



MALTA

**TRIBUNAL TA' REVIZJONI AMMINISTRATTIVA
MAGISTRAT DR.
GABRIELLA VELLA**

Seduta tat-23 ta' Marzu, 2015

Rikors Numru. 93/2013

GO p.l.c.

Vs

L-Awtorità ta' Malta dwar il-Komunikazzjoni

It-Tribunal,

Ra r-Rikors ipprezentat mis-socjetà GO p.l.c. fil-25 ta' Marzu 2013 permezz ta' liema titlob li t-Tribunal: (i) jirrevoka jew jannulla d-decizjonijiet numerati 4.3 u 5.1 moghtija mill-Awtorità ta' Malta dwar il-Komunikazzjoni fid-Decizjoni *Market 4 – Wholesale Unbundled Infrastructure Access Market – Identification and Analysis of Markets, Determination of Market Power and Setting of Remedies – Final Decision* ippubblikata fis-6 ta' Marzu 2013, u a tenur ta' l-Artikolu 39(1) tal-Kap.418 tal-Ligijiet ta' Malta jirreferi l-kwistjoni lura lill-Awtorità ta' Malta Dwar il-Komunikazzjoni; u (ii) jirrevoka jew jannulla d-decizjoni numerata 5.5 kollha jew partijiet minnha moghtija mill-Awtorità ta' Malta dwar il-Komunikazzjoni fid-Decizjoni appena citata u a tenur ta' l-Artikolu 39(1) tal-Kap.418 tal-Ligijiet ta' Malta jirreferi l-kwistjoni lura lill-Awtorità ta' Malta dwar il-Komunikazzjoni;

Ra d-dikjarazzjoni tas-socjetà GO p.l.c. fir-Rikors promotur fis-sens illi l-appell in ezami huwa bla pregudizzju ghal kull dritt iehor spettanti lilha skond il-Ligi;

Ra d-dokumenti annessi mar-Rikors promotur markati Dok. "A" sa' Dok. "D2" a fol. 16 sa' 181 tal-process;

Ra r-Risposta ta' l-Awtorità ta' Malta dwar il-Komunikazzjoni permezz ta' liema a bazi ta' eccezzjoni preliminari, fis-sens illi dan it-Tribunal ma ghandux il-*vires* li jirreferi l-kwistjoni lura lill-Awtorità f'kaz li l-appell tas-socjetà

Rikorrenti jigi milqugh *in toto* jew in parte, izda se mai tkun l-istess Awtorità li jkollha tifli l-impatt regolatorju ta' tali decizjoni tat-Tribunal u tara jekk ikunx hemm bzonn ta' xi forma ta' azzjoni regolatorja da parti taghha, u a bazi ta' eccezzjonijiet fil-meritu, toponni ghall-appell tas-socjetà GO p.l.c. u titlob li l-istess jigi michud, bl-ispejjez kontra taghha, u minflok jikkonferma d-*Decizjoni Market 4 – Wholesale Unbundled Infrastructure Access Market – Identification and Analysis of Markets, Determination of Market Power and Setting of Remedies – Final Decision* ippubblikata fis-6 ta' Marzu 2013, fit-totalità taghha;

Ra d-dokument Dok. "MCA1" anness mar-Risposta ta' l-Awtorità ta' Malta dwar il-Komunikazzjoni a fol. 194 sa' 200 tal-process;

Sema' x-xhieda ta' Stefan Briffa, Senior Manager Regulatory Affairs fi hdan is-socjetà Rikorrenti, moghtija waqt is-seduti tat-3 ta' Gunju 2013¹ u ta' l-10 ta' Gunju 2013² u ra d-dokumenti esebiti minnu markati Dok. "SB1" a fol. 205 sa' 222 tal-process, sema' x-xhieda ta' Arthur Azzopardi, Chief Officer – Strategy and Business Development fi hdan is-socjetà Rikorrenti, moghtija waqt is-seduta tat-3 ta' Gunju 2013³, ix-xhieda ta' Victor Zammit, Manager Market Analysis fi hdan l-Awtorità Intimata, moghtija waqt is-seduti ta' l-10 ta' Gunju 2013⁴, 3 ta' Lulju 2013⁵ u tad-19 ta' Lulju 2013⁶ u ra d-dokumenti esebiti minnu markati Dok. "VZ1" (li minhabba n-natura tad-dokument ma giex inserit fil-process izda inzamm fis-Sigrieta bil-possibiltà li jigi vizjonat mill-partijiet kontendenti) Dok. "VZ2" a fol. 241 sa' 292 tal-process u Dok. "VZ3" a fol. 335 sa' 384 tal-process, sema' x-xhieda ta' David Lewin, Founding Partner ta' Plum Consulting prodott mis-socjetà Rikorrenti, moghtija waqt is-seduta tal-25 ta' Ottubru 2013⁷ u x-xhieda ta' Stefan Piott, ghal Analysys Mason prodott mill-Awtorità Intimata, moghtija waqt is-seduta tat-8 ta' Jannar 2014⁸;

Ra n-Nota ta' Osservazzjonijiet tas-socjetà Rikorrenti a fol. 951 sa' 957 tal-process u ra n-Nota ta' Osservazzjonijiet ta' l-Awtorità Intimata a fol. 960 sa' 966 tal-process;

Sema' t-trattazzjoni orali finali da parte tad-difensuri tal-partijiet kontendenti;

Ra l-atti l-ohra kollha tal-kawza;

¹ Fol. 223 sa' 231 tal-process.

² Fol. 293 sa' 295 tal-process.

³ Fol. 232 sa' 239 tal-process.

⁴ Fol. 296 sa' 315 tal-process.

⁵ Fol. 317 sa' 333 tal-process.

⁶ Fol. 385 sa' 392 tal-process.

⁷ Fol. 395 sa' 417 tal-process.

⁸ Fol. 925 sa' 950 tal-process.

Ikkonsidra:

Fis-6 ta' Marzu 2013 l-Awtorità Intimata ppubblikat zewg Decizjonijiet intitolati *Market 5 – Wholesale Broadband Access Market – Identification and Analysis of Markets, Determination of Market Power and Setting Remedies – Final Decision* u *Market 4 – Wholesale Unbundled Infrastructure Access Market – Identification and Analysis of Markets, Determination of Market Power and Setting of Remedies – Final Decision*, li fihom analizzat is-suq tal-*Wholesale Broadband Access*, maghruf bhala Market 5, u s-suq tal-*Wholesale Unbundled Infrastructure Access*, maghruf bhala Market 4, f'Malta għall-fini li tiddetermina *definition of the relevant market* u *assessment of significant market power* u finalment biex tistabilixxi *the approach to regulation* f'kull wiehed minnhom.

Għal dak li jirrigwarda l- *Wholesale Broadband Access Market* [minn dawn 'l quddiem indikat bhala Market 5] l-Awtorità Intimata kkonkludiet u konsegwentement iddecidiet illi: **3.4 Decision on the market definition** – *According to the analysis carried out and evidence available to the MCA, the MCA concludes that the wholesale broadband market has a national geographical scope and: includes wholesale broadband access over DSL; includes wholesale broadband access over cable; excludes wholesale broadband access over WiMAX; includes wholesale broadband access over fibre; includes DSL and cable self supply;* **4.4 Decision on the assessment of SMP** – *Throughout its analysis, the MCA has found that Melita and GO could not act independently of each other and, ultimately, independently of other players. Consequently, the MCA considers that at present there is no clear evidence to support a finding of single market dominance at the wholesale level. Furthermore, given the similar positions held by Melita and GO at the wholesale level, the MCA carried out a further assessment for the potential finding of joint dominance. In its last market review in 2008, the MCA carried out an extensive review of the conditions which would lead to joint dominance. Since then, the retail market has undergone a positive evolution with a greater differentiation between the behaviour and positions of GO and Melita in 2012 than there was in 2008. As a result, the MCA believes that there is no sufficient evidence to prove that GO and Melita enjoy a joint dominant position. Therefore, the MCA declares that no operator in the wholesale broadband access market has been demonstrated to enjoy a position of SMP;* u **5.2 Decision on the non imposition of remedies** – *Currently no regulatory obligations exist in the market. Given that no SMP designation is made in this market, the MCA will not impose any ex-ante regulatory obligations on the Maltese wholesale broadband market.*

Id-Decizjoni globali ta' l-Awtorità Intimata dwar Market 5 ma gietx kontestata.

Ghal dak li jirrigwarda l-*Wholesale Unbundled Infrastructure Access Market* [minn hawn 'l quddiem indikat bhala Market 4] l-Awtorità Intimata kkunsidrat, ikkonkludiet u konsegwentement iddecidiet illi: **3.3 Decision on the market definition** – *From the analysis outlined above, and in line with the Commission's recommendations, the MCA concludes that Market 4 is national in scope: includes all unbundled access (including shared access) products and services provided via the existing copper network (including access to the sub-loop); includes unbundled access services over fibre; excludes wholesale services provided over cable; excludes wholesale broadband access services;* **4.3 Decision on the assessment of SMP** – *Based on the analysis and evidence above, the MCA considers that GO enjoys SMP in the market for wholesale unbundled infrastructure access services. This conclusion is supported by a number of factors including GO's position as sole provider in the market, its vertical and horizontal integration, its economies of scale and scope, and the lack of countervailing buyer power;* **5.1 Potential competition problems** - *The MCA identified that as a result of the SMP position held by GO in the market there is a risk that GO may engage in discriminatory practices and/or exercise either vertical or horizontal leveraging. If unregulated GO may engage in both price and non-price discrimination that would effectively foreclose market entry. The MCA believes that non-price leveraging strategies such as denial of access, the discriminatory use or withholding of information, delaying tactics, quality discrimination and the imposition of undue requirements on, and with respect to, potential alternative service providers at the downstream level, may contribute significantly to the creation of a non-competitive environment. Without proper regulation, GO may resort to pricing strategies that give rise to a margin squeeze. GO is also able to access economies of scale and scope that are not so readily available to other operators competing on the downstream market, and therefore GO may exercise additional pressure on the margins of these operators. GO may also use other price-leveraging strategies such as price discrimination and cross-subsidisation. The MCA considers that horizontal leveraging applies when the dominant undertaking uses its position in one market to exert undue influence on other markets at the same level in the value chain. This form of leveraging can be exercised by GO as it operates in a number of horizontal wholesale markets and can potentially leverage its power from one market to another;* **5.5 Decision on the imposition of remedies** – *The MCA has concluded that GO holds SMP in the market for wholesale unbundled infrastructure access and shall therefore comply with the following obligations.* **5.5.1 Access for copper products and services** – *In accordance with Article 15 of the ECNSR, GO shall: continue to offer wholesale unbundled access to the local loop and sub loop (including shared access) and associated facilities, and accommodate reasonable requests for access to service variants; give OAOs access to specified network elements and/or associated facilities, where such access is required for the purpose of the provision of wholesale unbundled access to the local loop and sub loop; provide co-location or other forms of facility and site sharing, where*

applicable for the purpose of unbundled local loop and sub loop services; provide access to backhaul services for the purpose of unbundling of the local loop and sub loop, including Ethernet services, dark fibre and duct access. Go is therefore required to negotiate in good faith with undertakings requesting any of these access services. The MCA believes that GO should provide the necessary information relevant to the access obligation to OAOs. As a consequence, GO shall provide access to technical interfaces, protocols or other key technologies that are necessary for the interoperability of services, and the operational support systems or similar software that is necessary to ensure fair competition in the provision of unbundled local loop services. In particular, GO is to offer service level agreements (SLAs) to access seekers with respect to the provision of access to the local loop. This provides alternative operators with certainty as to the supply and repair of the wholesale input and hence allows them to compete in the downstream market. Go must provide all the aforementioned access-related remedies in a fair, timely and reasonable fashion and in conformity with the appropriate provision of its RUO.

