



MALTA
Fit-Tribunal ta' Revizjoni Amministrattiva
Maġistrat
Dr.Gabriella Vella B.A., LL.D.

Rikors Nru. 23/16VG

Vodafone Malta Limited

Vs

Awtorità ta' Malta dwar il-Komunikazzjoni

Illum 11 ta' Novembru 2019

It-Tribunal,

Ra r-Rikors ipprezentat mis-soċjetà Vodafone Malta Limited fit-8 ta' April 2016 permezz ta' liema titlob li t-Tribunal, prevja li jagħti kull provvediment opportun ai termini ta' l-Artikolu 37 tal-Kapitolu 418 tal-Liġijiet ta' Malta (Att għat-Twaqqif ta' Awtorità ta' Malta dwar il-Komunikazzjoni): (1) iħassar u jirrevoka d-Deciżjoni MCA/D/16-2530 maħruġa mill-Awtorità ta' Malta dwar il-Komunikazzjoni fil-21 ta' April 2016 u għaldaqstant iwaqqaf u jħassar l-effetti kollha tad-Deciżjoni inkluż billi tirrevoka d-deciżjoni illi l-ebda operatur ma għandu Significant Market Power fis-suq *wholesale call origination on the public telephone network provided at a fixed location in Malta* u li għalhekk ma huwiex iktar meħtieġ intervent fis-suq tramite regolamentazzjoni *ex ante*; (2) konsegwentement jornda lill-Awtorità ta' Malta dwar il-Komunikazzjoni sabiex terġa' tikkunsidra l-mertu tad-Deciżjoni billi tieħu in konsiderazzjoni s-sottomissjonijiet kollha relattivi tal-partijiet kollha interessati, inkluż partikolarment dawk tagħha kif ukoll ta' l-MCCAA; bl-ispejjeż kontra l-Awtorità ta' Malta dwar il-Komunikazzjoni u b'riserva da parte ta' Vodafone Malta Limited għal kull azzjoni ulterjuri spettanti lilha, inkluż għad-danni minnha sofferti kawża tad-deciżjoni appellata;

Ra d-dokumenti annessi mar-Rikors promotur markati Dok. "VF1" sa' Dok. "VF4" a fol. 14 sa' 106 tal-proċess;

Ra r-Risposta ta' l-Awtorità ta' Malta dwar il-Komunikazzjoni permezz ta' liema topponi għall-appell tas-soċjetà Rikorrenti mid-Deciżjoni tagħha intitolata *Wholesale call origination on the public telephone network provided at a fixed location in Malta - MCA decision on market definition and the assessment of competition* ippubblikata fil-21 ta' Marzu 2016 u titlob li l-istess jiġi miċhud, bl-ispejjeż kontra s-soċjetà Rikorrenti, u minflok l-imsemmija Deciżjoni tiġi

ikkonfermata stante li għar-raġunijiet mogħtija fir-Risposta, l-aggravji fuq liema soċjetà Rikorrenti tibbaża l-appell tagħha mid-Deciżjoni huma infondati fil-fatt u fid-dritt;

Ra d-dokument markat Dok. "MCA1" esebit mill-Awtorità Intimata permezz ta' Nota ppreżentata fis-17 ta' Mejju 2016 a fol. 138 sa' 151 tal-proċess, liema dokument jissemma fir-Risposta ta' l-Awtorità Intimata iżda bi żvista ma ġiex anness ma' l-imsemmija Risposta, u ra d-dokumenti u *pendrive* esebiti mis-soċjetà Rikorrenti permezz ta' Nota ppreżentata fil-25 ta' Ottubru 2016 a fol. 108 sa' 117 tal-proċess, ra l-affidavit ta' Lauri Mustonen esebit mis-soċjetà Rikorrenti permezz ta' Nota ippreżentata fil-25 ta' April 2016 a fol. 124 sa' 127 tal-proċess, ra l-affidavit ta' Kevin Caruana¹ minnu kkonfermat bil-ġurament u ppreżentat waqt is-seduta tat-30 ta' Ottubru 2017² u sema' x-xhieda in kontro-eżami ta' Kevin Caruana mogħtija waqt is-seduta tas-7 ta' Mejju 2018³;

Ra n-Nota ta' Sottomissjonijiet tas-soċjetà Rikorrenti a fol. 163 sa' 184 tal-proċess u in-Nota Responsiva ta' l-Awtorità Intimata a fol. 186 sa' 210 tal-proċess;

Ra l-atti kollha tal-kawża;

Ikkonsidra:

B'Deciżjoni intitolata *Wholesale call origination on the public telephone network provided at a fixed location in Malta - MCA Decision on market definition and the assessment of competition* ippubblikata fil-21 ta' Marzu 2016 (hawn iktar 'l quddiem indikata bħala d-Deciżjoni Appellata), l-Awtorità Intimata kkunsidrat u ikkonkludiet is-segwenti:

Decision on the Relevant Product Market - *The MCA defines the provision of wholesale call origination services on the public telephone network provided at a fixed location as involving the setting up, switching and connection of a voice call to its next stage, this being either the interconnection stage or the termination stage. Based on the analysis presented above, the MCA considers the relevant product market for wholesale fixed call origination to include: call origination services provided to third parties; and self-supplied call origination services. The relevant market includes the provision of wholesale call origination services over copper / fibre, cable and wireless networks. The current conditions of competition are also deemed to be geographically homogenous in the identified wholesale market. The market in question is indeed subject to a national pricing constraint, as local service providers do not differentiate their call origination services in terms of pricing and availability by reference to their geographic location⁴. ...*

Decision in View of the Three Criteria Test Findings - *The MCA considers that the market under investigation tends towards effective competition within the timeframe of this review, for the following reasons: The incumbent's nationwide*

¹ Fol. 130 sa' 135 tal-proċess.

² Fol. 36 tal-proċess.

³ Fol. 140 sa' 158 tal-proċess.

⁴ Para. 4.5 tad-Deciżjoni Appellata a tergo ta' fol. 28 u fol. 29 tal-proċess.

access network infrastructure has been fully replicated by Melita, whilst other alternative service providers are investing in the extension of their access network infrastructures. These operators have all the necessary interconnection agreements in place and have sufficient spare capacity to meet future demand for fixed call origination. Melita can also readily switch from self-supplying the service to offering it on the merchant market; Alternative service providers have made consistent inroads in the retail fixed telephony markets at the expense of GO and also offer a diversified retail product portfolio. An equivalent trend has been observed in the supply of wholesale call origination, with alternative service providers gaining market share and thus benefiting from better economies of scale and scope in the provision of fixed call origination; The market share of GO is anticipated to decline further within the timeframe of this market review. This means that the presence of alternative service providers in direct competition with GO and potential new market entry allows wholesale customers to exercise a strong CBP in the market under investigation; In this regard, a wholesale customer of fixed call origination could opt for several strategies in order to avoid purchasing an excessively priced wholesale service from a local operator. Prevailing market conditions therefore inhibit GO and/or any other service provider from setting wholesale fixed call origination charges above the competitive level. The MCA therefore considers that, given the above-mentioned circumstances, the Three Criteria are not met and therefore ex ante regulation is warranted in the wholesale fixed call origination market in Malta. No operator can behave independently of competitors, customers and consumers when setting the relevant wholesale charges. This situation is likely to persist within the timeframe of this review. The MCA also deems that, in the absence of ex ante regulation, ex post competition law could effectively deal with any potential issues that may arise in the market⁵. ...

Decision on the Regulatory Approach - Based on the findings from the Three Criteria Test, the MCA considers that the market concerning the provision of wholesale call origination on public telephone networks provided at a fixed location in Malta is effectively competitive and that no undertaking active in this market enjoys a position of SMP. Given this conclusion and the provisions under Regulation 5(3) of the ECNSR, the MCA is to withdraw the regulatory obligations that are currently governing GO's provision of services in the market in question. This withdrawal shall be implemented without prejudice to any other general obligations at law. In order to have a smooth transition from a regulated market to a non-regulated market, the MCA shall withdraw the existing obligations at the expiry of 90 calendar days following the publication of the final decision concerning this market. Current obligations shall continue in effect during these 90 calendar days. The MCA believes that this notice period is justified and sufficient to allow for all stakeholders to make necessary arrangements for the new regulatory approach to the market in question⁶.

Is-soċjetà Rikorrenti ħassitha aggravata bid-Deciżjoni Appellata u fir-rigward tikkontendi li l-Awtorità ikkumentat illi anke mingħajr regolamenti ex ante ikun 'unlikely' li GO tagħxi b'mod anti-kompetittiv jew li tkun tista' żżid it-tariffi tagħha

⁵ Para. 5.6 tad-Deciżjoni Appellata, fol. 38 tal-proċess.

⁶ Para. 6.3 tad-Deciżjoni Appellata, a tergo ta' fol. 39 tal-proċess.

ta' access fiss u/jew telefonati fissi flivell li mhux kompetittiv mingħajr ma titef kljenti. ... l-Awtorità tat id-Deciżjoni mingħajr ma qieset is-sottomissjonijiet imressqa dwar l-abbozz tad-Deciżjoni u mingħajr ma indikat l-ebda raġuni dwar l-għaliex hija kienet qed tiddeċiedi kontra l-punti mressqa mis-soċjetà esponenti. Illi d-Deciżjoni ser ikollha impatt negattiv fuq is-swieq tal-komunikazzjoni ġewwa Malta u fuq l-attività kummerċjali tas-soċjetà esponenti stante illi fl-opinjoni umili tas-soċjetà esponenti, din id-Deciżjoni ser isservi biex tnaqqas il-kompetizzjoni fis-suq billi tagħti lok għal re-monopolizzazzjoni tas-suq da parte ta' l-operatur GO u dan tenut kont tal-fatt illi l-unika raġuni għaliex is-suq beda jara forma limitata ta' kompetizzjoni effettiva kienu proprju minħabba r-rimedji li ġew imposti mill-Awtorità stess fuq GO sew fis-suq ta' retail u kif ukoll f'dak wholesale. Illi din id-Deciżjoni ser tippermetti lil kumpannija GO, bħala operatur ewlieni f'dan is-suq tibbenefika minn din il-posizzjoni SMP li tgawdi, b'mod illi tista' tabbuża minn dik il-posizzjoni għad-detriment tal-kompetizzjoni, ta' l-operaturi l-oħra u ta' l-operaturi godda li jippruwaw jidhlu fis-suq. Illi għandu jiġi rimarkat illi l-porzjoni tas-suq li tgawdi minnha s-soċjetà GO ilha stabbli għall-numru kbir ta' snin. Dan ġej mill-fatt illi għal għexieren ta' snin is-soċjetà GO kienet tgawdi minn monopolju fuq dan is-settur f'Malta. L-impatt li kien hemm mill-kompetizzjoni fis-suq s'issa kienet wieħed jista' jgħid marginali bir-riżultat li għadu kmieni wisq biex is-suq jiġi deregolarizzat⁷.

L-appell tas-soċjetà Rikorrenti mid-Deciżjoni Appellata u l-argumentazzjonijiet tagħha kontra tali Deciżjoni huma bbażati fuq tlett aggravji ċentrali u cioè: (1) li d-Deciżjoni hija nulla minħabba nuqqasijiet fil-proċedura, senjatament li l-Awtorità Intimata tat id-Deciżjoni tagħha mingħajr ma kkunsidrat fatti, osservazzjonijiet u argumentazzjonijiet sottomessi u mressqa mis-soċjetà Rikorrenti fl-istadju ta' konsultazzjoni u per di più mingħajr ma tat raġunijiet motivati għalfejn ma kenitx qed tikkonsidra tali fatt; (2) li d-Deciżjoni hija żbaljata in kwantu l-Awtorità Intimata bil-konsiderazzjonijiet u konsegwenti deciżjonijiet tagħha mhux qed tiżgura li l-prinċipji tal-Liġi dwar il-kompetizzjoni qed jiġu għal kollox osservati fis-settur tal-komunikazzjonijiet elettronici; u (3) li d-Deciżjoni hija insostenibbli u mhux in konformità mad-dettami tal-Liġi in kwantu l-Awtorità Intimata naqset għal kollox milli tikkonsidra bil-mod opportun l-opinjoni ta' l-MCCAA.

L-Awtorità Intimata da parte tagħha topponi għall-appell tas-soċjetà Rikorrenti mid-Deciżjoni Appellata u titlob li l-istess jiġi miċhud u l-imsemmija Deciżjoni tiġi ikkonfermata stante li: (1) kuntrarjament għal dak pretiż mis-soċjetà Rikorrenti hija (l-Awtorità Intimata) ikkunsidrat bil-mod opportun u sew l-argumenti kollha validi imressqa mill-imsemmija soċjetà fl-istadju tal-konsultazzjoni, hekk kif jirriżulta mid-Deciżjoni Appellata nnifisha; (2) nonostante id-diversi allegazzjonijiet avanzati fil-konfront ta' l-Awtorità vis-à-vis id-Deciżjoni mogħtija minnha, partikolarment għal dak li jirrigwarda vjolazzjoni tal-provvedimenti tal-Liġi dwar is-salvagwardja tal-kompetizzjoni effettiva u sostenibbli fis-suq rilevanti u swieq relatati, is-soċjetà Rikorrenti naqset milli tressaq provi in sostenn ta' tali allegazzjonijiet u addirittura tapplika b'mod żbaljat il-prinċipji enunċjati fl-SMP Guidelines tal-Kummissjoni Ewropea dwar is-sejbien ta' Significant Market Power ta' operatur partikolari fis-suq relattiv; u (3) l-Awtorità Intimata ma vvjolat l-ebda obbligu nascenti mill-Liġi vis-à-

⁷ Para. 4, 8 sa' 11 tan-Nota ta' Sottomissjonijiet tas-soċjetà Rikorrenti, fol 164 sa' 165 tal-proċess.

vis l-opinjoni espressa mill-MCCAA in kwantu, apparte l-fatt li dejjem, anke fil-każ in eżami, tat id-debita konsiderazzjoni għall-kummenti ta' l-MCCAA, hija ma għandha l-ebda obbligu legali li trid bilfors tistrih fuq il-fehma ta' l-MCCAA u/jew id-Direttur Ġenerali tagħha.

