



An Investigation into the Procurement of Legal Services by the Privatisation Unit between 2008 and 2013

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List of Abbreviations

AG	Auditor General
DO	Direct Orders
DoC	Department of Contracts
EU	European Union
LGA	Lotteries and Gaming Authority
MEIB	Ministry for the Economy, Investment and Small Business
MFEI	Ministry of Finance, the Economy and Investment
MGI	Malta Government Investments Limited
MIMCOL	Malta Investment Management Company Limited
MITC	Ministry for Infrastructure, Transport and Communications
MMA	Malta Maritime Authority
MP	Member of Parliament
MSL	Malta Shipyards Limited
NAO	National Audit Office
OJEU	Official Journal of the European Union
PAC	Public Accounts Committee
PU	Privatisation Unit
TM	Transport Malta

Executive Summary

1. On 20 August 2013, the four Government Members of Parliament (MPs) who form part of the Public Accounts Committee (PAC) formally requested the Auditor General (AG) to investigate the practice of utilising direct contracts for legal services, particularly within the Ministry of Finance, the Economy and Investment, and specifically in relation to privatisation processes undertaken between March 2008 and March 2013.
2. On 25 September 2013, AG informed Chair PAC of the terms of reference established for the investigation regarding the use of direct contracts for the period under review, that is, to:
 - a. establish the extent of use of direct contracts for the procurement of legal services by the Privatisation Unit (PU) within the Ministry of Finance, the Economy and Investment (MFEI) during the period 2008-2013; and
 - b. explore the rationale employed by MFEI in resorting to direct contracts for such services.
3. Three privatisation processes were carried out during the period under review. The privatisation of Malta Shipyards Limited (MSL), which commenced in 2008, comprised the ship repair, ship building and steel fabrication facilities as well as the yacht repair and refit facilities, while later also encompassing the Ricasoli tank cleaning facility. The yacht marinas privatisation processes, also initiated in 2008, similarly encompassed various sites, namely, the Msida Yachting Centre, the Ta' Xbiex Yachting Centre and the Mgarr Gozo Marina. In 2011, the re-concession for the rights of the National Lotteries was undertaken following the expiry of the original concession.
4. The PU is primarily responsible for the privatisation of public entities and is assisted by the Malta Investment Management Company Limited (MIMCOL), which acts as a business and financial consultant during such privatisations. The privatisations reviewed sourced legal services by means of direct contracts, with the approval thereto or otherwise, granted by the Direct Orders (DO) Section within MFEI or the Department of Contracts (DoC). Moreover, technical expertise was provided by the diverse stakeholders involved in such processes, namely MSL, the Malta Maritime Authority (MMA), and the Lotteries and Gaming Authority (LGA).
5. Various legal firms were engaged to assist Government in these privatisations. Fenech & Fenech Advocates was the firm selected to support PU and MIMCOL in the MSL privatisation. This firm also provided assistance with respect to the yacht marinas

privatisations; however, the lead role in this process was assumed by Mamo TCV, which firm was, at the time, MMA's in-house legal counsel. In the case of the National Lotteries re-concession, GVTH was engaged to provide legal services and assist with the privatisation.

6. Following the review of documentation submitted and several meetings with officers from the aforementioned Government entities, NAO concluded that:
 - a. From a process management perspective, NAO noted a general lack of clarity in the delineation of responsibility between PU and MIMCOL with respect to the privatisations under analysis. This was mainly manifested in the payment processes reviewed, which lacked a coordinated system of invoice endorsement, key in ensuring the appropriate disbursement of funds. NAO considered the system of checks employed as weak, with different parties involved assuming that the other party was responsible and accountable for specific processes and tasks. Furthermore, NAO noted that no clear responsibility with regard to the issuance of the letter of engagement to firms engaged to provide legal assistance existed.

MSL Privatisation

- b. Given the wider political backdrop that characterised the MSL privatisation, and the urgency required in adhering to EU imposed targets, the recourse to the sourcing of legal services through a direct contract is acknowledged by this Office. The selected firm, Fenech & Fenech Advocates, was engaged on this assignment following a meeting held with Minister MFEI and Minister MITC. Justification provided to NAO by PU and MIMCOL with respect to the appointment of Fenech & Fenech Advocates centred on the premise that this firm had ample experience in maritime law and was, at the time, directly involved in an MSL court case.
- c. Although PU and MIMCOL stated that the terms of engagement were discussed during a meeting held with Fenech & Fenech Advocates, and that the firm had sent these terms to PU, no formal letter of engagement was drawn up and signed by PU, MIMCOL and Fenech & Fenech Advocates. This point of contention further intensifies when considering that the same agreement was extended to encompass the Ricasoli Tank Cleaning Facility privatisation process. NAO considers the appropriate documentation of contractual arrangements entered into as a basic aspect of management, more so when one considers that the nature of the expense incurred in this instance exceeded €370,000.
- d. NAO is cognisant of the fact that no direct contract approval was required from DoC. This situation is attributable to MIMCOL's Schedule 3 status under the public procurement regulations, which excludes the organisation from the obligation to source DoC approval. NAO acknowledges the utility of such provisions, serving to expedite sensitive processes and imbuing MIMCOL with the required flexibility; however, this Office contends that the responsibility of appropriately documenting processes and procedures is not exempted through such provisions, and instead renders its need even more pronounced.
- e. NAO was unable to establish whether all the legal expenses incurred by MIMCOL were eventually recovered from MSL since requests for documentation remained unanswered.

Yacht Marinas Privatisations

- f. Legal assistance provided with respect to the yacht marinas privatisations, sourced from Mamo TCV, was deemed as an extension of the firm's in-house engagement with MMA, although rates payable in this regard were revised upwards.
- g. NAO notes and acknowledges the contextual nuances that eventually developed and characterised the yacht marinas privatisations, with the risk of the preferred consortium impinging upon the berthing rights of occupants emerging as a critically important factor in this respect. Justification provided by PU officials indicated that Minister MFEI was seeking to mitigate this situation when appointing Fenech & Fenech Advocates to assist in this privatisation process.
- h. Similar to the case of the MSL privatisation, NAO noted that direct contract approval was not sought from either the DO Section or DoC, as this was in fact unnecessary. This situation is attributable to MIMCOL's Schedule 3 status under the public procurement regulations, which exempts the organisation from the obligation to source DO Section or DoC approval.
- i. Nonetheless, the concerns related to the absence of a signed agreement for the MSL privatisation are exacerbated by the fact that the MSL terms were extended to also regulate the yacht marinas privatisation processes. NAO considers the absence of a formal agreement regulating the services that were to be provided by Fenech & Fenech Advocates as a notable shortcoming. Such an agreement would have ensured clarity on the terms of engagement and allowed for adequate controls in terms of payment procedures against the agreed upon terms.

Re-concession of the National Lotteries Licence

- j. The procurement of legal services in relation to the granting of a re-concession of the lotteries licence essentially constituted a direct contract. Notwithstanding, PU did contact five firms of its choice and eventually selected the cheapest offer submitted, departing somewhat from previous methods employed in the MSL and the yacht marinas privatisations. Justifications supporting the decision to proceed with the award of a direct contract mainly centred on the urgency of the required legal service, which claims are rendered valid when one considers the restricted timeframes available. This Office also acknowledges the Advisory Committee's efforts at imbuing the process with an element of competitiveness by seeking proposals from a number of legal firms, albeit still effecting final award through a direct contract. However, NAO notes that the need for renewal could have been foreseen, and therefore, necessary preparations undertaken earlier, thereby allowing for the selection of a legal firm through a more competitive tender process.
- k. Although an 'in principle' approval for the utilisation of €125,000 for legal fees was acquired from the DO Section within MFEI, PU never obtained final approval from this Section. As indicated earlier, given that MIMCOL falls under Schedule 3 of the Public Procurement Regulations, approval, be it 'in principle' or final, was not in fact required. In this Office's opinion, the above situation created an element of ambiguity, in that PU was sourcing services, while MIMCOL provided funding.

- l. NAO is of the opinion that the Advisory Committee's eventual selection would have been more transparent had the evaluation criteria been made clearer to interested parties. GVTH, the firm selected to provide such legal services, submitted the most financially favourable offer out of the contacted firms.
- m. A positive aspect noted by NAO relates to the manner by which the process leading to the drafting of the Letter of Engagement was administered and managed. The involvement of the Advisory Committee was a crucial element in this process, which afforded PU with a much required level of assurance.
- n. NAO noted that, although the Letter of Engagement stipulated that GVTH was to obtain approvals from MIMCOL when a certain number of hours was to be exceeded, such approvals were not always sought, or alternatively, documentation was not retained. Furthermore, GVTH was to seek PU's approval for the incurrence of other fees, yet such approvals were not sought, or supporting documentation was not maintained. The absence of such approvals is not commendable and detracts from the process's system of financial control.
- o. This Office considered the level of vetting carried out prior to invoice payment as weak. To an extent, this shortcoming is attributable to the blurred delineation of responsibilities between PU and MIMCOL. The PU should have consistently vetted and endorsed requests for payments, particularly in view of its continuous involvement and active management of the privatisation process. MIMCOL too bears an element of responsibility, as it was ultimately responsible for the disbursement of funds and was therefore duty-bound to ensure conformity with contractual conditions.

7. Finally, NAO puts forward the following recommendations:

- a. roles and tasks to be assumed by PU and MIMCOL during privatisation processes are to be clearly established at the outset in order to avoid potential ambiguity with respect to the delineation of responsibility;
- b. as far as possible, more open, transparent and competitive procurement processes should be resorted to instead of direct contracts;
- c. a Letter of Engagement is to be invariably drawn up for every legal service procured, clearly stating the agreed terms of engagement;
- d. procedures relating to the endorsement of hours charged and claims for reimbursement should be clearly established; and
- e. adequate documentation should be retained, providing a detailed record of decisions taken, critically important for audit trail purposes and ensuring accountability.