5.5.2 Access for fibre (FTTH) products and services – *GO has started to deploy an FTTH network based on a PON configuration. In accordance with Article 15 of the ECNSR the MCA is therefore directing GO to offer a virtual unbundling local access (VULA) product where the FTTH network has been deployed. GO is required to negotiate in good faith with access seekers making a reasonable request for VULA access services. Where negotiations fail, the MCA shall intervene to determine whether such a request was reasonable or otherwise. In case of a dispute between the parties, when assessing the reasonableness or otherwise of a request for VULA access, the MCA shall take into consideration the technical and commercial terms under which the request is being made, as well as the access seeker's necessity for such a wholesale input. The MCA shall consider each request on a case by case basis. The obligation to negotiate a VULA access offer shall come into effect from the date of publication of this decision. Given the very recent announcement of the FTTH deployment, and the fact that a VULA offer will take some time to be compiled by GO and approved by the MCA, the MCA is directing GO to engage into commercial negotiations with access seekers until such time that a regulated VULA offer is completed. If during this period a commercial agreement is reached between GO and an access seeker, the MCA will consider taking this agreement as a basis for the VULA offer, subject that this is also provided to other access seekers on a transparent and non-discriminatory basis. The MCA maintains the right to revise, amend and effect changes to this offer should such course of action be required. Following the publication of this decision the MCA shall immediately start a consultative process with GO in order to establish the technical aspects and terms and conditions of the VULA offer.*

5.5.3 Non-discrimination – *In accordance with Regulation 13 of the ECNSR, GO, as a vertically integrated provider, is obliged to: apply equivalent conditions in equivalent circumstances to other undertakings providing equivalent services, and provide services and information to access seekers under the same conditions*

(including timescales) and of the same quality as it provides for its own downstream provider. The obligation of non-discrimination covers both price parameters as well as non-price parameters. This obligation ensures that GO does not withhold information, employ delaying tactics, impose undue requirements, provide low or discriminatory quality, engage in strategic design of products, and make discriminatory use of information which would put competing providers, and in turn consumers, at a disadvantage. This obligation shall apply equally to copper based access products as well as fibre based products. **5.5.4 Transparency for copper products and services** – In accordance with Regulation 12 of the ECNSR GO is required to: continue to maintain and publish a reference unbundling offer (RUO) for unbundled local loops and sub loops and associated facilities; give a detailed description of the relevant offerings broken down into components according to market needs, and the associated terms and conditions including prices; comply with its obligation to provide the minimum list of items to be included in a reference offer as set out in the Third Schedule to the ECNSR; continue to provide and publish appropriate descriptions, order forms and processes for unbundling services, the details of which are to be determined on a case-by-case basis; continue to be compliant with the MCA's decision related to local loop unbundling and GO's RUO, in particular as regards the provision of information related to its main distribution frames (MDFs) and co-location facilities, SLAs, timelines and determination of charges not established a priori. The MCA reserves the right to specify the precise information to be included in the RUO, the level of detail required and the manner of publication. In relation to access to ducts and dark fibre specifically serving as backhaul to local loop and sub loop unbundling, GO is not required to publish in the RUO the detailed conditions for access to these services. The technical conditions and pricing related to duct access and dark fibre are subject to commercial negotiations and the MCA may intervene on a case-by-case basis in the event of failed negotiations. This is without prejudice to any other general obligations at law that may be applicable to the sharing of passive infrastructure. In respect of Ethernet capacity for the purpose of backhaul services, GO is directed to follow all the conditions set in the decision entitled "MCA decision on the definition, assessment of competition and regulation of leased line markets". In relation to the pricing for Ethernet connections GO shall use the regulated pricing structure as set by the MCA. The proposed prices are currently under consultation – Local Dedicated Capacity – Pricing of Leased Lined and Ethernet Connections. **5.5.5 Transparency for fibre products and services** – The MCA has already taken steps to ensure the GO's RUO reflects the migration to FTTC. GO's RUO shall continue to be compliant with the MCA's decision of November 2011 that sets out the rules that regulate GO's ongoing migration to FTTC, in particular the obligation by GO to inform OAOs in advance of any exchange decommissioning. GO shall also continue to comply with the TVA obligation in the current form. Regarding the VULA obligation, as stated earlier on the MCA shall immediately start working with GO in order to develop a VULA reference offer covering its

FTTH network. The MCA is directing GO to provide a VULA reference offer to the MCA by no later than 31st December 2013. The MCA shall during this period consult with GO on the exact details that need to be set in this reference offer. As stated earlier on, in the case that GO and any access seeker conclude a commercial agreement for VULA access the MCA will consider adopting such agreement as the reference offer. In the case that during this period no access is requested or no agreement is reached, GO shall provide the MCA with its VULA offer by the 31st December 2013. In addition to the above, GO is also obliged to continue to provide detailed quarterly updates to the MCA on its network upgrade in particular on any extensions of the rollout of FTTH. Whilst, the MCA has already informed GO on the type of information that it needs to provide, the MCA reserves the right to make further changes to such requests.

5.5.6 Price control and cost accounting - *In the light of the risk that GO may charge excessive prices for wholesale access, the MCA shall continue to impose the obligation of cost orientation on GO for the setting of prices for local loop and sub loop access services. In setting these copper access prices the MCA shall continue using the same costing methodology currently applied. As stated earlier, GO has the obligation to negotiate in good faith all reasonable requests for access in relation to duct access and dark fibre for the purposes of backhaul services. The MCA believes that access to these facilities should be granted on commercial terms. Consequently, GO is not obliged to publish in its RUO the prices of the duct access and dark fibre products. Nevertheless, in the event that commercial negotiations fail the MCA shall uphold the principle of cost orientation to set the prices for duct access and dark fibre products used for backhaul on a case by case basis. The MCA shall also uphold the principle of cost orientation when setting the price of VULA access as set forth in the Commission's NGA Recommendation. However, in the event that a VULA offer is concluded on commercial terms the MCA will consider adopting that agreement including the prices set therein, as a basis for the reference VULA offer. In addition, where deemed necessary and justified, the MCA may decide to adopt other forms of price control for the setting of VULA prices - such as through the use of economic replicability tests - should this be in the interest of consumers. Any such changes to the price control obligation will be duly consulted upon with all stakeholders prior to coming into effect. In case that the MCA will have to set the price for VULA, in accordance with Regulation 16 of the ECSNR, and in order to encourage FTTH investments by GO, the MCA shall be taking into account the provisions on profitability as stated in the NGA Recommendation. In order to supplement the cost orientation obligation, GO shall continue to apply a cost accounting system which will provide the MCA with detailed information regarding GO's product costs and ensure that fair, objective and transparent methodologies are followed by the operator in allocating costs to the identified regulated products. GO shall continue to support such a system by virtue of the MCA decisions on the implementation of cost-based accounting systems. These decisions will remain in force until such time as the MCA issues new guidelines. The cost accounting obligation shall also be applicable to fibre*

based products. 5.5.7 Accounting separation - In accordance with Regulation 14 of the ECNSR, GO shall continue to apply the present accounting separation system for copper access services. In this regard, GO shall continue to be subject to the accounting separation obligation described in the MCA decision on Accounting Separation. Given that the FTTH deployment and take-up are still negligible, the MCA believes that it is not proportionate to extend the accounting separation to cover fibre access products at this very early stage of deployment. The MCA believes that such a burden would be disproportionate at this stage, as the costs would outweigh the practical benefits resulting from implementation of this remedy. Nonetheless, the MCA reserves the right to impose the accounting separation obligation should it consider that the market has developed enough to warrant such a change. The MCA will continue to monitor the market, in particular the deployment of FTTH by GO, to ensure that the remedies set above remain justified and proportionate. The MCA reserves the right to revise any of these obligations at any time in line with changing market realities.

Id-Decizjoni ta' l-Awtorità Intimata dwar Market 4 u b'mod partikolari d-decizjonijiet numerati 4.3, 5.1 u 5.5 qed jigu fortemment kritikati u kontestati mis-socjetà Rikorrenti li hassitha aggravata b'dawk l-istess decizjonijiet.

Is-socjetà Rikorrenti tibbaza l-appell taghha mid-Decizjoni ta' l-Awtorità Intimata dwar Market 4 jew ahjar mid-decizjonijiet numerati 4.3, 5.1 u 5.5 f'dik id-Decizjoni, fuq is-segweni aggravji:

- Id-decizjonijiet numerati 4.3 u 5.1 mhux oggettivi u lanqas proporzjonati u huma in vjolazzjoni tal-Ligi;
- Is-socjetà Rikorrenti ma ghandhiex dominanza u/jew is-Settur in kwistjoni ghandu jigi determinat kompetittiv u ghalhekk l-Awtorità Intimata ma kellha timponi l-ebda obbligu fuqha, u dan a tenur ta' dak provdut fir-Regolament 5(3) tal-Legislazzjoni Sussidjarja 399.28, Regolamenti dwar Networks u Servizi ta' Komunikazzjonijiet Elettronici (Generali), u konsegwentement ghalhekk id-decizjoni numerata 5.5 hija nulla u bla effett;
- F'kaz ta' ezitu negattiv fir-rigward ta' l-ewwel zewg aggravji, l-obbligi imposti fuqha biss, partikolarment dawk li gew estizi ghal *fibre* u *next generation access* (NGA), ma humiex proporzjonati u gusti kif sancit fil-Ligi u huma eccessivi u diskriminatorji fil-konfront taghha u ghalhekk id-decizjoni numerata 5.5 hija nulla u bla effett.

A bazi ta' dawn l-aggravji s-socjetà Rikorrenti titlob li t-Tribunal: (i) jirrevoka jew jannulla d-decizjonijiet numerati 4.3 u 5.1 moghtija mill-Awtorità Intimata fid-Decizjoni dwar Market 4 u a tenur ta' l-Artikolu 39(1) tal-Kap.418 tal-Ligijiet ta' Malta jirreferi l-kwistjoni lura lill-Awtorità Intimata; u li (ii) jirrevoka jew jannulla d-decizjoni numerata 5.5 kollha jew partijiet minnha moghtija mill-Awtorità Intimata fid-Decizjoni dwar Market 4 u a tenur ta' l-

Artikolu 39(1) tal-Kap.418 tal-Ligijiet ta' Malta jirreferi l-kwistjoni lura lill-Awtorità Intimata.

L-Awtorità Intimata topponi għall-appell tas-socjetà Rikorrenti u titlob li t-talbiet tagħha jigu michuda stante li: (i) in linea preliminari dan it-Tribunal ma għandux il-*vires* li jirreferi l-kwistjoni lura lill-Awtorità f'kaz li l-appell tas-socjetà Rikorrenti jigi milqugh *in toto* jew in parte, izda se mai tkun l-istess Awtorità li jkollha tifli l-impatt regolatorju ta' tali decizjoni tat-Tribunal u tara jekk ikunx hemm bzonn ta' xi forma ta' azzjoni regolatorja da parti tagħha; u (ii) fil-meritu, il-fatt li Market 5 instab li huwa kompetittiv u s-socjetà Rikorrenti m'hijiex dominanti f'tali suq ma jfissirx b'mod awtomatiku li l-istess għandu japplika għal Market 4. Ma hemmx dubju li mill-analizi magħmula mill-Awtorità Intimata jirrizulta b'mod car li s-socjetà Rikorrenti hija dominanti f'Market 4 u għalhekk l-istess Awtorità kellha l-obbligu li timponi obbligi regolatorji fuq is-socjetà Rikorrenti u l-obbligi regolatorji hekk imposti fuqha huma proporzjonati u ma humiex diskriminatorji fil-konfront tagħha.

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

F'tali rigward is-socjetà Rikorrenti tikkontendi li *l-Wholesale Unbundling jittratta settur kreat b'mod artificjali u kemm xejn fittizju u flimkien mal-Wholesale Broadband Access jaqa' taht l-istess kappa ta' Wholesale Broadband Markets, li huma swieq fejn operatur jaghti access u/jew servizzi lil operatur iehor biex dan ta' l-ahhar ikun jista' jikkompeti mieghu u jaghti servizz ta' broadband lill-konsumatur ahhari fis-suq retail. Illi peress li dawn is-swieq l-effett tagħhom jinhass fil-livell tar-retail u ben si direttament fuq dak li jikkonsma jew juza l-konsumatur, l-Awtorità għandha tiddetermina jekk ir-*retail market* ta' *broadband services* huwiex kompetittiv jew le. L-Awtorità din l-analizi estensiva għamlitha u sabet li s-suq huwa kompetittiv u fi kliem l-Awtorità: "... the retail broadband Market in Malta is well developed, with high penetration, attractive offers and overall a relatively competitive level ... The incumbents compete on the basis of prices and products, thus brining reasonably low prices and innovation, such as bundles and higher speeds". Din l-analizi tar-retail market wasslet lill-Awtorità biex fid-Decizjoni tal-WBA [Wholesale Broadband Access] tiddetermina li s-suq tal-WBA huwa kompetittiv u għaldaqstant m'hemmx lok li timponi ebda obligazzjoni regolatorja. Imma l-istess analizi li logikament taffettwa u hija parti intrinsika wkoll mill-Wholesale Unbundled Infrastructure Decision ma gietx inkluza f'din l-istess Decizjoni. Dan wassal saħansitra biex l-Awtorità*

tghid li fid-Decizjoni tal-Wholesale Unbundled Infrastructure li dan is-sug m'huwiex kompetittiv⁹.

Wara li qies b'mod akkurat dak affermat u sottomess mis-socjetà Rikorrenti, anke tramite x-xhieda minnha prodotti u s-sottomissjonijiet minnha avvanzati fin-Nota ta' Osservazzjonijiet taghha u fit-trattazzjoni orali finali, it-Tribunal wasal ghall-konkluzzjoni li s-socjetà Rikorrenti qed tibbaza dan l-aggravju fuq interpretazzjoni superficjali tal-qafas regolatorju li jirregola u jiddetta s-settur tal-Komunikazzjonijiet Elettronici u anke interpretazzjoni superficjali tad-Decizjoni ta' l-Awtorità Intimata dwar Market 4.

