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

Rikors Nru. 50/16VG

Vodafone Malta Limited

Vs

Awtorità ta' Malta dwar il-Komunikazzjoni

Illum 3 ta' Frar 2020

It-Tribunal,

Ra r-Rikors ippreżentat mis-soċjetà Vodafone Malta Limited fil-21 ta' Lulju 2016 permezz ta' liema titlob li t-Tribunal iħassar u jirrevoka d-Deċiżjoni DIS 234/MCA-LEG/mb/16-2604 maħruġa mill-Awtorità ta' Malta dwar il-Komunikazzjoni fl-1 ta' Lulju 2016 u għaldaqstant iwaqqaf u jħassar l-effetti kollha tad-Deċiżjoni u konsegwentement, prevja kull dikjarazzjoni li jeżisti l-obbligu ta' l-Awtorità li tinkoraġixxi l-parteċipazzjoni, aċċess, qism u/jew dħul f'faċilitajiet jew proprjetajiet li jinsabu fi, fuq jew taħt proprjetà privata jew pubblika bejn intrapriżi li joffru networks ta' telekomunikazzjoni elettronika, jordna lill-Awtorità sabiex tobbliga lil GO li tagħti lil terzi dħul għal elementi ta' network u, jew faċilitajiet speċifikati, inklużi għalhekk il-kanali u dan ai termini ta' l-Artikolu 2 tal-Kap.399 tal-Liġijiet ta' Malta, li tinnegozja in bona fidi ma' intrapriżi li jkunu qegħdin jitolbu dħul u li tipprovdi kollokazzjoni jew forom oħra ta' parteċipazzjoni fil-faċilitajiet assoċjati jew li tagħti rimedju effettiv lis-soċjetà esponenti dwar il-parteċipazzjoni, aċċess u/jew dħul f'tali faċilitajiet jew proprjetajiet ta' GO, bl-ispejjeż kontra l-Awtorità ta' Malta dwar il-Komunikazzjoni u b'riserva għal kull azzjoni ulterjuri spettanti lis-soċjetà Vodafone Malta Limited, inkluż għad-danni minnha sofferti kawża tad-Deċiżjoni appellata;

Ra d-dokumenti annessi mar-Rikors promotur markati Dok. "VF1" sa' Dok. "VF3" a fol. 14 sa' 92 tal-proċess;

Ra r-Risposta ta' l-Awtorità ta' Malta dwar il-Komunikazzjoni permezz ta' liema topponi għall-appell tas-soċjetà Rikorrenti mid-Deċiżjoni tagħha datata l-1 ta' Lulju 2016 u titlob li t-Tribunal jastejni milli jieħu konjizzjoni ta' dan l-appell stante li kif impostat inbidlu t-talbiet oriġinali kif avvanzati quddiemha u minnha deċiżi bid-Deċiżjoni appellata u fin-nuqqas, li l-appell jiġi miċħud stante li l-aggravji fuq

liema s-soċjetà Rikorrenti tibbaża l-appell tagħha huma infondati fil-fatt u fid-dritt, bl-ispejjeż kontra s-soċjetà Rikorrenti;

Ra d-dokumenti annessi mar-Risposta ta' l-Awtorità ta' Malta dwar il-Komunikazzjoni markati Dok. "MCA1" sa' Dok. "MCA9" a fol. 114 sa' 155 tal-proċess;

Ra d-dokumenti markati Dok. "VF1" u Dok. "VF2" esebiti mis-soċjetà Rikorrenti permezz ta' Nota ppreżentata fis-17 ta' Jannar 2017 a fol. 166 sa' 184 tal-proċess u ra l-affidavit ta' Sheila Kavanagh esebit mis-soċjetà Rikorrenti permezz ta' Nota ppreżentata fil-21 ta' Frar 2017 a fol. 186 sa' 189 tal-proċess;

Ra li waqt is-seduta tas-7 ta' Mejju 2018 id-difensur ta' l-Awtorità ta' Malta dwar il-Komunikazzjoni ddikjara li l-Awtorità ma għandhiex iktar provi xi tressaq u li tistrieħ fuq id-dokumenti ġia esebiti;

Ra n-Nota ta' Sottomissjonijiet tas-soċjetà Rikorrenti a fol. 199 sa' 212 tal-proċess u ra n-Nota Responsiva ta' l-Awtorità ta' Malta dwar il-Komunikazzjoni a fol. 216 sa' 230 tal-proċess;

Ra l-atti kollha tal-kawża;

Ikkonsidra:

Bil-proċeduri odjerni s-soċjetà Rikorrenti tikkontesta deċiżjoni ta' l-Awtorità Intimata datata 1 ta' Lulju 2016[1] (hawn iktar 'l quddiem indikata bħala d-Deċiżjoni) bis-saħħa ta' liema l-Awtorità essenzjalment iddeċidiet illi *the Authority, therefore for the reasons stated in this decision with reference to the claims lodged by Vodafone to this dispute, considers that GO did not act in breach of the obligations onerous upon it as consequence of the Market 4 Decision or of any of the applicable provisions at law as enforced by the Authority relating to access to duct network infrastructure*[2]. Din id-Deċiżjoni ġiet imqanqla minn *Dispute* avvanzata mis-soċjetà Rikorrenti quddiem l-Awtorità Intimata sabiex: *the Authority … declare that through its actions, GO are in breach of their obligations and subsequently to impose on GO: 1) The obligation to follow and comply with the measures and obligations imposed upon it by the MCA, through its Market 4 Decision; 2) The obligation to negotiate in good faith, and to grant Vodafone access to the duct network currently used by GO, at reasonable prices for such access; 3) The obligation to grant such access to the duct network based on the same conditions under which access has already been given to Melita, and this in line with GO's non-discrimination obligations; 4) Any other measure or decision which the MCA deems opportune and necessary given the circumstances at hand*[3].

[1] Fol. 14 sa' 25 tal-proċess.
[2] Fol. 25 tal-proċess.
[3] Fol. 116 u a tergo ta' fol. 116 tal-proċess.

Id-*Dispute* tas-soċjetà Rikorrenti kien jittratta dwar tentattivi da parte ta' l-imsemmija soċjetà biex tinnegozja għal u tottjeni aċċess għad-*duct network* tas-soċjetà GO p.l.c., liema tentattivi però ma taw l-ebda frott. Fl-imsemmija *Dispute*[4] s-soċjetà Rikorrenti ppremettiet is-segwenti: *1) Vodafone and GO are both licensed undertakings, operating and competing in the Maltese telecommunications industry, including mobile telephony; 2) GO is presently listed on the Malta Stock Exchange, being the successor of Maltacom p.l.c. and Telemalta Corporation, both of which were effectively controlled by the Government of Malta; 3) Being the successor of Maltacom p.l.c. and Telemalta Corporation, GO has inherited an inherent infrastructural advantage, owning an extensive array of telecommunications infrastructure which inter alia include antennae, masts, towers, ducts and other infrastructure, some of which funded through public government funds; 4) That in terms of the Market 4 Wholesale Unbundled Infrastructure Access Market Document No. MCA/D/13-1520 issued by the MCA on the 6th March 2013 (hereinafter the Market 4 Decision): "The MCA considers that GO enjoys significant market power (SMP) in the market for the provision of wholesale unbundled access services. This conclusion is supported by a number of factors including GO's position as sole provider in the market, its vertical and horizontal integration, its economies of scale and scope, and the lack of countervailing buyer power"; 5) That in terms of the same Market 4 Decision, the MCA imposed on GO a number of access and non-discrimination obligations which inter alia included: "negotiate access for related facilities including duct access, dark fibre or Ethernet capacity for the purpose of backhaul for local loop and sub-loop unbundling" "application of equivalent conditions in equivalent circumstances to other undertakings providing equivalent services"; 6) That for over a year, Vodafone has been unsuccessfully trying to negotiate a Duct-Sharing Framework with GO, which includes access to limited and specific parts of GO's duct network, loosely based on the existing Duct-Sharing Framework which currently regulates the sharing of GO's ducts with Melita plc (C-12715) (hereinafter referred to as Melita); 7) That despite Vodafone's insisted requests to negotiate such access, GO continues to adopt, through its procrastination, delaying tactics and methods which are hindering the progress of negotiations aimed at concluding a Duct-Sharing Framework with Vodafone, and this in breach of the obligations imposed on GO as the SMP in the Market 4 Decision; 8) That in light of such failed negotiations with GO, it is important to refer to page 20 of the Market 4 Decision, where the MCA clearly provides that: "GO is required to negotiate in good faith and on a commercial basis with access seekers requesting such backhaul services. The MCA will intervene to set terms and conditions (including prices) only in the case these commercial negotiations fail"; 9) That without prejudice, and in addition to the above, the attention of the MCA is being directed to the definition of 'associated facilities' as found under Article 2 of the Electronic Communications (Regulation) Act, Chapter 399 of the Laws of Malta, (hereinafter referred to as ECRA) which provides that: "associated services, physical infrastructures and other facilities or elements associated with an electronic communications network and, or an electronic communications service which enable and, or support the provision of services through that network and, or service or have the potential to do so, and include inter alia*

[4] Fol. 114 sa' 116 tal-proċess.

buildings and entries to buildings, building wiring, antennae, towers and other supporting constructions, ducts, conduits, masts, manholes and cabinets". In Vodafone's view, therefore there should be no doubt that the ducts in question should be accepted as falling under the definition found in ECRA.

In sostenn tat-tabliet tagħha s-soċjetà Rikorrenti invokat is-segwenti provvedimenti tal-Liġi: l-Artikolu 4(4) ta' l-Att għat-Twaqqif ta' Awtorità ta' Malta dwar il-Komunikazzjoni, Kap. 418 tal-Liġijiet ta' Malta; ir-Regolament 13 u r-Regolament 15 tar-Regolamenti dwar Networks u Servizzi ta' Komunikazzjonijiet Elettroniċi (Ġenerali), Leġislazzjoni Sussidjarja 399.28 u l-Artikolu 12 ta' l-Att biex Jirregola Komunikazzjonijiet Elettroniċi, Kap. 399 tal-Liġijiet ta' Malta.

L-Awtorità Intimata waslet għad-Deċiżjoni tagħha dwar id-*Dispute* sottomessa mis-soċjetà Rikorrenti in bażi għas-segwenti konsiderazzjonijiet[5]:

- ***Commercial negotiations****: Vodafone at the request of the MCA furnished the various communications which according to Vodafone were relevant to the commercial negotiations between Vodafone and GO. The said communications were copied to GO who did not inform the MCA that it had any other relevant documentation to submit to the Authority. The Authority accordingly considers that the documentation furnished to it by Vodafone comprehensively reflects all the written communications between the two sides on the subject of Vodafone's request for access to GO's ducts network infrastructure. From the documentation submitted it results that the first written communication was sent by Vodafone to GO as per an e-mail dated the 25 March 2015 asking for the commencement of discussions on duct sharing. A reminder by Vodafone was sent on the 16 April 2015. GO answered on the 20 April 2015 suggesting a meeting for the 30 April 2015. The date was subsequently brought forward by a couple of days at GO's request. A meeting between the two sides was then held on the 28 April 2015. From the minutes of that meeting furnished by Vodafone (the contents of which are not disputed by GO) it results that both sides had agreed to revert back on the matters discussed during the said meeting, in particular that GO had taken note of Vodafone's request and would be discussing it internally, whereas Vodafone had to discuss GO's request for the sharing of Vodafone's 4G infrastructure. On the 18 May 2015 and the 3 June 2015 respectively, Vodafone e-mailed two reminders to GO about the follow-ups to the 28 April 2015 meeting. On the 8 June 2015 Vodafone's CEO wrote to GO's CEO about a completely different matter and en passant, at the end of the communication referred to the meeting of the 28 April 2015 between the two sides, asking GO's CEO to look into matters 'so as to avoid unnecessary delays and escalations'. On the 21 December 2015 Vodafone's CEO specifically wrote to her GO counterpart asking for GO's position so that Vodafone could act accordingly, soliciting a 'timely response' from GO. GO's CEO replied on the 8 January 2016. In its response of the 8 January 2016, GO listed what it described as 'events' that set matters back, notably that Vodafone was not interested in providing passive access to GO, whilst noting that in the interval the Government had in tandem with the MCA issued a public consultation on*

[5] Fol. 17 sa' 24 tal-proċess.

