QORTI TA' L-APPELL

(SEDE INFERJURI)

IMHALLEF

ONOR. EDWINA GRIMA LL.D.

Seduta tat-30 ta' Settembru 2015

Appell Numru: 202/2012

MELITA plc

Vs

L-AWTORITA ta' MALTA dwar il-KOMUNIKAZZJONI

Il-Qorti,

Rat is-sentenza moghtija mit-Tribunal ghar-Revizjoni Amministrattiva tat-13 ta' Gunju 2013 fejn gie deciz:-

" ***It-Tribunal,***

Ra r-Rikors ipprezentat mis-socjetà Melita p.l.c. fit-8 ta' Marzu 2012 permezz ta' liema titlob li l-Bord ta' l-Appelli dwar il-Komunikazzjonijiet, illum it-Tribunal ta' Revizjoni Amministrattiva, jannulla u jirrevoka d-decizjoni ta' l-Awtorità ta' Malta dwar il-Komunikazzjoni datata 7 ta' Frar 2012 f'dik il-parti fejn l-istess Awtorità issostni li m'ghandhiex poter li tevalwa bundle maghmul minn prodotti regolati u mhux regolati u fejn ssosstni li ghalhekk ma tistax tapplika Net Revenue Test jew testijiet ohra ta' ragonevolezza fuq bundles li jikkonsistu f'prodotti regolati u mhux regolati, u konsegwentement jordna lill-

Awtorità ta' Malta dwar il-Kommunikazzjoni biex tikkunsidra jekk ghandhiex timplimenta Net Revenue Test jew testijiet ohra ta' ragonevolezza fuq bundles li jikkonsistu f'prodotti regolati u mhux regolati u/jew timplimenta r-rimedji kollha kif mehtiega skond il-kaz;

Ra d-dokumenti markati Dok. "M1" sa' Dok. "M3" annessi mar-Rikors promotur a fol. 160 sa' 1 tal-process;

Ra r-Risposta ta' l-Awtorità ta' Malta dwar il-Komunikazzjoni permezz ta' liema topponi ghat-talbiet tas-socjetà Rikorrenti u titlob li l-istess jigu michuda stante li: (i) dak li qed jintalab mill-Bord ta' l-Appelli dwar il-Komunikazzjonijiet, illum it-Tribunal ta' Revizjoni Amministrattiva, partikolarment bit-tieni talba, jmur lil hinn mill-kompetenza ta' l-istess Bord/Tribunal; (ii) l-ewwel talba tas-socjetà Rikorrenti ma hijiex sufficjentement spjegata u hija nieqsa mid-dettal necessarju biex tigi individwata dik il-parti tad-decizjoni ta' l-Awtorità li s-socjetà qed titlob li tigi annullata u revokata; u (iii) fil-mertu, il-pretensjonijiet tas-socjetà Rikorrenti ma humiex gustifikati u sostenibbli;

Ra d-dokument markat Dok. "MCA1" mar-Risposta ta' l-Awtorità intimata a fol. 73 u 72 tal-process;

Ra n-Nota ta' Sottomissjonijiet tas-socjetà Rikorrenti pprezentata fit-13 ta' Lulju 2012 a fol. 119 sa' 108 tal-process;

Ra n-Nota Responsiva ta' l-Awtorità intimata u d-dokumenti annessi maggha, ipprezentata fit-8 ta' Ottubru 2012 a fol. 188 sa' 128 tal-process;

Ra n-Nota ta' Sottomissjonijiet tas-socjetà Rikorrenti dwar l-eccezzjonijiet preliminari sollevati mill-Awtorità intimata u d-dokumenti annessi maghha, ipprezentata fil-5 ta' Dicembru 2012 a fol. 251 sa' 190 tal-process;

Ra n-Nota Responsiva ta' l-Awtorità intimata pprezentata fit-28 ta' Jannar 2013 a fol. 256 sa' 254 tal-process;

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

Sema' t-trattazzjoni finali da parte tad-difensuri tal-partijiet kontendenti dwar il-mertu tal-proceduri;

Ikkonsidra:

Bil-proceduri odjerni s-socjetà Rikorrenti tattakka decizjoni, jew ahjar parti specifika tad-decizjoni ta' l-Awtorità intimata datata 7 ta' Frar 2012 dwar Retail access to the public telephone network at a fixed location: Identification and Analysis of Markets, Determination of Market Power and Setting of Remedies1. Il-parti tad-decizjoni ta' l-Awtorità intimata li qed tigi kontestata mis-socjetà Rikorrenti hija l-parti li tittratta dwar Measures to counter the unreasonable bundling of services u l-aggravji fuq liema l-imsemmija socjetà tibbaza l-appell taghha essenzjalment huma li: (i) l-Awtorità qed tinterpreta l-ligi u r-rimedju ta' l-unreasonable bundling b'mod inkorrett fis-sens illi tghid li hi m'ghandhiex poter li tevalwa bundle maghmul minn prodotti regolati u mhux regolati u l-effetti ta' dan il-bundle fuq is-Suq Rilevanti; (ii) l-Awtorità ghaldaqstant mhix korretta li tghid li hi ma tistax tapplika Net Revenue Test fuq bundles li jikkonsistu f'prodotti regolati u mhux regolati; (iii) l-analizi ta' l-Awtorità dwar x'jikkostitwixxi unreasonable bundling u kif qed taghmel l-analizi ta' dan ir-rimedju huwa skorrett ghaliex l-Awtorità mhix qed tkun konsistenti ma' dak li ntqal mill-Kummissjoni Ewropea u istituzzjonijiet Ewropej ohrajn, kif ukoll mad-dettami ta' National Regulatory Authorities ta' Stati Membri ohrajn; (iv) minhabba dan in-nuqqas minn naha ta' l-Awtorità li tikkonsidra li tevalwa bundle maghmul minn prodotti regolati u mhux regolati u l-effetti ta' dan il-bundle fuq is-Suq Rilevanti, kif ukoll li tikkonsidra ghandhiex tapplika Net Revenue Test, hemm il-possibilità li l-intrapriza li ghandha significant market power fis-Suq Rilevanti tistagna u/jew ser tkompli tistagna l-kompetizzjoni hielsa f'dan is-suq; (v) dan in-nuqqas min-naha ta' l-Awtorità ser jeffettwa mhux biss is-Suq Rilevanti in kwistjoni imma is-swieq rilevanti kollha li huma regolati mill-Awtorità; (vi) dan qieghed jaffettwa lill-Melita (flimkien ma' kompetituri ohrajn fis-suq)…; u (vii) f'kull kaz, id-

1 Dok. "M1" a fol. 160 sa' 73 tal-process.

Decizjoni Appellata ta' l-Awtorità in kwantu r-rimedju ta' l-unreasonable bundling hija skorretta2.

2 Para. 4 tar-Rikors promotur.

L-Awtorità intimata tilqa' ghat-talbiet tas-socjetà Rikorrenti b'zewg eccezzjonijiet preliminari u cioè: (i) bl-eccezzjoni li dak mitlub mis-socjetà Rikorrenti b'dawn il-proceduri, partikolarment bit-tieni talba taghha, jmur lil hinn mill-kompetenza ta' dan it-Tribunal u tal-Bord ta' l-Appell dwar il-Komunikazzjoni quddiem min kienu originarjament istitwiti dawn il-proceduri; u (ii) bl-eccezzjoni li l-ewwel talba tas-socjetà Rikorrenti – ossia fejn titlob li parti mid-decizjoni tas-7 ta' Frar 2012 tigi kancellata u revokata – ma hijiex spjegata u

dettaljata bizzejjed. L-Awtorità intimata tikkontesta l-appell tas-socjetà Rikorrenti fil-mertu wkoll u teccepixxi li l-pretensjonijiet tas-socjetà Rikorrenti ma humiex gustifikati u konsegwentement ma humiex sostenibbli.

Fil-fehma tat-Tribunal, qabel ma jigi trattat il-mertu ta' dawn il-proceduri ghandhom l-ewwel jigu trattati l-eccezzjonijiet preliminari sollevati mill-Awtorità intimata u s-sottomissjonijiet rispettivament avvanzati mill-partijiet kontendenti in sostenn jew in opposizzjoni ghall-istess, skond il-kaz. It-Tribunal iqis li s-sottomissjonijiet avvanzati mill-partijiet kontendenti dwar jekk is-socjetà Rikorrenti b'xi mod gietx li rrinunzjat ghad-dritt ta' kontestazzjoni ta' l-ewwel zewg eccezzjonijiet sollevati mill-Awtorità intimata u ghalhekk it-tieni talba taghha ghandha tigi michuda b'mod awtomatiku – kif pretiz mill-Awtorità intimata – u dwar jekk dan it-Tribunal ghandux jinjora tali eccezzjonijiet u minflok jghaddi direttament ghall-mertu – kif jidher li qed jigi pretiz mis-socjetà Rikorrenti – huma ghal kollox futili u superfluwi u ghalhekk ser jinjorhom ghal kollox u jghaddi mill-ewwel biex jittratta z-zewg eccezzjonijiet preliminari fis-sustanza reali taghhom.

Kif appena osservat l-Awtorità intimata tikkontendi li dak mitlub mis-socjetà Rikorrenti, b'mod partikolari bit-tieni talba taghha, ma jinkwadrax ruhu fil-parametri tal-poteri ta' dan it-Tribunal u tal-Bord ta' l-Appelli dwar il-Komunikazzjonijiet li pprecedih u b'hekk issosstni li tali talba ma tistax tigi milqugha. Fin-Nota Responsiva taghha pprezentata fit-8 ta' Ottubru 2012, l-Awtorità intimata tamplifika din il-pretensjoni u tikkontendi li t-tieni talba tal-Melita ma tistax tigi sostenuta stante li dan l-Onorabbli Tribunal huwa nieqes mill-poteri li jaghti xi ordni tan-natura rikjesta mill-Melita fit-talba taghha fil-konfront ta' l-Awtorità. Il-vires ta' dan l-Onorabbli Tribunal jibda u jieqaf mal-parametri moghtija lilu mill-Ligi, u cioe l-Artiklu 39(1) tal-Kap.418 tal-Ligijiet ta' Malta… Skont din id-disposizzjoni legali dan l-Onorabbli Tribunal jista' biss jikkonferma jew jannulla in toto jew in parti decizjoni tal-Awtorità. Il-binarji ta' l-ezercizzju investigattiv ta' l-istess Tribunal huma ghalhekk ristretti fis-sens li t-Tribunal ghandu biss jara jekk id-decizjoni ta' l-Awtorità hija illegali u tikser xi principju jew disposizzjoni legali. Dan l-Onorabbli Tribunal ma jista' qatt, u bir-rispett kollu ma ghandux, jidhol fil-mertu dwar jekk fid-diskrezzjoni moghtija mil-ligi lill-Awtorità li din timponi obbligu regolatorju fuq l-operatur, l-Awtorità setghetx jew missitx uzat id-diskrezzjoni taghha b'mod differenti. Li kieku kien hekk, it-Tribunal jispicca hu stess regolatur tas-settur li bil-ligi huwa regolat mill-Awtorità – haga li certament la l-ligi nostrana, u lanqas dik Ewropeja li fuqha hija msejsa l-ligi taghna, ma trid. Fid-dawl ta' dan, isegwi li t-Tribunal ghandu, meta qed jikkunsidra l-mertu ta' l-appell, jinvestiga biss jekk l-

Awtorità uzatx id-diskrezzjoni riservata mill-ligi lilha b'mod legali, u cioè jekk fl-uzu tad-diskrezzjoni taghha l-Awtorità mxietx skond il-ligi. Dan huwa principju fundamentali li bl-ebda mod ma ghandu jithalla li jigi mittiefes permezz ta' appell li proprju jattakka l-ezercizzju tal-poteri diskrezzjonali ta' l-Awtorità bhal ma hu l-appell odjern. Dan l-appell ma huwiex bbazat fuq xi abbuz jew illegalità fl-uzu tad-diskrezzjoni ta' l-Awtorità, izda huwa appell mahsub sabiex id-diskrezzjoni uzata mill-istess Awtorità skond kif permess mill-ligi, tigi mibdula permezz ta' decizjoni ta' dan l-Onorabbli Tribunal. ... B'zieda ghal dan huwa sottomess bl-umiltà kollha li huwa mill-iktar lampanti li t-tieni talba tal-Melita hija nsostenibbli stante li dak mitlub mill-Onorabbli Tribunal – u cioe li t-Tribunal jordna lill-Awtorità tezercita d-diskrezzjoni taghha b'certu mod – mhuwiex kontemplat bl-ebda mod mill-Ligi applikabbli, cioè l-artiklu 39 tal-Kap.418. Fil-fatt m'huwa imkien ikkontemplat illi dan l-Onorabbli Tribunal jista' jaghti xi ordni lill-Awtorità biex taghmel xi haga partikolari. Il-vires tat-Tribunal huwa wiehed – dak li jikkonferma jew jannulla in toto jew in parte decizjoni ta' l-Awtorità3.

3 Para. 9,10 u 12 tan-Nota Responsiva ta' l-Awtorità intimata.

4 Artikolu 39(1) tal-Kap.418 tal-Ligijiet ta' Malta kif applikabbli kemm ghall-Bord ta' l-Appelli dwar il-Komunikazzjonijiet kif ukoll ghat-Tribunal ta' Revizjoni Amministrattiva in segwitu ghall-emendi introdotti bl-Avviz Legali 180 ta' l-2012.

5 Fol. 251 sa' 246 tal-process.

Is-socjetà Rikorrenti tirribatti ghal din l-eccezzjoni ta' l-Awtorità intimata billi b'mod dettaljat – izda sfortunatament fil-maggor parti ghal kollox inutili – tispjega li l-kompetenza ta' dan it-Tribunal u tal-Bord ta' l-Appelli dwar il-Komunikazzjonijiet li kien jipprecedih, hi u dejjem kienet li jqis il-merti ta' l-appell, u jista' ghal kollox jew f'parti, jikkonferma jew jannulla d-decizjoni appellata, fejn jaghti bil-miktub ir-ragunijiet ghad-decizjoni tieghu u ghandu jara li dik id-decizjoni tkun wahda pubblika u li tigi komunikata lill-partijiet fl-appell4. It-Tribunal iqis li s-sottomissjonijiet avvanzati mis-socjetà Rikorrenti fil-paragrafi 12 sa' 22 tan-Nota ta' Sottomissjonijiet taghha pprezentata fil-5 ta' Dicembru 20125, huma ghal kollox inutili ghaliex bl-ewwel eccezzjoni preliminari taghha l-Awtorità intimata iktar qed tattakka l-validità guridika u procedurali tat-tieni talba tas-socjetà Rikorrenti milli ta' l-ewwel talba taghha. In effetti l-Awtorità intimata – entro l-parametri stretti minnha esposti fis-sottomissjonijiet taghha u dwar liema t-Tribunal se jaghmel l-osservazzjonijiet tieghu iktar 'l quddiem f'din is-sentenza – tirrikonoxxi u taccetta li proceduralment is-socjetà

Rikorrenti tista' titlob ir-revoka u thassir in toto jew in parte ta' decizjoni moghtija minnha, izda tikkontendi li dan it-Tribunal ma jistax jissosstitwixxi d-diskrezzjoni tieghu ghal dik ta' l-Awtorità u lanqas ma jista' jordna lill-Awtorità biex taghmel jew tesegwixxi att amministrattiv partikolari.

