

Report on Case No U 0227

Complaint lodged by a consortium of NGOs and private individuals (complainants) in connection with the shipyard concession granted to a group of shipyard companies.

1. *The complaint*

The complaint centred on the shipyard concessions granted by Government over public land to X Limited on 3 June 2010 (Concession 1) and to Y Limited on 18 March 2011 (Concession 2), collectively referred to as the ‘Concessions’. Both companies will be henceforth referred to as the Emphyteuta. The Concessions are on land/docks abutting on the Grand Harbour. The complaint listed a number of issues which complainants wished this Office to investigate. These are briefly explained below:

- a) Complaint against Transport Malta: jack-up oil rigs were stationed in the Grand Harbour for a number of years. These were initially docked there for servicing, however, following the expiry of the contract these remained on site creating an eye sore impacting heritage views. Complaints appear to have been lodged with Transport Malta but no action was taken.
- b) Complaint against the Environment and Planning Review Tribunal (EPRT): delays experienced on the then ongoing case against the Company concerning environmental law breaches in connection with toxic waste disposal.

c) Complaint against MIMCOL: Complainants informed this Office that according to the terms of the Concessions, compliance reviews are to be carried out bi-annually. Complainants elaborated that the purpose of the reviews is to “... *address contractual obligations such as whether the docks have been effectively operational with full financial investments, labour and environmental compliance to professional standards throughout the duration of the concession*”. Particular emphasis was placed on noise and air pollution and possible employment law breaches. Complainants informed this Office that the last review was carried out in 2013 and another review was meant to be conducted in 2019. No information was made available as to: a) whether the review was carried out; and b) the outcome of the said review, “*Furthermore, the lack of adequate review could well mean that procedures endangering the health and safety of workers and residents are ongoing, and that obligations towards a public asset are not being met*”. Complainants further argued that, “... *lack of adequate procedure, information and action; all of which infringe on our economic, social and cultural rights as residents and citizens*”. Complainants, therefore, requested confirmation that a review is in the process or has been carried out and that its outcome be made public.

2. Preliminary Considerations

As far as the complaint lodged in connection with the delays experienced in proceedings before the EPRT, this Office refers to Article 12(3) (a) of the Ombudsman Act (Chapter 385 of the Laws of Malta) which specifically states

that the Act shall not apply to bodies listed in Part A of the First Schedule to the Act. The list includes “*Any Tribunal constituted by or under any law*”. The EPRT was set up by means of Chapter 551 of the Laws of Malta. In terms of the law, therefore, this Office was precluded from investigating the complaint dealing with the EPRT. Complainants were duly informed. In the meantime, the Tribunal gave its decision on the matter in July 2023. The matter will not be dealt with any further in this report.

As regards the complaint lodged in connection with the jack-up oil rigs berthed at the Emphyteuta’s shipyards, the matter was investigated by the Commissioner for Environment and Planning. The berths in question were eventually vacated and the matter was considered resolved. This issue will not be referred to again in this report.

This Office proceeded to investigate the complaint centred on the compliance reviews and in particular whether these were/will be carried out in the future.

3. *Facts and findings*

3.1 *Background*

Complainants informed this Office that the various issues surrounding the use and management of the shipyards had been ongoing for years and this to the detriment of the residents of the Cottonera area. Efforts were made over the years to address said issues with various Government authorities. At one point,

complainants were provided with copies of the agreements through which the Concessions were granted, by the then Permanent Secretary of the Ministry responsible for Economy which Ministry at the time also had the Lands Authority within its portfolio.

The announced merger of the Emphyteuta with a well-known cruise line, spurred complainants to renew their efforts in the hopes that their concerns would be adequately addressed. Complainants informed this Office that open letters were sent which were followed up with meetings with the relevant authorities. As part of the said efforts a meeting was held with MIMCOL on 27 May 2020 wherein complainants raised various concerns in connection with the way the shipyards were being managed. These included the management of toxic waste, air and noise pollution, alleged employment law breaches and possible breaches of other terms (particularly those pertaining to investment and maintenance of equipment) found in the Concessions. Complainants also raised questions on whether the Emphyteuta was abiding by its overall financial and operational obligations in terms of the Concessions. This was put forward by the complainants in the context of the compliance review obligation as stipulated in the Concessions. Complainants were informed that MIMCOL would be undertaking the task of carrying out the review. They, therefore, demanded that the findings of the upcoming review be made public. A few days after the said meeting, complainants were informed in writing that MIMCOL had looked into the various points raised as part of the compliance exercise and *“any matters arising therefrom were referred to the responsible authorities for verification, comments or actions ...”*¹. As no further information was provided to complainants, they

¹ Email dated 5 June 2020 addressed to complainants.

proceeded to file a complaint with this Office demanding that confirmation be provided that an adequate review was in the process or was carried out and the information be made public.

