MALTA

Administrative Review Tribunal
Magistrate
Dr. Gabriella Vella B.A., LL.D.

Application No. 34/14VG

Vodafone Malta Limited

Vs

Malta Communications Authority and in virtue of a Decree dated 24th April 2014 Melita Malta Limited, later named Melita p.l.c. and subsequently re-named Melita Limited, intervened in the proceedings *in statu et terminis*

Today, 11th January 2018

The Tribunal,

After having taken cognizance of the Application submitted by Vodafone Malta Limited on the 2nd April 2014, wherein it requests the Tribunal to: (i) cancel and revoke the Decision published by the Malta Communications Authority on the 14th March 2014 entitled *Bottom-Up Cost Model for Mobile Networks and Proposed Mobile Interconnection Pricing: Consultation and Proposed Decision;* (ii) consequently revoke the implementation of the rate of 0.4045 Euro cents per minute between telephony operators in Malta with regard to termination of mobile calls on their respective infrastructure, which came into effect on the 1st April 2014; (iii) order the Malta Communications Authority to: (a) carry out fresh consultations with the telephony operators in Malta with regard to rates for the termination of mobile calls on their respective infrastructure and grant them adequate time frames for their replies and proper verifications; and (b) subsequently publish the economic model adopted by it and of all that information which in the opinion of the Tribunal is necessary for the operators in the relevant market to be able to properly and validly participate in such consultations; (iv) with costs against the Malta Communications Authority and with the right of further action against the Authority for the recovery of damages caused to it as a consequence of the Decision being contested[1];

[1] Folios 1 to 13 of the records of the proceedings, Volume I.

After having taken cognizance of the documents marked Doc. "A" to Doc. Q" submitted by Vodafone Malta Limited together with its Application at folios 14 to 289 of the records of the proceedings[2];

After having taken cognizance of the Reply by the Malta Communications Authority wherein it opposes the Appeal lodged by Vodafone Malta Limited from the Decision published on the 14th March 2014 entitled *Bottom-up Cost Models for Mobile Networks and Mobile Interconnection Pricing: Response to Consultation and Decision* and, on the basis of the pleas set out in its Reply, requests the Tribunal to reject the said Appeal, with costs against Vodafone Malta Limited[3];

After having taken cognizance of the documents marked Doc. "MCA1" to Doc. "MCA17" submitted by the Malta Communications Authority together with its Reply at folios 328 to 412 of the records of the proceedings[4];

After having taken cognizance of the Decree dated 8th May 2014 by virtue of which Mobisle Communications Limited, today GO p.l.c., was authorised to intervene in these proceedings *in statu et terminis*;

After having taken cognizance of the Reply by Melita Malta Limited, later named Melita p.l.c.[5] and subsequently re-named Melita Limited[6], to the Appeal lodged by Vodafone Malta Limited from the Decision published by the Malta Communications Authority on the 14th March 2014 entitled *Bottom-up Cost Models for Mobile Networks and Mobile Interconnection Pricing: Response to Consultation and Decision*, wherein it opposes the said Appeal and on the basis of the reasons set out in its Reply requests the Tribunal to reject the Appeal whilst confirming the Decision, with costs[7];

After having taken cognizance of the Reply by Mobisle Communications Limited to the Appeal lodged by Vodafone Malta Limited from the Decision published by the Malta Communications Authority on the 14th March 2014 entitled *Bottom-up Cost Models for Mobile Networks and Mobile Interconnection Pricing: Response to Consultation and Decision*, wherein it agrees with and upholds the grounds on which Vodafone Malta Limited founds its Appeal from the said Decision and requests the Tribunal to: (i) cancel and revoke the Decision published by the Malta Communications Authority on the 14th March 2014; (ii) consequently revoke the implementation of the rate of 0.4045 Euro cents per minute between telephony operators in Malta with regard to termination of mobile calls on their respective infrastructure, which came into effect on the 1st April 2014; (iii) order the Malta Communications Authority to: (a) carry out fresh consultations with the telephony operators in Malta with regard to rates for the termination of

[2] Volume 1 and Volume II.
[3] Folios 291 to 327 of the records of the proceedings, Volume II.
[4] Volume II.
[5] Folios 1083 to 1088 of the records of the proceedings, Volume VI.
[6] Folios 1250 to 1252 of the records of the proceedings, Volume VI.
[7] Folios 416 to 422 of the records of the proceedings, Volume II.

mobile calls on their respective infrastructure and grant them adequate time frames for their replies and proper verifications; and (b) subsequently publish the economic model adopted by it and of all that information which in the opinion of the Tribunal is necessary for the operators in the relevant market to be able to properly and validly participate in such consultations; (iv) with costs against the Malta Communications Authority[8];

After having taken cognizance of the Note filed by Mobisle Communications Limited on the 30th July 2014[9], by means of which it withdrew the acts filed by it in these proceedings and consequently withdrew its interest in these proceedings;

After having taken cognizance of the affidavit by Jason Pavia and attached documents submitted by Vodafone Malta Limited by means of a Note filed on the 21st July 2014 at folios 447 to 622 of the records of the proceedings[10] and of the affidavit by Benjamin Mark Wreschner and the CD attached to it, also submitted by Vodafone Malta Limited by means of a Note filed on the 4th August 2014 at folios 615 to 635 of the records of the proceedings[11] and after hearing testimony given by Jason Pavia during the sittings held on the 6th October 2014[12], 11th December 2014[13], 14th May 2015[14] and taking cognizance of documents submitted by him marked Doc. "GV1" to "GV7" at folios 641 to 658 of the records of the proceedings[15], document marked Doc. "MCAX" submitted by Counsel to the Malta Communications Authority during the sitting held on the 11th December 2014 at folios 697 and 698 of the records of the proceedings[16] and of the documents marked Doc. "SC1" to Doc. "SC6" submitted by Counsel to the Malta Communications Authority during the sitting held on the 14th May 2015 at folios 1000 to 1009 of the records of the proceedings[17], after hearing testimony given by Benjamin Wreschner during the sitting held on the 10th November 2014[18], after taking cognizance of the affidavit by Ian Agius and documents attached to it submitted by the Malta Communications Authority by means of a Note filed on the 6th February 2015 at folios 715 to 840 of the records of the proceedings[19], after hearing testimony by Ian Agius during the sitting held on the 12th February 2015[20] and taking cognizance of document Doc. "GV1" at folio 842 of the records of the proceedings[21] submitted by Ian Agius during the said sitting, after taking cognizance of the affidavit by Victoria Darmanin and the documents attached to it[22] and the affidavit by Alan Cassar[23] submitted by the Malta Communications

[8] Folios 429 to 434 of the records of the proceedings, Volume II.
[9] Folio 624 of the records of the proceedings, Volume III.
[10] Volume III.
[11] Volume III.
[12] Folios 659 to 670 of the records of the proceedings, Volume III.
[13] Folios 699 to 714 of the records of the proceedings, Volume IV.
[14] Folios 1010 to 1014 of the records of the proceedings, Volume V.
[15] Volume III.
[16] Volume IV.
[17] Volume V.
[18] Folios 678 to 95 of the records of the proceedings, Volume IV.
[19] Volume IV.
[20] Fol. 843 to 855 of the records of the proceedings, Volume V.
[21] Volume V.
[22] Folios 858 to 870 of the records of the proceedings, Volume V.
[23] Folios 897 to 900 of the records of the proceedings, Volume V.

Authority by means of a Note filed on the 25th March 2015 at folio 857 of the records of the proceedings[24] and also of the affidavit by Ian Streule and documents attached to it submitted by the Malta Communications Authority by means of a Note filed on the 7th April 2015 at folios 934 to 993 of the records of the proceedings[25], after taking cognizance of the affidavit by John Gunnigan submitted by Melita p.l.c. by means of a Note submitted on the 22nd June 2015 at folios 1072 to 1082 of the records of the proceedings[26], of documents marked Doc. "IS2" and Doc. "IS3" submitted by the Malta Communications Authority by means of a Note filed on the 3rd July 2015 at folios 1088 to 1092 of the records of the proceedings[27] and of the documents, namely the financial statements of Vodafone Malta Limited for the years 2013 and 2014 submitted by Melita p.l.c. by means of a Note filed on the 8th July 2015 at folios 1098 to 1180 of the records of the proceedings[28], after hearing testimony by Victoria Darmanin given during the sittings held on the 24th September 2015[29], 25th January 2016[30] and 4th April 2016[31], and testimony by John Gunnigan given during the sitting held on the 24th September 2015[32] and testimony by Alan Cassar given during the sitting held on the 25th January 2016[33], after taking cognizance of the contents of the CD submitted by Melita p.l.c. by means of a Note filed on the 22nd October 2015 at folios 1214 and 1215 of the records of the proceedings[34] and of the contents of the Note submitted by the Malta Communications Authority on the 9th February 2016 at folios 1233 to 1235 of the records of the proceedings[35];

After taking cognizance of the Note of Submissions by Vodafone Malta Limited filed on the 12th August 2016[36], the Note of Submissions by the Malta Communications Authority filed on the 25th April 2017[37] and the Note of Submissions by Melita Limited filed on the 12th June 2017[38];

After taking cognizance of all the records of the proceedings;

Considers:

By means of a Decision entitled *Bottom-Up Cost Model for Mobile Networks and Mobile Interconnection Pricing* published on the 14th March 2014[39] [hereinafter referred to as the MTR Decision or Decision as the case may be], the Malta Communications Authority [hereinafter referred to as the MCA] decided that

[24] Volume V.
[25] Volume V.
[26] Volume VI.
[27] Volume VI.
[28] Volume VI.
[29] Folios 1203 to 1213 of the records of the proceedings, Volume VI.
[30] Folios 1223 to 1226 of the records of the proceedings, Volume VI.
[31] Folios 1241 to 1249 of the records of the proceedings, Volume VI.
[32] Folios 1183 to 1202 of the records of the proceedings, Volume VI.
[33] Folios 1227 to 1232 of the records of the proceedings, Volume VI.
[34] Volume VI.
[35] Volume VI.
[36] Folios 1255 to 1288 of the records of the proceedings, Volume VI.
[37] Folios 1297 to 1355 of the records of the proceedings, Volume VII.
[38] Folios 1356 to 1365 of the records of the proceedings, Volume VII.
[39] Doc. "A" at folios 14 to 26 of the records of the proceedings, Volume I.

after taking into account the feedback from respondents and the EU Commission, the MCA is hereby mandating the mobile termination rate of 0.4045 Euro cents per minute, which rate shall be applicable as from 1 April 2014. The charges shall be applicable to all those operators having SMP in the wholesale mobile termination market. Going forward, the MCA will be issuing an annual statement, notifying all stakeholders if it would be starting the review process of the model/rates in the subsequent year. By virtue of a Decision entitled *Wholesale Voice Call Termination on Individual Mobile Networks in Malta – Definition of Relevant Markets, Assessment of SMP and Regulatory Intervention* published on the 13th March 2014[40], the MCA *inter alia* decided that: *the wholesale markets under consideration are not competitive and will not retract from this position during the timeframe of this review. This conclusion is supported by a number of findings, namely that: Each MNO holds a 100% share in terms of voice call traffic terminating on its own network and therefore a monopolist on its own network; No CBP can be exercised on the setting of mobile termination charges. Due to the CPP principle, the retail customer does not sufficiently care about the costs that other parties incur when calling them. In addition, network operators have no alternative for terminating a mobile call other than the MNO to which the called number belongs; Absent regulation, MNOs have a strong incentive to charge excessive termination charges and to price discriminate when charging for termination; Mobile termination charges are likely to increase in the absence of regulatory intervention and may result in price distortions and allocative inefficiencies; In a scenario where MNOs can freely set high termination charges, the scope for price competition is reduced, to the detriment of retail customers. The MCA therefore considers that the following MNOs hold SMP in their respective wholesale termination market: 1. Vodafone Malta Ltd.; 2. Mobisle Communications Ltd.; 3. Melita Mobile Ltd. In view of the finding of SMP for Go Mobile, Vodafone (Malta) and Melita Mobile, the MCA is obliged to impose the necessary obligations to mitigate against potential competition problems…* From the latter decision it clearly results that the MTR Decision is directly applicable to and effects Vodafone Malta Ltd., Mobisle Communications Limited and Melita Mobile Limited *qua* SMP operators in the wholesale mobile termination market.

By means these proceedings Vodafone Malta Ltd. [herein after referred to as Vodafone] is in fact appealing from the MTR Decision and is requesting that the Tribunal: (i) cancel and revoke the MTR Decision*;* (ii) consequently revoke the implementation of the rate of 0.4045 Euro cents per minute between telephony operators in Malta with regard to termination of mobile calls on their respective infrastructure, which came into effect on the 1st April 2014; (iii) order the Malta Communications Authority to: (a) carry out fresh consultations with the telephony operators in Malta with regard to rates for the termination of mobile calls on their respective infrastructure and grant them adequate time frames for their replies and proper verifications; and (b) subsequently publish the economic model adopted by it and of all that information which in the opinion of the

[40] Doc. "JP1" at folios 467 to 507 of the records of the proceedings, Volume II.

Tribunal is necessary for the operators in the relevant market to be able to properly and validly participate in such consultations.