Jibda biex jigi osservat li a tenur tar-Regolament 5(1) tar-Regolamenti dwar Networks u Servizi ta' Komunikazzjonijiet Elettronici (Generali), Legislazzjoni Sussidjarja 399.28¹⁰, *l-Awtorità ghandha, wara li tkun fissret suq kifhemm fl-artikolu 9 ta' l-Att, taghmel analisi ta' dak is-sug b'kont mehud tas-swieg identifikati fir-rakkomandazzjonijiet¹¹ u bl-akbar konsiderazzjoni moghtija lil-linji gwida mahrugin mill-Kummissjoni Ewropea kif hemm fl-Artikolu 15 tad-Direttiva Kwadru: Izda meta l-Awtorità tqis li jkun adatt, hija ghandha taghmel dik l-analisi b'kollaborazzjoni ma' l-awtorità nazzjonali kompetenti responsabbli ghal affarijiet ta' kompetizzjoni. A tenur tas-subregolament 7 ta' l-imsemmi Regolament 5¹²: l-Awtorità ghandha meta tkun qeghda tiehu xi mizuri taht dan ir-regolament, hliel ghas-subregolament (5), issewgi l-proceduri msemmija fir-regolament 7 ta' dawn ir-regolamenti u fl-artikolu 4A ta' l-Att ghat-Twaqqif ta' Awtorità ta' Malta dwar il-Komunikazzjoni. L-Awtorità ghandha taghmel analisi tas-sug rilevanti u tavza dwar il-mizura abbozzata korrispondenti kif hemm fir-regolament 7: (a) fi zmien tlett snin minn meta tigi addottata mizura precedent li jkollha x'taqsam ma' dak is-sug: Izda dan iz-zmien jista' jigi estiz sa' tliet snin ohra, meta l-Awtorità tkun tat avviz ta' estensjoni proposta motivata lill-Kummissjoni Ewropea u l-Kummissjoni Ewropea ma tkunx oggezzjonat ghal dik l-estensjoni fi zmien xahar mill-avviz; jew (b) fi zmien sentejn minn meta tigi adottata rakkomandazzjoni riveduta fuq is-swieg rilevanti msemmija fl-Artikolu 15 tad-Direttiva Kwadru, dwar daww is-swieg li ma jkunux gew qabel avzati lill-Kummissjoni Ewropea.*

Is-swieg identifikati fil-Commission Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on common regulatory framework for electronic communications networks and services, li l-iskop taghha appuntu huwa to identify those product and service

⁹ Para. A(1) sa' (3) tar-Rikors promotur, fol. 7 u 8 tal-process.

¹⁰ Ir-Regolament jirrifletti l-Artikolu 16(1) tad-Direttiva 2002/21/EC On a Common Regulatory Framework for Electronic Communications Networks and Services (Framework Directive).

¹¹ Sottolinear tat-Tribunal.

¹² Ir-Regolament jirrifletti l-Artikolu 16(6) tad-Direttiva 2002/21/EC.

markets in which ex ante regulation may be warranted in accordance with Article 15(1) of Directive 2002/21/EC... huma s-segwent¹³: Retail Level – 1. Access to the public telephone network at a fixed location for residential and non-residential customers; Wholesale Level 2. Call origination on public telephone network provided at a fixed location; 3. Call termination on individual public telephone networks provided at a fixed location; 4. Wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location; 5. Wholesale broadband access; 6. Wholesale terminating segments of leased lines, irrespective of the technology used to provide leased or dedicated capacity; u 7. Voice call termination on individual mobile networks.

Già mill-Framework Directive u mir-Rakkomandazzjoni tal-Kummissjoni Ewropea johrog b'mod car li kuntrarjament ghal dak pretiz mis-socjeta' Rikorrenti Market 4, ossia s-suq li jittratta dwar *Wholesale Unbundling Infrastructure Access*, ma huwix settur kreat b'mod artificijali u kemm xejn fittizju anzi huwa suq specifiku li gie identifikat mill-Kummissjoni Ewropea bhala suq suxxettibbli ghal *ex ante regulation* u li minn zmien ghal zmien ghandu jigi analizzat min-*National Regulatory Authorities*, fil-kaz nostrali l-Awtorità Intimata, ghall-fini li jigi determinat jekk hemmx lok ghal tali *ex ante regulation*. Ghalkemm Market 4 u Market 5 entambe jaqghu taht is-settur tal-Wholesale u jista' jitqies li l-istat ta' suq wiehed jeffettwa s-suq l-iehor, b'daqshekk ma jfissirx li fihom infushom ma jikkostitwixxux zewgt iswieq distinti minn xulxin. In effetti Market 4, Market 5 u Market 6 (ghalkemm dan ta' l-ahhar mhux suq meritu ta' dawn il-proceduri) *refer to other types of facilities or networks or, to the extent that they concern public telephone networks at fixed location, to facilities or resources located on these networks but not included in the markets belonging to the first tier. These other facilities or networks can be fixed or mobile. Wholesale. The second tier entirely concerns wholesale activities. As the object dealt with in the Recommendation is access, they all concern access. The difference between them is the type of resource to which access is sought. Market 5 concerns access to broadband capacity¹⁴. Market 6 relates to leased lines, in particular lines located on the local loop. Market 4 concerns all types of other resources to which physical access can be sought¹⁵.*

Il-fatt li Market 4 huwa suq fih innifsu u suq distint minn Market 5 johrog car ukoll mill-*Commission Recommendation of 20 September 2010 on regulated access to Next Generation Access Networks (NGA)* fejn fil-preamboli jinghad *National Regulatory Authorities (NRAs) under Article 16(4) of Directive 2002/21/EC are developing regulatory responses to the challenges raised by the transition from copper to fibre-based networks. The relevant markets in*

¹³ Annex I tar-Rakkomandazzjoni.

¹⁴ Enfasi tat-Tribunal.

¹⁵ EU Electronic Communications Law – Competition and Regulation in the European Telecommunications Market, 2nd Edition – Paul Nihoul & Peter Rodford, pagna 213. Enfasi tat-Tribunal.

this connection are the markets for wholesale network infrastructure access (Market 4) and wholesale broadband access (Market 5)¹⁶. ... Demand and supply conditions are expected to change significantly at both wholesale and retail level following the deployment of NGA networks. Therefore new remedies may need to be imposed, and a new combination of active and passive access remedies on Markets 4 and 5 may be necessary¹⁷. ... Where SMP is found within Market 4 an appropriate set of remedies should be applied¹⁸. Fil-korp ta' l-istess Rakkomandazzjoni Market 4 u Market 5 huma trattati separatament wiehed mill-iehor u r-rakkomandazzjonijiet rispettivi huma where SMP is found on Market 4, NRAs should impose an appropriate set of remedies taking into account in particular the principles set out below...¹⁹ u where SMP is found on Market 5, wholesale broadband access remedies should be maintained or amended for existing services and their chain substitutes. NRAs should consider wholesale broadband access over VDSL as a chain substitute to existing wholesale broadband access over copper-only loops²⁰.

Id-distinzjoni bejn Market 4 u Market 5 tohrog cara wkoll mill-Commission Recommendation of 11 September 2013 on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment fejn fil-korp ta' din ir-Rakkomandazzjoni jinghad u jigi puntwalizzat li the principles set out in this Recommendation apply to the market for wholesale network infrastructure access (market 4) and to the wholesale broadband access market (market 5) referred to in the Recommendation 2007/879/EC or any markets susceptible to ex ante regulation identified by NRAs during a market analysis which substitute for these and cover the same network layers. This includes, inter alia: (i) access to the civil engineering infrastructure; (ii) unbundled access to the copper and fibre loops; (iii) unbundled access to the copper sub-loop; (iv) non-physical or virtual network access; and (v) wholesale broadband access (bitstream services) over copper and fibre networks (comprising, among others, ADSL, ADSL2+, VDSL and Ethernet).

Fid-dawl ta' dan hija korretta s-sottomissjoni ta' l-Awtorità Intimata li d-distinzjoni bejn iz-zewgt iswieg wholesale, u cioè l-Market 4 u l-Market 5 hija netta u hija dettata minn infrastruttura ghal kollox differenti. B'dan il-mod min irid jixtri, fuq livell wholesale, prodott supplit f'Market 5 ma jistax jixtri prodott supplit f'Market 4 ghax il-prodotti fiz-zewgt iswieg m'humix interchangeable. Huwa proprju ghalhekk illi l-Kummissjoni Ewropeja tohloq din id-distinzjoni bejn iz-zewgt iswieg u tirrakkomanda, fil-Commission Recommendation of 17 December 2007 on relevant product and service markets within electronic communications sector susceptible to ex ante

¹⁶ Preambolu (3) tar-Rakkomandazzjoni.

¹⁷ Preambolu (5) tar-Rakkomandazzjoni.

¹⁸ Preambolu (11) tar-Rakkomandazzjoni.

¹⁹ Para.12 tar-Rakkomandazzjoni.

²⁰ Para. 31 tar-Rakkomandazzjoni.

regulation in accordance with Directive 2002/21/ec of the European Parliament and of the Council on common regulatory framework for electronic communications networks and services, illi dawn iz-zewgt iswieq jigu analizzati separatament²¹.

Stabbilit li Market 4 u Market 5, ghad illi entrambe jaqghu taht is-settur tal-Wholesale, huma zewgt iswieq distinti minn xulxin u li kull wiehed minnhom huwa suxxettibbli ghal *ex ante regulation*, tant illi kull wiehed minnhom irid jigi analizzat minn zmien ghal zmien ghall-fini ta' imposizzjoni ta' tali *ex ante regulation*, jehtieg issa tigi trattata l-kwistjoni ulterjuri sollevata mis-socjetà Rikorrenti fl-ewwel aggravju ta' l-appell taghha u cioè kenitx korretta u legittimata l-Awtorità Intimata f'li timponi *ex ante regulation* fuq Market 4 meta sabet li s-suq *retail* u Market 5 huma entrambe relattivament kompetittivi tant illi ma imponiet l-ebda *ex ante regulation* fuqhom.

Fin-Nota ta' Osservazzjonijiet taghha s-socjetà Rikorrenti tissottometti li *is-swieq wholesale tal-Broadband Internet jikkomprenđu kemm il-Wholesale Broadband Access Market (maghruf ukoll bhala Market 5) li gie meqjus kompetittiv, u, kif ukoll il-Wholesale Unbundled Access to the Local Loop (market 4) li hu suggett ghal dan l-appell. Dawn huma swieq ta' natura wholesale li bihom operatur li ghandu infrastruttura tieghu jista' jaghti access u/jew servizz ta' Broadband lill-utent ahhari fuq is-suq retail. Kemm l-Awtorità u l-esperti taghha u kif ukoll il-GO p.l.c. qablu li s-suq retail ghandu jigi analizzat qabel ma jigu analizzati s-swieq wholesale, b'hekk jigi analizzat jekk l-utent ahhari (il-konsumatur) qieghedx igawdi minn servizz ta' Broadband kompetittiv. U din l-analizi ssir irrispettivament mit-teknologija, tip jew livell ta' access jew servizz moghtija mill-lat ta' wholesale broadband access. Illi dan is-suq retail tal-Broadband gie meqjus mill-Awtorità li hu kompetittiv wara analizi estensiva. Biss, kuntrarjament ghal li sar tul il-process ta' konsultazzjoni kemm f'Malta u mal-Kummissjoni Ewropeja, l-analizi u l-konkluzjoni tas-suq retail sparixxew ghal kollox u ma hemm l-ebda referenza ghalihom fid-decizjoni ta' l-Awtorità dwar market 4 li hu suggett ghal dan l-appell. Kemm l-Awtorità u kif ukoll il-GO p.l.c. jaqblu li anki fil-livell wholesale is-suq tal-Broadband f'Malta huwa karatterizzat minn kompetizzjoni bejn infrastrutturi (networks). Fil-fatt, minhabba dan, il-market 5 gie meqjus kompetittiv u dan mhux kontestat. Illi kif hareg car tul il-kaz, din il-kompetizzjoni fil-livell retail u anki bejn infrastrutturi ilha prezenti fis-suq Malti ghal zmien twil. Illi fix-xhieda hareg car ukoll li l-kompetizzjoni fis-suq sehhet mhux ghax dahal xi operatur iehor apparti dawk ezistenti. Gie stabbilit ukoll li l-kompetizzjoni fis-suq sehhet minkejja li ma kien hemm ebda operatur iehor li kkommetta li juza l-offerta tal-GO p.l.c. tal-wholesale unbundled access to the local loop li fiha kundizzjonijiet u prezzijiet li huma regolati strettament mill-Awtorità. Illi din il-kompetizzjoni sehhet ukoll minghajr il-bzonn ta' regolamentazzjoni fuq il-Wholesale*

²¹ Nota ta' l-Osservazzjonijiet ta' l-Awtorità Intimata, para. 11 a fol. 961 u 962 tal-process.

