



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

Rikors Nru. 24/15VG

Vodafone Malta Limited

Vs

Awtorità ta' Malta dwar il-Komunikazzjoni

Illum 22 ta' Novembru 2018

It-Tribunal,

Ra r-Rikors ipprezentat mis-socjetà Vodafone Malta Limited fit-28 ta' April 2015 permezz ta' liema titlob li t-Tribunal: (i) iħassar u jirrevoka d-Decizjoni "Retail Access to the Public Telephone Network at a Fixed Location: Identification and Analysis of Markets, Determination of Market Power and Setting of Remedies" mahruġa mill-Awtorità ta' Malta dwar il-Komunikazzjoni fit-8 ta' April 2015 u b'hekk iwaqqaf u jħassar l-effetti kollha ta' din id-Decizjoni, inkluż billi jirrevoka d-decizjoni li GO p.l.c m'ghadx għandha Significant Market Power fis-swieq rilevanti; u (ii) konsegwentement jordna lill-Awtorità ta' Malta dwar il-Komunikazzjoni sabiex terġa' tikkunsidra l-mertu tad-Decizjoni billi tiehu in konsiderazzjoni s-sottomissjonijiet kollha relattivi tal-partijiet kollha interessati, inkluż partikolarment dawk sottomessi minnha (ossia minn Vodafone Malta Limited) kif ukoll ta' l-MCCAA, u dana bla pregudizzju għal kull azzjoni ulterjuri li hija tirriserva li tiehu w id-dritt li tirkupra danni sofferti minnha b'din id-Decizjoni; bl-ispejjez kontra l-Awtorità ta' Malta dwar il-Komunikazzjoni;

Ra d-dokumenti annessi mar-Rikors promotur markati Dok. "VF1" sa' Dok. "VF4" a fol. 14 sa' 116 tal-process;

Ra r-Risposta ta' l-Awtorità ta' Malta dwar il-Komunikazzjoni permezz ta' liema topponi għall-appell tas-socjetà Rikorrenti u titlob li l-istess jigi miċhud, bl-ispejjez kontra is-socjetà Rikorrenti, u minflok id-Decizjoni intitolata "Retail Access to the Public Telephone Network at a Fixed Location: Identification and Analysis of Markets, Determination of Market Power and Setting of Remedies" mahruġa minnha fit-8 ta' April 2015 tigi kkonfermata, in kwantu l-appell tas-socjetà Rikorrenti huwa għal kollox infondat u fid-dritt għar-ragunijiet minnha dettaljatament mogħtija fir-Risposta tagħha;

Ra l-affidavit ta' Alexandre Serot esebit mis-socjetà Rikorrenti permezz ta' Nota ipprezentata fl-4 ta' Frar 2016 a fol. 153 sa' 160 tal-process u ra l-affidavit ta' Jason Pavia u d-dokumenti annessi mieghu pprezentati mis-socjetà Rikorrenti fl-4 ta' April 2014 a fol. 164 sa' 550 tal-process, sema' x-xhieda ta' Jason Pavia moghtija waqt is-seduta tal-21 ta' Lulju 2016¹ u ra d-dokument markat Dok. "GV1" a fol. 555 tal-process esebit mill-Awtorità intimata waqt l-imsemmija seduta, sema' x-xhieda ta' Victor Zammit moghtija waqt is-seduti tal-25 ta' Ottubru 2016² u tas-17 ta' Jannar 2017³ u ra d-dokument esebit minnu markat Dok. "Gv1" a fol. 580 tal-process;

Ra n-Nota ta' Sottomissjonijiet tas-socjetà Rikorrenti pprezentata fil-11 ta' Jannar 2018 a fol. 618 sa' 640 tal-process u ra n-Nota Responsiva ta' l-Awtorità intimata ipprezentata fit-12 ta' Lulju 2018 a fol. 644 sa' 682 tal-process;

Ra l-atti kollha tal-kawza;

Ikkonsidra:

B'Decizjoni intitolata "Retail Access to the Public Telephone Network at a Fixed Location - Identification and Analysis of Markets, Determination of Market Power and Setting of Remedies" mahruġa mill-Awtorità Intimata fit-8 ta' April 2015⁴, [iġitar 'l quddiem indikata bhala d-Decizjoni], l-Awtorità Intimata ddecidiet illi: *With reference to the evidence presented in the market analysis above the MCA concludes that no undertaking enjoys SMP in any of the identified retail fixed access markets and that these markets are effectively competitive. Given these conclusions and considerations, and the provisions under regulation 5(3) of the ECNSR, the MCA does not deem it justifiable to mandate regulatory obligations on undertakings active in the retail fixed access markets. To this effect, the MCA shall therefore withdraw existing retail regulatory measures governing the provisions of GO. This withdrawal shall however be implemented without prejudice to any other general obligations at law or remedies emanating from other market analysis decisions. The MCA underlines that whilst all retail obligations are being withdrawn from the access markets identified in this document, the withdrawal of regulations at retail level shall not affect existing wholesale obligations imposed on GO through other decisions, particularly the wholesale remedies imposed under the decision entitled 'Wholesale call origination services provided over fixed networks' published on the 18th January 2010. Any wholesale obligations listed in this decision were made for ease of reference and the removal or otherwise of these wholesale obligations will be dealt with under a separate market review. In order to have a smooth transition from a regulated market to a non-regulated market, the MCA shall withdraw the existing obligations within 90 calendar days following the publication of the final decision concerning these markets. This is in accordance with regulation 5(3) of the ECNSR. The MCA believes that this notice*

¹ Fol. 556 sa' 578 tal-process.

² Fol. 581 sa' 588 tal-process.

³ Fol. 590 sa' 613 tal-process.

⁴ Dok. "VFi" a fol. 14 sa' 52 tal-process.

*period is justified and sufficient to allow all stakeholders to make necessary arrangements for the new regulatory approach to the retail fixed access markets*⁵.

Is-socjetà Rikorrenti, bhala Operatur ewlieni fis-suq tat-telefonija mobbli f'Malta, hassitha aggravata bid-Decizjoni w interponiet dan l-appell minnha quddiem it-Tribunal permezz ta' liema titlob: (i) it-thassir u r-revoka tad-Decizjoni u b'hekk it-twaqqif u thassir ta' l-effetti kollha ta' din id-Decizjoni, inkluz ir-revoka tad-decizjoni li GO p.l.c m'ghadx ghandha Significant Market Power fis-swieq rilevanti; u (ii) konsegwentement li l-Awtorità Intimata tigi ordnata terga' tikkunsidra l-mertu tad-Decizjoni billi tiehu in konsiderazzjoni s-sottomissjonijiet kollha relattivi tal-partijiet kollha interessati, inkluz partikolarment dawk sottomissi minnha (ossia mis-socjetà Rikorrenti) kif ukoll ta' l-MCCAA.

Is-socjetà Rikorrenti tibbaza l-appell taghha mid-Decizjoni fuq is-segweni aggravji: (1) illi hemm nuqqasijiet serji fil-procedura ta' kif l-Awtorità Intimata waslet ghad-Decizjoni taghha in kwantu naqset milli tikkonsidra punti, fatti w argumenti imressqa minnha (ossia mis-socjetà Rikorrenti) u/jew naqset milli taghti spjegazzjoni studjata biex tiggustifika l-posizzjoni li hija (ossia l-Awtorità Intimata) hadet meta marret kontra l-obbligi taghha skond il-Kap.418 tal-Ligijiet ta' Malta li, fost ohrajn, jiddisponi illi mhux talli l-Awtorità trid taghmel disponibbli lill-partijiet interessati dikjarazzjoni tad-decizjoni proposta u taghti lil dawk il-partijiet l-opportunità li jikkumentaw fuq id-decizjoni proposta, talli ai termini ta' l-Artikolu 4(A)(c) tal-Kap.418 tal-Ligijiet ta' Malta ghandha tiehu in konsiderazzjoni wkoll il-veduti ta' l-utenti finali u ta' konsumaturi partikolarment utenti finali b'dizabilità, manufatturi w imprizi li jipprovdu networks ta' komunikazzjonijiet u, jew servizzi; (2) bil-procedura adottata minnha u b'rizultat tad-Decizjoni stess, l-Awtorità intimata ma hijiex qed tizgura li l-principji tal-Ligi dwar il-kompetizzjoni qed jigu ghal kollox osservati fis-settur tal-komunikazzjonijiet elettronici hekk kif inhu l-obbligu taghha li taghmel a tenur ta' l-Artikolu 4(2) tar-Regolamenti Dwar Networks u Servizzi ta' Komunikazzjonijiet Elettronici (Generali), Legislazzjoni Sussidjarja 399.28, u ta' l-Artikolu 4 tal-Kap.399 tal-Ligijiet ta' Malta li jghid li l-objettivi ta' l-Awtorità fl-ezercizzju tal-funzjonijiet taghha ghandhom jinkludu li ggib 'l quddiem il-kompetizzjoni fis-settur tal-komunikazzjonijiet elettronici; (3) it-tnehhija ta' l-istatus ta' SMP tas-socjetà GO p.l.c. se zzid ir-riskju ta' ipprezzar predatorju u rbit abbuziv ta' servizzi li ma jistghux jigu replikati mill-kompetituri l-ohra u b'hekk hemm ir-riskju li s-suq jigi milqut negattivament billi jintilfu dawk il-ftit sinjali ta' moviment fil-market share li wiehed jista' jghid bil-mod il-mod bdew jidhru fis-suq mill-2006 sa' illum biss permezz ta' regolamenti *ex ante* li kienu gew imposti mill-Awtorità intimata fuq is-socjetà GO p.l.c. Apparte minn hekk id-deregolamentazzjoni tas-suq retail tista' twassal ghad-deregolamentazzjoni tas-suq wholesale li konsegwentement tiggrava aktar in-nuqqas ta' kompetizzjoni fis-settur, thassib dan li gie espress ukoll mill-MCCAA izda injorat mill-Awtorità intimata.

L-Awtorità intimata topponi ghall-appell tas-socjetà Rikorrenti u titlob li l-istess jigi michud filwaqt li d-Decizjoni tigi kkonfermata stante li: (a) kuntrarjament ghal dak pretiz mis-socjetà Rikorrenti, hija kkunsidrat l-argumenti kollha validi mressqa

⁵ Fol. 49 tal-process.

matul il-process ta' konsultazzjoni. Il-fatt li ma laqghetx l-argumenti tas-socjetà Rikorrenti ma jfissirx li l-istess ma gewx ikkunsidrati. Tant gew ikkunsidrati l-argumenti tas-socjetà Rikorrenti u ta' operatori oħra fis-settur, senjatament tas-socjetà Melita p.l.c., li fid-Decizjoni hemm taqsima shiha, Taqsima 4.3 intitolata "Summary of Responses to the National Consultation and MCA replies related to the market analysis" fejn l-Awtorità tispjega l-posizzjoni tagħha fir-rigward ta' tali argumenti u sottomissjonijiet ta' l-operatori, inkluż tas-socjetà Rikorrenti. Apparte minn hekk f'taqsima oħra tad-Decizjoni intitolata "Assessment of significant market power" l-Awtorità tqis l-aspetti tad-diversi fatturi relatati ma' l-analizi tas-suq in kwistjoni tenut kont fejn approprijat tal-kummenti magħmula mill-operatori fis-settur, inkluż is-socjetà Rikorrenti u Melita p.l.c.; (b) l-aggravju tas-socjetà Rikorrenti fejn tikkontendi li b'rizultat tad-Decizjoni l-Awtorità b'xi mod qed tmur kontra l-objettiv imsemmi fl-Artikolu 4 tal-Kap.418 tal-Ligijiet ta' Malta li ggib 'l quddiem il-kompetizzjoni huwa b'żat fuq argument purament soggettiv. Kuntrarjament għal dak affermat mis-socjetà Rikorrenti, id-Decizjoni hi pass 'l quddiem fejn allura hi, ossia l-Awtorità, tqis li s-settur in kwistjoni sar matur b'żejjed biex allura jigi meqjus b'ħala wiehed kompetittiv; u (c) is-socjetà Rikorrenti ma tagħti l-ebda ħjiel ta' evidenza in sostenn ta' l-argumenti tagħha li t-tneħħija ta' dominanza minn fuq is-socjetà GO p.l.c. ser izzid ir-riskju ta' ipprezzar predatorju w irbit abbuziv ta' servizzi li skontha ma jistghux jigu replikati minn operatori oħra. Lanqas ma tissosstanzja l-argument tagħha li d-Decizjoni ser twassal għal *deregolamentazzjoni tas-suq wholesale*. Kuntrarjament għal dak affermat mis-socjetà Rikorrenti l-MCCAA ma esprimiet dubju serji dwar l-effett tad-Decizjoni izda esprimiet li għandha *some concern*. Apparte minn hekk filwaqt li l-Awtorità intimata dejjem tagħti d-dovut konsiderazzjoni għall-kummenti ta' l-MCCAA, hija ma għandhiex l-obbligu legali li bilfors trid tistriħ fuq il-fehma ta' l-MCCAA. In oltre d-Decizjoni bl-ebda mod ma tipprekludi lill-MCCAA milli tagħmel investigazzjoni dwar is-suq jew dwar xi aspekk specifik tas-suq jekk jidhrilha li hemm xi abbuz ta' dominanza hekk kif stabilit taht il-qasam regolatorju tar-regolamentazzjoni *ex post* a tenur tal-Ligi dwar il-Kompetizzjoni.