Stabbiliti l-parametri ta' l-appell in eżami t-Tribunal ser jgħaddi biex jittratta kull wiehed mit-tlett aggravji sollevati mis-soċjetà Rikorrenti b'mod individwali:

L-Ewwel Aggravju - nullità tad-Deciżjoni Appellata minhabba nuqqasijiet ta' natura proċedurali:

Is-soċjetà Rikorrenti tikkontendi li bil-mod kif waslet għad-Deciżjoni Appellata u bid-Deciżjoni Appellata nnifisha l-Awtorità Intimata vvjolat: (1) il-prinċipju enunċjat fl-Artikolu 4(A)(2) tal-Kap.418 tal-Liġijiet ta' Malta, liema artikolu tal-Liġi jipprovdi li: *meta l-Awtorità tkun bi ħsiebha tiegħu deciżjoni dwar affarijiet li jkollhom x'jaqsmu mad-drittijiet ta' xi utent finali u konsumatur, partikolarment meta dik id-deciżjoni jkollha impatt sinifikanti fis-suq għal xi networks ta' komunikazzjonijiet u, jew servizzi, l-Awtorità għandha tiżgura li fil-ġestjoni tal-mekkanizmu ta' konsultazzjoni msemmi fis-subartikolu (1), daqstant kemm dan ikun adatt għall-finijiet tal-funzjonijiet tagħha taht dan l-Att jew taht kull liġi oħra li l-Awtorità jkollha jedd tenforza, hija għandha tiegħu konsiderazzjoni tal-veduti ta' utenti finali u ta' konsumaturi partikolarment utenti finali b'diżabilità, manufatturi w impriżi li jipprovdu networks ta' komunikazzjonijiet u, jew servizzi;* (2) kif ukoll il-prinċipju enunċjat fl-Artikolu 3(2)(h) tal-Kap. 490 tal-Liġijiet ta' Malta, liema artikolu tal-Liġi jipprovdi li: *il-prinċipji ta' mgieba amministrattiva tajba jinkludu dawn li ġejjin: ... (h) is-sentenzi għandhom ikunu motivati. Tribunal amministrattiv għandu jagħti, b'mod biżżejjed ċar, il-motivi li fuqhom tkun mibnija d-deciżjoni. Għalkemm ma jkunx meħtieġ li t-tribunal jiddisponi minn kull punt imqajjem bħala argument, sottomissjoni li tkun, li kieku din tiġi aċċettata, meħuda deciżiva għar-riżultat tal-kawża, għandu jkollha risposta speċifika w espressa;* u (3) ukoll il-prinċipju assodat fis-sistema ġuridika nostrali li organu amministrattiv għandu jikkonsidra u jittratta l-mertu tal-kwistjoni quddiemu u għandu jagħti deciżjoni ben motivata.

Is-soċjetà Rikorrenti tibbaża din il-lanjanza tagħha verso l-operat u l-konsegwenti Deciżjoni ta' l-Awtorità Intimata in bażi għall-allegazzjoni li minkejja li hija ressqet diversi sottomissjonijiet ben motivati kontra l-proposti ta' l-Awtorità fl-istadju tal-konsultazzjoni, l-istess Awtorità naqset mhux biss milli tikkonsidra tali sottomissjonijiet talli naqset għal kollox f'li tagħti raġuni ben ġustifikati għalfejn dawn is-sottomissjonijiet ma ttieħdux in konsiderazzjoni w b'hekk aċċettati. Fir-Rikors promotur is-soċjetà Rikorrenti kjarament tikkontendi li *tali Deciżjoni hija nulla in kwantu tonqos milli telenka motivazzjonijiet ċari fil-mertu għall-istess*⁸.

L-Awtorità Intimata kategorikament tiċhad li fi u bid-Deciżjoni Appellata hija ivvjolat il-prinċipji ġuridiċi elenkati w indikati mis-soċjetà Rikorrenti. Fir-rigward tikkontendi li: *kuntrarjament għal dak li tissottometti l-Vodafone, l-Awtorità ikkunsidrat sew l-argumenti kollha validi mressqa matul il-proċess ta' konsultazzjoni. Dan fattwalment jirriżulta b'mod ċar minn qari akkurat tad-*

⁸ Para. 23 tar-Rikors promotur, fol. 4 tal-proċess.

Deciżjoni appellata. Li l-Awtorità setgħet ma taqbilx ma' l-argumenti sottomessi, ma jfissirx b'daqshekk li l-Vodafone tista' targumenta li l-Awtorità b'xi mod ma tatx l-importanza debita għal kull argument validu li seta' sar kemm mill-Vodafone jew minn kwalunkwe entita oħra fl-ambitu tal-konsultazzjoni li saret da parti ta' l-Awtorità qabel il-ħruġ tad-Deciżjoni appellata. Il-Vodafone in sostenn ta' l-argumentazzjoni tagħha tirreferi għal prinċipji ta' mgieba amministrattiva tajba kif dedotti fl-Artikolu 3(2)(h) fl-Att dwar il-Gustizzja Amministrattiva (Kap.490 tal-Liġijiet ta' Malta), u tpprosegwi billi tiċċita xi siltiet minn xi deciżjonijiet tal-Qrati dwar l-applikazzjoni ta' dawn il-prinċipji. Għal kull buon fini, bla preġudizzju għas-sottomissjonijiet l-oħra magħmula mill-Awtorità f'dan l-appell, jiġi rilevat li l-prinċipji ta' mgieba amministrattiva tajba kif dedotti fl-artikolu 3(2)(h) tal-Kap. 490 strettament huma applikabbli għal għemil ta' dan it-Tribunal u mhux għal xi awtorità pubblika bħalma hi l-Awtorità. Kuntrarju għal dak li targumenta l-Vodafone, jirriżulta biċ-ċar li l-Awtorità qiset sew il-punti kollha validi magħmula matul il-proċess ta' konsultazzjoni, u kif meħtieġ l-Awtorità tat ir-risposti tagħha⁹.

Wara li qies is-sottomissjonijiet tal-partijiet kontendenti dwar dan l-ewwel aggravju ta' l-appell sollevat mis-soċjetà Rikorrenti u wara li ra d-Deciżjoni Appellata, it-Tribunal hu tal-fehma ta' dan l-aggravju ma huwiex ġustifikat, kemm legalment kif ukoll fattwalment, u ma jistħoqqx li jiġi milqugh.

Għalkemm is-soċjetà Rikorrenti tibbaża l-ewwel aggravju tagħha *inter alia* fuq l-Artikolu 3(2)(h) tal-Kap.490 tal-Liġijiet ta' Malta u fuq il-prinċipji enunċjati mill-Qorti ta' l-Appell fid-diversi sentenzi minnha ċitati, dawn il-provvedimenti u prinċipji legali ma jistgħux jiġu applikati vis-à-vis awtorità pubblika bħala ma hi l-Awtorità Intimata.

L-Artikolu 3(1) tal-Kap.490 tal-Liġijiet ta' Malta jipprovdi li: *fir-relazzjonijiet tagħhom mal-pubbliku, it-tribunali amministrattivi¹⁰ kollha għandhom jirrispettaw u japplikaw il-prinċipji ta' mgieba amministrattiva tajba stabbiliti f'din it-Taqsima ta' dan l-Att, fosthom appuntu l-prinċipju enunċjat fis-subartikolu (2)(h) ta' l-imsemmi artikolu tal-Liġi. L-Artikolu 2 tal-Kap. 490 tal-Liġijiet ta' Malta jfisser it-terminu tribunali amministrattivi bħala tribunal elenkat fl-Ewwel Skeda, fost liema tribunali però ma tissemmiex l-Awtorità ta' Malta dwar il-Komunikazzjoni. Minn dan isegwi għalhekk li dak dispost fl-Artikolu 3(2)(h) tal-Kap.490 tal-Liġijiet ta' Malta ma jistax japplika vis-à-vis l-Awtorità Intimata in kwantu, kif appena osservat, l-imsemmija Awtorità ma hijiex u ma tistax titqies bħala tribunal amministrattiv għall-finijiet u effetti ta' dik il-Liġi. Id-Deciżjoni Appellata hija att amministrattiv ta' awtorità pubblika fl-eżercizzju tal-funzjonijiet tagħha u għalhekk lanqas il-prinċipji enunċjati mill-Qorti ta' l-Appell fid-diversi sentenzi ċitati mis-soċjetà Rikorrenti ma japplikaw vis-à-vis l-Awtorità Intimata u dana partikolarment fid-dawl tal-fatt li f'kull waħda minn dawk is-sentenzi l-Qorti ta' l-Appell kienet qed tikkonsidra u b'hekk tagħmel osservazzjonijiet u ippronunzjat ruħha dwar deciżjonijiet mogħtija minn tribunali amministrattivi u mhux fir-rigward ta' atti amministrattivi ta' awtorità pubblika fl-eżercizzju tad-doveri tagħha.*

⁹ Para. 19 sa' 22 tan-Nota Responsiva ta' l-Awtorità ta' Malta dwar il-Komunikazzjoni.

¹⁰ Enfasi tat-Tribunal.

Detto ciò però ma jfissirx li awtorità pubblika - bħalma hi l-Awtorità Intimata - tista' tieħu deċiżjonijiet, ossia tagħmel atti amministrattivi, li bihom tolqot liċ-ċittadin jew bħal fil-każ ta' l-Awtorità Intimata lis-suq tan-*networks* ta' komunikazzjoni, lill-intrapriżi li jipprovdu jew huma awtorizzati jipprovdu *networks* ta' komunikazzjoni u/jew servizzi jew faċilitajiet assoċjati jew lill-utenti finali, mingħajr ma tagħti raġunijiet in sostenn tad-deċiżjoni/att amministrattiv tagħha. Fir-rigward l-awtur H.W.R. Wade jsostni illi *the principles of natural justice do not, as yet, include any general rule that reasons should be given for decisions. Nevertheless there is a strong case to be made for the giving of reasons as an essential element of administrative justice. The need for it has been sharply exposed by the expanding law of judicial review, now that so many decisions are liable to be quashed or appealed against on grounds of improper purpose, irrelevant considerations and errors of law of various kinds. Unless the citizen can discover the reasoning behind the decision, he may be unable to tell whether it is reviewable or not, and so he may be deprived of the protection of the law. A right to reasons is therefore an indispensable part of a sound system of judicial review. Natural justice may provide the best rubric for it, since the giving of reasons is required by the ordinary man's sense of justice. It is also a healthy discipline for all who exercise power over others. No single factor has inhibited the development of English administrative law as seriously as the absence of any general obligation upon public authorities to give reasons for their decisions. ... Notwithstanding that there is no general rule requiring the giving of reasons, it is increasingly clear that there are many circumstances in which an administrative authority which fails to give reasons will be found to have acted unlawfully. The House of Lords has recognised 'a perceptible trend towards an insistence on greater openness ... or transparency in the making of administrative decisions and consequently has held that where, in the context of the case, it is unfair not to give reasons, they must be given. ... an important consideration underlying the extension of the duty to give reasons, referred to in many cases, is that in the absence of reasons the person affected may be unable to judge whether there has been 'a justiciable flaw in the [decision making] process', and thus whether an appeal, if available, should be instituted or an application for judicial review made. Since today there are few exercises of governmental power which are not subject to judicial review, it will be rare that a person affected by a decision - for which reasons are not given - will not be able to say that the absence of reasons has denied him effective recourse to judicial review. A general duty to give reasons is latent in this argument; and the courts seem willing to see sufficient weight given to it to enable such a duty to develop. ... The time has now surely come for the court to acknowledge that there is a general rule that reasons should be given for decisions based on the principle of fairness which permeates administrative law, subject only to specific exceptions to be identified as cases arise. Such a rule should not be unduly onerous, since reasons need never be more elaborate than the nature of the case admits, but the presumption should be in favour of giving reasons, rather than, as at present, in favour of withholding them¹¹.*

Fid-dawl ta' dan appena osservat jirriżulta b'mod ċar għalhekk li l-Awtorità Intimata, *qua* awtorità pubblika li bid-Deciżjoni Appellata ppronunzjat att amminsitrattiv fil-kors tal-qadi tal-funzjonijiet tagħha, għandha tagħti raġunijiet in sostenn tad-

¹¹ Administrative Law, H.W.R. Wade & C.F. Forsyth, pg 436 sa' 439.

deċiżjonijiet tagħha, partikolarment fid-dawl tal-fatt li dawn id-deċiżjonijiet huma soġġetti għal appell da parte ta' parti interessata li tħoss ruħha aggravata bl-istess.

Stabbiliti l-parametri entro liema għandha tiġi kkunsidrata d-Deciżjoni Appellata, it-Tribunal ser jgħaddi biex jikkonsidra u jiddetermina jekk, kif allegat mis-soċjetà Rikorrenti, l-istess Deciżjonijiet hijiex nieqsa minn raġunijiet in sostenn ta' l-istess o meno.

Mill-provi prodotti jirriżulta li kif prefiss fil-Liġi - Artikolu 4A(1) tal-Kap.418 tal-Liġijiet ta' Malta - l-Awtorità Intimata nehdiet proċess ta' konsultazzjoni permezz ta' Consultation Document intitolat *Wholesale call origination on the public telephone network provided at a fixed location in Malta. Identification of relevant market and assessment of competition* ippublikat fit-13 ta' Novembru 2015¹². F'dan id-dokument, wara li esponiet il-veduti, konsiderazzjonijiet u proposti tagħha dwar il-materja trattata, talbet lill-partijiet interessati, fosthom is-soċjetà Rikorrenti, sabiex jagħtu l-veduti tagħhom dwar is-segwenti kweżiti: *Do you agree with the above preliminary conclusion regarding the market definition concerning wholesale call origination services on public telephone networks provided at a fixed location in Malta? Do you agree with the conclusions regarding the assessment of competition based on the Three Criteria Test for the identified wholesale market? Do you agree with the proposed regulatory approach for the market under investigation?*¹³.

Is-soċjetà Rikorrenti, bħala parti interessata fil-proċess ta' konsultazzjoni, issottomettiet it-tweġibiet tagħha għall-kweżiti posti mill-Awtorità Intimata fil-15 ta' Diċembru 2015¹⁴ u llum tallega li l-Awtorità Intimata naqset milli tiegħu konjizzjoni ta' l-osservazzjonijiet avanzati minnha u naqset milli tagħti raġunijiet għalfejn għaddiet għad-deċiżjoni mingħajr ma qieset il-posizzjoni tagħha (ossia tas-soċjetà Rikorrenti). Minn qari tad-Deciżjoni Appellata però jirriżulta immedjatament evidenti li s-soċjetà Rikorrenti ma għandhiex raġun meta tallega li l-Awtorità Intimata ma kkunsidratx u ma qisitx l-osservazzjonijiet u veduti tagħha u li ma tat l-ebda spjegazzjoni għalfejn il-veduti ta' Vodafone ma ġewx aċċettati.

