

GO's Reference Unbundling Offer:

Consultation and Proposed Decision on the Review of Sub-Loop Unbundling related aspects of the Reference Unbundling Offer

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1. Introduction

Following the decision on the market analysis of the Wholesale Unbundled Access to the Local Loop market published in May 2007 ('Market 4' hereafter)¹, GO plc ('GO' hereafter) has been designated by the Malta Communications Authority (MCA) as having significant market power in the provision of wholesale unbundled access to the local loop. This market analysis was carried out in the context of the European Regulatory Framework for Electronic Communications Networks and Services entered into force in Malta in September 2004. This designation maintained and triggered a number of wholesale obligations amongst which access to wholesale unbundled local loops (including shared access) and other facilities, non-discrimination, transparency, accounting separation, price control and cost accounting.

It is pertinent to note that the above-mentioned market analysis follows the decision notice published by the MCA in May 2002 "Dominant Market Position in Telecommunications: Responses to Consultation and Designations", wherein GO (then Maltacom plc) was designated as having a dominant market position (DMP) in the public fixed telephony market. Subsequently, the Telecommunications (Unbundled Access to the Local Loop) Regulations 2003 were published whereby the obligation upon notified operators was imposed to publish a reference offer. Further to these regulations, the MCA issued Notice 173 in the Government Gazette dated 20 February 2004, establishing that GO was to publish a reference offer for unbundled access to its local loops and related facilities ('RUO' hereafter) by not later than 30 April 2004.

At the time, the MCA undertook a review of the RUO with particular emphasis on the underlying cost structures establishing the RUO prices. An independent review of the costing information relating to the wholesale prices was carried out, with the objective of ensuring that the methodology applied in determining the RUO prices was based on best practice and conformed to the regulatory principles of transparency and cost-orientation.

During the review process, GO continued to update its RUO. These updates have also been reviewed by the MCA.

¹ The market previously referred to as market 11 in the Commission Recommendation of 11 February 2003 was subsequently referred to as market 4 in the Commission Recommendation of 17 December 2007.

In June 2010 the MCA published a decision notice entitled “Local Loop Unbundling: Review of Go’s Reference Unbundling Offer” (‘LLU Review’ hereafter), which comprised a comprehensive review of GOs RUO aimed at taking a holistic view of the offer and ensuring that this remains fit for purpose in the present market circumstances. This decision covered the following aspects of GO’s RUO:

- Provision of Information by GO to the OAO;
- Unbundling Processes;
- Service Level Agreements (SLAs);
- Amendments to clauses including but not limited to the Main Body.

During this process, the MCA also reviewed and mandated changes to a number of ancillary documentation pertaining to the unbundling offer, such as Forms 1, 2 and 3, the co-location provisioning forms, as well the review of GO’s Access Network Frequency Plan (ANFP).

The MCA had also stated that it intended to keep this process under review and that it envisaged further iterations to address other specific areas of GO’s LLU offer as deemed fit by the Authority. Particular emphasis was made on Sub-Loop Unbundling (SLU) as an area for future review, since at that time GO embarked on a phased programme to install active DSL equipment in its cabinets, known also as a Fibre-to-the-Cabinet (FTTC) upgrade.

2. Market Developments

From the publishing of the LLU Review a number of key developments took place. At the outset, the MCA notes positively that an UALL agreement has been signed between GO and Vodafone, representing the first take-up of the offer since its introduction in 2004.

On a European level, in September 2010, the EU Commission published its recommendation on the regulation of Next Generation Networks – “Commission Recommendation on Regulated Access to Next Generation Access Networks (NGA)” (‘NGA recommendation’ hereafter).

Amongst other aspects, this recommendation set out important principles regarding the rights and obligations of access seekers to continue availing themselves of wholesale unbundling in an NGA context, as well as defining the intermediary role of the NRA both in encouraging investments in NGAs and managing the inherent transitional phase towards it. Apart from laying down the principles of costing and access to these wholesale offers, the recommendation stresses the need for a smooth transition from copper to next generation, or fibre-augmented network upgrades. The recommendation contemplates this smooth transition from both a functionality aspect of the wholesale offers, as well as safeguards for ensuring adequate ancillary services to support them.

3. Scope of this Consultation

The scope of this consultation is to continue along the path of the RUO review of 2010 and focus on the SLU-related aspects of the RUO, which in turn was already earmarked for future analysis in the said review.

This consultation document is structured in two parts. Part 1 will present the overall strategy and justifications on how the MCA intends to carry out the work streams related to GO's SLU offer going forward. Part 2, in turn will consult on the MCA's proposed migration rules to regulate GO's transition to FTTC and hence manage its impact on the Company's SLU offer.