Vodafone is founding its appeal from the MTR Decision on the following grounds: (i) since the MTR Decision, which was published on the 14th March 2014, became enforceable on the 1st April 2014, the MCA did not allow for Vodafone to exercise its right to request the suspension of the Decision before it actually came into force since in terms of Section 42(2) of the Malta Communications Authority Act, Chapter 418 of the Laws of Malta, an appeal from the Decision could be lodged up until the 3rd April 2014 and before lodging such an appeal Vodafone could not be considered to be a party to the appeal; (ii) the MCA did not act in a transparent and impartial manner as required in terms of Section 4(4) and Section 4A of Chapter 418 of the Laws of Malta since it did not provide the operators in the relevant market, including Vodafone, with the economic model via which it calculated the mobile termination rate set out in the Decision, for due verifications to be carried out by them, but merely provided a summary of the said model which is totally inadequate for verification purposes; (iii) by not providing Vodafone with the economic model via which it calculated the mobile termination rate set out in the Decision, by not giving Vodafone sufficient time within which to provide the requested information for input purposes into the economic model and by not granting the operators, including Vodafone, sufficient time for the consultation period, the MCA infringed Section 4A of Chapter 418 of the Laws of Malta, which provides that where the MCA intends to take a decision in accordance with any law it is entitled to enforce, and which decision has a significant impact in a market for any communications networks or services, it shall make available to interested parties, a statement of the proposed decision and give such parties the opportunity to comment on the proposed decision within a period which the Authority considers reasonable; (iv) there are a number of errors which feature in the economic model adopted by the MCA in order to calculate the mobile termination rate set out in the MTR Decision and from the Decision itself there result numerous inconsistencies in the MCA's approach and reasoning; (v) the Bottom-Up Cost Model created by the MCA and Analysys Mason gave a rate of 0.4045 Euro cents per minute, which is the lowest mobile termination rate in all of Europe and it also amounts to half the value of the rate of 0.8000 Euro cents per minute applicable in France which according to the "BEREC Integrated Report on Termination Rates in Europe as of 1 July 2013" was already considered to be the lowest rate in Europe. The rate of 2.07 Euro cents per minute which was applicable prior to the Decision was already a competitive rate and therefore no further reduction was needed. Furthermore, the rate of 0.4045 Euro cents per minute entails a reduction of more than 80% of the rate applicable prior to the MTR Decision and it amounts to a reduction of 0.65 Euro cents from the expected rate prior indicated prior to the Decision in the decision entitled *Interim Review of Wholesale Mobile Termination Rate – Response to Consultation & Decision* published in June 2012, which was published less than a year before the MTR Decision, which drastic reduction is not realistic and causes significant regulatory uncertainty; (vi) the MTR Decision is discriminatory in its regard since contrary to other operators in the relevant market, Vodafone offers only mobile services with the consequence that it will not be able to recoup its expenses from other services it might offer and in any case

transversal subsidies between services and/or products are directly contrary to that provided for in Section 9 of the Competition Act, Chapter 379 of the Laws of Malta. Furthermore, the MTR Decision is aiding anti-competitive behaviour in the relevant market by the other operators within the same market. Furthermore, the Decision will hamper future investments planned by Vodafone since they are unlikely to go ahead in view of the contents of the Decision and ultimately it will be the consumer who will suffer the greatest prejudice in this particular scenario; and (vii) most of the questions and submissions put forth by it during the consultation processes have not been satisfactorily addressed and/or answered by the MCA.

The MCA objects to the appeal lodged by Vodafone from the MTR Decision and requests that the same be rejected and the Decision confirmed on the basis of the following pleas: (i) by making the MTR Decision enforceable from the 1st April 2014, the MCA did not deprive Vodafone of its right to request the suspension of the Decision since as a matter of fact Vodafone did indeed request the suspension of the Decision and this request was duly decreed by the Tribunal[41]; (ii) the MCA acted in a transparent manner all throughout the process and it provided the operators with all the necessary information which could be provided to them for them to make their respective inputs with regard to the same. The full model was not provided to Vodafone due to confidentiality reasons pertaining to certain information which was being requested by Vodafone; (iii) Vodafone was given full opportunities to participate during the consultation process, both during the one-to-one phase of the consultation process as well as during the public phase of the consultation process and from the very initial phases of the process it, like all the other operators in the relevant market, was informed of the time frames involved and which issues/subjects were going to be discussed during the consultation process so that it could give all its inputs and fully participate in the consultation process; (iv) the MCA provided all the information it could provide with the exception of commercially sensitive and confidential information, sensitivity and confidentiality which were cited by Vodafone itself as a reason for not providing certain information and data which were requested from it by the MCA. The MCA did not act in an incoherent or inconsistent manner in its reasoning and final Decision since benchmarks were only used in those instances where the operators failed to provide the information which was requested from them or where the information provided was not sufficient; (v) the mobile termination rate determined by the MCA does not give rise to any regulatory instability. Vodafone itself predicted, in July 2013, that *the output of the model would be something far below what was expected and observed from other EU pure LRIC based models"*. This shows that the information provided by the MCA was sufficient for the operators to make their verifications and it also shows that the MCA did indeed act in a transparent manner. The fact that the MCA was going to adopt a pure LRIC methodology in order to determine the mobile termination rate was already determined in a decision which was published in 2010 and from which decision no appeal was lodged by any of the operators, including Vodafone,

[41] The request for the suspension of the Decision was rejected by a Decree dated 2nd June 2014, Doc. "JP9" at folios 608 to 619 of the records of the proceedings, Volume III.

effected by that decision and its consequential effects. Furthermore, the MCA acted according to the Recommendation by the European Commission and Vodafone did not put forth any valid reason or argument in order to show that the MCA should have acted differently; (vi) there is no valid ground on the basis of which it can be alleged that the MTR Decision is discriminatory since the model used in order to establish the mobile termination rate is neutral with regard to the operators concerned, including Vodafone. The only element which can impact an operator are traffic patterns of the phone calls by the subscribers which traffic patterns could vary depending on changes in market conditions and not as a consequence of the MTR Decision; and (vii) the MCA categorically denies the allegation by Vodafone that most of the questions and submissions put forth by it during the consultation processes have not been satisfactorily addressed and/or answered by the MCA[42].

Melita Mobile Limited[43] (hereinafter referred to as Melita), who was authorised to intervene in the proceedings *in status et terminis* by a Decree dated 24th April 2014, also objects to the appeal lodged by Vodafone from the MTR Decision and requests that the same be rejected on the following grounds: (i) since the Law clearly provides that decisions by the MCA are to come into force with immediate effect irrespective of any objections to the said decision/s, Vodafone is not correct in claiming that the MCA in any way deprived it of its right to request the suspension of the MTR Decision. As a matter of fact Vodafone had every right to request the suspension of the Decision, which request was in actual fact put forward by it; (ii) Vodafone is legally wrong in alleging that as a consequence of the MTR Decision it will incur a financial loss amounting to €1.7 million annually when it fails to mention the value of expenses it will save as a consequence of the lower rates it will be charged by other operators for the termination of mobile calls on their networks. Furthermore, Vodafone's financial position is such that any losses it may incur as a consequence of the MTR Decision would be negligible; (ii) the MCA acted in a transparent manner vis-à-vis each and every operator involved in the process leading up to the MTR Decision. Consultations were held both on a one-to-one basis and publicly, and all the operators concerned had every opportunity to submit all information and submissions they deemed necessary and relevant to the process. The operators were not only given ample time to put forth information and submissions during the consultation process but, in reality the consultation process was unnecessarily prolonged due to irrelevant interventions and requests by Vodafone itself. In so far as concerns the pure LRIC methodology adopted by the MCA, Melita deems that it is the right methodology to be applied and it is in line with the Recommendation by the European Commission. The request by Vodafone for the publication of information, including information provided by and therefore concerning other operators, which is confidential, is completely unacceptable and cannot be upheld; (iii) Vodafone is attacking the mobile termination rate established by the MCA in the MTR Decision simply because it is to its advantage that the rate remains high. Vodafone wants to retain its monopoly over the wholesale mobile

[42] Reply by the MCA, folios 291 to 327 of the records of the proceedings, Volume II.
[43] Subsequently known as Melita p.l.c. and today known as Melita Limited.

termination market and wants to make profits and not simply cover costs via the mobile termination rate. Vodafone wants to hinder competition within the market, which is the main element (that is effective competition) which the MCA wants to introduce by means of the MTR Decision, to the detriment of the consumer; (iv) the allegation by Vodafone that the MTR Decision is discriminatory towards it because it favours quad play operators within the market is completely unfounded since the Decision was based on a stand-alone operator as required by the Recommendation of the European Commission and not on a quad play operator. Therefore, none of the operators in question can be negatively or discriminatorily effected by the MTR Decision; (v) in so far as concerns the seventh ground on which Vodafone founds its appeal from the MTR Decision, Melita amply refers to that already submitted by the MCA in this regard[44].

Mobisle Communications Limited (hereinafter referred to as GO), who was authorised to intervene in these proceedings *in statu et terminis* by a Decree dated 8th May 2014, subsequently withdrew its interests in the case by means of a Note filed on the 30th July 2014[45].

The Tribunal deems that the first issue which must be addressed is that raised by Vodafone it its first ground for appeal, that is its claim that by enforcing the MTR Decision with effect from the 1st April 2014, the MCA deprived it of its right to request a suspension of the Decision.

In this regard Vodafone submits that: *even though the merits of this ground may appear, prima facie, to have been exhausted, Vodafone maintains that the principle raised therein remains valid, in that the enforcement of the Decision prior to the lapse of the 3 of April was in breach of the operators' right (including, therefore, Vodafone's right) to request a suspension of the Decision as contemplated by Article 42(2) of Chapter 418 of the Laws of Malta. Vodafone submits that the MCA should not have enforced the Decision until the term had lapsed, this because the scope and spirit of the said Article 42 is that of permitting interested parties to suspend a decision of the MCA pending an appeal thereon prior to the application thereof, as the application thereof could cause significant and possibly irreparable damages to the interested parties and/or to the end-consumers. Article 42 recognizes that in the field of telecoms, especially with the enforcement of ex-ante regulatory measures, operators, their business and consumers can be materially and significantly impacted by any Decision of the national regulatory authority, and thus establishes not only a right to appeal from such a Decision, but also the right to suspend the Decision in the course of the appeal procedure. Vodafone contends, therefore, that any Decision which is subject to the right of appeal and a right of suspension within a specified period, should not, as a matter of principle, and due process, be given effect to prior to the lapse of the said specified period. In this context, whereas Vodafone reiterates that Vodafone was and is negatively impacted by the lower*

[44] Reply by Melita Mobile Limited at folios 416 to 423 of the records of the proceedings, Volume II.
[45] Folio 624 of the records of the proceedings, Volume III.

rate of MTRs, Vodafone respectfully submits that as a matter of principle, whether or not Vodafone (or for that matter an appellant to decisions of the MCA) is materially or negatively impacted by the MTR Decision is not, as such pertinent to the argument. In fact, Vodafone also recognizes that interim measures suspending the effect of the decision of a national regulatory authority should be granted only in urgent cases in order to prevent serious and irreparable damage to the party applying for those measures and if the balance of interests so requires. This is not contested. However, the real issue here is that, as a matter of principle and rule of law the MCA should not be permitted to impose decisions prior to the lapse of a period within which parties may appeal and apply to suspend the respective decisions – Allowing the MCA to do so would create a very dangerous precedent from a regulatory perspective particularly in cases that are indeed deemed to be "urgent" and causing serious and irreparable damages to the party applying for those measures would arise and be proven to the satisfaction of the Tribunal[46].

The Tribunal must at the outset state that it completely fails to understand Vodafone's aim behind its first ground of appeal both in view of that provided for in Section 42 of Chapter 418 of the Laws of Malta and in view of the fact that Vodafone did indeed file a request for suspension of the MTR Decision by means of an application filed on the 2nd April 2014.

Section 42 of Chapter 418 of the Laws of Malta, which essentially implements within the national legislation the provision set out in Article 4.1 of the Framework Directive, provides that*: (1) The decision of the Authority pending an appeal whether before the Tribunal or the Court of Appeal, shall stand and shall be adhered to by all the parties to whom the decision applies. (2) The Tribunal or the Court of Appeal, as the case may be, where it considers it to be appropriate, may, on the application of a party to the appeal, suspend in whole or in part the decision which is the subject of the appeal pending the final determination of the appeal. The Tribunal or the Court of Appeal in deciding whether or not to suspend the decision shall state its reasons and shall take into account all the relevant circumstances, including - (a) the urgency of the matter; (b) the effect on the party making the request if the application for suspension is not upheld, and (c) the effect on competition and, or on end-users if the application is upheld: Provided that a party, in making an application under this article, shall state the factual and legal grounds establishing a prima facie case for the suspension of the decision. The Tribunal or the Court of Appeal, as the case may be, shall on receipt of any such application order the notification thereof to the other party or parties to the appeal affording them reasonable opportunity to make their response thereto: Provided further that the Tribunal in determining any such application may include such conditions as it considers necessary in the circumstances.*

From the said provision of the Law it clearly results that a request for the suspension of a decision by the MCA can only be lodged by **a party to an**

[46] Paras. 3 to 8 of the Note of Submissions by Vodafone Malta Limited, folio 1256 of the proceedings, Volume VI.

appeal from the decision. Therefore, the suspension of a decision can only be requested once an appeal from it has been lodged, which appeal can be lodged **within twenty days from the date when the decision is served on the appellant/appellants**[47]. In the light of these facts it clearly results that the submission by Vodafone that by making the MTR Decision come into force on the 1st April 2014 and not after the 3rd April 2014, the day when the period for lodging an appeal from the MTR Decision elapsed, the MCA deprived it of its right to request the suspension of the Decision, is manifestly unfounded.