Fir-rigward tat-tieni talba taghha, li hija l-qofol u l-pern ta' l-ewwel eccezzjoni preliminari ta' l-Awtorità intimata, is-socjetà Rikorrenti semplicement tghid li: fir-rigward tat-tieni talba tas-socjetà appellanti, fir-risposta ta' l-appell l-Awtorità zzid tghid li l-Awtorità ma tistax tkun imgieghla minn dan il-Bord/Tribunal taghmel xi att amminsitrattiv fuq ordni tal-Bord u li din l-ordni timpingi fuq l-indipendenza u d-diskrezzjoni ta' l-Awtorità. Dwar dan is-socjetà appellanti tissottometti li t-tieni talba tas-socjetà appellanti mhijiex intavolata fis-sens ta' ordni li l-Awtorità trid taghmel xi att izda giet imfassla fis-sens li l-Awtorità ghandha tikkunsidra testijiet ta' ragonevolezza fuq il-bundles. Imkien ma jissemma li dan il-Bord/Tribunal ser jimponi ordni li l-Awtorità tigi mgieghla taghmel xi att amministrattiv arbitrarju6.

6 Para. 23 tan-Nota ta' Sottomissjonijiet tas-socjetà Rikorrenti pprezentata fil-5 ta' Dicembru 2012.

L-Awtorità intimata essenzjalment tippretendi li fid-dawl tal-kompetenza konferita lilu bl-Artikolu 39(1) tal-Kap.418 tal-Ligijiet ta' Malta dan it-Tribunal jista', anzi ghandu jara biss jekk fl-ezercizzju tad-diskrezzjoni taghha hija mxietx skond kif tipprovdi l-Ligi u jekk dak l-ezercizzju jaqa' entro l-parametri prefissi fil-Ligi allura l-iskrutinju ta' dan it-Tribunal ghandu jieqaf hemm u ma jmurx oltre. Fil-fehma tat-Tribunal però il-pretensjoni ta' l-Awtorità intimata hija wahda restrittiva zzejjed u bl-ebda mod ma tirrispekkja l-principji ta' Dritt Amministrattiv li dan it-Tribunal hu marbut bihom u obbligat li josserva u jimplimenta.

Huwa minnu li ai termini ta' l-Artikolu 39(1) tal-Kap.418 tal-Ligijiet ta' Malta fid-determinazzjoni ta' appell it-Tribunal ghandu jqis il-meritu ta' l-appell, u jista' ghal kollox jew f'parti, jikkonferma jew jannulla d-decizjoni appellata, fejn jaghti bil-miktub ir-ragunijiet ghad-decizjoni tieghu u ghandu jara li dik id-decizjoni tkun wahda pubblika u li tigi komunikata lill-partijiet fl-appell, izda ma ghandux jigi injorat il-fatt li l-iskop ta' dan it-Tribunal huwa li ***jirrivedi*** *atti amminsitrattivi ta' l-amministrazzjoni pubblika fuq punti ta' ligi u ta' fatt skond kif jirrizulta mill-Artikoli 5 u 7 tal-Kap.490 tal-Ligijiet ta' Malta. Dana l-iskop centrali tat-Tribunal jissussisti anke fi proceduri istitwiti ai termini ta' l-Artikolu 36(1) tal-Kap.418 tal-Ligijiet ta' Malta stante li fis-subartikolu (2) jinsab espressament provdut illi*

d-disposizzjonijiet ta' l-Att dwar il-Gustizzja Amminsitrattiva, sa fejn japplikaw ghat-Tribunal ta' Revizjoni Amministrattiva, ghandhom japplikaw ghal kull procedura quddiem l-imsemmi Tribunal u l-kliem "amministrazzjoni pubblika" fl-imsemmija ligi ghandhom jinftiehmu bhala referenza ghall-Awtorità.

L-istharrig ta' ghemil amministrattiv ma sarx possibbli fis-sistema guridika nostrali biss bil-promulgazzjoni ta' l-Att dwar il-Gustizzja Amministrattiva u bil-holqien ta' dan it-Tribunal izda, dan già kien possibbli b'mod generali ghad illi entro parametri specifici permezz ta' proceduri istitwiti ai termini ta' l-Artikolu 469A tal-Kap.12 tal-Ligijiet ta' Malta quddiem il-Prim' Awla tal-Qorti Civili u b'mod partikolari fil-kuntest ta' decizjonijiet moghtija mill-Awtorità ta' Malta dwar il-Komunikazzjoni, bi proceduri istitwiti quddiem il-Bord ta' l-Appelli dwar il-Komunikazzjonijiet. Dan ifisser ghalhekk illi l-principji tad-Dritt Amministrattiv – li essenzjalment jirrivolvu madwar l-istharrig u revizjoni ta' ghemil amministrattiv ta' awtoritajiet pubblici – ilhom ormai ghal diversi snin jigu enuncjati w implimentati fis-sistema guridika nostrali. Ghalhekk illum tezisti gurisprudenza stabbilita – pronuncjata b'mod partikolari mill-Prim' Awla tal-Qorti Civili jew tal-Qorti ta' l-Appell skond il-kaz, fil-kuntest ta' proceduri istitwiti ai termini ta' l-Artikolu 469A tal-Kap.12 tal-Ligijiet ta' Malta – li tittratta dwar il-principji tad-Dritt Amminsitrattiv kif applikabbli fis-sistema guridika nostrali, fosthom appuntu l-poteri revizorji ta' l-awtorità gudikanti vis-à-vis ghemil amministrattiv – punt dan diversi drabi dibattut quddiem il-Prim' Awla tal-Qorti Civili fil-kuntest ta' proceduri dwar stharrig ta' ghemil amministrattiv.

Ghalkemm f'certu aspetti l-poteri tat-Tribunal ta' Revizjoni Amministrattiva huma kemm xejn iktar wiesgha minn dawk konferiti fuq il-Prim' Awla tal-Qorti Civili bl-Artikolu 469A tal-Kap.12 tal-Ligijiet ta' Malta ghaliex ma huwiex dejjem u f'kull kaz marbut li jikkonsidra proceduri migjuba quddiemu fil-kuntest ta' parametri ben definiti u ghaliex kuntrarjament ghall-Prim' Awla tal-Qorti Civili f'kawza ta' stharrig ta' ghemil amministrattiv, jista' f'certa cirkostanzi jissostitwixxi d-diskrezzjoni tieghu ghal dik ta' l-awtorità pubblika kontestata – bhal ad ezempju fil-kaz ta' appelli minn stimi mahruga mid-Direttur Generali (Taxxi Interni) jew mid-Direttur Generali (Taxxa fuq il-Valur Mizjud) – ma hemmx dubju li l-gurisprudenza relattiva ghall-proceduri dwar stharrig ta' ghemil amminsitrattiv u l-principji hemm stabbiliti, ma ghandhiex tigi injorata anzi ghandha tifforma bazi soda fuq liema ghandu jopera u jkompli jevolvi dan it-Tribunal – u in verità fuq liema kellu jopera wkoll il-Bord ta' l-Appell dwar il-Komunikazzjonijiet qablu.

Il-fatt li s-sottomissjoni avvanzata mill-Awtorità intimata f'dawn il-proceduri dwar il-poteri revizorji ta' dan it-Tribunal (u tal-Bord ta' l-Appell dwar il-Komunikazzjonijiet qablu) vis-à-vis decizjonijiet moghtija minnha hija restrittiva izzejjed jirrizulta minn dak osservat mill-Prim' Awla tal-Qorti Civili fis-sentenza fl-ismijiet ***Anthony Psaila v. Kummissarju tal-Pulizija, Citaz. Nru. 1734/97*** *deciza fit-28 ta' Jannar 2004, huwa accettat, u dan tista' tghid b'mod pacifiku, illi ma hemm xejn x'jimpedixxi d-dritt ta' kull cittadin li jimpunja fil-Qorti l-attijiet kollha ta' Ezekuttiv. Kif drabi ohra ritenut "l-attijiet kollha ta' l-Ezekuttiv, bhal dawk tal-privat, ma jistghux ikunu kontra l-ligi, ghax il-ligi ma tawtorizzax l-illegalitajiet" (Victor Henry Tabone nomine v. Dr. Vincent Tabone nomine, Prim' Awla, Qorti Civili, per Imhallef Maurice Caruana Curran, 24 ta' Gunju 1970). Illum aktar minn qabel dan huwa hekk il-kaz fir-rigward ta' kull azzjoni amministrattiva billi l-ligi stess, ex- Artikolu 469A, tikkonferixxi dan id-dritt ta' l-istharrig gudizzjarju dwar kull ghemil amminsitrattiv. "Ghemil amministrattiv" li skond l-istess dispost tal-ligi jinkorpora fih inter alia "il-hrug ta' kull ordni, licenza, permess, warrant, decizjoni jew ir-rifjut ghal talba ta' xi persuna li jsir minn awtorità pubblika…". Indubbjament ghalhekk ir-rifjut ta' licenza ta' arma tan-nar hu 'ghemil amministrattiv' jew ezekuttiv. L-Artikolu 469A imsemmi, introdott bl-Att XXIV ta' l-1995 u applikabbli ghall-procedura odjerna, jinvesti bl-ewwel subinciz tieghu lill-qrati ordinarji ta' kompetenza civili bil-gurisdizzjoni biex jistharrgu l-validità ta' l-ghemil amministrattiv jew li jiddikjaraw dak l-ghemil null, invalidu jew minghajr effett. Dan it-trattament akkordat mil-ligi lil qrati jiddipartixxi certament minn dik il-gurisprudenza, ormai destitwita minn kull logika, li kienet tirritjeni li l-funzjoni tal-Qrati kienet limitata ghall-indagini dwar jekk l-ghemil kienx jirrientra fl-attribuzzjonijiet ta' l-awtorità izda mhux ukoll li jezaminaw "l'opportunità o la gustizzja di esso."7 Ara decizjoni fl-ismijiet "Marchese Giuseppe Mallia Tabone v. Maggiore Frank Stivala noe" Appell Civili, 11 ta' Jannar 1926, li kienet tittratta minn nuqqas ta' renova ta' licenza lill-attur ghall-garr ta' arma tan-nar ghall-iskop ta' kacca. Huwa ovvju minn din is-sentenza illi l-kuncett ta' 'reasonableness" kif zviluppat fir-Renju Unit jew dak ta' "detournement de pouvoir" fid-dritt Franciz bhala mezz ta' kontroll fuq l-ezercizzju arbitrali tad-diskrezzjoni ma kienx konoxxut mill-Qorti.*

Similment fis-sentenza fl-ismijiet ***Lawrence Borg noe v. Gvernatur tal-Bank Centrali ta' Malta, Citaz. Nru. 2959/96*** *deciza mill-Prim' Awla tal-Qorti Civili fl-1 ta' Marzu 2004, fejn dik il-Qorti trattat il-kwistjoni dwar is-setghat diskrezzjonali ta' awtorità pubblika u kif il-Qrati ghandhom iqisu l-isharrig taghhom dwarhom, gie osservat illi meta wiehed jitkellem dwar diskrezzjoni, wiehed tabilfors ikun qieghed jara sitwazzjoni fejn trid issir ghazla bejn*

izjed minn linja wahda ta' azzjoni. Jekk m'hemmx ghazla ta' izjed minn triq wahda, allura wiehed ma jitkellimx dwar diskrezzjoni imma dwar dmir. F'dan il-kuntest il-Qorti thoss li ghandha ticcita din is-silta li gejja minn xoghol ewlieni f'dan il-qasam u li, fil-fehma taghha, tfisser b'mod car il-perm kollu ta' l-istharrig li hija mitluba taghmel f'din il-kawza. Inghad illi "To say that somebody has a discretion presupposes that there is no uniquely right answer to this problem. There may, however, be a number of answers that are wrong in law. ... The exercise of a discretion may be impugned directly or indirectly. The indirect method of challenge is the more common. A person aggrieved by the exercise of a discretionary power may, instead of attacking the merits of the exercise of the discretion, contend that the repository of the discretion has acted without jurisdiction or 'ultra vires' because of the non-existence of a state of affairs upon which the validity of the exercise of the discretion depends. Or he may contend that the repository of the discretion has failed to observe the rules of natural justice (if they are found to be applicable) or other essential procedural requirements. If his contentions are successful, the court will hold the discretionary act to be invalid, and the fact that the true reason for instituting proceedings will have been his dislike of the manner in which the discretion itself was exercised is not a valid objection to the proceedings. ... The crucial question, however, is: In what circumstances and to what extent will the courts review the merits of the exercise of a statutory discretion which is neither made subject to appeal nor limited by the express provisions of a statute? The courts have repeatedly affirmed their incapacity to substitute their own discretion to that of an authority in which the discretion has been confided9". Illi kien ghalhekk li, mal-medda taz-zmien, issawru regoli li jharsu l-imsemmija setghat diskrezzjonali u kif il-Qrati kellhom iqisu l-istharrig taghhom dwarhom. Ewlenija fost dawn ir-regoli hi li l-awtorità li hija moghnija b'diskrezzjoni tista' tigi ordnata tezercitaha f'kaz li tkun naqset li taghmel dan, imma ma tistax tigi dettata x'ghandha tiddeciedi jew li twettaqha b'xi mod partikolari. Biex jigi assikurat li din id-diskrezzjoni kienet imwettqa, jehtieg li lill-Qorti jirrizultalha li dik l-awtorità tassew qieset il-kwestjoni li kellha quddiemha, u li dan ghamlitu minghajr l-indhil ta' l-ebda haddiehor jew bla ma poggiet lilha nnfisha f'qaghda fejn ma setghetx jew irrifjutat li twettaq dik id-diskrezzjoni. Siewi wkoll li jigi accertat li l-awtorità mistharrga m'ghamlitx dak li kienet espressament mizmuma milli taghmel, jew jekk ghamlitx xi haga li ma kinitx awtorizzata taghmel. Fuq kollox, l-awtorità mistharrga trid tkun imxiet bona fide u qieset il-konsiderazzjonijiet rilevanti tal-kaz. Dawn huma, fil-qosor, il-gabra ta' kategoriji fid-Dritt Amministrattiv ta' nuqqas ta' ezercizzju ta' diskrezzjoni u ta' eccess jew abbuz ta' dak l-ezercizzju. Illi marbut sfiq ma' dawn il-principji wiehed isib ukoll it-test tar-ragonevolezza

tat-twettiq tad-diskrezzjoni. ... Id-dmir li awtorità tagixxi ragonevolment mhux l-istess bhad-dmir li tagixxi bona fide. Ghalhekk filwaqt li mhux kull ezercizzju ragonevoli ta' gudizzju huwa bilfors korrett, lanqas m'huwa bilfors irregonevoli kull ezercizzju ta' gudizzju zbaljat. F'kaz bhal dan, ix-xiber tal-Qorti jidher li ghandha tuza biex tkejjel bih ikun dak li tqis jekk id-decizjoni li minnhom jkun hemm ilment kinitx mistennija li tittiehed minn persuni ragonevoli. Il-kittieba awtorevoli f'dan il-qasam jghallmu li r-rwol ewlieni tal-Qrati fid-dritt amministrattiv huwa dak li jizguraw li ma tonqosx il-legalità fl-ghemil mistharreg izjed milli dak li jaraw l-awtorità pubblika mistharrga tkun iddecidiet sewwa.

