

Qorti ta' l-Appell  
(Kompetenza Inferjuri)

Imħallef Anthony Ellul

Appell numru:- 93/2013/1

**GO p.l.c.**  
**(appellanti)**

**Vs**

**L-Awtorità ta' Malta dwar il-Komunikazzjoni**  
**(appellata)**

4 ta' Ġunju, 2018.

1. Permezz ta' rikors preżentat fil-25 ta' Marzu 2013, is-soċjetà GO p.l.c., b'referenza għad-Deciżjoni tal-Awtorità ta' Malta dwar il-Komunikazzjoni tas-6 ta' Marzu 2013 dwar *'Market 4 - Wholesale Unbundled Infrastructure Access Market – Identification and Analysis of Markets, Determination of Market Power and Setting of Remedies – Final Decision'* ippubblikata fis-6 ta' Marzu 2013, talbet lit-Tribunal: (i) jirrevoka jew jannulla d-deciżjonijiet numerati 4.3 u 5.1 mogħtija mill-Awtorità intimata u a tenur ta' l-Artikolu 39(1) tal-Kap.418 tal-Liġijiet ta' Malta jirreferi l-kwistjoni lura lill-Awtorità ta' Malta Dwar il-Komunikazzjoni; u (ii) jirrevoka jew jannulla d-deciżjoni numerata 5.5 kollha jew partijiet minnha mogħtija mill-intimata u a tenur ta' l-Artikolu 39(1) tal-Kap.418 tal-Liġijiet ta' Malta jirreferi l-kwistjoni lura lill-Awtorità ta' Malta dwar il-Komunikazzjoni.
2. Permezz ta' risposta<sup>1</sup> ppreżentata fid-29 ta' April 2013, l-Awtorità ta' Malta dwar il-Komunikazzjoni wiegħbet illi in linja preliminari t-Tribunal ma għandux il-*vires* li jirreferi l-kwistjoni lura lill-Awtorità f'każ li l-appell tas-soċjetà rikorrenti jintlaqa', iżda se mai, f' każ li t-Tribunal iħassar *in toto* jew *in parte* d-deciżjoni appellata, tkun l-Awtorità li jkollha tifli l-impatt regolatorju ta' tali deciżjoni u tara jekk ikunx hemm bżonn ta' xi forma ta' azzjoni regolatorja da parti tagħha. Fil-mertu opponiet għall-appell tas-soċjetà GO p.l.c. u talbet li l-istess jiġi miċħud bl-ispejjeż, u minflok tiġi kkonfermata d-Deciżjoni appellata fit-totalità tagħha.

---

<sup>1</sup> Fol. 185 et seq.

3. Permezz ta' sentenza datata 23 ta' Marzu 2015, it-Tribunal ddecieda l-appell tas-soċjetà GO p.l.c. kif ġej:

*'Fid-dawl ta' dan kollu osservat it-Tribunal iqis li l-aggravji sollevati mis-soċjetà Rikorrenti fir-rigward tad-Deciżjoni ta' l-Awtorità Intimata dwar Market 4, in partikolari fir-rigward tad-deciżjonijiet numerati 4.3, 5.1 u 5.5, ma humiex ġustifikati u b' hekk ma jisthoqqux li jiġu milqugħa.*

*Għal dawn ir-raġunijiet it-Tribunal jaqta' u jiddeciedi billi jiċċad l-appell tas-soċjetà Rikorrenti mid-deciżjonijiet numerati 4.3, 5.1 u 5.5 tal-Market 4 –Wholesale Unbundled Infrastructure Access Market – Identification and Analysis of Markets, Determination of Market Power and Setting of Remedies, Final Decision publikata fis-6 ta' Marzu 2013 u minflok jikkoferma l-istess imsemmija deciżjonijiet.*

*L-ispejjez ta' dawn il-proċeduri għandhom jiġu sopportati interament mis-soċjetà Rikorrenti.'*

4. Illi minn din is-sentenza appellat s-soċjetà GO p.l.c. Fil-qosor l-aggravji tagħha huma:

- i. rigward il-lanjanza dwar in-nuqqas ta' trasparenza, nuqqas ta' oġġettività, proporzjonalità u legalità tad-deciżjonijiet enumerati 4.3. u 5.1. kontenuti fid-Deciżjoni tal-Awtorità appellata dwar is-suq tal-*Wholesale Unbundled Infrastructure Access* (Market 4), it-Tribunal ma kellux jasal għall-konkluzjoni li dan l-aggravju huwa bażat fuq interpretazzjoni superficjali tal-qafas regolatorju li jirregola u jiddetta s-settur tal-Komunikazzjonijiet Elettronici u tad-Deciżjoni ta' l-Awtorità intimata dwar Market 4. Tinsisti illi kuntrarjament għal dak deciż mit-Tribunal:

- hija qatt ma nnegat li Market 4 u Market 5 huma distinti iżda ppruvat biss tispjega r-relazzjoni bejniethom;
- ir-raġuni għalfejn Market 4 qed jiġi sottopost għal *ex ante regulation* ħarġet biss waqt il-kontro-eżami ta' Stefan Piott u t-Tribunal ma setgħax iġġustifika tali nuqqas b' referenza għal dokument ta' konsultazzjoni li ppreċeda d-deciżjoni appellata ladarba tali raġuni ma ġietx esplicitament indikata fid-deciżjoni tal-Awtorità, ossija, l-Att Amministrattiv. F' kull każ, ir-referenza li għamel it-Tribunal mhijiex pertinenti;

Tikkonkludi għalhekk illi kuntrarjament għal dak deciż mit-Tribunal, l-Awtorità appellata ma mxietx b' mod ekwu u trasparenti u fuq il-prinċipju tal-ġustizzja naturali kif rikjest mil-liġi sabiex waslet għad-Deciżjoni appellata; u

- ii. tisħaq li a tenur tar-Regolament 5(3) tar-Regolamenti dwar Networks u Servizzi ta' Komunikazzjonijiet Elettroniċi (Ġenerali) (Legislazzjoni Sussidjarja 399.28), hija m' għandiex dominanza u/jew is-settur in kwistjoni għandu jiġi determinat kompetittiv b' dan illi l-ebda obbligu ma kellu jiġi mpost fuqha u t-Tribunal ma kellux jikkonkludi li tali kontestazzjoni m' hijiex ġustifikata peress li hija bbażata fuq konsiderazzjonijiet għal kollox żbaljati tal-kuncett ta' *Significant Market Power* (SMP) u applikazzjoni għal kollox barra mill-kuntest reali tiegħu tal-prinċipju ta' *indirect constraints*;
5. Illi permezz ta' risposta datata 30 t' April 2015, l-Awtorità appellata rreplikat għal dawn il-lanjanzi u talbet li s-sentenza appellata mogħtija mit-Tribunal fit-23 ta' Marzu 2015 tiġi kkonfermata u l-appell ta' GO p.l.c. miċħud.

**Ikkunsidrat:**

6. Illi l-fatti fil-qosor huma s-segwent:
- Fis-6 ta' Marzu 2013 l-Awtorità Intimata ppubblikat żewġ Deċiżjonijiet intitolati:
    - *Market 4 – Wholesale Unbundled Infrastructure Access Market – Identification and Analysis of Markets, Determination of Market Power and Setting of Remedies – Final Decision* u
    - *Market 5 – Wholesale Broadband Access Market – Identification and Analysis of Markets, Determination of Market Power and Setting Remedies – Final Decision*;
  - Permezz tal-imsemmija deċiżjonijiet, l-Awtorità appellata analizzat is-swieq surriferiti f'Malta għall-fini li:-
    - tiddefinixxi s-suq rilevanti;
    - tiddetermina jekk xi operatur għandux *Significant Market Power* (SMP) f' dak is-suq; u
    - tistabbilixxi l-obbligi li għandhom jiġu mposti fuq dak l-operatur li waħdu jew flimkien ma oħrajn jitqies dominanti f' dak is-suq.
  - Għal dak li jirrigwarda '***Market 5***', ossija, l-***Wholesale Broadband Access Market***, l-analizi li għamlet l-Awtorità appellata wasslitha għas-segventi konkluzjonijiet:

**'3.4 Decision on the market definition**

*According to the analysis carried out and evidence available to the MCA, the MCA concludes that the wholesale broadband market has a national geographical scope and:*

- *includes wholesale broadband access over DSL*
- *includes wholesale broadband access over cable*
- *excludes wholesale broadband access over WiMAX*
- *includes wholesale broadband access over fibre*
- *includes DSL and cable self supply.'*

#### **'4.4 Decision on the assessment of SMP**

*Throughout its analysis, the MCA has found that Melita and GO could not act independently of each other and, ultimately, independently of other players. Consequently, the MCA considers that at present there is no clear evidence to support a finding of single market dominance at the wholesale level.*

*Furthermore, given the similar positions held by Melita and GO at the wholesale level, the MCA carried out a further assessment for the potential finding of joint dominance.*

*In its last market review in 2008, the MCA carried out an extensive review of the conditions which would lead to joint dominance. Since then, the retail market has undergone a positive evolution with a greater differentiation between the behaviour and positions of GO and Melita in 2012 than there was in 2008. As a result, the MCA believes that there is no sufficient evidence to prove that GO and Melita enjoy a joint dominant position.*

*Therefore, the MCA declares that no operator in the wholesale broadband access market has been demonstrated to enjoy a position of SMP'*

#### **'5.2 Decision on the non imposition of remedies**

*Currently no regulatory obligations exist in the market. Given that no SMP designation is made in this market, the MCA will not impose any ex-ante regulatory obligations on the Maltese wholesale broadband market.'*

