MALTA COMMUNICATIONS AUTHORITY

Please quote our ref. DIS 234 / MCA-LEG/mb/16-2604

1 July 2016

Ms. Amanda Nelson
Chief Executive Officer
Vodafone Malta Limited

Mr. Yiannos Mikaelides
Chief Executive Officer
GO Plc

Subject: Dispute by Vodafone Malta Limited versus GO plc about access to duct network controlled by GO

Background to the Dispute

1. Vodafone Malta Limited ('Vodafone'), as per a letter dated 25 February 2016 sent by Fenech & Fenech Advocates on its behalf, wrote to the Malta Communications Authority ('MCA') lodging a dispute against GO plc ('GO'). In this letter, received by the MCA on 1 March 2016, Vodafone asked the MCA to "formally intervene and investigate" in terms of article 43(1) of the Malta Communications Authority Act ('Cap. 418') "regarding access to certain infrastructure elements, specifically access to the duct network currently controlled by GO.".

2. In its submission lodging the dispute, Vodafone stated the basis for its case citing in support the obligations onerous on GO consequential to a regulatory decision issued by the MCA, and the legal provisions relating to the electronic communications sector, which according to Vodafone relate to the subject matter of the dispute. Vodafone in its conclusion requested the MCA to declare that GO is in breach of its obligations, asking the MCA to impose various measures notably requiring GO:

- to comply with the measures and obligations imposed by the MCA in its "Market 4 Decision"[1], and

[1] Vodafone is referring to the MCA's regulatory decision entitled "Market 4 – Wholesale Unbundled Infrastructure Access Market – Identification and Analysis of Markets, Determination of Market Power and Setting of Remedies – Final Decision", which decision was published on the 6 March 2013. For ease of reference this decision is being referred to in the same manner as referred to by Vodafone, namely "Market 4 Decision".

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- to negotiate in good faith and to grant Vodafone access to the duct network currently used by GO, and this at reasonable prices. In doing so, Vodafone stated that such access should be based "on the same conditions under which access has already been given to Melita and this in line with GO's non-discrimination obligations."[2]

3. Subsequent to the receipt of Vodafone's initial submissions whereby it lodged its dispute, the MCA as per its communication dated 1 March 2016, wrote to Fenech & Fenech Advocates (acting on behalf of Vodafone), raising two points in relation to the procedures to be followed in accordance with the MCA's Guidelines for Inter-Operator Complaints, Disputes & Own Initiative Investigations ('Guidelines'). The first point was that Vodafone must furnish the MCA with all the relevant documentation available to Vodafone in relation to the commercial negotiations between Vodafone and GO on the issue in dispute, this given that no such documentation was presented with the original submission lodging the dispute against GO. The second point was that Vodafone had failed to furnish a declaration by an officer of the said undertaking as required by MCA's Guidelines. The MCA, in doing so, explained to Vodafone that it could not initiate an investigation of the dispute before the above requirements were addressed by Vodafone and the required information duly provided to the MCA.

4. Vodafone subsequently as per its communication dated 9 March 2016 (which was received by the MCA on the 11 March 2016) provided the MCA with the correspondence between Vodafone and GO relating to the former's efforts to negotiate a duct sharing framework agreement with GO, and with a declaration signed by a Vodafone officer in line with the requirements of the MCA's Guidelines.

5. At this stage, after having examined Vodafone's submissions as complemented by the subsequent information provided by Vodafone at the request of the MCA, the MCA wrote to GO requesting its written response to the dispute raised. In doing so the MCA also copied GO with the documentation Vodafone had previously furnished.

6. GO replied and Vodafone were in turn provided with GO's reply. Given the points raised by both parties, a second round of submissions was deemed necessary, with Vodafone as the party raising the dispute making its (second) submissions and GO replying thereto.

Vodafone's claims in more detail

7. Vodafone argued that it had unsuccessfully been trying to negotiate a 'duct-sharing framework' with GO for 'over a year', stating that despite its 'insisted requests' to negotiate, GO continued to procrastinate hindering the progress of such negotiations and this (according to Vodafone) 'in breach of the obligations imposed on GO as the SMP in the Market 4 Decision'.[3] Vodafone in this regard referred to page 20 of MCA's Market 4 Decision, and to the definition of 'associated facilities'

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[2] See Vodafone's letter of dispute of the 25 February 2016.
[3] Ibid paragraphs 5) to 8) thereof.

under article 2 of the Electronic Communications (Regulation) Act ('Cap. 399'), arguing that in the light of this definition the ducts in question should be considered as falling under the definition of 'associated facilities'.