Fil-paragrafu 4.4 tad-Deciżjoni Appellata intitolat *Summary of responses to Market Definition and MCA reactions*, l-Awtorità Intimata kkunsidrat il-veduti, argumenti w osservazzjonijiet imressqa mid-diversi partijiet involuti fil-proċess ta' konsultazzjoni, inkluż is-soċjetà Rikorrenti, u anke tat raġunijiet suffiċjenti biex tiġġustifika għalfejn ma kenitx qed taqbel ma' wħud minn dawk il-veduti, argumenti u osservazzjonijiet. Ad eżempju fl-imsemmi paragrafu tad-Deciżjoni Appellata l-Awtorità Intimata tosserva li *whilst at present GO is currently providing wholesale call origination services, the MCA cannot agree with Vodafone's comment that substitutability from GO to any other service provider, following a SSNIP, is 'speculative'. This is because there is nothing to impede a potential entrant into the fixed telephony market or an existing customer of wholesale fixed call origination services from approaching Melita with a business proposal to gain access via its network infrastructure. To this effect, if a hypothetical monopolist had to increase the price of wholesale fixed call origination services, the customer of wholesale call*

¹² Dok. "VF2" a fol. 41 sa' 64 tal-proċess.

¹³ A tergo ta' fol. 63 tal-proċess.

¹⁴ Fol. 65 sa' 78 tal-proċess.

origination services may very well switch from one operator to another in reaction to this price increase. Further to the above, the MCA notes that, locally, newer market entrants have established their own access network infrastructure and are in a position to self-supply wholesale fixed call origination services and thus to link directly to end-users requiring retail fixed telephony services. This factor clearly indicates that alternative service providers can also deploy their own infrastructure thereby bypassing the use of wholesale call origination services. The MCA underlines that only one service provider, namely Ozone (Malta), is currently purchasing GO's wholesale call origination services. Furthermore, this service provider has also deployed its own wireless access network infrastructure and is in a position to self-supply wholesale fixed call origination services. In the event of a hypothetical price increase, Ozone has the possibility to switch to self-supplying wholesale call origination services or potentially start acquiring wholesale call origination services from Melita. In this regard the MCA reiterates that over the past years Ozone has already started migrating users from the WLR solution to its own infrastructure¹⁵.

Bl-istess mod fil-paragrafu 5.5.1 tad-Deċiżjoni Appellata intitolat *Responses and MCA reactions concerning the assessment of the first criterion*, l-Awtorità Intimata ikkunsidrat il-veduti, argumenti u osservazzjonijiet imressqa mid-diversi partijiet involuti fil-proċess ta' konsultazzjoni, inkluż is-soċjetà Rikorrenti, u anke, għal darb' oħra, tat raġunijiet suffiċjenti biex tiġġustifika għalfejn ma kenitx qed taqbel ma' whud minn dawk il-veduti, argumenti u osservazzjonijiet.

Fir-rigward ta' l-osservazzjonijiet dwar *sunk costs and economies of scale*, l-Awtorità Intimata ikkunsidrat u osservat illi: *The MCCA argues that it may not be financially feasible for a new entity to enter the market under consideration, given the high costs involved in rolling infrastructure. Vodafone shares this view as it argues that, apart from Melita, no smaller market player has deployed fixed infrastructure on a large scale, given the sunk cost involved with such deployment. Vodafone does acknowledge however that a number of smaller market players have deployed their own networks in parallel with GO, but adds that these 'cannot compete at par with larger service providers'. Ozone also says that the costs connected to the commencement of supply of these services might in effect provide a disincentive to new operators, particularly due to the small size of the market. It says that there are barriers to entry, particularly in view of the fact that the market is mature and by the fact that no new entrants have entered the market in recent years. As for economies of scale and scope, Vodafone considers that the scale of GO's economies pose a significant constraint on market entry. The MCA reiterates that sunk costs cannot be ignored in the market under investigation. For instance, a new operator requires significant upfront investment to deploy its own-built network. This investment also results in significant sunk costs, which will not be recouped upon exit from the market. However, the MCA considers that the sunk costs in the market under investigation are not as high as to inhibit market entry. The MCA notes that the market under review is characterised by several alternative service providers to GO. One alternative service provider, namely Melita, has been in the fixed telephony business for a number of years. This service provider has built a*

¹⁵ A tergo ta' fol. 28 tal-proċess.

strong customer base over the years, which today also translates into scale economies for this operator. There are also other smaller and newer market players, each with their own network build, that are today in direct competition with the incumbent operators Melita and GO. The MCA acknowledges that newer market entrants and smaller service providers will only benefit from scale economies once they manage to penetrate the market and expand over a span of time. As a result, this may serve as a barrier to market entry. Notwithstanding this, the presence of multiple players on the market is proof that, despite the significance of barriers to entry, market entry has not been restrained and new entrants can build market share¹⁶. Fir-rigward ta' vertical integration and economies of scope, l-Awtorità Intimata kkunsidrat u osservat illi: The MCCA says that only Melita has mirrored the vertically-integrated structure of GO and that therefore Ozone and other smaller operators cannot compete effectively in the provision of fixed voice call services. Vodafone also disagrees with the MCA's conclusions on vertical integration as it argues that although there are several operators self-supplying their own retail arm with fixed call origination services, apart from Melita, none of the other (smaller) operators have managed to 'successfully compete with GO at a wholesale or retail level'. As for economies of scope, Vodafone says that it does not see any justification for the MCA's change of assessment it undertook in 2011. The MCA notes that all fixed telephony service providers in Malta self-supply wholesale call origination services and provide retail fixed voice telephony services at a fixed location via their own network infrastructures. GO and Melita are both vertically integrated operators, in that they are active at both the wholesale and the retail level of retail fixed access and call origination services on a nationwide basis. They also supply a suite of other electronic communications services. For this reason, the MCA concludes that the main fixed telephony service providers in Malta can compete at par on this matter for they are vertically integrated to the point that they may equally leverage market power from upstream to downward markets. To a limited extent, other alternative service providers have mirrored the vertically integrated structure of GO and Melita in the provision of several electronic communications services. For example, Ozone (Malta) and SIS are self-supplying wholesale fixed call origination services and retail fixed telephony services. They are also offering retail fixed broadband services in parallel to their retail fixed line telephony services. The MCA reiterates that alternative service providers deployed their network inputs and built a vertically integrated structure in the absence of regulation and/or without recurring to existent regulatory obligations. For example, market entry in the provision of fixed telephony services has happened regardless of the wholesale remedies on CS and CPS services and wholesale line rental. As already pointed out in the consultation document, Melita, Vodafone, Vanilla Telecoms, SIS and Ozone have set up their own network infrastructure and are self-supplying wholesale fixed call origination services to supply retail fixed telephony services. This in large part explains why wholesale services (incl. CS and CPS services) and wholesale line rental have never really taken off in Malta. Indeed, scant use of these (regulated) wholesale services is explained by the fact that alternative service providers have been able to use their own network infrastructure in supplying wholesale and retail fixed telephony services. With regards to economies of scope the MCA reiterates that with the increased take up of

¹⁶ Fol. 35 tal-proċess.

bundled services, both GO and Melita enjoy similar benefits especially since the market share of Melita for bundles is equal to that of GO. Therefore economies of scope clearly do not limit competition in this market¹⁷.

Fil-paragrafu 5.5.2 tad-Deciżjoni Appellata intitolat Responses and MCA reactions concerning the assessment of the second criterion, l-Awtorità Intimata għamlet is-segwenti osservazzjonijiet u konsiderazzjonijiet: Market share developments, indirect constraints and countervailing buyer power - ... Vodafone also voices its concern that 'GO still enjoys the lion's share of the retail fixed access telephony market' and that GO's 'decrease in market share should not be attributed to any effective competition in the retail fixed access telephony market'. It argues that 'it is difficult to see how GO is not deemed to have SMP' with its present market share and with Ozone (Malta) and Vodafone (Malta) losing market share. Hence, Vodafone argues that deregulation of the market 'risks undoing any benefits that it has done and allowing the incumbent GO to re-monopolise the market'. The MCA has already shown through its assessment of the first criterion that new entry is possible in the market under review, as evidenced by the presence of several market players self-supplying wholesale call origination services. This is not to say that new entry was alone sufficient for the MCA to arrive at the conclusion of a competitive market. Indeed, the MCA's conclusion of a competitive market outcome is also supported by an assessment of structural market outcomes. The MCA analysis in this regard has in fact shown that although GO's market share remains above the 50% mark, this operator has seen a constant decline in its take over recent years. This is because alternative service providers, particularly Melita, have successfully managed to penetrate the market at its expense. Melita's subscriber base has seen significant growth over the last few years. In fact, the subscriptions of this operator totalled more than 78,000 as at end of September 2015, up from around 76,000 at the end of September 2014, with take-up of fixed telephony in bundled offers contributing to this outcome. Meanwhile, Melita's retail market share of fixed call origination traffic volumes (in terms of voice call minutes) has steadily improved between 2009 and 2013 and then stabilised at around 30% in 2014. Apart from Melita, other alternative service providers have registered gains in market share, with their combined market share going up marginally from around 3.0% in 2014 to around 3.3% for the first three quarters of 2015. Table 2 shows that this has been particularly the case with Vodafone (Malta). This operator's share of wholesale call origination traffic volumes (derived on the basis of originating voice minute volumes recorded at the retail level) has gone up from 1.2% in 2012 to around 2.0% in 2014 and 2015. ... This trend of small shifts in market shares is consistent with that of a mature market, whereby it is unlikely to observe large swings in market share over short periods of time. The MCA therefore considers that GO no longer enjoys a position to strongly influence the competitive market conditions for its competitors. Simultaneously, the MCA considers that competitive developments in the wholesale market under investigation have also been manifested in the provision of retail fixed telephony services. The outcome in this respect has been in favour of customers, with these availing of more competitively priced tariff plans offered by several service providers (taking into account for example the availability of free minute allowances) and a relatively

¹⁷ A tergo ta' fol. 35 tal-proċess.

easy and smooth number portability process. The MCA expects that Melita and, to a more limited extent, other alternative service providers, to slowly continue eroding GO's market share within the timeframe of this review. The MCA has no reason to doubt that these alternative service providers shall continue offering a strong competitive constraint to GO. As also confirmed by data available to the MCA, consumers are increasingly making use of mobile voice telephony services. Fixed-to-mobile substitutability is evident more than ever, and continues unabated. Whilst the MCA considers that, for the reasons provided in the consultation document, mobile telephony only poses an indirect competitive constraint on the market under investigation, it is nevertheless a further impediment on GO to act as a monopolist with respect to fixed telephony services. The effectiveness of indirect constraints and CBP - Vodafone also alludes that the increase in excise tax for mobile telephony may impact on the effectiveness of mobile telephony as an indirect constraint on fixed telephony. Vodafone also argues that GO's price setting behaviour in the provision of wholesale fixed call origination services would not be constrained via CBP. Data available to the MCA shows that consumers are increasingly making use of mobile voice telephony services. Fixed-to-mobile substitutability is evident more than ever and has continued unabated irrespective of the increase in excise tax for this service. In view of this, end-users are indirectly exerting countervailing buyer power on GO to sufficiently constrain an increase in price for wholesale fixed call origination. The MCA has also already referred to the fact that switching between fixed telephony service providers at the retail level is relatively easy and hassle free. Indeed, barriers to switching are not significant and the ease with which fixed telephony customers are switching from one operator to another to avail themselves of the latest offers and tariff plans and products is quite unrestricted. This in itself would also pose an indirect constraint on the ability of fixed telephony service providers to increase the price of their self-supplied wholesale call origination services. An increase in the price of wholesale call origination would increase the retail price of a fixed call, which would make it less attractive compared to a mobile call. Therefore a hypothetical increase in the price of wholesale fixed call origination would lead to further switching to mobile telephony and would be counterproductive. At a wholesale level, the MCA reiterates that, in the event of a price increase for fixed call origination, alternative service providers, namely Melita, can readily switch from self-supplying fixed call origination to supplying the service on the merchant market without incurring significant additional costs. This would make it possible for wholesale customers, such as Ozone, to seek fixed call origination service from this alternative service provider. It is also recalled that Ozone can also resort to fully self-supply wholesale call origination services via its network infrastructure. This means that wholesale customers of call origination services in Malta have sufficient CBP as to constrain any service provider from behaving independently of their service requirements and pricing considerations¹⁸.

Fil-paragrafu 5.5.3 tad-Deciżjoni Appellata intitolat Responses and MCA reactions concerning the assessment of the third criterion, l-Awtorità Intimata osservat illi: ... Vodafone also says that absent wholesale regulation, GO may stop providing wholesale call origination services, which would further strengthen the existing

¹⁸ Fol. 36 u 37 tal-proċess.

significant power' of this operator. Vodafone also suspects that Melita would not offer wholesale call origination services and that this would raise the risk of Ozone (Malta) to stop operations. ... The MCA considers that it has provided sufficient proof for its decision to deregulate the market under investigation. To this effect, the MCA has undertaken a thorough review of the market in question, going beyond the evident presence of several service providers in the market and a mere market share assessment. Indeed, the MCA takes into consideration the market structure and the characteristics of demand and supply of wholesale call origination services. As to the actual market share analysis, the MCA establishes that GO and Melita are the two main players determining competitive developments in the market in question, but that also other undertakings are having an impact on the prevailing competitive dynamics. There is reason to believe that Melita and other alternative service providers will continue to be a credible alternative to GO over the coming years. To this effect, the MCA believes that the market share of GO will continue to be eroded during the timeframe of this review and is therefore not by itself reflective of SMP in this market. Meanwhile, the MCA also argues that barriers to entry in the market in question, albeit significant, can be overcome and that there is nothing to stop existing wholesale customers of fixed call origination services from approaching Melita and seeking alternative services to those supplied by GO. Also, given the circumstances, it is extremely difficult for GO or any other service provider to behave independently of competitors and customers in the market under investigation, by, for example, increasing prices. The analysis in this market review has shown that the market structure is one that supports competition by itself. Therefore in line with the provisions under regulation 5(3) of the ECNSR ex ante regulation has to be withdrawn. The MCA believes that the wholesale fixed call origination market is now at a mature stage where ex ante regulation is no longer justified in the absence of any operator holding SMP. The MCA therefore believes that deregulation of the market in question is timely and warranted. The MCA also reiterates that any potential market failure in this market can be sufficiently addressed under the ex post framework¹⁹.