- L-ebda parti mid-Deciżjoni ta' l-Awtorità appellata dwar Market 5 ma ġiet kontestata. Fil-fatt fin-nota ta' osservazzjonijiet, l-appellanti kkonfermat li d-deciżjoni dwar il-Market 4 hi l-oġġett ta' dawn il-proċeduri (ara paragrafu 4.2).
- Għal dak li jirrigwarda '**Market 4**', ossija, l-**Wholesale Unbundled Infrastructure Access Market**, l-analiżi li għamlet l-Awtorità appellata wasslitha għas-segweni konkluzjonijiet:

#### **'3.3 Decision on the market definition**

*From the analysis outlined above, and in line with the Commission's recommendations, the MCA concludes that Market 4 is national in scope:*

- *includes all unbundled access (including shared access) products and services provided via the existing copper network (including access to the sub-loop)*
- *includes unbundled access services over fibre*
- *excludes wholesale services provided over cable*
- *excludes wholesale broadband access services'*

#### **'4.3 Decision on the assessment of SMP**

*Based on the analysis and evidence above, the MCA considers that GO enjoys SMP in the market for wholesale unbundled infrastructure access services.*

*This conclusion is supported by a number of factors including GO's position as sole provider in the market, its vertical and horizontal integration, its economies of scale and scope, and the lack of countervailing buyer power.'*

#### **'5.1 Potential competition problems**

*'The MCA identified that as a result of the SMP position held by GO in the market there is a risk that GO may engage in discriminatory practices and/or exercise either vertical or horizontal leveraging.*

*If unregulated GO may engage in both price and nonprice discrimination that would effectively foreclose market entry. The MCA believes that non-price leveraging strategies such as denial of access, the discriminatory use or withholding of information, delaying tactics, quality discrimination and the imposition of undue requirements on, and with respect to, potential alternative service providers at the downstream level, may contribute significantly to the creation of a non-competitive environment.*

*Without proper regulation, GO may resort to pricing strategies that give rise to a margin squeeze. GO is also able to access economies of scale and scope that are not so readily available to other operators competing on the downstream market, and therefore GO may exercise additional pressure on the margins of these operators. GO may also use other price-leveraging strategies such as price discrimination and cross-subsidisation.*

*The MCA considers that horizontal leveraging applies when the dominant undertaking uses its position in one market to exert undue influence on other markets at the same level in the value chain. This form of leveraging can be exercised by GO as it operates in a number of horizontal wholesale markets and can potentially leverage its power from one market to another.'*

#### **'5.5 Decision on the imposition of remedies**

*The MCA has concluded that GO holds SMP in the market for wholesale unbundled infrastructure access and shall therefore comply with the following obligations.'*

#### **'5.5.1 Access for copper products and services**

*In accordance with Article 15 of the ECNSR, GO shall:*

- *continue to offer wholesale unbundled access to the local loop and sub loop (including shared access) and associated facilities, and accommodate reasonable requests for access to service variants*
- *give OAOs access to specified network elements and/or associated facilities, where such access is required for the purpose of the provision of wholesale unbundled access to the local loop and sub loop*
- *provide co-location or other forms of facility and site sharing, where applicable for the purpose of unbundled local loop and sub loop services*
- *provide access to backhaul services for the purpose of unbundling of the local loop and sub loop, including Ethernet services, dark fibre and duct access.*

*Go is therefore required to negotiate in good faith with undertakings requesting any of these access services.*

*The MCA believes that GO should provide the necessary information relevant to the access obligation to OAOs. As a consequence, GO shall provide access to technical interfaces, protocols or other key technologies that are necessary for the interoperability of services, and the operational support systems or similar software that is necessary to ensure fair competition in the provision of unbundled local loop services.*

*In particular, GO is to offer service level agreements (SLAs) to access seekers with respect to the provision of access to the local loop. This provides alternative operators with certainty as to the supply and repair of the wholesale input and hence allows them to compete in the downstream market.*

*Go must provide all the aforementioned access-related remedies in a fair, timely and reasonable fashion and in conformity with the appropriate provision of its RUO.'*

#### **'5.5.2 Access for fibre (FTTH) products and services**

*GO has started to deploy an FTTH network based on a PON configuration. In accordance with Article 15 of the ECNSR the MCA is therefore directing GO to offer a virtual unbundling local access (VULA) product where the FTTH network has been deployed. GO is required to negotiate in good faith with access seekers making a reasonable request for VULA access services. Where negotiations fail, the MCA shall intervene to determine whether such a request was reasonable or otherwise. In case of a dispute between the parties, when assessing the reasonableness or otherwise of a request for VULA access, the MCA shall take into consideration the technical and commercial terms under which the request is*

*being made, as well as the access seeker's necessity for such a wholesale input. The MCA shall consider each request on a case by case basis.*

*The obligation to negotiate a VULA access offer shall come into effect from the date of publication of this decision.*

*Given the very recent announcement of the FTTH deployment, and the fact that a VULA offer will take some time to be compiled by GO and approved by the MCA, the MCA is directing GO to engage into commercial negotiations with access seekers until such time that a regulated VULA offer is completed. If during this period a commercial agreement is reached between GO and an access seeker, the MCA will consider taking this agreement as a basis for the VULA offer, subject that this is also provided to other access seekers on a transparent and nondiscriminatory basis. The MCA maintains the right to revise, amend and effect changes to this offer should such course of action be required.*

*Following the publication of this decision the MCA shall immediately start a consultative process with GO in order to establish the technical aspects and terms and conditions of the VULA offer.'*

### **'5.5.3 Non-discrimination**

*In accordance with Regulation 13 of the ECNSR, GO, as a vertically integrated provider, is obliged to:*

- apply equivalent conditions in equivalent circumstances to other undertakings providing equivalent services, and*
- provide services and information to access seekers under the same conditions (including timescales) and of the same quality as it provides for its own downstream provider.*

*The obligation of non-discrimination covers both price parameters as well as non-price parameters. This obligation ensures that GO does not withhold information, employ delaying tactics, impose undue requirements, provide low or discriminatory quality, engage in strategic design of products, and make discriminatory use of information which would put competing providers, and in turn consumers, at a disadvantage.*

*This obligation shall apply equally to copper based access products as well as fibre based products.'*

### **'5.5.4 Transparency for copper products and services**

*In accordance with Regulation 12 of the ECNSR GO is required to:*

- continue to maintain and publish a reference unbundling offer (RUO) for unbundled local loops and sub loops and associated facilities*

- *give a detailed description of the relevant offerings broken down into components according to market needs, and the associated terms and conditions including prices*
- *comply with its obligation to provide the minimum list of items to be included in a reference offer as set out in the Third Schedule to the ECNSR*
- *continue to provide and publish appropriate descriptions, order forms and processes for unbundling services, the details of which are to be determined on a case-by-case basis*
- *continue to be compliant with the MCA's decision related to local loop unbundling and GO's RUO, in particular as regards the provision of information related to its main distribution frames (MDFs) and co-location facilities, SLAs, timelines and determination of charges not established a priori.*

*The MCA reserves the right to specify the precise information to be included in the RUO, the level of detail required and the manner of publication.*

*In relation to access to ducts and dark fibre specifically serving as backhaul to local loop and sub loop unbundling, GO is not required to publish in the RUO the detailed conditions for access to these services. The technical conditions and pricing related to duct access and dark fibre are subject to commercial negotiations and the MCA may intervene on a case-by-case basis in the event of failed negotiations. This is without prejudice to any other general obligations at law that may be applicable to the sharing of passive infrastructure.*

*In respect of Ethernet capacity for the purpose of backhaul services, GO is directed to follow all the conditions set in the decision entitled "MCA decision on the definition, assessment of competition and regulation of leased line markets". In relation to the pricing for Ethernet connections GO shall use the regulated pricing structure as set by the MCA. The proposed prices are currently under consultation – Local Dedicated Capacity – Pricing of Leased Lined and Ethernet Connections.'*

#### **'5.5.5      Transparency for fibre products and services**

*The MCA has already taken steps to ensure the GO's RUO reflects the migration to FTTC. GO's RUO shall continue to be compliant with the MCA's decision of November 2011 that sets out the rules that regulate GO's ongoing migration to FTTC, in particular the obligation by GO to inform OAOs in advance of any exchange decommissioning. GO shall also continue to comply with the TVA obligation in the current form.*

*Regarding the VULA obligation, as stated earlier on the MCA shall immediately start working with GO in order to develop a VULA reference offer covering its FTTH network. The MCA is directing GO to provide a VULA reference offer to the MCA by no later than 31st December 2013. The MCA shall during this period consult with GO on the exact details that need to be set in this reference offer.*

*As stated earlier on, in the case that GO and any access seeker conclude a commercial agreement for VULA access the MCA will consider adopting such*



*agreement as the reference offer. In the case that during this period no access is requested or no agreement is reached, GO shall provide the MCA with its VULA offer by the 31st December 2013.*

*In addition to the above, GO is also obliged to continue to provide detailed quarterly updates to the MCA on its network upgrade in particular on any extensions of the rollout of FTTH. Whilst, the MCA has already informed GO on the type of information that it needs to provide, the MCA reserves the right to make further changes to such requests.'*

#### **'5.5.6 Price control and cost accounting**

*In the light of the risk that GO may charge excessive prices for wholesale access, the MCA shall continue to impose the obligation of cost orientation on GO for the setting of prices for local loop and sub loop access services. In setting these copper access prices the MCA shall continue using the same costing methodology currently applied.*