First of all an appeal from a decision by the MCA can be lodged **within** a period of twenty days from service of the decision which means that a person/undertaking who/which feels aggrieved by the decision may file his/its appeal on any day **within** that period and consequently it is fair to presume that if the person/undertaking feels that the decision is manifestly prejudicial to him/it, he/it would ensure to file such appeal in the shortest time possible, thus placing himself/itself in a position to request the suspension of the decision, and not leave it till the very end of the twenty day period set by the Law. It follows that the date of coming into force of the decision by the MCA is of relative importance within such a context particularly when, as was the case in this case, the decision effectively comes into force merely two days before the period for the filing of an appeal elapses.

Apart from this general observation, in this particular case Vodafone was not in any way deprived of its right to request the suspension of the MTR Decision since it effectively filed an application to this effect on the 2nd April 2014, that is one day after the date of coming into force of the Decision and on the same day when it filed its appeal from the Decision. Whilst claiming that by establishing the 1st April 2014 as the date of coming into force of the MTR Decision the MCA deprived it of its right to request the suspension of the Decision, Vodafone, through the affidavit submitted by Jason Pavia[48], admits and acknowledges that it had requested the stay/suspension of the Decision and it also exhibited the Decree dated 2nd June 2014 by means of which the request was rejected[49]. This is indeed a significant contradiction on the part of Vodafone which further undermines the validity of the first ground on which it founds its appeal from the MTR Decision.

The Tribunal therefore deems that the first ground on which Vodafone founds its appeal from the MTR Decision is unfounded and consequently cannot be upheld.

Even though Vodafone also founds its appeal from the MTR Decision on six further and seemingly distinct grounds for appeal, really and truly the appeal revolves around two central arguments/issues: (i) the validity of the use of the pure LRIC methodology for the purposes of establishing the Mobile Termination Rate, particularly within a market like the Maltese market; and (ii) the fact that the MCA did not provide Vodafone with a complete version of the economic

[47] Section 37(3) of Chapter 418 of the Laws of Malta.
[48] Folios 448 to 466 of the records of the proceedings, Volume III.
[49] Doc. "JP9" at folios 608 to 619 of the records of the proceedings, Volume III.

model used by it in order to determine the Mobile Termination Rate of 0.4045 Euro cents per minute.

Even though during the sitting held on the 11th December 2014[50], Counsel for Vodafone declared that although in these proceedings Vodafone is commenting about the pure LRIC methodology, the said methodology does not form part of the merits of these proceedings and even though in its Note of Submissions Vodafone tries to water down the importance of its contestation to the use of the pure LRIC methodology within the context of these proceedings, from the Application initiating these proceedings, from the affidavit by Jason Pavia and from the affidavit by Benjamin Wreschner, it clearly results that the use of the pure LRIC methodology by the MCA in order to determine the Mobile Termination Rata applicable for the termination of mobile calls on the operators' networks, or rather its opposition to the use of the said methodology by the MCA, is indeed central to its appeal from the MTR Decision.

In its Application, namely under the fifth ground for appeal from the MTR Decision, Vodafone expressly states: *illi din il-metodologija tal-pure LRIC giet uzata mill-MCA wara li l-Awtorità harget decizjoni f'dan ir-rigward fl-2010 bl-isem ta' "Interconnection Pricing Strategy for the Electronic Communications Sector in Malta" ...; u huwa veru li dik id-decizjoni, dak iz-zmien, ma gietx ikkontestata mis-socjetà rikorrenti. Illi però, is-suq illum huwa differenti hafna minn kif kien fl-2010 u r-riskju illi qieghda tiffaccja s-socjetà rikorrenti prezentement (anke permezz tad-Decizjoni innifisha) ghanhdom jigu kkunsidrati. Illi minghajr pregudizzju ghas-suespost, il-mod ta' kif qieghda tigi kkalkolata l-"WACC rate" ... li hija wahda mill-fatturi li qeghdin jigu wzati fil-mudell sabiex jistabilixxi r-Rata jinkorpora fih l-hekk imsejha "Beta", li hija intiza bhala mizura tar-riskju illi fih l-investiment u abbazi ta' liema jigi kkomputat dak illi jissejjah 'fair return on investment'. Illi dan ir-riskju involut fl-operat tas-socjetà attrici, minkejja li kien gie stabbilit f'konsultazzjoni ohra fl-2012, inbidel drastikament wara din id-Decizjoni u ghaldaqstant ghandu jigi rivedut u rifless fil-mudell illi minnu qieghda tohrog ir-Rata. Illi minghajr pregudizzju ghas-suespost, il-metodu ta' kif qieghda tigi implimentata l-metodologija ta' "pure LRIC" huwa l-aktar metodu drastiku possibli u dak li jirrizulta fl-akbar telf fuq is-servizz illi toffri s-socjetà attrici ... Illi dan il-metodu kif applikat, imur kontra l-principji fundamentali ta' Europe 2020 u d-Digital Agenda, u l-ispirtu illi fihom dawn id-dokumenti gew kostruiti u varati minhabba l-fatt illi l-principji f'dawn iz-zewg dokumenti (specjalment fir-Regulation of The European Parliament And of The Council laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent, and amending Directives 2002/20/EC, 2002/21/EC and 2002/22/EC and Regulations (EC) No. 1211/2009 and (EU) No. 531/2012) f'pagna 2 jghid illi – "The right regulatory environment is crucial to contribute to a dynamic and competitive market. It must provide the right balance of risk and reward for those prepared to invest" u in oltre f'pagna 3 itenni li "Economics of scale and new growth*

[50] Folio 696 of the records of the proceedings, Volume IV.

opportunities can improve the returns on investment in high-speed networks and can at the same time drive competition and global competitiveness. Yet within the EU, operators cannot benefit sufficiently from them. Other parts of the world are making significant digital efforts and investments – these investments are paying off for both investors and consumers, but in Europe such upgrades are not happening fast enough". Illi huwa veru wkoll illi l-metodologija ta' "pure LRIC" tohrog mir-Rakkomandazzjoni, izda r-Rakkomandazzjoni m'hix direttiva, izda hija semplicement gwida u r-regolatur ghandu l-obbligu li ma japplikax tali rakkomandazzjoni fl-ambitu tac-cirkostanzi nazzjonali. Illi in oltre, pajjizi bhall-Olanda u l-Germanja, fejn ic-cirkostanzi nazzjonali gew evalwati bir-reqqa, il-Qorti Nazzjonali (kif jidher mid-decizjoni tal-Qorti ta' l-Appell Olandiza hawn annessa u mmarkata Dok. P) u r-regolatur respettivament hassew illi ma kienx hemm bzonn illi d-drittijiet ta' l-operaturi bl-implimentazzjoni tal-metodologija pure LRIC kienu ser jigu infranti, minhabba l-fatt li l-mudell LRAIC+ kien qed jirrizulta f'kompetizzjoni efficjenti. Illi f'dawn iz-zewg pajjizi LRAIC+ kien qed jirrizulta f'kompetizzjoni effettiva gusta w allura r-rimedju tal-Pure LRIC gie meqjus eccessiv. Illi dawn il-kazijiet juru ben tajjeb illi l-MCA m'hijiex obbligata illi timplimenta r-Rakkomandazzjoni semplicement ghaliex gejja mill-EU, u ma jezonerahiex mill-obbligu li tikkunsidra x'impatt ser ikollha din id-Decizjoni fuq is-suq lokali u fuq ligijiet ohrajn konfliggenti bhal ma hija dik tal-kompetizzjoni gusta... Illi kieku dan sar bir-reqqa fil-kaz odjern, fejn ir-rizultat ta' l-applikazzjoni ta' "pure LRIC" kien tant differenti minn dak mistenni, u drastikament inqas mir-Rati li kienu prezenti, l-Awtorità kienet tikkalkula u tippubblika r-rata ta' "LRAIC+" u fil-kaz ta' varjazzjonijiet sostanzjali tezamina il-ghaliex hemm din l-inkonsistenza. Illi di più, dawn ir-Rati jezistu bejn l-operaturi u s-sitwazzjoni fil-passat ma taghtix indikazzjoni illi t-tnaqqis fir-Rati ser jigu riflessi fil-prezzijiet 'retail', jigifieri dawk li jithallsu mill-utenti finali. Illi fil-fatt r-Rakkomandazzjoni, li fuqha hija bbazata din id-Decizjoni, tidentifika s-servizzi 'retail' bhala s-servizz l-iktar efficjenti fejn operatur jista' jaghmel tajjeb ghat-telf illi qed jigi sostnut fuq il-provizjoni ta' dan is-servizz ta' terminazzjoni tat-traffiku, kuncett li fih innifsu huwa kuntrarju ghall-principji tal-kompetizzjoni gusta u jaffettwa l-kummerc bejn l-iStati Membri ta' l-Unjoni Ewropeja minhabba l-fatt illi Vodafone ghandha ishma mizmuma minn azzjonisti barranin u minhabba l-fatt ukoll illi permezz tad-Decizjoni, operaturi tat-telefonija mobbli Maltin ser ikunu qeghdin jissussidjaw lill-operaturi tat-telefonija mobbli barranin meta jitterminaw it-traffiku taghhom gewwa Malta. Illi ghaldaqstant, decizjoni bhal din, li hija bbazata fur ir-Rakkomandazzjoni, tibdel il-bazi fundamentali ta' decizjonijiet precedenti minhabba l-impatt estensiv li ser ikollha fuq l-operat tas-suq tat-telefonija mobbli[51].

In his affidavit Jason Pavia expressly declares that: *Long-run incremental cost (LRIC) is a method of understanding the incremental cost to a MNO for providing a service, compared with not providing that service. The evaluation should be based on an economic/engineering model of a 'hypothetical efficient' MNO. Pure LRIC is not exactly the same as marginal cost, but for regulatory*

[51] Folios 7 (tergo) to 9 of the records of the proceedings, Volume I.

price-setting purposes, pure LRIC is used as an approximation of the economic concept of marginal cost. Pure LRIC measures service-specific fixed and variable costs that arise in the long-run from the increment of output in question (in this case, all terminated minutes provided to other MNOs). Under Pure LRIC, the common costs to provide a service are excluded and it is assumed that the MNO must recover these costs from the other business activities. The classic example is the cost of the CEO, which cannot be recovered from the MCT service but needs to be recovered from the retail side of the business. Pure LRIC is by its very nature highly complex and calculating a MTR using Pure LRIC is an even more complex process. This is done through the creation of an intricate MS-Excel model that is unique to the country in question and that is composed of a magnitude of formulae that all have to work together to process all the inputs, parameters and variables in a correct and accurate manner. This is based on all the models that due to their complexity have been made available for scrutiny in other countries as is explained in further detail by Ben Wreschner in his sworn affidavit and in the VML appeal itself. … The use of Pure LRIC has been subject to intense debate worldwide. It is a view of many operators in the industry that Pure LRIC leads to under-recovery of their costs. For instance, OPTA, Dutch NRA, set FTRs based on Pure LRIC in its final decision on the wholesale market for fixed call termination of July 7, 2010. On Aug. 31, 2011 the national Court of Appeal decided that the use of Pure LRIC both for FTRs and MTRs was disproportional and that OPTA is not obliged to follow the non-binding Commission recommendation on termination rates. The court stated that BU-LRAIC+ with a mark up for non-incremental fixed costs is sufficient to address the potential competition problem of excessive prices in the market. Back in 2010 when the MCA took the decision to implement Pure LRIC, Vodafone did not appeal that specific decision by the MCA. This was not out of disinterest in the matter but because of specific reasons. Vodafone at the time, in good faith accepted that MCA was aiming to implement the EU Recommendation – and therefore, to the extent that such EU Recommendation was to be implemented fairly and transparently, then VML felt that it had no reason to oppose the application of Pure LRIC in principle. More importantly, in early 2010 (when the aforementioned decision was taken) the market situation and VML's position in the market, was very different from that of today and therefore VML's position vis-a-vis the MCA's decision to implement Pure LRIC at the time must be seen in a totally different context. In today's market VML is in a position where it has to compete against two nationwide fixed networks – these being "GO" and "Melita" – that are able to offer quad play offers to the public (that is, they are in a strong position to offer – and indeed offer – the 4 different services, bundled or unbundled, comprising TV, fixed telephone, fixed broadband and mobile telephony) – which VML cannot and does not offer. By way of example, the number of customers in a 'bundle offer' offered by VML's competitors has shot up from 38% as at March 2010 to 56% in March 2014 – and this precisely because offering bundled services comes with its many advantages from which VML's competitors benefit. Therefore – as one must appreciate – that VML did not challenge the decision of MCA to, in principle, apply Pure LRIC at a time when the market, and VML's position was substantially different to that of today – and at a time when the implications of Pure LRIC were far different to those which would apply today. … The Tribunal

should note that the application of Pure LRIC puts a mobile-only operator like VML at a disadvantage. As explained above, the Pure LRIC MTR is based solely on those costs that would not be incurred if an MNO were not to provide MCT services (as if this were practically possible!). Therefore, all the common costs (the cost of running the CEO office, the finance department, the credit control and marketing departments) which are incurred even if the MNO does not provide MCT service are excluded. The question is then "How do the operators recover these costs?". The MCA states it very clearly in its decision: "…in addition, the principle of the EC Recommendation points towards the retail side of the business as the most efficient channel through which an MNO is to recover its investment, leaving the recovery of third party termination costs on a pure incremental basis." In other words, the MNO has to recover those costs from charges to its end users. However, this applies to cases where MNO's are competing against each other on a level playing filed with regard to services. If the other MNOs can recover the afore-mentioned costs from the retail side of the business through other services that are not regulated and do not form part of this MCA Decision this is creating an anticompetitive scenario. As pointed out earlier, the Maltese market is dominated by two quad players that, because of legacy reasons, are able to offer a variety of services bundled together. This clearly sets VML in an uncompetitive situation which will ultimately work against the end user and which could result in a breach of competition from an 'Ex post' position. The MCA when taking regulatory action from an Ex-Ante point of view cannot simply look at the market that it is regulating without looking at other associated markets and how its decision will impact operators that do not offer similar services that are not part of the same market. GO and Meltia, can both recover the afore-mentioned costs through a variety of services that in many cases are bundled with mobile telephony services, whilst VML cannot as it does not provide the same services[52].