Meta s-sottomissjoni ta' l-Awtorità intimata li l-binarji ta' l-ezercizzju investigattiv ta' l-istess Tribunal huma ghalhekk ristretti fis-sens li t-Tribunal ghandu biss jara jekk id-decizjoni ta' l-Awtorità hija illegali u tikser xi principju jew disposizzjoni legali. Dan l-Onorabbli Tribunal ma jista' qatt, u bir-rispett kollu ma ghandux, jidhol fil-mertu dwar jekk fid-diskrezzjoni moghtija mil-ligi lill-Awtorità li din timponi obbligu regolatorju fuq l-operatur, l-Awtorità setghetx jew missitx uzat id-diskrezzjoni taghha b'mod differenti. Li kieku kien hekk, it-Tribunal jispicca hu stess regolatur tas-settur li bil-ligi huwa regolat mill-Awtorità – haga li certament la l-ligi nostrana, u lanqas dik Ewropeja li fuqha hija msejsa l-ligi taghna, ma trid. Fid-dawl ta' dan, isegwi li t-Tribunal ghandu, meta qed jikkunsidra l-mertu ta' l-appell, jinvestiga biss jekk l-Awtorità uzatx id-diskrezzjoni riservata mill-ligi lilha b'mod legali, u cioè jekk fl-uzu tad-diskrezzjoni taghha l-Awtorità mxietx skond il-ligi, tigi kkunsidrata fid-dawl tal-principji appeni citati jirrizulta immedjatament evidenti li l-istess sottomissjoni ma hijiex ghal kollox korretta u l-istharrig li t-Tribunal jista' u effettivament ghandu jaghmel tad-decizjoni ta' l-Awtorità intimata datata 7 ta' Frar 2012, u partikolarment tal-parti kontestata ta' dik id-decizjoni, ghandu jkun ferm iktar approfondit minn kif pretiz mill-Awtorità intimata.

L-Awtorità intimata però ghandha ragun f'li tikkontendi li fil-kaz ta' appelli minn decizjonijiet moghtija minnha dan it-Tribunal ma ghandux is-setgha li jissostitwixxi d-diskrezzjoni tieghu ghal dik taghha u b'hekk jiddeciedi minflokha jew jordnalha kif ghandha tiddeciedi. Dan huwa principju centrali fil-kuntest tad-Dritt Amministrattiv kif jirrizulta mis-sentenza iktar 'l fuq citata ***Lawrence Borg v. Gvernatur tal-Bank Centrali ta' Malta*** *kif ukoll mis-sentenza wkoll iktar 'l fuq citata* ***Anthony Psaila v. Kummissarju tal-Pulizija*** *fejn, f'din ta' l-ahhar, inghad illi l-Qrati fil-funzjoni taghhom ta' judicial review ta' l-operat ta' l-Ezekuttiv ghandhom iva d-dritt li jiddeciedu li atti partikolari ta' l-Ezekuttiv ikunu nulli u bla effett izda m'ghandhom qatt id-dritt li jissostitwixxu d-diskrezzjoni rizervata lill-Ezekuttiv*

b'dik taghhom – Mary Gech v. Ministru tax-Xoghlijiet et, Appell Civili, 29 ta' Jannar 1993. Fejn il-Legislatur ried li t-Tribunal ikollu l-fakoltà li jissostitwixxi d-diskrezzjoni tieghu ghal dik ta' l-awtorità pubblika kontestata espressament ipprovda dwar dan fil-Ligi relattiva bhal ad ezempju fl-Artikolu 35(4) tal-Kap.372 tal-Ligijiet ta' Malta li jipprovdi: bla hsara ghad-disposizzjonijiet tas-subartikolu (3), it-Tribunal jikkonferma, inaqqas, izid jew jannulla l-istima jew jaghmel dak l-ordni dwarha illi jidhirlu xieraq.

Madanakollu però ma hemmx dubju li fl-eventwalità li dan it-Tribunal kellu jannulla in toto jew in parte decizjoni ta' l-Awtorità intimata, l-istess Awtorità tkun in segwitu ghal tali decizjoni, ***obbligata*** *li terga' tikkonsidra l-kwistjoni mill-gdid* ***fid-dawl tar-ragunijiet moghtija mit-Tribunal ghar-revoka tad-decizjoni originali taghha****. Kieku l-Awtorità intimata kellha titqies bhala mhux marbuta bid-decizjoni qual' volta moghtija mit-Tribunal u bir-ragunijiet fiha dedotti, id-dritt ta' appell minn decizjonijiet ta' l-istess Awtorità moghti bis-sahha ta' l-Artikolu 37(1) tal-Kap.418 tal-Ligijiet ta' Malta kompletament jitlef l-iskop u s-siwi tieghu.*

Trattati dawn il-kwistjonijiet emergenti mill-ewwel eccezzjoni preliminari sollevata mill-Awtorità intimata, jehtieg issa li tigi trattata t-tieni eccezzjoni preliminari sollevata mill-istess Awtorità intimata.

Kif già iktar 'l fuq osservat bit-tieni eccezzjoni preliminari taghha l-Awtorità intimata teccepixxi li l-ewwel talba tas-socjetà Rikorrenti ma hijiex sufficjentement spjegata u hija nieqsa mid-dettal necessarju biex tigi individwata dik il-parti tad-decizjoni ta' l-Awtorità li s-socjetà qed titlob li tigi annullata u revokata. Fin-Nota Responsiva taghha l-Awtorità intimata telabora din l-eccezzjoni billi tissottometti illi bizzejjed li wiehed jghid l-ovvju – u cioe li meta qed tintalab ir-revoka in parte ta' decizjoni ghandu jigi specifikat fl-att promotur b'certezza u bi precizjoni dik il-parti tad-decizjoni li taghha qed tintalab ir-revoka. Jekk ma jkunx hekk jinholoq dubju nsormontabbli fil-mohh tal-gudikatur, f'dan il-kaz dan l-Onorabbli Tribunal, biex jigi identifikat liema parti tad-decizjoni appellata ghandha tigi kkunsidrata minnha u, fl-ipotezi li tintlaqa' t-talba, skartata. Fil-kaz partikolari, l-appell odjern jikkoncerna decizjoni ta' l-Awtorità li b'kollox fiha 88 pagna. Imkien fit-talba taghha numerata 4.2(i) fir-Rikors ta' l-Appell il-Melita ma tindika bil-preciz liema paragrafi ta' din id-decizjoni qed jigu kontestati. Minflok, il-Melita ghazlet li titlob illi dan l-Onorabbli Tribunal joghgbu jannulla u jirrevoka "dik il-parti (tad-decizjoni appellata) fejn l-Awtorità ssostni li m'ghandhiex poter li tevalwa 'bundle' maghmul minn prodotti regolati u mhux

regolati u fejn hi ssostni li ghalhekk ma tistax tapplika "Net Revenue Test" jew testijiet ohra ta' ragonevolezza fuq 'bundles' li jikkonsistu f'prodotti regolati u mhux regolati'. Hija l-umli sottomissjoni ta' l-Awtorità illi minghajr referenza preciza fit-talba ghall-parti tad-decizjoni appellata li qed jintalab li tigi revokata, tali talba ma tistax tintlaqa' minn dan l-Onorabbli Tribunal.

Is-socjetà Rikorrenti tirribatti ghal din l-eccezzjoni ta' l-Awtorità intimata billi tissottometti li ma hemm l-ebda dubju li s-socjetà appellanti tispjega ruhha sew dwar liema parti minn dik id-Decizjoni Appellata din qed tappella u dan partikolarment galadarba, immedjatament fl-ewwel pagna tar-rikors ta' l-appell tindika, proprju fil-paragrafi 1.2 – 1.4, liema parti tad-Decizjoni Appellata qed tigi appellata filwaqt li tindika li l-appellanti hassitha aggravata minn din id-decizjoni ta' l-Awtorità. Di più fit-talba stess, is-socjetà appellata tindika bic-car li dik il-parti tad-Decizjoni Appellata li ghandha tigi annullata u revokata hija proprju dik fejn 'l-Awtorità ssostni li m'ghandhiex poter li tevalwa bundle maghmul minn prodotti regolati u mhux regolati u fejn issostni li ghalhekk ma tistax tapplika Net Revenue Test jew testijiet ta' ragonevolezza fuq bundles li jikkonsistu f'prodotti regolati u mhux regolati'. Ulterjorment, is-sustanza ta' l-appell huwa estinsivament trattat kemm fir-rikors ta' l-appell, kif ukoll fin-nota ta' sottomissjonijiet tas-socjetà appellanti u allura ma ghandhiex ghalfejn terga' tirrepeti l-aggravji taghha f'din in-nota ta' sottomissjonijiet, a skans ta' ripetizzjoni. Minghajr pregudizzju ghas-suespost u in oltre, is-socjetà appellanti tissottometti li mkien fil-ligi ma jirrizulta li t-Tribunal (ex Bord) ma ghandux jilqa' din it-talba jekk, ghal-grazzja ta' l-argument din hija nieqsa minn xi dettall. Bil-kontra ta' dan, taht il-Ligi l-Antika, l-Artikolu 10 ta' l-avviz legali 418.01, jirrikjedi li: "(3) Il-Bord ta' l-Appelli jista' f'kull waqt jippermetti li ssir kull emenda fir-rikors bil-ghan li dan ikun aktar car: Izda l-Bord ta' l-Appelli ma ghandux jiehu konjizzjoni ta' ragunijiet ohra li ma jkunux dawk maghmulin fir-rikors ta' l-appell." Abbazi tal-premess allura, jekk dan it-Tribunal ihoss li ghandha ssir xi kjarifika fit-talba dan jista' jsir f'kull stadju; madanakollu, l-Awtorità ma tistax teccepixxi li dan it-Tribunal ghandu jghaddi sabiex ma jilqax it-talba tas-socjetà appellanti, kif fil-fatt qed jintalab mill-Awtorità appellata fin-nota ta' sottomissjonijiet risponsiva13.

13 Para. 25 sa' 29 tan-Nota ta' Sottomissjonijiet tas-socjetà Rikorrenti dwar l-eccezzjonijiet preliminari ta' l-Awtorità intimata pprezentata fil-5 ta' Dicembru 2012, a fol. 251 sa' 246 tal-process.

Minn ezami tar-Rikors promotur tas-socjetà Rikorrenti t-Tribunal ma jista' jsib ebda gustifikazzjoni ghat-tieni eccezzjoni preliminari sollevata mill-Awtorità intimata. Fil-fehma Tieghu l-ewwel talba tas-socjetà Rikorrenti hija sufficjentement spjegata u kuntrarjament ghal dak pretiz mill-Awtorità intimata jirrizulta b'mod car liema parti tad-decizjoni datata 7 ta' Frar 2012 qed tigi kkontestata mis-socjetà Rikorrenti. Ma hemmx dubju li l-iskop ta' l-appell tas-socjetà Rikorrenti u konsegwentement tat-talbiet minnha avvanzati ma ghandux jigi kkunsidrat limitatament mit-talbiet kif attwalment dedotti izda mir-Rikors promotur fl-intier tieghu fejn fil-kaz in ezami l-istess socjetà Rikorrenti spjegat b'mod dettaljat hafna il-lanjanza taghha u konsegwentement ir-remdju minnha mitlub.

Kif gustament rilevat mis-socjetà Rikorrenti fin-Nota ta' Sottomissjonijiet taghha dwar l-eccezzjonijiet preliminari sollevati mill-Awtorità intimata, fir-Rikors promotur – senjatament fil-paragrafi inizjali numerati 1.2 sa' 1.4 tar-Rikors14 – hija testwalment ticcita dik il-parti tad-decizjoni datata 7 ta' Frar 2012 li hassitha aggravata biha u, izid josserva it-Tribunal, fil-parti tar-Rikors fejn tittratta dwar l-appell taghha – ossia fil-paragrafu 3 tar-Rikors promotur15 - is-socjetà Rikorrenti specifikatament tghid il-Melita qieghda tappella kontra d-Decizjoni Appellata fir-rigward tar-rimedju ta' l-unreasonable bundling16 fuq il-bazi tas-segwenti… Fid-dawl ta' dan ghalhekk difficilment jista' jinghad illi l-ewwel talba tas-socjetà Rikorrenti fejn appuntu qed jintalab li d-Decizjoni Appellata tigi annullata u rrevokata in kwantu dik il-parti fejn l-Awtorità ssostni li m'ghandhiex poter li tevalwa bundle maghmul minn prodotti regolati u mhux regolati u fejn hi ssostni li ghalhekk ma tistax tapplika Net Revenue Test jew testijiet ohra ta' ragonevolezza fuq bundles li jikkonsistu f'prodotti regolati u mhux regolati, ma hijiex sufficjentement spjegata u hija nieqsa mid-dettal necessarju biex tigi individwata dik il-parti tad-decizjoni datata 7 ta' Frar 2012 li s-socjetà Rikorrenti qed titlob li tigi annullata u revokata.

Huwa evidenti li dak kontestat mis-socjetà Rikorrenti huwa l-mod kif l-Awtorità intimata ddecidiet li ghandha tagixxi fil-konfront ta' SMP operator – ossia f'dan il-kaz is-socjetà GO p.l.c. – to counter the unreasonable bundling of services kif minnha espost fil-paragrafu 5.4.3. tad-decizjoni datata 7 ta' Frar 2012. Is-socjetà Rikorrenti kjarament tikkontendi li l-Awtorità intimata ma hijiex qed tapplika u timplimenta l-poteri taghha fil-firxa shieha taghhom kif intiz fil-Ligi – kemm dik nostrali kif ukoll dik Ewropeja – bil-konsegwenza li l-obbligazzjonijiet li kkonkludiet li ghandhom jigu imposti fuq l-SMP operator fis-Suq Rilevanti17, u cioè is-socjetà GO p.l.c., bil-ghan li jigi evitat li jkun hemm unreasonable bundling of services ma humiex sufficjenti u ghalhekk hemm ir-riskju serju li din l-SMP

operator se tuza l-poter taghha fis-Suq Rilevatni biex tohnoq il-kompetizzjoni fi swieq ohrajn relatati fejn hemm kompetizzjoni hielsa. Konsegwentement ghalhekk it-tieni eccezzjoni preliminari sollevata mill-Awtorità intimata hija kjarament ghal kollox ingustifikata u bla bazi.

Trattati z-zewg eccezzjonijiet preliminari sollevati mill-Awtorità intimata jehtieg issa jigi trattat il-mertu proprju ta' dan l-appell.

Mill-atti processwali jirrizulta li fid-19 ta' Settembru 2011 l-Awtorità intimata ippubblikat Consultation Document dwar Retail access to the public telephone network at a fixed location – Identification and Analysis of Markets, Determination of Market Power and Setting of Remedies18 u fih esponiet its proposed decision on the markets for retail access to the public telephone network provided at a fixed location in Malta, in accordance with the EU regulatory framework of electronic communications networks and services. L-iskop tad-decizjoni hekk proposta kien li jigu identifikati s-swieq li ghandhom jigu regolati, li jigi individwat jekk hemmx operatur li ghandu Significant Market Power (SMP) f'wiehed jew iktar mis-swieq hekk identifikati u f' kaz li jigi determinat li hemm tali SMP operator, li jigu determinati l-mizuri u l-obbligi li ghandhom jigu imposti fuq tali operatur ghall-fini li tigi salvagwardata l-kompetizzjoni gusta f'tali swieq.

