



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

Rikors Nru. 82/2024

GO plc

Vs

L-Awtorità ta' Malta dwar il-Komunikazzjoni

Illum 25 ta' Marzu 2025

It-Tribunal,

Ra r-Rikors ipprezentat mis-soċjetà GO p.l.c. fid-19 ta' Awwissu 2024, permezz ta' liema titlob li t-Tribunal: (1) fuq bażi proċedurali jordna li l-appell istitwit minnha għandu jinstema' u jiġi determinat b'urgenza in vista tal-perijodi qosra kontenuti fit-talbiet l-oħra avvanzati minnha, u li fihom l-Awtorità ta' Malta dwar il-Komunikazzjoni jkollha tagħxi kemm-il darba tali talbiet jiġu milqugħa; (2) jissospendi minnufih u b'mod urġenti u *interim* sakemm jiġi deċiż l-appell istitwit minnha, id-deċiżjoni ta' l-Awtorità ta' Malta dwar il-Komunikazzjoni kif kontenuta fin-*Notification of re-assessment of the wholesale fixed access market(s) in Malta* bir-Referenza MCA/O/24-5379 u datata 30 ta' Lulju 2024, u li biha l-imsemmija Awtorità ddecidiet li hija, ossia s-soċjetà GO plc, għandha tkompli tagħti aċċess regolat permezz tar-rimedju tal-VULA sakemm tiġi ppubblikata miżura oħra li tiġi aċċettata mill-Kummissjoni Ewropea dwar il-*wholesale infrastructure access market*, u dan ai termini ta' l-Artikolu 42(2) tal-Kap.418 tal-Liġijiet ta' Malta; (3) fil-mertu, jhassar u jirrevoka d-deċiżjoni ta' l-Awtorità ta' Malta dwar il-Komunikazzjoni kif kontenuta fin-*Notification of re-assessment of the wholesale fixed access market(s) in Malta* bir-Referenza MCA/O/24-5379 u datata 30 ta' Lulju 2024, u li biha l-Awtorità ddecidiet li hija, ossia soċjetà GO plc, għandha tkompli tagħti aċċess regolat permezz tar-rimedju tal-VULA sakemm tiġi ippubblikata miżura oħra li tiġi aċċettata mill-Kummissjoni Ewropea dwar il-*wholesale infrastructure access market*, u dan in kwantu d-deċiżjoni hija illegali u tikser il-prinċipji ta' raġonevolezza, trasparenza, nuqqas ta' diskriminazzjoni u oġġettività, u tmur kontra l-provvedimenti ta' l-Artikolu 4A ta' l-Att għat-Twaqqif ta' Awtorità ta' Malta dwar il-Komunikazzjoni, Kap. 418 tal-Liġijiet ta' Malta; (4) sussegwenti għat-tielet talba, jiddikjara li d-deċiżjoni tas-6 ta' Marzu 2013 intitolata *Market 4 - Wholesale Unbundled Infrastructure Access Market: Identification and*

Analysis of Markets, Determination of Market Power and Setting of Remedies: Final Decision, fi kliem l-Awtorità ta' Malta dwar il-Komunikazzjoni fid-deċiżjoni hawn appellata *the current ex ante SMP regulation, based on a 2013 MCA Decision*, ma għadhiex fis-seħh u ma għadhiex torbot lilha, ossia lis-soċjetà GO plc, għall-kuntrarju ta' dak li gie deċiż mill-Awtorità ta' Malta dwar il-Komunikazzjoni fid-deċiżjoni tagħha intitolata *Notification of re-assessment of the wholesale fixed access market(s) in Malta* bir-Referenza MCA/O/24-5379 u datata 30 ta' Lulju 2024; (5) fin-nuqqas li jilqa' t-tielet u r-raba' talbiet tagħha, ivarja d-deċiżjoni ta' l-Awtorità ta' Malta dwar il-Komunikazzjoni kif kontenuta fin-*Notification of re-assessment of the wholesale fixed access market(s) in Malta* bir-Referenza MCA/O/24-5379 u datata 30 ta' Lulju 2024, billi din tigi taqra li l-imsemmija Awtorità għandha tikkonkludi l-eżerċizzju ta' konsultazzjoni pubblika, mal-BEREC, jekk ikun meħtieġ, u mal-Kummissjoni Ewropea u tippubblika d-deċiżjoni finali tagħha sa mhux aktar tard minn sitt xhur mid-data tad-deċiżjoni tal-Kummissjoni Ewropea tas-27 ta' Marzu 2024 u fin-nuqqas id-deċiżjoni ta' l-2013 intitolata *Market 4 - Wholesale Unbundled Infrastructure Access Market: Identification and Analysis of Markets, Determination of Market Power and Setting of Remedies: Final Decision*, fi kliem l-Awtorità ta' Malta dwar il-Komunikazzjoni fid-deċiżjoni hawn appellata *the current ex ante SMP regulation, based on a 2013 MCA Decision*, ma tibqax fis-seħh u ma tkunx torbotha aktar; (6) fin-nuqqas li t-tielet, ir-raba' u l-hames talbiet jiġu milqugħa, jordna lill-Awtorità ta' Malta dwar il-Komunikazzjoni tikkonsulta fi żmien qasir u perentorju fuq l-alternattivi għad-dispożizzjoni tagħha ta' jekk u kif għandu jiġi rregolat is-suq sakemm tigi ppubblikata mizura oħra li tigi aċċettata mill-Kummissjoni Ewropea dwar il-*wholesale infrastructure access market*, bl-ispejjeż kontra l-Awtorità ta' Malta dwar il-Komunikazzjoni;

Ra d-dokumenti annessi mar-Rikors promotur markati Dok. "GO1" sa' Dok. "GO7" a fol. 16 sa' 76 tal-proċess;

Ra r-Risposta ta' l-Awtorità ta' Malta dwar il-Komunikazzjoni permezz ta' liema topponi għat-talbiet tas-soċjetà Rikorrenti u titlob li l-istess jiġu miċhuda, bl-ispejjeż kontra tagħha, stante li: (1) in linea preliminari l-appell imressaq mill-imsemmija soċjetà huwa null; u (2) fil-mertu, l-aggravji fuq liema s-soċjetà Rikorrenti tibbaża l-appell tagħha huma għal kollox infondati fil-fatt u fid-dritt;

Ra d-dokumenti annessi mar-Risposta ta' l-Awtorità ta' Malta dwar il-Komunikazzjoni markati Dok. "MCA1" sa' Dok. "MCA4" a fol. 99 sa' 129 tal-proċess;

Ra li waqt is-seduta tal-5 ta' Diċembru 2024¹ gie determinat illi t-Tribunal ser jittratta u jiddeċiedi l-ewwel l-eċċezzjoni tan-nullità ta' l-appell tas-soċjetà Rikorrenti sollevata mill-Awtorità Intimata u t-talba għall-*interim measure* avanzata mis-soċjetà Rikorrenti fit-tieni talba tagħha;

Sema' x-xhieda ta' Damian Gatt, in rappreżentanza ta' l-Awtorità Intimata, mogħtija waqt is-seduti tal-5 ta' Diċembru 2024 u ta' l-20 ta' Jannar 2025² u ra d-dokumenti

¹ Fol. 140 tal-proċess.