Chapter 1 – Introduction

1.1 Terms of Reference

- 1.1.1 On 20 August 2013, the four Government Members of Parliament (MPs) who form part of the Public Accounts Committee (PAC) formally requested the Auditor General (AG) to investigate the practice of utilising direct contracts for legal services, particularly within the Ministry of Finance, the Economy and Investment (MFEI), and specifically in relation to privatisation processes undertaken during the period starting 2008 and ending March 2013.
- 1.1.2 This request followed an earlier and similar one made on 16 August 2013 by the three Opposition MPs on the PAC for an investigation into the procurement of legal services in connection with the grant of licence concessions to operate two casinos earlier that year. It was reported that the Evaluation Committee had made an open call for applications, following which a clear ranking of the submitted offers in line with specified evaluation criteria was forwarded to the Minister responsible for the Economy, Investment and Small Business. However, it was alleged that the Minister had objected to the manner by which the Evaluation Committee had evaluated the offers and applied different assessment criteria, resulting in a new ranking of the submitted proposals. A separate investigation was carried out by the National Audit Office (NAO) to establish the exact series of events and the rationale behind the decisions taken during this procurement process.
- 1.1.3 In their counter-request, the four Government MPs stated that, under the previous administration, similar contracts were directly awarded to legal firms chosen by the responsible Minister rather than through an open call for proposals or an expression of interest.
- 1.1.4 On 25 September 2013, AG informed Chair PAC of the terms of reference established for the investigation regarding the use of direct contracts for the period under review, that is, to:
- a. establish the extent of use of direct contracts for the procurement of legal services by the Privatisation Unit (PU) within MFEI during the period 2008-2013; and
 - b. explore the rationale employed by MFEI in resorting to direct contracts for such services.

1.1.5 For the purposes of this investigation, NAO limited its analysis to privatisation processes that had commenced during the period under review. Therefore, other privatisations that were ongoing at the time and where the engagement of legal firms in support of such processes predated the period of review were scoped out of this audit. The privatisation process of the Gzira Gardens Yacht Marina was also scoped out of this audit due to a court case that was pending during the period under investigation.

1.2 The Privatisation Unit and Other Entities

1.2.1 The PU is primarily responsible for the privatisation of public entities and is assisted by the Malta Investment Management Company Limited (MIMCOL), which acts as a business and financial consultant during such privatisations. The privatisations reviewed sourced legal services by means of direct contracts, with the approval thereto, or otherwise, granted by the Direct Orders (DO) Section within MFEI or the Department of Contracts (DoC). Moreover, technical expertise was provided by the diverse stakeholders involved in such processes, namely the Malta Shipyards Limited (MSL), the Malta Maritime Authority (MMA), and the Lotteries and Gaming Authority (LGA).

The Privatisation Unit

1.2.2 A privatisation programme has been in place since 1988 and, prior to the publication of a White Paper, Government had fully privatised 22 companies. This White Paper, issued on 22 November 1999 and entitled 'Privatisation – A Strategy for the Future', was principally aimed at privatising public enterprises. The publication of this White Paper was necessary due to privatisation becoming more complex in nature and inherently requiring a more robust framework in order to successfully drive such processes towards completion. The White Paper essentially studied the privatisation situation in Malta and proposed a programme on the way forward in this sphere.

1.2.3 Following the publication of the White Paper, Government appointed the PU on 1 June 2000. The PU is, in the main, tasked with assessing the preparedness of the various Government corporations and companies for privatisation within the policy guidelines presented in the White Paper. It is also tasked with identifying any Government function or service that could be considered for privatisation. The Unit is also responsible for drawing up a timetable for privatisation and to advise Government accordingly. In essence, the Unit coordinates the process of preparation and eventual privatisation with the various entities involved.

1.2.4 The PU currently forms part of the Ministry for the Economy, Investment and Small Business (MEIB) and is constituted by a Chair and a Transaction Manager. Budgetary allocations to the Unit amount to around €60,000 annually, with costs incurred by the Unit, other than salaries and incidentals, financed by MIMCOL or the government entity directly involved in the privatisation process. It is to be noted that during the period under review, the PU formed part of MFEI.

The Malta Investment Management Company Limited

1.2.5 MIMCOL was set up in 1988, with the primary aim of rationalising the portfolio of investments held by Government through a comprehensive management, restructuring and divestment programme. MIMCOL's scope progressed beyond the management of its own portfolio of investments as its extensive experience and technical expertise were increasingly recognised and drawn upon by various Ministries and Government agencies.

1.2.6 Since the late 1990s, MIMCOL has been involved in high-level specialised assignments such as strategic reviews of the management and operations of several parastatal companies and corporations operating in various sectors. Of particular relevance to this investigation is the fact that MIMCOL was actively involved in a lead advisory capacity to the PU in the context of Government's privatisation programme, and had a forefront role in the privatisation of state entities.

1.2.7 At times throughout the report, reference is made to the Malta Government Investments Limited (MGI), which organisation bears a considerable degree of overlap with MIMCOL in supporting Government with various processes of an investment nature.

The Direct Orders Section/Department of Contracts

1.2.8 The DO Section is primarily responsible for approving contracts directly entered into with third parties. Requests in writing for the placing of direct contracts are forwarded to the Ministry for Finance through the DO Section. The approval for direct contracts exceeding the DO Section threshold stipulated in the procurement regulations must be obtained from DoC. The legal framework regarding direct contracts is further elaborated upon in section 1.3.

The Malta Shipyards Limited

1.2.9 The MSL, established in the 1960s, provided general maritime ship repair as well as other maritime services related to offshore and energy, liner and yachting activities, as well as vessel conversion. Owned by the Government of Malta, MSL was one of the largest employers on the Island, employing over 1,700 persons as at 2007. MSL was composed of a number of business units, namely, the Malta Drydocks (Cospicua site), the Malta Shipbuilding Company Limited (Marsa site), the Manoel Island Yacht Yard, the Malta Super Yacht Services and the Malta Shipyards Tank Cleaning Station.

The Malta Maritime Authority

1.2.10 The MMA, now forming part of Transport Malta (TM), was set up as a distinct and autonomous corporate body to supervise the organisation of the primary maritime services.¹ The Authority was established through the enactment of the Malta Maritime Authority Act (Act XVII of 1991, as amended by Act XXIII of 2000). Article 6(2) of this Act lists the duties of the Authority, one of which being, *"to regulate, control, develop and promote the yachting centres"*.

1.2.11 The Authority's principal role was to create a climate that further enhanced Malta's maritime standing and associated business activities. It is to be noted that at the point of commencement of the yacht marinas privatisation processes, MMA was still a distinct organisation, and not yet part of TM; however, for the purposes of this audit, MMA and TM are interchangeably used, particularly with respect to events occurring after the restructuring which took place during the privatisation.

The Lotteries and Gaming Authority

1.2.12 The LGA, a single public regulatory body, is responsible for the governance of all gaming activities in Malta including amusement machines, broadcasting media games, casinos, commercial bingo halls, commercial communication games, the national lottery, non-profit games and remote gaming. Further to the enactment

¹ Primary maritime services refer to pilotage, towage, mooring and bunkering.

of the Lotteries and Other Games Act, 2001, LGA established the following mission statement: *"To regulate competently the various sectors of the lotteries and gaming industry that fall under the Authority by ensuring gaming is fair and transparent to the players, preventing crime, corruption and money laundering and by protecting minor and vulnerable players."*

1.3 Background on the 2008-2013 Privatisations

1.3.1 As stated in section 1.1 of this report, the period under investigation was 2008-2013. The privatisations that were carried out during this period of review were, in chronological order, the MSL privatisation, the yacht marinas privatisations and the National Lotteries re-concession. A general background on these processes is presented hereunder.

The Malta Shipyards Limited

1.3.2 In May 2008, the Minister for Infrastructure, Transport and Communications presented to Cabinet a memorandum requesting the Ministers' approval for the launch of the privatisation process of MSL, which fell under the responsibility of the Ministry for Infrastructure, Transport and Communications (MITC). On 11 June 2008, PU and MIMCOL were informed that the Cabinet was entrusting them with the privatisation of MSL.

1.3.3 In line with the endorsed Cabinet Memorandum, PU and MIMCOL proceeded to structure the competitive process with the intention of divesting the facilities of the four business units of the shipyards through four distinct but parallel processes. The four business units were the:

- a. ship repair facilities situated at Docks 4, 5, and 6 in Cospicua;
- b. Malta Super Yacht Services Facilities located at Cospicua;
- c. shipbuilding and steel fabrication facilities situated in Marsa; and
- d. yacht repair and refit facilities at Manoel Island.

In addition to the above facilities, the privatisation of the Ricasoli Tank Cleaning Facility was initiated at a later date.

1.3.4 The PU and MIMCOL drew up transaction documents for each of the four facilities, which documents were cleared with the European Commission in order to ensure that the processes did not entail any element of state aid.

The Yacht Marinas

1.3.5 Yachting activity in Malta had been experiencing exponential growth since 1989, the year in which a formal yachting centre was established for the first time in Malta. In a Cabinet Memorandum drawn up in July 2008 and signed by the then Minister responsible for Infrastructure, Transport and Communications, it was noted that a few years prior to this date, yacht marina activities were operated exclusively by MMA; however, this sector was developing rapidly and new privately-run marinas had practically doubled yacht berthing capacity on the Island. Furthermore, plans for the development of a number of new marinas were then in the pipeline, paving the way for further sector growth in the future.

1.3.6 Against this backdrop, it was increasingly being felt that MMA's role as the operator of these yacht marinas was no longer feasible. The Memorandum made reference to the

2006 Budget Speech, where it was announced that Government would consider the privatisation of yacht marinas as it, *“believes that the management of such marinas is not consistent with the regulatory role of the Malta Maritime Authority. This measure, whilst providing new opportunities for investment, will continue to strengthen Malta’s development as an international centre for yachting.”*

- 1.3.7 One of the recommendations listed in the Cabinet Memorandum identified PU and MIMCOL as the entities responsible for the privatisation process of the yacht marinas operation concessions. Three marinas were earmarked for privatisation, namely the:
- a. Msida Yachting Centre (Msida Gardens), Pontoons A to G;
 - b. Ta’ Xbiex Yachting Centre, Pontoons H to O; and
 - c. Mġarr (Gozo) Marina.