Fil-Kapitolu 5 tal-Consultation Document u senjatament fil-paragrafu 5.4.3 fejn trattat Measures to counter the unreasonable bundling of services l-Awtorità intimata osservat illi one of the major concerns of the MCA, as guarantor of effective competition in the retail access markets, is the ability of GO plc. as an SMP operator to bundle its retail products by leveraging into related markets and distorting pricing. However, the MCA recognises that such bundling of retail products may lead to economies of scale or scope for the operator and this in turn can lead to savings for the consumer. In considering the above, the MCA believes that there is a need to counter the risk of anti-competitive behaviour through bundling by means of an obligation to be imposed on GO plc. over and above those mentioned earlier on with respect to transparency. The main aim of such obligation would be that of preventing foreclosure of the retail access markets. One must note that under the regulatory regime currently in force, GO plc. is already obliged not to exclusively bundle any of the retail access services identified in this decision with other electronic communications services into a single tariff without also offering the fixed access service as a stand-alone product. In line with this approach, the MCA feels that it will benefit the competitiveness of the retail access

markets if this obligation continues to be imposed on all of GO's retail fixed access products falling within the markets identified above, to the effect that the said operator shall not unreasonably bundle retail fixed access services.

B'dokument ipprezentat f'Ottubru ta' l-201120 is-socjetà Rikorrenti ressqet is-sottomissjonijiet taghha dwar il-kontenut tal-Consultation Document ippubblikat mill-Awtorità intimata w in partikolari dwar il-preliminary conclusions regarding the regulatory obligations for the retail fixed access markets. F'tali rigward is-socjetà Rikorrenti esprimiet it-thassib taghha dwar ir-rimedju propost mill-Awtorità intimata fir-rigward ta' unreasonable bundling of services ghaliex skontha nonostante l-obbligazzjonijiet già imposti fuqha fir-rigward ta' bundling ta' servizzi ta' komunikazzjonijiet elettronici s-socjetà GO p.l.c. – identifikata bhala SMP operator fis-Suq Rilevanti – continues to unreasonably bundle TV, broadband and fixed telephony services to safeguard its monopoly over the fixed telephony market, and to leverage its dominance into related markets. Therefore, through its offers and practices, GO clearly continues to be in breach of its obligation not to unreasonably bundle its services as set out by the MCA u ghalhekk issottomettiet illi it is clear in relation to the foregoing that (a) anti-competitive bundling is a serious issue within the market at the present time and (b) the existing prohibition on unreasonable bundling is not a sufficiently effective remedy to prevent such anti-competitive activity. As a result, it is vital that the remedy now being proposed by the MCA has sufficient "teeth" to ensure that unreasonable bundling of services by the SMP operator and the consequent damage being caused to competition is brought to a swift end. Melita is therefore alarmed that the MCA's consideration of this issue in its Consultation Document is extremely cursory and contains no new proposals for an effective remedy in this area. The MCA's analysis of this issue gives no indication of the extent to which unreasonable bundling has become a major competition problem within the market nor does it address the fact that the current remedy – which merely contains a general prohibition on the SMP to the effect that it "shall not unreasonably bundle retail fixed access services" – has proven wholly ineffective in preventing GO from offering retail bundles which are exclusionary and anti-competitive in their effect. All the MCA proposes to do at this point in time is to re-confirm the existing ineffective remedy on GO. While the MCA states that it will "continue to monitor market developments" and "where appropriate" will "issue directions to further fine-tune" its retail access remedies, it puts forward no proposals to deal with problems created by the unreasonable bundling of fixed services by GO plc. This is a very serious omission on the MCA's part.

Konsegwentement ghalhekk fl-istess dokument is-socjetà Rikorrenti pproponiet li l-Awtorità intimata ghandha tindirizza s-segwenti aspetti: (i) that the application of competition law alone does not adequately address market failures resulting from bundles of regulated and non-regulated products; (ii) that the obligation not to unreasonably bundle is not limited to the obligation not to tie Products; (iii) that the obligation not to unreasonably bundle should be further detailed to specify that the bundles must be priced so as to avoid a margin squeeze and pass a net revenue test; u (iv) that any review of the reasonableness or otherwise of a bundle should take into account unregulated products and services – kif minnha spjegat f'iktar dettal fid-dokument sottomess.

Rigward ta' kull wiehed mill-erba' aspetti indikati mis-socjetà Rikorrenti fid-dokument taghha ta' Ottubru 2011, fid-decizjoni datata 7 ta' Frar 2012 l-Awtorità intimata ghamlet is-segwenti osservazzjonijiet: ***I.*** *The MCA is responsible to impose ex ante regulation, where one or more operators are found to have SMP in a defined electronic communications market. The imposition of ex ante regulation does not imply that ex post regulation is inadequate to address market failures. The two regulatory regimes can exist in parallel, each one dealing with different aspects of regulation. The MCA is not in a position to pronounce itself as to the effectiveness, or otherwise, of ex post regulation in respect to bundles made up of regulated (ex ante) and non-regulated (ex post) products. The remit of the MCA is limited to ex ante regulation of any product which is provided by a designated SMP operator within the specific market. The MCA does not enter into the merits of the adequacy of ex post competition law in products which are not subject to ex ante regulation. Any regulatory guidance on non-regulatory (under ex ante basis) products should be obtained from the competent authority administering the ex post regulatory regime.* ***II.*** *In its consultation document the MCA clearly highlighted that GO plc. cannot exclusively bundle any of the retail access services identified in this decision with other electronic communications services into a single tariff without also offering the fixed access service as a standalone product. This ensures that GO plc. does not engage in tying or pure bundling of services as a means of engaging in anti-competitive behaviour that would restrict market entry. The MCA believes that from an ex ante perspective this retail obligation is sufficient to prevent GO plc. from exerting market power in the retail fixed access markets. In addition the MCA would like to point out that this obligation is further complemented with the wholesale obligation on GO plc. to provide a WLR solution which enables any third party to replicate GO's offer. Furthermore, it is pertinent to note that other operators, like Melita plc. itself, are able to*

replicate the access components of GO's offer and are indeed offering bundles which include retail fixed access together with other services. The MCA believes that all these factors ensure that GO plc. does not engage in unreasonable bundling of services which will deter competition. ***III.*** *The MCA agrees with Melita plc. that any retail fixed telephony access products offered by GO plc. should avoid a margin squeeze. The MCA in fact has consistently approved GO's retail prices for retail fixed telephony access services in order to ensure that no margin squeeze is applied. Moreover, the MCA through its wholesale price regulation of the WLR offer has ensured that whatever retail price is adopted by GO plc., the WLR offer would allow a sufficient margin which enables third party operators, availing themselves of the WLR solution, to compete with GO plc. The MCA therefore believes that such a regulatory regime ensures that GO plc. does not engage in margin squeeze practices. The MCA however does not agree with Melita plc. that the MCA can apply a net revenue test on bundles which feature regulated and unregulated products. The MCA's regulatory remit is limited to ex ante intervention on products and services provided by an SMP operator within a defined market. The MCA cannot therefore apply ex ante regulatory controls on products and services which are not subject to SMP provisions. Such a measure would be deemed outside the scope of ex ante regulation and hence unjustified from a regulatory point of view. Where products have been assessed as competitive or falling outsides the scope of ex ante regulation, the market itself is deemed sufficient to ensure that market failure does not arise. In the case that some form of alleged market failure arises, ex post intervention should address such problems at that stage21.* ***IV.*** *As stated in the previous point, the MCA does not have legal remit to regulate products or services which are not subject to SMP provisions. Such regulations would need to be imposed under an ex post regime which in turn falls outside the regulatory remit of the MCA. Furthermore, at present no retail bundle market has been defined or has been subject to SMP regulations, and therefore the MCA cannot regulate retail bundles as a whole. Furthermore, where bundles include products which are part of a market which has been deemed as effectively competitive, the MCA cannot impose blanket regulation that would cover a product which is subject to competitive constraints. Such regulations would go counter to the spirit of the framework. The MCA therefore believes that the regulation of non-regulated products cannot be addressed by using ex ante provisions. In contrast, such regulation of non-regulated products would have to be a symmetric obligation which spans all operators and all products and services.*

Kif già iktar 'l fuq osservat hija appuntu l-konkluzzjoni raggunta mill-Awtorità intimata fl-ahhar parti tal-paragrafu III – ossia dik il-parti sottolineata – li qed tigi ikkontestata mis-socjetà Rikorrenti u dana billi skond l-istess socjetà l-Awtorità ma hijiex qed tinterpreta l-ligi u r-rimedju ta' l-unreasonable bundling b'mod korrett u ghalhekk b'mod ghal kollox erroneju tikkonkludi li ma ghandhiex il-poter li tevalwa bundle maghmul minn prodotti regolati u mhux regolati u l-effetti ta' dan il-bundle fuq is-Suq Rilevanti. Is-socjetà Rikorrenti tikkontendi li in linea ma' dak provdut mill-Kummissjoni Ewropeja w istituzzjonijiet Ewropeji ohra kif ukoll mad-dettami ta' National Regulatory Authorities ta' Stati Membri ohrajn23 u anke fid-dawl tar-rwol ta' National Regulatory Authority kif imfisser fid-Direttivi Ewropeji rilevanti u fil-Ligi nostrali24, l-Awtorità intimata ghandha l-poter, jekk mhux addirittura d-dover, li tevalwa bundle maghmul minn prodotti regolati u mhux regolati u li ghal dak il-bundle tapplika Net Revenue Test, u n-nuqqas ta' l-Awtorità intimata li taghmel hekk iwassal biex l-intrapriza li ghandha significant market power fis-Suq Rilevanti tistagna jew tkompli tistagna l-kompetizzjoni hielsa f'tali suq.

Fir-rigward fin-Nota ta' Sottomissjonijiet taghha pprezentata fit-13 ta' Lulju 2012 is-socjetà Rikorrenti tissottometti inter alia li l-Awtorità ghandha, allura, l-poter u kull dover li tizgura li, permezz tal-ligijiet ex ante, tevita li jkun hemm abbuz – mill-bidu u minghajr dewmien – billi timponi l-obbligi mehtiega, f'dan il-kaz tar-reasonable bundling fuq l-operatur GO plc, minghajr ma toqghod isserrah fuq il-fatt li ghandhom jigu applikati regoli ex post tal-kompetizzjoni minn awtortitajiet ohrajn meta jinstab agir illegali. Il-Comission for Communications Regulation (Comreg), in-NRA ta' l-Irlanda, fid-dokument ta' konsultazzjoni dwar "Accounting Separation and Cost Account Review" tghid li "ComReg will aiways have due regard to the competitive conent of the proposed bundling and will proportionate where it is clear that there will be no anti-competitive effect but that the proposed bundling is for the benefit of retail customers." Fil-fatt, l-ghan tar-regoli ex ante jigi deskritt tajjeb fir-"Report on the Discussion on the application of margin squeeze tests to bundles", fejn jinghad mill-ERG li l-ghan tal-regolamenti ex ante huwa proprju dak li jippreserva l-kompetizzjoni: "While competition law is intended to prevent margin squeeze as an exclusionary abuse, ex ante regulation seeks the more ambitious goal of promoting competition by facilitating entry into those markets meetings the three criteria test".

L-Awtorità intimata tirribatti fid-dettal ghal dawn is-sottomissjonijiet tas-socjetà Rikorrenti izda fis-sustanza l-kontestazzjonijiet principali taghha huma li: (i) l-Awtorità ma tagixxix b'mod awtonomu f'dak li huwa r-regolazzjoni tas-swieq tal-komunikazzjonijiet elettronici. L-

Awtorità, qua regolatur tas-settur f'Malta, tizvolgi l-attività regolamentarja taghha fl-isfond tal-ligijiet Ewropeji li gew trasportati fil-ligijiet nostrana. Kif gie spjegat mill-Awtorità fid-decizjoni appellata, u kif inhu pacifiku, l-Awtorità hija kostretta taht ir-Regolament 7 ta' l-Eletronic Communications Networks and Services Regulations (ECNSR) u l-Artikolu 7 tad-Direttiva 2002/21/EC (Framework Directive) li tinnotifika, kemm lill-Kummissjoni Ewropea, kif ukoll lir-Regolaturi l-ohra tas-settur tal-komunikazzjoni elettronika fil-pajjizi membri ta' l-Unjoni Ewropea (l-NRAs) kif ukoll lill-Body of European Regulators for Electronic Communications (BEREC) tad-decizjoni li bi hsiebha tiehu fir-rigward ta' kull suq li qed tirregola, u tibghat kopja ta' l-istess draft decision lil dawn l-organi li mbaghad ikollhom id-dritt li jikkummentaw dwar id-decizjoni. Il-Kummissjoni Ewropea tevalwa u tistudja bir-reqqa d-decizjoni li tkun bi hsiebha tiehu l-Awtorità u l-kummenti ta' l-operaturi kollha, u jekk ghandha d-dubji taghha dwar xi parti tad-decizjoni l-Kummissjoni Ewropea tibghat ghall-Awtorità sabiex din taghti l-informazzjoni kollha rilevanti lill-Kummissjoni. Fl-ahhar mill-ahhar il-Kummissjoni Ewropea ghandha, u f'diversi kazijiet fir-rigward ta' l-NRAs ta' diversi Stati Membri ta' l-Unjoni Ewropea ezercitat, l-veto taghha. Dan ifisser illi, jekk il-Kummissarjoni Ewropea ma tkunx konvinta bil-konkluzzjonijiet ta' l-Awtorità, u cioè ma tkunx qed taqbel mad-draft decision ta' l-Awtorità, l-Awtorità ma tkunx tista' tippubblika d-decizjoni taghha. Fil-kaz odjern, il-Kummissjoni ma kellha ebda rizerva dwar il-partijiet tad-decizjoni li dwarhom jittratta dan l-appell, anke wara li qieset il-kummenti li kienet ghamlet il-Melita, liema kummenti issa jifformaw il-bazi ta' dan l-appell. Ghaldaqstant, id-decizjoni appellata giet ippubblikata bil-kunsens tal-Kummissjoni Ewropea25; (ii) l-ezercizzju regolatorju li taghmel l-Awtorità f'dak li huwa market analysis u l-impozizzjoni ta' obbligi regolatorji hekk imsejjha ex ante jikkonsisti f'li l-Awtorità tidentifika d-diversi swieq tal-komunikazzjonijiet elettronici, tidentifika liema huma s-servizzi li jaqghu f'suq partikolari, u fejn operatur partikolari jinsab li huwa dominanti f'dak is-suq, ossija ghandu Significant Market Power (SMP) l-Awtorità timponi fuq dak l-operatur certi obbligi, stabbiliti fil-ligi, biex tagevola l-kompetizzjoni f'dak is-suq partikolari. Dan l-ezercizzju regolatorju huwa definit fil-qafas legali Ewropew (il-Framework Directive) li gie trasportat fil-ligijiet nostrana, fejn kemm is-swieq li ghandhom jigu identifikati mill-Awtorità, kif ukoll l-obbligi li jistghu jigu imposti fuq l-operaturi, huma stabbiliti mill-istess qafas legali. Ghandu jigi spjegat ukoll illi, fejn operatur ma jinstabx li huwa dominanti f'suq partikolari, l-Awtorità hija inibita illi timponi obbligi ex ante fuq dan l-operatur. Dan ma jfissirx illi operatur li ma ghandux obbligi ex ante imposti fuqu jista' jinjora l-obbligi tieghu naxxenti mill-qafas legali l-iehor dwar il-kompetizzjoni gusta u li huwa ezenti mir-responsabbiltajiet tieghu taht il-

