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16 November 2023

Environment and Resources Authority  
Hexagon House  
Spencer Hill  
Marsa, MRS 1441

Attn: Mr Kevin Mercieca - CEO

**Re: Exemption under Article 5 of the Environmental Impact Assessment Regulations**

Dear Mr Mercieca

Pursuant to Article 5(1) of the Environmental Impact Assessment Regulations (the “Regulations”), Enemalta plc hereby requests that the Environment and Resources Authority (ERA) grant an exemption from the application of the Regulations, specifically from the requirement to have an environmental impact assessment carried out with respect to the commissioning by Enemalta of a 60MW generation plant.

#### Background

Enemalta has an obligation, through the entrustment of a public service obligation, to ensure the security of Malta’s electricity supply, insofar as the availability of backup plant is concerned in case of any fault or other interruption of supply from the generation plant regularly in use. This PSO obliges Enemalta to guarantee the availability of adequate generation capacity, ensuring that a reliable and continuous supply of electricity is maintained. Enemalta has strong concerns that the current dispatchable generation capacity available is insufficient to ensure security of supply, particularly in view of the electricity crisis which Malta experienced last summer, which saw an unprecedented and unforeseeable increase in electricity demand.

Demand has been on the rise for the past few years; however, the increase, particularly during the summer months, has been somewhat steady (at approximately 3.5% year-on-year) and therefore foreseeable by Enemalta. This cannot however be said for the increase seen during this past summer, where the demand rose to 663MW in the month of July, more than 14% higher than the previous summer where the demand reached a maximum of 581MW. Enemalta anticipates that the demand in summer of 2024 will rise even higher and that unless the Project is commissioned by intended date, that is, before the summer of 2024, it will not be able to guarantee security of electricity supply.

It is expected that within the next three to four years, a second sub-sea connector between Malta and Sicily will be available for dispatch. However, this leaves an interim period during which Enemalta must secure electricity supply through alternative means and it must do so by the end of May 2024, at the very latest. After considering the options available, Enemalta's preferred solution would be to lease a 60MW generation plant for a period of approximately three years, which plant would be located within the Enemalta site in Delimara (the "Project").

Enemalta intends to commission the plant through a tender procedure which could take a number of months. The procurement and delivery of the plant together are expected to take between six and eight months which would mean that in order to have the plant available for dispatch by May 2024, the permitting process must necessarily be carried out in parallel with the procurement process.

#### Request for exemption under regulation 5 of the Regulations

The nature and scale of the Project is such that it would fall within Annex 1 of the Regulations and would consequently require a full environmental impact assessment (EIA). The EIA process, as ERA well knows, could take several months when considering the volume of information required for the preparation of the EIA report, and the period for public consultation. To carry out an EIA therefore would mean that the Project cannot be commissioned by the intended date, that is, end of May 2024, with the consequent risk on the security of electricity supply.

Accordingly, due to the urgent and exceptional nature of the Project, Enemalta is hereby requesting that such Project be exempted from the requirements of the Regulations. Enemalta submits that the application of the Regulations to the Project would adversely affect its purpose, that is, to ensure adequate supply of electricity during the summer months, which without the Project, Enemalta is quite certain would be at risk. The length of time required for the EIA process would, without doubt, prevent Enemalta from averting a situation which could potentially be worse than that of last summer, in which a significant number of customers would likely be without electricity supply for a considerable period. This lack of supply presents a serious and real threat to the health and wellbeing of many people, as well as to their economic welfare.

As noted above, the situation is exceptional and one which could not have been foreseen by Enemalta. In fact, the electricity supply study commissioned by the Energy and Water Agency and carried out by Électricité de France (EDF), which was completed in the beginning of 2021, projected that within a high demand growth scenario, the annual peak demand of 644MW would not be reached before 2029. Yet, last summer, the peak had already exceeded this value. This study shows that Enemalta could not have predicted this sudden rise in demand, nor could it have anticipated the urgent need for this Project. The increase in demand can partially be attributed to the effects of climate change, which have created extreme climatic conditions, including long periods of extreme heat during the summer months. Such conditions will almost certainly be experienced again in summer of 2024.

The circumstances of this case are such as to make compliance with the requirements of the Regulations highly impracticable as it would be near impossible to meet the timeframe in which the Project must become operational. It is therefore submitted that there is an urgent and substantial need for the Project and that the relief sought by Enemalta by means of the requested exemption would allow Enemalta to address this urgency.

It has come to Enemalta's attention that such an exemption (which is also found under article 2(4) of the EIA Directive) has been relied upon several times by other Member States, particularly over the last two years. In the majority of these cases, the projects in question, not surprisingly, related to electricity infrastructure.<sup>1</sup> More precisely, the Court of Justice of the EU (CJEU) had the opportunity to address a matter similar to the case in question where it was asked for a preliminary ruling on, *inter alia*, the application of article 2(4) of the EIA Directive in relation to security of electricity supply.<sup>2</sup> The CJEU acknowledged that the exemption under article 2(4) can in fact be exercised in connection with security of electricity supply so long as the risk to supply is reasonably probable:

*...the exemption of a project under Article 2(4) of the EIA Directive from the requirement to conduct an environmental impact assessment is only permissible if the Member State concerned can show that the alleged risk to security of the electricity supply is reasonably probable and that that project is sufficiently urgent to justify not carrying out such an assessment.*<sup>3</sup>

In this case, as explained above, the risk to security of electricity supply during the summer of 2024 is such that it certainly meets the benchmark of being 'reasonably probable'.