*As stated earlier, GO has the obligation to negotiate in good faith all reasonable requests for access in relation to duct access and dark fibre for the purposes of backhaul services. The MCA believes that access to these facilities should be granted on commercial terms. Consequently, GO is not obliged to publish in its RUO the prices of the duct access and dark fibre products. Nevertheless, in the event that commercial negotiations fail the MCA shall uphold the principle of cost orientation to set the prices for duct access and dark fibre products used for backhaul on a case by case basis.*

*The MCA shall also uphold the principle of cost orientation when setting the price of VULA access as set forth in the Commission's NGA Recommendation. However, in the event that a VULA offer is concluded on commercial terms the MCA will consider adopting that agreement including the prices set therein, as a basis for the reference VULA offer. In addition, where deemed necessary and justified, the MCA may decide to adopt other forms of price control for the setting of VULA prices - such as through the use of economic replicability tests - should this be in the interest of consumers. Any such changes to the price control obligation will be duly consulted upon with all stakeholders prior to coming into effect.*

*In case that the MCA will have to set the price for VULA, in accordance with Regulation 16 of the ECSNR, and in order to encourage FTTH investments by GO, the MCA shall be taking into account the provisions on profitability as stated in the NGA Recommendation. In order to supplement the cost orientation obligation, GO shall continue to apply a cost accounting system which will provide the MCA with detailed information regarding GO's product costs and ensure that fair, objective and transparent methodologies are followed by the operator in allocating costs to the identified regulated products. GO shall continue to support such a system by virtue of the MCA decisions on the implementation of cost-based accounting systems. These decisions will remain in force until such time as the MCA issues new guidelines. The cost accounting obligation shall also be applicable to fibre based products.'*

### **'5.5.7 Accounting separation**

*In accordance with Regulation 14 of the ECNSR, GO shall continue to apply the present accounting separation system for copper access services. In this regard, GO shall continue to be subject to the accounting separation obligation described in the MCA decision on Accounting Separation.*

*Given that the FTTH deployment and take-up are still negligible, the MCA believes that it is not proportionate to extend the accounting separation to cover fibre access products at this very early stage of deployment. The MCA believes that such a burden would be disproportionate at this stage, as the costs would outweigh the practical benefits resulting from implementation of this remedy. Nonetheless, the MCA reserves the right to impose the accounting separation obligation should it consider that the market has developed enough to warrant such a change. The MCA will continue to monitor the market, in particular the deployment of FTTH by GO, to ensure that the remedies set above remain justified and proportionate. The MCA reserves the right to revise any of these obligations at any time in line with changing market realities.'*

- Is-soċjetà appellanti ħassitha aggravata limitatament mid-deċiżjonijiet numerati **4.3**, **5.1** u **5.5** tad-Deciżjoni ta' l-Awtorità appellata dwar **Market 4** u konsegwentement interponiet appell minnhom quddiem it-Tribunal ta' Reviżjoni Amministrattiva iżda l-appell tagħha gie miċħud filwaqt li l-imsemmija deciżjonijiet ġew konfermati;
7. Illi permezz tal-**ewwel aggravju** s-soċjetà appellanti tilmenta li t-Tribunal ma kellux jasal għall-konklużjoni li l-aggravju dwar l-allegata nuqqas ta' oġġettività, proporzjonalità u legalità tad-deċiżjonijiet enumerati 4.3. u 5.1. tad-Deciżjoni tal-Awtorità appellata rigward *Market 4* huwa bażat fuq interpretazzjoni superficjali tal-qafas regolatorju li jirregola u jiddetta s-settur tal-Komunikazzjonijiet Elettronici u tad-Deciżjoni ta' l-Awtorità intimata dwar *Market 4*.
8. L-appellanti tikkontendi li kuntrarjament għal dak deciż mit-Tribunal:
- i. qatt ma nnegat li *Market 4* u *Market 5* huma distinti minn xulxin u kull wieħed minnhom huwa suxxettibbli għal *ex ante regulation*, iżda ppruvat biss tispjega r-relazzjoni bejniethom;
  - ii. ir-raġuni għalfejn *Market 4* qed jiġi sottopost għal *ex ante regulation* ħarġet biss waqt il-kontro-eżami ta' Stefan Piott u t-Tribunal ma setgħax iġġustifika tali nuqqas b' referenza għal dokument ta' konsultazzjoni li ppreċeda d-deċiżjoni appellata ladarba tali raġuni ma ġietx esplicitament indikata fid-deċiżjoni tal-Awtorità, ossija, l-Att Amministrattiv. F' kull każ, ir-referenza li għamel it-Tribunal mhijiex pertinenti u ttieħedt mill-parti tal-analiżi preliminari li

għamlet l-Awtorità għas-suq retail tal-*broadband* li hija komuni kemm għal *Market 4* kif ukoll għal *Market 5*. L-appellanti tikkonkludi għalhekk illi kuntrarjament għal dak deċiż mit-Tribunal, l-Awtorità appellata ma mxietx b' mod ekwu u trasparenti u fuq il-principju tal-gustizzja naturali kif rikjest mil-liġi sabiex waslet għad-Deċiżjoni appellata;

9. Da parti tagħha, l-Awtorità appellata wiegħbet illi:-

- i. L-argument tas-soċjetà appellanti fis-sens li hija qatt ma qalet li *Market 4* u *Market 5* mhumiex distinti minn xulxin u kull wieħed minnhom suxxettibli għal *ex-ante regulation*, huwa kontraddett mill-argument li hija stess tagħmel aktar 'l quddiem fir-rikors tal-appell fis-sens illi l-konkluzjonijiet tal-Awtorità kellhom ikunu l-istess fir-rigward taż-żewġt iswieq. L-Awtorità appellata tteni li huwa nkontestat li fattwalment *Market 4* u *Market 5* huma distinti, kif jirriżulta ukoll mid-definizzjonijiet maħruġa mill-Kummissjoni Ewropea. Id-distinzjoni bejn dawn iż-żewġt is-swieq *wholesale* hija netta peress li minn irid jixtri fuq livell *wholesale* prodott supplit f' *Market 4*, ma jixtrix prodott supplit f' *Market 5* inkwantu l-prodotti suppliti f'dawn iż-żewġt iswieq mhumiex *interchangeable*. Għalhekk *Market 4* jimmerita li jiġi analizzat mir-regolaturi tal-pajjiżi membri f' dik li hija l-livell ta' kompetizzjoni fis-suq. Għalkemm il-kundizzjonijiet ta' kompetizzjoni li jeżistu fis-swieq *retail* u *wholesale* huma relatati ma xulxin, ma humiex l-istess u fil-*Market 4* il-GO tgawdi minn monopolju sħiħ f'Malta. F'dan il-kuntest abbracjat dik il-parti tal-*Commission Recommendation of 20 September 2010 on regulated access to Next Generation Access Networks (NGA)* u *Commission Recommendation of 11 September 2013 on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment* citati mit-Tribunal a fol. 11 et seq. tas-sentenza appellata;
- ii. L-argument tas-soċjetà appellanti fis-sens illi l-Awtorità aġixxiet b' nuqqas ta' trasparenza u bi preġudizzju għaċ-ċertezza legali minnha meħtieġ mil-liġi huwa infondat in kwantu:
  - l-Awtorità appellata tat ir-raġunijiet tagħha għad-deċiżjonijiet regolatorji li ħadet f' kull stadju, inkluż id-deċiżjoni tas-6 ta' Marzu 2013;

- dak li xehed Stefan Piott jikkonferma dak li precedent qalet l-Awtorità kif gie nnotat mit-Tribunal fit-tieni paragrafu tal-paġna numru 16 tad-deċiżjoni appellata;
- il-bażi li fuqha l-Awtorità appellata ddecidiet li s-soċjetà appellanti għandha dominanza fil-*Market 4* u allura hemm bżonn regolamentazzjoni tirriżulta mit-Taqsima 4 tad-Deciżjoni tas-6 ta' Marzu 2013;
- jinjora l-proċess twil ta' konsultazzjoni li għamlet l-Awtorità qabel ma waslet għad-deċiżjoni tagħha u r-raġunijiet mogħtija fid-deċiżjoni nnifisha;
- is-soċjetà appellanti ma gābet l-ebda argument sostanzjat li jikkontesta l-analiżi riflessa fit-Taqsima 4 tad-Deciżjoni tas-6 ta' Marzu 2013 u l-konkluzjoni li l-GO tgawdi monopolju f' dan is-suq;
- l-*Consultation Document* gie kkwotat mit-Tribunal huwa parti integrali mill-proċess li wassal għad-Deciżjoni appellata u fil-fatt gie eżebit mill-appellanti stess flimkien mar-rikors promotur ('**Dok C**');
- f' diversi partijiet tad-deċiżjoni esplicitament jintqal li l-analiżi u l-konkluzjonijiet li saru fil-*consultation document* qed jiġu kkonfermati;
- l-analogija li qed tagħmel l-appellanti ma dik il-parti tad-deċiżjoni tat-Tribunal rigward metodoloġija tal-LRIC+ saret *fuori contesto* – Jirriżulta ċar mid-deċiżjoni Awtorità illi hija kienet għada ma ddecidietx liema metodoloġija ser tadotta dwar il-*price control* u li deciżjoni f' dan ir-rigward kienet se tittieħed biss wara konsultazzjoni pubblika;<sup>2</sup>

10. Din il-Qorti se tibda billi tindirizza l-ewwel parti ta' dan l-aggravju fejn l-appellanti tikkontendi li kuntrarjament għal dak deciż mit-Tribunal hija qatt ma nnegat li *Market 4* u *Market 5* huma distinti minn xulxin u kull wieħed minnhom huwa suxxettibbli għal *ex ante regulation*, iżda ppruvat biss tispjega r-relazzjoni bejniethom.