² Fol. 203 sa' 206 tal-proċess.

markati Dok. “GO8” esebiti mis-soċjetà Rikorrenti permezz ta’ Nota ppreżentata fl-20 ta’ Jannar 2025 a fol. 167 sa’ 202 tal-proċess;

Sema’ t-trattazzjoni orali da parte tas-soċjetà Rikorrenti u ta’ l-Awtorità Intimata dwar l-eċċezzjoni tan-nullità ta’ l-appell tas-soċjetà Rikorrenti sollevata mill-Awtorità Intimata u dwar it-talba għall-*interim measure* avanzata mis-soċjetà Rikorrenti permezz tat-tieni talba tagħha, u rat *Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code* esebita mid-Difensur tas-soċjetà Rikorrenti waqt it-trattazzjoni orali;

Ra l-atti kollha tal-kawża;

Ikkonsidra:

Permezz ta’ dokument intitolat *Notification of re-assessment of the wholesale fixed access market(s) in Malta* bir-Referenza MCA/O/24-5379 datat 30 ta’ Lulju 2024³, l-Awtorità Intimata għarrfet lill-operaturi fis-suq tat-telekomunikazzjoni illi, fost affarijiet ohra, *the current ex ante SMP regulation, based on a 2013 MCA Decision, will remain in effect through a remedy implemented in 2016 requiring GO to provide Virtual Unbundled Access (hereinafter VULA) to its FTTH network. This regulation has enabled the presence of a third operator, Epic, in the provision of retail fixed broadband services, whilst providing safeguards to ensure GO’s ongoing investment in fibre roll-out. The ex ante VULA regulation will remain in effect until the MCA publishes a new decision to either maintain, review or withdraw it. However, any future MCA decision would first require the EC’s acceptance of a future MCA draft measure, based on the new market analysis*⁴.

Is-soċjetà Rikorrenti hassitha aggravata b’dak mistqarr mill-Awtorità Intimata fid-dokument intitolat *Notification of re-assessment of the wholesale fixed access market(s) in Malta* bir-Referenza MCA/O/24-5379 datat 30 ta’ Lulju 2024, u interponiet dan l-appell quddiem it-Tribunal.

Hija titlob li t-Tribunal: (1) fuq bażi proċedurali jordna li l-appell istitwit minnha għandu jinstema’ u jiġi determinat b’urgenza in vista tal-perijodi qosra kontenuti fit-talbiet l-oħra avanzati minnha, u li fihom l-Awtorità Intimata jkollha taġixxi kemm-il darba tali talbiet jiġu milqugħa; (2) jissospendi minnufih u b’mod urġenti u *interim* sakemm jiġi deċiż l-appell istitwit minnha, id-deċiżjoni ta’ l-Awtorità Intimata kif kontenuta fin-*Notification of re-assessment of the wholesale fixed access market(s) in Malta* bir-Referenza MCA/O/24-5379 u datata 30 ta’ Lulju 2024, u li biha l-imsemmija Awtorità ddeċidiet li hija, ossia s-soċjetà GO plc, għandha tkompli tagħti aċċess regolat permezz tar-rimedju tal-VULA sakemm tiġi ippubblikata mizura ohra li tiġi aċċettata mill-Kummissjoni Ewropea dwar il-*wholesale infrastructure access market*, u dan ai termini ta’ l-Artikolu 42(2) tal-Kap.418 tal-Liġijiet ta’ Malta; (3) fil-mertu, jhassar u jirrevoka d-deċiżjoni ta’ l-

³ Dok. “GO1” a fol. 16 sa’ 25 tal-proċess.

⁴ Intestatura 3 tad-Dokument - Ex ante SMP regulation currently in force and the BCRD/GIA, a fol. 23 tal-proċess.

Awtorità Intimata kif kontenuta fin-*Notification of re-assessment of the wholesale fixed access market(s) in Malta* bir-Referenza MCA/O/24-5379 u datata 30 ta' Lulju 2024, u li biha l-Awtorità ddecidiet li hija, ossia soċjetà GO plc, għandha tkompli tagħti aċċess regolat permezz tar-rimedju tal-VULA sakemm tiġi ippubblikata mizura oħra li tiġi aċċettata mill-Kummissjoni Ewropea dwar il-*wholesale infrastructure access market*, u dan in kwantu d-deċiżjoni hija illegali u tikser il-prinċipji ta' raġonevolezza, trasparenza, nuqqas ta' diskriminazzjoni u oġġettività, u tmur kontra l-provvedimenti ta' l-Artikolu 4A ta' l-Att għat-Twaqqif ta' Awtorità ta' Malta dwar il-Komunikazzjoni, Kap. 418 tal-Ligijiet ta' Malta; (4) sussegwenti għat-tielet talba, jiddikjara li d-deċiżjoni tas-6 ta' Marzu 2013 intitolata *Market 4 - Wholesale Unbundled Infrastructure Access Market: Identification and Analysis of Markets, Determination of Market Power and Setting of Remedies: Final Decision*, fi kliem l-Awtorità Intimata fid-deċiżjoni hawn appellata *the current ex ante SMP regulation, based on a 2013 MCA Decision*, ma għadhiex fis-seħh u ma għadhiex torbot lilha, ossia lis-soċjetà GO plc, għall-kuntrarju ta' dak li ġie deciz mill-Awtorità Intimata fid-deċiżjoni tagħha intitolata *Notification of re-assessment of the wholesale fixed access market(s) in Malta* bir-Referenza MCA/O/24-5379 u datata 30 ta' Lulju 2024; (5) fin-nuqqas li jilqa' t-tielet u r-raba' talbiet tagħha, ivarja d-deċiżjoni ta' l-Awtorità Intimata kif kontenuta fin-*Notification of re-assessment of the wholesale fixed access market(s) in Malta* bir-Referenza MCA/O/24-5379 u datata 30 ta' Lulju 2024, billi din tiġi taqra li l-imsemmija Awtorità għandha tikkonkludi l-eżerċizzju ta' konsultazzjoni pubblika, mal-BEREC, jekk ikun meħtieġ, u mal-Kummissjoni Ewropea u tippubblika d-deċiżjoni finali tagħha sa mhux aktar tard minn sitt xhur mid-data tad-deċiżjoni tal-Kummissjoni Ewropea tas-27 ta' Marzu 2024 u fin-nuqqas id-deċiżjoni ta' l-2013 intitolata *Market 4 - Wholesale Unbundled Infrastructure Access Market: Identification and Analysis of Markets, Determination of Market Power and Setting of Remedies: Final Decision*, fi kliem l-Awtorità ta' Malta dwar il-Komunikazzjoni fid-deċiżjoni hawn appellata *the current ex ante SMP regulation, based on a 2013 MCA Decision*, ma tibqax fis-seħh u ma tkunx torbotha aktar; (6) fin-nuqqas li t-tielet, ir-raba' u l-ħames talbiet jiġu milqugħa, jordna lill-Awtorità Intimata tikkonsulta fi żmien qasir u perentorju fuq l-alternattivi għad-dispożizzjoni tagħha ta' jekk u kif għandu jiġi irregolat is-suq sakemm tiġi ppubblikata mizura oħra li tiġi aċċettata mill-Kummissjoni Ewropea dwar il-*wholesale infrastructure access market*.

Is-soċjetà Rikorrenti tibbaża t-talbiet tagħha fuq is-segweni tlett aggravji ċentrali: (1) li l-Awtorità Intimata injorat l-obbligi tagħha in kwantu ma segwietx il-proċeduri mfassla fl-Artikolu 4A tal-Kap.418 tal-Ligijiet ta' Malta qabel ma' ħarġet id-deċiżjoni appellata; (2) li d-deċiżjoni ta' l-Awtorità Intimata u l-użu tad-diskrezzjoni da parte tagħha huma rraġjonevoli u ingusti; u (3) li l-Awtorità Intimata qed tohloq sitwazzjoni ta' perpetwazzjoni ta' sitwazzjoni ingusta għal żmien indeterminat.