Finalment l-Awtorità Intimata, fil-paragrafu 5.5.4 tad-Deciżjoni Appellata intitolat *Summary of MCA reactions*, osservat u kkunsidrat illi: *In summary, the MCA considers that barriers to entry, although present in the market under investigation, do not appear to be posing a significant constraint on market entry. New entry has happened, with several service providers operating voluntarily on a commercial basis rather than by regulation. GO's position on the market under investigation has been constrained by Melita and smaller alternative service providers, as these are all self-supplying wholesale fixed call origination services to provide new fixed telephony products on the retail market. The competitive landscape concerning the provision of fixed telephony services has continued to experience changes since the last market review. Data available to the MCA shows that GO's market share in the provision of wholesale fixed access and call origination services went down over the last few years, with gains reported for alternative service providers, particularly Melita. Apart from Melita managing to continue building market share, other alternative service providers have also generally consolidated their market position. This goes to suggest that, whilst the*

¹⁹ Fol. 37 u a tergo ta' fol. 37 tal-proċess.

presence and scope of other alternative service providers using wireless networks is not directly comparable to GO or Melita given, for example, the prevailing demand for quad play services, fixed telephony services supplied over wireless solutions still present a constraint on incumbent operators, given the possibility for consumers to switch to these networks if they so wish. Subsequently, the MCA reiterates its position that the first and second criteria are not met and that the market under investigation is competitive and that therefore no regulatory intervention is warranted in this market²⁰.

Fid-dawl ta' dak kollu osservat u kkunsidrat mill-Awtorità Intimata fid-Deciżjoni Appellata, it-Tribunal bl-ebda mod ma jista' jqis u jikkonkludi li l-imsemmija Awtorità ma kkunsidratx il-veduti, osservazzjonijiet u argumenti avanzati mill-partijiet interessati, inkluż is-soċjetà Rikorrenti, waqt l-istadju ta' konsultazzjoni u lanqas ma jista' bl-ebda mod iqis u jikkonkludi li l-Awtorità ma tatx raġunijiet, per di più sodisfaċenti, għalfejn ma aċċettatx uħud minn dawn l-osservazzjonijiet, veduti w argumenti, inklużi dawk avanzati mis-soċjetà Rikorrenti. In verità dak li tippretendi s-soċjetà Rikorrenti hu li għaliex il-veduti, osservazzjonijiet u argumenti minnha avanzati waqt l-istadju ta' konsultazzjoni ma ġewx aċċettati mill-Awtorità Intimata, allura d-Deciżjoni Appellata għandha titqies monka, non che nulla; pretensjoni din li hi għalkollox legalment u fattwalment ingustifikata u bla bażi.

Fil-fehma tat-Tribunal għalhekk, l-ewwel aggravju fuq liema s-soċjetà Rikorrenti tibbaża l-appell tagħha mid-Deciżjoni Appellata huwa evidentement infondat, jekk mhux addirittura frivolu u vessatorju, u bħala tali għandu jiġi miċhud.

It-tieni aggravju - Kompetizzjoni effettiva u sostenibbli fis-swieq:

Fit-tieni aggravju ta' l-appell tagħha s-soċjetà Rikorrenti tikkontendi li bid-Deciżjoni Appellata l-Awtorità Intimata ma hijiex qed tiżgura li l-prinċipji tal-Liġi dwar il-kompetazzjoni jiġu għal kollox osservati fis-settur tal-komunikazzjonijiet elettronici u dana billi bl-imsemmija Deciżjoni l-Awtorità Intimata ddecidiet, skont is-soċjetà Rikorrenti b'mod għalkollox u prekolożament prematur, li tneħħi r-rimedji *ex ante* li kienet imponiet fuq GO, in kwantu li kellha posizzjoni SMP, f'deciżjoni li nġhatat fl-2011. Huwa tikkontendi li dawk ir-rimedji *ex ante* kienu imposti biex jiġi assigurat aċċess għall-*wholesale call origination and associated services*, biex tiġi assigurata t-trasparenza u li ma jkunx hemm diskriminazzjoni mill-operatur li jkollu posizzjoni dominanti fis-suq fil-fisazzjoni tal-*wholesale services* li jipprovdi u anke sabiex jiġu assigurati l-kontroll fuq il-prezzijiet, *cost accounting* u *accounting separation*. Tishaq huma dawn ir-rimedji *ex ante* li taw xejra ta' kompetittività lis-suq in kwistjoni, ossia s-suq tal-*wholesale call origination on the public telephone network provided at a fixed location in Malta*, u mhux għaliex hemm kompetizzjoni effettiva u per di più sostenibbli f'dan l-istess suq. Tenfasizza li d-deregularizzazzjoni tas-suq in kwistjoni hija għalhekk għalkollox kontra mhux biss il-Liġijiet nostrali dwar is-setturi speċifiku iżda anke in vjolazzjoni tal-linji gwida applikabbli maħruġa mill-Kummissjoni Ewropeja.

²⁰ A tergo ta' fol. 37 tal-proċess.

Dawn il-kontestazzjonijiet tas-soċjetà Rikorrenti huma diretti lejn element u konsiderazzjonijiet partikolari tad-Deciżjoni Appellata u cioè l-element tal-market share tas-soċjetà GO fis-suq in kwistjoni u l-konsiderazzjonijiet li l-Awtorità Intimata għamlet fl-ambitu u fir-rigward ta' dan il-market share. Fir-rigward is-soċjetà Rikorrenti tikkontendi li *d-deciżjoni appellata ma tinkludi l-ebda analiżi, studju jew statistika illi tista' twassal biex wieħed raġonevolment jikkonkludi illi s-suq in kwistjoni huwa (i) effettivament kompetittiv u (ii) b'mod sostenibbli. Illi pjuttost, mill-mod li bih waslet għad-deciżjoni tagħha wieħed ma jistax ma jinmutax illi l-Awtorità kienet qed tonqos milli taddotta approċċ regolatorju konsistenti, li huwa wieħed mill-għanijiet espressi għat-twaqqif ta' l-Awtorità ai termini tal-Kap.399. Illi f'dar-rigward issir riferenza ukoll għal The Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (EC SMP Guidelines) fejn jingħad senjatament illi: In the Commission's decision-making practice, single dominance concerns normally arise in the case of undertakings with market shares of over 40% although the Commission may in some cases have concerns about dominance even with lower market shares, as dominance may occur without the existence of a large market share. Illi trid tingibed l-attenzjoni għall-fatt illi fiż-żmien meta saret l-analiżi tas-suq fis-sena 2015, kienu biss is-soċjetajiet Go u Melita li kellhom il-kapaċità u l-facilitajiet li joffru prodotti ta' wholesale fixed access lil terzi. Operaturi oħrajn isofru minn żvantagġ minħabba li ma għandhomx l-aċċess għall-infrastruttura meħtieġa. Fil-fatt is-soċjetà esponenti ma tistax toffri l-istess servizzi li jigu offruti minn GO u Melita u tista' biss toffri dawn is-servizzi tramite broadband wireless network bid-diffikultajiet kollha li dan iġib miegħu. Jiġi ribadit illi minkejja d-dħul fis-suq tas-soċjetà Melita, is-soċjetà GO dejjem baqgħet tgawdi minn poter sinifikanti fis-suq senjatament għaliex mis-sena 2010 il-market share ta' GO ma ġarrbitx riduzzjonijiet sostanzjali u baqgħet dik ta' 66.73%. Jekk wieħed kellu jħares lejn fixed-originating call minutes, it-tnaqqis kien biss ta' 6.99% bejn is-sena 2010 u s-sena 2015. Għalhekk il-market share tas-soċjetà GO baqgħet ferm għolja biex wieħed ikun jista' jgħid illi hemm kompetizzjoni effettiva u sostenibbli. Illi huwa minnu illi market share huwa indikatur wieħed tal-livell ta' kompetizzjoni fis-suq, madanakollu, minkejja kollox il-livell ta' market share ta' GO baqa' wieħed sostanzjali u ben oltre l-50% li għab-baži tal-linji gwida u rakkomandazzjonijiet kollha għandu jibqa' jitqies bħala posizzjoni dominanti fis-suq. Illi barra minn hekk, jekk wieħed kellu jqis il-market share ta' GO in termini ta' dħul gross il-porbabilità hi li l-market share jkun ikbar minn dak li fil-fatt ġie misjub mill-Awtorità appellata, madanakollu l-Awtorità naqset għal kollox milli tagħmel tali konsiderazzjonijiet. Illi l-Awtorità appellata kienet hi stess ippublikat dokument b'linji gwida ta' metodoloġija għall-analiżi ta' l-eżistenza ta' kompetizzjoni effettiva fis-suq Malti li minnhom infishom jspeċifikaw illi market shares are an excellent indicator of the size of the undertaking within a particular market, and are widely acknowledged as a main indicator of SMP. Senjatament, dawn il-linji gwida jspeċifikaw illi market shares higher than 40 percent would raise concern of necessity of designation of SMP. Illi l-linji gwida adottati mill-Unjoni Ewropeja jgħidu illi huwa biss f'ċirkostanzi eċċezzjonali illi market share ikbar minn 50% m'għandux jitqies bħala posizzjoni dominanti fis-suq. Inoltre l-istess linji gwida jspeċifikaw illi the persistence of a high market share over time is important to prove single dominance. Madanakollu minn imkien mill-analiżi magħmula mill-Awtorità ma jirriżulta liema huma dawn iċ-ċirkostanzi eċċezzjonali*

għal xiex GO m' għandhiex tkompli titqies bħallikieku tgawdi minn posizzjoni dominanti fis-suq. Bl-istess mod, tali linji gwida jindikaw speċifikament illi only high, frequent and persistent changes in market share can indicate a development towards effective competition. Illi għalhekk, wieħed kien jistenna li l-Awtorità appellata, fid-deċizzjoni tagħha tindika liema kienu, skond hi, dawk iċ-ċirkostanzi eċċezzjonali li wassluha biex tiddeċiedi b'mod differenti minn kif iddecidiet fl-aħħar snin. Illi fil-fatt, mid-deċizzjoni appellata stess jirriżulta illi ma kien hemm l-ebda high, frequent and persistent changes in the market share. Anzi, dak illi kellu jirriżulta mid-deċizzjoni appellata kien illi soċjetajiet bħal dik esponenti ma setgħux jidhlu fis-suq b'mod li jrendi. Għalhekk kienet għal kollox skorretta w illogika d-deċizzjoni appellata u fl-opinjoni tas-soċjetà esponenti l-MCA kien messha tat iktar importanza għal din ir-realtà minflok ma ppruvat tpenġiha b'mod żvijanti fid-Deciżjoni tagħha²¹.

Mis-sottomissjonijiet tas-soċjetà Rikorrenti hawn appena citati jirriżulta b'mod ċar li skontha l-uniku element li kellu jiddetta d-deċizzjoni finali ta' l-Awtorità Intimata kellu jkun il-market share, mhux negligibbli, tas-soċjetà GO fis-suq in kwistjoni u a bażi ta' tali market share biss tasal għall-konkluzzjoni li s-soċjetà GO għad għandha posizzjoni SMP fis-suq hawn trattat u b'konsegwenza ta' hekk dan is-suq ma huwiex effettivament kompetittiv b'mod sostenibbli.

Fil-Linji Gwida tal-Kummissjoni Ewropea il-Criteria for assessing SMP jipprovdu li as the Court has stressed, a finding of a dominant position does not preclude some competition in the market. It only enables the undertaking that enjoys such a position, if not to determine, at least to have an appreciable effect on the conditions under which that competition will develop, and in any case to act in disregard of any such competitive constraint so long as such conduct does not operate to its detriment. In an ex-post analysis, a competition authority may be faced with a number of different examples of market behaviour each indicative of market power within the meaning of Article 82. However, in an ex-ante environment, market power is essentially measured by reference to the power of the undertaking concerned to raise prices by restricting output without incurring a significant loss of sales or revenues. The market power of an undertaking can be constrained by the existence of potential competitors. An NRA should thus take into account the likelihood that undertakings not currently active on the relevant product market may in the medium term decide to enter the market following a small but significant non-transitory price increase. Undertakings which, in case of such a price increase, are in a position to switch or extend their line of production/services and enter the market should be treated by NRAs as potential market participants even if they do not currently produce the relevant product or offer the relevant service. As explained in the paragraphs below, a dominant position is found by reference to a number of criteria and its assessment is based, as stated above, on a forward-looking market analysis based on existing market conditions. Market shares are often used as a proxy for market power. Although a high market share alone is not sufficient to establish the possession of significant market power (dominance), it is unlikely that a firm without a significant share of the relevant market would be in a dominant position. Thus, undertakings with market shares of no more than 25%

²¹ Para. 39 sa' 48 tan-Nota ta' Sottomissjonijiet tas-soċjetà Rikorrenti, fol. 172 sa' 174 tal-proċess.

are not likely to enjoy a (single) dominant position on the market concerned. In the Commission's decision making practice, single dominance concerns normally arise in the case of undertakings with market shares of over 40%, although the Commission may in some cases have concerns about dominance even with lower market shares, as dominance may occur without the existence of a large market share. According to established case-law, very large market shares - in excess of 50% - are in themselves, save in exceptional circumstances, evidence of the existence of a dominant position. An undertaking with a large market share may be presumed to have SMP, that is, to be in a dominant position, if its market share has remained stable over time. The fact that an undertaking with a significant position on the market is gradually losing market share may well indicate that the market is becoming more competitive, but it does not preclude a finding of significant market power. On the other hand, fluctuating market shares over time may be indicative of a lack of market power in the relevant market. ... It is important to stress that the existence of a dominant position cannot be established on the sole basis of large market shares. As mentioned above, the existence of high market shares simply means that the operator concerned might be in a dominant position. Therefore, NRAs should undertake a thorough and overall analysis of the economic characteristics of the relevant market before coming to a conclusion as to the existence of significant market power. In that regard, the following criteria can also be used to measure the power of an undertaking to behave to an appreciable extent independently of its competitors, customers and consumers. These criteria include amongst others: overall size of the undertaking, control of infrastructure not easily duplicated, technological advantages or superiority, absence of or low countervailing buying power, easy or privileged access to capital markets/financial resources, product/services diversification (e.g. bundled products or services), economies of scale, economies of scope, vertical integration, a highly developed distribution and sales network, absence of potential competition, barriers to expansion. A dominant position can derive from a combination of the above criteria, which taken separately may not necessarily be determinative. A finding of dominance depends on an assessment of ease of market entry. In fact, the absence of barriers to entry deters, in principle, independent anti-competitive behaviour by an undertaking with a significant market share. In the electronic communications sector, barriers to entry are often high because of existing legislative and other regulatory requirements which may limit the number of available licences or the provision of certain services (i.e. GSM/DCS or 3G mobile services). Furthermore, barriers to entry exist where entry into the relevant market requires large investments and the programming of capacities over a long time in order to be profitable. However, high barriers to entry may become less relevant with regard to markets characterised by on-going technological progress. In electronic communications markets, competitive constraints may come from innovative threats from potential competitors that are not currently in the market. In such markets, the competitive assessment should be based on a prospective forward-looking approach²².

