezz ghall-access mehtieg lejn l-infrastruttura ta' Malta fir-rigward tal-ilqugh, il-hazna u t-tqassim tal-jet fuel ghall-ajruplani. Hi kompliet tispjega illi fic-cirkostanzi tal-pajjiz, hi kellha htiega ta' access fuq bazi mhux diskriminatorja ghall-infrastruttura tal-Korporazzjoni Enemalta.

Ghalhekk hi ghamlet is-segwenti talba lill-Awtorita`:

1. To confirm that the airport depot is Centralised Infrastructure as defined by EU Ground Handling directive and declare it so.

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

3. To establish access and conditions to the dedicated jet fuel infrastructure in a fair, transparent objective, relevant and non-discriminatory way that does not hinder access or Competition and does not frustrate the aims of the Ground Handling Directive.

4. To establish appropriate market and efficient industry practices that exclude out dated practices and unnecessary costs and allow for the non-discriminatory and relevant use of these assets, whose complexity, or environmental impact does not allow for division or duplication. Thereby allowing for the fair, competitive supply of jet fuel from jetty to airport depot.

5. To establish fair, competitive and nondiscriminatory pricing for the receipt, storage, transmission and delivery of jet fuel using the dedicated jet fuel infrastructure operated by Enemalta Corporation on criteria which are relevant objective, and transparent.

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

Il-Bord innota illi fid-9 ta' Gunju 2005, l-Awtorita` appellata tat din id-decizjoni, li qeghda tigi riprodotta verbatim.

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

I. Determination

Whereas

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

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

Now, therefore, on the basis of the facts provided and for the reasons stated in Section

II of this Decision, the Malta Resources Authority hereby determines as follows:

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

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

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

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

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

This notwithstanding, it appears that the issue of whether the facilities in question constitute CI or not and, consequently, whether the access to these 2 facilities should be granted, is not disputed, since the parties seem to have reached a *prima facie* agreement that the access shall be granted and proceeded, in the course of their negotiations, to negotiate prices for ASL/Shell's access to the Enemalta's facilities.

2. With regard to the fourth complaint as to the establishing of appropriate market and efficient industry practices allowing for fair competition, the Authority has been made aware that following an inspection and audit on Enemalta's operations as commissioned by ASL/Shell, a number of potential inefficiencies were brought to the attention of Enemalta and we understand that the principal elements thereof were addressed by Enemalta in their preparation of revised cost calculations so as not to burden ASL/Shell with the costs thereof While this Authority does not condone blatant inefficiencies being adsorbed in cost-based prices, it accepts that a restructuring exercise necessitates time. Accordingly, the MRA hereby instructs Enemalta to report back to this Authority at regular intervals as to the progress of such agreed restructuring.

3. With reference to the fifth complaint as to whether Enemalta's price for the services requested by ASL/Shell is either not relevant, or non-transparent or non-objective or discriminatory, this Authority determines that notwithstanding that Enemalta's price is based on its current operating costs and not on open market considerations, the pricing method employed by Enemalta is not in violation of the provisions of Directive 96/67/EC.

Moreover, with regard to whether Enemalta's prices for the services requested amount to an entry barrier for newcomers to the sector and as such are an abuse of Enemalta's monopolistic position, this Authority, while it notes that it is not competent to rule of matters falling under the Competition Act proper, determines that provided Enemalta's price seeks to compensate for current incurred costs well as for reasonable profit, adjusted for the effect of significant potential operational inefficiencies as noted in 2 above, Enemalta's pricing method does not constitute

unfair competition and is not per se tantamount to an entry barrier.

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

II. Considerations
1. FACTS OF THE CASE

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

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

1.3. In view of the lack of agreement between the parties as aforementioned the MRA was formally requested, by an email from Dr Simon Busuttil of the 26'" September 2004, to intervene in the matter as the regulatory authority for energy, in

particular to ensure the process of liberalisation of the services of fuel provision at Malta's airport terminal were conducted in accordance with Directive 96/67/EC on access to the groundhandling market at Community airports.

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

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

> ‘1) To identify the current Enemalta Aviation Operations (from importing vessel/parcel, through the various stages of storage facilities, quality and quantity controls, certification and delivery of the product at the fueller loading gantry inside Malta International Airport) and 2) To identify the alternative optimised infrastructure and manning levels Shell Aviation would require and expect in order to supply jet fuel from the jetty to the fueller loading gantry inside Malta International Airport.’

The report advocated a reduced use of infrastructure (ie. no requirement for Has-Saptan and the second airside facility known as Bulk Fuel 2), as well as a reduction in manning levels achieved by a reduced use of facilities, a clear understanding of the actual time required on

aviation operations and a revised organisation of tasks. Such reduction was also advocated to ensure cost efficiency. The report concludes: *'In terms of costs it should be Enemalta's own decision and cost if it wishes to maintain its current facilities, operations, processes and* 4 *manning levels. Those costs associated with these operations should not be oncharged to commercial users of Malta's infrastructure'.*

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

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

a similar cost structure. But this too falls blatantly foul of the law.'

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

1.8. By means of a letter dated 9th February 2005, following a meeting with D&T and the MRA, Enemalta summarised its position as follows:

'*Without going into the legalities as to whether Enemalta's infrastructure can be considered as common infrastructure in terms of the law, Enemalta ... is willing to offer its services to ASL/Shell. ... However, Enemalta is only prepared to do so at a fair, transparent price that adequately remunerates Enemalta for the services it is providing and the investment it has made'.*

Adding that the infrastructure which ASL/Shell was requesting the utilisation of went beyond the installation at the airport but extended to those at Birzebbugia, Wied Dalam and Has-Saptan. Enemalta was prepared to offer these services at the charge advocated in the WC report of 2004.

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

1.10. In its submission of February 2005, with regard to rates ASL/Shell stated:

"Rates to be applied for access to the existing infrastructure dedicated to Jet fuel should be

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

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

1.11. By their letter of 4th April 2005 Enemalta clarified the position with regard to the prices currently charged by Enemalta for similar services provided to other companies as follows: *"The services being requested by Shell for the receipt, storage, transferring and loading of refuellers at Luqa airport are very much different from the contracts that Enemalta has up to now entered with third parties for the storage offuelatHas-Saptan." "...international procedures ... require also that all tests and quality control practices are properly recorded and that the operator must have a proper audit trail of the fuel such that every litre of fuel put onto an aircraft can be traced back to the refinery from where it originated. " "Also in handling third party aviation fuel Enemalta would*

be shouldering a lot of responsibility which needs lobe compensated".

2. THE COMPLAINT

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

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

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

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

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

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

2.1.6. To give effect to the international obligations entered by the Government in relation to the

resources regulated by the Malta Resources Authority.

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

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

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

3. ASSESSMENT OF LEGAL POSITION

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

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

3.1.2. This notwithstanding, it appears that the issue of whether the facilities in question constitute CI or not and, consequently, whether the access to these facilities should be granted, is not disputed, since the parties seem to have reached a *prima facie* agreement that the access shall be granted and proceeded, in the course of

their negotiations, to discuss prices for ASL/Shell's access to the Enemalta's facilities.

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

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

3.2. MATTERS RELATING TO PRICING

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

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

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

3.2.2. In terms of the Malta Resources Authority Act (cap. 423) the functions of the Authority include the regulation of the price structure for any activity regulated by the Act and where appropriate the establishing of the mechanisms whereby the price to be charged for the acquisition, production, manufacture, sale, storage

and distribution thereof is determined (Art. 4 (1) (i) of the Act) at the same time ensuring fair competition in all such practices, operations and activities (Art. 4 (1) (d) of the Act).

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

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

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

3.3.1. It is settled law that:

> Discrimination can arise only through the application of different rules to comparable situations or the application of the same rules to different situations'.

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

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

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

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

3.3.5.1. The services supplied to third parties are:

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

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

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

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

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

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

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

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

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

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

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

3.4.4. In the case under examination, the Authority has been made aware that following an inspection and audit on Enemalta's operations as commissioned by ASL/Shell, a number of potential inefficiencies were brought to the attention of Enemalta and we understand that the principal elements thereof were addressed by Enemalta in their preparation of revised cost calculations so as not to burden ASL/Shell with the costs thereof.

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

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

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

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

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

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

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

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

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

3.5.5. It is the Authority's opinion that provided that the above-listed principles are adhered to in Enemalta's pricing method, such method is not

anticompetitive and the charge arrived at is not excessive. Accordingly, such charge could not amount to an entry barrier to new entrants to the market.

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

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

Illi fil-25 t'Awissu 2005 is-socjeta' appellanti kienet kitbet risposta dettaljata lill-Awtorita` appellata, fejn ressqet diversi sottomissjonijiet dwar id-decizjoni citata. Fit-13 ta' Dicembru 2005 l-Awtorita` wiegbet ghal din l-ittra u informat lill-appellanti li jekk mhix ser toqghod ghad-decizjoni, din kellha dritt tappella quddiem dan il-Bord.

Illi l-appellanti, aggravata minn din id-decizjoni inoltrat appell li ukoll qed jigi riprodott verbatim:

Illi fis-26 ta’ Settembru 2004 l-esponenti talbu lill-Awtorita` ta’ Malta dwar ir-Rizorsi sabiex tintervjeni fi kwistjoni li huma ghandhom mal-Korporazzjoni Enemalta dwar l-access ghall-infrastruttura ta' l-Enemalta sabiex l-esponenti jkunu jistghu joffru servizz ta' refueling ta’ l-ajruplani fl-Ajruport Intemazzionali ta' Malta.

Illi permezz tad-decizioni taghha (02/ED) tad-9 ta' Gunju 2005 l-Awtorita` ta' Malta dwar ir-Rizorsi cahdet it-talba ta' l-esponenti.

Illi l-appellanti hassu ruhhom aggravati minn din id-decizjoni u ghaldaqstant qieghed minnha jinterponi umili appell quddiem dan il-Bord.

Illi l-aggravju ta' l-appellanti huwa car u manifest u jikkonsisti filli l-Awtorita` ta' Malta dwar ir-Rizorsi cahdet it-talba taghhom u dan billi ghamlet apprezzament zbaljat tal-fatti, ghamlet zball fil-ligi u waslet ghal konkluzjoni li hija nieqsa minn ragonevolezza u minn proporzjonalita' ai termini ta' artiklu 33, paragrafu 2, subincizi (a), (c) u (d) ta' Kap.423 tal-ligijiet ta' Malta.

Illi l-fatti tal-kaz huma s-segwenti:

Illi l-Korporazzjoni Enemalta hija s-sid uniku u l-operatur tal-postijiet pubblici u nazzjonali fejn jigi mahzun iz-zejt u prodotti petrolifici, inkluz tal-fuel ghall-avjazzjoni. Il-Korporazzoni ghandha wkoll monopolju fl-importazzjoni u l-bejgh tal-prodotti tal-fuel ghall-avjazzjoni li jintuza fis-suq lokali ta' Malta.

Illi ai termini tar-regolamenti Airport (Ground Handling Services) Regulations, ta' l-2003 (A.L. 66/2003) li dahhlu d-Direttiva Ewropea 96/67/EC fil-ligijiet ta' Malta, f'Marzu ta' l-2004 il-kumpanija Malta International Airport harget sejha ghal offerti permezz ta' Avviz Numru MIA/06/04 ghall-provvista ta' servizzi konsistenti fi provvista ta' fuel u ta' zejt (fuq in-naha ta' l-Airside) fl-ajruport internazzjonali ta' Malta. L-appellanti tefghu l-offerta taghhom u f' Gunju ta' l-2004 ntaghzlu bhala t-tieni operatur licenzjat sabiex joffri dawn is-servizzi fl-ajruport.

Illi l-kundizzjonijiet tat-tender obbligaw lill-appellanti sabiex juzaw l-"infrastuttura centrali" ta’ l-ajruport sabiex jofru s-servizz taghhom, jigifieri, l-infrastruttura ezistenti li diga tintuza ghall-provvista tas-servizzi hawn fuq imsemmija u bhala tali kienu obbligati li jinnegozjaw mal-Korporazzjoni Enemalta sabiex jinghataw access ghal din l-inftastruttura.

Illi sa mill-ewwel laqghat li saru bejn l-appellanti u l-Enemalta hareg car illi l-Enemalta ma kienitx lesta taghti access lill-appellanti ghall-infrastruttura taghha stante illi l-appellanti kienu se jikkompetu maghha stess. Minkejja dan, l-Enemalta kkummissjonat lil Pricewaterhousecoopers (PWC) sabiex iwettqu ezercizzju finanzjarju biex tigi stabbilita rata ta' hlas li ghandha tintalab lill-appellanti ghall-uzu ta’ l-infrastruttura. Fir.-rapport taghhom ta’ l-4 ta’ Ottubru 2004, PWC hargu b'rata ta[1] hlas ta’ tnejn u ghoxrin punt tnejn seba' dollaru Amerikan (USD22.27) ghal kull tunnellata metrika.

Illi l-appellanti qisu li din kienet rata eccessiva.

Illi f’ Lulju ta’ l-2004, permezz ta’ l-awdituri taghhom Denys Denant l-appellant ghamlu spezzjoni u audit ta' l-infrastruttura ta' l-Enemalta u tal-mod kif tigi adoperata u waslu ghal rapport li propona uzu ridott ta' l-infrastruttura kif ukoll tnaqqis fil-livell ta' manodopera, ftehim ahjar dwar il-hin mehtieg ghal dawn it-tip ta' servizzi u revizjoni tal-mod kif jitqassam ix-xoghol. Dawn il-proposti saru biex titjieb l-efficjenza u sabiex ir-rati ta’ hlas ghall-uzu ta' l-infrastruttura tkun tinkludu biss l-ispejjez relevanti biss.

Dan ir-rapport, li qed jigi anness ma dan ir-rikors, ikkonkluda illi jekk jidrilha li ghandha zzomm il-facilitajiet, l-operat, il-process u l-manodopera li ghandha bhalissa dan m'ghandhiex taghmlu a

spejjes ta’ imprendituri ohra li juzaw l-infrastuttura ta’ Malta.

Minhabba li ma ntahaqx ftehim dwar ir-rata ta' hlas ghall-uzu ta’ l-infrastruttura bejn iz-zewg nahat, fis-26 ta[1] Settembru ta' l-2004, l-appellanti fomalment talbu lill-Awtorita` ta' Malta dwar ir-Rizorsi sabiex tintervjeni fil-kwistjoni, bhala l-Awtorita` kompetenti b'responsabbilita' fil-qasam ta' l-energija, inkuz il-fuel, sabiex tara illi l-process ta' liberalizazzjoni tas-servizzi tal-provvista ta' fuel fl-ajruport ta' Malta isir skond id-Direttiva Ewropea 96/67/EC u senjatament sabiex l-appellanti jinghataw access ghall-infrastruttura ta' l-Enemalta taht l-kundizzjonijiet li jirrispettaw id-Direttiva msemmija kif ukoll il-ligi dwar il-kompetizzjoni gusta.

Illi l-Awtorita` ta' Malta dwar ir-Rizorsi investigat il-kwistjoni u waslet ghad-decizjoni taghha 02/ED fid-9 ta' Gunju 2005, liema decizjoni qed tigi annessa ma’ dan ir-rikors, u li fiha hija cahdet it-talbiet ta' l-appellanti. . Minkejja dan, l-Awtorita` sejhet lill-partijiet sabiex jergghu jidhlu f’negozjati sabiex jaslu ghal kompromess.

Illi permezz ta' dan ir-rikors, l-appellanti qed jappellaw mid-decizjoni ta' l-Awtorita` u minghajr pregudizzju regghu fethu t-tahdidiet ma' l-Enemalta. Saru zewg laqghat b’ dan l-iskop izda fihom l-Enemalta zammet mal-pozizzjoni taghha dwar ir-rata ta' hlas ta' USD 22.27 ghal kull tunnellata metrika.

Illi l-esponenti se jghaddu issa biex jaghmlu s-sottomissjonijiet tieghu dwar il-kwistjoni u jghidu fejn u kif ma jaqblux mal-konkluzjonijiet ta' l-Awtorita` ta' Malta dwar ir-Rizorsi.

1. Illi l-appellanti huma obbligati juzaw l-infrastruttura tal-Korporazzjoni Enemalta biex ikunu jistghu joffru s-servizz ta' refuelling fl-ajrport ta' Malta. Id-decizjoni ta' l-Awtorita` kellha

tirrikonoxxi l-attributi monopolistici ta' din l-infrastuttura u b'hekk tirrikonoxxi wkoll il-htiega li kemm l-access ghaliha kif ukoll il-prezz ghal dan l-access ghaliha ghandu jkun regolat b'mod xieraq u b'mod li jizgura kundizzjoniiiet gusti u mhux diskiminatorji ghall-appellanti biex dawn ikunu jistghu jahdmu bhala t-tieni 'fuel handler' fl-ajruport internazzjonali ta' Malta u dan ai temini tal-ligi, senjatament ta ' l-A.L. 66/2003 u tad-Direttiva 96/67.

2. Illi l-appellanti joggezzjonaw ghall-kunsiderazzjonijiet, ir-ragjunament u l-konkluzjonijiet ta’ l-Awtorita` f’ sezzjoni 3.2 u 3.3 tad-decizjoni taghha u jsostnu li l-prezz offrut lilhom (ta’ USD 22.27 ghal kull tunnellata metrika) mill-Korporazzjoni Enemalta ghall-access u uzu ta' l-infrastruttura ghal fuel ta’ l-avjazzjoni, li tinkludi l-hazna ta’ l-istess fuel, kien prezz diskriminatorju u eccessiv.

L-appellanti jsostnu li l-prodott (servizz) u l-hazna tieghu huma simili ghal servizz diga offrut mill-Korporazzjoni. Enemalta lil terzi bi prezz ta' USD 2.5 ghal kull tunnellata metrika u b'hekk l-Enemalta m'ghandhiex titlobhom prezz differenti ghall-istess servizz semplicement ghaliex dan huwa servizz li toffri hi stess fl-ajruport ta' Malta.

3. Illi l-appellanti ghandhom numru ta' oggezzjonijiet ghall-metedologija ta' costing li ntuzat mill-Korporazzjoni Enemalta u li tifforma l-bazi biex hi waslet ghar-rata taghha liema metedologiia giet approvata mill-Awtorita` ta' Malta dwar ir-Rizorsi f’sezzjoni 3.4.5 tad-decizjoni taghha. L-appellanti jsostnu illi l-Awtorita` ma ezaminatx il-kaz sewwa u b'mod li tizgura access gust u kompetizzjoni xierqa fis-suq tal-fuel ghall-avjazzjoni kif mehtieg minn Kap. 423 li jirregola l-istess Awtorita` u kif mehtieg ukoll mill-provvedimenti ta' A.L. 66/2003.

> 4. Illi l-appellanti jsostnu li r-rata mitluba mill-Enemalta hija eccessiva u tammonta ghal ostaklu ghad-dhul fis-suq (entry barrier) b'hekk m'ghandhiex tithalla. L-appellanti iqisu li l-ezami li ghamlet l-Awtorita` kif ukoll id-decizjoni li waslet ghaliha urew insufficjenza u naqsu milli jidhlu fil-kaz fid-dettall u jressqu provi u b'hekk ghandhom jigu sospizi, mibdula jew annullati.
>
> Illi kull wahda minn dawn is-sottomissjonijiet qed jigu spjegati amplifikati u sostnuti pemezz ta' nota li hija annessa ma' dan ir-rikors. Ghal dawn il-motivi, l-esponenti umilnent jitolbu li dan il-Bord ta' Appelli, joghgbu jvarja u jimmodifika d-decizjoni appellata billi jilqa' t-talbiet ta' l-esponenti senjatament illi jiddikjara illi l-appellanti mhux qed jinghataw access ghall-infrastruttura ta' l-Enemalta b 'mod li jirrispetta il-htiega ta' kompetizzjoni gusta u l-provvedimenti ta' A.L.66/2003 tad-Direttiva 96/67 u tordna lill-Korporazzjoni Enemalta sabiex taghti access ghal din l-infrastruttura taht kundizzjonijiet gusti li, jekk jidhrilha, joghgobha tistabbilixxi.

Illi in-nota riferita fil-paragrafu precedenti qeghda wkoll tigi riprodotta verbatim, minhabba illi fiha sottomissijiet ta' fatt u ta' dritt li prattikament tikkomprendi l-essenza shiha ta' l-appell. In-nota hija s-segwenti:

> Shell/ASL are obliged to utilise the aviation fuel infrastructure currently operated solely by Enemalta Corporation. The Decision should have recognized the monopolistic attributes of this centralied infrastructure and therefore also recognise the need to adequately and appropriately regulate access to it and access pricing in order to ensure fair and indiscriminate conditions for Shell/ASL to operate their licence as the second fuel handler at Malta International Airport.

Shell/ASL accept that as per Legal Notice 66/2003, ‘The Airport (Groundhandling Servivces) Regulations, 2003’, which incorporated Council Directive 96/67 into Maltese law the competent authority empowered to determine the fuel distribution and storage infrastructure at the Malta International Airport (MIA) is the Director of Civil Aviation following a request mede by the managing body of the airport; that is Malta International Airport (MIA). This emanates from regulation 14 (I) of the aforementioned Regulations.

Without prejudice to the respective statutory competencies of the Authorities, Shell/ASL question the reasoning on matters relating to centralised infrastructure in Section 3.1.2 of the Decision, namely that since 'the parties seem to have reached a prima facie agreement that the access shall be granted...' in the circumstances brought in front of the Authority, since similar access and agreements can be solely motivated by commercial interests as is the case with the leasing of other storage facilities on the island to third parties. The Regulations (14(1)) state that infrastructures may be determined to be centralised when 'whose complexity, cost and environmental impact does not allow for division or duplication, such as baggage handling .... fuel distribution and storage systems' and therefore, only these criteria and attributes of such character would justify infrastructure as centralised'. Shell/ASL uphold that the aviation fuel infrastructure in Malta bear these attributes and should therefore be so recognized in the assessment and ultimate determination of the case.

Moreover, Shell/ASL question the other issues considered in Section 3.1 of the Decision which fail to recognize that ShelllASL are required to use centralised infrastructure by MIA. This

requirement emanates from the terms and conditions included in the tender Advert No. MIA/06/04, which include those relating to centralised infrastructure in Section 2.2 and from the letter Issued by MIA in June 2004 that requested Shell/ASL to negotiate directly with Enemalta Corporation for use of centalised infrastructure. It should also be noted that the provisions of regulation 14 of Legal Notice 66 of 2003, paragraph 2, prohibit the use of alternatives to centralized infrastructure.

Therefore Shell/ASL maintain that due to the centralized infrastructure attributes of the aviation fuel distribution and storage in Malta and Shell/ASL's obligation to use it for the opemtion of its licence, this infrastructure should be treated as any other natural monopoly and hence requiring regulated access.

Moreover, since Enemalta Corporation has, to date, acted in a discriminatory and exclusionary manner with regard to access pricing as it has been submitted in the complaint to the Malta Resources Authority in February 2005 and shall be further submitted in subsequent sections of this appeal, access pricing should be regulated ex-ante by the Malta Resources Authority under its statutory functions to ensure fair competition (4 (I) (d) of the Act) and regulate the price structures (4 (I) (f) of the Act).

Shell/ASL contend the considerations reasoning and conclusions drawn in Section 3.2 and 3.3 of the Decision and maintain that the price offered to them (USD 22.27 per metric tonne) by Enemalta Corporation for access and use of the aviation fuel infrastructure, which includes a storage component, is indeed discriminatory and excessive. Shell/ASL uphold that the product (service) and market features of the storage component of their request are similar to the

service offered by Enemalta Corporation to other third parties at a charge of USD 2.5 per metric tonne.

Shell/ASL maintain that the price being offered to them by Enemalta is discriminatory as the storage component of the service, including a pumping in and pumping out movement falls within the same relevant market (product and geographic). On this basis, the storage fee should be similar to that charged by Enemalta Corporation to other third parties. This is without prejudice to the fact that Shell/ASL never conlended and would not contend that other directly relevant costs, such as those for tests required and to be agreed upon between the parties, would be borne by Shell/ASL. At this junction, it is worth highlighting that Enemalta Corporation has never itemised the service and specifications being offered for the price being quoted.

The product (service) features of the storage component of the service being requested by Shell/ASL is similar to that already provided to other third parties at the rate of USD 2.5MT. It involves pumping of product into storage from vessel, storage of product and pumping of product from storage for re-export. Shell/ASL submit that charges for product movements as set by the industry, including Enemalta Corporation, do not distinguish by the 'direction' and therefore it is not to be considered as a product feature.

Therefore, Shell/ASL cannot accept the distinction (and therefore discrimination) that has been claimed repeatedly by Enemalta and regretfully endorsed by the Authority in Section 3.3.3. of the Decision, that the discharge point to the airport perimeter is dissimilar because it is considered as 'local' (as opposed to 'international) and therefore not comparable.

Enemalta's statement, cited in Section 1.8 of the Decision that the infrastructure which Shell/ASL was requesting the utilisation went beyond the installation of the airport but extended to those at Birzebbugia, Wied Dalam and Has-Saptan validates Shell/ASL's position as submitted in February 2005 (cited in Section 1.10 of the Decision), and being maintained in this appeal, that the directly relevant product (service) features of the part outside the airport precincts (storage), which while part of the centralised infrastructure as defined by regulation 2 (Schedule) of the Regulations, demarcates the component of the service that is comparable to the services contracted by Enemalta to other third parties for storage Shell/ASL is aware that these service contracts cover Jet Al fuel as well.

Shell/ASL futher maintain that the geographical parameters defining the relevant market in this case remain Malta and not the 'international market' as stated in Section 3.3.4 of the Decision, since the service is delivered in Malta irrespective of the nationality of the customer, it makes use of the same storage infratructure in question, and is characterised by locational/geographical attributes which are not substitutable due to its isolation and lack of physical connecting infrastructure to other territories. Therefore, Shell/ASL maintain that the storage component requested by them and that provided by Enemalta Corporation to other third parties fall within the same geographical market and therefore no discriminations should prevail within it.

On this basis, and in virtue of Section 9 of the Competition Act (Cap. 379) which prohibits dominant undertakings from discriminating between similar transactions where such discriminations would have an effect on competition, and within Malta Resources Authority's statutory functions, inter alia, to ensure

fair competition, Shell/ASL maintain that Eremalta should be precluded from treating Shell/ASL differently from other customers with respect to similar transactions (in this case storage component). Furthermore, the European Commission has also made it clear with regard to access to infrastructure in the telecommunications sector which is being submitted here by way of example, that if the discrimination is sufficiently likely to restrict or distort actual or potential competition, any differentiation based on the use whioh is to be made of the access to the installations, rather than differences between the transactions for the access provider itself, it would also be in violation of the competition law.

Shell/ASL also highlight that any possible discrimination based on nationality or counrty of incorporation of the firm should be prohibited es they are deemed to fall foul of Articles 43 and 49 (EC) on the freedom of establishment and the freedom to provide services in the internal EU market.

Furthermore, Shell/ASL highlight that a price is excessive when it is above the competitive level. Joliet (1970:24J) considered that a price is excessive when dominant firms have actually taken advantage of their dominant position to set prices significantly higher than those which would result fiom effective competition. Hence, Shell/ASL maintain that the price offered to them is excessive as it is significantly above the effective competitive level. The rate of USD 2.5MT is an industry norm for storage, including loading and discharge, charged by Enemalta Corporation and other storage installations in Malta for similar services. Since this market segment in Malta is considered to be competitive, the rate is set by the most efficient firm and any price set above it, within the same relevant market is indeed excessive. The Decision should recognise that

this storage riate applies to all white products, that is, Jet Al included.