L-Awtorità Intimata topponi għat-talbiet tas-soċjetà Rikorrenti u titlob li l-istess jiġu miċhuda stante li: (1) l-appell odjern huwa null in kwantu d-dokument *Notification of re-assessment of the wholesale fixed access market(s) in Malta* bir-Referenza MCA/O/24-5379 datat 30 ta' Lulju 2024, ma huwiex decizjoni u għaldaqstant ma jistax ikun hemm appell minnu; (2) it-talba għas-sospensjoni tad-

dokument *Notification of re-assessment of the wholesale fixed access market(s) in Malta* bir-Referenza MCA/O/24-5379 datat 30 ta' Lulju 2024, ma hijiex legalment sostenibbli stante li l-imsemmija notifikazzjoni ma hijiex deċiżjoni u fil-mertu, kemm-il darba din it-talba tas-soċjetà Rikorrenti kif impostata kellha tigi milqugħa, twassal għal incertezza regolatorja serja; (3) ma huwiex minnu li hija injorat l-obbligi tagħha kif nascenti mil-Liġi, lanqas huwa minnu li hija użat id-diskrezzjoni tagħha b'mod irragonevoli u ingust u lanqas ma hija qed tipprowa toħloq perperpetwazzjoni ta' sitwazzjoni ingusta għal żmien indeterminat.

Hekk kif ivverbalizzat waqt is-seduta tal-5 ta' Diċembru 2024, sa' dan l-istadju tal-proċeduri ġew trattati biss l-eċċezzjoni tan-nullità ta' l-appell tas-soċjetà Rikorrenti sollevata mill-Awtorità Intimata u t-talba għal *interim measure* avvanzata mis-soċjetà Rikorrenti bit-tieni talba tagħha. Għaldaqstant b'din is-sentenza qed jiġu trattati u determinati biss dawn iż-żewġ kwistjonijiet partikolari.

It-Tribunal ser jibda l-ewwel billi jittratta l-**eċċezzjoni tan-nullità ta' l-appell tas-soċjetà Rikorrenti** sollevata mill-Awtorità Intimata.

L-Artikolu 37 tal-Kap. 418 tal-Liġijiet ta' Malta jipprovdi li: (1) **Kemm-il darba mhux provdut xort' oħra mil-liġi, jista' jsir appell quddiem it-Tribunal minn deċiżjoni ta' l-Awtorità kemm taħt dan l-Att, u kemm taħt l-Att biex jirregola Komunikazzjonijiet Elettroniċi, l-Att dwar ir-Regolament ta' Ċerti Xogħlijiet f'Utilitajiet u Servizzi, l-Att dwar is-Servizzi Postali jew l-Att dwar il-Komunikazzjonijiet u Transazzjonijiet Elettroniċi**⁵: Izda l-Prim' Ministru jista' b'ordni fil-Gazzetta jestendi l-ġurisdizzjoni tat-Tribunal għal: (a) kull deċiżjoni oħra li l-Awtorità tista' tiegħu taħt kull liġi oħra li l-Awtorità jkollha jedd tinforza; u (b) kull deċiżjoni meħuda minn jew fisem il-Gvern jew minn xi awtorità pubblika fil-qasam tal-komunikazzjonijiet jew li jkollha influwenza sostanzjali fuqhom. (2) **Id-dritt ta' appell quddiem it-Tribunal ikun jista' jsir mill-persuna aggravata bid-deċiżjoni**⁶: Izda f'kull każ, persuna li tagħmel appell quddiem it-Tribunal għandha wkoll tispjega l-interess ġuridiku li jkollha meta tkun qed tattakka d-deċiżjoni appellata. (3) Mingħajr preġudizzju għad-dispożizzjonijiet tal-artikolu 38, **appell minn deċiżjoni ta' l-Awtorità**⁷ għandu jsir b'rikors u jiġi ippreżentat għand is-Segretarju tat-Tribunal fi żmien għoxrin ġurnata mid-data meta dik id-deċiżjoni tkun ġiet notifikata; (4) L-entità kwalifikata li fuq talba tagħha tkun inħarġet ordni ta' tharis mill-Awtorità skond l-artikolu 31 għandha tigi notifikata bi kwalunkwe appell ta' persuna li kontriha tkun inħarġet l-ordni, u għandu jkollha għoxrin (20) ġurnata sabiex twieġeb għall-appell li jiddekorru mid-data meta tkun ġiet notifikata bl-imsemmi appell.

Minn dan il-provvediment tal-Liġi jirriżulta ferm ċar illi, sakemm mhux provdut xort' oħra mil-Liġi, appell quddiem dan it-Tribunal jista' jsir biss minn **deċiżjoni** ta' l-Awtorità Intimata. Ai termini ta' l-Artikolu 2 tal-Kap. 418 tal-Liġijiet ta' Malta t-

⁵ Enfasi tat-Tribunal.

⁶ Enfasi tat-Tribunal.

⁷ Enfasi tat-Tribunal.

terminu “*deċiżjoni*” jinkludi kull *direttiva*, *sentenza*, *direzzjoni*, *kondizzjoni ta’ liċenża*, *mizura*, *htieġa jew speċifikazzjoni jkunu kif ikunu deskritti*, *magħmulin mill-Awtorità u l-kelma “deċiżjoni” għandha tinftiehem skond hekk*. Fl-istess imsemmi artikolu tal-Liġi hemm provdut li t-terminu “*direttiva*” jfisser *direttiva maħruġa mill-Awtorità skond l-Artikolu 4*.

Għal kull buon fini jiġi osservat li l-Artikolu 4(6) tal-Kap.418 tal-Liġijiet ta’ Malta jipprovdi li: *l-Awtorità tista’ toħroġ dawk id-direttivi li tista’ tqis bħala meħtieġa sabiex jibdeu isehħu jew ikun hemm konformità ma’ kull dispożizzjoni ta’ dan l-Att, jew ta’ kull liġi oħra li l-Awtorità jkollha jedd tinforza, jew deċiżjonijiet li l-Awtorità tista’ tagħmel skond il-funzjonijiet tagħha taħt dan l-Att jew kull liġi oħra u l-Awtorità tista’ temenda jew tirrevoka dawk id-direttivi*.

Għal kull buon fini wkoll jiġi osservat li ai termini ta’ l-Artikolu 2 tal-Kap.399 tal-Liġijiet ta’ Malta, it-terminu “*deċiżjoni*” jfisser li jinkludi kull *sentenza*, *direttiva*, *mizura*, *htieġa jew speċifikazzjoni jkunu kif ikunu deskritti magħmulin mill-Awtorità u l-kelma “deċiżjoni” għandha tiftiehem skond hekk*.

Fil-fehma tat-Tribunal id-dokument *Notification of re-assessment of the wholesale fixed access market(s) in Malta* bir-Referenza MCA/O/24-5379 datat 30 ta’ Lulju 2024, li s-soċjetà Rikorrenti qed tqis li jikkostitwixxi deċiżjoni ta’ l-Awtorità Intimata, pretensjoni din iżda għal kollox opposta u kontestata mill-imsemmija Awtorità, ma jistax jitqies *in vacuo* iżda jrid jiġi kkunsidrat fid-dawl ta’ l-isfond storiku u kronoloġija tal-fatti li effettivament wasslu għal dak id-dokument.

