

# Local Loop Unbundling – Review of GO’s Reference Unbundling Offer

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Response to Consultation and Decision

June 2010

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## 1. INTRODUCTION

### 1.1 Background

In November 2009, the Malta Communications Authority (hereafter 'MCA') published a Consultation Document (hereafter 'CD') on GO's Reference Unbundling Offer (hereafter 'RUO') with the objective of reviewing this Offer to ensure that the obligations set forth in the Market Analysis on Wholesale Unbundled Access to the Local Loop published in May 2007 (hereafter 'Market Analysis') are met.

The Consultation period ended in January 2010 and the MCA received two responses from:

- GO plc (hereafter 'GO') and
- Vodafone Malta Limited (hereafter 'Vodafone').

The MCA takes the opportunity to thank the respondents for their feedback.

### 1.2 Structure of the Document

For ease of reference, the following is an overview of the structure of this Response to Consultation and Decision:

- Section 2** will address issues raised by respondents in relation to the MCA's adapted approach of the CD;
- Each of the **Sections 3 to 9** shall:
  - reinstate each of the proposed decisions dealt within the CD;
  - analyse any comments made by respondents in relation thereto;
  - disclose the MCA's views on those comments and
  - stipulate the MCA's final decision.
- Section 10** deals with the UALL Agreement, LLU Request Forms and the ANFP Document and the way forward in relation to these documents;
- Section 11** deals with the Customer Ordering Procedures mentioned in the CD;
- Section 12** lists the decisions being mandated in this Document;
- Section 13** lists the changes mandated to the various clauses within the RUO;
- Section 14** spells out the MCA's Way Forward;

- **Appendices Document:** this document is being attached to this Response to Consultation and Decision and includes the Original Draft UALL as submitted by GO, the UALL agreement as mandated by the MCA, the various LLU request forms as well as the various annexes within the RUO which were subject to amendments following the various decisions mandated by the Authority.

## **2. COMMENTS ON MCA'S APPROACH TO THE RUO REVIEW**

### **2.1 Focus of the Review**

In its CD, the MCA had stated that it plans to draw up other consultations with varying scope and terms of reference amongst which sub-loop unbundling.

#### **2.1.1 Responses**

Vodafone commented that whilst it notes the thorough review done by the MCA, it criticised the fact that sub-loop unbundling was not addressed concurrently with full loop unbundling and full loop shared access. The argument put forward by Vodafone is that in its view a viable broadband operation which is forward looking and seeks to remain competitive in the local context has to consider broadband speeds which can only be offered effectively through sub-loop unbundling in view that this allows the operative deployment of ADSL2+. Hence Vodafone argued that unless OAOs have access to sub-loop unbundling they will not be able to compete on a level playing field with GO in this area of electronic communications.

Access to ducts was also the subject of Vodafone's comments. Vodafone aired its view that the issue of access to GO's ducts is ancillary but vital to the issue of LLU, in that unless economically viable access to ducts for interested OAOs can also be ensured, then this could potentially hinder any interested OAO from seriously contending LLU, as a viable option for offering broadband services locally. For this reason, Vodafone urged the MCA to address this issue via consultation and analysis at the earliest.

#### **2.1.2 MCA's Views and Decision**

Whilst the MCA acknowledges Vodafone's comments in relation to sub-loop, the Authority stands by its position, as explained in the CD, to take a phased approach to the review of the RUO. Indeed this CD targeted the most crucial potential bottlenecks of the RUO's through a thorough review of the document's processes, SLAs as well as the terms and conditions. This will in turn permit subsequent reviews focusing on particular aspects of Unbundling particularly sub-loop unbundling. The MCA would also like to note that the relevance of sub-loop unbundling came to the fore following GO's network upgrades, which in turn took place at a time after the MCA has started reviewing the RUO.

This notwithstanding, the MCA is committed to address any issues relating to sub-loop unbundling shortly. One should also not underestimate the importance of a revised ANFP as well as the customer ordering procedures both being of paramount importance for the deployment of any of the services offered in the RUO. In fact in concurrence with the issue of the CD in November, the MCA also initiated discussions with GO aimed at a compilation of an updated ANFP document which naturally enables the proper deployment of sub-loop unbundling.

Insofar as Vodafone's comments on access to ducts, the MCA wishes to clarify that in implementing and enforcing remedies to SMP operators, the Authority is bound by the remedies mandated in the applicable Market Analysis. Currently the Market Analysis in force to date does not contemplate access to ducts as a remedy. This is however without prejudice to the remedies that the Authority would deem fit to impose in future market analysis. In the meantime, the MCA reminds OAOs that there are other legal remedies available such as the Utilities & Services Act (Chapter 81 of the Laws of Malta).

## 2.2 Approach: Use of Benchmarking

In proposing the various amendments to GO's RUO, reference was made to other International RUOs where a cross-comparison analysis was undertaken. Such an analysis was performed on five European countries namely, France, UK, Ireland, Luxembourg and Belgium.

### 2.2.1 Responses

GO expressed its scepticism on the approach adopted arguing that such an approach is flawed for a number of reasons amongst which:

- International comparison is made with an overly restricted sample of five EU Member States;
- None of the five EU Member states chosen are new EU Member States like Malta nor are any at the initial stages of their unbundling experience;
- Choice of sample dictated by the fact that consultants happen to have either been directly involved in the LLU process in some of these countries or are reasonably or well acquainted with the situation therein.

### 2.2.2 MCA's Views and Decision

The MCA fails to understand the criticism made by GO on this stance. In order to conclude the RUO review at the level of detail desired by the MCA, the Authority needed to acquire an in-depth knowledge of the corresponding offers found abroad as well as being supported by consultants having hands-on experience in the reviews of such documents. In the pursuit of such objectives, the Authority opted to focus on a sample size that does not compromise quality with quantity, as it was not after a simple benchmarking exercise. The MCA feels that this stance should have been seen positively by GO in particular the engagement of consultants whose hands-on experience could permit the design of tried-and-tested, and hence realistic, proposed changes to GO's RUO.

In addition with respect to GO's arguments on the sample not containing new EU member states, the MCA feels that considering that Malta's accession to the EU dates back to 2004, the use of the term 'new' is far from being fit and proper. Hence this argument lacks any logic even because the MCA's aim was to import the characteristics of the RUOs of more 'experienced' member states in order to make reference to best-practice in this area.



### 3. PROPOSED DECISION #1: 'GET-STARTED' PACK

The first proposed decision put forward in the CD dealt with addressing any *a priori* stumbling blocks in setting the ball rolling for any prospective OAO. The MCA in this regard had proposed the following:

1. The RUO is to be made available on GO's website and should be accessible to anyone without the need to get any prior authorisation. The MCA should be informed of the exact location (link) on the internet page where the RUO is published on the GO's website;
2. Upon formal communication made by an OAO making a formal request for unbundling under any of the forms stipulated within the RUO, the parties, within 1 week of the formal request by the OAO, have to sign the Non-Disclosure Agreement (NDA) as referred to in the RUO (Annex H);
3. UALL Agreement including UALL Collocation Facility Agreements and any forms mentioned in the RUO should be made available instantly upon the signing of the NDA.

#### 3.1 Responses

GO disagreed with the removal of password and argued that there is nothing in the Company's approach that lacks transparency as it invariably provides passwords to any identifiable person that requests it. GO also stated that the CD does not make the case that GO's password protected website is in any way in breach of transparency obligations and in this regard the proposed decision is both disproportionate and lacks reasoning as provided by law.

#### 3.2 MCA's Views and Decision

The issue at hand here is the interpretation of the transparency obligation that stems from the relevant Market Analysis. The MCA will be issuing a decision on the SMP operators' obligations on transparency and the use of passwords shortly.

**FINAL Decision #1:**

- 1. Upon formal communication<sup>1</sup> made by an OAO making a formal request for unbundling under any of the forms stipulated within the RUO, the parties have to sign the Non-Disclosure Agreement as referred to in the RUO (Annex H). The signing of said Agreement should be made within 1 week from when the OAO makes a formal request as stipulated above;**
- 2. UALL Agreement including UALL Collocation Facility agreements, the ANFP document as well as any forms mentioned in the RUO should be made available instantly upon the signing of the Non Disclosure Agreement (NDA) referred to in point 1 above.**

**The MCA is hereby also mandating the above timelines to be inserted in the RUO (see Section 13).**

The MCA would like to highlight the fact that the above decision also mandates that the ANFP document should be made available instantly upon the signing of the Non Disclosure Agreement. The ANFP document is the subject of Section 10.3 of this Document.

In accordance with the principles of non-discrimination and transparency, it is the MCA's understanding that the terms and conditions governing the provision of LLU services between GO and an OAO should reflect those established by the RUO in force at the time of signing the UALL Agreement.

This notwithstanding, any future changes in the RUO resulting from regulatory procedures or intervention would apply to all parties which have entered into the standard UALL Agreement from the date of coming into force of such changes. This should be carried out in accordance with the review clause mandated under Section 13, Amendment E of this Decision.

The MCA therefore believes that any departures in the UALL Agreement from the standard terms and conditions should be kept to a minimum.

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<sup>1</sup>The MCA, under Section 13, is mandating a new clause within the RUO so as to regulate what constitutes a request and/or formal communication between the parties.

## 4. PROPOSED DECISION #2: PROVISION OF INFORMATION

The second proposed decision, set forth in the CD, dealt with the provision of information that GO is to disclose to a prospective OAO upon signing of the non-disclosure agreement. This information is to be provided free of charge and shall include:

- Size of the exchange: number of inactive lines, number of active lines;
- Size A1-Map which broadly partitions Malta's territory according to the coverage areas of the MDFs;
- Types of collocation which are theoretically available on the site (co-mingling, dedicated collocation, virtual collocation, distant collocation);
- PSTN number ranges associated with exchange.

It was also proposed that, after the signature of a UALL agreement, information on theoretical eligibility and quality of broadband service over PSTN active line (preferably through a web portal) will be provided to the OAO free of charge. This proposed decision also stipulated the fact that GO shall ensure that the above information is kept-up-to-date and as accurate as reasonably possible and in any case shall be reviewed at intervals not exceeding 8 months and shall provide OAOs with reasonable notice of any significant changes to said information.

### 4.1 Responses

GO made reference to a meeting held with the Authority where amongst others, the issue relating to the provision of information to the OAO was discussed. GO made reference to the fact that during the meeting it had argued that in view of its geographical number portability service, providing information on PSTN number ranges associated with each exchange could lead to confusion. GO aired its concern about having to give confidential information to competitors in the retail market.

GO also noted that the list of information proposed by the MCA, if confirmed, would be joint longest when compared with the benchmark countries listed in page 15 of the CD.

On the other hand, Vodafone expressed concern of the possible room for misinterpretation in the term 'exchange' arguing that this could cover a particular area for analogue telephony however in the case of DSL, coverage is being supplemented by DSLAMs hosted in outdoor cabinets for ADSL2+ services already. Vodafone argued that

the map and associated data should clearly indicate service coverage of both traditional Exchanges as well as outdoor cabinets hosting external DSLAMs.

Vodafone also commented on the fact that GO should review the information on the theoretical line eligibility to broadband services at least once every 8 months contending that this timeframe is too long and could constitute a lack of transparency for the OAO which could in turn lead to the OAO having a competitive disadvantage compared to GO's retail arm. Vodafone therefore argued that the term 'reasonable notice' would be more justifiable if it were in the region of 3 rather than 8 months.

## 4.2 MCA's Views and Decision

Whilst the MCA acknowledges that the issue of geographical number portability was discussed, it was also agreed that this notwithstanding GO can still provide information on PSTN number ranges associated with each exchange.

In response to the issue raised by GO insofar as its competitors are concerned, the MCA would like to draw the attention to the relevant Market Analysis entitled '*Wholesale Unbundled Access to the Local Loop*' whereby GO was found as having an SMP in this market. This status brought about various obligations upon GO one of which is the obligation of non-discrimination. As amplified in said Market Analysis and in accordance with Regulation 19 of the ECNSR, GO is obliged to:

- a) Apply equivalent conditions in equivalent circumstances to other undertakings providing equivalent services, and
- b) Provide services and information to others under the same conditions and of the same quality as it provides to its own services, or those of its subsidiaries or partners.

Hence, this obligation of non-discrimination does not allow an undertaking with SMP status to discriminate between different undertakings operating in the electronic communications sector. This notwithstanding the MCA would also like to point out that when designing the proposed disclosure of information, the Authority took care to stagger the more sensitive information to later stages of interaction with prospective of OAOs such as for example following the signing of the UALL agreement.

GO also argued that the above list of information would be joint longest when compared with the benchmarked countries. The MCA would like to remind GO that some of the information requested, such as co-location options available at sites and information on the exchange sites are included as minimum list of requirements in the Fourth Schedule

to the Electronic Communications Networks and Services (General) Regulations, 2004 (Chapter 399.28 of the Laws of Malta).

Insofar as to the map of the exchange area, the MCA has proposed an A-1 Map that 'broadly' delineates the areas. So whereas the list as proposed by the MCA may appear the longest at face value, it is definitely not the most onerous particularly when one considers the country's geographical size.

Insofar as Vodafone's comments to the interpretation of the term 'exchange', the MCA acknowledges Vodafone's concern and confirms that this issue shall be addressed within the workstream addressing sub-loop unbundling.

As for Vodafone's comments to redefine reasonable notice as a 3-month period rather than 8 months, the MCA wishes to clarify that:

- The proposed decision stipulated that GO shall ensure that the above-mentioned information is to be kept-up-to-date and as accurate as reasonably possible and in any case shall be reviewed at intervals not exceeding 8 months. This timeline was primarily driven by the principle of non-discrimination and in effect reflects the refresh frequency offered to GO's retail arm;
- The proposed decision also stipulated that GO shall provide the OAOs with reasonable notice of any significant changes to said information. Reasonable notice in this context must be interpreted separately from the 8 months term. Basically, the context of this reasonable notice should be taken as referring to those instances where GO would have just refreshed the data and following such refreshed data, something happens that impacts significantly the information just forwarded to the OAO. In that case, GO is not to wait for a maximum of the expiration of the 8 months before it sends back refreshed data that reflects such changes.

At this stage, the MCA wishes to clarify that the 8 months were proposed as the maximum period allowed for revisions. Accordingly, for the avoidance of doubt the MCA mandates the following:

**FINAL Decision #2:**

**The MCA mandates that the following information should be available to OAOs, free of charge, upon the signature of a non-disclosure agreement:**

- **Size of the exchange: number of inactive lines, number of active lines;**
- **Size A1-Map which broadly partitions Malta's territory according to the coverage areas of the MDFs;**
- **Types of collocation which are theoretically available on the site (co-mingling, dedicated collocation, virtual collocation, distant collocation);**
- **PSTN number ranges associated with each exchange.**

**The above information shall be provided by means of a secure access over GO's website. Secure access to this information shall be given to the OAO within 3 working days of the signing of the NDA.**

**It is important to clarify that the theoretical availability of distant collocation falls outside the powers of GO due to its very nature. However, GO should in this case signal its amenability to accept access to its exchange for the purpose of interconnecting the equipment hosted by the OAO in the distant collocation to the relevant equipment on GO's side.**

**After the signature of a UALL agreement, information on theoretical eligibility and quality of broadband service over PSTN active line (preferably through a web portal) will be provided to the OAO. This should also be provided free of charge. GO shall ensure that the information provided is kept up-to-date and as accurate as reasonably possible consistent with the non-discrimination principle. In any case such information shall be reviewed at intervals not exceeding 8 months and GO shall provide OAOs with reasonable notice of any significant changes to said information.**

## 5. PROPOSED DECISIONS #3 & #4: COLLOCATION PROCESSES AND GENERIC MPF FACILITY SERVICE ORDER AND MPF MAINTENANCE PROCESSES

The third proposed decision set forth in the CD dealt with the desktop study within the Collocation Ordering process whereas the fourth proposed decision dealt with improving the process at Annex G1 as well as improvements to the MPF maintenance process.

### 5.1 Responses

No responses were received in relation to the above proposed decisions.

### 5.2 MCA's Views and Decision

Consequently, the MCA mandates the following decisions:

#### **FINAL Decision #3:**

**The MCA mandates the removal of the Desktop Study from the process in view of the fact that this is being replaced by the requirement to provide the necessary information upon the signing of the NDA.**

**In addition, the production of a bill of quantities with associated costs and forecast timescales should be carried out in the scope of a single study, comprising the former physical study and the former production of a bill of quantities with associated costs and forecast timescales.**

#### **Final Decision #4:**

**The MCA mandates:**

- **GO's process in Annex G1 should be restructured to separately capture the 3 possible Full Unbundling cases;**
- **an automatic acknowledgment should also be introduced in the fault clearance process;**
- **an SLA on acknowledgment in the MPF provision process should be introduced with the possibility of relevant KPIs introduced**

**following service take-up;**

- **GO's RUO should be modified to give the responsibility of the appointment with end-user to OAO;**
- **GO's RUO should introduce a threshold (to be set by OAO on a case by case basis) for the case where OAO's order requires relief project to be performed;**
- **GO's process in annex G1 should be streamlined so as to better correspond to annex J (SLA) and annex C2 (service description).**

The above decisions bring about changes to Annexes C2, D1, D2, D3, F, G1, G2 and G3. With the exception of Annex F, all the above-mentioned Annexes are being reproduced in the Appendices Document attached to this Decision. Insofar as Annex F, this is being impacted as follows:

- Service codes 5.1.1 and 5.1.2 stipulated in Annex F are made redundant;
- To ensure consistency and enhance clarity, the service descriptions under the following codes under 1.1 in Annex F should read as follows:
  - Service code 1.1.1: Case A: MPF Line Transfer;
  - Service code 1.1.2: Case B: New MPF with spare capacity between the DP and the MDF;
  - Service code 1.1.3: Case C: New MPF with no spare capacity between the DP and the MDF.



## 6. PROPOSED DECISION #5: SLA

In its CD, the MCA proposed a number of improvements targeted at the SLAs amongst which:

- The SLAs associated to MPF line transfer (for full unbundling service provisioning as well as shared access service provisioning) should remain unchanged but a threshold of 20 days should be introduced even in case of multiple problems (ex: pair gain + cable replacement);
- The SLAs associated to fault clearance process should be reduced to 3 working days for line fault and to 8 working days for a cable fault;
- The SLA associated to Physical survey should be reduced to 40 working days;
- The physical survey should include the provisioning of the bill of quantities;
- The SLA associated to the execution of the works should be lower or equal to 60 working days;
- The SLA associated to tie cables provisioning should be reduced to 40 working days;
- The SLA associated to internal tie cable fault rectification should cover the full length of the tie-cable provisioned.

### 6.1 Responses

GO contested the imposition of a reduction in the SLA for fault clearance to 3 working days for a line fault and 8 working days for a cable fault on the argument that this is not achievable at this time. It argued that in line with the principle of non-discrimination, GO cannot accept that it has to offer SLAs which are even better than the ones it offers its retail customers.

GO also expressed its disagreement to bring down the time associated with the tie cables provisioning in the SLA to 40 working days. GO also made reference to a meeting held with the Authority whereby the Company had offered the possibility for the OAO to procure the material and carry out the works itself.

On the other hand Vodafone commented that it had difficulties in calculating the lead times associated with the collocation provision process besides commenting that nowhere was specified whether the sites could be managed concurrently and not

sequentially. Vodafone also recommended that a different SLA be in place for residential and commercial LLU.

## 6.2 MCA's Views and Decision

With regards to the comments made by GO insofar as fault rectification, the MCA asked GO to furnish it with statistics on fault rectification. After analysing the additional data given by GO, the MCA feels that it would be more proportionate to amend its proposed decision as follows:

1. GO is to furnish the Authority with statistics on fault rectification clearly disaggregating between line faults and cable faults and also between faults relating to its customers and those of the OAO. Such data is to be submitted on a yearly basis within 2 months following the close of the calendar year.
2. MCA reserves the right to carry out tests and / or audits on the statistics given by GO;
3. MCA reserves the right to corroborate such data by requesting the OAO relevant statistics;
4. MCA reserves the right to introduce a compensation mechanism where it is found that there exists adverse diverging repair times for the OAO.

With reference to the lengthy lead times commented by Vodafone in respect of collocation provision process, the MCA would like to make the following clarifications:

Description of Works (refer to proposed Annex G2 within the Annexes Document attached to the CD)	Timelines
<b>Within 40 working days of when the OAO makes a request for collocation, GO is to carry out a detailed physical survey based upon the OAO requirements detailed in the LLU Request Forms and inform the OAO of the results</b>	40 working days
<b>OAO must validate the survey and enter into a formal collocation Agreement with GO</b>	Not stipulated
<b>The signing of this Formal Collocation Agreement would automatically trigger the timelines associated with tie-cable provisioning stipulated under Annex J</b>	40 working days
<b>Execution of the specified work to the timescales detailed in the physical survey</b>	60 working days
<b>GO will obtain formal acceptance of the executed works by the OAO and hand over the completed Collocation service</b>	Depends on the OAO

<b>Timeframe dependant from GO (excluding the signing of the collocation agreement)<sup>2</sup></b>	100 working days = 5 months
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In view of the above timeframes, the MCA feels it opportune to mandate also the timeframe within which the parties are to sign the formal collocation agreement. The MCA is of the view that within 10 working days from the elapse of the 40 working days (within which the detailed physical survey should be completed), this agreement should be signed.

