An Investigation of Property Transfers between 2006 and 2013: The Transfer of Land at Ta' L-Istabal, Qormi

Report by the Auditor General
December 2016

An Investigation of Property Transfers between 2006 and 2013: The Transfer of Land at Ta' L-Istabal, Qormi

This report has been prepared under Article 9(a) of the First Schedule of the Auditor General and National Audit Office Act, 1997 for presentation to the House of Representatives in accordance with Article 9(b) of the First Schedule of the said Act.

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List of Abbreviations

AG	Auditor General
CEO	Chief Executive Officer
CoL	Commissioner of Land
DG	Director General
GPD	Government Property Department
Lm	Maltese Lira
MEA	Ministry for Economic Affairs
MEPA	Malta Environment and Planning Authority
MFCC	Ministry for Fair Competition, Small Business and Consumers
MFEI	Ministry of Finance, the Economy and Investment
MJCL	Ministry for Justice, Culture and Local Government
NAO	National Audit Office
PA	Planning Authority
PAC	Public Accounts Committee
PCAC	Permanent Commission Against Corruption
PS	Parliamentary Secretary

Executive Summary

Executive Summary

1. On 23 June 2015, the four Government Members of Parliament on the Public Accounts Committee (PAC) requested the Auditor General to investigate the transfer of the site of the former Löwenbräu brewery in Qormi. The PAC specifically requested the National Audit Office (NAO) to ascertain whether the principles of good governance, value for money, transparency and accountability were respected and whether political pressure was exerted with respect to this transfer. Aside from the site in Qormi, reference was made to another three property transfers involving Government undertaken between 2006 and 2013; however, these are reported on separately.

2. The plot of land at Ta' L-Istabal, Qormi, measuring approximately 21,000 square metres, was granted to Löwenbräu Ltd by the Government of Malta on 13 November 1990. This direct allocation of land was authorised by the Minister for Economic Affairs, justified in terms of the economic benefit that was to be generated. The Minister for Economic Affairs established that the allocation was to be made on a perpetual basis against the annual payment of a non-revisable ground rent of Lm 10,000 (€23,294). The contract stipulated that the land was to be used specifically for the production of alcoholic and non-alcoholic beverages.

3. On 1 December 2009, LBM Breweries Ltd submitted a request for the redemption of the perpetual ground rent. The Government Property Department (GPD) endorsed this request on 2 December 2009, simultaneously authorising the cancellation of all the conditions burdening the land in Qormi, which effectively rendered the site free and unencumbered. This agreement was formalised through a contract entered into by Government with LBM Breweries Ltd on 3 December 2009, wherein payment of €465,875 was effected.

4. The legality of the 2009 contract was called into question in 2011, with the Commissioner of Land (CoL) noting that the transfer of the land following the cancellation of the conditions had probably been in breach of the Disposal of Government Land Act, which allowed for the sale of such land to be made only through a call for tenders or through a parliamentary resolution. Negotiations to rectify this situation were held between Government and Vassallo Builders Group Ltd, who had, in the interim, acquired LBM Breweries Ltd. The parties agreed that a Committee be established to determine the freehold value of the land as at 1990. According to the Committee, the value of the land in Qormi was €706,400. The difference between the €706,400 and the €465,875 paid in 2009, that is, €240,525, was settled against compensation due to the Company for other properties that had been previously expropriated. This was transacted through a contract of exchange dated 5 June 2012.

5. The NAO is of the opinion that failure in terms of good governance, to varying degrees, is a recurring theme that emerged throughout its review of this matter. This commences with the terms established by the Minister for Economic Affairs in the direct allocation of land in 1990, who specified that the grant was to be made on a perpetual basis with a non-revisable ground rent, which factors conditioned subsequent developments particularly in view of the fact that the land was to be used for a specific industrial purpose. While the policy governing allocations applicable at the time did not specify the duration of such emphyteutical grants, this Office established, based on information provided by the GPD, that allocations on perpetuity were atypical.

6. The submission of the request to redeem the ground rent by LBM Breweries Ltd remained subject to considerable doubt, as no record relating to this request was retained by the GPD when this should have been the basis of all subsequent developments. The NAO was unable to determine with any degree of certainty the sequence of events leading to the submission of this request, thereby hindering this Office's attempts at establishing a true and factual account of developments leading to the subsequent actions by the GPD officials. This, together with other aspects of the case, detracted from the required level of transparency, shrouding key developments that would eventually lead to the 2009 contract.

7. The manner by which the request for the redemption of ground rent and the cancellation of the conditions burdening the land in Qormi was processed by the GPD raised multiple concerns. Of concern to the NAO was the fact that this process was initiated by the GPD without a request to this effect retained in the relevant GPD file. The request was in fact captured by the Notary GPD, who although uncertain whether the cancellation of conditions was permissible, failed to overtly express concerns regarding the Company's request and its legality in a minute to the Director General (DG) GPD, through the CoL. The views of the CoL were conveyed, albeit in an ambiguous manner, in a minute by the Assistant Director Contracts GPD. Although reference was made to the awareness of the CoL of the request to cancel conditions, authorisation was noted as solely relating to the redemption of ground rent. Notwithstanding this, the involvement of the CoL, or otherwise, remained a point of contention, with conflicting accounts on this matter. Nevertheless, the NAO maintains that the case warranted the direct involvement of the CoL and could not identify any justifiable reason why this was not pursued. Having considered the cryptic minute by the Notary GPD and the ambiguous endorsement by the Assistant Director Contracts GPD following consultation with the CoL, the authorisation by the DG GPD was deemed equally anomalous by the NAO. In this Office's opinion, the DG GPD, and possibly the CoL, failed to appropriately consider the implications of that proposed by the Notary GPD and whether the renouncement by Government of all conditions was legally permissible. This concern was further heightened in view of the fact that the land in Qormi had originally been granted by direct allocation for a specific industrial purpose. These failures in terms of governance had far-reaching consequences on later developments, effectively constraining the GPD into a series of other flawed decisions.

8. The facts of the case render the extraordinary haste of the process amply evident. Following the request as captured in the minute by the Notary GPD, the relevant authorisations were obtained and the contract was finalised in a mere two days. It is in this context that this Office considers the haste in processing the request for the redemption of ground rent and the cancellation of the conditions as highly suspect. More so, when one considers that stated by the GPD officials involved, who maintained that the case had not been discussed with other GPD officials aside from the briefest of minutes documented in the GPD file. The NAO fails to understand how

the authorisation process was seemingly carried out through the forwarding of the relevant file, with the haste exhibited impeding any due consideration of whether the action proposed by the GPD was legal, or otherwise. In this Office's opinion, the actions of the GPD officials involved in this process may, to varying extents depending on their involvement and responsibility, be considered as negligent and draw the NAO's gravest concerns.

9. These concerns are further accentuated by the fact that the authorisation of the Minister of Finance, the Economy and Investment or the Parliamentary Secretary Revenues and Land was not sought prior to the signing of the 2009 contract. The NAO is of the opinion that the matter should have been referred for ministerial endorsement, as this case did not solely entail the redemption of ground rent, but the sale of the directum dominium. Furthermore, this Office is of the understanding that ministerial sanctioning was to be the precursor to eventual referral to Parliament or the issue of a call for tenders. The NAO considers this shortcoming as the responsibility of the DG GPD. Furthermore, the NAO fails to understand why the GPD did not obtain any form of legal advice assuring the Department of the legitimacy of the intended course of action, which serious shortcoming can be attributed to the DG GPD, the Notary GPD and the Assistant Director Contracts GPD. Not only did these officials, through negligence or otherwise, fail to safeguard Government's interests, they also acted without due authorisation when failing to refer the matter for ministerial endorsement and subsequent possible parliamentary scrutiny.

10. The contract entered into between Government and LBM Breweries Ltd on 3 December 2009 comprised a payment of €465,875 for the redemption of ground rent and the cancellation of conditions; however, the NAO noted that no charge was specifically levied with respect to the latter. In this Office's opinion, Government's consent to the cancellation of conditions bore considerable impact on the value of the land, which was no longer limited in terms of use. The NAO considers the fact that no charge was levied by the GPD for the renouncement of limitations as an abject failure of the Department to safeguard Government's interests and seriously undermines any consideration of whether value for money was obtained. To varying degrees, responsibility for this lies with the DG GPD, the Assistant Director Contracts GPD, the Notary GPD, and possibly the CoL.

11. Failures noted in terms of their respective involvement resulted in no charge being levied; however, this matter remains secondary to the overarching issue of the legality, or otherwise, of the transaction. Whether the cancellation of conditions, as executed in the 2009 contract, was permissible or otherwise was contentious, with the Notary GPD and the CoL putting forward opposing views. This is directly related to an ongoing court case involving Government; nonetheless, irrespective of the eventual outcome of this dispute, this Office is of the opinion that this matter could have been averted had an open call for tenders or referral to Parliament been resorted to. Aside from eliminating any doubt as to the legal basis of this disposal, resort to any of these options would have ensured an element of transparency and scrutiny. Moreover, the NAO contends that had such procedures been referred to, Government would have secured payment for the freehold value of the land, which value would have gone beyond the mere redemption of ground rent but reflected the true value of the site at the time.

12. Having addressed the incongruent action of all the GPD officials involved in the process in the preceding paragraphs, the NAO draws attention to evidence indicative of prior agreement between Marsovin Ltd and Agrico Ltd (shareholders of LBM Breweries Ltd), and Vassallo Builders Group Ltd, which was contingent on Government acceding to the cancellation of conditions burdening the land in Qormi. This latter aspect is of

concern to the NAO as evidence reviewed indicated that Government was aware of, and possibly facilitated, this transaction. This Office's convictions are supported by the preliminary agreement entered into by Marsovin Ltd and Agrico Ltd as vendors and Vassallo Builders Group Ltd as purchasers on 30 November 2009, wherein it was stipulated that the entire shareholding of LBM Breweries Ltd, whose sole asset was the land in Qormi, was to be transferred subject to Government's agreement to cancel the conditions burdening this land within seven weeks. The NAO is of the understanding that the cancellation of these conditions within the stipulated seven-week period was a highly improbable outcome had the appropriate legal mechanisms for the disposal of government land been adhered to. Other supporting evidence was an LBM Breweries Ltd board resolution to proceed with the redemption dated 1 December 2009 and a bank draft by Vassallo Builders Group Ltd payable to the CoL dated 2 December 2009. This must be considered in relation to the request, authorisation and contract, respectively dated 1 December 2009, 2 December 2009 and 3 December 2009. Highly indicative was an affidavit by the Chair Vassallo Builders Group Ltd, wherein it was stated that the representatives of Marsovin Ltd had informed him that they had an agreement with the Minister and the GPD for the cancellation of all the conditions on payment of €465,875. Additionally, Marsovin Ltd had assured Chair Vassallo Builders Group Ltd that once Marsovin Ltd had sourced the required funds, the transaction rendering the site free and unencumbered would be effected within a few days. Although these allegations were denied by all involved, the NAO is of the opinion that the facts of the case lend credence to that stated.

13. The NAO did not find direct evidence of political pressure exerted in the processes reviewed. However, the manner by which the GPD concluded the 2009 contract in a matter of days was deemed highly suspect by this Office. Although the Notary GPD indicated an element of pressure exerted by a representative of Marsovin Ltd, and the Assistant Director Contracts GPD indicated pressure by the DG GPD, these alone do not explain the immense haste with which the Department concluded the contract. The context for the exertion of pressure was certainly set with the preliminary agreement entered into by Marsovin Ltd, Agrico Ltd and Vassallo Builders Group Ltd, wherein a seven-week timeframe was established within which Government was to agree to the cancellation of all the conditions burdening the land in Qormi. This was a highly improbable outcome, which should never have transpired in the manner that it did, in terms of haste and method. While later deemed illegal, this was seen through in a matter of days. The NAO considers this as highly indicative of pressure being exerted for the conclusion of the 2009 contract, which albeit not necessarily political, was effective to the extent that a disposal of government land that was not meant to be undertaken in the manner that it was, was concluded in a matter of days, and without any charge levied by Government. Pressure to this end could have been exerted by the GPD officials or the third parties involved in this transaction, who all categorically denied this in reply to queries put by this Office. Nonetheless, an element of political pressure was asserted by the Chair Vassallo Builders Group Ltd, who alleged that Marsovin Ltd had prior agreement with the 'Minister' and the GPD. The Director Marsovin Group Ltd negated this allegation, as did the Minister of Finance, the Economy and Investment and the Parliamentary Secretary for Revenues and Land, who indicated that they were not aware of the case at the time. Queried in this respect, the Chair Vassallo Builders Group Ltd indicated no knowledge of who the 'Minister' was. While the NAO cannot rule out pressure being exerted by any of the aforementioned, or possibly by other persons who did not come to this Office's attention, the facts of the case render immediately evident that pressure was in fact exerted to the detriment of Government's interests.

14. Concerns regarding the 2009 contract emerged in 2011, which led Government to enter into negotiations with CaterGroup Ltd. The NAO's concern was drawn to the fact that no documentation was retained in this respect, thereby limiting this Office in formulating a complete and accurate understanding of the precise developments registered. Ultimately, the parties agreed that a Committee was to be appointed to establish the freehold value of the land in Qormi as at 1990. This Office deems the application of 1990 rates as fundamentally flawed, particularly in view of the fact that the site comprising developable land of approximately 20,000 square metres was valued at €706,400. The NAO considered this valuation as grossly understated and misrepresentative of the true value of this land. This Office is of the opinion that value for money was not assured through Government's efforts at corrective action in 2012. In the NAO's understanding, compensation payable to Government for the renouncement of conditions should have been valued at the time of such renouncement and not based on when the original emphyteutical grant was made. For this Office contends that it was then that the nature of the land was intrinsically altered, since no constraints in terms of use remained, resulting in an inevitable substantial increase in value. Given that the cancellation of conditions effected in the 2009 contract was deemed invalid, then the NAO is of the opinion that the conditions were to be valued as at 2012, when the limitations on use were rescinded.

15. Concerns in this respect were further accentuated following the NAO's establishment of the freehold value of the land as at 2012, determined as €7,839,000. Were it to be argued that the directum dominium was transferred in 2009, then the adjusted value of the land in Qormi as at this date would have been €8,466,000. Comparison of these values to that charged by Government results in a discrepancy of a magnitude that cannot be reasonably explained and extends beyond any limit of acceptability or fairness. In this Office's opinion, this variance represents the extent of the failure by the GPD in ensuring that Government was adequately compensated for land disposed of. The valuation of the land as at 1990 warped and compromised any notion of fair value, and it is in this context that the NAO considers the DG GPD and the CoL as answerable for this failure. In this Office's opinion, the Minister for Fair Competition, Small Business and Consumers (hereinafter referred to as Minister MFCC) also shoulders an element of responsibility in this respect, for he was aware of the nominal compensation being claimed by the GPD. In sum, in the NAO's understanding, the value assigned to the land remained far from fair, just or right and hence not representing value for money.

16. The NAO was unable to determine who decided that the Committee was to value the land by applying 1990 rates, yet ascertained that this consideration was not imposed by the Committee. Notwithstanding the shirking of responsibility by the DG GPD and the CoL, this Office maintains that both were ultimately responsible for failing to comprehensively rectify the error committed by the Department in 2009, again failing to ensure that Government be adequately compensated for land disposed of. The NAO is of the opinion that this represents a grave failure in terms of good governance, transparency and accountability. Although the Minister MFCC contended that the decision to value the land as at 1990 was not within the remit of the politician, this Office maintains that failure to question the grossly misrepresentative value of the land was a shortcoming in terms of ministerial oversight. For it was the responsibility of the Minister MFCC to safeguard Government's interests and ensure that the GPD acted in line with this objective. It is in this context that the Minister MFCC bears a degree of responsibility for this gross misrepresentation of the value of the land.

17. The NAO established that the transfer of the land in Qormi through the contract of exchange dated 5 June 2012 was in accordance with legislation regulating the disposal of government land. However, this Office is of the opinion that the exchange can only be deemed legitimate insofar as the values of the lands exchanged reflect their true value. In this case, the NAO disputes the basis of this exchange in view of its serious reservations regarding the valuation of the land in Qormi. In this Office's opinion, adherence to the law does not necessarily imply that Government respected the principles of good governance, accountability and transparency. The application of 1990 rates renders this concern immediately evident. In the NAO's understanding, these principles could have been better safeguarded had Government resorted to the disposal of land following referral to Parliament or subsequent to a call for tenders. While the NAO reaffirms that resort to exchange was a legally valid option, this Office is of the opinion that this course of action effectively circumvented the expected level of scrutiny provided by Parliament and in public calls for tenders.

18. This Office was unable to understand why the 2012 contract did not include the forfeiture, by LBM Breweries Ltd, of compensation for portions of land that had been expropriated, thereby exposing Government to possible claims in this respect. Other concerns related to the omission of a clause in the 2012 contract considering this transaction as full and final settlement, hence failing to definitely conclude the matter and ensure that Government was immune from possible legal action.

19. In view of the limited documentation of key developments retained by the GPD and the often conflicting accounts of events, the NAO was at times unable to determine the precise involvement of the Government officials and third parties. Shortcomings in this respect impeded the Office from establishing who was responsible for key decisions that led to the 2009 and 2012 contracts. In the case of the 2009 contract, gaps in accountability were most evident in the process leading to Government's agreement to the cancellation of all conditions burdening the land. Specific reference in this sense is made to the Notary GPD, the Assistant Director Contracts GPD, the DG GPD and, possibly, the CoL. The NAO was unable to establish a comprehensive understanding of the initial request made by LBM Breweries Ltd, with developments as recorded on file and communicated by the officials involved an unlikely, often conflicting and incomplete account of events. Also unlikely was the manner in which the request was vetted and approved by the GPD, with endorsement a mere formality eliciting no real consideration of the merits of the case. It is in this context that the NAO considers the involvement of the GPD officials as ambiguous, devoid of the expected level of accountability that should characterise decisions of this nature.

Chapter 1
Introduction

Chapter 1 – Introduction

1.1 Request for Investigation

1.1.1 During the Public Accounts Committee (PAC) sitting of 22 June 2015, the Hon. Dr Owen Bonnici, Minister for Justice, Culture and Local Government (hereinafter referred to as Minister MJCL), a member of the Committee, made reference to the request dated 5 June 2015 for an investigation of the expropriation of two one-fourth undivided shares of the property at 36 Old Mint Street, Valletta.[1] In this context, the Minister MJCL requested the Auditor General (AG) to undertake another investigation of properties that had been expropriated or exchanged by Government between 2006 and 2013.

1.1.2 Correspondence to this effect, dated 23 June 2015, was received by the AG, duly signed by the four Government Members of Parliament on the PAC, namely, the Minister MJCL, the Hon. Dr Edward Zammit Lewis, Minister for Tourism, the Hon. Chris Agius, Parliamentary Secretary for Research, Innovation, Youth and Sport, and Hon. Dr Charles Mangion. In seeking to ascertain that the principles of good governance, value for money, transparency and accountability were respected, and that no political pressure was exerted, the AG was to investigate expropriations and exchanges of property undertaken by the Government Property Department (GPD) between 2006 and 2013 (Appendix A refers). Specifically indicated were:

a. the site at Fekruna Bay, St Paul's Bay;

b. the purchase of the freehold property at 236 and 237 Republic Street and the temporary emphyteusis of 233 Republic Street, Valletta;

c. the property at Spinola Road, St Julians, owned by Eighty Two Company Limited; and

d. the site of the former Löwenbräu brewery at Ta' L-Istabal, Qormi.

1.1.3 The AG acknowledged this request in correspondence submitted to the Chair PAC on 11 August 2015. It was indicated that the National Audit Office (NAO) would be adopting that cited in the request as the basis for its terms of reference.

[1] The report relating to the request dated 5 June 2015 was published in January 2016 and titled 'An Investigation of Government's Expropriation of Two One-Fourth Undivided Shares of the Property at 36 Old Mint Street, Valletta'.

1.1.4 Considering the complexity of the transfer of each of the properties indicated in paragraph 1.1.2 (a) to (d), the NAO is separately reporting thereon. This report focuses on the allocation and subsequent transfer of government-owned land at Ta' L-Istabal, Qormi to third parties.

1.2 Media Allegations

1.2.1 The earliest press coverage traced by this Office with respect to the land in Qormi was an article by the Hon. Charles Buhagiar, then Opposition spokesperson on infrastructure, public works, capital projects and sustainable development, dated 7 September 2012. In this article, comparisons were drawn between the site previously occupied by the Hotel Les Lapins in Ta' Xbiex and the land in Qormi. Making specific reference to an advert that appeared in the Government Gazette of 19 June 2012, the Hon. Buhagiar indicated that €3,000,000 were to be paid by the successful bidder so that a condition in the original deed of emphyteusis burdening the Ta' Xbiex site could be changed. In this case, the condition limiting the use of the site as a hotel was changed, thereby allowing part of the site to be developed as offices.

1.2.2 On the other hand, the Hon. Buhagiar stated that in the case of the emphyteusis of the former Löwenbräu brewery, the specific condition that the site was to be utilised solely as a brewery was removed on 3 December 2009 without a call for tenders and without any payment. The Hon. Buhagiar claimed that this effectively rendered the site more lucrative but that Government had obtained no financial compensation from this concession. It was further stated that the site in Qormi had an area of 21,000 square metres. Citing the financial benefit gained by Government with respect to the Ta' Xbiex site, the Hon. Buhagiar questioned why the same action was not taken in both cases.

1.2.3 In a response dated 14 September 2012, the Communications Coordinator within the Ministry for Fair Competition, Small Business and Consumers (MFCC) indicated that the different treatment afforded to the two cases cited by the Hon. Buhagiar was attributable to technical and legal considerations. In the case of the Ta' Xbiex site, the tender was for the granting of a temporary emphyteusis and the removal of an obligation from the original contract. On the other hand, the site in Qormi was originally allocated on perpetual emphyteusis and therefore did not require a tender process as a perpetual emphyteusis is redeemable under specific provisions established by law.

1.2.4 The Hon. Buhagiar rebutted that stated by the Communications Coordinator MFCC in an article dated 21 September 2012. Here, the Hon. Buhagiar maintained that in both cases, the emphyteutae sought the removal of the conditions in their original contracts with Government. The fact that the site in Qormi was on perpetual emphyteusis and that in Ta' Xbiex on temporary emphyteusis had no bearing on the matter. It was further contended that the redemption of a perpetual emphyteutical lease did not automatically exonerate the emphyteuta from the conditions established in the original deed. In fact, the deed of redemption of the perpetual emphyteutical rent clearly indicated that Government was renouncing its rights as detailed in the original deed of concession. Moreover, the Hon. Buhagiar argued that the removal of the conditions burdening government-owned property could only be carried out in accordance with the Disposal of Government Land Act (Chapter 268), as was the case with the site in Ta' Xbiex. Finally, the Hon. Buhagiar questioned why no charge was levied by Government for the cancellation of the conditions and what action was taken to rectify this illegality.

1.2.5 In reply to that stated by the Hon. Buhagiar, in an article published on 5 October 2012, the Communications Coordinator MFCC reiterated that the bearing of the matter was precisely that whereas one of the concessions was a perpetual emphyteusis, the other was a temporary emphyteusis. In the case of the former, government policy and law allowed Government to sell the perpetual directum dominium and all other residual rights; in the case of the latter, any such redemption or sale could only be effected pursuant to a call for tenders or to a parliamentary resolution. The Communications Coordinator MFCC maintained that although both were emphyteutical concessions, they were completely different in purpose and scope. Moreover, when Government redeemed or sold its directum dominium over the site in question, all the conditions attached to the original deed of concession lapsed. Elaborating in this respect, the Communications Coordinator MFCC noted that on 15 January 2008, Government offered any emphyteuta of a perpetual revisable emphyteusis the option to redeem the emphyteusis encumbering government-owned property without the need for the lapse of the first year of revision. This was possible following the publication of a notice in the Government Gazette of 15 January 2008, titled 'Notice pursuant to Resolution of Motion 318 of the House of Representatives of the 19 November 2007 – Redemption of Ground Rent'.

1.3 Methodology

1.3.1 This investigation was conducted in accordance with Article 9(a) of the First Schedule of the Auditor General and National Audit Office Act (Act XVI of 1997), and in terms of practices adopted by the NAO.

1.3.2 Findings presented in this report are based on interviews, taken under oath, with persons who were directly involved in the transfer of land at Ta' L-Istabal, Qormi. These included the Minister of Finance, the Economy and Investment (hereinafter referred to as Minister MFEI), the Hon. Tonio Fenech and the Minister MFCC, the Hon. Dr Jason Azzopardi, who between March 2008 and December 2011 held the post of Parliamentary Secretary (PS) Revenues and Land. Meetings were also held with the Directors General (DG) GPD, the Commissioner of Land (CoL), a Notary GPD and the Assistant Director Contracts GPD. In addition, interviews were held with representatives of Marsovin Ltd and Vassallo Builders Group Ltd who, through subsidiary companies and in succession of one another, were the emphyteutae of the site in Qormi during the period under review.

1.3.3 All the interviews held were transcribed by the NAO and a copy submitted to the interviewee involved, who was requested to endorse the transcript and submit clarifications, if required. Public officers cited throughout the report are referred to by their designation at the time reported on.

1.3.4 This Office also sought clarifications from the Hon. John Dalli, the former Minister for Economic Affairs (hereinafter referred to as Minister MEA), the Attorney General, the Permanent Commission Against Corruption (PCAC) and an architect appointed by the DG GPD as chair of a committee tasked with establishing the value of the land in Qormi. Written submissions were made in this respect.

1.3.5 Aside from interviews held and written submissions obtained, the NAO examined all the documentation retained by the GPD relating to the transfer of the site. Particular attention was directed toward the various contracts entered into by Government regulating the original allocation of land, as well as the subsequent redemption of ground rent and transfer of property rights. In addition, this Office reviewed documentation held at the law courts in connection with an ongoing judicial case relating to the transfer of the site and involving Government, Marsovin Ltd and

Vassallo Builders Group Ltd, among other related parties. This Office also examined all other documentation and information provided by the interviewees during the course of the audit. Where required, clarifications and substantiating documentation were requested from interviewees, Government departments and other entities that were involved.

1.3.6 In seeking to determine whether Government established a fair value for the land in Qormi, the NAO engaged a technical consultant to assist the Office in its review of valuation-related aspects. In addition, the NAO obtained the advice of its legal consultant with respect to the Office's reporting of related matters emanating from the ongoing judicial case.

1.3.7 In line with its guiding principles of independence, fairness and objectivity, the NAO sought to ensure that the allegations brought to its attention were duly scrutinised and the resultant findings objectively reported on. Relevant documentation and information required were, in most cases and to the best of the NAO's knowledge, made available to this Office by the various parties. The NAO's findings and conclusions are based solely and exclusively on the evaluation of such documentation and information supplied, and the evidence at its disposal. The NAO sought to identify any possible shortcoming or irregularity and put forward recommendations essentially meant to ensure that the best use of public resources is made.

Chapter 2
The Transfer of the Land at Ta' L-Istabal, Qormi

Chapter 2 – The Transfer of the Land at Ta' L-Istabal, Qormi

2.1 The Grant of Land at Ta' L-Istabal, Qormi on Perpetual Emphyteusis

2.1.1 On 7 November 1990, the Minister MEA wrote to the CoL requesting that the necessary arrangements are made for Government to enter into a lease agreement with Löwenbräu Ltd, through which the Company was to be granted land at Ta' L-Istabal, Qormi on perpetual emphyteusis. The Minister MEA informed the CoL that annual ground rent of Lm5,000 (€11,647) was to be charged for the first two years, revised to an annual charge of Lm10,000 (€23,294) thereafter. According to the Minister MEA, Löwenbräu Ltd had originally acquired land for the setting up of an industrial processing plant for the production of alcoholic and non-alcoholic beverages; however, this land was not considered environmentally suitable by Government. Therefore, the land at Ta' L-Istabal, Qormi was to be allocated to Löwenbräu Ltd for this purpose. The Minister MEA justified this recommendation in terms of the economic benefit for the country resulting from this activity and instructed the CoL to apply the usual conditions as per government policy.