Shell/ASL agee in principle that 'the price and the economic value of the goods or services supplied cannot be reduced to a simplistic cost-plus formula’ as cited in 3.4.3.3 of the Decision, but it should also be recognised that overtime, a range of approaches have been developed by both the European Court of Justice and the European Commission to determine whether a price is excessive or not. For example, in the Guidelines on Vertical Restraints, the Commission defines the competitive price as the 'minimum average costs". The Court of Justice in Case 26/75, General Motors Continental vs Commission 1975 ECR 1367 defined excessive price as being "excessive in relation to the economic value ofthe service provided'.

9. Shell/ASL submit that an excessive price may be proved in various ways, such as by comparing the price under review with the price of similar products offered by other firms, or indeed by the same firm in the same relevant market (product and geographic). This approach was used by the European Court of Justice in the determination of United Brands (1978) Parke Davis (1968) and Renault (1988). The same Court used price of other firms offering similar products in other relevant market as a 'bench-mark' in Sirena (1971) and SACEM I (1989) and SACEM II (1939)- In Case 30-87, Corrine Bodson r- Pompe funebres des regionliberees [1988], ECR 2479 the Court specifically held that if possible a comparison could be made between the prices charged by a dominant firm and those charged on markets which are open to competition.

Therefore, while Shell/ASL maintain that the storage component falls within the same relevant market, it is further contended that contrary to the

argument in Section 3.3.4 of the Decision, comparison with similar products offered by other firms in the same relevant market or indeed in other relevant market is a valid, applicable and commendable tool in examining and determining this case.

Shell/ASL contend that the Decision should be reviewed to take account of the fact that the storage component of the service requested by Shell/ASL fall within the same relevant market and subsequently, to ensure that Enemalta's price to Shell/ASL for this component be not excessive and be similar, or at least comparable, to the prices charged to other third parties for the same services. With regard to distribution and other ancillary services required, which fall within the airport precincts, that is apart from the storge component, Shell/ASL are willing to accept that the computation of the fees to be charged be based on directly relevant and regulated costs since appropriate cost allocation is fundamental to determining whether a price is excessive or not.

Shell/ASL have a number of reservations on the costing methodology employed by Enemalta Corporation which forms the basis of the charges offered to them and which was endorsed by the Authority in Section 3.4.5 of the Decision. Shell/ASL contend that the Malta Resources Authority did not examire this case appropriately and as due in order to ensure fair access and competition in the aviation market segment as required by its statutory functions and the provisions of the Regulations (LN 66/2003),

Shell/ASL fullly agree that the basis for establishment of charges shall be according to relevant, objective, transparent and non - discriminatory criteria as required by regulation 9(d) of the Regulations. Shell/ASL also acknowledge that it is the Authorities'

responsibility to set these criteria and oblige and ensure that the incumbent adopts a cost-accounting methodology and establish charges that satisfy the requirements of the Regulations (and the Directive).

Shell/ASL argue that for fairness and transparency's sake, the tests applied to ensure the fulfilment of the criteria established by the Regulations (and the Directive) should be clear and evident to all and be able to bear scrutiny of all elements. The discriminatory and excessive nature of fees for the storage component of the requested services was argued in Section II above, which Shell/ASL maintain are in violation of the requirements of the Regulations and fair competition rules.

Shell/ASL do not contest that the charges for the use of infrastructure should reflect costs as well as a reasonable profit margin. In the case of Flughafen Hannover-Langenhagen GmhH v Deutsche Lufthansa" the European Court of Justice agreed that the fee may be determined in such a way that the company that owns the infrastructure is able not only to cover the costs associated with the provision and maintenance of airport installations, but also to make a profit.

In his opinion of the case, the Advocate General had opined that "the right of access to installation should be estimated at a fair value, that is to say that it allows for the depreciation of the installations and costs of management and that it provides airports with a reasonable level of profit.

Shell/ASL however do contend, 'which actual costs' and 'what profit margin' were accounted. Shell/ASL specifically question the accounting methodology used by Enemalta for the calculation of charges and used by the Authority for the assessment of this case and would like to

highlight that, cost accounting and financial statements based on international accounting standards such as those of Enemalta's consolidated published accounts, and in the absence of transparent regulatory accounting guidelines, such accounting methodology does not fulfil the needs of regulatory supervision and intervention necessary to examine this case. Due to the significant concern of abuse in network industries both in the European Union and United States, where the incumbent is vertically integrated and dominant in the provision of network access, vertical and horizontal separation of accounts has been essential in most cases to foster increased competition. In particular, therefore, Shell/ASL contend that the required relevant, objective transparent, and non-discriminatory criteria can only be fulfilled with complete separation of accounts of the (directly) relevant activities and therefore costs, which should follow regulatory cost accounting methodologies established for the specific purpose. This since the infrastructure is centralised as submitted in Section I of this appeal, and therefore bears natural monopoly features. On this basis, Shell/ASL object to Enemalta's accounting methodologies, 'that the price should he based on a cost build-down from the total Enemalta costs minus those charges not relating to aviation' (Point 3.2.1.1 of the Decision) and the Authority's opinion based on same. Shell/ASL reasonably appeal to the Authority fo inform them of the relevant, objective, transparent, and non-discriminatory criteria established for the costing methodology used for this case and what measues have been adopted by the Authority to ensure compliance by Enemalta Corporation.

Furthermore as the Authority is aware and with Enemalta's due permission, Shell/ASL conducted an inspection of the Enemalta's facilities in order to identify the 'relevant' service elements

necessary for them in order to exercise their rights and obligations under the licence granted in June 2004. (Copies of which were submitted to the Authority and Enemalta Corporation). Shell/ASL maintain that it is unfair on them and indeed anti-competitive to absorb and subsidise costs of activities and inefficiencies that are not directly connected to this market segment, not necessary and under the sole control of the incumbent. Best practice dictates that when prices are based on costs, the most efficient cost base is used.

Shell/ASL also question the apparent cursory treatment of the 'potential inefficiencies' highlighted by Shell/ASL inspection and of the way in which they were addressed by Enemalta as implied by Section 3.4.4 of the Decision. Furthermore Shell/ASL cannot accept a decision based on 'we understand that the principal elements thereof were addressed by Enemalta' Shell/ASL reasonably expect that the Authority, as the sectoral regulator with access to required information, would base its decisions on thorough cost evaluation and verfication that completely 'satisfy pre-established and transparent regulatory criteria as required by the Regulations and the Authority itself in order to fulfil its statutory responsibility of ensuring fair competition in the energy sector.

Shell/ASL further question the issue of subsidies and state-aid that the Decision refers to in Section 3.4.3.1 as one criterion of transparency used by the Authority in its opinion in Section 3.4.5.2. Apart from the required separation of accounts (included under point 5 above), Shell/ASL maintain that in order to ensure fair competition, subsidies including cross-subsidies and inefficiencies, should be forbidden as required by competition rules. Furthermore and by way of example, Shell/ASL estimate that if it is assumed that the charges offered to Shell/ASL of USD

22.27/Mt are indeed, reflective of all relevant costs as endorsed by the Authority (which Shell/ASL question), then the fee of USD 2.5MT granted to other third parties for storage becomes highly contestable that is, whether it is cost reflective or indeed predatory (and therefore similarly anti-competitive), and therefore whether the fee of USD *22.*27/MT offered to Shell/ASL would subsidize any other activities of Enemalta's vertically and horizontally integrated chain of products/services. It is estimated that the results of such a test would strengthen Shell/ASL's claim that the price of USD 22.27/MT is indeed excessive and that only on the basis of detailed analysis of separated regulatory cost accounts will the Authority be able to arrive to the opinion stated in Section 3.4.5.2 of the Decision, that 'the cost-based method employed by Enemalta does not hide any subsidies or state aid'.

Since, the criteria have not been transparent at the time of lodging this appeal, Shell/ASL reiterate that it would be beneficial to and indeed required by all parties, if the Authority discloses the criteria set for preparation of Enemalta's financial information, and further substantiate the concluding opinion in the Decision, including that referring to state-aid.

Shell/ASL reget to note the Authority's broad reasoning and legal justification and citations considered leading to its opinion on this significant matter, when, although still relevant and valid, more recent knowledge provides ample and more specific material.

Shell/ASL are aware that both economic theory and practice have substantially developed with the advent of cost/price regulation of previously monopolised network industries and residual natural monopolies, such as in telecommunications and energy sectors, and

more distinctly, in access pricing per se which is the focus of this case.

On the basis of the above, Shell/ASL contest the Authority's opinion stated in Section 3.4.5 of the Decision that the pricing methodology employed by Enemalta is not in violation of the Regulations. The appellants consider that the case should be more appropriately examined in accordance with the required economic criteria and be reasonably decided in a way that effective competition will ensue in the aviation fuel sector.

Shell/ASL maintain that Enemalta's charge for services requested are excessive and indeed tantamount to an entry barrier and therefore should be prohibited. The Authority's examinations and subsequent decision are considered by the appellants to be insuffcient and inappropriate in detail and evidence and should therefore be suspended or nullified.

As it has been submitted previously in this appeal, Shell/ASL contend that Enemalta is quoting an excessive price. It is clear that at law, excessive pricing for access, *as* well as being abusive in itself may also amount to an effective refusal to grant access.

Shell/ASL regret to note that despite the Authority's duties under its founding Act to ensure fair competition in the energy sector as acknowledged in Section 3.5.2 of the Decision, it proceeded with a cursory treatment of this complaint without economic examination and justification, and then determine that since charges are cost-based (even though costs are not regulated) and marked up with a reasonable pnofit (not regulated), then the method is not anti-competitive and the charge arrived at is not excessive' and therefore not a barrier to entry.

In Section II of this response, Shell/ASL submitted its arguments that the charge for the services requested is excessive and discriminatory while in Section III, the costing methodology adopted by Enemalta and endorsed by the Authority were questioned. Even on the basis of these preceding submissions, Shell/ASL cannot accept the considerations and opinion included in Section 3.5 of the Decision, that provided that Enemalta's changes are cost-based, Enemalta's pricing is not excessive or anti-competitive. Shell/ASL reiterate that appropriate cost allocation is fundamental to determining whether a price is excessive or not. Shell/ASL further argue that Enemalta's charge is a strategic exclusionary practice set to foreclose the market thus retaining its monopolistic dominance in both upstream and downstream segments of Ihe aviation market.

Shell/ASL recall that during their first meeting with Enemalta Corporation, Enemalta categorically refused to open negotiations on access to the aviation fuel infrastructure it operates which clearly implied a refusal to grant Shell/ASL their rightful access to the market. This first meeting and similar notions in subsequent meetings, until the latest one held on 10 August 2005 clearly illustrate the 'incentive' of Enemalta's strategy to foreclose the market through exclusionary abuse.

Shell/ASL contend that Enemalta's prices offered to Shell/ASL are excessive and tantamount to an exclusionary abuse aiming at maintaining its market power in both upstream and downsteam and putting Shell/ASL at a disadvantage; by setting the price of the input (upstream) services required; by virtue of the natural monopoly features of the central infrastucture it operates; so high that the margin between the wholesale and retail prices (after excluding the cost of the fuel) is insufficient for an eflicient firm to profitably operate in the downstream market. Shell/ASL's business

and operational plans are based on the best-operating principles and practices in the European Union adjusted to the Maltese circumstances aiming at the optimal efficiency possible; and henceforth the appellants' claim that Enemalta's stategy of exclusionary 'price squeezing' exists and should be prohibited as required by law.

6. In Poudres Spheriques, the Court of First Instance defined price squeeze as:

> Price squeezing may be said to take place when an undertaking which is in a dominant position on the market for an unprocessed product and itself uses part of its production for manufacture of a more processed product while at the same time selling off surplus unprocessed product on the market, sets the price at which it sells the unprocessed product at such level that those who purchase it do not have sufficient profit margin on the processing to remain competitive on the market for the processed product.

7. Crocioni and Veljanovski (2003:30) provide a more precise definition:

> "an anti-competitive price squeeze arises when a vertically integrated undertaking, with market power in the provision of an 'essential' upstream input prices it and/or its downstream product service, in such a way to deny an equally or more efficient downstream rival a sufficient profit to remain in the market".

As this definition makes clear, a price squeeze is concerned with downstream margins, the impact on entry and exit of downstream firms, and not with the price level of the input per se.

Shell/ASL submit that Enemalta's price squeeze strategy is being employed in the knowledge that the service required by Shell/ASL is 'essential' for

the operation of their licence and hence being adopted to leverage its dominance in the upstream market to retain its dominance in the downstream market and therefore adopting a double dominance strategy (as defined by Faull and Nikpay, Bellamy and Child,) thus foreclosing the total aviation market.

Shell/ASL maintain that the cause of the margin squeeze is due to Enemalta's excessive and discriminatory price (as submitted in Section II) of the storage component and unregulated cost accounting methodologies that are not transparent and obscure regulatory supervision and intervention (as submitted in Section III). It must also be noted that a price-squeeze strategy may be discriminatory or not and still be anti-competitive. This is because, every un-competitive margin squeeze, even if it's due to upstream non-discriminatory excessive price will necessarily lead to a cross-subsidization of the downstream (retail) division by the wholesale (upstream) division of the vertically integrated undertaking. Indeed, due to the insufficient margin, the retail division would be making a loss that is compensated (or strategically and actively seeking to be compensated in this case) by the excessive profit in the wholesale (upstream) division. The issue of subsidization, including that of inefficient operations, has been questioned in Section III.7 above and therefore, if further economic examinations reveal subsidies as Shell/ASL suspect, it would indeed indicate both exploitative abuse and exclusionary abuse by Enemalta Corporation.

Without prejudice to any other means and right of investigation available to the authorities Shell/ASL suggest that any investigation for proof of a price squeeze should include (I) a rigorous comparison between appropriate upstream prices and downstream prices (retail prices), and (2) be

complemented by a rigorous economic analysis of the possibilities and incentives for Enemalta Corporation to foreclose entry which, in Shell/ASL's view, seem amply apparent.

Shell/ASL have identified a number of price squeeze examples relating mainly to recently liberalised network industries in the European Union, like electricity and telecommunications. There is also significant concern both in Europe and the United States that in network industries, where the incumbent is vertically integrated and dominant in the provision of network access, price squeezes will and have been used to inhibit downstream competition and in which cases it would necessitate vertical separation to foster increased competition". The decisions adopted to date aimed at ensuring the success of the liberalisation progamme and condemning any strategic impediment to market entry. The EC Commission has also imposed undertakings to prevent possible margin squeezes on access undertakings as part of its merger clearances. Crocioni and Veljanovski (2003:57) report that regulators of newly liberalized network industries increasingly on ex-ante regulation to deal with market power and related access abuses and their regulatory laws contain prohibitions on price squeezes and imputation tests. Shell/ASL actively seek a similar and economically objective review of the Decision on this issue and as submitted in conclusion of section I of this appeal above.

With regard to the means of proof, the European Commission considers that price squeeze may be condemned as such, without having to show excessive (or predatory) price. Indeed, it relied on three tests: margin that is negative, margin that is positive but unprofitable for the dominant vertically integrated firm", or margin that is positive but unprofitable for an efficient operator".

Furthermore, economic theory suggests that in order to identify whether there is a price squeeze or not, the so-called "imputation test" is used to measure the downstream margins of either the dominant undertaking or the efficient downstream rival. The EU Access Notice is the only statement of an imputation test by the European Commission to date, that although it relates to the telecommunication sector it has general applicability. Sectoral regulators all over the European Union have adopted their respective methodologies for the application of this test. The imputation test bears strong similarities with the access-pricing rule known as the Efficient Component Pricing Rule (ECPR) or "retail minus". Both tests are widely used by regulators world-wide, both ex-ante and ex-post, in order to ensure successful liberalisation, competition and efficient downstream entry.

Therefore, Shell/ASL submit that due to the fact that Enemalta's input is an 'essential' service component, the undisputed dominance of Enemalta's position in the aviation fuel market (which has been rendered contestable at law since 2003) add its sole operation of the 'centralised infrastructure', and the prices being offered by the incumbent to Shell /ASL without any substantive and objective evidence that can acquired through vertically separated accounts are all factors that should be more comprehensively examined as indeed Enemalta's pricing strategy is foreclosing the market, hindering and unnecessarily delaying Shell/ASL's rght to provide fuel handling services at the Malta International Airport, The appellants consider these issues should be more appropriately examined in accordance with the required economic criteria and be reasonably decided in a wav that effective competition will ensue.

L-Awtorita` ta' Malta Dwar ir-Rizorsi inoltrat is-segwenti twegiba:

Whereas the decision being appealed from is reasonable, just and proportionate and therefore the appeal as being put forward by Attard Services Limited (ASL) should be rejected;

Whereas with regard to ASL's grievance I, as duly noted by the same appellant ASL, in terms of the applicable legislation, namely Legal Notice 66/2003 (which transposed into Maltese law the relevant provisions of Directive 96/67/EC), this Authority is not the competent authority to determine and establish as to what infrastructure should be designated as 'centralised infrastructure' in terms ofthe aforementioned legislation;

Whereas until such time as this designation as 'centralised infrastructure' is given effect to by the competent authority in terms of the same applicable law, contrary to the claims put forward by the appellant, the obligations and duties relative to 'centralised infrastructure' as enacted in the LN 66/2003 cannot be determined;

Whereas, consequently, neither can this Authority supplant its powers and functions for that of the authority competent to designate what should be deemed as 'centralised infrastructure', nor can it treat any infrastructure as such until the time of such designation;

Whereas, nonetheless, this Authority took cognisance of the complaint and having determined that Enemalta, in fact, was not denying the access to the infrastructure in question, regardless of its designation, proceeded to investigate the real point of contention between the parties, namely, the charge;

Whereas with regard to the grievance II of ASL that Enemalta's charge is discriminatory and excessive, contrary to the contention of the appellant that the service offered by Enemalta to ASL is similar to that offered by Enemalta to third parties at a lower rate and that, therefore, the rate offered to ASL is discriminatory and excessive, this Authority, while in agreement with the principle of 'like being treated as like', maintains that the services offered by Enemalta to third parties and to ASL are, in fact, not similar services and, therefore, need not be subject to a similar charge, as was exhaustively explained in the Authority's Decision, in particular points 3.2 and 3.3;

Whereas this Authority is in agreement with ASL's contention that Enemalta's charges should not distinguish between the direction of the product movement, this Authority does maintain that differences in the very nature of the service, where the service supplied to third parties is on a comparatively short-term basis and does not involve the incurring of any responsibility beyond mere storage as detailed in the aforementioned points of the Decision, may be justifiably reflected in different service charges, regardless of the direction of supply;

Whereas, with all due reverence to ASL, this Authority is of the opinion that the same appellant mistook the point made by the Authority in its Decision where reference was made to the international benchmark service charge. This Authority did not refer to this benchmark in order to imply that the airport discharge point is in some way 'international' and not local, which notion ASL rightly rebuts in its appeal, but merely that ASL's use of the comparison between the international benchmark charge and Enemalta's charge, in asserting that the latter charge was excessive, is

irrelevant; and this for the reasons as upheld in the same Decision, in particular point 3.3;

Whereas, consequently, while the Authority by no means sought to imply that the relevant geographic market is different with regard to the service offered by Enemalta to ASL and that offered to third parties or that there is any possible justification for discrimination on the basis of nationality, this Authority, for the reasons cited in its Decision (point 3.3) maintains that as the services are not comparable it would be, in fact, discriminatory to apply the same criteria for, on one hand, services supplied to a third party and, on the other hand, services supplied to ASL;

Whereas with regard to ASL's contention that while it agrees with this Authority that price cannot be reduced to a simple cost-plus formula, a price is excessive if it is above the competitive level, this Authority points to the fact that from the review of Enemalta's operations as carried out and submitted by ASL itself, Enemalta would be operating at a loss were it to offer the services requested by ASL at a significantly lesser charge. Therefore, there can be no doubt that the price quoted by Enemalta is not anti-competitive or excessive;

Whereas, moreover, ASL itself states that it has no objection to paying a charge which reflects the storage component of the service and bearing other directly relevant costs;

Whereas in the absence of being granted a specific mandate by either of the parties to the dispute to determine an appropriate charge for the service in question itself, this Authority could not carry out, or nominate an independent qualified third party to carry out, an economic exercise to determine what would amount to a fair charge. Thus this Authority is not in a position to comment

as to whether the amount of 22.27 USD per metric tonne, representing the charge which Enemalta is quoting ASL for the services being requested by the latter, fairly reflects the costs, together with a marginal profit, for storage services plus directly relevant costs;

Whereas with reference to the grievance III claimed by the appellant that this Authority endorsed Enemalta's costing methodologies, in fact this Authority merely examined the criteria to be employed in determining a charge in terms of Directive 96/67 and, being satisfied that Enemalta's costing methodology sufficiently upheld them, endorsed Enemalta's charge in principle, though not in practice as no mandate to do so was forthcoming, as will be further explained below;

Whereas ASL agrees with this Authority's use of the *relevant, objective, transparent and non-discriminatory criteria* in the determination of a charge and moreover shares the Authority's view that the charge imposed for use of infrastructure should include a reasonable profit, this Authority cannot however agree with ASL that this Authority did not sufficiently question Enemalta's methodology or that Enemalta's methodology was not rendered sufficiently transparent so as to satisfy the requirements of regulatory supervision;

Whereas, firstly, with regard to Enemalta's pricing methodology, it was evident from the results of the survey conducted by ASL on Enemalta's operations that such operations contained inefficiencies;

Whereas, ASL overlooks the mitigations contained within the Directive itself with regard to the principle of access to the market that regard must be had to the specific nature of the sector and to gradual adaptations to free access, as also

highlighted within this Authority's Decision, in particular point 3.4;

Whereas this Authority did not merely give cursory consideration to Enemalta's inefficiencies but addressed these specifically and, within the terms of the same Decision, point 11.2, ordered Enemalta to remedy by restructuring and to report at regular intervals;

Whereas the appellant's arguments contain a contradiction in terms in that one cannot agree that charges should reflect cost plus reasonable profit and, at the same time, being fully aware of Enemalta's inefficiencies, disagree with the unfairness of having to absorb such inefficiencies itself;

Whereas, secondly, referring to ASL's contention that Enemalta did not sufficiently justify its price transparency including unbundling of its accounts and that this Authority's study should have been more detailed in this regard, this Authority points to the scope of its competency under the Malta Resources Authority Act with extends to *regulating the price structure* but not the prices;

Whereas this Authority maintains that a costing exercise to determine an actual price for services goes beyond such 'pricing structure' and, for this reason, the Authority requested the parties, both in the terms of the Decision itself and in the terms of its letter to ASL dated 13th September 2005, to grant this Authority a specific mandate to carry out such an exercise itself or through the nomination of independent and suitably qualified third parties;

Whereas ASL replied by letter dated 16th September 2005 and while stating that ASL *"would not object should the Authority wish ... to suspend ... its decision until it completes the necessary investigation and verification ",* added *"this is not a mandate to the Authority to establish charges at this stage ";*

Whereas with regard to the appellant's grievance IV that Enemalta's excessive pricing is tantamount to a barrier to trade, particularly a mere strategy to foreclose the market and in effect a 'price squeeze', this Authority reassures the appellant that should it have become evident that Enemalta's pricing was excessive and merely strategic it would have been similarly condemned by this Authority;

Whereas this Authority's decision was by no means cursory but, constrained by the terms of its empowering legislation and restricted to the specific requests of the parties, based on the evidence as submitted by the aforementioned

parties which evidence did not support the allegations of subsidies and price squeezes being now newly pointed at by ASL;

Therefore, with reference to the reasons as herein contained and while reserving the right to bring forward any evidence as permitted by law, the applicant requests that the appellant's appeal be rejected.

Wara li l-Bord sema it-trattazzjoni dettaljata ta' l-appellant, mifruxa fuq diversi udjenzi, l-Awtorita` appellata ghamlet trattazzjoni li giet ridotta bil-miktub u hija s-segwenti:

nullita ta' l-appell - Art 33 (3)

l-appellat jissottometti li l-appell kif interpost imur oltre dak li huwa permessibbli mill-ligi

issir referenza ghall-artikolu 33 tal-Kap 423, liema artikolu jispecifika preciz il-poteri tal-Bord ta' l-Appelli u cioe' il-Bord jista' jiddecidi

(i.) li jichad l-appell jew
(ii.) Li jannulla id-decizjoni -
bil-fakolta li jekk il-Bord jannulla d-decizjoni, il-Bord jista' jirriferi lill-awtorita (cioe' l-appellat) u jordna li terga tikkunsidra mill-gdid il-kaz u tasal ghal decizjoni skond ir-rizultanzi tal-Bord.

It-talba ta' l-appellanti kif impostata mhiex konformi ma' ebda wahda mill-poteri tal-Bord. Fil-fatt l-appellanti talab li dan il-Bord "..... joghgbu **<u>jvaria u jimmodifika d-decizjoni</u>** *(enfasi mill- esponenti)* appellata billi jilqa t-talbiet ta' l-esponenti senjatament billi jiddikjara illi l-appellanti mhux qed jinghataw access ghall-infrastruttura ta' Enemalta b'mod li jirrispetta il-htiega ta' kompetizzjoni gusta u l-provvedimenti ta' A.L. 66.2003 u tad-Direttiva 96/67 u tordna lill-

Korporazzjoni Enemalta sabiex taghti access ghal din l-infrastruttura taht kundizzjonijiet gusti li, jekk jidhriha, joghgobha tistabilixxi".

1. Ma hemm dubbju ta' xejn li t-talba ta' l-appellanti hija il-qofol ta' l-appell u din it-talba biss ghandha tidderigi u torbot lill-Bord fil-konsiderazzjonijiet u konkluzjoni taghha. Jekk kemm il-darba dak li qed jintalab mhuiex possibbli u/jew imur jew oltre jew mhux permessibbli mill-ligi, il-Bord m'ghandux triq ohra hlief li tiddikjara l-appell null jew inkella insostenibbli.

2. l-esponenti jissottometti li l-ligi hija tassattiva u f' dan ir-rigward ma hemm lok ghal ebda emenda jew varjazzjoni tat-talba; lanqas il-Bord, fl-umli sottomissjoni ta' l-esponenti, ma jista' jissostitwixxi t-talba *ex-ufficio* billi din tkun *ultra petita.*

3. dan il-punt ta' nullita' jew insostenibilta' tat-talba qed tigi sottolineata u enfasizzata billi l-hsieb tal-ligi huwa li l-apprezzament maghmul mill-Awtorita` esponenti ma tigix sostitwita b' dik tal-Bord - interpretazzjoni differenti tirrendi il-paragrafu (4) ta' l-Artikolu 33 (Kap 423) inutli u ineffikaci.

Nullita' ta' l-appell - billi l-aggravju ma tinkwardaw taht ebda wahda mir-ragunijiet elenkati fl-Art 33 (2)

4. subordinatament u bla pregudizzju ghall-premess l-appell huwa ukoll insostenibli billi, minkejja li l-appellanti isostni li l-appell tieghu huwa bbazat fuq l-Artikolu 33 paragrafu 2, subinciz (a), (c) u (d) tal-Kap 423 minn ezami tal-argumenti u sottomissjonijet maghmula tul is-seduti mehuda u utilizzati minnu, s-succint taghhom huwa talba ghar-revisjoni ta' apprezzament maghmul mill-Awtorita` u xejn izjed.

5. issir referenza partikolari ghat-traskrizzjoni tas-seduta tat-2 ta' Gunju 2006 senjatament ghall-parti fejn l-appellanti jibda bil-konkluzjonijiet tas-sottomissjonijiet tieghu u dawna ser jigu trattati wiehed wiehed u issir is-sottomissjonijiet ghall kull wahda minnhom.

