THE LEGAL IMPACT OF THE EUROPEAN COMMUNITY’S STATE AID AND PUBLIC PROCUREMENT RULES ON PUBLIC SPENDING IN MALTA

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The application of the acquis communautaire related to State aid and public procurement is meant to ensure that the Member States’ resources are spent in an efficient manner, without unduly distorting competition and free trade within the internal market. State aid control is an essential component of the European Community’s competition policy, whilst the legislative package regarding public procurement is essentially designed to open up the public procurement of works, supplies and services within the internal market, thus increasing cross-border competition and improved prices paid by public authorities and entities. The aims of these two European Union (“EU”) policy areas are clearly intertwined, and, from a legal and economic perspective, procurement transactions may fall within the scope of State aid control and may even be prohibited if they entail unlawful State aid.¹ However, for the purposes of this article, the implementation of public procurement legislation and the State aid regime in Malta will be discussed separately.

Subject to certain transition arrangements negotiated with the EU, the acquis communautaire on State aid and public procurement became fully applicable in Malta on the date of the country’s accession to the EU, i.e. on 1st May 2004. The implementation of State aid rules and public procurement legislation by the Maltese Government was pertinent even before that date, in order to make effective use of Malta’s eligibility for structural funds as of 1st January 2004.²

The purpose of this article is to give a concise overview of the developments in the run-up to and after Malta’s accession to the EU, and the perceived challenges that lie ahead in the implementation of the acquis on State aid and public procurement respectively. It is not meant to provide an exhaustive list of implementation measures and problematic issues or proposals for solutions, but to give a general feeling of what has been accomplished so far and where continued efforts are still required in order to better achieve the objectives of Community law in these policy areas.

1. Implementation of the State Aid Regime

Overview of the State Aid Rules

Within the European Commission, there are four Directorates-General (“DGs”) that carry out State aid control: whilst three sector-specific services safeguard fair competition in transport, coal, fisheries, and agriculture, DG Competition deals with all other sectors.³ The scope of this article will be limited to aid schemes and measures falling within the remit of DG Competition.

The objective of the State aid regime is to ensure that government interventions do not unduly distort competition and intra-community trade. The rules on State aid derive from the Treaty establishing the European Community (the “Treaty”), secondary legislation as well as the case-law of the European Court of Justice (“ECJ”) and Court of First Instance (“CFI”). Article 87 of the Treaty essentially provides that State aid is in principle incompatible with the common market. Article 88 of the Treaty gives the Commission the task to control State aid, and requires Member States to notify the Commission in advance of their intention to grant State aid.

¹ “Public Procurement and State Aid control - the issue of economic advantage”, Nóra Tosics and Norbert Gaál, Competition Policy Newsletter, Number 3, 2007, p. 15.
State aid rules apply only to measures that satisfy all of the criteria listed in Article 87(1) of the Treaty, which can be summarised as follows:

(a) the measure involves a transfer of State resources (for example, grants, interest rate rebates, loan guarantees, accelerated depreciation allowances, capital injections, or tax exemptions);
(b) the aid constitutes an economic advantage that the beneficiary undertaking would not have received in the normal course of business;
(c) the measure must be selective: “selectivity” is what differentiates State aid from so-called “general measures”, i.e. measures which apply without distinction across the board to all firms in all economic sectors in a Member State; and
(d) aid must have a potential effect on competition and trade between Member States. The Commission considers that small amounts of aid (so-called de minimis aid) do not have a potential effect on competition and trade between Member States, and that such aid therefore falls outside the scope of Article 87(1) of the Treaty.¹

Certain measures caught by article 87(1) of the Treaty may nevertheless be considered lawful on the basis of the exemptions laid down in articles 87(2) and 87(3) of the Treaty. The European Commission has adopted a number of “guidelines”, “frameworks” and “block exemption regulation” which set out and clarify the applicable criteria to determine whether particular State aid measures may be granted lawfully.²

A particular area of State aid concerns services of general economic interest the provision of which may entail “public service compensation”. The term “services of general economic interest” (“SGEIs”) is used in Article 86 of the Treaty and refers to market services which the Member States subject to specific public service obligations (“PSOs”) by virtue of a general interest criterion.³ Where a Member State entrusts an undertaking, whether public or private, with an SGEI, it must observe the Community rules on competition as well as those regarding the internal market. Article 86 of the Treaty⁷, and in particular article 86(2) of the Treaty, is seen to be the central provision for reconciling the Community objectives, including those of competition and internal market freedoms on the one hand, with the effective fulfilment of the mission of general economic interest entrusted by public authorities on the other hand. Undertakings entrusted with the provision of SGEIs, and therefore subject to PSOs, may be financed directly or indirectly; financing schemes can take different forms, such as direct financing through the State budget, contributions made by market participants, exclusive rights, or tariff averaging. Public service compensation is not considered State aid if it meets a set of cumulative conditions, based on the ECJ’s Altmark judgment.⁸ Even where this is not the case, public service compensation may qualify as State aid that is exempt or compatible with the common market, subject to certain conditions specified in the Community framework for State aid in the form of Public Service Compensation⁹ and Commission Decision of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest.¹⁰

³ This is the definition given in Annex II of the Communication from the Commission - Services of general interest in Europe (2001/C 17/04).
⁴ Article 86(1) and (2) ECT reads as follows:
"1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 12 and Articles 81 to 89.
2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.”
The Community’s legal framework for State aid is regularly reviewed in order to improve its efficiency and to achieve the objective of less but better targeted State aid in order to boost the European economy. The recently adopted General Block Exemption Regulation (GBER) is one of the main pieces of the State aid reform undertaken by the Commission over the past few years. The reform is aimed at cutting red tape and reflects a modernised approach to State aid control in order to contribute to the Lisbon Strategy of sustainable development, competitiveness of EU industry, more jobs as well as social and regional cohesion. On the basis of the GBER, which came into force on 29th August 2008, automatic approval is given for a range of aid measures, allowing Member States to grant such aid without prior notification to the European Commission. The GBER consolidates and harmonises the rules previously existing in five separate Regulations, and expands the exempted categories of State aid. It establishes the conditions for automatic exemption in relation to the following categories of aid:

(a) regional aid (State aid granted to promote the economic development of certain disadvantaged areas within the EU);
(b) SME investment and employment aid;
(c) aid for the creation of enterprises by female entrepreneurs;
(d) aid for environmental protection;
(e) aid for consultancy in favour of SMEs and SME participation in fairs;
(f) aid in the form of risk capital;
(g) aid for research, development and innovation;
(h) training aid;
(i) aid for disadvantaged or disabled workers.