L-ewwel aggravju - nuqqasijiet fil-procedura:

A tenur ta' l-Artikolu 4A tal-Kap.418 tal-Ligijiet ta' Malta: (1) *Hilef* dwar - (a) xi tilwima jew ilment ikunu kif ikunu deskritti li jkunu qegħdin jigu ttrattati kif hemm f'dan l-Att jew f'xi ligi oħra li l-Awtorità jkollha jedd li tinforza; jew (b) l-eżercizzju ta' xi setgħat ta' infurzar ta' l-Awtorità taht dan l-Att, jew taht kull ligi oħra li l-Awtorità jkollha jedd li tenforza; jew (c) dawk il-kazijiet fejn l-Awtorità tqis li jkun hemm ħtiega urgenti ta' azzjoni biex tithares il-kompetizzjoni u jigu protetti l-interessi ta' utenti kif hemm fil-ligijiet ta' l-Unjoni, meta l-Awtorità tkun bi ħsiebha tiddeciedi kif hemm f'xi ligi li hija jkollha jedd tenforza, u meta dik id-decizjoni jkollha impatt sinifikanti f'suq għal kull network jew servizz ta' komunikazzjonijiet, hija għandha tagħmel disponibbli, lill-partijiet interessati, dikjarazzjoni tad-decizjoni proposta u tagħti lil dawk il-partijiet l-opportunità li jikkumentaw fuq id-decizjoni proposta f'dak iz-zmien li l-Awtorità tista' tqis li jkun ragonevoli. (2) Meta l-Awtorità tkun bi ħsiebha tiehu decizjoni dwar affarijiet li jkollhom x'jaqsmu mad-drittijiet ta' xi utenti finali u konsumatur, partikolarment meta dik id-decizjoni jkollha impatt sinifikanti fis-suq għal xi networks ta' komunikazzjonijiet u jew servizzi, l-Awtorità għandha tizgura li fil-gestjoni tal-

mekkanizmu ta' konsultazzjoni imsemmi fis-subartikolu (1), daqstant kemm dan ikun adatt ghall-finijiet tal-funzjonijiet taghha taht dan l-Att jew taht kull ligi ohra li l-Awtorità jkollha jedd tenforza, hija ghandha tiehu konsiderazzjoni tal-veduti ta' utenti finali u ta' konsumaturi partikolarment utenti finali b'dizabilità, manifatturi w imprizi li jipprovdu networks ta' komunikazzjonijiet u, jew servizzi. (3) L-Awtorità ghandha tippubblika l-proceduri ta' konsultazzjoni taghha u tistabilixxi sorsi ta' informazzjoni unika minn fejn kull konsultazzjoni korrenti tkun tista' tigi evalwata. (4) Ir-rizultat ta' kull konsultazzjoni taht dan l-Artikolu ghandha tkun disponibbli pubblikament mill-Awtorità permezz ta' daww il-mezzi li l-Awtorità tqis li jkun xierqa fic-cirkostanzi, hliief fil-kaz ta' informazzjoni li l-Awtorità tqis li tkun kunfidenzjali.

Fil-fehma tat-Tribunal ghall-fini li jigi determinat jekk fl-agir u operat ta' l-Awtorità intimata li wassal ghall-hrug tad-Decizjoni kienx hemm nuqqasijiet procedurali kif allegat mis-socjetà Rikorrenti, ghandu jigi kkunsidrat l-Artikolu 4A tal-Kap.418 tal-Ligijiet ta' Malta fl-intier tieghu u mhux jigi kkunsidrat biss sub-artikolu wiehed mehud *in vacuo*.

Mill-provi prodotti jirrizulta li fid-19 ta' Settembru 2014 l-Awtorità intimata ppubblikat Consultation Document intitolat "Retail Access to the Public Telephone Network at a Fixed Location - Identification and Analysis of Markets, Determination of Market Power and Setting of Remedies"⁶ li bih kienet appuntu *hereby presenting for national consultation its proposed decision on the markets of retail access to the public telephone network provided at a fixed location in Malta, in accordance with the EU regulatory framework of electronic communications networks and services*⁷. F'dan id-dokument tat kemm riassunt tal-konkluzzjonijiet taghha taht it-taqsim "Summary of Conclusions"⁸ kif ukoll esponiet f'iktar dettal il-konsiderazzjonijiet li wassluha ghal tali konkluzzjonijiet fit-Taqsimijiet 1 sa' 5 ta' l-istess Consultation Document⁹. In fine fid-dokument hemm ukoll il-Consultation Questions fejn l-Awtorità ippremettiet li *the MCA would like to ask the following consultation questions with respect to the market review carried above: Do you agree with the above preliminary conclusions regarding the market definition for the retail fixed access markets? Do you agree with the above preliminary conclusions regarding the market analysis for the retail fixed access markets? Do you agree with the above preliminary conclusions regarding the regulatory approach for the retail fixed access markets?*¹⁰.

Permezz ta' ittra datata 20 ta' Ottubru 2014¹¹, is-socjetà Rikorrenti sottomettiet il-veduti u argumenti taghha ghall-Consultation Document in kwistjoni u fis-sustanza taghhom dawn il-veduti w argumenti gew minnha esposti bil-mod segwenti fit-Taqsima "Executive Summary" tad-dokument sottomess minnha: *Vodafone notes with some concern the conclusion reached by the MCA in the Consultation Document. The de-regulation of such an important component of the telecoms*

⁶ Dok. "VF2" anness mar-Rikor's promotur a fol. 53 sa' 80 tal-process.

⁷ Fol. 54 tal-process.

⁸ *Ibid.*

⁹ Fol. 56 sa' 79 tal-process.

¹⁰ A tergo ta' fol. 79 tal-process.

¹¹ Dok. "VF3" a fol. 81 tal-process.

market in the absence of effective competition will only serve to further strengthen the existing significant power of the incumbent operator in the market to the detriment of consumers, existing competing operators and potential new entrants. Vodafone cannot understand how the very same market deemed to be not competitive in 2011 is now assessed as being competitive when one has seen only marginal changes in the competitive landscape. Since the last market review in 2011, two operators that have been presented as potential competitors in the Consultation have seen a decline in their market share or withdrawn from this market altogether. Vodafone is broadly in agreement with the definition of the market by the MCA. However, Vodafone notes an inconsistency in the fact that the MCA excluded Fixed Wireless Access from the relevant market yet goes on to present it to substantiate their argument that there are no barriers to entry into the same market. The Market Analysis carried out in this Consultation Document is not consistent and overlooks certain important aspects of the market which will be expanded upon throughout the response. Regulatory inconsistency over time is detrimental to investment. Vodafone cannot understand how, given a virtually identical market when compared to 2011, the MCA has come out with totally different conclusions on Market Share analysis, Economies of scale and scope, Countervailing buying power, Vertical integration, Sunk costs and Potential competition. Vodafone also notes that there are a number of assertions being made throughout the Consultation Document about how the market is aggressively competitive in the higher level access market without any evidence to support these assertions. The Consultation Document lacks any analysis whatsoever of price movements over time, there is no mention or comment about how retail prices for fixed access and fixed calls have remained static and how no pass-through of the drastic reduction in the mobile termination rates overtime has been observed. Vodafone also notes that the introduction and factoring in of over the top players (OTT) in local market analysis is a novel one and one that has not been observed in other market analysis carried out by the MCA. Whilst the reality of these services cannot be ignored, Vodafone is of the opinion that it has been treated too superficially in the review. Given the above, Vodafone feels that the market analysis is fundamentally flawed and therefore cannot agree with the conclusions derived by the MCA that the market is competitive. The total absence of regulation in this market is alarming to Vodafone. Vodafone also would like to note that there appears to have been no assessment carried out analysing how deregulation of a provider holding 69.5% market share will impact consumers and other operators. More importantly, there is a real risk that deregulation of the retail market will lead to the removal of regulation at the wholesale level, which is an unacceptable situation in the market that will only lead to the re-monopolisation of the market by the incumbent fixed operator GO. MCA has failed to analyse what would be the level of competition in the retail market absence wholesale regulation in accordance with the modified Greenfield approach. MCA should understand that the only reason why the market has seen the commencement of some very limited competition is because of the remedies that have been imposed on the incumbent operator GO, both at a retail and especially at a wholesale level. In the absence of these remedies it is highly likely that the retail market for fixed access will be further re-monopolised. Finally, Vodafone would also like to note that the findings of the MCA in this market analysis conveniently coincide with the adoption by the European Commission of its new

Relevant Markets Recommendation, which has removed this retail fixed access market from the list of markets susceptible to ex ante regulation. Vodafone would like to state that even if a market is removed from the list of recommended markets, this should not be used as an excuse to deregulate this market and remove SMP designation from an operator whose market position has not differed from the last round of market analysis finding them SMP. There should be no presumption that the market is competitive just because it has been or was going to be removed from the list of relevant markets. Further the retail analysis should not be conducted in isolation from the corresponding wholesale markets. The time horizon in relation to prospective competition is no longer for the European Commission's review of relevant markets than it is for MCA's individual market analysis. Therefore, given that this market has been removed from the list on the basis that it is likely to be competitive in circa 5 years, the MCA is conducting its market analysis to determine whether SMP still applies, needs to consider a much shorter time horizon before concluding that SMP no longer applies especially given that the relevant market being contemplated in the Consultation Document has shown next to no change from the last round of market analysis¹².

Il-veduti u l-argumenti tas-socjetà Rikorrenti kif minnha esposti f'iktar dettal fir-Response Document tagħha¹³, ma gewx accettati mill-Awtorità intimata u fit-8 ta' April 2015 l-istess Awtorità ppubblikat id-Decizjoni kif minnha effettivament prospettata fil-Consultation Document. B'daqshekk però ma jfissirx li l-Awtorità intimata naqset milli tikkonsidra l-punti, fatti w argumenti sottomessi mis-socjetà Rikorrenti bil-konsegwenza li l-istess Awtorità intimata giet li ma segwietx u ma wettqetx dak minnha rikjest fl-Artikolu 4A tal-KAp.418 tal-Ligijiet ta' Malta. Qari anke superficjali tad-Decizjoni immedjatament juri li dan l-aggravju tas-socjetà Rikorrenti huwa għal kollox ingustifikat.

Ma huwiex minnu li l-Awtorità intimata naqset milli tikkonsidra l-punti, fatti w argumenti sottomessi mis-socjetà Rikorrenti. Di fatti t-Taqsima 4.3 tad-Decizjoni hija kollha kemm hi iddedikata għall-iskrutinju, konsiderazzjoni w eventwali evalwazzjoni tar-risposti li l-Awtorità intimata rceviet minghand l-operaturi fis-settur, inkluz għalhekk is-socjetà Rikorrenti. F'din it-Taqsima l-Awtorità intimata tesponi fid-dettal il-konsiderazzjonijiet tagħha dwar l-osservazzjonijiet u anke l-kritika avanzata mill-operaturi fis-settur, inkluz is-socjetà Rikorrenti, dwar il-posizzjoni li fil-Consultation Document l-Awtorità intimata indikat li kienet se tadotta fid-Decizjoni finali. In effetti l-Awtorità intimata effettivament ikkunsidrat, irrispondiet u tat il-veduti tagħha dwar il-kwistjonijiet sollevati, *inter alia* mis-socjetà Rikorrenti, dwar il-Market Share Analysis, il-Barriers to Entry, il-Countervailing Buyer Power u Other Market Developments.