With respect to GO's suggestion for the self-procurement of material and installation by the OAO, the MCA agrees in principle with this proposal and will limit itself to lay down the following minimum set of parameters that need to be observed. The MCA shall leave the technical details to be agreed upon in good faith between the parties but will nonetheless remain vigilant and ready to intervene should any of the parties need it to do so.

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<sup>2</sup> The 40 working days related to tie-cable provisioning run in parallel with the timelines for the execution of the works specified in the physical survey (i.e. the 60 working days). This explains the 100 working days rather than 140 working days.

### 6.2.1 Minimum set of Parameters for self-procurement of materials and installation by the OAO

Procurement of the relevant material i.e. the tie-cables and any cable trays required:

1. Upon making a formal request for co-location, the OAO shall inform GO of its intention to procure itself the material;
2. As part of the Physical survey, GO is to provide the OAO with the minimum specifications and quantity of all the relative materials required. Utmost consideration is to be given for the most cost efficient and viable route as per clause 2.2 at Annex D5<sup>3</sup>. The survey shall, amongst others, also indicate to the OAO, on a map, the route of the tie-cable.

Execution of the works:

1. GO is to publish a list of not less than four independent contractors that it acknowledges are competent to carry out the necessary works with due care and diligence; This list should be made available at Annex I within the RUO;
2. GO is to give access to the location where the works need to be carried out during GO's official office hours from Monday to Friday. The OAO, on the other hand, should notify GO of the date when the contractor shall do the works at least 3 working days in advance;
3. Following the execution of the works, both parties shall certify that works were carried out to their satisfaction.

The MCA reiterates that the above conditions are to be considered the minimum set and hence parties are free to negotiate further. Consequently, the MCA does not exclude the possibility that GO grants the option for the OAO to execute the works directly itself.

In the interests of the prospective OAO to expedite the process, the MCA, in establishing the above minimum parameters, is assuming that if the above option is exercised by the OAO, then the OAO shall take over both the procurement of material as well as execution of works relative to tie-cables.

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<sup>3</sup> In fact clauses 2.2 was proposed for amendment under Section 7 in the CD (amendment labelled L: Routing of Internal Tie Cable) where the MCA proposed to change the wording in a manner that puts the responsibility upon GO to take utmost consideration of efficiency when determining the route for the internal tie cable. This proposal is being mandated under Section 13, Amendment L.

In view of this possibility, the MCA shall waive the proposed decision to reduce the lead times to 40 working days for tie cable provisioning. In other words, the MCA in view of the above alternative being mandated, shall leave the lead times for tie cable provisioning as currently contemplated within Annex J of the RUO as reproduced in Appendix XVI within the Appendices Document attached to this Decision.

The MCA reserves the right to revisit the above decision on this particular issue in the event that the Authority feels that in practice such an arrangement is failing to yield the desirable results.

With reference to Vodafone's comments on whether the sites for collocation are to be managed concurrently and not sequentially, Annex G2 of the RUO requires the stages of the collocation provisioning to be time-stamped from when the OAO makes an order requesting a collocation in a particular site. Hence, GO is bound to entertain requests within stipulated timelines (as set forth in Annex G2 of the RUO) from when the OAO makes a formal request for Collocation.

This notwithstanding, it is expected that an OAO should exercise a degree of reasonableness when making multiple requests for collocation.

As for the comments made by Vodafone in relation to the need to distinguish the SLA for fault repair on the metallic path for business customers from that of other non-business customers, the MCA would like to highlight that currently there is no regulatory obligation for GO to do so. This notwithstanding, GO is free to offer better SLAs to prospective OAOs. The MCA does not exclude the possibility of evaluating this proposal when designing future remedies in future market analysis.

### 6.2.2 Decisions

In view of all of the above, the MCA mandates the following:

#### **FINAL Decision #5:**

##### **The MCA mandates that:**

- **the SLAs associated with MPF line transfer (full unbundling service provisioning) should remain unchanged but a threshold of 20 days should be introduced even in case of multiple problems (ex: pair gain + cable replacement);**
- **the SLAs associated to the shared access service provisioning process should remain unchanged but a threshold of 20 days should be introduced even in case of multiple problems (ex: pair gain + cable replacement);**
- **GO is to furnish the Authority with statistics on fault rectification clearly disaggregating between line faults and cable**

**faults and also between faults relating to its customers and those of the OAO. Such data is to be submitted on a yearly basis within 2 months following the close of the calendar year. The MCA reserves the right to carry out tests and / or audits on the statistics given by GO and further reserves the right to introduce a compensation mechanism where it is found that there exists adverse diverging repair times for the OAO;**

- **the SLA associated to physical survey should be reduced to 40 working days;**
- **the physical survey should include the provisioning of the bill of quantities;**
- **within 10 working days from the completion of the detailed physical survey, the parties are to sign the Formal Collocation Agreement;**
- **the SLA associated to the execution of the works should be lower or equal to 60 working days;**
- **The OAO can exercise the option to procure directly the material and execute the works relative to tie cable provisioning. The OAO can appoint any one of the contractors being accredited by GO at Annex I;**
- **GO is to publish a list of not less than 4 independent contractors that it acknowledges are competent to carry out the necessary works with due care and diligence; this list should be made available in Annex I of the RUO;**
- **the SLA associated to internal tie cable fault rectification should cover the full length of the tie-cable provisioned.**

Part of the decisions mandated above brought about further changes to Annex G2. This Annex is being reproduced at Appendix I within the Appendices Document attached to this decision. Red and strikethrough text represent all the changes affected by the Authority to this Annex. The above decisions also impact Annex J insofar as the timelines relating to tie-cable provisioning as well as fault rectification. The updated Annex J is being reproduced at Appendix XVI within the Appendices Document attached to this decision.

## 7. PROPOSED DECISION #6: TIMELINES FOR AFFECTING CHANGES

Apart from the proposed decisions (as spelt out under Sections 3 to 6 above), the MCA, in its CD, also proposed a number of changes to a number of clauses which in their majority are found in the Main Body and Annex B of GO's RUO. Such proposed changes were aimed at promoting the equitable share of rights and obligations between the parties. In this regards, the MCA had proposed that following the publication of the decision by the MCA, GO shall affect the changes as mandated therein within two weeks from its publication.

### 7.1 Responses

In its response, GO argued that the two week timeframe is too short and suggested that a period of five weeks is more reasonable.

### 7.2 MCA's Views and Decision

MCA accedes to GO's request to update the RUO within 5 weeks of the publication of this Decision. The MCA takes the opportunity to clarify that the changes mandated in this Decision shall apply to all unbundling agreements that may have concluded in the meantime in accordance with the review clause.

#### **FINAL Decision #6:**

**The MCA directs that the respective clauses in GO's RUO be revised forthwith as specified in Section 13 below. GO shall affect the changes as mandated in this Decision within five (5) weeks from its publication. These amendments shall be applied to all unbundling agreements which may have been concluded in accordance with the review clause.**

## 8. COMMENTS RECEIVED WITH RESPECT TO PROPOSED AMENDMENTS TO SPECIFIC CLAUSES

As already amplified under Section 7, the MCA proposed a number of changes to the terms and conditions of the RUO. In relation to a few of these proposed amendments, the MCA received feedback from respondents. With respect to these clauses, the MCA is hereunder reproducing the Original text found in the RUO, the proposed text as spelt out in Section 7 of the CD followed by the feedback received from respondents. The MCA is then disclosing its views and decisions in relation thereto.

### 8.1 Timelines for Access to Information

#### **D: ESTABLISHING TIMELINES FOR ACCESS TO INFORMATION**

##### **Current RUO:**

There are no timelines established.

##### **Main Body Clause 1.4:**

....

The dissemination of certain types of information by Maltacom shall be subject to the prior signing by the OLO of the Non-Disclosure Agreement at Annex H. Maltacom reserves the right to request payment for particular documents. Following the conclusion of the Non-Disclosure Agreement between Maltacom and the OLO, Maltacom may provide the requested information through secure access over a Maltacom website. Information about how to access the secure website will be given after the Non-Disclosure Agreement at Annex H has been signed and any necessary payments made.

##### **Proposed Text:**

GO is bound to entertain the following requests by the timelines stipulated hereunder:

1. Upon a formal request for unbundling made by the OAO under any of the methods stipulated within the RUO<sup>4</sup>, the parties will sign the Non-Disclosure

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<sup>4</sup> As per Communication Clause proposed



Agreement as referred to in Annex H. The signing of said Agreement will be made within 1 week from when the OAO makes a formal request as stipulated above;

2. UALL Agreements including UALL Collocation Facility agreements and any Forms in the RUO will be made available instantly upon the signing of the Non Disclosure Agreement (NDA) referred to in point 1 above.
3. GO shall provide the information contained in Annex I through secure access over GO's website. Timelines for the submission of said information is as stipulated in Annex I. GO reserves the right to request payment for information requested by the OAO which is not included in Annex I. GO shall not delay access to the information at Annex I by reason of non-payment for other information.

Failure from the part of GO to adhere with the above stipulated timelines would constitute a breach of its obligations to provide access; provided that if GO deems that any request for confidential information is not a genuine request, GO may request the Authority's intervention prior to allowing access to such information. The Authority's decision following such intervention shall be final and binding, subject to the possibility of appeal.

In order for an interested party to make a formal request for unbundling, the party must be in possession of the applicable authorisations in line with the local regulatory framework to operate as a provider of electronic communications services.

### 8.1.1 Responses

GO argued that the phrase *'Failure from the part of GO to adhere with the above stipulated timelines would constitute a breach of its obligations to provide access'* is both superfluous and ill placed in the RUO on the argument that it is self evident that breach of any part of the RUO constitutes breach of regulatory obligations. GO also argued that it is ill placed because the RUO is a reference contract for agreement between two commercial parties and not a statement or information document on MCA regulations.

### 8.1.2 MCA's Views and Decision

The phrase commented by GO as explained above was inserted into the clause which governs the timelines for access of information in order to clarify the implications that non-compliance with said clause gives rise to. This phrase therefore has the intention of ensuring that a delay will be treated in the same manner as an outright refusal.

In view of the above, the MCA is mandating the proposed text spelt in the CD. For the avoidance of doubt, the MCA is hereunder reproducing both the text found in the current RUO as well as the mandated text.

#### **D: ESTABLISHING TIMELINES FOR ACCESS TO INFORMATION**

##### **Current RUO:**

There are no timelines established.

##### **Main Body Clause 1.4:**

....

The dissemination of certain types of information by Maltacom shall be subject to the prior signing by the OLO of the Non-Disclosure Agreement at Annex H. Maltacom reserves the right to request payment for particular documents. Following the conclusion of the Non-Disclosure Agreement between Maltacom and the OLO, Maltacom may provide the requested information through secure access over a Maltacom website. Information about how to access the secure website will be given after the Non-Disclosure Agreement at Annex H has been signed and any necessary payments made.

##### **Mandated Text:**

**GO is bound to entertain the following requests by the timelines stipulated**

**hereunder:**

- 1. Upon a formal request for unbundling made by the OAO under any of the methods stipulated within the RUO<sup>5</sup>, the parties will sign the Non-Disclosure Agreement as referred to in Annex H. The signing of said Agreement will be made within 1 week from when the OAO makes a formal request as stipulated above;**
- 2. UALL Agreements including UALL Collocation Facility agreements and any Forms in the RUO will be made available instantly upon the signing of the Non Disclosure Agreement (NDA) referred to in point 1 above.**
- 3. GO shall provide the information contained in Annex I through secure access over GO's website. Timelines for the submission of said information is as stipulated in Annex I. GO reserves the right to request payment for information requested by the OAO which is not included in Annex I. GO shall not delay access to the information at Annex I by reason of non-payment for other information.**

**Failure from the part of GO to adhere with the above stipulated timelines would constitute a breach of its obligations to provide access; provided that if GO deems that any request for confidential information is not a genuine request, GO may request the Authority's intervention prior to allowing access to such information. The Authority's decision following such intervention shall be final and binding, subject to the possibility of appeal.**

**In order for an interested party to make a formal request for unbundling, the party must be in possession of the applicable authorisations in line with the local regulatory framework to operate as a provider of electronic communications services.**

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<sup>5</sup> As per Communication Clause mandated under Section 13, Amendment C.

## 8.2 Quality of Service Guarantee

### **F: QUALITY OF SERVICE GUARANTEE**

#### **Current RUO:**

##### **Main Body Clause 1.2**

... Maltacom will not be responsible for the quality and content of the communications transmitted through the Network and other facilities to which UALL would have been granted.

#### **Proposed text:**

GO will not be responsible for the content of the communications transmitted through the Network and other facilities to which UALL would have been granted.

GO shall at all times offer to the OAO the same quality of service offered internally in accordance with the non-discrimination obligations arising under Regulation 19(2)(b) of the Electronic Communications Networks and Services (General) Regulations of 2004 and as mandated in the Market Analysis on Wholesale Unbundled Access to the Local Loop published in May 2007.

### 8.2.1 Responses

Vodafone commented on the above proposed term 'internally' which it feels should be modified to 'its customers' to provide a clearer indication of GO having to offer the same quality of service to the OAO as it does to its own customers.

### 8.2.2 MCA's Views and Decision

A similar clause was introduced by GO in its draft UALL Agreement. The MCA wishes to draw attention to Section 10.1.2.2 of this Decision for the MCA's way forward on this particular clause.

## 8.3 Charges not established a priori

### **G: CHARGES NOT ESTABLISHED A PRIORI**

#### **Current RUO:**

##### **Annex B Clause 6.1:**

In regard to all other Services for which no charge is specifically indicated in the RUO Price List, such Services shall, unless the contrary is otherwise expressly stated, be subject to bespoke charges. Such bespoke charges will be provided by Maltacom to the OLO on an ad hoc basis.

#### **Proposed Text:**

Services for which no charge is specifically indicated either in the RUO Price list or made reference to in the Annexes may be subject to bespoke charges unless the contrary is otherwise expressly stated. Such bespoke charges will be provided by GO to the OAO within 15 working days of the OAO's request for such information. It is understood that any such request for the bespoke charges shall not be interpreted as binding the OAO to request the relative service to which such bespoke charges relate.

The charges should include only efficiently incurred costs which are consistent with the principles of cost causality, transparency and non-discrimination. Should no agreement be reached between the parties within 15 working days from receipt by the OAO of the bespoke charge in question, a dispute is deemed to have arisen and the Dispute Resolution procedure described in Clause 5 shall be followed.

### 8.3.1 Responses

GO also commented on the fact that in Page 50 of the CD (text referred to is being reproduced above), the MCA proposed that in case of bespoke charges, GO has to provide such charges within 15 working days of the request made by the OAO. GO argued that it will not be possible to keep to the proposed deadline and by way of example GO put forward the case where it is requested to provide charges tied to a specific request such as for dedicated co-location space of specific dimensions at a specific site.

GO continued to argue that the text in same page provides for the automatic existence of a dispute if the negotiating parties do not reach agreement within a short period of time. GO argued that it has been unable to find reference in the law that provides for such automatic disputes, whilst showing concern that the proposed text seems to be at odds not only with the law but is also inconsistent with the proposed wording on disputes in page 49 of the CD (clause 18.8) and particularly in page 57 of the CD (Clause 20.3).

### 8.3.2 MCA's Views and Decision

From GO's feedback submitted and the example raised to contest the fact that 15 working days are not achievable, the MCA believes that the proposed changes as spelt out in the CD need to be explained further in this document.

In fact, the example raised by GO does not fall within the ambit of this clause as the bespoke charges relating thereto are dealt with specifically in Annex G2. Under Step 2 of Annex G2, the MCA proposed that a bill of the estimated costs and forecasted timescales for the collocation service provisioning should be provided to the OAO as part of the Physical Survey Results. For the Physical survey, the MCA proposed a timeframe of 40 working days which should cover the works relating to confirming the type of collocation availability<sup>6</sup>, the quantities of the various material required as well as the charges which are composed of standard charges as stipulated in Annex F and bespoke charges in cases where these are not specifically stated in Annex F.

The above notwithstanding, the MCA is amenable to allow the possibility to revise the 15 working days to 20 working days within which GO is to provide the OAO with the bespoke charges.

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<sup>6</sup> It is important to note that GO would already have an idea of the type of collocation availability through its list given to the OAO upon signing of the NDA.

In response to the other arguments forwarded by GO, the MCA has affected further changes to the bespoke charges clause as well as the Review Clause (at sub-clause 18.8). Hereunder, the MCA is reproducing both the text found in the current RUO as well as the mandated text in respect of the bespoke charges clause and the Review Clause.

#### **G: CHARGES NOT ESTABLISHED A PRIORI**

##### **Current RUO:**

##### **Annex B Clause 6.1:**

In regard to all other Services for which no charge is specifically indicated in the RUO Price List, such Services shall, unless the contrary is otherwise expressly stated, be subject to bespoke charges. Such bespoke charges will be provided by Maltacom to the OLO on an ad hoc basis.

##### **Mandated Change:**

**Services for which no charge is specifically indicated either in the RUO Price list or made reference to in the Annexes may be subject to bespoke charges unless the contrary is otherwise expressly stated. Except for when the timeframe of the bespoke charge is determined in a particular Annex, bespoke charges will be provided by GO to the OAO within 20 working days of the OAO's request for such information. It is understood that any such request for the bespoke charges shall not be interpreted as binding the OAO to request the relative service to which such bespoke charges relate.**

**The charges should include only efficiently incurred costs which are consistent with the principles of cost causality, transparency and non-discrimination. Should the OAO not be in agreement with the charges provided by GO in accordance with this Clause the OAO may resort to the Dispute Resolution procedure described in Clause 20.**

## **E: AMENDMENTS**

### **Current RUO:**

#### **Terms and Conditions Annex B Clause 18: Amendments**

Maltacom reserves the right to amend any document making up this RUO as well as any UALL Agreements entered into with the OLO at any time in its sole discretion, subject to regulatory obligations under applicable legislation.

#### **Main Body: Clause 1.2**

The prices, terms and conditions of the RUO are subject to change either by Maltacom in its sole discretion or as requested by the MCA, in accordance with applicable EU and Maltese legislation. Any changes will be published accordingly.

### **Mandated Text:**

**To remove text spelt above under Clause 1.2 and**

**Annex B Clause 18: To be renamed and amended as follows:**

#### **18. Amendments to RUO and Review of UALL Agreements**

**18.1 The Authority reserves the right to affect any amendments it deems fit to any of the terms and conditions stipulated in the RUO in accordance with its powers under Regulation 18(2) of the Electronic Communications Network and Services (General) Regulations (Chapter 399.28 of the Laws of Malta).**

**18.2. Any party to an existing UALL agreement shall be entitled, upon request to the other party in accordance with clause 18.3, to obtain the terms and conditions included in the most recent version of the RUO published from time to time.**

**18.3. A Party may seek to amend this Agreement by serving on the other a review notice if:**

- 18.3.1. either Party's General Authorisation is materially modified ; or**
- 18.3.2. a material change occurs in the law or regulations governing electronic communications in Malta or the EU; or**
- 18.3.3. This Agreement makes express provision for a review or the Parties may agree in writing that there shall be a review; or**
- 18.3.4. A material change occurs, which affects or reasonably could be expected to affect the commercial or technical basis of this Agreement; or**
- 18.3.5 There is a review of the RUO by the Authority;**
- 18.3.6. There is a material change to the terms and conditions of any UALL and/or Collocation Agreement.**



**18.4. A review notice shall set out in reasonable detail the issues to be discussed between the Parties.**

**18.5. Save for the provisions of the UALL and/or Collocation Agreement, a Party may initiate a general review of this Agreement at least once during the twelve month period beginning from the Commencement Date of this Agreement and subsequent anniversary. However, provided a Party complies with Clause 18.4, a review may be initiated as deemed appropriate by either Party serving a review notice.**

**18.6. On service of a review notice, the Parties shall forthwith negotiate in good faith the matters to be resolved with a view to agreeing the relevant amendments to this Agreement.**

**18.7. For the avoidance of doubt, the Parties agree that notwithstanding service of a review notice this Agreement shall remain in full force and effect.**

**18.8. If the Parties fail to reach agreement on the subject matter of a review notice within 1 calendar month (the relevant period) in each case from the date of service of such review notice, either Party may escalate the dispute for determination by the Authority in accordance with the MCA Guidelines for Inter-Operator Complaints Disputes & Own Initiative Investigations. The Authority shall endeavour to determine:**

**18.8.1. the matters upon which the Parties have failed to agree;**

**18.8.2. whether this Agreement should be modified to take account of such matters; and, if so**

**18.8.3. the amendment or amendments to be made.**

**The Parties shall enter into an agreement to modify or replace this Agreement in accordance with what is agreed between the Parties to conform to the determination of the MCA.**

**18.9. Any amendments and supplements to this Agreement, including its Annexes, Appendices and Service Schedules shall in order for them to be valid, have been drawn up in writing, dated and signed by both Parties. Such amendment and supplements shall not affect the validity or enforceability of any of the remaining provisions of this Agreement.**

## 8.4 Breach, Suspension and Termination & Dispute Resolution

The Breach, Suspension and Termination Clause and the Dispute Resolution clause are being tackled concurrently in view of the nature of comments received in relation thereto.