The GBER is intended to apply to virtually all sectors of the economy, with the exception of certain activities or measures in a few particular industries such as, for example, fisheries, agriculture and shipbuilding. It is at the Member States’ discretion to devise and implement support measures and incentives to overcome market failures and regional handicaps, as long as these are in line with the acquis communautaire. However, the GBER should encourage Member States to focus state resources on aid that will be of real benefit to job creation and Europe's competitiveness.

The Situation in Malta Before and After Accession to the European Union

Before Malta joined the EU, control on State aid was virtually non-existent. In the 1999 Regular Report from the Commission on Malta’s Progress Towards Accession it was indicated that “No specific system of State aid control exists in Malta as yet. Various types of State aid (export aid, operating aid…) are granted and the criteria under which they are awarded need to be brought into line with EU rules, in particular for shipbuilding and ship-repair. Malta needs to ensure full transparency by presenting annual State aid reports following EU methodology and by establishing a comprehensive inventory on existing aid. It also needs to set up a State aid monitoring authority with adequate powers and qualified resources.”

In order to close accession negotiations on the Competition chapter (Chapter 6), the Maltese government had to satisfy the following criteria:

- complete alignment with the acquis, in relation to antitrust and state aid legislation; complete inventory and annual State aid reports; ensure conformity of State aid system in particular regarding shipbuilding;

- strengthen the administrative capacity of the competition authorities to ensure the full enforcement of the antitrust and State aid rules; intensify the training of the judiciary in the specific fields of antitrust and State aid, increase awareness of the rules among all market participants and aid granters.

11 Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General Block Exemption Regulation).
Thus, the Maltese Government was required to set up a national state aid authority responsible to exercise functions similar to those of the European Commission until the date of accession. The State Aid Monitoring Board was established in 2000 in order to help develop an inventory of existing state aid measures and schemes, and to determine whether these were compatible with Community law. The revised Business Promotion Act (Chapter 325 of the Laws of Malta) was brought into force in June 2001. It was adopted with the intention to introduce new incentives structured to be in line with the State aid acquis, to abolish export-linked incentives and to align other fiscal incentives contained in the Malta Freeport Act and the Industrial Development Act with Community law. The Business Promotion Act also provided a legal basis for the State Aid Monitoring Board. In general, the implementation of the State aid acquis in Malta required the Maltese Government to (re-)consider its State aid policies in the light of the State aid rules that became applicable upon accession, rather than transposing the complex body of State aid rules into Maltese law by adopting new legislation.

By the end of 2003, the Commission noted that Malta had adopted State aid rules covering the main principles of the acquis and that the necessary implementing structures were in place. However, it urged Malta to ensure proper enforcement of State aid rules for new aid measure and to raise awareness of State aid rules among all market participants and aid grantors (including, training the judiciary).  

The current State Aid Monitoring Regulations (Legal Notice 210 of 2004) came into effect on 1st May 2004, from which point the European Commission became the ultimate watchdog over State aid in Malta. In terms of the State Aid Monitoring Regulations, proposed new aid must be notified to and examined by the State Aid Monitoring Board, which must issue its opinion in accordance with regulation 6 of the State Aid Monitoring Regulations. The State Aid Monitoring Board also has to notify the Commission of proposed new aid and provide all the necessary information on such aid in order to enable it to take a decision. Where the State Aid Monitoring Board becomes aware of non-notified aid, it has to start examining such aid without delay and may require the provider of the aid to suspend such aid until the Board issues its opinion. The State Aid Monitoring Regulations do not, however, impose a requirement on the State Aid Monitoring Board to notify the Commission of non-notified aid of which it becomes aware.

The individual aid measures and State aid schemes that were put into effect in Malta before the 1st May 2004 and still applicable after the date of accession, were classified as either existing aid or new aid, upon accession, in accordance with Annex IV, Chapter 3 and the Appendix to said Annex of the Act of Accession. Under the “interim procedure” provided for in Annex IV, Chapter 3, paragraph (1)(c) (under Article 22) of the Act of Accession, Malta was required to submit to the Commission those measure that it wished to be regarded as existing aid within the meaning of Article 88(1) of the EC Treaty but which were not provided for expressly in the Accession Act. Effectively, such existing state aid would be subject to the Commission’s review but, essentially, if the Commission would raise objections to such existing aid measures, it would not be possible to order recovery thereof.

The Maltese Government negotiated transition arrangements with regard to the following State aid measures and schemes (other than in the agriculture sector):

(i) operating aid granted under the fiscal schemes under Regulations 4 and 6 of the Business Promotion Act could be maintained until 31st December 2008, subject to conditions;

(ii) the application of corporate tax exemptions granted up until 30th November 2000 on the basis of the Industrial Development Act and the Malta Freeport Act, subject to conditions; and

14 Comprehensive monitoring report on Malta’s preparations for membership, November 2003, p. 22-23
15 Regulations 7 and 8 of the State Aid Monitoring Regulations.
16 Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded (Official Journal L 236 of 23 September 2003)
17 Chapter 3 of Annex XI to the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded.
(iii) the granting of restructuring aid measures of a maximum overall amount of Lm 419,491,000 (EUR 977,151,176) to Malta Drydocks and to Malta Shipbuilding Company Limited (or to any of their legal successors), during the restructuring period from 2002 until the end of 2008, subject to detailed conditions.