October 2015 consisting of a draft law to transpose the EU Directive 2014/61/EU on measures to reduce the cost of deploying high-speed electronic communications networks. GO argued that in the light of this development it made logical sense for both parties to continue their discussions once the national laws on the subject were in place, thereby enabling the parties to act within a context of legal certainty. Vodafone did not furnish a reply to this response from GO, and instead chose to file the current dispute with the MCA. It is relevant to note that GO during the meeting with Vodafone held on the 28 April 2015, specifically asked Vodafone what it had in mind for the use of GO's ducts network infrastructure. The reply was that Vodafone required generic access but that one of the main uses would be for fibre to radio sites. On the basis of the above the MCA considers that Vodafone did not actively pursue commercial negotiations with GO, and acted prematurely on lodging this dispute. It results that factually several months passed between when Vodafone initially met up with GO and when Vodafone again raised matters with GO. Indeed from the documentation presented, it results that for a period of almost seven months - namely from mid-June 2015 until mid-December 2015 - Vodafone did not, at least in writing, raise the subject again with GO. Then on the 21 December 2015 Vodafone's CEO wrote to her GO counterpart on the subject asking for GO's position, which position was communicated in early January 2016. Vodafone at this stage rather than replying to GO, decided a couple of months down the line, to file the present dispute. A reading of Vodafone's statement in its written exchanges with GO fails to explain clearly why Vodafone was not prepared to pursue further discussions with GO with regard to the sharing of its 4G infrastructure with a view to a bilateral agreement with access to the respective networks. Furthermore, Vodafone did not react to GO's suggestion as per GO's communication of the 8 January 2016 that the parties should consider continuing discussions once the new regulatory framework implementing the EU Directive 2014/61/EU is in place. Vodafone fail to explain why it was not prepared to consider a bilateral agreement for the provision of access as suggested by GO, and to state whether it agreed or not with GO's suggestion that discussions continue after the new legislative framework was in place. With regard to this latter point it is relevant to point out that Malta as a Member State was committed to having the new legislation implementing Directive 2014/61/EU in force as of the 1 July 2016, thereby superseding the previous framework by amending the applicable national legislation under Caps 81 and 399.

- ***Public Investment in GO's duct network infrastructure**: The Authority considers that Vodafone has no valid basis at law to request access to GO's duct network infrastructure on the basis of its argument that Maltacom (and more so TeleMalta) had previously benefitted from public investment in the construction of the duct network infrastructure now used by GO, this at a time when Maltacom (or TeleMalta before it) were, in part or fully owned by the State. Vodafone ignores the fact that GO is today owned in its entirety by private shareholders who purchased their shares based on market prices, which prices factored the assets that GO (and Maltacom and TeleMalta before it) had, including its duct network infrastructure. Based on these facts the MCA*

considers that there is no justification at law as to why Vodafone should insist that now it has 'a right at law' to access GO's duct network infrastructure.

- ***Duct sharing agreement with Melita**: Vodafone in support of its dispute refers to an agreement on duct sharing made between Malta and Maltacom, arguing that GO should act in a similar fashion with Vodafone. GO in response argue that this agreement predates the present regulatory regime and was "imposed" on Maltacom by its then majority shareholder, the State, presumably (according to GO's argument) in the general public interest but not necessarily that of Maltacom. The MCA considers that the agreement in question was entered prior to the application of the current regulatory regime and that the circumstances relating to that agreement were fundamentally different from the current situation relating to the present dispute between GO and Vodafone. The MCA cannot discount the submission made by GO, that Maltacom entered into a duct sharing agreement with Melita (then Melita Cable p.l.c.) primarily because the State as the major shareholder of Maltacom, considered such an agreement to be in the general public interest rather than because it necessarily suited the commercial interests of Maltacom. What is undeniable is that the present circumstances are radically different from those subsisting when the agreement between Maltacom and Melita was made, when then the interests of the major shareholder of Maltacom were not exclusively commercial, but were also conditioned by social and general public interest considerations, whereas today the interests of GO's shareholders are exclusively commercial. The MCA given the above, considers that Vodafone fails to explain on what legal grounds it is justified in arguing that because an agreement was entered into some years ago between Maltacom and a third undertaking, Vodafone is now as of right also entitled to a similar agreement providing it with access to GO's duct network infrastructure. The fact that Maltacom had years ago agreed to give access to Melita does not justify Vodafone in arguing that within the context of the laws now administered by the MCA, GO is now obliged to provide such access.*

- ***The application of article 12(1) of Cap. 399**: Vodafone argues that the MCA has under article 12(1) of Cap. 399 has the power to impose access on GO. It is pertinent to consider carefully what the law actually states: "12(1) Where an undertaking providing electronic communications networks has the right at law to install facilities on, over or under public or private property, or may take advantage of a procedure for the expropriation or use of property, the Authority shall, taking full account of the principle of proportionality, be able to impose the sharing of such facilities or property, including buildings, entries to buildings, building wiring, masts, antennae, towers and other supporting constructions however so described, ducts, conduits, manholes and cabinets". The faculty of the Authority to impose sharing of facilities - which therefore may include also the sharing of ducts network - is in the first instance conditioned by the consideration that such a faculty relates only to those electronic communications network undertakings which at law have a right to install facilities on, over or under public or private property, or else which may take advantage of a procedure for the expropriation or use of property. The measures therefore stated in article 12(1) relate only to such undertakings as*

described in the said provision, and do not conversely apply to other undertakings. To understand the correct application of this provision it is important that one considers carefully what the applicable parts of the EU legislation on which article 12(1) of Cap. 399 is based, actually state. Article 12 paragraph 1 of the EU Framework Directive 2002/21/EC (being the EU provision on which article 12(1) of Cap. 399 is modelled) states as follows: "Article 12 Co-location and sharing of network elements and associated facilities for providers of electronic communications networks - 1. Where an undertaking providing electronic communications networks has the right under national legislation to install facilities on, over or under public or private property, or may take advantage of a procedure for the expropriation or use of property, national regulatory authorities shall, taking full account of the principle of proportionality, be able to impose the sharing of such facilities or property, including buildings, entries to buildings, building wiring, masts, antennae, towers and other supporting constructions, ducts, conduits, manholes, cabinets. 2. Member States may require holders of the rights referred to in paragraph 1 to share facilities or property (including physical co-location) or take measures to facilitate the co-ordination of public works in order to protect the environment, public health, public security or to meet town and country planning objectives and only after an appropriate period of public consultation, during which all interested parties shall be given an opportunity to express their views. Such sharing or coordination arrangements may include rules for apportioning the costs of facility or property sharing. Omissis." Reference is also made to what the relevant recitals of this Directive (as amended in 2009) state: "(22) It should be ensured that procedures exist for the granting of rights to install facilities that are timely, non-discriminatory and transparent, in order to guarantee the conditions for fair and effective competition. This Directive is without prejudice to national provisions governing the expropriation or use of property, the normal exercise of property rights, the normal use of the public domain, or to the principle of neutrality with regard to the rules in Member States governing system of property ownership." "(23) Facility sharing can be of benefit for town planning, public health or environmental reasons, and should be encouraged by national regulatory authorities on the basis of voluntary agreements. In cases where undertakings are deprived of access to viable alternatives, compulsory facility or property sharing may be appropriate. It covers inter alia: physical co-location and duct, building, mast, antenna or antenna system sharing. Compulsory facility or property sharing should be imposed on undertakings only after full public consultation." From a reading of the above, the following points result. The measures that can be taken in accordance with Article 12 of the Directive - as reflected in article 12 of Cap. 399 - do not relate to measures that can be taken in relation to a specific dispute that may arise between two undertakings. The wording of Article 12 paragraph 2 of the Framework Directive is clear on this point. What Member States are required to do, is to ensure that for benefit of town planning, public health or environmental reasons, undertakings may be required to provide co-location to their facilities, this after "full public consultation" during which all interested parties are to be given an opportunity to express their views. This therefore means that measures that may be taken in the context of article 12(1) of Cap. 399, relate to measures that may taken

within a general regulatory context in line with the objectives stated in Article 12 paragraph 2 of the Framework Directive, and not conversely as some form of specific remedy aimed at providing redress to an aggrieved undertaking in the course of a specific dispute with another undertaking. The MCA considers that the correct application of article 12(1) of Cap. 399, given also what is stated in the relevant provisions and recitals of the Framework Directive referred to above, is that the MCA may consider imposing access on undertakings not in the course of a specific dispute - as is the present case - but in the course of a general consideration of the situation in the market - hence the requirement in Recital (23) referred to above, namely that a full public consultation should be first undertaken before the imposition of access or otherwise is decided vis-à-vis the undertakings referred to in the aforesaid Article 12 paragraph 1 of the Framework Directive. It is pertinent furthermore to note that Government, in tandem with the MCA and with the Authority for Transport in Malta (Transport Malta or TM) last October undertook a wide-ranging consultation as part of the process to transpose Directive 2014/61/EU on measures to reduce the cost of deploying high speed electronic communications networks. In this context, amendments were proposed to the article 12 of Cap. 399 as part of a comprehensive exercise to implement the requirements of the aforesaid Directive. Subsequent to the public consultation undertaken, amendments to Cap. 81 and to Cap. 399 were enacted. These amendments were approved and enacted as per Act XVIII of 2016, the provisions of which law come into force on the 1 July 2016. The revised regulatory framework, as reflected in the amendments as per Act XVIII of 2016, amplifies on the previous regulatory regime by providing for access be electronic communications operators to all utility network infrastructures based on uniform norms applicable through the EU. For the sake of clarity the MCA notes in this regard that Cap. 81 effectively even prior to the enactment of the amendments as per Act XVIII of 2016, did factually provide for redress for an aggrieved party seeking access to the duct networks of an undertaking. Vodafone however chose not to avail itself of the remedies under Cap. 81.