6. Dwar il-bazi ta' l-appell fuq **zball materjali ta' fatti;** l-appellanti issottometta li l-Awtorita`

a.(i.) *"ma iddistingwietx bejn is-servizz illi noffru ahna u dak illi jinghata lill-haddiehor"* - bla pregudizzju ghall-fatt li l-esponenti ma jaqbilx ma' dina l-allegazzjoni u li dwar dan ser issir sottomissjoniet aktar '1 quddiem, jidher car li l-ilment ta' l-appellanti huwa li l-Awtorita` ghamlet apprezzament zbaljat tal-fatti. L-Artikolu 33 (2) (a) jitkellem dwar "zball materjali dwar fatti" u mhux zball ta' apprezzament tal-fatti - distinzjoni importanti u basilari fl-interpretazjoni u applikabbilta' o meno ta' dan bazi u raguniji ta' l-appell.

b.dwar it-tieni (allegat) zball materjali ta' fatt l-appellanti jallega li l-Awtorita` *"ma iddistingwietx bejn facilitajiet essenzjali fil-parametri ta' l-ajruport u l- facilitajiet essenzjali. "* Hawn ukoll jidher car li l-ilment ta' l- appellanti huwa immirat lejn apprezzament allegatament zbaljat - ma hemm ebda argument dwar zball materjali dwar il-fatti.

c.dwar it-tielet (allegat) zball materjali ta' fatt - l-appellanti jilmenta li l-Awtorita` injorat ossia warbet argument maghmul mill-appellanti - hawn ukoll l-ilment mhiex relatat ma' zball materjali izda purament dwar apprezzament o meno ta' argument maghmul mill-appellanti.

d ghalhekk minn ezami tas-sottomissjonijiet appellanti jirrizulta li l-appell in kwantu ibbazat

fuq r-raguni ta' "zball materjali dwar il-fatti" mhux sostenibbli.

9 dwar il-bazi ta' l-appell fuq **"Zball ta' Procedura"** l-esponenti jissottometti li minkejja li l-appellanti ghamel is-sottomisssjonijet tieghu dwar din it-tieni raguni u bazi ta' l-appell - jirrizulta li din ir-raguni [u cioe' Art. 33(2) (b)] ma gietx indikata specifikatament bhala wahda mill-aggravji fir-rikors ta' appell tieghu (vide pagna 1 ta' l-appell);

10 illi l-appellanti ma jistax izid u jinkorpora ragunijiet jew aggravji oltre dawk indikati minnu originarjament. F' dan ir-rigwar l-esponenti jissottometti li kull argument jew sottomissjoni ibbazat buq din r-raguni u cioe' "zball ta' procedura" ghandha tigi skartat Pero' bla pregudizzju, l-esponenti xorta ser jaghmel l-osservazzjonijiet tieghu u cioe' - il-ligi titkellem dwar "zball materjali fil-procedura" - l-allegazjoni ta' l-appellanti huwa li l-Awtorita` "m'ghamlitx analzi ekonomika shiha....." "... ...ma ikkonsultatx ma' l-ufficju tal-Kompetizzjoni" u " ... .naqset li tikkoordina mad-Dipartiment ta' l-Awjazzjoni Civili....." Dawn it-tlett ilmenti ma jekwiparawx ruhom taht l-intestatura "zball materjali fil-procedura" - l-Awtorita` fl-analizi taghha ta' l-ilmenti imressaq mill-appellanti ghandha issegwi l-principji fondamentali tal-ligi, pero m'hiex marbuta jew kostretti bi proceduri formali. Jekk ghandiex tikkonsulta jew le ma' awtoritjajiet ohra hija decizjoni ghad-diskrezzjoni ta' l-Awtorita` - jkun prudenti li tikkonsulta ruha (u fil-fatt hekk ghamlet) pero' mhux obbligata jew marbut ma' xi procedura legali stretta. Apparti minn hekk jekk, l-appellanti naqas li jindika b'mod car u preciz il-ligi partikolari dwar ir-regoli ta' proceduri li ghandha issegwi l-Awtorita`. Kwindi f'dan il-kaz ukoll ir-raguni ta' hekk imsejjah "Zball ta' Procedura" hija bla bazi u infondata fil-fatt u fil-ligi.

11 dwar il-bazi ta' l-appell fuq **"Zball fil-Ligi"** - jigi innotat li l-artikolu relevanti jitkellem dwar zball fil-ligi u mhux zball ta' ligi - distinzjoni fina pero' krucjali.

it-test Ingliza huwa "that an error of law has been made"; l-esponenti jissottometti li din ghandha tinghata it-tifsira ta' applikazzjoni zbaljata tal-ligi.

- Error of law

Error of law is usually associated with a wrong interpretation of the law as was the case in *Anthony Cassar pro et noe v. Accountant General*[1] which centred around a wrong interpretation of Act XXII of 1990 and its erroneous application to plaintiffs situation:

... *n-nuqqas da parti tal-Bord tal-Appelli li japprezza dan l-aspett tal-vertenza u li allura jillimita d-definizzjoni dwar jekk l-istabbiliment li jipprovdi l-ikel in kwistjoni kellux jew le licenzja ghal dak li jkun certifikat mill-Bord kompetenti skond il-Kapitolu 197 kien naturalment jikkostitwixxi interpretazzjoni zbaljata tal-ligi li bilfors wasslitu ghall-applikazzjoni skorretta taghha.*

In this case a levy was to be collected by *a* catering establishment only where the said establishment was one which served food to patrons seated on tables and had been licensed by the Hotels and Catering Establishments Board to do so. However, defendant ignored the latter condition and had issued an *ex officio* assessment to plaintiff, even though he was not licensed to do so by the Board.

- Material Error of Fact

[1] Cit. Nru.: 667/92 FGC decided on the 23rd April 2001 by the Court of Appeal per Chief Justice Joseph Said Pullicino, Mr Justice Carmel A. Agius and Mr Justice Joseph D. Camilleri.

> The following quote from the English *Tameside* case may be of some assistance in understanding what is usually meant by error of fact:
>
> *If a judgement requires, before it can be made, the existence of some facts, then, although the evaluation of those facts is for the Secretary of State alone, the court must inquire whether those facts exist, and have been taken into account, whether the judgement has been upon a proper self-direction as to those facts, whether the judgement has not been made upon other facts which ought not to have been taken into account. If those requirements are not met, then the exercise of judgement, however, bona fide it may be, becomes capable of challenge.*
>
> An error of fact may be especially dangerous when it is a particular fact that gives the administrative authority jurisdiction to act. If an error of fact occurs the administrative authority will have had no right to act. For one the Rent Regulation Board can only exercise its jurisdiction if there is a dispute involving a contract of lease which according to law can be automatically extended. If it were to exercise its jurisdiction over a dispute in which no such contract exists the Board's decision will be considered *ultra vires.*
>
> The additional term *material* seems to indicate that not every error of fact is enough to be able to appeal from a decision of the MRA but it has to be an error as to a fact which in some manner influenced the taking of the decision being questioned.

minn analizi tas-sottomissjijiet ta' l-appellanti jirrizulta li l-appellanti qed jilmenta li jezisti ksur ta' l-obbligi assunti permezz tat-Trattat ta' Ruma u li l-

Awtorita` ma haditx passi biex dina tigi risolta - apparti li dina l-allegazjoni qed tigi respinta mill-esponenti, dina l-allegazzjoni certament ma tinkwadrax ruha bhala *zball fil-ligi* u cioe' "that an error of law has been made" tenut kont l-interpretazzjoni u sottomissjonijiet fuq esposti;

Anke dwar il-Ground Handling Directive (Legal Notice 66/2003) l-appellanti jitkellem dwar allegat ksur jew nuqqas ta' osservanza ta' dawn ir-regolamenti u jghid li "inksiret fil-fehma taghna" - dan kollu ifisser u juri li l-interpretazzjoni li l-appellanti qed jaghti ta' "zball fil-ligi" mhiex ta' applikazzjoni zbaljata tal-ligi.

c. l-istess sottomissjoni hija applikabbli ghall-allegat ksur ta' l-Artikolu 6 u 8 ta' l-istess avviz legali (66/2003)

d. issir riferenza ghat-tielet paragrafu pagna 11 ta' l-istess seduta (2.06.2006) - ammissjoni diretta mill-appellanti li l-argumenti tieghu huma kollha ibbazati fuq l-apprezzament maghmula mill-Awtorita` .... Il-fatt li intrabtet (riferribilment ghall-Awtorita`) biss fuq ligi wahda u ghamlet apprezzament zbaljata tal-ligi" turi bic-car u *ex-admissis,* li ma hemm ebda zball fil-ligi [art 33 (2) (c)] fil-veru u propju interpretazzjoni taghha.

e. L-allegazzjoni ta' ksur jew nuqqas ta' osservazzjoni tal-funzjonijiet ta' l-Awtorita` ma tistax tigi ekwiparata ma' zball fil-ligi fil-sens proprju tieghu - dan qed jinghad bla pregudizzju ghall-fatt li tali allegazzjoni qed tigi respinta u ser tigi trattata aktar 'l quddiem.

f. dwar l-ahhar raguni u bazi ta' l-appell fuq ".. **illegalita' materjali..",** l-esponenti jissottometti s-segwenti;

- Illegality (inc. Unreasonableness & Lack of proportionality)

The notion of illegality means non observance of the principles of natural justice

Reasonableness - This is a concept taken from English Administrative law associated with the exercise of discretion by a public authority. In terms of the Wednesbury judgement it entails that in exercising discretion one *must call his own attention to the matters which he is bound to consider. He must exclude from his considerations matters which are irrelevant to what he has to consider. If he does not obey these rules, he may truly be said, and often is said, to be acting 'unreasonably'. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority.*

This principle has also found application in Maltese law through its use in judicial review actions as evidenced by ***Chairman tal-kumpannija Public Broadcasting Services Limited et v Awtorita` tax-Xandir et***[2] wherein the Court of Appeal considered that a directive issued by the Broadcasting Authority which would have led PBS to potentially incur commercial losses was reasonable considering that the public interest promoted by the said directive in question had a more significant importance. In articulating its thoughts on the matter the Court quoted at length from Wade[3]:

"The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it

[2] Cit. Nru.: 711/2002/1 decided on the 15th January 2003 by the Court of Appeal, confirming the decision of the First Hall Civil Court dated 5th September 2002 *per Mr* Justice J.R. Micallef.
[3] 8th edition 2000

passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too tightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended. Decisions which are extravagant or capricious cannot be legitimate. But if the decision is within the confines of reasonableness, it is no part of the court's function to look further into its merits. With the question whether a particular policy is wise or foolish the court is not concerned; it can only interfere if to pursue it is beyond the powers of the authority.' As Lord Halisham LC. has said, two reasonable persons can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable. This is not therefore the standard of 'the man on the Clapham omnibus'. It is the standard indicated by a true construction of the Act which distinguishes between what the statutory authority may or may not be authorised to do. It distinguishes between proper use and improper abuse of power. It is often expressed by saying that the decision is unlawful if it is one to which no reasonable authority could have come."

Thus, in ***Lawrence Borg et v. Gvernatur tal-Bank Centrali***[4] the Court considered that every exercise of discretion has to be reasonable:

F'kaz bhal dan, ix-xiberli l-Qorti jidher li ghandha tuza biex tkejjel bih ikun dak li tqis jekk id-decizjoni li minha jkun hemm ilment kinitx mistennija li tittiehed minn persuni ragonevoli.

Moreover, it pointed out that *mhux kull ezercizzju ragonevoli ta'gudizzju huwa bilfors korrett.*

[4] Cit. Nru.: 2959/1996/1 decided on the 1st March 2004 by the First Hall Civil Court per Mr Justice J.R. Micallef.

In this case, considering that the Central Bank had taken account of a number of alleged irregularities in the administration of the company and of its funds (found to be substantiated by the investigations conducted by defendant) as well as the lack of any significant evidence to the effect that these irregularities had never taken place and the position occupied by plaintiff in the company at the time that there were criminal proceedings against him, the Court considered that the Central Bank had exercised its discretion reasonably in disallowing a request by plaintiff to join the forward buying rate scheme.

Both the afore mentioned judgments reflect the position adopted earlier in ***Charles sive Carmelo Ellul Sullivan noe v Kontrollur tad-Dwana***[5] wherein it was held that ... *l-Qorti ghandha tezamina l-accertamenti teknici maghmula mill-konvenut u tannulahom biss jekk jirrizultalha li dawn kienu manifestament zbaljati u doe li l-ebda Awtorita` amministrattiva ragjonevoli ma setghet tasal ghal dak l-accertamenti. Inkella l-Qorti tkun qed tusurpa l-funzjoni tal-Awtorita` amministrattiva u ma tkunx semplicement qed taghmel stharrig gudizzjarju.*

The question in this case revolved around the classification of a given product as either toffees or products containing cocoa. The court considered that the infinitely small amount of cocoa present in the given product as evidenced by analysis carried out in the UK, Belgium and Canada still allowed the Controller of Customs to classify the product as toffees rather than as a product containing cocoa.

Proportionality - Case law on this topic is inexistent, as the concept seems to be a novel one introduced from Continental systems through its adoption by the EU law. The concept calls for a degree of

[5] Cit Nru.: 1210/95GW decided by the First Hall Civil Court on the 31st January 2001 *per* Mr Justice Geoffrey Valenzia.

balance between the various interests at stake when an administrative authority comes to take *a* decision, and of a proper relationship between means and ends.

g. tenut kont is-sottomissjonijiet fuq maghmula, u tenut konk l-allegazzjonijiet maghmula mill-appellanti inkwadrati taht dan ir-raguni ta' l-appell, ma jinkwadrawx ruhom taht din il-kappa u kwindi insostenibbli.

Appell null u insostenibbli - funzjonijiet u poteri ta' l-Awtorita`

h. bla pregudizzju ghall premess l-appell huwa ukoll null jew insostenibbli anke in kwantu it-talba appellanti hija indirizzata jew intavolta b'mod li tiftehm li qed titlob lill-Bord jistabilixxi kondizzjonijiet ghall-"access ghall-infrastruttura..." u cioe' "access pricing".

i. tul is-sottomissjonijet ta' l-appellanti wiehed jirrealizza li l-ilment ta' l-appellant huwa li l-Awtorita` naqset fid-dmirijiet taghha li tisababilixxi "access pricing". Isir referenza ghall-artikolu 4 ta' l-att 423 u minnha tiddeduci li dak li qed jigi mitlub jew ilmentat mill-appellanti huwa '1 barra mill-poteri ta' l-Awtorita` fis-sens illi il-ligi taghti lil-Awtorita` il-poter li tirregola l-istruttura tal-prezzijiet u mhux li tistabilixxi il-prezz per se.

j. bl-isess argument/ sottomissjoni il-Bord qed jintalab jaghmel xi haga li ma setghetx issir fl-ewwel istanza u cioe' mill-Awtorita` u ghalhekk f' dan is-sens it-talba appellanti hija wkoll nula jew insostenibbli.

Sottomissjonijiet fil-mertu

k. bla pregudizzju ghall-premess, l-esponenti jghaddi biex jiddifendi id-decizjoni appellata.

l. l-esponenti jibda billi jaghmel osservazzjoni generali u cioe' l-appellanti tul it-trattazzjoni tal-kaz tieghu ma gab jew ressaq ebda xhud, la rappresentanti ta' Enemalta la rappresentanti ta' l-Awtorita` u ebda persuna jew rappresentant ta' xi entita' jew Awtorita` ohra imsemmija minnu tul it-trattazzjoni u dana in sostenn ta' kull argument jew allegazzjoni imressqa minnu.

m. Il-principju legali fondamenteli hu li kull minn jallega irid jipprova. Dan wkoll ifisser u jsahhah is-sottomissjonijiet fuq maghmula illi l-argumenti kollha ta' l-appellanti huma dwar apprezzament tal-fatti u mhux dwar inosservanza jew ksur ta' regolamenti jew ligijiet

n. dwar id-decizjoni mertu tal-kaz odjern - din hija strutturata u ragionata.

o. sottomissjoni generali huwa li l-Awtorita` qdiet il-funzjonijiet taghha skond il-ligi minghajr ebda nuqqas jew minghajr ma marret oltre l-fiinzjonijiet u poteri taghha.

p. l-Awtorita` kull fejn kellha bzonn tikkonsulta u/jew tinkariga entita' professjonali hekk ghamlet - ezempu car huwa meta ikarigat ditta ta' awdituri - u permezz ta' dan l-inkarigu l-Awtorita` setghet taghmel apprezzament ta' l-operat u metodologija ta' costing ta' Enemalta u tasal ghall-konkluzjonijiet studjati taghha;

q. l-ilment ewlieni ta' l-appellanti huwa dwar il-prezz li qed jigi mitlub min Enemalta ghall uzu u servizz ta' l-infrastruttura relata ma’ dan il-kaz. Liema prezz qed jigi allegat li huwa diskriminatorju, ezagerat bi ksur tar-regolamenti relattivi u addirittura qed jitqies bhala "effective entry barrier".

r. issir referenza ghar-risposta ta' l-esponenti fejn kull punti issollevat mill-appellanti gie trattat u respint u ghas-skanz ta' ripetizzjoni issir referenza kemm ghar-risposta u naturalment ghad-decizjoni proprio, ghal kull argument u konsiderazzjoni u riferenzi li saru.

s. il-funzjoni tal-Bord odjern huma tali li b'mod generali jissorvelja (jew jaghnel analazi) l-operat ta' L-Awtorita` fis-sens jara li l-istess Awtorita` agixxiet entro it-termini u parametri legali - il-Bord mhuiex awtorizzat jaghmel ebda apprezzamenti ta' fatti u ma jistax jissostitwixxi l-apprezzament maghmula mill-Awtorita` b' l-apprezzament tieghu.

t. illi kull allegazjoni maghmula mill-appellanti indirizzata lejn nuqqasijiet ta' inosservanza ta' regolamenti jew ligijiet da parti ta' l-Awtorita` qed tigi respinta - pero' il-Bord jekk taghzel li tikkonsidra dawna l-ilmenti jew osservazzjonijiet ta' l-appellanti ghandha l-ewwel tezamina il-ligi/jiet jew regolament/i proprju u dana relatat ma' l-allegat inosservanza jew ksur, tevalwa jekk dawn ir-regolamenti jew ligijiet huma direttament indirizzata lejn l-operat ta' l-Awtorita` u eventwalment tikkonkludi jekk verament hemm xi ksur jew inosservanza taghhom da parti ta' l-Awtorita` tenut kont il-provi prodotti quddiem dan il-Bord.

u. ezempju ta' allegat skur ta' regolament kien li l-Awtorita` ippermettiet jew ma iccensuratux lill-Enemalta talli ma zammitx "accounts relative to the said service separate from those of its other activities..". L-ewwel nett ma saret ebda prova li ma kienx hemm separation of accounts. Fit-tieni lok skond il-Ground Handling Regulation jirrizulta li huwa dmir tad-*Director of Civil Aviation* li jara li Enemalta qed tottempera ruha ma' dawn ir-regolamenti u mhux l-Awtorita` esponenti, Vide Artikoli 3 u 4 ta' l-A.L. 66/2003 - Dan kollu juri li jekk hemm xi nonosservanza jew xi ksur ta' xi regolament jew ligi dan mhuiex imputabbli lill-

Awtorita` esponenti. Dan huwa l-ezercizzju li ghandu jsir f kull kaz ta' allegazzjoni ta' inosservanza jew ksur ta' ligi jew regolamenti fil-konfront ta' l-esponenti. x

v. in kwantu ghat-talba proprju, jigi sottomess (u dana bla pregudizzju ghall-argumenti / sottomissjonijiet dwar nullita' tat-talba) illi anke jekk il-Bord jiddecidi li jilqa it-talba kif dedotta u jaccetta kull argument ta' l-appellanti, in vista tal-fatt li ma ingabet ebda prova quddiem il-Bord; l-istess Bord m'ghandux il-facilita' u l-materjal jew informazzjoni biex jasal ghall konkluzjoni jew rakkomandazzjonijet mitluba mill-appellant.

In konkluzjoni;

- Nullita' ta' l-appell billi t-talba tmur oltre il-poteri tal-Bord. [Art33(3)]
- Nullita' ta' l-appell billi ebda aggravju ma tinkwadra ruha tal-ebda raguni elenkati fl-Art 33 (2)
- Nullita / insotenibbli - funzjonijiet u poteri ta' l-Awtorita` (pricing)
- Ma ingabet ebda prova in sostenn ta' kull allegazzjoni ta' nonoservanza jew ksur ta xi regolament jew ligi.
- L-Awtorita` agixxiet skond u entro il-funzjonijiet u poteri taghha.
- Issir referenza ghall-argumenti kollha maghmula fil-mertu fir-risposta ta' l-appell ta' l-esponenti;
- Il-Bord fil-konsiderazzjonijiet tieghu ghandu jezamina l-operat ta' l-Awtorita` in kwantu relatat mal-funzjonijiet u poteri tieghu;
- Il-Bord ma jistax jaghmel apprezzamenti in sostituzzjoni ta' l-apprezzamenti maghmula lill-Awtorita` - jista' jkun li l-Bord ma jaqbilx ma' l-apprezzament jew interpretazzjoni izda sakemm din l-apprezzament jew interpretazzjoni ma tmur kontra ebda wahda mir-ragunijiet elenkati fl-Artikolu 33 (2)

ma tistax tissindika tali interpretazzjoni jew apprezzament.

- Bla pregudizju ghal-premess jekk ghall-argument il-Bord jiskarta kull argument u kull sottomissjoni ta' l-esponenti, huwa fi stat ta' impossibilta' li esegwixxi dak kollu mitlub mill-appellanti in vista ta' nuqqas ta' prova u material. U a kontrarjo senso fin-nuqqas ta' prova u materjal ma hemm mod kif il-Bord jista' jasal jilqa l-argumenti u l-aggravji ta' l-appellanti.

Is-socjeta' appellanti finalment issottomettiet nota bit-trattazzjoni finali taghha. Din hija in-nota ukoll riprodotta verbatim:

> Illi din in-nota hija maqsuma f' erba' partijiet hekk kif gej:
>
> **A. It-Talbiet ta' l-esponenti**
> **B. Il-fatti tal-kaz;**
> **C. Sintezi ta' l-argumenti mressqa mill-esponenti matul it-trattazzjoni;**
> **D. Repplika ghad-difiza maghmula mill-Awtorita` appellata dwar punti procedurali;**
>
> **A. It-talbiet ta' l-esponenti**
>
> **1. Illi essenzjalment it-talba ta' l-esponenti hija wahda: <u>li jinghataw access ghall-infrastruttura essenzjali ta' l-Enemalta</u> li tintuza ghall-*jet fuel* u li tinsab kemm fl-ajruport ta' Malta kif ukoll barra l-parametri ta' l-ajruport, cioe', mill-*jetty* tal-port sa' l-ajruport stess. Dan sabiex ikunu jistghu jipprovdu s-servizz ta' *refuelling* ta' l-ajruplani fil-parametri ta' l-ajruport ta' Malta wara sejha ghall-offerti li huma rebhu fl-2004 mill-Malta International Airport (MIA) plc sabiex ikunu t-tieni operatur ta' *refuelling* fl-ajruport.**

2. Illi t-talbiet originali maghmula mill-esponenti lill-Awtorita` dwar ir-Rizorsi (aktar 'il quddiem MRA) jirrizultaw mis-sottomissjonijiet originali ta' Frar 2005 li l-esponenti ghamlu lill-MRA (ANNESS NUMRU 1) u li huma s-segwenti (traduzzjoni mill-ingliz):

i. Illi l-MRA tikkonferma li d-depot tal-hazna tal-fuel fl-ajruport huwa infrastuttura centralizzata (essenzjali) ai fini tad-Direttiva ta' l-UE dwar *il-Groundhandling* u tiddikjaraha bhala tali:

ii. Illi L-MRA tizgura access adegwat ghal infrastruttura essenzjali ohra f'Malta dedikata ghall-hazna u/jew fornilment ta' *jet fuel* mill-*jetty* tal-port sa' l-ajruport;

iii. Illi l-MRA tistabbilixxi access u kundizzjonijiet ghal dan l-access ghall-infrastruttura essenzjali b'mod gust, trasparenti, oggettiv, rilevanti u mhux-diskriminatorju u b'mod li ma jintralcjax l-access jew il-kompetizzjoni u li ma jisfrustrax l-ghanijiet tad-Direttiva dwar il-*Groundhandling.*

iv. Illi l-MRA tistabbilixxi prattici efficjenti tas-suq u ta' l-industrija li jeskludu prattici skaduti u spejjes zejda u li tippermetti uzu b'mod mhux-diskriminatorju u rilevanti ta' dawn l-assi li l-kumplessita' taghhom, l-ispiza taghhom u l-impatt ambjentali ma jippermettux li jinqasmu jew jigu dupplikati. Ghaldaqstant, li tippermetti forniment gust u kompetittiv ta' *jet fuel* mill-*jetty* tal-port sa' l-ajruport;

v. Illi l-MRA tistabbilixxi mekkanizmu ta' prezzijiet gust, kompetittiv u mhux-diskriminatorju ghar-riceviment, hazna, trasmissjoni u konsenja ta' *jet fuel* permezz ta' l-infrastruttura essenjzali tal-*jet juel* operata mill-Korporazzjoni Enemalta taht kriterji li huma rilevanti, oggettivi u trasparenti;

vi. Illi l-MRA taghti effett ghall-obbligi internazzjonali li dahal fihom il-Gvern ta' Malta in konnessjoni mar-rizorsi regolati mill-MRA.

3. Illi fid-decizjoni taghha 02/ED tad-9 ta' Gunju 2005 (ANNESS NUMRU 2), l-MRA la laqghhetx it-talba ta' l-esponenti ghall-access ghall-infrastruttura msemmija u lanqas stabbiliet kundizzjonijiet cari u mhux-diskriminatorju ghall-access ghal din l- infrastruttura. Minflok, kull ma ghamlet kien li stiednet lill-esponenti u lill-Enemalta sabiex jinnegozjaw flimkien kundizzjonijiet ghal access u stedniethom ukoll, occorrendo, jaghtuha mandat sabiex tifissa hija stess il-hlas *(charge)* ghall-access. Dawn in-negozjati ma wasslu ghal xejn.

4. Illi l-eponenti wiegbu ghad-decizjoni ta' l-MRA permezz ta' sottomissjomjiet maghmula fl-24 ta' Awissu 2005 (ANNESS NUMRU 3).

5. Illi l-MRA wiegbet lill-esponenti permezz ta' ittra datata 13 ta' Settembru 2005 u stednithom jiccaraw jekk xtaqux jappellaw mid-decizjoni jew jawtorizzawha tghaddi biex tistabbilixxi hlas gust (ANNESS NUMRU 4).

6. Illi l-esponenti wiegbu ghall-ittra ta' l-MRA permezz ta' ittra datata 16 ta' Settembru 2005 fejn infurmawha li t-tentattivi godda biex jintlahaq ftehim ma' l-Enemalta a bazi ta' dak suggerit mill-MRA fid-decizjoni taghha kienu, ghal darb'ohra, fallew (ANNESS NUMRU 5).

7. Illi fit-22 ta' Settembru 2005 l-esponenti intavolaw appell mid-decizjoni ta' l-MRA quddiem dan l-Onorabbli Bord ta' l-Appell permezz ta' nota ta' l-appell bl-ilsien ingliz stante illi d-decizjoni ta' l-MRA kienet bl-ingliz ukoll (ANNESS NUMRU 6).