The National Lotteries

- 1.3.8 The organisation of lotteries and other games of chance was a state monopoly in Malta until mid-2001. The Department of Public Lotto, which was established in the 1940s, administered this activity. In July 2000, Government announced its intention to privatise the administration and management of this sector of the economy and, to this end, exercise congruency with the privatisation strategy presented in the aforementioned White Paper. Following a competitive bidding process, a seven-year concession was granted to Maltco Lotteries Limited, which agreement covered the period 2004-2011. This concession was later extended by a further year. In July 2012, a re-concession was once again granted to Maltco Lotteries Limited following another competitive bidding process. It is the re-concession that is of interest to NAO with respect to this audit.

1.4 Legal Framework on Direct Orders

- 1.4.1 The procurement of legal services for the MSL and the yacht marinas concessions was regulated by the Public Contracts Regulations 2005 (L.N. 177 of 2005), whereas the procurement of such services provided in relation to the National Lotteries concession was regulated by the Public Procurement Regulations 2010 (L.N. 296 of 2010).
- 1.4.2 Article 19(1)(d) of the Public Contracts Regulations 2005 states that, in cases where the estimated value of procurement exceeds Lm2,500 but not Lm20,000, services required may be procured after a departmental call for tenders. This clause was later amended by virtue of Article 20(1)(d) of the Public Procurement Regulations 2010 (L.N. 296 of 2010), which revised the figures upwards to €6,000 and €120,000, respectively.
- 1.4.3 Contracting authorities may resort to direct contracts in exceptional or urgent cases where the value of procurement ranges between these values, that is €6,000 and €120,000. However, in the case of such direct contracts, the prior approval of the Minister of Finance, or his delegated officer, must be sought (L.N. 296 of 2010, Article 20(4)). Similarly, Article 19(4) of L.N. 177 of 2005 affords these same provisions yet quotes values of Lm2,500 and Lm20,000.
- 1.4.4 Currently, public contract values exceeding €120,000 but not exceeding the EU thresholds of €130,000 for service and supply tenders, and €45 million for works tenders, *“shall be awarded using the open procedure, the restricted procedure or, in...exceptional cases...the negotiated procedure”* (L.N. 296 of 2010, Article 37(1)).

These may be procured after a call for tenders is published in the Malta Government Gazette. As per LN 177/2005, the thresholds were Lm63,000 for public supply and service contracts and Lm2,448,000 for public works contracts.

- 1.4.5 Finally, public contracts with a value in excess of the thresholds indicated above must be procured after the relevant call for tenders is published in the Malta Government Gazette and the Official Journal of the European Union (OJEU). However, these thresholds do not apply for EU-financed tenders of a value exceeding €47,000, which continue to be advertised in the OJEU and vetted, published and awarded by DoC.
- 1.4.6 The afore-quoted regulations do not apply in the case of MIMCOL, as this entity is recognised as a Schedule 3 contracting authority in the Public Procurement Regulations. In effect, contracting authorities listed under Schedule 3 are able to administer their own procurement in accordance with the provisions of the Public Procurement Regulations, thereby allowing for a certain element of discretion in the application of these Regulations.

1.5 Methodology

- 1.5.1 This investigation was carried out in terms of the provisions of Article 9(a) of the First Schedule of the Auditor General and National Audit Office Act, 1997.
- 1.5.2 NAO obtained copies of documentation relating to the procurement of legal services for privatisation processes initiated and concluded between 2008 and 2013 from PU and MIMCOL. The requested information included documentation related to the method employed for the selection of legal firms, authorisations sought from relevant entities, negotiations on the terms of engagement, the actual letters of engagement, any variations from the initial agreements, as well as the processed payments and any related authorisations.
- 1.5.3 The documentation available for the MSL and the yacht marinas privatisations was sparse. In the case of the National Lotteries, the documentation provided, though substantial, was incomplete. Consequently, the data collection of archived documents had to be supplemented by direct questioning of officials responsible for the management and coordination of the privatisation processes under review.
- 1.5.4 These sources of information were analysed in detail and provided the bases for the findings and conclusions presented in this report.
- 1.5.5 Public officers cited in this report are referred to by their designation at the time of the events reported.

Chapter 2 – Privatisations Reviewed

2.1 Privatisation of Malta Shipyards Limited

2.1.1 As indicated in Chapter 1, in May 2008, the Minister MITC presented a memorandum to Cabinet proposing the privatisation of MSL. The four business units that were to undergo individual privatisation processes were the:

- a. ship repair facilities;
- b. Malta Super Yacht Services facilities;
- c. shipbuilding and steel fabrication facilities; and
- d. yacht repair and refit facilities.

2.1.2 Following endorsement by Cabinet, in June 2008, PU and MIMCOL were requested to assume responsibility for this competitive process. Noteworthy is the fact that a further privatisation process was introduced in April 2011 – that of the Ricasoli Tank Cleaning Facility.

2.1.3 On 11 August 2008, PU, acting on behalf of Government and MSL, and assisted by MIMCOL as Lead Project Advisor, issued an Invitation for an Expression of Interest for the privatisation of the four shipyard facilities. The final proposals were opened on 16 February 2009.

2.1.4 An ad hoc Evaluation Committee was appointed and tasked with the evaluation and short-listing of proposals with respect to the four privatisations. The Committee entrusted the detailed evaluation of the proposals received to PU's advisors. The provision of expert advice relating to the technical aspects of the proposals was entrusted to Shipyard Economics Limited (UK), while the business and financial aspects of the proposals were to be attended to by MIMCOL.

2.1.5 Post evaluation, the privatisation processes of the four sites proceeded at different paces, particularly in view of their varying degrees of complexity, as well as other issues that had to be addressed.

2.1.6 The four MSL facilities were all privatised by March 2011. At a stage during this process, MSL had to be liquidated; however, since the Ricasoli Tank Cleaning Facility was to continue to operate (given Government's legal obligation to provide such a service),

Government decided to set up a separate company to manage and administer this facility. Fenech & Fenech Advocates assumed responsibility for the setting up of this company, which was subsequently also privatised.

Procuring Legal Services for the Privatisation Process

- 2.1.7 The PU monthly reports document a sense of urgency with respect to the completion of the privatisation of the MSL facilities, stating that Government had set the end of 2008 as a target date. On 20 June 2008, PU and MIMCOL officials attended a meeting that was held with Minister MFEI and Minister MITC. During this meeting, it was agreed to appoint Fenech & Fenech Advocates as legal advisors to this process.
- 2.1.8 The PU monthly reports document that a meeting was held with the selected law firm to discuss their appointment on the same day of the meeting with the aforementioned Ministers, that is, 20 June 2008. Chair PU, Transaction Manager PU and Chair MIMCOL confirmed to NAO that Fenech & Fenech Advocates' direct involvement with MSL, coupled with the firm's expertise in maritime law, had justified the award of a direct contract.
- 2.1.9 Fenech & Fenech Advocates had previously represented MSL in court cases, and had, at the time, just represented MSL in a lawsuit against Fairstar Heavy Transport NV (owners of a heavy lift vessel that had been serviced by MSL), apart from providing legal advice to the company on other matters. Fenech & Fenech Advocates was also representing Government in its dispute with the European Union (EU) on MSL, where the EU was insisting that MSL should be closed down due to the unsustainable government subsidy, whereas Government was asking for a period extension to enable the privatisation of MSL facilities rather than their closure.
- 2.1.10 According to Chair MIMCOL, the deadlines imposed by the EU for the privatisation of MSL were very tight. Moreover, Chair MIMCOL claimed that the EU was insisting that the privatisation of the yards should be left wide open, including the development of the estates for alternative purposes. Government was unwilling to go for an open call as recommended by the EU, particularly in view of the unique location of the docks and its specialised workforce. Chair MIMCOL asserted that Fenech & Fenech Advocates successfully assisted Government in convincing the EU to reverse its position.
- 2.1.11 PU officials confirmed that the urgency of the situation was an inherent consequence of the threat of closure by the EU. Hence, the need to exclusively secure the services of Fenech & Fenech Advocates before any other interested party approached this law firm was such that PU and MIMCOL had gone directly to this firm after the meeting with the Ministers. In this meeting, Fenech & Fenech Advocates was informed of the privatisation of MSL and requested to provide legal consultancy to PU in this process.
- 2.1.12 A representative of Fenech & Fenech Advocates confirmed that Chair PU had approached this firm immediately upon being informed of this privatisation because the Unit wanted to avoid a situation where Fenech & Fenech would be approached to represent potential bidders, which would result in a conflict of interest. Fenech & Fenech Advocates stated that the firm was often engaged by third parties interested in such projects due to their specialisation in the maritime sector. In fact, Fenech & Fenech Advocates claimed that it was contacted a few days after its engagement with PU by a major shipping company with respect to this privatisation, but had to decline providing such services given its earlier commitments to represent Government.