L-Awtorità intimata mhux ma kkunsidratx il-veduti tas-socjetà Rikorrenti *qua* impriza li tipprovdi networks ta' komunikazzjonijiet u/jew servizzi izda **cahdet** dawk il-veduti wara li gew minnha debitament ikkunsidrati; haga din ferm differenti min-nuqqas ta' konsiderazzjoni u decizjoni li taqa' entro s-setgħat ta' l-Awtorità intimata bhala Awtorità regolatrici fil-kamp tal-komunikazzjonijiet

¹² Fol. 82 u 83 tal-process.

¹³ Fol. 83 sa' 89 tal-process.

elettronici. Fil-fehma tat-Tribunal ghalhekk l-ewwel aggravju fuq liema s-socjetà Rikorrenti tibbaza l-appell taghha mid-Decizjoni huwa evidentement infondat - jekk mhux addirittura frivolu u vessatorju - u bhala tali ghandu jigi michud.

Stabilit li mill-lat procedurali ma kien hemm l-ebda nuqqas u/jew ommissjoni da parte ta' l-Awtorità intimata, jehtieg issa jigi trattat l-appell fil-mertu, u cioè jekk id-Decizjoni hijiex zbaljata u b'hekk qed tipperikola l-kompetizzjoni fis-swieq rilevanti u fi swieq ohra relattivi u konnessi, kif pretiz mis-socjetà Rikorrenti jew inkella hijiex ghal kollox korretta u gusta in kwantu s-swieq rilevanti huma *effectively competitive* u s-swieq relattivi u konnessi, b'mod partikolari dak wholesale, huma sufficjentement regolati *ex ante* u/jew protetti bil-Ligi tal-Kompetizzjoni *ex post* kif affermat mill-Awtorità intimata.

It-tieni aggravju - Kompetizzjoni effettiva u sostenibbli fis-swieq:

Is-socjetà Rikorrenti tikkontendi b'mod generali u generiku li fi u bid-Decizjoni l-Awtorità intimata naqset milli tosserva u tadempixxi ma' diversi disposizzjonijiet kemm tal-Ligijiet nostrali li jirregolaw il-komunikazzjonijiet elettronici kif ukoll tad-Direttivi ta' l-Unjoni Ewropeja b'mod partikolari tal-Framework Directive, pertinenti u rilevanti fil-kuntest ta' din l-istess Decizjoni. Fil-fehma tat-Tribunal u anke kif indikat mis-socjetà Rikorrenti stess, dawn id-disposizzjonijiet tal-Ligi jemanu principalment mill-Framework Directive, mill-Att biex Jirregola Komunikazzjonijiet Elettronici, Kap.399 tal-Ligijiet ta' Malta, u mir-Regolamenti dwar Networks u Servizi ta' Komunikazzjonijiet Elettronici (Generali), Legislazzjoni Sussidjarja 399. 28.

A tenur ta' l-Artikolu 15 tal-Framework Directive li jittratta dwar **Market Definition Procedure**: 1. *After public consultation and consultation with national regulatory authorities the Commission shall adopt a recommendation on relevant product and service markets (hereinafter, the recommendation). The recommendation shall identify in accordance with Annex I hereto those product and service markets within the electronic communications sector, the characteristics of which may be such as to justify the imposition of regulatory obligations set out in the Specific Directives, without prejudice to markets that may be defined in specific cases under competition law. The Commission shall define markets in accordance with the principles of competition law. The Commission shall regularly review the recommendation.* 2. *The Commission shall publish, at the latest on the date of entry into force of this Directive, guidelines for market analysis and the assessment of significant market power (hereinafter, the guidelines) which shall be in accordance with the principles of competition law.* 3. *National regulatory authorities shall, taking the utmost account of the recommendation and the guidelines, define relevant markets appropriate to national circumstances, in particular relevant geographic markets within their territory, in accordance with the principles of competition law. National regulatory authorities shall follow the procedures referred to in Articles 6 and 7 before defining the markets that differ from those defined in the recommendation.* 4. *After consultation with national regulatory authorities, the Commission may, acting in accordance with the procedure referred to in Article 22(3), adopt a Decision identifying transnational markets.*

Jigi osservat ukoll li a tenur ta' l-Artikolu 16 tal-Framework Directive li jittratta dwar **Market Analysis Procedure**: 1. As soon as possible after the adoption of the recommendation or any updating thereof, national regulatory authorities shall carry out an analysis of the relevant markets, taking the utmost account of the guidelines. Member States shall ensure that this analysis is carried out, where appropriate, in collaboration with the national competition authorities. 2. Where a national regulatory authority is required under Articles 16, 17, 18 or 19 of Directive 2002/22/EC (Universal Service Directive), or Articles 7 or 8 of Directive 2002/19/EC (Access Directive) to determine whether to impose, maintain, amend or withdraw obligations on undertakings, it shall determine on the basis of this market analysis referred to in paragraph 1 of this Article whether a relevant market is effectively competitive. 3. Where a national regulatory authority concludes that the market is effectively competitive, it shall not impose or maintain any of the specific regulatory obligations referred to in paragraph 2 of this Article. In cases where sector specific regulatory obligations already exist, it shall withdraw such obligations placed on undertakings in that relevant market. An appropriate period of notice shall be given to parties affected by such a withdrawal of obligations. 4. Where a national regulatory authority determines that a relevant market is not effectively competitive, it shall identify undertakings with significant market power on that market in accordance with Article 14 and the national regulatory authority shall on such undertakings impose appropriate specific regulatory obligations referred to in paragraph 2 of this Article or maintain or amend such obligations where they already exist.

L-Artikolu 9 tal-Kap.399 tal-Ligijiet ta' Malta li jittratta dwar **definizzjoni ta' suq u analizi** jipprovdi li: l-Awtorità ghandha, bla hsara ghal kull procedura li tista' tkun ordnata taht dan l-Att u skond il-principji tal-ligi dwar il-kompetizzjoni, tiddefinixxi s-swieq rilevanti adatti ghac-cirkostanzi nazzjonali, partikolarment swieq geografici rilevanti u ghandha taghmel analisi ta' dawk is-swieq rilevanti: Izda meta tkun qeghda taghmel dan l-Awtorità: (a) ghandha tqis mill-ahjar li tista' kull rakkomandazzjoni u linja direttiva rilevanti li l-Kummissjoni Ewropea tista' tohrog minn zmien ghal zmien skond l-Artikolu 15 tad-Direttiva Kwadru; u (b) ghandha timxi mal-proceduri imsemmija fl-Artikolu 4A ta' l-Att ghat-Twaqqif ta' Awtorità ta' Malta dwar il-Komunikazzjoni, qabel ma tiddefinixxi swieq li huma differenti minn dawk imfissra fxi rakkomandazzjoni rilevanti li l-Kummissjoni Ewropea tista' tippubblica. A tenur tar-Regolament 5 tal-Legislazzjoni Sussidjarja 399.28 li jittratta dwar il-**procedura fl-analisi tas-suq**: (1) L-Awtorità ghandha, wara li tkun fissret suq kif hemm fl-Artikolu 9 ta' l-Att, taghmel analisi ta' dak is-suq b'kont tas-swieq identifikati fir-rakkomandazzjonijiet u bl-akbar konsiderazzjoni moghtija lill-linji gwida mahrugin mill-Kummissjoni Ewropea kif hemm fl-Artikolu 15 tad-Direttiva Kwadru: Izda meta l-Awtorità tqis li jkun adatt, hija ghandha taghmel dik l-analisi b'kollborazzjoni ma' l-awtorità nazzjonali kompetenti responsabbli ghal affarijiet ta' kompetizzjoni. (2) Meta l-Awtorità tenhtieg taht is-subregolamenti (3) u (4) jew ir-regolament 11 jew 19 tistabilixxi jekk ghandhiex timponi, izzomm, temenda jew tirtira xi obligazzjonijiet dwar l-intraprizi, hija ghandha tiddeciedi abbazi ta' l-analisi tas-suq li taghmel imsemmi fis-subregolament (1) jekk suq rilevanti ikunx effettivament kompetittiv. (3) Meta l-Awtorità tiddeciedi li suq

rilevanti jkun effettivament kompetittiv, m'ghandha timponi jew izzomm ebda obbligazzjoni regolatorja specifika imsemmija fis-subregolament (2) li tkun tapplika ghal intrapriza li jkollha poter fis-suq sinifikanti: Izda f'dawk il-kazijiet meta intrapriza tkun qabel issemmiet bhala wahda li ghandha poter fis-suq sinifikanti u dawk l-obbligazzjonijiet jkunu digà jezistu, l-Awtorità ghandha, wara li taghti avviz ragonevoli lil kull parti li l-Awtorità tqis li tkun ser tintlaqat b'dak l-irtirar, tirtira dawk l-obbligazzjonijiet oneruzi minn fuq l-intrapriza involuta. (4) Meta l-Awtorità tiddeciedi li suq rilevanti ma jkunx effettivament kompetittiv, hija ghandha tinnomina intraprizi li individwalment jew solidalment ikollhom poter fis-suq sinifikanti kif hemm fir-regolament 6 u ghandha timponi fuq dawk l-intraprizi l-obbligazzjonijiet regolatorji specifici adatti imsemmija fis-subregolament (2) jew izzomm jew temenda dawk l-obbligazzjonijiet meta jkunu digà jezistu....

Minn dawn il-provvedimenti tal-Ligi u b'mod partikolari mill-Artikolu 16 tal-Framework Directive u mir-Regolament 5 tal-Legislazzjoni Sussidjarja 399.28, johrog car li ghall-finijiet ta' **l-analizi tas-suq rilevanti** - ghaliex hawn in verità jinsab il-qofol ta' l-appell odjern - l-Awtorità intimata ghandha obligu car li ssegwi bir-reqqa il-linji gwida mahruqa mill-Kummissjoni Ewropeja dwar l-analisi tas-swieq rilevanti, ossia tal-Commission Guidelines on Market Analysis and the Assessment of Significant Market Power under the Community Regulatory Framework for Electronic Communications Networks and Services (2002/C165/03) [hawn iktar 'l quddiem indikati bhala l-Linji Gwida tal-Kummissjoni Ewropea]. Jirrizulta wkoll li fil-kuntest ta' l-analisi tas-suq rilevanti l-NRA relattiva, fil-kaz in ezami l-Awtorità intimata, ghandha tiddetermina jekk dak is-suq huwiex *effectively competitive* u dana billi, fost affarijiet ohra, tiddetermina jekk hemmx intrapriza/intraprizi li ghandha/ghandhom *Significant Market Power* f'tali suq.

A tenur tal-Linji Gwida tal-Kummissjoni Ewropeja *in respect of each of these relevant markets, NRAs will assess whether the competition is effective. A finding that effective competition exists on a relevant market is equivalent to a finding that no operator enjoys a single or joint dominant position on that market. Therefore, for the purposes of applying the new regulatory framework, effective competition means that there is no undertaking in the relevant market which holds alone or together with other undertakings a single or collective dominant position.* Is-socjetà Rikorrenti tikkontendi li l-analizi ta' l-Awtorità intimata dwar jekk is-swieq rilevanti ghall-kaz in ezami, ossia l-product markets identifikati mill-Awtorità intimata fit-Taqsima 3.4 tad-Decizjoni - *lower level access to the public telephone network at a fixed location; higher level access with a maximum of two telephone connections to the public telephone network at a fixed location; u enhanced higher level access with more than two telephone connections to the public telephone network at a fixed location*, huwiex effettivament kompetittivi hija intrinsikament zbaljata ghaliex minkejja l-fatt li s-socjetà GO p.l.c. ghandha fis-swieq in kwistjoni *market share* gholi, ossia *market share* ta' 69.5% f'Q4 ta' l-2013, l-istess Awtorità sabet illi s-swieq rilevanti huma effettivament kompetittivi.

