

To the Honourable Members of Parliament
House of Representatives
Malta

January 30, 2019

SUBJECT: State aid granted to International Hotel Investments p.l.c. [IHI] by the Government of Malta

We write on behalf of **FORESITE**, a consortium of Maltese businesspersons who are justly concerned at the proposed granting of public land to IHI at Malta's "Golden Mile".

As you are aware, the Maltese Government has publicly declared that it intends to grant extended concession rights to IHI at values far below market price and without having issued issuing a tender. Consequently, IHI will benefit from a substantial waiver of public revenues by the Government, an unfair advantage which will lead to distortion of a level playing field within the Maltese tourist industry. This is in breach of EU state aid rules, which require that, when granting concessions for public land, the Maltese Government should act in a commercially sensible way like any Market Economy Operator. Any legal act in conflict with EU state aid law cannot be enforced. Unlawful state aid is void and has to be recovered from the beneficiary with interests.

There is still time to stop this from happening. Hence our appeal to you.

Context

The Government of Malta originally granted International Hotel Investments p.l.c., hereinafter referred to as IHI, land in Saint George's Bay, Saint Julian's, Malta, by title of temporary emphytheusis. IHI were granted this concession on condition that any development and use must be intended **solely for touristic purposes**.

According to media reports, Government had entered into a Memorandum of Understanding with IHI back in May 2015, following a request by IHI for a fresh concession with regard to the land. It now transpires that the request included a specific change of use and the removal of restrictive conditions on use. In fact, IHI requested a mixed use for touristic purposes and **also commercial and residential development. This concession for commercial and real estate development over Government property was an advantage or privilege granted solely to IHI to the exclusion of any other interested party.** IHI was additionally given the right to renegotiate the grant if economic circumstances were not favourable to IHI and **were given the right to transfer and assign their rights under the concession without the need of Government approval.** No call for an expression of interest or tender process was undertaken. No public offering process was sought to solicit the interest of third economic players in the market.

IHI operates and has a substantial presence in a number of sectors; in the hospitality sector IHI owns as well as manages a number of hotels, in the real estate sector IHI has developed commercial real estate including the implementation of residential offerings, leasable office and retail space, whilst in the catering sector IHI offers various catering solutions both within its venues and as part of outside catering.¹ By granting this concession IHI would be the recipient of a discriminatory gain from State resources as will be explained.

Needless to say, any purported agreement – whether the MoU signed in 2015 or the proposed concession – needs to respect both European and Maltese law. Breach of such rules would render both the MoU and the consequent concession irregular and illegal

State Aid is defined in Article 107 (1) of the Treaty on the Functioning of the European Union, hereinafter referred to as “TFEU” as:

...any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods [...], in so far as it affects trade between Member States.

¹ <http://www.ihiplc.com/our-portfolio-02>

i. **Discriminatory approach in providing the Aid/Advantage**

As was stated in the Judgement of *Bouygues SA v Commission*, a State would not be in breach of State aid rules should it carry out an open and transparent selection process in order to grant resources to a particular undertaking. When the State acts as a regulator, it can decide legitimately not to maximise the revenues which could otherwise have been achieved without falling under the scope of State aid rules, **provided that all the operators concerned are treated in line with the principle of non-discrimination.**² In the present case, if the proposed concession were to be approved, neither requirement would be observed.

Thanks to the proposed deal with IHI, the Government of Malta would effectively be granting special and exclusive rights on land owned by the Government of Malta to IHI, in an entirely arbitrary manner and following **no form of call for the expression of interest or consultation with other potential bidders.**

ii. **The Granting of an Advantage to an undertaking from state resources is clear**

As per article 107(1) of the TFEU quoted above³, the constituent elements of State aid are the following:

- i. the existence of an **undertaking**,
- ii. the **imputability** of the measure to the State, and its **financing** through State resources,
- iii. the granting of an **advantage**,

² See to that Judgment of the Court of Justice of 8 September 2011, *Commission v Netherlands*, C-279/08 P, ECLI:EU:C:2011:551, paragraphs 88 et seq. the Court did not identify regulatory reasons that would have justified the award without consideration of freely tradable emission rights. See also Judgment of the Court of Justice of 14 January 2015, *Eventech v The Parking Adjudicator*, C-518/13, ECLI:EU:C:2015:9, paragraphs 46 et seq.

