

Brincat Anna at Parlament-MT

From: Caruana Joseph F at MEEE
Sent: Friday, 13 January 2023 00:59
To: Brincat Anna at Parlament-MT
Cc: Buttigieg Dennis at MEEE
Subject: FW: Re: Dokument mitlub mill-Kumitat Permanenti dwar il-Kontijiet Pubbliċi
Attachments: Enemalta - Memorandum re. SSA (April 2017) (002).pdf

Is-Sra Anna Brincat
Kumitat Permanenti dwar il-Kontijiet Pubbliċi

Il-Ministeru tiegħi ma kellux kopja tal-parir in kwistjoni iżda irnexxilna ngibu kopja mingħand s-Sur Ronald Mizzi li dak iż-żmien kien Segretarju Permanenti fil-Ministeru għall-Energija. Qed nehmeż m'hawn id-dokument in kwistjoni.

Thanks and regards

Joe

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MINISTRY FOR ENVIRONMENT,
ENERGY AND ENTERPRISE

6, QORMI ROAD, ST VENERA, MALTA

From: Brincat Anna at Parlament-MT <anna.brincat@parlament.mt>
Sent: 09 December 2022 11:05 AM
To: Caruana Joseph F at MEEE <joseph.f.caruana@gov.mt>
Cc: Darren Carabott <carabottdarren@gmail.com>
Subject: Re: Dokument mitlub mill-Kumitat Permanenti dwar il-Kontijiet Pubbliċi

Is-Sur Joseph Caruana
Segretarju Permanenti fil-Ministeru għall-Ambjent, l-Energija u l-Intrapriża

Nirriferti għal-laqgħa tal-Kumitat Permanenti dwar il-Kontijiet Pubbliċi, li saret fid-29 ta' Novembru 2022, li fiha l-Ministeru għall-Ambjent, l-Energija u l-Intrapriża gie mitlub jgħaddi lill-Kumitat kopja tal-parir li kien ingħata lill-Gvern Malti minn Clifford Chance Law Firm, dwar għalfejn il-ftehim datat 14 ta' April 2015 li kien sar bejn il-Gvern ta' Malta u l-Istate Oil Company of Azerbaijan Republic (SOCAR) dwar l-LNG Security of Supply ma kienx jinvolvi state aid.

Filwaqt lil niringrazzjak nibgħat inselli għalik.

Anna Brincat
Clerk for Public Accounts Committee
Environment and Development Planning Committee



National Audit Office Accounts Committee

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HOUSE OF REPRESENTATIVES
PARLIAMENT OF MALTA
FREEDOM SQUARE, VALLETTA, MALTA

Memorandum

TO	Ronald Mizzi Permanent Secretary (Energy&Projects) Office of the Prime Minister	DATE	13 April 2017
COPY TO		FILE REF	
FROM	CC Team	DIRECT DIAL	+33 14405 5244

Enemalta – Analysis of the LNG Security of Supply Agreement with respect to State aid regulations in relation to the Project

1. You have drawn our attention to the document referred to as the LNG Security of Supply Agreement (the "**LNG SSA**"), which is an agreement entered into by and between the Government of Malta (the "**Government**") and Socar Trading S.A. ("**STSA**").

You asked us to confirm whether the LNG SSA contains any element of State aid to be taken into account in the context of the Malta Delimara gas and power energy project (the "**Project**"), which is being built by Electrogas Malta ("**EGM**") to supply gas and electricity to Enemalta, and for the performance of which EGM entered into a long term LNG sale and purchase agreement with STSA (the "**LNG SPA**").

2. For that purpose, we have reviewed the executed version of the LNG SSA entered into by the Government and STSA on 14 April 2015. The LNG SSA is governed by Maltese law.

The purpose of the LNG SSA is expressly for the Government to secure an obligation by STSA to continue supplying LNG to EGM's plant in the event of circumstances that would otherwise allow STSA to cease doing so.

In substance, the LNG SSA provides that, in events where STSA may, in accordance with the provisions of the LNG SPA, suspend the LNG deliveries under the LNG SPA or terminate the LNG SPA, (i) STSA must give notice of it to the Government, (ii) the Government then may take over EGM's obligations under the LNG SPA or designate another person to do so, and (iii) if the Government decides to

act this way, STSA must terminate the LNG SPA with EGM and enter into a new LNG SPA with the Government or the person it designated.