With regards to the volume of aid granted in Malta, the State Aid Scoreboard\(^{18}\) indicates that, there was a considerable decrease in State aid for industry and services in Malta, for the period 2005-2007 compared to the period 2002-2004, due largely to the phasing out of pre-accession measures. In absolute figures, State Aid for industry and services (i.e. less agriculture, fisheries and transport) in 2007 in Malta was quantified as EUR 74.1 million or 0.6% of the GDP, whilst it was EUR 163 million in 2000 or 1.4 % of GDP before accession and EUR125.8 million or 1.1 % of GDP in 2004 (the year of Malta’s accession to the EU).\(^{19}\) One thing is clear from the statistics provided by the European Commission (up to 2007): Malta granted virtually no State aid to research, development and innovation (“R&D&I”).\(^{20}\)

Thus, it appears that the first years after accession to the EU were more or less a transition period. However, whilst the old measures were being phased out, new measures were devised and gradually put into place, including, for example, the following:

(a) whilst the fiscal incentives in terms of the State Aid Monitoring Regulations (Legal Notice 210 of 2004, as amended) issued under the Business Promotion Act (Chapter 325 of the Laws of Malta) are still being phased out, new incentive schemes were created under the Malta Enterprise Act (Chapter 463 of the Laws of Malta). Malta Enterprise Corporation recently started administering new and revised incentive schemes relating to investment aid, SME development, enterprise support, access to finance, employment and training, and R&D and Innovation (the latter are not operational yet).\(^{21}\)

(b) new financial support measures for the audiovisual sector were introduced under the Malta Film Commission Act (Chapter 478 of the Laws of Malta). The cash rebate scheme based on the Financial Incentives for the Audiovisual Industry Regulations, 2008 (Legal Notice 37 of 2008) was given the Commission’s blessing in November 2007 (the Commission’s approval is valid until 31\(^{st}\) December 2009) and it seems that this measure has been successfully applied since.\(^{22}\)

(c) a noted development was Malta’s undertaking to gradually abolish the existing aid schemes providing selective fiscal advantages in favour of international trading companies and companies with foreign income by the end of 2010 at the latest, and the introduction of a revised corporate tax regime for so-called trading and holding companies which became effective as of 1\(^{st}\) January 2007.\(^{23}\)

**Challenges Ahead**

One of the imminent challenges for the Maltese Government is to successfully wrap up the issues surrounding its shipyards, as restructuring of this sector should have been achieved by the end of 2008. This is indeed an area where the Maltese Government appears to have little leeway, in that it is not allowed to grant State aid after the restructuring period agreed with the Commission, and where the Commission is likely to keep a close eye on any developments. In the Commission’s monitoring reports drawn up in the run-up to Malta’s accession to the EU, the issue of State aid to Malta Drydocks and Malta Shipbuilding Company Limited, or to any of their legal successors (the “shipyards”) was highlighted consistently as a

serious one, and detailed conditions were laid down in the Accession Treaty aimed at phasing out this unsustainable form of Government support. In terms of the transition provisions laid down in the Accession Treaty, restructuring aid measures could only be granted to the shipyards during the restructuring period from 2002 until the end of 2008. Malta undertook to implement the restructuring of the shipyards on the basis of a restructuring plan which aims at achieving full viability no later than by the end of the restructuring period. However, there is a mechanism whereby the Commission may review the conditions for the implementation of the restructuring plan in accordance with the procedure provided for in Article 88(1) of the EC Treaty, if viability for the shipyards cannot be achieved owing to exceptional circumstances unforeseen at the time the restructuring plan was drawn up, but even in such event the maximum overall aid amount could not be exceeded under any circumstances.24

The European Commission’s State Aid Register shows that there are currently eighteen (18) Maltese state aid cases under preliminary examination by DG Competition.25 So far no negative decisions have been adopted vis-à-vis the Maltese Government. Nevertheless, one of the major problems that the Maltese Government could face in the future concerns the consequences of a negative decision declaring a particular scheme or measure to be unlawful State aid or in the case of misuse of aid, in which event the European Commission would in principle have to issue a recovery decision. The Member State to which a recovery decision is addressed is obliged to execute this decision, unless there are exceptional circumstances that would make it absolutely impossible for the Member State to execute the decision properly, in accordance with ECJ case law.26 Article 14(3) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, prescribes that “[…] recovery shall be effected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow the immediate and effective execution of the Commission’s decision. To this effect and in the event of a procedure before national courts, the Member States concerned shall take all necessary steps which are available in their respective legal systems, including provisional measures, without prejudice to Community law.” Envisaging the Maltese scenario, a plethora of issues crops up. For instance, the question arises whether and how the Maltese Government would be able to recover State aid that was granted unlawfully, including interest27, from the beneficiary or beneficiaries of such aid, and more pertinent, whether it would be able to do so “without delay” (which seems to mean that the Member State cannot await the outcome of court proceedings at Community or national level).28 In a study procured by the European Commission dated March 200629 (it did not cover Malta), the perceived excessive length of recovery proceedings was indeed identified as a recurring theme in the countries covered by the study, and one could imagine that recovery of unlawful State aid under Maltese law could entail lengthy procedures due to the lack of clarity in relation to various factors, not all of which may be in the Government’s control. As local law does not cater for a special (administrative) recovery procedure (in particular, the Business Promotion Act, the State Aid Monitoring Regulations and the Malta Enterprise Act are silent on this matter)30, it appears that the provider of the unlawful aid would have to resort to regular administrative or court procedures, unless some form of alternative recovery mechanism is stipulated in the instrument (for example, a licence, concession or contract) by virtue of which the aid was granted to the recipient. Furthermore, it is not clear on the basis of which legal ground unlawful aid could be recovered: could recovery be ordered directly on the basis of the Commission’s decision or is a legal basis under national law

24 Section 3 of Chapter 3 of Annex XI to the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded.

25 Notice from the Commission - Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid; OJ C 272, 15 November 2007, p. 4-17, section 18 et seq.


29 Regulation 9 of the State Aid Monitoring Regulations merely states that “Unlawful aid shall be recovered by the provider of aid in line with article 14 of the Council Regulation.”

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required? It appears that, since the recovery decision issued by the Commission would be addressed to the
Member State and not to the beneficiary of the aid, it would not as such yield an executive title vis-à-vis the
beneficiary of the aid. Also, the mere fact that a measure or scheme is declared to be incompatible with the
common market\textsuperscript{31} does not seem to render it automatically null and void under Maltese law (if this were the
case, recovery from the recipient of the unlawful aid could perhaps be based on the principle of unjust
enrichment).\textsuperscript{32} And, what would happen if the beneficiary of the aid is insolvent or the subject of a
compromise or arrangement in terms of Part VI (Company Reconstruction) of the Companies Act (Chapter
386 of the Laws of Malta); what would the ranking of provider of the aid be amongst the beneficiary
company’s creditors if the company is being wound up? The question also arises whether or not a beneficiary
who was ordered to reimburse the aid received to the Maltese government could claim damages from
Government? In any event, it would appear that in the absence of any specific procedure or legal provisions
related to the recovery of unlawful State aid under Maltese law, some local litigation lawyers would have a
field day out of this and in any event, it seems unlikely that unlawful aid could be recovered in a timely
manner.