2.1.2 Following queries raised by the NAO, the Minister MEA indicated that this land was allocated following political protests against the granting of a development permit for the construction of a brewery on land the Company had already acquired, and that there was a Cabinet decision to this effect. This was corroborated by the NAO following review of extracts of Cabinet minutes dated 9 July 1990, 1 October 1990 and 4 February 1991. According to the extract of the minutes of the Cabinet meeting held on 9 July 1990, the promoters of the Löwenbräu Brewery were to submit an application for the development of a site at Marsaxlokk; however, alternative sites were also being considered, including a portion of land in Qormi. As reported in the extract of Cabinet minutes dated 1 October 1990, the promoters had deemed the site in Qormi acceptable, provided that a new road is constructed. Reference was made to a natural well, which was the determining factor that prompted the promoters to accept this alternative site. The only difficulty that remained concerned the lease of the land, which was government-owned, yet which Löwenbräu Ltd wanted to purchase in line with their established policy.

2.1.3 Documentation on file indicated that representatives of Marsovin Ltd, as proprietors of Löwenbräu Ltd, had met with the Minister MEA on 6 November 1990 to discuss and finalise the agreement with respect to the perpetual emphyteusis. A draft copy of the contract had previously been forwarded to Marsovin Ltd by the GPD. In fact, on 6 November 1990, the Managing Director of Marsovin Ltd forwarded the final draft

agreement in line with discussions held to the CoL, and copied the Parliamentary Secretary for the Environment, Local Government, Public Cleaning and Lands, the Hon. Dr Stanley Zammit.

2.1.4 This agreement was formalised on 13 November 1990, by virtue of a contract for the granting of the perpetual emphyteusis for this plot of land in Qormi, by the Government of Malta to Löwenbräu Ltd. The perpetual emphyteusis for the site, measuring approximately 21,000 square metres, was granted against the payment of an annual and perpetual ground rent of Lm10,000 (€23,294), administratively reduced to an annual charge of Lm5,000 (€11,647) for the first two years of the concession. Payments were to be effected half-yearly in advance, from the date of the contract. Moreover, the contract specified that for the purpose of ground rent redemption, the amount payable was to be based on a ground rent of Lm10,000 (€23,294), irrespective of when such redemption was effected. The agreement limited the use of the site for industrial purposes, specifically for the production of alcoholic and non-alcoholic beverages. The emphyteuta was required to erect proper and solid buildings on the land, costing not less than Lm450,000 (€1,048,218), within three years from the date of issue of all permits required by law, which permits were to be applied for within three months from the date of the contract.

2.1.5 The contract stipulated that the emphyteuta was not to create any servitude in favour of adjacent properties. Additionally, the emphyteuta was not to transfer, or otherwise dispose of the emphyteusis or grant on lease the emphyteutical site, either in whole or in part, without first obtaining the consent of Government. In the event of an authorised transfer or disposal, the emphyteuta was not to impose in his favour any additional ground rent or yearly burden, and a laudemium, equivalent to one year's ground rent, would be due to Government. Government had the right to dissolve the emphyteusis in the event of a default in payment equivalent to two years' ground rent, or if the required construction works were not initiated within three months of the issuance of building permits or completed within three years from the date of the receipt of such permits. The contract stipulated that on dissolution, the emphyteuta would have no right to compensation for the works and improvements carried out on site.

2.1.6 The agreement between the Government and Löwenbräu Ltd was contested by a private company in a letter dated 23 May 1994, addressed to the PCAC. The company alleged irregularity in the granting of this land by perpetual emphyteusis, claiming that the declared policy on similar land concessions stipulated that emphyteutical grants were to be issued on a temporary basis. The policy cited had been revised at the time, extending the duration of such grants from 50 to 65 years. To this end, the company requested the PCAC to fully investigate this matter. In turn, the PCAC forwarded this letter to the CoL on 4 July 1994, seeking comments with respect to the allegations made, to which the latter simply stated that the land allocation was made on the recommendation and approval of the Minister MEA. On 9 September 1994, the PCAC requested the relevant GPD files. No other documentation relating to this case was noted in the GPD files until 4 March 2002, when another request for documentation was made by the PCAC. The NAO requested the PCAC to provide information relating to this case; however, the Commission indicated that it was precluded by law from divulging any information on any of its investigations.

2.1.7 The NAO established that this direct allocation was in line with Article 3(1) of the Disposal of Government Land Act (Act XXXIII of 1976), which stated that '*No land which belongs to or is administered by the Government shall be disposed of unless such disposal is made in accordance with any of the following provisions, that is to say – ... (b) in accordance with a policy applicable to the land proposed to be disposed of*

and approved by a resolution of the House of Representatives which is in force at the time of the disposal; ...'. In line with Article 3(1)b, a policy to this effect was approved by the House of Representatives on 4 August 1976. Clause 4(b) of this Policy stated, '*Art tal-Gvern tista' tiġi trasferita b'titolu ta' enfitewsi - ... (b) jekk tikkonsisti f'art li tiġi mogħtija għal proġett industrijali wara li l-applikant ikun issodisfa lill-Gvern dwar il-benefiċċi li l-proġett jagħti lill-ekonomija tal-pajjiż u li n-numru ta' impjegati li joħloq huwa adegwat*.'[2] This policy was subsequently amended by motions passed on 2 June 1981, 25 May 1983, 2 April 1984, 27 July 1988 and 17 July 1989. The motion applicable at the time of the direct allocation of the land at Ta' L-Istabal, Qormi was passed by the House of Representatives during Sitting Number 403 of 11 July 1990. The NAO noted that, as at November 1990, no amendments had been effected to Clause 4(b), therefore, that cited above remained in force. Of note to this Office was the fact that the policy made no reference to the permissible term of the emphyteusis.

2.1.8 Queries in relation to the terms of the emphyteusis were addressed to the Minister MEA. In his reply to the NAO, the Minister MEA reiterated that originally indicated to the CoL, in that, '*The usual conditions of the lease as per government policy are to apply*.' Although the Minister MEA made reference to the applicable government policy, the NAO established, as cited in the preceding paragraph, that the policy did not specify the duration of allocations of land justified in terms of economic benefit. However, this was in fact specified by the Minister MEA when instructing the CoL '*to grant this land on perpetual emphyteusis*'. Likewise, the policy did not address whether emphyteutical grants made in terms of Clause 4(b) were to be subject to revisable or non-revisable ground rent. This was indirectly determined by the Minister MEA when specifying that an annual ground rent of Lm10,000 (€23,294) was to be levied, thereby rendering the ground rent payable non-revisable.

2.1.9 The NAO sought the views of the CoL in office at the time when this ground rent was eventually redeemed. The CoL indicated that allocations for industrial projects were usually granted either on temporary emphyteusis, or on lease, and that a perpetual emphyteusis was anomalous. To this end and to his knowledge, the CoL made reference to one other allocation of land for industrial purposes where the grant was made on a perpetual basis. In light of that stated by the CoL, queries were again directed to the Minister MEA, who maintained that this was a highly unusual case, and that he had sought a real and practical solution to the situation.

2.2 Sale of the Perpetual Directum Dominium

Documentation of the Request by LBM Breweries Ltd and Authorisation by the GPD

2.2.1 On 1 December 2009, LBM Breweries Ltd (Löwenbräu Ltd prior to September 1998[3]), through its Company Secretary, submitted a request for the redemption of the perpetual emphyteutical ground rent burdening the land in Qormi, which had been granted to the Company by virtue of the contract dated 13 November 1990. The correspondence was addressed to the Director Land GPD, at the time, the CoL. The Company nominated a Director to sign the notarial deed for the relative redemption and to negotiate, conclude and sign any other agreement/s and documentation related and/or ancillary thereto.

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[2] Government land may be transfered under title of emphyteusis - ... (b) if it consists of land granted for industrial projects to be awarded after the applicant has assured Government of the benefits of the project to the country's economy and that a satisfactory number of jobs would be created.

[3] Löwenbräu Ltd was registered as a company with the Malta Financial Services Authority in May 1990. In January 1991, the Company changed its name to Löwenbräu Malta Ltd. In September 1998, the Company again changed its name to LBM Breweries Ltd.

2.2.2 Subsequently, on 2 December 2009, a Notary GPD sought the authorisation of the DG GPD, through the CoL, to proceed with the sale of the perpetual directum dominium for the price of Lm200,000 (€465,875). In view of the pivotal importance of this minute in terms of later developments, this is being reproduced hereunder verbatim, faithfully representing emphasis made therein,

'*Please authorise to proceed with sale of perpetual directum dominium of land in Qormi measuring 21,000 metres squared for the price of Lm200,000 <u>including</u> the total cancellation of hypothec/privilege – meaning that the Government will <u>renounce</u> to <u>all</u> conditions mentioned in the deed of Notary Vincent Miceli dated 13 November 1990*.'

2.2.3 The NAO's attention was drawn to the fact that while LBM Breweries Ltd requested the redemption of the perpetual emphyteutical ground rent, the Notary GPD included the total cancellation of the hypothec/privilege held by Government burdening the site. This Office also noted that prior to the minute by Notary GPD, an office note, dated 1 December 2009, was recorded on file by the Cadastral Unit GPD. Indicated in this office note was the fact that the site in Qormi was not in a registration area. The Notary GPD indicated that this was a regular verification undertaken prior to the drafting of any contract for the transfer of property.

2.2.4 Equally important was the subsequent minute on file by the Assistant Director Contracts GPD, also dated 2 December 2009, addressed to the DG GPD. The minute is reproduced verbatim hereunder and represented the only indication of the endorsement of the CoL:

'*Please see previous minute. CoL has been informed regarding the renouncing of all conditions. He informed me that since in the original grant owners had the right to redeem perpetual ground rent and there were no legal problems to conclude contract, redemption of ground rent can be agreed to*.'

2.2.5 The authorisation of the DG GPD, also granted on 2 December 2009, followed the minute by the Assistant Director Contracts GPD. In view of its relevance to later developments, this minute is reproduced verbatim hereunder:

'*Go ahead as per minutes 200/201*.'

Minute 200 was that by the Notary GPD, while minute 201 was that by the Assistant Director Contracts GPD.

Analysis of the Request by LBM Breweries Ltd

2.2.6 The above paragraphs represent all the documentation retained by the GPD regarding the request by LBM Breweries Ltd for the redemption of ground rent and the internal process leading to the Department's authorisation for the redemption and renouncement of all the conditions burdening the site in Qormi. In the NAO's opinion, the above-cited minutes are grossly irregular and ambiguous on multiple counts. The course of action proposed by the Notary GPD was inconsistent with that requested by LBM Breweries Ltd and later deemed legally irregular by the GPD. The subsequent endorsement by the CoL was indirectly conveyed, when the nature of this transaction should have certainly warranted his direct involvement. Moreover, the endorsement was clearly for the redemption of ground rent, as reference to the cancellation of the conditions was limited to the fact that the CoL had been informed. The evident irregularities and ambiguities presented in these minutes by the Notary GPD and the Assistant Director Contracts GPD were ignored by the DG GPD, who failed

to adequately consider the implications of that stated, thereby failing to safeguard Government's interests.

2.2.7 Furthermore, the haste with which the relevant authorisation was sourced was deemed highly suspect. The NAO's concern was drawn to the fact that the DG GPD and the CoL did not appropriately question the implications of that proposed in the minute by the Notary GPD and whether the cancellation of the hypothec, which implied the renouncement by Government of all conditions, was legally permissible. This concern was further heightened in view of the fact that the land in Qormi had originally been granted by direct allocation for a specific industrial use justified in terms of the economic benefit that this would generate. These failures had far-reaching consequences on later developments, effectively constraining the GPD into a series of other flawed decisions.

2.2.8 It is in this context that the NAO obtained clarifications from all GPD officials involved in the process and the Company Secretary of LBM Breweries Ltd. Queries raised by the NAO sought to establish further details relating to the origin of the request by LBM Breweries Ltd, the inclusion of the cancellation of the conditions in the authorisation requested by the Notary GPD, the endorsement of the CoL through the Assistant Director Contracts GPD and the basis for the final sanctioning by the DG GPD.

2.2.9 The NAO noted that a copy of the correspondence submitted by LBM Breweries Ltd was not retained in the relevant GPD file. This document was subsequently traced by this Office in a part file opened by the GPD when a court case related to the matter was initiated. Following the review of court documents, the NAO established that a copy of this correspondence was presented by the Assistant Director Contracts GPD during testimony given in court on 6 March 2014. Aside from the fact that this crucial document was not filed by the GPD, when this should have been the basis of all subsequent developments, the NAO's attention was also drawn to the fact that this correspondence was not registered, lacking the Department's date stamp. When queried by the NAO, the Assistant Director Contracts GPD indicated that she could not recall how she had acquired this correspondence or whether it was given to her to present in court. Furthermore, in a meeting with this Office, the CoL categorically denied that he had received or was aware of the correspondence submitted by LBM Breweries Ltd even though this was addressed to him. In this light, the NAO maintains serious reservations as to whether this correspondence was in fact submitted to the GPD prior to the minute by the Notary GPD and subsequent endorsements provided thereto.

2.2.10 In a meeting with the NAO, the Notary GPD indicated that he had no knowledge of the correspondence submitted by LBM Breweries Ltd on 1 December 2009. In view of this, the NAO questioned what triggered his minute of 2 December 2009. According to the Notary GPD, he had initiated the process on receipt of the relative GPD file. Queried in terms of whether anyone had instructed the Notary GPD to process this case, the Notary GPD indicated that he had not received any instructions from the DG GPD and the CoL. The NAO enquired whether any political pressure had been exerted in this respect. The Notary GPD indicated that the Minister MFEI and PS Revenues and Land were not informed of the case; however, alleged that an element of pressure was made by the Company Secretary LBM Breweries Ltd and it was in this sense that the Notary GPD was aware of and processed this case. According to the Notary GPD, the Company Secretary LBM Breweries Ltd had initially contacted him around a week and a half prior to his minute of 2 December 2009, and continually requested updates, urging the conclusion of the process. The Notary GPD maintained that it was the Company Secretary LBM Breweries Ltd who insisted that the conditions burdening the land in Qormi were to be cancelled by virtue of the contract.

2.2.11 In contrast to that asserted during the meeting with this Office, in his testimony in court, the Notary GPD indicated that the DG GPD had instructed him to draft the deed a week and a half prior to its signing. This was negated by the DG GPD on grounds that, at the time, he was the Acting DG GPD and assumed the role of DG GPD in early December 2009. While bearing in mind that in court testimony the Notary GPD had specifically indicated the Acting DG GPD and not the outgoing DG GPD, the NAO noted that the authorisation to proceed, dated 2 December 2009, was given by the Acting DG GPD, hence shedding doubt on that previously asserted by him.

2.2.12 The NAO sought to verify that alleged by the Notary GPD with respect to the Company Secretary LBM Breweries Ltd. According to the Company Secretary, he had initially contacted the PS Revenues and Land as instructed by the Board of Directors of Marsovin Ltd. The Company Secretary LBM Breweries Ltd informed the PS Revenues and Land of the Company's intention to redeem ground rent. The PS Revenues and Land advised that the Company was to submit a formal request to the GPD. Moreover, the Company Secretary had indicated that the Company aimed to conclude the redemption by the end of the year, and it was in this respect that the PS Revenues and Land reportedly assured him efficiency in the process. With respect to that stated by the Notary GPD, regarding pressure exerted by the Company Secretary, the latter denied putting any pressure yet acknowledged that he had regularly sought information from the Notary GPD regarding any progress registered.

2.2.13 The NAO sought the views of the PS Revenues and Land in relation to that alleged by the Company Secretary. The PS Revenues and Land stated that he could not recall this exchange, although he did not exclude that his advice was sought and provided in terms of referral to the GPD. Notwithstanding this, the PS Revenues and Land denied any other contact with the representatives of Marsovin Ltd or third parties on the matter.

2.2.14 The Office endeavoured to establish details relating to the request for the redemption of ground rent by LBM Breweries Ltd, specifically intended to ascertain if the request dated 1 December 2009 was received by the GPD, and if so, when and by whom. In addition, the NAO sought to determine how this correspondence was subsequently presented in court by the Assistant Director Contracts GPD, whether negotiations leading to the eventual renouncement of the conditions preceded this correspondence and whether any pressure was exerted on the PS Revenues and Land and officials of the Department. In light of the limited documentation made available to this Office and the conflicting accounts of events, the NAO was unable to determine with any degree of certainty the sequence of events leading to the submission of the request for the redemption of ground rent made by LBM Breweries Ltd. Moreover, the actual submission of this correspondence on the indicated date remains dubious, further hindering this Office's attempts at establishing a true and factual account of developments leading to the minute by Notary GPD on 2 December 2009.

The Role of the Notary Government Property Department

2.2.15 Despite the fact that the minute by the Notary GPD lacked any form of context, as the request by LBM Breweries Ltd was not filed and the Notary GPD was not aware of its existence, the NAO noted that the Company's request to redeem ground rent and cancel all the conditions burdening the land in Qormi were captured in his minute of 2 December 2009. Queried in this respect, the Notary GPD indicated that the Company Secretary LBM Breweries Ltd had specifically requested and emphasised the need for the cancellation of the conditions and that he had documented this request in his minute to the DG GPD, through the CoL. That stated by the Notary GPD was corroborated by the Company Secretary, who confirmed that, from the outset,

it was the intention of Marsovin Ltd to request the cancellation of all the conditions burdening the land.

2.2.16 In further clarifications provided to this Office, the Notary GPD indicated that he was uncertain whether the cancellation of the conditions was permissible and it was in this context that he sought guidance from the DG GPD and the CoL. The Assistant Director Contracts GPD confirmed that stated, maintaining that the Notary GPD had expressed concerns in this regard in discussions with her. According to the Assistant Director Contracts GPD, the Notary GPD was well aware of the implications emanating from the cancellation of the conditions and that this course of action would result in LBM Breweries Ltd assuming full and unfettered ownership of the land. Nevertheless, the DG GPD maintained that the Notary GPD failed to communicate any concerns regarding the legality of the transfer. While the NAO acknowledges that the minute by Notary GPD was effectively a request for the scrutiny and authorisation of the DG GPD and the CoL, this Office is of the opinion that the Notary GPD failed to overtly express concerns regarding the Company's request and its legality.

The Endorsement of the Commissioner of Land

2.2.17 Although the minute by the Notary GPD was addressed through the CoL, the subsequent minute noted on file, also dated 2 December 2009, was that by the Assistant Director Contracts GPD. The NAO was unable to determine why and how the Assistant Director Contracts GPD ultimately assumed responsibility for what was later interpreted as endorsement of the cancellation of the conditions burdening the land in Qormi.

2.2.18 In a meeting with the NAO, the Assistant Director Contracts GPD explained that her involvement in this matter was coincidental, only because the CoL was away from work, possibly on sick leave. According to the Assistant Director Contracts GPD, the DG GPD had called her, insisting that the contract with LBM Breweries Ltd be concluded immediately. Acting on the orders of the DG GPD, the Assistant Director Contracts GPD called the CoL and requested his approval. Elaborating in this respect, the Assistant Director Contracts GPD stated that she had explained the situation to the CoL, that LBM Breweries Ltd wanted to purchase the directum dominium and obtain Government's consent to cancel the conditions. According to the Assistant Director Contracts GPD, her understanding of that indicated by the CoL was that, since the emphyteusis had been granted on a perpetual basis, then the ground rent could be redeemed or purchased, and therefore the contract could be concluded. The Assistant Director Contracts GPD understood that, as a consequence of this contract, the conditions burdening the property would be cancelled. Moreover, at the time, the Assistant Director Contracts GPD understood that the CoL was approving the redemption of the ground rent and the cancellation of the conditions, and her minute was intended to reflect this understanding. Supporting this interpretation, the Assistant Director Contracts GPD made reference to the fact that her minute was understood in this sense by the DG GPD and the Notary GPD. Nonetheless, the Assistant Director Contracts GPD acknowledged that the haste imposed by the DG GPD could have led to an element of misunderstanding or uninformed decisions by the CoL.

2.2.19 Whether the CoL knew of the Company's request, or otherwise, remained a point of contention. While the Assistant Director Contracts GPD and the Notary GPD indicated that the CoL was aware of this request, the CoL negated such knowledge. In a meeting with the NAO, the CoL confirmed his absence from work on 2 December 2009; however, he could not recall whether the Assistant Director Contracts GPD had

contacted him on that day. Notwithstanding this, the CoL was convinced that, in any case, he would have never agreed to the cancellation of the conditions, but simply to the redemption of ground rent through a contract. Additionally, the CoL maintained that, had he been made aware of the details of the contract, he would have insisted that the cancellation of the conditions be agreed to only subject to payment, which payment was to be determined by a valuation. In this respect, the CoL explained that redemption through a contract did not necessarily result in the cancellation of the conditions, and that such cancellation was only possible through the inclusion of a specific clause warranting such. Moreover, the CoL asserted that, in his opinion, the Assistant Director Contracts GPD might not have been aware of these technicalities and the legal implications of the proposed contract, resulting in an element of misunderstanding.

2.2.20 With reference to the alleged haste imposed on the Assistant Director Contracts GPD by the DG GPD, the latter denied having given instructions to conclude the contract in this sense, or exerting any pressure thereto. The DG GPD maintained that he had merely requested the opinion of the CoL after the file had been referred for his attention by the Notary GPD.

2.2.21 In a meeting with the NAO, the Assistant Director Contracts GPD stated that once she obtained the advice of the CoL and documented a minute to this effect, she forwarded the file to the Notary GPD. Whether the file was referred to the Notary GPD, or otherwise, could not be established; however, the ensuing minute recorded on file was the authorisation of the DG GPD.

The Authorisation by the Director General Government Property Department

2.2.22 Having considered the cryptic minute by the Notary GPD and the ambiguous endorsement by the Assistant Director Contracts GPD following consultation with the CoL, the authorisation by the DG GPD, also dated 2 December 2009, was deemed equally anomalous by the NAO. This authorisation merely sanctioned action through reference to the minutes by the Notary GPD and the Assistant Director Contracts GPD.

2.2.23 According to that stated to this Office, the DG GPD maintained that, to the best of his recollection, he was not aware of this case prior to the minute by the Notary GPD and that his involvement thereafter was restricted to that recorded on file. The DG GPD argued that the fact that he had only approved this transaction after the minute by the Assistant Director Contracts GPD indicated that he had requested guidance on the matter from the CoL. Furthermore, the DG GPD asserted that, in his opinion, he had obtained the advice of the CoL as captured in the minute by the Assistant Director Contracts GPD, and had no reason to doubt that this minute represented the CoL's views on the matter correctly.

2.2.24 In the meeting with the NAO, the DG GPD commented that he had no knowledge of GPD-related matters prior to his posting as Acting DG GPD in September 2009. In justifying his authorisation of the transfer, the DG GPD indicated to this Office that he had relied on that recorded by the Notary GPD and the Assistant Director Contracts GPD, who was conveying the views of the CoL. The DG GPD argued that none of these officials had expressed any concerns regarding this contract, and in view of his limited understanding of the legal implications of this disposal, he did not have any doubts when approving this transaction. According to the DG GPD, his authorisation was for the redemption of ground rent and the cancellation of the conditions, in line with the advice of the CoL, as recorded by the Assistant Director Contracts GPD. Making specific reference to the minute by the Notary GPD, the DG GPD claimed that the

wording '*Please authorise*...' failed to convey any concerns. Moreover, the DG GPD repeatedly alleged that the actions taken by the Notary GPD, the Assistant Director Contracts GPD and the CoL could be construed as intentionally misleading.

2.2.25 In testimony provided in court, the DG GPD stated that the negotiations, leading to the contract between Government and LBM Breweries Ltd, had been undertaken with the CoL and the Assistant Director Contracts GPD. In contrast to that stated by the CoL, who claimed no knowledge of the case at the time, the DG GPD maintained that the request for approval had been put forward to him by the CoL, who had advised him that this contract could be effected.

2.2.26 In view of the insistence of the CoL that he was not aware of the request by LBM Breweries Ltd, the NAO was unable to reconcile the diametrically opposing views presented on the one hand by the DG GPD, the Notary GPD and the Assistant Director Contracts GPD, with that stated by the CoL. While all the former GPD officials made reference to the CoL's awareness of the case, this was consistently denied by the CoL. To an extent, the documentation retained by the GPD supports that claimed by the CoL, as no direct intervention by the CoL was recorded at this stage of the process. On the other hand, that stated by the other GPD officials involved in the matter cannot be disregarded, particularly so when one considers that the DG GPD invariably claimed that he had authorised this request on the basis of the CoL's endorsement. While the NAO considers that stated by the DG GPD, the Notary GPD and the Assistant Director Contracts GPD as highly indicative of the CoL's awareness of the case, this Office notes that there was no documentation supporting the CoL's direct involvement. In effect, the uncertainty surrounding whether the CoL was aware, or otherwise, was compounded by the haste with which the process of authorisation came to a conclusion, commencing with a request on 2 December 2009 and ending with sanctioning on that same day. The NAO is of the opinion that the pace of the process was well within the control of the DG GPD, who could have held back his authorisation until the CoL's direct endorsement was obtained.

Pressure and Haste in Concluding the Contract

2.2.27 The immense haste of the process, rendered immediately evident in the documentation reviewed, lends credence to the understanding that some form of pressure was being exerted on the GPD for the conclusion of this contract. While the Notary GPD affirmed to the NAO that he was pressured by the Company Secretary LBM Breweries Ltd to conclude the contract, the DG GPD and the CoL denied being subjected to any pressure from any party. The DG GPD indicated to the NAO that he was unaware that the Company Secretary LBM Breweries Ltd had called at the Department and put pressure on GPD officials. Of interest was the understanding of the DG GPD, who negated this Office's observation that the contract was concluded in haste, stating that since he had just been posted to the GPD, he had no backlog of cases and that he was efficient and finalised assignments without unnecessary delays. A somewhat contrasting account was provided by the Assistant Director Contracts GPD, who justified her haste in terms of the pressure exerted by the DG GPD. While the Assistant Director Contracts GPD informed the NAO that the DG GPD had insisted that the contract be concluded immediately, the DG GPD denied this allegation.

2.2.28 The Company Secretary LBM Breweries Ltd also denied exerting any undue pressure and claimed that his exchanges with the Notary GPD were merely queries regarding the status of the request and to ensure its processing. However, the Company Secretary LBM Breweries Ltd acknowledged that he had emphasised the importance of the cancellation of the conditions in these exchanges.

2.2.29 In meetings with the NAO, the DG GPD, the CoL and the Notary GPD stated that no pressure was exerted by the Minister MFEI or the PS Revenues and Land. While the Assistant Director Contracts GPD indicated that no pressure was placed on her, she understood the haste with which the DG GPD was acting as indicative of ministerial pressure.

2.2.30 Despite the fact that the processing of the request by LBM Breweries Ltd was concluded by the GPD in one day, the NAO established that the matter had not been discussed aside from the exchange between the Notary GPD and the Assistant Director Contracts GPD referred to in paragraph 2.2.16. The Notary GPD confirmed that the case had not been discussed with other GPD officials, but the authorisation process was seemingly carried out through the forwarding of the relevant file, with minutes written as captured in paragraphs 2.2.2 to 2.2.5.

2.2.31 This Office sought to establish whether any pressure was exerted by the Minister MFEI and the PS Revenues and Land in relation to this case. In this respect, the Minister MFEI and the PS Revenues and Land denied that any pressure was put on them by third parties and stated that they did not exert any pressure on GPD officials to influence the process. In justifying their claims, the Minister MFEI and the PS Revenues and Land maintained that the matter had not been referred to them at the time.

Ministerial Authorisation and Legal Consultation

2.2.32 This understanding is further supported by the fact that neither the authorisation of the Minister MFEI nor that of the PS Revenues and Land was sought prior to the signing of the contract between Government and LBM Breweries Ltd. According to the Notary GPD, this case was not forwarded for ministerial approval, as ministerial authorisation was not considered normal procedure. In contrast, the Assistant Director Contracts GPD informed the NAO that, in her opinion, the authorisation of the Minister MFEI or the PS Revenues and Land should have been obtained. Although the DG GPD indicated that he could not recall whether ministerial authorisation was sought, he expressed doubt as to whether cases of redemption of ground rent were ever referred in this sense. The NAO considered the reply somewhat disingenuous, as that authorised was not merely the redemption of ground rent, but also the cancellation of all the conditions burdening the land in Qormi.