It-Tribunal jagħmilha ċara li f’dan l-istadju tal-proċeduri u b’mod partikolari għall-fini tal-kwistjoni hawn trattata, ossia l-allegata nullità ta’ l-appell tas-soċjetà Rikorrenti, mhux ser jidhol f’meta u kif suppost l-Awtorità Intimata għamlet jew għandha tagħmel ċerta *market analysis*, punt dan li s-soċjetà Rikorrenti tishaq ħafna fuqu, għar-raġuni li tali kwistjoni ma hijiex tant pertinenti għall-punt partikolari issa trattat iżda hija, se mai, iktar pertinenti għall-mertu tal-proċeduri, u, l-iktar l-iktar, għat-talba għall-ħruġ ta’ *interim measure* avanzata mis-soċjetà Rikorrenti bit-tieni talba tagħha.

Fis-6 ta’ Marzu 2013, l-Awtorità Intimata ppubblikat deċiżjoni intitolata *Identification and Analysis of Markets, Determination of Market Power and setting of Remedies, Market 4 - Wholesale Unbundled Infrastructure Access Market, Final Decision*, fejn l-imsemmija Awtorità kienet iddikjarat li s-soċjetà Rikorrenti kellha SMP fis-suq tal-*wholesale unbundled infrastructure access* u konsegwentement kellha tagħti aċċess lil operaturi oħra għall-infrastruttura tagħha tal-*fibre optic*, u dana b’mod regolat.

Fis-26 ta’ Frar 2016, l-Awtorità Intimata ppubblikat deċiżjoni intitolata *Virtual Unbundled Access to Fibre-to-the-Home: Implementing the VULA remedy*, li biha imponiet rimedju *ex ante* tal-VULA a bażi ta’ liema s-soċjetà Rikorrenti kellha tagħti aċċess għal *fibre access network* lis-soċjetà Vodafone Malta Limited, illum Epic Communications Limited, bi prezz regolat li kellu jiġi kkalkulat minn mudell stabbilit mill-Awtorità Intimata.

F'Diċembru 2023, l-Awtorità Intimata nnotifikat lill-Kummissjoni Ewropea b'*draft measure with a proposal to implement ex ante regulatory remedies concerning the provision of wholesale local access and PIA*⁸. Din id-draft measure però ġiet milqugħa b'riservi serji (*serious doubts*) mill-Kummissjoni tant li ġiet mibdija Phase II investigation da parte ta' l-istess Kummissjoni u f'komunikazzjoni datata 26 ta' Jannar 2024⁹, il-Kummissjoni stqarret illi *at the current stage of the procedure and on the basis of the information available, the Commission is concerned that the MCA would make part of GO's activities subject to ex ante regulation based on an SMP assessment that may not be in accordance with the principles of competition law. The Commission, therefore, has serious doubts as to the compatibility of the notified draft measure with EU law, in particular the objectives set out in Article 3 of the Code, and considers that it creates barriers to the internal market. The Commission points out that, in accordance with Article 32(4) of the Code, the notified draft measure concerning the market for wholesale physical and virtual infrastructure access in Malta shall not be adopted for a further two months. The Commission's position on this particular notification is without prejudice to any position it may take on other notified draft measures. Pursuant to point 6 of Recommendation 2021/554, the Commission will publish this document on its website. If the MCA considers that, in accordance with Union and national rules on business confidentiality, this document contains confidential information that you wish to have deleted prior to publication, please inform the Commission within three working days of receipt. Please give reasons for any such request. The Commission will publish this document on its website, together with a notice inviting third parties to submit observations on this serious doubts letter within five working days*¹⁰.

Bħala fatt b'deċizzjoni datata 27 ta' Marzu 2024¹¹, il-Kummissjoni Ewropea ikkonkludiet u ddeċidiet is-segwenti: *CONCLUSION AND PROPOSALS FOR AMENDING THE DRAFT MEASURE - Taking into utmost account BEREC's opinion and all evidence gathered in this case, the Commission considers that the MCA's (i) assessment of whether coaxial cable is a sufficient direct or indirect competitive constraint on copper/fibre on the relevant wholesale market and (ii) the resulting finding that GO has SMP at wholesale level, is not compliant with the principles of competition law. The Commission invites the MCA to carry out a new market analysis, which following the possible finding of the existence of a problem at retail level based on the assessment of an updated, correct and complete set of data relating to the entire period following the previous market review, thoroughly assesses the relevant wholesale market in Malta by taking into account: (i) the extent of direct or indirect competitive constraint applied by coaxial cable on VULA provided over fibre; (ii) the viability of access to alternative physical infrastructure owned by undertakings that are not providing electronic communications services, such as utilities. HAS ADOPTED THIS DECISION -*

⁸ Dok. "GO1" a fol. 18 tal-proċess.

⁹ Dok. "GO2" a fol. 26 sa' 40 tal-proċess.

¹⁰ Fol. 39 u 40 tal-proċess.

¹¹ Dok. "GO3" a fol. 42 sa' 64 tal-proċess.

Article 1 The MCA shall withdraw the draft measure notified to the Commission on 28 December 2023 and registered under case number MT/2024/2484. Article 2 Pursuant to Article 32(7) of the Code, the MCA shall amend or withdraw the draft measure within six months of the date of this Decision. Where the draft measure is amended, the national regulatory authority shall undertake a public consultation in accordance with Article 23 of the Code, and shall notify the amended draft measure to the Commission in accordance with Article 32(3) of the Code¹².

Fit-2 ta' April 2024¹³, in segwitu għad-deċiżjoni tal-Kummissjoni Ewropeja tas-27 ta' Marzu 2024, kien hemm pubblikazzjoni da parte ta' l-istess Kummissjoni intitolata *European Commission vetoes proposed regulation of the wholesale broadband market in Malta following in-depth investigation*, fejn bħala *Next Steps* gie ddikjarat is-segwent *the Malta Communications Authority must revisit its findings in light of the Commission's objections and re-notify the market review. In the meantime, the current regulation will remain in place. The Maltese regulator can also appeal the decision to the General Court.*

Fil-5 ta' April 2024¹⁴, l-Awtorità Intimata ppubblikat dokument bir-referenza MCA/O/24-5264, fejn ingħad is-segwent: *On the 2nd April 2024, the European Commission (EC) adopted a decision requiring the MCA to withdraw its proposed draft measure on the regulation of the wholesale physical and virtual infrastructure access market in Malta. This decision closes the Phase II investigation initiated by the EC on 29th January 2024, after the MCA notified its draft measure on the 28th December 2023. The EC decision to veto the aforementioned draft measure comes after the Body of European Regulators for Electronic Communications (BEREC) issued an opinion with its assessment of the EU serious doubts. BEREC disagreed with the EC's findings and serious doubts. The MCA is currently reviewing the considerations and recommendations of the EC, particularly those expressed on the role of alternative physical infrastructures and the competitive constraints imposed by all operators on the market. The current regulation, which is based on a 2013 MCA Decision, will continue to remain effective through a remedy imposed on GO plc to provide Virtual Unbundled Local Access (VULA) to its FTTH network. The MCA will, over the coming weeks update the market with the next steps in this process, primarily pertaining to the withdrawal of the notified draft measure. Such withdrawal would effectively precede a fresh market analysis of the relevant market(s).*

Fid-9 ta' Mejju 2024¹⁵, b'dokument bir-referenza MCA/O/24-5277, l-Awtorità Intimata nnotifikat lill-Kummissjoni Ewropea li kienet qed tirtira d-draft measure taht case number MT/2024/2484. Fl-imsemmi dokument l-Awtorità Intimata stqarret is-segwent: *On the 27 March 2024, the European Commission (EC) adopted a decision requiring the Malta Communications Authority (MCA) to withdraw its proposed draft measure on the regulation of the wholesale physical*

¹² Fol. 63 tal-proċess.