3.2 Particular paragraphs found in the Concessions

This Office had the opportunity to peruse the Concessions' agreements and noted that there are various paragraphs governing how Government is to oversee the Emphyteuta's use of the tenement in question. In their complaint, complainants made specific reference to Government's obligation to carry out 'bi-annual' reviews. For ease of reference, the pertinent paragraphs referring to this obligation/s within the Concessions are being reproduced below. This Office will not specifically refer to other paragraphs dealing with Government's obligations and rights pertaining to the use of the land in this report.

The wording of the paragraphs dealing with the obligation/s referred to by complainants (see above) found in both Concession 1 and Concession 2 are virtually identical. As such, this Office will reproduce the paragraphs found in Concession 1.

The obligation to carry out compliance reviews emanates from Paragraph 15 (Concession 1) and Paragraph 18 (Concession 2) which read as follows:

“Compliance with Laws and Regulations and Compliance Monitoring

15.1 The Emphyteuta shall ensure that all operations and activities carried out from the Tenement shall comply with this Deed, any applicable law and applicable regulations.

15.2 The person or entity responsible for monitoring compliance of the obligations and commitments arising under this Deed shall vest in such person or entity as may be delegated by the Government from time to time and notified to the Emphyteuta. Such person shall be responsible for certifying annually that such obligations and commitments are being properly fulfilled and maintained and shall keep proper records thereof.”

These will be henceforth be referred to as the ‘Compliance Paragraph’.

Moreover, Paragraph 10.3 (Concession 1) and Paragraph 13.4 (Concession 2) further provide:

“Investment, Repair and Maintenance

...

Government may request once every two (2) years from the date of this Deed that the Emphyteuta prepares a written condition report in respect of the maintenance of the Tenement and such condition report shall be delivered by the Emphyteuta to the Government within a reasonable date agreed between the Emphyteuta and the Government.”

The above paragraph will be referred to as the ‘Condition Report Paragraph’.

At this juncture this Office observes that the Compliance Paragraphs place an obligation on Government or any entity/persons as delegated by Government to **annually** certify that the Company is abiding by all its obligations and commitments as set out in the Concessions. The ‘Condition Report Paragraph’ on the other hand, grants Government the right to demand a condition report from the Emphyteuta once **every two years**. This right may or may not be exercised. There is no obligation to demand said Condition Report.

Confidentiality is dealt with in Paragraph 24 of Concession 1 and Paragraph 27 of Concession 2.

“Confidentiality

24.1 Each party to this Deed shall treat as confidential all information concerning the other parties’ business coming to its knowledge in connection with this Deed.

24.2 Notwithstanding the provisions of Article twenty-four point one (24.1), the Emphyteuta grants its consent to the Government to disclose or publish in such form and at such times as it sees fit, the following:

- (i) the existence and terms of this Deed;*
- (ii) the aggregate amount of the Groundrent received under this Deed;*
- (iii)(subject to the recipients providing suitable confidentiality undertakings) such information as may reasonably be required by the Government in connection with this Deed.*

24.3 Nothing in this Article twenty-four (24) shall be deemed to prohibit, prevent or hinder, or render the Emphyteuta or the Government liable for, the disclosure of [any]² information relating to the performance of the Emphyteuta's obligations under this Deed to Government, the Maltese House of Representatives (or any committee thereof) or any other regulatory authority.

24.4 This Article 24 (and any other clauses necessary to give effect thereto) shall survive the termination or expiry of this Deed."

The above will be referred to as the 'Confidentiality Paragraphs'.