Il-qofol ta' l-appell odjern kjarament jirrivolvi, u dana nonstatne d-diversi rimostrazzjonijiet tas-socjetà Rikorrenti, madwar il-*market share* tas-socjetà GO

p.l.c. fil-product market *lower level access to the public telephone network at a fixed location* u konsegwentement il-fatt li nonostante li l-imsemmija soċjetà għandha *market share* ta' ben 69.5% (f'Q4 ta' l-2013) f'tali *product market* l-Awtorità intimata ma tqisx li l-istess għandha Significant Market Power f'tali suq u li per konsegwenza l-istess suq, flimkien mal-*product markets* l-oħra identifikati fis-settur tar-retail access, gew ikkunsidrat swieq effettivament kompetittiv.

Fil-Linji Gwida tal-Kummissjoni Ewropea il-*Criteria for assessing SMP* jipprovdu li *as the Court has stressed, a finding of a dominant position does not preclude some competition in the market. It only enables the undertaking that enjoys such a position, if not to determine, at least to have an appreciable effect on the conditions under which that competition will develop, and in any case to act in disregard of any such competitive constraint so long as such conduct does not operate to its detriment. In an ex-post analysis, a competition authority may be faced with a number of different examples of market behaviour each indicative of market power within the meaning of Article 82. However, in an ex-ante environment, market power is essentially measured by reference to the power of the undertaking concerned to raise prices by restricting output without incurring a significant loss of sales or revenues. The market power of an undertaking can be constrained by the existence of potential competitors. An NRA should thus take into account the likelihood that undertakings not currently active on the relevant product market may in the medium term decide to enter the market following a small but significant non-transitory price increase. Undertakings which, in case of such a price increase, are in a position to switch or extend their line of production/services and enter the market should be treated by NRAs as potential market participants even if they do not currently produce the relevant product or offer the relevant service. As explained in the paragraphs below, a dominant position is found by reference to a number of criteria and its assessment is based, as stated above, on a forward-looking market analysis based on existing market conditions. Market shares are often used as a proxy for market power. Although a high market share alone is not sufficient to establish the possession of significant market power (dominance), it is unlikely that a firm without a significant share of the relevant market would be in a dominant position. Thus, undertakings with market shares of no more than 25% are not likely to enjoy a (single) dominant position on the market concerned. In the Commission's decision making practice, single dominance concerns normally arise in the case of undertakings with market shares of over 40%, although the Commission may in some cases have concerns about dominance even with lower market shares, as dominance may occur without the existence of a large market share. According to established case-law, very large market shares - in excess of 50% - are in themselves, save in exceptional circumstances, evidence of the existence of a dominant position. An undertaking with a large market share may be presumed to have SMP, that is, to be in a dominant position, if its market share has remained stable over time. The fact that an undertaking with a significant position on the market is gradually losing market share may well indicate that the market is becoming more competitive, but it does not preclude a finding of significant market power. On the other hand, fluctuating market shares over time may be indicative of a lack of market power in the relevant market. ... It is important to stress that the existence of a dominant position cannot be established on the sole basis of large market shares. As*

mentioned above, the existence of high market shares simply means that the operator concerned might be in a dominant position. Therefore, NRAs should undertake a thorough and overall analysis of the economic characteristics of the relevant market before coming to a conclusion as to the existence of significant market power. In that regard, the following criteria can also be used to measure the power of an undertaking to behave to an appreciable extent independently of its competitors, customers and consumers. These criteria include amongst others: overall size of the undertaking, control of infrastructure not easily duplicated, technological advantages or superiority, absence of or low countervailing buying power, easy or privileged access to capital markets/financial resources, product/services diversification (e.g. bundled products or services), economies of scale, economies of scope, vertical integration, a highly developed distribution and sales network, absence of potential competition, barriers to expansion. A dominant position can derive from a combination of the above criteria, which taken separately may not necessarily be determinative. A finding of dominance depends on an assessment of ease of market entry. In fact, the absence of barriers to entry deters, in principle, independent anti-competitive behaviour by an undertaking with a significant market share. In the electronic communications sector, barriers to entry are often high because of existing legislative and other regulatory requirements which may limit the number of available licences or the provision of certain services (i.e. GSM/DCS or 3G mobile services). Furthermore, barriers to entry exist where entry into the relevant market requires large investments and the programming of capacities over a long time in order to be profitable. However, high barriers to entry may become less relevant with regard to markets characterised by on-going technological progress. In electronic communications markets, competitive constraints may come from innovative threats from potential competitors that are not currently in the market. In such markets, the competitive assessment should be based on a prospective forward-looking approach¹⁴.

Meta l-Criteria for assessing SMP kif mahruga mill-Kummissjoni Ewropea jigu ikkunsidrati fl-intier taghhom u mhux biss b'mod selettiv kif invece taghmel is-socjeta' Rikorrenti, jirrizulta li l-market share ta' intrapriza fis-suq/swieq rilevanti, anke jekk dan ikun market share gholi, ma huwiex l-uniku kriterju u/jew il-kriterju determinanti li ghandu jwassal ghas-sejbien ta' Significant Market Power ta' dik l-intrapriza fis-suq/swieq rilevanti. Kif johrog ben car mill-Linji Gwida hawn appena citati: **it is important to stress that the existence of a dominant position cannot be established on the sole basis of large market shares. As mentioned above, the existence of high market shares simply means that the operator concerned might be in a dominant position. Therefore, NRAs should undertake a thorough and overall analysis of the economic characteristics of the relevant market before coming to a conclusion as to the existence of significant market power**¹⁵.

Dan huwa appuntu dak li ghamlet l-Awtorita' intimata fil-kaz in ezami.

¹⁴ Sezzjoni 3.1 paras. 72 sa' 75, 78 u 79 tal-Linji Gwida tal-Kummissjoni Ewropea.

¹⁵ Enfasi tat-Tribunal.

Wara li fid-Decizjoni l-Awtorità intimata kkonkludiet li fil-Lower Level Access Market: *while GO still enjoys 69.5% share of the lower level access market, Melita has nonetheless managed to successfully penetrate this market and erode the incumbent's dominant position. Furthermore, the MCA believes that this trend will continue to materialise during the time frame of this review and that Melita will continue to pose a strong and direct competitive constraint on the incumbent GO* u li fil-Higher Level Access Market: *given that competition in the higher level access markets is concentrated on a limited number of users, and that alternative operators are actively present in the market, the MCA argues that GO will find it extremely difficult to behave independently of competitors and consumers*¹⁶, l-Awtorità intimata għaddiet biex tikkonsidra diversi kriterji ohra - senjatament Barriers to Entry, Potential Competition, Countervailing Buyer Power u Other Local Market Developments¹⁷ qabel ma effettivament waslet għall-konkluzzjoni tagħha li s-swieq rilevanti huma effettivament kompetittivi.

Fir-rigward ta' l-analizi ta' dawn il-kriterji wkoll is-socjetà Rikorrenti tikkontendi li fi kwalunkwe kaz il-konsiderazzjonijiet u konsegwenti konkluzzjonijiet ta' l-Awtorità intimata huma zbaljati.

Fin-Nota ta' Sottomissjonijiet tagħha s-socjetà Rikorrenti ssostni li: *dwar dan il-market share analysis l-Awtorità tistrih fuq il-fatt illi l-Melita zdiedet b'77,000 utent, madanakollu minn imkien ma' jidher mid-decizjoni appellata illi saret xi ebda forma ta' analizi jekk tezistix korrelazzjoni bejn iz-zieda ta' 77,000 utent tal-Melita u t-tnaqqis fil-market share tal-GO. Il-fatt biss li zdied il-market share tal-Melita ma jfissirx necessarjament li allura kien hemm tnaqqis fil-market share ta' GO. Fil-fatt bhal ma jikkonferma Victor Zammit in kontro-ezami, klijent jista' jkun klijent sew ta' Melita kif ukoll GO. Għalhekk mhux kaz li wiehed semplicement jaqta' linja u jassumi illi ladarba zdieđu s-subscriptions tal-Melita allura dan jimplika tnaqqis fil-market share ta' GO. Fil-fatt Zammit jikkonferma illi skond l-Awtorità l-market share tal-GO nizeł bi 3% matematikament, u mhux necessarjament fattwalment. Fil-fatt l-Awtorità fid-decizjoni appellata imkien ma tghid jekk dawn is-77,000 attwalment biddlux l-operatur tagħhom; ma tindikax kemm minn din il-figura kienu subscriptions godda mal-Melita jew kemm minnhom huma klijenti tat-tnejn*¹⁸.

Fid-Decizjoni l-Awtorità intimata tosserva li: *Prior to 2006, GO had full control over the fixed telephony market, with an actual total of 202,116 connections by Q4 2005. GO's position started however to be challenged in early 2006 when Melita began to offer cable access for the provision of IP based telephony services and had by the end of that same year captured 2.9% of the market. Over the successive years, Melita's market share grew steadily to reach 30% by the end of 2013. Consequently, GO's market share in terms of lower level access connections fell below 70% by the end of 2013 as some 44,000 connections had been lost to the new competition over the 2006 - 2013 period. Furthermore, Melita's growth in the number of lower level access connections, with a standing of 68,420 subscribers*

¹⁶ A tergo ta' fol. 31 tal-process u a tergo ta' fol. 32 tal-process.

¹⁷ Decizjoni 4.2.2 sa' decizjoni 4.2.5 tad-Decizjoni, a tergo ta' fol. 32 sa' a tergo ta' fol. 38 tal-process.

¹⁸ Nota ta' Sottomissjonijiet tas-socjetà Rikorrenti, fol. 627 tal-process.

during 2013, was more than the 44,000 subscriptions competed away from GO. This therefore implies that Melita has also been able to capture a significant number of new fixed access subscribers. These movements are graphically highlighted in Chart 2 below¹⁹. Fit-Taqsima “Summary of Responses to the National Consultation and MCA Replies Related to the Market Analysis” l-Awtorità intimata ttenni li: *In the market share analysis carried out in Section 4.2.1 above the MCA shows how GO’s market share has fallen below 70% by the end of 2013 as some 44,000 connections had been lost to Melita over the 2006 – 2013 period. Furthermore, the MCA also explained that Melita’s growth in the number of lower level access connections, with a standing of 68,420 subscribers during 2013, was more than the 44,000 subscriptions competed away from GO. This therefore implies that Melita is able to compete and attract customers from GO and was also able to capture a significant number of new fixed access subscribers. This shows that Melita is a credible alternative to GO and the change in market share is a reflection of this. In view of these developments, the MCA therefore concludes that while GO still enjoys 69.5% share of the lower level access market, Melita is a successful market player and today enjoys a market share of 30% in the lower fixed access market. Furthermore, the MCA believes that this trend, whereby GO continues to lose its market share, will continue during the timeframe of this review. Likewise there is no reason to believe that Melita will not continue to be a credible alternative to GO over the coming years. As a matter of fact, new data shows that the market shares for GO in the lower level access market as at 2014 Q3 continued to fall reaching 66.9% while Melita’s share of the market grew to 32.5%. Likewise the number of Melita’s active fixed line connections increased from 68,420 as at the end of 2013 to 74,639 as at 2014 Q3. To this effect the MCA believes that the high market share of GO will continue to be eroded during the timeframe of this review and is not by itself reflective of SMP in this market*²⁰.