\section*{2. Implementation of the Public Procurement Package}

\textit{Overview of the Community’s Public Procurement Rules}

Community legislation on public procurement mainly consists of a package of Directives that impose EU-
wide competitive tendering for public contracts above a certain value, and requirements related to
transparency and equal treatment for all tenderers, to ensure that the contract is awarded to the tender
offering best value for money.\textsuperscript{33} Two new Directives on public procurement\textsuperscript{34} (the “Public Procurement
Directives”) were adopted in 2004 with the aim to simplify and modernise the previous public procurement
Directives and adapting them to administrative needs.\textsuperscript{35} In 2007, a Directive was adopted to amend the
current Directives on remedies,\textsuperscript{36} which is to be transposed into national law by 20\textsuperscript{th} December 2009 and
which is meant to introduce, \textit{inter alia}, new rights for rejected bidders in order to create stronger incentives
for EU businesses to bid for contracts anywhere in the EU.\textsuperscript{37}

The Public Procurement Directives do not apply to all public contracts. There remains a wide range of
contracts that are not or only partially covered by them, such as, for example, contracts below the thresholds
for application of the Public Procurement Directives, and Contracts for services listed in Annex II B to
Directive 2004/18/EC and in Annex XVII B to Directive 2004/17/EC that exceed the thresholds for
application of these Directives. Nevertheless, in awarding contracts that fall outside the scope of the Public
Procurement Directives contracting entities from Member States have to comply with the rules and

\begin{itemize}
\item \textsuperscript{31} Vide also regulation of the State Aid Monitoring Regulations, which states:
\item \textsuperscript{32} It would be interesting to see how the provisions of the European Union Act (Chapter 460 of the Laws of Malta)
could come into play; for instance, article 3 (2) of that Act stipulates that “Any provision of any law which from the
said date is incompatible with Malta’s obligations under the Treaty or which derogates from any right given to any
person by or under the Treaty shall to the extent that such law is incompatible with such obligations or to the extent that
it derogates from such rights be without effect and unenforceable.
\item \textsuperscript{33} For an overview, visit: \url{http://ec.europa.eu/internal_market/publicprocurement/legislation_en.htm} (website as on 13 April 2009).
\item \textsuperscript{34} Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement
procedures of entities operating in the water, energy, transport and postal services sectors and Directive 2004/18/EC of
the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public
works contracts, public supply contracts and public service contracts.
\item \textsuperscript{35} \url{http://ec.europa.eu/rapid/pressReleasesAction.do?reference=IP/04/150&format=HTML&aged=0&language=EN&guiLanguage=
en} (website as on 13 April 2009).
provisions relating to the application of review procedures to the award of public supply and public works contracts and
relating to the application of Community rules on the procurement procedures of entities operating in the water, energy,
transport and telecommunications sectors.
Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the
award of public contracts.
\end{itemize}
principles of the Treaty, including the free movement of goods (Article 28 of the Treaty), the right of establishment (Article 43), the freedom to provide services (Article 49), non-discrimination and equal treatment, transparency, proportionality and mutual recognition. Considering the ECJ’s case-law on the matter, the Commission suggested best practices in order to help the Member States to reap the full benefit of the internal market. Other key documents issued by the Commission concern, for instance, guidance on setting up institutionalised Public-Private Partnerships and a compendium of best practices facilitating access by SMEs to public procurement contracts.

In the Commission’s report on the economic effects of public procurement, published on 3rd February 2004 (i.e. before the so-called new legislative package came into force), the Commission stressed that competitive public procurement practices are essential for efficiency in public spending and presented evidence of the positive impact of internal market rules on the performance of public procurement markets over the preceding ten years, including that the public procurement Directives effectively increased transparency; that public procurement prices paid by public authorities are lower when the Directives are applied (the application of procurement rules appears to reduce prices by around 30%); and in general, that the Directives helped to increase intra EU competition (import and export prices of these goods converged over time).

The Situation in Malta Before and After Accession to the European Union

The 1999 Regular Report from the Commission on Malta’s Progress Towards Accession mentioned that “New legislation on Public Procurement was introduced in 1996, which partially corresponds with the provisions of the EC Directives. Malta still needs to introduce legislation extending the procurement rules to local authorities. Review procedures exist but will have to be brought into line with the acquis. In August 1999 the preferential treatment of local industrialists or suppliers was eliminated. Since February the total value of contracts awarded amounted to approximately €90 million.” Thus, one of the priority objectives for Malta in view of assuming the obligations of membership was the complete alignment in public procurement to include local authorities and other bodies governed by public law and to align the tender procedures, as well as to adapt the judicial review system to the requirements of relevant Directives.

The 2003 Comprehensive Monitoring Report highlighted that: “In the field of public procurement, the adoption of the new Public Contracts Regulations has been pending and amended several times to ensure that they would fully align legislation with the acquis in this area. They need to be issued. A Public Contracts Appeal Board has been set up and presents the relevant guarantees of independence and impartiality. It needs to be strengthened and its procedures need to be further developed. The Directorate General of Contracts within the Ministry of Finance and Economic Services, responsible for all public procurement, needs to be further strengthened, in particular as regards EU-related procurement. Its staff needs to be trained on new procurement rules and procedures.”

The Public Contracts Regulations, 2003 (Legal Notice 299 of 2003) referred to eventually came into force on 1st January 2004, and the old Public Services (Procurement) Regulations (Legal Notice 70 of 1996, as amended) were repealed with effect from the 1st May, 2004 subject to certain transition provisions.