### **I: BREACH, SUSPENSION AND TERMINATION**

#### **Current RUO:**

#### **Annex B Clause 11:**

11.1 If the OLO's Network or equipment adversely affects the normal operation of Maltacom's Network or equipment, or is a threat to any person's safety, Maltacom may suspend, to the extent necessary, such of its obligations under the UALL Agreements, and for such period as it may consider reasonable to ensure the normal operation of its Network or equipment or to reduce the threat to safety.

11.2 If the OLO shall be in breach of a material obligation under the UALL Agreements, Maltacom shall have the option to terminate the UALL Agreements forthwith, and this without the need of any authorisation or confirmation by any court or authority.

11.3 The UALL Agreements may also be terminated by Maltacom by written notice forthwith if the OLO:

- (a) is unable to pay its debts; or
- (b) ceases to carry on business; or
- (c) has a liquidator or an administrator appointed; or
- (d) has an order made or a resolution passed for its winding up.

11.4 The UALL Agreements shall also terminate:

11.4.1 in the event that the OLO ceases to hold a licence or equivalent to provide telecommunications services and systems granted to it pursuant to applicable legislation; or

11.4.2 in the case of Shared Access Service, if the User cancels his voice telephony subscription with Maltacom; or

11.4.3 in the case of Shared Access Service, if the User fails, within the stipulated period, to settle any outstanding debts that such User may have with

Maltacom. In any such circumstances, Maltacom shall resume provision of the Shared Access Service, upon a request made to it by the OLO, following payment by the User of all the said outstanding debts. All costs incurred in such disconnection and reconnection shall be fully borne by the OLO; or

11.4.4 in any other manner contemplated by the termination provisions of the UALL Agreements.

11.5 Upon termination or expiry of the UALL Agreements, the Parties shall cooperate with each other to ensure that such steps are taken as are necessary for recovery by each Party of any equipment or apparatus supplied by the other Party (even where that equipment or apparatus is on the premises of the other Party).

11.6 On termination or expiry of the UALL Agreements either Party shall be entitled after reasonable prior notice in writing to the other Party to enter the premises of the other Party for the purposes of carrying out necessary disconnection works and repossessing any plant, equipment or apparatus of that Party or a Third Party installed by or for that Party. The Party on whose premises such plant equipment or apparatus was installed shall be responsible for compensating the other for any such plant equipment apparatus or things belonging to the other or such Third Party which are not so delivered in good condition (fair wear and tear excepted) and the Party carrying out such disconnection works shall indemnify the other Party in respect of any damage thereby caused to the premises fixtures and fittings, apparatus and equipment of such other Party. Neither Party shall be responsible for any damage to plant, equipment or apparatus belonging to the other Party which has been caused by any negligence or failure to perform necessary or timely maintenance by such other Party or by a Third Party.

11.7 Termination or expiry of the UALL Agreements shall not be deemed a waiver of a breach of any term or condition of the said UALL Agreements and shall be without prejudice to either Party's rights, liabilities or obligations that would have accrued prior to such termination or expiry.

11.8 Notwithstanding the termination or expiry of the UALL Agreements, the preceding sub-clause and Clauses 12, 13 and 15 shall continue in full force and effect.

11.9 Maltacom's right to terminate or suspend performance of the UALL Agreements pursuant to this Clause is without prejudice to any other rights or remedies available to either Party at law.

**Proposed Text:**

11.1 If one Party's Network adversely affects the normal operation of the other Party's Network, or is a threat to any person's safety, the other Party may suspend, to the extent necessary, such of its obligations hereunder, and for such period as it may consider reasonable to ensure the normal operation of its Network, or to reduce the threat to safety, provided that the Party being suspended shall have right of recourse to the Authority if it feels that such suspension was unjustified in the circumstances.

11.2 If either Party is in breach of a material obligation under UALL Agreement and such breach is capable of remedy, the other Party ("the Terminating Party") shall send the Party in breach a written notice giving full details of the breach and requiring the Party in breach to remedy the breach within thirty (30) days starting on the day after receipt of such written notice or in the case of an urgent need to remedy the breach so as to safeguard end-to-end connectivity, within such shorter period as the Party not in breach may reasonably specify.

If the Party in breach does not remedy the breach within the time period stipulated in the said notice, the UALL may be suspended at the option of the Party not in breach provided that the Party being suspended shall have right of recourse to the Authority if it feels that such suspension was unjustified in the circumstances.

If the Party in breach does not remedy the breach within three (3) months from the date of receipt of the written notice, UALL may be terminated at the option of the Party not in breach. In this case termination shall occur immediately upon written notification by the Terminating Party to the Party in breach.

Provided that each of the Parties' right to terminate or suspend performance of the UALL pursuant to the above is without prejudice to any other rights available to the Parties, in particular the referral of the matter to the Authority for determination in accordance with the MCA Guidelines for Inter-Operator Complaints, Disputes and Own Initiative Investigations.

11.3 This UALL Agreement may be terminated by either Party by written notice forthwith (or on the termination of such other period as such notice may specify) if the other Party:

- (a) is unable to pay its debts; or
- (b) ceases to carry on business; or
- (c) has a liquidator or an administrator appointed; or
- (d) has an order made or a resolution passed for its winding up (other than for the purpose of amalgamation or reconstruction); or
- (e) ceases to hold an authorisation in accordance with the ECRA.

11.4 Upon termination or expiry of the UALL Agreements, the Parties shall cooperate with each other to ensure that such steps are taken as are necessary for recovery by each Party of any equipment or apparatus supplied by the other Party (even where that equipment or apparatus is on the premises of the other Party).

11.5 On termination or expiry of the UALL Agreements either Party shall be entitled after reasonable prior notice in writing to the other Party to enter the premises of the other Party for the purposes of carrying out necessary disconnection works and repossessing any plant, equipment or apparatus of that Party or a Third Party installed by or for that Party. The Party on whose premises such plant equipment or apparatus was installed shall be responsible for compensating the other for any such plant equipment apparatus or things belonging to the other or such Third Party which are not so delivered in good condition (fair wear and tear excepted) and the Party carrying out such disconnection works shall indemnify the other Party in respect of any damage thereby caused to the premises fixtures and fittings, apparatus and equipment of such other Party. Neither Party shall be responsible for any damage to plant, equipment or apparatus belonging to the other Party which has been caused by any negligence or failure to perform necessary or timely maintenance by such other Party or by a Third Party.

11.6 Termination or expiry of the UALL Agreements shall not be deemed a waiver of a breach of any term or condition of the said UALL Agreements and shall be without prejudice to either Party's rights, liabilities or obligations that would have accrued prior to such termination or expiry.

11.7 Notwithstanding the termination or expiry of the UALL Agreements, the preceding sub-clause and Clauses 12, 13 and 15 shall continue in full force and effect.

11.8 GO's right to terminate or suspend performance of the UALL Agreements pursuant to this Clause is without prejudice to any other rights or remedies available to either Party at law.

## **M: DISPUTE RESOLUTION**

### **Current RUO:**

The Current RUO does not include a dispute resolution.

### **Proposed Text:**

#### **To insert a clause in Annex B: Terms and Conditions:**

20.1 This clause shall not be applicable to disputes arising in respect to any breach, suspension and termination, as such matters are governed separately under Clause 11.

20.2 Save as provided in Clause 20.1 above, each Party shall use its best endeavours to resolve any disputes arising concerning implementation, application or interpretation of this Agreement in the first instance through negotiation between the Parties through the normal contacts. This phase of the dispute resolution shall be referred to as 'Level 1'.

20.3 In the event of the Parties failing to resolve the dispute at Level 1 negotiation within two (2) weeks either Party shall have a right to invoke the dispute procedures specified herein on the service of notice ("the Dispute Notice") on the other Party. The Party serving the notice ("the Disputing Party") shall include in the Dispute Notice all relevant details including the nature and extent of the dispute.

20.4 Service of the Dispute Notice shall constitute escalation to Level 2. Level 2 shall consist of consultation between the parties in good faith to resolve the dispute.

20.5 If the endeavours of the parties to resolve the dispute at Level 2 are not successful within two (2) weeks of escalation of the Dispute to Level 2, either Party may upon service of notice ("the Level 3 Notice") on the other, escalate the dispute for determination by the Authority, hereinafter referred to as Level 3, in accordance with the MCA Guidelines for Inter-Operator Complaints, Disputes & Own Initiative Investigations. The Level 3 Notice shall be served on both the Authority and the other Party. The Level 3 Notice shall include all details relevant to the dispute together with a submission from both Parties as to the nature and extent of the dispute.

20.6 The normal contact for GO is:

Level 1:

Head of Wholesale Contacts

GO

[Address]

[Tel:]  
[E:mail]

Level 2:

Contact Person Details

[Address]

[Tel:]

[E:mail]

The normal contact for the OAO is:

Level 1:

Contact Person Details

[Address]

[Tel:]

[E:mail]

Level 2:

Contact Person Details

[Address]

[Tel:]

[E:mail]

No change to the normal contact details shall be effected until same has been notified to the other Party.

20.7 The time limits specified at paragraphs 20.3 and 20.5 above may be extended by mutual agreement between the parties.

20.8 The above procedures are without prejudice to any rights and remedies that may be available to the Parties in respect of any breach of any provision of this Agreement.

20.9 Any disputes or queries that arise in relation to the charging principles of this Agreement or invoices furnished by GO to the OAO shall be subject to the dispute resolution provisions of this clause.

20.10 Where a dispute arises in relation to an amount payable in respect of an invoice then the OAO shall be entitled to withhold payment of the disputed amount due for payment, upon serving GO with a Level 1 notice and provided that the

disputed amount is greater than ten percent (10%) of the total invoice amount due for payment.

20.11 Where the OAO invokes the provisions of this Clause after the due date of a disputed invoice, then the OAO shall not be entitled to withhold any portion of the amount due and payable.

20.12 Following resolution of the dispute, the Parties will issue a credit or tender payment as appropriate.



#### 8.4.1 Responses

Vodafone aired its concern that clause 11.2 allows a maximum of 3 months from date of receipt of a written notice for the UALL to be terminated. It is Vodafone's view that in case of a breach this timeframe should be shortened or kept at 30 days. Vodafone argued that a 3 months' timeframe is typically allowed in the case of force majeure events and not in the case of a breach. Consequently, Vodafone argued that the 30 days' timeframe should only be allowed to be extended in the case that the breach cannot be rectified within the given timeframe of 30 days.

GO also expressed its disagreement with the proposed text contemplating remedies in case one party is in breach of the UALL Agreement, particularly the fact that the proposed text affords the party in breach a 30-day notice period within which to remedy the breach. GO claimed that in case of credit control issues this gives rise to an unintended effect that provides an OAO with the opportunity of extending credit period with impunity. Accordingly GO proposed that text should be added that provides for termination of the agreement where one party is objectively in breach 3 or more times in any rolling twelve month period.

GO extended its concern on the above issues to the proposed text in Clause 20.10 and 20.11 (within the Dispute Resolution Clause) wherein it is stipulated that in the eventuality of a dispute on an amount payable, the OAO shall be entitled to withhold payment of the disputed amount due for payment upon serving GO with a Level 1 notice and provided that the disputed amount is greater than ten percent (10%) of the total invoice amount due for payment.

GO argued that such text could be seen by certain OAOs as an opportunity or even an incentive to declare towards the end of the credit period that a dispute exists and this withhold payment that is actually due. GO argued that it has been at the receiving end of this type of behaviour on a number of occasions.

#### 8.4.2 MCA's Views and Decision

The MCA recognizes the concerns raised by the respondents particularly GO's concern insofar as the credit control issues. Consequently, the MCA is mandating changes to the Breach and Suspension Clause as stipulated hereunder. The MCA is also mandating changes to the said clause aimed at further clarifying the instances that fall within the Breach, Suspension and Termination as against those that fall within the ambit of the Dispute Resolution Clause. It is important to note that clause 11.5 follows the changes mandated and referred to in Section 10.1.1 and Section 10.1.1.2 of this Document.

Insofar as to the comments raised by GO with respect to the Dispute Resolution Clause, the MCA is mandating a change to clause 20.10 so as to clarify the right for GO to charge interest on any amount due to GO and withheld by the OAO in the event that the dispute is decided in favour of GO.

## **I: BREACH, SUSPENSION AND TERMINATION**

### **Current RUO:**

#### **Annex B Clause 11:**

11.1 If the OLO's Network or equipment adversely affects the normal operation of Maltacom's Network or equipment, or is a threat to any person's safety, Maltacom may suspend, to the extent necessary, such of its obligations under the UALL Agreements, and for such period as it may consider reasonable to ensure the normal operation of its Network or equipment or to reduce the threat to safety.

11.2 If the OLO shall be in breach of a material obligation under the UALL Agreements, Maltacom shall have the option to terminate the UALL Agreements forthwith, and this without the need of any authorisation or confirmation by any court or authority.

11.3 The UALL Agreements may also be terminated by Maltacom by written notice forthwith if the OLO:

- (a) is unable to pay its debts; or
- (b) ceases to carry on business; or
- (c) has a liquidator or an administrator appointed; or
- (d) has an order made or a resolution passed for its winding up.

11.4 The UALL Agreements shall also terminate:

11.4.1 in the event that the OLO ceases to hold a licence or equivalent to provide telecommunications services and systems granted to it pursuant to applicable legislation; or

11.4.2 in the case of Shared Access Service, if the User cancels his voice telephony subscription with Maltacom; or

11.4.3 in the case of Shared Access Service, if the User fails, within the stipulated period, to settle any outstanding debts that such User may have with Maltacom. In any such circumstances, Maltacom shall resume provision of the Shared Access Service, upon a request made to it by the OLO, following payment by

the User of all the said outstanding debts. All costs incurred in such disconnection and reconnection shall be fully borne by the OLO; or

11.4.4 in any other manner contemplated by the termination provisions of the UALL Agreements.

11.5 Upon termination or expiry of the UALL Agreements, the Parties shall cooperate with each other to ensure that such steps are taken as are necessary for recovery by each Party of any equipment or apparatus supplied by the other Party (even where that equipment or apparatus is on the premises of the other Party).

11.6 On termination or expiry of the UALL Agreements either Party shall be entitled after reasonable prior notice in writing to the other Party to enter the premises of the other Party for the purposes of carrying out necessary disconnection works and repossessing any plant, equipment or apparatus of that Party or a Third Party installed by or for that Party. The Party on whose premises such plant equipment or apparatus was installed shall be responsible for compensating the other for any such plant equipment apparatus or things belonging to the other or such Third Party which are not so delivered in good condition (fair wear and tear excepted) and the Party carrying out such disconnection works shall indemnify the other Party in respect of any damage thereby caused to the premises fixtures and fittings, apparatus and equipment of such other Party. Neither Party shall be responsible for any damage to plant, equipment or apparatus belonging to the other Party which has been caused by any negligence or failure to perform necessary or timely maintenance by such other Party or by a Third Party.

11.7 Termination or expiry of the UALL Agreements shall not be deemed a waiver of a breach of any term or condition of the said UALL Agreements and shall be without prejudice to either Party's rights, liabilities or obligations that would have accrued prior to such termination or expiry.

11.8 Notwithstanding the termination or expiry of the UALL Agreements, the preceding sub-clause and Clauses 12, 13 and 15 shall continue in full force and effect.

11.9 Maltacom's right to terminate or suspend performance of the UALL Agreements pursuant to this Clause is without prejudice to any other rights or remedies available to either Party at law.

**Mandated Text:**

**11.1 In the event that either Party is in breach of a material obligation under UALL Agreement, not being a breach described in Clauses 11.2 and 11.3 hereunder, and such breach is capable of remedy, the other Party ("the**

**Terminating Party”) shall send the Party in breach a written notice giving full details of the breach and requiring the Party in breach to remedy the breach or in the case of an urgent need to remedy the breach so as to safeguard end-to-end connectivity, within such shorter period as the Terminating Party may reasonably specify.**

**If the Party in breach does not remedy the breach within the time period stipulated in the said notice, the UALL may be suspended at the option of the Party not in breach provided that the Party being suspended shall have right of recourse to the Authority if it feels that such suspension was unjustified in the circumstances.**

**If the Party in breach does not remedy the breach within thirty (30) days from the date of receipt of the written notice, UALL may be terminated at the option of the Terminating Party. In this case termination shall occur immediately upon written notification by the Terminating Party to the Party in breach. Provided that if the breach is not capable of remedy within thirty (30) days, the Terminating Party shall extend the said period as required in the circumstances.**

**Provided further that each of the Parties’ right to terminate or suspend performance of the UALL pursuant to the above is without prejudice to any other rights available to the Parties, in particular the referral of the matter to the Authority for determination in accordance with the MCA Guidelines for Inter-Operator Complaints, Disputes and Own Initiative Investigations.**

**11.2 In the event that the OAO delays any three (3) payments, in any consecutive twelve (12) month period, of any uncontested amounts owed to GO for services rendered under the UALL, GO shall have the right to terminate the UALL; provided that for each delayed payment, GO shall notify the OAO of such delay, thereby warning the OAO of the number of times that the OAO has committed such breach within any consecutive twelve (12) month period. Provided further that upon the second delay, GO shall warn the OAO that in the event of another delay, the UALL shall be terminated forthwith.**

**11.3 In the event that either Party's Network adversely affects the normal operation of the other Party's Network, or is a threat to any person's safety, the other Party (“the Terminating Party”) may, after giving the first Party five (5) days written notice, suspend its obligations under the UALL, to the extent necessary, and for such period as it may consider reasonable, to ensure the normal operation of its Network, or to reduce the threat to safety; provided that the Party being suspended shall have right of recourse to the Authority if it feels that such suspension was unjustified in the circumstances.**

**11.4 In addition to the provisions of the clauses above, this UALL Agreement may be terminated by either Party by written notice forthwith (or on the termination of such other period as such notice may specify) if the other Party:**

- (a) is unable to pay its debts; or**
- (b) ceases to carry on business; or**
- (c) has a liquidator or an administrator appointed; or**
- (d) has an order made or a resolution passed for its winding up (other than for the purpose of amalgamation or reconstruction); or**
- (e) ceases to hold an authorisation in accordance with the ECRA.**

**11.5 In addition to the provisions of the clauses above, GO may terminate this Agreement if GO is no longer legally or regulatory obliged to offer Unbundled Access to the Local Loop, provided that such termination shall only occur as specified by the Authority in the relative market analysis in accordance with Article 10(3) of the Electronic Communications Networks and Services (General) Regulations (Chapter 399.28 of the Laws of Malta).**

**11.6 Upon termination or expiry of the UALL Agreements, the Parties shall co-operate with each other to ensure that such steps are taken as are necessary for recovery by each Party of any equipment or apparatus supplied by the other Party (even where that equipment or apparatus is on the premises of the other Party).**

**11.7 On termination or expiry of the UALL Agreements either Party shall be entitled after reasonable prior notice in writing to the other Party to enter the premises of the other Party for the purposes of carrying out necessary disconnection works and repossessing any plant, equipment or apparatus of that Party or a Third Party installed by or for that Party. The Party on whose premises such plant equipment or apparatus was installed shall be responsible for compensating the other for any such plant equipment apparatus or things belonging to the other or such Third Party which are not so delivered in good condition (fair wear and tear excepted) and the Party carrying out such disconnection works shall indemnify the other Party in respect of any damage thereby caused to the premises fixtures and fittings, apparatus and equipment of such other Party. Neither Party shall be responsible for any damage to plant, equipment or apparatus belonging to the other Party which has been caused by any negligence or failure to perform necessary or timely maintenance by such other Party or by a Third Party.**

**11.8 Termination or expiry of the UALL Agreements shall not be deemed a waiver of a breach of any term or condition of the said UALL Agreements and shall be without prejudice to either Party's rights, liabilities or obligations that would have accrued prior to such termination or expiry.**

**11.9 Notwithstanding the termination or expiry of the UALL Agreements, the preceding sub-clause and Clauses 12, 13 and 15 shall continue in full**

**force and effect.**

**11.10 GO's right to terminate or suspend performance of the UALL Agreements pursuant to this Clause is without prejudice to any other rights or remedies available to either Party at law.**

**M: DISPUTE RESOLUTION**

**Current RUO:**

The Current RUO does not include a dispute resolution.