The LNG SSA also provides that the Government has to pay the amounts outstanding due to STSA under the LNG SPA if the Government wishes STSA's obligations under the LNG SPA to be performed. Such payment is a prerequisite before the Government possibly takes over EGM's obligations under the LNG SPA.

The question you raise is whether this contractual scheme could be viewed as a State aid measure.

3. The fundamental point to assess in the present circumstances is whether the Government is legally bound or not to support EGM's purchase obligations.

In this regard, Camilleri Preziosi, the law firm acting as the Government's legal counsel in relation to Maltese law, has reviewed the LNG SSA and confirmed that the LNG SSA does not, in accordance with Maltese law, contain any binding obligation on the part of the Government to guarantee the payments due to STSA under the LNG SPA.

Indeed, a clause of the LNG SSA excludes the possibility for STSA to make any legal recourse, and in particular to take any enforcement action, against the Government if the latter decides not to pay the outstanding amounts. Should the Government not fulfill its financial "commitment", it would therefore be of no consequence for them.

Under Maltese law, the Government hence remains free to opt not to settle the outstanding amounts and the provisions regarding the Government's financial commitment are in fact equivalent to an option exercisable by the Government in the event that it would wish to take over EGM's obligations under the LNG SPA and execute a new LNG SPA, and hence non-binding.

4. As a result, in the absence of a binding obligation on the part of the Government, we are of the view that the LNG SSA does not constitute a State aid measure under European State aid regulations, because the transfer of State resources criterion is not met.

Indeed, pursuant to the notice of the European Commission on the notion of State aid, the fulfilment of the transfer of State resources criterion implies the "*creation of a concrete risk of imposing an additional burden on the State in the future, by a*

guarantee or by a contractual offer" and the "*commitment*" of the State must be "*firm and concrete*"¹ (we underline).

Likewise, pursuant to the notice of the European Commission on State guarantees, a guarantee can be considered as a State aid measure only if "*the risk associated with the guarantee is carried by the State*"², which will be the case only if the risk is "*concrete*".

The European Court of Justice also explicitly considered that only advantages granted through "*a reduction of the State budget or a sufficiently concrete economic risk of burdens on that budget*"³ (we underline) can be considered as State aid measures.

The above excerpts of the European Commission notices, as well as the existing EU case law, can be construed as meaning that for there to be a transfer of State resources, the State must have made some kind of binding commitment to transfer its resources, even though resources are not transferred in the end.

5. As regards the LNG SSA where this binding commitment criterion is not met for the reasons explained above, the issue of the presence of State aid could hence only be raised if the Government had nonetheless decided to make some payments to STSA (in this case triggering a possible analysis with regard to the principle of the private investor operating in a market economy).

But, in the present case, we understand from the information provided to us, that the Government has neither made any payment under the LNG SSA in the past, nor will it make any payments in the future since the LNG SSA is due to be soon terminated by the parties.

6. In any case, it is useful to note that, if for a reason that we are not identifying, a State aid element were to be identified in the LNG SSA, it would not be considered as benefiting to the Project and in particular EGM.

Indeed, the beneficiary would be STSA as benefiting from the possibility that the Government may enter into a new LNG SPA with STSA in case of EGM's default under the LNG SPA or other events triggering the LNG SPA's termination.

¹ Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (2016/C 262/01), point 3.2.1, §51, page 12.

² Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (2008/C 155/02), point 2.1, page 12.

³ ECJ, 19 March 2013, *Bouygues SA*, cases C-399/10 and C-401/10, §109.

But there is no clear reason why it should be considered that the LNG SSA also benefits to EGM.

There are on the contrary several reasons to exclude this hypothesis. The LNG SSA is indeed a stand-alone bilateral agreement between the Government and STSA, to which EGM is no party or witness and to which no agreement entered into by EGM makes any reference, as confirmed by Camilleri Preziosi (based on the documents reviewed by them). Further, in application of the LNG SSA, the Government does not bring any support to EGM but instead *may* bring some support to STSA by replacing EGM in the LNG SPA.

Clear evidence that the LNG SSA is neutral to EGM is also that, while the LNG SSA is due to be terminated soon, you confirmed that the conditions of LNG supply by STSA to EGM under the LNG SPA shall not be amended, proving that EGM has not benefited from any preferential conditions by STSA based on the LNG SSA.

As a result, even if a State aid element was to be identified in the LNG SSA for a reason we cannot apprehend, it should only affect STSA and not EGM in the context of the Project.

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