The Public Contracts Regulations, 2003 were repealed and replaced, with effect from 3rd June 2005, by the Public Contracts Regulations (Legal Notice 177 of 2005) and the Public Procurement of Entities operating in the Water, Energy, Transport and Postal Services Sectors Regulations (Legal Notice 178 of 2005) (the latter

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38 Commission interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives (2006/C 179/02).
39 For an overview, visit: [http://ec.europa.eu/internal_market/publicprocurement/key-docs_en.htm](http://ec.europa.eu/internal_market/publicprocurement/key-docs_en.htm) (website as on 13 April 2009).
43 Comprehensive monitoring report on Malta’s preparations for membership, November 2003, p. 17.
will hereinafter be referred to as the “Public Procurement Regulations”) in order to implement the new legislative package adopted in 2004.\textsuperscript{44}

In Malta, the Director of Contracts (the “Director”) runs the Department of Contracts within the Ministry of Finance and administers the Public Contracts Regulations and the Public Procurement Regulations (hereinafter together referred to as the “Regulations”).\textsuperscript{45} In the performance of his duties, the Director is assisted by the Contracts Committees. Public contracts above the EUR 47,000 threshold (including those equal to or above the Community value threshold) required by a contracting authority listed in Schedule 2 are issued, administered and determined by the Department of Contracts on behalf of the contracting authority, while public contracts required by those contracting authorities listed in Schedule 3 (for example, local councils, MGI / MIMCOL, Maltapost p.l.c., MITTS, Malta Air Traffic Services Limited, Malta Government Technology Limited and Grand Harbour Regeneration Corporation p.l.c.) are issued, administered and determined by the contracting authorities.\textsuperscript{46}

The portal of the Department of Contracts\textsuperscript{47} has been revamped recently and is intended to provide a user-friendly, efficient and effective online platform for bidders, which makes it possible for registered users to purchase and download tender documents, to register their attendance to site visits/clarification meetings, to post questions and view clarifications, notifications and answers, to view schedules and summary of tenders received online, to be alerted with developments in the adjudication process, and to see the recommendations, online.

According to the Department of Contract’s Annual Reports available for 2005, 2006 and 2007,\textsuperscript{48} the total value of contracts awarded by the Department reached Lm24,997,000 (approximately EUR 58,227,347) in 2005; Lm24,653,800 (approximately EUR 57,427,906) in 2006\textsuperscript{49}; and €67,097,601 (Lm28,805,000) in 2007 (these figures do not include contracts projects fully or partially funded through European Union funds).

Looking at the available Eurostat figures, the value of public procurement which is openly advertised in the Official Journal of the European Communities, for Malta, appears to be relatively low (expressed as a percentage of GDP): 0.22 in 2004, 1.05 in 2005 and 1.79 in 2006, (compared to the figures for the EU25: 2.65 in 2004, 2.92 in 2005 and 3.27 in 2006).\textsuperscript{50} Although the value of these statistics may be limited (for example, because they do not take account of contracts not subject to the Public Procurement Directives), they clearly reveal a substantial increase in the value of contracts subject to “international” public procurement procedures.

\textit{Challenges Ahead}

The timely transposition of the Public Procurement Directives and Directives on remedies into Maltese law, was a major step towards the creation of a robust public procurement regime in Malta that has the potential of positively affecting market transparency, increased cross-border competition and price savings. However, the correct and consistent application of the public procurement \textit{acquis} and local legislation continues to present a number of challenges.

The Public Contracts Regulations and Public Procurement Regulations (together referred to as the “Regulations”) may be rather lengthy and complex, but they contain certain lacunas. The Regulations contain, \textit{inter alia}, transposition provisions necessary for the implementation of the Public Procurement


\textsuperscript{45} Regulation 5 (1) of the Public Contracts Regulations.

\textsuperscript{46} Regulations 22 and 36 of the Public Contracts Regulations.

\textsuperscript{47} https://secure2.gov.mt/eprocurement/ (website as on 13 April 2009).

\textsuperscript{48} https://secure2.gov.mt/eprocurement/annual_reports (website as on 13 April 2009).

\textsuperscript{49} However, the total amount of the breakdown according to the type of contracts is Lm21,083,800 (approximately EUR49,112,043).

\textsuperscript{50} http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&plugin=0&language=en&pcde=tsier090 (website as on 13 April 2009).
Directives, which are fairly comprehensive but have a limited scope of application, in particular because these Directives only prescribe rules applicable to public services, supply and works contracts that have an estimated value (exclusive of VAT) equal to or exceeding certain thresholds (“the Community thresholds”), and that are not otherwise excluded or exempted. The Community thresholds can be summarised as follows:

(a) EUR 133,000 or EUR 206,000 (depending on the classification of the contracting authority and/or the types of services or products) for public supply and service contracts;
(b) EUR 5,150,000 for public works contracts;
(c) for entities operating in the water, energy, transport and postal services sectors: EUR 412,000 in the case of supply and service contracts; and EUR 5,150,000 in the case of works contracts.

The Regulations also prescribe rules applicable to the award of public contracts with an estimated value below the Community thresholds. Under Maltese law, the substantive rules in relation to the award of public contracts governed by the Public Contracts Regulations with an estimated value below the Community thresholds but exceeding EUR 47,000, are to a great extent similar to those applicable to contracts exceeding the Community thresholds. However, the way the Regulations are drafted has certain illogical consequences, for instance, with regard to the so-called two-tier application of the procurement regime to “non-priority” services, such as hotel and restaurant services, water transport services, legal services, personnel placement and supply services, investigation and security services (except armoured car services), education and vocational education services, health and social services, and recreational, cultural and sporting services. In terms of the Public Procurement Directives such non-priority services are only subject to the rules on technical specifications and on the transmission to the Commission of a contract award notice. The relevant provisions of the Regulations as they stand at present could be interpreted so that service contracts for non-priority services listed in Schedule 7 of the Public Contracts Regulations and Schedule XIX of the Public Procurement Regulations are subject to the full application of the public procurement regime if the estimated value is below the Community thresholds, whilst they would only be subject to the provisions on technical specifications and the requirement to dispatch an EU award notice to the Office for Official Publications. According to this interpretation, a contracting authority or entity could thus award a contract, for example for legal services, without following the prescribed tender procedure if the estimated value of such contract equals or exceeds the applicable Community threshold, but not in cases where the estimated value of the same contract falls below the applicable Community threshold.