2.2.33 In response to queries raised by the NAO, the Minister MFEI and the PS Revenues and Land explained that they were not involved in any way in this transfer, and therefore were not aware of the request made, had no contact with the third parties involved and did not approve this transaction. The Minister MFEI further elaborated that, generally, GPD officials liaised directly with the PS Revenues and Land, who was mainly responsible for the oversight of the Department. Crucially, the Minister MFEI and the PS Revenues and Land considered this transaction, that is the sale of the directum dominium, as necessitating ministerial approval. Moreover, the Minister MFEI asserted that a transaction of this nature necessitated parliamentary approval, and took exception to the fact that referral to Parliament was completely ignored.

2.2.34 Not only did the GPD fail to refer the matter to the attention of the Minister MFEI and the PS Revenues and Land, they also failed to obtain any form of legal advice assuring the Department of the legitimacy of the intended course of action. This understanding was confirmed following queries raised with the DG GPD and the Notary GPD. The DG GPD stated that he was unaware that this contract was contentious and sought to

justify this omission, arguing that the Notary GPD and the CoL had failed to indicate that further legal advice was required. On the other hand, the Notary GPD confirmed that this case was not referred to the Attorney General or the GPD Legal Section. The Notary GPD stated that, whereas it was not normal practice for the GPD to seek the advice of the Attorney General, the CoL often referred difficult cases to the GPD Legal Section, but did not do so in this case for reasons unknown to him.

2.2.35 Having considered the manner in which the case developed and that stated by the GPD officials, the NAO fails to understand why legal advice on the matter was not sought and why the authorisation of the Minister MFEI or the PS Revenues and Land was not obtained. In this Office's opinion, this gross shortcoming, which to varying degrees can be attributed to the DG GPD, the Notary GPD and the Assistant Director Contracts GPD, was to result in Government forfeiting its right to compensation by renouncing the conditions burdening the land in Qormi at no charge. Not only did these officials, through negligence or otherwise, fail to safeguard Government's interests, they also acted without due authorisation when failing to refer the matter for ministerial endorsement and subsequent parliamentary scrutiny.

The Contract between Government and LBM Breweries Ltd

2.2.36 The contract between the Government and LBM Breweries Ltd was signed on 3 December 2009 and published by the Notary GPD. The contract was for the sale and transfer of the perpetual directum dominium and the annual, perpetual and non-revisable ground rent of €23,294 with respect to the land in Qormi, measuring approximately 21,000 square metres. The sale was effected against the payment of €465,875, payable to the CoL. Clearly specified in the contract was the fact that, through this agreement, the Government of Malta was consenting to the complete cancellation of the hypothec and privilege recorded in the Public Registry of Malta (Volume I, 20109/1990) and therefore renouncing all the conditions prescribed in the contract dated 13 November 1990. According to GPD records, LBM Breweries Ltd settled the payment of the €465,875 and an additional payment of €1,340, equivalent to the balance due in arrears, on the day of the contract.

2.2.37 The Office's concerns, arising following review of this contract, essentially reflect that stated in the preceding paragraphs, particularly with respect to the renouncement by Government of all the conditions stipulated in the 1990 contract. However, the NAO's understanding of the process being characterised by haste was further confirmed as the bank draft through which payment was effected was dated 2 December 2009, while the contract was dated 3 December 2009. This was a mere one day after the presentation of the case for the redemption of ground rent by the Notary GPD, the endorsement by the CoL and approval by the DG GPD.

2.2.38 Other concerns related to documents appended to the contract. These included a site plan of the land in Qormi and a copy of the 1990 contract between Government and Löwenbräu Ltd. Also appended were multiple documents relating to LBM Breweries Ltd, namely, a board resolution to proceed with the redemption of the perpetual emphyteutical ground rent, notifications of changes of Company directors and shareholders, a change in Company name, and the articles of association.

2.2.39 Of interest to the NAO was the fact that the board resolution of LBM Breweries Ltd to proceed with the redemption of the perpetual emphyteutical ground rent with Government, and its corresponding request to the GPD, were dated 1 December 2009. This was a day before the minute by the Notary GPD requesting authorisation for the sale of the directum dominium and the cancellation of relevant hypothecs, and the relative authorisation by the CoL and DG GPD. This further confirmed the NAO's

understanding of haste and possibly indicated prior, yet undocumented, agreement regarding Government's renouncement of its privileges.

2.2.40 An element of confirmation of prior agreement was conveyed by the Chair Vassallo Builders Group Ltd, in an affidavit presented in connection with a court case related to the transfer. According to the Chair Vassallo Builders Group Ltd, in initial discussions with Marsovin Ltd regarding the acquisition of this land, representatives of Marsovin Ltd had informed him that they already had an agreement with the Minister and the GPD for the cancellation of all the conditions on payment of Lm200,000 (€465,875). Additionally, the Chair Vassallo Builders Group Ltd stated that in subsequent meetings, Marsovin Ltd had assured Vassallo Builders Group Ltd of this agreement with the GPD and that once Marsovin Ltd had sourced the required funds, the transaction rendering the site free and unencumbered would be effected within a few days. Similarly, in testimony in court, a Director Vassallo Builders Group Ltd confirmed that representatives of Marsovin Ltd had provided assurance that they were in contact with the GPD regarding the cancellation of the conditions. On being queried on this matter by the NAO, the Chair and Director Vassallo Builders Group Ltd indicated that they had no knowledge of who the Minister providing assurances to Marsovin Ltd was.

2.2.41 Despite that stated by the Chair and the Director Vassallo Builders Group Ltd, the Director Marsovin Group Ltd stated to the NAO that the comments made by the representatives of Vassallo Builders Group Ltd were being contested in court. Moreover, the Director Marsovin Group Ltd denied that the Company ever declared that there was already an agreement with the Minister or the GPD in relation to the waiver of the conditions imposed by Government on the land in Qormi. According to the Director Marsovin Group Ltd, during discussions relating to the transfer of shares held in LBM Breweries Ltd by Agrico Ltd, the Chair Vassallo Builders Group Ltd had repeatedly insisted that the shares would only be acquired if the ground rent was redeemed and the conditions on the land waived. In view of this, Marsovin Group Ltd signified its commitment to request the GPD for such redemption and waiver, but certainly never guaranteed that this would be achieved. The Director Marsovin Group Ltd argued that this was reflected in the promise of transfer of shares signed between Marsovin Ltd, Agrico Ltd and Vassallo Builders Group Ltd, which had the redemption and waiver as a condition. Elaborating in this respect, the Director Marsovin Group Ltd indicated that a request to this effect had been submitted to the GPD through the legal representatives of Vassallo Builders Group Ltd. This request was upheld by the GPD and was reflected in the deed for the redemption of ground rent and cancellation of all the conditions.

2.2.42 Notwithstanding that affirmed by the Chair and the Director Vassallo Builders Group Ltd, the Minister MFEI, the PS Revenues and Land, the DG GPD, the CoL, the Assistant Director Contracts GPD and the Notary GPD negated any such agreement, or having provided any assurance, to Marsovin Ltd.

2.2.43 While the redemption of ground rent is a straightforward matter, the renouncement of all the conditions referred to in the 1990 contract through the cancellation of hypothecs and privileges is not. In this Office's opinion, this decision should have instigated broader consultation and a more in-depth consideration by the CoL and the DG GPD, more so when one considers that the Notary GPD indicated the implications of this decision in his minute to the DG GPD, through the CoL.

2.2.44 Notwithstanding the concerns initially raised by the Notary GPD regarding the legality of the cancellation of the conditions, in a meeting with the NAO, the Notary GPD stated that in his opinion, the contract was in line with Article 3(1)(c) of the Disposal

of Government Land Act (Chapter 268). Article 3(1)(c) states that, '*No land which belongs to or is administered by the Government shall be disposed of unless such disposal is made in accordance with one of the following provisions, that is to say* – ... (c) *according to the policy applicable to the land being transferred as shown in the Schedule, which Schedule can only be changed by virtue of a Resolution of the House of Representatives*.' To this end, during sitting No. 590, on 19 November 2007, the House of Representatives had approved Motion 318, amending the Schedule to Chapter 268 with the introduction of Article 3a, which states that, '*The perpetual dominium directum of Government land, where the ground-rent is revisable, may be redeemed by the recognised emphyteuta in accordance with any conditions contained in a public notice*.' According to the Notary GPD, this provision was not restricted to residential properties, but applied to all cases of perpetual emphyteusis with revisable ground rent. A notice, pursuant to this Resolution, published on 15 January 2008, specified the price and the conditions pegged to such redemption. Furthermore, the Notary GPD argued that the renouncement of all conditions was considered to be part of the disposal allowed as per the Schedule, since Article 2(c) of the Disposal of Government Land Act defined disposal as, '*... the transfer or grant of any land under any title whatsoever, including, but without prejudice to the generality of the aforesaid – ... (c) any change of any condition included in the disposal of any land other than land disposed of by the Housing Authority or by the Government for housing purposes ...*'.

2.2.45 In submissions to court, the Notary GPD presented Notice 37 of 15 January 2008, explaining that this Notice reflected government policy at the time, which focused on the redemption of ground rent. According to the Notary GPD, this was part of Government's efforts intended to eliminate all perpetual emphyteusis that were, at the time, considered an administrative burden. Through this Notice, the redemption of perpetual emphyteusis with revisable ground rent was possible prior to the year of revision. The Notary GPD added that following the issuance of this Notice, notaries were allowed to renounce all the conditions burdening the emphyteusis on the redemption of ground rent. In correspondence exchanged with the NAO, the Notary GPD made reference to a Joint Office policy in this respect; however, was unable to provide documentation in this respect. In court, the Notary GPD claimed that on the basis of this policy, the Notarial Section had effected many contracts cancelling the conditions imposed on perpetual emphyteusis with revisable ground rent. However, the right to redeem the perpetual emphyteusis with non-revisable ground rent emanated from Article 1501 of the Civil Code, and not this policy. Nonetheless, the Notary GPD indicated that the Joint Office policy for the cancellation of all emphyteutical conditions was extended to cases of non-revisable ground rent. In this particular case, having queried whether he could proceed with the contract and having obtained clearance from his superiors, the Notary GPD concluded the contract, considering this contract as consistent with the spirit of Notice 37 of 15 January 2008 and the aforementioned policy.

2.2.46 This interpretation was challenged in court by the CoL, who stated that the policy referred to by the Notary GPD was not applicable with respect to the land in Qormi. According to the CoL, this was a Joint Office policy applicable to land that was in its vast majority residential, but had not been so when originally granted. It was in this context that the policy referred to by the Notary GPD allowed for the redemption of the perpetual ground rent under applicable schemes.

2.2.47 Independent of legal considerations, in his testimony in court, the Notary GPD stated that he had raised the issue of possible additional compensation to Government for the renouncement of conditions with his superiors, specifically referring to the CoL and the Assistant Director Contracts GPD. Although the Notary GPD made direct reference to queries raised regarding the weighting of conditions, the reason why

no value was assigned remained unclear and ambiguous. While the NAO was not able to clearly establish what efforts were made by the Notary GPD in this respect, in this Office's opinion, responsibility for ensuring that Government charged a value for the cancellation of conditions was that of the CoL and the DG GPD. Notwithstanding that stated in court, in a meeting with the NAO, the Notary GPD indicated that he had specifically used the word 'renunciation', rather than 'grant', in the contract since the Land Disposal Act (Chapter 268) did not include the renunciation of conditions or rights as part of the definition of a disposal. In this sense, the Notary GPD argued that such renunciation was not covered and therefore not limited in any way by the applicable law. On the other hand, a grant could have been gratuitous or effected against payment, and the Land Disposal Act specifically mentions the grant of a personal or a real right. Though Notary GPD affirmed that the cancellation of all conditions burdening the property in this case could be considered as the granting of a real right in terms of law, he had steered away from this interpretation through his phrasing of this transaction as a renunciation of rights. Irrespective of the validity, or otherwise, of the argument made by the Notary GPD, this Office maintains that, above all else, the Notary GPD was to ensure that Government's interests were well served and not to circumvent provisions that he was duty-bound to uphold.

2.2.48 Among other documents appended to the contract was a notification of change in directors of LBM Breweries Ltd, with the former Minister MEA appointed as a director with effect from 26 August 2004. At the time, the Hon. John Dalli was a Government Member of Parliament. Also noted was another notification of change in directors, with the Hon. John Dalli resigning from the post of director of LBM Breweries Ltd with effect from 24 March 2008, which coincided with his appointment as Minister for Social Policy. In seeking to establish whether this appointment constituted a conflict of interest situation, the NAO referred to the code of ethics for Members of Parliament. According to the code, Members of Parliament were to make annual submissions of directorships or other official positions held in commercial companies. To this end, the NAO verified whether directorships held by the former Minister MEA were declared in submissions made to the Speaker of the House. This Office established that in 2004, the former Minister MEA declared directorship of LBM Breweries Ltd and other related companies. Between 2005 and 2007, the former Minister MEA declared his role as the Chair of LBM Breweries Ltd and other related companies. These directorships did not feature in the return for 2008, presumably in view of his appointment as Minister for Social Policy.

2.2.49 During a meeting with the NAO, the Company Secretary LBM Breweries Ltd indicated that the Director Vassallo Builders Group Ltd was present for the signing of the 3 December 2009 agreement between Government and LBM Breweries Ltd. It is unclear to this Office whether GPD officials were aware that the Director Vassallo Builders Group Ltd, present for the signing of the contract, was representing a third party. In court submissions made by Marsovin Ltd and Agrico Ltd on 6 June 2012, it was claimed that Vassallo Builders Group Ltd was directly involved in negotiations leading to the 3 December 2009 contract, providing assistance throughout the process. According to the Company Secretary LBM Breweries Ltd, he was instructed to refer all matters relating to the contract to the Director Vassallo Builders Group Ltd.

2.2.50 Opposing views were noted in an affidavit by the Director Vassallo Builders Group Ltd, who stated that neither the Chair Vassallo Builders Group Ltd, nor he, were involved in negotiations between Marsovin Ltd, Agrico Ltd and the GPD. This was confirmed by the Chair Vassallo Builders Group Ltd, during a meeting with the NAO. However, the Director Vassallo Builders Group Ltd confirmed that he was present for the signing of the 3 December 2009 contract, though he was not party to it. The Director Vassallo Builders Group Ltd explained his presence in terms of obligations arising from another

agreement entered into by his Company, Marsovin Ltd and Agrico Ltd. According to this agreement, Vassallo Builders Group Ltd was to effect payment of €465,875 on the redemption of ground rent by Marsovin Ltd and Agrico Ltd.

2.2.51 Elaborating in this respect in testimony in court on 27 November 2014, the Director Vassallo Builders Group Ltd stated that he had effected the payment on account, allowing Marsovin Ltd and Agrico Ltd to then utilise the funds. However, in an affidavit dated 10 March 2015, the Chief Executive Officer (CEO) Marsovin Group Ltd stated that payment by Vassallo Builders Group Ltd was made directly to the CoL and not to Marsovin Ltd, Agrico Ltd or LBM Breweries Ltd. The NAO established that the payment of €465,875, by means of a bank draft dated 2 December 2009, was in fact made directly to the CoL by Vassallo Builders Group Ltd. This understanding was confirmed by the Chair and Director Vassallo Builders Group Ltd during a meeting held with the NAO.

2.2.52 In this Office's understanding, Government's renouncement of the conditions burdening the land in Qormi may be considered as a disposal of land in terms of Article 2(c) of the Disposal of Government Land Act (Chapter 268). According to Article 3(1) of this Act, Government land may be disposed of:

a. after a call for tenders published in the Government Gazette;

b. after an announcement of an auction published in the Government Gazette;

c. according to the policy applicable to the land being transferred, as shown in the Schedule of the Act;

d. in accordance with a special resolution by the House of Representatives;

e. to a body corporate established by law;

f. where a change of any condition included in the disposal consists of a modification to the conditions of a lease or a contract of emphyteusis, which change shall not affect property exceeding a footprint of 100 square metres; and

g. in accordance with any other law in force.

2.2.53 In this case, the Notary GPD referred to Article 3(1)(c), making specific reference to Clause 3a of the Schedule that addresses the redemption of revisable ground rent. The Notary GPD argued that this could be extended to apply to non-revisable ground rent and therefore, to the cancellation of any conditions. The CoL contended otherwise, maintaining that the conditions burdening the land were not extinguished with the redemption of ground rent. This is directly related to an ongoing court case involving Government; nonetheless, irrespective of the outcome of this dispute, the NAO maintains that this matter may have readily been avoided had reference been made to Article 3(1)(a) or Article 3(1)(d), that is, the resort to an open call for tenders or referral to Parliament, respectively. Aside from overcoming any doubt as to the legal basis of this contract, referral to any of these options would have provided an element of transparency and scrutiny. Furthermore, had reference been made to these Articles, Government would have secured payment for the freehold value of the land, which value would have gone beyond the mere redemption of ground rent, but reflected the true value of the site.

2.2.54 In the contract dated 3 December 2009, the sum paid by LBM Breweries Ltd represented the value of ground rent redemption and did not compensate Government for its loss of privilege. In this Office's opinion, the renunciation of privilege bore considerable impact on the value of the land, which was no longer limited in terms of use for the production of alcoholic and non-alcoholic beverages, but could be utilised freely by LBM Breweries Ltd. Aside from the serious reservations regarding the legality of the contract entered into by Government, the fact that no charge was levied by the GPD for the renouncement of limitations further renders evident the Department's abject failure to safeguard Government's interests. To varying degrees, responsibility for this lies with the DG GPD, the Assistant Director Contracts GPD as well as the Notary GPD, and possibly the CoL. The Notary GPD should have documented possible concerns regarding the value that was to be assigned to the cancellation of the conditions, which matter should have been taken up by the Assistant Director Contracts GPD when consulting the CoL. In turn, the CoL should have advised the DG GPD that a valuation was required to establish the freehold value of the land, without its limitations in terms of use. Finally, the DG GPD should have ensured that the process was appropriately seen through, with the matter referred to the Minister MFEI or the PS Revenues and Land for eventual endorsement by Parliament, or possible resort to a call for tenders. Failure at each of these stages resulted in no charge being levied; however, this matter remains secondary to the overarching issue of the legality, or otherwise, of the transaction.

2.3 Acquisition of the Land by Vassallo Builders Group Ltd

2.3.1 The cancellation of the 13 November 1990 contract conditions had direct implications on a private agreement between Marsovin Ltd and Agrico Ltd on one part, and Vassallo Builders Group Ltd on the other. Together, Marsovin Ltd and Agrico Ltd held the entire shareholding of LBM Breweries Ltd. On 30 November 2009, a preliminary agreement was signed between Marsovin Ltd and Agrico Ltd, as the vendors, and Vassallo Builders Group Ltd, as the purchaser, for the purchase and transfer of the entire shareholding of LBM Breweries Ltd, against the payment of €8,000,000.

2.3.2 The 30 November 2009 preliminary agreement clearly stated that the €8,000,000 outlay was based on the premise that the site in question would be the only asset owned by LBM Breweries Ltd on the date of the transfer to Vassallo Builders Group Ltd. According to the preliminary agreement, the site was a plot of land in Qormi, which plot of land included a spring of water, together with all improvements constructed thereon including, but not limited to, the building known as the Löwenbräu factory. The preliminary agreement was made subject to the redemption by notarial deed of the ground rent burdening the plot of land and the cancellation by Government of all the conditions regulating the emphyteusis within a seven-week period from the date of the preliminary agreement. The fulfilment of these conditions would render the land free and unencumbered, thereby allowing Vassallo Builders Group Ltd the right to make use, enjoy and dispose of the immovable property freely, at its absolute discretion. Failure by the vendors to satisfy these two conditions would have entitled the purchaser to withdraw from this preliminary agreement.

2.3.3 In negotiations with Marsovin Ltd and Agrico Ltd, Vassallo Builders Group Ltd had repeatedly stated that it was only interested in purchasing the land if the restrictions on its use were eliminated, since the Company did not intend to use the site for beverage production. This was stated in an affidavit by the Chair Vassallo Builders

Group Ltd, dated 17 April 2013, who maintained that the Company was interested in acquiring the property for a line of business other than the production of alcoholic and non-alcoholic beverages.[4] Vassallo Builders Group Ltd considered two possible methods of transfer – the purchase of the property or the acquisition of the LBM Breweries Ltd company shares – but decided on the latter option. This preference was reflected in the preliminary agreement entered into on 30 November 2009.

2.3.4 In this Office's understanding, reference to the cancellation by Government of all the conditions regulating the emphyteusis in this preliminary agreement indicated a degree of prior agreement between LBM Breweries Ltd and Government. This conclusion was based on the consideration that the cancellation of these conditions within the stipulated seven-week period was a highly improbable outcome had the appropriate legal mechanisms for the disposal of government land been adhered to. Queries regarding any possible prior agreement between Marsovin Ltd, Agrico Ltd or Vassallo Builders Group Ltd with the GPD or Government were raised with all officials involved. The Minister MFEI, the PS Revenues and Land, the DG GPD, the CoL, the Assistant Director Contracts GPD and the Notary GPD negated knowledge of any such agreement. Despite that stated, in this Office's opinion, the notion of prior agreement between Government and the Companies persists, substantiated by the seven-week timeframe stipulated in the 30 November 2009 preliminary agreement and the haste with which the GPD finalised the contract dated 3 December 2009. These facts lend credence to that stated by the Chair Vassallo Builders Group Ltd, who asserted that Marsovin Ltd and Agrico Ltd had informed him of their prior agreement with the Minister and the GPD regarding the cancellation of the conditions.

2.3.5 The preliminary agreement specified the modality of payments to be made by Vassallo Builders Group Ltd. Concurrent with the redemption of the ground rent of the property by LBM Breweries Ltd, €465,875 were to be paid by way of deposit, and not by way of earnest, to Marsovin Ltd and Agrico Ltd. The payment, referred to in paragraph 2.2.50, was in fact made directly to the CoL. The remaining balance, after deducting this deposit and any liabilities from the €8,000,000 price, was to be paid by Vassallo Builders Group Ltd on the final contract of the transfer of shares.

2.3.6 The renouncement of the conditions encumbering the land in Qormi by Government, in its agreement with LBM Breweries Ltd, implied that Marsovin Ltd and Agrico Ltd had fulfilled their obligations in terms of their preliminary agreement with Vassallo Builders Group Ltd. This development led to the signing of the final share transfer agreement on 23 December 2009. According to this agreement, 2,799,999 ordinary voting shares and 300,000 ordinary non-voting shares were transferred to Vassallo Builders Group Ltd, and one ordinary voting share was transferred to Vassallo Builders Ltd. The final share transfer agreement included a guarantee/warranty that LBM Breweries Ltd held a valid title, in full ownership, to the immovable property with all its right and appurtenances. Moreover, according to the agreement, the immovable property was vacant, free and unencumbered and, save for any privileged or hypothecary rights in favour of a commercial bank, was not subject to any servitude, privilege, hypothec, burden, ground rent or other right in favour of third parties. Nor was the property subject to any litigation, precautionary or executive warrants, enforcement notices, conservation orders, scheduling, expropriation, requisition orders or any other circumstances, which may affect the real enjoyment of the said land by the Company. In the event of a breach of any of these warranties, the agreement provided that the vendors would fully indemnify and hold harmless the purchasers.

[4] The affidavit by the Chair Vassallo Builders Group Ltd was submitted in relation to a later court case instituted by Vassallo Builders Group Ltd against Marsovin Ltd, Agrico Ltd, CaterGroup Ltd and the CoL. Further details relating to this case that are relevant to the matter under review are presented in subsequent sections of this report.

2.3.7 The 23 December 2009 agreement, in contrast to the 30 November 2009 preliminary agreement, which stated that shares for the global price of €8,000,000 were being transferred, indicated that the share price was €867,000. According to this agreement, following the payment of €465,875 on 3 December 2009 and the payment of €0.28 effected on the date of agreement (representing the one share acquired by Vassallo Builders Ltd), the remaining balance from the total price of €867,000 was to be paid on 15 March 2010. This remaining payment was subject to the removal of all plant and equipment by the vendors, the filing of the audited accounts of LBM Breweries Ltd for the year ending 31 December 2009, and the delivery of the register of members and all other statutory books of the Company. However, in addition to these payments, the 23 December 2009 agreement also stipulated that on the date of payment, that is, 15 March 2010, the liabilities of LBM Breweries Ltd were not to exceed €7,133,000. In this respect, the original global price of €8,000,000, cited in the preliminary agreement, was settled through the payment of €867,000 and the acceptance of €7,133,000 in liabilities.

2.3.8 Following full payment of dues, Vassallo Builders Group Ltd, through LBM Breweries Ltd, took possession of the site. On 1 March 2010, LBM Breweries Ltd changed its name to CaterGroup Ltd to reflect the intended change in line of business. Subsequent to this, CaterGroup Ltd implemented the necessary development works and started operating a catering enterprise.

2.4 On the Legality of the Contract of Sale of the Perpetual Directum Dominium

Initial Concerns regarding the 2009 Contract

2.4.1 The earliest reference to a possible issue with respect to the transfer of the land in Qormi was made in a parliamentary question dated 18 January 2011, raised by the Hon. Charles Buhagiar, whereby the Minister MFEI was requested to table a copy of the contract by which this site was allocated for the construction of the Löwenbräu brewery. This was subsequently followed by correspondence sent on 9 February 2011 by an official in the Secretariat of the PS Revenues and Land to the CoL and the DG GPD[5], following queries raised on the matter by a Sunday newspaper. The newspaper referred to the fact that the factory previously housing the Löwenbräu brewery had been acquired by Vassallo Builders Group Ltd, and questioned the process by which this transfer was effected. Moreover, the newspaper contended that, according to local development plans, the use of the land was restricted to industrial purposes, and queried whether the local plans had changed or whether catering was being considered an industrial activity. Another parliamentary question, raised by the same MP and addressed to the Minister MFEI on 15 February 2011, requested the tabling of the parliamentary resolution or the call for tenders through which this land was allocated.

2.4.2 Irrespective of that claimed regarding the CoL's involvement leading to the 3 December 2009 contract, in submissions to the NAO, the CoL maintained that he had become aware of this contract when a newspaper article relating to this disposal first appeared. According to the CoL, he immediately sought to take action to address that alleged in the article. Supporting documentation reviewed by the NAO indicated that on 24 February 2011, the CoL submitted correspondence to the DG GPD and copied to the PS Revenues and Land, wherein he indicated that he had discussed the matter with the Attorney General. In a response dated 26 February 2011, the PS Revenues and Land informed his Head of Secretariat, the DG GPD and

[5] It must be noted that from this point of the Report onwards, the DG GPD is not that referred to in earlier parts of the report, as the previous DG GPD had retired in January 2011.

the CoL that he was unaware of the matter yet intended to better understand the background of the case, particularly that stated by the Attorney General. To this end, the PS Revenues and Land proposed that a meeting be held on 28 February 2011. Following these developments, on 7 March 2011, the PS Revenues and Land directed the DG GPD to seek further advice from the Attorney General and subsequently take the appropriate legal measures.

2.4.3 During a meeting with the NAO, the PS Revenues and Land confirmed the sequence of events as captured in the preceding paragraph and indicated that the matter was first brought to his attention by the CoL, who requested an urgent meeting in this respect. Following this meeting, the Attorney General was informed, and another meeting was held shortly after with the DG GPD, the CoL, and possibly, the Head of Secretariat of the PS Revenues and Land.

2.4.4 The Minister MFEI indicated to the NAO that the PS Revenues and Land had informed him of this case, specifying that a value for the cancellation of the conditions was to be established. According to the Minister MFEI, he was in agreement with that indicated, particularly so in view of the fact that Government had changed its policy relating to land use for the area, no longer restricting it to industrial use. Furthermore, the Minister MFEI stated that he was not aware that a contract had already been signed and that action taken at this point in time was intended to correct the 2009 contract. Moreover, the Minister MFEI indicated that the CoL had not contacted him directly on this matter.

The Attorney General's Advice

2.4.5 On 4 April 2011, citing the parliamentary questions raised on the matter, the CoL sought the advice of the Attorney General regarding the possibility of challenging the validity of the contract signed on 3 December 2009. This correspondence was submitted through the Minister MFEI, the PS Revenues and Land and the DG GPD. In this correspondence, the CoL explained that the land in Qormi had been granted on perpetual emphyteusis in 1990 to Löwenbräu Ltd for industrial purposes, specifically for the production of alcoholic and non-alcoholic beverages. This grant was made on the instructions of the then Minister MEA, in terms of Clause 4b of the Schedule of the Disposal of Government Land Act (Chapter 268). According to this clause, Government land may be transferred by title of emphyteusis '*... if it consists in land which is offered for an industrial project after applicant would have satisfied Government about the benefit which the project would render to the country's economy and that it would create an adequate number of jobs*.'