qafas legali l-iehor. Li jfisser huwa biss illi, jekk dan isehh, u cioe jekk operatur illi ma ghandux obbligi ta' natura ex ante imposti fuqu jikser il-ligijiet dwar il-kompetizzjoni gusta, l-Awtorità ma tistax tintervjeni izda, semmai, ghandhom jintervjenu l-awtoritajiet kompetenti biex jirregolaw il-kompetizzjoni gusta, u cioè fil-kaz ta' Malta, il-Malta Competition and Consumer Affairs Authority (MCCAA). Ma ghandux ikun interpretat bl-ebda mod li din il-pozizzjoni hija wahda ta' kumdità jew wahda laissez faire da parti ta' l-Awtorità. Izda, kif certament jasserixxi dan l-istess Bord, l-Awtorità ghandha obbligu li tagixxi fil-limiti imposti minnha mil-Ligi altrimenti tkun qieghda tikser l-obbligi amministrattivi taghha u tkun qed tagixxi ultra vires. Dan kollu l-Melita tafu sew, tant hu hekk illi hi stess talbet l-intervent ta' l-MCCAA, permezz ta' ilment li ghamlet mal-MCCAA, fejn il-Melita proprju lmentat illi permezz tal-bundle taghha l-GO plc kienet qed tikser il-ligijiet dwar il-kompetizzjoni gusta u talbet lill-MCCAA sabiex tinvestiga dan l-agir tal-GO plc26; (iii) f'dan il-process regolamentatorju hemm principju kardinali li johrog kemm mill-Framework Directive kif ukoll mill-ligi taghna, u cioe li l-NRA (fil-kaz odjern l-Awtorità) ghandha timponi l-obbligu biss meta s-suq ma jkunx kompetittiv, u meta timponi obbligu dak l-obbligu ghandu jkun proporzjonali u gustifikat fid-dawl tal-problema fil-kompetizzjoni u l-ghan li ghalih l-obbligu jkun qed jigi impost. Malli l-obbligu jkun iebes wisq, dan ghandu jigi allevjat jew inkella mnehhi ghal kollox. Dan il-principju jirrizulta mill-Artikoli 8(5)(f) u 16(3) u (4) tal-Framework Directive u l-Artikolu 9(2) u (3) ta' l-ECRA u Regolament 11(3) tar-Regolamenti fost ohrajn. Jirrizulta ghalhekk, u dan huwa importanti fil-kuntest ta' l-appell odjern, li meta l-Awtorità tkun qed tuza d-diskrezzjoni taghha f'dak li jirrigwarda x'tip ta' obbligu timponi, hi dejjem timponi dak l-obbligu li huwa ta' l-anqas piz ghall-operatur li ser ikollu jgorr l-istess obbligu, basta li l-ghan li jkun hemm kompetizzjoni gusta fis-suq li qed jigi regolat (u mhux fi swieq ohra li mhumiex regolati) jintlahaq. Huwa proprju dan il-principju li applikat l-Awtorita fid-decizjoni appellata meta imponiet dawk l-obbligi li fil-fehma taghha, wara li kkunsidrat il-problemi ta' kompetizzjoni fis-suq, kienu necessarji u bizzejjed sabiex jeghlbu l-istess problemi. Fil-kliem ta' l-Awtorita "the MCA firmly believes that its regulatory approach to the provision of retail access set herein, in addition to the wholesale obligations related to the WLR solution, is sufficient and appropriate to deter GO from engaging into anti-competitive practices, such as margin squeeze, cross-subsidisation and leveraging of market power through unreasonable bundling. Jirrizulta ghalhekk illi, kif spjegat fid-decizjoni appellata, l-Awtorità ghamlet dan l-iskrutinju dettaljat tal-problemi fil-kompetizzjoni tas-suq in kwistjoni u ezercitat id-diskrezzjoni taghha, f'dak li hu l-imposizzjoni ta' l-obbligi regolatorji, skont il-ligi u l-limitazzjonijiet imposti fuqha mill-istess

ligi. Ghaldaqstant, la ma hemmx allegazzjoni li l-Awtorità uzat id-diskrezzjoni taghha b'mod abbuziv jew bi ksur tal-ligi, u kif già sottomess bir-rispett dan it-Tribunal ma ghandux jifli jekk l-Awtorità messha jew setghetx uzat id-diskrezzjoni taghha b'mod differenti, hija l-umli fehma tal-Awtorità li ma hemmx lok biex dan l-appell jintlahaq27. ... skont il-Melita l-Awtorità kienet erronja fil-konkluzjoni taghha illi ma setghetx timponi Net Revenue Test fuq il-bundles li toffri l-GO u li fihom hemm prodotti regolati u ohrajn mhux regolati. L-Awtorità terga' ttenni ghal kull bwon fini illi, fl-ewwel lok din l-istqarrija tal-Awtorità maghmula fid-dokument tad-decizjoni appellata ma kienet xejn ghajr rimarka assolutament korretta, biex twiegeb ghall-punt sollevat mill-Melita fir-Response to Consultation maghmula mill-Melita wara li l-Awtorità kienet harget id-Draft Decision ghall-konsultazzjoni. Ghalkemm korretta, din l-istqarrija ma tibdel xejn fid-decizjoni appellata stante li, kif gja spjegat hawn fuq, dak li gie impost bhala rimedju adegwat kien anqas oneruz fuq il-GO plc minn dak li l-Melita ppretendiet li l-Awtorità kellha timponi.

Mis-sottomissjonijiet rispettivament avvanzati mill-partijiet kontendenti huwa evidenti li l-kompitu principali tat-Tribunal f'dan il-kaz huwa li jiddetermina jekk fid-decizjoni tas-7 ta' Frar 2012, partikolarment fejn din tittratta dwar measures to counter the unreasonable bundling of services29, l-Awtorità intimata ezercitatx il-poteri u setghat taghha – u konsegwentement id-diskrezzjoni taghha – fil-firxa shiha taghhom kif intiza u prevista fil-Ligi rilevanti, kemm dik Ewropeja kif ukoll dik nostrali. Fir-rigward u b'referenza ghas-sottomissjonijiet avvanzati mill-Awtorità intimata dwar il-kompetenza ta' dan it-Tribunal u l-parametri tal-poteri tieghu, jigi osservat li l-kompitu tat-Tribunal f'dan il-kaz jaqa' entro l-parametri tal-kompetenza Tieghu kif intiza kemm fil-Ligi specifika li tirregola s-settur tal-komunikazzjonijiet elettronici – senjatament il-Kapitoli 399 u 418 tal-Ligijiet ta' Malta – kif ukoll fil-Ligi generali li tohloq u tirregola t-Tribunal – ossia l-Att dwar il-Gustizzja Amministrattiva, Kap.490 tal-Ligijiet ta' Malta.

Kif osservat mill-Awtorità intimata fin-Nota Responsiva taghha pprezentata fit-8 ta' Ottubru 201230, l-istess Awtorità hija r-regolatur ghas-servizzi ta' komunikazzjonijiet elettronici ghal Malta ai termini ta' l-Artikolu 3 tal-Kap.399 tal-Ligijiet ta' Malta u l-vires u poteri taghha huma regolati mill-istess Kap.399 tal-Ligijiet ta' Malta, mill-Kap.418 tal-Ligijiet ta' Malta u mill-Framework Directive 2002/31EC, l-Authorisation Directive 2002/20/EC, l-Access Directive 2002/19EC u l-Universal Services Directive 2002/22EC. Minn dawn id-diversi ligijiet jirrizultaw tlett ghanjiet principali li ghandhom jigu mharsa mill-Awtorità intimata bhala National Regulatory Authority fl-ezercizzju tal-poteri u seghat taghha, u cioè: (i) to

promote competition in the provision of electronic communications networks, electronic communications services and associated facilities and services, (ii) to contribute to the development of the internal market; u (iii) to promote the interests of the citizens of the European Union31 – liema tlett ghanjiet, u partikolarment l-ewwel ghan tal-promozzjoni tal-kompetizzjoni fis-settur tal-kommunikazzjonijiet elettronici, huma fil-fehma tat-Tribunal fondamentali u determinati ghas-soluzzjoni tal-vertenza odjerna.

Fid-dokument Report on the Discussion on the application of margin squeeze tests to bundles pubblikat f'Marzu ta' l-2009 l-ERG osservat illi t-tlett ghanjiet li johrogu mill-Artikolu 8 tal-Framework Directive u li jridu jigu mharsa min-National Regulatory Authorities ta' l-Istati Membri ta' l-Unjoni Ewropeja jpoggu certu oneru fuq l-NRAs fl-operat taghhom ghaliex while competition law is intended to prevent margin squeeze as an exclusionary abuse, ***ex ante regulation seeks the more ambitious goal of promoting competition by facilitating entry into those markets meeting the three criteria test32****. Fil-fehma tat-Tribunal fil-konsiderazzjonijiet li hija taghmel ta' diversi prattici kummercjali li minn zmien ghal zmien jemergu fis-Suq Rilevanti, l-Awtorità intimata necessarjament ghandha zzomm quddiem ghajnejha tali ambitious goal of promoting competition u dana partikolarment meta bis-sahha ta' l-Artikolu 4(3)(d) tal-Kap.418 tal-Ligijiet ta' Malta l-Awtorità ghandha wkoll, skont il-ligijiet li ghandha jedd tenforza, tizgura kompetizzjoni gusta f'kull pratika, operazzjoni u attività bhal dawk – ossia operati fis-settur tal-komunikazzjonijiet elettronici.*

Fil-fehma tat-Tribunal dan ifisser ghalhekk illi fl-ezercizzju tal-poteri u setghat – u konsegwentement tad-diskrezzjoni – taghha qua regolatur l-Awtorità intimata ghandha tosserva l-principju enuncjat fl-Artikolu 8(1) tal-Framework Directive – u cioè li l-mizuri minnha adottati shall be proportionate to those objectives – fid-dawl ta' l-ghanijiet specifici li hija marbuta w obbligata li tosserva, thares u tippromuovi. B'hekk meta tigi biex timponi rimedju partikolari l-Awtorità intimata ma ghandhiex thares l-iktar lejn l-operatur li se jkun assoggettat ghall-obbligu partikolari, kif fil-fehma tat-Tribunal jidher li qed taghmel fil-kaz in ezami in kwantu rigwarda l-imposizzjoni ta' measures to counter the unreasonable bundling of services fejn tishaq fuq il-kuncett li hi dejjem timponi dak l-obbligu li huwa ta' l-anqas piz ghall-operatur li ser ikollu jgorr l-istess obbligu33, izda ghandha l-ewwel qabel kollox thares lejn l-ghanijiet li ghandha tilhaq u tara li r-rimedju minnha impost ikun adegwat u adattat ghal tali ghanijiet.

Fil-fehma tat-Tribunal fil-kaz in ezami l-Awtorità intimata naqset milli tagixxi bil-mod minnha rikjest mill-Ligijiet u Direttivi appena imsemmija ghaliex fil-konsiderazzjoni u konsegwenti konkluzzjoni taghha dwar measures to counter the unreasonable bundling of services ma tatx id-debita importanza lill-ghan to promote competition in the provision of electronic communications networks, electronic communications services and associated facilities and services u konsegwentement lid-dover taghha li tizgura kompetizzjoni gusta f'kull pratika, operazzjoni u attività fis-settur tal-komunikazzjoni elettronika, partikolarment billi rrifjutat li tikkonsidra s-servizzi jew prodotti mhux regolati formanti parti mill-bundle propost mill- SMP operator in bazi ghall-konsiderazzjoni li the MCA's regulatory remit is limited to ex ante intervention on products and services provided by an SMP operator within a defined market. The MCA cannot therefore apply ex ante regulatory controls on products and services which are not subject to SMP provisions. Such a measure would be deemed outside the scope of ex ante regulation and hence unjustified from a regulatory point of view. Where products have been assessed as competitive or falling outsides the scope of ex ante regulation, the market itself is deemed sufficient to ensure that market failure does not arise. In the case that some form of alleged market failure arises, ex post intervention should address such problems at that stage. As stated in the previous point, the MCA does not have legal remit to regulate products or services which are not subject to SMP provisions. Such regulations would need to be imposed under an ex post regime which in turn falls outside the regulatory remit of the MCA. Furthermore, at present no retail bundle market has been defined or has been subject to SMP regulations, and therefore the MCA cannot regulate retail bundles as a whole. Furthermore, where bundles include products which are part of a market which has been deemed as effectively competitive, the MCA cannot impose blanket regulation that would cover a product which is subject to competitive constraints. Such regulations would go counter to the spirit of the framework. The MCA therefore believes that the regulation of non-regulated products cannot be addressed by using ex ante provisions. In contrast, such regulation of non-regulated products would have to be a symmetric obligation which spans all operators and all products and services34.

Huwa fatt rikonoxxut u accettat – u dan kif rilevat minn diversi awtoritajiet fis-settur – illi l-prattika tal-bundling ta' servizzi fis-settur tal-komunikazzjonijiet elettronici hija prattika komuni hafna li f'dawn l-ahhar snin assumiet importanza notevoli f'dan is-settur partikolari. Huwa daqstant iehor accettat u rikonoxxut li filwaqt illi l-bundling ta' servizzi ta' komunikazzjoni elettronici ghandu il-vantaggi tieghu – b'mod partikolari ghall-end user –

tali prattika tista' facilment tintuza minn SMP operator bhala mezz biex johnoq il-kompetizzjoni a detriment ta' operaturi ohra fis-settur u fl-ahhar mill-ahhar anke a detriment ta' l-end user. Proprio fid-dawl ta' tali fatt in-National Regulatory Authorities ta' l-Istati Membri ta' l-Unjoni Ewropeja, inkluz ghalhekk l-Awtorità intimata, ghandhom ikunu vigilanti u jirregolaw din il-prattika bil-mod opportun biex effettivament tintuza a beneficcju tas-suq u l-end user u mhux bhala metodu biex tigi ostakolata l-kompetizzjoni gusta.

