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**SG-Greffe (2011) D/22007**

Malta Communications Authority  
(MCA)

Valletta Waterfront — Pinto Wharf  
FRN 1913 Valletta  
Malta

For the attention of:  
Mr Philip Micallef  
Executive Chairman

Fax: +356 21 336 846

Dear Mr Micallef,

**Subject: Commission decision concerning Case MT/2011/1263: Modification of remedies in market 4 in Malta**

**Comments pursuant to Article 7(3) of Directive 2002/21/EC<sup>1</sup>**

## **I. PROCEDURE**

On 2 November 2012, the Commission registered a notification from the Malta Communications Authority (MCA), concerning the modification of remedies in market 4 in Malta.

The national consultation<sup>2</sup> ran from 15 April 2011 until 13 May 2011 and from 26 July 2011 until 13 September 2011.

On 11 November 2011, a request for information (RFI)<sup>3</sup> was sent to the MCA. A response was received on 16 November 2011. Further clarifications were provided on 18 November 2011.

Pursuant to Article 7(3) of the Framework Directive, the national regulatory authorities

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<sup>1</sup> Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, OJ L 108, 24.4.2002, p. 33, as amended by Directive 2009/140/EC (Better Regulation Directive), OJ L 337, 18.12.2009, p. 37, and Regulation (EC) No 544/2009, OJ L 167, 29.6.2009, p. 12 (Framework Directive).

<sup>2</sup> In accordance with Article 6 of the Framework Directive.

<sup>3</sup> In accordance with Article 5(2) of the Framework Directive.

(NRAs), the Body of European Regulators for Electronic Communications (BEREC) and the Commission may make comments on notified draft measures to the NRA concerned.

## **II. DESCRIPTION OF THE DRAFT MEASURES**

### **II.1. Background**

In 2006, the MCA notified<sup>4</sup> its first-round analysis of the market for wholesale network infrastructure access<sup>5</sup> (market 4). The relevant market was defined as wholesale unbundled access, including shared access to metallic local loops and sub-loops made available for the purpose of providing broadband and voice services. Fibre-based services were not included in the relevant market. The MCA imposed the full set of obligations on GO plc, including provision of a reference unbundling offer (RUO). The Commission made no comments.

In 2010, the MCA notified<sup>6</sup> further details of GO's RUO, which concerned, among other things, provision of information related to the main distribution frames (MDFs) and co-location facilities, service-level agreements, timelines and determination of charges not established *a priori*. The Commission made no comments.

### **II.2. The notified draft measures**

The proposed amendments to the RUO include migration rules regulating GO's planned transition to a Fibre-to-the-Cabinet (FTTC) network. The migration rules mainly concern information exchange, the sharing of cabinets, the introduction of temporary virtual access (TVA), rules on exchange decommissioning and principles regulating eligible costs.

#### **II.2.1. Management of information related to GO's network upgrade plans**

The MCA proposes to strike a balance between the interests of the operator with significant market power (SMP) and alternative network operators (ANOs) by adopting a model in which the level of detail disclosed depends on the level of commitment shown by ANOs. Therefore, GO's obligations will range from revealing a snapshot of the network's current status to providing ANOs with the most up-to-date information on specific exchanges.

#### **II.2.2. Migration rules and temporary virtual access**

The MCA proposes to maintain or impose the following obligations on GO in relation to cabinets which have been scheduled for an upgrade: (a) GO must offer the possibility to pre-reserve cabinet space<sup>7</sup> to ANOs which have signed a co-location or TVA agreement; (b) GO must continue complying with the obligations imposed in the last market review;

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<sup>4</sup> MT/2006/0549, SG-Greffe (2006) D/208615.

<sup>5</sup> Now corresponding to market 4 in Commission Recommendation 2007/879/EC of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services ('Recommendation on relevant markets'), OJ L 344, 28.12.2007, p. 65.

<sup>6</sup> MT/2010/1087, SG-Greffe (2010) D/9921.