11. Hemm qbil li l-*Wholesale Unbundled Infrastructure Access Market (Market 4)* u l-*Wholesale Broadband Access Market (Market 5)* huma distinti minn xulxin u

<sup>2</sup> Hawnhekk l-Awtorità appellata tirreferi għal dokument ta' konsultazzjoni dwar il-metodoloġija dwar il-*price control għall-aċċess għal fibre network* fejn l-Awtorità tipproponi l-użu ta' *economic replicability test* u mhux l-użu ta' *cost orientation* bażat fuq LRIC+. Minn riċerka li għamlet din il-Qorti jirriżulta li deciżjoni fir-rigward ittieħdet fis-26 ta' Frar 2016 <https://www.mca.org.mt/sites/default/files/VULAdecisionFeb16.PDF>

kull wieħed minnhom huwa suxxettibbli għal *ex ante regulation*. It-Tribunal qatt ta x'jifhem mod ieħor. Għalhekk il-qorti ma taqbilx mal-appellanti.

12. Il-konsiderazzjonijiet tat-Tribunal kienu s-segwenti:

*'In sostenn ta' l-ewwel aggravju tagħha, u cioè li d-deċiżjonijiet numerati 4.3 5.1 fid-Deciżjoni ta' l-Awtorità Intimata dwar Market 4 ma humiex oġġettivi u proporzjonati w addirittura huma in vjolazzjoni tal-Liġi, is-soċjetà Rikorrenti tikkontendi li fid-dawl u a bażi ta' dak konstatat u konkluz mill-istess Awtorità dwar ir-retail market ta' broadband services u dwar Market 5, ossia li huma relattivament kompetittivi, l-Awtorità kellha tasal għall-konkluzzjoni li ma hemmx lok ta' regolamentazzjoni ta' Market 4 u b' hekk ma timponix obbligi regolatorji fuqha.*

*F'tali rigward is-soċjetà Rikorrenti tikkontendi li l-Wholesale Unbundling jitratta settur kreat b' mod artifiċjali u kemm xejn fittizju ...'*

13. Huwa evidenti li t-Tribunal ħass il-ħtieġa li jippuntwalizza d-distinzjoni bejn *Market 4* u *Market 5* proprju fid-dawl tal-allegazzjoni tas-soċjetà attriċi li *l-Wholesale Unbundling* jitratta *'suq kreat b' mod artifiċjali u kemm xejn fittizju'*. Fil-fatt, wara d-debita riferenza għar-Regolament 5(1) tar-Regolamenti dwar Networks u Servizzi ta' Komunikazzjonijiet Elettronici (Ġenerali), Legislazzjoni Sussidjarja 399.28, id-Direttiva Kwadru u r-Rakkomandazzjoni tal-Kummissjoni Ewropea, it-Tribunal ikkonkluda li:

*'... joħroġ b' mod ċar li **kuntrarjament għal dak pretiż mis-soċjetà Rikorrenti Market 4**, ossia s-suq li jitratta dwar Wholesale Unbundling Infrastructure Access, **ma huwiex settur kreat b' mod artifiċjali u kemm xejn fittizju anzi huwa suq speċifiku** li ġie identifikat mill-Kummissjoni Ewropea bħala suq suxxettibbli għal *ex ante regulation* u li minn żmien għal żmien għandu jiġi analizzat min-National Regulatory Authorities, fil-każ nostrali l-Awtorità Intimata, għall-fini li jiġi determinat jekk hemmx lok għal tali *ex ante regulation*. Għalkemm *Market 4* u *Market 5* entrambe jaqgħu taħt is-settur tal-Wholesale u jista' jitqies li l-istat ta' suq wieħed jeffettwa s-suq l-ieħor, b' daqshekk ma jfissirx li fihom infushom ma jikkonstitwixxux żewġt iswieq distinti minn xulxin ...*

*Fid-dawl ta' dan hija korretta s-sottomissjoni ta' l-Awtorità Intimata li **d-distinzjoni bejn iż-żewġt iswieq wholesale, u cioè l-Market 4 u l-Market 5 hija netta u hija dettata minn infrastruttura għal kollox differenti**. B'dan il-mod min irid jixtri, fuq livell wholesale, prodott supplit f' *Market 5* ma jistax jixtri prodott supplit f'*Market 4* għax il-prodotti fiż-żewġt iswieq m' humiex interchangeable. Huwa proprju għalhekk illi l-Kummissjoni Ewropeja toħloq din id-distinzjoni bejn iż-żewġt iswieq u tirrakkomanda, fil-Commission Recommendation of 17 December 2007 on relevant product and service markets within electronic communications sector susceptible to *ex ante regulation* in accordance with Directive 2002/21/ec of the European Parliament and of the Council on common regulatory framework for electronic communications networks and services, illi dawn iż-żewġt iswieq jiġu analizzati separatament<sup>3</sup>*

<sup>3</sup> Enfasi tal-Qorti.

14. M'hemmx dubju għalhekk li l-analizi li għamel it-Tribunal fl-ewwel parti tas-sentenza appellata kienet proprju ntiza sabiex tindirizza l-fatt li l-appellanti stess irreferiet għal *Market 4* bħala '*settur kreat b' mod artifiċjali u kemm xejn fittizju*' u mhux għax naqas li jifhem jew japprezza l-ilment tas-soċjetà appellanti.
15. It-tieni parti tal-aggravju tas-soċjetà appellanti jirreferi mbgħad għall-evalwazzjoni li għamel it-Tribunal dwar l-ilment li l-Awtorità appellata agixxiet b'nuqqas ta' trasparenza u b' mod li ppreġudikat iċ-ċertezza legali minnha meħtieġa *ai termini* tal-liġi. L-appellanti bbażat dan l-ilment fuq li: (i) fid-deċiżjoni appellata l-Awtorità ma għamlet ebda riferenza għall-analizi li kienet għamlet dwar is-suq *retail* fid-dokument ta' konsultazzjoni fejn sabet li dan is-suq kien kompettiv; (ii) ir-raġuni għalfejn *Market 4* qed jiġi sottopost għal *ex ante regulation* ħarġet biss waqt il-kontro-eżami ta' Stefan Piott.
16. Permezz ta' dan l-aggravju, l-appellanti tilmenta li t-Tribunal għamel apprezzament żbaljat ta' dan l-ilment għaliex it-test ċitat mit-Tribunal sabiex jiġġustifika l-aġir tal-Awtorità:
  - (i) ma jinstabx fid-deċiżjoni appellata iżda huwa parti mill-*Consultation Document* li ħareġ qabel ma ttieħdet id-deċiżjoni u li minnu m'hemmx appell peress li ma jikkostitwix deċiżjoni jew att amministrattiv – dan ukoll in linea ma dak li qal it-Tribunal a fol. 35 – 36 tas-sentenza appellata b' referenza għall-ilment tas-soċjetà appellanti dwar l-allegat użu tal-metodoloġija tal-LRIC+ biex jiġi stabbilit l-prezz għall-aċċess għal *fibres network*;
  - (ii) m'huwiex pertinenti in kwantu ma jirreferix għal periklu ta' *duopoly* kif stqarr Stefan Piott;
  - (iii) ttieħed mill-parti tal-analizi preliminari tal-Awtorità appellata tas-suq tar-*retail broadband* liema analizi kienet komuni għal *Market 4* u *Market 5* iżda l-konkluzjonijiet mil-huqa mill-Awtorità dwar dawn is-swieq ma kinitx l-istess in kwantu kien f'*Market 4* biss li nstab li s-soċjetà appellanti għandha poter sinifikanti fis-suq (SMP);
17. L-appellanti tikkonkludi għalhekk illi kuntrarjament għal dak deċiż mit-Tribunal, l-Awtorità appellata ma mxietx b' mod ekwu u trasparenti u fuq il-principju tal-gustizzja naturali kif rikjest mil-liġi sabiex waslet għad-Deċiżjoni appellata.

18. Kif ingħad akar 'l fuq, l-appellata wiegħbet li hija tat ir-raġunijiet tagħha għad-deċiżjonijiet regolatorji li ħadet f' kull stadju, inkluż id-deċiżjoni tas-6 ta' Marzu 2013 u dak li xehed Stefan Piott jikkonferma dak li preċedentement qalet l-Awtorità, kif ġie nnotat mit-Tribunal fit-tieni paragrafu tal-paġna numru 16 tad-deċiżjoni appellata.