¹³ Dok. "MCA2" a fol. 101 u 102 tal-proċess.

¹⁴ Dok. "MCA1" a fol. 99 tal-proċess.

¹⁵ Dok. "GO6" a fol. 74 tal-proċess.

and virtual infrastructure access (PVIA) market in Malta. The EC decision closes the Phase II investigation initiated on 29 January 2024, after the MCA notified its draft measure on the 28 December 2023. The EC registered this draft measure as Case MT/2024/2484. The EC decision comes after the Body of European Regulators for Electronic Communications (BEREC) delivered its opinion to the EC whereby it did not share the EC's serious doubts and considered them as not justified. In view of the above, the MCA is withdrawing its notified draft measure registered under case number MT/2024/2484. The current remedy on GO plc to provide Virtual Unbundled Access (VULA) to its FTTH network, which is based on a 2013 MCA Decision, will continue to remain effective.

B'ittra datat 6 ta' Ġunju 2024¹⁶ indirizzata lill-Awtorità Intimata, is-soċjetà Rikorrenti avanzat kritika u varji pretensjonijiet fil-konfront ta' l-imsemmija Awtorità u l-operat tagħha u kkonkludiet l-ittra tagħha bil-mod segwenti: *In the meantime, we also expect the MCA to inform the market of its intentions and timelines as soon as possible. GO can no longer accept a situation where obligations mandated in 2013 remain in force due to the MCA's reluctance to formally declare the broadband market competitive and when all the facts and figures point in this direction. Any further inaction from the MCA and attempts to fabricate conclusions that diverge from the actual competitive landscape will leave GO with no choice but to seek legal redress in all avenues available to it in order to protect its shareholders' legitimate interests*¹⁷.

B'ittra datata 17 ta' Ġunju 2024, l-Awtorità Intimata wiegħbet għall-kritika, pretensjonijiet u interpellazzjoni tas-soċjetà Rikorrenti bil-mod segwenti: *The Malta Communications Authority (hereinafter the 'MCA') takes note of GO's letter dated 6 June 2024, titled "EU Commission decision on wholesale physical and virtual infrastructure access market". Following the European Commission's (hereinafter the 'Commission') Decision of 27 March 2024, the MCA, pursuant to article 32(7) of the European Electronic Communications CODE (EECC), has withdrawn its draft measure within the six-month period as specified under Article 2 of the Commission's Decision. The MCA does not agree with GO's interpretation that the six-month expiry period is applicable for the conclusion of a new market analysis. The MCA has commenced a new assessment that will also rely on various ongoing data gathering activities, as also evidenced by the publication of survey findings and market related data available on the MCA website. The current regulation which is based on the MCA's 2013 Decision will remain in place until a new decision is published. The MCA is currently engaging with various stakeholders, including the Office of Competition within the Malta Competition and Consumer Affairs Authority. A formal statement on the timeframes of the new analysis and consultation will be made public once this engagement process has been concluded. In line with applicable legislation, a new market analysis will entail a public consultation and notification to the Commission. The MCA, contrary to what has been stated by GO, underscores that it would have been appropriate to start a new assessment last January,*

¹⁶ Dok. "GO4" a fol. 66 sa' 68 tal-proċess.

¹⁷ Fol. 68 tal-proċess.

considering that BEREC's Expert Working Group (hereafter the 'EWG') was reviewing the Case 'MT/2024/2484: Wholesale physical and virtual infrastructure access market' based on the notified draft measure and an impending final decision by the Commission which was to be issued only after BEREC's Opinion was received. During this period, both the BEREC EWG and the Commission requested additional data and information from the MCA to support their assessment. It is also pertinent to emphasize that the MCA has consistently endeavoured to present factual information and data while providing its evidence-based interpretation of developments. The MCA remains committed to pursuing its objectives and fulfilling its regulatory duties through all necessary actions and respecting the objectives of the EECC. In this spirit, the MCA will consider both current and new market data while evaluating information for its new market assessment. Additionally, the MCA will take utmost account of the conclusions of the BEREC Opinion and the Commission's decision on its 2023 notified draft measure. The MCA envisages undertaking a new public consultation process on the review of the relevant market by the end of 2024. Meanwhile the MCA acknowledges and appreciates GO's professed commitment to reach an agreement on access through commercial negotiations. The MCA reiterates that it remains open to consider any commitments that GO may offer, to facilitate market access, to any other third party. The MCA also remains open to assisting any operator via mediation to resolve any issues, this regardless of the market review process. The MCA remains committed to fair market practices and regulatory accountability, which are crucial to fostering a healthy and competitive industry landscape. This commitment has driven the MCA over the years to assess competitive dynamics, propose and implement regulatory remedies, and withdraw wholesale regulation when appropriate. Finally, while GO is, of course, entitled to disagree with any regulatory decisions taken by the MCA, the MCA categorically refutes the allegations made in GO's letter that the MCA attempted 'to mislead EU institutions' in order to justify its position. It is pertinent to mention that the conclusions reached by BEREC and the Commission were based on factual and correct data. The MCA reserves the right to protect its position against any false allegations made against it which are not conducive to constructive argumentation. The MCA is committed to fostering a professional and constructive regulatory dialogue with all stakeholders, including GO. The acknowledgement by the Commission of the complexity inherent in Malta's telecommunications markets further underscores the importance of collaborative engagement by all stakeholders with the MCA. This is imperative for advancing the best interests of the telecommunications sector and, ultimately, the end users.

Fit-30 ta' Lulju 2024¹⁸ gie ppubblikat id-dokument intitolat *Notification of re-assessment of the wholesale fixed access market(s) in Malta* bir-Referenza MCA/O/24-5379, liema dokument jipprovdi li:

1. Context - Society is increasingly relying on access to high-quality broadband electronic communications networks, services and applications that support its social and economic needs. The Malta Communications

¹⁸ Dok. "GO1" a fol. 17 sa' 24 tal-proċess.

Authority (hereafter ‘MCA’) has a central role in ensuring that consumers and businesses obtain the maximum benefit in terms of choice, price and quality of electronic communications services. The MCA does this through ongoing monitoring and regulation to promote an environment that contributes to efficient investment, encourages innovation and empowers consumers to choose and use electronic communications services. This document outlines the status regarding the analysis of significant market power (hereafter ‘SMP’) concerning access to wholesale network elements that are necessary for the provision of fixed electronic communications services in Malta, particularly the provision of retail fixed broadband services. The primary wholesale products of relevance in the underlying assessment are bitstream access, virtual unbundled local access (hereafter ‘VULA’) and physical infrastructure access (hereafter ‘PIA’). The purpose of an ex ante market analysis is to determine whether any operator(s) has SMP, within the European sector-specific regulatory analytical framework. If SMP can be found, appropriate ex ante SMP remedies would be imposed to address structural market shortcomings and thus ensure sustainable competition to the benefit of end-users. If the MCA concludes that the imposition of regulatory obligations in the relevant market is no longer justified, it withdraws such obligations. In December 2023, the MCA notified a draft measure with a proposal to implement ex ante regulatory remedies concerning the provision of wholesale local access (hereafter ‘WLA’) and PIA. The MCA proposal aimed to enhance infrastructure-based competition, ultimately enabling the development of more effective and sustainable retail market competition in Malta. The draft measure was subject to serious doubts and a second phase assessment by the European Commission (hereafter ‘EC’). The Body of European Regulators for Electronic Communications (hereafter ‘BEREC’) also assigned an Expert Working Group (hereafter ‘BEREC EWG’) to assess the case. BEREC issued its Opinion with conclusions that did not support any of the EC serious doubts (for additional reference see sub-section 1.2 below).