3.3 MIMCOL

This Office requested that MIMCOL provide its views and comments on complainants' claims and to confirm whether a compliance review was carried out. The entity informed this Office that whilst the Concessions provided for yearly compliance certification to be carried out by Government or its delegate, the Concessions themselves do not specify which entity in particular is to be tasked with the role of carrying out said certification. MIMCOL was given an 'ad hoc' assignment by Government to carry out the review. On being requested to clarify which ministry/entity within Government instructed MIMCOL, this Office was informed that the instructions were given by the Ministry responsible for Economy. At this juncture the Ministry still had the Lands Authority within

² Word included in the text found in Paragraph 27 in Concession 2.

its purview of responsibilities. The entity confirmed that the review was still ongoing when its representatives met with complainants. The exercise was completed shortly after the said meeting. It further added that:

“... given that any reviews that we may have carried out were undertaken on the instructions of Government, it follows that any reports or findings we may have come across as a result of such exercise were to be provided to Government and remain property of Government and the relative Ministry

...

*... Any decision whether or not to make public the outcome of the review is outside our remit and will have to be addressed to Government authorities”.*³

MIMCOL informed this Office that many of the issues raised by the complainants fell within the direct competence of several regulatory authorities which have the function of monitoring compliance within specific legal frameworks. In the feedback provided to this Office, MIMCOL also referred to the Confidentiality Paragraphs (quoted above) that limit the disclosure of information on the Emphyteuta’s performance and the satisfaction of its obligations under the terms of the agreements to, *“Government, the House of Representatives (or any committee thereof) or any other regulatory authority”*.⁴

3.4 *Ministry and Lands Authority*

³ Email dated 26 January 2021.

⁴ Email dated 29 March 2021.

This Office proceeded to direct its enquiries to the Ministry in question and in particular requested that it confirms whether it had ‘ownership’ of the Concessions and, therefore, had responsibility to ensure implementation of both the Compliance and Condition Report paragraphs. Six months after the enquiries were raised, the Ministry did not confirm it had direct responsibility for the Concessions but instead directed this Office to the Lands Authority which fell within the Ministry’s portfolio of responsibilities.

This Office observes that the Concessions were entered into by the then Commissioner for Lands and referred to as ‘Government’. With the setting up of the Lands Authority to replace the Lands Department the role of Commissioner of Lands has since been abolished. Article 7 of the Lands Authority Act (Chapter 563 of the Laws of Malta) reads as follows:

“(2) ... it shall be the function of the Authority:

...

c) to administer in the most ample of manners and make best use of all the land of the Government of Malta ...”

This Office would like to draw attention to the Maltese version of sub-paragraph (c) which reads as follows:

“Tamministra bl-akbar mod assolut sabiex isir l-aħjar użu tal-art kollha tal-Gvern ta’ Malta ...”

Moreover Article 3 of the Government Lands Act (Chapter 573 of the Laws of Malta) states that, “... *the Lands Authority is responsible with the administration of all the land that belongs to the Government ...*”.

This Office proceeded to raise enquiries with the Lands Authority and in particular: a) requested details on how the annual certification obligation was being implemented and whether findings were being submitted to a particular Ministry/and or Parliament; and b) whether the right to demand a condition report was ever exercised, and if there was the intention to exercise said right in the near future.

Feedback was eventually provided by way of a written replies and a meeting with the CEO of the Lands Authority and Permanent Secretary of the Ministry concerned. This Office noted, that there were once again significant delays in the provision of substantive replies to the enquiries raised. With reference to said delays, the Authority acknowledged that these were not ideal and should not occur. As far as the substantive matters were concerned, the Authority pointed out that the Concessions did not designate any specific department or entity with the responsibility of carrying out the yearly certification. It also pointed out that the Emphyteuta's obligations under the said Concessions were wide in scope and encompassed (amongst others) specialist areas that fell outside the Authority's remit and were regulated by separate specialised regulators. This Office was informed that the Lands Authority could take action only if it was formally notified by regulatory bodies (charged with overseeing their specific specialised areas) of non-compliance/breaches by the Emphyteuta.