2.4.6 The CoL added that the conditions of the perpetual grant did not include any revision or limitation to the ground rent redemption, and therefore, in terms of Article 1501 of the Civil Code (Chapter 16), the emphyteuta could have redeemed the ground rent immediately following the publication of the contract. Such redemption could have been made through the filing of a schedule of redemption in court or at the Company's request for redemption through a contract.

2.4.7 The CoL maintained that although the emphyteuta may be considered as the owner of the property following the redemption of ground rent, this bore no impact on the conditions of the emphyteusis, which would remain in force throughout the term of the emphyteusis, as per the above-cited Article. Given that this case involved a perpetual emphyteusis, the conditions remained indefinitely applicable. Notwithstanding this, the CoL acknowledged that in this case, as in all other cases of redemption of Joint Office property, the GPD had not only redeemed the ground rent but had also sold the directum dominium. However, the CoL noted that the

redemption of ground rent inclusive of the sale of the directum dominium applied to property held on emphyteusis for residential purposes, as regulated in terms of Clause 3 of the Schedule of the Disposal of Government Land Act (Chapter 268).[6]

2.4.8 Crucially, in this correspondence to the Attorney General, the CoL stated that, in selling the directum dominium of the perpetual emphyteusis of the land in Qormi, granted originally for industrial purposes, the GPD had probably infringed the Disposal of Government Land Act (Chapter 268). For the Act only allowed for the sale of such land to be made through a call for tenders or through a parliamentary resolution. The CoL proceeded to state that, as a consequence, the contract dated 3 December 2009 was null.

2.4.9 The main concern of the CoL was that the emphyteuta, who had a non-revisable yearly ground rent of €23,294, had become the owner of the property with no restrictions with respect to land use for €465,875, which sum corresponded to the amount payable for redemption. In the CoL's opinion, the land in question was relatively large and of a much higher value than the amount paid if developed for commercial purposes, even if sold subject to the perpetual emphyteusis at the yearly ground rent of €23,294.

2.4.10 The CoL acknowledged that, according to the contract dated 3 December 2009, any litigation on disagreements regarding the interpretation of contract conditions was to be decided by the Malta Arbitration Centre, and therefore, Government would have to resort to this course of action if it intended to challenge the contract. According to the CoL's understanding, if arbitration found in favour of the GPD or settlement on a fair price to be paid was reached, then the land would have to be disposed of either through a call for tenders or by means of a parliamentary resolution, as prescribed by law. In the correspondence submitted to the Attorney General, the CoL indicated that he intended to challenge the contract through an official letter and call on the Company to amend the contract by limiting it to the redemption of ground rent as a first measure. Moreover, the CoL noted that the signatory that appeared on behalf of LBM Breweries Ltd '*was only authorised to redeem*'. The advice of the Attorney General was sought in this respect.

2.4.11 While the legal advice of the Attorney General was not found on file, the DG GPD, the PS Revenues and Land and the Minister MFEI endorsed the correspondence submitted by the CoL on 4 April 2011. Their respective endorsement was dated 8 April 2011, 11 April 2011 and 28 April 2011. Following the endorsement of the PS Revenues and Land, on 12 April 2011, the DG GPD instructed the CoL to initiate legal proceedings. The NAO was unable to determine whether action by the GPD was taken after the legal advice obtained from the Attorney General; however, that stated by the CoL indicated such.

2.4.12 Following queries raised by the NAO, the Attorney General confirmed that a meeting had taken place with GPD officials, wherein he advised that the validity of the 3 December 2009 contract could be challenged on the basis of the Disposal of Government Land Act (Chapter 268). The Attorney General indicated that this advice was most likely given verbally. This version of events was corroborated by the PS Revenues and Land, the DG GPD and the CoL during meetings with the NAO. Further commenting in this regard, the PS Revenues and Land noted that it was likely that the Attorney General was kept informed of developments throughout the process leading

[6] '*Government land may be sold or the perpetual or temporary dominium directum burden thereon may be redeemed if such land consists of flats, houses or garages which are offered by means of a public notice to be bought or redeemed by a person who resides therein in the case of flats or houses, or by the recognized emphyteuta or tenant in the case of garages, under such conditions as are shown in that notice.*'

to the corrective deed. The DG GPD confirmed that stated by the PS Revenues and Land.

Legal Action

2.4.13 On 20 May 2011, a GPD Legal Officer filed a judicial letter on behalf of the CoL against CaterGroup Ltd, formerly LBM Breweries Ltd, concerning the site in question. Stated in the letter was the fact that the perpetual emphyteusis had been granted in 1990 for industrial use, specifically for the production of alcoholic and non-alcoholic beverages. The concession had been made by direct allocation in view of the site's intended use in the beverage production industry, and its consequent benefit to Malta's economy, partly through the creation of new jobs. It was argued that the ground rent payable with respect to the land in Qormi was established in accordance with rates set for industrial sites.

2.4.14 Stated in the judicial letter was the fact that the conditions of the perpetual emphyteusis did not permit the purchase of the perpetual directum dominium, but only allowed for the redemption of ground rent subject to the conditions in the original emphyteutical grant, which limited use of the site to industrial purposes. The contract between Government and LBM Breweries Ltd, dated 3 December 2009, was therefore in breach of the provisions stipulated in the Disposal of Government Land Act (Chapter 268), that only allowed the transfer of such land through a call for tenders or through a parliamentary resolution. Consequently, the 3 December 2009 contract was null and without any legal basis. For this reason, CaterGroup Ltd was to come forward for the rescission of the contract within 15 days of notification of the judicial letter. In the eventuality of the Company's failure to comply, Government reserved the right to take further legal action. The NAO noted that the judicial letter of 20 May 2011 had not yet been served to CaterGroup Ltd by 2 June 2011, at which point the GPD resorted to file the judicial letter again.

2.4.15 Following the 20 May 2011 submission by the GPD, Vassallo Builders Group Ltd and Vassallo Builders Ltd sent Marsovin Ltd and Agrico Ltd a legal letter on 20 June 2011, informing them of the alleged nullity of the 3 December 2009 contract and calling on them to carry out any acts required to ensure that the warranties stipulated in the 23 December 2009 agreement were fully honoured. In reply, on 29 November 2011, through a legal letter, Marsovin Ltd and Agrico Ltd refuted the claims made by Vassallo Builders Group Ltd and Vassallo Builders Ltd, asserting that the provisions of the share transfer agreement were not breached or not being honoured, and suggested that any legal remedy should be sought from Government and the relevant officials thereof.

2.4.16 On 10 January 2012, Vassallo Builders Group Ltd and Vassallo Builders Ltd informed Marsovin Ltd and Agrico Ltd, by way of a legal letter, that, for all intents and purposes of law and of the share transfer agreement, the CoL had indicated that a public call for tenders for the transfer of the direct ownership, together with all the relative emphyteutical conditions burdening the immovable property, was to be issued by the GPD. In this respect, Marsovin Ltd and Agrico Ltd were being requested to carry out the necessary acts and formalities required to avert or remedy any breach of the warranties granted to Vassallo Builders Group Ltd and Vassallo Builders Ltd by virtue of the 23 December 2009 share transfer agreement. In response, on 1 February 2012, Marsovin Ltd and Agrico Ltd reiterated that stated in their reply by legal letter dated 29 November 2011.

2.4.17 Subsequent to these developments, Vassallo Builders Group Ltd sought the advice of a Legal Consultant regarding the claims made by the CoL through the judicial letter

dated 20 May 2011 and the denial of responsibility of Marsovin Ltd and Agrico Ltd. According to the Legal Consultant to Vassallo Builders Group Ltd:

a. Chapter 268 included imperative norms with respect to government land, dictated by safeguards of public interest. According to the letter and the spirit of the law, the cancellation of any conditions burdening the land could only be carried out according to one of the options stipulated in Article 3 of Chapter 268 – parliamentary resolution or a call for tenders. Therefore, Government could not transfer the land and cancel the conditions of the original emphyteusis without respecting the imperative precepts of the law. The consequence of this lack of compliance with these precepts was the nullification of the contract, as provided in Article 4 of Chapter 268. One could suppose that such a violation impinged on the structure and content of the contract.

b. Having accepted the fact that the 3 December 2009 contract was null, its consequences on the 23 December 2009 share transfer agreement were examined. Although the two deeds were autonomous, there was interdependence between the two, with one contract only being possible if the other was concluded. Therefore, the 3 December 2009 contract conditioned the execution and the efficacy of the 23 December 2009 agreement. Rationally, Vassallo Builders Group Ltd had no reason to doubt the validity of the 3 December 2009 contract, to which they were not participants.

c. The share transfer agreement made reference to the fact that LBM Breweries Ltd owned a plot of land in Qormi, in view of the ground rent redemption effected through the 3 December 2009 contract. This plot of land was noted as the only asset of the Company. The sellers guaranteed that LBM Breweries Ltd had a valid title in full ownership to the immovable property with all its rights and appurtenances. The reality and the juridical truth, even if recognised post-facto, were not in line with this guarantee. If the 3 December 2009 contract was considered null, this not only impacted on single transactions but also on the merits of the complex economic operation linking the two parties.

d. Since Marsovin Ltd and Agrico Ltd did not hold a valid title in full ownership of the land, then the guarantee provided by them was lacking, and this violation rendered them liable for any damages suffered by Vassallo Builders Group Ltd not only in terms of rectifying their position in line with the provisions of Chapter 268, but also in terms of the investment made on the site.

e. Marsovin Ltd and Agrico Ltd could not shift the blame on Government, since ignorance of the law was not an excuse. However, undoubtedly Government had a lot to answer for, since the promulgator of the law should also observe it.

f. For practicality's sake, Vassallo Builders Group Ltd was to secure the cancellation of the conditions on the land in terms of the special legal provisions. Once this was secured, and the payment requested by Government effected, then Vassallo Builders Group Ltd could proceed with judicial action against Marsovin Ltd and Agrico Ltd, and not against Government, as suggested by the vendors in their replies. Vassallo Builders Group Ltd was not party to the 3 December 2009 agreement, and since this contract was being considered null, then it was as if it never took place. The vendors could then initiate judicial proceedings against Government if they felt they had a right to compensation. In the meantime, Vassallo Builders Group Ltd and Vassallo Builders Ltd were to reserve their right for damages through judicial action.

2.4.18 Without prejudice to their right to legal action, Vassallo Builders Group Ltd and Vassallo Builders Ltd, through CaterGroup Ltd, acted on this legal advice and sought to secure the cancellation of any restriction regarding the use of the property. This is addressed in detail in the ensuing section of the report.

NAO Concerns regarding the 2009 Contract

2.4.19 The developments that ensued following the parliamentary questions raised by the Hon. Charles Buhagiar vindicated the concerns expressed by the NAO in the preceding sections of the report. These concerns related to possible prior agreement, the legality of the cancellation of the conditions without due authorisation and at no charge and the overall haste of the process. The declaration by the CoL that the cancellation of the conditions in the 2009 contract was in breach of the Disposal of Government Land Act (Chapter 268) and the affirmation by the Attorney General that grounds for challenging this contract existed substantiate this Office's concerns.

2.4.20 In light of the now evident irregularity and the suspect manner with which the 2009 contract was finalised, the NAO raised queries with the Minister MFEI and the PS Revenues and Land. The Minister MFEI acknowledged the serious failures in terms of the management of the process and the conduct of the officials involved. On the other hand, the PS Revenues and Land stated that he had tasked the DG GPD and the CoL to investigate and take appropriate measures; however, he had refrained from taking any direct action. Commenting in this respect, the CoL maintained that he did not consider any disciplinary action necessary, as he did not suspect any wrongdoing by the GPD officials involved, but assumed that this was the result of a lack of experience and knowledge. Elaborating in this respect, the CoL indicated that the DG GPD had no experience of GPD-related matters at the time, while the Assistant Director Contracts GPD and the Notary GPD ordinarily focused on matters unrelated to this case.

2.4.21 The NAO has serious reservations regarding this justification, for a lack of experience and knowledge will only explain part of the irregularities noted. Lack of experience and knowledge cannot be cited as justification for the evidence indicating prior accord documented in the preliminary agreement between Marsovin Ltd and Agrico Ltd, and Vassallo Builders Group Ltd. This too cannot be cited with respect to the inexplicable haste with which the GPD finalised the 2009 contract. Whether this justification may be extended to account for the GPD's failure to seek legal advice, to obtain ministerial authorisation and to levy no charge remains subject to debate; however, when one simultaneously considers all the circumstances of the case, the NAO remains unconvinced.

2.4.22 Notwithstanding this, under the premise that the Minister MFEI, the PS Revenues and Land and the CoL were originally unaware of what went on in 2009, then the prompt corrective action taken is commendable. The matter was immediately brought to the attention of the Minister MFEI and the PS Revenues and Land, who in coordination with the DG GPD and the CoL referred it to the Attorney General. The CoL rightly advocated that part of the 2009 contract was to be challenged, with the Company called on to amend the contract by limiting it to the redemption of ground rent as a first measure. The Attorney General acknowledged the validity of that proposed and by 20 May 2011, the GPD had initiated judicial action. Although the planned action was commendable, developments that ensued deviated, in an adverse manner from that intended, resulting in the failure to safeguard Government's interests and an increased exposure to possible liabilities.

2.5 Agreement of Regularisation

Negotiations between Government and CaterGroup Ltd

2.5.1 Following the filing of the judicial letter by the GPD, CaterGroup Ltd sought a solution to this situation, thereby attempting to avoid the eventuality of being prohibited from making use of the premises for their catering operations. The concerns of the Company centred on the fact that it had invested significant funds in this project, in terms of its acquisition of the entire shareholding of LBM Breweries Ltd from Marsovin Ltd and Agrico Ltd, as well as in terms of investment in the catering business. This investment included infrastructural work undertaken, the purchase of catering equipment and the recruitment of personnel.

2.5.2 Based on documentation reviewed, the NAO established that a number of meetings were held between the GPD and CaterGroup Ltd. According to GPD records, the Minister MFCC[7] had directed the CoL to hold discussions with CaterGroup Ltd in order to rectify the error committed through the contract of redemption. Indicated in the documentation reviewed by the NAO was the fact that these meetings were attended by the DG GPD, the CoL, as well as the Chair and the Director Vassallo Builders Group Ltd. Although the documentation reviewed indirectly referred to the meetings held, the NAO was not provided with any minutes of these meetings despite requests made to this effect.

2.5.3 In view of the lack of documentation, the NAO sought clarifications from the Minister MFCC, the DG GPD and the CoL. The CoL indicated to this Office that, following the filing of the 20 May 2011 judicial letter by the GPD, CaterGroup Ltd had approached the Minister MFCC, who in turn instructed the CoL to discuss matters with the Company with a view to finding a possible solution. This was corroborated by the DG GPD. The Minister MFCC acknowledged that he had discussed the matter with the DG GPD and the CoL; however, he denied giving instructions to this effect to the CoL, claiming instead that direction must have been provided by the DG GPD, in line with that discussed. Moreover, the Minister MFCC maintained that he was not party to these discussions, yet was informed of developments.

2.5.4 Additionally, aside from the meetings referred to in paragraph 2.5.2, an initial meeting was held at the GPD and attended by the DG GPD, the CoL, the CEO and the Company Secretary Marsovin Group Ltd[8] as well as the Legal Adviser Vassallo Builders Group Ltd. This was established in court testimony given by the CEO Marsovin Group Ltd and the Legal Adviser Vassallo Builders Group Ltd. Both stated that the stance adopted by the GPD during this meeting was that the 3 December 2009 contract was null and void, and therefore the site could only be used for the production of beverages. The solution presented by the GPD was the cancellation of the condition limiting use of the land in this sense against an additional payment.

2.5.5 According to the CEO Marsovin Group Ltd, Marsovin Ltd and Agrico Ltd terminated negotiations with the GPD on this matter following this meeting. The DG GPD and Chair Vassallo Builders Group Ltd confirmed this version of events.

[7] It must be noted that the PS Revenues and Land was appointed Minister MFCC on 6 January 2012. The developments referred to in this section of the report take place during both tenures; however, for purposes of clarity, reference is made to Minister MFCC.

[8] The Company Secretary Marsovin Group Ltd was, earlier in the report, referred to as the Company Secretary LBM Breweries Ltd.

2.5.6 Following discussions held, agreement on a way forward was eventually reached between the GPD and CaterGroup Ltd, duly represented by Vassallo Builders Group Ltd. In this sense, it was agreed that the amount payable by CaterGroup Ltd for the cancellation of all existing conditions was to be established by three architects, hereafter referred to as the Committee. According to the CoL, it was the DG GPD who had proposed the establishment of this Committee, which course of action he had agreed to. In effect, the three architects constituting the Committee were selected as follows: one representing the GPD, another representing CaterGroup Ltd, while the third architect, who was to chair the Committee, was nominated by the GPD and endorsed by the Company.

2.5.7 In a meeting with the NAO, the Minister MFEI stated that he was not involved in the process of setting up this Committee, though he did not exclude that he may have been informed about it. It must be noted that the setting up of the Committee in December 2011 occurred at a time when responsibility for the GPD shifted from the MFEI to the MFCC.

2.5.8 During court testimony provided on 2 June 2016, the Chair Vassallo Builders Group Ltd explained that the GPD had initially requested a 'phenomenally high' compensation for the cancellation of the conditions. This amount was contested by Vassallo Builders Group Ltd and, in a bid to find a solution, arbitration was resorted to. Although the GPD and Vassallo Builders Group Ltd agreed on the appointment of the Committee, the Chair Vassallo Builders Group Ltd noted that this course of action was considered as an attempt at resolving this impasse, and both parties were free to accept or reject the valuation determined by the Committee. This was corroborated in court testimony given by the Director Vassallo Builders Group Ltd on 27 November 2014, who stated that the GPD informed the Company that the compensation due, as arrived at by the Committee, was less than that originally requested by the GPD. When queried on this matter by the NAO, the Chair Vassallo Builders Group Ltd indicated that, to the best of his knowledge, the sum originally requested was around €400,000 to €500,000. Further commenting in this respect, the Chair Vassallo Builders Group Ltd indicated that this sum was proposed by either the CoL or the DG GPD during a meeting held. This was confirmed by the Director Vassallo Builders Group Ltd. Notwithstanding that stated by the Chair and the Director Vassallo Builders Group Ltd, the DG GPD claimed that he could not recall any sum requested by the GPD prior to that established by the Committee. Similarly, the CoL argued that he was not aware of this initial request, yet were it the case, he would not have been informed about it as valuations were not within the remit of the CoL. Reiterating that stated, the Chair Vassallo Builders Group Ltd explained that as a reaction to the initial amount requested by the GPD, the Company had indicated that it was not willing to pay this sum and would be suing the GPD for damages. It is precisely in this context that the proposal to appoint a committee to estimate the value of the land was then put forward by the GPD.

Determining Value: Setting Up of the Committee, Mandate and Report

2.5.9 The Committee's instructions regarding the valuation of the immovable property located at Ta' L-Istabal, Qormi were provided by the DG GPD through correspondence dated 17 December 2011, a copy of which was not found in file and could not be sourced by the NAO despite requests made to this effect. In view of the absence of the required documentation, the NAO directed queries regarding the Committee's terms to its Chair. According to the Chair Committee, in addition to the correspondence dated 17 December 2011, the mandate and circumstances of the case were explained in detail by the DG GPD during a meeting, possibly two, held at the office of the DG GPD. This meeting was attended by all Committee members, and possibly another

GPD official as well as the Chair and the Director Vassallo Builders Group Ltd. In clarifications provided to the NAO, the Chair Committee indicated that while the role of the Committee was that of establishing value, his role was that of an arbitrator over the two potentially different views presented by the members, one representing the GPD and the other representing Vassallo Builders Group Ltd. Of paramount importance was that stated by the Chair Committee in court testimony and in submissions to the NAO regarding the mandate of the Committee, which was to ascertain the value of the land according to 1990 rates had the property not been burdened with any conditions regarding its use when originally allocated.

2.5.10 According to the Chair Committee, documents provided in relation to this assignment were the 13 November 1990 contract and a site plan. In written submissions to this Office, the Chair Committee explained that his role was that of challenging the technical aspects underlying the points of view presented by the other two members in their valuation of the land and determining whether technical consensus could be reached between all members of the Committee. Should such consensus not be reached, the Chair's role was to provide his own, independent and definitive valuation of the land.

2.5.11 Although the NAO established that the DG GPD communicated to the Committee the mandate that it was to assume, this Office was unable to establish who set the parameters for the valuation, specifically the application of 1990 rates. In a meeting with the NAO, the CoL claimed that he was not in any way involved in the setting of these parameters, since this was a technical matter and therefore formed part of the responsibilities of the DG GPD. On the other hand, the DG GPD indicated that he had merely communicated these instructions to the Committee; however, it was the CoL who had taken ownership of this case, proposed the setting up of the Committee, and decided to value the land as at 1990. In this respect, the DG GPD commented that the CoL had proposed ascertaining the market value of the land in 1990 had its use not been restricted to beverage production. Nevertheless, the DG GPD indicated that he was in agreement with the application of the 1990 rates. The DG GPD noted that this case was brought to his attention a few weeks after his posting as DG GPD and that he had been relieved that the CoL had identified a possible solution to this problem. In light of the diametrically opposing views expressed by the DG GPD and the CoL, the NAO was unable to determine who decided that the Committee was to base its valuation on 1990 rates.

2.5.12 The PS Revenues and Land asserted to the NAO that he was not involved in setting the parameters and was not aware of the application of the 1990 rates at the time; however, he vehemently argued that the application of the 1990 rates was legally sound and just, basing his argument on the fact that the Company had been the emphyteuta of the land since 1990 and that valuing the site at current rates would have constituted 'unjustified enrichment' by Government. Moreover, the PS Revenues and Land indicated that, even if he had been notified of this criterion and found it questionable, he would not have interfered as this was outside the politician's remit.

2.5.13 In a meeting with the NAO, the Chair and the Director Vassallo Builders Group Ltd provided a slightly divergent version of events in explaining the Committee's application of the 1990 rates. The Chair Vassallo Builders Group Ltd indicated that the decision to value the property as at 1990, and more broadly the terms of reference of the valuation, were proposed by the GPD, but were agreed to by both parties. On the other hand, the Director Vassallo Builders Group Ltd suggested that the terms of reference were decided by both parties following discussions held.

2.5.14 The report by the Committee, signed by all three members, was submitted to the DG GPD and the Chair Vassallo Builders Group Ltd on 30 January 2012, with the latter referring to a meeting between both parties and the Committee, during which the report was presented. In its review, the Committee examined the original contract granting the perpetual emphyteusis, drawings of the site and planning permits. The Committee noted that the emphyteutical grant was subject to an annual and perpetual ground rent of Lm10,000 (€23,294) and subject to a number of conditions, including the use of the site for industrial purposes, specifically the production of alcoholic and non-alcoholic beverages. Furthermore, the Committee considered that the emphyteuta was to erect a factory building costing at least Lm450,000 (€1,048,218) within three years from the date of issue of the relative permits and to maintain the building in a good state of repair.

2.5.15 The site area and characteristics were also duly noted. The deed referred to an area of approximately 21,000 square metres, bound on the northeast and northwest by government property, on the southwest by a public road, and included a spring of fresh water that the emphyteuta had the right to make use of without making additional excavations. It was further stated that, since the 1990 grant, part of the land had been used to construct additional public roads, reducing the site from the original area of 21,000 square metres to 17,660 square metres, as measured by the Committee. Erected buildings covered an area of 7,057 square metres, equivalent to a built-up area of approximately 40 per cent of the site. The Committee noted that an application had been submitted to the Malta Environment and Planning Authority (MEPA), then still at development approval stage, for alterations to the existing structures and to change the use of the site to an area for the manufacture and preparation of food products. According to MEPA notes appended to this application, the area was designated as a small to medium enterprise site in the Central Malta Local Plan, which included industrial activities such as workshops and warehouses, and had building height limitations of three floors with a semi-basement, or 14 metres.

2.5.16 As per instructions given, the Committee sought to estimate the fair market value of the perpetual emphyteusis as at 1990, without any conditions limiting site use, that is, as a freehold, commercial property. The Committee indicated that the fair market value of a property was the amount for which an asset could be exchanged between knowledgeable, willing parties, in an arm's length transaction. In such a transaction, it was assumed that the property was publicly exposed to the market, that market conditions permitted orderly disposal, and that a normal period was available for the negotiation of the sale.

2.5.17 In order to establish the applicable market rates prevalent in 1990, the Committee carried out a survey of prices for land offered for sale between January and December 1990. Information was sourced from a newspaper, sampling approximately two Sundays per month over the survey period. While 80 plots of land were identified in this process, only eight were indicated as suitable for industrial use. The asking price for these plots varied somewhat by location, but more importantly by size. The average asking price for plots smaller than 500 square metres (average in the survey was 250 square metres) was €101 per square metre. On the other hand, the average asking price for plots larger than 1,000 square metres (average in the survey was approximately 1,600 square metres) was €35 per square metre, with the asking price of the largest plot identified in the survey going down to approximately €12 per square metre. The Committee attributed this variation to the smaller coverage (percentage of the site that can be built) possible on larger plots, because of the need to create internal infrastructure, such as roads.

2.5.18 Bearing in mind these considerations, while assuming site coverage of 45 per cent as well as a 10 per cent difference between the asking price and selling price, the Committee established a rate varying between €35 and €45 per square metre. Applied to the land in Qormi, which has a site coverage of 40 per cent, the Committee determined that the appropriate rate to be utilised was of €40 per square metre. Considering the overall area of 17,660 square metres, the freehold value of the land in Qormi, zoned for unlimited industrial use, was estimated at €706,400. The NAO noted that the valuation excluded structures, and in submissions to this Office, the Chair Committee explained that since the structures on site were erected after 1990, then a valuation as at 1990 was not to include such structures. Moreover, the mandate put to the Committee was specifically for a valuation of the land.

2.5.19 The estimated freehold value of €706,400, based on 1990 market rates, was higher than the amount arrived at through the capitalisation of the ground rent as per the original contract, which was equivalent to €571,000 and €462,400, capitalised at four per cent and five per cent, respectively. The Committee argued that the difference in price between that established based on market rates and that resulting from the capitalisation of ground rent of the original contract represented the limitation imposed on the type of industrial activity that could be allowed. However, the Committee noted that the type of industrial use allowed in terms of planning regulations applicable to the area was wider than that defined in the original contract.

A Proposal for Regularisation through Exchange

2.5.20 Following the submission of the report by the Committee, discussions between the GPD and CaterGroup Ltd regarding the regularisation of the Company's position came to a conclusion in early March 2012, for, on 2 March 2012, the CoL submitted a minute to the Minister MFCC, through the DG GPD. In this minute, the CoL stated that initially, CaterGroup Ltd was not willing to pay for the 'sale' of the conditions that still encumbered the site and thereby regularise its position in terms of the Disposal of Government Land Act (Chapter 268). The CoL stated that agreement was eventually reached, whereby the amount payable by CaterGroup Ltd for the cancellation of all existing conditions was established by the Committee.

2.5.21 The minute by the CoL, dated 2 March 2012, referred to the free market value arrived at by the Committee, understood as implying the 'sale' of the condition limiting the use of the Qormi site for industrial purposes. The CoL stated that while the value arrived at was of €706,400, the redemption of ground rent on 3 December 2009 had entailed a disbursement (in favour of Government) of €465,875. In this context, the CoL requested the approval of the Minister MFCC and the DG GPD regarding the offsetting of the two transactions, thereby resulting in a balance due to Government of €240,525.

2.5.22 Furthermore, in this minute, the CoL referred to a list of expropriated property belonging to Vassallo Builders Group Ltd. The CoL stated that Vassallo Builders Group Ltd was the utilista of these properties and that the amount due by Government in this respect was approximately €291,660. According to the CoL, CaterGroup Ltd and Vassallo Builders Group Ltd were owned by the same shareholders. Elaborating on this point, the CoL stated that Vassallo Builders Group Ltd was willing to transfer its right to compensation with regard to the aforementioned list of expropriated properties to CaterGroup Ltd. In so doing, CaterGroup Ltd would be able to exchange the sum of €291,660 with the sale of the condition encumbering the site, which amounted to €240,525. The sale of this condition was termed by the CoL as an indirect sale of the property.