Following further correspondence with the EC, on 27 March 2024, the EC issued a decision detailing several factors that, in its view, justified its request to the MCA to withdraw the draft measure and to start a new market analysis (for additional reference see sub-section 1.1 below). In view of this, the MCA has initiated a new market analysis that concerns access to wholesale network elements that are necessary for the provision of retail fixed electronic communications services in Malta. The MCA will take into account the views of the EC, BEREC and all the relevant stakeholders in this new analysis. The opinions and conclusions expressed by the MCA in its 2023 consultation document titled "MCA Analysis of the Market for the Provision of Wholesale Physical and Virtual Infrastructure" will not condition the new analysis. Alongside the views expressed by the EC, BEREC and stakeholders to the now withdrawn draft measure, the new analysis will consider ongoing and new market developments that are relevant in view of the forward-looking nature of this ex ante assessment. The new market analysis exercise will further demonstrate the MCA's commitment to ensuring a fair and competitive electronic communications landscape in Malta, benefiting both consumers and

industry stakeholders. This commitment has guided the MCA in its efforts over the years to evaluate competitive dynamics, propose and implement proportionate, pro-investment regulatory measures, and withdraw ex ante regulation when appropriate. Both investment and competition should be encouraged, in order to increase economic growth, innovation and consumer choice.

1.1. The EC decision subsequent to the MCA notified draft measure -

On the 28th December 2023, the MCA notified its draft measure titled 'MCA DRAFT DECISION DOCUMENT - Based on the analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta'. The EC registered the notification as Case MT/2024/2484. On 29th January 2024, the EC initiated a Phase II investigation, pursuant to Article 32 of Directive (EU) 2018/1972 (the 'Code'), the relevant Serious Doubts letter having been issued to the MCA on 26 January 2024. On the 2nd April 2024, the EC adopted a decision requiring the MCA to withdraw its proposed draft measure, which had foreseen the imposition of ex ante remedies on the wholesale physical and virtual infrastructure access market in Malta. The EC decision to veto the aforementioned draft measure came after BEREC had issued an opinion with its assessment of the EC serious doubts. BEREC had disagreed with the EC's findings and serious doubts. The EC decision essentially concludes (on p. 21) that: • The MCA (i) assessment of whether coaxial cable is a sufficient direct or indirect competitive constraint on copper/fibre on the relevant wholesale market and (ii) the resulting finding that GO has SMP at wholesale level, is not compliant with the principles of competition law. • The MCA needs to carry out a new market analysis, which, following the possible finding of the existence of a problem at retail level based on the assessment of an updated, correct and complete set of data relating to the entire period following the previous market review, thoroughly assesses the relevant wholesale market in Malta by taking into account: (i) the extent of direct or indirect competitive constraint applied by coaxial cable on VULA provided over fibre; and (ii) the viability of access to alternative physical infrastructure owned by undertakings that are not providing electronic communications services, such as utilities. More specifically, the EC decision (on p.19) states that 'The assessment of market power in a wholesale market, which includes nation-wide cable infrastructures, could potentially lead to the following conclusions: (i) none of the operators has SMP; (ii) one of the two operators (GO or Melita) is dominant; (iii) both operators are jointly dominant; or (iv) both operators are dominant in their separate wholesale markets. Such market power at wholesale level would also be reflected in market dynamics at the downstream retail level where the wholesale inputs provided are used to supply consumers.' The EC decision (on p. 18) states that 'In the recent years, the EC has been indicating that the presence of three networks as one of the conditions for deregulation seems to be conservative, while the criteria identified should be appropriate to reflect the competitive conditions in a given settlement with a sufficient forward-looking approach.' The EC decision (on p. 18) also notes that 'the EC disagrees with BEREC's Opinion which suggests that the presence of at least three networks is conducive to effective competition. Such a high

threshold for deregulation, in particular in the national circumstances of Malta, could lead to the continuing regulation instead of progressively reducing ex ante sector-specific rules, if justified by the level of effective competition in the market. Indeed, an efficient level of infrastructure-based competition is the extent of infrastructure duplication at which investors can reasonably be expected to make a fair return based on reasonable expectations about the evolution of market shares.’

1.2. The BEREC Opinion on Case MT/2024/2484 - The BEREC EWG finalised its draft Opinion on 16 February 2024, with a final Opinion presented and adopted by the BEREC Board of Regulators on 23 February 2024. This Opinion was issued in accordance with Article 32(5) of the Directive (EU) 2018/1972 (hereafter the ‘European Electronic Communications Code’, ‘EECC’ or the ‘Code’). The BEREC Opinion essentially concludes (on p.21 and p.22) that: • ‘Pursuant to Article 32(5) of the Code, BEREC shall publish an opinion on the Commission’s reservations referred to in paragraph 4, indicating whether it considers that the draft measure should be maintained, amended or withdrawn and shall, where appropriate, provide specific proposals to that end. BEREC is of the opinion that none of the EC’s four serious doubts are justified. BEREC is accordingly of the view that there are insufficient grounds to justify the withdrawal or amendment of the Draft Measure, based specifically on the reservations arising from the EC’s Serious Doubts. BEREC does not agree with the EC that the draft measure: (i) Is characterised by a lack of sufficient justification that the wholesale market should continue to be regulated; (ii) Provides insufficient evidence that the PVIA market passes Criterion 2 of the three criteria test (3CT); (iii) Incorrectly excluded the direct constraint arising from Melita self-supply of cable in its product market definition; and (iv) Has failed to justify a finding of SMP on the PVIA market arising in particular from an improperly defined PVIA market definition (arising from the exclusion of self-supply of cable as a direct constraint).’ • ‘Serious Doubt 2 relies to a non-trivial extent on analysis set out in Serious Doubt 1, and, similarly, Serious Doubt 4 relies to a non-trivial extent on analysis set out in Serious Doubt 3. BEREC is particularly unconvinced of the EC’s assumption that downstream retail broadband markets would be effectively competitive absent regulation in the presence of just two networks, only one of which currently offers wholesale services on a regulated basis.’ • ‘For the avoidance of doubt, the BEREC conclusions do not amount to a positive endorsement of the findings of the MCA Draft Measure in all material respects.’

2. Stakeholders’ input in view of market developments - The new market analysis, similar to the principles upheld for earlier analyses, will prioritise stakeholder input, especially for the collection of new data and information on market developments, ongoing and foreseen. The main stakeholders include the operators providing fixed broadband services in Malta. The two nationwide operators, namely GO and Melita offer services through various networks. GO has continued to roll out its FTTH network, with national coverage expected by the end of this year as it migrates its clients

away from its legacy copper-based DSL network. Melita owns a nationwide cable network based on DOCSIS 3.1 standard, whilst also deploying a FTTH network. Epic offers fixed broadband services over GO's FTTH network in addition to also having deployed its own FTTH network. In the case of Melita and Epic, fibre deployment is currently limited to a number of localities. The MCA conclusions from the new market analysis on the current state and potential future development of service-based/infrastructure-based competition will draw from data and information provided by stakeholders, including operators. Key considerations include: • the coverage of very high-capacity fixed networks (VHCN) across Malta; • operators' continued investment in fibre deployment and FTTH coverage; • the availability and use of physical infrastructure by owners and third parties; • market share developments at retail level; • changes in market structure; • commercial offerings at both wholesale and retail levels; and • evolving indicators with respect to choice, quality of service, and price. The MCA will evaluate these factors, among others, to assess the level of competition and decide whether continued regulatory intervention or deregulation is necessary.