This Office enquired if there were any formal channels set up between the Lands Authority and other regulators. The Authority confirmed that as at May 2023 there were no formal channels of communication in place between the Authority and the regulatory bodies but elaborated that it was actively seeking to set up said channels. It acknowledged that despite its non-regulatory role (vis specific regulatory frameworks), it still needed to be kept in the proverbial loop of regulatory action. This Office was eventually informed that the Enforcement and Compliance officers within the Lands Authority were in active discussions with the newly set up Inspections Coordination Unit (under the responsibility of the Office of the Prime Minister) which was created in an effort to establish simplified reporting channels for regulatory breaches.

This Office observes that in the feedback provided by the Lands Authority, no reference was made to the right granted in terms of the Concessions for Government to demand a status report of the tenement in question.

3.5 Office of the Prime Minister (OPM)

This Office made enquiries with OPM to determine the scope and functions of the Inspections Coordination Unit. The Unit was set up to implement the Coordination of Government Inspections Act (Chapter 568 of the Laws of Malta). The aim of the Unit is to: (a) minimise the burden of inspections on entities; and b) to ensure that such inspections are as transparent and effective as possible, by (amongst other things) carrying out joint inspections and pooling in resources of inspectorates. This initiative has so far been rolled out for certain categories of business outlets only. The Office of the Prime Minister has confirmed that there

are no plans for heavy industry and in particular shipyards to be covered by this ‘system’.

3.6 *Environment and Resources Authority (ERA)*

As complainants’ main and possibly most pressing concern was environmental pollution, in the interest of completeness, this Office also made enquiries with ERA. It was informed that the Authority was actively monitoring qua regulator the operational activity of the Emphyteuta. It also provided this Office with information on how said monitoring was being carried out and the action the Authority was taking in the furtherance of its duties. It informed this Office that it is standard practice for ERA to carry out routine inspections (be they announced or not) to ensure that activities are carried out in line with permit conditions. Inspections are also carried out upon complaints being lodged. As far as the regulation of emissions from stacks of vessels such as cruise ships are concerned, ERA informed this Office that this fell within the remit of Transport Malta. Moreover, the type and quality of fuels used by vessels within the Maltese territorial waters including ports fell within the remit of the Regulator for Energy and Water Services. This Office notes, that the replies provided indicate that the regulatory framework impacting the environmental status of the harbour area is complex and fragmented.

This Office was informed that complainants were in direct communication with ERA on environmental matters affecting the area in question. Amongst other demands, complainants requested (not through an Environmental Freedom of Information request) that certain documents pertaining to the Emphyteuta’s

compliance be released to them. ERA, however, did not accede to said request stating that the said documents belong to the Emphyteuta and the Authority only had access to them qua regulator.

As the purpose and focus of this investigation was not the individual specialised regulators, this Office will not comment any further on ERA's actions in regards to this case.

3.7 Confidentiality and Freedom of Information Requests

This Office notes that as already observed, the Concessions impose a number of obligations on Government for the purpose of ensuring proper management of the public land in question. Unlike, matters pertaining to the Emphyteuta's contractual obligations that are specifically catered for in the Confidentiality Paragraphs, this Office observes that, information dealing with the satisfaction or otherwise by Government (or its delegate) of its 'policing' obligations does not appear to be captured by the wording of the said paragraphs.

As far as, legislation dealing with the obtaining of information from public authorities, this Office makes reference to the Freedom of Information Act (Chapter 496 of the Laws of Malta) and the Freedom to Access to Information on Environment Regulations (S.L. 549.39). The latter transposes Directive 2003/4/EC *On Public Access to Environmental Information* which adapts the *Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters* (adopted on 25 June 1998 in Aarhus, Denmark) known as the Aarhus Convention. This Office was informed

that complainants submitted an access request to the results of the compliance review carried out by MIMCOL under the Aarhus Convention – it was not, however, apprised of the outcome of said request. While S.L. 549.39 deals specifically with environmental information and names ERA as the ‘competent authority’, the Freedom of Information Act has much wider application with no specific public authority being identified as such. This Office notes that an FOI request must be directed to the public authority in possession of the required information. The law also provides for the possibility for the original public authority to transfer the request to another authority. This Office observes that knowledge of which public authority (both from the person requesting the information and the public authority that may have received the request but may not have the information) is in possession of the required information is key.