F'dan ir-rigward issir referenza ghal dak osservat mill-BEREC fid-dokument Berec report on impact of bundled offers in retail and wholesale market definition ippubblikat f'Dicembru ta' l-2010 fir-rigward ta' bundling ta' servizzi ta' komunkiazzjonijiet elettronici: Market definition is an important step in the imposition of ex ante obligations under the current regulatory framework. As the Framework Directive establishes, NRAs will intervene to impose obligations on undertakings only where the markets are considered not to be effectively competitive as a result of such undertakings being in a position equivalent to dominance within the meaning of Article 102 of the Treaty on the Functioning of the European Union (TFEU). According to the Commission"s Guidelines on market analysis (the Guidelines), "[I]n assessing whether an undertaking has SMP, that is whether it enjoys a position of economic strength affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately consumers, the definition of the relevant market is of fundamental importance since effective competition can only be assessed by reference to the market thus defined". The Commission's Guidelines do not explicitly deal with bundles, although the Explanatory Note accompanying the Recommendation on relevant markets acknowledges the importance of bundled products in the field of market definition. Indeed, in section 3.2 of the Explanatory Note to the Recommendation the Commission recognises that when consumers prefer to purchase the services from a single supplier, given high transaction costs, the bundle "may become the relevant product market". However, according to the Explanatory Note, if "…in the presence of a small but significant non-transitory increase in price there is evidence that a sufficient number of customers would "unpick" the bundle and obtain the service elements of the bundle separately, then it can be concluded that the service elements constitute the relevant markets in their own right and not the bundle." Beyond these broad statements, there is very little guidance provided at EU level on the potential impact of bundled offers in the market definition exercises that NRAs must undertake according to the EU regulatory framework. It is important to note that the situation has changed since the one described by Commission in

the Recommendation which stated that whilst "... certain bundles are well established (voice and SMS on mobile), others are at an earlier stage of development such as bundles of television and internet." Consequently, in the discussion of relevant markets, bundling is only referred by the Commission in the context of mobile services. With regard to bundling and market definition, BEREC wishes to point out that bundling beyond the mobile sector has gained importance in a number of Member States in recent years. While in most cases products continue to be sold on a standalone basis, the share of consumers buying different communications services as a bundle increased significantly in a number of countries. In fact, the evolution described by BEREC/ERG Reports indicates that bundling is becoming an increasingly popular way of buying and selling communication services. The increased take up of bundles raises the question of how bundling at the retail level might affect market definition at both the retail and wholesale levels. This report aims to give guidance to NRAs on how to consider market definition when there is high take up of bundles at the retail level. In particular, the document covers the modifications on technical aspects on market definition required by this fact and potential implications at wholesale level. BEREC considers that the definition of a bundled market at retail level can be appropriate in some circumstances. In such cases the wholesale market definition can be affected. The document explores the potential impact at wholesale level resulting from a retail bundled market definition and the manner NRAs could handle it, including market definition tools and acknowledging that wholesale markets are closely linked to retail ones. This report sets out guidance on how an NRA might define and analyse markets in instances where bundled products are prevalent at a wholesale and/or retail level. In particular, the paper identifies conditions that might suggest to NRAs the presence of "bundle markets". In a regulatory context, the defining of bundle markets may be useful where the monitoring of compliance with remedies applied from the current list of "stand-alone" recommended markets is proving difficult and ineffective; and where anti-competitive effects are evident in a retail market(s) through possible leverage market power (vertical or horizontal), to the detriment of end users35.

Fir-rigward tal-prattika ta' bundling ta' servizzi ta' komunikazzjonijiet elettronici u l-intervent li ghandu jsir min-National Regulatory Authorities ta' l-Istati Membri ta' l-Unjoni Ewropeja mill-gdid issir referenza ghad-dokument Report on the Discussion on the application of margin squeeze tests to bundles ippubblikat mill-ERG f'Marzu ta' l-2009, fejn gie osservat illi: A bundling practice arises when a firm sells two or more services together,

as one combined offering, at a joint price. Two types of bundling may be identified: i) "pure bundling" that occurs when consumers can only purchase the entire bundle and not the single services separately; ii) "mixed bundling" that occurs when consumers are offered a choice between purchasing the entire bundle at a discounted price and purchasing the separate components of the bundle. Tying occurs when the purchase of a good is conditional on the purchase of another good. In some cases, the effects of tying are equivalent to those of mixed or pure bundling. In this document, we will refer to bundling, but the reader must be aware that such statements will also hold true for relevant tying. In analyzing retail bundling practices, there may be a trade-off between static positive and dynamic negative effects. For example, in the short term, retail bundling practices may well be welfare-enhancing as a consequence of both supply-side and demand-side efficiencies- such as the existence of production and marketing economies of scope or reductions in consumers´ transaction costs. However, retail bundling strategies may also be pursued by a vertically integrated firm to foreclose competitors from downstream markets. Specifically, bundling might be used by a vertically integrated operator with SMP in an input market to leverage its power into one or several downstream markets where it does or does not have SMP (i.e vertical leverage). This could occur by charging a bundle price that a non-vertically integrated downstream rival – relying on regulated wholesale inputs for the provision of the retail product – would be unable to replicate. Ultimately, it has to be recognized that often bundled offers may include both regulated and unregulated retail services and a key consideration for NRAs is whether the bundle can be replicated by the market, including new entrants, on a sustainable basis over the medium to long term36. … As far as bundles are concerned, the current regulatory framework requires NRAs to strike a balance between the above-mentioned positive static and negative dynamic effects of bundled offers. On the one hand, NRAs, pursuant to Article 17 (2) of Universal Service Directive, may impose an SMP obligation not to unreasonably bundle retail services. However, on the other, in order not to rule out welfare-enhancing cases arising from bundling, the directive notes that the imposition of this remedy should consider the specific circumstances of each single market analysis and on the specific obligations imposed at the wholesale level. Therefore, NRAs may need to develop a methodology to assess, whether a bundle is likely to have anticompetitive effects. Indeed, this is the approach followed by a number of NRAs (see results of the questionnaire in section C). Furthermore, as far as bundling practices are concerned, paragraph 3.2. of the Explanatory Note to 2007 EC Recommendation, provides some innovative indications on when a bundle may become a relevant product market: "In most cases the individual services in the bundle

are not good demand-side substitutes for each other yet may be considered to be part of the same retail market if there is no more independent demand for individual parts of the bundle. […….] Hence the bundle may become the relevant product market. Whilst certain bundles are well established (voice and SMS on mobile), others are at an earlier stage of development such as bundles of television and internet. If, in the presence of a small but significant non-transitory increase in price there is evidence that a sufficient number of customers would "unpick" the bundle and obtain the service elements of the bundle separately, then it can be concluded that the service elements constitute the relevant markets in their own right and not the bundle." Where retail bundles are offered by a vertically integrated firm with SMP in the wholesale market, NRAs may have to apply the bundling regulatory provisions set out by the Universal Service Directive and/or a MS assessment (test) at the wholesale level. Where this is the case NRAs, at the same time, may want to assess whether to impose an obligation not to unduly bundle and may want to check whether an equally/reasonably efficient operator in the downstream market would be able to replicate the bundled offer of the SMP operator. Checking for replicability may involve NRAs conducting profitability tests for the bundle to verify if the bundle retail price covers the costs of acquiring the wholesale inputs necessary for the provision of the bundle plus any other relevant costs. In carrying this exercise, it is likely that NRAs would need information on input prices, downstream prices, efficient downstream costs and appropriate margins of downstream competitors. This raises an issue as to what powers do NRAs have to request information or to act when bundles include unregulated parts. In this sense, it is worth remembering that there is a crucial difference between MS practices and other sorts of anticompetitive practices in downstream markets, in that the former challenge the cornerstone of EC regulation in a way that no other upstream or downstream or upstream practice does. The Explanatory Note to 2007 EC Recommendation recognizes the distinct status of MS as a damaging practice. This states that NRAs must be involved in monitoring the structure of regulated (and unregulated) prices over which MS may exist and NRAs are invited to monitor the situation and establish justified and appropriate remedies with respect to wholesale access. Article 5 of the new proposal for the framework directive provides authorities explicitly with the legal basis to obtain information to make such an assessment. Information can be gained even if the market is not identified (retail markets).

Minn dawn iz-zewg rapporti johrog car ghalhekk illi huwa mistenni min-National Regulatory Authorities, fosthom l-Awtorità intimata, li jikkunsidraw jekk bundling ta' servizzi ta'

komunikazzjonijiet elettronici ikunx qed jintuza mill-SMP operator bhala mod biex johnoq il-kompetizzjoni u l-element deciziv f'tali konsiderazzjoni huwa dak tar-replicability tal-bundle u dana billi tidhol fid-dettal fil-kwistjoni tal-pricing ta' tali bundle anke jekk l-istess ikun maghmul minn servizzi regolati u servizzi mhux regolati.

Dana l-Awtorità intimata evidentement ma ghamlitux ghaliex minkejja l-fatt li sabet li s-socjetà GO p.l.c. ghandha Significant Market Power fl-erba' swieq minnha identifikati fl-analizi taghha u ghalkemm osservat illi the MCA believes that there is a need to counter the risk of anti-competitive behaviour through bundling by means of an obligation to be imposed on GO p.l.c. over and above those mentioned earlier on with respect to transparency. The main aim of such obligation would be that of preventing foreclosure of the retail access markets, meta giet biex tiddetermina l-mizura mehtiega fid-dawl ta' dan kollu hija semplicement llimitat ruhha f'li tikkonferma l-imposizzjoni ta' obbligu li ghalih s-socjetà GO p.l.c. kienet già assoggettata, ossia l-obbligu not to exclusively bundle any of the retail access services identified in this decision with other electronic communications services into a single tariff without also offering the fixed access service as a stand alone product.

In effetti fir-rigward l-Awtorità intimata osservat illi the MCA must ensure that it curtails the ability of GO plc. as an SMP operator to bundle its retail fixed telephony access services in a way that it leverages this market power into other markets. Nevertheless, the MCA also recognises that the bundling of retail products may lead to economies of scale or scope for the operator and this in turn can lead to savings for the consumer. In considering the above, the MCA believes that there is a need to counter the risk of anti-competitive behaviour through bundling by means of an obligation to be imposed on GO plc. over and above those mentioned earlier on with respect to transparency. The main aim of such obligation would be that of preventing foreclosure of the retail access markets. One must note that under the regulatory regime currently in force, GO plc. is already obliged not to exclusively bundle any of the retail access services identified in this decision with other electronic communications services into a single tariff without also offering the fixed access service as a stand-alone product. In line with this approach, the MCA feels that it will benefit the competitiveness of the retail access markets if this obligation continues to be imposed on all of GO's retailfixed access products falling within the markets identified above, to the effect that the said operator shall not unreasonably bundle retail fixed access services.

L-Awtorità intimata tiggustifika l-mod kif indirizzat il-kwistjoni tal-measures to counter unreasonable bundling of services u l-mizura jew ahjar obbligu minnha finalment impost fuq l-SMP operator billi tghid illi: with respect to the potential of GO plc. leveraging its market power from the retail fixed telephony access markets through the use of unreasonable bundling, the MCA has targeted such a problem in two ways. Firstly, the MCA has imposed an obligation on GO plc. not to exclusively bundle any retail fixed telephony access services without also offering it as a standalone service. This obligation ensures that any customer who wants to purchase a standalone retail fixed telephony access service does not need to purchase a bundle. Furthermore, the availability of a standalone product ensures that customers can obtain other electronic communications services from other providers other than GO. Therefore, it is up to the customer to decide freely whether it wants to purchase a bundle or a standalone product from GO plc., as it is the case with other operators in the market. Secondly, the MCA is convinced that through the availability of the WLR solution the retail fixed telephony access services provided by GO plc. can be replicated both as a standalone product or bundled together with other services provided by the third party. As the WLR is regulated on a retail-minus basis, any third party operator would be able to match or improve on the retail price offered by GO plc. The MCA therefore concludes that these two obligations ensure that GO plc. cannot leverage its market power from the retail fixed telephony access markets to other markets. Finally, also notes that Melita plc. currently replicates and offers bundles in direct competition to those of GO plc. This further ensures that the consumer has a wider selection of stand-alone products and bundle services, provide by different providers.

It-Tribunal però ma jqisx illi r-rimedju provdut mill-Awtorità intimata effettivament jindirizza l-problema in kwistjoni bil-mod idoneju u kif gustament osservat mis-socjetà Rikorrenti, l-Awtorità naqset milli tezercita l-poteri taghha fil-firxa shiha intiza mid-Direttivi u Ligijiet applikabbli in materja. Huwa evidenti minn dak kollu iktar 'l fuq riportat li l-obbligu impost fuq is-socjetà GO p.l.c. bhala SMP operator not to exclusively bundle any retail fixed telephony access services without also offering it as a standalone service huwa bla dubju ta' xejn l-inqas oneruz fuq l-imsemmija socjetà izda ma huwiex affattu sufficjenti biex jindirizza l-possibilità reali li l-imsemmi operatur johnoq il-kompetizzjoni bil-prattika ta' bundling ta' servizzi ta' komunikazzjonijiet elettronici u ghalhekk l-Awtorità intimata ma tistax tippretendi li ezercitat il-poteri taghha – u b'hekk ukoll id-diskrezzjoni taghha – bil-mod kif minnha mitlub mid-Direttivi u Ligijiet applikabbli in materja.

L-element l-iehor tal-WLR solution ukoll ma jindirizzax bil-mod opportun il-mertu tal-kwistjoni in ezami u dana partikolarment meta mid-decizjoni39 tas-7 ta' Frar 2012 stess jirrizulta li ma hemmx operaturi ohra – hlief limitatament ghal Sky Telecom Ltd. – li jaghmlu uzu mis-sistema tas-socjetà GO p.l.c. ghall-wholesale line rental (WLR) u dana billi s-socjetà Rikorrenti tipprovdi calbe modem connection, is-socjetà Vodafone Ltd u wkoll is-socjetà Sky Telecom Ltd. jipprovdi wireless connection. In fine l-osservazzjoni ta' l-Awtorità intimata fid-decizjoni tas-7 ta' Frar 2012 illi finally, also notes that Melita plc. currently replicates and offers bundles in direct competition to those of GO plc. This further ensures that the consumer has a wider selection of stand-alone products and bundle services, provide by different providers, bl-ebda mod ma tista' tissosstanzja u tiggustifika r-rimedju moghti biex jigi evitat unreasonable bundling of services ghaliex l-analizi li trid taghmel l-Awtorità intimata qua regolatur hija wahda progettata fil-futur u mhux marbuta ma' dak li qed jigri jew hu possibbli fil-prezent.

L-Awtorità intimata tikkontendi li kuntrarjament ghal dak pretiz mis-socjetà Rikorrenti, ir-rimedju minnha moghti ghall-fini li tilqa' ghal unreasonable bundling of services da parte tas-socjetà GO p.l.c. huwa adegwat u idoneju tant illi l-Kummissjoni Ewropeja u n-National Regulatory Authorities l-ohra kif ukoll il-BEREC ma ghamlu ebda kumment negattiv fir-rigward tal-mizura minnha proposta li tigi imposta fuq SMP operator. Fid-decizjoni tas-7 ta' Frar 2012 l-Awtorità intimata tirrileva li the Commission agreed with the conclusion in the draft decision and made one comment. The Commission stated that the MCA was not able to specify the market shares of all undertakings active in the higher level and enhanced higher level access markets out of the fact that it was not able to identify the number of Melita's multiple line connections in these markets. While the Commissions does not dispute the MCA's finding of SMP on the higher level and enhanced higher level access markets, it invites the MCA to require Melita to supply the exact number of multiple line connections in the future40 u fis-sottomissjonijiet minnha avvanzati waqt is-smigh tal-proceduri donnha timplika li ghaliex id-decizjoni in kwistjoni giet ippubblikata bil-kunsens tal-Kummissjoni Eworpeja allura dan it-Tribunal ghandu jinjora l-aggravji tas-socjetà Rikorrenti u b'mod kwazi ghal kollox awtomatiku jichad l-appell minnha interpost mid-decizjoni in kwistjoni.