8. Vodafone in support of its claims referred to the following:

- Article 4(4) of Cap. 418 and the MCA's Market 4 Decision. The provision of article 4(4) relates to the duty of the MCA to carry out its functions in an impartial, transparent and timely manner.
- Subregulations 15(1) and (2) of Electronic Communications Networks and Services (General) Regulations ('SL 399.28') which relate to the faculty of the MCA to impose obligations on operators to meet reasonable requests for access. Vodafone within the context of the above argues that the construction of an alternative duct system by Vodafone is economically and technically "unfeasible and nonsensical". Vodafone further claims that GO never gave sufficient reason or proof that the request for duct-sharing is technically unfeasible such that it would affect GO's use of its duct network. Vodafone also argue that GO, as the successor of the former State owned Maltacom plc to "a certain degree", had use of public funds in laying out the duct network infrastructure.
- Article 12(1) of Cap. 399, whereby the MCA can consider imposing the sharing of facilities or property where an undertaking providing electronic communications networks has the right to install facilities over public or private property or may take advantage of a procedure for expropriation or use of property.
- Subregulations 13(1) and (2) of SL 399.28 which relates to the power of the Authority to impose obligations of non-discrimination in relation to interconnection and, or access.

GO's response

9. GO contend that its obligation to provide access to associated facilities under the Market 4 Decision is meant to be exclusively available when taken in association with the main regulated product. In support of this point, GO refer to the MCA's Market 4 Decision, observing that the Decision states that access to related facilities, including duct access, is intended 'for the purpose of backhaul for local loop unbundling and sub-loop unbundling'. To emphasise this point, GO note that the operative part of the Market 4 Decision emphasises the conditionality of access to ducts on first having obtained wholesale unbundled access to the copper local loop.[4]

10. In reply to the argument that GO has an agreement on sharing with Melita Limited ('Melita'), GO note that the agreement in question is unrelated to any *ex ante* obligations as provided for in the Market 4 Decision, and was actually made between TeleMalta Corporation ('TeleMalta') and Melita many years before the current regulatory norms were in place, and was 'imposed' on TeleMalta by its then shareholder.

[4] See GO's submissions of the 8 April 2016 first paragraph page 3 thereof.

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11. GO dispute Vodafone's argument that the MCA can impose access on the basis of article 12(1) of Cap.399. GO counter this argument by referring to Recital (43) of the Better Regulation Directive no. 2009/140/EC, noting that Recital (43) gives an important background to the provisions of Article 12 of the Framework Directive (on which in turn article 12(1) of Cap. 399 is based). GO specifically note that the aforesaid recital states that the national regulatory authority ('NRA') should be empowered to require holders of rights to install facilities only after an appropriate period of public consultation during which all interested parties are to be given the opportunity to state their views. GO remarks that Article 12 of the Directive relates to what it describes as the powers of an NRA "to draw up overall infrastructure sharing policies if and when warranted", hence (according to GO) the inclusion of the statement in Recital (43) that an appropriate period of public consultation should first be undertaken.[5] GO's argument in substance is that article 12 of Cap. 399 should therefore not apply in relation to the dispute in question, and if anything Vodafone should have sought redress under the remedies available under the Utilities and Services (Regulation of Certain Works) Act (Cap. 81 of the Laws of Malta).

12. With regard to the point by Vodafone that part of GO's duct network infrastructure was funded by the State during the time when Maltacom plc (and before Maltacom, TeleMalta Corporation) was still State owned in part or in full. GO dismiss this argument by pointing out that the State sold all of its shareholding and that GO is now completely owned by the private sector who bought the ownership of the company and its infrastructure from the State at market prices.

13. GO argue that it has "repeatedly" approached Vodafone to co-invest extensively in network elements both in the mobile and fixed fields, but that Vodafone did not take up this invitation. GO also emphasises that it has never refused to grant access to Vodafone to its duct network and is amenable to discussion on the matter.