- ***Compliance of GO with the requirements under the Market 4 Decision**: Vodafone argues that in terms of the Market 4 Decision GO has the obligation to provide duct access to Vodafone. Section 5.5.1 of the Market 4 Decision entitled "Access for copper products and services" states that: "In accordance with Article 15 of the ECNSR, GO shall: continue to offer wholesale unbundled access to the local loop and sub loop (including shared access) and associated facilities, and accommodate reasonable requests for access to service variants; give OAOs access to specified network elements and/or associated facilities, where such access is required for the purpose of the provision of wholesale unbundled access to the local loop or sub loop; provide co-location or other forms of facility and site sharing, where applicable for the purpose of unbundled local loop and sub loop services; provide access to back haul services for the purpose of unbundling of the local loop and sub loop, including Ethernet services, dark fibre and duct access. GO is therefore required to negotiate in good faith with undertakings requesting any of these access services." The MCA specifically refers to the fourth bullet point quote above wherein it clearly stipulates that GO must provide access to backhaul services including Ethernet*

services, dark fibre and duct access for the purpose of unbundling of the local loop and sub loop. The MCA therefore underlines that the obligation on GO to provide duct access is not a generic obligation, but is a specific obligation targeted at supplementing the access remedy for the unbundling of the local loop and sub-loop. This notion is further reinforced in Section 5.5.4 of the Market 4 Decision wherein it is stated: "In relation to access to ducts and dark fibre specifically serving as backhaul to local loop and sub-loop unbundling, GO is not required to publish in the RUO the detailed conditions for access to these services. The technical conditions and pricing related to duct access and dark fibre are subject to commercial negotiations and the MCA may intervene on a case-by-case basis in the event of failed negotiations." For the avoidance of doubt, the MCA explains that the purpose of a market analysis is to define specific markets with a view to regulate any market failures pertaining to the market in question. The Market 4 Decision being invoked by Vodafone in support of its claims in this dispute specifically deals with the provision of unbundling services of the copper and fibre loops as clearly demarcated in Section 3.3 entitled "Decision on the market definition". It is therefore consequential that any obligations arising from the Decision pertain to services falling within the scope of this market. As quoted above, the Market 4 Decision clearly indicated that the obligation incumbent on GO for the provision of duct access under that decision is for the purposes of facilitating the unbundling of the local loop and sub-loop and nothing else.

- ***Other legal provisions cited by Vodafone in support of its case**: For the sake of completeness and clarification the MCA refers also to the other provisions at law cited by Vodafone in support of its dispute with GO. Vodafone in its dispute also cited various provision of S.L. 399.28 of the Laws of Malta, notably various provisions of regulations 13 and 15 which relate to the imposition of obligations by the MCA on any operator designated by the MCA as having significant market power (SMP) in any one of the regulated markets following a market analysis carried out in accordance with the aforesaid legislation. The application of the obligations as stated in regulations 13 and 15 therefore arises only in those instances where after the MCA undertakes a market analysis of a particular (regulated) market, it determines that an undertaking has SMP in that market and consequently imposes obligations. This is precisely what happened in relation to the Market 4 Decision referred to by Vodafone. Hence the obligations therein stated only subsist once such a process is undertaken and where applicable, obligations imposed on the undertaking concerned. The provisions of the said regulations do not impose a generic requirement whereby an operator can request access to another operator's infrastructure if not in such circumstances, and then only after obligations have been imposed following a regulatory decision by the MCA in accordance with its powers under Part III of S.L. 399.28.*

Is-soċjetà Rikorrenti ħassitha aggravata bid-Deċiżjoni ta' l-Awtorità Intimata u interponiet dan l-appell minnha. Hija titlob li t-Tribunal iħassar u jirrevoka d-Deċiżjoni u għaldaqstant iwaqqaf u jħassar l-effetti kollha tagħha u konsegwentement, prevja kull dikjarazzjoni li jeżisti l-obbligu ta' l-Awtorità li tinkoraġixxi l-parteċipazzjoni, aċċess, qism u/jew dħul f'faċilitajiet jew

proprjetajiet li jinsabu fi, fuq jew taħt proprjetà privata jew pubblika bejn intrapriżi li joffru networks ta' telekomunikazzjoni elettronika, jordna lill-Awtorità sabiex tobbliga lil GO tagħti lil terzi dħul għal elementi ta' network u, jew faċilitajiet speċifikati, inklużi għalhekk il-kanali u dan ai termini ta' l-Artikolu 2 tal-Kap.399 tal-Liġijiet ta' Malta, li tinnegozja in bona fidi ma' intrapriżi li jkunu qegħdin jitolbu dħul u li tipprovdi kollokazzjoni jew forom oħra ta' parteċipazzjoni fil-faċilitajiet assoċjati jew li tagħti rimedju effettiv lis-soċjetà esponenti dwar il-parteċipazzjoni, aċċess u/jew dħul f'tali faċilitajiet jew proprjetajiet ta' GO.

Is-soċjetà Rikorrenti tibbaza l-appell tagħha mid-Deċiżjoni fuq is-segwenti aggravji: (1) l-Awtorità Intimata naqset milli tapplika r-rimedju mogħti mill-Artikolu 12 tal-Kap. 399 tal-Liġijiet ta' Malta u minflok irrifjutat li tapplika tali rimedju a bażi ta' interpretazzjoni ħażina tal-Liġi u dana billi applikat l-Artikolu 12(2) tad-Direttiva 2002/21/EC li ma ġiex traspost fil-Liġi Maltija u b'hekk huwa inapplikabbli għall-każ odjern; u (2) fil-mertu u bla preġudizzju għall-ewwel aggravju, ma huwiex minnu li hija kienet prematura fit-talbiet tagħha lill-Awtorità Intimata.

L-Awtorità Intimata topponi għall-appell tas-soċjetà Rikorrenti u titlob li t-Tribunal jastejni milli jieħu konjizzjoni tiegħu stante li kif impostat inbidlu t-talbiet oriġinali kif avvanzati quddiemha mis-soċjetà Rikorrenti u minnha deċiżi bid-Deċiżjoni u fin-nuqqas, li l-istess imsemmi appell jiġi miċhud stante li l-aggravji ta-soċjetà Rikorrenti huma infondati fil-fatt u fid-dritt.

L-Awtorità Intimata titlob li t-Tribunal jastjeni milli jieħu konjizzjoni ta' l-appell tas-soċjetà Rikorrenti mid-Deċiżjoni in bażi għas-segwenti sottomissjoni: *wieħed irid jpoġġi l-appell odjern, u l-aggravji mressqa fil-kuntest ta' dak li ġie oriġinarjament mitlub mill-istess Vodafone meta ressqet it-talba tagħha għall-intervent ta' l-Awtorità fit-tilwima (dispute) li, skont hi, kienet teżisti mal-GO p.l.c. u konsegwentement id-Deċiżjoni li ħarġet l-Awtorità. It-talba tal-Vodafone kienet taqra hekk: "CONCLUSION - Vodafone is hereby submitting this dispute to the MCA and respectfully requests the MCA to declare that through its actions GO are in breach of their obligations and subsequently to impose on GO: 1) The obligation to follow and comply with the measures and obligations imposed upon it by the MCA, through its Market 4 Decision; 2) The obligation to negotiate in good faith and to grant Vodafone access to the duct network currently used by GO, at reasonable prices for such access; 3) The obligation to grant such access to the duct network based on the same conditions under which access has already been given to Melita, and this in line with GO's non-discrimination obligations; 4) Any other measure or decision which the MCA deems opportune and necessary given the circumstances at hand. Surely the redress being requested by Vodafone finds its legal basis not only in current legislation as explained in detail in this letter, but also finds its rationale in European and national legislative and regulatory developments, including but not limited to the provisions contained in EU Directive 2014/61/EU regarding measure to reduce the cost of deploying high-speed electronic communication networks. Ironically, GO are now using such legislative developments in a last ditch attempt to try to justify their continued procrastination on this matter. Whilst we reserve the right to present any further submission or document in support of our claims, we remain at your*

full disposal should any further information or clarification be required and would be available to discuss this matter directly with you at your convenience". … Fi kliem l-istess Vodafone, l-impożizzjoni ta' l-obbligi li hija talbet mill-Awtorità fil-konfront ta' GO p.l.c., kellha tkun konsegwenzjali għal dikarazjoni mill-istess Awtorità illi l-GO p.l.c. kienet qed tikser l-obbligi tagħha. Huwa f'dan il-kuntest li l-Awtorità ikkunsidrat it-talbiet li kellha quddiemha u ddeċidiet dwarhom fid-Deċiżjoni. Isegwi għalhekk illi l-appell, kif impostat, ma jistax jissussisti għaliex qiegħed ibiddel il-kuntest tat-talbiet oriġinali li ddeċidiet fuqhom l-Awtorità fid-Deċiżjoni u għalhekk tad-Deċiżjoni stess. Semmai, it-talbiet f'dan l-appell kellhom jirriflettu t-talbiet oriġinali tal-Vodafone u kellhom għalhekk ikunu sussegwenti għal dikjarazzjoni mill-Onorabbli Tribunal illi l-GO p.l.c. kisret l-obbligi tagħha. Fi kliem ieħor, l-ebda obbligu ma jista' jiġi impost fuq il-GO p.l.c. fl-ambitu tad-Deċiżjoni jekk ma jkunx hemm fl-ewwel lok konklużjoni illi l-GO p.l.c. kisret l-obbligi tagħha. Din id-dikjarazzjoni ma ġietx mitluba u għalhekk dan l-Onorabbli Tribunal għandu jastjeni milli jieħu konjizzjoni ulterjuri ta' l-appell u tat-talbiet tas-soċjetà appellanti[6].

In kwantu rigwarda l-aggravji sollevati mis-soċjetà Rikorrenti l-Awtorità Intimata tinsisti li t-talba avvanzata mill-imsemmija soċjetà quddiemha kienet intempestiva stante li *a bażi tad-dokumentazzjoni mogħtija mill-Vodafone jirriżulta, l-Awtorità tqis, li kien hemm lok għal negozjati ulterjuri qabel ma il-Vodafone għażlet li tagħmel id-dispute ma' l-Awtorità. Hu pertinenti li wieħed jinnota li l-Vodafone ma tagħti l-ebda raġuni għalfejn hi naqset milli twieġeb l-email tat-8 ta' Jannar 2016 tas-CEO tal-GO Michaelides u li minflok ftit ġimgħat wara ddeċidiet li tagħmel dispute quddiem l-Awtorità. Madanakollu, u dan huwa punt kardinali, il-fatt illi l-Awtorità dehrilha li d-dispuste tal-Vodafone kien prematur, ma żammx lill-istess Awtorità lura milli tanalizza l-mertu tad-dispute u tiddeċiedi dwaru. Il-Vodafone, f'dan l-aggravju* [it-tieni aggravju fuq liema tibbaża l-appell tagħha]*, qed tisħaq fuq punt li ma kienx konklussiv u anke, jekk għall-grazzja ta' l-argument, dan l-aggravju jintlaqa' mill-Onorabbli Tribunal, dan ma jbiddel xejn mis-sustanza tad-Deċiżjoni. Di più bla preġudizzju għas-suespost kif ser jiġi spjegat iżjed 'il quddiem il-Vodafone setgħet tqis ir-rimedji a tenur tal-Kap. 81 tal-Liġijiet ta' Malta, ħaġa li l-Vodafone ma ikkunsidratx*[7]. Per quanto rigwarda l-ewwel aggravju sollevat mis-soċjetà Rikorrenti, ossia l-interpretazzjoni erroneja u b'hekk l-applikazzjoni żbaljtata ta' l-Artikolu 12 tal-Kap. 399 tal-Liġijiet ta' Malta, l-Awtorità Intimata ssostni li dan l-Artikolu tal-Liġi ġie minnha applikat bil-mod korrett u in konformità mad-Direttiva 2002/21/EC u li l-premessi fuq liema s-soċjetà Rikorrenti tibbaża dan l-aggravju, inkluż il-verżjoni ta' l-Artikolu 12 tad-Direttiva 2002/21/EC minnha ċitat, huma għal kollox infondati fil-fatt u fid-dritt.