8. Illi permezz ta' verbal datat 31 t'Ottubru 2005 il-Bord ta' l- Appell talab lill-esponenti jipprezentaw

rikors ta' appell li jkun iffirmat, li jindikaw taht liema kap ta' l-Art 33(2) qed isir l-istess appell u li jindikaw ir-rimedju/i li jixtiequ. (ANNESS NUMRU 7).

9. Illi l-esponenti intavolaw appell in konformita mal-verbal msemmi. (ANNESS NURMU 8).

B. Il-fatti tal-kaz

9. Illi l-esponenti issa ser jghaddu biex jaghti sintezi tal-fatti tal-kaz hekk kif diga esposti fir-rikors ta' l-appell:

10. Illi l-Korporazzjoni Enemalta hija s-sid uniku u l-operatur tal-postijiet pubblici u nazzjonali fejn jigi mahzun iz-zejt u prodotti petrolifici, inkluz tal-*fuel* ghall-avjazzjoni. Il-Korporazzoni ghandha wkoll monopolju fl-importazzjoni u l-bejgh tal-prodotti tal-*fuel* ghall-avjazzjoni li jintuza fis-suq lokali ta' Malta, liema monopolju kellu jispicca sa Jannar 2006 in kwantu jghodd ghas-setturi kollha hlief ghas-settur ta' l-avjazzjoni li suppost kien ilu liberalizzat sa mill-2003, ai termini tar-regolamenti *Airport (Ground handling services) Regulations,* ta' l-2003 (A.L. 66/2003) li dahhlu d-Direttiva Ewropea 96/67/EC fil-ligijiet ta' Malta.

11. Illi ai termini ta' l-imsemmija *Airport (Ground handling services) Regulations* u tad-Direttiva Ewropea 96/67/EC, f Marzu ta' l-2004 il-kumpanija Malta International Airport Ltd harget sejha ghal offerti permezz ta' Awiz Numru MIA/06/04 ghall-prowista ta' servizzi konsistenti fi prowista ta' *Fuel* u ta' Zejt (fuq in-naha ta' l-*airside)* fl-ajruport internazzjonali ta' Malta. L-appellanti tefghu l-offerta taghhom u f Gunju ta' l-2004 ntaghzlu bhala t-tieni operatur sabiex jofrri dawn is-servizzi fl-ajrport.

12. Illi fi klawsola 2.2.2, il-kundizzjonijiet tat-tender ta' l-MIA (ANNESS 9) obbligaw lill-appellanti

sabiex juzaw l-"infrastruttura centrali" ta' l-ajruport sabiex jofiha s-servizz taghhom, jigifieri, l-infrastruttura ezistenti li diga tintuza ghall-prowista tas-servizzi hawn fuq imsemmija u bhala tali kienu obbligati li jinnegozjaw mal-Korporazzjoni Enemalta sabiex jinghataw access ghal din l-infrastruttura. Klawsola 2.2.2 taht *Sub Title Central Infrastructure Facilities* tghid hekk: *'Fuel and oil handling service suppliers* ***must use the central infrastructure facilities*** *on behalf of the airlines handled by them'.*

13. Illi sa mill-ewwel laqghat li saru bejn l-appellanti u l-Enemalta hareg car illi l-Enemalta ma kienitx lesta taghti access lill-appellanti ghall-infrastruttura taghha stante illi l-appellanti kienu se jikkompetu maghha stess. Minkejja dan, l-Enemalta kkummissjonat lil PriceWaterhouseCoopers (PWC) sabiex iwettqu ezercizzju finanzjarju biex tigi stabbilita rata ta' hlas li ghandha tintalab lill-appellanti ghall-uzu ta' l-infrastruttura. Fir-rapport taghhom ta' l-4 ta' Ottubru 2004, PWC hargu b'rata ta' hlas ta' tnejn u ghoxrin punt tnejn seba' dollaru Amerikan (USD22.27) ghal kull tunnellata metrika.

14. **Illi din ir-rata qatt ma nghatat lill-esponenti fil-miktub izda dejjem bil-fomm.**

15. Illi l-appellanti qisu li din kienet rata eccessiva.

16. Illi f' Lulju ta' l-2004, permezz ta' l-awdituri taghhom Denys Denant, l-appellant ghamlu spezzjoni u *audit* ta' l-infrastruttura ta' l-Enemalta u tal-mod kif tigi adoperata u waslu ghal rapport li propona li ghall-fini tas-servizz li huma riedu joffru fl-ajrport kellhom bzonn biss uzu ridott ta' l-infrastruttura ta' l-Enemalta u mhux l-infrastruttura kollha ta' l-Enemalta u kellhom bzonn ukoll anqas manodopera milli tuza l-Enemalta. Kellhom bzonn ukoll ftehim ahjar dwar il-hin mehtieg ghal dawn it-tip ta' servizzi u revizjoni tal-mod kif jitqassam ix-

xoghol. Dawn il-proposti saru biex titjieb l-efficjenza u sabiex ir-rati ta' hlas ghall-uzu ta' l-infrastruttura tkun tinkludu biss l-isejjez relevanti. Dan ir-rapport (ANNESS NUMRU 10) ikkonkluda illi jekk l-Enemalta jidhrilha li ghandha zzomm il-facilitajiet, l-operat, il-process u l-manodopera li ghandha bhalissa, dan m'ghandhiex taghmlu a spejjes ta' imprendituri ohra li juzaw l-infrastruttura ta' Malta.

17. Illi minhabba li ma ntahaqx ftehim dwar ir-rata ta' hlas ghall-uzu ta' l-infrastruttura bejn iz-zewg nahat, fis-26 ta' Settembru ta' l-2004, l-appellanti formalment talbu lill-MRA sabiex tintervjeni fil-kwistjoni, bhala l-Awtorita` kompetenti b'responsabbilita' fil-qasam ta' l-energija, inkuz il-*fuel,* sabiex tara illi l-process ta' liberalizazzjoni tas-servizzi ta' prowista ta' *fuel* fl-ajruport ta' Malta - li suppost kien miftuh ai termini tad-Direttiva tal-*Groundhandling* - isir skond il-ligi u senjatament sabiex l-appellanti jinghataw access ghall-infrastruttura ta' l-Enemalta taht kundizzjonijiet li jirrispettaw il-ligi, inkluz il-ligi dwar il-kompetizzjoni gusta.

18. Illi l-MRA investigat il-kwistjoni u waslet ghad-decizjoni taghha 02/ED fid-9 ta' Gunju 2005 li fiha ma laqghax it-talbiet ta' l-appellanti, anzi kkonkludiet li l-hlas mitlub mill-Enemalta ghall-access ghall-infrastruttura ma kien hemm xejn hazin fih. Minkejja dan, l-Awtorita` sejhet lill-partijiet sabiex jergghu jidhlu f' negozjati sabiex jaslu ghal kompress.

19. Illi fuq stedina ta' l-MRA u minghajr pregudizzju l-esponenti kienu regghu fethu t-tahdidiet ma' l-Enemalta. Saru zewg laqghat b'dan l-iskop izda fihom l-Enemalta zammet mal-pozizzjoni taghha dwar ir-rata ta' hlas ta' USD 22.27 ghal kull tunnellata metrika.

C. Sintezi ta' l-argumenti mressqa mill-esponenti matul it-trattazzjoni;

19. Illi l-esponenti ghamlu trattazzjoni estensiva quddiem il-Bord ta' l-Appell fis-seduti segwenti:

• ls-seduta tas-17 ta' Frar 2006;
• is-seduta ta' l-24 ta' Marzu;
• is-seduta tas-7 ta' April 2006;
• is-seduta tat-12 ta' Mejju 2006 u
• is-seduta tat-2 ta' Gunju 2006.

20. **Illi l-esponenti se jistriehu fuq l-imsemmija trattazzjoni u permezz ta' din in-nota jixtieq biss jaghmlu sintezi ta' l-argumenti migjuba f dik it-trattazzjoni u jghidu fejn u kif ma jaqblux mal-konkluzjonijiet ta' l-MRA.** Ghaldaqstant din in-nota se ssegwi wahda wahda is-sottomissijonijiet verbali li saru fl-imsemmija trattazzjoni.

21. Illi fir-rikors ta' l-appell, l-esponenti nkwadraw l-aggravji taghhom fil-parametri ta' Kap. 423, Artiklu 33(2)(a), (c) u (d). Madankollu, matul it-trattazzjoni, huma ziedu wkoll, ghal kull buon fini, xi argumenti marbuta wkoll ma' Art 33(2)(b), liema argumenti qed jigu riprodotti hawn ukoll.

22. Illi qabel dan, l-esponenti se jaghmlu sottomissjonijiet dwar il-kwistjoni tal-kompetenza ta' l-MRA.

Il-kompetenza ta' l-MRA f'dan il-kaz;

23. Illi, fid-decizjoni taghha stess, l-MRA qajjmet il-kwistjoni ta' kompetenza kemm dwar id-Direttiva tal-Groundhandling (pagna 6-7) u anki fejn tidhol il-kompetizzjoni (pagna 10). Izda fiz-zewg kazi baqghhet ghaddejja u baqghet tiehu konjizzjoni tal-kaz. Dan ifisser li bl-ebda mod ma tista' l-MRA issa tghid li mhix l-Awtorita` kompetenti fil-kaz odjern.

24. Illi ghaldaqstant ghandu jkun pacifiku illi l-MRA ghandha kompetenza li tisma u tiddeciedu dwar dan il-kaz.

25. Illi anki kieku l-kompetenza ta' l-MRA ma kienitx pacifika, ghal kull buon fini, l-esponenti jsostnu li l-MRA hija tabilhaqq l-Awtorita` kompetenti stante illi ai termini ta' Kap. 423 (Art. 4) hija l-Awtorita` kompetenti fil-qasam ta' l-energija, li jinkludi wkoll il-*fuel.* Hija responabbli wkoll biex "tirregola u tizgura l-interkonettivita'" ghad-distribuzzjoni tal-*fuel.*

26. Illi l-Awtorita` kompetenti ma setghet qatt tkun il-Malta International Airport (MIA) plc li hija biss l-entita kummercjali (illum privatizzata) li tiggestixxi l-ajruport ta' Malta.

27. Illi l-Awtorita` kompetenti ma seta' qatt ikun id-Dipartiment ta' l-Avjazzjoni Civili stante illi dan huwa r-regolatur limitatament entru l-parametri ta' l-ajruport u mhux 'il hinn minnhom, mentri t-talba ghall-access ta' l-esponenti hija talba ghal access ghall- infrastruttura ta' l-Enemalta mill-*jetty* tal-port sa l-ajruport u mhux fl-ajruport biss. (Ghall-precizjoni jinghad li l-esponenti mhux qed jitolbu li juzaw l-infrastruttura kollha ta' l-Enemalta f'Malta u Ghawdex, izda semplicment parti mill-infrastuttura tal-*fuel* illi mill-port twassal il-*fuel* ghall-ajruport hekk kif spjegat fir-rapport Denant).

28. Illi dan ihalli biss lill-MRA li hija l-Awtorita` **specjalizzata settorjalment** fil-qasam ta' l-energija u li ghandha funzjonijiet cari moghtija lilha bil-ligi fejn tidhol l-energija, inkluz il-fuel, kif ukoll dwar l-interkonnettivita u anki dwar il-kompetizzjoni gusta fil-qasam ta' l-energija.

Kap. 423, Art: 33(2)(a) (Appell)/Zball materjali ta' fatti:

29. Illi meta qieset l-access ghall-infrastruttura l-MRA wettqet zball materjali ta' fatt ghaliex halltet l-uzu infrastrutturali mitlub mill-esponenti ma’ uzu infrastrutturali tipikament uzat minn kumpaniji terzi li jahznu l-fuel temporanjament f’ tankijiet ta' l-Enemalta ghal hlas ta' madwar zewg dollari ghal kull tunellata metrika (USD2/MT).

30. Illi fil-fatt, l-esponenti qatt ma talbu l-istess uzu infrastrutturali ezatt bhal ta' kumpaniji terzi izda talbu uzu aktar estensiv u kienu lesti jhallsu ghalih. Biss mhux il-prezz eccessiv mitlub mill-Enemalta.

31. Illi matul it-trattazzjoni l-esponenti ressqu grafiku (ANNESS II) sabiex juru grafikament kif *is-supply chain* tat-transazzjoni mitluba mill-esponenti tista' tinqasam f’erba' fazijiet distinti u cioe':

A. Ghandek l-importazzjoni tal-fuel li jasal permezz ta' vapur / tanker taz-zejt - evidentement, hawn l-esponenti m'huma qed jitolbu xejn minghand l-Enemalta ghaliex l-importazzjoni tista' ssir minnhom;

B. Ghandek it-tragitt tal-fuel mill-*jetty* tal-port ghat-tankijiet tal-hazna u l-hazna tal-*fuel* fit-tankijiet - hawn l-esponenti qed jitolbu l-istess uzu infrastrutturali bhal kumpaniji terzi li jhallsu rata ta' USD2/MT u jippretendu li ghandu jigu mitluba jhallsu rata simili;

C. Ghandek it-tragitt tal-fuel mit-tankijiet tal-hazna lejn il-parametri ta' l-ajruport sakemm jaslu fit-tankijiet tal-hazna ta' l-Enemalta entru l-parametri ta' l-ajruport - hawn l-esponenti ghandhom bzonn ukoll l-uzu ta' l-infrastruttura ta' l-Enemalta kemm barra kif ukoll entru l-parametri ta' l-ajruport. Dan, izda, huwa uzu infrastrutturali li ma jinghatax lil kumpaniji terzi li jhallsu bl-imsemmija rata ta' USD2/MT u li ghalih l-

esponenti minn dejjem ghamluha cara li huma lesti jhallsu oltre l-ammont ta' USD2/MT.

D. Ghandek it-trasport tal-*fuel* entru l-parametri ta' l-ajruport ghall-*bowsers* li jwasslu l-*fuel* fl-ajruplani - hawn l-esponenti mhux qed jitolbu xejn ghaliex se juzaw *bowsers* taghhom stess.

32. Illi l-uzu infrastrutturali mitlub mill-esponenti mill-Enemalta huwa (B) u (C).

33. Illi fid-decizjoni taghha l-MRA qalet illi l-esponenti ma jistghux jippretendu li jhallsu l-istess bhal kumpaniji terzi ghaliex it-tip ta' uzu infrastrutturali li jridu huma huwa differenti. Izda l-MRA naqset milli taghraf li, fil-fatt, l-oggezzjoni ta' l-esponenti kienet ohra u cioe' illi, ma jista' qatt ikun ragjonevoli li l-prezz mitlub mill-Enemalta lil kumpaniji terzi ghall-uzu infrastrutturali limitat ghal (B) (mill-vapur ghat-tanker tal-hazna u lura ghall-vapur) huwa ta' USD2/MT filwaqt li l-uzu ta' (B) u (C) flimkien jitla' ghal USD22.27/MT. Id-differenza hija ferm u ferm eccessiva u ma tistax tkun gustifikata.

34. Illi l-MRA naqset ukoll li tapprezza li l-esponenti mhux qed jitolbu l-istess servizz bhal kumpaniji terzi li jahznu l-fuel fit-tankijiet ta' l-Enemalta ghal ftit zmien u wara jergghu jiehduh lura (jigifieri A -B - A). L-esponenti iridu dan is-servizz u aktar (u naturalment lesti jhallsu ghas-servizz addizjonali). Minflok, l-MRA qabdet u kkonkludiet li l-esponenti jridu l-istess servizz bhal kumpaniji terzi meta dan ma kienx il-kaz. Inoltre l-MRA ikkonkludiet ukoll li l-esponenti riedu jhallsu l-istess bhal kumpaniji terzi ghal servizz li huwa differenti. Izda lanqas dan ma kien il-kaz. Dan huwa zball manifest ta' fatt li fuqu l-MRA ghaddiet biex tasal ghall-konkluzjoni taghha. Jekk dawn il-fatti kienu erronji ma jista' qatt ikun li d-decizjoni mibnija fuqhom tkun korretta.

Kap. 423, Art: 33(2) (b) /Zball ta' procedura:

35. Illi l-MRA m'ghamlitx analizi ekonomika shiha ta' dan il-kaz. Meta wiehed iqis l-implikazzjonijiet serji ta' dan il-kaz, kien jistenna li l-MRA taghmel analizi ekonomika approfondita tat-talbiet ta' l-esponenti u ta' l-effett fuq is-suq tar-rifjut ta' l-Enemalta li taghti access ghall-infrastruttura taghha.

36. Illi l-MRA ma kkonsultatx ma' l-Ufficcju tal-Kompetizzjoni meta kellha taghmel dan sabiex tkun qed tissodisfa l-funzjoni taghha hekk kif interposta f'Kap. 423. Dan huwa nuqqas iehor procedurali da parti ta' l-MRA minnbarra li huwa wkoll ksur tad-dmir taghha taht Kap. 423 li tara li bhala regolatur tizgura l-kompetizzjoni gusta fis-suq.

37. Illi l-MRA naqset milli tikkordina mad-Dipartiment ta' l-Avjazzjoni Civili li huwa l-Awtorita` responabbli mill-ajruport. Anki hawn, filwaqt li dahlet fil-merti tad-Direttiva tal-*Groundhandling,* l-MRA manifestament naqset milli tikkonsulta mad-dipartiment, wisq anqas li tintervjeni mieghu sabiex tara li d-Direttiva tigi rispettata.

Kap. 423, Art: 33(2) (c) / Zball ta' ligi

Kap. 423 li waqqaf l-MRA:

38. Bid-decizjoni taghha l-MRA naqset mir-responsabbilita' imposta fuqha mil-ligi bhala l-awtorita` settorjali rsponsabbli mis-settur tal-fuel. Senjatament naqset milli taqdi dawn il-funzjonijiet mpoggija fuqha mil-ligi:

A. Artiklu 4(c): Il-funzjoni li tirregola u tizgura l-interkonnettivita; *to regulate and secure interconnectivity for the production, transmission and distribution of the services or products regulated by or under this Act;* - dan huwa kaz

klassiku ta' interkonnettivita', izda l-MRA ma tatx dan ir-rimedju;

B. Artiklu 4(d): Il-funzjoni li tizgura kompetizzjoni gusta; *to ensure fair competition in all such practices, operations and activities;* - dan huwa kaz b'implikazzjonijiet kbar ta' kompetizzjoni, izda l-MRA naqset milli ssegwi l-ligi u l-gurisprudenza stabbilita fil-kamp tal-kompetizzjoni;

C. Artiklu 4(f): *to secure and regulate the development and maintenance of* ***efficient systems*** *in order to satisfy as economically as possible all reasonable demands for the provision of the resources regulated* - l-MRA naqset ghal kollox milli tizgura efficjenza fis-suq hekk kif se jigi stabbilit aktar 'il quddiem f' din in-nota;

D. Artiklu 4(i): *To regulate the price structure for any activity regulated by this Act and where appropriate to establish the mechanisms whereby the price to be charged for the ... storage and distribution thereof is determined."* – f' certu punt l-esponenti hassew li kien hemm malintiz ma' l-MRA fis-sens li huma qed jitolbuha tiffisa prezz meta, fil-fatt, huma qatt ma talbu lill-MRA li taghmel dan (ara talbiet aktar 'il fuq). Tant hu hekk li fid-decizjoni taghha hija l-MRA stess li toffri li, jekk il-partijiet jaqblu, tghaddi biex tiffissa prezz. Hadd ma kien talabha taghmel dan. L-esponenti ma pretendewx li l-MRA kellha tiffissa prezz imma li tirregola l-istruttura tal-prezz, taht liema kundizzjonijiet ghandu jigi stabilit il-prezz, f' liema parametri ghandu jigi stabilit il-prezz, x'inhu tajjeb u x'inhu hazin biex wiehed jasal biex jikkwota prezz u mhux iehor. Hemm obbligu ta' l-MRA mhux li tistabilixxi l-prezz izda li tirregola l-istruttura tal-prezz, haga li m'ghamlithiex.

E. **Artiklu 4(1):** Il-funzjoni li tara li l-obbligi internazzjonali li dahal fihom il-Gvem ta' Malta jigu rispettati; *to ensure that international obligations*

entered into by the Government relative to the matters regulated by or under this Act are complied with; Dan l-artiklu jorbot ma' l-Artiklu 10 tat-Trattat tal-KE (ara aktar 'l isfel) li jghid li l-awtoritajiet ghandhom jaraw li l-ligi Ewropea ghandha tigi osservata u dan fi spirtu ta' koperazzjoni leali *(loyal co-operation).* Ghal darb'ohra hawn naraw li l-MRA ghalqet ghajnejha quddiem bosta ligijiet u gurisprudenza Ewropea li nkisru f' dan il-kaz;

F. **Artiklu 4(m):** *To advise the Minister on the formulation of policy in relation to matters regulated by this Act and in particular in relation to such international obligations ".* - dan l-artiklu jkompli jzid fuq Art 4(1) u fuq l-MRA biex tara li l-obbligi Ewropej ta' Malta jigi rispettati u mhux injorati.

39. Illi l-esponenti issa se jghaddu biex jelenkaw kif, fil-fehma taghhom, id-decizjoni ta' l-MRA hija legalment zbaljata ai termini tal-ligi u l-gurisprudenza Ewropea u senjatament:

• Artiklu 10 u Artiklu 31 tat-Trattat li waqqaf il-Komunita` Ewropea;

• Id-Direttiva Ewropea tal-Groundhandling (96/67/EC) li giet trasposta fil-ligi Maltija permezz ta' Avviz Legali 66 ta' l-2003;

• Il-ligi Maltija u Ewropea dwar il-kompetizzjoni u l-gurisprudenza Ewropea dwar il-kompetizzjoni li fuqha ahna marbutin li nistriehu.

• It-Trattaq li waqqaf il-Komunita` Ewropea

40. **Artiklu 10 tat-Trattat tal-KE:** Illi l-MRA naqset mill-obbligu li tara li l-ligi Ewropea tigi rispettata u li ma jsir xejn li jista' ixekkel dan milli jsir. Ai termini ta' l-Artiklu 10 tat-Trattat tal-KE, li jistabbilixxi l-

principju ta' "koperazzjoni leali" *(loyal co-operation)* tant zviluppat fil-ligi Ewropea, l-MRA kellha l-obbligu li tara li l-ligi Ewropea, kemm jekk hix Direttiva, kemm jekk hix gurisprudenza, ma tinkisirx u li r-regoli ta' kompetizzjoni gusta, kemm lokali kemm Ewropej, ma jinkisrux.

Artiklu 10 tat-Trattat dwar il-KE jaqra hekk. *Member States shall take all appropriate measures, whether general or particular, to ensure fulfillment of the obligation arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.*

41**. Artiklu 31 tat-Trattat tal-KE:** Illi l-MRA hija fl-obbligu li tara li monopolji ta' l-istat li ghandu karattru kummercjali jigu esposti ghall-kompetizzjoni.

Artiklu 31 tat-Trattat tal-KE jaqra hekk. *Member States shall adjust any State monopolies of a commercial character so as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States.*

The provisions of this Article shall apply to any body through which a Member State, in law or in fact, either directly or indirectly supervises, determines or appreciably influences imports or exports between Member States. These provisions shall likewise apply to monopolies delegated by the State to others.

42. Illi dan l-artiklu qed jinkiser fil-kaz odjern u l-MRA halliet kollox ghaddej. Dan ghaliex l-Enemalta ma gietx aggustata ghall-kompetizzjoni u fil-fatt l-esponenti ghadhom qed jithallew barra

mis-suq tar-*refuelling* ta' l-ajruplani fl-ajruport ta' Malta. Difatti, fir-rigward tas-settur tal-*fuel* ta' l-avjazzjoni l-Enemalta ghad ghandha l-monopolju assolut sal-gurnata ta' llum.

43. Illi ta' min wiehed jaccenna li l-Kummissjoni Ewropea ghadha kif habbret proceduri legali *(infringement proceedings)* kontra l-awtoritajiet Maltin talli Artikli 31 qed jinkiser billi l-process ta' liberalizazzjoni tas-settur tal-fuel ma sehhx sa' Jannar 2006. Multo magis, mela, kemm qed jinkisru l-obbligi ta' Malta fir-rigward ta' *refuelling services* fl-ajruport meta dan suppost li gie liberalizzat fl-2003 meta dahlet fis-sehh id-Direttiva tal-*Groundhandling.*

44. Illi difatti, fil-*Consultation Paper* taghha dwar il-liberalizazzjoni tas-suq, l-MRA qalet li s-suq tal-fuel ta' l-avjazzjoni ilu liberalizzat sa mill-2003. Madankollu, il-fatti juru li l-Enemalta ghadha l-uniku operatur fis-suq lokali f'dan il-qasam. Dan ifisser li, jekk gie liberalizzat, dan is-suq gie liberalizzat biss fuq il-karta. Fil-prattika ghadna bil-monopolju - u dan bi ksur ta' Artiklu 31 tat-Trattat (ara *MRA: Liberalisation of the Inland Fuel Market, Consultation Paper, 19th April 2006).*

45. Illi, terga', fl-istess *Consultation Paper,* l-MRA lanqas biss taghmel accenn wiehed ghall-kwistjoni ta' **l-access** ghall-infrastruttura tal-fuel ta' l-Enemalta. Jigifieri minkejja l-kaz odjern u minkejja l-ligijiet u l-gurisprudenza kollha li qed jissemmew hawn, l-MRA ghaddejja minn process ta' konsultazzjoni li jinjora ghal kollox l-access ghall-infrastruttura ta' l-Enemalta daqs li kieku mhuwa qed jigri xejn.

• Id-Direttiva ta' l-UE dwar il-*Groundhandling* (96/67/EC) u l-Avviz Legali 66 ta' l-2003 li dahhalha fil-ligi Maltija:

46. **Mhux id-Direttiva biss:** Illi l-MRA ippernjat id-decizjoni taghha BISS fuq id-Direttiva u mhux a bazi ta' ligijiet ohra applikabbli, fosthom ir-regoli dwar il-kompetizzjoni. Dan huwa nuqqas serju ghaliex id-Direttiva tapplika biss ghal attivitajiet entru l-parametri ta' l-ajruport, filwaqt li t-talba ta' l-esponenti kienet manifestament tirreferi ghall-infrastruttura ta' l-Enemalta mill-*jetty* tal-port sa' l-ajruport, jigifieri kemm l-infrastruttura ta' l-Enemalta kemm gewwa l-ajruport kif ukoll barra. Il-fatt li l-MRA illimitat ruhha biss ghal konsiderazzjonijiet legali marbuta mad-direttiva ifisser li injorat ghal kollox l-implikazzjonijiet legali tar-rifjut ta' l-Enemalta li taghti access ghall-infrastruttura essenzjali taghha barra l-paramentri ta' l-ajruport.

47. **Artiklu 4 *l* Separazzjoni tal-kontijiet:** Illi l-MRA naqset milli tara jekk l-Enemalta hiex qed izzomm kontijiet *(accounts)* separati hekk kif jitlob **Artiklu 4** tad-Direttiva li jghid illi: *Where the managing body of an airport, the airport user or the supplier of groundhandling services provide groundhandling services, they must rigorously separate the accounts of their groundhandling activities from the accounts of their other activities, in accordance with current commercial practice.*

An independent examiner appointed by the Member State must check that this separation of accounts is carried out. The examiner shall also check the absence of financial flows between the activity of the managing body as airport authority and its groundhandling activity.