Decision

Commercial negotiations

14. Vodafone at the request of the MCA furnished the various communications which according to Vodafone were relevant to the commercial negotiations between Vodafone and GO. The said communications were copied to GO who did not inform the MCA that it had any other relevant documentation to submit to the Authority. The Authority accordingly considers that the documentation furnished to it by Vodafone comprehensively reflects all the written communications between the two sides on the subject of Vodafone's request for access to GO's ducts network infrastructure.

[5] GO's submissions of 25 May 2016 at page 4 thereof.

15. From the documentation submitted it results that the first written communication was sent by Vodafone to GO as per an e-mail dated the 25 March 2015 asking for the commencement of discussions on duct sharing. A reminder by Vodafone was sent on the 16 April 2015. GO answered on the 20 April 2015 suggesting a meeting for the 30 April 2015. The date was subsequently brought forward by a couple of days at GO's request. A meeting between the two sides was then held on the 28 April 2015. From the minutes of that meeting furnished by Vodafone (the contents of which are not disputed by GO) it results that both sides had agreed to revert back on the matters discussed during the said meeting, in particular that GO had taken note of Vodafone's request and would be discussing it internally, whereas Vodafone had to discuss GO's request for the sharing of Vodafone's 4G Infrastructure.

16. On the 18 May 2015 and the 3 June 2015 respectively, Vodafone e-mailed two reminders to GO about the follow-ups to the 28 April 2015 meeting. On the 8 June 2015 Vodafone's CEO wrote to GO's CEO about a completely different matter and *en passant,* at the end of the communication referred to the meeting of the 28 April 2015 between the two sides, asking GO's CEO to look into matters "so as to avoid unnecessary delays and escalations". On the 21 December 2015 Vodafone's CEO specifically wrote to her GO counterpart asking for GO's position so that Vodafone could act accordingly, soliciting a 'timely response' from GO. GO's CEO replied on the 8 January 2016.

17. In its response of the 8 January 2016, GO listed what it described as 'events' that set matters back, notably that Vodafone was not interested in providing passive access to GO[6], whilst noting that in the interval the Government had in tandem with the MCA issued a public consultation in October 2015 consisting of a draft law to transpose the EU Directive 2014/61/EU on measures to reduce the cost of deploying high-speed electronic communications networks. GO argued that in the light of this development it made logical sense for both parties to continue their discussions once the national laws on the subject were in place, thereby enabling the parties to act within a context of legal certainty.[7] Vodafone did not furnish a reply to this response from GO, and instead chose to file the current dispute with the MCA.

18. It is relevant to note that GO during the meeting with Vodafone held on the 28 April 2015, specifically asked Vodafone what it had in mind for the use of GO's ducts network infrastructure. The reply was that Vodafone required generic access but that one of the main uses would be for fibre to radio sites.[8]

19. On the basis of the above the MCA considers that Vodafone did not actively pursue commercial negotiations with GO, and acted prematurely in lodging this dispute. It results that factually several

[6] See minutes of the meeting of the 28 April 2015 the 8th bullet point whereby Jason Pavia on behalf of Vodafone stated that Vodafone is not interested in sharing its 4G infrastructure.
[7] See GO's e-mail of the 8 January 2016.
[8] See minutes of meeting held on the 28 April 2015 presented as part of doc VF1 with Vodafone's letter dated 9 March 2016 addressed to the MCA.

months passed between when Vodafone initially met up with GO and when Vodafone again raised matters with GO. Indeed from the documentation presented, it results that for a period of almost seven months – namely from mid-June 2015 until mid-December 2015 - Vodafone did not, at least in writing, raise the subject again with GO. Then on the 21 December 2015 Vodafone's CEO wrote to her GO counterpart on the subject asking for GO's position, which position was communicated in early January2016. Vodafone at this stage rather than replying to GO, decided a couple of months down the line, to file the present dispute.