Meta l-Criteria for assessing SMP kif maħruġa mill-Kummissjoni Ewropea jiġu ikkunsidrati fl-intier tagħhom u mhux biss b'mod selettiv kif invece tagħmel is-

²² Sezżjoni 3.1 paras. 72 sa' 75, 78 u 79 tal-Linji Gwida tal-Kummissjoni Ewropea, a tergo ta' fol. 143 tal-proċess.

soċjetà Rikorrenti, jirriżulta li l-*market share* ta' intrapriżi fis-suq rilevanti, anke jekk dan ikun *market share* għoli, ma huwiex l-uniku kriterju jew il-kriterju determinanti li għandu jwassal għas-sejbien ta' *Significant Market Power* ta' dik l-intrapriża fis-suq rilevanti. Kif jgħid il-Linji Gwida hawn appena citati: ***it is important to stress that the existence of a dominant position cannot be established on the sole basis of large market shares. As mentioned above, the existence of high market shares simply means that the operator concerned might be in a dominant position. Therefore, NRAs should undertake a thorough and overall analysis of the economic characteristics of the relevant market before coming to a conclusion as to the existence of significant market power***²³.

Dan huwa appuntu dak li għamlet l-Awtorità Intimata fid-Deciżjoni Appellata.

Mid-Deciżjoni Appellata u mill-atti proċesswali jirriżulta li fil-kuntest tas-suq trattat f'din id-Deciżjoni hemm konsiderazzjoni partikolari x'issir u li fil-fatt saret mill-Awtorità Intimata. Din il-konsiderazzjoni temani mill-fatt li skond Rakkomandazzjoni tal-Kummissjoni Ewropeja maħruġa f'Ottubru 2014²⁴, il-*wholesale market for the provision of wholesale call origination services provided on public telephone networks at a fixed location*, ma għadux indikat bħala wieħed mis-swieq fis-settur tal-komunikazzjoni elettronika li għandu jkun suscetibbli u sugġett għal *ex ante regulation*, bil-premessa però li l-NRAs tad-diversi stati membri jistgħu xorta waħda jagħzlu li jimponu jew iżommu fis-seħħ *ex ante regulation* fis-suq in kwistjoni jekk iċ-ċirkostanzi nazzjonali jirrikjedu li dan ikun hekk. Fid-dawl ta' tali Rakkomandazzjoni u proprio minhabba fiha u l-premessa fiha prevista, l-Awtorità Intimata, una volta li stabbiliet il-*relevant product market* għal *wholesale fixed call origination* u ddeterminat li dan jinkludi u jikkonsisti fi *call origination services provided to third parties; and self-supplied call origination services* u li *the relevant market includes the provision of wholesale call origination services over copper/fibre, cable and wireless networks*, għaddiet biex tapplika u tesegwixxi *The Three Criteria Test*, kif diretta tagħmel fir-Rakkomandazzjoni tal-Kummissjoni Ewropeja, għall-fini li tistabilixxi jekk fil-każ ta' Malta dan is-suq partikolari jistax jiġi deregolarizzat o meno.

Fir-Rakkomandazzjoni tagħha l-Kummissjoni Ewropeja tosserva li: *the wholesale markets listed in the Annex may have such characteristics as to justify ex ante regulation because overall they meet the following three cumulative criteria, which have also been used to identify markets susceptible to ex ante regulations in the previous versions of the Recommendation. The first criterion is the presence of high and non-transitory barriers to entry. However, given the dynamic character and functioning of electronic communications markets, possibilities to overcome barriers to entry within the relevant time horizon should also be taken into consideration when carrying out a prospective analysis to identify the relevant markets for possible ex ante regulation. The second criterion addresses whether a market structure tends towards effective competition within a relevant time*

²³ Enfasi tat-Tribunal.

²⁴ Commission Recommendation of 9 October 2014 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.

horizon. The application of this criterion involves examining the state of infrastructure-based and other competition behind the barriers to entry. The third criterion is that the application of competition law alone would not adequately address the market failure(s) concerned. The main indicators to be considered when assessing the first and second criteria are similar to those examined as part of a forward-looking market analysis to determine the presence of significant market power. In particular, indicators of barriers to entry in the absence of regulation (including the extent of sunk costs), market structure, market performance and market dynamics, including indicators such as market shares and trends, market prices and trends, and the extent and coverage of competing networks or infrastructures. As far as the first criterion is concerned, two types of barriers to entry are relevant for the purpose of this Recommendation: structural barriers and legal or regulatory barriers. Structural barriers to entry result from original cost or demand conditions that create asymmetric conditions between incumbents and new entrants impeding or preventing market entry of the latter. For instance, high structural barriers may be found to exist when the market is characterised by absolute cost advantages, substantial economies of scale and/or economies of scope, capacity constraints and high sunk costs. A related structural barrier can also exist where the provision of service requires a network component that cannot be technically duplicated or only duplicated at a cost that makes it uneconomic for competitors. Legal or regulatory barriers are not based on economic conditions, but result from legislative, administrative or other measures that have a direct effect on the conditions of entry and/or the positioning of operators in the relevant market. An example of a legal or regulatory barrier impeding or preventing entry into a market is a limit on the number of undertakings that have access to spectrum for the provision of underlying services. Other examples of legal or regulatory barriers are price controls or other price-related measures imposed on undertakings, which affect not only entry but also the positioning of undertakings on the market. Legal or regulatory barriers that are likely to be removed within the relevant time horizon should not normally be deemed to constitute a barrier to entry such as to fulfil the first criterion. Barriers to entry may also become less relevant with regard to innovation-driven markets characterised by ongoing technological progress. In such markets, competitive constraints often come from innovative threats from potential competitors that are not currently in the market. In innovation-driven markets, dynamic or longer-term competition can take place among firms that are not necessarily competitors in an existing 'static' market. This Recommendation identifies markets where barriers to entry are expected to persist over a foreseeable period. In assessing whether barriers to entry are likely to persist in the absence of regulation, it is necessary to examine whether the industry has experienced frequent and successful entry and whether entry has been or is likely in the future to be sufficiently immediate and persistent to limit market power. The relevance of barriers to entry will depend, inter alia, on the minimum efficient scale of output and the costs which are sunk. Even when a market is characterised by high barriers to entry, other structural factors in that market may entail that the market still tends towards becoming effectively competitive within a relevant time horizon. A tendency towards effective competition implies that the market will either reach the status of effective competition absent ex ante regulation within the period of review, or will do so after that period provided clear evidence of positive dynamics in the market is available within the period of review. Market dynamics may for instance

be caused by technological developments, or by the convergence of products and markets which may give rise to competitive constraints being exercised between operators active in distinct product markets. This may also be the case in markets with a limited – but sufficient – number of undertakings having diverging cost structures and facing price-elastic market demand. There may also be excess capacity in a market that would normally allow rival firms to expand output very rapidly in response to any price increase. In such markets, market shares may change over time and/or decreasing prices may be observed. The third criterion serves to assess the adequacy of corrective measures that can be imposed under competition law to tackle identified persistent market failure(s), in particular given that ex ante regulatory obligations may effectively prevent competition law infringements. Competition law interventions are likely to be insufficient where for instance the compliance requirements of an intervention to redress persistent market failure(s) are extensive or where frequent and/or timely intervention is indispensable. Thus, ex ante regulation should be considered an appropriate complement to competition law when competition law alone would not adequately address persistent market failure(s) identified. The application of these three cumulative criteria should limit the number of markets within the electronic communications sector where ex ante regulatory obligations are imposed and thereby contribute to one of the aims of the regulatory framework, namely to reduce ex ante sector-specific rules progressively as competition in the markets develops. Failure to meet any one of the three criteria would indicate that a market should not be identified as susceptible to ex ante regulation.

Fid-dawl ta' dak provdut fir-Rakkomandazzjoni jirriżulta b'mod ċar li l-Awtorità Intimata ma setgħetx tibbaża l-konsiderazzjonijiet u konsegwenti deċiżjoni tagħha dwar id-deregolarizzazzjoni tas-suq in kwistjoni u konsegwementment dwar it-tnehhija tar-rimedji *ex ante* fir-rigward tas-soċjetà GO unikament u esklussivament fuq il-*market share* tas-soċjetà GO fis-suq in kwistjoni, anke jekk dan il-*market share* huwa wiehed għoli.

Fid-Deciżjoni Appellata l-Awtorità Intimata kjarament imxiet u agixxiet skond kif mehtieg minnha fir-Rakkomandazzjoni tal-Kummisssjoni Ewropea, ossia eżaminat il-kriterji involuti wiehed wiehed u jerga kkunsidrat kull wiehed minnhom fis-sudivizjonijiet rispettivi tiegħu, hekk kif indikati fir-Rakkomandazzjoni tal-Kummisssjoni Ewropeja - vide l-paragrafi 5.2 sa' 5.4 tad-Deciżjoni Appellata - u a bażi tal-konsiderazzjonijiet dettaljati u raġunati li għamlet, ikkonkludiet illi *overall the MCA considers that competition in this market is possible in the absence of ex ante wholesale regulation and that competition law, per se, is deemed sufficient to address any potential competition shortcomings*²⁵. It-Tribunal hawn josserva li in verità is-suq hawn trattat ossia l-*wholesale market for the provision of wholesale call origination services provided on public telephone networks at a fixed location* ma huwiex totalment u kompletament deregolarizzat kif donnha tagħti ad intendere is-soċjetà Rikorrenti in kwantu għadu u jibqa' regolat bir-regolamentazzjoni *ex post*.

Għalkemm l-element tal-*market share* tas-soċjetà GO fih innifsu u waħdu ma għandux u ma jistax jitqies bħala element determinanti għad-deċiżjoni finali li kellha

²⁵ Para. 5.4.2 tad-Deciżjoni Appellata a tergo ta' fol. 34 tal-proċess.

tiehu l-Awtorità Intimata dwar il-mertu tal-materja minnha trattata fid-Deciżjoni Appellata, it-Tribunal iqis li xorta waħda għandu jindirizza s-sottomissjonijiet u l-argumentazzjonijiet avvanzati mis-soċjetà Rikorrenti fir-rigward ta' dak li skontha kellu jirriżulta lill-Awtorità Intimata, u b'hekk għandu jirriżulta lil dan it-Tribunal, dwar ir-rilevanza u l-importanza tal-market share tas-soċjetà Go fis-suq rilevanti fil-kuntest tal-materja trattata.

Fir-rigward is-soċjetà Rikorrenti tikkontendi li mill-affidavit ta' Kevin Caruana, rappreżentant ta' l-Awtorità Intimata jirriżulta li *Caruana jikkonferma fuq is-suq in kwistjoni jibda billi jgħid illi the number of total subscriptions fell from 247,635 at the end of 2010 to 230,226 at the end of 2015. Madanakollu in kontro-eżami l-istess Caruana jikkonferma li dan it-tnaqqis kien dovut in parti għall-clean up ta' pre-paid subscriptions. Fil-fatt Caruana donnu jrid jpenġi l-istampa li t-tnaqqis kien grdwali però bħala stat ta' fatt fis-sena 2011 kien sar tnaqqis ta' madwar 15,000 linja ta' pre-paid subscriptions, u cioè fil-perijodu bejn is-sena 2010, id-data ta' l-aħħar Market Analysis u s-sena 2015, u cioè d-data meta saret il-Market Analysis li wasslet għad-deċiżjoni hawn appellata u dan jidher mit-tnaqqis drastiku fin-numru ta' linji li kellha s-soċjetà GO bejn is-sena 2010 u s-sena 2011. Illi jekk xejn dan l-eżercizzju kien juri li s-suq in kwistjoni kien minfuħ b'cirka 15,000, imma billi gie registrat dan it-tnaqqis ma jfissirx għalhekk illi s-suq kien neċessarjament iktar kompetittiv. Fil-fatt, minn imkien mid-deċiżjoni appellata ma jirriżulta illi dan it-tnaqqis kien kawża ta' suq iktar kompetittiv jew illi effettivament dawn il-linji ġew registrati ma' operaturi oħrajn fl-istess suq. Madanakollu l-istess xhud in kontro-eżami jgħid illi l-Awtorità ma għamlet l-ebda korrezzjoni għal dan il-fatt biex tiddetermina l-market share tas-soċjetà GO. ... Dan kollu huwa ta' rilevanza kbira għaliex il-figuri, meħud in waħedhom, mingħajr ma wieħed jieħu in konsiderazzjoni dan il-clean up juru, erronejament, illi f'sena waħda s-soċjetà GO marret minn 77% tal-market share għal 65% tal-market share, madanakollu, oġġettivament, nofs il-figura li wasslet għal dak it-tnaqqis ma kienx minħabba li l-utenti tas-servizz marru għand operatur ieħor imma kien biss minħabba eżercizzju amministrattiv u bħala stat ta' fatt l-market share ta' GO kien baqa' identiku peress illi l-ammont kbir ta' linji li tneħħew kienu linji inattivi. Filwaqt li matematikament huwa minnu li l-figura ta' 77% kienet minfuħa b'linji inattivi, bħala stat ta' fatt il-market share ta' GO xorta waħda kienet enormi, anzi kellha dominanza waħedha fis-suq u minkejja li jidher li kien hemm xi ċaqliq dan iċ-ċaqliq ma kien ċaqliq xejn iżda biss riżultat ta' eżercizzju amministrattiv ta' tindif ta' linji inattivi. Għalhekk dak li qed jiġi umilment sottomess hu illi l-Awtorità ma kellhiex taħres biss lejn it-tnaqqis ta' numru ta' linji iżda kellha tiddetermina x'wassal biex inbidel kif kien qiegħed jidher li l-market share ta' GO, u senjatement jekk dan kienx riżultat ta' zieda ta' kompetizzjoni fis-suq, li qed jiġi sottomess li ma kienx, jew hux sempliċi riżultat ta' tibdil ta' figuri li kienu qed jiġu meqjusa għall-finijiet ta' determinazzjoni ta' market share. Fatturi ieħor li jidher li ma ġiex ikkunsidrat minn naħa ta' l-Awtorità huwa illi mis-sena 2015 is-soċjetà Melita bdiet ukoll toffri bundles fejn ma kull subscription ta' broadband illi kienet qiegħda tagħti, kienet ukoll qed tagħti linja fixed. Dan wassal għal żvjar fil-preċentwali ta' linji li kellhom l-operaturi, u għal darb' oħra mhux minħabba ċaqliq fis-suq. In oltre jekk wieħed jara t-tabelli li hemm fl-Affidavit ta' l-istess Kevin Caruana, li kieku wieħed kellu jħares lejn il-figuri għas-sena 2016 fejn is-soċjetà GO kellha market share ta' 64.83% ta' subscriptions fuq 234,368 subscriptions (jiġifieri total ta' 151,940 subscriptions) u tqabbel dan ma' Q2*