48. Illi s-separazzjoni tal-kontijiet huwa krucjali sabiex ikun jista' jigi stabblit prezz gust ghall-access ghall-infrastruttura, prezz li ma jkunx wiehed eccessiv.

49. Illi in vista ta' dan l-artiklu, l-esponenti staqsew jekk l-MRA stabbilitx li l-Enemalta qed izzomm

kontijiet separati ai termini tad-Direttiva. Imkien ma jirrizulta li l-Enemalta qed izzomm kontijiet separati. Ghaldaqstant jidher li hemm ksur ta' dan l-artiklu u li l-MRA halliet dan il-ksur ghaddej daqs li kieku ma gara xejn.

50. Illi kif intqal aktar 'il fuq, ai termini ta' Artiklu 10 tat-Trattat tal-KE, anki jekk l-MRA mhix l-awtorita kompetenti biex timplimenta d-Direttiva hija xorta obbligata bil-principju ta' *loyal co-operation* li tara li ma thalliex ligi Ewropea tigi injorata. Hija kellha tiffacilita l-implimentazzjoni tad-Direttiva u mhux tinjoraha.

51. **Artiklu 6 / Mill-anqas zewg operaturi fl-ajruport ghar-*refuelling:*** Illi meta ma tatx access lill-esponenti ghall-infrastruttura essenzjali ta' l-Enemalta, l-MRA fixklet milli jintlahaq l-obbligu previst f'**Artiklu 6** tad-Direttiva li ghandu jkun hemm ghall-anqas zewg operaturi tas-servizz ta' *refuelling* fl-ajruport ta' Malta jigi rispettat. In kwantu tapplika ghas-servizzi ta' *"fuel and oil handling",* il-parti operattiva ta' Artiklu 6 tad-Direttiva tghid hekk: *They may not, however, limit this number to fewer than two for each category of groundhandling service.*

52. Illi huwa pacifiku li tliet snin wara li suppost giet implimentata din id-Direttiva, fl-ajruport ta' Malta ghad hemm biss operatur wiehed - l-Enemalta - jaghti s-servizz ta' *refuelling* ta' l-ajruplani. Dan huwa ksur tad-Direttiva *de quo.*

53. Illi quddiem din is-sitwazzjoni ta' ksur tad-Direttiva, mitluba taghti access ghat-tieni operatur, l-MRA ma laqghetx it-talba. Jigifieri bid-decizjoni taghha mhux biss naqset li taghti access ghal infrastrutturali essenzjali kif huwa mehtieg mil-ligi, izda ippermettiet li jibqa jigi injorat artiklu 6 tad-Direttiva. Dan, minkejja li ai termini ta' Artiku 10 tat-Trattat - il-principju ta' *loyal co-operation* - l-

MRA hija marbuta li tara li l-ligi Ewropea tigi osservata u mhux injorata.

54. **Artiklu 8 / Infrastruttura essenzjali ma tistax tintuza biex tfixkel il-kompetizzjoni:**

Member States may reserve for the managing body of the airport or for another body the management of the centralized infrastructure used for the supply of groundhandling services whose complexity, cost or environmental impact does not allow of division or duplication, ***such as ... fuel-distribution systems.***

They may make it ***compulsory*** *for suppliers of groundhandling services and self-handling airport users to use these infrastructures.*

Member States shall ensure that the management of these infrastructures is transparent, objective and non-discriminatory and, in particular, that ***it does not hinder the access*** *of suppliers of groundhandling services or self-handling airport users within the limits provided for in this Directive.*

55. Illi dan l-artiklu tant hu car li m'ghandu bzonn l-ebda spjega. Ghandu bzonn biss li jigi implimentat.

56. Illi meta ma tatx access lill-esponenti ghall-infrastruttura essenzjali ta' l-Enemalta, l-MRA fixklet milli jintlahaq l-obbligu previst f'Artiklu 8 tad-Direttiva li l-infrastruttura centralizzata (essenzjali) m'ghandhiex tintuza biex tfixkel l-access ghal min irid jipprovdi servizz ta' groundhandling fl-ajruport. Anki hawn, mela, hawn ksur ta' l-Artiklu 10 tal-Trattat tal-KE dwar koperazzjoni leali.

57. **Preambolu 10 / Japplika ghall-groundhandling mhux ghas-settur tal-fuel:** Illi b'mod erronju, fid-decizjoni taghha (para. 3.2.3) l-

MRA applikat il-preambolu numru 10 tad-Direttiva ghas-settur tal-liberalizazzjoni ta' l-Enemalta meta dan kien qed jirreferi ghall-liberalizazzjoni tas-suq tal-*groundhandling* fl-ajruporti. Il-preambolu numru 10 tad-Direttiva jaqra hekk: *"Member States are allowed the possibility to take into consideration the* ***specific nature of the sector*** *and such free access must be introduced gradually and must be adapted to the* ***requirements of the same sector".*** Dan qed jirreferi hawn ghas-settur tal-*groundhandling* u mhux ghas-settur tal-fuel u l-kompetizzjoni ma' l-Enemalta kif qed tghid l-MRA.

• **Ligi dwar il-kompetizzjoni */ essential facilities:***

58. Illi l-infrastruttura in kwistjoni hija infrastruttura essenzjali *(essential facilities)* stante illi hija infrastruttura li d-daqs, kumplessita', l-ispiza taghha u l-impatt ambjentali ma jippermettux li jinqasmu jew jigu dupplikati. Dan jaghmel l-infrastruttura ta' l-Enemalta "facilitajiet essenzjali" ghall-fini tal-ligi.

59. Illi jidher illi huwa pacifiku bejn il-partijiet (ara para. 3.1.2) illi l-infrastruttura in kwistjoni hija *essential facilities.*

60. Illi huwa stabbilit fil-ligi u fil-gurisprudenza li infrastruttra li hija *essential facility* ghandu jinghata access ghaliha. Dan tikkonfermah ukoll l-MRA f para. 1.8 tad-decizjoni.

61. Illi anki kieku ma kienx pacifiku bejn il-partijiet li hawn si tratta ta' infrastruttura essenzjali *(essential facilities)* jew li ghandu jinghata access ghaliha, xorta huwa stabbilit mill-ligi, inkluz il-ligi dwar il-kompetizzjoni u mill-gurisprudenza, illi dan huwa l-kaz.

62. Illi fil-ktieb tieghu *Competition Law, f'Kap. 17,* l-awtur akklamat fil-kamp tal-kompetizzjoni, Richard

Whish, jaghmel punti ferm relevanti dwar **id-duttrina tal-facilitajiet jew infrastruttura essenzjali** jew ahjar l-***essential facilities doctrine.*** Il-punti saljenti li jaghmel Whish u li taghmel il-gurisprudenza dwar din il-materja huma s-segwenti:

A. In the context of Article 82 (tat-Trattat tal-KE) the essential facilities doctrine is a natural consequence of the judgement in Commercial Solvents, that a refusal to supply a customer in a downstream market would amount to an abuse if the effect would be to eliminate all competition in that market. (Whish, pagna 667) - m'hemmx dubju li bir-rifjust taghha li taghti access ghall-infrastruttura, l-Enemalta qed telimina l-kompetizzjoni fis-suq tar-*refuelling* ta' l-ajruplani stante illi qed timblokka lill-esponenti milli tikkompeti ma' l-istess Enemalta f'dan il-qasam.

B. The expression "essential facility " is a particularly apt one where an undertaking seeks access to a physical infrastructure such as a port, airport or pipeline. (Whish, pagna 368) - M'hemmx dubju ghal Whish illi fil-kaz odjern si tratta ta' *essential facilities* ghaliex qed nitkellmu fuq l-infrastruttura ta' l-Enemalta, inkluz il-*pipeline* taghha bejn il-port u l-ajruport. Hu jkompli jghid: ... *competition would be slow to emerge where service providers could compete only if they had access to important infrastructures such as telecommunication wires and cables, the electricity grid, gas and oil pipelines, ports, airports and railway lines owned and operated by dominant undertakings. In such cases, control of the infrastructure gives rise to what is often referred to as a 'bottleneck 'problem; that competition is impossible where only one firm, or a combination of firms, can prevent others from operating on the market by denying access to a facility which is essential and cannot be duplicated, (pagna 669)*

C. Whish jghid ukoll illi normalment l-awtoritajiet isolvu din il-problem billi jirregolaw il-qasam *ex ante* sabiex jizguraw li jkun hemm access. Fejn dan ma jsirx, izda, trid tidhol il-ligi tal-kompetizzjoni: ... *the Commission, proceeding from the ECJ's judgement in* ***Commercial Solvents,*** *began to develop its practice under Article 82 in such a way that a refusal to allow access to an essential facility could be found to be an abuse of a dominant position. As a result of this, there are circumstances in which access can be achieved by invoking competition law (Whish, 669)* - huwa proprja dan li qed jippruvaw jaghmlu l-esponenti.

D. Fid-decizjoni taghha fil-kaz *Sealink/B&I - Holyhead* il-Kummissjoni Ewropea qalet hekk: *A dominant undertaking which both owns or controls and itself uses an essential facility, ie a facility or infrastructure without access to which competitors cannot provide services to their customers, and which refuses its competitors access to that facility or grants access to competitors only on terms less favourable than those which it gives its own services, thereby placing the competitors at a competitive disadvantage,* ***infringes Article 82.*** - l-esponenti jqisu li hekk qed jigri f'dan il-kaz u li ghaldaqstant l-Enemalta qed tabbuza mid-dominanza taghha.

E. Fid-decizjoni taghha fil-kaz *Holyhead Harbour,* il-Kummissjoni qalet hekk: *An undertaking that owns or manages and uses itself an essential facility, ie a facility or infrastructure without which its competitors are unable to offer their services to customers and refuses to grant them access to such facility is abusing its dominant position.*

F. Whish izid fuq dak li tghid il-Kummissjoni b'dan il-mod: *Where infrastructures of this kind have been established by the State or with state-*

funding, or by undertakings to which monopoly rights have been grated by the state, a requirement that they should be shared with third parties may be considered to be a reasonable public policy choice. Undertakings controlling a bottleneck might be considered to be 'super-dominant', ***implying that they have a higher responsibility not to distort competition*** *than the obligations attaching to 'merely' dominant firms. (Whish 670)* - huwa car li l-Enemalta hija 'super-dominant' u mhux biss dominant ghall-fini ta' l-infrastruttura li tikkontrolla, kollha mhallsa minn fondi pubblici.

G. X'tip ta' infrastruttura tista' tigi kkunsidrata bhala *essential facilities*? Whish iwiegeb hekk: *The doctrine has been applied to other physical infrastructures. It was applied in the Commission's decision on the Port of Rodby. In Frankfurt Airpot the Commission required that the airport authority should terminate its monopoly over ground-handling services and that it should grant access to third parties wishing to supply such services there. Oil and gas pipelines are capable of being essential facilities. So too are telecommunications wires and cables and set-top boxes necessary, for example, for the provision of interactive television services. (Whish 675-676).* – huwa car, mela, li l-infrastruttura in kwistjoni fil-kaz odjern taqa' taht il-kappa ta' *essential facility.*

• Ligi dwar il-kompetizzjoni */* abbuz ta' dominanza minhabba *constructive refusal* ta' l-Enemalta:

63. Illi bid-decizjoni taghha l-MRA halliet ghaddej ksur lampanti tal-ligi dwar il-kompetizzjoni, kemm lokali (Kap. 379, Artiklu 9) kif ukoll Ewropea (Artiklu 82 tat-Trattat tal-KE), u senjatament abbuz ta' dominanza ta' l-Enemalta stante illi din irrifjutat li taghti access lill-esponenti ghall-infrastruttura

taghha u ghamlet dan permezz ta' dak li jissejjah *"constructive refusal".*

64. Illi, ghall-fini tal-ligi dwar il-kompetizzjoni, hekk kif zviluppata fil-gurisprudenza tal-Qorti Ewropea ghall-Gustizzja, hemm abbuz ta' dominanza fejn ghandek *constructive refusal* jew rifjut ta' access bhalma ghamlet b'dan il-kaz il-Korporazzjoni Enemalta senjatament billi uzat *delaying tactics* billi:

A. naqset milli tiehu n-negozjati bis-serjeta' billi kaxkret saqajha ghal zmien twil u sahansitra fil-bidu waqqghet ghac-cajt it-talba ta' l-esponenti bhala xi haga ridikola. Bhallikieku huwa inkoncepibbli li l-esponenti jistghu qatt jinghataw access ghall-infrastruttura proprjela' ta' l-Enemalta.

B. filwaqt li accettat fil-principju li l-esponenti ghandhom jinghataw access, l-Enemalta baqghet qatt m'ghamlet ebda talba ufficjali bil-miktub ta' kemm riedet hlas *(charge)* ghall-access ghall-infrastruttura taghha u ghamlet biss offerta bil-fomm;

C. l-ewwel u l-unika evidenza li tezisti tal-hlas *(charge)* li l-Enemalta talbet mill-esponenti insibuha fid-decizjoni ta' l-MRA. Qatt qabel l-Enemalta ma kienet ghamlet it-talba taghha bil-miktub jew b'mod ufficjali;

D. l-offerta bil-fomm maghmula mill-Enemalta qatt in inkludiet dettalji jew *itemised break-down* ta' x'kien jirraprezenta l-hlas u x'kien ikopri.

65. Illi dan juri li l-Enemalta kellha interess ovvju li tirrifjuta access ghall-infrastruttura stante illi l-esponenti kienu ser ikunu kompetituri taghha fis-suq tar-*refuelling* ta' l-ajruplani fl-ajruport. Dan minnu nnifsu huwa wkoll abbuziv skond gurisprudenza tal-Qorti Ewropea.

66. Illi fil-ktieb tieghu *Competition Law, f'Kap. 17,* l-awtur Richard Whish jghid dan dwar *constructive refusal: A constructive refusal to supply -for example, by acting in a discriminatory manner, by delaying access in an unreasonable manner or by charging an excessive price for access - would also infringe Article 82. (Whish pagna 677). -* dawn huma lkoll elementi li nsibuhom fil-kaz odjern meta anki element wiehed ikun bizzejjed biex jistabblixxi *constructive refusal* u konsegwentement abbuz.

• **Ligi dwar il-kompetizzjoni / *constructive refusal* minhabba prezz eccessiv:**

67. Illi l-hlas *(charge)* mitlub mill-Enemalta huwa **prezz eccessiv** u jikkostitwixxi wkoll kaz ta' *price squeeze* u/jew kaz ta' *cross-subsidisation.* Ghaldaqstant l-offerta tikkostitwixxi abbuz ta' dominanza. Kap. 379, Art 9 u Art 82 tat-Trattat tal-KE jghidu illi "*an undertaking shall be deemed to abuse a dominant position where it directly or indirectly imposes excessive or unfair purchase or selling price or other unfair trading conditions ".*

68. Illi talba ghal prezz eccessiv jikkostitwixxi minnu nnifsu abbuz ta' dominanza. Fil-kaz *United Brands,* il-Qorti Ewropea ghamlitha cara illi: *charging a price which is excessive because it has no reasonable relation to the economic value of the product supplies is ... an abuse. ([1978] ECR 207, [1978] 1 CMLR 429, para 250.)*

69. Illi hemm modi differenti ta' kif wiehed jasal ghall-konkluzjoni li prezz mitlub huwa prezz eccessiv u allura abbusiv. F*'United Brands* il-Qorti qalet illi d-domanda li ghandha ssir hija *whether the difference between the costs actually incurred and the price actually charged is excessive and if the answer to this question is in the affirmative, to consider whether a price has been charged which*

is either unfair in itself or when compared to other competing products. ([1978] EC 207, [1978] 1 CMLR 429, para 252).

70. Illi Whish jispjega kif prezz eccessiv jista' jkun anti-kompetittiv: *The most obvious example would be the situation in which the owner of an essential facility charges an excessive (or disriminatory) price for granting access to it: this could be regarded as a constructive refusal to supply, and therefore as an abuse of a dominant position, (ara. pagna 692).* Hawn Whish qed jistrieh fuq il-gurisprudenza ta' *Commercial Solvents.* Huwa car li huwa proprju dan li qed jigri fil-kaz odjern.

71. Illi anki l-Kummissjoni Ewropea fin-*Notice on the Application of the Competition Rules to Access Agreements in the Telecommunications Sector (OJ [1988] C265/2, [1998] 5 CMLR 821, para 97)* tghid illi *excessive prices for access to essential facilities can be abusive.*

Illi fil-kaz "Disma" - li huwa relevanti ghall-kaz odjern - rappurtat fil-*Competition Report* tal-Kummissjoni Ewropea ta' l-1993 u li kien jitratta grupp ta' kumpaniji li hadu f'idejhom impjant tal-fuel fl-ajruport ta' Malpensa, il-Kummissjoni Ewropea tghid hekk:

223. Under an agreement between certain oil companies and the managing company of Milan's Malpensa Airport, a joint venture was created under the name Disma for the intallation and operation of equipment for storing jet fuel and transferring it to supply points on the site of the new airport. The Commission demanded and obtained certain changes needed to guarantee non-discriminatory access for the companies operating on this market.

The agreement envisages the creation on the site of the airport of a new fixed aircraft-refuelling

installation essentially comprising a fuel and lubricant depot directly linked via underground pipelines to supply points. This will enable fuel to be transferred direct from the depot's pipelines and pumping equipment without the use of the traditional tankers. Once it has been completed, this equipment will be the only means of refuelling aircraft at the new airport.

224. At the outset, the Commission acknowledged that the technological characteristics of the Disma installations would enable jet fuel to be stored and transported advantageously in terms of Community environmental legislation, particularly with regard to traffic and air pollution. Moreover, the advantages benefit not only the oil companies but also the customer airlines and their users.

However, the initial version of the agreements notified to the Commission contained clauses preventing non-Disma companies from having access on non-discriminatory terms to the joint venture's services. For one thing, the almost insurmountable obstacles making impossible in practice the transfer of holdings in Disma to third parties prevented the latter from gaining access to the market. ***The founding members had also agreed to impose significantly higher charges on non-members. Some users of Disma's installations and services were thus forced to accept unequal conditions for equivalent services, and this placed them at a comparative disadvantage.***

In view of the foregoing considerations, and given the more important role that Milan Malpensa Airport is likely to play as regards air transport in the Community, a sector which is gradually being liberalised, the Commission initiated proceedings with a view to eliminating these unjustified barriers to access and ensuring neutrality and equality of treatment for all users of Disma 's installations, it

being borne in mind that all oil companies, whether or not members of the joint venture, have to use these installations to supply their customers. The members of Disma have therefore proposed a uniform tariff although actual charges are on a sliding scale according to the quantities of jet fuel supplied. The principle of a sliding scale can be justified by the existence-affixed costs associated with the services supplied to each customer.

The parties to the agreement finally agreed that access by firms not participating in the capital of Disma should be made easier once Malpensa 's static refuelling system is operational.

The Commission took the view that the agreements concerning the Disma joint venture were then compatible with the common market. Accordingly, it adopted a favourable position in their regard and terminated the proceedings by standard confort letter, (pagna 141-143).

• **Ligi dwar il-kompetizzjoni *I* prezz eccessiv minhabba inefficjenzi:**

72. Illi prezz jista' jkun eccessiv ukoll jekk fih ikun hemm inkluz l-inefficjenzi tal-monopolju li jkollha f idejha l-infrastruttura. Dan ghaliex l-esponenti ikunu qed jintalbu jaghmlu tajjeb ghall-inefficjenzi tal-kumpanija li ghandha monopolju jew inkella jkunu qed jintalbu jibqghu barra mis-suq minhabba l-inefficjenzi ta' l-istess monopolju - kif gara f dan il-kaz.

73. Illi fl-ezami taghha ta' dan il-kaz, l-MRA ma kellha qatt taccetta li l-inefficjenzi ta' l-Enemalta setghu jigu ammessi ghall-fini tal-prezz kwotat. Dan ukoll johrog car mill-gurisprudenza li tghid b'mod car li l-prezz mitlub bhala hlas ghal access ghal infrastruttura ghandu jinjora kull inefficjenza

jew spejjes sproporzjonati tal-kumpanija in kwistjoni.

74. Illi fil-kaz *Ministere Public v Tournier (Case 395/87 [1989] ECR 2521, [1991] 4 CMLR 248)* il-Qorti Ewropea ma setghhetx tkun aktar cara meta stabbiliet (ara rapport f Whish pagan 692) illi ***excessive disproportionate costs should not be taken into account in determining the reasonableness of prices. The society in question had a de facto monopoly and the ECJ suggested that it was the very lack of competition which had led to high administrative costs: the society had no incentive to keep them down.***

75. Illi huwa ben saput li l-Enemalta ghandha inefficjenzi serji u dan gie sahansitra rappurtat fil-gazzetti anki matul il-proceduri odjerni, liema rapporti gew kwotati matul it-trattazzjoni. L-esponenti diga ghamlu referenza ghar-rapport f'*The Times of Malta* datat 5 t'Aprl 2006 fejn il-Ministru ghall-Investiment, Industrija u Teknologija ta' l-Informatika gie rappurtat li qal fil-Parlament matul is-seduta dwar l-estimi finanzjarji ta' l-Enemalta illi *It was evident that department such as aviation could do with four workers per shift instead of 14 workers ...*

76. Illi dan ifisser li fis-sezzjoni ta' l-avjazzjoni (responsabbli mir-*refuelling)* l-Enemalta qed tuza 14-il haddiem minflok erba' kif mehtieg. Difatti, filwaqt li l-Enemalta bhalissa timpjega 60 persuna fis-sezzjoni ta' l-avjazzjoni, il-Ministru qal li b'4 biss jista' jsir xoghol li bhalissa qed isir b'14 il-persuna. Dan juri li l-efficjenza fl-Enemalta hija ta' madwar 25%, jigifieri dak li tista' taghmel persuna wahda qed isir minn erba'.

77. Illi anki aktar ricentement stqarrija ghall-istampa mahruga mill-Enemalta nhar id-9 t'Ottubru 2006 tramite l-Ministeru ghall-Investiment,

Industrija u Teknologija ta' l-Informatika tofrri evidenza inekwivoka ta' kif, kontra dak li sabet l-MRA, is-sezzjoni ta' l-Avjazzjoni ta' l-Enemalta li hija dik is-sezzjoni ta' l-Enemalta responsabbli mis-servizz ta' *refuelling* fl-ajruport **hija inefficienti.** Dawn is-siltiet jitkellmu wahedhom (enfazi mizjud mill-esponenti):

*A. Il-GWU tqarraq meta tghid li insistiet mal-management tal-Korporazzjoni biex ikun hemm ftehim dwar is-sezzjoni ta' l-avjazzjoni. Il-GWU qatt ma riedet taccetta li tiddiskuti li fl-ajruport l-Enemalta jkollha anqas minn **erbatax-il ruh kull hin tal-jum u l-lejl anke meta fl-ajruport ma ikun hemm xoghol ta' xejn.** Din il-pozizzjoni intransigenti li ma nbidlet qatt f'sentejn ta' diskussjonijiet ma tista qatt tinftiehem li hi xi rieda tal-GWU li tissolva l-problema.*

*B. anke bl-apparat li hemm illum, ix-xoghol jista' jigi ezegwit b' 'mod kompletament korrett u sikur **b'hafna anqas impjegati mill-14** li tinsisti fuqhom il-GWU.*

*C. **Mhux korrett li tinghad li s-sezzjoni ta' l-aviazzjoni taghmel il-profitt. Dan apparti li s-sezzjoni ta' l-avjazzjoni m' ghadx ghandha monopolju fl-ajruport u d-decizjonijiet li jridu jittiehdu iridu jitqiesu fil-kuntest shih ta' kompetizzjoni. Anke kieku dan ma kienx il-fatt izda, il-hela ta' nies jithallsu l-overtime biex ma jaghmlu xejn, ma tista' qatt tkun gustifikata.***

*D. Attitudnijiet inflessibbli u sistemi minghajr gustifikazzjoni ddisinjati biex **nies imhallsa biex il-parti l-kbira ta' hinhom jaghmluh iharsu u jirduppjaw il-paga f'overtime** m'huma qatt bazi ghal ftehim.*

78. Illi din l-istqarrja hija konferma lampanti li la l-Enemalta u wisq anqas l-MRA ma hadu in konsiderazzjoni l-inefficjenza ta' l-Enemalta meta

gie stabbilit il-prezz eccessiv ta' USD22.27/MT li ntalab lill-esponenti sabiex jinghataw access ghall-infrastruttura ta' l-Enemalta. Din hija wkoll konferema ta' kif l-offerta ta' l-Enemalta tmur kontra s-sentenza tal-Qorti hawn fuq citata *Ministere Public.*

79. Illi, jekk xejn, dawn l-istqarrijiet juru li jew l-Enemalta pretendiet li l-esponenti jhallsu ghall-inefficjenzi taghha jew inkella riedet thallihom barra mis-suq sakemm tnehhi l-inefficjenzi u tghaddi mir-ristrutturazzjoni li ghandha tghaddi. **Izda fiz-zewg kazijiet, dan huwa agir abbusiv u llegali.**

80. Illi lanqas biss huwa minnu dak li tghid l-Enemalta f' din l-istqarrija illi *"s-sezzjoni ta' l-avjazzjoni m 'ghadx ghandha monopolju fl-ajruport u d-decizjonijiet li jridu jittiehdu iridu jitqiesu fil-kuntest gdid ta' kompetizzjoni."* Ghall-kuntrarju, huwa fatt maghruf li l-Enemalta ghadha l-uniku fornitur tas-servizz ta' refuelling fl-ajruport.

81. Illi fid-decizjoni taghha l-MRA ma sabet xejn minn dawn l-inefficjenzi gravi li effettivament ghamlu l-prezz ta' l-offerta ta' l-Enemalta lill-esponenti wiehed eccessiv. Mhuwiex minnu li fid-decizjoni taghha l-MRA hadet kont ta' l-inefficjenzi ta' l-Enemalta. Anzi injorathom. Fid-decizjoni taghha, l-MRA ammettiet illi *"Enemalta's price is based on its current operating costs and not on open market considerations"* (para. 3). Izda minflok ma ghaddiet ghall-konkluzjoni gusta u logika li dawn l-inefficjenzi kellhom jittiehdu in konsidersiderazzjoni fl-offerta maghmula lill-esponenti, qabdet u kkonkludiet illi l-metodu ta' prezzar *(pricing method)* ta' l-Enemalta *"does not constitute unfair competition and is not per se tantamount to an entry barrier"* (ara decizjoni MRA para. 3). Din hija akrobazija legali ghaliex taghmel legali xi haga li manifestement hija llegali u dan skond gurisprudenza tal-Qorti Ewropea.

82. Illi fid-decizjoni taghha l-MRA qalet ukoll (pagna 10, para. 3.4.5.2) illi *the cost-based method employed by Enemalta does not hide any subsidies or state aid.* L-esponenti jqisu din id-dikjarazzjoni bhala ghal kollox skorretta u nieqsa minn kull ezami serju tas-sitwazzjoni. Din id-dikjarazzjoni tikkozza wkoll ma' l-istqarrijiet tal-Gvern u ta' l-istess Enemalta hawn fuq citati u kieku kienet minnha allura ma kienx ikun mehtieg il-process ta' ristrutturazzjoni ta' l-Enemalta li ghaddej bhalissa. Hawn ukoll, mela, hawn zball serju ta' ligi da parti ta' l-MRA.

83. Illi dan ifisser illi minflok l-oghla livell ta' efficjenza *(highest level of efficiency)* kif huwa mistenna f'suq kompetittiv, f'dan il-kaz l-MRA accettat l-anqas livell ta' efficjenza *(lowest level of inefficiency)* meta waslet ghall-konkluzjoni li m'hemmx xejn hazin fl-offerta ta' l-Enemalta.