- 2.1.13 The firm's terms of engagement were discussed during the meeting held on 20 June 2008 with Fenech & Fenech Advocates. Besides clarifying the terms and possible conflict of interest considerations, this meeting served to formalise the firm's engagement on this assignment.
- 2.1.14 On 1 July 2008, Fenech & Fenech Advocates sent a letter to Chair PU thanking the Unit for its engagement on this privatisation process, and proceeded with outlining its understanding of this brief and confirming the agreed upon hourly rates. Fenech & Fenech Advocates understood its role in this privatisation as involving:
- a. the compilation of an Information Index, including all relevant documents, categorised accordingly;
 - b. according detailed consideration to all documents provided by MIMCOL in relation to this Information Index and drawing up the vendor's due diligence reports based on these documents;
 - c. the provision of assistance in the drafting of the Confidentiality Agreement to be annexed to the Call for Expression of Interest;
 - d. vetting the Call for Expression of Interest;
 - e. vetting the Request for Proposals and Information Memorandum, as well as other accompanying documents such as draft leases and draft contracts of sale;
 - f. assisting with the setting up of the Data Room;
 - g. assisting in any other legal request that may arise during the privatisation process; and
 - h. the drafting of the final transfer document.
- 2.1.15 Fenech & Fenech Advocates confirmed the different hourly rates that were to be charged depending on whether service was provided by a partner, senior associate or junior associate. The wording of the letter indicated that the scope and conditions of the engagement had already been agreed upon during the meeting of 20 June 2008.
- 2.1.16 NAO noted that no formal letter of engagement was found in the PU and MIMCOL archived files. Therefore, Fenech & Fenech Advocates' 1 July 2008 correspondence seems to have served the purpose of an engagement letter, despite it not being signed by PU and/or MIMCOL.
- 2.1.17 Chair PU and Transaction Manager PU concurred with NAO's deduction on the purpose of Fenech & Fenech Advocates' letter and confirmed that there probably was no formal letter of engagement and that Fenech & Fenech Advocates was given the assignment on the basis of this letter. Both PU officials maintained that they would have sent an email or a formal letter confirming agreement to the proposed terms. However, no such written confirmation was found in the PU and MIMCOL archived documents. In view of the above, and as suggested by Transaction Manager PU, NAO sought to locate the missing documentation by accessing this official's email account. This attempt proved to be unsuccessful as NAO found no offline emails on the hard drives provided by the incumbent PU officials.
- 2.1.18 Upon being requested to forward the signed agreement entered into with PU/MIMCOL with regard to the legal services provided for the MSL privatisation, Fenech & Fenech Advocates provided NAO with a copy of the letter dated 1 July 2008, confirming that a formal letter of engagement signed by all parties was not drawn up.
- 2.1.19 In July 2008, a budget of €250,000 was requested by PU and approved by MFEI for this privatisation process in order to pay for legal consultants and other expenses. The request was made by PU to MFEI on 24 July 2008. Minister MFEI authorised the allocation of funds through Director Budget Operations.

- 2.1.20 On 15 October 2008, Chair PU wrote to Chair MIMCOL to clarify some issues regarding the obtaining of authorisation for the appointment of this legal firm. In this correspondence, Chair PU made reference to previous discussions on the appointment of Fenech & Fenech Advocates as legal advisors for the MSL privatisation process. Further reference was made to a meeting held on 6 August 2008, where Chair MIMCOL had informed Minister MFEI of the appointment of Fenech & Fenech Advocates.
- 2.1.21 The letter also stated that Minister MFEI had recommended that the details of this appointment be forwarded to Permanent Secretary MFEI for authorisation. In turn, PU followed these instructions and on 7 August 2008, sent an email to Permanent Secretary MFEI detailing the firm's brief and proposed fees, while simultaneously requesting authorisation to finalise the agreement with Fenech & Fenech Advocates.
- 2.1.22 Until 14 October 2008, when PU re-contacted Permanent Secretary MFEI, this request was stagnant, as PU had not yet received any reply to the initial email. On receipt of this second email sent by PU, Permanent Secretary MFEI contacted Director Budget Operations to enquire about developments relating to this case and was informed that a request for authorisation had not been received by MFEI. Chair PU, upon receiving this information, decided to re-initiate the process to obtain the required authorisation to appoint Fenech & Fenech Advocates as the legal advisors for this privatisation. However, Director Budget Operations informed Chair PU that since the payment would be issued by MIMCOL, the request for authorisation should be made by MIMCOL. Moreover, Director Budget Operations also explained that since the total amount that was to be spent on legal fees was not capped and it was difficult to estimate the total cost, the authorisation was to be sought from the Director of Contracts.
- 2.1.23 When Chair PU enquired with Director Budget Operations whether the public procurement regulations did in fact apply to MIMCOL, Director Budget Operations informed Chair PU to verify whether MIMCOL was listed under Schedule 2 of L.N. 77 of 2005, which lists the contracting authorities that fall within the jurisdiction of DoC.
- 2.1.24 NAO did not find any other documentation following this email, which may indicate that since MIMCOL falls under the list of contracting authorities that administer their own public procurement, that is, under Schedule 3 of the Public Procurement Regulations, this matter did not necessitate further action.
- 2.1.25 When presented with correspondence exchanged between Chair PU, Chair MIMCOL and MFEI, PU officials indicated that MIMCOL's Schedule 3 status exempted it from the requirement to obtain such authorisation. In this context, the PU officials noted that the absence of a duly signed agreement with Fenech & Fenech Advocates, or any other acknowledgement sent by the Unit, was possibly attributable to this pending MFEI authorisation.
- 2.1.26 L.N. 77 of 2005 stipulates that while PU is a contracting authority listed under Schedule 2, MIMCOL is a Schedule 3 listed contracting authority, and is therefore able to administer its own procurement. NAO's understanding of this arrangement, in which MIMCOL issues payment for PU procurement, is one that effectively implies that PU could bypass the need for authorisation from DoC or MFEI. This arrangement led to a lack of clarity with respect to the chain of responsibility and consequently to weak control systems.
- 2.1.27 The records made available to NAO confirmed that MIMCOL paid Fenech & Fenech Advocates directly for the legal services provided; however, MIMCOL was subsequently

reimbursed by MSL, and by the MSL Liquidator once it was dissolved. In this regard, Chair MIMCOL stated that Government had allocated €50 million to MSL for various expenses including the procurement of materials and the settlement of wages in order for the Shipyard to complete pending conversion works. Therefore, it was agreed that legal costs would be paid through MIMCOL and reimbursed by MSL.

2.1.28 CFO MIMCOL and Finance Executive MSL provided the first three invoices, which covered the period 20 June 2008 up to 28 February 2010, except for one that was provided by Finance Executive MSL only. CFO MIMCOL provided a further four invoices, which invoices' date followed the one when MSL was dissolved, that is, 26 July 2010. None of these four invoices were obtained from the MSL Liquidator, who was also CFO MIMCOL. Hence, NAO could not verify the actual reimbursement of these invoices to MIMCOL, despite numerous reminders sent to the Liquidator. In total, legal fees relating to the MSL privatisation process amounted to €301,374.

2.1.29 In providing an element of context to the above-quoted costs, Chair MIMCOL stated that the privatisation of MSL was riddled with complications, one of which was the fact that the privatisation process for the Malta Super Yacht facilities was aborted three times and re-issued before being finally adjudicated. Chair MIMCOL made reference to other complications that arose, citing a court injunction requested by a bidder, difficulties in connection with the overlap of works carried out at the various sites, and the common access in the case of the Super Yacht Yard and the Ship Repair Yard. Resolution of these issues proved very complex and costly, requiring lengthy negotiations with the bidders involved.

Ricasoli Tank Cleaning Facility Privatisation

2.1.30 Fenech & Fenech Advocates was also assigned work on the Ricasoli Tank Cleaning Facility privatisation. PU officials explained that the initial four components of the MSL privatisation process were completed by 18 March 2011. In April 2011, PU and MIMCOL were assigned the task of privatising the Ricasoli Tank Cleaning Facility. In a meeting held on 20 April 2011, Minister MFEI agreed that this process was an extension of the MSL privatisation and approved the retention of Fenech & Fenech Advocates under the same terms and conditions of the MSL privatisation.

2.1.31 In total, MIMCOL paid Fenech & Fenech Advocates €71,452 for services rendered with respect to legal advice on the Ricasoli Tank Cleaning Facility privatisation. Fenech & Fenech Advocates issued two separate invoices to PU covering the periods 21 April 2011 to 30 July 2012 and 31 July 2012 to 4 February 2013. Detailed timesheets were included with the invoices. PU officials asserted that it was agreed that the MSL Liquidator would pay the fees in connection with this concession process.

2.2 Privatisation of Yacht Marinas

2.2.1 In the 2006 Budget Speech, Government announced that it was considering the privatisation of its yacht marinas. This decision was motivated by the notion that MMA's role as the yacht marinas operator was no longer desirable in the Maltese yachting context as it was not consistent with the Authority's regulatory role. Based on the expectation that Government should not charge commercial rates, a low fee was being levied for the mooring of yachts in the Government-owned marinas. Fees charged were far below those charged by the existing commercially-owned marinas, and Government acknowledged that there was no social reason justifying this subsidy.