**Mandated Text:**

**To insert a clause in Annex B: Terms and Conditions:**

**20.1 This clause shall not be applicable in the event that a party to this agreement intends to contest a claim of breach of this agreement or to contest a notice of suspension or termination, as such matters are governed separately under Clause 11.**

**20.2 Save as provided in Clause 20.1 above, each Party shall use its best endeavours to resolve any disputes arising concerning implementation, application or interpretation of this Agreement in the first instance through negotiation between the Parties through the normal contacts. This phase of the dispute resolution shall be referred to as 'Level 1'.**

**20.3 In the event of the Parties failing to resolve the dispute at Level 1 negotiation within two (2) weeks either Party shall have a right to invoke the dispute procedures specified herein on the service of notice ("the Dispute Notice") on the other Party. The Party serving the notice ("the Disputing Party") shall include in the Dispute Notice all relevant details including the nature and extent of the dispute.**

**20.4 Service of the Dispute Notice shall constitute escalation to Level 2. Level 2 shall consist of consultation between the parties in good faith to resolve the dispute.**

**20.5 If the endeavours of the parties to resolve the dispute at Level 2 are not successful within two (2) weeks of escalation of the Dispute to Level 2, either Party may upon service of notice ("the Level 3 Notice") on the other, escalate the dispute for determination by the Authority, hereinafter referred to as Level 3, in accordance with the MCA Guidelines for Inter-Operator Complaints, Disputes & Own Initiative Investigations. The Level 3 Notice shall be served on both the Authority and the other Party. The Level 3 Notice shall include all details relevant to the dispute together with a submission from both Parties as to the nature and extent of the dispute.**

**20. 6 The normal contact for GO is:**

**Level 1:**

**Head of Wholesale Contacts**

**GO**

**[Address]**

**[Tel:]**

**[E:mail]**

**Level 2:**

**Contact Person Details**

**[Address]**

**[Tel:]**

**[E:mail]**

**The normal contact for the OAO is:**

**Level 1:**

**Contact Person Details**

**[Address]**

**[Tel:]**

**[E:mail]**

**Level 2:**

**Contact Person Details**

**[Address]**

**[Tel:]**

**[E:mail]**

**No change to the normal contact details shall be effected until same has been notified to the other Party.**

**20.7 The time limits specified at paragraphs 20.3 and 20.5 above may be extended by mutual agreement between the parties.**

**20.8 The above procedures are without prejudice to any rights and remedies that may be available to the Parties in respect of any breach of any provision of this Agreement.**



**20.9 Any disputes or queries that arise in relation to the charging principles of this Agreement or invoices furnished by GO to the OAO shall be subject to the dispute resolution provisions of this clause.**

**20.10 Where a dispute arises in relation to an amount payable in respect of an invoice then the OAO shall be entitled to withhold payment of the disputed amount due for payment, upon serving GO with a Level 1 notice and provided that the disputed amount is greater than ten percent (10%) of the total invoice amount due for payment. Provided that in the event that the dispute is decided in favour of GO, GO shall have the right to charge interest due on the amount so withheld.**

**20.11 Where the OAO invokes the provisions of this Clause after the due date of a disputed invoice, then the OAO shall not be entitled to withhold any portion of the amount due and payable.**

**20.12 Following resolution of the dispute, the Parties will issue a credit or tender payment as appropriate.**

## 8.5 Assignment of Rights and Obligations

### J: ASSIGNMENT OF RIGHTS AND OBLIGATIONS

#### **Annex B Clause 16:**

16.1. Maltacom may at any time assign, sub-contract or transfer the UALL Agreements in whole or in part to any person without requiring any consent therefore from the OLO.

16.2. The OLO shall not be entitled to assign, sub-contract or transfer the UALL Agreements, either in whole or in part, or otherwise dispose of any of its rights or obligations thereunder to any person.

#### **Proposed Text:**

16.1 Unless otherwise agreed in writing, and subject to clause 16.2, no rights, benefits or obligations under this Agreement may be assigned, sub-contracted or transferred, in whole or in part, by a Party without the prior written consent of the other Party.

Provided that each Party may assign, subcontract or transfer this Agreement to an entity under its direct or indirect control or an entity acquiring all, substantially all or parts of its equity without the consent required under this Clause 16.1. The assigning Party shall promptly give notice to the other Party of any assignment or transfer permitted to be made without the other Party's consent. Nevertheless, no notification shall be required in the case of a sub-contracting which can be made without the other Party's consent, provided that in such cases the Party making the sub-contracting shall remain exclusively liable vis-à-vis the other Party for the due and proper performance of all its obligations under this Agreement, and provided further that no relationship whatsoever shall be created between the sub-contractor and such other Party.

16.2 Without limiting the generality of the foregoing, this Agreement shall be binding upon and shall inure to the benefit of the Parties' respective successors and assignees. No assignment shall be valid unless the assignee/successor agrees in writing to be bound by the provisions of this Agreement.

### 8.5.1 Responses

Vodafone recommended that before the proviso at clause 16.1, the following words are included *‘..which consent shall not be unreasonable delayed or withheld’*.

### 8.5.2 MCA’s Views and Decision

The MCA finds no objection to this recommendation. Consequently, the MCA is hereunder reproducing both the text found in the current RUO as well as the mandated text.

#### **J: ASSIGNMENT OF RIGHTS AND OBLIGATIONS**

##### **Annex B Clause 16:**

16.1. Maltacom may at any time assign, sub-contract or transfer the UALL Agreements in whole or in part to any person without requiring any consent therefore from the OLO.

16.2. The OLO shall not be entitled to assign, sub-contract or transfer the UALL Agreements, either in whole or in part, or otherwise dispose of any of its rights or obligations thereunder to any person.

##### **Mandated Text:**

**16.1 Unless otherwise agreed in writing, and subject to clause 16.2, no rights, benefits or obligations under this Agreement may be assigned, sub-contracted or transferred, in whole or in part, by a Party without the prior written consent of the other Party, which consent shall not be unreasonably delayed or withheld and in any case said consent or refusal shall be communicated within 15 working days from the receipt of the formal request as per communication clause.**

**Provided that each Party may assign, subcontract or transfer this Agreement to an entity under its direct or indirect control or an entity acquiring all, substantially all or parts of its equity without the consent required under this Clause 16.1. The assigning Party shall promptly give notice to the other Party of any assignment or transfer permitted to be made without the other Party’s consent. Nevertheless, no notification shall be required in the case of a sub-contracting which can be made without the other Party’s consent, provided that in such cases the Party making the sub-**

**contracting shall remain exclusively liable vis-à-vis the other Party for the due and proper performance of all its obligations under this Agreement, and provided further that no relationship whatsoever shall be created between the sub-contractor and such other Party.**

**16.2 Without limiting the generality of the foregoing, this Agreement shall be binding upon and shall inure to the benefit of the Parties' respective successors and assignees. No assignment shall be valid unless the assignee/successor agrees in writing to be bound by the provisions of this Agreement.**

## 8.6 Shared access definition

### **N: DEFINITION OF THE SHARED ACCESS SERVICE**

#### **Current RUO:**

##### **Main Body Clause 2.3**

...

##### **Definition: Shared Access Service**

A service offered by Maltacom, whereby Maltacom provides the OLO with access to its Copper Access Network, allowing the OLO to may make use of specific upper band frequency spectrum of the twisted metallic pair, while Maltacom continues o use the local loop to provide the telephone service to the public.

The OLO will be given shared connectivity to a MPF for the purpose of providing xDSL services to Users. Shared access is achieved by using filters to separate the switched voice and xDSL services at the DSLAM location and the User premises.

The Shared Access Service will only be offered on MPFs that are currently working and supplying Maltacom analogue telephony service to the User. The implementation of the Shared Access Service will allow the MPF, by means of the introduction of frequency splitters in the circuit, to support the simultaneous operations of two separate service providers. Maltacom will continue to supply analogue telephony service and the OLO will deliver allowed xDSL services.

##### **Main Body Clause 2.3.1**

The Shared Access Service on Full Loop (see figure 5) allows the OLO access to frequency spectrum above that used to transmit voice services on a MPF which is used by Maltacom to transmit analogue telephony service. ....

#### **Proposed change:**

A service offered by GO, whereby GO provides the OAO with access to its Copper Access Network, allowing the OAO to make use of specific upper band frequency spectrum of the twisted metallic pair, while the current service provider continues to use the local loop to provide the telephone service to the public .

The OAO will be given shared connectivity to a MPF for the purpose of providing xDSL services to Users. Shared access is achieved by using filters to separate the

switched voice and xDSL services at the DSLAM location and the User premises.

The Shared Access Service will only be offered on MPFs that are currently working and supplying analogue telephony service to the User by the service provider using the GO's network. The implementation of the Shared Access Service will allow the MPF, by means of the introduction of frequency splitters in the circuit, to support the simultaneous operations of two separate service providers. The current service provider will continue to supply analogue telephony service and the OAO will deliver allowed xDSL services.

#### **Main Body Clause 2.3.1**

The Shared Access Service on Full Loop (see figure 5) allows the OAO access to frequency spectrum above that used to transmit voice services on a MPF which is used by the service provider using the GO's network to transmit analogue telephony service. ....

### **8.6.1 Responses**

GO expressed its trouble in understanding what the MCA is aiming when the MCA proposed changes in the definition of the shared access definition. In fact, for the avoidance of doubt, GO disagreed to this proposed amendment stating that it would among others introduce significant complications to the LLU process.

MCA requested GO to elaborate further on the complications mentioned in GO's response to the CD. GO expressed concerns about the working in practice of this arrangement arguing that in the case where a user experiences a fault, it would be unclear:

- what sort of fault the user shall report i.e. whether a telephony or a DSL fault;
- to whom the user shall raise the call whether with his telephony provider or the DSL ISP.
- Who of these would be responsible for the fault vis-à-vis the user and who does GO deal with?

Consequently, GO contended that in such eventuality they have to write an extensive new set of RUO Chapters to deal with this proposal.

### 8.6.2 MCA Views and Decision

After reviewing GOs feedback, the MCA believes that the reasons put forward by the company mainly reflect logistical challenges more than technical limitations. Hence whilst acknowledging that the concerns raised by GO are justifiable these concerns should not limit prospective customers from availing themselves from the widest possible range of potential providers of electronic communications services.

In this regard, the MCA would also like to highlight that GO is by no way being precluded from producing the additional documents it deems necessary to address these interactions. In view of GO's feedback, the Authority is establishing the following guiding principles that should be at the fore in any interaction related to fault responsibilities:

1. The first contact point with the end user, including fault reporting, shall be the service provider with whom the end-user has signed a contractual agreement related to the particular service purchased. In instances where the end-user is serviced by two separate service providers which are distinct from GO, and the fault experienced affects both services, the end-user is to lodge the fault with both service providers separately i.e. those same service providers with whom the end-user has signed a contractual agreement;
2. The service provider should explain in both the verbal and written format with whom the customer has to lodge the fault and what the customer has to check prior to lodging the fault.

In view of the above the MCA mandates the following:

#### **N: DEFINITION OF THE SHARED ACCESS SERVICE**

##### **Current RUO:**

##### **Main Body Clause 2.3**

...

##### **Definition: Shared Access Service**

A service offered by Maltacom, whereby Maltacom provides the OLO with access to its Copper Access Network, allowing the OLO to may make use of specific upper band frequency spectrum of the twisted metallic pair, while Maltacom continues o use the local loop to provide the telephone service to the public.

The OLO will be given shared connectivity to a MPF for the purpose of providing xDSL services to Users. Shared access is achieved by using filters to separate the switched voice and xDSL services at the DSLAM location and the User premises.

The Shared Access Service will only be offered on MPFs that are currently working

and supplying Maltacom analogue telephony service to the User. The implementation of the Shared Access Service will allow the MPF, by means of the introduction of frequency splitters in the circuit, to support the simultaneous operations of two separate service providers. Maltacom will continue to supply analogue telephony service and the OLO will deliver allowed xDSL services.

#### **Main Body Clause 2.3.1**

The Shared Access Service on Full Loop (see figure 5) allows the OLO access to frequency spectrum above that used to transmit voice services on a MPF which is used by Maltacom to transmit analogue telephony service. ....

#### **Mandated Text:**

**A service offered by GO, whereby GO provides the OAO with access to its Copper Access Network, allowing the OAO to make use of specific upper band frequency spectrum of the twisted metallic pair, while the current service provider continues to use the local loop to provide the telephone service to the public .**

**The OAO will be given shared connectivity to a MPF for the purpose of providing xDSL services to Users. Shared access is achieved by using filters to separate the switched voice and xDSL services at the DSLAM location and the User premises.**

**The Shared Access Service will only be offered on MPFs that are currently working and supplying analogue telephony service to the User by the service provider using the GO's network. The implementation of the Shared Access Service will allow the MPF, by means of the introduction of frequency splitters in the circuit, to support the simultaneous operations of two separate service providers. The current service provider will continue to supply analogue telephony service and the OAO will deliver allowed xDSL services.**

#### **Main Body Clause 2.3.1**

**The Shared Access Service on Full Loop (see figure 5) allows the OAO access to frequency spectrum above that used to transmit voice services on a MPF which is used by the service provider using the GO's network to transmit analogue telephony service. ....**



## 9. PROPOSED DECISION #7: TIMELINES FOR AFFECTING CHANGES IN THE ANNEXES DOCUMENT

In its CD, the MCA proposed that GO affects the changes proposed in the various Annexes to the RUO within two weeks from the publication of the decision by the MCA.

### 9.1 Responses

GO put forward the same arguments raised under section 7. As in the case of section 7.1, GO suggested that a period of five weeks is more reasonable.

### 9.2 MCA's Views and Decision

MCA accedes to GO's request to update the Annexes within five weeks of the publication of this Decision. The MCA takes the opportunity to clarify that the changes mandated in this Decision shall apply to all unbundling agreements that may have concluded in the meantime in accordance with the review clause.

#### **FINAL Decision #7:**

**The MCA directs that the RUO and its annexes be amended in line with the preceding decisions inter alia by implementing the amended annexes contained in the Appendices Document attached to this Decision including the changes stipulated under Section 12.6.1 for Annex F. Following the publication of a Decision by the MCA, GO is to affect the changes necessary to implement the mandated amendments within five (5) weeks from its publication. These amendments shall be applied to all unbundling agreements which may have been concluded in accordance with the review clause.**

**The MCA further mandates that every version of the RUO shall include a date and version number. GO shall be obliged to maintain a special marked version of each version of the RUO showing tracked changes in respect of the former version. Such tracked version of the RUO is to be communicated to the Authority.**

## 10. UALL AGREEMENT, LLU REQUEST FORMS & ANFP

In concurrence with the workstreams being undertaken by the Authority in connection with the review of GO's RUO, the MCA initiated a parallel workstream whereby it requested GO to submit the following additional documents:

- Draft UALL Agreement;
- Form 1: *Order Form for GO MPF Full Unbundling Service;*
- Form 2: *Order Form for GO MPF Shared Access Unbundling Service;*
- Form 3: *Order Form for Cessation of a Unbundling Access to the Local Loop Service;*
- Collocation Form: *Collocation Service Request Form;*
- Access Network Frequency Plan (ANFP).

Following the MCA's review of these documents, the Authority engaged the respondents to this CD in further technical consultations related to these documents. The rest of this section contains the proposed changes put forward by the Authority during these technical consultations followed by a report on the respondents' feedback and subsequently the MCA views and related decisions. This structure is generally recurred for each type of document reviewed, namely the UALL agreement, the forms and the ANFP.

### 10.1 Report on Consultation on UALL agreement

Upon reviewing the UALL document submitted by GO, the MCA noted a series of clauses that were duplicating, to a varying extent, those already found in Annex B. Besides proposing some necessary changes to these particular clauses, the MCA was of the opinion that these should be placed in Annex B in view that such clauses can also be considered as terms and conditions. In this way, Annex B would encompass all the terms and conditions of the Offer. A detailed analysis can be found in Sections 10.1.1 – 10.1.1.3.

On the other hand, Sections 10.1.2 – 10.1.2.3 cover the analysis in respect of those clauses which GO proposed in their Draft UALL Agreement and which are found nowhere else in the RUO.

For further ease of reference Appendix II within the Appendices Document attached to this Decision reproduces the Original draft UALL as submitted by GO whilst Appendix III depicts the final structure and contents of the UALL following the changes effected by the MCA. Mainly this contains the clauses that were retained in the UALL agreement with the changes effected by the MCA shown in red.

### 10.1.1 Duplicate Clauses with further changes

The MCA noted a number of clauses which were reproduced by GO in their draft UALL and which are also found in other parts of the RUO, mainly in Annex B. The MCA noted instances where GO affected amendments to certain parts of these clauses and consequently do not match exactly their respective counterparts found in Annex B. The position taken by the Authority in this regard was to propose to retain the original clauses as found in the Current RUO subject to any amendments proposed in the CD in relation thereto. However, there were a few isolated instances where the MCA felt that the amended text as reproduced in the UALL proved to be clearer. In such cases, the MCA either proposed that such clauses replace those in the current RUO or further proposed amendments to further enhance the clarity of the text in question. Hereunder is a list of such clauses.

### **Clause 5 in original UALL: Obligations of the OAO**

This clause is found in Annex B, clause 4. Part of this clause (clause 5.1 in the UALL<sup>7</sup>) was proposed for amendments in the CD. The MCA noted, however, that clause 5.3 (in the UALL) was slightly amended when compared to the original text found in Annex B as shown below. The MCA in the technical consultation had stated that it finds no objection to this change (as per red and strikethrough text hereunder) and had proposed that this amendment is taken into account at Annex B:

*5.3 The OAO shall take all necessary measures to ensure that the use of GO's Services under this Agreement will not cause any damage, disturbance, interruptions or the like to ~~the traffic in the PSTN~~ any of the other services provided over the GO infrastructure.*

### **Clause 10 in original UALL: Network Alteration**

The MCA noted that a similar clause in the Main Body at Clause 4: *Maltacom Infrastructure Development* already exists but the text is not the same. Consequently and in view that clause 10 as proposed in the UALL is more concise, the MCA, in the technical consultation, had argued that the clause as proposed in the UALL should replace the above mentioned clause in the Main Body subject that this be amended (as per red and strikethrough text) as shown hereunder :

*10.1 Nothing in this Agreement shall in any way hinder GO from the expansion, upgrade, operation and maintenance of its Access Network even if this results in a change in the number of network sites and / or equipment operated by GO.*

*10.2 In case where any planned Network Alteration carried out by GO may lead to serious impact on the operations of the OAO, GO shall give advance notice to the OAO as directed by the MCA from time to time ~~inform the OAO as soon as reasonably possible~~. Such advance notice shall be given in respect of any changes that may affect directly or indirectly the operations of the OAO and to make available any amendments to the relevant technical diagrams, documents and annexes that may be necessary.*

*10.3 Any expenses incurred by the OAO and by GO in relation to Unbundled Access to the Local Loop Services and as a result of Network Alteration shall be fully borne by the OAO unless specified otherwise in any decision issued by the MCA related to this subject.*

### **Clause 12 in the original UALL: Network Safety and Standards**

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<sup>7</sup> Equivalent to 4.2 in Annex B.

MCA noted that this clause was amended from the one originally found in Annex B clause 9 in a manner that puts the obligation solely upon the OAO to safeguard the equipment of GO. In the original clause, the obligations were laid upon both parties in respect of both parties' equipment. Consequently the MCA in the technical consultation had stated that it is against such amendments and proposed that the original clause as found in Annex B is retained subject to the modifications (red and strikethrough text) detailed hereunder<sup>8</sup> :

*9.1 Each Party is responsible for the safe operation of its Network and all equipment relating thereto and shall take all reasonable and necessary steps in its operation and implementation of the UALL Agreements to ensure that its Network and all equipment relating thereto does not:*

*9.1.1 Endanger the safety or health of employees, contractors, agents, customers or other authorised personnel of the other Party; or*

*9.1.2 Damage, interfere with or cause any deterioration in the operation of the other Party's Network or any equipment relating thereto.*

*9.2 Both Parties shall ensure full compliance with Annex E10 of this Agreement, Spectrum Management Specifications. Neither Party shall do or permit anything to be done or omit or permit the omission of anything in relation to the other Party's Network or equipment which either causes damages to the other Party's Network or equipment or will, save as permitted under or pursuant to the UALL Agreements, result in modification of the proper and normal operation of the other Party's Network or equipment.*

*9.3 Each Party shall conform with the relevant EU and Maltese Legislation as well as with all relevant national and international standards in communications industry including but not limited to those standards and operating guidelines laid down by the International Telecommunication Union (ITU) and the European Telecommunications Standards Institute (ETSI).*

*9.4 Neither Party shall connect or knowingly permit the connection to its Network of any equipment or apparatus, including but not limited to any terminal equipment, which does not meet the requirements specified in the preceding sub-clause or which shall degrade the quality of the other Party's Network or equipment.*

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<sup>8</sup> Modification proposed was taken from the suggested text at sub-clause 12.2 of the original UALL but was further modified in a way to make both parties responsible.

### **Clause 18 in the original UALL: Breach, Suspension and Termination**

The MCA noted that with the exception of sub-clause 18.2, all clause 18 is found in Annex B and was proposed for amendments by MCA in its CD. Insofar as the new sub-clause 18.2, the MCA proposed that this be replaced as follows (subject to the modifications shown below in red and strikethrough text) and included in Annex B:

18.2 GO may, ~~at its sole discretion~~, terminate this Agreement if GO is no longer legally or regulatory obliged to offer Unbundled Access to the Local Loop, **provided that such termination shall only occur as specified by the Authority in the relative market analysis in accordance with Article 10(3) of the Electronic Communications Networks and Services (General) Regulations (Chapter 399.28 of the Laws of Malta)**. ~~Should GO decide to terminate the Agreement under sub-clause 18.2 GO shall give the OAO at least one month written notice of GO's intent to terminate this Agreement.~~

#### **10.1.1.1 Responses to technical consultation**

What follows are comments received by Vodafone and GO in relation to the above clauses.