PART 1. SLU Review Methodology

1. MCA's Approach to SLU Review

1.1. Methodology

The MCA commissioned TERA Consultants to assist it in conducting its SLU-related review. TERA were also involved in the previous LLU review mentioned earlier, as well as having a proven track record of direct involvement in various reviews of unbundling offers throughout Europe and other non-European jurisdictions.

As a first step, the MCA surveyed the international evidence in a bid to identify the success factors or critical aspects of SLU deployment, so as to be able to prioritise its regulatory focus. For ease of reference the international survey, along with the subsequent related work streams aimed at identifying these critical factors, will be referred to as the 'preliminary assessment' from here onwards.

This preliminary assessment covered the prices and costs involved in the SLU offer. Apart from looking at the direct prices (one-off and recurrent unbundling charges), this assessment took also into account the prices and availability of backhaul alternatives, as well as the adequacy of other ancillary services.

To perform such analysis the MCA undertook a benchmarking exercise using a small number of European countries. The relatively small sample size of these comparator countries reflected first and foremost the relative scarcity of FTTC deployment in Europe as well as the requirement to have sufficient in depth knowledge on the offers that would then be compared to that of GO. The MCA feels that such in depth knowledge and information, hence the quality, of the comparator offers should take precedence on the quantity, given the complexity of the subject matter.

Apart from these benchmarks, the preliminary assessment took also into account the adequacy of the operational process found in the RUO, including also the scope of the work undertaken in the LLU review.

The MCA, assisted by TERA, conducted also site visits on a number of GO's cabinets. The scope of the site visits was to unearth any technical limitations in accessing the cabinets that could potentially hinder or limit the operational deployment of SLU. These visits covered cases from the complete range of cabinets currently deployed in GO's network. The MCA also requested GO to submit a desktop simulation of the operational steps involved in accessing the copper pairs from GO's Primary Cross-connection Points (PCPs). This plan was subsequently reviewed by TERA to ensure that such a critical task can be successfully performed from a technical point of view. At this stage, the MCA would like to thank GO and its detailed personnel for their disposition and cooperation throughout the accomplishment of these tasks.

Furthermore, prior to the publication of this consultation and proposed decision, the MCA also held additional meetings with principal stakeholders (GO as the incumbent and Vodafone as the only OAO that entered into a UALL agreement) in order to provide preliminary indications of its proposals, and to obtain initial high-level feedback thereon.

1.2. Conclusions of the Preliminary Assessment

Following the completion of the preliminary assessment the MCA was able to reach the following conclusions:

1.2.1. General Note

Firstly, international evidence shows that the case for SLU remains uncertain at the moment, which coupled with the fact that its deployment has been relatively scarce, limits the possibilities of unearthing success factors which can potentially be emulated in the local context.

1.2.2. Operational Requirements

With respect to operational processes, these were found to be satisfactory for the moment and hence, in relation to other SLU-related issues, can be assigned a lower priority level. This reflected both the fact that a thorough general review of the RUO was

conducted only recently, as well as the conclusions from the technical visits conducted on GO's sites and cabinets. In this respect, the MCA reserves the right to revisit this stance and intervene on ad hoc basis on any step of the SLU/LLU operational process as it deems fit.

1.2.3. Migration Rules

The preliminary assessment established also that in every country where FTTC was deployed, migration rules of a varying degree of detail played an important part in managing the transition for both OAOs and incumbents. For this reason, the establishment of migration rules for the local context was earmarked as one of the most critical requirements related to SLU.

1.2.4. Backhaul Alternatives and Pricing

Based on the preliminary assessment, it was evident that the availability of backhaul alternatives and their pricing models play a crucial role in SLU deployment. This is also reflected in the NGA Recommendation, which stresses their importance both in an SLU context as well as an FTTH scenario.

In this regard, it was noted that Ethernet-based backhaul services (apart from traditional leased lines) represent the only form of backhaul solutions regulated in Malta. This contrasts with the situation in other European countries which feature other alternatives, such as duct access and dark fibre offers ('passive backhaul alternatives' hereafter).

The local scenario reflects in itself the limited demand for such backhaul alternatives given that physical unbundling is a relatively new phenomenon in Malta. The MCA is also aware of the fact that passive access alternatives, such as duct access, have been granted by GO in limited cases, albeit on a commercial basis.