With regard to entities operating in the water, energy, transport and postal services sectors, the provisions of the Public Procurement Regulations appear to apply exclusively to contracts with an estimated value not less than the relevant Community thresholds. Nevertheless, entities operating in the said sectors that qualify as contracting authorities for the purposes of the Public Contracts Regulations, seem to remain subject to the same, insofar as the award of contracts that are not intended to cover the specific activities described in regulations 3 to 7 of the Public Procurement Regulations is concerned. Thus, if the contract is intended principally for an activity as per regulations 3 to 7 of the Public Procurement Regulations but has an estimated value below the applicable Community threshold, it need not be awarded following the tender procedures prescribed by Public Procurement Regulations, but if it is intended principally for other activities

52 Public contracts the estimated value of which does not exceed €47,000, are subject to Part II of the Public Contracts Regulations and are administered by the contracting authorities themselves. The rules on this category of contracts will not be discussed in this article.
53 In recital 19 of the Preamble to Directive 2004/18/EC it is explained that: “As regards public service contracts, full application of this Directive should be limited, for a transitional period, to contracts where its provisions will permit the full potential for increased cross-frontier trade to be realised. Contracts for other services need to be monitored during this transitional period before a decision is taken on the full application of this Directive. In this respect, the mechanism for such monitoring needs to be defined. This mechanism should, at the same time, enable interested parties to have access to the relevant information.”
55 Vide regulations 9 and 20 of the Public Procurement Regulations and regulation 76 of the Public Contracts Regulations.
a contracting authority would have to follow the prescribed tender procedures whether or not the Community thresholds are exceeded, in accordance with the provisions of the Public Contracts Regulations.

It is not particularly clear where to draw the line between the scope of application of the Public Contracts Regulations on the one hand and the Public Procurement Regulations on the other hand. It would appear that the legislator may not have carried out a thorough exercise when determining which entities in Malta are actually carrying out the specific activities covered by the Public Procurement Regulations, considering, for example, that Schedule IX to the Public Procurement Regulations which is meant to contain a (non-exhaustive) list of contracting entities in the field of maritime port or other terminal facilities does not list any entities, not even the Malta Maritime Authority which is indeed an entity whose activities relate to the exploitation of a geographical area for the purpose of the provision of maritime ports or other terminal facilities to carriers by sea.

As a general comment, there is no guidance at local level regarding contracts falling outside the scope of application of the Regulations. Although one may refer to guidance and clarifications provided by the European Commission and the European Courts’ case-law on particular matters, these obviously do not provide answers to all questions that may arise and do not deal with the peculiarities of the Member States’ national procurement regimes. For example, service concession contracts are expressly excluded from the scope of application of the Public Procurement Directives56 (whilst the award of public works concession contracts is subject to minimal regulation). Under Maltese law, public service concession contracts are excluded from the scope of application of the Public Contracts Regulations57 and public works concessions are subject to the relevant provisions transposing the Public Procurement Directive; the Public Procurement Regulations do not apply to works and service concessions awarded by contracting entities carrying out one or more of the activities covered by the same Regulations, where those concessions are awarded for carrying out those activities.58 Although there are no special rules in relation to concessions falling outside the scope of application of the Regulations, the award thereof nevertheless remains subject to the provisions of the Treaty and the general principles of Community law, as mentioned above, which means for instance that, depending on the circumstances, public concession contracts may have to be awarded by tender. However, where contracting authorities in Malta organise a tender procedure for the award of a service concession contract, the Department of Contracts has no competence and interested parties cannot invoke the remedies provided for by the Regulations, as such contracts are excluded from their scope of application. In practice, this means that any objections against decisions by the contracting authority or entity would have to be handled either through normal court proceedings, which may cause considerable delays in the award process, or alternative dispute resolution such as arbitration, which may be faster but is usually more costly for the parties involved.

One of the challenges in the field of public procurement that was identified by the European Commission pre-accession, still remains: namely the strengthening of the Department of Contracts, and the need for ongoing training of its staff and members, as well as officials within the contracting authorities dealing with public procurement. It is true that the Department of Contracts has been beefed up over the years, but it faces a heavy workload in view of its extensive functions (amongst which is its duty to vet and approve tender documents prepared by the contracting authorities59 and to administer and determine the tender procedures on behalf of all contracting authorities listed in Schedule 2 of the Public Contracts Regulations60, for contracts with an estimated value exceeding the EUR 47,000 threshold in terms of the Public Contracts Regulations). Problems tend to arise in the course of tender procedures due to the varying quality of the tender documents, lack of understanding of applicable legislation and Community law and of technical expertise within the contracting authorities, especially when it comes to complex services, products or works. The Department of Contract’s Annual Reports available for 2006 and 2007,61 indicate that training initiatives are being undertaken (in particular, by sending some officials to seminars abroad), and that templates for documents used in tender procedures have been reviewed. However, continued efforts are needed to make

57 Regulation 16 of the Public Contracts Regulations.
58 Regulation 18 of the Public Procurement Regulations.
59 Regulations 5(2)(e) and 12 of the Public Contracts Regulations.
60 Regulations 22 and 36 of the Public Contracts Regulations.
61 https://secure2.gov.mt/eprocurement/annual_reports (website as on 13 April 2009).
officials aware of the peculiarities of the Maltese public procurement regime and developments at EU and national level, and to update standard documents in view of past experience and anticipated changes in the law (for example, it is expected that the Regulations will be amended in order to transpose the provisions of Directive 2007/66/EC).

One of the basic concepts related to the conduct of award procedures for contracts with an estimated value exceeding EUR47,000 which appears to be misunderstood more often than not is the application of selection criteria related to tenderers and award criteria regarding the tender (the technical and financial offer made by a tenderer).62

(i) the exclusion of tenderers based on mandatory and optional rules and criteria laid down in regulations 49 and 51(4) and (5) of the Public Contracts Regulations and regulation 54(1), (2) or (4) of the Public Procurement Regulations (for example) and selection of tenderers on the basis of criteria in relation to economic and financial standing, and/or professional and technical knowledge or ability referred to in regulations 35, 50, 51 and 52 of the Public Contracts Regulations and regulation 52 and 54 of the Public Procurement Regulations, in order to determine the suitability of the tenderer;

(ii) evaluation of tenders on the basis of the award criteria laid down in regulations 27 and 28 of the Public Contracts Regulations and regulations 55 and 57 of the Public Procurement Regulations, i.e. the most economically advantageous tender (“MEAT”) or the lowest price.