Stabbiliti l-parametri ta' l-appell tas-soċjetà Rikorrenti u ta' l-oġġezzjonijiet u opposizzjonijiet ta' l-Awtorità Intimata għal tali appell, it-Tribunal ser jgħaddi biex jittratta l-istess u ser jibda l-ewwel bl-oġġezzjoni preliminari ta' l-Awtorità Intimata li t-Tribunal għandu jastjeni milli jieħu konjizzjoni ta' l-appell tas-soċjetà Rikorrenti in kwantu kif impostat ma jistax jissussisti għaliex qiegħed ibiddel il-kuntest tat-talbiet oriġinali minnha deċiżi bid-Deċiżjoni.

[6] Para. 2 sa' 6 tar-Risposta ta' l-Awtorità Intimata, fol. 96 u 97 tal-proċess.
[7] Para. 32 u 33 tar-Risposta ta' l-Awtorità Intimata, fol. 102 tal-proċess.

Oġġezzjoni preliminari sollevata mill-Awtorità Intimata - it-Tribunal għandu jastjeni milli jieħu konjizzjoni ta' l-appell tas-soċjetà Rikorrenti stante li kif impostat qed ibiddel il-kuntest tat-talbiet oriġinali deċiżi bid-Deċiżjoni:

Mir-Risposta u min-Nota Responsiva ta' l-Awtorità Intimata jirriżulta ferm ċar li l-kontestazzjoni tagħha dwar l-inproponibilità ta' l-appell odjern hija ibbażata fuq l-affermazzjoni li fit-talbiet tagħha lit-Tribunal s-soċjetà Rikorrenti naqset milli titlob li t-Tribunal jordna lill-Awtorità sabiex, prevja kull imposizzjoni ta' obbligi fuq GO p.l.c. biex tagħti aċċess lis-soċjetà Rikorrenti għad-duct network tagħha, tiddikjara li GO p.l.c. kisret l-obbligi tagħha relattivament għal tali aċċess, talba din li invece kienet ġiet avvanzata mill-istess soċjetà quddiem l-Awtorità fid-*Dispute* tagħha. Fil-fehma tat-Tribunal però tali kontestazzjoni ta' l-Awtorità Intimata hija għal kollox frivola u vessatorja għaliex anke jekk it-talba tas-soċjetà Rikorrenti ma ġietx ippostulata b'mod għal kollox korrett fil-kuntest ta' proċeduri ta' reviżjoni amministrattiva, dan ma jfissirx li l-appell għandu jiġi injorat u skartata fl-intier tiegħu.

A tenur ta' l-Artikolu 36(1) tal-Kap. 418 tal-Liġijiet ta' Malta *t-Tribunal ta' Reviżjoni Amministrattiva huwa kompetenti li jisma' u jiddetermina appelli minn deċiżjonijiet tal-Awtorità kif previst f'dan l-Att jew f'xi liġi jew regolameti* u a tenur ta' l-Artikolu 39(1) ta' l-istess imsemmi Kapitolu tal-Liġijiet ta' Malta *fid-determinazzjoni ta' appell it-Tribunal għandu jqis il-merti ta' l-appell, u jista' għal kollox jew f'parti, jikkonferma jew jannulla d-deċiżjoni appellata, fejn jagħti bil-miktub ir-raġunijiet għad-deċiżjoni tiegħu u għandu jara li dik id-deċiżjoni tkun waħda pubblika u li tiġi komunikata lill-partijiet fl-appell.*

Dawn il-provvedimenti tal-Liġi kjarament jistabilixxu l-parametri li fihom jista' jaġixxi t-Tribunal f'kuntest ta' appell minn deċiżjoni ta' l-Awtorità Intimata, u cioè li t-Tribunal jista' **jannulla jew jikkonferma d-deċiżjoni ta' l-Awtorità Intimata iżda ma jistax u ma għandux jissostitwixxi d-diskrezzjoni tiegħu għal dik ta' l-Awtorità Intimata**. Dan ifisser għalhekk li t-Tribunal ma jista' qatt u bl-ebda mod jordna lill-Awtorità Intimata x'għandha u x'ma għandhiex tagħmel għaliex b'hekk ikun kjarament qed jissostitwixxi d-diskrezzjoni tiegħu għal dik ta' l-Awtorità. Detto ciò però ma għandu jkun hemm l-ebda dubju li fejn deċiżjoni tiġi annullata in bażi għal konsiderazzjonijiet partikolari - ad eżempju konsiderazzjoni li l-mod kif l-Awtorità tkun applikat id-diskrezzjoni tagħha ma kienx ġust, korrett u/jew proporzjonali jew inkella konsiderazzjoni li l-Awtorità bbażat id-deċiżjoni tagħha fuq Liġi żbaljata jew interpretazzjoni żbaljata tal-Liġi - l-Awtorità għandha l-obbligu li terġa tikkonsidra l-kwistjoni miġjuba quddiemha fid-dawl tal-konsiderazzjonijet magħmula mit-Tribunal fid-deċiżjoni tiegħu għaliex altrimenti kwalunkwe deċiżjoni tat-Tribunal kontra l-Awtorità Intimata tiġi reża għal kollox inutili u ma jkollha ebda forma ta' utilità jew piż u valur legali.

It-Tribunal già kien esprima ruħu f'dan ir-rigward fis-sentenza fl-ismijiet **Melita p.l.c. v. L-Awtorità ta' Malta dwar il-Komunikazzjoni, Rik. Nru. 202/12** deċiża fit-13 ta' Ġunju 2013 u kkonfermata mill-Qorti ta' l-Appell (Sede Inferjuri) b'sentenza pronunċjata fit-30 ta' Settembru 2015. Fl-imsemmija sentenza t-

Tribunal kien osserva li *fil-każ ta' appelli minn deċiżjonijiet mogħtija* [mill-Awtorità Intimata] *dan it-Tribunal ma għandux is-setgħa li jissostitwixxi d-diskrezzjoni tiegħu għal dik tagħha u b'hekk jiddeċiedi minflokha jew jordnalha kif għandha tiddeċiedi. Dan huwa prinċipju ċentrali fil-kuntest tad-Dritt Amministrattiv kif jirriżulta mis-sentenza iktar 'l fuq ċitata 'Lawrence Borg v. Gvernatur tal-Bank Ċentrali ta' Malta' kif ukoll mis-sentenza wkoll iktar 'l fuq ċitata 'Anthony Psaila v. Kummissarju tal-Pulizija' fejn, f'din ta' l-aħħar, ingħad illi l-Qrati fil-funzjoni tagħhom ta' judicial review ta' l-operat ta' l-Eżekuttiv għandhom iva d-dritt li jiddeċiedu li atti partikolari ta' l-Eżekuttiv ikunu nulli u bla effett iżda m'għandhom qatt id-dritt li jissostitwixxu d-diskrezzjoni riżervata lill-Eżekuttiv b'dik tagħhom - Mary Grech v. Ministru tax-Xogħlijiet et, Appell Ċivili, 29 ta' Jannar 1993. Fejn il-Leġislatur ried li t-Tribunal ikollu l-fakoltà li jissostitwixxi d-diskrezzjoni tiegħu għal dik ta' l-awtorità pubblika kontestata espressament ipprovda dwar dan fil-Liġi relattiva bħal ad eżempju fl-Artikolu 35(4) tal-Kap. 372 tal-Liġijiet ta' Malta li jipprovdi: bla ħsara għad-disposizzjonijiet tas-subartikolu (3), it-Tribunal jikkonferma, inaqqas, iżid jew jannulla l-istima jew jagħmel dak l-ordni dwarha illi jidhirlu xieraq. Madanakollu però ma hemmx dubju li fl-eventwalità li dan it-Tribunal kellu jannulla in toto jew in parte deċiżjoni ta' l-Awtorità intimata, l-istess Awtorità tkun in segwitu għal tali deċiżjoni, obbligata li terġa' tikkonsidra l-kwistjoni mill-ġdid fid-dawl tar-raġunijiet mogħtija mit-Tribunal għar-revoka tad-deċiżjoni oriġinali tagħha. Kieku l-Awtorità intimata kellha titqies bħala mhux marbut bid-deċiżjoni qual' volta mogħtija mit-Tribunal u bir-raġunijiet fiha dedotti, id-dritt ta' appell minn deċiżjonijiet ta' l-istess Awtorità mogħtija bis-saħħa ta' l-Artikolu 37(1) tal-Kap. 418 tal-Liġijiet ta' Malta kompletament jitlef l-iskop u s-siwi tiegħu.*

Applikat dan kollu appena osservat għall-każ in eżami għandu jirriżulta bl-iktar mod ċar u limpidu li dan it-Tribunal ma għandux jastjeni milli jieħu konjiżżjoni ta' l-appell tas-soċjetà Rikorrenti mid-Deċiżjoni u dana billi bl-istess appell l-ewwel u qabel kollox l-imsemmija soċjetà qed titlob li għar-raġunijiet minnha mogħtija fil-korp ta' l-appell it-Tribunal *jirrevoka u jħassar id-Deċiżjoni DIS 234/MCA-LEG/mb/16-2604 maħruġa mill-Awtorità fl-1 ta' Lulju 2016 u għaldaqstant iwaqqaf u jħassar l-effetti kollha tad-Deċiżjoni,* talba din li taqa' ben entro l-parametri tal-kompetenza u setgħat tat-Tribunal. Bit-tieni talba tagħha s-soċjetà Rikorrenti titlob li *konsegwentement prevja kull dikjarazzjoni illi jeżisti l-obbligu ta' l-Awtorità li tinkoraġixxi l-parteċipazzjoni, aċċess, qsim u/jew dħul f'faċilitajiet jew proprjetajiet li jinsabu fi, fuq jew taħt proprjetà privata jew pubblika bejn intrapriżi li joffru networks ta' telekomunikazzjoni elettronika, jordna lill-Awtorità sabiex tobbliga lil GO li tagħti lil terzi dħul għal elementi ta' network u, jew faċilitajiet speċifikati [inklużi għalhekk il-kanali u dan ai termini ta' l-Art. 2 tal-Kap.399], li tinnegozja in bona fidi ma' intrapriżi li jkunu qegħdin jitolbu dħul, u li tipprovdi kollokazzjoni jew forom oħra ta' parteċipazzjoni fil-faċilitajiet assoċjati jew li tagħti rimedju effettiv lis-soċjetà esponenti dwar il-parteċipazzjoni, aċċess, qsim u/jew dħul f'tali faċilitajiet jew proprjetajiet ta' GO.* Huwa b'din it-talba, jew aħjar b'parti minn din it-talba li s-soċjetà Rikorrenti qed titlob li t-Tribunal jordna lill-Awtorità Intimata x'għandha tagħmel u tiddeċiedi fir-rigward tat-talbiet minnha proposti quddiemha bid-*Dispute* sottomessa fil-25 ta'

Frar 2016[8] u għalhekk hija dik il-parti ta' din it-talba li se mai ma għandhiex tiġi kkunsidrata, però ċertament mhux l-appell fl-intier tiegħu kif pretiż mill-Awtorità Intimata.

Fid-dawl ta' dan kollu osservat għalhekk it-Tribunal iqis li l-oġġezzjoni preliminari sollevata mill-Awtorità Intimata ma hijiex ġustifikata u b'hekk għandha tiġi miċħuda.