- 2.2.2 This privatisation would allow MMA to better focus on its regulatory role by releasing it from its day-to-day marina operational responsibilities, with the expectation that this would lead to the strengthening of Malta's development as an international centre for yachting. It was envisaged that this privatisation would also allow for new investment opportunities in this sector.
- 2.2.3 On 24 July 2008, PU was sent a copy of the Cabinet Memorandum on the privatisation of the MMA yacht marinas by Minister MFEI, which document indicated that PU, with assistance from MIMCOL, should take charge of this privatisation.
- 2.2.4 The PU was responsible for three distinct but parallel processes leading to the concessions for the operations and management of three MMA-owned yacht marinas. These were the Msida Yachting Centre (Msida Gardens), the Ta' Xbiex Yachting Centre and the Mgarr Gozo Marinas.
- 2.2.5 In October 2008, representatives of PU and MIMCOL, as well as Chair MMA, devised plans that were to be pursued with respect to this privatisation process. All parties agreed that MMA's in-house lawyers, Mamo TCV, would be maintained as the legal advisors for this process. Chair PU confirmed this state of events, maintaining that with respect to the sourcing of legal services for this privatisation process, it was agreed that Mamo TCV would be retained, particularly in view of the fact that this firm had already started work on this privatisation.
- 2.2.6 The minutes of the 17 October 2008 MMA Board Meeting document the decision to retain Mamo TCV by the Authority to render legal services in connection with the privatisation of the yacht marinas. TM explained that the role of Mamo TCV was that of providing MMA with general legal counsel and that Mamo TCV was not engaged solely for this project.
- 2.2.7 NAO reviewed the original letter of appointment of Mamo TCV, dated 1 December 2000, which vaguely specifies the non-exclusive engagement of this firm as legal advisors to MMA. Mamo TCV was originally selected as MMA's in-house legal firm following a public call for tenders for the procurement of legal services by the then Authority. In this Letter of Engagement, MMA clearly specified that they reserved the right to use the services of other legal firms. This letter did not specify any detailed terms of engagement, such as the number of hours of service required, the date of termination or renewal of the agreement, and agreed payment rates. TM indicated that there were no subsequent renewals of the agreement and that the original Letter of Engagement still applied. In fact, TM noted that Mamo TCV's services had been retained as their service was deemed satisfactory.
- 2.2.8 It was agreed that MMA would pay for the legal services required in relation to the yacht marinas privatisations. All the hours incurred by Mamo TCV were charged to MMA. Despite MMA (and TM post-restructuring) paying for this service, PU had access to the legal support provided by Mamo TCV. In fact, in an email submitted to PU on 18 August 2009, Chair MMA assured the Unit that Mamo TCV was at its disposal for any legal work required in connection with the marinas privatisation.
- 2.2.9 Notwithstanding the arrangements in place with Mamo TCV, NAO noted that an element of legal assistance was also provided by another legal firm, that is, Fenech & Fenech Advocates. In fact, correspondence exchanged between the two legal firms, dated 17 December 2009, indicated that Fenech & Fenech Advocates was approached by PU to assist in the negotiations with the preferred bidders. This correspondence

further elaborates on the nature of the engagement entered into between PU and Fenech & Fenech Advocates, with the latter clearly outlining their intention not to interfere with the work of Mamo TCV. Fenech & Fenech Advocates emphasised that its involvement as legal advisors to PU in negotiations with the preferred bidders on the yacht marinas privatisations was in no way to encroach on Mamo TCV's brief as given by MMA. In essence, Fenech & Fenech Advocates sought to reassure Mamo TCV of its separate role, and of its intention to cooperate in a professional manner.

2.2.10 Documentation exchanged thereafter with respect to the privatisation process was copied to a representative of Fenech & Fenech Advocates and emails exchanged throughout the process were forwarded to this representative.

2.2.11 After noting the involvement of Fenech & Fenech Advocates following the review of archived documents, Chair PU and Chair MIMCOL provided further clarifications relating to the firm's involvement. According to them, there were apprehensions relating to the possibility that one of the bidding consortia (made up of a number of existing berth holders) for the yacht marinas would impose certain conditions on other users of the marinas (who were not part of this consortium). In this scenario, PU and MIMCOL, in consultation with Minister MFEI, agreed that Fenech & Fenech Advocates would assist PU on this specific issue.

2.2.12 Chair PU and Transaction Manager PU confirmed this version of events with NAO, stating that some of the yacht owners who berthed their vessel in the marinas being privatised had formed a consortium to bid for the concessions. This consortium had submitted the best proposal for the Ta' Xbiex Yachting Centre Marina and the Msida Yacht Marina. The PU was about to commence negotiations with the consortium when Minister MFEI was informed that this consortium could possibly impinge upon the berthing rights of occupants who were not part of the consortium. According to Chair PU and Transaction Manager PU, it was with the intention of averting such circumstances that, in a meeting with Minister MFEI, it was decided that Fenech & Fenech Advocates was to be engaged to help with this issue.

2.2.13 An additional confirmation of these events was noted in an email addressed to Chair PU in which Fenech & Fenech Advocates outlined its role in the yacht marinas privatisation process. This role entailed the safeguarding of non-members' interests from possible unreasonable conditions imposed by members of the consortium. More precisely, Fenech & Fenech Advocates commented that, *"originally, the concession agreement was devoid of any assurances ... [its] role was precisely to see that the position of the non foundation members was protected as much as possible from eventual unreasonable demands made by the new company on the non foundation members such as for instance ensuring that the non foundation members would have no problems when they came to sell their boats, when they came to replace their boats and particularly that the non foundation members do not end up paying all the berthing fees allowing the foundation members to pay nothing at all which would have meant that after the 5th year the tariffs would be extremely high."*

2.2.14 TM confirmed that besides Mamo TCV, Fenech & Fenech Advocates was also appointed as legal advisor by PU and that payment for the latter's service was not made by TM.

2.2.15 In reply to NAO's request for information, Fenech & Fenech Advocates confirmed that the firm was approached by PU for assistance in the privatisation of the marinas when the process was already underway. At the time, Fenech & Fenech Advocates

was also providing legal assistance to PU in the privatisation of MSL. Fenech & Fenech Advocates confirmed that PU was making use of the services of Mamo TCV – MMA’s legal advisors at the time – and it was due to complications arising during the privatisation process that PU required urgent and immediate guidance, which was provided by Fenech & Fenech Advocates. Fenech & Fenech Advocates reiterated that PU required their services because of their particular expertise in the maritime sector.

- 2.2.16 No official documentation confirming the engagement of Fenech & Fenech Advocates was found in the PU or MIMCOL files made available to NAO. Moreover, the PU monthly reports do not make any reference to this engagement. No documents of correspondence relating to discussions and negotiations on the terms of engagement, or the actual letter of engagement, conflict of interest checks and declarations or any authorisations sought were traced.
- 2.2.17 Some form of explanation relating to this lack of documentation was provided by Fenech & Fenech Advocates, who explained to NAO that it was agreed with PU that the same terms and conditions with respect to the hourly rates as per the MSL privatisation would be maintained for that of the yacht marinas. There were no separate contract terms agreed to with respect to the legal services that were to be provided in relation to this privatisation.
- 2.2.18 On the basis of information made available to NAO, the fee for the legal services rendered by Fenech & Fenech Advocates with respect to the yacht marinas privatisations amounted to €19,054. An invoice was issued on 16 February 2011 for services provided over a period of one year, that is, from December 2009 to December 2010. The invoice was submitted to Chair MIMCOL and was paid by MIMCOL on behalf of PU. The hourly rates invoiced tally with the MSL agreement rates, and no monthly retainer fees were paid, as was also the case in the MSL agreement.
- 2.2.19 This Office noted that no request for the granting of approval for a direct contract was submitted to the DO Section within the then MFEI or DoC. Notwithstanding, NAO acknowledges that MIMCOL’s Schedule 3 status exempts it from the requirement to source such approval.
- 2.2.20 NAO also reviewed the fees paid by TM to Mamo TCV in order to establish whether the payment made to Fenech & Fenech Advocates represented a substantial amount of the total legal fees incurred with respect to this privatisation. The invoices forwarded by TM indicate that different rates were charged by Mamo TCV, with the rate charged for privatisation-related services 72 per cent higher than that charged for other non-privatisation work. Following queries raised by NAO, TM confirmed the two different rates, but could not retrieve any documentation relating to such an arrangement.
- 2.2.21 It is to be noted that at the start of the yacht marinas privatisation processes, Mamo TCV was the general legal counsel for MMA. Consequently, while some invoices deal only with privatisation issues, the majority of invoices received from the law firm during the privatisation process included hours clocked for other issues handled by the firm, aside from those relating to the privatisation process. NAO’s calculation of the total expenditure incurred by TM in this respect amounted to €65,260.²

² Payments made for legal services with respect to the privatisation process were calculated by ascertaining the hours relating to privatisation work, as outlined in the timesheets attached to the invoices, and multiplying these hours by the agreed rate per hour, then multiplying the sum by 1.18 to include Value Added Tax, and then adding a proportion (the apportionment was based on the ratio of hours worked on the privatisation processes as compared to the total hours worked) of the office and administration expenses.

2.2.22 In sum, the total expenditure incurred by Government with respect to legal services sourced for the yacht marinas privatisations amounted to €84,314.

2.3 Re-concession of the National Lotteries Licence

2.3.1 The organisation of lotteries and other games of chance was a state monopoly in Malta until mid-2001. The Department of Public Lotto, which was established in the 1940s, administered this sector. In July 2000, Government announced its intention to privatise the administration and management of this sector of the economy and, to this end, exercise congruency with the privatisation strategy presented in the White Paper entitled “Privatisation – A Strategy for the Future” and published in November 1999.

2.3.2 The PU was assigned the responsibility of overseeing the privatisation process of the National Lotteries. This process was initiated through a Request for Proposals from all interested bidders for the running and management of existing games of chance, which were previously organised by the Department of Lotto, as well as future games, subject to approval by the Lottery Regulator. The licence was to be valid for a period of seven years, yet could be extended by another year under certain circumstances related to the award of the second National Lottery Licence. To assist and advise it through this privatisation process, PU sought the services of legal consultants. To this end, it contracted the services of a local law firm as well as those of an international firm, that is, Mamo TCV and Vlaeminck & Partners, respectively.

2.3.3 The scope of the legal consultants’ work included the following:

- a. reviewing existing local and European legislation;
- b. drafting amendments to local legislation;
- c. providing input on the conduct of legal due diligence;
- d. providing advice on the parameters and structure of the concession;
- e. reviewing and finalising the draft Request for Proposals;
- f. assisting in the drafting of the qualification criteria for bidders;
- g. contributing to the evaluation of the submitted bidders; and
- h. assisting in the selection of and negotiation with the selected bidder.

2.3.4 Three proposals were received with respect to the competitive bidding process. Maltco Lotteries Limited emerged as the successful party, and was subsequently awarded the National Lotteries Licence, which allowed it to start operating in July 2004. The one-year contractual extension was granted, resulting in the contract running out in July 2012.

2.3.5 In May 2011, PU initiated a process that led to the July 2012 award of the re-concession for the rights of the National Lotteries, as opposed to simply renewing the licence awarded to Maltco in 2004. To this end, Government issued a public call for proposals in October 2011. An Advisory Committee was set up with the principal aim of overseeing the procurement process of the re-concession. The team, made up of 11 persons, was composed of representatives from PU, MGI and LGA.