84. Illi ghandu jinghad ukoll li l-esponenti kienu ghamlu car x'tip ta' uzu infrastratturali kellhom bzonn u li ma riedux ihallsu ghall-inefficjenzi ta' l-Enemalta. Dan hareg car fir-rapport ta' l-awditur ta' l-esponenti, Denys Denant (kopja tar-rapport fl-atti tal-kaz) kwotat anki mill-istess MRA fid-decizjoni taghha (pagna 3): *"The report advocated a reduced use of infrastructure (that is, no requirement for Has-Saptan and a second airside fuel facility known as 'Bulk Fuel 2') as well as a reduction in manning levels achieved by a reduced use of facilities, a clear understanding of the actual time required on an aviation operation and a revised organisation tasks. Such reduction was also advocated to ensure cost efficiency."*

85. Illi l-istess rapport ta' l-esponenti jasal ghal dawn il-konkluzjonijiet (ukoll kwotat fid-decizjoni ta' l-MRA f'pagna 3-4): *In terms of costs it should be Enemalta's own decision and cost if it wishes to maintain its current facilities, operations,*

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

86. Illi, minflok, f'paragrafu 3.5.5 tad-decizjoni taghha, l-MRA tikkonkludi illi *"It is the Authority's opinion that provided that the above listed principles are adhered to in Enemalta 's pricing methods, such method is not uncompetitive."* L-esponenti joggezzjonaw bil-qawwa ghal din id-dikjarazzjoni ghaliex xoghol l-MRA ma kienx li tghidilna "kieku" dawn il-kriterji (ta' efficjenza) gew rispettati izda "jekk" dawn il-kriterji gewx rispettati. Ghaldaqstant, l-MRA ma setghhet qatt tghaddi ghall-konkluzjoni li *Enemalta's pricing methods, such method is not uncompetitive* ghaliex m'ghamlitx ezami bir-reqqa ta' jekk u kemm effettivament il-prezz mitlub mill-Enemalta kienx jinkludi inefficjenza u/jew sussidji mohbija.

• Ligi dwar il-kompetizzjoni / prezz eccessiv permezz ta' *price squeeze:*

87. Illi meta ghandek monopolju naturali bhal fil-kaz odjern li fl-istess hin trid tikkompeti *at the downstream level* fis-suq tal-fuel fl-ajruport, tista' facilment tinholoq sitwazzjoni ta' abbuz permezz ta' prezz eccessiv li jwettaq *price squeeze.* Dan isehh jekk wiehed jgholli l-ispejjes tieghu ghall-infrastruttura fuq naha u jbaxxi t-tariffi ghall-operazzjoni tieghu fuq l-ohra.

88. Illi l-esponenti jikkontendu li t-talba ta' l-Enemalta ta' USD22.27 / MT tohloq *price squeeze* ghaliex taghmel l-access ghall-infrastruttura ta' l-Enemalta tant gholja li l-esponenti ma jkunux jistghu jikkompetu fl-ajruport.

89. Illi gie zviluppat test ta' imputazzjoni *(imputation test)* bhala metodologija intiza sabiex wiehed jara jekk kienx hemm jew le prezz

eccessiv. Dan jista' jsir billi wiehed jara jekk bit-talba ta' USD22.27/MT tinholoqx sitwazzjoni fejn wiehed ma jistax jikkompeti *at downstream level* ma' l-istess Enemalta. Jew jekk, minn lenti ohra, tistax is-sezzjoni ta' l-avjazzjoni ta' l-Enemalta topera b'mod profitabbli.

90. Illi fil-fatt, kif rajna aktar 'il fuq, diga hemm ammissjoni pubblika li s-sezzjoni mhix profitabbli. Dan wahdu jindika *price squeeze.*

91. Illi l-MRA naqset milli taghmel ezami bir-reqqa tal-metodologija li ntuzat biex jigi stabbilit il-prezz mitlub mill-Enemalta. L-MRA kellha tara x'tip ta' spejjez ghandha s-sezzjoni ta' l-avjazzjoni ta' l-Enemalta - u dan permezz ta' kontijiet separati ta' l-istess Enemalta - sabiex tasal ghall-ispiza veritjiera ta' l-infrastruttura ta' l-Enemalta.

92. Illi, inoltre, suppost li l-ispejjes li ghandu jittiehed kont taghhom sabiex jigi stabbilit il-prezz mitlub lill-esponenti, huma biss l-ispejjes addizjonali li tinkorri l-Enemalta sabiex taghti access lill-esponenti. Bl-esponenti u minghajrhom l-Enemalta diga ghandha spiza ghall-infrastruttura taghha. Dawn huma *avoidable downsteam costs.* Mhuwiex a bazi ta' din l-ispiza li ghandu jigi stabbilit il-prezz mitlub lill-esponenti izda **a bazi ta' l-ispejjes addizzjonali** li tinkorri l-Enemalta sabiex taghti access lill-esponenti. Imkien fid-decizjoni taghhom l-MRA ma turi li hadet dan in konsiderazzjoni. Anzi, titkellem biss dwar prezz globali li jirrifletti l-ispiza ta' l-infrastruttura ta' l-Enemalta - u anki hawn, mhux f'suq kompetittiv.

93. Illi sabiex jaghmlu l-kaz taghhom li jezisti tassew prezz eccessiv, l-esponenti prezentaw **grafika** (ANNESS NUMRU 12 + notamenti) li **tqabbel l-ispiza totali tas-servizz li jkollhom jinkorru l-esponenti jekk jaccettaw l-offerta ta' USD22.27/MT ta' l-Enemalta mal-prezz tas-servizz attwali fl-ajruport** (mill-Enemalta stess).

Biex tinbena din il-grafika, l-esponenti striehu fuq il-prezz internazzjonali tal-fuel (Mejju 2006), maghruf bhala *Platts,* u ziedu l-ispejjes segwenti skond normi stabbliti fl-industrija: *Product premium; Freight premium; Estimated 90 Day Stock Financing u* l-ispejjes li l-esponenti jistmaw li tigihom l-operazzjoni fl-ajruport a bazi ta' normi fl-industrija.[6] Naturalment, ziedu wkoll il-hlas ta' USD22.27 mitlub mill-Enemalta.

94. Illi minn din il-grafika l-akbar spiza hija appuntu l-hlas ta' USD22.27/MT mitlub mill-Enemalta lill-esponenti, liema hlas l-esponenti qed isostnu li huwa prezz eccessiv.

95. Illi minn din il-grafika johrog bic-car ukoll *price squeeze* fis-sens illi l-ispiza li biha l-Enemalta trid lill-esponenti jikkompetu fl-ajruport hija sostanzjalment oghla mill-prezz anki massimu li bih jinbiegh is-servizz ta' *refuelling* mill-Enemalta stess fl-ajruport. Ghaldaqstant l-esponenti ma jistghu qatt jikkompetu f' dawn il-kundizzjonijiet.

96. Illi konsegwentement minn din il-grafika jirrizulta illi bl-operazzjoni taghha fl-ajruport ta' Malta, l-Enemalta qed taghmel wahda minn tliet affarijiet:

A. **jew qed taghti s-servizz fl-ajruport bit-telf intenzjonalment *(predatory pricing)* sabiex**

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[6] *Product premium* - dawn huwa *hlas* jew *premium* li jvarja skond id-daqs ta' l-ammont ta' fuel li jkun qed jinbiegh. Ovvjament, aktar ma jkun zghir l-ammont, aktar il-hlas ikun relattivament kbir il-premium.
Freight premium - dan huwa l-ispiza tat-trasport li jvarja minn fejn jisab il-vapur (tanker) l-ammont u z-zmien. Hawn ukoll il-*premium* jonqos hekk kif l-ammont jizdied.
Estimated 90 Day Stock Financing - dawn huwa hlas sabiex jaghmel tajjeb ghall-htiega li l-pajjiz izomm stokk ta' disghin jum skond normi Ewropej. Dan huwa spiza ta' finanzjament.
Undefined Infrastructure Charge - dan huwa l-hlas mitlub mill-Enemalta ghall-uzu ta' l-infrastruttura, ghalkemm l-Enemalta ma tat qatt dettalji ta' f'hiex jikkonsisti jew x'jirraprezenta dan il-hlas.
JTP - Into Plane (ITP) - dan huwa l-istima ta' l-ispejjes mehtiega sabiex isir ir-refuelling ta' l-ajruplani. Fl-esperjenza taghhom, l-esponenti jafu li dan jista' jvarja bejn $13.24 u $19.86/MT u ghaldaqstant, ghall-fini ta' dan l-ezercizzju ittiehdet rata medja ta' $16.55/MT ghax-xenarju f' Malta. Din tikkonsisti f'*manpower costs* ta' $9.93/MT u $6.62/MT ghal *depreciation charges, equipment maintenance, insurance* ecc...

izzomm lill-esponenti 'il barra mis-suq - dan huwa ovvjament illegali izda huwa improbabbli f'dan il-kaz minhabba li huwa fatt maghruf, b'ammissjoni ta' l-Enemalta stess, li s-sezzjoni ta' l-avjazzjoni ta' l-Enemalta hija sezzjoni li taghmel it-telf. B'hekk it-telf mhux intenzjonat;

B. **jew qed tissussidja l-istess operazzjoni taghha fl-ajruport bil-goff *(cross subsidisation)*** — bla dubju dan ikun illegali u inoltre hija ghal kollox skorretta l-MRA li tghid illi *the cost-based method employed by Enemalta does not hide any subsidies or state aid.*

C. **jew inkella qed titlob <u>prezz eccessiv.</u>**

97. Illi dawn it-tliet xenarji huma lkoll illegali kif stabbilit mil-ligi u mill-gurisprudenza msemmija.

Kap. 423, Art: 33(2)(d) /Illegalita' materjali, inkluz in-nuqqas ta' ragjonevolezza u ta'proporzjonalita' tad-decizjoni

98. Illi d-decizjoni ta' l-MRA hija nieqsa minn proporzjonalita' u raguni ghaliex tinjora ghal kollox mhux biss il-funzjonijiet ta' l-MRA skond il-ligi, izda tinjora wkoll sensiela ta' ligijiet Ewropej li l-istess MRA hija kienet obbligata li thares, fosthom artikli 10 u 31 tat-Trattat tal-KE, id-Direttiva tal-Groundhandling (A.L. 66/2003) kif ukoll il-ligi dwar il-kompetizzjoni u gurisprudenza relevanti.

99. Illi ma tista' qatt tkun ragjonevoli u/jew proporzjonali id-decizjoni ta' l-MRA jekk din ma taghtix access ghall-infrastruttura in kwistjoni stante illi hija *essential facility* jew, jekk ghall-anqas, ma tistabbilixxix kundizzjonijiet cari u inekwivoci li tahthom ghandu jinghata access. Fid-decizjoni taghha l-MRA la ghamlet wahda u lanqas l-ohra.

100. Illi d-decizjoni ta' l-MRA turi nuqqas ta' proporzjonalita' u raguni anki ghaliex tippermetti li jintalab prezz eccessiv ghall-uzu ta' infrastruttura essenzjali.

101. Illi d-decizjoni ta' l-MRA hija nieqsa minn proporzjonalita' u raguni anki ghaliex tonqos milli tiehu kont ta' l-inefficjenzi cari u evidenti ta' l-Enemalta u halliet minflok li dawn jigu riflessi fil-prezz li ntalbu l-esponenti.

102. Illi d-decizjoni ta' l-MRA hija nieqsa minn proporzjonalita' u raguni anki ghaliex minkejja li kienu nieqsa minn informazzjoni u numru (hlief ghat-talba ta' USD22.27/MT) l-esponenti xorta rnexxielhom jaghmlu *cost-build-up* permezz ta' l-*imputation test* u jistabbilixxu li hemm prezz eccessiv. Ghall-kuntrarju, bl-informazzjoni u d-dettalji b'kollox f'idejha l-MRA naqset milli taghmel dan l-ezercizzju.

103. Illi d-decizjoni ta' l-MRA turi nuqqas ta' proporzjonalita' u raguni anki ghaliex uriet li mhux talli l-MRA ma kienitx hadet azzjoni *ex-ante* biex jinghata access ghall-infrastruttura essenzjali fil-qasam ta' l-energija f Malta (inkluz il-*fuel)* - haga li bhala regolatur ghandha d-dmir u l-obbligu li taghmel taht Kap. 423 (ara aktar 'il fuq) - talli lanqas kienet lest tirregola l-access *ex-post* fuq talba specifika biex tintervjeni u tirregola.

104. Illi s-settur tat-telekomunikazzjoni u s-settur ta' l-elettriku kienu regolati *ex ante* u l-ligi diga tghidilna taht liema kundizzjonijiet ghandu jkun hemm access. Dawn il-ligijiet originaw mill-ligi Komunitarja u gew *transposed* ukoll fil-ligi Maltija. Dan mhux il-kaz fil-qasam tal-*fuel* fejn ghad m'hemmx regolamenti. Issa f'kaz bhal dan, fejn m'hemmx regolamenti *ex ante* jista' jew ikollok l-Awtorita` kompetenti li tiehu l-inizjattiva biex tirregola l-access fis-settur - haga li l-MRA m'ghamlitx - jew li l-Awtorita` taghmel dan wara

talba ta' xi hadd - haga li l-MRA xorta m'ghamlitx. Ghaldaqstant f’ dawn ic-cirkustanzi wiehed bilfors suppost ghandu jistrieh fuq il-ligi tal-kompetizjoni u l-gurisprudenza relattiva - haga li, ghal darb'ohra, l-MRA naqset milli taghmel.

105. Illi huwa nuqqas kbir ta' proporzjonalista' u raguni li l-MRA ma marritx ghand l-Ufficcju tal-Kompetizzjoni, ufficcju specjalizzat, biex tikkonsulta fuq materja fejn il-ligi dwar il-kompetizzjoni hija tant determinanti.

Konkluzjoni dwar il-mertu

106. In konkluzjoni ghandu jinghad li, ghalkemm ingiebu bosta argumenti legali ghaliex id-decizjoni ta' l-MRA ghandha tigi annullata filwaqt li jintlaqa' dan l-appell, anki argument wiehed ghandu jkun sufficjenti biex titwaqqa' d-decizjoni appellata.

107. Illi dan il-kaz se jistabbilixxi precedent fil-kazistika Maltija ghaliex qed jitratta l-ftuh ghall-kompetizzjoni ta' kamp fejn ghad ghandna monopolju naturali u fejn l-Awtorita` responsabbli naqset milli tagixxi kif mitlub mill-ligijiet diversi.

108. Illi dan il-kaz se johloq precendent anki fis-sens illi hawn si tratta ta' l-applikazzjoni gusta u adegwata tal-ligi ta' l-Unjoni Ewropeja. Hemm diversi ligijiet Ewropej u gurisprudenza citati u la darba l-MRA injorathom, issa sta ghal dan l-Onorabbli Bord biex jaghtihom effett. Ghaldaqstant, din se tkun decizjoni taht l-iskrutinju ta' l-istituzzjonijiet Ewropej relevanti.

109. Illi d-decizjoni ta' l-MRA kienet superficjali u ma dahlitx fil-fond bizzejjed. Hija nieqsa minn analizi legali u anki minn analizi ekonomika. Bhal donnha, f’ dan il-kaz, l-MRA bdiet mill-konkluzjoni u mbaghad imxiet lura u kitbet decizjoni li

twassalha ghall-konkluzjoni li riedet. Huwa ghalhekk li naqset milli taghti rimedju.

110. Illi ghaldaqstant, l-esponenti qeghdin nitolbu li dan l-Onorabbli Bord ta' l-Appell joghgbu jannulla, jwaqqa u jbiddel id-decizjoni li waslet ghaliha l-MRA, filwaqt li jilqa' t-talbiet ta' l-esponenti, *inter alia,* billi jordna illi jinghataw access ghall-infrastruttura ta' l-Enemalta u jordna li jittiehdu dawk il-mizuri kollha necessarji biex dan isehh fi zmien qasir u perentorju.

F. Repplika ghad-difiza maghmula mill-Awtorita` appellata dwar punti procedurali;

111. Illi n-nullita' ta' l-appell ma tista' qatt tintlaqa' ghal bosta ragunijiet.

112. Illi f'Artikli 33 Kap. 423 jaghmilha cara fuq liema punti jista' jsir appell. Fl-ebda mument ma jghid kif ghandha tigi intavolata t-talba ta' l-appellant. Jghid biss kif il-Bord ta' l-Appell jista' jiddetermina l-Appell. Inoltre, meta jitkellem dwar x'tip ta' decizjoni jista' jasal ghaliha dan il-Bord, l-istess artiklu mhux tassattiv - juza l-kelma "may" u mhux "shall". Terga', l-istess artiklu jaghmilha cara wkoll illi meta l-Bord ta' l-Appell jannulla decizjoni ta' l-MRA, huwa "jista' jirreferi l-kwistjoni lill-Awtorita flimkien ma' ordni biex din terga' tikkunsidraha mill-gdid ***u tasal ghal decizjoni skond ir-rizultanzi tal-Bord."***

113. Illi anki kieku kien hemm zball procedurali da parti ta' l-esponenti fil-mod kif impustaw it-talba ta' l-appell taghhom, ghandu jinghad li dan mhux il-kamp kriminali fejn allura zball procedurali tista' timporta n-nullita' ta' l-azzjoni.

114. Illi anki kieku kien hemm zball procedurali da parti ta' l-esponenti, ghandu jinghad li fil-kamp civili llum huwa stabbilit illi zball jista' jigi ssanat u

ghandu jkun pacifiku illi proceduri legali ghandhom jigu salvati u mhux mormija minhabba l-procedura. Anki f’ appell civili, il-forma ma timporta l-ebda nullita'.

115. Illi Kap. 423, tipiku ta' ligi li twaqqaf awtoritajiet, ma jidholx f’ dettall kbir dwar l-aspett procedurali ta' appell mid-decizjoni ta' l-Awtorita`. Zgur mela, illi l-ligi ma rieditx li l-procedura tintuza bhala pretest biex appell jigi rigettat.

116. Illi fir-rikors ta' l-appell taghhom l-esponenti segwew l-istruzzjonijiet moghtija fil-verbal ta' l-istess Bord u allura huma koperti b'dak id-digriet datat 31 t'Ottubru 2005 fejn il-Bord ta' l-Appell talab lill-esponenti jipprezentaw rikors ta' appell li jkun iffirmat, li jindikaw taht liema kap ta' l-Art 33(2) qed isir l-istess appell u li jindikaw ir-rimedju/i li jixtiequ.

117. Illi dwar in-nullita' esposta mill-Awtorita` intimata "billi l-aggravju ma tinkwadrax taht ebda wahda mir-ragunijiet elenkati f’ Art 33(2)" l-esponent jghid biss illi kieku l-Awtorita` intimata kellha ragun u l-ebda aggravju ta' l-esponenti ma jinkwadra ruhu f’ Art 33(2), allura huwa assolutament impossibbli li wiehed jappella minn decizjoni ta' l-MRA - haga li l-legislatur zgur qatt ma ried ghaliex kieku ma kienx jaghti l-possibilita' ta' appell.

118. Illi fl-ahharnett, dwar il-punt ta' nuqqas ta' xiehda, filwaqt li jfakkru li hawn ninsabu fi stadju ta' appell u mhux ta' prim'istanza, l-esponenti jsostnu illi x-xiehda li jistriehu fuqha hija x-xiehda rizultanti mill-atti tal-kawza. Isostnu wkoll li l-akbar xiehda ghalihom irrizultat mill-istess decizjoni ta' l-MRA li, ghall-ewwel darba, tat prova bil-miktub tal-kwantum ta' l-offerta ta' l-Enemalta (USD22.27/MT) lill-esponenti. L-argumenti kollha maghmula f’ dan l-appell huma mibnija fuq din l-

offerta li fil-fatt ingiebet prova taghha mill-istess MRA fid-decizjoni taghha.

B'dan il-mod qeghda tinghalaq din l-ewwel parti ta' din is-sentenza. Il-Bord hass illi stante it-tul u d-diversita' kif ukoll il-kumplessita' tas-sottomissjonijiet, kien mehtieg li dawn jigu riprodotti verbatim, billi diversament kien jista' jkun hemm il-preokkupazzjoni li tithalla xi haga barra.

IT-TIENI PARTI - ID-DECIZJONI TA' DAN IL-BORD

Filwaqt il-Bord jifhem l-importanza kbira ta' dan il-kaz, u naturalment ihoss it-toqol ta' responsabbilta' imposta fuqu li jiddeciedi fuq kuncetti ta' certa toqol u kumplessita', il-Bord ukoll ihoss illi dan l-appell, kemm bil-mod kif sar, u kemm ukoll bil-mod kif gie milqugh, ikkomplika ruhhu aktarx izzejjed. Minghajr ma jaghmel xi *reductio ad absurdum* il-Bord, fejn huwa possibbli, u legalment korrett, ser jaghmel li jista' biex jissimplifika l-ezercizzju li ghandu quddiemu.

Wiehed mill-fatturi li aktarx wassal ghal certa kumplikazzjoni kien il-mod mhux dejjem felici ta' kif l-Awtorita` irredigiet id-decizjoni taghha. Dan wassal sabiex l-appellant hass (forsi mhux dejjem b'gustifikazzjoni kompleta) illi jrid jidhol *funditus* f' materji, li fil-fatt m'humhiex kontestati.

Il-punt tat-tluq ghandu jkun li wiehed jifhem precizament dak illi ddecidiet l-Awtorita`. L-appellant appella, naturalment ghaliex fil-fehma tieghu, l-Awtorita` cahditlhu t-talbiet tieghu. Izda dan huwa veru fid-dawl tal-konkluzjoni raggjunta mill-istess Awtorita? Hawn il-Bord jiccita direttament:

3.5.7. *The Authority, therefore, on the basis of the above and without prejudice to all other legal means available to the parties, directs the parties*

to negotiate in good faith to arrive at mutually agreeable fair cost-based charge for the services in question within 4 weeks, failing which to give this Authority or other mutually acceptable competent entity a mandate to establish such charge.

Minn dan il-bran, li fil-fehma tal-Bord huwa d-*decide* tad-decizjoni ta' l-Awtorita` wiehed donnu jasal ghall-konkluzjoni li altru milli l-Awtorita` cahdet it-talbiet ta' l-appellant, jidher li din fil-fatt pjuttost laqghathom.

Li gara huwa li l-Awtorita` kitbet decizjoni daqsxejn stramba. Meta wiehed jaqra l-premessi tad-decizjoni, wiehed jinnota illi l-Awtorita` prattikament ma qablitx ma ilment wiehed ta' l-appellant. Izda meta giet ghall-konkluzjoni taghha l-Awtorita` qatt ma semmiet li hi qeghda tichad it-talbiet ta' l-appellant. Di fatti, wara li wiehed jaqra u janalizza d-decizjoni kollha, IMKIEN ma wiehed isib xi indizju li l-t-talbiet qeghdin jincahdu. Izda kif inghad, dan in-nuqqas ta' cahda, tant tqieghed f' ambjent negattiv (ghax kif intqal, l-Awtorita` prattikament ma qablet ma l-ebda wiehed mill-ilmenti individwali), illi dan mid-dehra wassal lill-appellanti sabiex jinterpretaw id-decizjoni bhala wahda negattiva.

Izda dan mhux ezattament korrett. L-Awtorita` fil-fatt, idderigiet sabiex il-partijiet jinnegozjaw in bona fides, u jekk sa erba' gimghat ma jittiehmux, stednithom jaghtuha mandat sabiex tkun hi stess li permezz ta' esperti, jew bl-intervent ta' xi entita' ohra, tistabilixxi l-prezz tal-interkonnessjoni hi stess.

Dan iwassal lill-Bord biex jaghmel numru ta' riflessjonijiet.

Qabel xejn, din id-decizjoni timplika illi ma hemm ebda kontestazzjoni dwar il-fatt illi facilitajiet li taghhom hu mitlub l-access, huwa "centralised

infrastructure". B'hekk is-sottomissjonijiet kollha li saru f'dan ir-rigward, donnhom saru inutilment.

Iktar importanti, huwa l-fatt illi l-access per se ma jidher li gie (bhala principju) QATT negat, la mill-Korporazzjoni Enemalta, u lanqas mill-Awtorita`. Mid-decizjoni, nonostante numru ta' pozizzjonijiet legali li hadet l-Awtorita` fil-premessi tad-decizjoni taghha, id-decizjoni innifisha, IMKIEN ma timplika xi cahda ta' access, anzi ghall-KUNTRARJU, id-decizjoni innifisha qeghda TASSUMI li dan l-access ghandu jinghata.

Illi jidher kristallin, li L-UNIKA vertenza bejn il-partijiet tirrigwarda l-prezz ta' l-access li l-appellant ghandu jkollu lejn l-infrastruttura ta' l-Enemalta, u assolutament xejn aktar.

Illi ukoll fid-dawl tad-decizjoni attwali l-agir ta' l-appellant huwa difficli li jiftiehem sew. L-Awtorita` iddecidiet li tordna lill-Appellant u l-Korporazzjoni Enemalta sabiex jinnegozjaw prezz, bl-intiza li jekk ma jintlahaqx ftiehim, l-Awtorita` talbet mandat minghand il-partijiet sabiex tiehu l-inkariku li tiffissa l-prezz hi stess. Wiehed jistaqsi il-ghala l-Appellanti irrifjutat li taghti dan il-mandat. Kien ikun ferm iktar ghaqli u legalment korrett li kieku l-appellant accetta din l-istedina. B'hekk l-Awtorita` kien ikollha taghmel ezercizzju dwar dan, tispjega l-metodologija uzata, u jekk din il-metodologija kienet tkun mittiefsa u skorretta, din id-decizjoni (li tiffissa l-prezz) setghet tigi attakkata.

Illi dan il-Bord huwa ukoll perpless kif l-Awtorita`, fit-twegiba ta' l-appell, minnflok semplicement irrilevat illi l-appell kien intempestiv, ghaliex il-kwistjoni tal-prezz, kienet ghada impregudikata, donna lanqas fehmet id-decizjoni taghha stess, u spiccat billi iddefendiet *ad unguem,* il-prezz kif mitlub mill-Enemalta. B'hekk donnu li issa ma zammittx pozizzjoni imparzjali fuq il-kwistjoni, kif kellha zzomm.

Il-Bord ukoll irid josserva b'dispjacir, li l-Awtorita` qanqlet pregudizzjali ta' nullita' fi stadju ferm avvanzat tal-procedura ta' l-appell. Kien ikun ferm u ferm iktar indikat li materji bhal dawn jitqanqlu *in limine litis,* u jigu regolati, qabel ma jinstama' l-appell fuq il-mertu.

Sfortunatament ghad ma hemmx regolamenti li jirregolaw il-proceduri quddiem dawn il-Bord. Ghalhekk il-Bord ma jhossx li ghandu l-poter li jiskarta punti sollevati tardivament, minhabba li ma tressqux meta kien ikun ghaqli. Il-Bord fuq kollox irid izomm quddiemu il-principji tal-gustizzja naturali, u jirregola l-proceduri minn dik il-perspettiva.

Ir-rizultat ta' dan kollu huwa li filwaqt li l-appell seta' gie meqjus bhala prematur u intempestiv, minhabba nuqqas ta' cahda attwali dapparti ta' l-Awtorita`, illum dan m'ghadux jista' jinghad iktar, minhabba li l-mod kif iddefendiet ruhha l-Awtorita`, anki jekk ma ikkonkretizzax ic-cahda tat-talbiet ta' l-appellant, gab sitwazzjoni, fejn l-Awtorita` tant hadet pozizzjoni defensjonali rigida fuq il-materji in kwistjoni, illi issa din ic-cahda issopravveniet matul dawn il-proceduri.