4. *Considerations*

The investigation launched by this Office was initiated on the basis of two questions:

- 1) whether the compliance review carried out by MIMCOL was finalised; and
- 2) whether the results of the review would be made public.

The first port of call was the Compliance Paragraphs found in the Concessions. This Office notes that these are very widely drafted with a view of ensuring that the Emphyteuta not only complies with its obligations and commitments as found in the Concessions themselves, but also with any other obligation arising

generally in consequence of the laws regulating the various aspects of its operations. The Condition Report Paragraphs takes the oversight of the tenements a step further by granting the right to Government to demand a condition report every two years.

Given the vast array of contractual and regulatory obligations placed on the Emphyteuta, Government prudently imposed upon itself the obligation to annually certify, “... *that such obligations and commitments are being properly fulfilled and maintained.*” The Concessions also give Government the option to delegate this certification obligation to any entity or person it deems fit. Whilst the paragraph as drafted allows Government ultimate flexibility, it also created a situation where unless said delegation is unequivocally made, the performance of this obligation runs the risk, on the face of it, of falling through the proverbial cracks – in that no named ministry/department or entity has the responsibility of carrying out the obligatory compliance review or demand a condition report.

As regards the compliance review being the subject matter of this investigation, MIMCOL confirmed that this was finalised in August 2020. It, however, stressed that this was a one-off assignment and that it was not responsible to certify Emphyteuta’s compliance on yearly basis. As for the publication of the findings, it did not have the authority to publish said results.

The investigation was, therefore, necessarily further widened to determine:

- a) which ministry/department/entity had ‘ownership’ of these Concessions;
- b) which entity was entrusted with the yearly certification; and

c) whether a Condition Report was ever requested from the Emphyteuta.

In its replies MIMCOL informed this Office that it received its instructions from the Ministry for Economy. Upon, however, being questioned whether it had responsibility for the Concessions, the Ministry delayed in providing its replies for several months and when it did, it referred this Office to the Lands Authority. At this juncture, this Office needs to point out that the Lands Authority Act unequivocally assigns to the Authority the administration in the “*most ample of manners*” (“*bl-akbar mod assolut*”) of Government land. It is safe to say that the obligations/rights found in the Compliance and Condition Report Paragraphs form an intrinsic part of Government’s administrative burden over its land. Whilst it is true that the Compliance Paragraphs do not specify which ministry/department/entity is to be entrusted with annual certification, in terms of the Lands Authority Act the Lands Authority arguably has ‘residual’ responsibility. In its replies, however, the said Authority stated that it could not take on the responsibility of performing the yearly certification obligation, citing lack of resources and expertise. Moreover, it argued that it could not carry out compliance over matters falling with the remit of other specialised regulators. The Authority stated that it would only be empowered to take action with regards to the Emphyteuta if it received clear and unequivocal reports of regulatory breaches from the area specific regulators. That said, it appears that as of May 2023 no formal channels of communication between regulatory authorities and the Lands Authority had been set up.

The wording used in the Compliance Paragraphs implies that the intention was for one entity to have ultimate oversight over the Emphyteuta’s compliance

obligations. It is noted that at the time of the granting of the Concessions there was undoubtedly already an awareness of the complex regulatory landscape governing the Emphyteuta's operations. As such, certification as envisaged in the Compliance Paragraphs would arguably require a two-level approach. The first being the regulatory work carried out by the individual specialised regulators and the second being the coordination and amalgamation of the initial regulatory work to create a holistic picture of the Emphyteuta's compliance status.

During the investigation it was noted that, coordination amongst the various regulatory bodies 'policing' one aspect or other of the Emphyteuta's operations was limited at best. Moreover, there were no plans to include shipyards and heavy industry in the public administration's most recent efforts to improve coordination amongst various regulatory inspectorates. This Office noted that the lack of coordination only fostered a silo mentality, where the proverbial right hand did not know what the left hand was doing, resulting in inadequate oversight over the use of a commercially highly valuable tract of land and berthing facilities to the distinct disadvantage of not only Government, but also residents and tax payers more generally. This Office also noted a distinct reluctance by the public administration to confirm or otherwise to complainants whether it satisfied its own obligations in terms of the Concessions – arguably because of the said silo mentality and the lack of awareness within the public administration itself as to which ministry/department/entity had ultimate responsibility for the Concessions. This state of affairs significantly hindered any efforts to obtain any information by the public including complainants, on the management of the said Concessions, which in turn created significant accountability issues.