2.3.6 The complexities associated with this procurement exercise once again called for the provision of legal support. In this regard, in a letter sent to LGA on 13 May 2011, PU stated that, *“an assignment of this complexity cannot proceed, even beyond the initial stages, without appropriate legal support.”* LGA, in its reply on 16 May 2011, and after further discussions with MGI, MFEI and PU, listed the requirements for the engagement of legal assistance. The following were the conditions listed in this letter:

- a. *“The MFEI providing an approval for a Direct Order based on Quotations received from a number of law firms;*
- b. *MGI Ltd, on behalf of PU, would request quotations from a number of law firms; and*
- c. *Approval for funding from MFEI is obtained to cover costs in relation to legal assistance which would not be fully covered from the revenues received from tender application and submission fees.”*

2.3.7 In May 2011, LGA had estimated legal services to cost a minimum of €50,000. As noted in the previous paragraph, LGA expected to recover these costs from tender applications. However, PU replied that, based on historical data, it was anticipating that such legal fees were likely to exceed €200,000. Hence, tender application fees would not suffice to cover the anticipated legal costs, especially since no more than three bidders were expected to submit a tender offer.

2.3.8 Further to the above communication, a meeting was held on 25 May 2011 in order to more accurately identify the way forward with regard to the sourcing of funds for legal services. Present for this meeting were representatives of PU, MGI and LGA. It was established that PU was to contact a number of reputable, local legal firms requesting proposals for the provision of legal services. It was also agreed that, due to the urgency of the matter, an expeditious process was essential in order to ensure the completion of the re-concession process prior to the expiry of the first concession period and the one-year extension.

2.3.9 The PU officials acknowledged the fact that, despite obtaining proposals from five firms, this procedure was, in terms of the public procurement regulations, considered to constitute a direct contract. They explained that the stringent timeframes justified the choice of this procurement method. Additionally, the prior approval of Minister MFEI for procuring such services through a direct contract was obtained. In addition, the PU officials revealed that, initially, the Advisory Committee had preferred another firm to the one ultimately chosen, as this preferred firm was already providing services to LGA. However, the Committee chose not to appoint this preferred firm, but rather to request proposals from five firms. This decision was taken to introduce an element of competition as well as to give more credibility to the process. All Advisory Committee members supported this decision.

2.3.10 PU officials explained to NAO that it was the Advisory Committee that had informed Minister MFEI of the legal firms that were to be contacted for the submission of a proposal. Minister MFEI agreed to these arrangements. The choice of firms was based on the Advisory Committee’s understanding of the firms’ experience and their capability to provide the required services. All the selected firms (or lawyers working within a specific firm) had previous experience in privatisation processes.

2.3.11 Members of the Advisory Committee had, in the first week of June 2011, met with an official from the DO Section, who had confirmed that the available direct contract threshold was €125,000, as in fact determined by the relevant public procurement regulations in force at the time. Although PU was, at this point, unable to accurately determine the total cost of the required legal services, the Unit did not deem €125,000 to be sufficient to cover such costs. In this regard, the Advisory Committee contacted Director General DoC asking for guidance on how to proceed with the procurement process. To this end, on 13 June 2011, Director General DoC informed the Advisory Committee that if the price quoted by the firm was less than €125,000, approval should be sought from MFEI; however, if the cost exceeded this threshold, the corresponding approval should be sought from DoC.

- 2.3.12 With this information in hand, the Advisory Committee sent an 'Invitation for Proposals' to five legal firms, which document had been drafted and finalised during May and June 2011. More specifically, LGA drew up the draft Invitation, which was subsequently reviewed, amended, and approved by PU and MFEI, and again endorsed by LGA. The five legal firms were proposed by PU, which subsequently sought the approval of the rest of the Advisory Committee. The Committee approved the five firms proposed.
- 2.3.13 In this respect, CEO MIMCOL and PU officials indicated that the firms identified were, in their opinion, highly reputable, and that this ensured that the privatisation process proceeded as intended, thereby safeguarding Government's interests and reputation.
- 2.3.14 NAO noted that the legal firms were not informed of the criteria to be used in the evaluation of their quotations, other than the fact that PU reserved the right to refuse even the most advantageous proposal. This Office found no documentation that indicated the establishment of specific evaluation criteria prior to the request for proposals. Following queries raised by NAO with respect to the setting of pre-defined evaluation criteria, PU officials explained that the Committee had agreed in advance that the selection of the legal firm would be based solely on price. In fact, the cheapest offer was ultimately accepted.
- 2.3.15 Not all legal firms contacted responded to the Invitation for Proposals, with only three out of the five submitting a detailed proposal. Following the receipt of proposals, dated 16, 24, and 27 June 2011, PU was in a more informed position, enabling it to seek the formal approval of the DO Section. To this end, the Unit emailed the DO Section on 28 June 2011, stating that it had invited proposals for legal services from five reputable law firms. The DO Section was also informed that each of the three firms could provide the services required and that, in the circumstances, it was decided to go for the cheapest offer. The favoured bid was that of GVTH, which quoted a monthly retainer fee for the first 40 hours, and an hourly rate for any additional hours. The additional hourly rate quoted represented a seven per cent increase over the hourly equivalent for the retainer fee. Against this background, PU requested the DO Section to authorise the appointment of GVTH Advocates as its legal advisor for the then imminent National Lottery privatisation process, while highlighting the urgency of the case.
- 2.3.16 On 28 June 2011, the DO Section approved the direct contract subject to the availability of the necessary funds and the total cost, exclusive of VAT, not exceeding €125,000. The DO Section expressed its intention to send formal approval 'in principle' in due course and requested PU to revert to the Section once the final cost of the required legal services was established.
- 2.3.17 The formal 'in principle' approval was sent to PU on 1 July 2011. The DO Section granted this approval on the condition that the total cost, excluding VAT, would not exceed €125,000. However, approval was only granted 'in principle', and PU was required to contact the DO Section again once the total cost of the service was established, to then obtain definite approval. As indicated earlier, at this stage, PU was unable to establish the total cost of the services required due to the various uncertainties related to the process.
- 2.3.18 Despite PU's earlier concerns with regard to the sufficiency of funds allocated to legal services, the rates quoted by the selected legal firm, the allocated budget of €125,000, was, at this point, deemed to be sufficient. With specific reference to the final approval for funding, NAO found no documentation in this regard. More specifically,

the Advisory Committee assumed that the 'in principle' approval constituted the final approval, even though PU was specifically requested to contact the DO Section once the total cost of the service was established, in order to obtain the definite and final approval.

- 2.3.19 PU officials indicated to NAO that they were unaware of the requirement to obtain final authorisation, especially since the conditions laid down by MFEI in the 'in principle' approval had been satisfied.
- 2.3.20 Further to the 'in principle' approval, on 5 July 2011, LGA drafted a Letter of Engagement and forwarded it to the rest of the Advisory Committee for their review, assessment and approval. PU forwarded it to GVTH on the same day for approval or amendments, which amendments were subsequently sent to PU that same day. Further to GVTH's feedback, LGA objected to two of the proposed changes to the Letter of Engagement. In order to address these issues, a meeting between the Advisory Committee and GVTH was scheduled on 7 July 2011.
- 2.3.21 Prior to the finalisation and signing of the Letter of Engagement, the Advisory Committee requested GVTH to carry out a detailed conflict of interest check. GVTH duly carried out this exercise and identified one client with potential conflicts of interest. In an email dated 11 July 2011, GVTH declared that it would not provide any services to this client in relation to this concession process.
- 2.3.22 Upon reviewing the declaration of impartiality included in the aforementioned email, and prior to the signing of the Letter of Engagement, LGA asserted that it was satisfied with GVTH's disclosure, as well as the firm's undertaking not to offer any services relating to the National Lottery to the said client. In view of this declaration, a clause in this respect was assimilated into the Letter of Engagement, under the 'Declaration of Impartiality' section.
- 2.3.23 An MFEI official noted another issue of concern that emerged during the finalisation of the Letter of Engagement. In an email sent to the other members of the Advisory Committee on 27 July 2011, the MFEI official stated that, further to a meeting that had been held with members of the Committee, certain cost-related issues were to be discussed with GVTH. More specifically, the MFEI official stated that the monthly retainer fee was based on 40 hours, and therefore, if these hours were not accumulated, a reduced fee would apply. However, NAO noted that this particular condition was not assimilated into the final Letter of Engagement.
- 2.3.24 The PU officials informed NAO that they were under the impression that the proposal for the banking of hours was negotiated with GVTH and a clause to this effect was included in the Letter of Engagement. On being informed by NAO that no such clause was included in the Letter of Engagement, PU officials asserted that irrespective of whether a clause was included or not, the proposal was adopted. In this context, PU officials explained that they were not aware of the finer technicalities of the signed agreement, as MIMCOL had been tasked with its drafting and signing, and PU had not checked the agreement as it had no reason to question MIMCOL's input. However, on reviewing invoices submitted by GVTH, NAO confirmed that this payment option was not implemented in practice. PU officials were unaware of this arrangement and reiterated their understanding that the Committee had agreed that unused hours would be credited to the following month.
- 2.3.25 The Letter of Engagement did not specify how instances of unutilised hours covered by the retainer fee were to be managed. The invoices indicated that the banking of hours system was not implemented. Instead, for the months in which the 40 hours

were not utilised, the monthly retainer fee was waived and the overtime hourly rate was applied to the clocked hours. During their interview with NAO, PU officials and CFO MIMCOL stated that they were not aware of this arrangement. CEO MIMCOL was unable to find any documentation of the revised agreement in his email archives. Furthermore, CEO MIMCOL maintained that the decision to solely charge the number of hours worked rather than the monthly retainer fee for those months where the 40-hour limit was not attained (and bank the unused hours to the following month), resulted in savings to public funds.