In his affidavit Benjamin Wreschner states: *for the purposes of this affidavit I will not distinguish between LRIC+ and LRAIC. Either of these two costing methodologies results in the common and joint costs of service provision being distributed across all services. LRIC on the other hand is the costing methodology which results in only the directly avoidable costs on an individual service being included in the price of that service. As note in the European Commission's 2009 termination rate recommendation, it is only the special (two-sided) nature of the termination market that allows the LRIC costing methodology to be employed. Due to the market being two-sided, to the extent that there is a shortfall of cost recovery on one side of the market it can be compensated for on the other side of the market. Whilst this argument might by true in theory, in setting mobile termination rates at pure LRIC regulators must be confident that this actually holds in practice in the market that they are regulating. Otherwise, there is a high risk that their regulatory intervention will be welfare reducing. Specifically, if operators are not able to make up the shortfall in cost recovery from the other side of the market (or other adjacent markets) then the regulatory intervention will lead to a level of pricing that is*

[52] Folios 448 to 466 of the records of the proceedings, Volume III.

unsustainable and could lead to inefficient market exit or lower level of investment. This is not the aim of the regulatory intervention. Therefore, it is incumbent on the regulator to demonstrate that the proposed intervention is welfare enhancing. It is not sufficient for MCA to rely on generic justification of the European Commission for its recommendation on termination rates. The burden of proof is on the MCA to demonstrate that its regulatory intervention is justified and proportionate given the specific circumstances in the Maltese market. Another crucial element of such analysis is actually quantifying the common and joint costs that are no longer recovered from the termination service. By refusing to disclose the LRIC+ rate that the model calculates, MCA has not given the operators any opportunity to assess whether one of the principle theoretical justifications for implementing pure LRIC actually holds given the specifics of the Maltese market. MCA's final decision relies on the imposition of pure LRIC without a specific market impact analysis. In other countries the obligation of pure LRIC has been implemented only after a detailed analysis of the likely impact of the new rates on the market and demonstrating that these impacts, in combination, are welfare enhancing. For example, Ofcom considered the differences between MTRs based on LRIC and LRIC+ in relation to: 1. The impact on pricing including the extent to which MTR cuts get passed on by fixed operators for fixed to mobile calls. This is especially important in a country where two of the three mobile operators also provide fixed services and one mobile operator (Vodafone) is a mobile-only operator. The lower level of competitive intensity in the fixed market presents a risk that the fixed operators are able to earn excess profit in the less competitive part of the market and use this profit to drive out an efficient operator from the competitive part of the market; 2. The impact on different customer segments – prepay vs contract customers; 3. The impact on competition – large operators vs small operators; 4. The impact on investment incentives. As of today, Vodafone is not aware that the MCA has conducted any such analysis and is relying on the generic justifications of the European Commission. This is not sufficient in any market, especially not in Malta which is significantly different from the average European member state. For this reason, the MTR decision of MCA is based on insufficient evidence and analysis and should not be implemented in the absence of a detailed impact analysis[53].

In view of the above testimonies and observations the Tribunal finds it very hard to accept that as stated by Counsel for Vodafone during the sitting held on the 11th December 2014, Vodafone's objections to the use of the pure LRIC methodology by the MCA in order to determine the Mobile Termination Rate is not central to its appeal from the MTR Decision.

As clearly results even from the above quoted testimonies and observations, the major stumbling block for Vodafone with regard to its objections to the use of the pure LRIC methodology by the MCA to determine the Mobile Termination Rate established in the MTR Decision, is the fact that the use of this particular methodology was already set and decided upon by the MCA in a previous decision

[53] Folios 626 to 634 of the records of the proceedings, Volume III.

– which was preceded by the due consultation process and which, like all decisions published by the MCA was subject to the operators' right of appeal therefrom – entitled *Interconnection Pricing Strategy for the Electronic Communications Sector in Malta* published in May 2010[54] [hereinafter referred to as the 2010 Decision]. In the said decision, namely in Decision 4, the MCA decided that: *in view of all the issues identified in the consultation document and also in view of all responses received, the Authority has decided that as a primary target it will ensure that by December 2012 it will be fully compliant with the Recommendation, primarily by doing its utmost to conclude 'Pure' LRIC models for both the MTR and FTR respectively by the said date. The Authority will stagger the building of these models according to the MCA's identified regulatory needs of the markets and hence these will not be built in parallel. In the eventuality that any one of the LRIC models will not be completed by December 2012, the MCA will ensure that the alternative treatment used until completion of the models will be in line with the principles featured in the Recommendation. This notwithstanding, the Authority will continue to monitor the developments on future charging mechanisms in the EU and reserves the right to review its decision in line with them, following adequate consultation with all stake holders as well as maintaining the utmost regard for the Recommendation*[55].

As acknowledged by Vodafone itself at the time it did not, for reasons known best to it, appeal from the 2010 Decision and since it is not up to the Tribunal to examine what these reasons were and whether they were justified or not, the central issue which the Tribunal must consider and take into account is solely the fact that to date there is this decision, i.e. the 2010 Decision, which is *res judicata* and forms the basis of the MTR Decision appealed from by means of these proceedings.

In its Application Vodafone claims amongst other things that: ***Illi fil-fatt r-Rakkomandazzjoni, li fuqha hija bbazata din id-Decizjoni***[56]*, tidentifika s-servizzi 'retail' bhala s-servizz l-iktar efficjenti fejn operatur jista' jaghmel tajjeb ghat-telf illi qed jigi sostnut fuq il-provizjoni ta' dan is-servizz ta' terminazzjoni tat-traffiku, kuncett li fih innifsu huwa kuntrarju ghall-principji tal-kompetizzjoni gusta u jaffettwa l-kummerc bejn l-iStati Membri ta' l-Unjoni Ewropeja minhabba l-fatt illi Vodafone ghandha ishma mizmuma minn azzjonisti barranin u minhabba l-fatt ukoll illi permezz tad-Decizjoni, operaturi tat-telefonija mobbli Maltin ser ikunu qeghdin jissussidjaw lill-operaturi tat-telefonija mobbli barranin meta jitterminaw it-traffiku taghhom gewwa Malta.* ***Illi ghaldaqstant, decizjoni bhal din, li hija bbazata fur ir-Rakkomandazzjoni, tibdel il-bazi fundamentali ta' decizjonijiet precedenti minhabba l-impatt estensiv li ser ikollha fuq l-operat tas-suq tat-telefonija mobbli***[57]. It is very clear that Vodafone tries to give the impression that the MTR Decision is based solely on the Recommendation but

[54] Folios 27 to 36 of the records of the proceedings, Volume I.
[55] Folio 32 of the records of the proceedings, Volume I.
[56] Emphasis by the Tribunal.
[57] Emphasis by the Tribunal. Folio 8 (tergo) and 9 of the records of the proceedings, Volume I.

from the Decision itself it clearly results that the decision to use the Pure LRIC methodology in line with the Recommendation was taken in the 2010 Decision which, it is reiterated, was *res judicata* by the date of publication of the MTR Decision. This therefore effectively means that the Tribunal cannot simply ignore the 2010 Decision and proceed to determine whether or not the Pure LRIC methodology is the most adequate or constitutes the best methodology in order to establish the Mobile Termination Rate.

Knowing full well that the Tribunal cannot ignore the juridical impact of the 2010 Decision, Vodafone argues that in the Netherlands the Dutch Court of Appeal had by a decision given on the 31st August 2011, declared that the use of Pure LRIC both for FTRs and MTRs was disproportionate and that OPTA is not obliged to follow the non-binding Commission recommendation on termination rates and that BU-LRAIC+ with a mark-up for non-incremental fixed costs is sufficient to address the potential competition problem of excessive prices in the market. What Vodafone however fails to address is the issue whether or not the Dutch substantive and procedural systems vis-à-vis objections to decisions by NRAs are comparable to and consequently compatible with the Maltese substantive and procedural systems vis-à-vis objections to decisions by the MCA.

For the Tribunal to effectively consider the decision by the Dutch Court of Appeal and possibly follow in that Court's footsteps in spite of the 2010 Decision, it has to be convinced that the circumstances of that case were identical or sufficiently similar to this case, that in that case too there was a decision by the Dutch NRA which was *res judicata* but was nonetheless ignored by the Court and that if there was such a *res judicata* decision which was effectively ignored by the Court, that the Dutch Court is legally and specifically empowered to ignore such decisions by the Dutch NRA. The Tribunal however, is not at all convinced about the existence of these elements since Vodafone did not put forth any evidence in this regard but merely limited itself to try and impose upon these proceedings outcomes resulting from circumstances which are totally different to those pertinent to this case.

Vodafone failed to submit a full version of the judgement delivered by the Dutch Court of Appeal but it only submitted part of the judgement, namely the part which most suites its arguments. From a reading of the full version of the judgement in fact, which was viewed by the Tribunal on-line on the link https://uitspraken.rechtspraak.nl, it clearly results that the decision by the Dutch NRA to adopt the Pure LRIC methodology was taken **in the same decision being appealed from and considered by the Dutch Court of Appeal** and therefore that Court, unlike the Tribunal in this case, was procedurally empowered to revoke that decision since it wasn't based on a previous decision which was *res judicata*.

Vodafone puts forth a further argument in support of its objections to the use of the Pure LRIC methodology in order to determine the Mobile Termination Rate[58],

[58] Vide Application by Vodafone at folio 8 of the records of the proceedings, Volume I.

which argument is spelt out in the affidavit by Jason Pavia. In this regard Jason Pavia declared that: *More importantly, in early 2010 (when the aforementioned decision was taken) the market situation and VML's position in the market, was very different from that of today and therefore VML's position vis-a-vis the MCA's decision to implement Pure LRIC at the time must be seen in a totally different context. In today's market VML is in a position where it has to compete against two nationwide fixed networks – these being "GO" and "Melita" – that are able to offer quad play offers to the public (that is, they are in a strong position to offer – and indeed offer – the 4 different services, bundled or unbundled, comprising TV, fixed telephone, fixed broadband and mobile telephony) – which VML cannot and does not offer. By way of example, the number of customers in a 'bundle offer' offered by VML's competitors has shot up from 38% as at March 2010 to 56% in March 2014 – and this precisely because offering bundled services comes with its many advantages from which VML's competitors benefit. Therefore – as one must appreciate – that VML did not challenge the decision of MCA to, in principle, apply Pure LRIC at a time when the market, and VML's position was substantially different to that of today – and at a time when the implications of Pure LRIC were far different to those which would apply today. … The Tribunal should note that the application of Pure LRIC puts a mobile-only operator like VML at a disadvantage. As explained above, the Pure LRIC MTR is based solely on those costs that would not be incurred if an MNO were not to provide MCT services (as if this were practically possible!). Therefore, all the common costs (the cost of running the CEO office, the finance department, the credit control and marketing departments) which are incurred even of the MNO does not provide MCT service are excluded. The question is then "How do the operators recover these costs?". The MCA states it very clearly in its decision: "…in addition, the principle of the EC Recommendation point towards the retail side of the business as the most efficient channel through which an MNO is to recover its investment, leaving the recovery of third party termination costs on a pure incremental basis." In other words, the MNO has to recover those costs from charges to its end users. However, this applies to cases where MNO's are competing against each other on a level playing filed with regard to services. If the other MNOs can recover the afore-mentioned costs from the retail side of the business through other services that are not regulated and do not form part of this MCA Decision this is creating an anticompetitive scenario. As pointed out earlier, the Maltese market is dominated by two quad players that, because of legacy reasons, are able to offer a variety of services bundled together. This clearly sets VML in an uncompetitive situation which will ultimately work against the end user and which could result in a breach of competition from an 'Ex post' position*[59].

The Tribunal is however of the opinion that this argument still does not constitute sufficient reason for it to ignore the 2010 Decision and **now** determine whether or not the Pure LRIC methodology should effectively be the basis for the calculation of the Mobile Termination Rate. Even though Jason Pavia tries to give the impression that the market has effectively changed since 2010 and that these

[59] Folio 448 to 466 in the records of the proceedings, Volume III.

changes were not already evident or could not at the time have been foreseen, by means of further statements made by him in his affidavit he contradicts himself.