2.5.23 To this end, the CoL requested the authorisation of the Minister MFCC and the DG GPD to exchange the amount due by Government for the expropriated property against that payable by CaterGroup Ltd for the land in Qormi. Authorisation was sought in terms of Clause 13 of the Schedule of the Disposal of Government Land Act (Chapter 268), which stipulates that '*Government land may be given by exchange with any other land which is declared as required for a public purpose under Chapter 88 of the Laws of Malta, to the owner of land which has been so declared. Provided that when a difference exists in the value of the two plots of land given by exchange, such difference shall be balanced with also giving an additional sum of money. Sohowever that the exchange may not be effected if the value of the government land to be given exceeds thirty per cent of the value of the expropriated land. Any damages sustained due to the expropriation of such land shall form part of the value of the same land.*'

2.5.24 Under such an understanding, the CoL indicated that the sum of €291,660 due for expropriated property, inclusive of further interest accrued up to the date of the contract, would be exchanged for the sum of €240,525, resulting in a balance of approximately €52,000 payable to CaterGroup Ltd. Finally, the CoL noted that part of the Qormi land had been expropriated for road formation. No valuation of this expropriated land had been carried out and the CoL was concerned that this could have resulted in substantial compensation payable to CaterGroup Ltd. The CoL ultimately indicated that CaterGroup Ltd was willing to forego compensation payable in this respect.

2.5.25 In light of this minute, the NAO sought to establish why this course of action was resorted to instead of other options. According to the Minister MFEI, Government's main focus was on establishing reasonable compensation for the cancellation of the conditions while identifying a method for the correct disposal of these conditions. This was confirmed by the CoL, during a meeting with the NAO, who stated that since the land belonged to CaterGroup Ltd, the tender and parliamentary resolution methods of disposal were not feasible, and could only be effected if the relevant part of the 2009 contract was nullified through legal action, or if the Company agreed to it, which was unlikely. According to the CoL, the GPD did not have any alternative but to work towards attaining payment for the conditions, as the Department was effectively constrained in terms of possible action by the error committed in the 2009 contract. The DG GPD indicated that payment for the cancellation of the conditions was to be made in compliance with existing legislation, that is, either through a call for tenders, or a parliamentary resolution, or an exchange. However, the DG GPD acknowledged that Government was in a weak position, since the situation was the result of an error on the part of the Department and that challenging the 2009 contract presented an element of legal uncertainty. In this scenario, the GPD was amenable to arrive at an out-of-court settlement that was considered reasonable by both parties. Finally, the Minister MFCC informed the NAO that he was not involved in the identification of possible methods of resolving the impasse between Government and CaterGroup Ltd.

2.5.26 It was in this context that the NAO sought to determine who proposed an exchange of land under Clause 13 of the Schedule of the Disposal of Government Land Act (Chapter 268). The DG GPD and the CoL indicated that it was the latter who had suggested this way forward. On the other hand, the Director Vassallo Builders Group Ltd maintained that he had proposed this possible means of resolution in order to expedite the process.

2.5.27 The resort to an exchange of government land for expropriated property under Clause 13 of the Schedule effectively indicated that Government was no longer considering resolution of the matter through a public call for tenders or referral to

Parliament, as provided in Article 3(1)(a) and (d) of the Disposal of Government Land Act (Chapter 268), respectively. The NAO noted that the only reference to the resort to a call for tenders or referral to Parliament in documentation retained by the GPD was in the correspondence submitted by the CoL to the Attorney General on 4 April 2011 (paragraph 2.4.11 refers). Aside from this documentation, another reference to a possible call for tenders was made in a judicial letter submitted by Vassallo Builders Group Ltd to Marsovin Ltd and Agrico Ltd on 10 January 2012, wherein it was indicated that the GPD intended to issue such a call. When queried by the NAO on the GPD's preference to resort to this course of action rather than the issue of a call for tenders or referral to Parliament, the DG GPD indicated that had the possibility of an exchange not been proposed and not been feasible, then the sale of the condition would have had to be effected through a call for tenders with a right of first refusal. On the other hand, the CoL stated that the GPD was unable to issue a call for tender unless it first revoked in part the 3 December 2009 agreement. The NAO noted that this logic was similarly applicable under any of the options considered. According to the Chair Vassallo Builders Group Ltd, the issue of a call for tenders was one of the three viable methods of transfer, with the other two being an exchange or a parliamentary resolution; however, the Chair indicated that the resort to the issue of a tender was not favourably considered by his Company.

2.5.28 The above-cited developments between Vassallo Builders Group Ltd and CaterGroup Ltd were corroborated by the Chair Vassallo Builders Group Ltd (also Chair of its subsidiary, CaterGroup Ltd) in court documents reviewed by this Office. The Chair maintained that the transfer by Vassallo Builders Group Ltd to CaterGroup Ltd of the right for compensation for expropriated land was motivated by the latter's lack of funds. According to documentation examined by the NAO, since CaterGroup Ltd was unable to effect the necessary payment to Government, Vassallo Builders Group Ltd had to cover this cost. The Chair Vassallo Builders Group Ltd claimed that this Company had incurred financial damages in this respect, since Vassallo Builders Group Ltd had to transfer a minimum of €240,525 to CaterGroup Ltd, by way of non-refundable contribution, in order to secure the unconditional use of the land in Qormi.

2.5.29 This understanding was also reflected in that stated by the Director Vassallo Builders Group Ltd, who confirmed that this arrangement between these two Companies was primarily motivated by CaterGroup Ltd's inability to effect such a payment. Moreover, the Director Vassallo Builders Group Ltd argued that the exchange between Government and CaterGroup Ltd was possible under the Disposal of Government Land Act (Chapter 268). This exchange involved the transfer of immovable property belonging to Government for the payment of compensation arising from the expropriation of land. The Director Vassallo Builders Group Ltd stated that this exchange was possible without recourse to a parliamentary resolution or a call for tenders. Therefore, according to the Director Vassallo Builders Group Ltd, CaterGroup Ltd was to pay Government an aggregate consideration of €706,000 for the purchase of the site unencumbered by any conditions that previously limited use of the land in Qormi.

2.5.30 Following the detailed minute by the CoL on 2 March 2012, approvals were duly sourced. The DG GPD, through whom this minute was addressed, provided his endorsement on 8 March 2012. On the other hand, the authorisation of the Minister MFCC was dated 4 June 2012.

The 2012 Contract between Government and CaterGroup Ltd

2.5.31 By virtue of a contract, on 5 June 2012, Vassallo Builders Group Ltd assigned gratuitously and irrevocably to CaterGroup Ltd, by way of a non-refundable contribution, the

five properties that had been expropriated by Government for a public purpose. Consequently, the compensation due for these expropriated properties was now owed by Government to CaterGroup Ltd. An element of context was provided in this contract, wherein it was stated that further to verifications effected following the 20 May 2011 judicial letter, it transpired that the assertions made by the CoL therein were, in fact, correct. In this respect, CaterGroup Ltd was in agreement with the CoL that the 3 December 2009 contract, entered into by Government and LBM Breweries Ltd, was not conformant with the provisions stipulated in the Disposal of Government Land Act (Chapter 268). To this end, CaterGroup Ltd required the cancellation of the emphyteutical burdens and conditions originally imposed on the land as the Company would otherwise suffer an irreparable prejudice and an irrecoverable financial loss. According to the 5 June 2012 contract, CaterGroup Ltd did not have the necessary assets to effect the additional payment of €240,525, established by the CoL as the amount payable to secure the cancellation of all emphyteutical burdens and conditions limiting use of the land. In the circumstances, Vassallo Builders Group Ltd, in its capacity as shareholder of CaterGroup Ltd and in order to safeguard its investment in CaterGroup Ltd, elected to make a non-refundable capital contribution to CaterGroup Ltd to make good for the deficiency in the assets of CaterGroup Ltd. The non-refundable capital contribution in favour of CaterGroup Ltd entailed the transfer of five immovable properties, that is, two portions of land in Santa Venera and three portions of land in Msida. According to the contract, the value of the five properties amounted to €120,403, as determined by the architects appointed by Government to establish the fair value of these properties. Furthermore, damages payable by Government in terms of the Land Acquisition (Public Purposes) Ordinance (Chapter 88) with respect to these five properties amounted to €177,945.

2.5.32 Following this transfer of compensation rights, Government and CaterGroup Ltd entered into a contract for the rescission in part of the 3 December 2009 contract and the cancellation of the conditions limiting use of the Qormi site as per the 13 November 1990 contract. This contract between Government and CaterGroup Ltd was also signed on 5 June 2012. The NAO established that the notary who published this contract was engaged by Vassallo Builders Group Ltd. In the first instance, by virtue of this contract, the parties agreed to rescind the part of the 3 December 2009 contract wherein Government had consented to the renouncement of all the conditions regulating the emphyteutical concession dated 13 November 1990. Aside from this partial rescission, all other aspects of the 3 December 2009 contract remained valid. The parties agreed that Government was not liable to pay compensation to the Company since the rescission was being effected for reasons deemed valid at law.

2.5.33 In the second instance, reference was made to another contract entered into that same day, whereby Vassallo Builders Group Ltd had assigned gratuitously and irrevocably to CaterGroup Ltd five properties that had been expropriated for a public purpose. The properties transferred to CaterGroup Ltd were:

a. a portion of land located at the limits of Santa Venera, measuring approximately 412 square metres, which land was designated as a building site according to the Land Acquisition (Public Purposes) Ordinance (Chapter 88), shown on plan LD/104C/75, valued at €57,813 and subject to interests and damages amounting to €60,720, calculated with effect from 5 May 1991;

b. another portion of land situated within the limits of Santa Venera, measuring approximately 17 square metres, which land was designated as a building site according to the Land Acquisition (Public Purposes) Ordinance (Chapter 88), shown on plan LD/104C/75, valued at €2,385 and subject to interests and damages amounting to €2,506, calculated with effect from 2 May 1991;

c. a portion of land within the limits of Msida, measuring approximately 61 square metres, which land was designated as agricultural land according to the Land Acquisition (Public Purposes) Ordinance (Chapter 88), identified in red as plot 8A on plan LD/104/75/6, valued at €96 and subject to interests and damages amounting to €182, calculated with effect from 1 April 1974;

d. another portion of land within the limits of Msida, measuring approximately 1,368 square metres, which land was designated as agricultural land according to the Land Acquisition (Public Purposes) Ordinance (Chapter 88), identified in red as plot 10B on plan LD/104/75/5, valued at €59,257 and subject to interests and damages amounting to €112,913, calculated with effect from 1 April 1974; and

e. a third portion of land at the limits of Msida, measuring approximately 547 square metres, which land was designated as agricultural land according to the Land Acquisition (Public Purposes) Ordinance (Chapter 88), identified in red as plot 13 on plan LD/104/75, valued at €853 and subject to interests and damages amounting to €1,625, calculated with effect from 1 April 1974.

The value of the properties transferred from Vassallo Builders Group Ltd to CaterGroup Ltd, as agreed by the CoL and the Chair Vassallo Builders Group Ld, on behalf of CaterGroup Ltd, was set at €298,349.

2.5.34 In this context, CaterGroup Ltd requested, and Government accepted, to renounce in favour of the Company, by title of exchange, all the conditions imposed in the emphyteutical concession for the land in Qormi as stipulated in the 13 November 1990 contract. This cancellation was being effected by Government for a consideration of €240,525, which amount was being offset from the amount owed to CaterGroup Ltd for expropriated property, valued at €298,349. In exchange, CaterGroup Ltd transferred the title to the above-cited properties to Government. Finally, the Government paid the remaining balance of €57,824 to CaterGroup Ltd.

2.5.35 According to the contract, CaterGroup Ltd paid the Government a total of €706,000.[9] Of this amount, €465,875 had been paid for the redemption of ground rent by virtue of the contract dated 3 December 2009. Government offset the remaining amount of €240,525, payable by CaterGroup Ltd for the cancellation of all the conditions specified in the 13 November 1990 contract, against compensation due to the Company.

2.5.36 The NAO sought to establish whether Clause 13 of the Schedule of the Disposal of Government Land Act (Chapter 268) was appropriately cited in this case. According to this Clause, '*Government land may be given by exchange with any other land which is declared as required for a public purpose under Chapter 88 of the Laws of Malta, to the owner of land which has been so declared*.' To this end, the Office questioned whether this provision applied to the circumstances prevailing in this case, where Government was effectively exchanging a 'condition' burdening the land, rather than the land itself. According to Article 2 of the Disposal of Government Land Act, 'land' is defined as '... *any property which is immovable either by its nature or by reason of the object to which it refers, as provided in articles 308, 309 and 310 of the Civil Code*.' In turn, Article 310 of the Civil Code (Chapter 16) states that, 'The following are immovables by reason of the object to which they refer: *(a) the dominium directum or the right of the dominus on the tenement let out on emphyteusis, and the dominium utile or the right of the emphyteuta on such tenement* ...'. Therefore, the Office deems it reasonable to equate Government's ownership of the condition burdening the land

[9] Although the 5 June 2012 contract made reference to a total payment of €706,000, in effect, CaterGroup Ltd was charged €706,400, which amount was consistent with the freehold value established by the Committee.

in Qormi with that so termed as 'Government land' in Clause 13 of the Schedule, hence rendering possible the proposed exchange.

2.5.37 Further stipulated in Clause 13 of the Schedule is the proviso that, '... *when a difference exists in the value of the two plots of land given by exchange, such difference shall be balanced with also giving an additional sum of money. Sohowever that the exchange may not be effected if the value of the government land to be given exceeds thirty per cent of the value of the expropriated land*.' In this case, the value of the Government land, here equated as the condition, was that of €240,525, while the value of the expropriated land was that of €298,349. It is immediately evident that the value of the Government land being exchanged does not exceed the value of the expropriated land, therefore rendering the exchange conformant in this respect. However, it is imperative to note that the exchange can only be deemed conformant insofar as the values assigned to the lands in exchange reflect their true value. In this case, the NAO maintains strong reservations regarding the value assigned to the land in Qormi, contending that the basis of the valuation, devised by Government in agreement with Vassallo Builders Group Ltd, was seriously flawed. In this Office's understanding, the cancellation of the conditions should have been valued at the time of such cancellation, and not based on when the original emphyteutical grant was made. For it was then that the nature of the land was fundamentally altered, since no limitations in terms of use constrained ownership, therefore resulting in an accretion in value. Bearing in mind that the cancellation of the conditions as transacted in the 2009 contract was deemed invalid, then it is reasonable to consider that the conditions were to be valued when effectively cancelled, that is, 2012. It is in this context that the NAO considers the value assigned to the government land in Qormi as not reflecting its true value, for the basis of the application of 1990 rates remains fundamentally flawed and specious.

2.5.38 In this Office's opinion, the legality of Government's actions does not necessarily imply that the principles of good governance, accountability and transparency were respected. This is rendered immediately evident in the decision to apply 1990 rates. While the contract of exchange respected the letter of the law, the application of these rates flouted these principles. To an extent, these principles could have been better safeguarded had Government resorted to the disposal of its land following referral to Parliament or through a call for tenders. While the NAO reasserts that recourse to exchange was a legally valid option, this Office maintains that this course of action effectively circumvented the expected level of scrutiny provided by Parliament and exercised in public calls for tenders.

NAO Observations relating to the 2012 Contract

2.5.39 The NAO noted that the 5 June 2012 contract failed to include a clause that specified that this agreement was in full and final settlement and that CaterGroup Ltd would not hold Government responsible for any damages arising from the rescission in part of the 3 December 2009 contract. In a meeting with this Office, the Notary GPD referred to this shortcoming, noting that the corrective contract rendered Government vulnerable to possible court action and liable for the payment of damages. This perspective was supported by the Minister MFCC, who contended that this clause should have been included in the contract. Despite being a signatory to the 2012 contract, the CoL claimed that this must have been an oversight by the notary. On the other hand, the DG GPD maintained that through this corrective contract, the Chair Vassallo Builders Group Ltd had tacitly agreed to the settlement and therefore Government assumed that the matter had been decisively settled.

2.5.40 A starkly contrasting account was provided by the Director Vassallo Builders Group Ltd, who informed the NAO that this contract was entered into by the Company under protest, with the clear understanding that a court case would ensue. Furthermore, the Director Vassallo Builders Group Ltd maintained that the GPD was well aware of this intent. This understanding was corroborated by Chair Vassallo Builders Group Ltd, who stated that the 2012 contract was entered into for the purpose of safeguarding the Company's investment, after having obtained legal advice to this effect (paragraph 2.4.17 refers). The Chair Vassallo Builders Group Ltd explained that the Company's initial intended course of action was to sue Government for damages amounting to €20,000,000. Court documents of the testimony given by the Legal Adviser of Vassallo Builders Group Ltd, reviewed by the NAO, supported that stated by the Chair and the Director of the Company. According to this testimony, the decision to initiate legal action was taken prior to the conclusion of the 2012 contract, in line with the advice given by the Company's Legal Consultant. In this respect, the non-inclusion of a full and final settlement clause was in line with the position taken by Vassallo Builders Group Ltd that the 2012 contract was only in full and final settlement if due, and that was to be determined by the court case initiated.

2.5.41 The NAO's attention was also drawn to the portion of land expropriated de facto for road formation referred to by the Committee in its valuation of the site (paragraph 2.5.15 refers). This Office noted that no specific reference to the expropriated portion of land was made in the 2012 contract. The contract refers to the area as described in the 2009 contract, measuring 21,000 square metres, despite the fact that the expropriated area was specifically excluded in the valuation by the Committee. Aside from concerns arising from the fact that the dimensions of the land cited in the contract differ to those indicated in the Committee's valuation, this Office's concern was directed to the forfeiture of compensation payable to Vassallo Builders Group Ltd for the expropriated land. According to the minute dated 2 March 2012 by the CoL, CaterGroup Ltd was willing to forego compensation payable in this respect. Failure to include such a provision in the 2012 contract exposes Government to potential claims for compensation in this regard, as the only documented record supporting that noted by the CoL is the minute of 2 March 2012. The NAO could not verify whether any verbal agreement was reached between the parties and whether this would have any bearing on possible claims for compensation.

2.5.42 In this context, the NAO sought to reconcile the difference in area cited in the 2012 contract (21,000 square metres) with that indicated in the Committee valuation report (17,660 square metres). Queries in this respect were addressed to the GPD. The incumbent Acting DG GPD informed this Office that following the review of graphical records retained by the GPD, the Department found no trace of any expropriation of any land that originally formed part of the 1990 grant. Notwithstanding this, the Acting DG GPD submitted a plan superimposing the site, as it exists today and as originally granted, on a 2012 base map. According to this plan, the original allocation of land measured 20,334 square metres, 760 square metres of which were taken for road widening and another 394 square metres were deducted following the widening of a storm water canal (Appendix B refers). This resulted in an overall area of 19,180 square metres.

2.5.43 The implications of this anomaly in site area are twofold. First, the NAO questions the basis of the valuation by the Committee, which erroneously cited an area of 17,660 square metres instead of the actual measurement of 19,180 square metres. This discrepancy adversely impacted Government as the value of the site was understated by 8.6 per cent, which in monetary terms and applying 1990 rates, equated to a variance of €60,800. Second, the 21,000 square metres cited in the 2012 contract may give rise to claims for compensation by Vassallo Builders Group Ltd or CaterGroup

Ltd with respect to the portions of land taken by Government for the widening of a road and a storm water culvert as the 'circa 21,000 square metres' cited in the 2012 contract effectively reflects the actual site measurement of 20,334 square metres. This actual measurement includes the portions of land that Government had reclaimed for public use, yet now effectively transferred back to CaterGroup Ltd. According to the Acting DG GPD, the Department had no documentation that indicated any forfeiture for compensation by CaterGroup Ltd or Vassallo Builders Group Ltd in this regard.

2.5.44 The Minister MFCC, the DG GPD and the CoL, in meetings with the NAO, indicated that they were unaware of the fact that this forfeiture of compensation due in respect of the expropriated portion of the land was not included in the 2012 contract. While the Minister MFCC and the DG GPD could argue that they were not involved in the finalisation of the 2012 contract, this argument cannot be extended to the CoL, who had originally drawn the attention of the Minister MFCC and the DG GPD to the forfeiture of compensation rights by CaterGroup Ltd and was a signatory to the 2012 contract. It is in this context that the NAO deems this omission as a failure on the part of the CoL to secure Government's interests.

2.5.45 The NAO established that the Notary GPD, who had notarised the 3 December 2009 contract, was not informed of developments captured in the 5 June 2012 contract. According to the Notary GPD, this was in contravention of Article 47(3) of the Notarial Profession and Notarial Archives Act (Chapter 55), which stipulates that the notary receiving the act of rescission, cancellation, variation or the notarial corrective act shall, within one month of receiving the act, submit a copy of it to the notary responsible for the original act. This Office directed queries regarding this omission to the CoL, who maintained that the Notary GPD was no longer an employee of the Department at the time of these developments.

2.5.46 Contrary to that stated in the 2009 contract, and that indicated in a minute by the CoL to the Attorney General dated 4 April 2011, Government did not challenge the contract by resort to the Malta Arbitration Centre. Following queries raised by the NAO, the CoL explained that formal arbitration was not resorted to since this would have constrained Government from taking other possible action and could have resulted in less advantageous settlement terms. Moreover, according to the CoL, referral to the Malta Arbitration Centre was ordinarily resorted to for less onerous matters. Similar concerns were expressed by the Minister MFCC, who emphasised the uncertainty of the outcome had Government referred the matter to the Malta Arbitration Centre. In addition, the Minister MFCC argued that formal arbitration was resorted to in cases of disputes arising out of the contract, not when the validity of the contract itself was challenged. Although the Minister MFCC stated that his direction on whether to resort to formal arbitration, or otherwise, was not sought, he agreed with the course of action that was pursued. The DG GPD indicated that, as a general rule, the Department preferred to reach an out-of-court settlement when possible, to expedite matters. A different perspective was provided by the Director Vassallo Builders Group Ltd, who stated that formal arbitration would have been resorted to had the Company chosen to challenge the GPD on their stance regarding the nullity of the 2009 contract, which it did not. In this case, the Company preferred to come to a settlement, albeit under protest, to secure its investment.

2.5.47 Despite the fact that the authorisation of the Minister MFCC to proceed with this exchange was obtained on 4 June 2012, on 28 May 2012, Vassallo Builders Group Ltd and Vassallo Builders Ltd filed a judicial protest against Marsovin Ltd and Agrico Ltd, whereby reference was made to the agreement reached with the GPD. Marsovin Ltd and Agrico Ltd were informed that the CoL had established the additional compensation for the renouncement of all the conditions burdening the land at €240,525, which

amount was to be effected to remedy the irregularities highlighted in the 20 May 2011 judicial letter. In this respect, Vassallo Builders Group Ltd and Vassallo Builders Ltd requested that Marsovin Ltd and Agrico Ltd come forward, within two days from the receipt of the judicial protest, for the payment of €240,525, as well as any other amount owed to the CoL and to Vassallo Builders Group Ltd and Vassallo Builders Ltd, incurred as expenses, tax and other damages relating to this case, so as to honour the guarantees provided as per the 23 December 2009 share transfer agreement.

2.5.48 In their counter-protest filed on 6 June 2012, Marsovin Ltd and Agrico Ltd refuted the claims made against them, insisting that they were not in any way in breach of their obligations emanating from the 23 December 2009 agreement. Moreover, Marsovin Ltd and Agrico Ltd claimed that Vassallo Builders Group Ltd had pushed for the 3 December 2009 contract, and had involved themselves directly in the negotiations, through the Director Vassallo Builders Group Ltd, who had provided legal counsel resulting in the signing of the said agreement. Therefore, Vassallo Builders Group Ltd was fully aware of the content and effects of the 3 December 2009 contract when they came forward for the 23 December 2009 share transfer agreement. On the other hand, the 3 December 2009 contract was a public deed, read by the Notary GPD, to which Government, represented by the CoL, was part of. In this respect, Marsovin Ltd and Agrico Ltd claimed that it was Government and its officials who were to be held responsible for the alleged irregularities in procedures. Additionally, Marsovin Ltd and Agrico Ltd noted that, though the CoL had claimed that the 3 December 2009 contract was not conformant with the Disposal of Government Land Act (Chapter 268), no allegation had been made that the €465,875 paid by LBM Breweries Ltd did not reflect the value of the rights transferred. For this reason, Marsovin Ltd and Agrico Ltd questioned the additional payment requested by the CoL and the computation leading to the determination of the amount.

2.6 Developments following the Contract of Exchange

2.6.1 Following the signing of the 5 June 2012 contract between Government and CaterGroup Ltd, the latter wrote to the CoL questioning the additional payment of €240,525 effected by the Company for the cancellation of the emphyteutical conditions relating to the Qormi site. In this correspondence, dated 19 October 2012, CaterGroup Ltd made reference to an article by the Communications Coordinator MFCC that appeared in the media on 5 October 2012. This article was written in response to a previous article dated 21 September 2012 by the Hon. Charles Buhagiar, Opposition spokesperson for infrastructure, public works, capital projects and sustainable development, wherein details of the 3 December 2009 contract were presented. Specifically, reference was made to the rescission of the original contract conditions, that is, the use of the site for the production of beverages. The Opposition MP insisted that the redemption of a perpetual emphyteusis did not automatically exonerate the emphyteuta from the conditions specified in the original deed. To this end, he requested the Minister MFCC to explain why the cancellation of the conditions was effected at no additional cost in the 3 December 2009 contract and what action, if any, had been taken to make amends for this illegality.

2.6.2 In response, the Communications Coordinator MFCC stated that since the emphyteusis had been granted on a perpetual basis, Government had the right to redeem or sell the perpetual directum dominium and all other residual rights. Moreover, the Communications Coordinator MFCC claimed that in the case of perpetual emphyteusis, the sale or redemption of the directum dominium by Government also brought about the lapse of all the conditions attached to the original deed of concession.

2.6.3 In turn, CaterGroup Ltd noted that this statement was at odds with the judicial letter filed by Government on 20 May 2011 and with the developments that followed, mainly the payment of €240,525 by the Company to secure the cancellation of the emphyteutical conditions. To this end, CaterGroup Ltd contended that Government was to refund the Company the amount of €240,525. In this context, CaterGroup Ltd requested a formal response by the GPD prior to the Company's initiation of judicial action.

2.6.4 A reply to this correspondence, dated 29 November 2012, was submitted by a GPD Legal Officer on behalf of the CoL. According to that stated in this correspondence, the Communications Coordinator MFCC was mistaken in statements made in the newspaper article and that CaterGroup Ltd had not effected any undue payment. A detailed explanation of the case and its legal implications were presented in this correspondence.

2.6.5 The GPD Legal Officer stated that the direct allocation of the perpetual emphyteusis had been granted as per Clause 4(b) of the Schedule of the Disposal of Government Land Act (Chapter 268), for an industrial project that was to be of benefit to the economy and lead to the creation of new jobs. The 13 November 1990 contract had specifically restricted the use of the site for the production of alcoholic and non-alcoholic beverages, and also imposed the requirement of an investment of Lm450,000 (€1,048,218) in property development on site. Since the contract did not include any provisions regarding the redemption of ground rent, the emphyteuta had the right to redeem the ground rent when so desired, as stipulated in Article 1501 of the Civil Code (Chapter 16).

2.6.6 Elaborating on this point, the GPD Legal Officer referred to the fact that the ground rent was redeemed by means of a contract dated 3 December 2009. After this redemption, the emphyteuta was considered as the owner of the redeemed property, but the conditions stipulated in the emphyteutical concession remained valid. The duration of the conditions was to remain valid for the duration of the original emphyteusis, and in this case, since the emphyteusis was perpetual, the conditions were to remain indefinitely applicable.

2.6.7 Besides the redemption of the ground rent, the Government had also sold the directum dominium by virtue of the 3 December 2009 contract. The GPD Legal Officer explained that Clause 4(b) of the Schedule of the Disposal of Government Land Act (Chapter 268) did not permit the sale of the directum dominium of sites granted for industrial projects. Therefore, through this sale, the Government had acted in breach of the provisions of this Act, which only allowed the sale of the directum dominium through a call for tenders or a parliamentary resolution. However, the Act did allow the transfer of land in exchange for expropriated land.