- 2.3.26 The Letter of Engagement was signed on 1 August 2011 by GVTH and MGI, on behalf of PU. The agreed fee charged by the legal firm to MGI for its legal advisory services quoted a monthly retainer fee, based on 40 hours per month, and an hourly rate for any additional hours worked in excess of the monthly 40 hours. The agreement stipulated that prior to utilising additional hours in excess of the monthly 40 hours, GVTH was to request MGI's approval in writing. These excess hours were not to exceed a monthly capping equivalent to an additional 20 hours, unless prior written approval was acquired from MGI. Moreover, written authorisation by PU would have to be obtained prior to GVTH incurring any additional fees. It was agreed that GVTH was to charge MGI on a monthly basis, which invoice would include a detailed breakdown of the time utilised. The conditions of prior approval provided for greater accountability and efficient use of resources, as long as these were adhered to during the process.
- 2.3.27 The Letter of Engagement stipulated that GVTH was to invoice MGI every month. A detailed breakdown of the tasks carried out during the corresponding month and the hours incurred per task were to be presented with the invoice in order to substantiate the number of hours claimed. GVTH was to provide such invoices and accompanying detailed timesheets by not later than the tenth day of the subsequent month.
- 2.3.28 NAO raised queries with respect to the ambiguity in PU contracting legal services and MIMCOL signing the relevant contractual agreement. According to Chair MIMCOL, GVTH had insisted that since MIMCOL was responsible for any defaults in payment, then legally, MIMCOL should endorse the contract.

Payments

- 2.3.29 Further to a review of the payments effected to GVTH with respect to legal services provided to PU in respect of the National Lotteries re-concession, NAO noted that, during the periods August to December 2011 and March to June 2012, the minimum monthly 40 hours (covered by the retainer fee) were exceeded. Moreover, in August, September and November 2011, as well as from April to June 2012, the capping for excess hours over those covered by the retainer fee was exceeded.
- 2.3.30 In this regard, the Office noted that GVTH only made requests for prior approval for the use of additional hours for August and September 2011. Moreover, in the case of August, approval to utilise more than 60 hours (retainer fee and the additional 20 hours) was sought on 25 August after the excess hours limit (60 hours) had already been exceeded by 16 hours. In the case of September 2011, NAO only found documentation related to the authorisation for the use of hours beyond the 40-hour retainer fee, despite invoices rendering evident that the 60-hour limit was exceeded. With respect to the rest of the months mentioned in the previous paragraph, despite the level of hours used requiring authorisation from MGI as stipulated in the Letter of Engagement, no documentation of such requests or actual authorisations were found in the documentation made available to NAO.

- 2.3.31 Chair PU and Transaction Manager PU explained that it was unlikely that authorisations for the utilisation of extra hours were sought and obtained every month. However, PU was fully aware that the monthly hours were being exceeded since the legal firm worked closely with the Committee. On the other hand, CEO MIMCOL acknowledged that the legal firm was required to ask for these authorisations from MIMCOL. The need for further hours of legal assistance would be triggered by PU, and therefore, Chair PU would probably have approached him in such circumstances and informed him of the need for further use of hours and the relevant authorisation would be provided verbally.
- 2.3.32 The Letter of Engagement stipulated that a detailed timesheet should be kept for each month in order to substantiate the hours invoiced. No copies of the timesheets were found in PU files. On the other hand, detailed timesheets were attached to most invoices in the MIMCOL files. However, timesheets for June 2012 and January/February 2013 were not found.
- 2.3.33 Further queries were directed at PU officials with respect to the procedure adopted for the verification of the receipt of timesheets and the veracity of the hours claimed in the invoice. PU officials explained that, although there was no standard procedure for the receipt and verification of invoices for all the privatisation processes, GVTH was instructed to send the invoices, together with the corresponding timesheet, to MIMCOL. According to Chair PU, the prevalent understanding was that MIMCOL was to check the invoice and issue payment without requiring PU's authorisation. Given such a tacit understanding, NAO noted that if GVTH failed to produce the timesheets with the relevant invoices, such a shortcoming would not have been drawn to the attention of the PU officials, thereby detracting from the desired level of vetting prior to the approval for payment.
- 2.3.34 CEO MIMCOL asserted that, upon directly receiving or being forwarded the invoices, he expected CFO MIMCOL to check with Chair PU if the hours claimed were actually utilised and whether the service provided was deemed satisfactory. CEO MIMCOL also stated that it was the CFO's duty to verify whether the invoice adhered to the contractual agreement. This would entail checking the agreed hourly rates against those that were charged. Furthermore, CEO MIMCOL was of the opinion that since CFO MIMCOL was not directly involved in the privatisation process, PU officials were responsible for checking and approving the hours and subsequently reverting to the CFO with the Unit's evaluation/opinion.
- 2.3.35 On the other hand, CFO MIMCOL asserted that he used to issue payment for the submitted invoices after verification by Chair MIMCOL and Chair PU, without carrying out the necessary checks, under the presumption that both Chair MIMCOL and Chair PU were in agreement with the processing of the said invoices. CFO MIMCOL stated that he acted as a paying agent on behalf of PU, therefore the presentation of the invoice duly authorised by the Chair PU and Chair MIMCOL, was, in his opinion, sufficient evidence for the eventual settlement of invoices. The invoices made available to NAO did not indicate that Chair PU consistently provided written authorisation for the payment of invoices and the approval of timesheets. On the other hand, according to CFO MIMCOL, the second signatory for cheques issued by MIMCOL was its CEO, which CFO interpreted as implying the CEO's direct access to the invoices and timesheets.
- 2.3.36 CFO MIMCOL insisted that he was never provided with a copy of the Letter of Engagement for this privatisation, claiming that it was standard practice that he would only ask for such when the fees being invoiced were substantial. When queried as to whether he had asked for this specific Letter of Engagement, CFO MIMCOL indicated

that he could not reply with certainty as many years had passed since the occurrence of these events. CFO MIMCOL added that there were times when he had asked Chair PU for copies of contracts and he was not provided with a copy due to their, at times, sensitive nature.

2.3.37 CEO MIMCOL maintained that it was highly unlikely that GVTH had failed to submit the timesheets. He also stated that it was PU's responsibility to check the timesheets since it was in direct contact with GVTH and was therefore able to verify the hours charged.

2.3.38 Table 1 presents the amounts invoiced by GVTH to MGI. According to the invoices made available to NAO, MIMCOL paid GVTH a total of €79,299.

Table 1: Invoices and Approvals for Legal Services Rendered

Month	Retainer Fee Charged	Total Number of Hours	Time Sheet Found	Approval for Exceeding 40 Hours	Approval for Exceeding 60 Hours
August 2011	Yes	98.5	Yes	Obtained	Obtained ¹
September 2011	Yes	84	Yes	Obtained	Not found
October 2011	Yes	50.5	Yes	Not found	Not required
November 2011	Yes	71	Yes	Not found	Not found
December 2011	Yes	60	Yes	Not found	Not required
January 2012	No	30.5	Yes	Not required	Not required
February 2012	No	28.5	Yes	Not required	Not required
March 2012	Yes	51.5	Yes	Not found	Not required
April 2012	Yes	104	Yes	Not found	Not found
May 2012	Yes	158	Yes	Not found	Not found
June 2012	Yes	67.5	No	Not found	Not found
July 2012	No	18	Yes	Not required	Not required
August 2012	No records found ²				
September 2012	No records found				
October 2012	No records found				
November - December 2012	No	24.5	Yes	Not required	Not required
January - February 2013	No	22	No	Not required	Not required
Total Charged	€79,299		-	-	-

Notes

1. Approval was sought after the 60 hours had already been exceeded by 16 hours.
2. In the case of August, September and October 2012, NAO found no records relating to expenditure incurred; however, NAO noted that the re-concession licence was granted in July 2012, which possibly implied that legal services were no longer required. Furthermore, it was indicated to NAO that PU, between November 2012 and January 2013, required legal services with respect to appeals that were filed against the Unit by competing bidders.

2.3.39 As shown in Table 1, there were several months where the 40-hour allotment was not utilised and, in these cases, the retainer fee was waived; instead, an hourly rate (slightly higher than the rate applicable for the first 40 hours), was applied. CEO MIMCOL asserted that his primary concern was to ensure that public funds were not misused and further argued that in this case, savings were registered. Substantiating

this argument, CEO MIMCOL calculated the legal fees payable under three different scenarios as follows:

- a. legal fees actually paid;
- b. legal fees that should have been paid in strict conformity with the Letter of Engagement; and
- c. legal fees based on the banking of unused hours (despite not being provided for by the Letter of Engagement) and the application of the monthly retainer fee.

2.3.40 Calculations undertaken in this respect indicate that the method chosen (on the basis of the resultant fees paid) was the most economical of the three methods. This was confirmed by NAO through the calculation of utilised hours against fees actually paid (Table 2 refers).

Table 2: Comparison of Actual / Expected Cost Options

Method Applied	Cost (€)
Actual Expenditure Incurred	79,299
Expected Cost as per Letter of Engagement Option	85,190
Expected Cost as per Banking of Unused Hours Option	81,690

2.3.41 MIMCOL also reimbursed GVTH for expenses incurred in connection with opposition proceedings filed with the Office of the Harmonisation of the Internal Market, professional services paid in respect of the registration of trademarks, and trademark publication fees. In total, these fees amounted to €19,409.

2.3.42 According to the Letter of Engagement, authorisation for the incurrence of other fees had to be obtained in writing from PU prior to the incurrence of these fees. NAO found no record of such authorisations in PU's and MIMCOL's documentation. PU officials clarified that GVTH was given the go-ahead to undertake whatever measures were necessary and incur the relevant expenses for the registration of trademarks during a Committee meeting. PU officials also stated that the Committee did not interfere with the details of the trademarks registration process. NAO was informed that minutes of this meeting were not kept.

2.3.43 GVTH substantiated the fee paid (which was reimbursed by MIMCOL) for the registration of web domains with a receipt of the invoice that GVTH had already settled. They forwarded this receipt with their request for reimbursement to MIMCOL. No such receipts were found for the expenses incurred in connection with opposition proceedings filed with the Office of the Harmonisation of the Internal Market and expenses relating to professional services rendered in respect of the registration of trademarks.