Broadband Access Market (market 5) li ilhom li tnehew sa' mill-2007. Huwa dan kollu li precizament jaghmel is-suq Malti tal-Broadband ferm partikolari fost il-pajjizi membri ta' l-Unjoni Ewropeja. Illi fil-kawza gie determinat u kkonfermat mit-testimonjanzi ta' l-esperti li l-iskop ta' l-identifikazzjoni u regolamentazzjoni tas-swieq wholesale, bhal ma huwa market 4 suggett ta' dan l-appell, huwa li jindirizza kazi fejn tezisti nuqqas ta' kompetizzjoni fis-suq retail, jigifieri s-suq ahhari ta' l-utent. Dan huwa ikkonfermat ukoll fir-Recommendation on Relevant Markets ta' l-2007, li huwa dokument li jiggwida lill-awtoritajiet fil-pajjizi membri ta' l-UE dwar liema swieq ghandhom janalizzaw. Recital 15 ta' din ir-recommendation fost ohrajn ighid li: The Recommendation therefore mainly identifies wholesale markets, the appropriate regulation of which is intended to address a lack of effective competition that is manifest on end-user markets. Peress illi ma huwiex kontestat li f'Malta fis-suq retail tal-Broadband ma hemmx sitwazzjoni ta' nuqqas ta' kompetizzjoni, u peress li wkoll ma huwiex kontestat li hawn kompetizzjoni fuq servizzi, provdituri u kwalità kif ukoll kompetizzjoni bejn infrastrutturi differenti, u dawn gew ampjament konfermati mill-Awtorità, l-Awtorità skont il-qafas legali ezistenti ma kellhiex poter li tirregola u kellha tiddikjara li ma hemmx dominanza u lanqas skop ghar-regolamentazzjoni ta' dan is-suq. Illi in vista tas-suespost huwa legittimu u pertinenti li wiehed jistaqsi ghaliex din l-analizi hekk krucjali w importanti fuq is-suq tar-retail, ma gietx inkluzo u maghmula pubblika fil-konsiderazzjonijiet tad-decizjoni dwar market 4 ta' l-Awtorità (ara punt 4.5 ta' din in-nota ta' osservazzjonijiet). Illi wiehed irid ukoll jinnota illi waqt il-kontro-ezami l-espert ta' l-Awtorità ikkonferma li market 4 huwa kompetittiv, izda skont hu l-Awtorità ddecidiet li xorta kellha tirregola ghax skont l-espert ta' l-Awtorità market four currently with effective competition but as a risk in the future, especially with the removal of fibre, there will be a duopolistic situation. Illi kif gie konfermat ukoll waqt l-istess kontro-ezami, la din ir-raguni hekk krucjali li fuqha bbazat id-decizjoni taghha l-Awtorità u lanqas il-bazi legali, ma jidhru mkien fid-decizjoni. Illi wiehed irid isostni li, apparti n-nuqqas ta' trasparenza, certezza legali u obbligu sancit mill-Ligi u bi ksur tad-drittijiet tal-GO p.l.c., tali ragunament bhal dak spjegat f'punt 4.14 hawn fuq ma jregix, partikolarment fl-isfond tas-suq kif zviluppa, il-poteri u d-doveri ta' l-Awtorità li taghmel determinazzjoni u analizi tas-swieq, is-similaritajiet ta' Market 4 u Market 5 u anki l-facilità li ghandu l-konsumatur li jista' jaghzel u jiddetta l-andament tas-suq tal-Broadband²².

Fil-fehma tat-Tribunal l-ewwel kwistjoni li ghandha tigi trattata hija dik fejn is-socjetà Rikorrenti tallega li fid-Decizjoni dwar Market 4 l-Awtorità Intimata agixxiet b'nuqqas ta' trasparenza u b'mod li ppregudikat ic-certezza legali minnha mehtiega ai termini tal-Ligi. Is-socjetà Rikorrenti tibbaza din il-kontestazzjoni fuq l-affermazzjoni li fl-imsemmija Decizjoni l-Awtorità ma ghamlet l-ebda referenza: (a) ghall-analizi dwar is-suq retail li nstab li huwa

²² Para. 4.2 sa' 4.16 tan-Nota ta' Osservazzjonijiet tas-socjetà Rikorrenti.

kompetittiv; u (b) għall-konstatazzjoni w osservazzjoni li dan is-suq partikolari, ossia Market 4, jehtieg li fi kwalunkwe kaz jigi sottopost għal *ex ante regulation* anke minhabba l-periklu ta' *duopolistic situation* bejn is-socjetà Rikorrenti u Melita p.l.c., kif affermat minn Stefan Piott, l-espert ta' l-Awtorità Intimata, in kontro-ezami waqt is-seduta tat-8 ta' Jannar 2014²³, skontha entrambe fatturi fuq liema giet ibbazata d-decizjoni ta' l-Awtorità Intimata dwar Market 4.

Fil-fehma tat-Tribunal din il-kontestazzjoni jew ahjar akkuza tas-socjetà Rikorrenti fil-konfront ta' l-Awtorità Intimata hija għal kollox gratuwita u arbitrarja in kwantu bbazata fuq konsiderazzjoni u evalwazzjoni superficjali tal-process li jwassal għad-decizjonijiet finali ta' l-Awtorità Intimata.

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

Dan huwa dak li effettivament għamlet l-Awtorità Intimata fil-kaz in ezami billi fl-ewwel lok ipubblikat id-dokument *Wholesale Broadband Markets - Identification and Analysis of Markets, Determination of Market Power and Setting of Remedies – Consultation Document* – fil-15 ta' Gunju 2012, li ittratta fid-dettal fost affarijiet ohra dwar ir-*Retail Broadband Market*, il-*Market for Unbundled Access* (Market 4) u il-*Wholesale Broadband Market*, ossia Market 5. Il-konsiderazzjonijiet, osservazzjonijiet u konsegwenti konkluzzjonijiet ta' l-Awtorità Intimata gew sottomessi għall-konsultazzjoni mal-partijiet interessati fosthom is-socjetà Rikorrenti u dawn l-istess konsiderazzjonijiet, osservazzjonijiet u konkluzzjonijiet jiffurmaw, wara naturalment li għadda l-process kollu li jwassal għad-decizjoni finali, il-bazi tad-decizjonijiet ta' l-Awtorità Intimata kemm dwar Market 5 kif ukoll dwar Market 4. In effetti già fil-bidu tad-Decizjoni ta' l-Awtorità Intimata dwar Market 4 l-istess Awtorità kjarment tipprovdi li *this decision summarises the findings of a more detailed study that was published for national consultation on the 15th June 2012. During this consultation period the MCA received three responses from Melita p.l.c., GO p.l.c. and Vodafone Malta Ltd.* Semplicement għaliex l-Awtorità Intimata ma qagħdetx terga' tirrepeti dak kollu li hemm fil-*Consultation Document* ma jfissirx li ma haditx l-istess in konsiderazzjoni u li agixxiet b'nuqqas ta' trasparenza u b'mod li ppregudikat

²³ Fol. 925 sa' 950 tal-process.

ic-certezza legali li hija obbligata li tipprovdi ai termini tal-Ligi, anzi piuttost il-kuntrarju.

In effetti fil-konkluzjoni taghha dwar il-*retail broadband market*, liema konkluzzjoni flimkien mal-konsiderazzjonijiet relattivi, jigi ribadit, giet sottomessa ghall-konsiderazzjoni tal-partijiet interessati waqt il-process ta' konsultazzjoni pubblika, l-Awtorità Intimata tghid: *as discussed in previous sections, the retail broadband market in Malta is well developed, with high penetration, attractive offers and overall a relatively competitive level. There are two vertically and horizontally integrated "incumbents" with two different infrastructures, each enjoying what can be assumed to be comparable economies of scale and scope. The incumbents compete on the basis of prices and products, thus bringing reasonably low prices and innovation, such as bundles and higher speeds. However, Vodafone has failed to make an impact on the market, which is increasingly moving towards multiple-play services. Also, despite the current good level of competition in the market, the two established incumbents may have a common long-term interest in protecting revenues from their existing customer base by reducing the level of competition at a later stage. The MCA will therefore pay close attention to forthcoming developments, and the impact these might have on the broadband markets*²⁴.

Fil-fehma tat-Tribunal minn din il-konkluzjoni, kif ukoll in realtà mill-*Consultation Document* kollu kemm hu, tohrog cara l-posizzjoni ta' l-Awtorità Intimata fir-rigward tal-*Broadband Markets* minkejja l-fatt li sabet illi l-*retail broadband market* huwa relattivament kompetittiv u ghalhekk id-Decizjoni finali taghha dwar Market 4 ma kellhiex tkun daqstant ta' sorpriza jew ahjar daqstant inkomprensibbli ghas-socjetà Rikorrenti daqskemm taghti ad intendere li hi fil-proceduri odjerni. In effetti anke dak affermat minn Stefan Piott in kontro-ezami waqt is-seduta tat-8 ta' Jannar 2014 u li fuqu tishaqq is-socjetà Rikorrenti bhala prova ta' l-allegat n-nuqqas ta' trasparenza ta' l-Awtorità Intimata, jsib konferma f'din il-konkluzzjoni ta' l-Awtorità fejn kjarament tghid li *despite the current good level of competition in the market, the two established incumbents may have a common long-term interest in protecting revenues from their existing customer base by reducing the level of competition at a later stage. The MCA will therefore pay close attention to forthcoming developments, and the impact these might have on the broadband markets*²⁵.

Kuntrarjament ghal dak pretiz mis-socjetà Rikorrenti l-fatt li l-Awtorità Intimata sabet illi r-*retail broadband market* huwa relattivament kompetittiv u li Market 5 ma jehtiegx *ex ante regulation* ghaliex *given that no SMP designation is made in this market, the MCA will not impose any ex-ante regulatory obligations on the Maltese wholesale broadband market*, ma

²⁴ Para. 4.4 Conclusion on retail broadband market tal-Consultation Document.

²⁵ Sottolinear tat-Tribunal.

jfissirx b'mod kwazi awtomatiku li Market 4 ukoll ma jehtiegx jew ahjar ma ghandux ikun assoggettat ghal *ex ante regulation*. Ir-raguni ghalfejn dan huwa hekk hija kjarment spjegat minn Stefan Piott, rapprezentant ta' Analysys Mason, l-esperti inkarigati mill-Awtorità Intimata, in risposta ghal domanda li sariltu in kontro-ezami waqt is-seduta tat-8 ta' Jannar 2014²⁶. Stefan Piott gie mistqosi: *we've established that the retail market is competitive, so why did you ... feel the need that you should impose more regulation, more remedies which come at a cost on GO, if the retail market is competitive and there's infrastructure based competition, there is competition as well irrespective of any third access seeker, and there is no access seeker. So why did the Authority feel the need, what is the problem here being identified to impose remedies?* Huwa rrisponda: *so in a very concise way just let me make this point: in all EU countries the retail broadband market has been found to be effectively competitive but it is competitive in the sense to what's happening also on the wholesale market. So in all EU countries there is no intervention on the retail market and the regulators are focusing on the wholesale. Now to come back to your question, what was the need, so the need as I mentioned as I we discussed before, yes there is effectively competition on the broadband market, however with the strength of having a market that will evolve to a duopolistic situation, what is important as a safeguard is to ensure potential market entry which I think is really important. If as we discussed already, market five is not regulated which is quite exceptional as regards to other EU countries, if you also remove any obligation to negotiate to have an access on the market four, it means that you won't have any control anymore on what's happening on the wholesale market and when Go and Melita are the only players with comparable products with no one able to get in the market on a relative short term basis, there the interest from an economic perspective, it makes sense. If you are the only two in the market and nobody can get in, your interest is not to have some strong competition to maintain, maybe slightly increase in price and make as much margin as you can.*

Dak affermat minn Stefan Piott jinsab konfermat u korroborat fuq livell iktar generali mill-Kummissjoni Ewropea kemm fil-*Commission Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services* kif ukoll u b'mod partikolari fil-*Commission Recommendation of 20 September 2010 on regulated access to Next Generation Access Networks (NGA)*. Fil-preambolu (15) tar-Rakkomandazzjoni ta' l-2007, liema preambolu ghandu jinqara kollu kemm hu u mhux jittiehdu siltiet minnu 'l barra mill-kuntest kollu taghhom, il-Kummissjoni tghid *regulatory controls on retail services should only be imposed where national regulatory authorities consider that relevant wholesale measures or measures regarding carrier selection or pre-selection*

²⁶ Fol. 925 sa' 950 tal-process.

would fail to achieve the objective of ensuring effective competition and the fulfillment of public interest objectives. By intervening at the wholesale level, including with remedies which may affect retail markets, Member States can ensure that as much of the value chain is open to normal competition processes as possible, thereby delivering the best outcomes for end-users. This Recommendation therefore mainly identifies wholesale markets, the appropriate regulation of which is intended to address a lack of effective competition that is manifest on end-user markets. Should a national regulatory authority demonstrate that wholesale interventions have been unsuccessful, the relevant retail market may be susceptible to ex ante regulation provided that the three criteria set out above are met. Fil-preamblu (5) tar-Rakkomandazzjoni ta' l-2010 il-Kummissjoni tghid: demand and supply conditions [kundizzjonijiet li fost ohrjan jeffettwaw il-kompetittivita fis-swieq] are expected to change significantly at both wholesale and retail level following the deployment of NGA networks [li in verita huwa l-qofol tal-kwistjoni in ezami]. Therefore new remedies may need to be imposed and a new combination of active and passive remedies on Markets 4 and 5 may be necessary.

Proprio ghaliex Market 4 jittratta dwar *Wholesale Physical Network Infrastructure*, liema infrastuttura ma hijiex facilment replikabbli minn operatur iehor anke minhabba kwistjonijiet ta' spejjez ingenti, ir-regolamentazzjoni *ex ante* ta' dan is-suq hija ferm importanti ghaliex jekk is-swieq l-ohra ma humiex regolati in kwantu misjuba kompetittivi jew ta' l-inqas relattivament kompetittivi, operatur li jkollu posizzjoni b'sahhita fis-suq tal-*Wholesale Physical Network Infrastructure*, iktar u iktar jekk ikun l-uniku operatur attiv ftali suq – hekk kif inhu l-kaz in ezami, jista' fin-nuqqas tad-debitament regolamentazzjoni jabbuza minn tali posizzjoni f'dan is-suq ghall-fini li jeffettwa l-kompetittivita tas-swieq l-ohra partikolarment jekk ikun jopera fihom ukoll bil-provvista ta' servizzi relattivi, partikolarment jekk ikun qed jintroduci jew fil-process li jintroduci teknologija gdida bhal ma hi t-teknologija tal-Fibre-To-The-Home (FTTH). Fin-nuqqas ta' debita regolamentazzjoni tali operatur jista' jew ma jipprovdi access lil xi operatur iehor, potenzjalment kompetittur fis-settur tas-servizzi, interessat f'li jipprovdi servizz ta' *broadband* jew inkella jista' jimponi jew jiffissa prezzijiet mhux viabbli ghal jew li ma jistghux jigu riplikati minn operaturi ohra (*price squeeze*) ukoll potenzjalment kompetituri tieghu fis-settur tas-servizzi.