In the part of his affidavit where he explains *what is the impact on VML of this decision?* Jason Pavia declares *firstly, one should understand the current market context in which VML operates. VML competes primarily against GO plc and Melita plc, both owning their own fixed infrastructures (the former having a copper infrastructure and the latter a cable one). Go is the incumbent Fixed telephony operator which for a large number of years had a monopoly in this market and had a fixed phone line into virtually every premises in Malta. By time, those phone lines started being used to provide fixed internet. In 2000, GO entered the mobile telephony market and a few years later acquired a television provider ("Multiplus") too so that it could offer TV services. Hence today GO is effectively a quad play operator. Melita is the incumbent cable TV operator and also, through its monopoly over cable, managed to enter almost every premises in Malta to offer TV services. By time, the network over which cable TV was delivered developed into a network that could provide fixed internet. Over this same network, Melita started offering fixed telephony also. In 2009, Melita entered into the mobile telephony market. Hence today Melita is also a quad play operator. VML started mobile telephony operations in 1990, and was the only mobile telephony provider in Malta until GO came into the market in 2000. Unlike GO and Melita, VML invested heavily in its mobile telephony network, as a result of not having access to a fixed network, VML was never able to access premises with any fixed infrastructure, in order to compete on par. Recent and ongoing developments in the sector both at an EU level and locally provide for mechanisms/regulations that oblige GO (as SMP) to give access to its infrastructure to interested parties such as VML through wholesale offers to date this has not yet been achieved as reasonable terms have not been agreed to. The end result is that VML must compete with two strong quad-play operators – when VML is not a quad-play operator and thus should not be seen to be immediately comparable to its competitors. Since the other players have a full suite of products, they are able to bundle products together and give advantageous offers to end users. Without the infrastructure available, VML is not able to compete with similar products. Finally it is worth mentioning that given the cost involved in rolling out another fixed network on an island that already has 2 is very high and brings with it a multitude of problems, rolling out a third doesn't make sense. This is recognized even through legislation and regulations, which oblige other operators that already have a fixed network and utility service providers to make their infrastructures accessible to undertakings seeking access. As explained above, the Maltese market has taken to the purchase of of bundled products with 52% if fixed broadband users on a bundled tariff as at December 2013. The first and most direct impact of this MCA Decision on VML is effectively a reduction in mobile termination revenues from providing MCT service. This, as shown in the actual appeal amounts to approximately €1.7 million in a year based on 2013 revenues. Naturally, since VML customers also call customers on GO and Melita networks there is also a reduction in mobile termination costs (i.e. mobile termination revenues for GO and Melita from Vodafone). Therefore, based on the 2013, €1.7 million revenues, the net impact based on one year's traffic of this MCA Decision is therefore*

approximately €850k. The main driver of this variance is related to fixed telephony because VML's loss in revenue is not mitigated by a corresponding reduction in interconnection costs and therefore the cut in MTR on traffic terminated from Fixed lines is not affected by this MCA Decision and goes straight to the bottom line. This means that this MCA Decision is going to result in larger profit margins for fixed telephony operators because their MTR costs have reduced[60].

From this testimony it is very clear that the alleged market changes mentioned by Vodafone were already existent or easily foreseeable in 2010 and therefore Vodafone could have easily appealed from the 2010 Decision when the same was published and not, for reasons best known to it, choose not to appeal and try to revoke that decision retrospectively by means of these proceedings.

As correctly pointed out by the MCA in its Note of Submissions *it therefore clearly transpires that Vodafone's issue here lies with the use of the Pure LRIC methodology which leads to a low mobile termination rate because, according to Vodafone, it would not be in a position to recover its costs. It is no more than a mere camouflage that Vodafone attempts to bring its reason for appeal within the ambit of the decision of 14th March 2014 … by stating that "This is the reason, why it is of fundamental importance for VML to ensure and put its mind at rest that the MCA Decision, which has resulted in the lowest MTR in the EU and one of the lowest in the world is free from errors and this can be done by being given visibility of the actual model and a chance to scrutinize it" … the imposition of regulatory obligations by the MCA does not work in such a 'pick and choose' way where, if it suits a particular player right then the methodology is correct, whilst if it does not please that player it is incorrect. The MCA is bound to ensure transparency and non-discrimination, amongst others. A Pure LRIC methodology, if correct in principle in one market, is equally correct in another market where the purpose for the application of such a methodology is one and the same, namely the imposition of a fair termination rate. Whether the rate that is arrived at through the application of a Pure LRIC methodology is "1" or "100" is irrelevant since such rate would reflect the underlying cost of the particular market. Therefore, where Vodafone applauded the use of the Pure LRIC methodology for establishing the termination rate in a market where is was going to be the net contributor for payments of such termination rates, it cannot at the same time object to such a methodology because in this particular market a Pure LRIC methodology does not allow it to make higher profit margins. Again, this is not to mention that Vodafone has no right to object to a Pure LRIC methodology now since the decision by means of which the said methodology was set as the applicable one is today cast in stone. This is not to mention also that, in terms of benefit to competition and ultimately to the end user, Vodafone had not raised a shadow of doubt that a reduction in fixed termination rates would be beneficial*[61].

[60] Folios 460 and 461 of the records of the proceedings, Volume III.
[61] Paras. 17, 19 and 20 of the Note of Submissions by the MCA at folios 1299 to 1357 of the records of the proceedings, Volume VI.

In view of the above the Tribunal is of the opinion that Vodafone's objections to the validity of the use of the pure LRIC methodology for the purposes of establishing the Mobile Termination Rate, particularly within a market like the Maltese market, are not acceptable and must therefore be rejected.

As already pointed out above in this decision, there is another central argument to Vodafone's appeal from the MTR Decision which is based on the fact that the MCA did not provide Vodafone with a complete version of the economic model used by it in order to determine the Mobile Termination Rate of 0.4045 Euro cents per minute. On the basis of this fact Vodafone is accusing the MCA of lack of transparency and impartiality on its part in violation of Section 4(4) of the Malta Communications Authority Act, Chapter 418 of the Laws of Malta, and Article 6 of the Framework Directive.

Section 4(4) of Chapter 418 of the Laws of Malta provides that: *It shall be the duty of the Authority to carry out its functions as established by or under this Act or any other law in an impartial and transparent and timely manner and to ensure compliance therewith, and without prejudice to the generality of the foregoing, to ensure that persons providing any services, products, operations and activities in or from Malta relating to any matter regulated by the Authority, comply with this Act and with any other law which the Authority is entitled to enforce, and with any decisions issued by or under this Act or any such other law*. Article 6 of the Framework Directive provides that: *Except in cases falling within Articles 7(9), 20, or 21, Member States shall ensure that, where national regulatory authorities intend to take measures in accordance with this Directive or the Specific Directives, or where they intend to provide for restrictions in accordance with Article 9(3) and 9(4), which have a significant impact on the relevant market, they give interested parties the opportunity to comment on the draft measure within a reasonable period. National regulatory authorities shall publish their national consultation procedures. Member States shall ensure the establishment of a single information point through which all current consultations can be accessed. The results of the consultation procedure shall be made publicly available by the national regulatory authority, except in the case of confidential information in accordance with Community and national law on business confidentiality*. The provision under national legislation which mirrors Article 6 of the Framework Directive is Section 4A of Chapter 418 of the Laws of Malta which provides that: *(1) Except in relation to - (a) any dispute or complaint however so described being dealt with in accordance with this Act or any other law which the Authority is entitled to enforce; or (b) the exercise of any enforcement powers of the Authority under this Act, or under any other law which the Authority is entitled to enforce; or (c) cases where the Authority considers that there is an urgent need to act to safeguard competition and protect the interests of users in accordance with European Union law, where the Authority intends to take a decision in accordance with any law which it is entitled to enforce, and which decision has a significant impact in a market for any communications networks or services, it shall make available to interested parties, a statement of the proposed decision and give such parties the opportunity to comment on the proposed decision within a period which the Authority considers reasonable.*

On the basis of this allegation of lack of transparency and impartiality on the part of the MCA, Vodafone argues that: *as a matter of fact the MCA did not only hold back on providing visibility of certain information which it deemed to be confidential, but in effect the MCA held back from providing any visibility whatsoever of the entire Model per se and merely provided 'some extracts' containing some information from isolated parts of the model. In fact upon being questioned by this Honourable Tribunal Ian Agius (COO at MCA) confirms that 'in terms of excel spreadsheets nothing was provided.' .... the provision of certain information which would be 'relevant' to the model is a totally different matter as to providing the model itself. Visibility of the model itself would, in turn, allow the operator (and its regulatory economists) to visualize, understand, test and effectively audit inter alia (i) how the model is structured and (ii) how and where the information would be imputed in the model and (iii) how the inputted information was applied by the model. Therefore, the limited information provided during the consultation period by the MCA was not sufficient and indeed, the limited information that was provided was generic in nature, listing terms which were not clearly defined or described and left open to one's interpretation (such as, for instance, the reference to 'common costs' which the MCA claim to have originally included 'regulatory fees' but which inclusion could never have been known or confirmed by the operators, apart from the fact that the MCA confirmed that they were, in fact, erroneously catered for under the 'common costs' when imputed in the Model. In this context, when asked whether operators can today confirm where, if at all, the information referred to in the consultation process resides in the actual model Ian Streule (Analysys Mason) confirms that "Well you cannot be sure that we have actually used it but our consultation papers says we have" which means that operators must, simply assume that the information is in the model (as a given) – but will not be given the opportunity to verify that it actually made its way there, let alone how it was applied in the model. ... a model similar to the one developed by Analysys Mason for the MCA comprises (or should comprise much more than a mere extract of lists of information which would be 'relevant' to the model. In this context, contrary to the impression that the MCA tried to give throughout the proceedings, a model is not a simple formula and an MTR is not achieved by merely considering 'relevant' information. Conversely, model effectively comprises a complex, intricate database of cross-referenced excel spreadsheets which are designed in a manner so that country-specific data are inserted taking into account specific assumptions and using elaborate variables, constants, parameters, dimensions, functions and references applied with sophisticated formulae and cells which run into hundreds of sheets to arrive at the various thousands of calculations relating to the various features comprising the market (such as development of traffic on mobile networks, required network elements to support that traffic, cost of building and maintaining the appropriately-sized network, the recovery of that cost over time, and the allocation of annual costs to the different traffic type services), and ultimately the MTR. Creating a model is an intricate, complex and highly technical process, as is interpreting same, and as confirmed by Mr. Benjamin Wreschner (an expert in the field of telecoms with over 16 years of experience in the telecoms field and who is currently responsible for economic regulation across Vodafone's 26 operating market, with the field of*

MTRs being one of his main areas of responsibilities) catering for a pure LIRIC termination rate methodology in a model "adds a slightly additional complexity to the modeling…" so much so that in such cases adjustments are made to what would normally be deemed to be a 'typical' model. Clearly, get one parameter, one function, one reference wrong and the Model's output is distorted. Equally, input the wrong data and the output is distorted. Insert data in the wrong cell or at the wrong end of a formula, and the output is again distorted. Omit data altogether, and the output is again distorted. Wreschner confirms that a 'model would be very mathematically complex' and also confirms that there have been occasions when the maths have been applied wrongly. Furthermore, the bottom-up cost model applied by the MCA is 'inherently risky' for several reasons including 'because operators are asked to provide inputs to the model without a full understanding of how the inputs will be used/interpreted". Wreschner adds that it is also risky because 'all models contain a risk of calculation error due to the high degree of country-specific customization that is required' and '[…] There are very generic inputs that can be used/re-used from market to market'. In fact, on this basis, the assertions made by MCA representatives that the Model "was already tried and tested" is contested as being unfounded. The Model was developed as customized for Malta according to the various specificities relating to Malta – and thus could never have been 'tried and tested'. … Vodafone requested to see the Model in 'one form or another' precisely because the so called 'relevant' information supplied by the MCA during the consultation process was not sufficient for Vodafone to understand, analyze and comment/consult further upon the Model that was being used by the MCA in the course of its Decision which brought about the resulting MTR. … by way of illustration Vodafone has throughout the proceedings made reference to several models which were made public in foreign jurisdictions for the purposes of consultation processes leading up to decisions of the NRA as regards MTRs, including the model used by OFCOM in the UK, incidentally developed by Analysys Mason. This OFCOM model is a clear specimen of what a model should look like and of the complexity which operators (and their technical experts) would want to study in order to audit the correctness of the model and its eventual output. Incidentally, as confirmed by Wreschner, all operators in the UK were given full unconditional visibility to this model developed by the UK Regulators (OFCOM) in the course of the OFCOM consultation leading up the new MTR for the United Kingdom. Wreschner confirms that the model was 'provided in full to stakeholders with exception to selected confidential information' and in fact he also provides a web-link to the model which thus remains available for public scrutiny. In addition Wreschner confirms that OFCOM actually carried out changes to their model as a result of an error identified following public review of the model. Therefore, Vodafone submits that this is the level of visibility which Vodafone would have expected to have and respectfully claims to have had a right to have during the consultation. The model impacts Vodafone as a key stakeholder directly and materially and therefore, with respect, Vodafone had and continues to have a legitimate expectation to understand the logic, the calculations, the formulae behind a Decision that impacts its operations – after all the consultation process (and the development of the Model) is funded by the operators (including Vodafone) through the very 'regulatory fees' paid to the MCA. … That, as explained by

Vodafone, Vodafone requested visibility of the model during the consultation process as it was necessary for Vodafone to verify inter alia the manner with which the costs for an efficient operator were calculated, the way with which the costs for an efficient operator were modeled and the way with which the costs for an efficient operator were allocated throughout the model. Vodafone needs to see the functionality of the model and check the formulae and get and understanding of the logical model. For the avoidance of any doubt, whereas the MCA at some stage seeks to give the impression that Vodafone only wanted to have visibility of the Model to verify the unit 'costs' (which according to the MCA could not, in any case, be disclosed due to confidentiality reasons) it must be restated that Vodafone's request for the visibility of the model was not tied to unit costs as is being claimed by the MCA but was made in the context of Vodafone's legitimate concern as an operator wanting to analyze the very tool with which the MTR and eventual Decision was to be determined. ... In this context, Vodafone submits that it is not the only operator that is concerned by the results of this MTR Decision. Reference is made, for instance, to "Go Mobile's" assertion that the MTR Decision and the rate imposed have a strong and detrimental impact on the commercial activity of mobile operators in the market: "[...] id-Decizjoni taffettwa direttament l-operat [ta' Go mobile], peress li d-Decizjoni w ir-rata imposta ghandhom impatt qawwi u detrimentali fuq l-attività kummercjali tal-GO mobile, li tiddependi fuq l-introjtu mis-suq tat-telefonija tal-mobile." Vodafone contends that it is fundamental for all concerned (including the MCA and the operators) to ensure that any MTR precisely reflects the costs of a 'hypothetical efficient operator' not only at the time of the Decision but also going forward, as even the slightest of errors in the Model, any exclusion, miscalculation, wrong assumption or any incorrect input in the Model could distort the final MTR and thus could distort the market and could give rise to significant losses and financial repercussions for operators going forward. An ex ante regulatory measure of this nature that potentially serves to prohibit operators to recover their real costs is not only contrary to the scope of the regulatory measure (that is of achieving competition in the market) and hence an unlawful imposition of regulation on a legitimate operator but is all the more, simply, contrary to the obvious business principal that an operator should, in the least, recover the costs incurred to deliver a good or a service[62].