Dan in-nuqqas ta' kjarezza legali minn naha taz-zewg kontendenti holqot matassa legali li trid tigi ridotta ghall-essenzjali taghha.

Il-Bord irid jibda billi qabel xejn jistabilixxi x'inhi il-kontroversja li ghandu quddiemu.

L-ewwel zewg talbiet li saru lill-Awtorita` kienu dawn:

1. To confirm that the airport depot is Centralised Infrastructure as defined by EU Ground Handling directive and declare it so.
2. To ensure appropriate access to associated dedicated jet fuel infrastructure in Malta that may be used to store and supply product from jetty to the airport.

Il-Bord jifhem li dawn il-punti kienu kontestati mill-Awtorita` iktar ghall-fini ta' kjarezza (li fil-fatt holqot iktar konfuzjoni). L-Awtorita` minkejja l-oggezzjonijiet li ressqet, fil-fatt qatt ma qalet li id-depot tal-mitjar mhux infrastruttura centralizzata. Din qalet sempliciment li ma kienx kompitu taghha li tghid jekk hux jew le. Izda mit-termini tat-tender innifsu, jidher evidenti li din kienet l-intenzjoni. L-agir stess tal-Korporazzjoni Enemalta ma kienx kuntrarju ghal din il-pozizzjoni, in kwantu li din qatt ma cahdet id-dritt ta' l-access, u difatti dahlet f'negozjati (forsi dan huwa ewfemizmu) ma' lappellanti dwar l-access lejn din l-infrastruttura.

Il-Bord ghalhekk ma jsibx il-bzonn li jiccensura id-decizjoni ta' l-Awtorita` fuq dan il-punt, ghaliex anki jekk l-Awtorita` qalet li hi ma kienitx l-enti kompetenti fuq din il-kwistjoni, din xorta agixxiet fuq il-presuppost li dan ma kienx punt kontroversjali.

L-appellant ukoll talab lill-Awtorita`:

> 3. To establish access and conditions to the dedicated jet fuel infrastructure in a fair, transparent objective, relevant and non-discriminatory way that does not hinder access or Competition and does not frustrate the aims of the Ground Handling Directive.
>
> 4. To establish appropriate market and efficient industry practices that exclude out dated practices and unnecessary costs and allow for the non-discriminatory and relevant use of these assets, whose complexity, or environmental impact does not allow for division or duplication. Thereby allowing for the fair, competitive supply of jet fuel from jetty to airport depot.
>
> 5. To establish fair, competitive and nondiscriminatory pricing for the receipt, storage, transmission and delivery of jet fuel using the

dedicated jet fuel infrastructure operated by Enemalta Corporation on criteria which are relevant objective, and transparent.

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

Hawn jigi osservat illi it-talba numru 6 hija kumplikazzjoni zejda. Billi l-obbligazzjonijiet internazzjonali prospettati mill-appellanti huma infatti parti mill-ligi lokali u cioe' l-Awiz Legali 66/2003. Ghalhekk l-appellanti setghu, anzi kellhom jillimitaw ruhhom li jesigu li tigi applikata l-ligi lokali, u dan kien ikun sufficjenti. Ghalhekk it-talba numru 6 hija pjuttost inutili u mhux ser tinghata importanza, ghaliex f' dan il-kaz l-osservanza tal-ligi lokali tkun minnha nnifisha l-osservanza tal-obbligazzjonijiet internazzjonali.

Meta wkoll wiehed janalizza il-kontenut tat-talbiet 3, 4 u 5, wiehed jista' jara li it-talba vera hija dik kontenuta fil-paragrafu 3, filwaqt li t-"talbiet" 4 u 5, m'huma xejn hlief spjegazzjoni tal-modalita' ta' kif ghandu jinghata u jigi regolat l-access, u l-kundizzjonijiet li tahtu dan l-access irid jinghata.

Il-Bord ikompli josserva illi (kif gja ntqal) lanqas ma tezisti kwistjoni dwar hemmx dritt ta' access jew le. L-unika kwistjoni li tifred lill-kontendenti huma il-modalitajiet ta' l-access, u fil-fatt iktar specifikament, IL-PREZZ marbut ma dan l-access.

Il-fatti huma maghrufin u jistghu jingabru f' sentenza wahda. Biex tilqa' u tahzen iz-zjut li ser jimporta l-appellant, il-Korporazzjoni Enemalta qeghda titlob kumpens ta $22.27 ghal kull tunnellata metrika fix-xahar, meta hi soltu tilqa' u tahzen iz-zjut ta' terzi b'rata ta' $ 2.00 kull tunnellata metrika fix-xahar, piu' $0.50 kull tunnellata biex tilqa' u $0.50 biex tippompja 'l barra. L-appellanti huma mistifikati kif is-

servizz li qeghdin jitolbu huma, ser jiswilhom kwazi ghaxar darbiet milli qed jiswa lill-haddiehor. Huma ghalhekk jghidu li dan jixhed li dan il-prezz mhux wiehed genwin u tas-suq, imma prezz eskogitat biex jaqtalhom qalbhom milli jikkompetu fis-suq, u b'hekk l-Enemalta tippreserva l-monopolju taghha f dan is-settur.

Li jrid l-appellanti huwa li jigi miksur dan id-"deadlock".

Issa f' dan l-istadju, il-Bord irid jezamina il-pregudizzjali imressqin mill-Awtorita` dwar dak li hi ssejjah bhala n-nullita' ta' l-appell.

L-ewwel pregudizzjali hija wahda purament formali. L-Awtorita` tissottometti illi t-talba hija koncepita b'mod li tmur oltre l-poteri tal-Bord quddiem il-Ligi. L-Awtorita` qeghda tinsisti illi meta l-appellant talab li "dan il-Bord joghgbu jvarja u jimmodifika d-decizjoni appellata", dan ghamel talba mhux kontemplata mill-Ligi ghaliex skond l-Awtorita` il-Bord, skond l-art. 33 tal-Kap. 423 jista' biss jannulla d-decizjoni, izda dana, bil-fakolta li jekk il-Bord jannulla d-decizjoni, il-Bord jista' jirriferi lill-awtorita (cioe' l-appellat) u jordna li terga tikkunsidra mill-gdid il-kaz u tasal ghal decizjoni skond ir-rizultanzi tal-Bord.

Wiehed irid jammetti illi d-dicitura tal-Ligi hija xi ftit Bizantina. Il-Ligi ma tghidx illi il-Bord jista' jirrevoka id-decizjoni, u jibdilha skond ma jirrizultalu. Izda il-Bord ghandu l-fakolta' li jekk jannulla decizjoni ta' l-Awtorita`, dan ma' jieqafx hemm.

Il-Bord jista' mhux biss jordna lill-Awtorita` tirrikonsidra l-kaz. Jista' wkoll jordnalha din ir-rikonsiderazzjoni billi din tasal ghal decizjoni skond ir-rizultanzi tal-Bord. Il-Bord jifhem illi b'dan il-bran il-legislatur mhux qed jaghti lill-Bord id-dritt li jiddeciedi HU minnflok l-Awtorita`. Il-poter tal-Bord jidher li huwa kbir imma mhux assolut. Il-Bord, jekk jara li hemm rizultanzi (u dawn naturalment jistghu ikunu

ta' fatt jew ta' dritt) dan jista' jordna lill-Awtorita` li meta tigi biex tirrikonsidra t-talba, tibbaza ruhha fuq dawk ir-rizultanzi, daqs li kieku, irriskontrathom hi stess. Donnu ghalhekk illi il-Bord mhux intitolat li jissostitiwxxi id-diskrezzjoni ta' l-Awtorita` bid-diskrezzjoni tieghu (principju ormaj tant stabbilit li huwa wiehed mill-kolonni tad-dritt amministrattiv). Il-Bord pero' jista' jintrometti ruhu fuq l-Awtorita` in kwantu dawk il-fatti li huwa jistabilixxi bhala il-verita' u in kwantu jiddeciedi dwar l-applikazzjoni tal-ligi in materja. Una volta il-Bord iqieghed lill-Awtorita` fuq it-triq "it-tajba", huwa ma jindahalx izjed (ammenokke' ma jkunx hemm appell iehor mit-tieni decizjoni ta' l-Awtorita`).

Issa fil-kaz in ezami, jista' jinghad illi t-talba kif redatta tirrendi null l-appell innifsu? Qabel xejn kif gja gie osservat, ma hemmx regoli ta' procedura ad hoc li jirregolaw il-proceduri quddiem dan il-Bord. Inqas u inqas ma' hemm xi forma preskritta mill-ligi. Ghalhekk sabiex appell jigi meqjus null, irid ikun hemm xi difett baziku, bhala per ezempju xi nuqqas ta' kompetenza, jew xi dicitura fit-talba li tirrendi l-appell inkomprensibbli.

F'dan il-kaz, li xi hadd jitlob lill-Bord ivarja decizjoni ta' l-Awtorita` mhux xi dnub fatali. Il-Bord jifhem li l-appellant irid jattakka id-decizjoni, u li jiehu il-mizuri dwarha, kif konsentit mill-ligi. Anki jekk stess il-Bord ma jistax HU STESS ivarja decizjoni, imma jista' biss jirrimettiha taht il-kundizzjonijiet fuq spjegati, dan ifisser li dik il-parti tat-talba qeghda titlob lill-Bord li jagixxi ultra vires, haga li naturalment ma kien qatt ser jaghmel. Is-soluzzjoni ghalhekk hija li jekk it-talba hija oltre l-poteri tal-Bord, il-Bord jista' ma jilqaghhix, jew ma jilqaghhix kollha, imma b'daqshekk ma hemmx in-nullita' ta' l-att innifsu.

Ghalhekk il-Bord, qed jirrespingi din il-pregudizzjali.

It-tieni pregudizzjali ta’ l-Awtorita` hija li l-Appell ma' jinkwadra ruhu taht l-ebda wiehed mill-kapijiet li tahthom il-Ligi tippermetti li jsir appell.

Tajjeb ghalhekk illi hawnhekk jigu ripetuti il-kapijiet li skond il-Ligi jista' jsir appell dwarhom.

L-art. 33(2) tal-Kap 423 jiddisponi hekk:

> (2) Jista' jsir appell quddiem il-Bord ghal kull wahda mir-ragunijiet li gejjin:
> (a) li jkun sar zball materjali dwar il-fatti;
> (b) li kien hemm zball materjali fil-procedura;
> (c) li jkun sar zball fil-ligi;
> (d) li kien hemm xi illegalita materjali, inkluza l-irragonevolezza jew nuqqas ta' proporzjonalita.

L-Awtorita` appellata tidhol f’ certu dettal sabiex tispjega illi l-appell ma jista' jinkwadra ruhu taht ebda wiehed minn dawn il-kapi. L-appellant, naturalment jirrespingi.

Hawn, ghalhekk il-Bord irid jezamina x'intqal mill-partijiet, u jasal ghall-konkluzjoni tieghu.

Zball Materjali dwar il-Fatti.

L-Awtorita` teccepixxi illi l-allegati zbalji mehudin mill-Awtorita` in kwantu it-tip ta' servizz mitlub mill-appellanti u s-servizz moghti mill-Enemalta lill-haddiehor, u in-nuqqas ta' distinzjoni bejn facilitajiet essenzjali ta’ l-ajruport u facilitajiet essenzjali, huma, se mai, zbalji ta' apprezzament, u mhux zbalji materjali ta' fatti. Skond l-Awtorita`, zball li jolqot l-apprezzament ta' fatt, ma' jaghtix lok ghal appell. Minn naha tieghu, l-appellant jirrileva dak li skond hu huwa numru ta' zbalji li hadet l-Awtorita` fil-mod kif hi fehmet it-tip ta' infrastruttura li kienet qeghda tintalab access ghaliha.

Il-Bord ihoss illi din il-pregudizzjali hija fondata, ghaliex ma jarax illi, kienu x'kienu l-apprezzamenti

ta' fatt dwar l-infrastruttura, dawn kienu daqshekk il-boghod mir-realta' li tassew influwenzaw id-decizjoni. Il-qofol tad-decizjoni, kif ser jigi analizzat ‘l quddiem kien jiddependi minn fatturi ohrajn, li dwarhom il-Bord, ghad irid jippronunzja ruhu.

Ghalhekk il-Bord jaqbel li dan l-appell, in kwantu huwa bbazat fuq zball materjali tal-fatti, huwa infondat.

Zball Materjali ta' Procedura

Il-Bord ma jaqbilx ma’ lAwtorita` li m'ghandux jiehu konjizzjoni ta' dan l-aggravju, ghaliex mhux imnizzel fl-appel innifshu. Huwa dejjem desiderabbli li l-aggravji kollha jitnizzlu fil-korp ta’ l-appell, imma, fil-mankanza ta' forma espressa dettata mill-ligi, il-Bord ma jhossux legalment gustifikat illi jinjora ilment minhabba difett ta' forma (li aktarx lanqas hu difett ghax mhux vjetat mill-ligi). Del resto, l-Awtorita` lanqas m'hi innocenti, u di fatti il-Bord gja osserva illi pregudizzjali bhal dawn messhom ukoll tressqu fit-twegiba ta’ l-appell. Il-Bord, f’ materja ta' forma ihoss, li entro limiti ragjonevoli, ghandu jippermetti latitudni biex isiru l-ilmenti kollha, b'dan dejjem li l-kontroparti m'ghandhiex tigi sorpriza, u li din allura dejjem tinghata l-istess latitudni biex twiezen l-aggravju l-gdid u jkollha l-opportunita' xierqa biex tirribattih.

Una volta investit dan il-punt, il-Bord hawn ukoll irid jaqbel illi din il-pregudizzjali hija fondata. Il-Bord ma jistax jaqbel illi l-fatt li l-Awtorita` ma ikkonsultatx ruhha ma entitajiet ohrajn bhal per ezempju l-Ufficcju Dwar il-Kompetizzjoni, u d-Direttur ta’ l-Avjazzjoni Civili, u l-fatt li m'ghamlitx analizi ekonomiku dettaljat jikkostitwixxi ksur ta' procedura.

Ghandu jkun pacifiku illi hawn, il-Legislatur qed jirreferi ghal xi procedura mandatorja, imposta fuq l-Awtorita` minn xi ligi jew regolament. Meta ir-regolatur jonqos milli jadopera proceduri li bniedem

ragjonevoli jista' jikkunsidra bhala desiderabbli, dak ma jkunx zball procedurali. Veru wkoll, illi mankanza simili tista' twassal ghal difetti ohrajn fid-decizjoni, b'mod li tali decizjoni tista' tkun appellabbli taht kap iehor. Izda fil-kaz in ezami, ma jirrizultax illi l-Awtorita` ikkommettiet ksur ta' xi proceduri mandatorji, u ghalhekk il-Bord jilqa' din il-pregudizzjali.

Zball fil-Ligi

Il-Bord innota illi fil-pagni 50-66 supra, l-Appellant dahal b'mod ferm erudit fil-kuncetti legali applikabbli ghall-kaz. L-Appellant qed jghid illi ic-cahda ta' l-access lejn l-infrastruttura ta' l-Enemalta tikser mhux ligi wahda izda diversi ligijiet. Il-Bord mhux ser jirrepeti hawn l-argumenti imsemmija li huma gja riprodotti verbatim.

Il-Bord jinnota pero' li hemm certa djufijja ta' kjarezza fl-istruttura tal-argument ta' l-appellant. Li gara f' dan il-kaz ma kienx illi l-Awtorita` qalet li l-appellant m'ghandux dritt ta' access.

Li kieku kien hekk, ma hemmx dubbju li dan kien ikun zball notevoli ta' ligi. Izda il-fattispecje m'humhiex hekk affattu. Il-problema jinsab fil-fatt illi, minkejja li hemm qbil fil-principju li GHANDU jkun hemm l-access, il-MODALITAJIET ta' l-istess access huma tali, li jirrendu l-access ekonomikament impossibbli ghall-appellant.

F'dan l-isfond jista' jinghad illi hemm zball fil-ligi? Il-Bord jidhirlhu illi ma jirrizultax illi l-Awtorita` ma haditx konjizzjoni ta' xi ligi rilevanti, jew naqset li tapplika ligi li hija rilevanti. Li jista' jigi argumentat huwa illi l-Awtorita` fehmet jew interpretat hazin il-ligijiet vigenti.

Issa huwa minnu illi l-ordinament guridiku Malti tassew jiddistingwi bejn applikazzjoni hazina tal-ligi minn interpretazzjoni hazina tal-ligi. Il-kaz klassiku

huwa dak ta’ l-istitut ta' ritrattazzjoni fil-Kap.12. F'dan il-kaz, avolja id-differenza tidher illi hi wahda semantika, ma jirrizultax li hemm zball fil-Ligi, imma jista' jkun li kien zball ta' ligi, cioe' zball fil-mod kif il-Ligijiet gew interpretati mill-Awtorita` u applikati ghall-kaz partikolari.

Ghalhekk din il-pregudizzjali tirrizulta wkoll fondata, u qeghda tigi milqugha mill-Bord.

Illegalita' Materjali Inkluza l-Irragjonevolezza jew in-Nuqqas ta' Proporzjonalita'.

Hawn ukoll l-Awtorita` tghid li l-appell ma jinkwadrax ruhu taht dan il-Kap, u ghalhekk l-appell huwa jew null jew insostenibbli.

Il-Bord studja bir-reqqa l-atti u l-argumenti migjuba, u inter alia innota illi il-Ligi ta' Malta, fl-artikolu 14(3) tal-Avviz Legali 66 tal-2003, meta qed titkellem fuq infrastruttura centralizzata fl-ajruport tghid dan:

> "(3) The person for whom the management of a centralised infrastructure has been reserved to subregulation (1) shall ensure that the management of that infrastructure is transparent, objective and non-discriminatory and, in particular, that it does not hinder the access of suppliers of groundhandling services or self-handling airport users within the limits provided for in these regulations."

Mid-dokumenti u atti formanti parti minn dan l-appell, hemm haga wahda li ma jista' jmeriha hadd. L-agir tal-Korporazzjoni Enemalta u l-management ta’ l-istess korporazzjoni tal-infrastruttura taghha qeghda twassal ghal talba ta' prezz ta' access li de facto qed jichad l-access ta’ l-appellant lejn din l-infrastruttura centralizzata.

Jekk ma jirrizultawx ragjunijiet validi u legali biex dan l-istat ta' fatt jkompli jissussisti, ikun hemm ksur

flagranti tal-ligi, u ksur flagranti tal-ligi zgur li jikkwalifika bhala illeglita' materjali.

Ghalhekk il-Bord jirravviza li l-appell interpost jista' certament jinkwadru ruhu taht dan il-kap, u ghalhekk filwaqt li din il-pregudizzjali qeghda tigi respinta, il-Bord huwa tal-fehma l-appell huwa wiehed validu u ammissibbli u li l-Bord ghandu issa jezamina l-appell fil-mertu tieghu.

Il-Mertu ta' l-Appell

L-ewwel element li jrid jigi investit issa jirrigwarda il-kompetenza settorjali ta' l-Awtorita` appellata. Din issottomettiet korrettement illi ir-regolatur kompetenti sabiex jissorvelja l-harsien tal-Groundhandling Regulations (A.L.66/2003) huwa d-Direttur tal-Avjazzjoni Civili. Izda dan ifisser illi ghalhekk l-Awtorita` hija ezawtorata f' dan il-kaz?

Fil-verita', il-kaz huwa wiehed xi ftit kumpless, u wiehed jista', anki jekk ma jaqbilx, jifhem il-pozizzjoni li hadet l-Awtorita`. Il-qofol tal-problema jinsab hawn. L-appellant rebah id-dritt li jkun fornitur tal-fuel ghall-ajruplani gewwa l-mitjar internazzjonali ta' Malta. Biex huwa jkun jista' jwettaq din l-attivita', huwa kien gie mill-bidu nett OBBLIGAT li juza l-infrastruttura centralizzata li tezisti. Din hija haga kompletament sensata, u hija mizura ghaqlija hafna. Izda din l-infrastruttura centralizzata, fil-kaz in ezami ma tieqafx gewwa l-konfini tal-mitjar. Hija infrastruttura li tibda minn ma' xatt il-bahar mnejn iz-zjut jinhattu mit-tankers, tkompli ghall-facilitajiet ta' hazna ta' l-istess likwidi, hekk appena kif jinhattu, umbaghad tinkludi wkoll is-sistema ta' trazmissjoni tal-istess zjut tramite il-pipes sabiex jidhol fil-bulk storage facilities gewwa l-mitjar. Minn dawn umbaghad ikun irid jitghabba gol-fuel tankers (li jistghu jkunu tal-kuntrattur u mhux ta' l-Enemalta) sabiex isir ir-refuelling tal-ajruplan.

Ghalhekk sabiex l-Appellant ikun jista' jaccedi ghall-infrastruttura tal-mitjar, dan qabel, irid ikun acceda ghall-infrastruttura imsemmija, li l-parti l-kbira taghha hija BARRA l-konfini tal-mitjar, u ghalhekk barra mill-kompetenza tad-Direttur tal-Avjazzjoni Civili.

L-artiklu 4 tal-Kap.423 jelenka fost il-funzjonijiet ta' l-Awtorita` dawn iz-zewg funzjonijiet li huma rilevanti ghall-kaz in ezami.

> (c) li tirregola u tizgura li jkun hemm interkonnessjoni ghall-produzzjoni, trasmissjoni u distribuzzjoni tas-servizzi jew tal-prodotti regolati minn jew taht dan l-Att;
>
> (d) li tizgura kompetizzjoni gusta f' kull prattika, operazzjoni u attivita bhal dik;

F'dan il-kaz tezisti sitwazzjoni fejn, b'ligi huwa ordnat illi irid ikun hemm il-kompetizzjoni fit-tqassim tal-fuel fil-mitjar. B'ligi huwa ordnat illi dan it-tqassim irid juzufruwixxi mis-sistema infrastrutturali centralizzata tal-mitjar. Din is-sistema centralizzat, b'ligi trid tigi amministrata b'mod li ma jfixkilx il-kompetizzjoni. Il-harsien ta' din il-ligi, in kwantu ghandu x'jaqsam mal-konfini tal-mitjar huwa taht ghajnejn id-Direttur tal-Avjazzjoni Civili. Izda jekk hemm xkiel li jintlahaq l-ghan tal-ligi, dwar fatturi ta' interkonnessjoni BARRA l-mitjar, kif inhu dan il-kaz, hemmhekk l-Awtorita` hija b'ligi obbligata li tidhol fil-kwistjoni u tirrisolviha.

Ghalhekk il-Bord ma jaccettax li hemm xi nuqqas ta' kompetenza settorjali f' dan ir-rigward, jew li l-Awtorita` trid iccedi xi mansjoni taghha lid-Direttur tal-Avjazzjoni Civili jew lill-Ufficcju dwar il-Kompetizzjoni. Din il-materja taqa' taht l-Awtorita`, u l-Awtorita` trid tholl din il-kobba, u trid thollha minghajr dewmien.

Issa l-Bord irid jigi ghall-qofol tal-kwistjoni. Din tirrigwarda il-prezz mitlub mill-Korporazzjoni

Enemalta. Dan huwa eccessiv u jikkostitwixxi entry barrier jew le? Hawnhekk il-Bord jinnota li l-pozizzjoni li hadet l-Awtorita` hija wahda ambivalenti. Fil-korp tad-decizjoni taghha, l-Awtorita` tat diversi ragjunijiet studjati sabiex tispjega kif ma setghet isib xejn hazin fil-mod li l-Korporazzjoni Enemalta iffissat il-prezz ta' $22.27/tunnellata metrika/xahar. Qalet illi l-Appellanti ma setghetx tipparaguna il-prezz ta' $2.00/tunnellata metrika/xahar li l-Korporazzjoni ticcita lill-haddiehor, ghaliex is-servizzi iccitati lill-haddiehor kienu talment differenti minn dawk mitluba mill-appellant, illi l-ebda paragun ma kien ser iriegi. Li kieku l-Awtorita` waqfet hemm, wiehed seta' ma jaqbilx, imma ghall-inqas kien jifhem. Izda fil-konkluzjoni taghha l-Awtorita` qalet illi partijiet kellhom ikomplu jinnegozjaw, u jekk in-negozjati ma jirnexxux, l-Awtorita` stiednet lill-partijiet jaghtuha mandat biex tiffissa struttura hi stess.

Hawn il-Bord huwa perpless. Jekk l-Awtorita` deherilha li ma hemm xejn hazin fil-prezz kwotat, li dan ma kienx diskriminatorju, li dan kien cost based, li dan ma kienx entry barrier, il-ghala talbet lill-partijiet ikomplu jinnegozjaw? Il-logika kienet trid li l-Awtorita` tghid lill-appellant sempliciment li dak huwa l-prezz, u jekk joghgbu, jaccetta, u jekk ma joghgbux, jibqa' kif inhu.

Izda il-perplessita' tizdied meta fl-ahhar nett, l-Awtorita` tistieden lill-partijiet sabiex, fil-kaz li ma jiftiehmux, dawn jaghtuha, jekk iridu, mandat "to establish such a charge". Hawn wiehed jerga jistaqsi lilu nnifsu li jekk skond l-Awtorita` il-prezz kwotat mill-Korporazzjoni Enemalta kien wiehed ammissibbli, il-ghala l-Awtorita` kellha tistaqsi jekk il-partijiet iriduhix tiffissa l-prezz hi ? Dan jaghmel sens biss, jekk fil-fatt, fi hdan l-Awtorita` kien hemm xi kurrent ta' opinjoni li jista' jkun hemm xi haga hazina fil-prezz kwotat. Il-bqija, id-decizjoni ma taghmilx sens.

Naturalment dan il-Bord ma tantx ser jaghti spalla ghal decizjonijiet li prima facie ma jaghmlux sens, u ghalhekk issa ser jasal ghall-konkluzjoni li tmiss.

Il-Bord innota illi l-Korporazzjoni Enemalta kienet qeghda taghti prezz ta' $3.00/tunnellata metrika/xahar, ghall-hazna, kif ukoll pumping in and pumping out. Tassew illi l-appellant ried dan is-servizz, u ried ukoll il-hazna gewwa l-mitjar u l-facilitajiet "into plane". Izda il-Bord ma jista' QATT jaccetta li dawn il-facilitajiet addizzjonali - kienu x'kienu- kellhom jimmolteplikaw il-prezz b'fattur ta' kwazi ghaxar darbiet ghal $22.27/tunnellata metrika/xahar.

Minn ezami tal-korrispondenza skambjata bejn l-appellant u l-Korporazzjoni Enemalta, ma jidhirx illi kien hemm tentattiv serju mill-Enemalta biex jaghtu spjegazzjonijiet attendibbli li jiggustifikaw dan il-prezz, u dan il-Bord jirravviza li huwa possibbli li il-korporazzjoni kienet qeghda tassew tghaddi il-madmad ta' certa inefficjenza u "over manning" ghal fuq l-appellant.

Il-Bord josserva illi hemm numru ta' fatturi illi fil-fehma kkunsidrata tieghu, jirrendu il-prezz mitlub mill-Korporazzjoni Enemalta bhal wiehed inattendibbli. Il-fatturi huma dawn.