għas-sena 2017 u wieħed jagħmel l-istess eżercizzju jsib illi GO kien għad kellha 151,823 subscription - tnaqqis f'sentejn ta' biss 117 linja għas-soċjetà GO. Fattur rilevanti oħrajn huma illi globalment fis-suq bejn is-sena 2011 u s-sena 2017 żdiedu biss 6,000 linja. Barra minn hekk, Caruana stess jikkonferma li d-differenza fil-market share għas-soċjetà GO bejn is-sena 2015, u cioè qabel ma gie deregolarizzat s-suq għal dik fl-2017 kienet biss ta' 2%. Madanakollu, Caruana jikkonferma in kontro-eżami li l-Awtorità ma tagħmilx eżercizzji ta' korrelazzjoni bejn il-fatt li s-suq globalment qed jikber u t-tibdil fil-market share ta' kull wieħed mill-operaturi. Din il-korrelazzjoni hija meħtieġa għaliex huwa b'dan il-mod li wieħed jista' jara eżatt jekk hux minnu illi l-utenti hux qed igawdu mill-effetti tal-kompetizzjoni billi jkun jistgħu liberalment jiċcaqalqu bejn operatur u ieħor, jew inkella jekk in-numri, fir-realtà kienux qed jibqgħu statiči, bit-tibdil fl-istatistika jkun biss minħabba jew tindif amministrattiv jew r-rizultat tal-fatt illi l-linji kienu qed jingħataw bhala parti minn bundle. Jigi umilment sottomess illi l-eżercizzju li jispjega Caruana fil-kontro-eżami tiegħu, u cioè dak simplistiku li wieħed jara l-market share x'inhu billi biss jara kemm hemm linji għand operatur partikolari u jqabbilhom ma' kemm hemm linji globalment fis-suq ma tagħtix stampa veritiera tad-daqs ta' kull operatur fis-suq. Dan qed jigi sottomess, wassal biex il-figuri simplistiċi adoperati mill-Awtorità juru li s-soċjetà GO tilfet parti mis-suq mentri fir-realtà l-market share ta' GO ... kien baqa' bejn wieħed u ieħor identiku bejn is-sena 2010 u s-sena 2015 t-tibdiliet li qed jidhru f'dik il-figura kienu minħabba li s-suq kien biss qiegħed jizdied b'linji li mhux neċessarjament kienu qed jintużaw. Tant hu hekk illi jekk wieħed kellu jħares lejn tabella preżentata minn Caruana fl-affidavit tiegħu, dwar in-numru ta' minuti originati minn fixed-call traffic wieħed jara illi l-volum ta' traffiku li kellha s-soċjetà GO kien, waqt li s-suq kien għadu regolarizzat, qed jonqos biss bir-rata ta' madwar 1% fis-sena. Dan it-tibdil, jigi sottomess, ma kienx jagħti serħan il-moħħ li kien hemm kompetizzjoni effettiva fis-suq u dan għaliex b'dik ir-rata s-soċjetà GO kien ser jkun fadlilha ben 15-il sena biex tiflew l-istatus ta' SMP, madanakollu permezz tad-deċiżjoni odjerna, l-Awtorità xorta qieset li dan is-suq seta' jigi deregolarizzat. Għalhekk jigi sottomess ukoll illi l-użu ta' dawn il-linji kien ikun metragġ ħafna iktar adegwat sabiex jigi determinat jekk is-soċjetà GO tgawdix minn SMP jew le f'dan is-suq²⁶.

Wara li qies il-provi prodotti, dak li jirriżulta minn tali provi w anke dak ikkunsidrat u determinat mill-Awtorità Intimata fid-Deciżjoni Appellata, it-Tribunal hu tal-fehma li s-soċjetà Rikorrenti hija ferm selettiva fil-konsiderazzjonijiet tagħha dwar l-import tal-provi prodotti u ta' l-eżercizzju esegwit mill-Awtorità Intimata biex waslet għad-Deciżjoni Appellata, u dana bl-iskop uniku li ssahħaħ l-argument - del resto mhux aċċettabbli - tagħha dwar l-importanza assolutament u ad esklużjoni ta' kollox tal-market share tas-soċjetà GO fis-suq rilevanti.

Għalkemm is-soċjetà Rikorrenti tishaq li t-tnaqqis fil-market share tas-soċjetà GO huwa dettat prinċiplament, jekk mhux addirittura unikament, mill-fatt li fi żmien partikolari l-imsemmija soċjetà għamlet *clean-up* tal-linji tagħha u mhux dettat minn kompetittività fis-suq in kwistjoni, dan mhux affattu korrett. Għalkemm mhux miċhud li s-soċjetà GO għamlet *clean-up* tal-linji tagħha w allura l-figuri riżultanti ta' linji attivi kienu inqas u jirriflettu iktar is-sitwazzjoni attwali fis-suq kif kienet u

²⁶ Para. 49 sa' 59 tan-Npta ta' Sottomissjonijiet tas-soċjetà Rikorrenti, fol. 174 sa' 177 tal-proċess.

b'hekk kien hemm ukoll it-tnaqqis relattiv u ovvju fil-*market share* tagħha, is-soċjetà Rikorrenti konvenjentement tinjora l-fatt li waqt li kien hemm tnaqqis fil-*market share* tas-soċjetà GO kien hemm żieda korrispettiva fil-*market share* ta' dawk li l-Awtorità Intimata ssejthilhom *alternative providers*, żieda li ċertament ma tiddependix minn *clean up* ta' linji inattivi, iktar u iktar meta skond is-soċjetà Rikorrenti tali *clean up* - jew għall-inqas il-maġġor parti ta' din il-*clean up* - seħhet f'sena partikolari.

Mid-Deciżjoni Appellata jirrizulta li: (1) il-*market share* tas-soċjetà GO fil-*wholesale fixed access lines* - fejn hemm inkluzi wkoll il-*fixed access lines* li kienu qed jagħmlu uzu mill-WLR based service provdut minn Ozone (Malta) - minn 77.39% fl-2010 niżel għal 66.49% fl-2014, iżda l-*market share* tas-soċjetà Melita fil-*wholesale fixed access lines* minn 22.21% fis-sena 2010 tela' għal 33.10% fis-sena 2014²⁷; (2) il-*market share* tas-soċjetà GO fil-*wholesale call origination traffic volumes* niżel minn 74.88% fl-2010 għal 66.73% fl-2014, il-*market share* tas-soċjetà Melita żdied minn 24.615 fl-2010 għal 30.05% fl-2014 u l-*market share* tas-soċjetà Rikorrenti żdied minn 0.08% fl-2010 għal 1.91% fl-2014²⁸. Kien hemm żieda riflessa wkoll fil-*market shares* f'dan is-settur ta' Ozone (Malta) u SIS. Mill-affidavit ta' Kevin Caruana mbaġġad jirrizulta li fir-rigward tal-*local fixed line telephony subscriber base* il-*market share* tas-soċjetà GO niżlet minn 76.84% fl-2009 għal 63.37% fil-Q2 ta' l-2017 filwaqt li l-*market share* tas-soċjetà Melita żdiedet minn 22.45% fl-2009 għal 34.98% fil-Q2 ta' l-2017. Il-*market share* tas-soċjetà Rikorrenti f'dan l-istess settur żdiedet minn 0.22% fl-2009 għal 1.41% fil-Q2 ta' l-2017²⁹. Fil-fehma tat-Tribunal meta t-tnaqqis fil-*market share* tas-soċjetà GO matul is-snin - u dana anke wara li s-suq in kwistjoni ġie deregolarizzat - jinsab *mirrored* fiż-żieda tal-*market share* tas-soċjetà Melita w anke f'ċerta setturi tal-*market share* tas-soċjetà Rikorrenti, diffiċilment jista' jregi l-argument tas-soċjetà Rikorrenti li t-tnaqqis fil-*market share* tas-soċjetà GO kien biss riżultat ta' *clean up* fil-linji u mhux ta' kompetizzjoni fis-suq in kwistjoni.

Is-soċjetà Rikorrenti tikkontendi ukoll li għalkemm is-*subscriber base* minn 234,368 fis-sena 2016 żdiedet għal 239,582 sa' Q2 fl-2017, it-tnaqqis riskontrat mis-soċjetà GO kien biss ta' 117 *subscriber*. Fil-fehma tat-Tribunal konsiderazzjoni ta' dan il-fattur minn din l-ottika hija għal kollox żbaljata in kwantu dak li għandu jiġi kkunsidrat huwa li għalkemm is-*subscriber base* żdiedet bejn l-2016 u Q2 ta' l-2017, xorta waħda ġie li s-*subscriber base* tas-soċjetà GO naqset b'117 *subscriptions* - fattur dan li fil-fehma tat-Tribunal juri li s-soċjetà GO qed tiffaċċja kompetizzjoni effettiva da parte tas-*service providers* l-oħra fis-suq in kwistjoni - konsiderazzjoni din li teffettwa ferm il-konsiderazzjonijiet finali li l-Awtorità Intimata għandha tagħmel u fil-fatt għamlet fl-eżerċizzju tad-diskrezzjoni tagħha.

Ta' interess huwa dak iddikjarat minn Kevin Caruana fl-affidavit tiegħu, dikajrazzjonijiet dawn li fil-fehma tat-Tribunal u kuntrarjament għal dak affermat, pretiż u sottomess mis-soċjetà Rikorrenti, jirriflettu r-realtà tas-sitwazzjoni kif inhi: *on an operator level, GO maintains the largest number of fixed line connections. However, the market share of this operator declined consistently over the years, from 77.1% at the end of 2010 to 65.4% at the end of 2015. This operator's market*

²⁷ Chart 8 fid-Deciżjoni Appellata, a tergo ta' fol. 31 tal-proċess.

²⁸ Table 1 fid-Deciżjoni Appellata, fol. 32 tal-proċess.

²⁹ Table 1 fl-affidavit ta' Kevin Caruana, fol. 131 tal-proċess.

share went down further to 64.8% by the end of 2016 and to 63.4% by the end of June 2017, despite the increase in the local subscriber base. The latter development suggests that new subscribers to the fixed telephony service are increasingly opting for alternative providers to GO. Effectively, this means that the market standing of alternative providers is consolidating, this at a time when the MCA is not regulating the provision of fixed telephony services. In absolute terms, the number of subscriptions with alternative service shot up by 30,930 between the end of 2010 and the end of June 2017, in contrast to a decline of 38,983 subscriptions reported by GO. Melita remains the largest alternative service provider competing directly with GO, with its market share climbing from 22.2% at the end of 2010 to 35.0% at the end of June 2017. Focusing on the 12-month period ending December 2016 (i.e. a period that saw a strengthening of the local fixed telephony subscriber base), the number of subscriptions for alternative service providers increased by 2,827 compared to an increase of 1,315 subscriptions reported by GO. In the six month period January to June 2017, the number of subscriptions of alternative service providers was up by 5,346 compared to a drop of 132 subscriptions for GO. ... As with the case for the number of fixed telephony subscriptions GO's market share in terms of fixed voice call origination traffic has gone down almost seven (7) percentage points between 2010 and 2016, from 73.2% to 66.4%. A similar decline is observed during the same period when GO's traffic volumes encompass traffic minutes originating over Ozone's CS/CPS-based service. Of note here are the figures presented on Table 2 below, which show that the proportion of CS/CPS-based originating traffic volumes to the total shrank from 0.5% in 2010 to just 0.1% in 2016. This reinforced the MCA's view that the merits of a CS/CPS business model holding on its own in the context of local market conditions have been dissipating rapidly over a number of years, leading to the current scenario where no service provider is actually using GO's WLR service. This outcome is also partly explained by the increase in take-up of fixed telephony in bundle packages including other electronic communications services. Few households and businesses are effectively purchasing fixed telephony on a stand-alone basis. In fact, around 65% of retail demand for access to fixed telephony services is not accounted for by bundled subscriptions, whilst only around 35% of demand is for stand alone. ... Over all, alternative service providers have managed to gradually and consistently cut the incumbent's overall market position, as evidenced by GO's declining market shares, both in terms of subscriber numbers and traffic volumes. This is also because alternative service providers are already self-supplying wholesale call origination services and are not likely to face capacity constraints in the supply of these services. This means that alternative service providers find no difficulty in supplying their own retail fixed telephony services and will be in a position to continue doing so in the future, without the need to recourse to GO's WLR service. In addition to this, in the event of a SSNIP for wholesale fixed call origination services implemented by GO, Melita could readily switch from self-supply of the services in question to supply a new market player on the merchant market. Alternative service providers other than Melita may also opt to continue investing in their network and eventually position themselves to supply the merchant market with wholesale call origination services. All these factors would pose a direct constraint on the pricing behaviour of GO³⁰.

³⁰ Para. 3 sa' 11 ta' l-affidavit ta' Kevin Caruana, fol., 131 sa' 133 tal-proċess.

Il-provi prodotti mill-Awtorità Intimata, konsistenti fl-affidavit ta' Kevin Caruana, juru mhux biss li hemm kompetittività fis-suq in kwistjoni imma li din il-kompetittività hi, kuntrarjament għal dak pretiż mis-soċjetà Rikorrenti, sostenibbli u dana in kwantu kjarment jirriżulta li nonostante d-diversi dubji sollevati mis-soċjetà Rikorrenti u l-kritika ħarxa minnha avvanzata, *il-market share* tas-soċjetà GO fis-suq in kwistjoni baqgħet tonqos fil-waqt li *l-market shares* ta' *l-alternative providers* baqgħu per lo più jizdiedu anke wara li s-suq in kwistjoni gie deregolarizzat u r-rimedji *ex ante* imposti fuq is-soċjetà GO tnehhew.