2.6.8 Finally, the GPD Legal Officer maintained that it was in view of this infringement, that the 3 December 2009 contract was revoked in part, and the reason why the emphyteutical conditions were reinstated. To regularise the position of both parties, on 5 June 2012, a contract of exchange was entered into between Government and CaterGroup Ltd. In so doing, the Company acquired the directum dominium of the Qormi property in exchange for compensation payable by Government for various parcels of land expropriated for a public purpose. Consequently, the GPD Legal Officer concluded that the Government did not owe CaterGroup Ltd any refund, as this payment for the cancellation of the emphyteutical conditions was necessary.

2.6.9 On 10 December 2012, Vassallo Builders Group Ltd filed a judicial letter against Marsovin Ltd, Agrico Ltd, CaterGroup Ltd and the CoL, claiming that these parties were

to be held responsible for the partial revocation of the contract dated 3 December 2009, specifically referring to the emphyteutical conditions emanating from the original 1990 contract. Specifically, Vassallo Builders Group Ltd was holding Marsovin Ltd and Agrico Ltd responsible for the loss of €240,525, payable for the cancellation of all the conditions burdening the property, as well as other damages, including tax and other expenses, in view of the fact that the guarantees provided in the 23 December 2009 share transfer agreement were not honoured. The CoL and CaterGroup Ltd were being called in judgement for any interest that the parties might have with respect to the declaration that the 3 December 2009 was being considered null and void. In this regard, Vassallo Builders Group Ltd requested the court to:

a. declare that Marsovin Ltd and Agrico Ltd had failed to uphold the guarantees provided to Vassallo Builders Group Ltd, as per the private writing/agreement dated 23 December 2009, for the possession of a valid title of full ownership of the property by LBM Breweries Ltd and the possession of the site as vacant, free and unencumbered, not subject to servitudes, privileges, hypothecs and ground rent and devoid of any restrictions with respect to site use;

b. declare that due to the failures of Marsovin Ltd and Agrico Ltd, Vassallo Builders Group Ltd had suffered damages;

c. declare that Marsovin Ltd and Agrico Ltd were responsible for these damages;

d. quantify the damages; and

e. order Marsovin Ltd and Agrico Ltd to, between them, pay such damages.

2.6.10 In response, the GPD filed a judicial letter on 11 January 2013, stating that if Vassallo Builders Group Ltd was alleging that the contract signed by Government on 3 December 2009 was null, then such a contract carried no legal effect, with all the consequences that this implied in the Company's regard.

2.6.11 In line with the judicial letter dated 10 December 2012, a sworn application was filed in court on 21 January 2013. In a meeting with the NAO, the Director Vassallo Builders Group Ltd indicated that the Company intends to take possible action following the court's ruling on the matter. If the court rules in favour of Vassallo Builders Group Ltd, and therefore Marsovin Ltd are requested to pay damages to the Company, then the dispute with the GPD will be discontinued. However, if the court decides that the 2012 contract was unnecessary, as the 2009 contract was not null and void, then Vassallo Builders Group Ltd will request reimbursement from the GPD for the amount paid for the cancellation of the condition.

2.6.12 On 22 February 2013, the CoL submitted a sworn reply, outlining that the request made by Vassallo Builders Group Ltd did not concern the GPD in a direct manner, as the Department was not involved in the private agreement relating to the transfer of the shares of LBM Breweries Ltd. Consequently, the GPD was not liable to pay any damages.

2.6.13 Marsovin Ltd and Agrico Ltd filed a judicial letter on 4 March 2013 against the CoL, the Notary GPD who had published the 3 December 2009 contract, and the GPD official who had been authorised to appear on behalf of Government on this contract. Marsovin Ltd and Agrico Ltd contended that the GPD was responsible for ensuring that the contract was valid and according to law. In view of the judicial proceedings initiated against them by Vassallo Builders Group Ltd, Marsovin Ltd and Agrico Ltd were holding the respondents responsible for any payment of damages determined by court.

2.6.14 On 21 March 2013, the GPD filed another judicial letter denying the allegations put forward by Marsovin Ltd and Agrico Ltd. The case was still pending as at end September 2016, the point at which the NAO last reviewed the court documents relating to the case.

2.7 NAO Verification of the Value of the Land in Qormi

2.7.1 In view of the notable concerns expressed by the NAO regarding the value established for the land at Ta' L-Istabal, Qormi, which was based on the application of 1990 rates (paragraph 2.5.37 refers), this Office commissioned an independent valuation of the land to an external consultant. This valuation was to estimate the freehold value of the land, excluding structures, as at 2009 and 2012. The valuation was undertaken according to the 'Kamra tal-Periti Valuation Standards' of 2012 for the valuation of developable land, based on the comparative method of valuations.

2.7.2 An extensive measured site survey was not undertaken; however, areas were calculated through reference to layout plans retained by the GPD, the Planning Authority's (PA) map server and Google Earth. According to the 13 November 1990 emphyteutical grant, the original land area was 21,000 square metres (Appendix C refers). However, the area cited in the report by the Committee in January 2012 was that of 17,660 square metres, as portions of the land were required for the widening of a water culvert and for road formation purposes (Appendix D refers). The NAO established that the land area presently utilised is 19,150 square metres (Appendix E refers), which measurement is corroborated by that provided by the GPD, that is, 19,180 square metres (paragraph 2.5.42 and Appendix B refer). The increase in site area from 17,660 to 19,150 square metres is due to the present retail development's overtaking of the diagonal slip road marked as Triq L-Iljun in Appendix D and reflected in the changed boundary of the north-east corner of the site as indicated in Appendix E.

2.7.3 The site, parabolic in shape, is bound on two sides by commercial premises and a bus terminus. The remaining side is bound by a major open water culvert. A street frontage of 579 metres overlooks Triq Manwel Dimech and Triq L-Iljun, commanding a very good passing trade. The existing land presently comprises various retail outlets, and an eatery complemented with an outside seating area and a children's play area. The rest of the site is an open site parking facility and landscaped areas. Unloading facilities are available to the retail outlets through the encircling internal road network, with loading bays located at the rear side of the land overlooking the storm culvert. The present site coverage of the retail park accounts for 28 per cent of the area; however, in 2002, a permit was approved by MEPA allowing for an additional 1,250 square metre development. Should this development be carried out, site coverage would increase to 35 per cent.

2.7.4 The site falls under Policy QO08 of the MEPA Local Plans 2006, which allows for the following uses:

a. Class 11 (Use Classes Order, 1994), Business and Light Industry;

b. Class 12 (Use Classes Order, 1994), General Industry; and

c. Class 17 (Use Classes Order, 1994), Storage and Distribution.

Although the PA defines this land as lying within a business, light and general industry area, together with storage and distribution uses, the area has been taken over as a retail park, the relevance of which has increased in importance these last years.

2.7.5 The height limitation for this area is that of three floors and a semi-basement (industrial). According to information obtained from the PA, the permissible height for a street façade in the area is that of 14.1 metres, while the overall height including the receded floor is 17.5 metres. The existing street façade is of 9.2 metres and the overall height for the receded floor is 15.25 metres.

2.7.6 While the applicable PA policies define site use and height limitations, site coverage is not specified. Notwithstanding this, the maximum site coverage within the area is approximately 40 per cent. The NAO notes that if the 40 per cent coverage is imposed, this would result in the number of car parking spaces provided as too stringent, with alternative basement parking facilities considered not possible due to the existing flood-prone foundation terrain.

2.7.7 In view of the applicable PA policies, approved PA applications and the characteristics of the terrain, the NAO considered sustainable site coverage as 32.5 per cent, with 52.5 per cent of the site allocated for parking and the remaining 15 per cent for landscaping. Applied to a total site area of 19,150 square metres, this results in 6,223 square metres of built land, parking facilities measuring 10,054 square metres and landscaping accounting for the remaining 2,873 square metres.

2.7.8 The present market value of each portion of land was estimated by the NAO depending on the varying uses of each portion. The value of developable land for a sustainable venture ranges between €750 per square metre to €2,000 per square metre. The lower range is for industrial and warehousing facilities, with a maximum building height at street level of 14 metres, increasing to 17.5 metres for a recessed top floor construction. In establishing the rate that is to be applied to the built area, the NAO considered that a maximum of five floors may be constructed on the site for a total building height of 17.5 metres, which includes a recessed top floor. It is further considered that land outlined for future development will be suitably stepped down from this overall height, thereby resulting in a total building height averaged at four and a half floors. A ground floor retail lease rate of €160 per square metre and an upper office lease rate estimated at €100 per square metre were applied. The €160 per square metre rate for ground floor retail was arrived at through consideration of rental rates for shopping malls in Malta, which vary from €131 to €856 per square metre. Bearing in mind other factors that determine retail rental rates, the NAO estimated sustainable rental retail for this locality at €160 per square metre. On the other hand, the rental value of office space in Malta varies from €20 to €475 per square metre, with the central business district rate averaging €155 per square metre. Although the average office rental market rate for Malta stands at €117.50 per square metre, the €70 to €150 per square metre range attracts the highest proportion. In effect, 87 per cent of available office space falls within the €35 to €150 per square metre range, with 17 per cent within the highest range of €151 to €475 per square metre. In view of these considerations, the NAO estimated a sustainable office rental for this locality at €100 per square metre.

2.7.9 The application of these rates (€160 per square metre for ground floor and €100 per square metre for the remaining three and a half floors of office space) resulted in a present market value of €6,905 per square metre. This rate was obtained by capitalising estimate rentals over the averaged four and a half floors at €500 per square metre at 6.25 per cent and deducting this capital value by five per cent for management and maintenance fees and by a further ten per cent for purchase expenses. On the other hand, building expenses estimated at €3,873 per square metre of building height as well as a profit element of €1,208 per square metre of building height were considered. Therefore, total development costs were estimated at €5,519 per square metre of building height. Deducting these development costs from the market value

of completed units of €6,905 per square metre of building height resulted in a residual value for land considered in 21 months time of €1,386 per square metre. Considering a nine-month selling period, with interests incurred equivalent to 5.75 per cent, the value of the developable land is revised to €1,205 per square metre (Table 1 refers).

Table 1: Residual Valuation

Present market value of completed units	Unit	Quantity	Rate (€)	Estimated value (€)	Asking price (€)
Ground retail + four overlying floors offices	m^2	1.00	499.70		6,904.89
Development costs	**Unit**	**Quantity**	**Rate (€)**	**Estimated cost (€)**	
Construction and finishing costs	m^2	4.75[a]	650.00	3,087.50	
Professional fees at 6%				185.25	
Sub-total				3,272.75	
VAT 18%				589.10	
PA Levy	m^2	1.00	12.00	12.00	
Total construction and finishing costs				3,873.85	
Interest costs at 5.75%[b]				194.90	
Estate agent fees at 3.5% of market value				241.67	
Developer's profit at 17.5% of market value				1,208.36	
Total development costs					5,518.78
Residual value for land considered in 21 months time					1,386.12
Present vacant land value: 21-month development and 9-month selling period at 5.75% interest[c]					1,205.31

Note:

a. The quantity cited reflects the construction and finishing costs for 4.75 floors, with the fraction corresponding to the top recessed floor.

b. Interest costs of 5.75 per cent are considered for half the development period, taken as 21 months and therefore equivalent to 10.5 months.

c. €1,386.12/(1.0575^2.5) = €1,205.31

2.7.10 The present market value for an open car space was estimated at €9,500. Assuming total development costs of €5,825, of which €3,725 are construction costs, a fair land market rate for open car spaces occupying 25 square metres of land area is estimated at €135 per square metre. On the other hand, the value of the landscaped land was estimated at €25 per square metre. Applying these rates to the 19,150 square metres of the land, apportioned according to use, results in a present market value of €8,896,715 (Table 2 refers).

Table 2: Present Market Value

Use	Rate (€)	Area (square metres)	Value (€)
Developable land	1,200	6,223	7,467,600
Parking	135	10,054	1,357,290
Landscaping	25	2,873	71,825
Total	**-**	**19,150**	**8,896,715**

2.7.11 Having established the present value of the land in Qormi, the NAO sought to adjust this valuation to reflect the applicable market value at the time of transaction between Government and CaterGroup Ltd, that is, as at 2012. To this end, this Office made reference to a land and property index compiled by the NAO Consultant based on in-house valuations undertaken between 1982 and 2016 (Table 3 refers). It must be noted that the this Office was unable to source a land index from an official source as the National Statistics Office Property Index relates to residential premises and not land. Application of the 2012 land rate to the present market value results in an adjusted value of €7,838,515.[10]

Table 3: Land/Property Index: 1982-2016

Type	Year										
	1982	1987	1992	1995	1997	2002	2005	2007	2012	2014	2016
Property	100	130	214	274	314	386	632	743	696	738	820
Land	100	120	369	720	1,080	1,680	2,892	3,400	3,000	3,183	3,405

2.7.12 Were it to be argued that the directum dominium was transferred in 2009, then the adjusted value of the land in Qormi as at this date would have been €8,465,597.[11] It must be noted that, according to the index, land values over the past 20-year period, that is, 1992 to 2012, appreciated by 11.27 per cent per annum. During the recent 10-year period, that is, 2002 to 2012, land values increased at a lower rate of six per cent per annum. On the other hand, during the previous 10-year period, that is, 1992 to 2002, land values increased by the highest rate, equivalent to 16.37 per cent per annum. It must be noted that, as illustrated in Table 3, the decrease in land values evident in 2012 may be attributed to the global financial crisis of 2008. Lower increases of 3.22 per cent per annum were registered over the period 2012-2016, largely representative of the recovery following this crisis.

[10] €8,896,715 * 3,000/3,405 = €7,838,515
[11] €8,896,715 * 3,240/3,405 = €8,465,597

Chapter 3
Analysis and Conclusions

Chapter 3 – Analysis and Conclusions

3.1 Timeline of Key Developments

3.1.1 Hereunder are the key developments noted by the NAO with respect to the land in Qormi granted on a perpetual emphyteusis to Löwenbräu Ltd in 1990 for industrial purposes, specifically for the production of beverages. This condition was eventually renounced by Government at no charge following the redemption of ground rent effected in December 2009; however, Government later established that the cancellation of conditions was in breach of the Disposal of Government Land Act (Chapter 268). In the interim, the site had been transferred from Löwenbräu Ltd to CaterGroup Ltd. In order to rectify this situation, Government and CaterGroup Ltd agreed to reverse the cancellation of conditions and exchange the site in Qormi for compensation, due by Government to the Company, with respect to other properties that had been expropriated years earlier. As part of this exchange, dated June 2012, Government again agreed to the renouncement of all conditions burdening the site in Qormi, valued at €706,400, of which €465,875 had already been paid for the redemption of ground rent.

Table 4: Timeline of key events with respect to the land at Ta' L-Istabal, Qormi

Date	Details
7 November 1990	The Minister MEA requested the CoL to grant Löwenbräu Ltd the land at Ta' L-Istabal, Qormi on perpetual emphyteusis. The Minister MEA indicated that ground rent of Lm5,000 (€11,467) per annum was to be charged for the first two years and Lm10,000 (€23,294) per annum thereafter. This direct allocation was justified in terms of the economic benefit resulting from the industrial activity that was to be undertaken.
13 November 1990	A contract was entered into whereby Government granted the perpetual emphyteusis for the land in Qormi to Löwenbräu Ltd. The agreement limited the use of the site for industrial purposes, specifically for the production of alcoholic and non-alcoholic beverages.
30 November 2009	A preliminary agreement was entered into by Marsovin Ltd and Agrico Ltd, as vendors, and Vassallo Builders Group Ltd, as purchasers, for the entire shareholding of LBM Breweries Ltd (previously Löwenbräu Ltd). This sale was to be effected against payment of €8,000,000 and was based on the premise that the land in Qormi would be the only asset on the date of transfer. This preliminary agreement was made subject to the redemption of the ground rent burdening the land and the cancellation, by Government, of all conditions regulating the emphyteusis.

1 December 2009	LBM Breweries Ltd requested the redemption of the perpetual emphyteutical ground rent burdening the site.
2 December 2009	The Notary GPD requested the authorisation of the DG GPD, through the CoL, to proceed with the sale of the perpetual directum dominium of the land in Qormi for the amount of Lm200,000 (€465,875), including the total cancellation of all hypothecs and privileges, effectively meaning that Government would renounce all conditions burdening the property.
2 December 2009	The Assistant Director Contracts GPD notified the DG GPD that the CoL had been informed of the renouncement of all conditions. Furthermore, according to the CoL, the original grant owners had the right to redeem the perpetual ground rent and he envisaged no legal impediments to conclude the contract, therefore the redemption of ground rent could be agreed to.
2 December 2009	The DG GPD granted authorisation, referring to that stated by the Notary GPD and the Assistant Director Contracts GPD.
3 December 2009	A contract for the sale and transfer, from Government to LBM Breweries Ltd, of the perpetual directum dominium and the annual, perpetual and non-revisable ground rent of €23,294 with respect to the land in Qormi was entered into. The transfer was effected against payment of €465,875 by LBM Breweries Ltd. The contract clearly specified that Government was consenting to the complete cancellation of the hypothec and privilege burdening the land, thereby renouncing all the conditions prescribed in the contract dated 13 November 1990. The €465,875 was paid by Vassallo Builders Group Ltd on behalf of Marsovin Ltd and Agrico Ltd as part of its obligations arising out of the 30 November 2009 preliminary agreement.
23 December 2009	A contract between Marsovin Ltd and Agrico Ltd, as vendors, and Vassallo Builders Group Ltd, as purchasers, for the entire shareholding of LBM Breweries Ltd was finalised. The remaining balance, after deducting the deposit and any liabilities from the €8,000,000, was paid. Vassallo Builders Group Ltd took possession of the site through its subsidiary CaterGroup Ltd and utilised the site for commercial purposes, particularly retail and catering.
18 January 2011	A parliamentary question was raised by an Opposition MP regarding the land in Qormi, requesting the tabling of the contract of the original grant in 1990.
9 February 2011	Correspondence was sent by an official in the Secretariat of the PS Revenues and Land to the CoL and the DG GPD regarding the transfer of the land in Qormi to Vassallo Builders Group Ltd following queries raised by a newspaper.
15 February 2011	A parliamentary question was raised by an Opposition MP regarding the land in Qormi, requesting the tabling of the parliamentary resolution or call for tenders through which the land was allocated.
7 March 2011	The PS Revenues and Land directed the DG GPD to seek the advice of the Attorney General and subsequently take the appropriate legal measures. This course of action was instigated following a meeting between the PS Revenues and Land, the DG GPD and the CoL, during which concerns regarding the validity of the 2009 contract were raised.
4 April 2011	The CoL sought the advice of the Attorney General regarding the possibility of challenging the validity of the 2009 contract. This correspondence was submitted through the Minister MFEI, the PS Revenues and Land and the DG GPD. This line of action was based on the CoL's understanding that the provisions stipulated in the Disposal of Government Land Act (Chapter 268) had probably been infringed.
12 April 2011	The DG GPD instructed the CoL to initiate legal proceedings.
20 May 2011	The CoL filed a judicial letter against CaterGroup Ltd (registered as LBM Breweries Ltd until 28 February 2010), requesting the Company to come forward for the rescission of the contract signed on 3 December 2009.
20 June 2011	In turn, Vassallo Builders Group Ltd filed a legal letter against Marsovin Ltd and Agrico Ltd, informing them of the alleged nullity of the 2009 contract and calling on them to ensure that any warranties stipulated in the 23 December 2009 agreement were fully honoured.

29 November 2011	Marsovin Ltd and Agrico Ltd refuted these claims through a legal letter, asserted that the provisions of the share transfer agreement were not breached and suggested that any legal remedy should be sought from Government.
undated	The PS Revenues and Land directed the CoL to hold discussions with CaterGroup Ltd in order to rectify the error committed in the 2009 contract. Following a series of meetings, the parties agreed that a Committee was to be set up to determine the freehold value of the land.
17 December 2011	The DG GPD instructed the Committee to determine the freehold value of the land in Qormi as at 1990.
30 January 2012	The Committee finalised its report, estimating the freehold market value of the land for unlimited industrial use as at 1990 at €706,400. The report was submitted to the DG GPD and CaterGroup Ltd.
2 March 2012	The CoL, through the DG GPD, informed the Minister MFCC that: 1. The parties had accepted the Committee's valuation of €706,400. The CoL requested the approval of the Minister MFCC for the deduction of €465,875 (the amount paid for the redemption of ground rent in the 2009 contract) from €706,400, resulting in a balance due to Government of €240,525. This balance was equated with the value of the conditions encumbering the site. 2. Government owed compensation to Vassallo Builders Group Ltd for five properties that had previously been expropriated. The right to this compensation was to be gratuitously transferred by Vassallo Builders Group Ltd to CaterGroup Ltd. The amount owed by Government in this respect was approximately €291,660. The CoL proposed the exchange of the sum due for expropriated property with the sale of the condition, leaving a balance of €52,000 payable to CaterGroup Ltd. The authorisation of the Minister MFCC was sought in this respect.
8 March 2012	The DG GPD endorsed the minute by the CoL.
4 June 2012	The Minister MFCC granted authorisation to proceed as indicated by the CoL.
5 June 2012	A contract was entered into by Vassallo Builders Group Ltd and CaterGroup Ltd, wherein the former gratuitously assigned to the latter, by way of a non-refundable contribution, the five properties that had been expropriated by Government for a public purpose.
5 June 2012	Government and CaterGroup Ltd entered into a contract for the rescission in part of the 3 December 2009 contract and the cancellation of conditions limiting use of the Qormi site as per the 13 November 1990 contract. According to the 2012 contract: 1. In the first instance, the parties agreed to rescind the part of the 3 December 2009 contract wherein Government had consented to the renouncement of all conditions regulating the emphyteutical concession dated 13 November 1990. Aside from this partial rescission, all other aspects of the 3 December 2009 contract remained valid. The parties agreed that Government was not liable to pay compensation to the Company since the rescission was being effected for reasons deemed valid at law. 2. In the second instance, Vassallo Builders Group Ltd had assigned gratuitously and irrevocably to CaterGroup Ltd five properties that had been expropriated for a public purpose. The value of the properties transferred, as agreed by the CoL and CaterGroup Ltd, was €298,349. In this context, Government renounced in favour of CaterGroup Ltd, by title of exchange, all conditions imposed in the emphyteutical concession for the land in Qormi as stipulated in the 13 November 1990 contract. This cancellation was being effected by Government for a consideration of €240,525, which amount was being offset from the amount owed to CaterGroup Ltd for expropriated property, valued at €298,349. Finally, Government paid the remaining balance of €57,824 to CaterGroup Ltd. According to the contract, CaterGroup Ltd paid Government a total of €706,000.

10 December 2012	Vassallo Builders Group Ltd filed a judicial letter against Marsovin Ltd, Agrico Ltd, CaterGroup Ltd and the CoL, claiming that these parties were to be held responsible for the partial revocation of the 2009 contract. Damages were claimed from Marsovin Ltd and Agrico Ltd.
11 January 2013	In response, the GPD filed a judicial letter stating that if Vassallo Builders Group Ltd was alleging that the 2009 contract was null, then such a contract carried no legal effect with all the consequences that this implied in the Company's regard.
21 January 2013	Vassallo Builders Group Ltd filed a sworn application that effectively reflected the 10 December 2012 judicial letter.
22 February 2013	The CoL submitted a sworn reply outlining that the request made by Vassallo Builders Group Ltd did not concern the GPD in a direct manner as the Department had no involvement in the private agreement relating to the transfer of shares of LBM Breweries Ltd. Consequently, the GPD argued that it was not liable to pay any damages.
4 March 2013	Marsovin Ltd and Agrico Ltd filed a judicial letter against the CoL, the Notary GPD and the GPD official who had appeared on behalf of Government on the 2009 contract. Marsovin Ltd and Agrico Ltd contended that the GPD was responsible for ensuring that the contract was valid and legally compliant. In view of the judicial proceedings initiated against them by Vassallo Builders Group Ltd, the Companies were holding the respondents responsible for any payment of damages determined by court.
21 March 2013	The GPD filed a judicial letter denying the allegations put forward by Marsovin Ltd and Agrico Ltd.
September 2016	The court case was still pending as at this date.

3.2 Analysis of the Transfer of the Land at Ta' L-Istabal, Qormi

3.2.1 Hereunder are the salient issues noted by the NAO in its review of the transfer of the land at Ta' L-Istabal, Qormi by Government to third parties. This Office took cognisance of the original grant of the land to Löwenbräu Ltd in 1990, by way of direct allocation for industrial purposes, and considered its bearing on subsequent developments. The non-revisable perpetual emphyteusis by which the land was granted was eventually redeemed by LBM Breweries Ltd in 2009. Aside from the redemption of ground rent, Government also consented to the cancellation of all conditions burdening the land. This contract of sale of the directum dominium later proved to be irregular and efforts intended to rectify this anomaly were undertaken in 2012, when Government entered into another agreement with CaterGroup Ltd.

The 1990 Allocation of the Land at Ta' L-Istabal, Qormi

3.2.2 While the original grant of the land in Qormi in 1990, whereby government-owned land was directly allocated to Löwenbräu Ltd, was not specifically indicated in the request made by the PAC, the conditions of this grant inevitably influenced subsequent developments. Specific reference is made to the allocation of land on a perpetual basis with non-revisable ground rent, which rendered possible the redemption of ground rent any time immediately thereafter. The allocation of this land was made on condition that its use would be limited to industrial purposes, specifically for the production of alcoholic and non-alcoholic beverages.

3.2.3 Although the Minister MEA originally indicated to the CoL that the usual conditions as per government policy were to apply in this allocation, the NAO established that the policy in force at the time did not specify the duration of allocations of land justified in terms of economic benefit. However, this was in fact specified by the Minister MEA when instructing the CoL '... *to grant this land on perpetual emphyteusis*'. Likewise, the

policy did not address whether emphyteutical grants, made for economic purposes in view of their envisaged contribution to employment and the broader economy, were subject to revisable or non-revisable ground rent. This was indirectly determined by the Minister MEA when specifying that an annual ground rent of Lm10,000 (€23,294) was to be levied, thereby rendering the ground rent non-revisable.

The 2009 Sale of the Perpetual Directum Dominium

The Request by LBM Breweries Ltd

3.2.4 On 1 December 2009, LBM Breweries Ltd, through its Company Secretary, submitted a request for the redemption of the perpetual emphyteutical ground rent burdening the land in Qormi. Subsequently, on 2 December 2009, the Notary GPD sought the authorisation of the DG GPD, through the CoL, to proceed with the sale of the perpetual directum dominium for the price of Lm200,000 (€465,875). Included in this minute was the fact that the payment of Lm200,000 included the total cancellation of all conditions burdening the site held by Government. Later that day, the Assistant Director Contracts GPD noted that the CoL had been verbally informed of the renouncement of all conditions and had reportedly indicated that the redemption of ground rent could be agreed to. Finally, the authorisation of the DG GPD was also granted on 2 December 2009.

3.2.5 This Office's attention was drawn to the fact that the request made by LBM Breweries Ltd, dated 1 December 2009, was not filed in the relevant GPD file and was only traced following the submission of documents by the Assistant Director Contracts GPD in subsequent court proceedings. Aside from the fact that this crucial document was not filed by the GPD, when this should have been the basis of all subsequent developments, the NAO's attention was also drawn to the fact that this correspondence was not registered and lacked the Department's date stamp. The NAO sought to establish how the Assistant Director Contracts GPD was in possession of this document; however, she could not recall how this had been acquired or whether it was given to her to present in court. Furthermore, the CoL categorically denied that he had received or was aware of this correspondence even though this was addressed to him. In light of this, the NAO maintains serious reservations as to whether this correspondence was in fact submitted to the GPD prior to the minute by the Notary GPD and subsequent endorsements provided thereto.

3.2.6 Confounding matters even further was the fact that the Notary GPD indicated that he had no knowledge of the correspondence submitted by LBM Breweries Ltd on 1 December 2009. This raised the NAO's concern in terms of what triggered his minute of 2 December 2009. While the Notary GPD indicated that he had not received any instructions from the DG GPD and the CoL, and maintained that the Minister MFEI and PS Revenues and Land were not informed of the case, he alleged an element of pressure by the Company Secretary LBM Breweries Ltd. It was reportedly in this sense that the Notary GPD was aware of and processed this case.

3.2.7 With respect to that stated by the Notary GPD, the Company Secretary LBM Breweries Ltd denied exerting any pressure, yet he acknowledged that he had regularly sought information from the Notary GPD regarding any progress registered. Moreover, the Company Secretary LBM Breweries Ltd noted that he had earlier informed the PS Revenues and Land of the Company's intention to redeem the ground rent. The PS Revenues and Land had advised that the Company was to submit a formal request to the GPD and assured efficiency in the process. Notwithstanding that stated, the PS Revenues and Land indicated that he could not recall this exchange although he did not exclude that his advice was sought and provided in terms of referral to the

GPD. Furthermore, the PS Revenues and Land denied any other contact with the representatives of LBM Breweries Ltd or third parties on the matter.