Minkejja l-fatt illi il-prezz kien allegatament ibbazat fuq l-ispejjez inkorsi mill-korporazzjoni, huwa assjomatiku illi meta wiehed qed jikkonsidra l-ispejjez inkorsi minn settur partikolari, wiehed ma jistax jinjora il-konsiderazzjonijiet tas-suq hieles. Minghajr tali konsiderazzjoni, jezisti il-periklu ovvju illi dan il-"cost based pricing" jassorbi l-inefficjenzi li tkun qed iggorr dik l-industrija partikolari. Kemm l-Appellant fl-ezercizzju li ghamel u anki l-istess Awtorita` irriskontraw l-ezistenza ta' ghadd ta' inefficjenzi fl-operat tal-korporazzjoni. Dawn huma inefficjenzi li jehtiegu tibdil fl-istrutturi u prattiki ta' xoghol adoperati s'issa. Il-Korporazzjoni m'ghandha

l-ebda dritt li tghabbi il-kompetituri taghha, bi prezz li jgorr l-inefficjenzi taghha stess.

Waqt li tassew il-prezz internazzjonalment accettat ta' $2.00/tunnellata metrika/xahar ma jistax a priori jigi impost fuq il-korporazzjoni, jidher car illi fil-fatt il-korporazzjoni qeghda izomm dan il-prezz diga, fir-rigward ta' certi klienti taghha.

Irid ghalhekk jigi ezaminat jekk il-korporazzjoni tatx spjegazzjoni serja biex tispjega illi l-prezz li trid taghti lill-appellant huwa ta' $22.27, kwazi ghaxar darbiet izjed. Fil-fatt ir-ragjuni moghtija, tant hi superficjali (kif ser jigi spjegat) illi hija prima facie inaccettabbli.

Il-korporazzjoni sostniet illi is-servizzi li ghalihom hi izzomm prezz ta' $2.00 (piu $1.00 ghall-pumping u pumping out) huma sempliciment servizzi ta' hatt, hazna u tghabija. Filwaqt li l-appellanti iridu"receipt" - allura fil-kaz tal-klienti l-ohrajn ma jkunx hemm dan ir-"receipt"? Dan ifisser l-ilqugh taz-zjut. Dan certament isir ukoll mal-klienti l-ohrajn. L-appellanti irid "storage". Dan ukoll huwa servizz in komuni mal-klienti l-ohrajn. L-istess jinghad ghall-"loading" u l-istess ukoll ghall-"discharge". Umbaghad inghad illi l-appellant ried ukoll servizzi ta' testing and filtration". Mid-dehra, dan huwa l-uniku servizz mitlub mill-appellant, li mhux normalment mitlub mill-klienti l-ohrajn. Huwa prima facie inaccettabli li dan is-servizz ta' testing and filtration WAHDU qed jimmolteplika il-prezz "normali" b'fattur ta' kwazi ghaxar darbiet.

Huwa ta' meravilja illi l-Awtorita` ma sabet xejn x'tissindaka f' argument puerili bhala dan.

Imma it-tieni argument tal-korporazzjoni huwa iktar sorprendenti, u l-Awtorita` accettatu minghajr ma hasbitha darbtejn. Il-korporazzjoni qeghda tghid illi is-servizz moghti lil terzi huwa iktar irhis ghaliex jinghata ghall-perijodi qosra, filwaqt li l-Appellant irid

is-servizz fuq medda ta' zmien itwal. Dan l-argument jisfida kull realta' ekonomika accettata. Huwa maghruf illi meta servizz jinghata fuq medda ta' zmien twil, il-prezz tieghu jonqos MHUX jizdied. Dan minhabba l-"economies of scale". Dan jinsab f'kull settur ekonomiku li wiehed jista' jimmagina. Jekk tikri karozza ghal zmien twil, ir-renta tkun inqas. Jekk toqghod f' lukanda ghal zmien twil, il-prezz jonqos. L-ezempji huma kwazi bla tmiem.

Argument iehor ta' l-Awtorita` huwa li la darba il-prezz tal-korporazzjoni huwa "cost based", mela allura, dan ma jista' qatt ikun ingust. Dan ukoll huwa argument li jisfida is-sewwa maghruf. Meta prezz li jkun "cost based" jew jahbi inefficjenzi, jew inkella jinkorpora aspettattiva ta' profitti mhux gustifikati, dan jista' facilment hafna ikun ingust, u jipprezenta ostakolu biex kompetitur jidhol jikkompeti.

L-appellant ghandu ragjun jghid illi d-decizjoni ta' l-Awtorita` kellha tidhol b'mod ferm iktar profond fil-metodologija tal-"costing" applikat mill-korporazzjoni. Dan l-analizi profond li wiehed kien jistenna mill-Awtorita` ma jinsab imkien. Minflok, wiehed isib illi l-Awtorita` accettat kwazi minghajr riserva, l-argumenti superficjali tal-korporazzjoni, li konvenjentement ghall-istess korporazzjoni, huma argumenti immirati biex johonqu kull possibilita' ta' kompetizzjoni. Dan kien ser jigri billi il-kompetizzjoni tigi obbligata li thallas tal-inefficjenzi tal-korporazzjoni li jkunu qeghdin jikkompetu maghha.

Illi, wara li jsir fid-dettal 1 **'Analysis of the cost-based and pricing structure of the Aviation Fuel Operations'** ta' l-Enemalta waqt li tuza:

- Kull informazzjoni statistika ezistenti iggenerata mill- 'management information system' ta' l-Enemalta,
- 'Consolidated audited financial statements' ibbazati fuq 'International Accounting Standards',

- Analizi fid-dettal tal 'Key Aviation Fuel Activities' tal Enemalta,
- 'An Assessment of the cost base including the segregation of costs by activity (Importation and Delivery [storage] services against Airside services)'
- 'An Assessment of Enemalta's Expected Return on Capital Invested' ghal kull attivita taghha,
- Struttura tal prezzijiet (a pricing structure) ibbazata fuq 'cost plus a fair return on capital employed (ROCE)' u
- Revizjoni shiha tal-istruttura prezenti tal-prezzijiet (current pricing structure) tal 'aviation fuel' filwaqt li tiehu in konsiderazzjoni xi charges jew prezzijiet ohra kif ikun mehtieg f' dan ir rigward.

Imbaghad biss l-Awtorita` tkun f' qaghda li tistabbilixxi li ***prezz gust u kompetitiv*** qieghed fil-verita' jigi ikkwotat u li fl-ahhar mill-ahhar l-'Aviation Fuel Market' tista tigi illiberalizzata kif suppost u fil-veru sens tal-kelma, kif trid il-Ligi.

Konkluzjoni

Il-Bord ghalhekk isib illi il-prezz kwotat mill-Enemalta huwa PRIMA FACIE eccessiv, abuziv u jikkostitwixxi "entry barrier" ghall-appellant, u meta l-Awtorita` ippermettietu, din naqset mid-doveri taghha taht l-artikolu 4 biex TIZGURA l-interkonnessjoni tas-servizzi kif ukoll illi TIZGURA il-kompetizzjoni gusta.

Il-Bord jaqbel mas-sottomissjonijet ta' l-appellant fl-interpretazzjoni tieghu dwar x'inhuma "essential facilities", jaqbel fuq il-kwistjoni ta' pozizzjoni ta' dominanza fis-suq fir-rigward tal-Korporazzjoni Enemalta, u jaqbel ukoll illi PRIMA FACIE, l-agir s'issa tal-istess Korporazzjoni huwa "a constructive refusal to grant access".

Dan kollu ghalhekk jikkostitwixxi illegalita' materjali, kif ukoll nuqqas ta' ragjonevolezza u ta' proporzjonalita' fid-decizjoni ta' l-Awtorita`.

Dawn l-inefficjenzi m'humhiex immaginati, ghax kien il-Ministru responsabbli ghas-settur li kien kwotat fl-istampa li qal li f' certi kazijiet il-korporazzjoni kienet qeghda thaddem 14 il-haddiem meta kellha bzonn biss erbgha. Huwa evidenti illi l-Awtorita` ma wettqet ebda ezami finanzjarju analitku sabiex tistabilixxi x'inhuma l-ispejjez veri tal-korporazzjoni fis-settur rilevanti, wara li jittiehed kont ta' kif is-settur ghandu jithaddem b'rata ta' efficjenza internazzjonalment rikonoxxuta.

Meta settur irid jinfetah ghall-kompetizzjoni, u jkun irid ikun hemm "sharing" tal-infrastruttura ezistenti, wiehed dejjem ser isib li hemm intrapriza "incumbent" li ser tkun b'sahhitha, dominanti u vertikalment integrata. Jekk ma jkunx hemm **vertical and horizontal separation of accounts,** wiehed m'hu ser jasal qatt ghall-struttura ta' prezzijiet kompetittivi u gusti. Biex ikun hemm criterji li jkunu "relevant, objective, transparent and non discriminatory" fil-kalkolu tal-prezzijiet ghall-access ta' infrastruttura, irid ikun hemm separazzjoni ta' kontijiet tal-intrapriza dominanti bhal ma hi l-Korporazzjoni Enemalta f' dan il-kaz, sabiex jittiehed kont BISS ta' dak li hu strettament rilevanti ghas-servizz mitlub. Dan l-ezercizzju irid isir in konformita' **ma' l-international accounting standards** li jintuzaw meta jkunu qeghdin jigu ppreparati il-kontijiet socjali konsolidati tal-korporazzjoni. Dan ma giex adoperat fil-kaz in ezami. Kull ma sar kien "cost build down" nieqes xi spejjez mhux direttament relatati ma' lavjazzjoni.

Il-Korporazzjoni bhal issa tigbor taht umbrella wahda is-servizzi taghha kollha u l-prezzijiet li tistaqsi huma ibbazati fuq il-kwantum tal-'fuel' kkonsmat.

L-Enemalta trid tkun lesta li tikkonsidra u tifformula struttura gdida tal-prezzijiet kollha taghha fejn l-ezercizzju jirrikjedi li tissepara d-diversi attivitajiet tal-Korporazzjoni innifisha. Dan l-istess ezercizzju irid jezamina l-istruttura prezenti tal-ispejjez kollha ezistenti sabiex il-prezzijiet li l-Enemalta bi hsiebha titlob ghal 'Importation and Delivery Services' ikunu separati minn dawk ghal 'Airside Services'.

Bis-sahha t'hekk il-Korporazzjoni tkun qed tizgura li dawn il-punti segwenti jkunu qed jigu milqugha:

- Biex tkopri il 'variable procurement costs' taghha,
- Biex tkopri il-bicca l-kbira tal-'operating costs' [u tizgura li (1) kull inefficjenzi interni ma' jghaddux dritt ghand il-konsumatur, (2) tiehu in konsiderazzjoni l-infrastruttura ridotta hekk kif inhi mitluba mill-appellanti u (3) tinkludi "charge" addizzjonali ghal 'filtrations' u ghall-uzu tal-'loading gantry' hekk kif mitlub mill-appellant],
- Biex taqla a 'fair return on capital employed', u
- Biex il-prezz ikun jipparaguna mal-prezzijiet internazzjonali.

Ghal dawn il-motivi il-Bord, filwaqt li jilqa' l-appell interpost mill-appellanti, qed jannulla id-decizjoni ta' l-Awtorita`, u fid-dawl tar-rizultanzi imsemmija, senjatament illi il-prezz kwotat mill-Korporazzjoni Enemalta huwa "a constructive refusal to grant access" billi huwa prima facie eccessiv u diskriminatorju, jew inkella qed jghaddi inefficjenzi tal-Korporazzjoni ingustament fuq l-appellanti, JIDDERIEGI lill-Awtorita` ta' Malta Dwar ir-Rizorsi, sabiex, minnufih tordna lill-Korporazzjoni Enemalta sabiex, mhux iktar tard minn xahar mil-lum, din tipprezenta "segregated accounts" li juru x'inhuma l-ispejjez veri konnessi ma' linfrastruttura in kwistjoni, tikkompara dawn l-ispejjez ma operazzjonijiet simili f' pajjizi ohrajn, partikolarment pajjizi zghar, fejn mhux dejjem l-economies of scale ikunu favorevoli daqs dawk ta' pajjizi kbar, tordna li fl-istess zmien il-

> Korporazzjoni Enemalta taghti kull gustifikazzjoni dettaljata dwar il-prezz minnha s'issa mitlub, u tidderiegi lill-istess Awtorita` li mhux iktar tard minn tliet xhur mil-lum, tistabilixxi il-prezz gust ta' din l-operazzjoni, u taghti ragjunijiet dettaljati lill-partijiet li jispjegaw id-decizjoni taghha.
>
> Imbaghad wara li tkun hadet kont ta' din l-informazzjoni hekk migbura, tasal biex hi stess, jew xi entita' ohra kompetenti fil-qasam finanzjarju/ekonomiku ghan-nom taghha, twettaq fi zmien tliet xhur wara li tkun ingabret l-informazzjoni imsemmijja, l-imsemmi l-**Analysis of the cost-based and pricing structure of the Aviation Fuel Operations** u tistabilixxi il-prezz gust ghas-servizzi mitlubin mill-Appellant sabiex dan ikun jista' jibda' jopera bhala it-tieni operator fit-tqassim tal-fuel ghall-avjazzjoni fl-Ajruport Internazzjonali ta' Malta.**"**

L-aggravji ta' l-Awtorita` intimata, bl-appell taghha introdott minn din is-sentenza huma koncizament suddivizi kif gej:-

(1) Il-Bord agixxa *ultra vires* meta ddecieda li kellu l-poter jintrattjeni t-talba tas-socjeta` Attard Services Limited *nomine* ghal modifikazzjoni tad-decizjoni ta' l-istess Awotrita` moghtija fid-9 ta' Gunju 2005. B' dan il-motiv l-Awtorita` trid taghti sostenn lill-eccezzjoni taghha ventilata quddiem il-Bord illi l-appell quddiemu mill-kumpanija msemmija kellu jitqies irritu u null in kwantu mhux konformi ghad-dispost ta' l-Artikolu 33 (4) ta' l-Att XXV ta' l-2000 (Kapitolu 423);

(2) Fil-mertu, ma kienx hemm raguni biex il-Bord iqis id-decizjoni taghha bhala wahda mibnija fuq xi illegalita` materjali, irragjonevoli jew sproporzjonata. Hi tikkontendi illi la pprovat tahrab mir-responsabilitajiet taghha u lanqas applikat hazin il-kriterji li ghab-bazi taghhom iddeterminat jekk sehhetx diskriminazzjoni jew le. Tissokta tamplifika illi r-rwol taghha hu cirkoskritt ghal dawk il-funzjonijiet u attribuzzjonijiet moghtija lilha mil-ligi,

u jekk talvolta seta' jirrizulta abbuz tal-kondizzjonijiet necessarji sabiex jigi zgurat li jkun hemm access ghas-suq tal-kompetittivita`, tali kompitu kien jispetta lill-Ufficcju tal-Kompetizzjoni Gusta u mhux lilha;

Fit-twegiba taghha s-socjeta` appellata tindirizza ruhha fuq l-obbjezzjonijiet sollevati b' dan il-mod:-

(i) L-appell mhux ammissibbli ghaliex ma jikkontjenix dak il-"punt ta' ligi" ghal liema l-Artikolu 35 ta' l-Att imsemmi jaghti dritt ta' appell minn sentenzi tal-Bord. Dan b' eccezzjoni ta' l-ewwel aggravju sottomess;

(ii) Anke hawn, pero`, lanqas jista' jigi pretiz illi l-kaz kollu ghandu jaqa' sempliciment ghaliex flok il-verb "jannulla" skond l-Artikolu 33 (4), intuza l-kliem "ivarja u jimmodifika d-decizjoni appellata billi jilqa' t-talbiet ta' l-esponenti". F' dan il-kuntest il-kumpanija appellata tirrikorri ghal dik il-gurisprudenza li kkommentat fuq ir-rigur tal-formalizmu esagerat fl-atti;

(iii) Il-Qorti ma ghandhiex fuq is-sustanza tad-decizjoni tissostitwixxi l-gudizzju tal-Bord fuq materja purament teknika-fattwali. B' dan hi riedet tfisser li l-kwestjonijiet imqanqla mill-Awtorita` appellanti huma intizi biex jiccensuraw id-diskrezzjoni gudizzjali tal-Bord u xejn izjed;

(iv) Fuq kollox, l-istess Awtorita` appellanti m' ghandhiex ragun fis-sottomissjonijiet taghha, anke ghal dawk li huma l-veri funzjonijiet taghha;

Premessi l-aggravji kostitwiti bl-appell u r-risposta ghalihom, din il-Qorti hi ta' l-opinjoni, kemm ghal limitazzjoni mposta bl-Artikolu 35 tal-ligi specjali ghall-aditu ta' l-appell, kemm ghall-importanza tal-punt guridiku sollevat, illi l-punt li jimmerita l-aktar attenzjoni hu dak devolut bl-ewwel aggravju;

Mill-korp tas-sentenza l-Bord jidher li nvesta dan il-punt taht dan il-profil ta’ hsieb:-

(1) L-eccezzjoni tan-nullita` tqajmet fi stadju ferm inoltrat tal-proceduri, izda la ghad m’ hemmx regolamenti li jirregolaw il-proceduri quddiem il-Bord ma jidhirlux li seta’ jiskarta l-punt imqanqal anke jekk sottomess tardivament;

(2) Il-fatt li ntalbet mis-socjeta` il-varjazzjoni tad-decizjoni ta’ l-Awtorita` mhux xi dnub fatali, anke ghaliex hu jifhem x’ kien il-veru oggett tat-talba;

Il-Qorti hi tal-fehma li ghandha, opportunatament, issegwi l-istess *iter* argomentattiv maghmul mill-Bord u taghmel l-osservazzjonijiet taghha fir-rigward;

Ibda biex, il-fatt li ghad m’ hemmx regolamenti *ad hoc* ma kellux, fil-hsieb tal-Qorti, jipprekludi lill-Bord milli jikkonsegwi l-principji procedurali generali traccjati fil-Kodici ta' Organizzazzjoni u Procedura Civili u dawk tar-regoli dottrinali fuq ir-ritwal tal-procedimenti. Hekk min jinsab imsejjah biex jiggudika u jkollu jezamina eccezzjoni bhal dik imqanqla tan-nullita ta’ att procedurali quddiemu, kellu, qabel kollox, jassikura li dik id-deduzzjoni mill-parti li tqajjem l-eccezzjoni tkun saret tempestivament b’ opposizzjoni *in limine litis.* Dan ghar-raguni li eccezzjoni konsimili versanti fuq il-gudizzju kienet wahda ta’ indoli dilatorja u, allura, skond l-Artikolu 728 (1) tal-Kapitolu 12, messha tqajmet fil-bidu tal-proceduri u flimkien mar-risposta. F’ dan il-kaz, kif ikkonstatat mill-Bord innifsu il-*limen litis* kien diga` sew superat ghax kienet gja bdet it-trattazzjoni u l-appell quddiemu kien jinsab fi stadju sew inoltrat. La ma sarx hekk, dik l-istess nullita` sollevata tibqa’ sanata ghax ikun ifisser li l-parti li qajmitha tkun, implicitament, irrinunzjat ghaliha. Ara “**Madalena Mifsud *et* -vs- Maria Giuseppa Morana *et***”, Appell Civili, 17 ta’ Mejju 1943;

Akkopjat ma' dan hemm id-dispost ta' l-Artikolu 789 ta' l-istess Kapitolu 12 kemm jekk in-nullita` pretiza hi inkwadrabbli taht l-inciz (c) kemm jekk taht l-inciz (d) tas-subartikolu 1 tieghu. Taht l-ewwel prospettazzjoni, l-eccezzjoni ta' nullita` ta' att gudizzjarju minhabba vjolazzjoni tal-formalita` mil-ligi preskritti ma tistax tinghata meta l-parti li taghtiha tkun baqghet taghmel jew, ghad li tkun taf biha, tkun halliet li jsiru atti ohra minghajr ma teccepixxi dik in-nullita`. Ara "**Maria Tabone -vs- Charles Welsh**", Prim' Awla, 26 ta' Jannar 1925, "**Saverio Sciortino *et* -vs- Carmelo Micallef**", Prim' Awla, 5 ta' Gunju 1959 u "**Frank Fenech *nomine* -vs- Boris Arcidiacono *et***", Appell, 30 ta' Marzu 2001. Ankorke in-nullita`, opposta hi raffigurabbli taht is-subinciz (d) - bazi din ferm dubbjuza gjaladarba r-rikors ta' l-appell tas-socjeta` appellata mhux nieqes minn xi partikolarita` essenzjali, gjaladarba l-oggett tat-talba hu sew maghruf anke kieku stess intalbet varjazzjoni u mhux ukoll dak tal-kliem espress fl-Artikolu 33 (4) ta' l-Att - din l-istess nullita` ma gabet ebda pregudizzju lill-Awtorita` "*di conoscere alla semplice lettura dell' atto (*citazzjoni f' dan il-kaz*) cio che si domanda, perche egli possa o ammettere o preparsi ad una giusta difesa*" ("**Francesco Callus *et* -vs- Spiridione Baldacchino**", Appell Civili, 5 ta' Dicembru 1921). F' kull kaz, ankorke seta' kien hemm dak id-difett fl-oggett tat-talba, l-istess ligi procedurali ghal kawzi sagramentali tahseb bl-Artikolu 143(5) ghall-ordni ta' nota addizzjonali korrettorja u/jew ghall-korrezzjoni ta' l-att fit-termini ta' l-Artikolu 175 tal-Kapitolu 12. Ara f' sens konformi s-sentenza tal-Qorti Kostituzzjonali fl-ismijiet "**Avukat Dr. Lawrence Pullicino -vs- Kap Kmandant tal-Forzi Armati bhala Kapitolu tal-Korp tal-Pulizija *et***", 19 ta' Ottubru, 1988;

Dan kollu qed jigi rilevat u enfasizzat mill-Qorti biex turi illi la n-nullita` giet mill-Awtorita` denuncjata mhux fl-istadju bikri ta' l-appell, il-Bord ma kellux, ghar-ragunijiet esposti, jokkupa ruhu minnha u kellu, anzi, jghaddi biex jichadha ghal fatt li ma kienetx ritwalment proposta;

Issa avolja li l-Bord ma ghamelx dan, u, avolja wkoll, id-dizzjoni espressa mis-socjeta` appellata fir-rikors ta' l-appell taghha lil Bord setghet kienet aktar regolari, ghandu, b' danakollu, jirrizulta mill-istess oggett tat-talba x' kienet il-vera intenzjoni tal-parti li pproponiet l-appell. Il-ligi ma tahseb ghall-ebda mudell processwali specifiku ghal kif ghandu jkun ifformulat l-att izda, b' daqshekk, ma jistax jinghad li l-att ta' l-appell mis-socjeta`, formulat b' dak il-mod, kien inidoneju biex jilhaq l-iskop volut minn norma tal-ligi, ex-Artikolu 33(4) ta' l-Att. Dak, cjoe, li jgib fix-xejn id-decizjoni ta' l-Awtorita` in meritu ghall-vertenza. Anke jekk mhux necessarjament identici ghal fattispeci konkreti tal-kaz ezaminat, jistghu jigu kkonsultati s-sentenzi fl-ismijiet "**Salvatore Bilocca -vs- Salvatore Schembri**", Appell Civili, 11 ta' Ottubru 1920 u "**Carmelo Bonavia -vs- Alfredo Denicola *et***", Appell Kummercjali, 20 ta' Gunju 1930. Kemm f' dawn, kif ukoll f' bosta ohrajn li segwewhom, kien ilu jinhass il-bzonn li jigi mitigat ir-rigur tal-formalizzjoni li, kif ikkwalifikat mill-Onor. Imhallef Dottor Paolo Vella, hu "*l-antico sistema delle formule solenni che ora è abbandonato come sistema prorpio dell' infanzia del diritto"* ("**Xuereb *utrinque***", Qorti tal-Kummerc, 2 ta' Jannar 1883). Mhux ta' b' xejn li nhasset il-htiega li jigi ulterjorment ikkummentat illi "b'wisq aktar raguni nistghu nghidu hekk illum meta l-ligi u l-qorti aktar mil-legalizmu u formalizmu thares lejn dak li hu skond il-haqq u s-sewwa, lejn il-gustizzja sostanzjali, xi drabi wkoll, fejn jinhtieg, moderata mill-principju ta' l-ekwita`, li wisq tajjeb giet imfissra bhala '*la giustizia del dato caso*'." ("**Salvatore Tonna -vs- Carmelo Chetcuti *et***", Appell Kummercjali, 16 ta' Novembru 1934). Maggorment, illum, anke wara l-emendi ta' l-1995 ghal-Kodici ta' Organizzazzjoni u Procedura Civili, dan il-kliem jibqa' attwali u, spiss drabi, jkollu jigi mfakkar. L-aggravju procedurali anke jekk *pro tanto* ammissibbli qieghed ghal motivi kollha suespressi, jigi respint;

Fil-kaz tat-tieni aggravju, jkollu jinghad bi qbil mas-socjeta` appellata illi din il-Qorti ma tirravvizax fih dak il-"punt ta' dritt" dwar liema l-ligi ritwalment takkorda d-dritt ta' l-appell skond l-Artikolu 35 ta' l-Att. Fil-kumpless, u

oggettivament, l-argomenti dedotti mill-Awtorita` appellanti ma jistghux hlief jitqiesu censuri ta' dik il-valutazzjoni diskrezzjoniali li ghamel il-Bord tal-provi u tal-fatti li kellu quddiemu. Mill-att tas-sentenza appellata l-Bord, oltre li elenka x' kienu l-funzjonijiet ta' l-Awtorita` skond il-ligi, ghadda biex jaghmel l-accertament tieghu tal-fatti u ta' l-aspetti teknici involuti, ivvaluta dawn l-istess elementi, u skond il-principju tal-prudenzjali u liberu konvinciment tieghu iddetermina, in bazi ghar-regoli tal-kompetizzjoni gusta, illi l-prezz prefiss mill-Korporazzjoni Enemalta kien jaghmilha difficli ghas-socjeta` appellata illi jkollha dik l-accessibilita` adegwata u uzu ragonevoli ta' l-infrastuttura fl-Ajruport ghall-iskop tal-operazzjonijiet taghha. Huwa wkoll minn din l-ottika li l-Bord jikkritika r-rizultat decizjonali ta' l-Awtorita` appellata. Fil-fehma konsiderata ta' din il-Qorti huma dawn l-elementi li fuqhom il-Bord iffonda r-*ratio* decidendi tieghu. Elementi dawn purament teknici-fattwali li ma kienu jinvolvu ebda enuncjazzjoni skorretta tal-principji tal-ligi dwarhom. Fic-cirkostanzi, din il-Qorti ma tistax tirrevedi l-valutazzjoni hekk maghmula ghax il-ligi ma tikkonsentilix li tissindika dak l-ezercizzju tal-Bord fuq dik il-bazi ghal fatt li issa l-Awtorita` appellanti ghogobha tikkontrapponi ghaliha r-ri-elaborazzjoni personali taghha. Biex proprju jinghad kollox, imbaghad, din il-Qorti lanqas ma tara illi l-Bord wasal ghal gudizzju tieghu permezz ta' process vizzjat tar-ragonament legali in materja ghal dawk li huma l-funzjonijiet ta' l-Awtorita` fit-termini ta' l-Artikolu 4 ta' l-Att. Anke allura dan l-aggravju qed jigi michud.

Ghal dawn il-motivi din il-Qorti qed tirrespingi l-appell ta' l-Awtorita` u tikkonferma d-decizjoni tal-Bord ta' l-Appelli dwar ir-Rizorsi moghtija fil-21 ta' Frar, 2007. L-ispejjez ta' dan l-appell jitbatew mill-istess Awtorita` appellanti.

< Sentenza Finali >

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