<sup>7</sup> GO will price this access in accordance with best practice and on a non-discriminatory basis. Moreover, it will inform the MCA of the applicable pricing methodology.

and (c) GO must offer the possibility of a TVA alternative if the cabinet in question is to be upgraded within the next three years.<sup>8</sup>

The TVA is regarded as an interim solution intended to fill the gap and ease the transition from local loop unbundling (LLU) to sub-loop unbundling (SLU) in instances where the FTTC upgrade is underway. The TVA service must be accessible from the MDF site and will apply prior to the cabinet upgrade. Once the cabinet is upgraded, the ANOs are expected to perform their own migration to the sub-loop. The aim of TVA is to give the ANOs a temporary alternative to investing in full loop unbundling at the MDF level. The TVA offer will enable ANOs to serve their new customers during the period of cabinet upgrade for a maximum of nine months after the cutover date.<sup>9</sup> The MCA expects that after this period TVA will no longer be needed as by that time ANOs should have migrated to the street cabinet and therefore be in a position to start unbundling the sub-loop.

The MCA proposes to model TVA on the wholesale broadband access (WBA) service offered by GO on a voluntary basis. However, these services differ. Most importantly, the TVA offer is available only to LLU operators which have already signed an LLU agreement and will apply only in areas where a planned FTTC upgrade is underway. As for the speed capabilities, the ANOs should be able to compete at the same level with GO's retail arm. The MCA imposes no price control obligation. However, GO should comply with the non-discrimination and transparency principles when setting its prices. The quality of service is to be provided on a non-discriminatory basis and in line with the existing provisions of the RUO.

The MCA provided further clarifications on the technical and functional differences between TVA and WBA: (a) physical points of interconnection — the point of interconnection for TVA must be at each available exchange site, whereas WBA requires the ANOs to interconnect at a single point of presence; (b) logical level of interconnection — TVA will operate at the lowest level possible in the network hierarchy, whereas WBA allows interconnection even at IP level; (c) customer premises equipment (CPE) — with TVA, the ANOs will be permitted to use their own CPE following testing by GO, whereas the commercial WBA offer allows use of GO's modems only; (d) duration — the duration of TVA is finite, i.e. a maximum of nine months after the upgrade of the cabinet has been finalised, whereas use of WBA is left to the discretion of the access seeker; (e) covered areas — TVA applies only in those areas where GO has planned an upgrade, whereas WBA applies nationwide.

According to the MCA, TVA is therefore located on a higher rung of the investment ladder. In the light of the foregoing, the MCA considers TVA to be a market 4 'interim' remedy.

### II.2.3. Rules on exchange decommissioning<sup>10</sup>

If an exchange site is to be decommissioned, ANOs will, in principle, be given five

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<sup>8</sup> On the other hand, when cabinets are being considered for an upgrade only, GO is under no obligation to offer TVA, but can do so voluntarily.

<sup>9</sup> In the reply to the RFI, the MCA defined the 'cutover date' as the date on which the subscribers connected to a given cabinet area start being served by the DSLAM installed in the cabinet. GO is under the obligation to inform the ANOs about the cutover date at least three months in advance.

<sup>10</sup> The MCA understands 'decommissioning' as the total closure of an exchange site.

years' notice.<sup>11</sup> In the absence of a co-location agreement, the ANOs will receive six months' notice.<sup>12</sup>

#### II.2.4. Principles regulating eligible costs

GO will have to compensate ANOs' costs when (a) these costs could have been avoided if the ANO had known about a change in plans and (b) the services or assets for which the costs were incurred cannot be re-used.<sup>13</sup> The compensation will be based on the net book value of the expenditure.

### III. COMMENTS

On the basis of the notification and the additional information provided by the MCA, the Commission has the following comments:<sup>14</sup>

#### **Imposition of temporary virtual access and need for a market review**

The Commission welcomes the MCA's proposed migration rules which, in line with the NGA Recommendation,<sup>15</sup> put in place a transparent framework enabling ANOs to receive in good time all the necessary information on the SMP operator's network upgrades and exchange decommissioning, thus providing them with the means to adjust their own networks accordingly.