19. Qabel xejn hu xieraq li din il-Qorti tirriproduci x'qal it-Tribunal fir-rigward:

*'Fil-fehma tat-Tribunal din il-kontestazzjoni jew aħjar akkuza tas-socjetà Rikorrenti fil-konfront ta' l-Awtorità Intimata hija għal kollox gratuwita u arbitrarja in kwantu bbażata fuq konsiderazzjoni u evalwazzjoni superficiali tal-proċess li jwassal għad-deċiżjonijiet finali ta' l-Awtorità Intimata.*

*Qabel ma' l-Awtorità Intimata tasal għad-deċiżjoni finali tagħha hemm proċess sħiħ li jibda b'konsultazzjoni pubblika ma' l-operaturi, entitatijiet u awtoritajiet oħra involuti u dana a tenur ta' dak provdut fl-Artikolu 6 tal-Framework Directive, liema konsultazzjoni tiġi segwita b' dokument li jkun fih ir-responses varji għall-konsultazzjoni u l-abbozz tad-deċiżjoni li a tenur ta' l-Artikolu 7 tal-Framework Directive, għandu jiġi notifikat lill-Kummissjoni Ewropea u lin-National Regulatory Authorities ta' l-Istati Membri l-oħra li jkollhom żmien xahar biex jagħtu l-kummenti tagħhom, jekk ikollhom, dwar ir-rimedji proposti mill-Awtorità Intimata. Huwa biss wara dan il-proċess kollu **u wara li tiegħu in konsiderazzjoni dak kollu li jirriżulta matulu** li l-Awtorità Intimata tagħti d-deċiżjoni finali tagħha.*

*Dan huwa dak li effettivament għamlet l-Awtorità Intimata fil-każ in eżami billi fl-ewwel lok ipubblikat id-dokument Wholesale Broadband Markets - Identification and Analysis of Markets, Determination of Market Power and Setting of Remedies – Consultation Document – fil-15 ta' Gunju 2012, li ittratta fid-dettal fost affarijiet oħra dwar ir-Retail Broadband Market, il-Market for Unbundled Access (Market 4) u il-Wholesale Broadband Market, ossia Market 5. Il-konsiderazzjonijiet, osservazzjonijiet u konsegwenti konkluzzjonijiet ta' l-Awtorità Intimata ġew sottomessi għall-konsultazzjoni mal-partijiet interessati fosthom is-socjetà Rikorrenti u dawn l-istess konsiderazzjonijiet, osservazzjonijiet u konkluzzjonijiet jiffurmaw, wara naturalment li għadda l-proċess kollu li jwassal għad-deċiżjoni finali, il-bażi tad-deċiżjonijiet ta' l-Awtorità Intimata kemm dwar Market 5 kif ukoll dwar Market 4. In effetti ġia fil-bidu tad-Deciżjoni ta' l-Awtorità Intimata dwar Market 4 l-istess Awtorità kjarment tipprovdi li this decision summarises the findings of a more detailed study that was published for national consultation on the 15th June 2012. During this consultation period the MCA received three responses from Melita p.l.c., GO p.l.c. and Vodafone Malta Ltd. Semplicement għaliex l-Awtorità Intimata ma qagħdetx terġa' tirrepeti dak kollu li hemm fil-Consultation Document ma jfissirx li ma ħaditx l-istess in konsiderazzjoni u li aġixxiet b' nuqqas ta' trasparenza u b' mod li ppreġudikat iċ-ċertezza legali li hija obbligata li tipprovdi ai termini tal-Liġi, anzi piuttost il-kuntrarju.*

*In effetti fil-konkluzjoni tagħha dwar il-retail broadband market,<sup>4</sup> liema konkluzjoni flimkien mal-konsiderazzjonijiet relattivi, jiġi ribadit, ġiet sottomessa għall-konsiderazzjoni tal-partijiet interessati waqt il-proċess ta' konsultazzjoni pubblika, l-*

---

<sup>4</sup> Fol. 115.

*Awtorità Intimata tgħid: as discussed in previous sections, the retail broadband market in Malta is well developed, with high penetration, attractive offers and overall a relatively competitive level. There are two vertically and horizontally integrated "incumbents" with two different infrastructures, each enjoying what can be assumed to be comparable economies of scale and scope. The incumbents compete on the basis of prices and products, thus bringing reasonably low prices and innovation, such as bundles and higher speeds. However, Vodafone has failed to make an impact on the market, which is increasingly moving towards multiple-play services. Also, despite the current good level of competition in the market, the two established incumbents may have a common long-term interest in protecting revenues from their existing customer base by reducing the level of competition at a later stage. The MCA will therefore pay close attention to forthcoming developments, and the impact these might have on the broadband markets.<sup>5</sup>*

*Fil-fehma tat-Tribunal minn din il-konkluzzjoni, kif ukoll in realtà mill-Consultation Document kollu kemm hu, toħroġ ċara l-posizzjoni ta' l-Awtorità Intimata fir-rigward tal-Broadband Markets minkejja l-fatt li sabet illi l-retail broadband market huwa relattivament kompetittiv u għalhekk id-Deciżjoni finali tagħha dwar Market 4 ma kellhiex tkun daqstant ta' sorpriża jew aħjar daqstant inkomprensibbli għas-soċjetà Rikorrenti daqskemm tagħti ad intendere li hi fil-proċeduri odjerni. In effetti anke **dak affermat minn Stefan Piott in kontro-eżami waqt is-seduta tat-8 ta' Jannar 2014 u li fuqu tishaq is-soċjetà Rikorrenti bħala prova ta' l-allegat n-nuqqas ta' trasparenza ta' l-Awtorità Intimata, jsib konferma f' din il-konkluzzjoni ta' l-Awtorità fejn kjarament tgħid li despite the current good level of competition in the market, the two established incumbents may have a common long-term interest in protecting revenues from their existing customer base by reducing the level of competition at a later stage. The MCA will therefore pay close attention to forthcoming developments, and the impact these might have on the broadband markets.**<sup>6</sup>*

*... Stefan Piott, rappreżentant ta' Analysys Mason, l-esperti inkarigati mill-Awtorità Intimata ... rrisponda: so in a very concise way just let me make this point: ... in all EU countries there is no intervention on the retail market and the regulators are focusing on the wholesale. Now to come back to your question ... yes there is effectively competition on the broadband market, however with the strength of having a market that will evolve to a duopolistic situation, what is important as a safeguard is to ensure potential market entry which I think is really important. If as we discussed already, market five is not regulated which is quite exceptional as regards to other EU countries, if you also remove any obligation to negotiate to have an access on the market four, it means that you won't have any control anymore on what's happening on the wholesale market and when Go and Melita are the only players with comparable products with no one able to get in the market on a relative short term basis, there the interest from an economic perspective, it makes sense. If you are the only two in the market and nobody can*

---

<sup>5</sup> enfasi tal-Qorti.

<sup>6</sup> Enfasi tal-parti citata mis-soċjetà appellanti fir-rikors tal-appell tagħha..



*get in, your interest is not to have some strong competition to maintain, maybe slightly increase in price and make as much margin as you can.'*

20. Jirrizulta inkontestat li d-deċiżjoni aħħarija tal-Awtorità tteħdet wara proċess sħiħ ta' konsultazzjoni li fih ippartecipat l-appellanti. Dan ġie spjegat ukoll fl-*'executive summary'* tad-deċiżjoni appellata fejn ingħad li:

*'In accordance with Article 9 of the Electronic Communications (Regulation) Act, the Malta Communications Authority (MCA) is obliged, amongst other things, to carry out reviews of competition in communications markets to ensure that regulation remains appropriate in the light of changing market conditions.*

*This decision sets out the MCA's conclusions on the market review of the wholesale unbundled infrastructure access market in Malta. In carrying out of this analysis the MCA was assisted by independent consultants Analysys Mason.*

*This decision summarises the findings of a more detailed study that was published for national consultation on the 15th June 2012. During this consultation period the MCA received three responses from Melita plc., GO plc., and Vodafone Malta Ltd.*

*As required by Regulation 7 of the Electronic Communications Networks and Services (General) Regulations, 2011, the MCA's proposals including the responses received during the national consultation, were notified to the European Commission (the 'EU Commission' or the 'Commission') and to other National Regulatory Authorities (NRAs) as well as the Body of European regulators (BEREC) on the 15th October 2012.*

*On the 15th November 2012 the Commission concluded its investigation and published its Comments Letter on this case. The MCA is taking utmost account of these comments in this final decision.*

***Based on the analysis carried out, the MCA arrives to the following conclusions.***<sup>7</sup> (enfasi tal-Qorti)

21. Għalkemm huwa minnu li l-*Consultation Document*<sup>8</sup> u r-*Response to Consultation and Draft Decision*<sup>9</sup> surriferiti huma dokmenti distinti mid-deċiżjoni finali hawn appellata, ladarba saru dawn id-dokumenti bħala tnejn għad-deċiżjoni finali, l-appellanti ma tistax tippretendi li d-deċiżjoni finali kellha tiġi analizzata *in vacuum*. Dan aktar u aktar meta d-deċiżjoni finali nnifisha esplicitament itteni li l-konkluzjonijiet raġġunti isibu l-bażi tagħhom fl-analiżi mwettqa u mfissra f' daww id-dokumenti. Dan bl-ebda mod ma jrendi d-deċiżjoni appellata priva minn trasparenza kif allegat mis-socjetà attriċi, anzi, pjuttost il-kontra.

---

<sup>7</sup> Fol 44.

<sup>8</sup> Fol. 73 et seq.

<sup>9</sup> Fol. 242 et seq.