Fid-dawl ta' dan appena osservat it-Tribunal hu tal-fehma li hija korretta l-Awtorita Intimata meta fin-Nota ta' l-Osservazzjonijiet taghha tosserva li *dan* (ossia l-imposizzjoni ta' *ex ante regulation* fuq Market 4) *ghandu jigi ikkunsidrat f'kuntest illi GO ser tkun l-uniku operatur illi joffri l-fibre li ghandu velocita akbar minn dak tal-copper. U allura, jekk il-Market 5 huwa kompetittiv u allura ma hemmx obbligu ta' access fuq l-operaturi f'dak is-suq u l-Market 4 ma jkunx regolat, skond kif trid il-GO, kif jista' qatt jigi assigurat illi operatur li jixtieq jipprovdi servizz retail ta' broadband jista' jaccessa flivell ta' wholesale dawk l-inputs necessari biex ikun jista'*

*jipprovidi dan is-servizz? Kif jista' jigi argumentat illi dan ma jkollux impatt fuq ir-retail market?*²⁷

Dawn l-ahhar osservazzjonijiet jwasslu lit-Tribunal biex jittratta kwistjoni ohra sollevata mis-socjetà Rikorrenti in sostenn ta' l-appell taghha mid-Decizjoni ta' l-Awtorità Intimata dwar Market 4, in partikolari d-decizjonijiet numerati 4.3 u 5.1, u cioè il-kontestazzjoni li kuntrarjament ghal dak konkluz mill-Awtorità Intimata fl-imsemmija Decizjoni, hija ma hijiex dominanti fis-suq tal-*Wholesale Unbundled Infrastructure Access*.

Fir-Rikors promotur is-socjetà Rikorrenti tikkontendi li *biex operatur jinstab dominanti skont Regolament 6(2) ta' LN 399.28 irid: "... jkollha poter fis-suq sinifikanti jekk, sew individwalment sew solidalment ma' ohrajn, tkun tgawdi posizzjoni ekwivalenti ghal dominanza, jigifieri posizzjoni ta' sahha ekonomika li taghtiha s-setgha li kemm jista' jkun tagixxi indipendentement mill-kompetituri, klijenti u finalment konsumaturi."* L-Awtorità, meta giet biex tiddetermina d-dominanza fis-suq tal-*Wholesale Unbundled Infrastructure*, naqset milli tiehu konjizzjoni ta' kunsiderazzjonijiet fundamentali bhal ma huma indirect constraints u dan ghax ma kkunsidratx is-sahha fis-suq u l-effett ta' dik is-sahha fis-suq li ghandha l-Melita. Meta jittiehdu in konsiderazzjoni elementi ta' indirect constraints ikun hemm analizi ta' l-impatt li jista' jkollhom servizzi fis-settur tar-retail li ma jigux kummercjalizzati fuq livell ta' wholesale. Fil-kaz odjern l-analizi ta' dominanza fis-suq *Wholesale Unbundled Infrastructure* kellha wkoll tinkludi servizzi li jinghataw mill-Melita fis-suq retail, biex tanalizza jekk l-esponenti tistghax fil-verità tezercita poter sinifikanti fis-suq u jekk, sew individwalment sew solidalment ma' ohrajn, tkun tgawdi posizzjoni ekwivalenti ghal dominanza, jigifieri posizzjoni ta' sahha ekonomika li taghtiha s-setgha li tagixxi pratikament indipendentement mill-kompetituri, klijenti u finalment il-konsumaturi. Minn din l-analizi l-esponenti umilment issostni li hekk kif gia hareg fid-Decizjoni tal-WBA, ghandu jirrizulta wkoll li is-sahha tal-Melita u l-fatt li ghandha infrastruttura taghha, servizzi indipendenti minn ta' l-esponenti u klijentela vasta ta' approssimament 50% tas-suq ma tippermettix lill-esponenti li tgawdi posizzjoni ta' sahha ekonomika jew dominanza li taghmel xi azzjonijiet li jaffettwaw operaturi klijenti taghha fuq il-wholesale u finalment il-konsumaturi, ghax dan iwassal ghal beneficcju mhux ghall-GO imma minflok ghall-kompetizzjoni u cioè il-Melita. Il-principju ta' indirect constraint huwa accertat u applikat fil-qasam tal-Ligijiet u kazijiet ta' kompetizzjoni, hekk kif citat fost ohrajn fil-kaz ta' *Scheider/Legrand 2002* u anki fil-kamp tat-telekomunikazzjonijiet fejn il-Kummissjoni Ewropea hadnet dan il-principju u fost l-ohrajn accettat li: (1) *Ofcom (ir-Regolatur Ingliz)* jinkludi id-definizzjoni ta' cable network u l-indirect effects taghha fil-*Wholesale Access Market Review*; (2) *Anacom (Ir-Regolatur Portugiz)* jikkonsidra l-cable meta jexamina ghal indirect constraints fuq ir-retail level; (3) U anki ghamlet referenza specifika ghalha

²⁷ Nota ta' l-Osservazzjonijiet ta' l-Awtorità Intimata, para. 19.

fir-rapport li kien qed jakkumpanja r-Rakkomandazzjoni tal-Kummissjoni dwar is-swiegq regolamentati: “the presence of cable (or other broadband-capable networks) in a given Member State may, however, exercise an indirect constraint on the provider of DSL-based wholesale broadband access, through the substitutability between both products at retail level. Broadband subscribers may have a choice between the services provided by the integrated incumbent, by other vertically integrated companies (such as a cable operator) or by firms using inputs supplied by the incumbent. Illi dawn huma fatturi importanti, rilevanti u materjali li ma jidhirx illi l-Awtorità kkunsidrat²⁸.

Fil-fehma tat-Tribunal però din il-kontestazzjoni tas-socjetà Rikorrenti ma hijiex gustifikata in kwantu bbazata fuq konsiderazzjonijiet ghal kollox zbaljati tal-kuncett ta' Significant Market Power (SMP) u applikazzjoni ghal kollox barra mill-kuntest reali tieghu tal-principju ta' *indirect constraints*.

Jibda biex jigi osservat li s-sejbien ta' SMP irid ikun ***in the relevant market*** li qed jigi analizzat, ossia fil-kaz in ezami fis-suq ta' *Wholesale Unbundled Infrastructure Access – Market 4* in kwantu hija d-decizjoni ta' l-Awtorità Intimata dwar dak is-suq li qed tigi kontestata. Dana johrog car kemm mill-Framework Directive kif ukoll mill-*Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services*. B'hekk una volta li jigi identifikat is-suq rilevanti li ghandu jigi analizzat u wara li ssir l-analizi ta' dak is-suq ghall-fini li jigi determinat jekk huwiex sufficjentement kompetittiv o meno, trid tigi analizzata il-posizzjoni ta' operatur jew operatori f'dak is-suq ghall-fini li jigi determinat jekk tali operatur wahdu jew flimkien ma' ohrajn ghandux Significant Market Power f'dak is-suq.

Il-fatturi li skond il-*Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services* li ghandhom jigu kkunsidrati ghall-fini li jigi determinat jekk hemmx operatur li wahdu jew flimkien ma' ohrajn ghandux SMP *in the relevant market* huma s-segweni: *market share, overall size of the undertaking, control of infrastructure not easily duplicated, technological advantages or superiority, absence of or low countervailing buying power, easy or privileged access to capital markets/financial resources, product/services diversification (e.g. bundled products or services), economies of scale, economies of scope, vertical integration, a highly developed distribution and sales network, absence of potential competition, barrier to expansion²⁹*. Wara li taghti dan l-elenku mhux ezawrjenti l-Kummissjoni zzid li *a dominant position can derive*

²⁸ Fol. 8 u 9 tal-process.

²⁹ Para. 78 tal-*Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services*.

from a combination of the above criteria, which taken separately may not necessarily be determinative³⁰.

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

Is-socjetà Rikorrenti in verità mhux qed tghid li l-Awtorità Intimata ma ghamlet l-ebda forma ta' analizi biex waslet ghall-konkluzzjoni li hija ghandha SMP fil-Market 4 izda, tikkontendi li f'din l-analizi naqset milli tikkonsidra l-*indirect constraints* li tiffaccja mill-kompetitur dirett taghha fis-suq *retail*, is-socjetà Melita p.l.c. li tippovdi servizz tramite *cable*, u precizament tghid li l-Awtorità *ma kkunsidratx is-sahha fis-suq u l-effett ta' dik is-sahha fis-suq li ghandha l-Melita.*

Ghalkemm is-socjetà Rikorrenti taghti esposizzjoni piuttost dettaljata ta' dan l-aggravju taghha, fil-fehma tat-Tribunal din hija ghal kollox irrilevanti fil-kuntest tas-suq analizzat, ossia tas-suq ta' *Wholesale Unbundled Infrastructure Access*. Is-sahha li tirreferi ghalha s-socjetà Rikorrenti u l-*indirect constraints* rizultanti minn servizz tal-*cable* li tant taghmel enfasi fuqhom huma pertinenti u rilevanti ghal Market 5, *Wholesale Broadband Access Market*, u mhux ghal Market 4, *Wholesale Unbundled Infrastructure Access*, li kif già iktar 'l fuq osservat huwa suq ghal kollox distint minn Market 5.

Ghalkemm is-socjetà Rikorrenti tikkontendi li dan il-principju ta' *indirect constraints* rizultanti minn servizz tal-*cable* u l-impatt ta' l-istess ghall-finijiet ta' determinazzjoni ta' SMP gie accettat ukoll mill-Kummissjoni Ewropeja fis-settur tat-telekommunikazzjonijiet, meta wiehed jara d-dokumentazzjoni li

³⁰ Para. 79 tal- Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services.

ghaliha ghamlet referenza fir-Rikors promotur ossia: (a) *Ofcom “Review of the wholesale broadband access markets” Statement 3rd December 2010*; (b) *Case PT/2008/0851*; u (c) *Commission Staff Working Document Explanatory Note Accompanying document to the Commission Recommendation on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services*³¹ bhala prova ta' din il-posizzjoni, tirrizulta posizzjoni – speċjalment fejn jidhol Market 4 – kemm xejn differenti minn dik esposta mis-socjetà Rikorrenti.

In effetti fid-dokument Case PT/2008/0851, fir-rigward tal-proposta ta' ANACOM *ghall-inclusion of cable in market 4 on the basis of indirect constraints*, il-Kummissjoni Ewropeja osservat is-segwent: *firstly, the Commission notes that – to its knowledge – cable cannot be unbundled, therefore ruling out the possibility of direct wholesale substitution with copper loops. Despite this, and unlike other NRAs, ANACOM nonetheless intends to include cable in market 4 on the basis of indirect constraints. ANACOM notes that the share of the LLU price in the retail price is 50%. ANACOM assumes that in case of a small but significant non-transitory increase in price (SSNIP) (10%) the retail price of the broadband access would increase by 5%, and as a result end users would switch to cable-based access products to such an extent as to make the price increase unprofitable. In relation to the arguments put forward by ANACOM in this respect, the Commission has the following concerns. ANACOM has not provided sufficient justification as to why a price increase would be entirely passed through to the end users of retail broadband access products or that sufficient demand substitution would take place at the retail level to render that price increase unprofitable, in particular because an LLU price increase could affect other retail products, such a voice telephony and IPTV as well. Moreover, it is doubtful that competitors would not be able to at least partially absorb the 10% price increase in their margins. An incomplete pass-through of this price increase would further weaken the substitution effect at the retail level. For these reasons the Commission is of the view that cable should not be included in the market definition as its inclusion leads to an overstatement of the competitive constraints on LLU. However, as ANACOM has carried out the SMP analysis both with and without the inclusion of cable, and since the regulatory outcome is not affected, the Commission does not wish to challenge ANACOM's finding this time, but strongly urges ANACOM not to include cable in market 4 in the final measure – quindi altru milli dan il-principju gie accettat u adottata mill-Kummissjoni Ewropea fil-kuntest ta' Market 4.*

³¹ Mhux id-dokument erronejament indikat mis-socjetà Rikorrenti f'footnote nru.6 fir-Rikors promotur.

Anke fejn is-socjetà Rikorrenti taghmel referenza ghar-rapport li kien qed jakkumpanja r-Rakkomandazzjoni tal-Kummissjoni dwar is-swieg regolamentati, meta s-silta citata mis-socjetà Rikorrenti fir-Rikors promotur tigi kkunsidrata fl-interrezza taghha, ossia jinqara u jigi kkunsidrat dak kollu osservat mill-Kummissjoni dwar *Wholesale inputs to broadband internet access*, tirrizulta posizzjoni ben diversa minn dik esposta minnha.