The Tribunal is of the opinion that the mere fact that the MCA did not grant visibility of the full model to the operators involved in the consultation process, including therefore Vodafone, does not of itself place the MCA in violation of its obligations of transparency and impartiality. Even though Vodafone put forth evidence which shows that other NRAs did grant visibility of the full model to operators involved in their consultation processes, there is no direct obligation arising from the law which obliges an NRA to actually grant visibility of the full model to the operators/parties involved in the consultation process. In fact, Section 4A of Chapter 418 of the Laws of Malta provides that *where the Authority intends to take a decision in accordance with any law which it is entitled to*

[62] Paras. 15, 17, 18 to 21, 22, 23 to 25, 28 to 29 of the Note of Submissions by Vodafone, folios 1259 to 1263 of the records of the proceedings, Volume VI.

enforce, and which decision has a significant impact in a market for any communications networks or services, it shall make available to interested parties, ***a statement of the proposed decision and give such parties the opportunity to comment on the proposed decision within a period which the Authority considers reasonable***[63] and Article 6 of the Framework Directive stipulates that *Member States shall ensure that, where national regulatory authorities intend to take measures in accordance with this Directive or the Specific Directives, or where they intend to provide for restrictions in accordance with Article 9(3) and 9(4), which have a significant impact on the relevant market,* ***they give interested parties the opportunity to comment on the draft measure within a reasonable period. National regulatory authorities shall publish their national consultation procedures. Member States shall ensure the establishment of a single information point through which all current consultations can be accessed. The results of the consultation procedure shall be made publicly available by the national regulatory authority, except in the case of confidential information in accordance with Community and national law on business confidentiality***[64].

Therefore, for the Tribunal to actually conclude that the MCA in this case infringed its obligations of transparency and impartiality, it must be convinced that the MCA acted in a way effectively prejudicial to the rights and interests of one or more of the operators concerned in the consultation process. Anything short of such a consideration cannot lead to the conclusion that there was an infringement on the part of the MCA of its obligations of transparency and impartiality.

In so far as concerns the allegation of lack of impartiality on the part of the MCA, the Tribunal deems such an allegation to be totally unfounded in fact and at law. When Section 4(4) of Chapter 418 of the Laws of Malta is considered within its proper context, it is obvious that the MCA must act impartially **between** all the operators/persons involved in the consultation process, in the sense that it must not favour or be seen to favour one operator/person as opposed to another/other operators/persons. In fact it is an accepted concept that *under the Framework Directive, NRAs must carry out their duties impartially. (a) That requirement is obviously not remote from the obligation that NRAs must be functionally independent from undertakings. Impartiality means that no undertaking may be favoured. No decision or attitude may be taken which favours an undertaking or group of undertakings. Favours granted by public authorities are often explained by specific links existing between these authorities and the undertakings they favour. (b) A further relationship exists between the requirement for independence and the need for decisions or positions adopted by the authorities to be based on objective criteria. Objectivity implies that the line of action must be founded on criteria which are not related to the identity of*

[63] Emphasis by the Tribunal.
[64] Emphasis by the Tribunal.

the undertakings concerned. Pursuant to the Framework Directive and the RF in general, objectivity must guide the line of action adopted by the authorities[65].

When the facts of this case are properly considered it clearly results that vis-a-vis the operators effected by the MTR Decision, therefore including Vodafone, the MCA did not act in a way which lacked impartiality. Even though Vodafone tries to argue that as a consequence of the MTR Decision it is being placed at a disadvantage as opposed to GO and Melita, as already considered further up in this decision any complaints which Vodafone is today putting forth against the way the MCA tackled the consultation process and ultimately against the MTR Decision itself, are complaints deriving from situations within the relevant market which pre-existed or were very clear way before the publication of the MTR Decision and not situations caused by the Decision itself or any lack of impartiality on the part of the MCA. Therefore, the claim by Vodafone that the MCA did not act in an impartial manner is completely unfounded and unjustified.

In so far as concerns the allegation by Vodafone that the MCA acted in a manner which was not at all transparent, it is an accepted principle that *another procedural constraint* (other than the obligation of impartiality) *imposed on NRAs is transparency. National authorities must adopt their opinions and decisions in a transparent manner. An implication of transparency is that Member States must identify publicly the authorities which they have entrusted with the various tasks and missions granted to NRAs in the RF. This is particularly the case where general competition law, sector-specific regulation, and the rules concerning consumer protection are applied by distinct bodies. … An additional implication of transparency is that all decisions and positions by NRAs must result from a process where transparency is practiced. … Transparency requires that interested parties be heard and consulted whenever a decision with potentially adverse consequences for the parties is envisaged by an NRA. The result of the consultation must be made public. Information must be readily available about the procedures used in the various Member States for such consultations. In each Member State an information point must be set up through which users and undertakings can at any time gather intelligence about all consultation in progress*[66].

When the facts of this case are considered within the above-described concept of transparency it is very difficult to conclude that the MCA did not respect this particular obligation imposed on it by national Legislation and by the Framework Directive. In fact, from the evidence submitted by the parties to these proceedings it results that the MCA did hold a consultation with the operators to be effected by the MTR Decision, both on a one-to-one basis as well as on a public level, it informed the operators that the model was created and applied by Analysys Mason and sufficient information was also provided with regard to the model itself by means of two consultation papers: the first paper entitled *Proposed*

[65] EU Electronic Communications Law – Competition and Regulation in the European Telecommunications Market, Second Edition – Paul Nihoul & Peter Rodford, Chapter 1 Para. 1.145 page 38.
[66] EU Electronic Communications Law – Competition and Regulation in the European Telecommunications Market, Second Edition – Paul Nihoul & Peter Rodford, Chapter 1 Para. 1.146 – Para. 1.148, pages 38-39.

methodological modeling and network design choices published on the 11th March 2013 which presented the approach to the model and the second paper entitled *Private consultation document on the mobile BUCM* published on the 28th June 2013, which described the full model, and ultimately the result of the consultation process was published in the document *Bottom-Up Cost Model for Mobile Networks and Proposed Mobile Interconnection Pricing: Consultation and Proposed Decision* published on the 14th March 2014 – this being the Decision forming the subject of this appeal.

The specific complaints put forth by Vodafone with regard to the MCA's alleged violation of the obligation of transparency are those regarding the fact that the full model was not provided to it and also the fact that allegedly not sufficient time was given for consultation and that a number of questions and submissions put forth by it were left unanswered. However, in so far as concerns the fact that the MCA did not grant visibility to Vodafone of the full model, even though this fact is in itself uncontested, the Tribunal does not deem that by not granting visibility of the actual full model the MCA in any way infringed its obligation of transparency.

As already pointed out above during the consultation process the operators involved in the said consultation process, including Vodafone, were provided with the approach to the model via a paper entitled *Proposed methodological modeling and network design choices* published on the 11th March 2013[67] **and** with a description of the full model via another paper entitled *Private Consultation document on the mobile BUCM* published on the 28th June 2013[68] **and** a presentation entitled *Introduction to the private consultation on mobile BUCM, 27-28 March 2013*, was given to each one of the operators by Analysys Mason[69]. By means of these papers and presentations the operators involved in the consultation process, including Vodafone, were presented with the approach to the model and the description of the full model which, in Ian Streule's words, even though *it did not contain inputs derived directly from data that was confidential to one MNO (typically, the MNO which provided the most information in response to the data collection) but* ***did contain numerous extractions from the model itself***[70]. The presentation given to each of the three operators involved in the consultation process *set out the principles being consulted upon. At a number of points in this presentation, information expected to be obtained from the MNOs is mentioned as relevant inputs to the process of developing the model … During the same meetings, the data request was discussed with the MNOs…* ***Accordingly, the operators were well informed of the way in which the data would be used in the model***[71]**.** Therefore, even though Vodafone was not granted visibility of the full model, it, together with the other operators, were given numerous extractions from the

[67] Doc. MCA 1 at folios 328 to 346 of the records of the proceedings, Volume II.
[68] Doc. "D" at folios 45 to 84 of the records of the proceedings, Volume I.
[69] Doc. "IS1" at folios 949 to 993 of the records of the proceedings, Volume V.
[70] Emphasis by the Tribunal. Affidavit by Ian Streule at folios 935 to 948 of the records of the proceedings, Volume V.
[71] Emphasis by the Tribunal. Affidavit by Ian Streule at folios 935 to 948 of the records of the proceedings, Volume V.

model itself and were given ample information of the way in which the data would be used in the model, all of which in the Tribunal's 0opinion sufficiently satisfies the obligation of transparency imposed on the MCA.

It is pertinent to point out that the description of the model, the numerous extractions from the model itself and the information about the way in which the data would be used in the model provided by the MCA to the operators was sufficient for Vodafone to actually calculate a mobile termination rate which was very close to the Mobile Termination Rate arrived at by the MCA and published in the MTR Decision. In fact, it is only at this point – which was fairly close to the date when the consultation process was to be concluded – that Vodafone requested, for the first time, visibility of the full model. This fact clearly results from the affidavit by Jason Pavia who with reference to this particular issue stated that *following the data collection phase, the MCA issued another Private Consultation Document for the MNOs on 28th June 2013. The intention behind this document was to provide the Maltese MNOs with a description of the inputs that were going into the MS-Excel model so as to allow the MNOs to provide feedback. VML found that crucial data about 'network costs' were redacted from the document. However, this consultation had once again did not provide any visibility of the MS Excel Model. The MNOs were given until 26th July 2013 to provide a response to the consultation. At this stage, it became clear for the first time that the Maltese MTR was going to be substantially lower than the existing level of €0.0207 and even the indicative rate of €0.0103 which was an average of the Pure LRIC rates used in other countries. On the 18th July, the MCA informed the MNOs that it had asked the European Commission whether the notification period (30 days) which is stipulated in Article 7 of the Framework Directive could run parallel to the consultation period in Malta. This request was refused by the Commission but this clearly demonstrates the haste with which the MCA was treating this exercise – and the haste with which the MNOs had to deal with this matter, which suddenly was pointing towards a materially drastic reduction in the MTR. VML responded to the private consultation on 26th July 2013. In this document VML made it clear that it expected to be given access to the MS-Excel cost model used to derive the new Pure LRIC MTR to be able to review it*[72].

Vodafone tries to justify its request to gain visibility of the full model at such an advanced stage of the consultation process by claiming that its has to have such visibility in order to verify the way the inputted data has been made use of in order to establish whether or not there was a mistake/error on the part of the MCA in the implementation of a complex and complicated model which gave out such a low Mobile Termination Rate, particularly in the light of the fact that during the consultation process it pointed out to the MCA that it was erroneously calculating Regulatory Fees under a particular heading of the model and not under the proper heading – an error which was ultimately rectified by the MCA prior to the publication of the MTR Decision[73]. The Tribunal deems that this is no

[72] Affidavit by Jason Pavia, folio 455 of the records of the proceedings, Volume III.
[73] Vide affidavit by Jason Pavia, folios 455 to 460 of the records of the proceedings, Volume III and the Note of Submissions by Vodafone at folios 1299 to 1357 of the records of the proceedings, Volume VI.

more than a mere excuse on the part of Vodafone to try and stall and possibly halt the process of applying a Mobile Termination Rate based on a Pure LRIC methodology since s now it deems that such a methodology does not conform to its business strategy within the market.

That this is the ultimate aim behind Vodafone's request is clear from that stated by Jason Pavia in his affidavit when explaining why Vodafone wants to see the actual MS-Excel cost model: *again, we emphasize, it is one thing agreeing in principle to applying a Pure LRIC model – it is quite another evaluating the actual MS Excel model – in order to verify that all the formulae are working and interacting correctly with all the inputs, variables and parameters contained therein – and with which the Pure LRIC would be ultimately determined. It is the latter model which really counts in practice. … In addition to the above, during the consultation phase, the MCA had stated that the Model they built to calculate the Pure LRIC MTR can also give the LRAIC+ MTR as one of its outputs. As already explained above LRAIC+ includes an allocation for the fixed and common costs (excluded in the Pure LRIC calculations) so that the service in question ie. MCT contributes to common cost recovery. In other words the MTR produced by a LRAIC+ model is such that it will contribute to common costs (e.g. running of CEO office). As explained in further detail in Ben Wreschner's sworn affidavit, VML is of the opinion that the LRAIC+ MTR is a relevant data point for this exercise and had requested that it be disclosed. The MCA also refused to do this, deeming the request as out of scope. … One therefore wonders why the model was built to calculate the LRAIC+ rate if this is deemed to be out of scope for the whole exercise. The justification for VML's request was inexistent and simply brushed off*[74].