Hawnhekk l-Awtorità intimata turi b’mod car - hekk kif mehtieg anke mill-Linji Gwida tal-Kummissjoni Ewropeja - li ma setghetx tibbaza d-decizjoni finali taghha dwar l-istatus tas-socjetà GO p.l.c. fis-swieq rilevanti, b’mod partikolari fil-lower level access market, unikament fuq il-*market share* ta’ l-imsemmija socjetà, iktar u iktar meta tul is-snin jidher li dan il-*market share* qed jonqos minn sena ghal sena minhabba l-kompetizzjoni da parte tas-socjetà Melita p.l.c. Ghalkemm is-socjetà Rikorrenti tikkontendi li mid-Decizjoni ma tirrizulta l-ebda korrelazzjoni bejn iz-zieda fl-utenti u b’hekk fil-*market share* tas-socjetà Melita p.l.c u t-tnaqqis fl-utenti u b’hekk fil-*market share* tas-socjetà GO p.l.c., dan ma huwiex minnu. Mill-analizi maghmula mill-Awtorità intimata tali korrelazzjoni tirrizulta b’mod evidenti in kwantu ma jidhirx u ma rrizultax li l-utenti li tilfet u ghadha qed titlef is-socjetà GO p.l.c., jew ghaliex jiccaqilqu ghal ghand il-Melita jew ghax jaghzlu lill-Melita flok il-GO ghal servizzi godda minnhom mehtiega, qed imorru ghand *service provider* iehor li ma huwiex is-socjetà Melita p.l.c. B’hekk il-gwadan u l-passi ‘l quddiem li qed taghmel mis-socjetà Melita p.l.c. fis-sueq rilevanti tal-Lower Level Access qed isiru a skapitu u a detriment tas-socjetà GO p.l.c. Dan gie wkoll imfisser minn Victor Zammit, li fiz-zmien meta nharget id-Decizjoni kien Manager Market Review fi hdan l-Awtorità intimata, fix-xhieda li ta waqt is-seduta tal-25 ta’ Ottubru 2016:

¹⁹ Fol. 31 tal-process.

²⁰ A tero ta’ fol. 39 tal-process u fol. 40 tal-process.

diga' rajna l-ahhar hames snin, ic-caqliq huwa wiehed dokumentat. Il-market share tal-GO nizel sostanzjalment, illum qieghed roughly around sixty six per cent (66%), jigifieri nizel, ghandek sebgha u sebghin elf u aktar ghax kull xahar li jghaddi qed jizdiedu s-subscribers tal-Melita ghandek sebgha u sebghin elf user li lllum mhux qeghdin mal-GO li ghazlu li jgibu l-istess servizz minghand il-Melita u anki minghand operaturi zghar ohra. Jigifieri ghalkemm, bhal ma qalu l-Vodafone, ma rridux nonfhu hafna l-presenza tagghom, fir-realta' qeghdin hemm id-domanda qed jigi provdut servizz minn operaturi differenti²¹.

Is-socjetà Rikorrenti ma tridx tara din il-korrelazzjoni ghaliex tinsisti li r-rizultanzi ta' l-Awtorità intimata huma l-frott ta' ezercizzju purament matematiku li ma jiehux in konsiderazzjoni aspetti fattwali li jeffettwaw u jimpingu fuq is-suq rilevanti.

L-argumenti centrali tas-socjetà Rikorrenti fir-rigward huma tnejn: (i) principali fosthom illi Victor Zammit jammetti li dawn il-konstatazzjonijiet u konkluzzjonijiet relattivi huma rizultat ta' ezercizzju matematiku u mhux fattwali; u li (ii) tant l-Awtorità intimata ma ikkunsidratx il-fatti rilevanti u relattivi ghas-suq in kwistjoni, li mid-Decizjoni w anke mix-xhieda ta' Victor Zammit jirrizulta li l-Awtorità ma hadtix in konsiderazzjoni kemm mill-utenti kkunsidrati huma effettivament abbonati kemm mas-socjetà GO p.l.c. kif ukoll mas-socjetà Melita p.l.c. u x'impatt ghandu tali fatt fuq ir-rizultat ahhari dwar l-analizi tas-suq rilevanti.

It-Tribunal iqis li hawn ukoll is-socjetà Rikorrenti qed tkun selettiva hafna fir-rigward ta' liema mill-elementi rizultanti mill-provi prodotti tenfasizza fuqhom. In effetti minn qari akkurat tax-xhieda ta' Victor Zammit, anke dik moghtija in kontroezami, jirrizulta b'mod car li kuntrarjament ghal dak pretiz mis-socjetà Rikorrenti, l-istess Victor Zammit ma jissostanzjax u wisq inqas jassekonda l-argumentazzjonijiet taghha.

Fir-rigward tal-kwistjoni tas-77,000 abbonament mas-socjetà Melita p.l.c. u l-impatt ta' l-istess fuq il-market share tas-socjetà GO p.l.c., Victor Zammit verament spjega li biex jinhadem il-market share ta' l-operaturi kollha fis-suq rilevanti, inkluz ghalhekk tas-socjetà GO p.l.c., l-ezercizzju huwa wiehed matematiku izda l-ispijega tieghu marret ferm oltre minn hekk.

In risposta ghall-mistoqsija tat-Tribunal, bi kjarifika ta' mistoqsija precedenti li saritlu mid-difensur tas-socjetà Rikorrenti, *skontkom intom qed tghidu ghax il-GO tilfet 77,000 clients naqsilha l-market share by 3%? Victor Zammit wiegeb il-market share johrog sempliciment meta inti tara n-numru ta' subscribers ma' operator divided by the total, jigifieri l-market share jitla' u jinzel skond kemm ghandek subscribers jigifieri din hija haga semplicissima. Ghall-mistoqsija ulterjuri jigifieri qed taqbel mieghi illi l-Awtorità meta wasslet biex taghmel din l-analizi dwar il-market share u dwar it-tibdil fil-market share, ma ratx jekk dik iz-zieda fin-numru ta' subscribers li kellha l-Melita kellhiex jew le impatt fuq il-market share tal-GO? Victor Zammit wiegeb bilfors ikollha w in risposta ghall-mistoqsija ulterjuri imma bilfors ghaliex? Mela din x'inhi xi assumption? Mela*

²¹ Fol. 583 tal-process.

spjegali kif wasaltu ghalha, Victor Zammit wiegeb nerga' nghidlek li l-Melita u l-GO u l-Vodafone u operatori ohra kollha ghandhom is-subscribers taghhom, meta tghodhom kollha jigi t-total subscribers fis-suq, issa t-total subscribers fis-suq jiddependi ovvjament kemm hawn nies u kemm hawn businesses li qed juzaw dak is-servizz jigifieri s-suq huwa li hu. Issa kull operatur, is-share tieghu johrog ibbazat minn kemm ghandu subscribers minn dak it-total jigifieri dik hija xi haga li kulhadd juza, m'hemmx xi metodologija jew xi studju ta' barra minn hawn imma hija xi haga semplici. Issa aktar ma l-Melita qed ikollha subscribers aktar ha jizdiedilha l-market share, ma jfissirx li ahna qed naghmlu xi assumption imma qed nibbazaw ruhna fuq in-numri. Ghall-mistoqsija imma l-fatt biss illi zdieg il-market share tal-Melita, ha nimxu ma' l-assumption li qed taghmel inti, dak kif jikkorelata imbaggad ma' dak li qed tasal ghalih l-Awtorita' illi kien hemm tnaqqis fil-market share tal-GO? Victor Zammit wiegeb: Ghax johrog wahdu hija somma, pero' naqbel mieghek li mhux il-market share, u nerghu nigu ghall-istess punt li konna qed naghmlu hawn, dik tindikalek kemm il-market share huwa biss fattur lejn xiex trid thares.

Huwa evidenti ghalhekk li fl-ahhar mill-ahhar Victor Zammit ma jaqbilx mal-posizzjoni tas-socjeta' Rikorrenti li l-fattur uniku u determinanti dwar jekk suq rilevanti huwiex effettivament kompetittiv o meno huwa l-market share ta' l-operaturi fuq is-suq u li l-operatur bl-ghola market share necessarjament u b'mod awtomatiku ghand Significant Market Power f'dak is-suq.

In kwantu rigwarda t-tieni argument tas-socjeta' Rikorrenti u cioe' li l-konkluzzjoni finali ta' l-Awtorita' intimata hija fl-ahhar mill-ahhar zbaljata ghaliex ma haditx in konsiderazzjoni dawk l-utenti li huma abbonati kemm mas-socjeta' GO p.l.c. kif ukoll mas-socjeta' Melita p.l.c., it-Tribunal josserva li s-socjeta' Rikorrenti naqset milli ttipprova b'mod konkret u sodisfacenti - u dana la bi prova diretta u lanqas bi prova tramite l-Awtorita' intimata billi titlobha c-cifri in kwistjoni - kemm huma tali abbonati u x'percentagg tal-client base taz-zewg operatori jikkostitwixxu u b'hekk kif tali figura effettivament timpingi, jekk timpingi, fuq il-konsiderazzjonijiet finali ta' l-Awtorita' intimata.

Is-socjeta' Rikorrenti tikkontendi li konsimilment, l-Awtorita' tinjora wkoll il-fatt illi sabiex wiehed jkun jista' jottjeni s-servizz tal-broadband tal-GO jinhtieglu illi jkollu fixed line - dan ta' bilfors jimplika illi kwalsiasi caqliq li ser ikun hemm fis-suq tal-broadband ser jkollu impatt ukoll fuq dan is-suq. Anzi Victor Zammit in kontroezami jghid illi din ta' l-ahhar kienet kwistjoni li ma kellniex ghalfejn nidhlu fiha u jghid biss illi skond l-Awtorita' l-konsumaturi ghandhom ghazla, u dan pero' minghajr ma taghmel refrenza ghall-ebda data jew analizi li ghamlet l-Awtorita' sabiex tkun tista' tikkonkludi fuq dan il-punt. Illi kuntrarjament ghal dak li tghid l-Awtorita', din kienet kwistjoni pertinenti u dana stante li l-provizzjoni tas-servizz tal-broadband huwa direttament konness mas-suq in kwistjoni. Dan apparti mill-fatt illi meta l-konsumaturi gew mistoqsija dwar dan il-punt, dawn ma giex sottolineat lilhom illi sabiex jigi introdott is-servizz ta' broadband tal-GO dawn kien ser ikollhom necessarjament bzonn ta' fixed access izda gew mistoqsija biss dwar jekk kienux ser jibiddu l-operatur f'kaz li jkun hemm zieda fil-prezz. Fil-fatt skond ma jidher minn rapport dwar studju li sar mill-Awtorita' stess ghall-perijodu bejn Dicembru 2016 u 2017 hafna mill-konsumaturi ma kienux disposti li

jbiddlu suppliers ta' broadband minhabba l-problemi konnessi dwar dan. Fil-fatt kien hemm biss caqliq minimu fis-suq fl-ahhar sentejn²². Bl-istess mod l-Awtorità filwaqt li taghmel accenn ghall-impatt tal-bundles, u senjatament minhabba l-fatt illi l-Melita kienet qed taghti bundle ta' fixed retail b'xejn mas-servizz ta' l-internet. L-Awtorità jidher li ghamlet biss ezercizzju matematiku dwar kemm il-parti mis-suq hija konsistenti fil-linji li huma parti minn bundle u kemm le, minghajr ma ghamlet ko-relazzjoni bejn iz-zieda fin-numru ta' bundles u t-tnaqqis fil-market share ta' GO. Illi bhal ma jikkonferma Zammit in kontro-ezami wkoll meta kien qed isir is-survey mal-konsumaturi, l-Awtorità naqset milli tindika illi f'kaz illi dak li jkun kien ser jkun qed ibiddel il-fixed line tieghu, jekk ghandu s-servizz ta' broadband ta' GO, kien ser jkollu wkoll jbidel l-operatur ghal dan is-servizz, bil-konsegwenza illi l-utenti possibilment ma giex a konjizzjoni taghhom il-fatt illi mhux biss kellu wiehed jiehu in konsiderazzjoni xi zieda fil-prezz izda wkoll l-iskarigg biex dak li jkun jbidel l-operatur tal-broadband tieghu²³.