In effetti dak osservat mill-Kummissjoni Ewropea dwar *wholesale inputs to broadband internet access* fl-interrezza tieghu huwa s-segwent: *in order for broadband access to Internet and related data services to be supplied to an end user at a fixed location, a suitable transmission channel is required that is capable of passing data in both directions and at rates that are appropriate for the service demanded. Therefore, any undertaking providing services to end-users needs to build, establish or obtain access to a transmission channel to the end-customer locations that are served. The least replicable element in the establishment of an access transmission channel to an end user location is local access or the local loop. There are major obstacles, in terms of cost, time and legal barriers to duplicating the incumbent's local access network. Barriers to entering the local loop market are indeed high and non-transitory. Behind the barriers to entry, there is no tendency towards effective competition. While upgraded cable systems have become more widely developed and deployed in some parts of the Community, such systems overall still have a limited coverage. Moreover, the unbundling of cable networks at this stage does not appear technologically possible, or economically viable, so that an equivalent service to local loop unbundling cannot be provided over cable networks. Other access technologies including wireless local loops, digital broadcast systems and power-line systems are starting to become available, but only on a scale that imposes little if any constraint on the local loop operators. Thirdly, competition law would be insufficient to redress the market failure on the local loop market, as the compliance requirements of intervention in this market are extensive (including the need for detailed accounting, assessment of costs and monitoring of terms and conditions including technical parameters). The local loop market, which is equivalent to the physical or infrastructure-based local access for the purpose of supplying retail broadband service, hence meets the three-criteria test and continues to be susceptible to ex ante regulation. As networks evolve in most Member States and existing metallic Loops are replaced partially by fibre, the successor to the existing local loop may be significantly shorter than today's local loops. Where the metallic local loop is shortened and where the access seeker has no infrastructure of its own to replicate the former (longer) loop and where no alternative infrastructure is likely to become available to allow such replication then access to either ducts or alternative network elements must be considered in order to make access to the local loop meaningful. In this context, access to ducts could be an important part of any remedy imposed to address problems associated with physical network access. The initial Recommendation identified two wholesale markets that were linked to the*

broadband retail market: wholesale unbundled access (including shared access) to metallic loops and sub-loops, and wholesale broadband access. The reason for identifying a second separate wholesale market was based on the view that even regulated local loop access would be insufficient in most Member States to constrain potential market power at the retail level and a significant entry barrier would still exist. The fact that the two wholesale markets are linked in this way to the same broadband retail market implies that it is logical for national authorities to undertake a single overall analysis of the broadband market which examines in sequence the impact that (a) regulated infrastructure-based access and (b) regulated (non-physical) network-based access could be expected to have on any significant market power that is identified. Ten Member States have so far undertaken such a combined analysis. During the application of the initial Recommendation it has also be relatively straightforward to separate these two wholesale markets, on the basis of their product characteristics and by virtue of demand and supply substitution. For example, the two services, access to unbundled loops and wholesale broadband access, can frequently be distinguished on the basis of the flexibility they give in supplying the retail service, or by means of the location at which access is obtained. Hence, unbundled loops typically give greater flexibility and control over the retail broadband service offered to the end-user and have typically been supplied at the main distribution frame (MDF). In contrast, wholesale broadband access in the form of a bit-stream service typically gives less flexibility over the retail service, and may be supplied at higher points in the network (such as regional interconnection points), as well as at the MDF. Since the initial Recommendation, there have been significant developments concerning next generation networks, as described in section 3.3. In the context of supplying broadband (and related services), many undertakings with established infrastructures envisage installing fibre closer to end-users, both to increase capacity and broadband speeds, and to reduce operational costs. Such changes, which are expected to vary between Member States in terms of the type of network investments and the speed at which they occur, are likely to modify the demand and supply characteristics described above. For example, the replacement of copper access lines between the MDF and (more) localised concentration points by fibre, implies that an undertaking that currently exploits access to unbundled loops at the MDF would have to consider the appropriateness of any alternatives. Such alternatives could conceivably include building its own local access network, using access to sub-loops in combination with its own (extended) network, using sub-loops in combination with an appropriate backhaul service to the MDF location, or using a wholesale broadband service supplied at the MDF location or at a higher level in the network. In principle, on the basis of characteristics concerning the capability and the location of the service (as indicated above), and with respect to demand and supply substitution, it would be possible to determine whether these various potential services are in the same or separate relevant wholesale markets. However, at this stage, given that these network changes are still taking place, it is difficult to be absolutely precise

about the boundaries of the relevant prospective wholesale markets that are linked to the retail broadband market, in terms of their various possible technical characteristics. This suggests a more generic and forward-looking approach to market identification in this area at EU level (based on the two currently defined wholesale markets), within which regulatory authorities can analyse markets, with the twin aim of facilitating as much infrastructure-based competition as is possible and addressing market power via appropriate access regulation where it is not. The question then arises whether, in addition to unbundled local access (or its equivalent), the market for wholesale broadband access constitutes a distinct market and, if so, whether it should be identified as being susceptible to ex ante regulation. An operator using unbundled local loops (or an equivalent infrastructure-based input) would not normally consider wholesale broadband access to be a substitute even if the service provided by the wholesale broadband access provider allowed the supply of the same retail services that were provided over the unbundled loops. However, the propensity to switch between the two inputs could be expected to depend on the relative price and other terms (such as contract length), and on factors such as the two noted above, i.e. the location of access, and the latitude that the input confers in supplying a range of different retail products. Once an operator has invested in local loop unbundling, its preparedness to switch to wholesale broadband access could also depend on the investments that it has already made and whether they can easily be adapted or reversed. Likewise, it is questionable whether an entrant using wholesale broadband access to deliver retail broadband services to the final user market could easily switch to using unbundled local loops to provide an equivalent service. From a demand perspective, a retail provider using wholesale broadband access will only consider unbundled local loops a substitute if it has all the other network elements needed to self-provide an equivalent wholesale service. The supply substitution possibilities depend on the same condition. Therefore, unbundled local loops and wholesale broadband access constitute distinct markets. The local loop market is situated upstream from the wholesale broadband access market and regulation on the local loop market may facilitate market entry on the wholesale broadband access market. However, in view of the investment required for local loop unbundling (LLU) and the absolute cost advantages of the incumbent resulting from economies of density and scale, high barriers to entering the wholesale broadband access market remain even in the presence of regulated LLU. The wholesale broadband access market hence continues to meet the first criterion under the modified greenfield approach. Experience under the market analysis and Article 7 notification procedures so far indicates that the coverage of LLU in a given Member State, in combination with the existence of alternative broadband access networks such as cable, fibre and wireless, may imply that in a limited number of Member States the market for wholesale broadband access may tend towards effective competition behind the barriers to entry. This may be the case where both broadband penetration and unbundling rates are very high, and where alternative operators have started to provide wholesale broadband access

services in large parts of the country in competition with the incumbent, thereby providing a direct constraint on the market power of the incumbent in supplying wholesale access services. In addition, the level of competition at the retail level from both vertically integrated undertakings and those exploiting unbundled local loop access may be such as to exert an indirect constraint on the market for wholesale access services – NL/2008/0281. In general across the EU, however, this is not the case yet and is not foreseeable within the next few years. Therefore the wholesale broadband access market continues to meet the second criterion. In addition, where competition is not effective, competition law is not sufficient to redress the market failure as, under competition law, the provision of wholesale broadband access services could not in principle be mandated, and compliance requirement would in any case be high (including detailed monitoring of cost and technical conditions). Moreover, it is important to maintain co-ordination and consistency between regulation of wholesale broadband access and that of local loop unbundling. Since the third criterion is also met, the wholesale broadband access market continues to warrant inclusion in the revised draft Recommendation as a market susceptible to ex ante regulation. In the initial Recommendation, the wholesale broadband access market was said to cover 'bitstream' access that permits the transmission of broadband data in both directions and other wholesale access provided over other infrastructures, if and when they offer facilities equivalent to bitstream access. In this context, the question has arisen as to whether wholesale access to cable networks that provide a return path is part of the relevant market. Across the EU, cable represents 15.5% of broadband connections compared to 81.8% of DSL lines and its relative importance has been declining, although broadband delivered via cable has a high market share in Malta, Austria, Belgium, the Netherlands and Portugal. Experience under the market analysis and Article 7 notification procedures so far has indicated that, where cable networks exist, their geographical coverage is often limited and wholesale access to such networks does not constitute a direct substitute for DSL-based wholesale access products from the demand or the supply side, so that inclusion in the same product market is not justified. The presence of cable (or other broadband-capable networks) in a given Member State may, however, exercise an indirect constraint on the provider of DSL-based wholesale broadband access, through the substitutability between both products at retail level. Broadband subscribers may have a choice between the services provided by the integrated incumbent, by other vertically integrated companies (such as a cable operator), or by firms using inputs supplied by the incumbent. If alternative integrated undertakings have high market shares compared to firms exploiting inputs, (and the former choose not to offer wholesale inputs), it is likely that indirect constraints will be more important than direct ones. Such indirect pricing constraint, where it is found to exist, should be taken into account when assessing if the incumbent DSL operator has SMP on the relevant market. Another similar question that has arisen is whether services using DSL technologies other than ADSL are part of the relevant market for wholesale broadband access. The speeds

which DSL technologies are capable of providing are evolving continuously depending on network topology, and loop lengths or proximity to exchange points, etc. ADSL technologies are currently capable of supplying up to 28 Mbit/sec to end-users, providing the ancillary elements are suitable, and the future roll-out of VDSL allows for speeds of up to 100 Mbit/sec. The range of access speeds that are available at the retail level is typically evolving as a function of users' demands and willingness to pay, network capabilities, and retail competition from other infrastructures. To satisfy retail demand, wholesale broadband access services over any DSL technology appear to be substitutable, (subject to any constraints imposed by network capabilities or the speeds enabled by the prevailing technology), provided that any actual or perceived switching costs for end-users are not excessive. It remains open to individual NRAs to examine this issue in further detail on the basis of national circumstances. Given the link between the retail broadband market and the two corresponding input markets identified in the initial Recommendation and also the varying ways in which supply and demand characteristics could evolve over the coming period, (and the speed at which they take place), it is proposed to identify two relevant markets as being susceptible to ex ante regulation as follows: – wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location; and – wholesale broadband access – This market comprises non-physical or virtual network access including 'bitstream' access at a fixed location. This market is situated downstream from the physical access covered by the first market listed above in that wholesale broadband access can be constructed using this input combined with other elements. The point in the network at which the demand and supply of either of these separate markets is defined will depend on the market analysis and in particular on the network topology and the state of network competition. Depending on the way in which network upgrades occur or the particular demand and supply conditions evolve in Member States, these two wholesale markets may remain distinct, or conceivably merge into one. Consequently and for the reasons outlined above, it is recommended that the markets be analysed together³².

Meta dak li osservat il-Kummissjoni Ewropea jigi kkunsidrat fl-interessa tieghu jirrizulta b'mod car li kuntrarjament ghal dak affermat mis-socjeta' Rikorrenti, kwalunkwe *indirect constraints* rizultanti mill-operatur li jipprovdi *cable-based access*, bhalma hi l-Melita fil-kaz nostrali, fuq id-*DSL operator*, fil-kaz ta' Malta s-socjeta' Rikorrenti, jinhassu fuq il-*Wholesale Broadband Access Market* u mhux fuq il-*Wholesale Unbundled Infrastructure Access Market*, li huwa s-suq formanti s-suggett tad-Decizjoni appellata.

³² Commission Staff Working Document Explanatory Note Accompanying document to the Commission Recommendation on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services.

Ta' min josserva wkoll li fl-imsemmi rapport akkumpanjanti r-Rakkomandazzjoni tal-Kummissjoni Ewropeja dwar is-swieq regolamentati, jinghad fir-rigward ta' *Retail Regulation* illi: *In the initial Recommendation, in keeping with Annex 1 of the Framework Directive, two access markets and four calls markets were identified as being susceptible to ex ante regulation. Retail regulation can only be justified if, with all regulatory remedies in place on wholesale markets including Carrier Selection and Carrier Pre-Selection (including wholesale line rental where appropriate), there remains a lack of effective competition at the retail level. Regarding retail access to the public telephone network at a fixed location, the only wholesale regulation that could impact on competition in this market is the regulation of the wholesale infrastructure access market, which enables new entrants to provide narrowband access services to retail customers. However, exploiting wholesale infrastructure access requires time and significant investments, a large portion of which are sunk. Moreover, new entrants in principle do not lease infrastructure access to provide narrowband access only. Wholesale infrastructure access therefore does not remove the high and non-transitory barriers to entering the retail access market at a fixed location, nor does it make this market tend towards effective competition. Even in combination with the development of other infrastructures such as cable or fibre-to-the-home etc., such a tendency is not yet observed at the European level. Therefore, even in the presence of wholesale regulation, the retail market for access to the public telephone network at a fixed location remains susceptible to ex ante regulation.*

Fid-dawl ta' dan kollu osservat ghalhekk it-Tribunal ma jsib l-ebda raguni ghalfejn ghandu jiddipartixxi mill-konkluzzjoni raggunta mill-Awtorità Intimata dwar is-Significant Market Power tas-socjetà Rikorrenti f'Market 4, liema konkluzzjoni fil-fehma tieghu hija kompletament korretta. Fid-dawl ta' tali konkluzzjoni l-Awtorità Intimata kienet ukoll ghal kollox korretta u legittimata f'li timponi obbligi regolatorji fuq is-socjetà Rikorrenti, dan del resto kif obligata li taghmel skond ir-Regolament 5(4) tar-Regolamenti dwar Networks u Servizi ta' Komunikazzjonijiet Elettronici (Generali), Legislazzjoni Sussidjara 399.28 – *meta l-Awtorità tiddeciedi li suq rilevanti ma jkunx effettivament kompetittiv, hija ghandha tinnomina intraprizi li individwalment jew solidalment ikollhom poter fis-suq sinifikanti kif hemm fir-regolament 6 u ghandha timpani fuq dawk l-intraprizi l-obbligazzjonijiet regolatorji specifici adatti msemmija fis-subregolament (2) jew izzomm jew temenda dawk l-obbligazzjonijiet meta jkun diga jezistu*³³.