A considerable number of decisions in tender procedures are contested through the available administrative procedures; instances where cases are brought before the civil courts are less frequent. According to the Department of Contract’s Annual Reports available for 2005, 2006 and 2007,63 the Public Contracts Appeals Board held various sittings that dealt with eighty six (86) objections, of which thirty two (32), i.e. about 37 %, were upheld. At the time of writing this article, the decisions of the Public Contracts Appeals Board were not available online.64 In practice, it seems that a great deal of such cases find their cause directly or indirectly in ambiguities and inconsistencies in the tender documents, inadequacy of the technical specifications and the strict approach adopted by the evaluation committees within the contracting authorities and the Department of Contracts, in particular when assessing “administrative” compliance of tenders and the application of selection and evaluation criteria set out the tender document. Generally, the Public Contracts Appeals Board seems to take a more equitable stance, considering the application of the general principles of equal treatment of economic operators and the objective of ensuring competition, rather than following the tender documents and Regulations strictly by the letter. The tension between the generally formalistic approach by the contracting authorities and the Department of Contracts and the more pragmatic vision of the Public Contracts Appeals Board, leads to legal uncertainty and sometimes undue delays in the adjudication of tenders.

One could think of a number of measures to mitigate the risk of decisions of the contracting entities or Department of Contracts being contested and tender procedures being stalled (or even cancelled), most of which already have a legal basis. Such measures could include: the review of standard tender documents so as to further clarify them, establishing procedures and practical guidelines for contracting entities on the selection and evaluation process, and generally the rules laid down in the Regulations. Furthermore, the sensible and correct use of the possibility to allow tenderers to submit variants65 would make it possible to take into consideration alternative and innovative solutions which the contracting entity may not have thought of when drawing up the tender documents.

62 Regulation 27 of the Public Contracts Regulations and regulation 51 of the Public Procurement Regulations. See also Procurement Policy Note 1 of 11 December 2008 on the Department of Contract’s website: https://secure2.gov.mt/eprocurement/news-details?l=1&i=59 (website as on 13 April 2009)
63 https://secure2.gov.mt/eprocurement/annual_reports (website as on 13 April 2009)
64 On the FAQ section, it is stated that “To emphasise the independence of the PCAB from the Department of Contracts, the PCAB is in the process of developing its own portal, in which all information pertinent to its operations will be displayed. Concurrently, information on objections will no longer be displayed on the Department’s portal.”: https://secure2.gov.mt/eprocurement/faqs?l=1#Registered%20Users%20Features (website as on 13 April 2009).
65 Regulation 46 of the Public Contracts Regulations.
One of the functions of the Director of Contracts is to establish and/or to approve the general conditions of tender documents and to authorise deviations from standard conditions in accordance with the regulations set out herein and which may be included in tender documents. The standard documents provided by the Department of Contracts should be reviewed and updated regularly. For example, the templates for tender documents seem to be drawn up (partly) on the basis of templates that were provided by the European Commission and used for tender procedures in relation to pre-accession funding (these typically still refer to Malta as a “beneficiary State”); although these documents are very useful, it would be commendable to incorporate clarifications drawn from experience with complaints from interested parties and decisions by the Public Contracts Appeals Board as well as ECJ case law.

The rules governing the functioning of the Public Contracts Appeals Board could be improved. The Public Contracts Appeals Board has the function to hear and determine complaints submitted by any person having or having had an interest in obtaining a particular public supply, public service or public works contract and who has been or risks being harmed by an alleged infringement by contracting authorities or entities, whose value exceeds EUR 47,000, in accordance with the procedures laid down in Parts XII and XIII of the Public Contracts Regulations. The composition and powers of the Board are governed by the rather generic provisions of Part XIV of the Public Contracts Regulations. For instance, regulation 84(1) of the Public Contracts Regulations currently states that the Public Contracts Appeals Board shall be composed of a Chairman and two members who shall be appointed by the Prime Minister for a period of up to three years with the possibility of re-appointment, but there are no requirements regarding the qualifications or experience that the Chairman or the other members should possess (in particular, the members of the Public Contracts Appeals Board are currently not required to have any sort of legal or judicial background). This particular shortcoming is expected to be corrected in the future, through amendments to the Public Contracts Regulations in view of the transposition of Directive 2007/66/EC, which provides, inter alia, that the members of the independent bodies responsible for review procedures must be appointed and leave office under the same conditions as members of the judiciary as regards the authority responsible for their appointment, their period of office, and their removal and that, at least the president of this independent body has the same legal and professional qualifications as members of the judiciary. It should also be noted that the Public Contracts Appeals Board is included in Schedule 1 “List of Administrative Tribunals Respecting the Principle of Good Administrative Behaviour” of the Administrative Justice Act (Chapter 490 of the Laws of Malta), and is now formally required to respect and apply the principles of good administrative behaviour, as codified in Part II of the said Act, in its relations with the public.

Another issue to consider is the better use of remedies where infringements against procurement rules are still capable of being rectified. The complaints procedure before the Public Contracts Appeals Board in the case of separate packages offered covered by Part XII of the Regulations seems to have been designed to ensure that review of any complaints is effected by the Public Contracts Appeals Board before the next stage of the adjudication process is commenced. The separate packages procedure only applies to tenders awarded by the open or restricted procedures with an estimated value of over EUR 600,000 or, at the discretion of the Director of Contracts, on tenders of a lower estimated value or on tenders awarded through the negotiated or competitive dialogue procedures. However, the Public Contracts Regulations also provide for interim remedies, listed in regulation 6 of the Public Contracts Regulations, which fall under the Department of Contract’s responsibility and are available in respect of all contracts irrespective of their value. These are largely based on those prescribed by Directives 89/665/EEC and 92/13/EEC. It is not clear though whether

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66 Regulation 5(2) (a) and (b) of the Public Contracts Regulations.
67 Templates are available from: https://secure2.gov.mt/eprocurement/templates (website as on 13 April 2009).
68 Regulation 33(2) of the Public Contracts Regulations.
70 Regulation 82 of the Public Contracts Regulations.
71 The provisions of regulation 6 and the regulations related to the Public Contracts Appeals Board of the Public Contracts Regulations apply mutatis mutandis to contracts governed by the Public Procurement Regulations pursuant to regulation 68 thereof.
and to what extent the Director of Contracts makes use of its powers to take such interim measures and the fact that public contracts above the EUR 47,000 threshold (including those equal to or above the Community value threshold) required by a contracting authority listed in Schedule 2 are issued, administered and determined by the Department of Contracts on behalf of the contracting authority, may be seen as an obstacle to the objective and impartial application of such measures. However, it appears that the effective use of interim measures could contribute towards ensuring compliance with public procurement law, especially at a time when infringements can still be corrected. This is in fact one of the issues which Directive 2007/66/EC aims to address.