As already pointed out above, the decision to apply the Pure LRIC methodology for the purposes of determining the Mobile Termination Rate to be applied locally was taken in 2010 and it was only at that point in time that Vodafone could have contested that decision but for reasons known only to it it failed to do so. Vodafone's argument that it is one thing to agree in principle with the application of the Pure LRIC methodology and quite another to agree to such a methodology applying in practice is completely unfounded and unacceptable. If Vodafone's strategy or decision to agree to the application of Pure LRIC following the publication of the 2010 Decision somehow back-fired to its detriment, it cannot now expect to be allowed to disrupt the whole process which the MCA has so meticulously been carrying out ever since the publication of the 2010 Decision and only after the resulting Mobile Termination Rate is not to its liking.

In its Note of Submissions Vodafone submits that *it is not the only operator that is concerned by the result of this MTR Decision. Reference is made, for instance, to 'Go mobile's' assertion that the MTR Decision and the rate imposed have a strong detrimental impact on the commercial activity of mobile operators in the market: "[…] id-Decizjoni taffetwa direttament l-operat [ta' Go mobile], peress li d-Decizjoni u r-rata imposta ghandhom impatt qawwi u detrimentali fuq l-*

[74] Folios 457 to 459 of the records of the proceedings, Volume III.

attività kummercjali tal-Go mobile, li tiddependi fuq l-introjtu mis-suq tat-telefonija tal-mobile, however Vodafone fails to note that even though Mobisle Communications Limited, today GO p.l.c., had requested and was authorised to intervene in these proceedings *in statu et terminis*, it then withdrew its interests in this case by means of a Note filed on the 30th July 2014[75], thus rendering any intervention in these proceedings and any submissions put forth by it up until it withdrew its interests in the case no longer pertinent to the merits of this appeal.

Vodafone also criticizes the MCA for refusing to give visibility of the actual model due to confidentiality issues and accuses the MCA of using the obligation of confidentiality as mere excuse in order to evade its obligation of transparency[76]. The Tribunal however deems such a claim by Vodafone as completely unfounded and totally unfair.

It is very clear that Vodafone would not be content with any other version of the model other than the full version, knowing full well that within the context of the local market – where essentially there are only three operators involved in mobile calls termination market and where only one of these operators provided most of the information and data requested by the MCA – such a request would be very difficult to balance with the statutory obligation of confidentiality imposed on the MCA. In fact, even though in its Note of Submissions Vodafone tries to give the impression that it would accept a model with redacted information[77], from the affidavit by Jason Pavia it clearly results that it is not at all inclined to accept a model with redacted information. In his affidavit Jason Pavia states *following the data collection phase, the MCA issued another Private Consultation Document for the MNOs on 28th June 2013.* ***The intention behind this document was to provide the Maltese MNOs with a description of the inputs that were going into the MS-Excel model so as to allow the MNOs to provide feedback.*** ***VML found that crucial data about 'network costs' were redacted from the document****. However, this consultation had once again did not provide any visibility of the MS Excel Model.* Once Vodafone objects to a redacted version of what it considers to be crucial information in the documents provided by the MCA with reference to the model, it is fair to assume that it will object to a redacted version of such crucial information even if the full model is effectively provided by the MCA.

The Tribunal essentially deems that in the particular circumstances of this case, where in reality sufficient information has been provided to the operators with regard to the model and the possibility of verification – so much so that Vodafone actually calculated a mobile termination rate which is very close to the Mobile Termination Rate set by the MCA in the MTR Decision – Vodafone's request for visibility of the actual model and relative allegation of breach of transparency on the part of the MCA – leading to an alleged breach of fair hearing (which

[75] Folio 624 of the records of the proceedings, Volume III.
[76] Vide paras. 40 to 43 of the Note of Submissions by Vodafone, folio 1268 of the records of the proceedings, Volume VI.
[77] Paras. 50 et seq under the heading Alternative methods of Protecting Confidential Information of the Note of Submissions by Vodafone, folios 1270 to 1275 of the records of the proceedings, Volume VI.

allegation will be dealt with further down in this judgement) – is nothing short of a tactic on its part to try and dissuade the MCA from implementing or continue to implement the Mobile Termination Rate based on a Pure LRIC methodology and instead to have it implement a Mobile Termination Rate possibly based on a LRAIC+ methodology, which is more conducive to Vodafone's business strategy and financial considerations; a tactic which the Tribunal absolutely cannot condone or support.

As pointed out above, Vodafone alleges that the MCA breached its right to a fair hearing by not granting it visibility of the actual model. In its Note of Submissions Vodafone submits that: *there is not doubt that in the proceedings leading up to the MTR Decision the MCA was bound by, and should have complied with, the rules of natural justice, including on fair hearing, which have been recognized and applied also by our Honourable Courts. … Vodafone contends that this general principle to a fair hearing which is enshrined in EU Law and undoubtedly also under Maltese Law, cannot be easily set aside merely under the disguise of 'confidentiality'. In the above-referenced La Roche Case (C85/76) the CJEU reaffirms this principle and in so doing declared that even though there may be an obligation of 'professional secrecy' which may have led to the authority (in that case the European Commission) to hold on to certain information, such obligation of professional secrecy has to nonetheless 'be reconciled with the right to be heard'. The rule of reconciliation established by the CJEU is that where confidential information cannot be disclosed then it cannot be used to the detriment of an interested party where the interested party cannot make known perceptively its views on the truth of implication of those circumstances, on those documents or again on the conclusions drawn from them. On the basis of the above-mentioned, principles, Vodafone maintains that the MCA was aware that the Model was the primary instrument to be used to establish the MTR which undoubtedly and inevitably significantly impacts Vodafone and other operators. Therefore, the MCA should have done all in its powers to ensure compliance with its obligation to act transparently (including to ensure a fair hearing throughout the consultation process leading up to the final Decision). The MCA was obliged to disclose the Model as part of the consultation process leading up to the Decision, in order to allow Vodafone and the operators to fully evaluate the implications and for the MCA to be able to take into account the arguments raised by Vodafone and the operators thereon prior to issuing the Decision. If (and only if) the MCA was constrained for disclosing certain confidential information then this restraint had to be 'reconciled' with Vodafone's right to be given the Model – and, in this context, Vodafone submits that most certainly an outright exclusion of visibility of the Model per se was, in Vodafone's humble opinion, excessive and disproportionate in the circumstances*[78].

[78] Paras. 47 to 49 of the Note of Submission by Vodafone, folios 1269 and 1270 of the records of the proceedings, Volume VI.

In spite of that submitted by Vodafone, the Tribunal does not agree with it that the MCA in any way breached its right to a fair hearing, even by not granting it visibility of the actual model.

Vodafone's allegation of breach of its right to a fair hearing cannot be considered within the context of a single instance within the whole consultation process, that is limitedly within the context of the MCA's refusal to grant visibility of the actual model, but must be considered within the context of the consultation process as a whole. From evidence submitted during the course of these proceedings it clearly results that Vodafone, and the other operators in the consultation process, were provided with sufficient possibilities to put forth information and data which was to be used within the model, with only one of the three operators providing most of the information and data requested, they were given sufficient possibilities to put forth any queries and submissions to the MCA both on a one-to-one basis as well as publicly and they were given sufficient information in order to understand the model and the way it was going to operate and function.

The possibilities were undoubtedly given but not all the operators opted to take full advantage of these possibilities or, as in the case of Vodafone, opted to raise queries and difficulties at a too advanced stage of the **whole** process – which really an truly started with the consultation leading up to the 2010 Decision. Therefore when it was Vodafone itself who, for reasons known to it, decided not to be forthcoming with information or initially agreed with the MCA's course of action but then for its own personal and commercial reasons decided to start contesting practically every move and decision by the MCA, cannot now expect to succeed in its argument/allegation that the MCA breached its right to a fair hearing. Within this same context the Tribunal also deems that Vodafone's allegations that it was restricted from validly participating in the consultation process[79] and that the MCA did not give sufficient responses to its submissions[80] are likewise completely unfounded and therefore unacceptable.

Vodafone also accuses the MCA of being inconsistent in its approach towards setting the Mobile Termination Rate. It submits that *the MCA was inconsistent in its approach in that, with certain calculations used for arriving at the MTR the MCA applied on some occasions a 'benchmarking' methodology (as can be seen in the Public Consultation) whereas the MCA also confirms that other calculations were based on actual figures provided by operators or on figures which the MCA determined applied in the case of 'hypothetical efficient operator'. Vodafone submits that in adopting such an approach the MCA has not ensured consistency and reliability in its Decision, especially if, as it has stated in its Reply to the Appeal, some operators did not provide complete information – which also means that operators who did provide such information may have provided skewed information which is favourable to them. With respect, Vodafone submits that the approach should have been uniform throughout so that if benchmarking was applied, it should have been applied throughout for*

[79] Third ground of appeal.
[80] Seventh ground of appeal.

the sake of consistency. For instance, if one operator declared a very low cost and the other two that didn't declare costs have a very high cost, then the input is not equivalent to that of a hypothetical efficient operator, and vice versa. Vodafone further submits that such inconsistencies further emphasize the need and legitimacy of Vodafone's request to have visibility of the model. Where the MCA contemplated data which it considered to be of a 'hypothetical efficient operator' (in its subjective discretion – as there is no specifically defined formula to determine what a 'hypothetical efficient operator' is) it becomes necessary to understand what data was applied, how it was applied (taking into account Malta's specific local market conditions) and where it featured in the model[81].

The Tribunal is of the opinion that here Vodafone is literally clutching at straws and trying to put forth any and all imaginable excuses in order to halt the application of the Mobile Termination Rate set by the MCA on the basis of the Pure LRIC methodology. The reason why the MCA was compelled to apply benchmarks as opposed to proper data in certain instances and how it ensured that by applying such benchmarks it was deriving the appropriate and correct result, result from the affidavit by Ian Streule when tackling the issue: *Given the small set of information/data not provided by the operators, was the modeling process still able to continue? We did not receive a complete set of requested data from all three operators. However, there was sufficient information to progress the modeling, since we were able to apply our expertise in interpreting the data provided, and complement it with assumptions or benchmarks. We also conducted a cross-check of network deployments (asset counts) and network costs (capex and opex) to understand whether the model was reflecting costs relevant to a modern, efficient network operator in Malta. … We undertook a cross-check of modeled network costs against accounting information from the three operators. This involved setting up the model with three scenarios to approximately replicate the real operators using their key characteristics namely: their approximate market share; whether they operate a 2G/3G or a 3G-only network; their spectrum allocation in each band (900MHz, 1800MHz and 2100MHz); choice of transmission technology and protocol. When the model was run for the three scenarios, we compared aggregate outputs with the accounting information. … The asset allocation compares GRC with GBV and therefore is not a like-for-like comparison. However, the opex and asset comparisons were informative in giving us confidence that the model did reflect a reasonably efficient level of costs for a Maltese operator*[82].

From this explanation by Ian Streule, which explanation has not been in any way contradicted or nullified by Vodafone, it clearly results that the MCA, or rather Analysys Mason, applied benchmarks to their considerations when requested data was not provided by the operators and applied them in a way which did not render their work and approach in any manner inconsistent. Due to the checks and balances adopted by them in order to ensure that the benchmarks applied were adequate for the purposes of the model, Analysys Mason managed to derive

[81] Paras. 79 to 82 of the Note of Submissions by Vodafone, folio 1279 of the records of the proceedings, Volume VI.
[82] Para. 5 of Ian Streule's affidavit, folios 640 and 941 of the records of the proceedings, Volume V.

a reasonably efficient level of costs for a Maltese operator which is the basis on which the Mobile Termination Rate was calculated.

Apart from this observation it must be pointed out that when operators participating in a consultation process fail – for whatever reason – to provide the requested data and information, the NRA involved must use its discretion in order to complete the process it embarked on, otherwise it would be too easy for any operator, who for its own reasons doesn't want the process to be duly concluded, to stall the whole process by not providing requested and required data. Naturally the NRA would have to use its discretion in a reasonable and just manner, which is what the MCA – through Analysys Mason and as clearly explained by Ian Streule – did in this case.

Vodafone also claims that the MTR Decision and the MCA's approach leading towards the Decision create instability and uncertainty within the market. In its Note of Submissions Vodafone submits that *the MCA's Decision – and the MCA's approach leading towards the Decision – is non-compliant with the Law in that the Decision and approach created instability and uncertainty. Reference is made to Article 8(5) of Directive 2002/21/EC which provides as follows: "The national regulatory authorities shall … apply objective, transparent, non-discriminatory and proportionate regulatory principles, by inter alia promoting* ***regulatory predictability*** *by ensuring a* ***consistent regulatory approach*** *over appropriate review periods". Vodafone submits that, as regards the process leading up to the MTR Decision, the MCA most definitely failed in its role to promote regulatory predictability or ensuring a consistent regulatory approach: (i) Firstly, it restated that the MCA Decision led to the lowest MTR in Europe (and this is confirmed by the MCA), with the next highest rate at the time of the Decision being that of France (at 0.8.000). Even the EU Commission report itself notes that the resulting MTR for Malta was "steeply reduced … (from €0.207 to €0.004). (ii) Secondly, Vodafone and all operators were constantly throughout the process given the false impression, understanding and legitimate expectation that the final MTR would be far higher than the resulting MTR. However, conversely and to everyone's surprise, the resulting MTR was 0.65 cents per minute less than the anticipate date issued by the MTR in 2012. (iii) Thirdly, the MCA itself was not predicting such an extreme outcome and when in 2012 (just one year prior to the final Decision) the MCA had published its 'Interim Review of Wholesale Mobile Termination Rate – Response to Consultation & Decision' wherein it established an indicative rate of 1.03 Euro cents per minute after a 'benchmarking exercise', the MCA itself chose not to implement such a rate because it was too low, as follows: "Given the uncertainty surrounding the unique characteristics of a small market such as that of Malta and as witnessed by the feedback of the local operators, using the indicative target rate rather than an interim rate would risk undershooting the cost-oriented rate resulting from the eventual model. Put differently, the indicative target rate of €1.03 cents being an average of the other Member States 'pure' LRIC rates might result in a lower rate than the rate established from the Maltese 'pure' BU-LRIC model as in the case of the Netherlands (target rate of €1.02 cents and Portugal (target rate of €1.27 cents). Even if this was an interim rate, nonetheless it was indicative of the resulting rate and most*

certainly did not envisage a lower MTR. (iv) The MCA itself also states (in its Reply to the Appeal) that the MCA was conscious of the fact that the resulting rate for Malta was low – and that, in fact, when the MCA got to know of this outcome the MCA engaged its consultants (the same Analysys Mason) to prepare a report about the reasons for the low resulting rate. This fact goes to show that it is not true that the impact of the lower MTR was 'predictable' as the MCA. The MCA argues predictability based on the fact that the 'method of calculating the price' did not change further to the 2010 Decision. Clearly, however, this is not the case as even though the principle upon which the MTR was to be calculated might have been established since 2010, the methodology applied and Model were developed after 2010. Indeed, the fact that it requested Analysys Mason to reaffirm the result (and this, one notes, after Vodafone had raised its concerns about the likely outlier result) is evidence of the fact that even the MCA itself was not convinced of the MTR and all the more was not in a position to itself establish the low reasons for the MTR (let alone, therefore, be able to review the correctness or otherwise of the Model)! Thus clearly, the resulting MTR is drastically different to the legitimate expectations which the MCA led operators to expect just one year earlier – and this most certainly does not promote regulatory predictability or ensure a consistent regulatory approach[83].