Fid-dawl tal-fatt li s-socjetà Rikorrenti habbret *upgrade* ta' l-infrastruttura taghha ghall-*fibre*, l-Awtorità Intimata a bazi: (i) tal-fatt li *unbundled access service over fibre* jaqa' taht Market 4; (ii) ta' *prospective analysis* fid-dawl ta' *GO's roll-out of FTTC/H* u *the Maltese government's FTTH initiative*; u a bazi wkoll (iii) tal-fatt li s-socjetà Rikorrenti ghandha SMP f'Market 4, estendiet l-

³³ Dan ir-Regolament jirrifletti dak provdut fl-Artikolu 16(4) tal-Framework Directive.

obbligi regolatorji imposti fuq is-socjetà Rikorrenti ghal dak li jirrigwarda *local loop unbundling* (LLU) u *subloop unbundling* (SLU) ghal fuq il-fibre ukoll. In effetti fil-paragrafu 5.2 tad-Decizjoni ta' l-Awtorità Intimata dwar Market 4 l-Awtorità osservat illi *given that fibre is included in the market, the MCA also proposed a set of new remedies that are to be applicable to fibre. These remedies included: access for fibre unbundling in case of point-to-point deployment, or VULA in case of PON deployment; access to backhaul facilities for unbundling purposes, including Ethernet connections, dark fibre and duct access; transparency; non-discrimination; and price control based on principle of cost orientation* u effettivament fid-decizjoni numerata 5.5 sistematikament estendiet l-obbligi regolatorji imposti fuq is-socjetà Rikorrenti ghal dak li jirrigarda LLU u SLU ghal fuq il-fibre wkoll.

Is-socjetà Rikorrenti tikkontesta din id-decizjoni ta' l-Awtorità Intimata billi tikkontendi li *l-obbligi imposti fuqha biss, partikolarment dawk li gew estizi ghal fibre u next generation access (NGA), ma humiex proporzjonati u gusti kif sancit mill-Ligi u huma eccessivi u diskriminatorji fil-konfront ta' l-esponenti. ... Illi jekk ikollna nissemplifikaw l-effett ta' dawn l-obbligi imposti mill-Awtorità fuq l-esponenti, bla ebda dubju jiddiskriminawh ghax hu jkun obligat jaghti access lil operaturi bhal Melita u dawn ta' l-ahhar, li presentement ghandhom infrastruttura superjuri u fuq skala nazzjonali, ma ghandhom l-ebda obbligu li jirreciprokaw. Illi b'mod partikolari fejn fic-cirkostanzi li huma prevalenti ghall-esponenti, fosthom li l-esponent ghadu ma jafx kemm ha jigih l-investment kapitali kumplessiv biex jagheml l-upgrade u l-manteniment ta' l-infrastruttura kollha u b'liema teknologija, x'take up ha jkun hemm ghas-servizzi li jingarru fuq dan l-upgrade, x'return of investment ha jkun hemm u fuq liema medda ta' zmien u in vista ta' dawn kemm ha jipprezza tali servizz inizjalment, l-obbligu ta' price control fuq tali servizzi naqqas mill-flessibilità li operatur bhall-esponenti ghandu jkollu fl-istadji inizjali meta jigi biex jikkomercjalizza tali servizzi godda. Dan jikkondizzjona l-prospetti ta' investment fit-teknologija gdida biex l-esponenti jagheml upgrade ta' l-infrastruttura*³⁴.

Fil-fehma tat-Tribunal fil-kors tas-smigh ta' dawn il-proceduri rrizulta li tnejn huma l-aspetti fuq liema s-socjetà Rikorrenti tibbaza l-aggravju taghha mid-decizjoni ta' l-Awtorità Intimata li testendi l-obbligi regolatorji imposti fuqha f'Market 4 ghall-fibre ukoll: (a) peress illi se tidhol f'investment notevoli biex tizviluppa din it-teknologija gdida ghall-fini li tkun tista' tikkompeti ahjar mal-kompetitur taghha Melita p.l.c. fis-suq *retail*, kien ikun iktar gust u ekwu li kieku inghatat *regulatory holiday*; u (b) f'kaz li l-Awtorità Intimata tibqa tinsisti fuq l-imposizzjoni ta' obbligi regolatorji, fejn jidhol *price control* dan ma ghandux ikun kontroll a bazi tal-metodologija l-iktar stringenti ta' *l-incremental cost* li l-Awtorità Intimata trid tadotta.

³⁴ Rikors promotur.

Fir-rigward David Lewin, espert inkarigat mis-socjetà Rikorrenti, xehed illi *I do not really see any interest in regulating fibre any more than I see a benefit in regulating copper* [liema obbligi regolatorji skonthu huma redundant partikolarment fid-dawl tal-fatt li sa' llum hadd ma talab u inghata access ghall-local loop] *because I think the retail and the wholesale broadband access markets are already effectively competitive. On the other hand, I can see some strong public interest arguments as to why you should not regulate market four as far as fibre loops are concerned and I can explain those if you would like. In a normal market if GO or some other operator were rolling out fibre loops then what they want to do is to offer a range of products on the back of those fibre loops to end users. So there might be a premium product which is high price, very high speed, with unlimited use for those people who really want those connections. Let alone some businesses but there would be some consumers and they have a high willingness to pay and they will then offer some mid-range products and there will be probably an entry level product. An entry level product will typically be based on: we need to recover the long running committal cost but the fixed costs of the fibre roll out will mainly be recovered from the other two categories of product. Then if you come along as a regulator and say no we want to have a cost oriented access to your fibre loops, then you have set a single price in the market and that act combined with the competition which will then come from access seekers drives out the ability to price and product differentiate and that means that the investment case for GO becomes significantly more challenging. It probably has lower uptake of the fibre loops, it has less opportunity to recover its fixed costs from those who are willing to pay most which is the efficient way of recovering fixed costs which economists call it ramsey pricing. That has been recognized for example by the Commission who recently produced a recommendation to try and deal with this particular problem and perhaps if I can just quote from that recommendation, the Commission says: "due to current demand uncertainty regarding the provision of very high speed broadband services, it is important in order to promote efficient investment and innovation to allow those operators investing in NGA networks and by that we include fibre to the home networks, a certain degree of pricing flexibility to test price points and conduct appropriate penetration pricing."* That's recital 49 of the Commission's new recommendation on non-discrimination. So this is an affect which is well recognized by imposing cost oriented pricing, the MCA has removed that pricing flexibility that ability to price experiment and as a result of that it has significantly increased the challenge of making an investment case for rolling out fibre to the home. This Commission recommendation of the 9th September 2013: on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment. The quote comes from recital 49 of that recommendation. I'm sorry that was a slightly lengthy explanation and as this is a complex point but I think it is well recognized now within the EU regulatory field. I think the consequence therefore of the MCA decision on market four is that the prospects for investment in high-speed broadband in

Malta are reduced and that means that Maltese people are likely to get poorer high-speed broadband services as a result. I also think that it means that competition in that market is weakened because if the primary competition is between GO on one hand and Melita on the other hand, if GO is not investing because of the regulation, then it has a weaker product set than Melita and that clearly weakens the competition between the two. Maybe that theoretically you might expect more service based competition but the primary competition is the infrastructure based competition, the prospect of access seekers entering the high-speed broadband market at the retail level given what's happened so far with local loop unbundling, slight and therefore overall when you combine the two, the service based and the infrastructure based competition, I would suggest that overall competition would be diminished by this ruling rather than strengthened³⁵.

In risposta ghad-domanda piuttosto dirett: So if I understood you correctly just to close this off, you are of the opinion that regulating the local loop market will bring no consumer welfare, no sustained consumer welfare, and at the end of the day if I understood you correctly there is a shift as well in that competition which is not regulated, so infrastructure competition the Melita of this world, which are not regulated will tend benefit from this, am I correct? David Lewin irrisponda: I mean I would say that I don't see the decision as being in the public interest because I think you will get less investment not just less investment by GO by the way. I think if GO is not investing in FTTH, then I don't think Melita will be investing to upgrade its network because it doesn't need to anymore, so it's a double effect; it's not a single effect. Others think that at the moment the Melita network broadband is based on technology called DOCSIS3.0. DOCSIS3.1 is in the wings which will produce substantially superior speeds with relatively little cost, but why should Melita bother if it doesn't have to compete with GO because GO hasn't made the investment. So there's an investment problem, there's a consumer choice problem, if you reduce the price product differentiation, not just what GO does, but potentially what Melita might do as well, there's no choice between GO and Melita and there's weakening of competition. So, I really don't see any public interest in this and I would also suggest that in terms of duties of NRA they do focus around the idea that they should promote competition, investment, innovation and end users' choice. So I find it difficult to support the idea that that is a correct decision³⁶.

Ghalkemm David Lewin jipprova jipoggi kollox f'perspettiva ta' kompetizzjoni u kompetittività, liema prospettiva però mhux kondiviza mit-Tribunal, it-Tribunal itenni li huwa tal-fehma li l-pretensjoni fundamentali tas-socjeta' Rikorrenti hija li tinghata *regulatory holiday* fir-rigward tal-fibre network li trid tizviluppa.

³⁵ Xhieda moghtija waqt is-seduta tal-25 ta' Ottubru 2013, fol. 395 sa' 417 tal-process.

³⁶ *Ibid.*

Apparte l-fatt li t-Tribunal già ikkonkluda li l-fatt li s-suq *retail* u Market 5 instabu li huma relattivament kompetittivi ma jfissirx li b'mod awtomatiku Market 4 ma ghandux ikun regolat, Huwa ma jaqbilx ma' dak affermat minn David Lewin dwar il-fatt li ma hemmx il-htiega li Market 4 ikun regolat speċjalment fid-dawl ta' l-intenzjoni tas-socjetà Rikorrenti li tizviluppa *fibres network* ghal zewg ragunijiet fundamentali: (i) il-fatt li fil-prezent u kif inhuma l-affarijiet illum is-suq tar-*retail* huwa relattivament kompetittiv ma jfissirx li bl-izvilupp tal-*fibres network* da parte tas-socjetà Rikorrenti l-affarijiet se jibqghu l-istess, anzi fil-fehma tat-Tribunal bl-izvilupp ta' tali teknologija s-socjetà Rikorrenti se tkun f'posizzjoni ferm iktar b'sahhitha milli hi illum partikolarment fuq Market 4, u hemm il-possibilità reali li fin-nuqqas ta' regolamentazzjoni tuza tali posizzjoni biex tinfluwenza s-swieq l-oħra; u (ii) il-Kummissjoni Ewropea kjarment tindika li fil-kuntest ta' Next Generation Access irid ikun hemm *ex ante regulation* minhabba l-impatt li tali teknologija certament se jkollha fuq is-swieq rilevanti, u dana apparte l-fatt li kemm-il darba l-Awtorità Intimata tiddetermina li operatur ghandu SMP f'suq rilevanti, f'dan il-kaz Market 4, hija obligata bil-Ligi, inkluz il-Framework Directive, li timponi obbligi regolatorji fuq l-istess.

Huwa interessanti li jigi osservat illi waqt li kien qed jirricerka dan il-kaz it-Tribunal irriskontra *paper* intitolata *Regulating next-generation fixed access to telecommunications services* miktuba minn David Lewin, ossia l-istess David Lewin li xehed fil-mori ta' dawn il-proceduri, Brian Williamson u Martin Cave, pubblikata f'Novembru ta' l-2008 fejn giet trattata il-kwistjoni *what rules, if any should regulators put in place to provide incentives for timely and efficient investment in NGA while, at the same time, preventing monopoly abuse – either by taking monopoly rents from end users or harming downstream competition?*

Fl-analizi li ghamlu ta' din il-kwistjoni hekk centrali ghar-regolamentazzjoni tas-settur tat-telekomunikazzjoni l-imsemmija awturi kkonkludew illi *there is a range of both active and passive remedies which regulators might use. We argue that, while passive remedies are important in enabling infrastructure-based competition, active (bitstream) remedies will be important for preserving competition in the supply of retail, NGA-based products. In particular bitstream offers access seekers a way of reaching customers nation-wide at the same time as the national fixed incumbent for a relatively modest investment. This is especially important when competing for the revenues of multi-sited businesses. To regulate bitstream products effectively regulators might specify the price regulation principles which would apply to operators found to have significant market power (SMP) in NGA supply in advance of any market definition and SMP assessment. To enable timely and efficient investment in NGA regulators should allow access providers to provide distinct NGA-based bitstream products to meet the needs of different segments of the end-user market and to then charge for these products at the wholesale level so as to reflect their value to end users rather than their costs. But regulators also need to put in place competitive safeguards. These might*

require access providers with SMP to supply all access seekers, including its own downstream retail business, on equivalent supply conditions and prevent them from exerting a price squeeze on access seekers. Access providers with SMP should also provide a price regulated bitstream product to replacve unbundled local loops. Transition measures are also important in moving from competition based on copper access to competition based on NGA access. Here we argue that regulators should: Remove obligations on access providers to offer legacy wholesale products at Greenfield sites where they want to supply FTTH; Not require access providers to compensate local loop unbundlers for any shortening of economic asset lives as a result of closure of the copper access networks but give reasonable minimum notice of such closures so as to allow an orderly transition to competition in an NGA world; Allow incumbent fixed operators to shut down their copper networks.