20. A reading of Vodafone's statement in its written exchanges with GO fails to explain clearly why Vodafone was not prepared to pursue further discussions with GO with regard to the sharing of its 4G infrastructure with a view to a bilateral agreement with access to the respective networks. Furthermore, Vodafone did not react to GO's suggestion as per GO's communication of the 8 January 2016, that the parties should consider continuing discussions once the new regulatory framework implementing the EU Directive 2014/61/EU is in place.[9]

21. Vodafone fail to explain why it was not prepared to consider a bilateral agreement for the provision of access as suggested by GO, and to state whether it agreed or not with GO's suggestion that discussions continue after the new legislative framework was in place. With regard to this latter point it is relevant to point out that Malta as a Member State was committed to having the new legislation implementing Directive 2014/61/EC in force as of the 1 July 2016, thereby superseding the previous framework by amending the applicable national legislation under Caps 81 and 399.[10]

<u>Public investment in GO's duct network infrastructure</u>

22. The Authority considers that Vodafone has no valid basis at law to request access to GO's duct network infrastructure on the basis of its argument that Maltacom (and more so TeleMalta) had previously benefitted from public investment in the construction of the duct network infrastructure now used by GO, this at a time when Maltacom (or Telemalta before it) were, in part or fully, owned by the State. Vodafone ignores the fact that GO is today owned in its entirety by private shareholders who purchased their shares based on market prices, which prices factored the assets that GO (and Maltacom and TeleMalta before it) had, including its duct network infrastructure. Based on these facts the MCA considers that there is no justification at law as to why Vodafone should insist that now it has "a right at law" to access GO's duct network infrastructure.[11]

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[9] Directive 2104/61/EC deals with access to all utility networks.

[10] As a matter of fact Act XVIII implementing the Directive was approved last April and Legal Notice 172 of 2016 was subsequently issued stating the relevant provisions come into force as of the 1 July 2016.

[11] See Vodafone's submission as per its letter dated 2 May 2016, the last paragraph of page 1 thereof.

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Duct sharing agreement with Melita

23. Vodafone in support of its dispute refers to an agreement on duct sharing made between Melita and Maltacom, arguing that GO should act in a similar fashion with Vodafone. GO in response argue that this agreement predates the present regulatory regime and was 'imposed' on Maltacom by its then majority shareholder, the State, presumably (according to GO's argument) in the general public interest but not necessarily that of Maltacom.

24. The MCA considers that the agreement in question was entered prior to the application of the current regulatory regime and that the circumstances relating to that agreement were fundamentally different from the current situation relating to the present dispute between GO and Vodafone. The MCA cannot discount the submission made by GO, that Maltacom entered into a duct sharing agreement with Melita (then Melita Cable plc) primarily because the State as the major shareholder of Maltacom, considered such an agreement to be in the general public interest rather than because it necessarily suited the commercial interests of Maltacom.

25. What is undeniable is that the present circumstances are radically different from those subsisting when the agreement between Maltacom and Melita was made, when then the interests of the major shareholder of Maltacom were not exclusively commercial, but were also conditioned by social and general public interest considerations, whereas today the interests of GO's shareholders are exclusively commercial. The MCA given the above, considers that Vodafone fails to explain on what legal grounds it is justified in arguing that because an agreement was entered into some years ago between Maltacom and a third undertaking, Vodafone is now as of right also entitled to a similar agreement providing it with access to GO's duct network infrastructure. The fact that Maltacom had years ago agreed to give access to Melita does not justify Vodafone in arguing that within the context of the laws now administered by the MCA, GO is now obliged to provide such access.

The application of article 12(1) of Cap.399

26. Vodafone argues that the MCA has under article 12(1) of Cap. 399 has the power to impose access on GO. It is pertinent to consider carefully what the law actually states:

> "**12.** (1) Where an undertaking providing electronic communications networks **has the right at law to install facilities on, over or under public or private property, or may take advantage of a procedure for the expropriation or use of property**, the Authority **shall, taking full account of the principle of proportionality, be able to impose the sharing of such facilities** or property, including buildings, entries to buildings, building wiring, masts, antennae, towers and other supporting constructions however so described, ducts, conduits, manholes and cabinets." (emphasis is of the Authority).

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The faculty of the Authority to impose sharing of facilities – which therefore may include also the sharing of ducts network - is in the first instance conditioned by the consideration that such a faculty relates only to those electronic communications network undertakings which at law have a right to install facilities on, over or under public or private property, or else which may take advantage of a procedure for the expropriation or use of property. The measures therefore stated in article 12(1) relate only to such undertakings as described in the said provision, and do not conversely apply to other undertakings.