22. Lanqas għandha raġun is-soċjetà appellanti tilmenta li t-Tribunal ma kellux jistrieħ fuq il-*Consultation Document* għaliex ma jikkostitwix deċiżjoni jew att amministrattiv, u minnu m'hemmx appell. Għalkemm huwa minnu li singolarment l-*Consultation Document* u r-*Response to Consultation and Draft Decision* mhumiex 'deċiżjoni' għal fini tad-definizzjoni ta' 'atti amministrattivi' li jistgħu jiġu riferuti għall-iskrutinju tat-Tribunal,<sup>10</sup> meta l-Qrati tagħna jistharrġu għemil amministrattiv jagħmlu dan fl-isfond tal-proċess sħiħ li wassal għad-deċiżjoni aħħarija.
23. F'dan l-isfond, kif ukoll fil-kuntest tal-fatt li **d-deċiżjoni appellata nnifisha esplicitament tirreferi għall-analiżi kontenuta fil-*Consultation Document*** maħruġ mill-istess Awtorità, l-ebda analogija ma tregi ma dak li qal it-Tribunal dwar l-użu tal-metodoloġija tal-LRIC+.
24. Dwar l-obbligu tal-*price control*, is-soċjetà appellanti tirreferi għal dokument maħruġ mill-Kummissjoni Ewropea fejn ingħad li l-Awtorità appellata kienet ipproponiet l-użu ta' dan il-metodu, ossija l-LRIC+. Madanakollu, l-Awtorità appellata mkien ma ssemmiet l-użu ta' *cost orientation* bażat fuq LRIC+ fid-dokument maħruġ minnha. Tgħid biss li f'każ li s-soċjetà appellanti tistabbilixxi 'VULA offer' fuq bażi kummerċjali, l-Awtorità kienet se tikkunsidra tadotta tali ftehim u l-prezzijiet hemm stabbiliti bħala l-baży tar-'*reference VULA offer*'. F'każ imbgħad li l-Awtorità tħoss il-ħtieġa li tadotta miżuri oħra ta' *price control*, pereżempju l-'*economic replicability test*', jekk dan jitqies fl-interess tal-konsumaturi, kienet se tikkonsulta mal-partijiet interessati qabel id-dħul fis-seħħ ta' tali miżura. Kien f' dan il-kuntest li t-Tribunal għustament osserva li kull lanjanza dwar il-metodoloġija tal-LRIC+ għall-iffissar tal-prezz għall-aċċess għal-*fibre* hija intempestiva u inappellabbli f'dak l-istadju in kwantu ma tirriżultax mid-deċiżjoni ta' l-Awtorità.
25. Fit-tieni lok is-soċjetà appellanti tilmenta ukoll li f' kull każ il-parti tad-dokument ta' konsultazzjoni kwotat mit-Tribunal mhijiex pertinenti in kwantu ma tirreferix għal periklu '*reali u mminent*' ta' *duopoly* u '*wisq anqas ma tiġġustifika jew tikkorabora li l-Awtorità irregolat il-Market 4, li hu suġġett għal dan l-Appell, minħabba xi periklu reali ta' duopoly kif stqarr Stefan Piott*' iżda kienet parti minn konkluzjoni milħuqa dwar is-suq tar-*retail* fejn ingħad li għalkemm kien hemm livell tajjeb ta' kompetizzjoni f' dan is-suq (*retail*) l-Awtorità kienet ser iżzomm għajjha fuq l-istess suq għall-eventwalità li l-Go u l-Melita jista' jkollha interess komuni *long term* li ma jibqgħux jikkompetu bl-istess ritmu u b' hekk

---

<sup>10</sup> Art 37 tal-Kap. 418.

per eżempju jgħollu l-prezzijiet. Tisħaq li din l-analizi la saret u wisq anqas ma tidher xi konklużjoni ta' sitwazzjoni eżistenti ta' *duopoly* fid-deċiżjoni appellata.

26. Dan l-ilment huwa infondat. Mistoqsi għalfejn inħasset il-ħtieġa li jiġi regolat *Market 4* ladarba kemm ir-*retail market* kif ukoll *Market 5* kienu '*effectively competitive*', *Stefan Piott* wieġeb:

*'as I mentioned in the retail market once again there is a question mark that in the medium term there is the risk that the market becomes a duopoly and therefore what is important is to make sure that there is a way for potential new entrance to enter the market and to push incumbent players in the future. On market five we did the analysis and there's no need for it to be justified. On the other hand, market four is basically the way by which potential players could be interested in getting in. So we know we have to recognise that no one is using the local loop products, and we did that obviously, so no one can at least buy the product for GO. However, what we found important is that there is the potentiality of someone that could be interested to actually buy this product or at least to negotiate with GO. This is because due to absence of any such obligation on GO, GO could say, "Well, sorry I don't have any obligation so why should I discuss with you?" to basically slow down the process and we may can come back to that relatively like regulation as regards to what has been done in some other countries. There is a way for MCA to intervene if someone is interested before it takes two to three years of discussion between the only player Vodafone and GO. What was important for us was the fact that if someone wants to step in, if suddenly the two established players say that they are not going to innovate any more or even they try to increase their prices, then someone who could be interested could step in and in a relatively short term could get into the market.'*<sup>11</sup>

27. Dak li spjega dan l-espert huwa l-ħtieġa ta' regolazzjoni tal-*Market 4*, f'liema suq is-soċjetà attriċi hija l-unika operatur, fil-kuntest tal-fatt li għalkemm is-suq retail huwa '*effectively competitive*' kien hemm ir-riskju li dan ma jibqax il-każ fil-**medium term**. Ix-xhud reġa tenna l-istess kuncett in *kontro-eżami*:

*'as I mentioned as I we discussed before, yes there is effectively competition on the broadband market, however with the strength of having a market that will evolve to a duopolistic situation, what is important as a safeguard, is to ensure potential market entry which I think is really important. If as we discussed already, market five is not regulated which is quite exceptional as regards to other EU countries, if you also remove any obligation to negotiate to have an access on the market four, it means that you won't have any control anymore on what's happening on the wholesale market and when Go and Melita are the only players with comparable products with no one able to get in the market on a relative short term basis. If you are the only two in the market and nobody can get in, your interest is not to have some strong competition to maintain, maybe slightly increase in price and make as much margin as you can.'*

---

<sup>11</sup> Fol. 433.

28. Isegwi għalhekk, kuntrarjament għal dak allegat mis-soċjetà appellanti, li l-bran ċitat mit-Tribunal dwar il-konklużjoni tal-Awtorità appellata fuq ir-*retail broadband market* fil-*Consultation Document* huwa pertinenti ħafna u effettivament jikkorabora *in parti* dak li qal Stefan Piott. Irid jinżamm amment tal-fatt li dak li qal Stefan Piott kien in risposta għal domanda speċifika, ossija, għalfejn inħasset il-ħtieġa li jiġi regolat *Market 4* fil-kuntest tal-fatt li r-*retail market* gie meqjus *reasonably competitive* u ma nħasset l-ebda ħtieġa li tiġi mposta *ex-ante regulatory obligation* fuq *Market 5*. Dan fil-kuntest tal-allegazzjonijiet li għamlet l-appellanti fir-rikors tagħha quddiem it-Tribunal. Min-naħa l-oħra il-bran ċitat huwa biss parti minn dokument ta' erba' u disgħin paġna f' proċess konsultattiv li wassal għad-deċiżjoni appellata, u kif tajjeb saħaġ it-Tribunal, irid jinqara' f' dak il-kuntest u jiġi nterpretat fil-qafas tal-analiżi sħiħa tas-swieq *broadband*. Fl-istess dokument ingħad li għalkemm ir-*retail broadband market* ma kienx fil-lista ta' swieq sugġetti għal *ex ante regulation* skont ir-rakkomandazzjoni tal-Kummissjoni, '*it is essential to review the retail broadband market given that the objective of wholesale regulation is to promote the development and competition on the retail market*'<sup>12</sup> u għalhekk, parti mid-dokument konsultattiv giet dedikata lill-analiżi ġenerali tar-*retail broadband market* fejn saret reviżjoni tal-fatturi ewlenin li jaffettwaw il-kompetizzjoni f'dan is-suq u l-iżvilupp tal-istess.
29. Il-fatt li l-analiżi tar-*retail broadband market* saret f'sezzjoni għaliha minn liema sezzjoni tnissel il-bran ċitat mit-Tribunal, ma jfissirx li l-konklużjonijiet ma jorbtux mal-kumpliment tal-analiżi tas-swieq *broadband*, *inter alia*, mal-ħtieġa li jiġi regolat *Market 4* fejn instab li s-soċjetà appellanti '*enjoys SMP in the market for the provision of wholesale unbundled access to the local loop*'. F'dan il-kuntest it-Tribunal kien korrett meta kkonkluda li l-lanjanza tas-soċjetà appellanti dwar l-allegata nuqqas trasparenza tad-deċiżjoni tal-Awtorità hija bbażata fuq evalwazzjoni superficjali tal-proċess konsultattiv li wassal għad-deċiżjoni tal-Awtorità appellata.
30. Fit-tielet lok is-soċjetà appellanti tilmenta ukoll li l-estratt mid-dokument ta' konsultazzjoni ċitat mit-Tribunal ttiehed mill-parti tal-analiżi preliminari tal-Awtorità appellata tas-suq tar-*retail broadband* liema analiżi kienet komuni għal *Market 4* u *Market 5* iżda l-konklużjonijiet mil-ħuqa mill-Awtorità dwar dawn is-swieq ma kinitx l-istess in kwantu kien f' *Market 4* biss li nstab li s-soċjetà appellanti għandha poter sinifikanti fis-suq (SMP).
31. Din il-Qorti tagħraf li fl-analiżi ta' *Market 5* kontentuta fil-*Consultation Document*, ġew ikkunsidrati bosta aspetti, fosthom li l-GO u l-Melita '*appear to*

---

<sup>12</sup> Fol. 82 tal-proċess.