³ As also interpreted in terms of notices From European Union Institutions, Bodies, Offices And Agencies European Commission; *Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union* (2016/C 262/01)

- iv. the **selectivity** of the measure, and its effect on **competition and trade** between Member States.

In this case the **grant of public land is NOT a normal market condition and a direct intervention of the State**. This concession is being granted to a (a) **commercial undertaking** (b) **as direct aid of State resources**⁴.

i. **IHI plc is a commercial undertaking**

As per page 6 of IHI's presentation presented to the Government of Malta, IHI *"is one of Malta's foremost hotel and real-estate investor, developer and operator[...]"*. IHI plc, is a registered public listed company with a vast economic and commercial portfolio⁵. There is no doubt that IHI is an "undertaking" in terms of law.

ii. **Advantage or Aid from State Resources**

Granting access to a public domain or natural resources, or granting special or exclusive rights⁶ without adequate remuneration in line with market rates, also constitutes foregoing State revenues.⁷ This is particularly applicable to the case at hand, as by replacing the existing concessions by a new concession agreement, the Government of Malta is categorically granting unto IHI special and exclusive rights in an arbitrary manner and without granting the same opportunity to competitors in the market.

There can also be no doubt that this aid is one conceded by the State.⁸ The grant, if and when conceded, would be granted by the Government of Malta through a parliamentary resolution. There can be no doubt therefore that the advantage or gain is being offered by the State.⁹

⁴ Judgment of the Court of Justice of 11 July 1996, SFEI and Others, C-39/94, ECLI:EU:C:1996:285, paragraph 60

⁵ <http://www.ihiplc.com/>

⁶ As defined in Article 2 (f) and (g) of Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (OJ L 318, 17.11.2006, p. 17).

⁷ See also Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (OJ C 8, 11.1.2012, p. 4), paragraph 33.

⁸ Notices From European Union Institutions, Bodies, Offices And Agencies European Commission; *Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (2016/C 262/01)*, Para 39

⁹ Judgment of the Court of Justice of 16 May 2002, France v Commission (Stardust), C-482/99, ECLI:EU:C:2002:294, paragraphs 55 and 56. See also the Opinion of Advocate General Jacobs of 13 December 2001, France v Commission (Stardust), C-482/99, ECLI:EU: C:2001/685, paragraphs 65 to 68.

iii. **The Government of Malta would be giving IHI numerous advantages**

The actual aid to IHI plc takes various forms in the concession:

(1) Asset/Liquidity Injection in the Company

The concession to IHI plc is for public land which has been conservatively estimated to have a value much higher than what is being proposed. This land has been conceded to IHI plc for values which are far less than the true economic market value of the property. This therefore is an asset or liquidity injection in the company.

(2) Right to speculate and transfer rights (even if at a premium)

Article 4 of the draft concession clearly states that IHI plc have the right to transfer its rights under the concession to third parties without the specific consent of the Government. This means that IHI will also have the power to speculate over government property given that IHI have the right to redeem and transfer to third parties, even if at a premium in their favour!

(3) Other favourable economic benefits in the concession

- The Government of Malta is agreeing to terminate all emphytheutical and sub-emphytheutical concessions made to IHI limitedly, insofar as it allows the Government to remove the restrictive condition imposed on IHI.¹⁰
- The term of the new concession agreement to be adopted will be of 99 years, effectively extending the term of the original concessions.¹¹
- Following the lapse of term mentioned in the preceding advantage, IHI will have the right of first refusal, "to retain and or otherwise to take over the Emphytheutical site under any title [...]"¹²
- 3192 sqm of the area designated for this additional development of commercial offices and private residential units, shall be given by the Government of Malta to IHI **without**

¹⁰ Amended Emphytheutical Concession, page 6.

¹¹ Ibid, page 10.

¹² Ibid, article 2, page 12

any imposition on IHI to pay ground rent. IHI will be receiving an emphyteutical concession for 3192sqm for free.¹³