**Clause 10: Network Alteration.** GO argued that there is some incongruence in the proposed wording of sub-clause 10.2. GO argued that in the second line it is envisaged that advance notice has to be given where alterations may lead to serious impact on the operations of the OAO, yet 2 lines down it is envisaged that such notice should be given in respect of any changes that may affect directly or indirectly the operations of the OAO. Furthermore, GO is of the view that the wording of the latter is so wide that it could encompass any conceivable change that GO may make to its network, even where the possibility of effects on the OAO are remote. GO argued that the wording should be tightened to more realistic events.

**Clause 18: Breach, Suspension and Termination.** GO argued that the proposed amendments to sub-clause 18.2 are superfluous as they do not refer to GO's but rather to the MCA's obligations. As such, GO argued that the manner in which the legal or regulatory obligations are withdrawn are outside the scope of the agreement between 2 operators so long as said manner is within the law. Furthermore, GO argued that the proposed change can be interpreted to wrongly restrict GO's right to stop providing LLU services in case where an OAO fails to abide by its agreement obligations, such as but not limited to failure to pay for service.

### 10.1.1.2 MCA's views and Decisions

**Clause 10: Network Alteration** – Following the arguments raised by GO, the MCA is amenable to affect further changes and to therefore mandate the following to replace clause 4 of the Main Body:

*Nothing in this Agreement shall in any way hinder GO from the expansion, upgrade, operation and maintenance of its Access Network even if this results in a change in the number of network sites and / or equipment operated by GO.*

*In case where any planned Network Alteration carried out by GO may lead to serious impact on the operations of the OAO, GO shall give advance notice to the OAO as directed by the MCA from time to time ~~inform the OAO as soon as reasonably possible.~~ Such Advance notice shall be given in respect of any such changes ~~that may affect directly or indirectly the operations of the OAO~~ and to make available any amendments to the relevant technical diagrams, documents and annexes that may be necessary.*

*Any expenses incurred by the OAO and by GO in relation to Unbundled Access to the Local Loop Services and as a result of Network Alteration shall be fully borne by the OAO unless specified otherwise in any decision issued by the MCA related to this subject.*

**Clause 18: Breach, Suspension and Termination:** The MCA does not agree with the comments made by GO in respect of the proposed amendments to sub-clause 18.2 as found in the original UALL. Whilst it may be correct to argue that the manner in which the legal or regulatory obligations are withdrawn are outside the scope of the agreement between the two operators, the amendments as proposed by the MCA were considered important to include in view of the text GO inserted. Therefore, the purpose of the amendments was for the MCA to limit the manner in which GO may terminate the UALL, to ensure that the UALL is in no way interpreted in any manner against the law. As for the argument raised by GO that the proposed changes by the MCA wrongly restricts GO's right to stop providing LLU services in case where an OAO fails for example to pay for service, this has been now contemplated in other sub-clauses as clearly spelt out under Section 8.4.2 above.

### 10.1.1.3 Summary of Decisions

Hereunder is a reproduction of the mandated clauses following the MCA's views and Decisions laid out under Section 10.1.3 above. With respect to Clause 18: Breach, Suspension and Termination, the mandated change is already contemplated in Section 8.4.2.

**Annex B Clause 4.4**

**Current Text:**

4.4 The OLO shall take all necessary measures to ensure that the use of Maltacom's local loop by the OLO's Users will not cause any damage, disturbance, interruptions or the like to the traffic in the PSTN.

**Annex B Clause 4.4**

**Mandated Text:**

**4.4 The OAO shall take all necessary measures to ensure that the use of GO's Services under this Agreement will not cause any damage, disturbance, interruptions or the like to any of the other services provided over the GO infrastructure.**

**Main Body Clause 4**

**Current RUO:**

4. Maltacom Infrastructure Development

Maltacom endeavours to regularly upgrade and adapt its infrastructure in line with technological changes and developments, international standards (ITU-T and ETSI), market demand and changes driven by regulatory authorities and contingencies. This may have an impact on any Services offered by Maltacom under this RUO. Maltacom will endeavour to give the OLO advance notice of any changes that may substantially affect such Services and to publish any amendments to the relevant technical diagrams, documents and annexes that may be necessary. Maltacom shall however not be liable to compensate the OLO in any manner.

Maltacom may in future also consider changing the number of Maltacom Exchanges or switching equipment operated in its Network, or deploying active street equipment eliminating existing Primary Cross-connection Points, as Maltacom may deem necessary in view of its technological and market needs. In such cases Maltacom will endeavour to give the OLO advance notice of any such changes that may substantially affect the Services provided by Maltacom. Maltacom shall however not be liable to compensate the OLO in any manner.

**Main Body Clause 4**

**Mandated Text:**

**Nothing in this Agreement shall in any way hinder GO from the expansion, upgrade, operation and maintenance of its Access Network even if this results in a change in the number of network sites and / or equipment operated by GO.**



**In case where any planned Network Alteration carried out by GO may lead to serious impact on the operations of the OAO, GO shall give advance notice to the OAO as directed by the MCA from time to time. Advance notice shall be given in respect of any such changes and to make available any amendments to the relevant technical diagrams, documents and annexes that may be necessary.**

**Any expenses incurred by the OAO and by GO in relation to Unbundled Access to the Local Loop Services and as a result of Network Alteration shall be fully borne by the OAO unless specified otherwise in any decision issued by the MCA related to this subject.**

**Annex B Clause 9**

**Current RUO:**

**Network Safety and Standards**

9.1 Each Party is responsible for the safe operation of its Network and all equipment relating thereto and shall take all reasonable and necessary steps in its operation and implementation of the UALL Agreements to ensure that its Network and all equipment relating thereto does not:

9.1.1 endanger the safety or health of employees, contractors, agents, customers or other authorised personnel of the other Party; or

9.1.2 damage, interfere with or cause any deterioration in the operation of the other Party's Network or any equipment relating thereto.

9.2 Neither Party shall do or permit anything to be done or omit or permit the omission of anything in relation to the other Party's Network or equipment which either causes damage to the other Party's Network or equipment or will, save as permitted under or pursuant to the UALL Agreements, result in modification of the proper and normal operation of the other Party's Network or equipment.

9.3 Each Party shall conform with the relevant EU and Maltese legislation as well as with all relevant national and international standards in the communications industry including but not limited to those standards and operating guidelines laid down by the International Telecommunication Union (ITU) and the European Telecommunications Standards Institute (ETSI).

9.4 Neither Party shall connect or knowingly permit the connection to its Network of any equipment or apparatus, including but not limited to any terminal equipment, which does not meet the requirements specified in the preceding sub-clause or which shall degrade the quality of the other Party's Network or equipment.

**Annex B Clause 9**

**Mandated Text:**

**9.1 Each Party is responsible for the safe operation of its Network and all equipment relating thereto and shall take all reasonable and necessary steps in its operation and implementation of the UALL Agreements to ensure that its Network and all equipment relating thereto does not:**

**9.1.1 Endanger the safety or health of employees, contractors, agents, customers or other authorised personnel of the other Party; or**

**9.1.2 Damage, interfere with or cause any deterioration in the operation of the other Party's Network or any equipment relating thereto.**

**9.2 Both Parties shall ensure full compliance with Annex E10 of this Agreement, Spectrum Management Specifications. Neither Party shall do or permit anything to be done or omit or permit the omission of anything in relation to the other Party's Network or equipment which either causes damages to the other Party's Network or equipment or will, save as permitted under or pursuant to the UALL Agreements, result in modification of the proper and normal operation of the other Party's Network or equipment.**

**9.3 Each Party shall conform with the relevant EU and Maltese Legislation as well as with all relevant national and international standards in communications industry including but not limited to those standards and operating guidelines laid down by the International Telecommunication Union (ITU) and the European Telecommunications Standards Institute (ETSI).**

**9.4 Neither Party shall connect or knowingly permit the connection to its Network of any equipment or apparatus, including but not limited to any terminal equipment, which does not meet the requirements specified in the preceding sub-clause or which shall degrade the quality of the other Party's Network or equipment.**

### 10.1.2 Clauses in the original UALL which are not found elsewhere in the RUO and which are proposed to be relocated to Annex B following certain changes

What follows is a list of clauses as found in the draft UALL submitted by GO, which are found nowhere else in the RUO and for which the MCA, in its technical consultation, proposed to be relocated to Annex B subject to a number of proposed amendments. In fact, red and strikethrough text represent amendments proposed by the MCA in its technical Consultation.

#### **Clause 8 in original UALL: New Services**

8.1 The OAO may, at any time, make a written request to GO *in accordance with Clause 18<sup>9</sup> at Annex B: the Review Clause*, requesting GO to enter into an agreement for the provision of new UALL services in accordance with the terms and conditions of Annex G.

8.2 Following a request pursuant to Clause 8.1, GO shall offer UALL services as specified in Annex G of this Agreement.

#### **Clause 13 in original UALL: Quality of Unbundled Access Local Loop Services:**

13.1 GO shall, ~~with reasonable commercially endeavour~~, provide good quality Unbundled Access Local Loop Services to the OAO *in accordance with the terms and conditions stipulated in the various annexes making up the Reference Unbundling Offer. GO will not be responsible for the content of the communications transmitted through the Network and other facilities to which UALL would have been granted.*

13.2 GO binds itself to provide Unbundled Access Local Loop Services to the OAO at the same level of service it provides Unbundled Access local Loop Services for its own retail and to other OAOs subscribing to Unbundled Access Local Loop Services from GO *in accordance with the non-discrimination obligations arising under Regulation 19(2)(b) of the Electronic Communications Networks and Services (General) Regulations of 2004 and as mandated in the Market Analysis on Wholesale Unbundled Access to the Local Loop published in May 2007.*

13.3 ~~Subject to Clauses 13.1 and 13.2 the OAO shall have no right for any claims whatsoever, in regards to the quality of service which GO renders to the OAO in respect to provision, operation and maintenance of Unbundled Access Local Loop Services.~~

#### **Clause 14 in original UALL: Provisioning, Operation and Maintenance**

14.1 The procedures for the provision, operation and maintenance of Metallic Path Facilities and Collocation Services as for the continued operation and maintenance

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<sup>9</sup> As proposed in CD.

thereof shall be governed by the provisions of the Main Body and ~~Annex B~~ **all applicable annexes.**

**Clause 15 in original UALL: Provision of Information**

15.1 Subject to any confidentiality obligations the OAO shall provide GO with the necessary information which is reasonably required by GO in the provision of Unbundled Access to the Local Loop Services to the OAO.

15.2 ~~GO~~ **The Parties shall** ~~will~~ use reasonable endeavours to ensure that information disclosed is correct to the best of its knowledge at the time of provision of such information.

15.3 The Parties shall consult together on a timely basis in relation to the operation of this Agreement and apply their best endeavours to resolve any problems arising from such consultation or otherwise encountered in relation to this Agreement. **In the event that any disagreement occurs in this respect, the Parties shall have recourse to Clause 20<sup>10</sup> at Annex B: Dispute Resolution.**

15.4 Without prejudice to the provisions of Clause 15.1 each of the Parties shall appoint a representative for the purposes of overseeing the organisation of the day-to-day practical implementation of this Agreement each of them shall liaise with the other and report to the Party appointing him on any problem which has not proved capable of resolution. On receipt of such report the Parties shall consult with a view to achieving a mutually acceptable solution to such problem.

15.5 Subject to Clause ~~19~~ **12<sup>11</sup>** hereof, both Parties shall indemnify the disclosing Party and keep it indemnified against all liabilities, claims, demands, damages, costs and expenses arising as a consequence of any failure by the receiving Party to comply with any written conditions imposed, including those relating to confidentiality as per Clause ~~19~~ **12** or arising as a consequence of any failure by the receiving Party or any Third Party authorized by the receiving Party to comply with any obligations of confidentiality in accordance with Clause ~~19~~ **12** or with any obligations under the DPA and any regulations promulgated thereunder.

15.6 Nothing in this Agreement shall require a Party to do anything in breach of any statutory or regulatory obligation of confidentiality, including without prejudice to the generality of the foregoing, any obligation pursuant to the ECRA, the DPA or any other applicable legislation.

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<sup>10</sup> As stipulated in the CD and finally mandated in the Decision.

<sup>11</sup> In view that this clause is proposed to be included in Annex B, the confidentiality clause to which clause 19 is referring to in the UALL is found under clause 12 in Annex B.

**Clause 23 in original UALL: Limitation of Liability:**

In view of the proposed changes as detailed hereunder, the MCA, in the technical consultation, had also proposed that clause 23.1 should be kept separate under the heading of: Other Obligations, under Annex B. Consequently clauses 23.2 to 23.4 should then be renumbered as 23.1-23.3. In view of the above, the MCA proposed the removal of clause 23 from the UALL.

*23.1 ~~Each party has an obligation to the other party to exercise reasonable skill and care~~ Neither Party has an obligation of any kind to the other Party beyond an obligation to exercise the reasonable skill and care of a competent electronic communications operator in performing its obligations under this Agreement and under any and all applicable legislation.*

*23.2 If a Party is in breach of any of its obligations under this Agreement to the other Party (excluding the liability to settle any charges incurred in relation to any Unbundled Access to the Local Loop Services or any new service contemplated by this Agreement), such Party's liability for damages to the other shall be limited to one million euro ((€1,000,000) for any one event or series of connected events and two million euro (€2,000,000) for all events, whether connected or not, in any period of twelve (12) calendar months.*

*23.3 Each Party ("the indemnifying Party") shall defend and indemnify the other Party ("the indemnified Party"), its officers, directors, employees and permitted assignees and hold such indemnified Party harmless against any loss to the indemnified Party and/or to any Third Party including any loss arising out of the negligence or willful misconduct by the indemnifying Party, its employees, agents, customers, contractors, or others retained by such parties, in connection with its provision of services under this Agreement or arising out of the indemnifying Party's failure to comply with the provisions of any law.*

*23.4 Neither Party excludes or restricts its liability for death or personal injury caused by its own negligence or for any fraudulent mis-statement or fraudulent misrepresentation made by it in connection with this Agreement.*

*Nothing in this Clause shall render either Party liable to the other for loss of profits, business revenues, missed opportunities or anticipated savings whether incurred directly or indirectly, or for any indirect or consequential damage whatsoever either in contract, tort or otherwise (including negligence or breach of statutory duty).*

**Clause 28 in original UALL: Waiver**

*A failure to exercise or delay in exercising a right or remedy provided by ~~this~~ the UALL Agreement or by law does not constitute a waiver of the right or remedy or a waiver of*

*other rights or remedies or in any way affects the validity of this Agreement. No single or partial exercise of a right or remedy provided by the Agreement or by law prevents further exercise of the right or remedy or the exercise of another right or remedy. Provided that either Party may decide to make any such waiver, in which case the said waiver must be in writing and signed by such Party making the waiver in order for it to be valid.*

#### **Clause 29 in original UALL: Severability**

*The invalidity, illegality or unenforceability of any Clause of ~~this~~ **the UALL** Agreement or part thereof for any reason whatsoever shall not affect the validity, legality or enforceability of the remaining Clauses of this Agreement.*

*Both parties shall negotiate in good faith with respect to an equitable modification of the provisions, or application thereof, held to be invalid, illegal or unenforceable. Provided that ~~if an equitable modification of the invalid, illegal or unenforceable provision is not possible, this Agreement shall be terminated~~ **the parties fail to reach agreement on an equitable modification, the parties shall have right of recourse to Clause 20<sup>12</sup> at Annex B: Dispute Resolution.***

#### **Clause 30 in original UALL: Amendments**

*~~30.1 — GO reserves the right to unilaterally amend any document making up this Agreement as well as any amendments to this Agreement entered with the OAO at any time in its sole discretion, subject to regulatory obligations under applicable legislation. GO shall notify the OAO in writing of any such amendments to this Agreement at least one month prior to activating such changes.~~*

*~~30.2 For avoidance of doubt this Agreement does not preclude GO from amending the GO published Reference Unbundling Offer.~~*

#### **Clause 32 in original UALL: Governing Law and Jurisdiction**

*The interpretation, validity and performance of ~~this~~ **the UALL** Agreement shall be governed in all respects by Maltese Law.*

*The Parties irrevocably submit to the jurisdiction of the Maltese courts.*

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<sup>12</sup> As stipulated in the CD and finally mandated in this Decision.

#### **10.1.2.1 Responses to technical consultation**

What follows are comments received by Vodafone and GO in relation to the above clauses.

**Clause 13: Quality of Unbundled Access Local Loop Services.** GO disagreed with the proposed change by the MCA in clause 13.1 arguing that the removal of the wording *'with reasonable commercial endeavour'* effectively means that the onus is put on GO not to experience degradation or damages to any part of its network that is being used by an OAO. GO contends that aside from not being realistically achievable, it effectively intimates that GO is being obliged to give OAOs a better service that it gives its own retail arm and customers. This was claimed to be in conflict with sub-clause 13.2 and goes well beyond the non-discrimination obligation placed on GO.

**Clause 15: Provision of Information** - Vodafone commented on clause 15.1 which stipulates that the OAO shall provide GO with the necessary information which is reasonably required by GO in the provision of LLU service provisioning. Vodafone's view is that this clause is too vague and does not clearly identify the type/s of information which may be requested by GO from the OAO. Vodafone continued to argue that the parties are to be made aware of the type of information which needs to be provided and ensure that information is provided in so far as it is strictly necessary for the provision of LLU services.

**Clause 23: Limitation of Liability** - Vodafone recommended that a timeframe be included here to ensure that a process is introduced whereby the party in breach has the opportunity to remedy such a breach prior to the mechanism for damages coming into effect. On the other hand GO argued that the text in sub-clause 23.1 being proposed for amendment is standard wording that one finds in all contracts and that the proposed amendment by the MCA turns the sense on its head. To this effect, GO recommended that its wording is retained.

#### **10.1.2.2 MCA's Views and Decision**

**Clause 13: Quality of Unbundled Access Local Loop Services** - Whilst the MCA has reservations on GO's views on the repercussions of removing the term *'with reasonable commercial endeavour'*, the Authority is amenable to changing the wording as detailed hereunder. Additionally, the MCA fails also to understand the logic behind GO's views that Clause 13.1, as proposed by the MCA, conflicts with 13.2, as in the Authority's view these are complementary to each other.

***Without prejudice to the terms and conditions stipulated in the various annexes making up the Reference Unbundling Offer, GO shall, with reasonable***

***commercially endeavour, provide good quality Unbundled Access Local Loop Services to the OAO. GO will not be responsible for the content of the communications transmitted through the Network and other facilities to which UALL would have been granted.***

***GO binds itself to provide Unbundled Access Local Loop Services to the OAO at the same level of service it provides Unbundled Access local Loop Services for its own retail and to other OAOs subscribing to Unbundled Access Local Loop Services from GO in accordance with the non-discrimination obligations arising under Regulation 19(2)(b) of the Electronic Communications Networks and Services (General) Regulations of 2004 and as mandated in the Market Analysis on Wholesale Unbundled Access to the Local Loop published in May 2007.***

The above mandated text is to be incorporated within the Main Body under Clause 1.2 and as further stipulated under Section 13 Amendment F.

**Clause 15: Provision of Information.** In response to Vodafone's comments on this clause, the MCA believes that the information requested within the various forms in general incorporate the standard information GO would need to entertain any request for access.

This notwithstanding, the MCA does not exclude the possibility that GO requires further information in good faith and in order to satisfy its obligations at law to provide access. Hence, other things being equal, clause 15.1 should be interpreted within the context of the information that GO requests the OAO to complete on the face of the various forms.

**Clause 23: Limitation of Liability:** In response to Vodafone's comments, the MCA wishes to clarify that the Limitation of Liability clause, as its name implies, is a mere Limitation of Liability clause and not a penalty clause. Moreover, it should be pointed out that there exists the possibility that damages could be incurred even in the event that a breach is eventually remedied. The Authority will not enter into the merit of the existence or otherwise of any liability for damages. The Authority cannot stipulate the timing of when the penalties come into play. It is not within its powers to do so as these depend on the breach in question and whether in the interim any damages were suffered by the party not in breach. The objective of the Limitation of Liability clause as suggested is solely the setting of liability thresholds should any of the parties exercise the right to claim damages.

As for the comments raised by GO, the MCA does not share the same views but rather is in favour of the text as proposed in the technical consultation as it clearly spells out in a positive manner the obligations each party has towards each other rather than stating so in a negative manner.



### 10.1.2.3 Summary of Decisions

Hereunder is a reproduction of the mandated clauses found in the Original UALL and for which the MCA mandates relocation within Annex B.

#### **New Services**

##### **[Article numbering to be determined by GO]**

**X.1 The OAO may, at any time, make a written request to GO in accordance with Clause 18 at Annex B: the Review Clause, requesting GO to enter into an agreement for the provision of new UALL services in accordance with the terms and conditions of Annex G.**

**X.2 Following a request pursuant to Clause 8.1, GO shall offer UALL services as specified in Annex G of this Agreement.**

#### **Provisioning, Operation and Maintenance**

##### **[Article numbering to be determined by GO]**

**The procedures for the provision, operation and maintenance of Metallic Path Facilities and Collocation Services as for the continued operation and maintenance thereof shall be governed by the provisions of the Main Body and all applicable annexes.**

#### **Provision of Information**

**X.1 Subject to any confidentiality obligations the OAO shall provide GO with the necessary information which is reasonably required by GO in the provision of Unbundled Access to the Local Loop Services to the OAO.**

**X.2 The Parties shall use reasonable endeavours to ensure that information disclosed is correct to the best of its knowledge at the time of provision of such information.**

**X.3 The Parties shall consult together on a timely basis in relation to the operation of this Agreement and apply their best endeavours to resolve any problems arising from such consultation or otherwise encountered in relation to this Agreement. In the event that any disagreement occurs in this respect, the Parties shall have recourse to Clause 20<sup>13</sup> at Annex B:**

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<sup>13</sup> As stipulated in Section 13, Amendment M of this Decision.