Indeed, improvements to the remedies available to interested parties are expected in view of the implementation of Directive 2007/66/EC, which needs to be transposed into Maltese law by 20th December 2009. This Directive was adopted following consultation of the interested parties and considering the case law of the ECJ, which revealed certain weaknesses in the review mechanisms in the Member States, including in particular the absence of a period allowing an effective review between the decision to award a contract and the conclusion of the contract in question. The two main tools introduced by Directive 2007/66/EC are the minimum standstill period during which the conclusion of the contract in question is suspended, and the “ineffectiveness” of contracts. Under Maltese law, a standstill and suspension period of ten calendar days is already contemplated in regulation 83 of the Public Procurement Regulations. Nevertheless, the relevant provisions of the Regulations would have to be tweaked and brought into line with the (amended) provisions of the Directives on remedies. More innovative for the Maltese public procurement regime will be the implementation of a new mechanism regarding the “ineffectiveness” of contracts in certain circumstances (in particular, in the case of a contract resulting from an illegal direct award), so that the rights and obligations of the parties under the contract cease to be enforced and performed, and, possibly, the imposition of alternative penalties on the contracting authority in the case of infringements of certain formal requirements. As no measures for the transposition of Directive 2007/66/EC into Maltese law have been published yet, it would be premature to comment on this matter. However, this is certainly one of the areas where it would be prudent for all stakeholders, including practitioners, economic operators and contracting authorities, to carefully assess the implications of the new legislation that will have to be adopted.

Finally, one of the issues that consistently crops up in disputes surrounding the award of public contracts is whether or not there is a right to access documents submitted by other tenderers in the course of tender procedures. On the basis of article 3(2)(d) of Administrative Justice Act (Chapter 490 of the Laws of Malta), the Public Contracts Appeals Board can rely on one of the principles of good administrative behaviour, formalised as the duty of an administrative tribunal to ensure that the public administration makes available the documents and information relevant to the case and that the other party or parties to the proceedings have access to these documents and information. In practice, the Public Contracts Appeals Board does not seem to concede to “fishing expeditions” by complainants or appellants, but it appears that generally it is willing to order the disclosure of certain information if there are reasonable suspicions about specified illegalities in a given tender procedure that could harm the interests of potential or actual bidders.

A similar transparency issue relates to the disclosure to third parties of the content or details on the performance of a contract concluded with a successful tenderer, or a contractor to whom a contract was awarded directly, where there are alleged infringements against the rules and principles governing public procurement. Except for some rules on variation orders in Part VIII of the Public Contracts Regulations, there are no special rules in the Regulations that apply once the contract has been concluded, and if the contract concerned contains a confidentiality clause, it could be argued that the contracting authority or entity would need to obtain consent from the counterparty if it would wish to disclose certain details in relation to the contract to a third party who may perhaps be questioning the legitimate award or performance of a public contract (including changes agreed between the parties post adjudication). Generally, after the award of the contract, the only remedy available to an interested party would be an action for damages before relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.

the Courts, but this issue is likely to become more pertinent once the provisions on the ineffectiveness of contracts as per Directive 2007/66/EC are implemented.

One could envisage requests for access to documents held by public authorities being made under the recently adopted Freedom of Information Act (Chapter 496 of the Laws of Malta), once it comes into force.\(^4\) It is outside the remit of this article to identify and formulate answers to the questions that could arise in relation to the application of this Act, but it emerges that it would be helpful to for all stakeholders if the position on this matter would be clarified in tender documents or by way of general guidelines in due course, in order to anticipate a plethora of interpretation issues that could arise once the Freedom of Information Act is brought into effect.

3. Conclusions

It is clear that Malta has come a long way in the field of State aid and public procurement since it started preparing for accession to the EU in 1999. There are indeed indications that Malta is moving in the right direction towards contributing to the achievement of the Community’s objectives in these areas, but in order to keep on the right track and to further improve State aid control and the public procurement regime so that all stakeholders (including tax payers) benefit from the intended benefits, continued efforts will be needed in the future, in particular in terms of enforcement and review of existing legislation and policy.

The State aid Scoreboard kept by the European Commission shows that the amount of State aid in Malta has decreased substantially between 2000 and 2007, although this is mainly due to the phasing out of existing aid measures. Nevertheless, new aid schemes have been and are being put in place and hopefully, the expected incentives that will be offered through Malta Enterprise to stimulate innovative enterprises to engage in research and development, will mark the start, at last, of serious support for local R&D&I. It appears that the main challenges in relation to State aid lie in the less visible areas, such as individual support granted that does not form part of a State aid scheme based on legislative acts (e.g. compensation for public services obligations laid down in a contract) and, generally, non-notified State aid measures. In such cases in particular, one can imagine the problems that may arise in the worst case scenario, i.e. the adoption of a recovery decision by European Commission which would oblige the provider of unlawful aid to recuperate the aid (plus interest) from a beneficiary, without delay.

The implementation of the public procurement *acquis* entailed an increase in the volume of contracts awarded through “international” tender procedures subject to the Public Procurement Directives, and even at a local level the procurement market seems to have opened up. Looking at recent developments, the Maltese Government’s efforts in relation to e-procurement should be applauded, especially as e-procurement could offer new possibilities for cost reductions. It appears that further reductions of costs for economic operators and contracting authorities and entities, and increased competition, could also be achieved through measures for which there is a legal basis already, for example regular review of standard tender documents and the use of interim measures to correct infringements against procurement rules during the actual tender procedure. Naturally, ongoing training of the relevant officials within the procuring entities and the Department of Contracts should also be encouraged in order to prevent breaches of national and Community law in the first place. Finally, the need to amend national public procurement legislation in view of the transposition of Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, could also be an opportunity to review and generally enhance such legislation.

\(^4\) At the time of writing this article, the Freedom of Information Act had not been brought into force yet.