The Commission also welcomes, in principle, the imposition of TVA, an interim remedy which could ensure that the upgrade of GO's network does not lead to stranded investments by ANOs. The Commission is nevertheless concerned that such a remedy will be imposed, at least for a period of nine months, over an FTTC network, whereas the relevant product market 4, as defined in 2007, currently excludes fibre-based access products.

The Commission therefore invites the MCA to clarify in its final measure that imposing TVA is necessary, in order to render the overall regulation effective, and also to proceed with its full review of the wholesale infrastructure access market as soon as possible and carefully to justify the scope and duration of the TVA remedy once the relevant product market has been properly assessed.

In this respect, the Commission also invites the MCA, in the forthcoming review of market 4, to assess the need to impose TVA as a permanent virtual access product, should the remedies currently imposed, namely the SLU obligation, not

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<sup>11</sup> However, it may be possible to grant ANOs only one year's notice in cases where 25% of GO's customers served by the exchange have already been disconnected, but only if both parties agreed to TVA or if equivalent access is provided. In the latter case, GO must grant access to an alternative site offering the equivalent interconnection level or, if this would not be technically possible, offering access at the next most viable type of unbundling (e.g. from the MDF to the sub-loop). In such cases GO will compensate eligible migratory costs to ANOs.

<sup>12</sup> However, if interest is shown in the site or the parties are in the process of signing a co-location agreement, GO must immediately inform the ANO concerned about the decommissioning.

<sup>13</sup> These include, for example, tie cables, costs related to reconfiguration requirements for ANO's core equipment, backhaul at the exchange site, etc.

<sup>14</sup> In accordance with Article 7(3) of the Framework Directive.

<sup>15</sup> Commission Recommendation 2010/572/EU of 20 September 2010 on regulated access to Next Generation Access Networks (NGA), OJ L 251, 25.9.2010, p. 35.

prove sufficient to address the competition problems identified in the market.

The Commission also recalls that, in accordance with recital 30 and recommends 29 and 30 in the NGA Recommendation, whenever the SMP operator is rolling out FTTC, the NRA should impose an SLU remedy which is to be supplemented by appropriate backhaul (e.g. fibre and Ethernet backhaul) and ancillary remedies, in order to render the remedy effective. The Commission therefore invites the MCA to ensure that the SLU obligation, which will remain in place after the upgrade to FTTC has been carried out, is properly supplemented by adequate backhaul.

Pursuant to Article 7(7) of the Framework Directive, the MCA shall take the utmost account of comments of other NRAs, BEREC and the Commission and may adopt the resulting draft measures and, where it does so, shall communicate them to the Commission.

The Commission's position on this particular notification is without prejudice to any position it may take *vis-à-vis* other notified draft measures.

Pursuant to Point 15 of Recommendation 2008/850/EC<sup>16</sup> the Commission will publish this document on its website. The Commission does not consider the information contained herein to be confidential. You are invited to inform the Commission<sup>17</sup> within three working days following receipt whether you consider that, in accordance with EU and national rules on business confidentiality, this document contains confidential information which you wish to have deleted prior to such publication<sup>18</sup>. You should give reasons for any such request.

Yours sincerely,  
For the Commission,  
Robert Madelin  
Director-General

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<sup>16</sup> Commission Recommendation 2008/850/EC of 15 October 2008 on notifications, time limits and consultations provided for in Article 7 of Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, OJ L 301, 12.11.2008, p. 23.

<sup>17</sup> Your request should be sent either by email: [INFSO-COMP-ARTICLE7@ec.europa.eu](mailto:INFSO-COMP-ARTICLE7@ec.europa.eu) or by fax: +32 2 298 87 82.

<sup>18</sup> The Commission may inform the public of the result of its assessment before the end of this three-day period.