3. Ex ante SMP regulation currently in force and the BCRD / GIA -
The current ex ante SMP regulation, based on a 2013 MCA Decision, will remain in effect through a remedy implemented in 2016 requiring GO to provide Virtual Unbundled Access (hereafter 'VULA') 7 to its FTTH network. This regulation has enabled the presence of a third operator, Epic, in the provision of retail fixed broadband services, whilst providing safeguards to ensure GO's ongoing investment in fibre roll-out. The ex ante VULA regulation will remain in effect until the MCA publishes a new decision to either maintain, review or withdraw it. However, any future MCA decision would first require the EC's acceptance of a future MCA notified draft measure, based on the new market analysis. The MCA also notes that the applicability of ex ante SMP regulation and the ongoing market analysis is without prejudice to the applicability of the Broadband Cost Reduction Directive (hereafter the 'BCRD') as transposed in Malta. The measures contemplated by the BCRD apply in the context of dispute resolution regarding specific generic issues related to physical infrastructure, including non-telecom infrastructure. The Gigabit Infrastructure Act (hereinafter 'GIA'), which entered into force on the 11th May 2024, has now replaced the BCRD. The GIA aims to further facilitate and stimulate the widespread roll-out of VHCNs by promoting the joint use of existing physical infrastructure and by enabling more efficient deployment of new physical infrastructure so that such networks can be rolled out faster and at a lower cost. In contrast, ex ante regulation through a SMP-based market analysis aims to address competition issues in markets where SMP is present. Finally, the MCA commends any commercial initiatives for access to both virtual and physical infrastructure. In line with previous efforts, the MCA will pursue the conclusion of commercial agreements involving operators, which may have not materialized so far. The MCA remains open to consider any commitments offered by the currently designated SMP operator to facilitate market access. As also stipulated by the Code, such arrangements/agreements

would provide a solid foundation for considering future deregulation of the market.

4. Timelines for the new analysis and public consultation - The MCA will take into account national circumstances when seeking to determine its way forward on the regulatory approach in the relevant market(s), this being either continued regulation or deregulation. As already highlighted in previous sections, the MCA will take into account the EC Decision on Case MT/2024/2484, the BEREC views on the now withdrawn MCA draft measure and stakeholder input. It also remains committed to take utmost account of the most recent EU guidance on the assessment of markets. It is of note that, in December 2020, the EC published a new Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation, in accordance with Directive (EU) 2018/1972 of the European Parliament and of the Council establishing the European Electronic Communications Code (hereafter referred to as the '2020 EU Recommendation'). This replaced the 2014 EU Recommendation. The MCA aims to publish the new market analysis for public consultation by the end of 2024. The consultation exercise will allow interested parties and stakeholders to react and submit their responses within a specified time window. This will be followed by a notification of the MCA's proposed draft measure to the EC.

Is-soċjetà Rikorrenti tikkontendi li fejn fid-dokument imsemmi l-Awtorità Intimata tistqarr illi **the current ex ante SMP regulation, based on a 2013 MCA Decision, will remain in effect through a remedy implemented in 2016 requiring GO to provide Virtual Unbundled Access (hereinafter 'VULA') to its FTTH network**¹⁹, jikkostitwixxi, ai termini tal-Ligi, deċizzjoni da parte ta' l-imsemmija Awotirtà.

Fir-Rikors promotur fil-fatt is-soċjetà Rikorrenti tippremetti li GO tħossha aggravata mid-Deċizzjoni Appellata għaliex hija ingusta u ta' preġudizzju, mhux biss għaliha iżda wkoll għas-suq tal-broadband f'Malta li l-Awtorità suppost għandha l-obbligu li tipproteġi. L-Awtorità kellha alternattivi oħra għad-dispożizzjoni tagħha iżda għażlet it-triq l-aktar faċli għaliha a skapitu ta' l-interessi ta' GO meta ddeċidiet testendi l-effetti u l-obbligi ta' deċizzjonijiet li ttiehdu minnha abbażi ta' analiżi tas-suq li sar h̄dax-il sena ilu f'kuntest totalment differenti minn dak vigenti llum. Għaldaqstant, is-soċjetà rikorrenti qiegħda tinterponi dan l-appell sabiex titlob ir-revoka u tħassir tad-Deċizzjoni Appellata (u cioè, għal kull kjarifika l-bran ċitat hawn fuq²⁰) biex b'hekk ma jibqgħux fis-seħh l-obbligi ex ante ta' Significant Market Power ('SMP') imposti fuq GO fid-deċizzjoni tas-sena 2013, kif implementata fis-sena 2016, sakemm terġa' ssir analiżi tas-suq tal-wholesale fixed broadband għar-raġunijiet li ser jiġu elenkati u spjegati hawn taħt, u dan mingħajr preġudizzju għad-dritt tas-soċjetà rikorrenti li tfittex l-Awtorità għad-danni sofferti minhabba l-effett tal-prolungazzjoni ingusta tad-deċizzjoni li kienet hadet l-Awtorità fl-2013.

¹⁹ Enfasi tat-Tribunal.

²⁰ The current ex ante SMP regulation, based on a 2013 MCA Decision, will remain in effect through a remedy implemented in 2016 requiring GO to provide Virtual Unbundled Access (hereinafter 'VULA') to its FTTH network.

Meta d-dokument in kwistjoni u partikolarment il-parti identifikata mis-soċjetà Rikorrenti bħala l-allegata deċiżjoni ta' l-Awtorità Intimata, jiġu kkunsidrati fid-dawl tal-fatti hawn iktar 'l fuq kronologikament esposti, it-Tribunal diffiċilment jiista' jifhem kif dak id-dokument u l-parti speċifikatament in kwistjoni jikkostitwixxu deċiżjoni, wisq inqas deċiżjoni kif previst fil-Liġi in materja.

Huwa fatt inkontestat li Market 4, ossia *wholesale unbundled infrastructure access market*, huwa suq regolat bid-deċiżjoni ta' l-Awtorità Intimata ta' l-2013 fejn ġie determinat li s-soċjetà Rikorrenti għandha SMP f'dak is-suq u b'hekk ġie impost l-obbligu li tagħti aċċess lil operaturi oħra għall-infrastruttura tagħha tal-fibre optic b'mod regolat. Dan l-obbligu hekk impost fuq is-soċjetà Rikorrenti ġie implimentat bid-deċiżjoni ta' l-Awtorità Intimata ta' l-2016, ossia d-deċiżjoni intitolata *Virtual Unbundled Access to Fibre-to-the-Home: Implementing the VULA remedy*, fejn allura s-soċjetà Rikorrenti għandha tagħti aċċess għal *fibre access network* lis-soċjetà Vodafone Malta Limited, illum Epic Communications Limited, bi prezz regolat li kellu jiġi kkalkulat minn mudell sstabbilit mill-istess Awtorità. Dik hija s-sitwazzjoni regolatorja attwali ta' Market 4 u tal-VULA remedy u sakemm ma jkunx hemm deċiżjoni oħra da parte ta' l-Awtorità Intimata, fil-fehma tat-Tribunal tali sitwazzjoni regolatorja ma hijiex, u iktar importanti minn hekk, ma tistax tinbidel.