Is-soċjetà Rikorrenti tikkontesta diversi konsiderazzjonijiet oħra magħmula mill-Awtorità Intimata fid-Deċiżjoni Appellata u fir-rigward tikkontendi li *anke l-konkluzjonijiet ta' l-MCA rigward 'sunk costs', 'substitutability' u 'economies of scale'* jhallu ħafna dubji u dan partikolarment fejn *l-MCA tagħmel dikjarazzjoni jew tasal għal konkluzjonijiet li mhumiex sostanzjali. Illi dwar il-konsiderazzjonijiet magħmula mill-Awtorità dwar id-Demand-side substitutability jigi sottolineat illi l-argument illi jeżisti impediment fuq GO f'każ illi kellhom jgħollu l-prezzijiet bejn 5 u 10% għaliex il-konsumatur ta' servizzi wholesale jbidde l-operatur huwa bir-rispett kollu ipotetiku u spekulattiv. Fir-realtà lllum ma hemm l-ebda operatur ieħor fis-suq li joffri tali servizzi. Hija bid-dovut rispett, daqstant ieħor remota l-possibilità illi tigi kreata access network analoga għal dik mqiegħda fis-seħħ minn GO u Melita, tenut kont mhux biss tad-daqs tas-suq, imma wkoll ta' l-ispejjeż meħtieġa biex ikun jista' jsir dan. Fatt li hu korroborat min-nuqqas ta' operaturi f'dan is-suq. Konsimilment, dwar supply-side substitutability, l-Awtorità hija spekulattiva fir-raġġungiment tal-konkluzjonijiet tagħha. Dak li jirriżulta fir-realtà huwa illi operaturi oħrajn, kompetituri ta' Go, m'humiex jaraw ebda zieda sostanzjali fid-domanda għal servizzi ta' telefonija fissi.*

Dak essenzjalment kontestat mis-soċjetà Rikorrenti huma s-segweni konsiderazzjonijiet u konsegweni konkluzjonijiet ta' l-Awtorità Intimata fid-Deċiżjoni Appellata: *Demand-side substitutability - From a demand-side point of view, a direct constraint on GO or any other service provider would arise if a 5 to 10% increase in the price of fixed call origination would induce a wholesale customer to switch to a substitutable product offered by an alternative service provider, such as to render the price increase unprofitable. It is relevant to underline here that GO is currently self-supplying wholesale call origination services to its own retail arm and is the only market player supplying fixed call origination services to third parties in Malta. Nevertheless, alternative service providers, which are currently self-supplying the service to their own retail arm, have the necessary infrastructure and capacity in place to start supplying wholesale call origination services on the merchant market. This would suggest that if a SSNIP is implemented by GO on its wholesale call origination services, the third party purchasing these wholesale services may seek to switch to potential alternative service providers. The third party may also seek to establish a new access network infrastructure and thus build a direct link to end-users. Local experience has shown that this is possible, as evidenced by the market entry of operators deploying their own nationwide network infrastructure. Although the cost of infrastructure investment will be considerable and sunk, the deployment of multiple wireless networks shows that this cost does not act as a barrier to entry.*

Another option for the third party would be to purchase or lease an established network connection to the end-user either via the acquisition of leased lines and/or the rental of local loops. Such a course of action would also entail considerable financial outlays and an element of sunk costs. The MCA therefore considers that, in the event of a 5 to 10% increase in price, wholesale customers of fixed call origination services may switch to similar services supplied by alternative service providers or else switch to self-supply mode by adopting a ladder of investment approach and start deploying the necessary network infrastructure. Supply-side substitutability - The main consideration here is whether a 5 to 10% increase in price of wholesale call origination by a hypothetical monopolist would induce an alternative service provider to start offering a similar wholesale service to third parties. It is relevant to underline at this juncture that alternative service providers to GO are currently self-supplying wholesale call origination services to their own retail arm. There seems to be no limitations to the potential for increased self-supply, given that these operators are managing to cater for a sustained increase in demand for their retail voice telephony services. These alternative service providers have deployed their own access network infrastructure and have all the necessary interconnection agreements in place to allow their subscribers to exchange calls with all local telephone numbers. It is therefore technically possible for Melita, and to a certain extent other alternative service providers to convert self-supplied fixed call origination services to merchant market supply, in the event of a 5 to 10% increase in price implemented by a hypothetical monopolist, sufficiently quickly and without incurring significant additional costs. Conclusion - The MCA considers that wholesale call origination services supplied by GO, Melita, Ozone (Malta), SIS, Vanilla Telecoms and Vodafone (Malta) form part of the same relevant market. The relevant product market includes self-supplied services. Alternative service providers, but most notably Melita, are posing a direct constraint on the pricing behaviour of GO. This is because wholesale customers can switch between substitutable wholesale call origination products supplied by alternative market players³¹.

Minn qari akkurat u mhux merament superfiċjali ta' dak konstatat u konkluz mill-Awtorità Intimata fid-Deciżjoni Appellata immedjatament jirriżulta li l-kontestazzjonijiet u konsegwenti pretensjonijiet tas-soċjetà Rikorrenti huma għal kollox infondati fil-fatt u fid-dritt.

Jibda biex jingħad illi kif osservat mill-Awtorità Intimata fid-Deciżjoni Appellata, *the MCA assessment is forward looking in nature and seeks to determine the boundaries of the identified market by assessing constraints on the price setting behaviour of firms.* Għaldaqstant dak li jehtieg jiġi kkunsidrat ma huwiex jekk fil-preżent hemmx operaturi oħra li attwalment joffru *wholesale services to third parties* imma jekk is-suq huwiex tali li jista' jippermetti li jkun hemm operaturi oħra li joffru tali *wholesale services to third parties*, li huwa appuntu dak li għamlet l-Awtorità Intimata fid-Deciżjoni Appellata. Bl-istess mod jiġi osservat li l-konkluzżjonijiet ta' l-Awtorità Intimata dwar *supply-side substitutability* ma humiex spekulattivi in kwantu l-Awtorità - kif jirriżulta mill-korp tad-Deciżjoni Appellata - waslet għall-konkluzżjonijiet tagħha fuq *data*, informazzjoni u figuri tangibbli fil-

³¹ Para. 4.2 tad-Deciżjoni Appellata, fol. 54 u 55 tal-proċess.

magħġor parti tagħhom provduti lilha mill-operaturi stess u a bażi ta' l-istess għamlet konsiderazzjonijiet dwar x'jista' b'mod plawsibbli jiġri 'l quddiem.

Li l-Awtorità Intimata mxiet kif premiss mit-Tribunal jirriżulta mill-osservazzjonijiet ta' l-Awtorità dwar l-argumenti w osservazzjonijiet avanzati mis-soċjetà Rikorrenti u minn operaturi oħra waqt il-proċess ta' konsultazzjoni. Di fatti l-Awtorità Intimata osservat illi: *From a demand-side perspective and assuming a Greenfield scenario, the MCA notes that both GO and Melita have high market penetration levels and offer ubiquitous coverage facilities, which would be favourably considered by any market player or potential market entrant seeking to obtain wholesale fixed call origination services. Moreover, any potential entrant into the fixed line telephony market is free to choose between these two operators as the wholesale products they offer are equivalent. Whilst at present only GO is currently providing wholesale call origination services, the MCA cannot agree with Vodafone's comment that substitutability from GO to any other service provider, following a SSNIP, is 'speculative'. This is because there is nothing to impede a potential entrant into the fixed telephony market or an existing customer of wholesale fixed call origination services from approaching Melita with a business proposal to gain access via its network infrastructure. To this effect, if a hypothetical monopolist had to increase the price of wholesale fixed call origination services, the customer of wholesale call origination services may very well switch from one operator to another in reaction to this price increase. Further to the above, the MCA notes that, locally, newer market entrants have established their own access network infrastructure and are in a position to self-supply wholesale fixed call origination services and thus to link directly to end-users requiring retail fixed telephony services. This factor clearly indicates that alternative service providers can also deploy their own infrastructure thereby bypassing the use of wholesale call origination services. The MCA underlines that only one service provider, namely Ozone (Malta), is currently purchasing GO's wholesale call origination services. Furthermore, this service provider has also deployed its own wireless access network infrastructure and is in a position to self-supply wholesale fixed call origination services. In the event of a hypothetical price increase, Ozone has the possibility to switch to self-supplying wholesale call origination services or potentially start acquiring wholesale call origination services from Melita. In this regard the MCA reiterates that over the past years Ozone has already started migrating users from the WLR solution to its own infrastructure. From a supply-side point of view, Ozone argues that a SSNIP implemented by GO on its wholesale call origination service would not necessarily lead to other operators to commence supply of this service due to the small size of the market and the high cost associated with providing such services. The MCA however considers that an operator not currently supplying wholesale fixed call origination services to third parties may very well start to offer such services in response to a SSNIP implemented by a hypothetical monopolist. A fixed network operator, such as Melita, would also be able to provide wholesale fixed call origination services to third party service providers since these will use the same network elements as those used by Melita when delivering the fixed telephony service directly to end users at the retail level. The MCA agrees that the market in Malta is small, nevertheless size does not limit existing operators from offering wholesale services to third parties. On the contrary, an alternative service provider would find it economically advantageous*

to wholesale any spare capacity on its network to third parties to maximise return on its investment³².

Is-soċjetà Rikorrenti tikkontendi wkoll illi lanqas ma wieħed jista' raġonevolment jaqbel mal-konklużjonijiet raġġunti mill-Awtorità dwar it-Three Criteria Test. Diffiċilment wieħed jifhem kif l-Awtorità tikkonkludi illi s-sunk costs sostanzjali meħtieġa biex operatur gdid jibda jipprovi servizzi f'dan is-suq m'hum iex barriers to entry meta wieħed iqis li għal dal-aħħar h'dax-il sena l-ebda operatur ieħor ma pprova servizzi ta' telefonija fissa. L-unika operatur ieħor li pprova tali servizzi, u cioè Melita, irnexxielha tagħmel dan biss minħabba l-infrastruttura ta' cable network pre-eżistenti li ppermettilha tipprovi tali servizzi. Dan huwa korroborat ukoll mill-fatt li Melita kienet qed tipprovi s-servizzi ta' telefonija fissa b'xejn għal tul ta' żmien. Bl-istess mod, u għar-raġunijiet fuq indikati, diffiċilment wieħed jifhem kif l-Awtorità tikkonkludi li GO ma tgawdix minn Economies of Scale u Economies of Scope meta ma kien hemm essenzjalment l-ebda tibdil fis-suq sa' mill-aħħar market review fis-sena 2010. Inoltre bil-fatt biss illi operaturi oħrajn fis-suq jistgħu jgawdu wkoll minn livell ta' Economies of Scale u Economies of Scope ma jfissirx illi dawn jistgħu awtomatikament jzommu lil GO milli topera b'mod antikompetittiv ġialadarba din ta' l-aħħar qiegħda f'posizzjoni li tgawdi minn tali Economies of Scale u Economies of Scope b'mod iktar estiż. Konsimilment l-ebda operatur ieħor, salv għall-Melita, ma rnexxielu jilhaq livell ta' Vertical Integration li jippermettilu li jikkompeti ma' GO fuq il-provizjoni ta' servizzi ta' telefonija fissa, la fuq wholesale u lanqas fis-suq retail. Illi dan jfisser mhux biss illi GO għadha tgawdi minn poter fis-suq sinifikanti, imma wkoll li l-istess tgawdi minn posizzjoni dominanti fis-suq, liema posizzjoni hija konsoldiata bil-fatt illi GO hija l-unika operatur b'infrastruttura għal fixed network li joffri servizzi ta' wholesale call origination lil terzi. Dawn is-servizzi huma offruti biss għab-baži tar-rimedji regolatorji imposti fuq l-istess GO mill-Awtorità, u li wieħed jista' faċilment jistenna li mhux ser jibqgħu jiġu provduti fin-nuqqas ta' l-imsemmija regolamentazzjoni.

Hawnhekk is-soċjetà Rikorrenti qed tikkontesta s-segweni konstatazzjonijiet magħmula u konklużjonijiet raġġunti mill-Awtorità Intimata fid-Deciżjoni Appellata: Sunk costs and infrastructure replicability - Sunk costs are the costs that a new market entrant must incur when investing in the access network infrastructure necessary to provide a particular service and which are not recovered on market exit. The MCA notes that a new market entrant can offer wholesale call origination services by primarily investing in an own-built network. This option requires a large upfront investment, most of which will be considered as sunk cost given that investment outlays cannot be recovered if the entrant decides to exit the market. The MCA however notes that, notwithstanding the significant upfront investment needed to deploy a nationwide network infrastructure, most of which can be considered to be sunk cost upon exit, new entry still took place by way of Melita and other service providers self-supplying wholesale call origination services. The MCA therefore considers that while sunk costs are surely to be significant in the market under investigation and a major consideration when entities formulate their investment plans, these are not as high as to inhibit market entry. This notion is further reinforced with the deployment of wireless networks

³² Para. 4.4 tad-Deciżjoni Appellata, a tergo ta' fol. 28 tal-proċess.

which entail much less cost and effort to deploy as opposed to the copper network.

Economies of scale - Economies of scale refer to the cost reductions that a business may enjoy as it expands its production and penetrates the market in which it operates. Economies of scale are generally achieved because as production increases, the cost of producing each additional unit falls, provided that fixed costs, among other elements, are shared over an increased number of units. On the same lines, the additional costs incurred by a fixed telephone operator will fall as more subscribers are roped in. With reference to the local scenario, the MCA observes that alternative service providers to GO have already been active in the retail fixed telephony business for a number of years. Moreover, the MCA notes that, most notably, Melita managed to intensify its presence in the fixed telephony sector, at the expense of the incumbent operator GO. By capturing a larger market share, Melita achieved higher economies of scale. Furthermore, alternative service providers are already self-supplying fixed call origination to their own retail arm (for the purposes of providing retail fixed telephony services). They also have the necessary capacity to cater for immediate and future demand of fixed call origination. The MCA therefore considers that while economies of scale for GO are expected to remain high, these are not posing and should not pose a significant constraint on market entry within the timeframe of this review. Likewise the MCA is of the opinion that, given its strengthening market presence, Melita can enjoy economies of scale within the timeframe of this review.

Economies of scope - Economies of scope refer to the unit cost reduction of a particular service as it results from being produced jointly with another service by the same firm. In this regard, costs may be saved where common processes or technological infrastructures are used in the provision of a group of services. Likewise, when an operator is present in a large number of markets it can share common cost over a greater range of services. With reference to this, the MCA notes that one of the alternative service providers, Melita, is offering multiple services directly to the consumer, including but not limited to fixed line telephony. This horizontal integration enables Melita to benefit from economies of scope, where the average costs of production are lower given that these are shared over a greater range of services (given the cost savings on common processes). It may however be argued that smaller alternative service providers, namely Ozone (Malta), Vodafone (Malta), SIS and Vanilla Telecoms, lack economies of scope as their product line-up remains rather limited. It is acknowledged that these service providers may find it difficult to mark their presence with sufficient scale, at least in the short term. Nevertheless, their market entry materialised despite GO and other service providers enjoying significant economies of scope. The MCA therefore considers that economies of scope do not pose a significant constraint to entry in the market under investigation.