Minn dak konkluz fl-imsemmija *paper* u b'mod partikolari minn dak fiha osservat, huwa evidenti li imkien ma hi qed tisemma l-possibilità ta' l-assenza ta' regolamentazzjoni fir-rigward ta' *SMP in NGA*, kif invece pretiz mis-socjetà Rikorrenti anke tramite x-xhieda ta' l-istess David Lewin, anzi piuttost il-kuntrarju. In effetti huma u jesponu l-osservazzjonijiet taghhom l-awturi ta' l-imsemmija *paper* fost affarijiet ohra ghamlu s-segweni osservazzjonijiet: *There is one central issue facing regulators as they decide how best to regulate NGA: What rules, if any should regulators put in place to provide incentives for timely and efficient investment in NGA while, at the same time, preventing monopoly abuse – either by taking monopoly rents from end users or harming downstream competition? Answering this question requires a regulator to balance two considerations: On the one hand how does a regulator ensure timely and efficient investment? The simple approach is to leave NGA investment unregulated as the authorities do in the USA. **One problem with this approach is that it could allow incumbent fixed operators to re-monopolise markets. NGA leads to the replacement of the copper access network, either partially or fully, with fibre. This undermines the current business models of many AltNets. Without any NGA access obligations, access seekers must then accept whatever supply conditions the access provider offers and, given that the access provider normally competes with the access seeker in retail markets, the access provider has strong incentives to offer supply conditions which weaken competition***³⁷. *On the other hand how does a regulator ensure vigorous innovation and competition at the retail level? A simple approach here is to maximize competition by applying the same legacy access obligations as it has applied to the copper network. Access seekers would then be able to rent NGA connections from the access provider at cost base prices. The problem with this approach, as we explain below, is that it severely weakens the business case for investing in NGA and hence leads to delayed investment.* Ghalkemm fir-rigward ta' din l-ahhar osservazzjoni

³⁷ Enfasi tat-Tribunal.

taghom l-awturi ta' l-imsemmija *paper* jargumentaw favur *value-based pricing* huma xorta jammonixxu li hemm il-htiega ta' *competitive safeguards* ghaliex *allowing SMP access provider's freedom to price discriminate between distinct bitstream products is important for timely and efficient investment in NGA. **But allowing the access provider complete freedom to price NGA bitstream products as it wishes is unlikely to lead to vigorous competition at the retail level***³⁸. We suggest that three safeguards are needed. The access provider should be required to supply all access seekers (including its own downstream retail business) on equivalent supply conditions – both in terms of price and non-price terms. The access provider should be prevented from exerting a price squeeze on access seekers – for example by setting the price of its wholesale bitstream products high relative to the equivalent retail prices charge by its downstream business. Finally there is a need to impose conditions so as to enable an orderly transition for access seekers from copper-based wholesale broadband products to NGA-based bitstream products. ...

L-insostenibilità tal-pretensjoni tas-socjetà Rikorrenti dwar in-nuqqas ta' regolamentazzjoni fuq *SMP in NGA* tirrizulta wkoll mir-Rakkomandazzjonijiet tal-Kummissjoni Ewropea, partikolarment *Commission Recommendation of 20 September 2010 on regulated access to Next Generation Access Networks (NGA)*, li fil-*BEREC report on Co-investment and SMP in NGA networks* ippubblikat f'April 2010, giet *inter alia* deskritta bhala Rakkomandazzjoni li ghandha l-ghan *to ensure the convergence of regulatory approach (i.e. no "regulatory holiday")*; *foster private investment in a context of limited public funding*; *ensure rapid roll outs in order to reach the Digital Agenda objectives*.

Fid-dawl ta' dan kollu ghalhekk huwa bil-wisq evidenti li l-Awtorità Intimata ma tistax tagixxi bil-mod kif pretiz mis-socjetà Rikorrenti, u cioè li ma timponi fuqha l-ebda obbligu regolatorju fejn jidhol il-*fibres* u dana nonostante l-assigurazzjonijiet verbali ta' l-istess socjetà li hija disposta li tipprovdi access lil terzi li jitolbuh u li ma huwiex fl-intenzjoni u l-interess taghha li timponi jew tistabilixxi prezzijiet li jippregudikaw il-kompetizzjoni fis-swieq.

In kwantu rigwarda l-obbligu regolatorju tal-*price control*, is-socjetà Rikorrenti, tramite x-xhud Stefan Briffa, tikkontendi li *hemm ukoll l-obbligu tal-price control jigifieri l-prezz illi bih ahna nbieghu at the wholesale level jigi ddeterminat mill-awtorità fuq bazi ta' cost orientation imma mhux biss, fuq l-iktar bazi stringenti ta' cost orientation li jista' jkollok li huwa fuq incremental cost fuq bazi ta' incremental cost jigifieri kemm tiswik fil-verità biex taghti l-linja extra lil min iridha w ahna l-iktar haga li noggezzjonaw dwarha din hija ghaliex ahna meta qed nibnu network ma nibnux linja linja. Meta allura ahna ghandna dak ir-riskju kummercjali haddiehor li jirkeb fuqna mhux se jkollu ghaliex se jghid ok, jiena rrid linja ghax hemm xi hadd*

³⁸ Enfasi tat-Tribunal.

Tas-Sliema li jrid linja u se nhallas biss ta' dik il-linja plus a small risk premium però still jekk qed nghidu l-cost huwa X u ha zzid risk premium ta' 20%. In kontro-ezami³⁹ Stefan Briffa kkonferma li skond is-socjetà Rikorrenti l-Awtorità Intimata ser tadotta l-metodologija ta' LRIC+ biex tastibilixxi l-prezz għall-access.

Meta wiehed jikkonsidra d-Decizjoni ta' l-Awtorità Intimata dwar Market 4, partikolarment id-decizjoni numerata 5.5.6 dwar *Price control and cost accounting* mill-ewwel jinduna li imkien ma jirrizulta li l-Awtorità Intimata effettivament iddecidiet li se tadotta l-metodologija ta' LRIC+. Dak li deciz mill-Awtorità Intimata fir-rigward huwa li *the MCA shall also uphold the principle of cost orientation when setting the price of VULA access as set forth in the Commission's NGA Recommendation. However, in the event that a VULA offer is concluded on commercial terms the MCA will consider adopting that agreement including the prices set therein, as a basis for the reference VULA offer. In addition, where deemed necessary and justified, the MCA may decide to adopt other forms of price control for the setting of VULA prices – such as through the use of economic replicability tests – should this be in the interest of consumers. Any such changes to the price control obligation will be duly consulted upon with all stakeholders prior to coming into effect. In case that the MCA will have to set the price for VULA, in accordance with Regulation 16 of the ECSNR, and in order to encourage FTTH investments by GO, the MCA shall be taking into account the provisions on profitability as stated in the NGA Recommendation.*

In verità Stefan Briffa stess jikkonferma li fid-Decizjoni *per se* l-Awtorità Intimata ma tghidx li se tadotta l-metodologija tal-LRIC+ u in fatti għall-mistoqsija *m'hemmx specifikat x'tip ta' cost orientation ha jigi impost qed naqblu fuq hekk, fid-decizjoni appellata?* Stefan Briffa rrisponda *hekk hu. Jekk mhux se jkun LRIC ahna niehdu pjacir kieku jigifieri però lill-Kummissjoni l-Awtorità qaltilha li hekk se taghmel jigifieri ghandi x'nifhem li hekk se jigri fil-verità.* In effetti Stefan Briffa xehed illi s-socjetà Rikorrenti waslet għall-konkluzjoni li l-Awtorità Intimata se tadotta l-metodologija tal-LRIC+ min-notifika ta' l-abbozz tad-decizjoni da parte ta' l-Awtorità lill-Kummissjoni Ewropea a tenur ta' l-Artikolu 7 tal-Framework Directive. Fir-rigward Stefan Briffa jghid: *din hadniha mhux mid-decizjoni imma min-notifika li l-Awtorità għamlet lill-Kummissjoni Ewropeja u l-kummenti tal-Kummissjoni Ewropeja. Fil-fatt as such qatt ma kienet konsultata magħna però x'imkien hawn kument fejn il-Kummissjoni Ewropeja qalet li talbet xi kjarifika lill-Awtorità u l-Awtorità fil-fatt infurmata b'dan. ... Pagna 4 tad-dokument [Dok. "MCA1" anness mar-Risposta ta' l-Awtorità Intimata]. L-ahhar sentenza il-Kummissjoni qieghda tghid 'regarding fibre access prices' qed nitkellmu fibre to the home, 'MCA proposes to impose cost orientation based on a new LRIC model'. Imbagħad footnote 15 'MCA explains that the model is currently being consulted on a National level' u nikkonferma dan*

³⁹ Seduta mizmuma fl-10 ta' Gunju 2013, fol. 293 sa' 295 tal-process.

kien bottom up cost model jahdem fuq LRIC kemm ghal fixed u kemm ghal mobile 'and will be notified to the Commission etc. etc.'

Ladarba dan huwa l-kaz it-Tribunal iqis li din il-kontestazzjoni partikolari tas-socjetà Rikorrenti, u cioè li l-Awtorità Intimata se tadotta l-metodologija tal-LRIC+ biex tistablixxi l-prezz ghall-access, hija intempestiva u bhala tali ma ghandhiex tigi trattata minnu. Apparte minnhekk ladarba din il-kwistjoni ma tirrizultax mid-Decizjoni ta' l-Awtorità Intimata, li huwa l-att amministrattiv li jista' jigi skrutinizzat u rivedut minn dan it-Tribunal, it-Tribunal huwa prekluz milli jittratta u jiddetermina dwar l-istess.

Is-socjetà Rikorrenti, tramite x-xhud minnha prodott David Lewin, taghmel referenza ghall-*Commission Recommendation of 11 September 2013 on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment*, biex issosstni l-argument li l-posizzjoni li skontha se tigi adottata mill-Awtorità Intimata ma hijiex dik korretta u ma hijiex in linea mar-Rakkomandazzjonijiet tal-Kummissjoni. Dak rakkomandat mill-Kummissjoni Ewropea fl-imsemmija Rakkomandazzjoni però, anke fejn jirrigwarda *non-imposition of regulated wholesale access prices on NGA networks*, ma jista' bl-ebda mod iwassal lit-Tribunal biex jannulla xi parti mid-decizjoni ta' l-Awtorità Intimata hawn appellata ghas-semplici raguni li dik ir-Rakkomandazzjoni inharget **wara** l-pubblikazzjoni tad-Decizjoni ta' l-Awtorità Intimata dwar Market 4 u b'hekk tad-decizjonijiet appellati. L-unika haga li jista' jghid it-Tribunal hija li meta l-Awtorità Intimata tigi biex tikkonsidra u tistabilixxi, jekk ikun il-kaz, *a regulated VULA offer* hija probabilment ser tiehu in konsiderazzjoni dak rakkomandat mill-Kummissjoni Ewropea fl-imsemmija *Commission Recommendation tal-11 ta' Settembru 2013*, kif del resto già intrabtet li taghmel meta fid-Decizjoni dwar Market 4 esplicitament tghid *finally the MCA has taken note of the EU Commission's invitation to consider lifting the cost orientation when the conditions listed above are met. At the outset, the MCA considers that most of these conditions are not met at present and it is unlikely that this situation will change with the timeframe of this review. Furthermore, considering the fact that FTTH coverage is still negligible and that the full implementation of EoI involves significant time and effort by both the incumbent and the regulator, the lifting of cost orientation at this stage would be highly premature. The MCA shall therefore assess what the forthcoming Recommendation on non-discrimination and costing methodologies will propose in relation to EoI and access pricing, and will re-evaluate its position should market relatives require. Nevertheless, although at present the MCA shall be using the cost orientation principle to set access prices, the MCA may consider using alternative pricing methodologies should it see that these are justified and lead to a positive market outcome*⁴⁰.

⁴⁰ Para. 5.4 tad-Decizjoni ta' l-Awtorità Intimata dwar Market 4.

Kopja Informali ta' Sentenza

Fid-dawl ta' dan kollu osservat it-Tribunal iqis li l-aggravji sollevati mis-socjetà Rikorrenti fir-rigward tad-Decizjoni ta' l-Awtorità Intimata dwar Market 4, in partikolari fir-rigward tad-decizjonijiet numerati 4.3, 5.1 u 5.5, ma humiex gustifikati u b'hekk ma jisthoqqu li jigu milqugha.

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

L-ispejjez ta' dawn il-proceduri ghandhom jigu sopportati interament mis-socjetà Rikorrenti.

< Sentenza Finali >

-----TMIEM-----