**Dispute Resolution.**

**X.4 Without prejudice to the provisions of Clause X.1 each of the Parties shall appoint a representative for the purposes of overseeing the organisation of the day-to-day practical implementation of this Agreement each of them shall liaise with the other and report to the Party appointing him on any problem which has not proved capable of resolution. On receipt of such report the Parties shall consult with a view to achieving a mutually acceptable solution to such problem.**

**X.5 Subject to Clause 12<sup>14</sup> hereof, both Parties shall indemnify the disclosing Party and keep it indemnified against all liabilities, claims, demands, damages, costs and expenses arising as a consequence of any failure by the receiving Party to comply with any written conditions imposed, including those relating to confidentiality as per Clause 12 or arising as a consequence of any failure by the receiving Party or any Third Party authorized by the receiving Party to comply with any obligations of confidentiality in accordance with Clause 12 or with any obligation under the DPA and any regulations promulgated thereunder.**

**X.6 Nothing in this Agreement shall require a Party to do anything in breach of any statutory or regulatory obligation of confidentiality, including without prejudice to the generality of the foregoing, any obligation pursuant to the ECRA, the DPA or any other applicable legislation.**

**Limitation of Liability:**

**Clause X.1 hereunder should be kept separate under the heading of: *Other Obligations* under Annex B. Clauses X.2 and X.3 should then be renumbered accordingly.**

**X.1 Each party has an obligation to the other party to exercise reasonable skill and care of a competent electronic communications operator in performing its obligations under this Agreement and under any and all applicable legislation.**

**X.2 If a Party is in breach of any of its obligations under this Agreement to the other Party (excluding the liability to settle any charges incurred in relation to any Unbundled Access to the Local Loop Services or any new service contemplated by this Agreement), such Party's liability for damages**

<sup>14</sup> This refers to the confidentiality clause found under clause 12 in Annex B.

to the other shall be limited to one million euro ((€1,000,000) for any one event or series of connected events and two million euro (€2,000,000) for all events, whether connected or not, in any period of twelve (12) calendar months.

**X.3 Each Party ("the indemnifying Party") shall defend and indemnify the other Party ("the indemnified Party"), its officers, directors, employees and permitted assignees and hold such indemnified Party harmless against any loss to the indemnified Party and/or to any Third Party including any loss arising out of the negligence or willful misconduct by the indemnifying Party, its employees, agents, customers, contractors, or others retained by such parties, in connection with its provision of services under this Agreement or arising out of the indemnifying Party's failure to comply with the provisions of any law.**

**X.4 Neither Party excludes or restricts its liability for death or personal injury caused by its own negligence or for any fraudulent mis-statement or fraudulent misrepresentation made by it in connection with this Agreement.**

**Nothing in this Clause shall render either Party liable to the other for loss of profits, business revenues, missed opportunities or anticipated savings whether incurred directly or indirectly, or for any indirect or consequential damage whatsoever either in contract, tort or otherwise (including negligence or breach of statutory duty).**

#### **Waiver**

**A failure to exercise or delay in exercising a right or remedy provided by the UALL Agreement or by law does not constitute a waiver of the right or remedy or a waiver of other rights or remedies or in any way affects the validity of this Agreement. No single or partial exercise of a right or remedy provided by the Agreement or by law prevents further exercise of the right or remedy or the exercise of another right or remedy. Provided that either Party may decide to make any such waiver, in which case the said waiver must be in writing and signed by such Party making the waiver in order for it to be valid.**

#### **Severability**

**The invalidity, illegality or unenforceability of any Clause of the UALL Agreement or part thereof for any reason whatsoever shall not affect the**

**validity, legality or enforceability of the remaining Clauses of this Agreement.**

**Both parties shall negotiate in good faith with respect to an equitable modification of the provisions, or application thereof, held to be invalid, illegal or unenforceable. Provided that if the parties fail to reach agreement on an equitable modification, the parties shall have right of recourse to Clause 20<sup>15</sup> at Annex B: Dispute Resolution.**

#### **Governing Law and Jurisdiction**

**The interpretation, validity and performance of the UALL Agreement shall be governed in all respects by Maltese Law.**

**The Parties irrevocably submit to the jurisdiction of the Maltese courts.**

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<sup>15</sup> As stipulated in Section 13, Amendment M.

### **10.1.3 Structure of the UALL**

During the technical consultation with respondents, the MCA proposed that the UALL will be limited to general contractual clauses, leading to the proposed amended version found in Appendix III<sup>16</sup> within the Appendices Document attached to this Decision.

#### ***10.1.3.1 Responses on the Structure of the UALL***

Vodafone agreed with the way forward as proposed by the MCA i.e. to leave the UALL a two page document and to therefore remove the clauses already found in Annex B. Vodafone proposed also amendments to Clause 2.5 clarify the process by which amendments to the RUO could be made from time to time.

#### ***10.1.3.2 MCA's Views and Decision***

After evaluating the response related to the structure of the UALL agreement the MCA is hereby amending the proposed UALL Agreement as shown in Appendix III within the Appendices Document attached to this Decision. Red text represents amendments made by the MCA to take into consideration Vodafone's comments.

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<sup>16</sup> The MCA carried other minor changes aimed at fine-tuning the final version of the UALL Agreement.

## 10.2 LLU Request Forms

### 10.2.1 MCA's Analysis

GO submitted the various LLU request Forms referred to throughout the RUO. These are being included at Appendices IV - VII within the Appendices Document attached to this Decision. Red text inserted in these annexes represents the MCA's final decision as spelt under Section 10.2.2. In summary the amendments mandated by the MCA were the result of the following observations made by the Authority.

- **Form 1:** the field for the end user telephone number is missing;
- **Forms 1 & 2:** Amongst others, OAO is requested to disclose the following:
  - Address of GO building where MPF is required: Considering number portability issues and the fact that GO will provide an A1-Map which 'broadly' partitions Malta's territory by MDF, the OAO may not be 100% sure of the address of GO building especially in instances where the OAO would have a collocation facility in areas adjacent to each other.
  - GO collocation reference: same arguments as above apply.
  - Tie cable details: same arguments as above apply.
  - Prepayment reference: GO was asked to elaborate on the meaning of this term.
- **Collocation Provisioning Form:** The OAO, amongst others, is required to disclose the following:
  - GO Building Reference: the MCA understands that this is equivalent to the building code that the OAO is knowledgeable about and hence this assumes the same reference specified by GO in its list of the building sites and the type of collocation facilities available;
  - Forecast duration of Collocation Facility: the MCA, in its private consultation with GO and Vodafone has aired its lack of understanding for the inclusion of this field by GO. MCA further disclosed its assumption that when a prospective OAO requests unbundling in a particular site, it bases its request upon a firm belief that the OAO has a business case which therefore naturally assumes, other things being equal, a duration equivalent to at least the contract period.

### *10.2.2.2 Responses to the technical Consultation*

The MCA did not receive any feedback on these forms. Neither did the MCA receive any feedback from GO on the specific requests for clarifications made by the Authority.

### **10.2.2 MCA's Views and Decision**

In view of the above the MCA mandates the following:

#### **Form 1:**

- GO is to include a field for the end user telephone number;
- GO is to include a field where the OAO can stipulate the threshold he is prepared to pay in case where the OAO's order requires relief project to be performed<sup>17</sup>.

#### **Forms 1 & 2:**

The following fields are to be filled by GO and data communicated to the OAO.

- Address of GO building where MPF is required;
- GO Collocation Reference;
- Tie cable details.

As for the prepayment reference, GO is to clearly stipulate on the face of the forms what is meant by this term and hence what reference is expected to be filled by the OAO.

#### **Collocation Provisioning Form:**

- GO building Reference: GO is to clearly stipulate on the face of the forms what is meant by this term and hence what reference is expected to be filled by the OAO.
- Forecast duration of Collocation Facility: this shall be retained in view of the requested information on the OAO Equipment Forecast Power Gradient. This should be considered as an estimate that can be reasonably projected at the time of requests and in no way binds the OAO in any manner whatsoever.
- Tie-cable Provisioning and execution of works: to include this field in a manner that the OAO can mark who is to carry out the works and procure the necessary material i.e. whether OAO (through one of the contractors accredited by GO at Annex I) itself or GO.

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<sup>17</sup> Refer to Decision #4 under Section 5.2.

### 10.2.3 MCA's views on the contact details specified within the RUO related forms

The MCA is of the view that for the smooth running of the processes contemplated in Annex G of the RUO the OAO should supply a unique set of contact details. Furthermore, the MCA recommends that such details remain the same across all the various requests that the OAO makes for unbundling. Such details should therefore be submitted at the commencement of the first requested unbundled service. The purpose of the above recommendations is solely aimed at minimizing the possibility for eventual logistical problems.

## 10.3 ANFP

Following the analysis of the new ANFP document submitted by GO, it transpired that this document had an important chapter missing relating to the process for the introduction of new technologies on the network (hereafter 'technology chapter'). At the time of writing, this chapter was submitted by GO and is currently being analysed by the Authority.

### 10.3.1 Decision on ANFP

**GO is hereby directed to make available the ANFP document as is (i.e. except for the technology chapter) by not later than one week from the publication date of this decision. This document shall be made available to potential access seekers following the signature of the NDA.**

**Following a preliminary review by the MCA, the Authority will submit the new technology chapter for public consultation.**

**GO will be required to incorporate the above-mentioned chapter (as an integral part of the ANFP document) following the finalisation of the above mentioned consultation phase.**



## 11 CUSTOMER ORDERING PROCEDURES

The CD made reference to a number of issues that the MCA intends to address in the future. A case in point relates to the customer ordering procedures related to Clause 1.2 General Principles in the Main Body to the RUO and Clause 5 in Annex B.

These clauses are being reproduced in italics hereunder for ease of reference.

*'Maltacom reserves the right, prior to complying with a request from the OLO for a UALL Service:*

1. *To ensure that the prospective User, who would have applied to the OLO for the service in regard to which the OLO would be requesting the UALL Service, is Maltacom's registered subscriber for the voice telephony service or, if not, has obtained the consent of such registered subscriber to apply for the said OLO service;*
2. *To ensure that the prospective User, who would have applied to the OLO for the service in regard to which the OLO would be requesting the UALL Service, does not have any outstanding debts with Maltacom. In the event that any such outstanding debts exist, Maltacom reserves the right not to comply with the OLO's request for the UALL service pending settlement by the User of the said outstanding debts; and*
3. *Generally, to communicate with the prospective User who would have applied to the OLO for the service in regard to which the OLO would be requesting the UALL Service.'*

In relation to the above, the MCA had commented that clauses 1 & 2 depicted above should be made more robust and sufficiently elaborated so as to minimize room for misinterpretation. In its CD, the MCA reserved the right to update or change them in the future as deemed necessary. In the case of clause 3, the MCA opined that this needs to be revisited on the basis of the Decision entitled '*Preventing anti-competitive winback tactics in Number Portability, WLR, and Carrier Pre-Selection*' published by the MCA in March 2008.

This clause was touched upon again in the technical consultation with Vodafone and GO in view that GO had inserted this clause on the face of the UALL. In this technical consultation, the MCA proposed the removal of clause 1.2.3 from the Main Body and clause 5.3.3 from Annex B (equivalent to clause 3 as reproduced above) with immediate effect.

## 11.1 MCA Decision

**The MCA is hereby mandating that clause 1.2.3 of the Main Body and clause 5.3.3 from Annex B be removed.**

With regards to the ordering processes when the OAO applies for UALL service on behalf of their customer/s who opt to retain their numbers, the ordering processes relating to Number Portability shall apply over and above the LLU processes stipulated in Annexes G and J. Any interim routing issues that may arise in this instance shall be addressed in the near future.

## 12. LIST OF DECISIONS

Hereunder is a list of all the decisions the MCA is mandating throughout this document. For ease of reference, the decisions are being reproduced in the format and in the same order as proposed in the CD.

### 12.1 'GET-STARTED' PACK

#### **FINAL Decision #1:**

- 1. Upon formal communication<sup>18</sup> made by an OAO making a formal request for unbundling under any of the forms stipulated within the RUO, the parties have to sign the Non-Disclosure Agreement as referred to in the RUO (Annex H). The signing of said Agreement should be made within 1 week from when the OAO makes a formal request as stipulated above;**
- 2. UALL Agreements including UALL Collocation Facility agreements, the ANFP document as well as and any forms mentioned in the RUO should be made available instantly upon the signing of the Non Disclosure Agreement (NDA) referred to in point 2 above.**

**The MCA is hereby also mandating the above timelines to be inserted in the RUO (see Section 13).**

### 12.2 Provision of Information to OAO

#### **FINAL Decision #2:**

**The MCA mandates that the following information should be available to OAOs, free of charge, upon the signature of a non-disclosure agreement:**

- Size of the exchange: number of inactive lines, number of active lines;**
- Size A1-Map which broadly partitions Malta's territory according**

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<sup>18</sup> The MCA, under Section 13, is mandating a new clause within the RUO so as to regulate what constitutes a request and/or formal communication between the parties.

- to the coverage areas of the MDFs;
- Types of collocation which are theoretically available on the site (co-mingling, dedicated collocation, virtual collocation, distant collocation);
- PSTN number ranges associated with each exchange.

The above information shall be provided by means of a secure access over GO's website. Secure access to this information shall be given to the OAO within 3 working days of the signing of the NDA.

It is important to clarify that the theoretical availability of distant collocation falls outside the powers of GO due to its very nature. However, GO should in this case signal its amenability to accept access to its exchange for the purpose of interconnecting the equipment hosted by the OAO in the distant collocation to the relevant equipment on GO's side.

After the signature of a UALL agreement, information on theoretical eligibility and quality of broadband service over PSTN active line (preferably through a web portal) will be provided to the OAO. This should also be provided free of charge. GO shall ensure that the information provided is kept up-to-date and as accurate as reasonably possible consistent with the non-discrimination principle. In any case such information shall be reviewed at intervals not exceeding 8 months and GO shall provide OAOs with reasonable notice of any significant changes to said information.

### 12.3 UNBUNDLING PROCESSES: Collocation Processes

#### **FINAL Decision #3:**

The MCA mandates the removal of the Desktop Study from the process in view of the fact that this is being replaced by the requirement to provide the necessary information upon the signing of the NDA.

In addition, the production of a bill of quantities with associated costs and forecast timescales should be carried out in the scope of a single study, comprising the former physical study and the former production of a bill of quantities with associated costs and forecast timescales.

## 12.4 Generic MPF facility service order and MPF maintenance processes

### **Final Decision #4:**

#### **The MCA mandates:**

- **GO's process in Annex G1 should be restructured to separately capture the 3 possible Full Unbundling cases;**
- **an automatic acknowledgment should also be introduced in the fault clearance process;**
- **an SLA on acknowledgment in the MPF provision process should be introduced with the possibility of relevant KPIs introduced following service take-up;**
- **GO's RUO should be modified to give the responsibility of the appointment with end-user to OAO;**
- **GO's RUO should introduce a threshold (to be set by OAO on a case by case basis) for the case where OAO's order requires relief project to be performed;**
- **GO's process in annex G1 should be streamlined so as to better correspond to annex J (SLA) and annex C2 (service description).**

## 12.5 Service Level Agreement

### **FINAL Decision #5:**

#### **The MCA mandates that:**

- **the SLAs associated with MPF line transfer (full unbundling service provisioning ) should remain unchanged but a threshold of 20 days should be introduced even in case of multiple problems (ex: pair gain + cable replacement);**
- **the SLAs associated to the shared access service provisioning**

**process should remain unchanged but a threshold of 20 days should be introduced even in case of multiple problems (ex: pair gain + cable replacement);**

- **GO is to furnish the Authority with statistics on fault rectification clearly disaggregating between line faults and cable faults and also between faults relating to its customers and those of the OAO. Such data is to be submitted on a yearly basis within 2 months following the close of the calendar year. The MCA reserves the right to carry out tests and / or audits on the statistics given by GO and further reserves the right to introduce a compensation mechanism where it is found that there exists adverse diverging repair times for the OAO.**
- **the SLA associated to physical survey should be reduced to 40 working days;**
- **the physical survey should include the provisioning of the bill of quantities;**
- **within 10 working days from the completion of the detailed physical survey, the parties are to sign the Formal Collocation Agreement;**
- **the SLA associated to the execution of the works should be lower or equal to 60 working days;**
- **The OAO can exercise the option to procure directly the material and execute the works relative to tie cable provisioning. The OAO can appoint any one of the contractors being accredited by GO at Annex I;**
- **GO is to publish a list of not less than 4 independent contractors that it acknowledges are competent to carry out the necessary works with due care and diligence; this list should be made available in Annex I to the RUO;**
- **the SLA associated to internal tie cable fault rectification should cover the full length of the tie-cable provisioned.**

## 12.6 Impact of the Decisions on the various Annexes making up the RUO

The above decisions bring about changes to a number of annexes within the RUO. The Annexes affected by the above decisions include:

- Annex C1 - C2;
- Annexes D1 – D3;
- Annex F;
- Annex G1 – G3;
- Annex I;
- Annex J.

With the exception of Annex F, all the affected Annexes were reproduced in an Annex Document to the CD where the proposed changes were highlighted accordingly.

With the exception of Annex G2 and Annex J, all the proposed changes to the annexes as detailed in the Annexes document to the CD are being hereby mandated. For the sake of clarity these are being reproduced again in Appendices VIII to XV within the Appendices Document attached to this Decision. For ease of reference, these Annexes are being reproduced in the same format as produced within the Annexes document to the CD. In other words, red and strikethrough text represent all the changes that are being mandated by the MCA on the original relative Annex. However, as in the case of the Annexes Document that was attached to the CD, Annexes G1, G3 and J, due to their particular nature, are being reproduced in the mandated format only. Insofar as Annex G2, this is being reproduced as an Appendix I within the Appendices Document attached to this Decision and in this particular instance, red and strikethrough text represent both the changes proposed in the CD (and hereby mandated in this Decision) as well as further amendments affected by the MCA following responses to the CD. As for Annex J, this is being reproduced in Annex XVI and includes further amendments to the one proposed within the Annexes document to the CD in view of the decisions mandated by the MCA in Section 6.2.2 of this Document.

### 12.6.1 Annex F:

Annex F is not being reproduced. The only changes mandated are as follows:

1. Service codes 5.1.1 and 5.1.2 stipulated in Annex F are to be deleted as these are redundant.
2. To ensure consistency and enhance clarity, the service descriptions under the following codes under 1.1 in Annex F should read as follows:
  - a. Service code 1.1.1: Case A: MPF Line Transfer;
  - b. Service code 1.1.2: Case B: New MPF with spare capacity between the DP and the MDF;
  - c. Service code 1.1.3: Case C: New MPF with no spare capacity between the DP and the MDF.

#### **FINAL Decision #6:**

**The MCA directs that the respective clauses in GO's RUO be revised forthwith as specified in Section 13 below. GO shall affect the changes as mandated in this Decision within five (5) weeks from its publication. These amendments shall be applied to all unbundling agreements which may have been concluded in accordance with the review clause.**

#### **FINAL Decision #7:**

**The MCA directs that the RUO and its annexes be amended in line with the preceding decisions inter alia by implementing the amended annexes contained in the Appendices Document attached to this Decision including the changes stipulated under Section 12.6.1 for Annex F. Following the publication of a Decision by the MCA, GO is to affect the changes necessary to implement the mandated amendments within five (5) weeks from its publication. These amendments shall be applied to all unbundling agreements which may have been concluded in accordance with the review clause.**

**The MCA further mandates that every version of the RUO shall include a date and version number. GO shall be obliged to maintain a special marked version of each version of the RUO showing tracked changes in respect of the former version. Such tracked version of the RUO is to be communicated to the Authority.**



## 12.7 Further Decisions

**GO is hereby directed to make available the ANFP document as is (i.e. except for the technology chapter) by not later than one week from the publication date of this decision. This document shall be made available to potential access seekers following the signature of the NDA.**

**Following a preliminary review by the MCA, the Authority will submit the new technology chapter for public consultation.**

**GO will be required to incorporate the above-mentioned chapter (as an integral part of the ANFP document) following the finalisation of the above mentioned consultation phase.**

## 13. AMENDMENTS TO SPECIFIC CLAUSES

What follows is a list of those clauses for which the MCA is mandating a number of changes. 'Current text' represents text that is found in the current version of the RUO, whereas 'Mandated Text' represents the text that should supersede the 'Current Text'. Included under this Section there are also a number of clauses which GO introduced as new in their draft UALL and for which the MCA is mandating inclusion within Annex B.

### **A: AMENDMENTS TO CERTAIN TERMS AS MENTIONED IN THE RUO:**

#### **Changes Mandated:**

'Maltacom' to be replaced with 'GO';

'OLO' to be replaced with 'OAO';

Prices in LM to be reinstated in € equivalents;

'working day' : any day other than Saturdays, Sundays and public holidays in Malta.