*have similar positions in the wholesale market' iżda ma rriżultat li għandhom 'a joint dominant position'. Minkejja dan l-Awtorità waslet għall-konkluzjoni li 'given the similar positions held by Melita and Go at the wholesale level, the market merits a further assessment for the potential finding of joint dominance'.<sup>13</sup> Min-naħa l-oħra, fl-analiżi tas-suq for unbundled access, ossija Market 4 instab li 'based on the previous analysis and evidence, the MCA considers that GO enjoys SMP in the market for the provision of wholesale unbundled access to the local loop. This conclusion is supported by a number of factors including GO's position as sole provider in the market, its vertical and horizontal integration, its economies of scale and scope, and the lack of countervailing buyer power.'<sup>14</sup>*

32. Jirriżulta għalhekk li fl-analiżi tagħha l-Awtorità ezaminat bosa fatturi li minnhom irriżultaw diskrepanzi netti bejn il-Market 5 u l-Market 4. Isegwi għalhekk, kuntrarjament għal dak allegat mill-appellanti, li l-fatt li r-retail market instab li kien *effectively competitive* 'despite the good level of competition in the market, the two established incumbents may have a common long-term interest in protecting revenues from thier existing customer base by reducing the level of competition at a later stage' ma jfissirx neċessarjament li l-Awtorità kellha tasal għall-istess konkluzjoni dwar il-ħtieġa o meno ta' *ex ante regulation* fis-setturi rispettivi.
33. Għalhekk dan l-aggravju qed jiġi miċhud;
34. Illi permezz tat-**tieni aggravju** tagħha, l-appellanti tilmenta li t-Tribunal ma kellux jikkonkludi li l-kontestazzjoni tagħha ma hijiex ġustifikata in kwantu bbażata fuq konsiderazzjonijiet għal kollox żbaljati tal-kunċett ta' *Significant Market Power* (SMP) u applikazzjoni għal kollox barra mill-kuntest reali tiegħu tal-prinċipju ta' *indirect constraints* u tishaq li a tenur tar-Regolament 5(3) tar-Regolamenti dwar Networks u Servizzi ta' Komunikazzjonijiet Elettronici (Ġenerali) (Legislazzjoni Sussidjarja 399.28), hija m'għandhiex dominanza u/jew is-settur in kwistjoni għandu jiġi determinat kompetittiv b' dan illi l-ebda obbligu ma kellu jiġi mpost fuqha.
35. Hija għamlet ukoll referenza għall-qafas tal-liġijiet Ewropej dwar ir-regolamentazzjoni tas-settur tal-komunikazzjoni elettronika li ġew adottati fil-liġi Maltija permezz tal-Kap. 399, 418 u l-liġijiet sussidjarji li jaqgħu taħthom u r-Rakkomandazzjoni tal-Kunsill 2007/879/EC tas-17 ta' Diċembru 2007 li tiddistingwi bejn is-swieq *wholesale* u dawk *retail* u f' recital 2 tipprovdi li 'The

---

<sup>13</sup> Fol. 163 tal-proċess.

<sup>14</sup> Fol. 131 tal-proċess.

*objective of any ex ante regulatory intervention is ultimately to produce benefits for end-users by making retail markets competitive on a sustainable basis.* Iżid illi f' każ li operatur f' suq suġġett għall-analiżi jinsab dominanti, skont il-*Framework Directive* l-Awtorità għandha timponi **'appropriate specific regulatory obligations'** li jinsabu riprodotti fir-regolamenti 11 sa 19 tal-L.S.399.28. Tikkontendi li għaladarba s-suq tar-*retail broadband* huwa kompetittiv u huwa karatterizzat ukoll minn kompetizzjoni bejn ta' lanqas żewġ pjattaformi (dik tal-Go u tal-Melita) li jipprovdu servizzi distinti għax-xelta tal-konsumatur, u li m' hemmx problema ta' kompetizzjoni jew preġudizzju għall-konsumaturi u l-utenti, m'hemmx ġustifikazzjoni iktar għar-regolamentazzjoni u impożizzjoni ta' obbligi f' *Market 4*. Tikkontendi ulterjorment li t-Tribunal żbaljatament ikkonkluda li *indirect constraints* m' għandhomx jidhlu fl-analiżi tal-*Market 4*. L-appellanti tallega li filwaqt li dan huwa l-każ fir-rigward tal-fażi tal-*market definition*, skont il-Komunikazzjoni tal-Kummissjoni Ewropea, *indirect constraints* huma rilevanti fl-analiżi għal sejba ta' dominanza / *significant market power* u s-saħħa tal-Melita timponi fuqha *indirect constraints* li ma jippermettulhiex tgawdi posizzjoni ta' saħħa ekonomika jew dominanza. F'dan il-kuntest issottomettiet illi jekk din il-Qorti m' hijiex konvinta li ladarba s-suq tar-*retail broadband* instab kompetittiv l-appellanti ma kellix tinsab dominanti u tiġi imposta r-rimedji fis-Suq 4 skont l-interpretazzjoni tal-qafas legali kif eċċepit minnha, l-artikolu 267 tat-Trattat dwar il-Funzjonijiet tal-Unjoni Ewropeja jirrikjediha tirreferi l-kwisjoni lill-Qorti Ewropea.

36. Din il-Qorti se tibda billi tqis dik il-parti tal-aggravju dwar id-dominanza fil-*Market 4*. Hawnhekk is-soċjetà appellanti ttenni l-argument li għaladarba s-suq tar-*retail broadband* huwa kompetittiv u huwa karatterizzat ukoll minn kompetizzjoni bejn ta' lanqas żewġ pjattaformi (dik tal-Go u tal-Melita) li jipprovdu servizzi distinti għax-xelta tal-konsumatur, u li m' hemmx problema ta' kompetizzjoni jew preġudizzju għall-konsumaturi u l-utenti, m' hemmx ġustifikazzjoni iktar għar-regolamentazzjoni u impożizzjoni ta' obbligi f' *Market 4*.

37. F'dan ir-rigward, it-Tribunal għamel is-segweni konsiderazzjonijiet:

*'Jibda biex jiġi osservat li s-sejbien ta' SMP irid ikun in the relevant market li qed jiġi analizzat, ossia fil-każ in eżami fis-suq ta' Wholesale Unbundled Infrastructure Access – Market 4 in kwantu hija d-deċiżjoni ta' l-Awtorità Intimata dwar dak is-suq li qed tiġi kontestata. Dana joħroġ ċar kemm mill-Framework Directive kif ukoll mill-Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services. B' hekk una volta li jiġi identifikat is-suq rilevanti li għandu jiġi analizzat u wara li ssir l-analiżi ta' dak is-suq għall-fini li jiġi determinat jekk huwiex suffiċjentement kompetittiv o meno, trid tiġi analizzata il-posizzjoni ta' operatur jew operatori f' dak is-suq għall-fini li jiġi determinat jekk*

*tali operatur waħdu jew flimkien ma' oħrajn għandux Significant Market Power f' dak is-suq.*

*Il-fatturi li skond il-Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services li għandhom jiġu kkunsidrati għall-fini li jiġi determinat jekk hemmx operatur li waħdu jew flimkien ma' oħrajn għandux SMP in the relevant market huma s-segwenti: ... Wara li tagħti dan l-eleku mhux eżawrjenti l-Kummissjoni żżid li a dominant position can derive from a combination of the above criteria, which taken separately may not necessarily be determinative.*

*Meta tiġi kkunsidrata d-deċiżjoni ta' l-Awtorità intimata dwar SMP fis-suq ta' Wholesale Unbundled Infrastructure Access, ossia Market 4, jirriżulta b' mod ċar li l-istess Awtorità ħadet in konsiderazzjoni diversi fatturi skond kif hemm indikat fil-Commission Guidelines. In effetti l-Awtorità osservat illi given that GO is the sole provider of wholesale unbundled access in Malta, it implies that GO enjoys SMP in the provision of such services, even though no unbundled lines are currently in operation. Even if GO's self-supplied lines are included in the MCA's definition of the relevant market, this would imply that GO has 100% market share in the wholesale market for unbundled access, which would also suggest that GO has SMP in this market. To substantiate further the conclusion that GO holds a position of SMP, the MCA analysed a number of other factors that have an impact on competition in this wholesale market. Economies of scale and scope... sunk costs and infrastructure not easily replicable... vertical and horizontal integration... barrier to switching... countervailing buyer power. Apparti minn hekk l-Awtorità Intimata kkunsidrat ukoll il-fatt GO's roll-out of FTTC/H u the Maltese government's FTTH initiative li skontha jista' jkollhom impatt fuq is-suq rilveanti, ossia fuq Market 4.'*

38. Dwar l-allegata nuqqas ta' aderenza mal-qafas regolatorju, jirriżulta li d-deċiżjoni tal-Awtorità intimata dwar SMP fis-suq ta' *Wholesale Unbundled Infrastructure Access*, ossia *Market 4*, ittiegħdet wara d-debita konsiderazzjoni ta' diversi fatturi skond kif hemm indikat fil-*Commission Guidelines*. Din il-Qorti ttenni li l-fatt li r-*retail market* instab li kien *effectively competitive`despite the good level of competition in the market, the two established incumbents may have a common long-term interest in protecting revenues from thier existing customer base by reducing the level of competition at a later stage'*, ma jfissir neċessarjament li l-Awtorità kellha tasal għall-istess konklużjoni dwar il-ħtieġa o meno ta' *ex ante regulation* fiż-żewġ swieq *wholesale* kif pretiż mill-appellanti. Kif tajjeb ikkonstatat mit-Tribunal, *Market 4* jittratta dwar *Wholesale Physical Network Infrastructure* li m'hijiex faċilment replikabbli minn operatur ieħor. Għalhekk, ir-regolamentazzjoni *ex ante* ta' dan is-suq hija ferm importanti għaliex jekk is-swieq l-oħra ma humiex regolati in kwantu misjuba kompetittivi jew ta' l-inqas relattivament kompetittivi, l-operatur li jkollu posizzjoni b' saħħita f' dan is-suq, iktar u iktar jekk ikun l-uniku wieħed hekk kif

irrizulta fil-każ odjern, jista' fin-nuqqas tad-debita regolamentazzjoni jabbuza minn tali posizzjoni billi jew ma jipprovdix aċċess lil xi operatur ieħor, potenzjalment kompetittur fis-settur tas-servizzi, interessat f'li jipprovdix servizz ta' *broadband* jew inkellha jista' jimponi jew jiffissa prezzijiet mhux viabbli għal jew li ma jistgħux jiġu riplikati minn operaturi oħra (*price squeeze*) ukoll potenzjalment kompetituri tiegħu fis-settur tas-servizzi.