Enemalta understands that if such exemption were to be granted, ERA would have to assess whether some other form of assessment would be appropriate, and possible in the circumstances. In fact, the CJEU acknowledged in Doel the importance of the obligations of the competent authority under paragraphs (a) to (c) of the same Article:

*Although it is conceivable that the need to ensure the security of the electricity supply to a Member State could amount to an exceptional case, within the meaning of the first subparagraph of Article 2(4) of the EIA Directive, which would justify exempting a project from environmental impact assessment, it should be noted that points (a) to (c) of the second subparagraph of Article 2(4) of that directive impose specific obligations upon Member States wishing to rely on that exemption.*

*In such a case, the Member States concerned are required to consider whether another form of assessment would be appropriate, make available to the public concerned the information thereby obtained, and inform the Commission, prior to granting consent, of the reasons justifying the exemption granted, and provide it with the information, if any, made available to their own nationals.*<sup>4</sup>

The Court concluded on the exemption issue that:

*Article 2(4) of Directive 2011/92 must be interpreted as meaning that a Member State may exempt a project such as that at issue in the main proceedings from the requirement to conduct an environmental impact assessment in order to ensure the security of its electricity*

<sup>1</sup> <https://circabc.europa.eu/ui/group/26370f9e-245c-4c09-8a75-68655a74875b/library/76f6bbc6-4bed-4506-a6db-e1ba9183a829/details>

<sup>2</sup> Case C-411/17 - Request for a preliminary ruling under Article 267 TFEU from the Cour Constitutionnelle (Constitutional Court, Belgium), made by decision of 22 June 2017, received at the Court on 7 July 2017, in the proceedings *Inter-Environnement Wallonie ASBL, Bond Beter Leefmilieu Vlaanderen ASBL ("Doel")*

<sup>3</sup> Paragraph 101 of the Judgment of the Court in Doel

<sup>4</sup> Paragraphs 97 and 98 of the Judgment of the Court in Doel

*supply only where that Member State can demonstrate that the risk to the security of that supply is reasonably probable and that the project in question is sufficiently urgent to justify not carrying out the assessment, subject to compliance with the obligations in points (a) to (c) of the second subparagraph of Article 2(4) of that directive.<sup>5</sup>*

The EU Commission, in 2019, adopted a guidance document regarding the application of exemptions under the EIA Directive.<sup>6</sup> With respect to Article 2(4), the Commission referred to the Doel case and to the Court's conclusion that the need to ensure security of supply in electricity could amount to an 'exceptional case' where the risk for the security in supply is 'reasonably probable' and the envisaged project is sufficiently urgent to justify not carrying out the assessment.<sup>7</sup>

The Commission further stated:

*In addition, the Commission's experience with the notifications for exemption under Article 2(4) can provide examples of situations that would qualify as 'exceptional cases'. Between 2014 and 2017, the European Commission has received several notifications that fell under the category of exceptional cases.*

...

*In one of these there was a need to secure a supply of gas, in another the project was needed to satisfy a strategic interest in renewable energies, and in the third case the reason for the project was to meet high-level political commitments made by public authorities to build confidence between communities in the context of broader reconciliation negotiations.*

...

*As indicated above, the circumstances of an exceptional case must be such that compliance with all the Directive's requirements would be impossible or impracticable and counter-productive in terms of achieving the purpose of the project. For example, a development might need to be approved and completed so quickly that there would be too little time to prepare all the environmental information required under Article 5(1) or to conduct a public consultation before deciding to proceed.<sup>8</sup>*

In addition to the considerations made above, it should also be specified that the Project relates to the relevant generation capacity being leased and deployed on a temporary basis, for a duration which is expected not to exceed 36 months. During this period, it is envisaged that longer-term generation capacity will be procured to address the security of supply concerns that the Project intends to address in the interim period. The long-term solution would clearly be such as to fully comply with the assessment requirements in the Regulations.

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<sup>5</sup> Paragraph 2 of the Court's Conclusion in Doel

<sup>6</sup> (2019/C 386/05) Guidance document regarding application of exemptions under the Environmental Impact Assessment Directive (Directive 2011/92/EU of the European Parliament and of the Council, as amended by Directive 2014/52/EU) – Articles 1(3), 2(4) and 2(5)

<sup>7</sup> Paragraph 3.6 of the Guidance Document

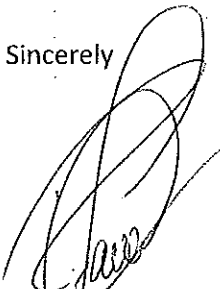
<sup>8</sup> Paragraphs 3.6 to 3.8 of the Guidance Document

### Conclusion

On the basis of the above, Enemalta submits that the Project is extremely urgent and is required to prevent the occurrence of inadequate supply of electricity in 2024. Due to the time constraints requiring the additional generation capacity to be in place before summer 2024, compliance with the requirements of the Regulations would not only be impossible, but would defeat the entire purpose of the Project, that is, to avoid a repeat of the crisis experienced last summer by having this plant available for dispatch by end of May 2024.

Accordingly, Enemalta hereby requests, pursuant to regulation 5, that the Project is exempted from the requirements of the Regulations.

Sincerely



Ing. Ryan Fava  
Executive Chair  
Enemalta plc