Trattatta din l-oġġezzjoni preliminari t-Tribunal ser jgħaddi biex jittratta l-aggravji sollevati mis-soċjetà Rikorrenti in sostenn ta' l-appell tagħha mid-Deċiżjoni u se jibda billi jittratta l-ewwel it-tieni aggravju sollevat mill-imsemmija soċjetà u cioé l-aggravju li kuntrarjament għal dak ikkunsidrat u affermat mill-Awtorità Intimata fid-Deċiżjoni, hija ma kenitx pre-matura fit-talbiet tagħha quddiem l-Awtorità.

It-Tieni Aggravju - Kuntrarjament għal dak determinat mill-Awtorità Intimata, id-*Dispute* tas-soċjetà Rikorrenti ma kienx prematur:

L-Awtorità Intimata tikkontendi li b'dan l-aggravju s-soċjetà Rikorrenti qed tisħaq fuq punt li ma kienx konklussiv għall-finijiet tad-*Dispute* minnha (ossia is-soċjetà Rikorrenti) sottomess quddiemha (ossia l-Awtorità Intimata), tant illi l-istess Awtorità għaddiet biex tittratta d-*Dispute* fil-mertu u fi kwalunkwe każ anke jekk it-Tribunal kellu jilqa' dan l-aggravju ma jinbidel xejn mis-sustanza tad-Deċiżjoni. It-Tribunal però ma jaqbilx għal kollox ma' din il-kontestazzjoni ta' L-Awtorità Intimata għar-raġuni li l-osservazzjonijiet u konsiderazzjonijiet tagħha dwar l-intempestività tad-*Dispute* tas-soċjetà Rikorrenti kjarament jikkostitwixxu waħda mir-raġunijiet għalfejn it-talbiet tas-soċjetà Rikorrenti ġew miċħuda minnha. In effetti l-parti deċiżiva tad-Deċiżjoni tgħid: *The Authority, therefore* ***for the reasons stated in this decision with reference to the claims lodged by Vodafone in this dispute***[9]*, considers that GO did not act in breach of the obligations onerous upon it as consequence to Market 4 Decision or of any of the applicable provisions at law as enforced by the Authority relating to access to duct network infrastructure*[10].

Huwa ferm evidenti li la taħt il-kap tad-Deċiżjoni dwar *Commercial Negotiations* l-Awtorità Intimata qieset li t-talbiet tas-soċjetà Rikorrenti kienu prematuri/intempestivi għaliex ma kienx hemm negozjati effettivi għaddejjin bejnha u s-soċjetà GO p.l.c. għal aċċess għad-*duct network* ta' din ta' l-aħħar, hija ma setgħetx issib li GO p.l.c. kisret l-obbligi imposti fuqha fir-rigward. B'hekk altru milli tali osservazzjoni ta' l-Awtorità Intimata ma kenitx konklussiva għall-finijiet tad-Deċiżjoni tagħha. Ċertament ma kenitx l-unika konsiderazzjoni u konklużjoni ta' l-Awtorità Intimata fir-rigward tat-talbiet tas-soċjetà Rikorrenti però kjarament tifforma parti piuttost importanti mill-bażi tad-Deċiżjoni stante li fl-aħħar mill-aħħar timpinġi fuq il-*locus standi* tas-soċjetà Rikorrenti fir-rigward tad-*Dispute* minnha avvanzata. F'tali kuntest għalhekk is-soċjetà Rikorrenti qatt ma setgħet tappella mid-Deċiżjoni u b'mod partikolari mill-kap dwar l-interpretazzjoni ta' l-

[8] Fol. 114 sa' 116 tal-proċess.
[9] Enfasi tat-Tribunal.
[10] Fol. 25 tal-proċess.

Artikolu 12 tal-Kap. 399 tal-Liġijiet ta' Malta mingħajr ma tappella wkoll minn dan il-kap partikolari ukoll.

Fid-Dawl ta' dan appena osservat għalhekk it-Tribunal ser jgħaddi biex jittratta dan l-aggravju sollevat mis-soċjetà Rikorrenti.

Wara li fin-Nota Responsiva tagħha elenkat il-fatti tal-każ u senjatament il-kuntatti u komunikazzjonijiet li kien hemm bejn is-soċjetà Rikorrenti u s-soċjetà GO p.l.c. bejn it-28 ta' April 2015 u t-8 ta' Jannar 2016, l-Awtorità Intimata tissottometti li: *bħala stat ta' fatt hu pertinenti li jiġi notat li l-konsultazzjoni pubblika da parti tal-Gvern dwar il-bdil meħtieġ fil-liġijiet kien sar f'Ottubru 2015 u li l-Gvern kien kommess a tenur ta' l-obbligi ta' Malta bħala stat membru ta' l-UE li skont id-Direttiva ta' l-UE numru 2014/61/EU jieħu l-miżuri neċessarji għat-twettiq ta' din id-Direttiva liema miżuri kellhom ikunu applikabbli sa mhux aktar tard mill-1 ta' Lulju 2016. Din id-Direttiva u l-liġi Maltija li kienet ddaħħal lid-Direttiva fis-seħħ, kienu jimpattaw b'mod sħiħ il-kwistjoni ta' bejn il-partijiet. Dan ifisser li Vodafone kienet taf li sa' l-1 ta' Lulju 2016, il-Gvern kien marbut li jimplimenta l-miżuri neċessarji fir-rigward ta' din id-Direttiva. Għal kull buon fini jiġi rilevat li r-rikors ta' l-appell odjern ġie intavolat mill-Vodafone fil-21 ta' Lulju 2016, waqt li l-liġi li allura implimentat id-Direttiva 2014/61/EU għaddiet mill-Parlament u ġiet ippubblikata bħala att ta' l-istess Parlament fit-12 ta' April 2016. Dan kollu qed jingħad biex juri li kienet biss kwistjoni ta' ftit xhur minn wara li l-GO kitbet lill-Vodafone f'Jannar 2016 u ssugeriet lil Vodafone li tqis li tistenna li jsir il-liġi domestika, li effettivament saru l-liġijiet li allura implimentaw id-Direttiva 2014/16/EU. Il-Vodafone ssaqsi x'kienet qed tistenna l-Awtorità biex ma ssibx l-aġir ta' l-istess Vodafone prematur? Ir-risposta hi ċara: tweġiba da parti tal-Vodafone għall-komunikazzjoni tal-GO tat-8 ta' Jannar 2016. L-Awtorità tissottometti li l-Vodafone naqset milli twieġeb id-diversi punti msemmija mic-CEO tal-GO fil-komunikazzjoni tiegħu tat-8 ta' Jannar 2016, li almenu wħud minnhom, fil-fehma ta' l-Awtorità kienu jimmeritaw risposta da parti tal-Vodafone, b'mod partikolari l-aċċenn da parti tal-GO għall-fatt li l-Vodafone ma kienetx disposta li hi minn naħa tagħha tagħti aċċess lil GO, u li l-Gvern kien viċin li jagħmel liġijiet ġodda dwar il-materja w allura kien ikun loġiku li wieħed jistenna sa' kemm isiru dawn il-liġijiet. Il-Vodafone però għar-raġunijiet li taf hi, naqset milli tagħti xi forma ta' tweġiba u minflok bla preavviz ta' xejn lil GO fil-25 ta' Frar 2016 għażlet li tintavola tilwima ma' l-Awtorità. Hu sottomess li kieku l-Vodafone baqgħet bla l-ebda risposta mill-GO għal komunikazzjoni tac-CEO tagħha tal-21 ta' Diċmebru 2015, wieħed kien jifhem li l-Vodafone imbagħad tqis x'passi oħra tista' tieħu inkluż li titlob intervent regolatorju. Però fattwalment il-GO tat risposta u qajmet diversi punti li l-Awtorità tqis li kienu pertinenti, li l-Vodafone però injorat u minflok għażlet li tagħmel tilwima kontra l-GO mingħajr l-ebda preavviż lil GO li kienet ser tieħu dan il-pass. Bħala minimu wieħed jistenna li l-Vodafone twieġeb l-ittra tal-GO tat-8 ta' Jannar 2016, tgħid fejn u għalfejn ma taqbilx mal-GO u se mai tavża lil GO li fin-nuqqas hi ser tqis li titlob l-intervent tar-regolatur. Minn dan kollu però ma sar xejn da parti tal-Vodafone la wara li ntbagħtet il-komunikazzjoni tal-GO tat-8 ta' Jannar 2016 u lanqas qabel. Minflok kif jirriżulta mill-provi l-Vodafone qabdet u intavolat tilwima fi Frar 2016 kontra l-GO. Hu fid-dawl ta' dawn il-fatti li l-Awtorità tqis li l-intavolar tat-tilwima da parti tal-Vodafone kien prematur. Il-Vodafone*

ripetutament tagħmel l-argument li, skont hi, mill-korrispondenza skambjata bejnha u bejn il-GO jirriżulta li hi talbet diversi drabi biex isir ftehim ta' aċċess għad-ducts tal-GO. Wieħed jieħu l-impressjoni minn dak li qed jgħid il-Vodafone li tul iż-żmien ta' disa' xhur il-Vodafone b'mod persistenti kienet qed issaqsi lil GO biex isir dan il-ftehim, meta fattwalment dan ma jirriżultax li kien il-każ. Il-Vodafone b'mod partikolari tonqos milli tispjega għalfejn fil-perijodu ta' bejn Ġunju u sa' l-aħħar ta' Diċembru hi qatt ma għamlet l-iċken aċċenn għal dawn it-talbiet mal-GO, u aktar importanti għalfejn naqset li twieġeb il-punti sollevati mill-GO fit-tweġiba tal-GO tat-8 ta' Jannar 2016 b'mod partikolari fl-ambitu tal-proposta da parti tal-GO li jkun ftehim bilaterali għal aċċess, talba li l-Vodafone imkien ma tispjega x'inhi l-posizzjoni tagħha f'dan ir-rigward tenut kont li GO fl-email tat-8 ta' Jannar 2016 telenka l-fatt li l-Vodafone 'was not interested in providing access to GO'. Il-Vodafone tirrimarka li sa' llum 'kważi tlett snin wara għadu lanqas biss beda jiġi negozjat' ftehim mal-GO. Bir-rispett ma kien hemm xejn milli jżomm lil Vodafone biex tavviċina lil GO biex tkompli bin-negozjati biex ikollha aċċess. Il-Vodafone volontarjament għażlet li tinjora u twieġeb dak li qalet il-GO fil-komunikazzjoni tat-8 ta' Jannar 2016. Minflok il-Vodafone minn jeddha għażlet li tirreġistra tilwima qabel il-waqt u tikkontesta d-deċiżjoni ta' l-Awtorità sussegwenti għal dik it-tilwima. Ma tistax issa l-Vodafone għaliex għażlet din it-triq targumenta li sa' llum għadha mingħajr ftehim mal-GO[11].

Wara li qies kemm l-iskambju ta' korrispondenza bejn is-soċjetà Rikorrenti u is-soċjetà GO p.l.c. kif ukoll is-sottomissjonijiet avvanzati mill-partijiet kontendenti, b'mod partikolari dawk avvanzati mill-Awtorità Intimata, fir-rigward ta' l-allegata intempestività tad-*Dispute* tas-soċjetà Rikorrenti, it-Tribunal huwa tal-fehma li l-Awtorità Intimata ma hijiex affattu korretta fil-konsiderazzjonijiet magħmula minnha u l-konsegwenti konkluzzjoni raġġunta fir-rigward.