Hawnhekk is-socjetà Rikorrenti kjarament qed tikkontesta l-konsiderazzjonijiet ta' l-Awtorità intimata fir-rigward ta' din il-kwistjoni partikolari tal-broadband sollevata fost ohrajn mis-socjetà Rikorrenti fl-istadju ta' konsultazzjoni. In effetti fid-Decizjoni fit-Taqsima "Summary to Responses to the National Consultation and MCA replies Related to the Market Analysis" taht il-parti GO's *Broadband Services* l-Awtorità intimata osservat li: *On a separate but related note, Vodafone and Melita both remark that in its Consultation document the MCA failed to mention the fact that GO's broadband product is linked to its fixed telephony services. Consequently, a prospective customer cannot take GO's broadband service without also having to take GO's fixed telephony offer. Vodafone also argues that in this respect a GO fixed telephony and broadband customer wishing to terminate or switch the fixed telephony service only is not permitted to do so without also terminating the broadband service. The MCA responds to this by referring Vodafone and Melita to a separate market review decision dealing with wholesale broadband markets. This is because the fact that GO's broadband product is linked to its fixed telephony services is, if anything, a constraint on broadband and not fixed telephony services. Moreover, the MCA had concluded that no operator in the wholesale broadband access market enjoys SMP and it thus follows that this condition does not result in any competitive advantages for GO over other operators. As for access to fixed telephony services, the MCA already explained that fixed telephony services can be procured either as part of a bundle or on a standalone basis. In both instances, the MCA has shown that customers have the option to choose between different operators. Furthermore, with the increase in the take up of bundles this factor is becoming less prominent. In a market where 51% of customers already take their fixed access service as part of a bundle, the majority of which on a triple play bundle, the argument that GO is gaining some unfair advantage over other operators through this practice is not correct. This is especially so when other operators can replicate the fixed and broadband bundle and also given that GO is still providing fixed access telephony services on a standalone basis. In view of this, the MCA therefore deems that this argument does*

²² <https://www.mca.org.mt/articles/mca-publishes-findings-business-perceptions-survey-period-december-2016-%E2%80%93-march-2017> - kif citat fin-Nota ta' Sottomissjonijiet tas-socjetà Rikorrenti.

²³ Nota ta' Sottomissjonijiet tas-socjetà Rikorrenti, fol. 627 u 628 tal-process.

*not prove in any way that GO holds some competitive advantage over other operators with respect to retail fixed access services. Likewise, the MCA concludes that this has no or very limited impact on the switching possibilities of customers subscribing to fixed telephony services*²⁴.

Minn qari ta' dan l-estratt tad-Decizjoni jirrizulta b'mod car li kuntrarjament ghal dak affermat mis-socjetà Rikorrenti l-Awtorità intimata b'bazat il-konsiderazzjonijiet u konsegwenti konkluzzjoni taghha fuq data w analizi akkurata li saru u jinsabu f'decizjoni moghtija mill-Awtorità intimata intitolata "Market 5 - Wholesale Broadband Access Market", ghal liema decizjoni hemm referenza u *link* specifika fid-Decizjoni u b'hekk tiffirma, ghal min jindenja ruhu jaqraha, parti integrali tal-konsiderazzjonijiet maghmula mill-Awtorità intimata fid-Decizjoni hawn appellata.

Fid-dawl ta' dak li jirriuzlta mid-decizjoni "Market 5 - Wholesale Broadband Access Market", fejn l-Awtorità a bazi ta' konstatazzjonijiet u konsiderazzjonijiet hemm maghmula kkonkludiet illi *the MCA declares that no operator in the wholesale broadband access market has been demonstrated to enjoy a position of SMP*²⁵, u fid-dawl tal-mod kif zviluppa dak is-suq partikolari sal-perijodu kkunsidrat fid-Decizjoni hawn appellata, it-Tribunal iqis li l-Awtorità intimata korrettament ikkunsidrat li *as for access to fixed telephony services, the MCA already explained that fixed telephony services can be procured either as part of a bundle or on a standalone basis. In both instances, the MCA has shown that customers have the option to choose between different operators. Furthermore, with the increase in the take up of bundles this factor is becoming less prominent. In a market where 51% of customers already take their fixed access service as part of a bundle, the majority of which on a triple play bundle, the argument that GO is gaining some unfair advantage over other operators through this practice is not correct. This is especially so when other operators can replicate the fixed and broadband bundle and also given that GO is still providing fixed access telephony services on a standalone basis.*

Ghall-fini li tipprova tissosstanzja ulterjorment l-argument taghha s-socjetà Rikorrenti tikkontendi li *meta l-konsumaturi gew mistoqsija dwar dan il-punt [ossia l-kwistjoni tal-broadband], dawn ma giex sottolineat lilhom illi sabiex jigi introdott is-servizz ta' broadband tal-GO dawn kien ser ikollhom necessarjament bzonn ta' fixed access izda gew mistoqsija biss dwar jekk kienux ser jibiddu l-operatur f'kaz li jkun hemm zieda fil-prezz. **Fil-fatt skond ma jidher minn rapport dwar studju li sar mill-Awtorità stess ghall-perijodu bejn Dicembru 2016 u 2017 hafna mill-konsumaturi ma kienux disposti li jbiddu suppliers ta' broadband minhabba l-problemi konnessi dwar dan. Fil-fatt kien hemm biss caqliq minimu fis-suq fl-ahhar sentejn***²⁶.

Ir-rapport li ghalih taghmel referenza s-socjetà Rikorrenti huwa r-rapport relattiv ghal "Business Perceptions Survey for the period December 2016 – March 2017" pubblikat fit-2 ta' Novembru 2017, liema rapport jigi osservat ma giex prodott bhala

²⁴ A tergo ta' fol. 43 tal-process.

²⁵ Decision 4.4 fid-Decizjoni Market 5 - - Wholesale Broadband Access Market.

²⁶ Enfasi tat-Tribunal.

prova f'dawn il-proceduri izda l-prova tramite l-istess tressqet biss fin-Nota ta' Sottomissjonijiet tas-socjetà Rikorrenti, agir dan ghal kollox proceduralment zbaljat u skorrett. Detto ciò, jigi ulterjorment osservat li anke kieku stess tali rapport kellu jitqies bhala prova valida fil-kuntest ta' dawn il-proceduri, is-socjetà Rikorrenti naqset milli tosserva u tindikat li dan dan ir-rapport huwa immirat *at examining the views and opinions of **local businesses***²⁷ *based on their experience in using products and services related to mobile telephony, fixed broadband, fixed telephony, and other tailor-made packages for business clients*, li jfisser ghalhekk li jaghti stampa ta' parti biss mill-client base ta' l-operaturi fis-suq rilevanti u pertinenti ghal dawn il-proceduri. Apparti minnhekk dak li effettivament irrizulta dwar jekk il-local businesses humiex o meno inklinati li jiccaqilqu minn operatur ghall-iehor huwa s-segwent: *only a small percentage of respondents reported having made a switch between operators in the last two years. For example, only 5% of respondents having a fixed broadband connection reported having changed their operator over the last two years, and only 6% in the case of respondents having a mobile subscription. **This somewhat corresponds to the survey finding of a perceived high level of quality of service being offered by local service providers to their business clientele. Notwithstanding this, a segment of respondents still perceive switching to be an inconvenient process and that switching to alternatives would not meet their business requirements***²⁸.

Din il-konkluzzjoni hija kemm xejn differenti minn kif esposta mis-socjetà Rikorrenti in kwantu il-maggoranza tal-businesses ikkunsidrati ma humiex inklinati li jiccaqilqu minn operatur ghall-iehor minhabba *a perceived high level of quality of service being offered by local service providers to their business clientele* u huwa biss **segment** minn dawn il-businesses li jqisu c-caqliq minn operatur ghall-iehor bhala process inkonvenjenti u b'hekk mhux inklinati li jirrikorru ghalih in vista wkoll tal-fatt li l-alternattivi disponibbli mhux necessarjament huma idoneji ghall-bzonnijiet tal-kummerc/negozju minnhom gestit. Dan juri li f'din l-istanza ukoll is-socjetà Rikorrenti tesponi biss dak li jidher lilha u dana b'mod li l-iktar jaqbel is-sottomissjonijiet taghha, anke jekk mhux necessarjament jirrifletti l-verità.

Ghal dak li jirrigwarda *switching* minn operatur ghall-iehor dak li rrizulta lill-Awtorità intimata minn Surveys li ghamlet, u kwindi minn data u figuri minnha migbura, huwa s-segwent: *customers with a strong negotiating position may significantly shape the level of competition in a market as this will tend to restrict the undertakings' ability to exercise market power and to act independently of their customers. In effect, when customers can exert significant pressure on the supplier of a good or service, they can effectively stop an attempt to increase prices by service providers. The extent of countervailing buyer power will however depend on whether customers could, at the outset, choose to discontinue the service being provided by a particular supplier and switch to alternative providers, within a short period of time. The MCA notes that customers have the possibility of acquiring retail access to the public telephone network from a*

²⁷ Enfasi tat-Tribunal.

²⁸ Enfasi tat-Tribunal.

number of operators. In view of this, customers can potentially exert countervailing buyer power to sufficiently constrain any market power enjoyed by a local operator. However the ease with which consumers can switch between one option and another does not solely depend on the range of services available by different operators. In essence, it also depends on whether barriers to switching are significant and therefore pose a constraint on consumers to change a particular service or an operator altogether. Similarly if customers are satisfied by the services being offered or have had a long-term relationship with their operator, or perceive it as an unnecessary inconvenience to switch to another provider, then customers would be unwilling to exert countervailing power by way of subscribing to an alternative operator. The MCA also notes that the possibility to purchase packaged products bundling two or more electronic communication services may also hinder countervailing buyer power as customers subscribing to such bundles may find it difficult to discontinue any one of the services included in the package. In terms of the availability of alternatives to the fixed telephony services offered by GO, both Melita and Ozone offer a range of packages to equivalently match, in terms of quality, service and pricing, those being offered by GO. Vodafone, Ozone and Vanilla Telecoms also offer telephony access via their wireless solution. This level of access, however, cannot be purchased as a standalone but is available only with broadband access and thus cannot be considered as a direct alternative to fixed telephony services offered by GO. At best, these wireless connections will nonetheless pose an indirect competitive constraint on other forms of lower level access. However, while a range of telephony services by alternative operators is available, the ease with which consumers can switch between one option and another may not always be possible. An important consideration in analysing the ease with which consumers can switch between one provider and another relates to the emergence of bundles. In essence, customers can subscribe to packaged products bundling two or more electronic communication services offered by the same provider. Although, in themselves bundles provide certain advantages to consumers in terms of cost savings and single billing, bundles may limit switching between providers where the customer is locked for a particularly long period of time and where the costs of exit are high. Statistical data collected by the MCA shows that those subscribing to a bundle offer have been increasing significantly over the years. In actual terms, the number of consumers signing up to a bundle offer comprising fixed line telephony increased to circa 97,000 by the end of 2013 or 51% of all post-paid fixed telephony subscriptions. In this regard, undertakings not present across a wide range of electronic communication services may lose ground in terms of competition, as they are excluded from this growing activity. This said, it is to be clarified that the two main fixed telephony operators in Malta, GO and Melita, are both offering bundle packages comprising two or more electronic communication services. For the record, 48% of fixed telephony subscriptions forming part of a bundle are Melita connections; 52% are GO subscriptions. In view of this, the MCA thus argues that no operator appears to have a competitive advantage over the other by way of the bundle packages being offered and that GO and Melita are competing at par on this level. Likewise consumers wishing to subscribe to a bundle service that comprises fixed telephony have the option to choose between the two operators and are thus in a position to exert some degree of countervailing buyer power on both GO and Melita. Moreover, the MCA notes that Vodafone,

Ozone and Vanilla Telecoms are also offering bundle packages over their wireless solution. These offerings are however limited to fixed telephony and broadband Internet services only. In this regard, consumers wanting to subscribe to a bundle offer comprising other electronic communication services must refer to GO or Melita. Notwithstanding this, the MCA argues that bundle offerings over wireless networks, limited as they may be, can still pose a competitive constraint on similar packages offered by GO and Melita. All in all the MCA thus finds no reason to conclude that GO's bundle offerings serve as a competitive advantage over other operators. Furthermore the MCA has no evidence to suggest that bundle offerings are holding back people from switching operators or from going back to standalone services. Retail Fixed Access Market Review: A survey on bundle services carried out by the MCA between August and October 2013 shows that that 70% of households claim to be satisfied or highly satisfied with their current bundle service. To this effect these households would not consider switching operators. However, 43% of households that are not satisfied with the bundle service consider changing the bundle provider. In fact, 9% of dissatisfied households claim to have already switched operators for the bundle. Interestingly, the majority of those that switched (64%) claim it was not difficult to change the original operator. Moreover, only 8% of those that switched and found it difficult relate this to the fact that they were bound by a contract. Indeed when customers subscribe to a bundle offer they are locked by a contract for a particular period of time and would have to pay termination fees if they decide to terminate their contract prematurely. This said the MCA notes that a number of bundle contracts have by now expired and thus households can choose to discontinue their bundle service without incurring any termination fees. The MCA concludes that this development will continue to materialise during the timeframe of this review, in which case more and more consumers would be able to switch operators without any hindrance if they deem the competition to be offering a better alternative²⁹.