Vertical Integration - Vertical integration involves an undertaking operating in a given market, while also being operative in a market that is at a higher or lower level in the chain of provision. Put differently, an undertaking may decide to enter a market by investing in both upstream access to infrastructure markets and downstream service provision markets, as this may give the undertaking a competitive edge over existent and potential competitors by way of market power leverage from upstream to downstream markets. Ultimately, the presence of vertically integrated service providers may deter potential market entry by making it difficult for new entrants at the retail level to obtain the necessary inputs at a competitive price in the absence of regulation. Similarly, the vertically integrated provider can engage itself in a

number of non-price leveraging strategies that may take the form of delaying tactics and withholding of information, amongst others. With reference to the market under investigation, the MCA notes that Melita and to a limited extent other alternative service providers have mirrored the vertically integrated structure of the incumbent in the provision of several electronic communications services. GO and alternative service providers self-supply wholesale call origination services, whilst GO also supplies fixed call origination services to an independent CS /CPS operator Ozone. The latter operator also has a separate access network infrastructure in place, which it uses to self-supply its own retail arm with fixed call origination services. As is the case with GO, alternative service providers have sufficient spare capacity to cater for existing and new demand for fixed call origination. In this regard, the MCA is of the opinion that the service providers in question can compete at par on this matter. Therefore, the efficiencies stemming from vertical integration are not only available to the incumbent. To this effect, it is considered that Melita could also avail of stronger scale efficiencies resulting from its vertically integrated structure and increasingly stronger retail customer base. Melita can also readily switch from self-supplying fixed call origination to supplying the merchant market with this service, without incurring significant additional costs. This means that in the case of a SSNIP for fixed call origination supplied to third parties by GO, the existing CS / CPS operator may also decide to switch to this alternative service providers. Overall, the MCA considers that vertical integration does not and should not pose a constraint on market entry within the timeframe of this review³³.

Minn qari akkurat u mhux superfiċjali ta' dawn il-konsiderazzjonijiet magħmula mill-Awtorità Intimata jirriżulta b'mod ċar li l-kontestazzjonijiet tas-soċjetà Rikorrenti huma għal kollox infondati. Għalkemm ma hemmx dubju li f'dawn l-ahħar ħdax-il sena l-ebda operatur ieħor ma pprova s-servizzi ta' telefonija fissa, b'daqshekk ma jfissirx li dan ġara jew seħħ bil-fors u neċessarjament minħabba *barriers to entry* partikolarment meta ampjament jirriżulta li fis-suq in kwistjoni hemm operaturi oħra joperaw, principali fosthom is-soċjetà Melita, liema operaturi huma f'kompetizzjoni diretta mas-soċjetà GO. Dak li effettivament jirriżulta mill-provi - anke dwar iċ-ċaqliq li kien hemm u għad hemm fil-*market share* tad-diversi operaturi fis-suq in kwistjoni - ma jistax jiġi miċħud mis-soċjetà Rikorrenti u dan nonostante d-diversi tentattivi tagħha biex tiskredita l-osservazzjonijiet u konstatazzjonijiet ta' l-Awtorità Intimata. Il-kontestazzjonijiet tas-soċjetà Rikorrenti dwar il-konsiderazzjonijiet u osservazzjonijiet ta' l-Awtorità Intimata dwar *economies of scale, economies of scope* u *vertical integration* ukoll ma humiex ġustifikati in kwantu huma bbażati fuq il-pretensjoni żbaljata - u dana kif orami ppruvat anke iktar 'l fuq f'din is-sentenza - li s-suq in kwistjoni ma ra u esperjenza l-ebda ċaqliq mis-sena 2010 'l hawn.

In kwantu rigwarda b'mod speċifiku l-konsiderazzjonijiet ta' l-Awtorità Intimata dwar *vertical integration* it-Tribunal jagħmel referenza għall-osservazzjonijiet ta' l-istess Awtorità għall-argumenti mressqa mis-soċjetà Rikorrenti fl-istadju tal-konsultazzjoni, ossia li: *Vodafone also disagrees with the MCA's conclusions on vertical integration as it argues that although there are several operators self-*

³³ Para. 5.2.1 sa' 5.2.4 tad-Deċiżjoni Appellata a tergo ta' fol. 56 tal-proċess sa' a tergo ta' fol. 57 tal-proċess.

supplying their own retail arm with fixed call origination services, apart from Melita, none of the other (smaller) operators have managed to 'successfully compete with GO at a wholesale or retail level'. As for economies of scope, Vodafone says that it does not see any justification for the MCA's change of assessment it undertook in 2011. The MCA notes that all fixed telephony service providers in Malta self-supply wholesale call origination services and provide retail fixed voice telephony services at a fixed location via their own network infrastructures. GO and Melita are both vertically integrated operators, in that they are active at both the wholesale and the retail level of retail fixed access and call origination services on a nationwide basis. They also supply a suite of other electronic communications services. For this reason, the MCA concludes that the main fixed telephony service providers in Malta can compete at par on this matter for they are vertically integrated to the point that they may equally leverage market power from upstream to downward markets. To a limited extent, other alternative service providers have mirrored the vertically integrated structure of GO and Melita in the provision of several electronic communications services. For example, Ozone (Malta) and SIS are self-supplying wholesale fixed call origination services and retail fixed telephony services. They are also offering retail fixed broadband services in parallel to their retail fixed line telephony services. The MCA reiterates that alternative service providers deployed their network inputs and built a vertically integrated structure in the absence of regulation and / or without recurring to existent regulatory obligations. For example, market entry in the provision of fixed telephony services has happened regardless of the wholesale remedies on CS and CPS services and wholesale line rental. As already pointed out in the consultation document, Melita, Vodafone, Vanilla Telecoms, SIS and Ozone have set up their own network infrastructure and are self-supplying wholesale fixed call origination services to supply retail fixed telephony services. This in large part explains why wholesale services (incl. CS and CPS services) and wholesale line rental have never really taken off in Malta. Indeed, scant use of these (regulated) wholesale services is explained by the fact that alternative service providers have been able to use their own network infrastructure in supplying wholesale and retail fixed telephony services³⁴. It-Tribunal ma jistax jonqos milli josserva li għalkemm is-soċjetà Rikorrenti tikkontesta l-osservazzjonijiet u konsiderazzjonijiet ta' l-Awtorità Intimata, hija ma ressqet l-ebda prova biex tikkontradiċi jew xxejjen l-aspetti fattwali fuq liema l-imsemmija Awtorità bbażat il-konsiderazzjonijiet tagħha.

Fid-dawl ta' dan kollu osservat għalhekk it-Tribunal iqis li anke t-tieni aggravju ta' l-appell sollevat mis-soċjetà Rikorrenti huwa għal kollox ingustifikat u bħala tali għandu jiġi miċħud.

It-tielet aggravju - Opinjoni ufficjali ta' l-MCCA:

In fine s-soċjetà Rikorrenti tikkontendi li d-Deciżjoni Appellata hija insostenibbli u mhux in konformità mad-dettami tal-Liġi in kwantu l-Awtorità Intimata naqset għal kollox milli tikkonsidra bil-mod opportun l-opinjoni ta' l-MCCAA, hekk kif espressa fl-ittra datata 30 ta' Novembru 2015³⁵.

³⁴ Para. 5.5.1 tad-Deciżjoni Appellata a tergo ta' fol. 35 tal-proċess.

³⁵ Fol. 40 tal-proċess.

Fl-imsemmija itttra l-MCCAA stqarret is-segwenti: *Reference is made to your recent consultation document as captioned above [MCA Consultation Document - Wholesale Call Origination (13 November 2015)] Our comments with regard to the current consultation document are the following: 1. The Commission Recommendation of 2014 seems to suggest that the market for wholesale call origination would not be subject to regulation BUT it does not quite take into account markets similar to the Maltese market, where there is a small number of major operators. Reference is here made to Article 5 ECRA, which states that MCA should tailor its market definition to the Maltese scenario which, both operationally and geographically, differs from that of larger countries. 2. The MCA Consultation document lists criteria for retaining regulatory intervention; these include the presence of high and non-transitory barriers to entry. It has long been established that rolling out another fibre or copper network may not be financially feasible for a new entrant. MCA seems to advocate that there are not barrier to entry - and brings Ozone as an example in terms of building its own infrastructure. However, one has to evaluate the feasibility for a third operator to roll out another fibre or copper network with the same ubiquity as GO and Melita. While Ozone did roll out a network, this is wireless-based and does not provide coverage over the whole territory. The barriers to entry are acknowledged in section 5.2 page 31 et seq. of the Consultation Document. 3. Previous MCA decisions did designate GO as having SMP, but when one considers the size of Melita's market share, and possibly the behaviour of both players, a proper competition law assessment might result in them BOTH having SMP. Melita's increase in market share at the expense of GO is testimony to this. The definition of SMP which is a reproduction of the definition of dominance as enshrined in case law of the Court of Justice of the EU must kept in mind as well as the fact that a market share of a certain size gives rise to the presumption of dominance or SMP. This could in turn imply that the companies are subjected to certain sector-specific obligations. 4. The MCA mentions Ozone as a third player - but its market share is insignificant. It has not gained sufficient strength to pose a real competitive threat. It is however true that mobile telephony poses a competitive threat to fixed line, especially since many operators offer unlimited minutes to all networks on at least business packages, and a number of minutes on the consumer packages. Ozone only offers telephony and internet so that it cannot quite compete with the quad-play packages of the main two players, nor with Vodafone's market share in mobile telephony, given that fixed line telephony is fast being phased out in preference to mobile telephony (page 23 - fixed telephony plan in a bundle increased in terms of purchases by 58.6%). 5. We tend to agree that Melita has mirrored the vertically-integrated structure of GO, as well as its pricing structure. This may be currently considered to be tantamount to competition but in the absence of sector-specific regulation, they might be tempted to act anti-competitively. 6. The SSNIP Test indicated on page 28 does not give detailed explanations and calculations for its conclusions reached by MCA. 7. Competition law (ex post) may in itself be sufficient to address any competition shortcomings but one must also consider that the market being what it is, characterised by two main large players, there could be competitive concerns. This might justify retaining sector-specific regulation. Once a complaint reaches this Office to be analysed ex post, it is often the case that the damage has already been done. 8. The proposed decision suggests that no market player has SMP. This Office disagrees,*

for the above reasons. The sector-specific obligations are necessary to continue to ensure competition in such a limited market; they perhaps could be extended to Melita in order to ensure a level playing field.

Is-soċjetà Rikorrenti tikkontendi li ladarba l-Awtorità Intimata, nonostante l-osservazzjonijiet ta' l-MCCAA, għaddiet għad-Deciżjoni Appellata u biha sabet li s-soċjetà GO ma għandhiex posizzjoni SMP fis-suq tal-*wholesale call origination on a the public telephone network provided at a fixed location in Malta* u konsegwentement għaddiet biex tneħhi ir-rimedji *ex ante* li kienu imposti fuq l-imsemmija soċjetà b'dana li l-imsemmi suq ġie deregolarizzat, hija agixxiet in vjolazzjoni tar-Regolament 5 tal-Legislazzjoni Sussidjarja 399.28, li fis-subartikolu (1) jipprovdi illi: *l-Awtorità għandha, wara li tkun fissret suq kif hemm fl-artikolu 9 ta' l-Att, tagħmel analiżi ta' dak is-suq b'kont meħud tas-swieq identifikati fir-rakkomandazzjonijiet u bl-akbar konsiderazzjoni mogħtija lill-linji gwida maħruġin mill-Kummissjoni Ewropea kif hemm fl-Artikolu 15 tad-Direttur Kwadru: Izda meta l-Awtorità tqis li jkun adatt, hija għandha tagħmel dik l-analiżi b'kollaborazzjoni ma' l-awtorità nazzjonali kompetenti responsabbli għal affarijiet ta' kompetizzjoni.*

Nonostante dak affermat u pretiż mis-soċjetà Rikorrenti t-Tribunal ma jqisx li l-Awtorità Intimata agixxiet in vjolazzjoni tar-Regolament 5 tal-Legislazzjoni Sussidjarja 399.28 u b'hekk naqset milli taderixxi ma' l-obbligi tagħha skond dak ir-Regolament. Minn qari akkurat ta' l-imsemmi Regolament, partikolarment tas-subregolament (1) hawn appena citat, jirriżulta immedatament evidenti li imkien fl-imsemmi provvediment tal-Ligi ma jingħad illi l-Awtorità Intimata hija obbligata li ma tipproċedix bil-konkluzżjonijiet tagħha dwar regolamentazzjoni o meno *ex ante* tas-suq/swieq rilevanti jekk l-MCCAA *qua* l-Awtorità kompetenti għall-affarijiet ta' kompetizzjoni turi xi tħassib dwar tali konkluzżjonijiet.

In kwantu rigwarda d-Deciżjoni Appellata fiha nfisha t-Tribunal itenni li fil-fehma tiegħu din id-Deciżjoni hija fiċ-ċirkostanzi u mill-aspett ta' regolamentazzjoni ***ex ante*** waħda ġusta u korretta. Jiġi osservat ukoll li għalkemm l-Awtorità Intimata ipproċediet bid-Deciżjoni Appellata hija ma eskcludietx għal kollox u assolutament ma injoraxx it-tħassib espress mill-MCCAA in kwantu fit-Taqsima 6.4 tad-Deciżjoni Appellata intitolata *Monitoring of future market developments*, ossservat illi: *The MCA considers that it is sensible to keep a close watch on the competitive progress of the market identified in this review. To this end, the MCA intends to analyse market trends and developments on an ongoing basis, and remains committed to issue a new market analysis at any point in time in response to any significant change in market conditions. In accordance with its powers at law, the MCA is also reserving the right to change any of the above mentioned regulatory obligations following changes in the market structure*³⁶.

Fid-dawl ta' dan osservat għalhekk it-Tribunal iqis li t-tielet aggravju ta' l-appell sollevat mis-soċjetà Rikorrenti wkoll ma huwiex ġustifikat u bħala tali għandu jiġi miċhud.

³⁶ A tergo ta' fol. 39 tal-proċess.

Għal dawn ir-raġunijiet it-Tribunal jaqta' u jiddeciedi billi jiċhad l-appell tas-soċjetà Rikorrenti mid-deċiżjoni ta' l-Awtorità Intimata intitolata *Wholesale call origination on the public telephone network provided at a fixed location in Malta - MCA Decision on market definition and the assessment of competition* ippubblikata fil-21 ta' Marzu 2016, u minflok jikkonferma l-istess imsemmija deċiżjoni.

L-ispejjeż ta' dawn il-proċeduri għandhom jiġu sopportati mis-soċjetà Rikorrenti.

A tenur ta' l-Artikolu 39(1) tal-Kap.418 tal-Liġijiet ta' Malta, it-Tribunal jordna li kopja ta' din is-sentenza tiġi komunikata lill-partijiet kontendenti.

MAĠISTRAT

DEPUTAT REĠISTRATUR