- Even though a Base Ground Rent is being agreed to, IHI shall have no obligation to pay said ground rent for any portion of land that is being demolished, constructed and developed. IHI would effectively be in possession of Government land without any obligation to pay rent prior to the completion of the works. This grants IHI the advantage of being in control of when to pay or not to pay the ground rent due.¹⁴
- IHI have publicized the fact that as compensation, apart from the amended Base Ground Rent, they shall be paying the Government a one-time premium amounting to 17,000,000 Euros. However, the draft agreement states that 13,000,000 Euros of the said amount shall be payable to the Government only if the full development permits are issued. If no permits are issued, Government will receive only 4,000,000 Euros of the original 17,000,000 Euros.¹⁵
- IHI has the possibility of forgoing, **at its own discretion**, the entire project if the permits for 25% of the development area are not obtained.¹⁶
- An additional concession is also being made to IHI, whereby any land that is reclaimed from the sea by IHI, is to be considered developable and would be bound by the same conditions imposed on the land where commercial offices and residential offices are to be built.¹⁷ This not only provides an incentive to IHI to reclaim as much land as possible from the sea, but it also puts all of its competitors, and the Government of Malta itself, at a disadvantage in relation to the same land being reclaimed.
- IHI and the Government of Malta would also be agreeing to amend the entire agreement if the financial circumstances indicate that this would be more advantageous to IHI.¹⁸

IHI plc has received an economic advantage which it would not have obtained under normal market conditions,¹⁹ placing it in a more favourable position compared to that of its competitors.²⁰

¹³ Ibid, article 3.1, page 12

¹⁴ Ibid, article 3.8, page 13

¹⁵ Ibid, article 3.10, page 14

¹⁶ Ibid, article 3.11, page 14

¹⁷ Ibid Article 7.1, page 14

¹⁸ Ibid Article 26, page 30

¹⁹ Judgment of the General Court of 6 March 2003, Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v Commission, Joined Cases T-228/99 and T-233/99, ECLI:EU:T:2003:57, paragraph 208.

²⁰ See, to that effect, Judgment of the Court of Justice of 5 June 2012, Commission v EDF, C-124/10 P, ECLI:EU:C:2012:318, paragraph 90; Judgment of the Court of Justice of 15 March 1994, Banco Exterior de España, C-387/92, ECLI:EU:C:1994:100, paragraph 14; Judgment of the Court of Justice of 19 May 1999, Italy v Commission, C-6/97, ECLI:EU:C:1999:251, paragraph 16.

It is manifestly evident that the Government of Malta will not be acting as a Market Economy Operator would in these circumstances.

iv. **This grant distorts competition**

A measure granted by the State is considered to distort or threaten to distort competition when it is **liable to improve the competitive position of the recipient compared to other undertakings with which it competes.**²¹

IHI plc are huge commercial players in three distinct sectors:

- 1) Hoteliers
- 2) Restaurateurs, outside catering, aviation (on board) catering;
- 3) Real Estate development

This grant will have a serious impact in various forms. The asset injection in IHI will allow IHI to compete unfairly with third party competing hotelier and catering companies. The economic injection will allow the company to operate in a position of strength competing unfairly with other commercial enterprises in the same sectors.

In real estate, IHI are being given property at prices which are substantially below market prices and with advantageous payment terms. This will effect negatively property owners, developers and real estate agents who have invested heavily in private property and land in the area.

Above all, the terms of the concession are so advantageous that many private companies have expressed interest to develop the said land under the same or similar terms. They were not offered any chance to participate. Finally, the new concession will have serious and long standing effects on the overall economy of Malta effecting intra-State trade within the EU. All

²¹ Judgment of the Court of Justice of 17 September 1980, *Philip Morris*, 730/79, ECLI:EU:C:1980:209, paragraph 11; See also Judgment of the General Court of 15 June 2000, *Alzetta*, Joined Cases T-298/97, T-312/97 etc., ECLI:EU:T:2000:151, paragraph 80.

sectors in which IHI plc is doing business are characterized by cross-border investments in the EU. This applies also to IHI itself.

IHI does not limit its operations to the Maltese market. IHI is also heavily invested across the European Union, namely in the United Kingdom, in Portugal, in Hungary, in the Czech Republic, and in Belgium.²² Therefore, any State aid conceded to IHI by the Government of Malta will not only distort the competition and trade in Malta, but can also have effects across the European Union, particularly within the Member States mentioned.

It is for these reasons that we are bringing formally this information to your attention. The clients we represent are expressly reserving their rights to proceed with a formal report to the European Commission, as well as to other relevant authorities, on this clear breach of State Aid regulations. They also expressly reserve their right to proceed judicially for breach of local and European rules relating to state aid, competition and public procurement.

We hope however that through your able intervention, this concession will NOT be granted.



Dr Joseph Camilleri

cc. Commissioner Perit Karmenu Vella
Maltese Delegation, European Parliament
European Commission Representation in Malta

²² <http://www.ihiplc.com/our-portfolio-02>