27. To understand the correct application of this provision it is important that one considers carefully what the applicable parts of the EU legislation on which article 12(1) of Cap. 399 is based, actually state. Article 12 paragraph 1 of the EU Framework Directive 2002/21/EC (being the EU provision on which article 12(1) of Cap. 399 is modelled) states as follows:

"Article 12

Co-location and sharing of network elements and associated facilities for providers of electronic communications networks

1. Where **an undertaking providing electronic communications networks has the right under national legislation to install facilities on, over or under public or private property, or may take advantage of a procedure for the expropriation or use of property**, national regulatory authorities shall, taking full account of the principle of proportionality, be able to impose the sharing of such facilities or property, including buildings, entries to buildings, building wiring, masts, antennae, towers and other supporting constructions, ducts, conduits, manholes, cabinets.

2. Member States may require holders of the rights referred to in paragraph 1 **to share facilities or property (including physical co-location) or take measures to facilitate the coordination of public works in order to protect the environment, public health, public security or to meet town and country planning objectives and only after an appropriate period of public consultation, during which all interested parties shall be given an opportunity to express their views.** Such sharing or coordination arrangements may include rules for apportioning the costs of facility or property sharing.

Omissis"

Reference is also made to what the relevant recitals of this Directive (as amended in 2009) state:

"(22) It should be ensured that procedures exist for the granting of rights to install facilities that are timely, non-discriminatory and transparent, in order to guarantee the conditions for fair and effective competition. This Directive is without prejudice to national provisions governing the expropriation or use of property, the normal exercise of property rights, the normal use of the public domain, or to the principle of neutrality with regard to the rules in Member States governing the system of property ownership.

(23) Facility sharing **can be of benefit for town planning, public health or environmental reasons,** and should be encouraged by national regulatory authorities on the basis of voluntary agreements. **In cases where undertakings are deprived of access to viable alternatives, compulsory facility or property sharing may be appropriate**. It covers *inter alia*: physical co-location and duct, building, mast, antenna or antenna system sharing. Compulsory facility or property sharing **should be imposed on undertakings only after full public consultation**." (MCA's emphasis).

28. From a reading of the above, the following points result. The measures that can be taken in accordance with Article 12 of the Directive – as reflected in article 12 of Cap. 399 – do not relate to measures that can be taken in relation to a specific dispute that may arise between two undertakings. The wording of Article 12 paragraph 2 of the Framework Directive is clear on this point. What Members States are required to do, is to ensure that for benefit for town planning, public health or environmental reasons, undertakings may be required to provide co-location to their facilities, this after "full public consultation" during which all interested parties are to be given an opportunity to express their views. This therefore means that measures that may be taken in the context of article 12(1) of Cap. 399, relate to measures that may taken within a general regulatory context in line with the objectives stated in Article 12 paragraph 2 of the Framework Directive, and not conversely as some form of specific remedy aimed at providing redress to an aggrieved undertaking in the course of a specific dispute with another undertaking.

29. The MCA considers that the correct application of article 12(1) of Cap. 399, given also what is stated in the relevant provisions and recitals of the Framework Directive referred to above, is that the MCA may consider imposing access on undertakings not in the course of a specific dispute – as is the present case – but in the course of a general consideration of the situation in the market – hence the requirement in Recital (23) referred to above, namely that a full public consultation should be first undertaken before the imposition of access or otherwise is decided vis-a-vis the undertakings referred to in the aforesaid Article 12 paragraph 1 of the Framework Directive.

30. It is pertinent furthermore to note that Government, in tandem with the MCA and with the Authority for Transport in Malta ('Transport Malta' or 'TM'), last October undertook a wide-ranging consultation as part of the process to transpose Directive 2014/61/EC on measures to reduce the cost of deploying high speed electronic communications networks. In this context, amendments were proposed to the article 12 of Cap.399 as part of a comprehensive exercise to implement the requirements of the aforesaid Directive. Subsequent to the public consultation undertaken, amendments to Cap 81 and to Cap.399 were enacted. These amendments were approved and enacted as per Act XVIII of 2016, the provisions of which law come into force on the 1 July 2016.

31. The revised regulatory framework, as reflected in the amendments as per Act XVIII of 2016, amplifies on the previous regulatory regime by providing for access by electronic communications operators to all utility network infrastructures based on uniform norms applicable through the EU. For the sake of clarity the MCA notes in this regard that Cap.81 effectively even prior to the

enactment of the amendments as per Act XVIII of 2016, did factually provide for redress for an aggrieved party seeking access to the duct networks of an undertaking. Vodafone however chose not to avail itself of the remedies under Cap. 81.