3.2.8 In light of the limited documentation made available to this Office and the conflicting accounts of events, the NAO was unable to determine with any degree of certainty the sequence of events leading to the submission of the request for redemption of ground rent made by LBM Breweries Ltd. Moreover, the actual submission of this correspondence on the indicated date remains dubious, further hindering this Office's attempts at establishing a true and factual account of developments leading to the minute by the Notary GPD on 2 December 2009.

The Role of the Notary Government Property Department

3.2.9 Despite the fact that the minute by the Notary GPD lacked any form of context, as the request by LBM Breweries Ltd was not filed and the Notary GPD was not aware of its existence, the NAO noted that the Company's request to redeem ground rent and cancel all the conditions burdening the land in Qormi were captured in his minute of 2 December 2009. It must be noted that the request by LBM Breweries Ltd dated 1 December 2009 made no reference to the cancellation of the conditions and solely referred to the redemption of ground rent, thereby rendering that noted by the Notary GPD somewhat anomalous. This Office established that, from the outset, it was the intention of LBM Breweries Ltd not only to redeem ground rent but to request the cancellation of all the conditions burdening the land, which request was accurately conveyed in the minute by the Notary GPD.

3.2.10 While the NAO established that the Notary GPD was uncertain whether the cancellation of the conditions was permissible and sought guidance from the DG GPD and the CoL in this respect, this Office is of the opinion that the Notary GPD failed to overtly express concerns regarding the Company's request and its legality. This by no means detracts from the responsibility that should have been borne by the DG GPD and the CoL, for the minute by the Notary GPD was effectively a request for the scrutiny and authorisation of this transaction.

The Endorsement of the Commissioner of Land

3.2.11 Although the minute by the Notary GPD was addressed through the CoL, the subsequent minute noted on file, also dated 2 December 2009, was that by the Assistant Director Contracts GPD. The NAO was unable to determine why and how the Assistant Director Contracts GPD ultimately assumed responsibility for what was later interpreted as endorsement of the cancellation of the conditions burdening the land in Qormi. This Office considered the involvement of the Assistant Director Contracts GPD in this matter as incongruent with her role within the Department, lending an element of credence to the alleged pressure put on her by the DG GPD.

3.2.12 Notwithstanding the clarifications obtained, the NAO considered the minute by the Assistant Director Contracts GPD as ambiguous, as while reference was made to the awareness of the CoL of the request to cancel the conditions, the authorisation was noted as solely relating to the redemption of ground rent. The Assistant Director Contracts GPD acknowledged that the haste imposed by the DG GPD could have led to an element of misunderstanding or uninformed decisions by the CoL. When one considers that the CoL maintained that he would not have endorsed the cancellation of conditions in this manner, then this Office's concerns are further heightened. The NAO maintains that the advice of the CoL could have readily been sought in a matter of days, rendering the haste evident in this case all the more suspect.

The Authorisation by the Director General Government Property Department

3.2.13 Having considered the cryptic minute by the Notary GPD and the ambiguous endorsement by the Assistant Director Contracts GPD following consultation with the CoL, the authorisation by the DG GPD, also dated 2 December 2009, was deemed equally anomalous by the NAO. This authorisation merely sanctioned action through reference to the minutes by the Notary GPD and the Assistant Director Contracts GPD. In justifying his authorisation, the DG GPD indicated to the NAO that he had relied on that recorded by the Notary GPD and the Assistant Director Contracts GPD, who was conveying the views of the CoL. The DG GPD argued that none of these officials had expressed any concerns regarding this contract, and in view of his limited understanding of the legal implications of this disposal, he did not have any doubts when approving this transaction. Moreover, the DG GPD repeatedly alleged that the actions taken by the Notary GPD, the Assistant Director Contracts GPD and the CoL could be construed as intentionally misleading.

3.2.14 According to the DG GPD, the negotiations on behalf of Government with LBM Breweries Ltd had been undertaken by the CoL and the Assistant Director Contracts GPD. In view of the insistence of the CoL that he was not aware of the request by LBM Breweries Ltd, the NAO was unable to reconcile the diametrically opposing views presented on one hand by the DG GPD, the Notary GPD and the Assistant Director Contracts GPD, with that stated by the CoL. While the NAO considers that stated by the DG GPD, the Notary GPD and the Assistant Director Contracts GPD as highly indicative of the CoL's awareness of the case, this Office notes that there was no documentation supporting the CoL's direct involvement. In effect, the uncertainty surrounding whether the CoL was aware, or otherwise, was compounded by the haste with which the process of authorisation came to a conclusion, commencing with a request on 2 December 2009 and ending with sanctioning that same day. The NAO is of the opinion that the pace of the process was well within the control of the DG GPD, who could have held back his authorisation until the CoL's direct endorsement was obtained.

3.2.15 Having reviewed the process that ultimately led to the endorsement of the request by LBM Breweries Ltd, in this Office's opinion, the DG GPD and possibly the CoL failed to appropriately question the implications of that proposed in the minute by the Notary GPD and whether the cancellation of the hypothec, which implied the renouncement by Government of all conditions, was legally permissible. This concern was further heightened in view of the fact that the land in Qormi had originally been granted by direct allocation for a specific industrial use justified in terms of the economic benefit that this would generate. These failures had far-reaching consequences on later developments, effectively constraining the GPD into a series of other flawed decisions.

Pressure and Haste in Concluding the Contract

3.2.16 The immense haste of the process, rendered immediately evident in the documentation reviewed, is indicative that some form of pressure was being exerted on the GPD for the conclusion of this contract. While the Minister MFEI, the PS Revenues and Land, the DG GPD and the CoL all denied being pressured or exerting pressure to influence the process, the Notary GPD and the Assistant Director Contracts GPD indicated otherwise. The Notary GPD maintained that he was pressured by the Company Secretary LBM Breweries Ltd to conclude the contract, while the Assistant Director Contracts GPD indicated that the DG GPD had insisted on the immediate conclusion of the contract. The Company Secretary LBM Breweries Ltd and the DG GPD denied these allegations.

3.2.17 Irrespective of that stated, the facts of the case render the extraordinary haste of the process amply evident, and it is in this context that the NAO considers the haste in processing the request for the redemption of ground rent and the cancellation of the conditions as highly suspect. This assumes greater relevance when one considers that stated by the GPD officials involved, who maintained that the case had not been discussed with other GPD officials aside from the succinct minutes documented in the GPD file. The NAO fails to understand how the authorisation process was seemingly carried out through the forwarding of the relevant file, with the haste exhibited impeding any due consideration of whether the action proposed by the GPD was legal or otherwise. In this Office's opinion, the actions of the GPD officials involved in this process may, to varying extents depending on their involvement and responsibility, be considered as negligent and draw the NAO's gravest concerns.

Ministerial Authorisation and Legal Consultation

3.2.18 This understanding is further supported by the fact that the authorisation of the Minister MFEI or the PS Revenues and Land was not sought prior to the signing of the contract between Government and LBM Breweries Ltd. The Minister MFEI and the PS Revenues and Land explained that they were not involved in any way in this transfer, and therefore were not aware of the request made, had no contact with the third parties involved and did not approve this transaction. While acknowledging this, the NAO is of the opinion that the matter should have been referred for ministerial authorisation, as this was not merely a case of redemption of ground rent, but the sale of the directum dominium. Moreover, the NAO is of the understanding that ministerial authorisation was to be the precursor to eventual referral to Parliament or the issue of a call for tenders. This Office deems this shortcoming as the responsibility of the DG GPD, who disingenuously claimed that the redemption of ground rent did not require ministerial approval.

3.2.19 Not only did the GPD fail to refer the matter for ministerial authorisation, the Department also failed to obtain any form of legal advice assuring it of the legitimacy of the intended course of action. Having considered the details of the case and that stated by the GPD officials, this Office fails to understand why legal advice on the matter was not obtained. In the NAO's opinion, this serious shortcoming, which to varying extents can be attributed to the DG GPD, the Notary GPD and the Assistant Director Contracts GPD, was to result in Government forfeiting its right to compensation by renouncing the conditions burdening the land in Qormi at no charge. Not only did these officials, through negligence or otherwise, fail to safeguard Government's interests, they also acted without due authorisation when failing to refer the matter for ministerial endorsement and subsequent possible parliamentary scrutiny.

The Contract between Government and LBM Breweries Ltd

3.2.20 The contract between Government and LBM Breweries Ltd was signed on 3 December 2009 and was for the sale and transfer of the perpetual directum dominium and the annual, perpetual and non-revisable ground rent of €23,294 with respect to the land in Qormi, measuring approximately 21,000 square metres. The sale was effected against the payment of €465,875. Clearly specified in the contract was the fact that, through this agreement, the Government of Malta was consenting to the complete cancellation of the hypothec and privilege and therefore renouncing all the conditions prescribed in the contract dated 13 November 1990.

3.2.21 The Office's concerns, arising following the review of this contract, essentially reflect that stated in the preceding paragraphs, particularly with respect to the renouncement by Government of all the conditions stipulated in the 1990 contract. The NAO's

understanding of the process being characterised by haste was further confirmed, as the bank draft through which payment was effected was dated 2 December 2009, which fact assumes relevance when one considers that the request by LBM Breweries Ltd was dated 1 December 2009 and the contract was signed on 3 December 2009. Furthermore, the board resolution allowing LBM Breweries Ltd to proceed with the redemption of the perpetual emphyteutical ground rent with Government was dated 1 December 2009, that is, a day prior to the minutes noted by the Notary GPD, the Assistant Director Contracts GPD and the DG GPD. These documents provide additional confirmation of the NAO's understanding of haste and indicate prior, yet undocumented, agreement regarding Government's renouncement of its privileges.

3.2.22 An element of confirmation of prior agreement was conveyed by the Chair Vassallo Builders Group Ltd, who shortly after the 2009 contract acquired the land from Marsovin Ltd and Agrico Ltd. In an affidavit presented in connection with a court case related to the transfer of this land, the Chair Vassallo Builders Group Ltd stated that the representatives of Marsovin Ltd informed him that they already had an agreement with the Minister and the GPD for the cancellation of all the conditions on payment of Lm200,000 (€465,875). Additionally, Marsovin Ltd had assured Vassallo Builders Group Ltd that once Marsovin Ltd had sourced the required funds, the transaction rendering the site free and unencumbered would be effected within a few days. The NAO was unable to establish who the Minister and the GPD officials referred to were, despite queries to this effect made to Vassallo Builders Group Ltd.

3.2.23 In turn, Marsovin Ltd denied that the Company ever declared that there was already an agreement with the Minister or the GPD in relation to the waiver of the conditions imposed by Government on the land in Qormi. However, the Company confirmed that it had signified its commitment to request the redemption of ground rent and the waiver of conditions from the GPD, yet never guaranteed that this would be achieved. Notwithstanding that affirmed by the Chair Vassallo Builders Group Ltd, the Minister MFEI, the PS Revenues and Land, the DG GPD, the CoL, the Assistant Director Contracts GPD and the Notary GPD negated any such agreement, or having provided any assurance, to Marsovin Ltd.

3.2.24 In this Office's opinion, while the redemption of ground rent is a straightforward matter, the renouncement of all conditions referred to in the 1990 contract through the cancellation of hypothecs and privileges is not. The decision to renounce all conditions should have instigated broader consultation within the GPD and referral to the Attorney General, as well as the Minister MFEI and the PS Revenues and Land. The NAO is of the understanding that this decision required a more in-depth consideration by the CoL and the DG GPD, particularly in view of the implications indicated by the Notary GPD in his minute to the DG GPD, through the CoL.

3.2.25 Independent of legal considerations, the NAO noted that the Notary GPD claimed to have raised the issue of possible additional compensation due to Government for the renouncement of conditions with his superiors, specifically the CoL and the Assistant Director Contracts GPD. Although the Notary GPD made direct reference to queries raised regarding the weighting of the conditions, the reason why no value was assigned remained unclear and ambiguous. While the NAO was not able to clearly establish what efforts were made by the Notary GPD in this respect, in this Office's opinion, the responsibility for ensuring that Government charged a value for the cancellation of conditions was that of the CoL and the DG GPD. Even though the Notary GPD affirmed that the cancellation of all the conditions burdening the property in this case could be considered as the granting of a real right in terms of law, in drafting the 2009 contract he had steered away from this interpretation through his phrasing of this transaction as a renunciation of rights. Irrespective of the validity, or otherwise, of the argument

made by the Notary GPD, this Office maintains that, above all else, the Notary GPD was to ensure that Government's interests were well served and not to circumvent provisions that he was duty-bound to uphold.

3.2.26 The NAO's attention was also drawn to the possible involvement of Vassallo Builders Group Ltd in the process leading to the 2009 contract between Government and LBM Breweries Ltd. This Office established that the Director Vassallo Builders Group Ltd was present for the signing of the 3 December 2009 agreement. Although Marsovin Ltd and Agrico Ltd claimed that Vassallo Builders Group Ltd was directly involved in the negotiations and provided assistance throughout the process, opposing views were presented by the latter Company. The Director Vassallo Builders Group Ltd in fact confirmed that he was present for the signing of the 2009 contract although he was not party to it. He explained his presence in terms of obligations arising from another agreement entered into by Vassallo Builders Group Ltd, Marsovin Ltd and Agrico Ltd. This was confirmed by the NAO when the Office established that payment of €465,875, by means of a bank draft dated 2 December 2009, was in fact made directly to the CoL by Vassallo Builders Group Ltd.

3.2.27 In this Office's understanding, Government's renouncement of conditions burdening the land in Qormi may be considered as a disposal of land in terms of the Disposal of Government Land Act (Chapter 268). According to this Act, Government land may be disposed of in a number of ways. In this case, the Notary GPD referred to the policy applicable to the land being transferred, as indicated in the Schedule of the Act, making specific reference to Clause 3a of the Schedule that addresses the redemption of revisable ground rent. The Notary GPD argued that this could be extended to apply to non-revisable ground rent and therefore, the cancellation of any conditions. The CoL contended otherwise, maintaining that the conditions burdening the land were not extinguished with the redemption of ground rent. This is directly related to an ongoing court case involving Government; however, irrespective of the outcome of this dispute, the NAO maintains that this matter may have readily been avoided had an open call for tenders or referral to Parliament been resorted to. Aside from overcoming any doubt as to the legal basis of this contract, referral to any of these options would have provided an element of transparency and scrutiny. Furthermore, had reference been made to the provisions of the Act, Government would have secured payment for the freehold value of the land, which value would have gone beyond the mere redemption of ground rent, but reflected the true value of the site.

3.2.28 In the contract dated 3 December 2009, the sum paid by LBM Breweries Ltd represented the value of ground rent redemption and did not compensate Government for its loss of privilege. In this Office's opinion, the renunciation of privilege bore considerable impact on the value of the land, which was no longer limited in terms of use for the production of alcoholic and non-alcoholic beverages, but could be utilised freely by LBM Breweries Ltd. Aside from the serious reservations regarding the legality of the contract entered into by Government, the fact that no charge was levied by the GPD for the renouncement of limitations further renders evident the Department's abject failure to safeguard Government's interests. To varying degrees, responsibility for this lies with the GPD officials involved. The Notary GPD should have documented the possible concerns regarding the value that was to be assigned to the cancellation of conditions, which matter should have been taken up by the Assistant Director Contracts GPD when consulting the CoL. In turn, the CoL should have advised the DG GPD that a valuation was required to establish the freehold value of the land, without its limitations in terms of use. Finally, the DG GPD should have ensured that the process was appropriately seen through, with the matter referred to the Minister MFEI or PS Revenues and Land for eventual endorsement by Parliament, or possible resort to a call for tenders. Failure at each of these stages resulted in no charge being

levied; however, this matter remains secondary to the overarching issue of the legality, or otherwise, of the transaction.

The Acquisition of the Land by Vassallo Builders Group Ltd

3.2.29 The cancellation of the 13 November 1990 contract conditions had direct implications on a private agreement between Marsovin Ltd and Agrico Ltd on one part, and Vassallo Builders Group Ltd on the other. Together, Marsovin Ltd and Agrico Ltd held the entire shareholding of LBM Breweries Ltd. On 30 November 2009, that is, a day before the request for the redemption of ground rent was submitted to the GPD, a preliminary agreement was signed between Marsovin Ltd and Agrico Ltd as the vendors, and Vassallo Builders Group Ltd as the purchaser, for the purchase and transfer of the entire shareholding of LBM Breweries Ltd against the payment of €8,000,000. The only asset owned by LBM Breweries Ltd on the date of finalisation of the agreement would be the land in Qormi.

3.2.30 Of particular interest to the NAO was the fact that the preliminary agreement was made subject to the redemption by notarial deed of the ground rent burdening the plot of land and the cancellation by Government of all the conditions regulating the emphyteusis within a seven-week period from the date of the preliminary agreement. Failure of the vendors to satisfy these two conditions would have entitled the purchaser to withdraw from this preliminary agreement. In this Office's opinion, reference to the cancellation by Government of all the conditions regulating the emphyteusis in this preliminary agreement provides further evidence of prior agreement between LBM Breweries Ltd and Government. The NAO's conclusion was based on the consideration that the cancellation of these conditions within the stipulated seven-week period was a highly improbable outcome had the appropriate legal mechanisms for the disposal of government land been adhered to. Although the Minister MFEI, PS Revenues and Land, DG GPD, CoL, Assistant Director Contracts GPD and the Notary GPD negated knowledge of any prior agreement, in this Office's opinion, the notion of prior agreement between Government and the Companies persists. This understanding is substantiated by the seven-week timeframe stipulated in the preliminary agreement, the haste with which the GPD finalised the 2009 contract and that stated by the Chair Vassallo Builders Group Ltd regarding prior agreement with the Minister and the GPD with respect to the cancellation of conditions.

3.2.31 As a matter of fact, the seven-week timeframe was well respected, for four days after the signing of this preliminary agreement, Government had consented to the redemption of ground rent and the cancellation of all the conditions burdening the land in Qormi. In light of this, on 23 December 2009, Vassallo Builders Group Ltd acquired the entire shareholding of LBM Breweries Ltd for €8,000,000.

The Legality of the Contract of Sale of the Perpetual Directum Dominium

3.2.32 Initial concerns regarding the 2009 contract emerged in January 2011, when the Minister MFEI was requested, following parliamentary questions, to table a copy of the contract by which the site was originally allocated in 1990 and the relevant parliamentary resolution or call for tenders through which the land was transferred to third parties. It was at this stage that the possible infringement of the Disposal of Government Land Act (Chapter 268) was brought to the attention of the Minister MFEI, the PS Revenues and Land and the DG GPD by the CoL. The advice of the Attorney General was sought as the CoL intended to challenge the 2009 contract through an official letter, limiting it to the redemption of ground rent as a first measure. The Attorney General advised that the validity of the 2009 contract could be challenged in this respect.

3.2.33 These developments vindicated the concerns expressed by the NAO in the preceding paragraphs, notably those relating to probable prior agreement, the legality of the cancellation of the conditions without due authorisation and at no charge and the overall haste of the process. The declaration by the CoL that the cancellation of conditions in the 2009 contract was in breach of the law regulating the disposal of government land and the affirmation by the Attorney General that grounds for challenging this contract existed, particularly substantiate this Office's concerns.

3.2.34 These serious failures in terms of the management of the process were acknowledged by the Minister MFEI and the PS Revenues and Land, with the latter tasking the DG GPD and the CoL to take appropriate measures. The CoL maintained that he did not consider any disciplinary action necessary, attributing these failures to a lack of experience and knowledge. The NAO has serious reservations regarding this justification, for a lack of experience and knowledge will only explain part of the irregularities noted. In this Office's opinion, lack of experience and knowledge does not explain the evidence indicating prior accord documented in the preliminary agreement between Marsovin Ltd, Agrico Ltd and Vassallo Builders Group Ltd. This too cannot justify the inexplicable haste with which the GPD finalised the 2009 contract. It is debatable whether this justification may be extended to account for the GPD's failure to seek legal advice, to obtain ministerial authorisation and to levy no charge; however, when the NAO simultaneously considers all the circumstances of the case, this Office remains unconvinced.

3.2.35 Under the premise that the Minister MFEI, the PS Revenues and Land and the CoL were originally unaware of what went on in 2009, then the corrective action taken is commendable. The matter was immediately brought to the attention of the Minister MFEI and the PS Revenues and Land, who in coordination with the DG GPD and the CoL referred the matter to the Attorney General, and by 20 May 2011, the GPD had initiated judicial action. Although the planned action was commendable, developments that ensued deviated, in an adverse manner, from those intended, resulting in the failure to safeguard Government's interests and an increased exposure to possible liabilities.

The 2012 Agreement of Regularisation

3.2.36 On instructions of the Minister MFCC, meetings were held between the GPD and CaterGroup Ltd with a view to address the error in the 2009 contract. Following discussions held, agreement on a possible way forward was reached, with the amount payable by CaterGroup Ltd for the cancellation of existing conditions burdening the land to be determined by a Committee. Three architects, one representing the GPD, another representing CaterGroup Ltd and a Chair, nominated by the GPD and endorsed by the Company were appointed as the Committee. Considering the site as measuring 17,660 square metres and applying 1990 rates, the Committee established the freehold value of the land at €706,400. The GPD and CaterGroup Ltd agreed on this valuation and identified the method that was to be pursued for this transaction to be effected. In essence, the amount due to Government was the €706,400 less the €465,875 that had previously been paid for the redemption of ground rent in the 2009 contract. The remaining balance of €240,525 was equated with the value of the conditions, which amount was to be exchanged with compensation due to CaterGroup Ltd, amounting to €291,660, for land that had been expropriated. Following the authorisation of the Minister MFCC on 4 June 2012, a contract of exchange was entered into by the parties on 5 June 2012.

Determining Value

3.2.37 The NAO's attention was drawn to the application of 1990 rates in establishing the value of the land in Qormi by the Committee. This Office was unable to determine who decided that the land was to be valued in this manner, for this consideration was not imposed by the Committee. Although the DG GPD communicated this mandate to the Committee, he maintained that he had not determined this criterion, indicating that the CoL was responsible for this. In turn, the CoL denied any involvement in stipulating the application of the 1990 rates, attributing the determination of this technical matter to the DG GPD. In light of the diametrically opposing views expressed by the DG GPD and the CoL, the NAO was unable to determine who decided that the Committee was to base its valuation on these rates. Although the Minister MFCC asserted that he was not involved in setting the parameters and was not aware of the application of 1990 rates at the time, he vehemently argued that the application of these rates was legally sound and just. The Minister MFCC based his argument on the fact that the Company was the emphyteuta of the land since 1990 and valuing the site at current rates would have constituted 'unjustified enrichment' by Government.

3.2.38 This Office is of the firm opinion that the application of 1990 rates to value the land in Qormi, devised by Government in agreement with Vassallo Builders Group Ltd, was seriously flawed. In the NAO's understanding, the cancellation of the conditions should have been valued at the time of such cancellation and not based on when the original emphyteutical grant was made. For it was at that point that the nature of the land was fundamentally altered, since no limitations in terms of use constrained ownership, resulting in an accretion in value. Bearing in mind that the cancellation of conditions as transacted in the 2009 contract was deemed invalid, then it is reasonable to consider that the conditions were to be valued when effectively cancelled, that is, as at 2012. It is in this context that the NAO deems the value assigned to the government land in Qormi as grossly misrepresenting its true value, since the application of 1990 rates remains fundamentally flawed and only falsely appearing to be fair, just or right.

3.2.39 Of concern to the NAO was this Office's inability to determine who decided that the land was to be valued as at 1990. The shifting of responsibility between the DG GPD and the CoL is an affront to the principles of good governance and accountability and it is these officials who bear responsibility for failing to comprehensively rectify the error committed by the Department in 2009, again failing to ensure that Government be adequately compensated for land disposed of. Furthermore, irrespective of that stated by the Minister MFCC, who argued that the decision to apply 1990 rates was not within the remit of the politician, the NAO contends otherwise. For it is the role of the politician to, above all else, safeguard Government's interests and ensure that the administrative arm of government, here the GPD, works towards this objective. In this particular case, which was fraught with anomalies and certainly one that was brought to the Minister's attention, this Office is of the opinion that the Minister MFCC should have questioned the value assigned to the land. It is in this context that the Minister MFCC bears an element of responsibility for this gross misrepresentation of the value of the land.

3.2.40 Another concern relating to the valuation of the land in Qormi was the area considered by the Committee. While the 1990 grant corresponded to an allocation of a site measuring approximately 21,000 square metres, the Committee valued 17,660 square metres, attributing the difference to the de facto expropriation of portions of the land. According to information obtained from the GPD, the original allocation of land measured 20,334 square metres, of which 1,154 square metres were taken for public purposes, resulting in a total area of 19,180 square metres. In this context, the NAO questions the basis of the valuation by the Committee, which erroneously cited

an area of 17,660 square metres instead of the actual measurement of 19,180 square metres. This discrepancy bore an adverse impact to Government as the value of the site was understated by 8.6 per cent. This Office could not determine the source of this discrepancy, which resulted in an undervaluation of the land and compounded the shortfall to Government attributable to the application of the 1990 rates.

Regularisation through Exchange

3.2.41 Having reviewed the details of the case, the NAO established that the transfer of this land to CaterGroup Ltd by method of exchange was in accordance with the applicable legislation regulating the disposal of government land. Based on its review of the Disposal of Government Land Act (Chapter 268) and the relevant provisions in the Civil Code (Chapter 16), this Office deemed it reasonable to equate Government's ownership of the conditions burdening the land in Qormi with 'Government land', hence rendering possible the proposed exchange. For the exchange to be possible, the value of government land to be disposed of was not to exceed thirty per cent of the value of the expropriated land. In this case, the value of the Government land, here equated as the conditions, was that of €240,525, while the value of the expropriated land was that of €298,349, which gives rise to a difference in value within the parameters stipulated in the Act. However, the NAO is of the opinion that the exchange can only be deemed conformant insofar as the values assigned to the lands in exchange reflect their true value. In this case, the NAO challenges the basis of this exchange and maintains the strongest of reservations regarding the valuation of the land in Qormi. This Office contends that the valuation did not reflect its true and fair value, with the serious flaws identified adversely impacting Government's position.

3.2.42 In the NAO's opinion, Government's conformity to the law does not necessarily imply that the principles of good governance, accountability and transparency were respected. This is rendered immediately evident in the decision to apply 1990 rates. While the contract of exchange respected the letter of the law, the application of these rates flouted these principles. To an extent, these principles could have been better safeguarded had Government resorted to the disposal of its land following referral to Parliament or through a call for tenders. While the NAO reasserts that recourse to exchange was a legally valid option, this Office maintains that this course of action effectively circumvented the expected level of scrutiny provided by Parliament and exercised in public calls for tenders.

Contract-related Issues

3.2.43 The NAO noted that the 5 June 2012 contract failed to include a clause that specified that this agreement was in full and final settlement, and that CaterGroup Ltd would not hold Government responsible for any damages arising from the rescission in part of the 3 December 2009 contract. While the Minister MFCC contended that such a clause should have been included in the 2012 contract, the CoL claimed that this must have been an oversight of the notary. Although the DG GPD maintained that through this contract CaterGroup Ltd had tacitly agreed to the settlement, and therefore Government assumed that the matter had been decisively settled, the Company informed the NAO that the contract was entered into under protest with the intent, made clear to the GPD, that legal action would ensue. In this Office's opinion, the GPD's failure to incorporate a clause to this effect in the 2012 contract exposed Government to the risk of possible further legal action by CaterGroup Ltd.

3.2.44 Another contract-related shortcoming was Government's failure to account for the expropriated portions of land originally forming part of the 1990 grant. The NAO noted

that the 2012 contract refers to the area as described in the 2009 contract, measuring 21,000 square metres, despite the fact that the expropriated area was specifically excluded in the valuation by the Committee. Aside from concerns arising from the fact that the dimensions of the land cited in the contract differ to those indicated in the Committee's valuation, this Office's concern was directed to the forfeiture of compensation payable to CaterGroup Ltd for the expropriated land. Although a minute by the CoL indicated that the Company was willing to forego compensation in this respect, this Office maintains that failure to include such a provision in the 2012 contract exposed Government to potential claims for compensation. While the Minister MFCC and the DG GPD could argue that they were not involved in the finalisation of the 2012 contract, the NAO is of the opinion that this argument cannot be extended to the CoL, who had originally drawn the attention of the Minister MFCC and the DG GPD to the forfeiture of compensation rights by CaterGroup Ltd, and was a signatory to the 2012 contract. It is in this context that this Office deems this omission as a failure on the part of the CoL to secure Government's interests.