It-Tribunal iqis li hawn l-Awtorità intimata ghamlet analizi akkurata tal-fatturi kollha li jistghu jimpingu fuq Countervailing Buyer Power u jqis li fid-dawl ta' dak minnha kkunsidrat il-konkluzzjoni hija wahda logika u fic-cirkostanzi korretta.

Ix-xhieda prodotti mis-socjetà Rikorrenti u cioè Alexandre Serot u Jason Pavia entrambe jressqu diversi sottomissjonijiet, u mhux xhieda, fl-affidavits taghhom in sostenn tat-tieni aggravju tas-socjetà Rikorrenti izda dawn is-sottomissjonijiet, u mhux xhieda, taghhom ma gew minnhom jew mis-socjetà Rikorrenti bl-ebda mod sostanzjati bi provi sodisfacenti u ghalhekk il-valur probatorju ta' l-istess huwa wiehed fqir hafna.

Kif gustament osservat mill-Awtorità intimata fin-Nota Responsiva taghha: *il-Vodafone in sostenn ta' l-argument taghha li s-suq mhux kompetittiv taghmel riferenza ghall-evidenza tax-xhieda prodotti minnha u cioè ta' Jason Pavia u ta' Alexandre Scott [recte: Serot] it-tnejn ufficjali fi hdan il-Vodafone. Kif inghad u jirrizulta b'mod car, f'numru kbir ta' okkazzjonijiet, Jason Pavia spicca kellu jdawwar l-argumenti li pprezenta fl-affidavit tieghu meta xehed in kontro-ezami.*

²⁹ A tergo ta' fol. 34 tal-process u fol. 35 tal-process.

Biex ma jinghadx ukoll li l-istess Pavia ma pprezenta l-ebda fatti izda biss supposizzjonijiet u argumentazzjoni. Jekk wiehed jevalwa dak li qal Serot wiehed jerga' jsib li dan kulma pprezenta kien sottomissjonijiet dwar, skont hu, kif l-MCA kellha tapplika l-principji regolatorji, u cioè l-SMP Guidelines tal-Kummissjoni u l-“Market Review Methodology”. Fejn dan Serot ittenta jssahhah l-argumenti tieghu billi jipprezenta stampa tal-posizzjoni vigenti f'pajjizi oħra, wiehed ma jistax ma jarax kemm kien qarrieqi u selettiv f'dak li qal. Hu sinifikanti li fl-affidavit tieghu Serot jghid li hemm sitt pajjizi fl-UE (dan sa' Jannar 2016) li sabu li ma kienx hemm Significant Market Power fis-suq in kwistjoni, però imbaghad jonqos li jinnota li fil-maggoranza ta' dawn il-pajjizi l-operatur ewlieni kellu izjed minn 50% tal-market share meta s-suq gie deregolat (fil-kaz ta' l-Estonia l-operatur koncernat addirittura kellu l fuq minn 80% tal-market share). Kif gia inghad, meta mistoqsi dwar dan, Jason Pavia ma kellux għazla hlief li jaccetta l-fatt bhala tali³⁰.

Is-socjetà Rikorrenti tikkontendi wkoll li l-Awtorità inspjegabilment tikkonkludi illi Over the Top Services kien qed ikollhom impatt kbir fis-suq u li dawn it-tip ta' servizzi kienu qed joffru kompetizzjoni indiretta - izda tali konkluzjoni m'hi sorretta bl-ebda analizi u bl-ebda statistika - hija biss konkluzjoni in aria li l-Awtorità tonqos għal kollox milli tipsjega x'wassalha biex zzidha mal-konsiderazzjonijiet tagħha. Fil-fatt sa' llum l-Awtorità għadha m'ghamlet l-ebda studju serju dwar l-impatt ta' servizzi OTT fuq is-swieq, u għalhekk difficilment wiehed jifhem kif l-Awtorità qabdet u hadet id-decizjoni li fil-fatt hadet. Illi minn imkien mid-decizjoni appellata ma jidhru provi attendibbli jew statistika li turi tibdil materjali u effettiv tal-mod kif il-konsumaturi juzaw dawn it-tip ta' servizzi jew li addirittura dawn kienu sostitut effettiv għall-fixed jew mobile, jew saħansitra għall-utenti ta' business. Illi d-decizjoni appellata ma tindika bl-ebda mod jekk per eżempju l-konsumaturi humiex qed jikkunsidraw li jzidu telefonati tramite OTT jew servizzi cellulari u jekk dawn jitqiesux bhala alternattiva vijabbli għall-inqas għal uhud mis-servizzi fixed. Bl-istess mod, id-decizjoni appellata ma tindika bl-ebda mod jekk per eżempju kellu jkun hemm zieda fil-prezzijiet ta' servizzi fixed jekk il-konsumaturi kienux ser jaqilbu minn servizzi ta' fixed retail għall-OTT jew għal servizzi cellulari³¹.

Din is-sottomissjoni tas-socjetà Rikorrenti twassal lit-Tribunal biex fermament jemmen li jew l-istess socjetà Rikorrenti ma qratx id-Decizjoni b'mod akkurat jew inkella appozitament tressaq argumentazzjonijiet arbitrarji jew mhux addirittura qarrieqa basta li fl-aħhar mill-aħhar twaqqa', akkost ta' kollox, id-Decizjoni hawn appellata.

*Din l-osservazzjoni tat-Tribunal hija ibbazata fuq il-fatt li fid-Decizjoni l-Awtorità intimata effettivament u attwalment ikkunsidrat u kkonstatat is-segweni taht it-Taqsima “Other Local Market Developments”: *In carrying out this market analysis the MCA will also take into account other aspects of the fixed telephony sector. The MCA will investigate a number of structural aspects of the local retail fixed access markets and consider evidence of actual market performance to assess whether or**

³⁰ Para. 58 tan-Nota Responsiva ta' l-Awtorità intimata, fol. 672 tal-process.

³¹ Para. 52 tan-Nota ta' Sottomissjonijiet tas-socjetà Rikorrenti, fol. 636 tal-process.

not, over the timeframe of this review, these markets have characteristics which may be such as to justify the imposition of regulatory obligations. In doing so, the MCA will look at market factors, such as trends in voice traffic and external-indirect constraints. According to 2013 statistics the penetration rate for fixed telephony services in Malta is 97.7%. Furthermore, the 2013 survey results show that only 3% of all household respondents consider terminating their fixed line connection during the next 12 months presumably to use other means of communications such as mobile telephony. In this context, the MCA thus argues that fixed telephony services are still considered to be an important component of the Maltese household. Consequently, this should serve as an incentive for new entry and current market players to compete in order to rope in more subscribers and acquire more presence in a market that so far caters for 97% of all households and registered businesses in Malta. Having said this, the MCA also explains that traffic volumes with respect to the number of calls and originating minutes over the fixed telephony networks have fallen during recent years. For instance over the 5 year period between 2009 and 2013 the number of fixed telephony voice calls fell by 20% while the number of fixed telephony voice call minutes fell by 18% over the same period. The MCA explains that this development in the fixed telephony traffic volumes has been mainly the result of consumers using other channels of communication, namely mobile telephony and over-the-top (OTT) content such as Skype - Din l-osservazzjoni ta' l-Awtorità intimata hija debitament spjegata u sorretta bi grafika dwar "Fixed Telephony Voice Traffic Volumes"³² - With reference to mobile telephony, the MCA has already explained in the market definition exercise that mobile access is functionally different from retail fixed access; the most salient difference being the mobility factor. Similarly, mobile telephony is also different from fixed telephony in terms of pricing. The MCA has also explained with reference to statistical evidence that there had been no net substitution over the years between mobile access and fixed line access connections. The MCA thus argues that consumers in Malta still prefer to have a fixed line connection even though their mobile usage has increased significantly in recent years. Consequently, the MCA has concluded that fixed access and mobile access pertain to separate markets. Despite falling within separate markets, the significant increase in mobile usage over recent years is nonetheless posing an indirect competitive constraint on fixed telephony services. In terms of usage, fixed line access and mobile access provide users with a variety of 'secondary' services that continue to highlight the distinctive properties of the two. Fixed access, for example, facilitates services such as fax. Mobile access, on the other hand, facilitates data services by way of text messaging. Similarly, the use of mobile technology to access the internet is becoming increasingly popular. In any event, irrespective of the successful penetration or otherwise of these related services, consumers continue to subscribe to both fixed line access and mobile access for the core purpose of voice telephony. To this effect fixed line operators are not only competing directly between themselves for market share but are also indirectly competing with mobile telephony for voice traffic. Statistical evidence over the 5 year period between 2009 and 2013 shows that the number of mobile telephony voice calls increased by 92% while the number of mobile telephony voice call

³² Chart 6, pagna 41 tad-Decizzjoni, a tergo ta' fol. 37 tal-process.

minutes more than doubled over the same period. On the other hand, fixed telephony voice traffic volumes have fallen to the extent that the number of voice calls and voice call minutes originating from fixed telephony is today lower than the number of calls and minutes originating from mobile telephony - Dan kollu huwa illustrat bi grafika dwar “Traffic Volumes: Fixed versus Mobile”³³. In view of this, the MCA thus argues that even if there were no alternative fixed telephony operators, GO would still be indirectly constrained by mobile voice telephony services. In the absence of regulation it would be very unlikely, therefore, for GO or any other fixed telephony operator to increase the tariffs of fixed access and/or fixed calls beyond the competitive level. This is because if fixed access and/or fixed call tariffs were to significantly increase, the extent with which people are using their mobile phone to make voice calls will further intensify as the price differential between fixed and mobile telephony would continue to narrow. The MCA thus believes that mobile voice telephony services serve as an indirect constraint to the behaviour of fixed telephony operators in the absence of regulation. Similarly, the MCA argues that OTT services are also likely to be posing an indirect competitive constraint on the fixed telephony markets. In fact according to the 2013 survey 18% of households claim to use OTT services such as Skype and MSN to make local calls. Furthermore, the majority of respondents that make local calls over these services believe that they are a good substitute to fixed line telephony. In view of this, the MCA once again reaffirms that in order to consolidate voice traffic volumes, GO cannot act in an uncompetitive way in the absence of regulation without facing a drop in usage or subscriptions - Dan huwa illustrat bi grafika dwar “Fixed Telephone versus Over-The-Top Services”³⁴.

Minn dan l-estratt mid-Decizjoni jirrizulta evidenti li hawn l-Awtorità intimata qed tikkonsidra l-aspetti ta' *indirect competition* fis-suq rilevanti, principali fost dawn il-*mobile telephony* - dwar liema s-socjetà Rikorrenti ma tikkummenta xejn - u anke, b'**mod sekondarju** is-servizzi OTT, ma liema aspetti ta' *indirect competition* iridu jhabbtu wicchom u debitament jikkunsidraw l-impatt taghhom l-operaturi fis-suq rielvanti, ossia s-socjetà GO p.l.c. u s-socjetà Melita p.l.c. Ghalkemm is-socjetà Rikorrenti tikkritika lill-Awtorità intimata billi tikkontendi li l-konkluzzjoni minnha raggunta ma hijiex spjegata u ma hijiex debitament sorretta bi provi w analizi akkurata, mid-Decizjoni kjarament jirrizulta li dan ma huwiex minnu in kwantu l-Awtorità intimata tat spjegazzjoni cara tal-konstatazzjonijiet maghmula minnha u wasslet ghad-decizjoni finali taghha a bazi ta' rizultanzi fattwali minn surveys illi saru fil-kuntest ta' dan l-istudju partikolari u r-rizultat ta' liema surveys gie riprodott grafikament fl-istess Decizjoni.