Filwaqt li l-Awtorità Intimata saħqet ħafna fuq il-perċepita inazzjoni tas-soċjetà Rikorrenti bejn iż-żmien meta nżammet il-laqgħa bejn ir-rappreżentanti taż-żewġ soċjetajiet fit-28 ta' April 2015 u l-email tac-CEO tas-soċjetà Rikorrenti lic-CEO tas-soċjetà GO p.l.c. datata 21 ta' Diċembru 2015, l-Awtorità Intimata stranament ma kkummentat bl-ebda mod u lanqas biss ikkunsidrat il-fatt li s-soċjetà GO p.l.c. kjarament injorat għal darba, darbtejn, tlieta, it-talbiet tar-rappreżentanti tas-soċjetà Rikorrenti għal risposta dwar dak diskuss fil-laqgħa tat-28 ta' April 2015 biex b'hekk in-negozjati dwar il-ftehim li riedet tilhaq is-soċjetà Rikorrenti mas-soċjetà GO setgħu jimxu 'l quddiem.

Mill-minuti ċċirkolati bejn ir-rappreżentanti taż-żewġ soċjetajiet li kienu preżenti għall-laqgħa, liema minuti jirriżulta li ma ġewx kontestati mis-soċjetà GO, dan anke kif osservat mill-Awtorità Intimata fid-Deċiżjoni, jirriżulta li kien ġie diskuss u miftiehem is-segwenti:

- *JP kicked off by stating that Vodafone would like to enter into a duct sharing agreement with GO. This would be on the same basis of the Duct sharing agreement GO has with Melita.*

[11] Para. 28 sa' 33 tan-Nota Responsiva ta' l-Awtorità Intimata, fol. 222 u 223 tal-proċess.

- *SB asked what Vodafone had in mind for use of ducts. AC replied that Vodafone required generic access but one of the main uses would be fibre to radio sites. AC said that we would require a framework agreement which would be complemented by annexes detailing the actual operational details.*
- *SB stated that the agreement is very old and he has never actually seen it himself.*
- *MC explained the history behind the agreement between GO and Melita. That agreement was imposed on GO when it was a state company which had to be accepted after Melita had already laid infrastructure in the ducts.*
- *MC also gave examples of difficulties encountered because contractors of different operators accessed the ducts, damaging infrastructure without taking responsibility;*
- *AC suggested that over the years some operating procedures must have been developed but MC stated that following the initial use of ducts by Melita they no longer accessed them because most of Melita's network was done overhead.*
- *MC stated that any agreement reached would have to be completely new and with different commercial conditions. He also said that any agreement would have to be a bi-lateral one.*
- *SB asked that Vodafone consider an LTE sharing agreement. JP replied by saying that Vodafone's position is that it is not interested in sharing 4G active infrastructure. SB said that GO would be interested in passive sharing.*
- *It was agreed that GO will take note of Vodafone's request and discuss it as EXCO level. Vodafone will also discuss GO's request for sharing of passive 4G infrastructure.*
- *GO to come back to Vodafone with an update following internal discussions*[12].

Minkejja dak diskuss u miftiehem li kellu jsir waqt il-laqgħa tat-28 ta' April 2015, is-soċjetà Rikorrenti baqgħet ma semgħet xejn mingħand is-soċjetà GO tant illi fit-18 ta' Mejju 2015, ossia madwar għoxrin ġurnata wara l-laqgħa, Jason Pavia, għas-soċjetà Rikorrenti, bagħat email lil Stefan Briffa għas-soċjetà GO fejn appuntu staqsieh *could you let us know if there have been any developments on the below please?* [ma' l-email kien hemm annessi il-minuti tal-laqgħa tat-28 ta' April 2015] *Also, could we agree on the contents of our last conversation?*[13]. Jason Pavia bagħat reminder oħra lil Stefan Briffa fit-3 ta' Ġunju 2015[14] u fit-8 ta' Ġunju 2016 Amanda Nelson, CEO tas-soċjetà Rikorrenti mill-ġdid talbet lic-CEO tas-soċjetà GO p.l.c. *whilst I have your attention, our wholesale/regulatory teams met to discuss Vodafone's use of GO ducts. Following the initial meeting held a few weeks ago, we have not hear anything from your team despite a couple of reminders. I was hoping you could look into this so as to avoid unnecessary delays and escalations*[15] - fir-rigward ta' din l-aħħar e-mail it-Tribunal josservat li l-fatt li ż-żewġ CEOs kienu qed jikkorispondu bejniethom dwar materji oħra ma jnaqqas xejn mill-valur u import ta' din ir-reminder. Dawn ir-reminders baqgħu bla tweġiba u meta fil-21 ta' Diċembru 2015 ic-CEO tas-soċjetà Rikorrenti mill-ġdid issollevat il-kwistjoni mac-CEO tas-soċjetà GO biex tara *what GO's position is regarding this matter so that we can act accordingly? As you can see from the*

[12] Fol. 173 u 174 tal-proċess.
[13] Fol. 175 tal-proċess.
[14] Fol. 175 tal-proċess.
[15] Fol. 179 tal-proċess.

above Vodafone has waited patiently for a reply since April, I would therefore appreciate a timely response to this letter, dan ta' l-aħħar flok ma ta ir-risposta minnu meħtieġa, ossia x'inhi l-posizzjoni tas-soċjetà minnu rappreżentata dwar it-talba avvanzata fir-rigward ta' Duct Sharing Agreement, għażel li jipprokrastina ulterjorment billi wieġeb: *thank you for your email of 21st December 2015. The request of 25th March 2015 you refer to, through an e-mail from Jason Pavia to Mario Cachia, was to start discussions to explore the possibility of reaching an agreement for access to GO's duct infrastructure. As you state in your email, a meeting was held in the following month. During the meeting, GO had among others stated that it would inter alia have to have a good look at its duct infrastructure and its usage before it could come back with a more specific answer. GO also stated that it wanted any eventual agreement to provide for access both ways, where GO would also be able to access Vodafone's passive infrastructure. A number of events took place that set this project back: the first was Vodafone's subsequent communication to us that it was not interested in providing access to GO. Although this did not change GO's openness to discussions, it deviated attention to focus more closely on our own immediate infrastructure projects and operations over other operations which are non-core; the second was confirmation a few weeks after the meetings of our suspicions that Vodafone was occupying frequency spectrum assigned to GO and which thus delayed our LTE rollout plans. This issue took up a lot of our technical resources and focus which would otherwise have been employed elsewhere and it is only a few days ago that Vodafone informed us that the issue should now be resolved from its end. I hope you understand also that we could not reasonably expected to divert significant resources from having Vodafone remove its encumbrances from our LTE spectrum and to make up for consequent lost time in our network rollout plans to facilitate Vodafone's development of its own LTE network in parallel; the third was the publication of the consultation in October 2015 by the Parliamentary Secretary For Competitiveness and Economic Growth within the Ministry for Transport and Infrastructure on the transposition of Directive 2014/61/EU on measures to reduce the cost of deploying high-speed electronic communications networks. Considering that, as we informed you during the meeting of April 2015, any bi-lateral agreement would have to be drafted from scratch, we think it makes logical sense for both parties to carry out this exercise once the upcoming changes in various laws that govern access to infrastructure are put in place, especially where it would have to cater for access over both parties' infrastructure. That way, we can both act within a context of legal certainty. This third point was communicated by Stefan Briffa during a telephone conversation shortly after publication of the consultation*[16].

It-Tribunal assolutament ma jistax jifhem kif l-Awtorità Intimata setgħet tinterpreta dan kollu b'mod għal kollox u esklussivament kontra s-soċjetà Rikorrenti meta huwa ben evidenti li kienet is-soċjetà GO p.l.c. li kienet qed tinjora t-talbiet tas-soċjetà Rikorrenti, dan probabilment dettat mill-fatt li s-soċjetà Rikorrenti wrietha biċ-ċar li ma kenitx interessata li tipprovdi lil GO b'aċċess għall-4G *passive infrastructure* tagħha. In effetti filwaqt li s-soċjetà GO tat l-impressjoni li ma kenitx apertament qed tagħlaq il-bibien f'wiċċ is-soċjetà Rikorrenti, bl-

[16] Fol. 182 tal-proċess.

attitudini tagħha li tinjora din il-kwistjoni sollevata mis-soċjetà Rikorrenti kienet fil-verità qed tagħmel hekk.

Fid-dawl ta' dan il-fatt it-Tribunal ma jista' jsib xejn x'jlum lis-soċjetà Rikorrenti li ressqet *Dispute* quddiem l-Awtorità Intimata u ċertament ma jistax iqis li l-istess kien intempestiv u/jew prematur.

Għalkemm l-Awtorità Intimata tisħaq fuq il-fatt li ma kienx hemm negozjati kummerċjali għaddejjin bejn is-soċjetà Rikorrenti u s-soċjetà GO u tinsisti li n-nuqqas ta' dawn in-negozjati huwa fih innifsu u mingħajr konsiderazzjoni ta' fatturi oħra impediment għas-sottomissjoni ta' *Dispute* quddiemha, mill-*MCA Guidelines for Inter-Operator Complaints, Disputes & Own Initiative Investigations* pubblikati fl-20 ta' Diċembru 2008 u emendati fis-7 ta' Jannar 2011, esebiti mill-Awtorità flimkien mar-Risposta tagħha a fol. 140 sa' 155 tal-proċess, tirriżulta verità mod ieħor. Dawn il-Guidlines jipprovdu li: *In particular, it must be noted that* ***whilst evidence of attempted negotiation is not a mandatory condition for the acceptance of a complaint, where MCA feels that the matter could have been better solved through commercial discussions, and no such attempts were made, MCA may decide not to open investigation and take appropriate measures which may include: treating the matter under facilitation/mediation procedures instead; OR stating that the submission was frivolous and vexatious***[17].

Minn dawn il-Guidelines jirriżulta b'mod ċar li negozjati kummerċjali bejn il-partijiet/intrapriżi konċernati ma għandhomx għalfejn u ta' bilfors ikunu definittivi jew attwali għall-finijiet ta' ilment quddiem l-Awtorità. Anzi huwa suffiċjenti li jkun hemm *attempted negotiation* u jerġa' dan ma huwiex xi element tassattiv imma jista' se mai jeffettwa l-mod kif taġixxi l-Awtorità u dana billi jekk tara li l-kwistjoni tista' tiġi risolta permezz ta' negozjati bejn il-partijiet interessati, minflok ma tinvestiga l-każ taġixxi iktar ta' medjatur bejn il-partijiet jew fl-estrem l-ieħor li tiddikjara li l-ilment huwa għal kollox frivolu u vessatorju. Għalkemm l-Awtorità esebiet dawn il-Guidelines b'dana li effettivament tagħmel referenza għalihom, l-argumentazzjonijiet tagħha dwar nuqqas ta' negozjati kummerċjali bejn iż-żewġ intrapriżi ma jirriflettux dak li hemm dispost fihom u in verità lanqas aġixxiet bil-mod hemm delinejat. Ladarba għaddiet biex tinvestiga d-*Dispute* tas-soċjetà Rikorrenti, fid-dawl ta' dak dispost fil-Guidelines kif tista' l-Awtorità tikkontendi li dak l-istess *Dispute* kien intempestiv u/jew prematur!