Naturalment it-Tribunal qatt ma jista' jaqbel ma' tali asserzjoni ghaliex altrimenti id-dritt ta' appell koncess lil persuna jew operatur milqut bl-effetti ta' decizjoni ta' l-Awtorità intimata kontemplat kemm fil-Framework Directive kif ukoll fil-Ligi nostrali kompletament jitlef is-siwi tieghu w il-funzjoni ta' dan it-Tribunal tigi ridotta ghal wahda ta' semplici rubber

stamping tad-decizjonijiet ta' l-Awtorità; sitwazzjoni din li tmur ghal kollox kontra l-Artikolu 4 tal-Framework Directive li jipprovdi illi Member States shall ensure that effective mechanisms exist at national level under which any user or undertaking providing electronic communications networks and/or services who is affected by a decision of a national regulatory authority has the right of appeal against the decision to an appeal body that is independent of the parties involved. This body, which may be a court, shall have the appropriate expertise available to it to enable it to carry out its functions. Member States shall ensure that the merits of the case are duly taken into account and that there is an effective appeal mechanism. Pending the outcome of any such appeal, the decision of the national regulatory authority shall stand, unless the appeal body decides otherwise.

Filwaqt li t-Tribunal ma jiddubitax mir-reqqa ta' l-iskrutinju tal-Kummissjoni Ewropeja, tan-National Regulatory Authorities l-ohra u tal-BEREC tad-decizjoni proposta mill-Awtorità intimata ma jista' jsib ebda raguni ghalfejn ma ghandux jikkonsidra hu wkoll il-kaz in kwistjoni u jekk isib li l-aggravji tas-socjetà Rikorrenti huma gustifikati – kif fil-fatt qed isib li huma – jghaddi biex jirrevoka in toto jew in parte d-decizjoni kontestata. Mill-Artikolu 7 tal-Framework Directive, li fis-subartikolu (4) jipprovdi where an intended measure covered by paragraph 3 aims at: (a) defining a relevant market which differs from those defined in the recommendation in accordance with Article 15(1), (b) deciding whether or not to designate an undertaking as having, either individually or jointly with others, significant market power, under Article 16(3), (4) or (5), and would affect trade between Member States and the Commission has indicated to the national regulatory authority that it considers that the draft measure would create a barrier to the single market or if it has serious doubts as to its compatibility with Community law and in particular the objectives referred to in Article 8, then the draft measure shall not be adopted for a further two months. This period may not be extended. Within this period the Commission may, in accordance with the procedure referred to in Article 22(2), take a decision requiring the national regulatory authority concerned to withdraw the draft measure. This decision shall be accompanied by a detailed and objective analysis of why the Commission considers that the draft measure should not be adopted together with specific proposals for amending the draft measure, jirrizulta li l-intervent tal-Kummissjoni Ewropeja u ta' l-entitajiet l-ohra koncernati ghandu jkun wiehed ben specifiku u cioè li jaraw li d-decizjoni proposta min-National Regulatory Authority in kwistjoni ma tkunx wahda li tqajjem ***dubji serji dwar il-kompatibilità taghha mal-Ligi Ewropeja****. Dana ma jfissirx però li ghaliex id-decizjoni proposta ma titqiesx li tohloq dubji serji dwar il-*

kompatibilità taghha mal-Ligi Ewropeja allura ghandu per forza jirrizulta li n-National Regulatory Authority agixxiet fl-isfera shiha tal-poteri lilha moghtija bil-Ligi u li tat l-aqwa rimedju – dejjem entro l-parametru tal-proporzjonalità – li setghet taghti fic-cirkostanzi u ma ghandux jew ma jistax ikun rimedju iktar idoneju ghall-kaz in kwistjoni.

Ghalhekk, dejjem bid-dovut rispett lejn il-Kummissjoni Ewropeja u l-entitajiet l-ohra kollha koncernati u nonostante n-nuqqas ta' opposizzjoni taghhom ghad-decizjoni ta' l-Awtorità intimata pubblikata fis-7 ta' Frar 2012, it-Tribunal iqis li in kwantu rigwarda l-kwistjoni ta' measures to counter the unreasonable bundling of services id-decizjoni ta' l-Awtorità intimata ma tistax tregi ghaliex f'tali rigward l-Awtorità ma agixxietx fl-isfera shiha tal-poteri lilha koncessi mid-Direttivi u Ligijiet relattivi applikabbli u r-rimedju jew ahjar mizura minnha imposta fuq is-socjetà GO p.l.c. qua SMP operator ma tindirizzax bil-mod adegwat il-possibilità li l-imsemmija socjetà tuza l-bundling ta' servizzi ta' komunikazzjonijiet elettronici biex tohnoq il-kompetizzjoni – aspett dan li kif iktar 'l fuq osservat huwa wiehed mill-ghanijiet li ghandu jigi mhares mill-Awtorità intimata qua National Regulatory Authority.

Is-socjetà Rikorrenti tishaqq li dan it-Tribunal ghandu, wara li jannulla u jirrevoka dik il-parti tad-decizjoni datata 7 ta' Frar 2012 li tittratta dwar measures to counter the unreasonable bundling of services, jordna lill-Awtorità intimata biex tapplika Net Revenue Test lill-bundles offerti mis-socjetà GO p.l.c. hekk kif isir ad ezempju da parte tal-ComReg fl-Irlanda. It-Tribunal però iqis li ghalkemm l-aggravji tas-socjetà Rikorrenti fir-rigward tal-parti tad-decizjoni tas-7 ta' Frar 2012 minnha attakkata huma fil-maggor parti gustifikati, ma jistax jornda lill-Awtorità intimata tiehu decizjoni amministrattiva b'mod partikolari u dana ghas-segwenti ragunijiet:

1. Fl-ewwel lok u kif gustament osservat mill-Awtorità intimata, filwaqt li dan it-Tribunal ghandu s-setgha li jirrevedi decizjonijiet moghtija minnha ma ghandux però is-setgha u l-poter li jordnala li tiehu decizjoni amministrattiva b'mod partikolari; u

2. Fit-tieni lok l-analizi li trid taghmel National Regulatory Authority fir-rigward tal-possibilità ta' margin squeeze practice tramite bundling ta' servizzi ta' komunikazzjonijiet elettronici hija tant dettaljata u f'certu aspetti anki laborjuza li mhux ghalkemm jigi deciz li fil-kaz in ezami jrid jigi applikat test partikolari flok iehor. Fir-rigward issir referenza ghall-konkluzjoni raggunta mill-ERG fid-dokument Report on the Discussion on the application of margin squeeze tests to bundles ippubblikat f'Marzu 2009, fejn jinghad illi: The most likely

situation where a margin squeeze practice may take place is where wholesale prices are regulated, some retail prices are left unregulated and where the marginal profitability of regulated upstream services is small relative to downstream service marginal profitabilities. There are a number of methodological differences by NRAs to assess MS. This reflects in part differences national markets and divergences in NRAs' objectives. There are two tests: the equally efficient operator test and the reasonably efficient operator test. Their usage depends on the specific objectives of the NRA and the circumstances of the case. For example, if the market is mature and the main aim is to promote competition then there may be merit in using the REO test, but if there is a concern to protect investment and innovation incentives for the SMP operator then the EEO standard might be more suitable. Evaluating the margin properly is important, and a good evaluation depends on how stable are costs. In situations where costs are stable, historical or current cost accounting may be used, but if markets are fast growing, LRIC may be more appropriate. In addition, NRAs must consider the stability of revenues and costs in deciding whether a static single-period or a dynamic multi-period (DCF) test should be used. As convergence makes bundling more likely, the consideration of margin squeeze for bundled offers will become more prominent. As a wholesale SMP operator may use bundles to margin squeeze competitors at the retail level, assessing whether there is a MS on bundled offers can be important under the current regulatory regime. Yet, the analysis of margin squeeze for bundles is complex because it may require the allocation of a common margin to bundled parts, involve several wholesale services, and span regulated and unregulated services. The analysis is information intensive and data availability is likely to be a challenge.Given these difficulties, NRAs may find it useful to complement the use of the test with other indicators linked to the likelihood of an anticompetitive effect. For example (but not exclusively), the existence of demand complementarities, whether the price is of a permanent nature, or whether the bundle is targeted to a key demand segment. There are a number of approaches for allocating margins to bundle parts. However, whichever rules are used, NRAs may need to ensure consistency between the methods to allocate costs and the ones used to allocate revenues.

Ghalhekk dak li jista' u anzi ghandu jaghmel dan it-Tribunal huwa li filwaqt li jirrevoka u jannulla dik il-parti tad-decizjoni tas-7 ta' Frar 2012 kontestata mis-socjetà Rikorrenti, jidderiegi lill-Awtorità intimata sabiex tikkonsidra mill-gdid il-kwistjoni mertu ta' dawn il-proceduri ossia the measures to counter unreasonable bundling of services fid-dawl tal-

motivazzjonijiet li wasslu lit-Tribunal biex jirrevoka u jannulla dik il-parti tad-decizjoni in kwistjoni.

Ghal dawn ir-ragunijiet it-Tribunal jaqta' u jiddeciedi l-kawza billi jilqa' in parte l-appell tas-socjetà Rikorrenti u filwaqt li jannulla u jirrevoka l-parti tad-decizjoni ta' l-Awtorità intimata datata 7 ta' Frar 2012 li tittratta dwar measures to counter unreasonable bundling of services, jidderiegi lill-Awtorità intimata sabiex tirrevedi l-kwistjoni mertu ta' dawn il-proceduri – ossia the measures to counter unreasonable bundling of services – fil-firxa shiha w apporprjata tal-poteri taghha kif rizultanti b'mod partikolari mill-Framework Directive u l-Kap. 399 tal-Ligijiet ta' Malta.

B'applikazzjoni ta' l-Artikolu 39(2) tal-Kap.418 tal-Ligijiet ta' Malta, it-Tribunal jordna li fic-cirkostanzi partikolari ta' dan il-kaz l-ispejjez jigu sopportati interament mill-Awtorità intimata."

Illi l-Awtorita appellanti appellat minn dina id-decizjoni abbazi tas-segwenti aggravvji:

1. Fir-rigward ta' dik il-parti tad-decizjoni impunjata li fiha it-Tribunal ikkonkluda illi "l-Awtorita ma ezercitatx il-poteri u is-setghat taghha – u konsegwentement id-diskrezzjoni taghha – fil-firxa shiha taghhom kif intiza u prevista fil-Ligi rilevanti" u dan billi t-Tribunal ma fehemx id-distinzjoni li ghandha issir bejn dak li huwa ezercizzju regolatorju fil-qasam tar-regolamentazzjoni tas-swieq tat-telekomunikazzjoni (*ex-ante regulations*) u dak li huwa enforzar tal-ligijiet ta' kompetizzjoni fis-swieq tat-telekomunikazzjoni (*ex-post regulations*).

2. Illi t-Tribunal ghamel apprezzament zbaljat tan-natura tad-decizjoni tal-Awtorita appellata.

3. Illi filwaqt illi t-Tribunal qabel mal-Awtorita appellanti illi bid-decizjoni tieghu t-Tribunal ma setax jiddetta lill-Awtorita x'rimedju jimponi ghaliex jekk jaghmel dan ikun qieghed jissostitwixxi r-rwol ta'l-Awtorita

u inehhielha id-diskrezzjoni riservata lilha biss bil-ligi, ghadda imbaghad biex ikkonkluda li l-konsiderazzjonijiet tal-Awtorita meta din imponiet l-obbligi, ossia rimedji fuq il-GO plc ma kenux korretti u ghalhekk ordna lill-Awtorita sabiex terga' tikkonsidra l-obbligi li imponiet.

4. Illi mhuwiex minnu dak konkluz mit-Tribunal illi l-Awtorita appellanti kienet qed tuza lill-Kummissjoni Ewropeja bhala arma meta issottomettiet illi id-decizjoni taghha mertu ta' dawn il-proceduri ghaddiet minn skrutinju intensiv da parti tal-Kummissjoni Ewropeja li ma sabet xejn hazin jew li imur kontra il-principju tal-qafas regolatorju. Illi l-Awtorita irrimarkat dan semplicement ghaliex s-socjeta appellata allegat illi l-Awtorita kienet naqqset mill-obbligi taghha bhala NRA (National Regulatory Authority) u li ma kenitx osservat dak li kellha taghmel taht il-qafas regolatorju.

Illi l-punt tat-tluq sabiex tigi issindikata d-decizjoni mehuda mill-Awtorita appellanti tas-7 ta' Frar 2012 huwa illi jigi mistharreg qabel xejn dak illi giet mitluba taghmel l-Awtorita fl-analizi minnha kondotta. Illi inghad fil-preamblu tad-decizjoni illi:

"***A national consultation process was carried out during the period running from the 19th September 2011 to the 21st October 2011***" u dan fir-rigward ta' "***markets for retail access to the public telephone network provided at a fixed location in Malta***".

Illi mill-analizi minnha kondotta l-Awtorita sabet illi s-socjeta Go plc kienet dominanti fis-suq tat-telefonija fissa u kwindi imponiet regolamentazzjoni fir-rigward fejn allura iddecidiet illi:

The Authority shall impose obligations to ensure that the SMP undertaking concerned does not:

- ***Charge excessive pricing***
- ***Inhibit market entry or restrict competition by setting predatory prices***
- ***Show undue preference to specific end-users***
- ***Unreasonably bundle services.***

Illi fil-konkluzjoni minnha raggunta l-Awtorita b'referenza ghall-ahhar punt hekk iddecidiet:

"***Go plc cannot exclusively bundle any of the retail access services identified in this decision with other electronic communications services into a single tariff without also offering the fixed access service as a stand alone product. This ensures that Go plc does not engage in tying or pure bundling of services as a means of engaging in anti-competitive behaviour that would restrict market entry. The MCA believes that from an ex-ante perspective this retail obligation is sufficient to prevent Go plc from exerting market power in the retail fixed access markets.***"

Illi is-socjeta appellata dehrilha illi din il-parti tad-decizjoni ma kenitx suffijenti sabiex jigi garantit illi s-socjeta Go plc ma tkunx dominanti fis-suq fil-prodott tat-telefonija fissa u li kellhom jigu applikati rimedji ohra fosthom li jigi mistharreg jekk bil-fatt illi l-prodott qed jigi offert f'pakkett jew *bundle* kienx qed jinhonoq il-kompetizzjoni gusta billi xortwahda ikun hemm id-dominanza sanzjonata kif ukoll billi l-operatur ikun qed jestendi dik id-dominanza ghar-rigward tal-prodotti l-ohra mhux regolati u li ikunu qed jigu offerti flimkien fil-pakkett.