39. L-appellanti tgħid ukoll f'każ li l-Awtorità kellha tiskarta ir-rizultat li ħareġ mill-analiżi tal-*Market 5*, u tipprova tara ssibx dominanza fil-*Market 4*, xorta ma setgħetx tinsab dominanti minħabba *indirect constraints* li l-Awtorità naqset tikkunsidra. Targumenta li l-analiżi ta' *Market 4* kellha tinkludi s-servizzi li jingħataw mill-Melita fis-suq *retail*.
40. L-Awtorità wiegħbet li hija għamlet analiżi sew tal-*cable* kemm fuq livell ta' *retail* kif ukoll fil-kuntest tal-*Market 5*. Però fir-rigward tal-*Market 4* stabbilit li l-*cable* mhux *direct constraint* peress li l-*cable* ma jistax joffri s-servizz ta' unbundled access to the local loop rizultat tat-teknoloġija użata.

41. F' dan ir-rigward it-Tribunal għamel is-segwent i kunsiderazzjonijiet:

*Għalkemm is-soċjetà Rikorrenti tikkontendi li dan il-prinċipju ta' indirect constraints* rizzultanti minn servizz tal-*cable* u l-impatt ta' l-istess għall-finijiet ta' determinazzjoni ta' SMP gje aċċettat ukoll mill-Kummissjoni Ewropeja fis-settur tat-telekommunikazzjonijiet, meta wieħed jara d-dokumentazzjoni li għaliha għamlet referenza fir-Rikors promotur ossia: (a) Ofcom "Review of the wholesale broadband access markets" Statement 3rd December 2010; (b) Case PT/2008/0851; u (c) Commission Staff Working Document Explanatory Note Accompanying document to the Commission Recommendation on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services bħala prova ta' din il-posizzjoni, tirrizzulta posizzjoni – speċjalment fejn jidhol *Market 4* – kemm xejn differenti minn dik esposta mis-soċjetà Rikorrenti.

*In effetti fid-dokument Case PT/2008/0851, fir-rigward tal-proposta ta' ANACOM għall-inclusion of cable in market 4 on the basis of indirect constraints, il-Kummissjoni Ewropeja osservat is-segwent i: firstly, the Commission notes that – to its knowledge – **cable cannot be unbundled, therefore ruling out the possibility of direct wholesale substitution with copper loops.**<sup>15</sup> Despite this, and unlike other NRAs, ANACOM nonetheless intends to include cable in market 4 on the basis of indirect constraints ... the Commission is of the view that cable should not be included in the market definition<sup>16</sup> as its inclusion leads to an overstatement of the competitive constraints on LLU. However, as ANACOM has*

<sup>15</sup> Enfasi tal-Qorti.

<sup>16</sup> Enfasi tal-Qorti.



*carried out the SMP analysis both with and without the inclusion of cable, and since the regulatory outcome is not affected, the Commission does not wish to challenge ANACOM's finding this time, but strongly urges ANACOM not to include cable in market 4 in the final measure – quindi altru milli dan il-prinċipju għe aċċettat u adottata mill-Kummissjoni Ewropea fil-kuntest ta' Market 4.'*

42. Huwa minnu li din id-deċiżjoni kienet fil-kuntest tal-eskluzjoni tal-*cable* mid-definizzjoni tal-*Market 4*. Madanakollu, jibqa' l-fatt li, kif tajjeb ikkonkluda t-Tribunal:

*'Anke fejn is-soċjetà Rikorrenti tagħmel referenza għar-rapport li kien qed jakkumpanja r-Rakkomandazzjoni tal-Kummissjoni dwar is-swieq regolamentati, meta s-silta ċitata mis-soċjetà Rikorrenti fir-Rikors promotur tiġi kkunsidrata fl-interessa tagħha, ossia jinqara u jiġi kkunsidrat dak kollu osservat mill-Kummissjoni dwar Wholesale inputs to broadband internet access, tirriżulta posizzjoni ben diversa minn dik esposta minnha...*

*Meta dak li osservat il-Kummissjoni Ewropea jiġi kkunsidrat fl-interessa tiegħu jirriżulta b'mod ċar li kuntrarjament għal dak affermat mis-soċjetà Rikorrenti, kwalunkwe indirect constraints riżultanti mill-operatur li jipprovdni cable-based access, bħalma hi l-Melita fil-każ nostrali, fuq id-DSL operator, fil-każ ta' Malta s-soċjetà Rikorrenti, jinħassu fuq il-Wholesale Broadband Access Market u mhux fuq il-Wholesale Unbundled Infrastructure Access Market, li huwa s-suq formanti s-sugġett tad-Deciżjoni appellata.'*

43. Din il-qorti lanqas ma tqies li hemm bażi sabiex issir riferenza lill-Qorti Ewropea skont l-Artikolu 267 tat-Trattat dwar il-Funzjonament tal-Unjoni Ewropea<sup>17</sup>, kif ipproponiet l-appellanti fir-rikors tal-appell (ara paġna 17). L-appellanti argumentat li l-qorti għandha tordna riferenza f' każ li, *'din il-Qorti jidrilha li għadha mhux konvinta illi s-soċjetà appellanti ma kellhiex tinsab dominanti u tiġi mposta rimedji fis-suq 4 skont l-interpretazzjoni tal-qafas legali kif eċċepit mis-soċjetà rikorrenti'*. L-aggravji tal-appellanti ma jinvolvux interpretazzjoni tat-Trattati jew dwar il-validità u l-interpretazzjoni ta' l-atti ta' l-istituzzjonijiet, korpi jew organi ta' l-Unjoni kif stabbilit fl-imsemmi artikolu. Il-qorti taqbel mal-appellata li l-appellanti qegħda tipproponi riferenza lill-Qorti Ewropeja fuq *'apprezzament ta' stat ta' fatt wara analiżi magħmula mill-Awtorità tas-suq konċernat'*. Dan m'għandu x'jaqsam xejn ma' dak li jipprovdni l-artikolu 267 tat-Trattat dwar il-Funzjonament tal-Unjoni Ewropea.
44. Is-soċjetà appellanti irreferiet ukoll għall-*Commission Recommendation* tad-9 ta' Ottubru 2014 *on the relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC* u tinsisti li ladarba is-suq tar-retail broadband instab kompettitiv, hija ma kellhiex tinsab dominanti f' *Market 4* u

<sup>17</sup> <http://eur-lex.europa.eu/legal-content/MT/TXT/PDF/?uri=CELEX:12016E/TXT&from=EN>

lanqas tiġi regolata bħala konsegwenza ta' dan. Filwaqt li huwa minnu li din ir-rakkomandazzjoni tispjega li *'In accordance with Directive 2009/140/EC, the aim of the regulatory framework is inter alia to reduce ex ante sector-specific regulation progressively as competition in markets develops and, ultimately, for electronic communications to be governed by competition law only'*, li *'The objective of any ex ante regulatory intervention is ultimately to produce benefits for end-users by making retail markets effectively competitive on a sustainable basis'* u li *'ex ante regulatory obligations are only imposed on markets that are not effectively competitive'*, tgħid ukoll li *'an analysis of effective competition should include an analysis as to whether the market is prospectively competitive, and thus whether any lack of effective competition is durable.'* Apparti l-fatt li din ir-rakkomandazzjoni daħlet fis-seħħ wara d-deċiżjoni tal-Awtorità appellata mertu tal-proċeduri odjerni, fil-każ *de quo*, irrizulta li ċ-ċirkostanzi ta' Malta huma different minn dawk ta' pajjiżi oħrajn. F' Malta ġie prospettat ix-xenarju oppost, ossija, filwaqt li r-*retail market* instab *'effectively competitive'* kien hemm il-possibiltà li ma jibqax *prospectively competitive'*.

45. Is-soċjetà appellanti emfasizzat dik il-parti ta' din ir-rakkomandazzjoni li tgħid, *'if the retail market concerned is effectively competitive from a forward looking perspective in the absence of ex ante wholesale regulation on the corresponding relevant market(s), this should lead the national regulatory authority to conclude that regulation is no longer needed at wholesale level. In such a case, the corresponding relevant wholesale market(s) should be assessed with a view to withdrawing ex ante regulation. Where wholesale markets are vertically linked in the supply chain, the wholesale market to be analysed first is the one that is most upstream from the retail market in question.'* Jibqa iżda l-fatt li l-Awtorità appellata sabet illi għalkemm is-suq tar-*retail broadband* insab *'effectively competitive'*, from a *forward looking perspective* kellha r-rizervi tagħha li dan kien se jibqa l-każ. Dan minħabba l-fatt li is-soċjetà appellanti kienet fil-proċess li tintroduċi teknoloġija ġdida tal-Fibre-To-The-Home (FTTH).
46. Fiċ-ċirkostanzi, din il-Qorti hi tal-fehma li mhemmx bazi sabiex tiddisturba r-raġunament u deċiżjoni tat-Tribunal.

**Għal dawn il-motivi il-Qorti, tiċhađ l-appell bl-ispejjeż kontra l-appellanti.**

Anthony Ellul.