Anke r-referenza għat-transposizzjoni tad-Direttiva 2014/61/EU fil-Liġi nostrali ma hijiex, fil-fehma tat-Tribunal, raġuni valida biex l-ilment tas-soċjetà Rikorrenti jitqies bħala wieħed intempestiv u/jew prematur. Jibda biex jiġi ribadit illi s-soċjetà GO kienet kjarament qed tinjora t-talba tas-soċjetà Rikorrenti għal Duct Sharing Agreement jew ta' l-inqas għal diskussjonijiet fir-rigward u għaldaqstant ma jistax jiġi konkluż li l-introduzzjoni tal-provvedimenti ta' l-imsemmija Direttiva fil-Liġi nostrali kienu per forza se jbiddlu s-sitwazzjoni, se mai l-kwistjoni kienet sempliċement tiġi postposta b'iktar dewmien da parte tas-soċjetà GO a detriment

[17] Fol. 149 tal-proċess. Enfasi tat-Tribunal.

tas-soċjetà Rikorrenti li b'dan il-mod kienet ser tibqa għal iktar żmien ma tafx fejn tinsab vis-a-vis it-talba magħmula lis-soċjetà GO. Apparte minnhekk ladarba skond il-Guidelines tagħha stess l-Awtorità setgħet fid-debiti ċirkostanzi taġixxi ta' medjatur bejn il-partijiet konċernati, it-transposizzjoni tad-Direttiva imsemmija fil-Liġi nostrali ma kenitx se tkun ta' preġudizzju għall-każ post quddiemha għaliex setgħet toħloq il-bażi għal diskussjonijiet, liema diskussjonijiet imbagħad setgħu jieħdu l-forma proprja tagħhom fil-qafas ta' tali provvedimenti legali. Fil-fehma tat-Tribunal anke fil-kuntest ta' investigazzjoni u mhux sempliċi medjazzjoni, it-transposizzjoni tad-Direttiva 2014/61/EU fil-Liġi nostrali ma kenitx se timpinġi negattivament lill-partijiet kontendenti partikolarment jekk fid-deċiżjoni eventwali tagħha l-Awtorità Intimata setgħet qegħdetihom jew idderiġiethom għall-qafas leġislattiv korrett għall-każ in eżami.

Għaldaqstant, it-Tribunal iqis li ebda waħda mir-raġunijiet mogħtija mill-Awtorità Intimata għas-sejbien ta' prematurità u/jew intempestività tad-*Dispute* tas-soċjetà Rikorrenti ma hija ġustifikata u b'hekk it-tieni aggravju fuq liema s-soċjetà Rikorrenti tibbaża l-appell tagħha mid-Deċiżjoni huwa ġustifikat u jistħoqq li jiġi milqugħ.

Peress illi s-sejbien da parte ta' l-Awtorità Intimata ta' prematurità u/jew intempestività tad-*Dispute* tas-soċjetà Rikorrenti ma huwiex l-uniku element u wisq inqas l-element ċentrali in bażi għal liema l-Awtorità ħadet id-deċiżjoni finali tagħha fir-rigward tat-talbiet tas-soċjetà Rikorrenti, it-Tribunal ma jistax a bażi tal-fatt li t-tieni aggravju ta' l-appell huwa ġustifikat jipproċedi għan-nullità tad-Deċiżjoni u dana billi fil-fehma tiegħu tali nullità o meno tiddependi primarjament mill-eżitu ta' l-ewwel aggravju fuq liema s-soċjetà Rikorrenti tibbaża l-appell tagħha mid-Deċiżjoni.

L-Ewwel Aggravju - Interpretazzjoni erroneja u konsegwenti applikazzjoni żbaljata ta' l-Artikolu 12(1) tal-Kap. 399 tal-Liġijiet ta' Malta:

Kif ġia iktar 'l fuq osservat f'din is-sentenza s-soċjetà Rikorrenti tikkontendi li id-Deċiżjoni hija żbljata u b'hekk għandha tiġi annullata għar-raġuni li l-Awtorità applikat b'mod għal kollox żbaljat il-provvediment ta' l-Artikolu 12(1) tal-Kap.399 tal-Liġijiet ta' Malta u dana billi l-istess ġie interpretat fid-dawl ta' disposizzjoni tad-Direttiva 2002/21/EC, senjatament l-Artikolu 12(2) tad-Direttiva, li ma ġietx debitament trasposta fil-Liġi nostrali u b'hekk mhux applikabbli għall-każ in eżami.

Peress illi l-Awtorità Intimata interpretat l-Artikolu 12 tal-Kap. 399 tal-Liġijiet ta' Malta fid-dawl ta' l-Artikolu 12, b'mod partikolari tas-subartikolu (2), tad-Direttiva 2002/21/EC, hija waslet għall-konkluzzjoni li s-soċjetà Rikorrenti ma setgħet tingħata l-ebda rimedju a bażi ta' dak l-artikolu in kwantu l-istess seta' jiġi applikat biss *within a general regulatory context in line with the objectives stated in Article 12 paragraph 2 of the Framework Directive and not conversely as some form of specific remedy aimed at providing redress to an aggrieved undertaking in the course of a specific dispute with another undertaking*. Ikkunsidrat ulterjorment illi *the MCA considers that the correct application of article 12(1) of Cap. 399,*

given also what is stated in the relevant provisions and recitals of the Framework Directive referred to above, is that the MCA may consider imposing access on undertakings not in the course of a specific dispute - as is the present case - but in the course of a general consideration of the situation in the market - hence the requirement of Recital (23) referred to above, namely that a full public consultation should be first undertaken before the imposition of access or otherwise is decided vis-a-vis the undertakings referred to in the aforesaid Article 12 paragraph 1 of the Framework Directive[18].

Is-soċjetà Rikorrenti ma taqbilx ma' din il-konklużjoni in bażi għall-konsiderazzjoni li *kwalsiasi riferenza li tagħżel li tagħmel l-Awtorità għall-applikabilità ta' l-Art 12(2) għall-mertu tal-vertenza odjerna huwa kompletament irrilevanti. Illi bħal ma hu risaput, hu paċifiku li dispozizzjoni statutorja li ssemmi espressament każ wieħed ma tistax tiġi estiża għal każ mhux espress. Illi għalhekk l-Awtorità ma setgħetx, meta kien hemm l-Artikolu applikabbli, u cioè l-Art. 12(1) tad-Direttiva 2002/21/EC, il-miżuri li għandhom jittieħdu mill-Awtorità ai termini ta' l-Art. 12 tal-Kap.399 għandhom jittieħdu fil-kuntest ġenerali regolatorju, u mhux jiġu applikati għall-vertenza bejn żewġ partijiet. Illi bid-dovut rispett, imkien minn qari ta' l-Art.12 tal-Kap.399 ma jirriżulta dak li qed tgħid l-Awtorità, bħal ma wisq inqas ma jirriżulta l-ebda bżonn ta' full public consultation kif donnha l-Awtorità tippretendi li kellha ssir. L-interpretazzjoni ta' Artikolu huwa kompletament separat u distint, u li lanqas biss ġie traspost, sabiex tiddetermina jekk kellhiex timponi l-obbligu tal-parteċipazzjoni. Illi konsimilment, ubi lexit voluit dixit, ubi noluit tacuit. Illi l-Awtorità tasal biex tikkonkludi li b'applikazzjoni ta' l-oġġettivi ta' l-Art. 12(2) tad-Direttiva 2002/21/EC, il-miżuri li għandhom jittieħdu mill-Awtorità ai termini ta' l-Art. 12 tal-Kap.399 għandhom jittieħdu fil-kuntest ġenerali regolatorju, u mhux jiġu applikati għall-vertenza bejn żewġ partijiet. Illi bid-dovut rispett, imkien minn qari ta' l-Art. 12 tal-Kap.399 ma jirriżulta dak li qed tgħid l-Awtorità, bħal ma wisq inqas ma jirriżulta l-ebda bżonn ta' full public consultation kif donnha l-Awtorità tippretendi li kellha ssir. L-interpretazzjoni tal-Liġi għandha dejjem tkun marbuta mal-finalità tagħha. M'għandhiex tiġi interpretata b'mod assurd u bla sens u lanqas b'mod li tagħti lok għall-vessazzjoni bla raġuni b'applikazzjoni letterali li qatt ma setgħet kienet fil-ħsieb tal-leġislatur. Meta l-kliem użat mill-leġislatur huwa ċar, m'hemmx lok interpretazzjoni ġialadarba l-interpretazzjoni għandha tittieħed mill-Liġi nfisha (u cioè l-Art. 12 tal-Kap.399) u mhux minn xi provi estraneji, speċjalment meta l-interpretazzjoni hija relattiva għall-kwistjoni prinċipali. Illi għandu jingħad ukoll illi l-Awtorità tirreferi għall-premessa numru 23 tad-Direttiva 2002/21/EC sabiex tinterpreta l-Art. 12 tal-Kap.399. Illi jekk xejn, din il-premessa għandha tintuża sabiex jkun jista' jiġi interpretat l-Art. 12(2) tad-Direttiva, li bħal ma ngħad, lanqas biss ġie traspost fid-Dritt Malti. Għalhekk, kwalsiasi interpretazzjoni ta' kwalsiasi disposizzjoni mibnija fuq l-interpretazzjoni ta' din il-premess hija bid-dovut rispett irrelevanti*[19].

[18] Fol. 22 tal-proċess.
[19] Para. 27 sa' 30 tar-Rikors promotur, fol. 6 u 7 tal-proċess.

L-Artikolu 12 tal-Kap. 399 tal-Liġijiet ta' Malta kif applikabbli fiż-żmien pertinenti għal dawn il-proċeduri - ossia qabel l-emendi ta' l-2016 - kien jipprovdi li: *(1) Meta intrapriża li tipprovdi networks tal-komunikazzjonijiet elettroniċi jkollha dritt bil-liġi tinstalla faċilitajiet fuq, permezz ta', jew taħt proprjetà pubblika jew privata, jew tkun tista' tieħu vantaġġ minn xi proċedura għall-esproprjazzjoni jew l-użu ta' proprjetà, l-Awtorità għandha tkun tista', billi tieħu kont tal-prinċipju ta' proporzjonalità, timponi l-parteċipazzjoni ta' dawk il-faċilitajiet jew proprjetà inkluż kull bini, dħul f'bini, fili mal-bini, arbli, antenni, torrijiet u kostruzzjonijiet oħra ta' appoġġ ikunu kif ikunu mfissra, xaftijiet, kanali, toqob ta' spezzjoni u kmajjar. (2) L-Awtorità għandha, hekk kif ikun meħtieġ, timponi obbligazzjonijiet dwar il-parteċipazzjoni fit-tqegħid ta' fili fil-bini jew sa' l-ewwel punt ta' konċentrament jew distribuzzjoni meta dan ikun lokalizzat 'il barra mill-bini, fuq impriża li tipprovdi networks ta' komunikazzjonijiet elettroniċi li jkollha jedd tinstalla faċilitajiet fuq, permezz ta' jew taħt proprjetà pubblika jew privata, u jew fuq is-sid ta' dak it-tqegħid ta' fili, meta dan ikun ġustifikat abbażi li d-duplikazzjoni ta' infrastruttura bħal dik tkun waħda ekonomikament mhux effiċjenti jew fiżikament mhux prattikabbli. Dik il-parteċipazzjoni jew arranġamenti ta' koordinazzjoni għandhom ikunu jinkludu regoli għall-apporzjonament ta' l-ispejjeż ta' parteċipazzjoni f'xi faċilità jew proprjetà aġġustati għar-riskju meta jkun adatt. (3) L-Awtorità tista' titlob lill-impriżi jipprovdu l-informazzjoni meħtieġa, hekk kif tista' titlob, biex tkun tista' tistabilixxi inventarju dettaljat tax-xorta, disponibilità u lokazzjoni ġeografika tal-faċilitajiet imsemmija fis-subartikolu (1) u jagħmilha disponibbli għall-partijiet li jkollhom interess. (4) Il-miżuri li jittieħdu mill-Awtorità skond dan l-artikolu għandhom ikunu oġġettivi, trasparenti, mhux diskriminatorji u proporzjonali u meta jkun rilevanti, dawn il-miżuri għandhom jitwettqu f'koordinazzjoni ma' awtoritajiet pubbliċi oħra.*