### **B: REFERENCE TO LEGISLATION**

#### **Current RUO:**

#### **Legislation currently referenced on the cover page of each Annex:**

This Reference offer for unbundled access to Maltacom's local loops and related facilities is published in accordance with Regulation 4 of the Electronic Communications (Unbundled Access to the Local Loop) Regulations as per Legal Notice 45 of 2003. This regulation transposes Article 3 of the Regulation on Unbundled Access to the Local Loop (Regulation (EC) 2887/2000).

Undertakings are advised that the Malta Communications Authority may impose changes to this Reference Offer in accordance with its powers under Regulation 7 of above mentioned Legal Notice (the said regulation 7 transposes Article 4 of Regulation (EC) 2887/2000).

#### **Main Body Clause 1.1:**

This Reference Unbundling Offer ("RUO") is being made in accordance with the provisions of L.N. 45 of 2003 entitled Telecommunications (Unbundled Access to the Local Loop) Regulations, 2003 made under the Telecommunications (Regulation) Act

1997.

**Mandated Text:**

**On The Cover page of each Annex:**

**This Reference offer for unbundled access to GO's local loops and related facilities is published in accordance with Regulation 18(4) of the Electronic Communications Network and Services (General) Regulations (Chapter 399.28 of the Laws of Malta). This regulation transposes Article 9(4) of the Access Directive (DIRECTIVE 2002/19/EC).**

**Undertakings are advised that the Malta Communications Authority may impose changes to this Reference Offer in accordance with its powers under Regulation 18(2) of the Electronic Communications Network and Services (General) Regulations (Chapter 399.28 of the Laws of Malta) which transposes Article 9(2) of the Access Directive (DIRECTIVE 2002/19/EC).**

**Main Body Clause 1.1:**

**This Reference Unbundling Offer ("RUO") is being made in accordance with Regulation 18(4) of the Electronic Communications Network and Services (General) Regulations (Chapter 399.28 of the Laws of Malta).**

**C: COMMUNICATION BETWEEN GO AND OAO**

**Current RUO:**

There is no detail in the current RUO that clarifies how the communication is to be affected.

**Mandated Text:**

**To be inserted in Main Body:**

**Any notice or other form of communication required to be given by one Party to the other under this agreement shall be in writing and shall be deemed duly served if:**

**(a) delivered personally by hand during office hours: at the time of actual delivery; or**

**(b) sent by facsimile: upon its receipt being confirmed, provided that such receipt takes place on a working day; or**

**(c) sent by registered post (return receipt to be requested): three (3)**

**working days after the day of posting; or**

**(d) sent by electronic mail: upon receipt in terms of the Electronic Commerce Act, Cap.426 of the Laws of Malta.**

**Provided that, until such time as the coming into force of a web portal for use in relation to Annexes G1, G2, G3 and G4, any communication required in the execution of the processes detailed in said Annexes will be by means of communication detailed in either (b) or (d) as agreed by the parties, in which case both parties are to provide each other with the fax number or e-mail address (whichever the case) to use in such instances. The lead times stipulated in Annex J in relation to Annexes G1, G2, G3 and G4 will be time stamped upon the date of receipt of such communication.**

**Except where otherwise specifically provided, all notices and other communications between the parties relating to this RUO shall be in writing and shall be addressed to:**

**GO:  
The Group Chief Executive Officer  
GO p.l.c;  
Spencer Hill,  
Marsa MRS 1950  
Fax no:  
E-mail:**

**Operator:**

**[Designation]  
[ Address]  
[Fax No.]  
[E-mail]**

#### **D: ESTABLISHING TIMELINES FOR ACCESS TO INFORMATION**

##### **Current RUO:**

There are no timelines established.

##### **Main Body Clause 1.4:**

....

The dissemination of certain types of information by Maltacom shall be subject to the prior signing by the OLO of the Non-Disclosure Agreement at Annex H. Maltacom reserves the right to request payment for particular documents. Following the conclusion of the Non-Disclosure Agreement between Maltacom and the OLO, Maltacom may provide the requested information through secure access over a

Maltacom website. Information about how to access the secure website will be given after the Non-Disclosure Agreement at Annex H has been signed and any necessary payments made.

**Mandated Text:**

**GO is bound to entertain the following requests by the timelines stipulated hereunder:**

- 1. Upon a formal request for unbundling made by the OAO under any of the methods stipulated within the RUO<sup>19</sup>, the parties will sign the Non-Disclosure Agreement as referred to in Annex H. The signing of said Agreement will be made within 1 week from when the OAO makes a formal request as stipulated above;**
- 2. UALL Agreements including UALL Collocation Facility agreements and any Forms in the RUO will be made available instantly upon the signing of the Non Disclosure Agreement (NDA) referred to in point 1 above.**
- 3. GO shall provide the information contained in Annex I through secure access over GO's website. Timelines for the submission of said information is as stipulated in Annex I. GO reserves the right to request payment for information requested by the OAO which is not included in Annex I. GO shall not delay access to the information at Annex I by reason of non-payment for other information.**

**Failure from the part of GO to adhere with the above stipulated timelines would constitute a breach of its obligations to provide access; provided that if GO deems that any request for confidential information is not a genuine request, GO may request the Authority's intervention prior to allowing access to such information. The Authority's decision following such intervention shall be final and binding, subject to the possibility of appeal.**

**In order for an interested party to make a formal request for unbundling, the party must be in possession of the applicable authorisations in line with the local regulatory framework to operate as a provider of electronic communications services.**

**E: AMENDMENTS**

<sup>19</sup> As per Communication Clause proposed

**Current RUO:**

**Terms and Conditions Annex B Clause 18: Amendments**

Maltacom reserves the right to amend any document making up this RUO as well as any UALL Agreements entered into with the OLO at any time in its sole discretion, subject to regulatory obligations under applicable legislation.

**Main Body: Clause 1.2**

The prices, terms and conditions of the RUO are subject to change either by Maltacom in its sole discretion or as requested by the MCA, in accordance with applicable EU and Maltese legislation. Any changes will be published accordingly.

**Mandated Text:**

**To remove text spelt about under Clause 1.2 and**

**Annex B Clause 18: To be renamed and amended as follows:**

**18. Amendments to RUO and Review of UALL Agreements**

**18.1 The Authority reserves the right to affect any amendments it deems fit to any of the terms and conditions stipulated in the RUO in accordance with its powers under Regulation 18(2) of the Electronic Communications Network and Services (General) Regulations (Chapter 399.28 of the Laws of Malta).**

**18.2. Any party to an existing UALL agreement shall be entitled, upon request to the other party in accordance with clause 18.3, to obtain the terms and conditions included in the most recent version of the RUO published from time to time.**

**18.3. A Party may seek to amend this Agreement by serving on the other a review notice if:**

- 18.3.1. either Party's General Authorisation is materially modified ; or**
- 18.3.2. a material change occurs in the law or regulations governing electronic communications in Malta or the EU; or**
- 18.3.3. This Agreement makes express provision for a review or the Parties may agree in writing that there shall be a review; or**
- 18.3.4. A material change occurs, which affects or reasonably could be expected to affect the commercial or technical basis of this Agreement; or**
- 18.3.5 There is a review of the RUO by the Authority;**
- 18.3.6. There is a material change to the terms and conditions of any UALL and/or Collocation Agreement.**

**18.4. A review notice shall set out in reasonable detail the issues to be discussed between the Parties.**

**18.5. Save for the provisions of the UALL and/or Collocation Agreement, a Party may initiate a general review of this Agreement at least once during the twelve month period beginning from the Commencement Date of this Agreement and subsequent anniversary. However, provided a Party complies with Clause 18.4, a review may be initiated as deemed appropriate by either Party serving a review notice.**

**18.6. On service of a review notice, the Parties shall forthwith negotiate in good faith the matters to be resolved with a view to agreeing the relevant amendments to this Agreement.**

**18.7. For the avoidance of doubt, the Parties agree that notwithstanding service of a review notice this Agreement shall remain in full force and effect.**

**18.8. If the Parties fail to reach agreement on the subject matter of a review notice within 1 calendar month (the relevant period) in each case from the date of service of such review notice, either may escalate the dispute for determination by the Authority in accordance with the MCA Guidelines for Inter-Operator Complaints Disputes & Own Initiative Investigations. The Authority shall endeavour to determine:**

**18.8.1. the matters upon which the Parties have failed to agree;**

**18.8.2. whether this Agreement should be modified to take account of such matters; and, if so**

**18.8.3. the amendment or amendments to be made.**

**The Parties shall enter into an agreement to modify or replace this Agreement in accordance with what is agreed between the Parties to conform to the determination of the MCA.**

**18.9. Any amendments and supplements to this Agreement, including its Annexes, Appendices and Service Schedules shall in order for them to be valid, have been drawn up in writing, dated and signed by both Parties. Such amendment and supplements shall not affect the validity or enforceability of any of the remaining provisions of this Agreement.**

#### **F: QUALITY OF SERVICE GUARANTEE**

##### **Current RUO:**

##### **Main Body Clause 1.2**

... Maltacom will not be responsible for the quality and content of the communications transmitted through the Network and other facilities to which UALL would have been granted.

##### **Mandated text:**

**Without prejudice to the terms and conditions stipulated in the various annexes making up the Reference Unbundling Offer, GO shall, with**

**reasonable commercial endeavour, provide good quality Unbundled Access Local Loop Services to the OAO. GO will not be responsible for the content of the communications transmitted through the Network and other facilities to which UALL would have been granted.**

**GO binds itself to provide Unbundled Access Local Loop Services to the OAO at the same level of service it provides Unbundled Access local Loop Services for its own retail and to other OAOs subscribing to Unbundled Access Local Loop Services from GO in accordance with the non-discrimination obligations arising under Regulation 19(2)(b) of the Electronic Communications Networks and Services (General) Regulations of 2004 and as mandated in the Market Analysis on Wholesale Unbundled Access to the Local Loop published in May 2007.**

#### **G: CHARGES NOT ESTABLISHED A PRIORI**

##### **Current RUO:**

##### **Annex B Clause 6.1:**

In regard to all other Services for which no charge is specifically indicated in the RUO Price List, such Services shall, unless the contrary is otherwise expressly stated, be subject to bespoke charges. Such bespoke charges will be provided by Maltacom to the OLO on an ad hoc basis.

##### **Mandated Text:**

**Services for which no charge is specifically indicated either in the RUO Price list or made reference to in the Annexes may be subject to bespoke charges unless the contrary is otherwise expressly stated. Except for when the timeframe of the bespoke charge is determined in a particular Annex, bespoke charges will be provided by GO to the OAO within 20 working days of the OAO's request for such information. It is understood that any such request for the bespoke charges shall not be interpreted as binding the OAO to request the relative service to which such bespoke charges relate.**

**The charges should include only efficiently incurred costs which are consistent with the principles of cost causality, transparency and non-discrimination. Should the OAO not be in agreement with the charges provided by GO in accordance with this Clause the OAO may resort to the Dispute Resolution procedure described in Clause 20.**

#### **H: MINIMUM UNBUNDLED LOOPS**

##### **Current RUO:**



**Main Body Clause 1.2**

The OLO shall guarantee that by the end of the first year from the commencement date of the UALL Agreement(s), and annually thereafter, the OLO shall request Maltacom to unbundle a minimum of 1,500 local loops. For the avoidance of doubt, the minimum annual charge payable to Maltacom by the OLO for UALL Services shall be equivalent to the charge for 1,500 requests for UALL Services.

**Annex B Clause 4.2**

The OLO shall guarantee that by the end of the first year from the commencement date of the UALL Agreements, and annually thereafter, the OLO shall request Maltacom to unbundle a minimum of 1,500 local loops (whether by requesting Full Unbundling Service or Shared Access Service). For the avoidance of doubt, the minimum annual charge payable to Maltacom by the OLO for UALL Services shall be equivalent to the charge for 1,500 requests for UALL Services.

**Mandated Text:**

**Both instances shall read:**

**The OAO shall guarantee that by the end of the first year from the date of formal acceptance by the OAO of the executed works of the first unbundled MDF, and annually thereafter, the OAO shall have a minimum of 1,500 unbundled local loops. For the avoidance of doubt, the minimum annual charge payable to GO by the OAO for the UALL Services shall be equivalent to the shared access rental annual charge for 1,500 unbundled local loops.**

**I: BREACH, SUSPENSION AND TERMINATION**

**Current RUO:**

**Annex B Clause 11:**

11.1 If the OLO's Network or equipment adversely affects the normal operation of Maltacom's Network or equipment, or is a threat to any person's safety, Maltacom may suspend, to the extent necessary, such of its obligations under the UALL Agreements, and for such period as it may consider reasonable to ensure the normal operation of its Network or equipment or to reduce the threat to safety.

11.2 If the OLO shall be in breach of a material obligation under the UALL Agreements, Maltacom shall have the option to terminate the UALL Agreements forthwith, and this without the need of any authorisation or confirmation by any court or authority.

11.3 The UALL Agreements may also be terminated by Maltacom by written notice

forthwith if the OLO:

- (a) is unable to pay its debts; or
- (b) ceases to carry on business; or
- (c) has a liquidator or an administrator appointed; or
- (d) has an order made or a resolution passed for its winding up.

11.4 The UALL Agreements shall also terminate:

11.4.1 in the event that the OLO ceases to hold a licence or equivalent to provide telecommunications services and systems granted to it pursuant to applicable legislation; or

11.4.2 in the case of Shared Access Service, if the User cancels his voice telephony subscription with Maltacom; or

11.4.3 in the case of Shared Access Service, if the User fails, within the stipulated period, to settle any outstanding debts that such User may have with Maltacom. In any such circumstances, Maltacom shall resume provision of the Shared Access Service, upon a request made to it by the OLO, following payment by the User of all the said outstanding debts. All costs incurred in such disconnection and reconnection shall be fully borne by the OLO; or

11.4.4 in any other manner contemplated by the termination provisions of the UALL Agreements.

11.5 Upon termination or expiry of the UALL Agreements, the Parties shall cooperate with each other to ensure that such steps are taken as are necessary for recovery by each Party of any equipment or apparatus supplied by the other Party (even where that equipment or apparatus is on the premises of the other Party).

11.6 On termination or expiry of the UALL Agreements either Party shall be entitled after reasonable prior notice in writing to the other Party to enter the premises of the other Party for the purposes of carrying out necessary disconnection works and repossessing any plant, equipment or apparatus of that Party or a Third Party installed by or for that Party. The Party on whose premises such plant equipment or apparatus was installed shall be responsible for compensating the other for any such plant equipment apparatus or things belonging to the other or such Third Party which are not so delivered in good condition (fair wear and tear excepted) and the Party carrying out such disconnection works shall indemnify the other Party in respect of any damage thereby caused to the premises fixtures and fittings, apparatus and equipment of such other Party. Neither Party shall be responsible for any damage to plant, equipment or apparatus belonging to the

other Party which has been caused by any negligence or failure to perform necessary or timely maintenance by such other Party or by a Third Party.

11.7 Termination or expiry of the UALL Agreements shall not be deemed a waiver of a breach of any term or condition of the said UALL Agreements and shall be without prejudice to either Party's rights, liabilities or obligations that would have accrued prior to such termination or expiry.

11.8 Notwithstanding the termination or expiry of the UALL Agreements, the preceding sub-clause and Clauses 12, 13 and 15 shall continue in full force and effect.

11.9 Maltacom's right to terminate or suspend performance of the UALL Agreements pursuant to this Clause is without prejudice to any other rights or remedies available to either Party at law.

**Mandated Text:**

**11.1 In the event that either Party is in breach of a material obligation under UALL Agreement, not being a breach described in Clauses 11.2 and 11.3 hereunder, and such breach is capable of remedy, the other Party ("the Terminating Party") shall send the Party in breach a written notice giving full details of the breach and requiring the Party in breach to remedy the breach or in the case of an urgent need to remedy the breach so as to safeguard end-to-end connectivity, within such shorter period as the Terminating Party may reasonably specify.**

**If the Party in breach does not remedy the breach within the time period stipulated in the said notice, the UALL may be suspended at the option of the Party not in breach provided that the Party being suspended shall have right of recourse to the Authority if it feels that such suspension was unjustified in the circumstances.**

**If the Party in breach does not remedy the breach within thirty (30) days from the date of receipt of the written notice, UALL may be terminated at the option of the Terminating Party. In this case termination shall occur immediately upon written notification by the Terminating Party to the Party in breach. Provided that if the breach is not capable of remedy within thirty (30) days, the Terminating Party shall extend the said period as required in the circumstances.**

**Provided further that each of the Parties' right to terminate or suspend performance of the UALL pursuant to the above is without prejudice to any other rights available to the Parties, in particular the referral of the matter to the Authority for determination in accordance with the MCA Guidelines for Inter-Operator Complaints, Disputes and Own Initiative Investigations.**

**11.2 In the event that the OAO delays any three (3) payments, in any consecutive twelve (12) month period, of any uncontested amounts owed to GO for services rendered under the UALL, GO shall have the right to terminate the UALL; provided that for each delayed payment, GO shall notify the OAO of such delay, thereby warning the OAO of the number of times that the OAO has committed such breach within any consecutive twelve (12) month period. Provided further that upon the second delay, GO shall warn the OAO that in the event of another delay, the UALL shall be terminated forthwith.**

**11.3 In the event that either Party's Network adversely affects the normal operation of the other Party's Network, or is a threat to any person's safety, the other Party ("the Terminating Party") may, after giving the first Party five (5) days written notice, suspend its obligations under the UALL, to the extent necessary, and for such period as it may consider reasonable, to ensure the normal operation of its Network, or to reduce the threat to safety; provided that the Party being suspended shall have right of recourse to the Authority if it feels that such suspension was unjustified in the circumstances.**

**11.4 In addition to the provisions of the clauses above, this UALL Agreement may be terminated by either Party by written notice forthwith (or on the termination of such other period as such notice may specify) if the other Party:**

- (a) is unable to pay its debts; or**
- (b) ceases to carry on business; or**
- (c) has a liquidator or an administrator appointed; or**
- (d) has an order made or a resolution passed for its winding up (other than for the purpose of amalgamation or reconstruction); or**
- (e) ceases to hold an authorisation in accordance with the ECRA.**

**11.5 In addition to the provisions of the clauses above, GO may terminate this Agreement if GO is no longer legally or regulatory obliged to offer Unbundled Access to the Local Loop, provided that such termination shall only occur as specified by the Authority in the relative market analysis in accordance with Article 10(3) of the Electronic Communications Networks and Services (General) Regulations (Chapter 399.28 of the Laws of Malta).**

**11.6 Upon termination or expiry of the UALL Agreements, the Parties shall co-operate with each other to ensure that such steps are taken as are necessary for recovery by each Party of any equipment or apparatus supplied by the other Party (even where that equipment or apparatus is on the premises of the other Party).**

**11.7 On termination or expiry of the UALL Agreements either Party shall be entitled after reasonable prior notice in writing to the other Party to**

enter the premises of the other Party for the purposes of carrying out necessary disconnection works and repossessing any plant, equipment or apparatus of that Party or a Third Party installed by or for that Party. The Party on whose premises such plant equipment or apparatus was installed shall be responsible for compensating the other for any such plant equipment apparatus or things belonging to the other or such Third Party which are not so delivered in good condition (fair wear and tear excepted) and the Party carrying out such disconnection works shall indemnify the other Party in respect of any damage thereby caused to the premises fixtures and fittings, apparatus and equipment of such other Party. Neither Party shall be responsible for any damage to plant, equipment or apparatus belonging to the other Party which has been caused by any negligence or failure to perform necessary or timely maintenance by such other Party or by a Third Party.

**11.8 Termination or expiry of the UALL Agreements shall not be deemed a waiver of a breach of any term or condition of the said UALL Agreements and shall be without prejudice to either Party's rights, liabilities or obligations that would have accrued prior to such termination or expiry.**

**11.9 Notwithstanding the termination or expiry of the UALL Agreements, the preceding sub-clause and Clauses 12, 13 and 15 shall continue in full force and effect.**

**11.10 GO's right to terminate or suspend performance of the UALL Agreements pursuant to this Clause is without prejudice to any other rights or remedies available to either Party at law.**

## **J: ASSIGNMENT OF RIGHTS AND OBLIGATIONS**

### **Annex B Clause 16:**

16.1. Maltacom may at any time assign, sub-contract or transfer the UALL Agreements in whole or in part to any person without requiring any consent therefore from the OLO.

16.2. The OLO shall not be entitled to assign, sub-contract or transfer the UALL Agreements, either in whole or in part, or otherwise dispose of any of its rights or obligations thereunder to any person.