Il-mizura proposta mill-Awtorità Intimata lill-Kummissjoni Ewropea fir-rigward tas-suq tal-*wholesale unbundled infrastructure access market* f'Diċembru 2023 kienet *draft measure* u allura bħala tali bl-ebda mod ma setgħet teffettwa, tbiddel jew tvarja l-istat regolatorju ta' dan is-suq kif imsemmi. Il-veto tal-Kummissjoni Ewropea għal dik id-*draft measure* u l-irtirar ta' l-istess da parte ta' l-Awtorità Intimata sabiex issir market analysis oħra, halla kollox kif kien, ossia bil-Market 4 u b'mod speċifiku l-VULA remedy regolati bid-deċiżjonijiet ta' l-2013 u ta' l-2016. Tant hu hekk li fil-pubblikazzjoni tat-2 ta' April 2024, il-Kummissjoni Ewropea stess stqarret illi *in the meantime, the current regulation will remain in place*.

Ladarba din hija s-sitwazzjoni, u cioè li l-*wholesale unbundled infrastructure access market* u l-VULA remedy **huma regolati b'deċiżjonijiet ta' l-Awtorità Intimata**, l-istess Awtorità bid-dokument tat-30 ta' Lulju 2024 ma ħadet l-ebda deċiżjoni meta hemm stqarret li *the current ex ante SMP regulation, based on a 2013 MCA Decision, will remain in effect through a remedy implemented in 2016 requiring GO to provide Virtual Unbundled Access (hereinafter 'VULA') to its FTTH network*. Fil-fehma tat-Tribunal din l-istqarrija ta' l-Awtorità Intimata ma hija xejn għajr osservazzjoni ta' l-istess Awtorità dwar stat ta' fatt. L-Awtorità Intimata in verità ma setgħet tieħu l-ebda deċiżjoni fir-rigward tal-*wholesale unbundled infrastructure access market* u l-VULA remedy għar-raġuni li l-istat regolatorju kien u baqa' - u għal' issa għandu jibqa' - l-istess. L-Awtorità Intimata f'din l-istanza partikolari ma eżerċitat l-ebda tip ta' diskrezzjoni, u dana billi hija, bħal ma għandhom jagħmlu wkoll l-operaturi fis-suq in kwistjoni, inkluża għalhekk is-soċjetà Rikorrenti, għandha l-obbligu li tosserva u tirrispetta l-istat regolatorju **attwali** ta' l-istess suq u tal-VULA remedy.

Bla preġudizzju għall-konklużjoni li d-dokument maħruġ mill-Awtorità Intimata intitolat *Notification of re-assessment of the wholesale fixed access market(s) in Malta* bir-Referenza MCA/O/24-5379 datat 30 ta' Lulju 2024, u l-istqarrija kontenuta fih li *the current ex ante SMP regulation, based on a 2013 MCA Decision, will remain in effect through a remedy implemented in 2016 requiring GO to provide Virtual Unbundled Access (hereinafter 'VULA') to its FTTH network*, **ai termini tal-Liġi ma jikkostitwixxux deċiżjoni** ta' l-Awtorità Intimata, it-Tribunal ma jistax jonqos milli jistaqsi lilu nnifsu għalfejn is-soċjetà Rikorrenti qed tqis tali dokument speċifiku u l-istqarrija hemm kontenuta bħala deċiżjoni ta' l-Awtorità Intimata, meta stqarrijiet preċedenti simili da parte ta' l-istess Awtorità ma ġewx meqjusa bl-istess mod mis-soċjetà Rikorrenti.

Kif osservat iktar 'l fuq f'din is-sentenza fid-dokument bir-referenza MCA/O/24-5264, ippubblikat mill-Awtorità Intimata fil-5 ta' April 2024²¹, l-imsemmija Awtorità stqarret fost affarijiet oħra li *the current regulation, which is based on a 2013 MCA Decision, will continue to remain effective through a remedy imposed on GO plc to provide Virtual Unbundled Local Access (VULA) to its FTTH network. The MCA will, over the coming weeks update the market with the next steps in this process, primarily pertaining to the withdrawal of the notified draft measure. Such withdrawal would effectively precede a fresh market analysis of the relevant market(s).* Bl-istess mod fl-ittra lis-soċjetà Rikorrenti datata 17 ta' Ġunju 2024, l-Awtorità Intimata stqarret, fost affarijiet oħra, *the current regulation which is based on the MCA's 2013 Decision will remain in place until a new decision is published.*

Din l-anomaliya fil-ħsieb tas-soċjetà Rikorrenti, ossia għaliex l-istess identika stqarrija da parte ta' l-Awtorità Intimata tqieset bħala deċiżjoni meta magħmula fit-30 ta' Lulju 2024 iżda mhux ukoll bħala tali meta magħmula preċedentement fil-5 ta' April 2024 u fis-17 ta' Ġunju 2024, ukoll serjament timpinġi fuq il-validità tal-pretensjonijiet tas-soċjetà Rikorrenti fir-rigward.

Ladarba d-dokument intitolat *Notification of re-assessment of the wholesale fixed access market(s) in Malta* bir-Referenza MCA/O/24-5379 datat 30 ta' Lulju 2024, u senjatament l-istqarrija ta' l-Awtorità Intimata kontenuta fih illi *the current ex ante SMP regulation, based on a 2013 MCA Decision, will remain in effect through a remedy implemented in 2016 requiring GO to provide Virtual Unbundled Access (hereinafter 'VULA') to its FTTH network*, ai termini tal-Liġi ma tikkostitwixxix deċiżjoni ta' l-istess Awtorità, jikkonsegwi li ai termini ta' l-Artikolu 37 tal-Kap.418 tal-Liġijiet ta' Malta s-soċjetà Rikorrenti ma kellhiex dritt tappella mill-istess. Konsegwentement għalhekk, l-Awtorità Intimata ġustament teċċepixxi n-nullità ta' l-appell tas-soċjetà Rikorrenti.

Fid-dawl ta' din il-konklużjoni, it-Tribunal ma għandux triq oħra għajr li jastjeni milli jieħu konjizzjoni ulterjuri ta' l-appell tas-soċjetà Rikorrenti, inkluż naturalment li jastjeni milli jieħu konjizzjoni tat-tieni talba tagħha wkoll. Għal kull buon fini jiġi osservat li talba għas-sospensjoni ai termini ta' l-Artikolu 42(2) tal-

²¹ Dok. "MCA1" a fol. 99 tal-proċess.

Kap.418 tal-Liġijiet ta' Malta, tista' ssir **biss** fir-rigward ta' **deċiżjoni** ta' l-Awtorità Intimata u mhux ukoll fir-rigward ta' kwalunkwe dokument mahruġ u/jew stqarrija magħmula minnha.

Għal dawn ir-raġunijiet it-Tribunal jaqta' u jiddeċiedi billi **jilqa'** l-eċċezzjoni tan-nullità ta' l-appell tas-soċjetà Rikorrenti sollevata mill-Awtorità Intimata stante li d-dokument intitolat *Notification of re-assessment of the wholesale fixed access market(s) in Malta* bir-Referenza MCA/o/24-5379, datat 30 ta' Lulju 2024, u senjatament l-istqarrija kontenuta fih illi *the current ex ante SMP regulation, based on a 2013 MCA Decision, will remain in effect through a remedy implemented in 2016 requiring GO to provide Virtual Unbundled Access (hereinafter 'VULA') to its FTTH network*, ai termini tal-Liġi ma tikkostitwixxix deċiżjoni ta' l-Awtorità u b'hekk hija inappellabbli, u konsegwentement jastjeni milli jiehu konjizzjoni ulterjuri ta' l-appell ta' l-soċjetà Rikorrenti, inkluż għalhekk tat-tieni talba minnha avvanzata bl-istess appell.

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

Ai termini 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