Compliance of GO with the requirements under the Market 4 Decision

32. Vodafone argues that in terms of the Market 4 Decision, GO has the obligation to provide duct access to Vodafone. Section 5.5.1 of the Market 4 Decision entitled 'Access for copper products and services' states that:

> "In accordance with Article 15 of the ECNSR, GO shall:
>
> - continue to offer wholesale unbundled access to the local loop and sub loop (including shared access) and associated facilities, and accommodate reasonable requests for access to service variants;
> - give OAOs access to specified network elements and/or associated facilities, where such access is required for the purpose of the provision of wholesale unbundled access to the local loop or sub loop;
> - provide co-location or other forms of facility and site sharing, where applicable for the purpose of unbundled local loop and sub loop services;
> - provide access to backhaul services for the purpose of unbundling of the local loop and sub loop, including Ethernet services, dark fibre and duct access.
>
> GO is therefore required to negotiate in good faith with undertakings requesting any of these access services."

33. The MCA specifically refers to the fourth bullet point quoted above wherein it clearly stipulates that GO must provide access to backhaul services including Ethernet services, dark fibre and duct access **for the purpose of unbundling of the local loop and sub loop**. The MCA therefore underlines that the obligation on GO to provide duct access **is not a generic obligation**, but is a specific obligation targeted at supplementing the access remedy for the unbundling of the local loop and sub-loop.

34. This notion is further reinforced in Section 5.5.4 of the Market 4 Decision wherein it is stated:

> "In relation **to access to ducts and dark fibre specifically serving as backhaul to local loop and sub-loop unbundling**, GO is not required to publish in the RUO the detailed conditions for access to these services. The technical conditions and pricing related to duct access and

dark fibre are subject to commercial negotiations and the MCA may intervene on a case-by-case basis in the event of failed negotiations." [12] (emphasis is of the MCA).

35. For the avoidance of doubt, the MCA explains that the purpose of a market analysis decision is to define specific markets with a view to regulate any market failures pertaining to the market in question. The Market 4 Decision being invoked by Vodafone in support of its claims in this dispute specifically deals with the provision of unbundling services of the copper and fibre loops as clearly demarcated in Section 3.3 entitled 'Decision on the market definition'. It is therefore consequential that any obligations arising from the Decision pertain to the services falling within the scope of this market. As quoted above, the Market 4 Decision clearly indicated that the obligation incumbent on GO for the provision of duct access under that decision is for the purposes of facilitating the unbundling of the local loop and sub-loop and nothing else.

Other legal provisions cited by Vodafone in support of its case

36. For the sake of completeness and clarification the MCA refers also to the other provisions at law cited by Vodafone in support of its dispute with GO. Vodafone in its dispute also cited various provisions of SL 399.28 of the Laws of Malta, notably various provisions of regulations 13 and 15 which relate to the imposition of obligations by the MCA on any operator designated by the MCA as having significant market power ('SMP') in any one of the regulated markets following a market analysis carried out in accordance with the aforesaid legislation.[13] The application of the obligations as stated in regulations 13 and 15 therefore arises only in those instances where after the MCA undertakes a market analysis of a particular (regulated) market, it determines that an undertaking has SMP in that market and consequently imposes obligations.

37. This is precisely what happened in relation to the Market 4 Decision referred to by Vodafone. Hence the obligations therein stated only subsist once such a process is undertaken and where applicable, obligations imposed on the undertaking concerned. The provisions of the said regulations do not impose a generic requirement whereby an operator can request access to another operator's infrastructure if not in such circumstances, and then only after obligations have been imposed following a regulatory decision by the MCA in accordance with its powers under Part III of SL 399.28.

[12] Market 4 Decision, page 27 last paragraph thereof.
[13] Regulations 13 and 15 deal respectively with the obligations of non-discrimination and of access to and use of specific network facilities.

Conclusion

38. The Authority, therefore for the reasons stated in this decision with reference to the claims lodged by Vodafone in this dispute, considers that GO did not act in breach of the obligations onerous upon it as consequence of the Market 4 Decision or of any of the applicable provisions at law as enforced by the Authority relating to access to duct network infrastructure.

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