Developments following the 2012 Contract

3.2.45 A few days prior to the signing of the 2012 contract, Vassallo Builders Group Ltd and Vassallo Builders Ltd filed a judicial protest against Marsovin Ltd and Agrico Ltd, claiming that following the agreement reached with the GPD, additional compensation of €240,525 for the renouncement of the conditions burdening the land in Qormi was determined. In this context, Marsovin Ltd and Agrico Ltd were to reimburse Vassallo Builders Group Ltd and Vassallo Builders Ltd this amount. A counter-protest was subsequently filed by Marsovin Ltd and Agrico Ltd; however, the case was still pending as at end September 2016.

NAO Verification of the Value of the Land in Qormi

3.2.46 In view of the notable concerns expressed by the NAO regarding the value established for the land at Ta' L-Istabal, Qormi, which was based on the application of 1990 rates, this Office commissioned an independent valuation of the land. This valuation was to estimate the freehold value of the land, excluding structures, as at 2009 and 2012. The NAO established that the land area presently utilised is 19,150 square metres, which measurement is corroborated by that provided by the GPD. The existing land presently comprises various retail outlets and an eatery complemented with an outside seating area and a children's play area. The rest of the site is an open site parking facility and landscaped areas.

3.2.47 The present market value of each portion of land was estimated by the NAO depending on the varying uses of each portion. A ground floor retail lease rate of €160 per square metre and an upper office lease rate estimated at €100 per square metre were applied. The application of these rates resulted in a present market value of €6,905 per square metre. Deducting development costs from this market value resulted in a residual land value of €1,386 per square metre, revised to €1,205 per square metre when considering the interest incurred during a nine-month selling period. A fair land market rate for open car spaces was estimated at €135 per square metre, while the value of the landscaped land was estimated at €25 per square metre. Applying these rates to the 19,150 square metres of land in Qormi, apportioned according to use, resulted in a present market value of €8,896,715.

3.2.48 Having established the present value of the land in Qormi, the NAO sought to adjust this valuation to reflect the applicable market value at the time of the transaction between Government and CaterGroup Ltd, that is, as at 2012. Application of the 2012

land rate to the present market value results in an adjusted value of €7,838,515. Were it to be argued that the directum dominium was transferred in 2009, then the adjusted value of the land in Qormi as at this date would have been €8,465,597.

3.2.49 When one considers the freehold value at which the land was disposed of by Government, that is, €706,000, with the €7,838,515 established by the NAO, the discrepancy is obscene, beyond any limit of acceptability or fairness. In this Office's opinion, this shortcoming represents a gross lapse by the GPD in ensuring that Government was adequately compensated for the land disposed of. The valuation of the land as at 1990 distorted and vitiated any notion of fair value, and it is in this context that the NAO deems the DG GPD and the CoL as responsible for this failure. An element of responsibility must also be attributed to the Minister MFCC, who was aware of the nominal compensation being claimed by the GPD and should have questioned how a tract of developable land measuring approximately 20,000 square metres was being disposed of by Government for this inconsiderable sum.

3.3 Conclusions

3.3.1 In addressing that requested by the PAC, the NAO sought to ascertain whether the principles of good governance, value for money, transparency and accountability were respected and whether any political pressure was exerted with respect to Government's transfer of the land at Ta' L-Istabal, Qormi to third parties.

Good Governance

3.3.2 The NAO is of the opinion that failure in terms of good governance, to varying degrees, is a recurring theme that emerged in its review of this matter. This commences with the terms established by the Minister MEA in the 1990 direct allocation of land, who specified that the grant was to be made on a perpetual basis with a non-revisable ground rent, which factors conditioned subsequent developments, particularly in view of the fact that the land was to be used for a specific industrial purpose. While the policy governing allocations applicable at the time did not specify the duration of such emphyteutical grants, this Office established, based on information provided by the GPD, that allocations on perpetuity were atypical.

3.3.3 The manner by which the request for the redemption of ground rent and the cancellation of conditions burdening the land in Qormi was processed by the GPD raised multiple concerns. Of concern to the NAO was the fact that this process was initiated by the GPD without a request to this effect retained in the relevant GPD file. The request was in fact captured by the Notary GPD, who although uncertain whether the cancellation of conditions was permissible, failed to overtly express concerns regarding the Company's request and its legality in a minute to the DG GPD, through the CoL. The views of the CoL were conveyed, albeit in an ambiguous manner, in a minute by the Assistant Director Contracts GPD. Although reference was made to the awareness of the CoL of the request to cancel the conditions, authorisation was noted as solely relating to the redemption of ground rent. Notwithstanding this, the involvement of the CoL, or otherwise, remained a point of contention, with conflicting accounts on this matter. Nevertheless, the NAO maintains that the case warranted the direct involvement of the CoL and could not identify any justifiable reason why this was not pursued. Having considered the cryptic minute by the Notary GPD and the ambiguous endorsement by the Assistant Director Contracts GPD following consultation with the CoL, the authorisation by the DG GPD was deemed equally anomalous by the NAO. In this Office's opinion, the DG GPD, and possibly the CoL, failed to appropriately consider the implications of that proposed by the

Notary GPD and whether the renouncement by Government of all conditions was legally permissible. This concern was further heightened in view of the fact that the land in Qormi had originally been granted by direct allocation for a specific industrial purpose. These failures in terms of governance had far-reaching consequences on later developments, effectively constraining the GPD into a series of other flawed decisions.

3.3.4 The facts of the case render the extraordinary haste of the process amply evident. Following the request as captured in the minute by the Notary GPD, the relevant authorisations were obtained and the contract was finalised in a mere two days. It is in this context that this Office considers the haste in processing the request for the redemption of ground rent and the cancellation of the conditions as highly suspect. More so, when one considers that stated by the GPD officials involved, who maintained that the case had not been discussed with other GPD officials aside from the briefest of minutes documented in the GPD file. The NAO fails to understand how the authorisation process was seemingly carried out through the forwarding of the relevant file, with the haste exhibited impeding any due consideration of whether the action proposed by the GPD was legal, or otherwise. In this Office's opinion, the actions of the GPD officials involved in this process may, to varying extents depending on their involvement and responsibility, be considered as negligent and draw the NAO's gravest concerns.

3.3.5 These concerns are further accentuated by the fact that neither the authorisation of the Minister MFEI nor that of the PS Revenues and Land was sought prior to the signing of the 2009 contract. The NAO is of the opinion that the matter should have been referred for ministerial endorsement, as this case did not solely entail the redemption of ground rent, but the sale of the directum dominium. Furthermore, this Office is of the understanding that ministerial sanctioning was to be the precursor to eventual referral to Parliament or the issue of a call for tenders. The NAO considers this shortcoming as the responsibility of the DG GPD. Furthermore, the NAO fails to understand why the GPD did not obtain any form of legal advice assuring the Department of the legitimacy of the intended course of action, which serious shortcoming can be attributed to the DG GPD, the Notary GPD and the Assistant Director Contracts GPD. Not only did these officials, through negligence or otherwise, fail to safeguard Government's interests, they also acted without due authorisation when failing to refer the matter for ministerial endorsement and subsequent possible parliamentary scrutiny.

3.3.6 The contract entered into between Government and LBM Breweries Ltd on 3 December 2009 comprised a payment of €465,875 for the redemption of ground rent and the cancellation of conditions; however, the NAO noted that no charge was specifically levied with respect to the latter. In this Office's opinion, Government's consent to the cancellation of conditions bore considerable impact on the value of the land, which was no longer limited in terms of use. The NAO considers the fact that no charge was levied by the GPD for the renouncement of limitations as an abject failure of the Department to safeguard Government's interests. To varying degrees, responsibility for this lies with the DG GPD, the Assistant Director Contracts GPD, the Notary GPD, and possibly the CoL. Failures noted in terms of their respective involvement resulted in no charge being levied; however, this matter remains secondary to the overarching issue of the legality, or otherwise, of the transaction.

3.3.7 Whether the cancellation of the conditions executed in the 2009 contract was permissible or otherwise was contentious, as the Notary GPD and the CoL put forward opposing views. This is directly related to an ongoing court case involving Government; nonetheless, irrespective of the eventual outcome of this dispute, this

Office is of the opinion that this matter could have been averted had an open call for tenders or referral to Parliament been resorted to. Aside from eliminating any doubt as to the legal basis of this disposal, resort to any of these options would have ensured an element of transparency and scrutiny. Moreover, the NAO contends that had such procedures been referred to, Government would have secured payment for the freehold value of the land, which value would have gone beyond the mere redemption of ground rent but reflected the true value of the site at the time.

3.3.8 Concerns regarding the 2009 contract emerged in 2011, which led to Government, in agreement with CaterGroup Ltd, appointing a Committee to establish the freehold value of the land in Qormi as at 1990. This Office deems the application of 1990 rates as fundamentally flawed, particularly in view of the fact that the site comprising developable land of approximately 20,000 square metres was valued at €706,400. In the NAO's understanding, compensation payable to Government for the renouncement of conditions should have been valued at the time of such renouncement and not based on when the original emphyteutical grant was made. For this Office contends that it was then that the nature of the land was intrinsically altered, since no constraints in terms of use remained, resulting in an inevitable substantial increase in value. Given that the cancellation of conditions effected in the 2009 contract was deemed invalid, then the NAO is of the opinion that the conditions were to be valued as at 2012, when limitations on use were rescinded.

3.3.9 The NAO was unable to determine who decided that the Committee was to value the land by applying 1990 rates, yet this Office ascertained that this consideration was not imposed by the Committee. Notwithstanding the shirking of responsibility by the DG GPD and the CoL, this Office maintains that both were ultimately responsible for failing to comprehensively rectify the error committed by the Department in 2009, again failing to ensure that Government be adequately compensated for land disposed of. The NAO is of the opinion that this represents a grave failure in terms of good governance and accountability. Although the Minister MFCC contended that the decision to value the land as at 1990 was not within the remit of the politician, this Office maintains that failure to question the grossly misrepresentative value of the land was a shortcoming in terms of ministerial oversight. For it was the responsibility of the Minister MFCC to safeguard Government's interests and ensure that the GPD acted in line with this objective. It is in this context that the Minister MFCC bears an element of responsibility for this gross misrepresentation of the value of the land.

Value for Money

3.3.10 The NAO is of the opinion that Government's abject failure to levy any charge for the cancellation of conditions in the 2009 contract seriously undermines any consideration of whether value for money was obtained. The gratuitous renunciation by Government of the conditions burdening the land is intrinsically wrong, an outright failure on part of the GPD officials involved and a serious undermining of Government's interests. Not only did Government fail to secure adequate compensation in 2009, but again in 2012, when the land in Qormi was valued at €706,400 through the application of 1990 rates. The NAO considers this valuation as grossly understated, misrepresentative of the true value of a tract of developable land measuring approximately 20,000 square metres. This Office is of the opinion that value for money was not assured through Government's effort at corrective action in 2012.

3.3.11 Concerns in this respect were further accentuated following the NAO's establishment of the freehold value of the land as at 2012, determined as €7,839,000. Were it to be argued that the directum dominium was transferred in 2009, then the adjusted value of the land in Qormi as at this date would have been €8,466,000. Comparison of these

values to that charged by Government results in a discrepancy of a magnitude that cannot be reasonably explained, and that extends beyond any limit of acceptability or fairness. In this Office's opinion, this variance represents the extent of failure by the GPD in ensuring that Government was adequately compensated for land disposed of. The valuation of the land as at 1990 warped and compromised any notion of fair value, and it is in this context that the NAO considers the DG GPD and the CoL as answerable for this failure. In this Office's opinion, the Minister MFCC also shoulders an element of responsibility in this respect, for he was aware of the nominal compensation being claimed by the GPD. In sum, in the NAO's understanding, the value assigned to the land remained fundamentally flawed, far from being considered fair, just or right and hence not representing value for money.

Transparency

3.3.12 The submission of the request to redeem the ground rent by LBM Breweries Ltd remained subject to considerable doubt, as no record relating to this request was retained by the GPD when this should have been the basis of all subsequent developments. The NAO was unable to determine with any degree of certainty the sequence of events leading to the submission of this request, thereby hindering this Office's attempts at establishing a true and factual account of developments leading to the subsequent actions by the GPD officials. This, together with other aspects of the case, detracted from the required level of transparency, shrouding key developments that would eventually lead to the 2009 contract.

3.3.13 Having addressed the incongruent action of all GPD officials involved in the process in the preceding paragraphs, the NAO draws attention to evidence indicative of prior agreement between Marsovin Ltd, Agrico Ltd and Vassallo Builders Group Ltd, which was contingent on Government acceding to the cancellation of conditions burdening the land in Qormi. It is this latter aspect that is of concern to the NAO, as evidence reviewed indicated that Government was aware of and possibly facilitated this transaction. This Office's convictions are supported by the preliminary agreement entered into by Marsovin Ltd and Agrico Ltd as vendors and Vassallo Builders Group Ltd as purchasers on 30 November 2009, wherein it was stipulated that the entire shareholding of LBM Breweries Ltd, whose sole asset was the land in Qormi, was to be transferred subject to Government's agreement to cancel the conditions burdening this land within seven weeks. The NAO is of the understanding that the cancellation of these conditions within the stipulated seven-week period was a highly improbable outcome had the appropriate legal mechanisms for the disposal of government land been adhered to. Other supporting evidence was an LBM Breweries Ltd board resolution to proceed with the redemption dated 1 December 2009 and a bank draft by Vassallo Builders Group Ltd payable to the CoL dated 2 December 2009. This must be considered in relation to the request, authorisation and contract, dated 1 December 2009, 2 December 2009 and 3 December 2009, respectively. Highly indicative was an affidavit by the Chair Vassallo Builders Group Ltd, wherein it was stated that the representatives of Marsovin Ltd had informed him that they had an agreement with the Minister and the GPD for the cancellation of all the conditions on payment of Lm200,000 (€465,875). Additionally, Marsovin Ltd had assured the Chair Vassallo Builders Group Ltd that once Marsovin Ltd had sourced the required funds, the transaction rendering the site free and unencumbered would be effected within a few days. Although these allegations were denied by all involved, the NAO is of the opinion that the facts of the case lend credence to that stated.

3.3.14 With regard to the 2012 contract, the NAO's concern was drawn to the fact that no documentation was retained with respect to the process of negotiation between Government, as represented by the DG GPD and the CoL, and Vassallo Builders Group

Ltd. This limited the NAO in formulating a complete and accurate understanding of the precise developments registered in this respect. Of specific concern and critical in this context was this Office's inability to establish who determined the application of the 1990 rates in the valuation of the land in Qormi. Aside from concerns in terms of the governance of the process, this lacuna raises issues of transparency and accountability.

3.3.15 The NAO established that the transfer of the land in Qormi through exchange was in accordance with legislation regulating the disposal of government land. However, this Office is of the opinion that the exchange can only be deemed legitimate insofar as the values of the lands exchanged reflect their true value. In this case, the NAO disputes the basis of this exchange in view of its serious reservations regarding the valuation of the land. In this Office's opinion, adherence to the law does not necessarily imply that Government respected the principles of good governance, accountability and transparency. The application of 1990 rates renders this concern immediately evident. In the NAO's understanding, these principles could have been better safeguarded had Government resorted to the disposal of land following referral to Parliament or subsequent to a call for tenders. While the NAO reaffirms that resort to exchange was a legally valid option, this Office is of the opinion that this course of action effectively circumvented the expected level of scrutiny provided by Parliament and exercised in public calls for tenders.

Accountability

3.3.16 In view of the limited documentation of key developments retained by the GPD and the often conflicting accounts of events, the NAO was at times unable to determine the precise involvement of the Government officials and third parties. Shortcomings in this respect impeded the Office from establishing who was responsible for key decisions that led to the 2009 and 2012 contracts. In the case of the 2009 contract, gaps in accountability were most evident in the process leading to Government's agreement to the cancellation of all the conditions burdening the land. Specific reference in this sense is made to the Notary GPD, the Assistant Director Contracts GPD, the DG GPD and, possibly, the CoL. The NAO was unable to establish a comprehensive understanding of the initial request made by LBM Breweries Ltd, with developments as recorded on file and communicated by the officials involved an unlikely, often conflicting and incomplete account of events. Also unlikely was the manner in which the request was vetted and approved by the GPD, with endorsement a mere formality eliciting no real consideration of the merits of the case. It is in this context that the NAO considers the involvement of the GPD officials as ambiguous, devoid of the expected level of accountability that should characterise decisions of this nature.

3.3.17 Aside from the serious failure regarding the application of 1990 rates, attributed to the DG GPD and the CoL, the NAO noted other shortcomings in terms of accountability evident in the 2012 contract. This Office was unable to understand why the 2012 contract did not include the forfeiture, by LBM Breweries Ltd, of compensation for portions of land that had been expropriated, thereby exposing Government to possible claims in this respect. Other concerns related to the omission of a clause in the 2012 contract considering this transaction as full and final settlement, hence failing to definitely conclude the matter and ensure that Government was immune from possible legal action.

Political Pressure

3.3.18 The NAO did not find direct evidence of political pressure exerted in the processes reviewed. However, the manner by which the GPD concluded the 2009 contract in a matter of days was deemed highly suspect by this Office. Although the Notary GPD indicated an element of pressure exerted by a representative of Marsovin Ltd, and the Assistant Director Contracts GPD indicated pressure by the DG GPD, these alone do not explain the immense haste with which the Department concluded the contract. The context for the exertion of pressure was certainly set with the preliminary agreement entered into by Marsovin Ltd and Agrico Ltd as vendors and Vassallo Builders Group Ltd as purchasers, wherein a seven-week timeframe was established within which Government was to agree to the cancellation of all conditions burdening the land in Qormi. This was a highly improbable outcome, which should never have transpired in the manner that it did, in terms of haste and method. While later deemed illegal, this was seen through in a matter of days. The NAO considers this as highly indicative of pressure being exerted for the conclusion of the 2009 contract, which although not necessarily political, was effective to the extent that a disposal of government land that was not meant to be undertaken in the manner that it was, was concluded in a matter of days, and without any charge levied by Government. Pressure to this end could have been exerted by the GPD officials or the third parties involved in this transaction, who all categorically denied this in reply to queries put by this Office. Nonetheless, an element of political pressure was asserted by the Chair Vassallo Builders Group Ltd, who alleged that Marsovin Ltd had prior agreement with the 'Minister' and the GPD. The Director Marsovin Group Ltd negated this allegation, as did the Minister MFEI and the PS Revenues and Land, who indicated that they were not aware of the case at the time. Queried in this respect, the Chair Vassallo Builders Group Ltd indicated no knowledge of who the 'Minister' was. While the NAO cannot rule out pressure being exerted by any of the aforementioned, or possibly by other persons who did not come to this Office's attention, the facts of the case render immediately evident that pressure was in fact exerted to the detriment of Government's interests.

Appendices

Appendix A – Request by the Public Accounts Committee

MINISTERU GĦALL-ĠUSTIZZJA, KULTURA
U GVERN LOKALI
30, TRIQ IT-TEŻORERIJA, VALLETTA, MALTA

Illum it-23 ta' Ġunju, 2015

Lis-Sur Anthony Mifsud
Awditur Ġenerali
National Audit Office
Notre Dame Ravelin
Floriana

Qed niktbulek b'referenza sħiħa u per konsegwenza tas-seduta tal-bieraħ fil-Kumitat għall-Kontijiet Pubbliċi in segwitu tal-investigazzjoni li ntalbet minn membri tal-Oppożizzjoni dwar l-espropriju ta' proprjeta' fi Strada Zekka, Valletta.

Biex ikun aċċertat li dejjem ġew rispettati l-prinċipji ta' *good governance*, *value for money*, trasparenza, kontabbilita' u li ma kien hemm ebda pressjoni politika aħna 'l hawn taħt iffirmati Membri Parlamentari u membri tal-Kumitat għall-Kontijiet Pubbliċi nitolbuk tinvestiga każijiet li saru bejn l-2006 u l-2013 fejn fihom kien hemm esproprjazzjoni u permuta da parti tad-Dipartiment tal-Artijiet senjatament - imma mhux limitatament għal u bla preġudizzju għas-senjalizzazzjoni ta' każijiet oħra iktar 'il quddiem – is-segwenti każijiet:

1) Il-każ tal-Fekruna fix-Xemxija.
2) Il-każ tax-xiri tal-(a) *freehold* ta' 236, 237 u (b) taċ-ċens temporanju ta' 233 Triq ir-Repubblika, Valletta
3) Il-każ tal-proprjeta' ta' Spinola Road, fuq ix-Xatt ta' San Giljan proprjeta' ta' eighty two Company Limited;
4) Il-każ tal-ex birrerija tal-Lowenbrau f'Ħal Qormi.

Insellu għalik,

Owen Bonnici | Edward Zammit Lewis | Chris Agius | Charles Mangion

REGISTRY
23 JUN 2015
NATIONAL AUDIT OFFICE

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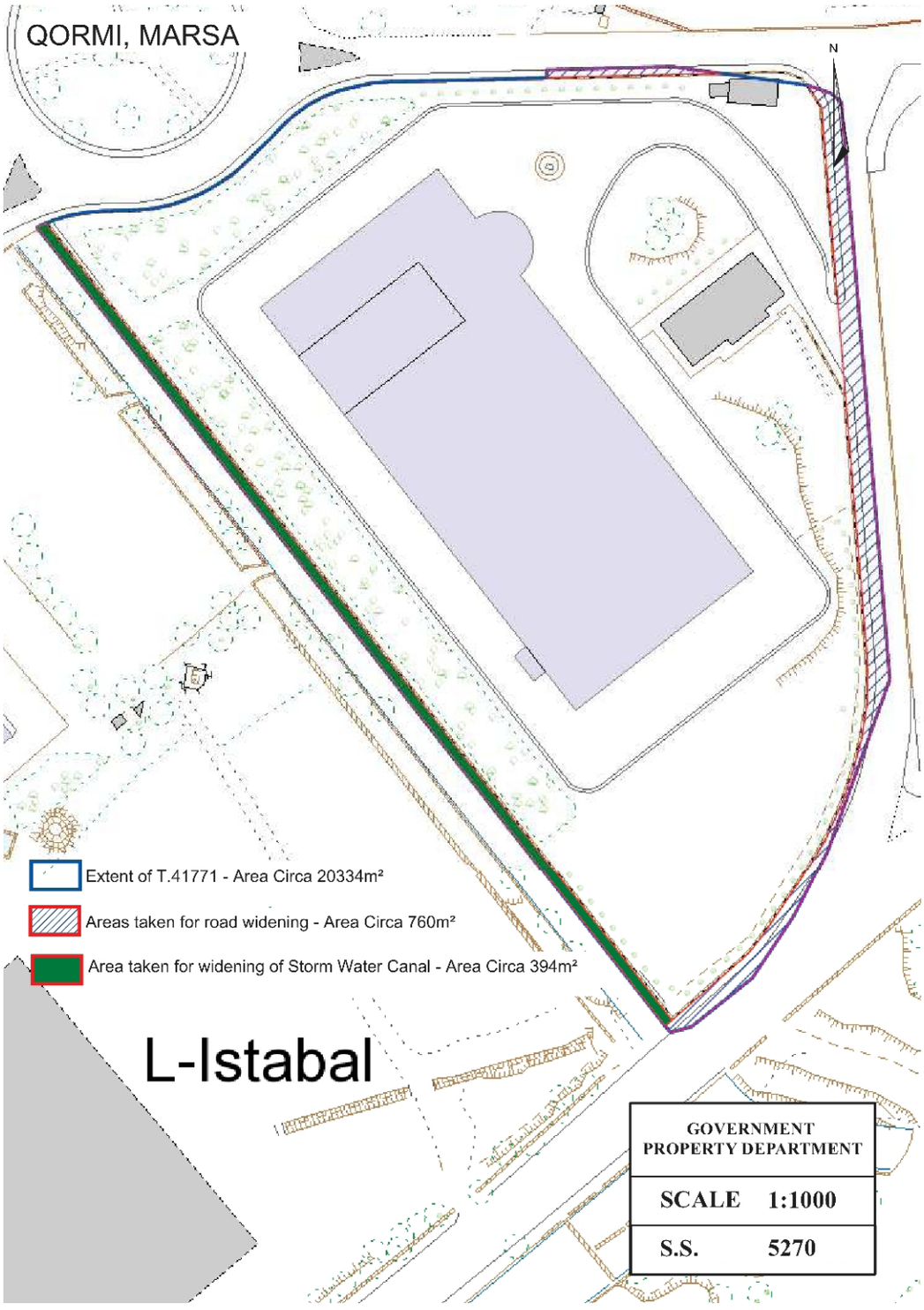
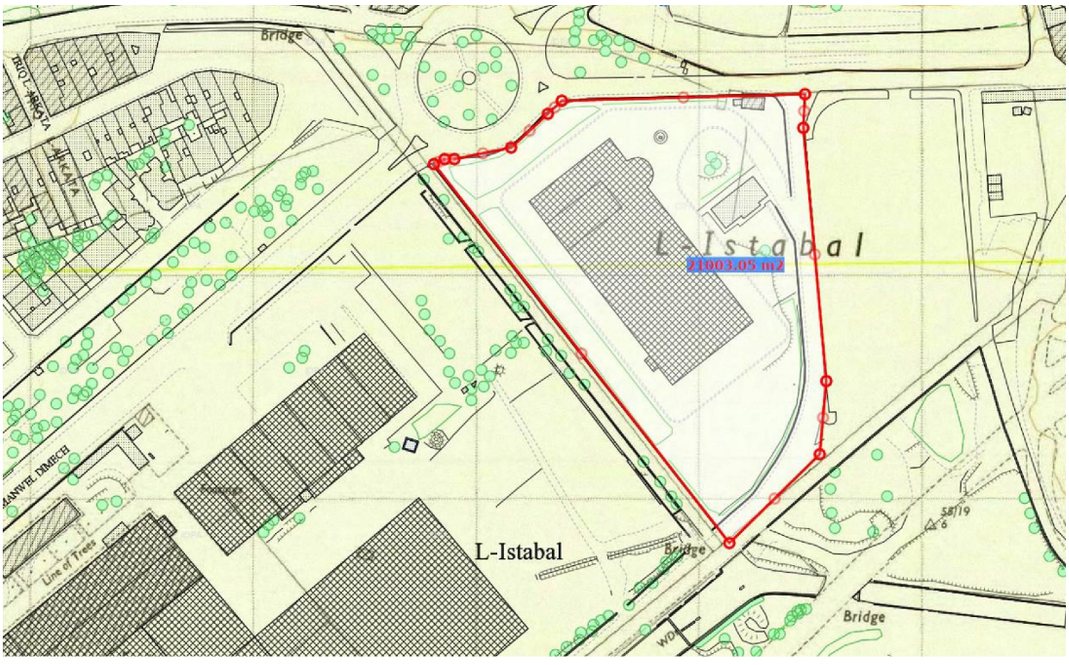
Appendix B – Government Property Department Site Measurements



Appendix C – Location Plan 1



Site measuring 21,000 square metres based on 1968 and 1988 survey sheet boundaries. The 2012 site has been superimposed for clarification purposes.

Appendix D – Location Plan 2

Site measuring 17,660 square metres based on 1988 survey sheet boundaries. The 2012 site has been superimposed for clarification purposes.

Appendix E – Location Plan 3

Existing site measuring 19,150 square metres using 2012 survey sheet boundaries.

Recent NAO Publications

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February 2016	Performance Audit: Service Agreements between Government and INSPIRE Foundation
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July 2016	An Investigation of the 2015 Local Councils' Capital Projects Fund
July 2016	An Investigation of Local Councils Funding Schemes launched between 2008 and 2013
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October 2016	Performance Audit: Agreements between Government and YMCA Valletta
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December 2016	Annual Audit Report of the Auditor General - Public Accounts 2015
December 2016	Annual Audit Report of the Auditor General - Local Government 2015

NAO Work and Activities Report

March 2016	Work and Activities of the National Audit Office 2015