2.3.44 Following queries raised by NAO, PU officials accepted that it was their responsibility to ask for the receipt of invoices paid by GVTH that needed to be reimbursed. However, they recognised that they probably did not actually ask for these receipts. However, PU was confident that there was no misuse of public funds as the legal firm in concern was deemed trustworthy and professional. Moreover, once the trademarks were registered, PU was certain that the relevant fees had been paid to the entities concerned.

Chapter 3 – Conclusions and Recommendations

3.1 General Overview

3.1.1 During the period under review, the services of three legal firms were procured, the cumulative fees of which amounted to €536,439. Table 3 presents an overview of the legal services provided during the various privatisation processes reviewed. The dates included in Table 3 refer to the period during which the privatisation processes took place; however, the dates do not always reconcile with invoiced dates due to the fact that legal services were also provided in relation to appeals filed following the finalisation of the privatisation processes.

Table 3: Overview of Cost of Legal Services

Privatisation	Legal Firm	Period	Cost (€)
Malta Shipyards Limited	Fenech & Fenech Advocates	May 2008 – March 2011	301,374
Ricasoli Tank Cleaning Facility ¹	Fenech & Fenech Advocates	April 2011 – January 2013	71,452
Yacht Marinas	Mamo TCV	July 2008 – December 2010	65,260
	Fenech & Fenech Advocates	July 2008 – December 2010	19,054
National Lotteries Re-concession	GVTH	May 2011 – July 2012	79,299
Total			536,439

Notes:

1. The Ricasoli Tank Cleaning Facility privatisation formed part of the MSL privatisation, yet was contracted separately at a later date in the process.

3.2 Conclusions and Recommendations

3.2.1 From a process management perspective, NAO noted a general lack of clarity in the delineation of responsibility between PU and MIMCOL with respect to the privatisations under analysis. This was mainly manifested in the payment processes reviewed, which lacked a coordinated system of invoice endorsement, key in ensuring the appropriate disbursement of funds. NAO considered the system of checks employed as weak, with different parties involved assuming that the other

party was responsible and accountable for specific processes and tasks. Furthermore, NAO noted that no clear responsibility with regard to the issuance of the Letter of Engagement to firms engaged to provide legal assistance existed.

Conclusions regarding the MSL Privatisation

- 3.2.2 Given the wider political backdrop that characterised the MSL privatisation, and the urgency required in adhering to EU imposed targets, the recourse to the sourcing of legal services through a direct contract is acknowledged by this Office. The selected firm, Fenech & Fenech Advocates, was engaged on this assignment following a meeting held with Minister MFEI and Minister MITC. Justification provided to NAO by PU and MIMCOL with respect to the appointment of Fenech & Fenech Advocates centred on the premise that this firm had ample experience in maritime law and was, at the time, directly involved in an MSL court case.
- 3.2.3 Although PU and MIMCOL stated that the terms of engagement were discussed during a meeting held with Fenech & Fenech Advocates, and that the firm had sent these terms to PU, no formal Letter of Engagement was drawn up and signed by PU, MIMCOL and Fenech & Fenech Advocates. This point of contention further intensifies when considering that the same agreement was extended to encompass the Ricasoli Tank Cleaning privatisation process. NAO considers the appropriate documentation of contractual arrangements entered into as a basic aspect of management, more so when one considers that the nature of the expense incurred in this instance exceeded €370,000.
- 3.2.4 NAO is cognisant of the fact that no direct contract approval was required from DoC. This situation is attributable to MIMCOL's Schedule 3 status under the public procurement regulations, which excludes the organisation from the obligation to source DoC approval. NAO acknowledges the utility of such provisions, serving to expedite sensitive processes and imbuing MIMCOL with the required flexibility; however, this Office contends that the responsibility of appropriately documenting processes and procedures is not exempted through such provisions, and instead renders its need more pronounced.
- 3.2.5 NAO was unable to establish whether all the legal expenses incurred by MIMCOL were eventually recovered from MSL. Queries, as well as requests for documentation, addressed to CFO MIMCOL and the MSL Liquidator, both functions were in fact performed by the same person, remained unanswered despite numerous attempts by this Office to source the required information. This Office considers CFO MIMCOL's failure to cooperate as a notable shortcoming and a matter of due concern.

Conclusions regarding the Yacht Marinas Privatisations

- 3.2.6 Legal assistance provided with respect to the yacht marinas privatisations was sourced from Mamo TCV, which firm was, at the time, TM's in-house law firm. This privatisation assignment was deemed as an extension of the firm's in-house engagement, although rates payable in this regard were revised upwards.
- 3.2.7 NAO notes and acknowledges the contextual nuances that eventually developed and characterised the yacht marinas privatisations, with the risk of the preferred consortium impinging upon the berthing rights of occupants emerging as a critically important factor in this respect. Justification provided by PU officials indicated that Minister MFEI was seeking to mitigate this situation when appointing Fenech & Fenech Advocates to assist in this privatisation process.

- 3.2.8 Similar to the case of the MSL privatisation, NAO noted that direct contract approval was not sought from the DO Section or DoC, as this was in fact unnecessary. This situation is attributable to MIMCOL's Schedule 3 status under the public procurement regulations, which exempts the organisation from the obligation to source DO Section or DoC approval.
- 3.2.9 Nonetheless, the concerns related to the absence of a signed agreement for the MSL privatisation are exacerbated by the fact that the MSL terms were extended to also regulate the yacht marinas privatisation processes. NAO considers the absence of a formal agreement regulating the services that were to be provided by Fenech & Fenech Advocates as a notable shortcoming. Such an agreement would have ensured clarity on the terms of engagement and allowed for adequate controls in terms of payment procedures against the agreed upon terms.

Conclusions regarding the Re-concession of the National Lotteries Licence

- 3.2.10 The procurement of legal services in relation to the granting of a re-concession of the lotteries licence essentially constituted a direct contract. Notwithstanding, PU did shortlist five firms of its choice and eventually selected the cheapest offer submitted, departing somewhat from previous methods employed in the MSL and the yacht marinas privatisations. Justifications supporting the decision to proceed with the award of a direct contract mainly centred on the urgency of the required legal service, which claims are rendered valid when one considers the restricted timeframes. This Office also acknowledges the Advisory Committee's efforts at imbuing the process with an element of competitiveness by seeking proposals from a number of legal firms, albeit still effecting final award through a direct contract. However, NAO notes that the need for renewal could have been foreseen, and therefore, necessary preparations undertaken earlier, thereby allowing for the selection of a legal firm through a more competitive tender process.
- 3.2.11 Although an 'in principle' approval for the utilisation of €125,000 for legal fees was acquired from the DO Section within MFEI, PU never obtained final approval from this Section. As indicated earlier, given that MIMCOL falls under Schedule 3 of the Public Procurement Regulations, approval, be it 'in principle' or final, was not in fact required. In this Office's opinion, the above situation created an element of ambiguity, in that PU was sourcing services, while MIMCOL provided funding.
- 3.2.12 With regard to the Invitation for Proposals, NAO noted that the five selected legal firms were not informed of the criteria that the Advisory Committee would base its final decision upon. NAO is of the opinion that the Advisory Committee's eventual selection would have been more transparent had the evaluation criteria been made clearer to interested parties. GVTH, the firm selected to provide such legal services, submitted the most financially favourable offer out of the contacted firms.
- 3.2.13 A positive aspect noted by NAO relates to the manner by which the process leading to the drafting of the Letter of Engagement was administered and managed. The involvement of the Advisory Committee was a crucial element in this process, which afforded PU a much required level of assurance.

- 3.2.14 NAO noted that, although the Letter of Engagement stipulated that GVTH was to obtain approvals from MIMCOL when a certain number of hours were to be exceeded, such approvals were not always sought, or alternatively, documentation was not retained. Furthermore, GVTH was to seek PU's approval for the incurrence of other fees, yet such approvals were not sought, or supporting documentation was not maintained. The absence of such approvals is not commendable and detracts from the process's system of financial control.
- 3.2.15 In addition, on the basis of the documentation made available, NAO noted that receipts corresponding to expenses incurred in the process of trademark registration were not consistently forwarded to MIMCOL or PU. Although such a requirement was not specifically listed in the Letter of Engagement, requesting supporting documentation to substantiate expenses incurred on one's behalf is reasonable and would have ensured greater accountability and transparency.
- 3.2.16 This Office considered the level of vetting carried out prior to invoice payment as weak. To an extent, this shortcoming is attributable to the blurred delineation of responsibilities between PU and MIMCOL. The PU should have consistently vetted and endorsed requests for payments, particularly in view of its continuous involvement and active management of the privatisation process. MIMCOL too bears an element of responsibility, as it was ultimately responsible for the disbursement of funds and was therefore duty-bound to ensure conformity with contractual conditions. In this regard, CFO MIMCOL's failure to carry out basic verifications conspicuously stands out.
- 3.2.17 NAO is of the opinion that the incongruence noted between the provisions stipulated in the Letter of Engagement and actual practice does not represent sound contract management. Irrespective of the complexity of the process, or otherwise, standard authorisation and verification procedures should be consistently adhered to in order to allow for greater accountability and to minimise the risk of error.

Recommendations

- 3.2.18 Finally, NAO puts forward the following recommendations:
- a. roles and tasks to be assumed by PU and MIMCOL during privatisation processes are to be clearly established at the outset in order to avoid potential ambiguity with respect to the delineation of responsibility;
 - b. as far as possible, more open, transparent and competitive procurement processes should be resorted to instead of direct contracts;
 - c. a Letter of Engagement is to be invariably drawn up for every legal service procured, clearly stating the agreed terms of engagement;
 - d. procedures relating to the endorsement of hours charged and claims for reimbursement should be clearly established; and
 - e. adequate documentation should be retained, providing a detailed record of decisions taken, critically important for audit trail purposes and ensuring accountability.

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