L-Artikolu 12 tad-Direttiva 2002/21/EC kif emendat fl-2009 u mhux il-verżjoni ċitata mis-soċjetà Rikorrenti fir-Rikors promotur, jipprovdi li: *1. Where an undertaking providing electronic communications networks has the right under national legislation to install facilities on, over or under public or private property, or may take advantage of a procedure for the expropriation or use of property, national regulatory authorities shall, take full account of the principle of proportionality, be able to impose the sharing of such facilities or property, including buildings, entries to buildings, building wiring, masts, antennae, towers and other supporting constructions, ducts, conduits, manholes, cabinets. 2. Member States may require holders of the rights referred to in paragraph 1 to share facilities or property (including physical co-location) or take measures to facilitate the co-ordination of public works in order to protect the environment, public health, public security or to meet town and country planning objectives and only after an appropriate period of public consultation, during which all interested parties shall be given an opportunity to express their views. Such sharing or coordination arrangements may include rules for apportioning the costs of facility or property sharing. 3. Member States shall ensure that national authorities, after an appropriate period of public consultation during which all interested parties are given the opportunity to state their views, also have the power to impose obligations in relation to the sharing of wiring inside buildings or up to the first concentration or distribution point where this is located outside*

the building, on the holders of the rights referred to in paragraph 1 and/or on the owner of such wiring, where this is justified on the grounds that duplication of such infrastructure would be economically inefficient or physically impracticable. Such sharing or coordination arrangements may include rules of apportioning the costs of facility or property sharing adjusted for risk where appropriate. 4. Member States shall ensure that competent national authorities may require undertakings to provide the necessary information, if requested by the competent authorities, in order for these authorities, in conjunction with national regulatory authorities, to be able to establish a detailed inventory of the nature, availability and geographical location of the facilities referred to in paragraph 1 and make it available to interested parties. 5. Measures taken by a national regulatory authority in accordance with this Article shall be objective, transparent, non-discriminatory, and proportionate. Where relevant, these measures shall be carried out in coordination with local authorities.

Fil-fehma tat-Tribunal l-Awtorità Intimata kienet ġustifikata f'li rreferiet għall-Artikolu 12(2) tad-Direttiva 2002/21/EC għall-infurzar korrett ta' l-Artikolu 12(1) tal-Kap.399 tal-Liġijiet ta' Malta. Apparti l-fatt li mit-test stess ta' l-Artikolu 12(2) tad-Direttiva jirriżulta b'mod ċar li dan il-provvediment jiddelineja l-mod kif l-Awtoritajiet Nazzjonali Regolatriċi - ossia l-Awtorità Intimata fil-każ in eżami - għandhom jinfurzaw il-provvediment ta' l-Artikolu 12(1) tad-Direttiva f'każijiet fejn *inter alia* ikun hemm il-ħtieġa ta' *sharing facilities or property including physical co-location* - huwa prinċipju assodat li l-Liġijiet traspositttivi ta' Direttivi għandhom jiġu interpretati w applikati skond u a tenur tad-Direttiva/i in kwistjoni, u dana anke f'kuntest ta' ilment bejn intrapriżi, sabiex jiġi aċċertat li għad illi l-provvedimenti ta' Direttiva ma jkunux ġew trasposti sew jew fl-intier tagħhom, l-effetti u l-iskop tad-Direttiva jistgħu jiġu fi kwalunkwe każ milħuqa. Huwa opportun ukoll li ssir referenza għall-preambolu 32 tad-Direttiva 2002/21/EC li jipprovdi illi: *in the event of a dispute between undertakings in the same Member State in an area covered by this Directive or the Specific Directives, for example relating to obligations for access and interconnection or to the means of transferring subscriber lists, an aggrieved party that has negotiated in good faith but failed to reach agreement should be able to call on the national regulatory authority to resolve the dispute. National regulatory authorities should be able to impose a solution on the parties.* ***The intervention of a national regulatory authority in the resolution of a dispute between undertakings providing electronic communications networks or services in a Member State should seek to ensure compliance with the obligations arising under this Directive or the Specific Directives***[20].

Kif gia osservat l-Artikolu 12(2) tad-Direttiva jipprovdi dwar kif l-Istati Membri, naturalment tramite l-Awtorità Nazzjonali Regolatriċi relattiva, għandhom jaġixxu fil-konfront ta' intrapriżi delinejati fis-subartikolu (1) ta' l-imsemmi Artikolu - artikolu dan li kjarament ma jirrferix biss għal intrapriża li għandha Significant Market Power imma jirreferi għal kwalunkwe intrapriża li għandha l-jeddijiet hemm deskritti. In effetti is-subartikolu (1) ta' l-Artikolu 12 tad-Direttiva - hekk kif traspost fil-Liġi nostrali - huwa eżempju ċar ta' *symmetric regulation*, ossia

[20] Enfasi tat-Tribunal.

regolamentar li jista' japplika fil-konfront ta' kwalunkwe intrapriża f'determinati ċirkostanzi u mhux biss fil-konfront ta' intrapriża li gġandha SMP. Minn dan il-provvediment joħroġ car li meta Awtorità Nazzjonali Regolatriċi jkollha timponi - *marte proprio* jew għax tiġi hekk mitluba tagħmel - obligazzjonijiet fuq intrapriżi elenakti fis-subartikolu (1) ta' l-Artikolu 12 fir-rigward ta' *inter alia sharing of facilities or property, including physical co-location*, din għandha l-ewwel qabel kollox tagħmel konsultazzjoni pubblika sabiex kull min jista' jkun interessat f'tali kwistjoni jingħata l-opportunità jesprimi l-veduti tiegħu fir-rigward.

Li *sharing of facilities or property, including physical co-location* jirrikjedi konsultazzjoni pubblika jirriżulta wkoll mir-rimedju li kien previst fl-Artikolu 4 tal-Kap. 81 tal-Liġijiet ta' Malta qabel l-emendi ta' l-2016. In effetti l-Artikolu 4(2) ta' l-imsemmi Kapitolu tal-Liġijiet ta' Malta kien jipprovdi li: *l-Awtorità għat-Trasport f'Malta tista' wara konsultazzjoni ma' l-Awtorità ta' Malta dwar il-Komunikazzjoni, ukoll tordna t-tqegħid flimkien jew użu ta' l-istess faċilitajiet dwar xi gumni, fili w aċċessorji oħra li jintużaw jew li jkunu se jintużaw għall-provvediment ta' xi servizz ta' komunikazzjonijiet elettroniċi jew xi utilitajiet jew servizzi oħra minn provditur ta' servizz ta' komunikazzjonijiet elettroniċi bħal dak jew utilitajiet jew servizzi oħra f'xi trinek, fosos, kanali jew fuq arbli, ventijiet jew brazzijiet, imħaffra, imqiegħed, imwaqqfa jew imwaħħla minn provditur ieħor ta' servizz ta' komunikazzjonijiet elettroniċi jew ta' utilitajiet jew servizzi oħra; u kull ordni bħal dak għandu jiġi notifikat lill-provditur li jkun waqqaf jew waħħal il-faċilitajiet li se jkunu s-suġġett tat-tqegħid flimkien jew li jkunu se jintużaw, mill-inqas għaxart ijiem qabel ma jibdew isiru x-xogħlijiet hawn aktar qabel imsemmija:* ***Iżda l-Awtorità għat-Trasport f'Malta għandha qabel ma toħroġ ordni taħt dan is-subartikolu, tagħti opportunità raġonevoli lill-partijiet kollha interessati jesprimu l-veduti tagħhom***[21].

Fil-fehma tat-Tribunal ma jagħmel l-ebda sens illi għall-finijiet ta' *sharing of facilities or property, including physical co-location* iż-żewġ awtoritajiet kompetenti fir-rigward, fejn addirittura l-Awtorità għat-Trasport f'Malta kellha a tenur ta' l-Artikolu 4 tal-Kap.81 tal-Liġijiet ta' Malta qabel l-emendi ta' l-2016 tikkonsulta ma' l-Awtorità Intimata meta mitluba tagħti *sharing of facilities*, jeżerċitaw u jimplimentaw il-funzjonijiet tagħhom b'mod differenti minn xulxin. B'hekk ma għandu jkun hemm l-ebda dubju li biex jiġi konċess /impost tali *sharing of facilities or property, including physical co-location* sia jekk mill-Awtorità *marte proprio* u anke jekk a bażi ta' talba da parte ta' intrapriża li trid tużufruwixxi minn tali *sharing of facilities or property, including physical co-location,* għandu jkun hemm konsultazzjoni pubblika biex il-partijiet kollha interessati jesprimu l-veduti w opinjonijiet tagħhom fir-rigward.

Minn dak provdut fl-Artikolu 4A tal-Kap. 418 tal-Liġijiet ta' Malta però jirriżulta li l-Awtorità Intimata hija prekluża milli tutilizza l-proċedura ta' konsultazzjoni pubblika fil-kuntest ta' tilwima jew ilment li jkun hemm bejn intrapriżi u għaldaqstant, kif ġustament ikkonkludiet l-Awtorità Intimata fid-Deċiżjoni, isegwi li r-rimedju kontemplat fl-Artikolu 12 tal-Kap.399 tal-Liġijiet ta' Malta, liema rimedju, jiġi ribadit, jesiġi konsultazzjoni pubblika, ma huwiex disponibbli lis-

[21] Enfasi tat-Tribunal.

soċjetà Rikorrenti tramite d-*Dispute* minnha avvanzat quddiem l-Awtorità Intimata fil-25 ta' Frar 2016.

Minn dan kollu osservat jirriżulta għalhekk illi l-ewwel aggravju fuq liema s-soċjetà Rikorrenti tibbaża l-appell tagħha mid-Deċiżjoni mhux ġustifikat u b'hekk ma jistħoqqx li jiġi milqugħ.

Għal dawn ir-raġunijiet it-Tribunal jaqta' u jiddeċiedi billi filwaqt li jilqa' t-tieni aggravju fuq liema s-soċjetà Rikorrenti tibbaża l-appell tagħha mid-Deċiżjoni u jiddikjara li d-*Dsipute* sottomess quddiem l-Awtorità Intimata fil-25 ta' Frar 2016 ma kienx prematur, jiċħad l-ewwel aggravju ta' l-appell sollevat mis-soċjetà Rikorrenti u peress illi t-tieni aggravju waħdu għad illi milqugħ ma jagħtix lok għan-nullità tad-Deċiżjoni, jiċħad l-ewwel talba dedotta mis-soċjetà Rikorrenti fir-Rikors promotur u minflok jikkonferma d-Deċiżjoni ta' l-Awtorità Intimata datata 1 ta' Lulju 2016. Fid-dawl ta' dan appena deċiż, it-Tribunal jastjeni milli jieħu konjizzjoni tat-tieni talba dedotta mis-soċjetà Rikorrenti fir-Rikors promotur.

L-ispejjeż ta' dawn il-proċeduri għandhom jiġu sopportati interament 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