5. *Preliminary conclusions and recommendations*

Principles of good public administration dictate that public assets should be managed in a clear and transparent manner to ensure proper accountability. While this Office appreciates that the proper management of public assets such as the shipyards in question requires significant expertise and logistical effort, this Office cannot but observe that during its investigation there was a distinct lack of initiative to shoulder responsibilities as set out by Concessions by the public administration.

As far as the three questions this Office sought to answer (see above)– all three remained unanswered. This Office did, however, find evidence of regulatory silos with little coordination amongst entities which were tasked with overseeing some aspect or other of the Emphyteuta's operations. It appears that whilst safeguards were put in place in the Concessions themselves to ensure that Government had the tools necessary to truly monitor the Emphyteuta's operations – proper use of the said tools remained elusive.

The lack of clarity as to which entity or ministry bore responsibility for the Concessions also rendered accountability somewhat problematic. Which in turn also caused issues for interested parties to exercise their rights to access of information.

This Office, therefore, recommended that:

- a) the central public administration, take it upon itself to unequivocally name which ministry/entity has overall responsibility for the Concessions and make said information public;
- b) the central public administration appoint the ministry/department/entity responsible to carry out the annual certification and also make said information public;
- c) the central public administration or the ministry/entity having overall responsibility for the Concessions publish on a yearly basis:
 - a) whether the annual certification exercise was carried out;
 - b) whether a condition report was requested and handed over to Government; and
 - c) information on any other action taken by Government in consequence of a right or obligation emanating from the Concessions for the purposes of carrying proper oversight over Emphytueta's use of the tenement.

6. Interim Report and outcome.

Given the implementation of this Office's recommendations necessarily required the coordination of a number of regulators falling under the purview of different Ministries, this Office opted to include the above findings in an Interim Report, (which also included the above quoted preliminary recommendations), addressed

to the central public administration for its feedback. A copy of the Interim Report was also forwarded to the primary entities/ministries.

This Office was subsequently informed that the said report was discussed at length with all stakeholders involved and the following feedback was provided:

- a) The Lands Authority was deemed to have ‘ownership’ and overall responsibility for the Concessions;
- b) With regards to the annual certification this Office was informed that, *‘...despite there not being any formal delegation in carrying out the respective annual certification, this requirement was completed.’*; and
- c) Any *‘Requests for information will be treated and addressed within the ambit of the Freedom of Information Act, Chapter 496 (Laws of Malta)’*.

The reply provided addresses one of the major issues highlighted by this Office in that it clearly identifies the Lands Authority as the entity that has overall responsibility for the Concessions. As already commented above, this is to the advantage of both the public administration, which now has a clear referral point for these Concessions, as well as the general public whose ability to file FOI requests has been greatly facilitated.

The feedback provided, however, appears to place all the onus of ensuring transparency and accountability of the public administration’s management of the Concessions on FOI requests. While said requests are a useful, in that, they are means through which information may be obtained, they have limitations. Said requests require positive action by an interested party which may or may not

result in the information being provided. In other words, they are an information ‘gatekeeping’ tool which effectiveness maybe be greatly reduced if not made use of correctly.

Final conclusions and recommendations

Transparency and accountability of the public administration actions or inactions in the management of these Concessions, should not be simply dependent on the possibility of filing FOI requests. True transparency and accountability require a hybrid approach consisting of the latter as well as publicly available information.

- 1) This Office, therefore, recommends that information pertaining to the Government’s performance of its compliance/oversight obligations be published and be made readily available to the public without the latter needing to take any further steps including the publication of the following on a yearly basis:
 - a) whether the annual certification exercise was carried out;
 - b) whether a condition report was requested and handed over to Government; and
 - c) information on any other action taken by Government in consequence of a right or obligation emanating from the Concessions for the

purposes of carrying proper oversight over the Emphytueta's use of the tenement.

- 2) Furthermore, should overall responsibility of the Concessions be moved to another ministry/department/entity, then this should also be made public without delay.

Judge Emeritus Joseph Zammit McKeon
Ombudsman

17 September 2024