**Mandated Text:**

**16.1 Unless otherwise agreed in writing, and subject to clause 16.2, no rights, benefits or obligations under this Agreement may be assigned, sub-contracted or transferred, in whole or in part, by a Party without the prior written consent of the other Party, which consent shall not be unreasonably delayed or withheld and in any case said consent or refusal shall be communicated within 15 working days from the receipt of the formal request as per communication clause.**

**Provided that each Party may assign, subcontract or transfer this Agreement to an entity under its direct or indirect control or an entity acquiring all, substantially all or parts of its equity without the consent required under this Clause 16.1. The assigning Party shall promptly give notice to the other Party of any assignment or transfer permitted to be made without the other Party's consent. Nevertheless, no notification shall be required in the case of a sub-contracting which can be made without the other Party's consent, provided that in such cases the Party making the sub-contracting shall remain exclusively liable vis-à-vis the other Party for the due and proper performance of all its obligations under this Agreement, and provided further that no relationship whatsoever shall be created between the sub-contractor and such other Party.**

**16.2 Without limiting the generality of the foregoing, this Agreement shall be binding upon and shall inure to the benefit of the Parties' respective successors and assignees. No assignment shall be valid unless the assignee/successor agrees in writing to be bound by the provisions of this Agreement.**

**K: INFORMATION TO BE SUPPLIED BY GO**

**Current RUO:**

**Annex D5: Tie Cables Service**

**2.1.1.1 Generic Operational Requirements for Full Loop Unbundling Services**

In the Distant Collocation Facility where the External Tie Cable(s) terminate/s it is the responsibility of the OLO, at the OLO's expense, to:

- Ensure that space is available for Maltacom to install an HDF of appropriate specification and with sufficient capacity to accommodate all requested External Tie Cables.
- Ensure that there is suitable accommodation for any Maltacom equipment that may need to be installed for the purposes of providing UALL Collocation Facility Service.

**Additional Mandated Text:**

**Provided that GO provides information to the OAO of the required space to accommodate the equipment that is to be installed by GO. This information should be forwarded within five (5) working days from the date that the OAO makes a formal request for a distance collocation facility.**

**L: ROUTING OF INTERNAL TIE CABLE**

**Current RUO:**

**Annex D5 Clause 2.2:**

... Maltacom will route the Internal Tie Cable within the MDF site at its own discretion.

**Mandated Text:**

**... GO will route the Internal Tie Cable within the MDF site taking into consideration the most efficient route possible.**

**M: DISPUTE RESOLUTION**

**Current RUO:**

The Current RUO does not include a dispute resolution.

**Mandated Text:**

**To insert a clause in Annex B: Terms and Conditions:**

**20.1 This clause shall not be applicable in the event that a party to this agreement intends to contest a claim of breach of this agreement or to contest a notice of suspension or termination, as such matters are governed separately under Clause 11.**

**20.2 Save as provided in Clause 20.1 above, each Party shall use its best endeavours to resolve any disputes arising concerning implementation, application or interpretation of this Agreement in the first instance through negotiation between the Parties through the normal contacts. This phase of the dispute resolution shall be referred to as 'Level 1'.**

**20.3 In the event of the Parties failing to resolve the dispute at Level 1 negotiation within two (2) weeks either Party shall have a right to invoke the dispute procedures specified herein on the service of notice ("the Dispute Notice") on the other Party. The Party serving the notice ("the Disputing Party") shall include in the Dispute Notice all relevant details including the nature and extent of the dispute.**

**20.4 Service of the Dispute Notice shall constitute escalation to Level 2. Level 2 shall consist of consultation between the parties in good faith to resolve the dispute.**

**20.5 If the endeavours of the parties to resolve the dispute at Level 2 are not successful within two (2) weeks of escalation of the Dispute to Level 2, either Party may upon service of notice ("the Level 3 Notice") on the other, escalate the dispute for determination by the Authority, hereinafter referred to as Level 3, in accordance with the MCA Guidelines for Inter-Operator Complaints, Disputes & Own Initiative Investigations. The Level 3 Notice shall be served on both the Authority and the other Party. The Level 3 Notice shall include all details relevant to the dispute together with a submission from both Parties as to the nature and extent of the dispute.**

**20. 6 The normal contact for GO is:**

**Level 1:**

**Head of Wholesale Contacts**

**GO**

**[Address]**

**[Tel:]**

**[E:mail]**

**Level 2:**

**Contact Person Details**

**[Address]**

**[Tel:]**

**[E:mail]**

**The normal contact for the OAO is:**

**Level 1:**

**Contact Person Details**

**[Address]**

**[Tel:]**

**[E:mail]**

**Level 2:**

**Contact Person Details**

**[Address]**



[Tel:]  
[E:mail]

**No change to the normal contact details shall be effected until same has been notified to the other Party.**

**20.7 The time limits specified at paragraphs 20.3 and 20.5 above may be extended by mutual agreement between the parties.**

**20.8 The above procedures are without prejudice to any rights and remedies that may be available to the Parties in respect of any breach of any provision of this Agreement.**

**20.9 Any disputes or queries that arise in relation to the charging principles of this Agreement or invoices furnished by GO to the OAO shall be subject to the dispute resolution provisions of this clause.**

**20.10 Where a dispute arises in relation to an amount payable in respect of an invoice then the OAO shall be entitled to withhold payment of the disputed amount due for payment, upon serving GO with a Level 1 notice and provided that the disputed amount is greater than ten percent (10%) of the total invoice amount due for payment. Provided that in the event that the dispute is decided in favour of GO, GO shall have the right to charge interest due on the amount so withheld.**

**20.11 Where the OAO invokes the provisions of this Clause after the due date of a disputed invoice, then the OAO shall not be entitled to withhold any portion of the amount due and payable.**

**20.12 Following resolution of the dispute, the Parties will issue a credit or tender payment as appropriate.**

#### **N: DEFINITION OF THE SHARED ACCESS SERVICE**

##### **Current RUO:**

##### **Main Body Clause 2.3**

...

##### **Definition: Shared Access Service**

A service offered by Maltacom, whereby Maltacom provides the OLO with access to its Copper Access Network, allowing the OLO to may make use of specific upper band

frequency spectrum of the twisted metallic pair, while Maltacom continues to use the local loop to provide the telephone service to the public.

The OLO will be given shared connectivity to a MPF for the purpose of providing xDSL services to Users. Shared access is achieved by using filters to separate the switched voice and xDSL services at the DSLAM location and the User premises.

The Shared Access Service will only be offered on MPFs that are currently working and supplying Maltacom analogue telephony service to the User. The implementation of the Shared Access Service will allow the MPF, by means of the introduction of frequency splitters in the circuit, to support the simultaneous operations of two separate service providers. Maltacom will continue to supply analogue telephony service and the OLO will deliver allowed xDSL services.

#### **Main Body Clause 2.3.1**

The Shared Access Service on Full Loop (see figure 5) allows the OLO access to frequency spectrum above that used to transmit voice services on a MPF which is used by Maltacom to transmit analogue telephony service. ....

#### **Mandated Text:**

**A service offered by GO, whereby GO provides the OAO with access to its Copper Access Network, allowing the OAO to make use of specific upper band frequency spectrum of the twisted metallic pair, while the current service provider continues to use the local loop to provide the telephone service to the public .**

**The OAO will be given shared connectivity to a MPF for the purpose of providing xDSL services to Users. Shared access is achieved by using filters to separate the switched voice and xDSL services at the DSLAM location and the User premises.**

**The Shared Access Service will only be offered on MPFs that are currently working and supplying analogue telephony service to the User by the service provider using the GO's network. The implementation of the Shared Access Service will allow the MPF, by means of the introduction of frequency splitters in the circuit, to support the simultaneous operations of two separate service providers. The current service provider will continue to supply analogue telephony service and the OAO will deliver allowed xDSL services.**

#### **Main Body Clause 2.3.1**

**The Shared Access Service on Full Loop (see figure 5) allows the OAO access to frequency spectrum above that used to transmit voice services on a MPF which is used by the service provider using the GO's network to transmit analogue telephony service. ....**

**O: SHARED ACCESS SERVICE DESCRIPTION**

**Amendments to Annex C1 are being proposed in order to reflect the above proposed change (Amendment N) to the Definition of the Shared Access Service. Annex C1 is being reproduced in the Annexes Document.**

**P: RIGHT OF REFUSAL TO PROVISIONING OF UALL COLLOCATION FACILITY**

**Main Body Clause 2.4.1**

Maltacom reserves the right to refuse provision of any UALL Collocation Facility Service on grounds of lack of capacity or in circumstances where the work required to create space can be demonstrated to be practically and/or economically not viable. In those circumstances in which Maltacom refuses to provide any UALL Collocation Facility Service on grounds of lack of capacity, Maltacom shall, upon request, allow any authorised MCA representative to inspect the site(s) in question in order that the MCA may be satisfied that Maltacom's refusal is justified. The MCA will only intervene in cases of a dispute and site inspections will be carried out by the MCA only in connection with such disputes on refusal by Maltacom to provide collocation services.

**Mandated Text:**

**GO reserves the right to refuse provision of any UALL Collocation Facility Service on grounds of lack of capacity or in circumstances where the work required to create space can be demonstrated to be practically and/or economically not viable. In those circumstances in which GO refuses to provide any UALL Collocation Facility Service on grounds of lack of capacity, GO shall, upon request, allow any authorised MCA representative to inspect the site(s) in question in order that the MCA may be satisfied that GO's refusal is justified.**

**FURTHER MANDATED CHANGES**

**Main Body Clause 1.2**

**Annex B Clause 5**

**Current Text:**

Maltacom reserves the right, prior to complying with a request from the OLO for a

**UALL Service:**

1. To ensure that the prospective User, who would have applied to the OLO for the service in regard to which the OLO would be requesting the UALL Service, is Maltacom's registered subscriber for the voice telephony service or, if not, has obtained the consent of such registered subscriber to apply for the said OLO service;
2. To ensure that the prospective User, who would have applied to the OLO for the service in regard to which the OLO would be requesting the UALL Service, does not have any outstanding debts with Maltacom. In the event that any such outstanding debts exist, Maltacom reserves the right not to comply with the OLO's request for the UALL service pending settlement by the User of the said outstanding debts; and
3. Generally, to communicate with the prospective User who would have applied to the OLO for the service in regard to which the OLO would be requesting the UALL Service.

**Main Body Clause 1.2**

**Annex B Clause 5**

**Mandated Text:**

**GO reserves the right, prior to complying with a request from the OAO for a UALL Service:**

1. **To ensure that the prospective User, who would have applied to the OAO for the service in regard to which the OAO would be requesting the UALL Service, is GO's registered subscriber for the voice telephony service or, if not, has obtained the consent of such registered subscriber to apply for the said OAO service;**
2. **To ensure that the prospective User, who would have applied to the OAO for the service in regard to which the OAO would be requesting the UALL Service, does not have any outstanding debts with GO. In the event that any such outstanding debts exist, GO reserves the right not to comply with the OAO's request for the UALL service pending settlement by the User of the said outstanding debts.**

**The above clause is still subject to further changes as deemed necessary.**

**Annex B Clause 4.4**

**Current Text:**

4.4 The OLO shall take all necessary measures to ensure that the use of Maltacom's local loop by the OLO's Users will not cause any damage, disturbance, interruptions or the like to the traffic in the PSTN.

**Annex B Clause 4.4**

**Mandated Text:**

**4.4 The OAO shall take all necessary measures to ensure that the use of GO's Services under this Agreement will not cause any damage, disturbance, interruptions or the like to any of the other services provided over the GO infrastructure.**

**Main Body Clause 4**

**Current RUO:**

4. Maltacom Infrastructure Development

Maltacom endeavours to regularly upgrade and adapt its infrastructure in line with technological changes and developments, international standards (ITU-T and ETSI), market demand and changes driven by regulatory authorities and contingencies. This may have an impact on any Services offered by Maltacom under this RUO. Maltacom will endeavour to give the OLO advance notice of any changes that may substantially affect such Services and to publish any amendments to the relevant technical diagrams, documents and annexes that may be necessary. Maltacom shall however not be liable to compensate the OLO in any manner.

Maltacom may in future also consider changing the number of Maltacom Exchanges or switching equipment operated in its Network, or deploying active street equipment eliminating existing Primary Cross-connection Points, as Maltacom may deem necessary in view of its technological and market needs. In such cases Maltacom will endeavour to give the OLO advance notice of any such changes that may substantially affect the Services provided by Maltacom. Maltacom shall however not be liable to compensate the OLO in any manner.

**Main Body Clause 4**

**Mandated Text:**

**Nothing in this Agreement shall in any way hinder GO from the expansion, upgrade, operation and maintenance of its Access Network even if this results in a change in the number of network sites and / or equipment operated by GO.**

**In case where any planned Network Alteration carried out by GO may lead to serious impact on the operations of the OAO, GO shall give advance notice to the OAO as directed by the MCA from time to time. Advance notice shall be given in respect of any such changes and to make available any amendments to the relevant technical diagrams, documents and annexes that may be necessary.**

**Any expenses incurred by the OAO and by GO in relation to Unbundled Access to the Local Loop Services and as a result of Network Alteration shall be fully borne by the OAO unless specified otherwise in any decision issued by the MCA related to this subject.**

**Annex B Clause 9**

**Current RUO:**

**Network Safety and Standards**

9.1 Each Party is responsible for the safe operation of its Network and all equipment relating thereto and shall take all reasonable and necessary steps in its operation and implementation of the UALL Agreements to ensure that its Network and all equipment relating thereto does not:

9.1.1 endanger the safety or health of employees, contractors, agents, customers or other authorised personnel of the other Party; or

9.1.2 damage, interfere with or cause any deterioration in the operation of the other Party's Network or any equipment relating thereto.

9.2 Neither Party shall do or permit anything to be done or omit or permit the omission of anything in relation to the other Party's Network or equipment which either causes damage to the other Party's Network or equipment or will, save as permitted under or pursuant to the UALL Agreements, result in modification of the proper and normal operation of the other Party's Network or equipment.

9.3 Each Party shall conform with the relevant EU and Maltese legislation as well as with all relevant national and international standards in the communications industry including but not limited to those standards and operating guidelines laid down by the International Telecommunication Union (ITU) and the European Telecommunications Standards Institute (ETSI).

9.4 Neither Party shall connect or knowingly permit the connection to its Network of any equipment or apparatus, including but not limited to any terminal equipment, which does not meet the requirements specified in the preceding sub-clause or which shall degrade the quality of the other Party's Network or equipment.

**Annex B Clause 9**

**Mandated Text:**

**9.1 Each Party is responsible for the safe operation of its Network and all equipment relating thereto and shall take all reasonable and necessary steps in its operation and implementation of the UALL Agreements to ensure**

**that its Network and all equipment relating thereto does not:**

**9.1.1 Endanger the safety or health of employees, contractors, agents, customers or other authorised personnel of the other Party; or**

**9.1.2 Damage, interfere with or cause any deterioration in the operation of the other Party's Network or any equipment relating thereto.**

**9.2 Both Parties shall ensure full compliance with Annex E10 of this Agreement, Spectrum Management Specifications. Neither Party shall do or permit anything to be done or omit or permit the omission of anything in relation to the other Party's Network or equipment which either causes damages to the other Party's Network or equipment or will, save as permitted under or pursuant to the UALL Agreements, result in modification of the proper and normal operation of the other Party's Network or equipment.**

**9.3 Each Party shall conform with the relevant EU and Maltese Legislation as well as with all relevant national and international standards in communications industry including but not limited to those standards and operating guidelines laid down by the International Telecommunication Union (ITU) and the European Telecommunications Standards Institute (ETSI).**

**9.4 Neither Party shall connect or knowingly permit the connection to its Network of any equipment or apparatus, including but not limited to any terminal equipment, which does not meet the requirements specified in the preceding sub-clause or which shall degrade the quality of the other Party's Network or equipment.**

**NEW CLAUSES AS INSERTED BY GO IN THEIR DRAFT UALL AND FOR WHICH THE MCA MANDATES INCLUSION IN ANNEX B**

**New Services**

**[Article numbering to be determined by GO]**

**X.1 The OAO may, at any time, make a written request to GO in accordance with Clause 18 at Annex B: the Review Clause, requesting GO to enter into an agreement for the provision of new UALL services in accordance with the terms and conditions of Annex G.**

**X.2 Following a request pursuant to Clause 8.1, GO shall offer UALL services as specified in Annex G of this Agreement.**

**Provisioning, Operation and Maintenance**

**[Article numbering to be determined by GO]**

**The procedures for the provision, operation and maintenance of Metallic Path Facilities and Collocation Services as for the continued operation and maintenance thereof shall be governed by the provisions of the Main Body and all applicable annexes.**

**Provision of Information**

**[Article numbering to be determined by GO]**

**X.1 Subject to any confidentiality obligations the OAO shall provide GO with the necessary information which is reasonably required by GO in the provision of Unbundled Access to the Local Loop Services to the OAO.**

**X.2 The Parties shall use reasonable endeavours to ensure that information disclosed is correct to the best of its knowledge at the time of provision of such information.**

**X.3 The Parties shall consult together on a timely basis in relation to the operation of this Agreement and apply their best endeavours to resolve any problems arising from such consultation or otherwise encountered in relation to this Agreement. In the event that any disagreement occurs in this respect, the Parties shall have recourse to Clause 20<sup>20</sup> at Annex B: Dispute Resolution.**

**X.4 Without prejudice to the provisions of Clause X.1 each of the Parties shall appoint a representative for the purposes of overseeing the organisation of the day-to-day practical implementation of this Agreement each of them shall liaise with the other and report to the Party appointing him on any problem which has not proved capable of resolution. On receipt of such report the Parties shall consult with a view to achieving a mutually acceptable solution to such problem.**

**X.5 Subject to Clause 12 hereof, both Parties shall indemnify the disclosing Party and keep it indemnified against all liabilities, claims, demands, damages, costs and expenses arising as a consequence of any failure by the receiving Party to comply with any written conditions imposed, including those relating to confidentiality as per Clause 12 or arising as a consequence of any failure by the receiving Party or any Third Party authorized by the receiving Party to comply with any obligations of**

<sup>20</sup> As stipulated in Amendment M above.



**confidentiality in accordance with Clause 12 or with any obligation under the DPA and any regulations promulgated thereunder.**

**X.6 Nothing in this Agreement shall require a Party to do anything in breach of any statutory or regulatory obligation of confidentiality, including without prejudice to the generality of the foregoing, any obligation pursuant to the ECRA, the DPA, or any other applicable legislation.**

**Limitation of Liability:**

**Clause X.1 hereunder should be kept separate under the heading of: *Other Obligations* under Annex B. Clauses X.2 and X.3 should then be renumbered accordingly.**

**[Article numbering to be determined by GO]**

**X.1 Each party has an obligation to the other party to exercise reasonable skill and care of a competent electronic communications operator in performing its obligations under this Agreement and under any and all applicable legislation.**

**X.2 If a Party is in breach of any of its obligations under this Agreement to the other Party (excluding the liability to settle any charges incurred in relation to any Unbundled Access to the Local Loop Services or any new service contemplated by this Agreement), such Party's liability for damages to the other shall be limited to one million euro ((€1,000,000) for any one event or series of connected events and two million euro (€2,000,000) for all events, whether connected or not, in any period of twelve (12) calendar months.**

**X.3 Each Party ("the indemnifying Party") shall defend and indemnify the other Party ("the indemnified Party"), its officers, directors, employees and permitted assignees and hold such indemnified Party harmless against any loss to the indemnified Party and/or to any Third Party including any loss arising out of the negligence or willful misconduct by the indemnifying Party, its employees, agents, customers, contractors, or others retained by such parties, in connection with its provision of services under this Agreement or arising out of the indemnifying Party's failure to comply with the provisions of any law.**

**X.4 Neither Party excludes or restricts its liability for death or personal injury caused by its own negligence or for any fraudulent mis-statement or fraudulent misrepresentation made by it in connection with this Agreement.**

**Nothing in this Clause shall render either Party liable to the other for loss of**

**profits, business revenues, missed opportunities or anticipated savings whether incurred directly or indirectly, or for any indirect or consequential damage whatsoever either in contract, tort or otherwise (including negligence or breach of statutory duty).**

#### **Waiver**

**[Article numbering to be determined by GO]**

**A failure to exercise or delay in exercising a right or remedy provided by the UALL Agreement or by law does not constitute a waiver of the right or remedy or a waiver of other rights or remedies or in any way affects the validity of this Agreement. No single or partial exercise of a right or remedy provided by the Agreement or by law prevents further exercise of the right or remedy or the exercise of another right or remedy. Provided that either Party may decide to make any such waiver, in which case the said waiver must be in writing and signed by such Party making the waiver in order for it to be valid.**

#### **Severability**

**[Article numbering to be determined by GO]**

**The invalidity, illegality or unenforceability of any Clause of the UALL Agreement or part thereof for any reason whatsoever shall not affect the validity, legality or enforceability of the remaining Clauses of this Agreement.**

**Both parties shall negotiate in good faith with respect to an equitable modification of the provisions, or application thereof, held to be invalid, illegal or unenforceable. Provided that if the parties fail to reach agreement on an equitable modification, the parties shall have right of recourse to Clause 20<sup>21</sup> at Annex B: Dispute Resolution.**

#### **Governing Law and Jurisdiction**

**[Article numbering to be determined by GO]**

**The interpretation, validity and performance of the UALL Agreement shall be governed in all respects by Maltese Law.**

**The Parties irrevocably submit to the jurisdiction of the Maltese courts.**

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<sup>21</sup> As stipulated in Amendment M above.

## **14. WAY FORWARD**

It is the intention of the MCA to keep monitoring any developments occurring in this particular area including, but not limited to, any change in technology and/or change in GO's access network infrastructure that may impact any of the services offered within the RUO.

In the near future, the MCA intends to embark in a review targeting sub-loop unbundling and the customer ordering procedures.

**Ing. Philip Micallef**

**Chairman  
Malta Communications Authority**