A tenur tal-Linji Gwida tal-Kummissjoni Ewropeja: *in carrying out the market analysis under the terms of Article 16 of the framework Directive, NRAs will conduct a forward looking, structural evaluation of the relevant market, based on existing market conditions. NRAs should determine whether the market is prospectively competitive, and thus whether any lack of effective competition is durable, by taking into account expected or foreseeable market developments over the course of a reasonable period. The actual period used should reflect the specific*

³³ Chart 7 f'pagna 42 tad-Decizjoni, fol. 38 tal-process.

³⁴ Chart 8 f'pagna 43 tad-Decizjoni, a tergota' fol. 38 tal-process.

characteristics of the market and the expected timing for the next review of the relevant market by the NRA. NRAs should take past data into account in their analysis when such data are relevant to the developments in that market in the foreseeable future. ... Relevant markets defined for the purposes of sector-specific regulation will always be assessed on a forward looking basis, as the NRA will include in its assessment an appreciation of the future development of the market. However, NRAs' market analyses should not ignore, where relevant, past evidence when assessing the future prospects of the relevant market (see also Section 2, below). The starting point for carrying out a market analysis for the purpose of Article 15 of the framework Directive is not the existence of an agreement or concerted practice within the scope of Article 81 EC Treaty, nor a concentration within the scope of the Merger Regulation, nor an alleged abuse of dominance within the scope of Article 82 EC Treaty, but is based on an overall forward-looking assessment of the structure and the functioning of the market under examination. Although NRAs and competition authorities, when examining the same issues in the same circumstances and with the same objectives, should in principle reach the same conclusions, it cannot be excluded that, given the differences outlined above, and in particular the broader focus of the NRAs' assessment, markets defined for the purposes of competition law and markets defined for the purpose of sector-specific regulation may not always be identical. ... It is considered that markets which are not identified in the Recommendation will not warrant ex-ante sector specific regulation, except where the NRA is able to justify such regulation of an additional or different relevant market in accordance with the procedure in Article 7 of the framework Directive. ... The designation of an undertaking as having SMP in a market identified for the purpose of ex-ante regulation does not automatically imply that this undertaking is also dominant for the purpose of Article 82 EC Treaty or similar national provisions. Moreover, the SMP designation has no bearing on whether that undertaking has committed an abuse of a dominant position within the meaning of Article 82 of the EC Treaty or national competition laws. It merely implies that, from a structural perspective, and in the short to medium term, the operator has and will have, on the relevant market identified, sufficient market power to behave to an appreciable extent independently of competitors, customers, and ultimately consumers, and this, solely for purposes of Article 14 of the framework Directive.

Fil-fehma tat-Tribunal l-Awtorità intimata mxiet skond u a tenur ta' dawn il-Linji Gwida u hija effettivament ghamlet *a forward looking, structural evaluation of the relevant market, based on existing market conditions* proprio kif mitlub u mehtieg mill-istess Linji Gwida. Apparte minn hekk, hekk kif provdut fl-istess Linji Gwida l-Awtorità intimata ghamlet ukoll it-*three criteria test* ghall-fini li tiddetermina jekk *non-listed markets* [u dana billi s-suq rilevanti hawn trattat ma ghadux indikat fir-Rakkomandazzjoni mahruga mill-Kummissjoni Ewropeja bhala suq li jehtieb *ex ante intervention*] *still warrant ex ante regulatory intervention*, fejn it-Tribunal ukoll iqis li l-konstatazzjonijiet maghmula mill-Awtorità u l-konkluzzjonijiet raggunit minnha huma gusti u korretti.

It-tielet aggravju - Opinjoni ufficjali ta' l-MCCA

In fine s-socjetà Rikorrenti tikkontendi wkoll li d-Decizjoni hija zbaljata u skorretta ghar-raguni li l-Awtorità intimata naqset milli tikkunsidra, tiehu konjizzjoni u b'hekk tagixxi fuq it-thassib ta' l-Awtorità ta' Malta ghall-Kompetizzjoni u ghall-Affarijiet tal-Konsumatur (iktar 'l quddiem indikata bhala MCCA) hekk kif espress fl-ittra datata 18 ta' Novembru 2014³⁵.

Fl-imsemmija ittra l-MCCA, *inter alia*, ippremettiet *the OC to express some concern that GO has not been found to have significant market power. This particularly in the lower level access to the public telephone network at a fixed location, where GO has a market share of 69.5% as at Q4 2013. This market share meets the requirements of dominance or, in this case, significant market power. While the market share has not remained stable (since it has declined slightly due to Melita's entry), the decline of GO's market share has been slow. ... In this context the Report does not seem to deal with the question of whether another operator using a technology similar to that of GO and Melita can and would enter the market at present under the same conditions. The other market players in fixed telephony have a very insignificant market share (three entities collectively have 0.5% of the market). GO's only serious competitor is Melita. Even Melita's market share is less than half that of GO. GO's first-mover advantage, brought about by long-standing monopoly being the incumbent since its inception, is also relevant. Melita has had first mover advantage in fixed cable technology and retains this exclusive access to date. These respective positions have enabled both companies to penetrate the retail public fixed telephony markets with considerable ease compared to other competitors, such that the competitor's market shares have remained insignificant. The current infrastructure and Malta's geographic logistics entail that it is not technically feasible for a new operator with like technology to consider investing in a new infrastructure, even were it to be financially feasible. Paragraph 74 of the SMP Guidelines states that an NRA should thus take into account the likelihood that undertakings not currently active on the relevant product market may in the medium term decide to enter the market following a small but significant non-transitory price increase. Undertakings which, in case of such a price increase, are in a position to switch or extend their line of production/services and enter the market should be treated by NRAs as potential market participants even if they do not currently produce the relevant product or offer the relevant service". A new operator would not find it practical to enter the market and build its own like infrastructure. This is also somewhat alluded to in the Report. During the past 5 years GO's market shares have declined at very slow pace from 2009 to 2013 where GO has lost only 7.2% of the market. The market share of Melita during this time has increased at slow pace: it has gained only 7.4% of the market, not all of which is composed of subscribers who have switched from GO. This ought to raise concerns as to how far the market can be considered to be competitive: that there is some competition cannot be denied, but it is not clear as to whether the market shares will shift significantly in the near future. In particular the Report outlines that 70% of households are generally satisfied with their service and only 54% would switch in the event of a price increase. The MCA seems to regard the market as competitive,*

³⁵ A tergo ta' fol. 51 tal-process u fol. 52 tal-process.

but in fact the only real competition in the market is between Melita and GO due to the small size of any other competitor. To this end, it is unclear to what extent (healthy or otherwise) the MCA considers the market to be competitive. The existence of a single competitor may not necessarily amount to healthy competition. The OC has, in submitting the above observations, consulted the full text of the Report available on the MCA's website. These observations are being submitted in the context of the specific provisions of the SMP Guidelines in the particular sector of Electronic Communications. As the authority vested with ex post powers, the OC reserves the right to re-examine any or all of MCA's recommendations in the light of facts and evidence that may arise in future cases or matters referred to it and to reach different conclusions. The OC's position is being taken in accordance with the SMP Guidelines (para. 73) to the effect that a National Competition Authority may find different examples of dominance when examining ex post.

Is-socjetà Rikorrenti tikkontendi li ladarba l-Awtorità intimata, nonostante l-osservazzjonijiet ta' l-MCCAA, għaddiet għad-Decizjoni finali tagħha, sabet li s-socjetà GO p.l.c ma għandhiex Significant Market Power fis-swieq rilevanti u li per konsegwenza s-swieq in kwistjoni huma effettivament kompetittivi u b'hekk nehhiet l-obbligi in precedenza imposti fuq l-istess GO p.l.c., hija giet li effettivament naqset milli tadempixxi għall-obbligi imposti fuqha ai termini tar-Regolament 5 tal-Legislazzjoni Sussidjarja 399.28, fejn *l-istess Awtorità hi marbuta li tagħmel l-analizi tagħha in kollaborazzjoni ma' l-Awtorità nazzjonali kompetenti responsabbli għall-affarijiet tal-kompetizzjoni u fil-fatt tista' titlob il-parir ta' l-istess Awtorità. ... wiehed kien jistenna li dan l-ezercizzju ma jkunx semplicement gustifikazzjoni ta' decizjoni li mid-deher kienet digà mehuda, izda kien jistenna li l-Awtorità tagħmel analizi serja ta' kif is-suq kien ser jkun qed jahdem minghajr ir-regolamentazzjoni ex ante fil-futur*³⁶.

It-Tribunal ma jqisx li l-Awtorità intimata b'xi mod kisret l-obbligi imposti fuqha bil-Ligi. Ir-Regolament 5 tal-Legislazzjoni Sussidjarja 399.28, senjatament il-proviso tas-subregolament (1) jipprovdli li *meta l-Awtorità tqis li jkun adatt, hija għandha tagħmel dik l-analizi b'kollaborazzjoni ma' l-awtorità nazzjonali kompetenti responsabbli għal affarijiet ta' kompetizzjoni*. Imkien però ma jgħid li l-Awtorità intimata hija obbligata li ma tipprocedix bil-konkluzzjonijiet tagħha dwar regolamentazzjoni o meno *ex ante* tas-suq/swieq rilevanti jekk l-MCCAA *qua* l-Awtorità kompetenti għall-affarijiet ta' kompetizzjoni turi xi thassib dwar tali konkluzzjonijiet.

In kwantu rigwarda d-Decizjoni fiha nfisha t-Tribunal itenni li fil-fehma tiegħu din id-Decizjoni hija fic-cirkostanzi u mill-aspett ta' regolamentazzjoni **ex ante** wahda gusta u korretta. Jigi osservat ukoll li għalkemm l-Awtorità intimata pprocediet bid-Decizjoni hija ma eskcludietx għal kollox u assolutament ma injoratx it-thassib espress mill-MCCAA in kwantu fit-Taqsima 5.5 "Monitoring of Future Market Developments" l-Awtorità intimata għamlet is-segwentanti konsiderazzjonijiet u konstatazzjonijiet: *The MCA considers that, given the dynamic nature of the local*

³⁶ Para. 61 u 63 tan-Nota ta' Sottomissjonijiet tas-socjetà Rikorrenti, fol. 639 tal-process.

retail fixed access markets and the fact that all existing retail regulations are being withdrawn, it is important to keep a close watch on the progress and developments in these markets. To this end, the MCA intends to analyse market trends and developments on an ongoing basis, and remains committed to issue a new market analysis at any point in time in response to any deterioration in the competitive level of the market. The MCA will also keep the market under close observation in accordance with the reservations expressed by the OFC in its response to the consultation. In particular, in the unlikely event that competition in the retail fixed access market deteriorates, the MCA will pass on any evidence to the OFC for further investigation. Should this investigation show that ex post competition law cannot adequately address this market failure, the MCA would initiate a new analysis in order to re-establish ex ante regulatory controls as appropriate³⁷.

Fid-dawl ta' dan kollu osservat it-Tribunal iqis li l-aggravji fuq liema s-socjetà Rikorrenti tibbaza l-appell taghha mid-Decizjoni fil-mertu ma humiex gustifikati u b'hekk ma jisthoqqx li jigu milqugha.

Ghal dawn ir-ragunijiet it-Tribunal jaqta' u jiddeciedi billi jichad l-appell tas-socjetà Rikorrenti mid-decizjoni "Retail Access to the Public Telephone Network at a Fixed Location - Identification and Analysis of Markets, Determination of Market Power and Setting of Remedies" mahruga mill-Awtorità Intimata fit-8 ta' April 2015 u minflok jikkonferma l-istess imsemmija decizjoni.

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

A tenur ta' l-Artikolu 39(1) tal-Kap.418 tal-Ligijiet ta' Malta, it-Tribunal jordna li kopja ta' din is-sentenza tigi komunikata lill-partijiet kontendenti.

MAGISTRAT

DEPUTAT REGISTRATUR

³⁷ A tergo ta' fol. 50 tal-process.