Ikkunsidrat,

Illi ma hemmx dubbju illi s-settur tat-telekomunikazzjoni kien minn dejjem regolat. Ghall-ewwel din ir-regolamentazzjoni kienet gustifikata minhabba l-fatt illi s-servizz tal-komunikazzjoni kien jitqies bhala obbligu nazzjonali li ma kellux jithalla f'idejn il-privat. Allura is-settur tat-telekomunikazzjoni kien igawdi minn monopolju naturali u dan sabiex jigi garantit access fuq skala nazzjonali ghas-servizzi tal-komunikazzjoni bi prezz ragjonevoli li jista' jigi milhuq mill-konsumatur. Illum bl-avvanzi fit-teknologija, is-suq tat-telekomunikazzjoni gie privatizzat u liberalizzat bil-konsegwenza allura li inhasset il-htiega issa illi tigi assigurata kompetizzjoni gusta f'dan il-qasam fejn allura operatur (li forsi qabel kien igawdi dak il-monopolju billi kien jappartjeni lill-Istat qabel ma ghadda f'idejn il-privat) jista' ikollu dominanza fis-suq. Illi allura l-Awtorita Regolatorja ghandha tiggarantixxi illi dik id-dominanza tigi regolata bl-imposizzjoni ta' regolamenti li ighinu biex ma tinhonoqx il-kompetizzjoni. Jigri allura illi hafna minn dawn ir-regolamenti hekk imsejjha "*ex-ante regulations*" jistghu jirfsu fil-qasam tad-dritt li tirregola l-kompetizzjoni u dan sabiex tigi imrazzna dina l-posizzjoni dominanti. Fil-fatt l-Awtorita appellanti tishaq illi dak li qed jigi lilha miltub li taghmel bid-decizjoni impunjata ma jaqax fis-setghat moghtija lilha bil-ligi, izda ghandhom jithallew f'idejn l-Awtorita ghal-Kompetizzjoni f'Malta u ghall-Affarijiet tal-Konsumatur (MCCAA) biex taghmel dawk 'l hekk imsejha *ex-post regulations* jekk jirrizulta illi l-prattika addottata mis-socjeta GO plc dwar il-*bundling* tal-prodotti taghha tkun qed tohnoq il-kompetizzjoni fis-suq. Dan huwa il-qafas tal-ewwel aggravvju imressaq mill-Awtorita appellanti li allura tishaq illi l-ligijiet li jirregolaw r-regolamenti *ex-ante* u *ex-post* huma differenti, ghaliex il-qasam regolatorju huwa regolat b'ligijiet specifici limitati ghas-swieq tat-telekomunikazzjoni kuntrarjament ghal dawk li rregolaw il-kompetizzjoni generali li allura l-ghan taghhom huwa li jipprovdu dawk is-sanzjonijiet

necessarji fejn jirrizulta illi ikun hemm kompetizzjoni ingusta fis-suq. Filwaqt li dak ta'l-Ewwel huma regolati bid-Direttivi Ewropej bin-numru 2002/19/EC sa 2002/22/EC kif tramandati fil-ligi taghna fil-Kapitoli 399 u 418 tal-Ligijiet ta' Malta u il-Legislazzjoni Sussidjarja 399.28, dawk ta'l-ahhar jinsabu sanciti fl-artikoli 101 u 102 tat-Tratta dwar il-Funzjonament tal-Unjoni Ewropeja inkorporata fil-ligi taghna fil-Kapitolu 379.

Illi l-Awtorita appellanti bhala in-***National Regulatory Authority*** ghandha l-ghan li tirregola dawk l-operaturi li ghandhom ***Significant Market Power*** (SMP) fis-servizzi regolati bil-ligi, u allura huma dominanti fis-suq, f'dan il-kaz is-servizzi tat-telefonija fissa offrut mill-Go plc kemm meta dawn jigu offruti fis-suq wahedhom (*stand alone products*) kif ukoll jekk ikunu qed jigu offruti ma' servizzi ohra mhux regolati, bhal ma hu qed jigri fil-kaz in dizamina meta isir pakkett ta' servizzi flimkien bhal dak per ezempju tat-televizjoni u l-*internet*, flimkien ma' dak regolat tat-telefonija, bi prezz kompettitiv u cioe' 'l hekk imsejjah *bundling*. Illi l-Awtorita appellanti, izda, tishaq illi hija m'ghandhiex is-setgha li taghmel regolamenti *ex-ante* sabiex thares prodotti jew servizzi mhux regolati anke jekk dawn jigu offruti flimkien ma' prodotti jew servizzi ohrajn regolati fejn l-operatur huwa dominanti fis-suq. Fil-fatt hija il-ligi stess li timpedixxi lill-Awtorita milli timponi regolamentazzjoni meta is-suq ikun wiehed kompettitiv u dan fir-regolament 5(3) tal-Legislazzjoni sussidjarja 399.28.

Illi l-Awtorita appellanti jidhrilha ghalhekk illi irregolat b'mod shih u fil-parametri tal-ligi il-prezz li fih il-Go plc toffri l-prodott regolat tat-telefonija fissa kemm *wholesale* kif ukoll *retail* u dan fejn instab illi kien dominati fis-suq kemm meta il-prodott jinbiegh wahdu kif ukoll meta jinbiegh f'pakkett. Ma setatx fil-limiti stretti imposti fuqha bil-ligi timponi regoli *ex-ante* fir-rigward ta' prodotti mhux regolati anke jekk dawn ikunu qed jigu offerti ma' prodotti regolati f'*bundle*. Issa jekk jirrizulta illi fil-fatt b'konsegwenza ta' din id-

dominanza, l-operatur ikun qieghed jaghmel uzu minn prattici abuzivi, jew ikun hemm vjolazzjoni ta' kompetizzjoni gusta, allura imbaghad f'dawk ic-cirkostanzi hija l-Awtorita tal-Kompetizzjoni (NCA – ***National Competition Authority***) li ghandha tidhol biex trazzan dan l-abbuz u dan sabiex ma ikunx hemm ksur tal-artikoli 101 u 102 tat- TFEU kif addottati fil-ligi taghna permezz tal-Kapitolu 379.

Illi t-Tribunal, madanakollu fid-decizjoni tieghu ma setax jaqbel ma' dina l-fehma ghaliex hass illi bil-poteri moghtija lill-Awtorita fl-artikolu 4 tal-Kapitolu 418 tal-Ligijiet ta' Malta hija kellha l-obbligu li tizgura li ikun hemm kompetizzjoni gusta f'kull prattika jew operazzjoni kummercjali.

"**4(2) Ikun b'mod partikolari dmir tal-Awtorità li teżerċita dawk il-funzjonijiet regolatorji fil-kamp tal-komunikazzjonijiet, li jistgħu minn żmien għal żmien ikunu assenjati lill-Awtorità minn jew taħt xi Att tal-Parlament.**

(3) L-Awtorità għandha wkoll, skont il-liġijiet li għandha jedd tenforza

(d) tiżgura kompetizzjoni ġusta f'kull pratika, operazzjoni u attività bħal dawk;"

Illi b'mod speciifku imbaghad ir-regolament 6 tal-Legislazzjoni Sussidjarja 399.28 jistipula illi:

(1) L-Awtorità għandha tiddeċiedi jekk intrapriżi jkollhiex poter fis-suq sinifikanti kif hawn f'dan ir-regolament. (2) Intrapriża titqies li jkollha poter fis-suq sinifikanti jekk, sew individwalment sew solidalment ma' oħrajn, tkun tgawdi pożizzjoni ekwivalenti għal dominanza, jiġifieri pożizzjoni ta' saħħa ekonomika li tagħtiha s-setgħa li kemm jista' jkun taġixxi indipendentement mill-kompetituri, klijenti u finalment konsumaturi. (3) L-Awtorità għandha, meta tkun qegħda tevalwa jekk intrapriża għandhiex poter fis-suq sinifikanti jew jekk żewġ intrapriżi jew aktar humiex f'pożizzjoni dominanti solidali f'xi suq, taġixxi kif hemm fil-liġijiet tal-Unjoni Ewropea u tieħu kont sħiħ ta' kull linji gwida rilevanti dwar l-analisi tas-suq u l-istima ta' poter fis-suq sinifikanti pubblikati mill-Kummissjoni Ewropea konformement mal-Artikolu 15 tad-Direttiva Kwadru u, b'żjieda ma' dan, fil-każ tal-istima ta' jekk żewġ intrapriżi

jew aktar humiex f'pożizzjoni dominanti solidali, il-kriterji stabbiliti flEwwel Skeda li tinsab ma' dawn ir-regolamenti.

Maghdud dan ghandu jidher car illi t-thassib tat-Tribunal fir-rigward tar-regolamentazzjoni imposta mill-Awtorita appellanti fil-kaz tal-prattika tal-*bundling* hija wahda gustifikata. Dan ghaliex ghalkemm l-Awtorita appellanti ghandha ragun meta tishaq illi hija ma tistax timponi regoli u obbligi fir-rigward ta' prodotti mhux regolati li jiffurmaw parti mill-pakkett, madanakollu hija ghandha l-obbligu li tistharreg jekk l-operatur dominanti fis-suq huwiex xortawahda qed jabbuza minn dik id-dominanza meta qed joffri il-prodott tieghu f'dan il-pakkett.

Fid-definizzjoni li tinghata ghal dina l-prattika tal-*bundling* inghad:

"**Product bundling is a marketing strategy by which a firm offering several products separately, also gives a discount to those consumers purchasing the products as a single combined product (a package). …. bundling practices are a particular form of price discrimination.[1]**"

"Bundling can be used by firms to discriminate among consumers or to extend market power into a related product market. Bundling can be profitable, reduce a rival's profits and overall welfare, or may drive rivals from the market.[2]"

Skont ghal "*bundles*" li jinkludu prodotti regolati jistghu ukoll iwasslu ghal hekk imsejha *margin squeeze*, anke jekk il-prezz ghal prodott regolat wahdu ighaddi mit-test tal-*margin squeeze*. Dan jista' iwassal ghar-rizultat li minnu qed tibza' is-socjeta appellata illi ghalkemm ikun hemm margini sufficjenti ghar-rigward tal-prezz tal-prodott regolat wahdu sabiex ikun hemm kompetizzjoni gusta f'dan il-qasam, ma ifissirx necessarjment illi l-istess qed jigri meta il-prodott qed jigi offrut f'*bundle*, jekk f'dak il-pakkett il-prodotti l-

[1] http://pareto.uab.es/xmg/Bundling.pdf

[2] https://en.wikipedia.org/wiki/Product_bundling

ohra mhux regolati qed jigu offruti bi skont sostanzjali mill-prezz tal-prodott meta jinbiegh wahdu jekk mhux addirittura b'xejn. Illi ghal din ir-raguni allura ir-rapport tal-BEREC issugerixxa illi l-Awtorita Regolatorja nazzjonali ghandha id-dmir li taghmel ezercizzju biex tara jekk operatur bil-prezz offrut ghal *bundle* ikunx dominanti fis-suq, ezercizzju illi jidher illi l-Awtorita appellanti ma ghamlitux ghalkemm huwa premess fil-ligi illi :

"(3) L-Awtorità għandha wkoll, skont il-liġijiet li għandha jedd tenforza

(d) tiżgura kompetizzjoni ġusta f'kull pratika, operazzjoni u attività bħal dawk;"

.. u dan billi isir *market analysis* ghar-rigward tal-prodotti f'pakkett ghal bejgh lill-konsumatur, mhux biss dawk regolati. Dan ghaliex huwa bil-wisq evidenti illi meta socjeta kummercjali ikollha monopolju fis-suq, hija tista' tuza din il-prattika tal-*bundling* sabiex tikseb sahha fis-suq f'prodott iehor. Illi minn studji li saru instab illi l-prattika tal-*mixed bundling* (kif qed isehh fil-kaz indizamina billi il-prodott qed jigi offert kemm wahdu kif ukoll fil-pakkett), meta imqabbla ma' dik ta' *pure bundling* jew il-prattika imsejjha *tying of products* (kif giet impeduta li taghmel is-socjeta GO plc mill-Awtorita) xortawahda iwasslu ghal-l-istess livell ta' qligh ghall-operatur biex b'hekk allura ir-regolamentazzjoni imposta mill-Awtorita fuq l-operatur Go plc illi joffri il-prodott wahdu (*stand alone*), kif ukoll f'pakkett mhuwiex sufficjenti biex irazzan il-kompetizzjoni ingusta.

Dan ifisser illi l-Awtorita appellanti ma tistax tinheba wara l-argument illi legalment hija m'ghandhiex jedd fuq prodotti mhux regolati, ghaliex il-prattika tal-*mixed bundling* tista' indirettament tfisser illi meta il-prodott dominanti ikun qed jinbiegh fil-pakkett, ghalkemm il-prezz tieghu ma ikunx qed jigi mittiefes, izda bil-fatt illi l-prezz tal-prodotti l-ohra ikun qed jigi imrahhas sostanzjalment (jekk mhux addirittura jinghata b'xejn), allura indirettament ikun qed jigi mittiefes ukoll il-prezz tal-prodott dominanti billi ikun qed jinghata skont

indirett lilu biex b'hekk ikun hemm vjolazzjoni tal-obbligazzjoni imposta mill-Awtorita li ma ghandux isir caqliq fil-prezz tal-prodott regolat. L-Awtorita dan ghandha id-dmir li tinvestigah ghaliex b'hekk mhux biss hemm ir-riskju illi l-operatur ikun qed jadotta prattici anti-kompettitivi (bhal *margin squeeze* jew *predatory pricing*) izda ukoll illi ikun hemm ksur tal-obbligi imposti fuqu mill-Awtorita Regolatorju billi ikun qed jinghata skont indirett fuq il-prodott regolat meta dan jinbiegh f'pakkett. Dan ir-riskju gie rikonoxxut ukoll mill-Unjoni Ewropeja kif imfisser car fir-rapport mahrug mill-BEREC[3] ikkwotat b'mod estensiv mit-Tribunal fid-decizjoni tieghu.

B'dan allura ghandu johrog illi l-Awtorita bhala dik regolatorja b'mod specifiku fil-qasam tal-komunikazzjoni ghandha l-obbligu kif imfassla car u tond fil-ligi illi tirregola dana il-qasam b'mod illi ghandha tara mill-analizijiet minnha kondotti illi ikun hemm kompetizzjoni b'sahhitha fis-suq u allura jitrazzan dak l-operatur monopolista li ghalkemm fil-faccata ikun qed jigi regolat izda xortawahda ikun qieghed jinghata l-opportunita li jaddotta prattici anti-kompettitivi f'prodotti u servizzi ohra bl-iskuza illi dawn ma jistghux jigu regolati mill-awtorita regolatorja, prattici li jiksru kull regola ta' kompetizzjoni gusta u huma lezivi tal-obbligi imposti mill-Awtorita fuq il-monopolista. Din hija prassi li l-Awtorita ghandha dmir li trazzan qabel ma ikun tard wisq u allura l-partijiet ikollhom jirrikorru ghas-sanzjonijiet tal-Awtorita tal-Kompetizzjoni. Fuq kollox dak li qed tigi mitluba taghmel l-Awtorita huwa mhux li tirregola prodotti mhux regolati u li ma jaqghux taht il-manzjonijiet rimessi lilha bil-ligi, izda li taghmel studju sabiex tara jekk l-prezz ta' dawk il-prodotti meta jigi ipprezentat f'pakkett huwiex qieghed iservi ta' skont fuq il-prezz tal-prodott regolat biex b'hekk l-operatur ikun qed jikser l-obbligi fuq imposti mill-awtorita regolatorja fuq dak il-prodott regolat.

[3] The Body of European Regulators for Electronic Communications

Premessi dawn il-konsiderazzjonijiet l-Qorti ma issib xejn x'ticcensura fid-decizjoni studjata u ragjonata tat-Tribunal u allura milhuqa dina l-fehma ma tarax illi ghandha ghalfejn tinoltra ruhha fl-aggravvji l-ohra sollevata mill-Awtorita appellanti.

Ghal dawn il-motivi l-appell qed jigi michud u id-decizjoni appellata ikkonfermata.

Bl-ispejjez ikunu ghak-karigu ta'l-Awtorita appellanti.

(ft) Edwina Grima

Imhallef

VERA KOPJA

Franklin Calleja

Deputat Registratur