It is an established principle under Administrative Law, including on a national level, that for an expectation to be legitimate it must first and foremost be a reasonable expectation and not one founded on mere speculation. When the decision entitled *Interim Review of Wholesale Mobile Termination Rate – Response to Consultation and Decision* published on the 28th June 2012[84] is considered properly and not merely superficially, it clearly results that any expectations which Vodafone might have entertained following that decision were founded on mere speculation and therefore cannot be considered to be legitimate expectations.

Under the heading *MCA's Response to Consultation Feedback* of the said decision, the MCA clearly stated that: *Proposed Methodology and Indicative Target Rate: With respect to both operators'* [Melita and Vodafone] *comments on the likely standing of the proposed indicative target rate vis-à-vis that emanating from Malta's eventual 'pure' LRIC model, the MCA feels that the operators' conflicting conclusions relative to each other reinforces the Authority's position to establish an indicative rate solely for the setting of the interim MTR.* ***For the avoidance of doubt, the MCA would like to clarify that the proposed methodology was designed to eventually substitute this indicative rate by its model-based counterpart by the time of the next MTR review. In fact, in the proposed decision, the level of the indicative target rate was only disclosed in so far as to offer the required transparency on the derivation of the interim***

[83] Paras. 84 to 88 of the Note of Submissions by Vodafone, folios 1280 and 1281 of the records of the proceedings, Volume VI.
[84] Doc. "C" attached to Vodafone's Application, folios 37 to 44 of the records of the proceedings, Volume I.

rate[85]*. … With respect to Vodafone's view to take the maximum of the reference rates within the benchmark, the MCA is of the opinion that for the purposes of the present exercise the use of the average is more adequate given the uncertainty on the standing of the Maltese model-based rate. Furthermore, the EC Recommendation refers to the average rates based on 'pure' LRIC when setting guidelines on the outcomes of alternative methodologies. In addition,* ***one has to keep in mind that the indicative rate was used solely to derive a reasonable interim rate. Notwithstanding, the MCA sees the validity that the MTR set on a benchmarked basis in the present circumstances should not be below the actual modeled rate***[86]*. … the adjustment mechanism's purpose was to keep operators updated on the movement of the indicative rate and advise the operators one month in advance of any changed in the MTR. After taking into account the uncertainty emanating from the operators' feedback on the expected model-based rate for Malta vis-à-vis its European counterparts, the MCA is of the opinion that the adjustment mechanism's purpose has been superseded with the use of the indicative target rates stated in the Comments Letter as described in Section 3.2 below. … After taking into account the updated information included by the Commission, the indicative target rate is calculated at €1.03 cents and the interim rate is calculated at €2.07 cents…* ***The interim rate of €2.07 cents for July 2012 is intended to be finally replaced by the Maltese 'pure' BU-LRIC model***[87]*. The MCA has also considered the Commission's views that the indicative target rate would be used as its benchmark rate and introduced at the latest by January 2013. The MCA, has strong reservations in that it notes that other Member States (Italy, UK, Spain), who unlike Malta, have already developed their bottom-up models and hence know a priori their respective target rate, have nonetheless, and for very valid reasons also valid in the present circumstances, set a glide path which goes beyond January 2013. By this yardstick, the MCA therefore feels that the Commission's views in this regard should be interpreted in the light of the Decisions notified by other NRAs, even more so because the Recommendation itself accommodates interim measures that go beyond January 2013, given exceptional circumstances of small NRAs with limited resources. Given* ***the uncertainty surrounding the unique characteristics of a small market such as that of Malta and as witnessed by the feedback of the local operators, using the indicative target rate rather than an interim rate would risk undershooting the cost-oriented rate resulting from the eventual model***[88]*. Put differently, the indicative target rate of €1.03 cents being an average of the other Member States 'pure' LRIC rates might result in a lower rate than the rate established from the Maltese 'pure' BU-LRIC model as in the case of the Netherlands (target rate of €1.02 cents and Portugal (target rate of €1.27 cents).*

When the considerations leading to the decision published on the 28th June 2012 are considered in their entirety and not merely in isolated snippets, as Vodafone

[85] Emphasis by the Tribunal.
[86] Emphasis by the Tribunal.
[87] Emphasis by the Tribunal.
[88] Emphasis by the Tribunal.

is seeking to do, it clearly results that contrary to that now alleged by Vodafone the conclusions reached by the MCA in the MTR Decision did not surprise anyone, least of all the MCA itself, and neither did they infringe any legitimate expectations of any of the operators effected by the MTR Decision, including therefore Vodafone. From the above-quoted extract it is very clearly that the MCA repeatedly emphasized the fact that: (i) the indicative target rate of €1.03 cents was disclosed simply to show how the interim rate was reached and set; and (ii) the interim rate of €2.07 cents was merely an interim/temporary rate which was to be replaced by the final rate arrived at on the basis of the pure BU-LRIC model. Furthermore it must be noted that the fact that the MCA requested Analysys Mason to draw up a report explaining why the Mobile Termination Rate for Malta was amongst the lowest in Europe at the time, is not indicative of any misgivings on the part of the MCA but is merely a requirement which the MCA was bound to fulfill in order to transparently and effectively explain to the operators concerned the reasons for that particular outcome.

Vodafone also claims that *although the MCA had initially led the operators to believe that a 'glide-path' towards the reduced new MTR was to be introduced (in such a manner, therefore, as to avoid heavy impacts on the industry, and this at a time when the MCA was still predicting a higher MTR), when the final MTR was published the MCA actually decided not to implement the glide-path, this because, in the MCA's view, it was constrained by 'the lapse of time' – which Vodafone contends is not a reasonable regulatory approach seeing that the operators were suddenly faced with such a drastic change*[89].

When evidence submitted by Vodafone itself, in particular the decision entitled *Interim Review of Wholesale Mobile Termination Rate – Response to Consultation and Decision* published on the 28th June 2012[90], the decision entitled *The MCA's Bottom-Up Cost Model for Mobile Networks and Proposed Mobile Interconnection Pricing – Consultation and Proposed Decision* published on the 16th August 2013[91], the document entitled *Addendum to the MCA's Consultation of 16 August 2013: Bottom Up Cost Model for Mobile Networks and Proposed Mobile Interconnection Pricing* published on the 23rd August 2013[92] and the MTR Decision, is considered appropriately there emerges a totally different scenario to that now being put forth by Vodafone.

In the decision entitled *Interim Review of Wholesale Mobile Termination Rate – Response to Consultation and Decision* published on the 28th June 2012, the MCA – under the heading Interim Rate – 2.1.2 – observes that *Vodafone stated that the MCA should avoid the implementation of a glide path following the adoption of the revised rate, since the target rate would not be truly reflective of the conditions prevailing locally. This would risk that the rate prevailing after the interim adjustment would be below-cost. Vodafone also claimed that the MCA's attempts at revising the MTRs is premature and may result in*

[89] Para. 88 of the Note of Submissions of Vodafone, folio 1281 of the records of the proceedings, Volume VI.
[90] Doc. "C" attached to Vodafone's Application, folios 37 to 44 of the records of the proceedings, Volume I.
[91] Doc. "E" at folios 85 to 102 of the records of the proceedings, Volume I.
[92] Doc. "F" at folios 103 to 109 of the records of the proceedings, Volume I.

disruptions to the mobile industry[93]. In the decision entitled *The MCA's Bottom-Up Cost Model for Mobile Networks and Proposed Mobile Interconnection Pricing – Consultation and Proposed Decision* published on the 16th August 2013 the MCA declared that *the pure LRIC cost has been calculated based on 2012 market data and the equipment prices of the incremental assets featured above. This resulted in an average calculated cost for the wholesale mobile termination service of 0.40 Euro cents per minute*[94]. In the document entitled *Addendum to the MCA's Consultation of 16 August 2013: Bottom Up Cost Model for Mobile Networks and Proposed Mobile Interconnection Pricing* published on the 23rd August 2013, the MCA observed that: *In Vodafone Malta's early response sent on 17th August 2013, amongst other comments, Vodafone Malta's proposal was motivated by the fact that although the Company 'has long expected and planned for the implementation of a pure LRIC MTR … there was never the expectation that the lowest possible MTRs in the EU would be proposed for this market'. Vodafone Malta also commented that 'such a drastic reduction cannot but have a significant impact'. Vodafone Malta proposed that the duration of this glide-path should be set for 12 months. At the outset, the MCA would like to remind Vodafone Malta, that although in its proposal, the glide-path is being referred to as a new measure, MTRs in Malta are already set on a glide-path. In fact, in June 2012 the MCA published a decision entitled 'Interim Review of Wholesale Mobile Termination Rate – Response to Consultation & Decision' (hereinafter '2012 MTR decision'), which set an interim rate of 2.07 Euro cents per minutes, based on an indicative target rate of 1.03 Euro cents per minute. This Decision stated also the MCA's intention to substitute this indicative target rate with a model-based rate. The MCA is therefore of the view that the market was given ample visibility of regulatory process related to mobile termination rates. … The MCA however appreciates that operators might have based their budgets and projection on the assumption that the new MTR would be closer to the indicative target rate mentioned in 2012 decision, which is significantly higher than the proposed MTR based on MBUCM. For this reason it is requesting feedback from interested parties on the potential introduction of the modified glide-path found hereunder – Step 1: From 1 December 2013 to 31 May 2014 – 1.03 Euro Cents @ minute; Step 2: From 1 June 2014 onwards – 0.40 Euro Cents @ minute. In Step 1, the proposed glide-path features the indicative target rate proposed in the 2012 Decision for a period of six months after which the proposed rate emanating from the MBUCM model will come into effect as from 1 June 2014. … Interested Parties are invited to comment on: the introduction of the modified glide-path; and the timelines proposed therein*[95]. In the MTR Decision the MCA noted Vodafone's reaction to the request put forth in the addendum document that is, that *on its part, VFM appreciated the MCA's proposal to introduce a glide-path in response to its earlier request. However, VFM strongly disagreed with the statement that the MCA was of the view that the market was given ample visibility of the regulatory process related to MTRs. VFM feels that this process has given rise to regulatory uncertainty which has unsettled VFM's investment recoupment plants and forecasting processes.* ***For***

[93] Folio 39 (tergo) of the records of the proceedings, Volume I.
[94] Folio 101 of the records of the proceedings, Volume I.
[95] Folios 105 and 106 of the records of the proceedings, Volume I.

these reasons VFM expressed its disagreement with the proposed glide-path trajectory[96]. *... With respect to the proposed glide-path, the MCA would like to note that both VFM and Melita were not supportive of its proposals. In fact, whilst Melita disagreed categorically with the introduction of a glide-path,* ***VFM did not support this trajectory failing to suggest any alternative***[97].

From the above it is amply clear that the MCA did not implement the glide-path it was originally proposing in view of the fact that Melita and Vodafone were not supportive of its proposals. This being the situation, Vodafone cannot not expect to successfully argue that the MCA created instability and uncertainty in the market and that it infringed its legitimate expectations by not introducing the originally proposed glide-path.

In view of the above the Tribunal deems that all the grounds on which Vodafone founds its appeal from the MTR Decision are completely unfounded in fact and at law and therefore cannot be upheld.

For these reasons the Tribunal rejects the appeal lodged by Vodafone Malta Limited from the Decision by the Malta Communications Authority entitled *Bottom-Up Cost Model for Mobile Networks and Proposed Mobile Interconnection Pricing: Consultation and Proposed Decision* published on the 14th March 2014, and instead confirms the said Decision.

Costs pertinent to these proceedings, with the exception of costs pertinent to Melita Limited, are to be borne by Vodafone Malta Limited, whilst Melita Limited is to bear its own costs.

In terms of Section 39(1) of Chapter 418 of the Laws of Malta, the Tribunal orders that a copy of this judgement be served on Vodafone Malta Limited, the Malta Communications Authority and Melita Limited.

MAGISTRATE

DEPUTY REGISTRAR

[96] Folio 18
[97] Folio 18 & tergo of the records of the proceedings, Volume I.