This notwithstanding, the preliminary assessment highlighted the need to review in further detail the backhaul alternatives as part of the potential remedies that can be imposed under Market 4 and the revised provisions of the new electronic communications regulation framework, once this comes in force.

With respect to the pricing aspect of Ethernet-based backhaul services, this was identified as a critical factor for SLU take-up. The MCA however is also sensitive to the fact that the requirement of having to acquire multiple backhaul connections for active cabinets in itself represents a structural economic challenge for any SLU deployment. This challenging aspect has been amply documented in the international supporting literature. Hence, whilst recognising the need for fair and cost-oriented prices, the Authority nonetheless feels that the aim of such price reviews should not be to reverse engineer the feasibility of SLU in general. This is because reverse engineering prices to ease the feasibility of SLU might on the other hand hinder the long term sustainability of such an important ancillary service.

For this reason the MCA feels that the possible availability of alternative backhaul solutions (subject to the findings of the market analysis process), coupled with an effort to establish fair and reasonable pricing is the best way forward in ensuring the correct input-price signalling in the SLU take-up.

In this regard, to date, the MCA has not yet conducted an in-depth cost modelling exercise of Ethernet prices. However given the newly acquired importance of Ethernet-based connections, the Authority intends to embark on such a study in the medium term. In the meantime, the MCA is proposing to use benchmarked information to make inference on the price levels and/or any commercial aspects that the Authority deems fit to introduce in the local context, given its remit at law.

The Authority's review of the benchmarked Ethernet prices and additional related aspects is already in an advanced stage. The MCA intends to dedicate a separate consultative document to this work stream as soon as its review is finalised. In the eventuality that the review concludes that no immediate intervention will be needed prior to the bottom-up cost modelling exercise, a notice to this effect will be issued by the Authority.

1.2.5. MCA's identified work streams and their proposed order of occurrence

Given the above conclusions, the MCA identified a number of work streams that are to follow the Proposed Migration Rules found in Part 2 of this document. These work streams are summarised in their proposed order of occurrence in the Table 1 hereunder.

Table 1. Identified work streams

Identified Work stream	Order of Occurrence
Ethernet Prices / Commercial aspects of	Subsequent consultation following MCA review of benchmarking exercise
Cost Oriented Ethernet Prices	Following development of bottom-up cost model earmarked to start later on this year
Passive Backhaul Alternatives	Following/conditional on next Market 4 analysis earmarked to start later on this year or the provisions of the new Electronic Communications Regulation Framework.

Question 1: Do you agree with the work streams and order of occurrence being proposed by the MCA? Please justify your feedback.

PART 2. Migration Management Framework

2. Migration Rules and Framework

2.1. Scope

Recital (39) of the NGA Recommendation states that *"NRAs should put in place a transparent framework for the migration from copper to fibre-based networks"*.

When designing the migration management framework that is being proposed in this consultation document, the MCA kept the minimisation of the risks and uncertainty to stakeholders emanating from such a transitional phase as its primary regulatory target. At a strategic level, uncertainty should be minimised by implementing a forward looking network upgrade plan whilst managing risks by ensuring as much as possible that no stranded investment occurs throughout the process.

The MCA also feels that the achievement of such targets needs to cause the minimum disruption possible to the access provider's network improvement plans, who is ultimately investing and fostering innovation for the benefits of consumers at large, as long as these are carried out in respect of its regulatory obligations.

The aim of Part 2 of this document is to consult with interested stakeholders on the MCA's proposed migratory management framework and is structured as follows:

- Section 2.2 sets out the proposed level and sequence of information required by the OAO in taking GO's SLU offer.
- Section 2.3 follows with a detailed treatment of the proposed migration rules to regulate the interaction between GO and prospective OAOs (taking GO's RUO) during the migration phase to FTTC.
- Section 2.4 and 2.5 feature the proposed specification and principles on migratory costs and the parameters of a temporary access alternative respectively.

2.2. Migration Plans Information Flow Model

The MCA feels that the first stepping stone towards achieving an effective migration framework is to establish the proposed level of detail that is on the one hand sufficient for a transparent process, whilst on the other hand safeguards the confidentiality of commercially sensitive data from GO's potential and existing retail competitors.

In this regard Recital (41) of the NGA recommendation states that '*...NRAs should define the format and level of detail of such information, and ensure that strict confidentiality of the information disclosed is respected.*' Furthermore, Article (41) of the same recommendation states that NRAs should ensure '*that such information is used only for the purpose it is intended to serve*'.

In the MCA's view, the best way to ensure the maintenance of this regulatory balance is by gradating the intensity of detail of the required information with the different stages of commitment entered into by both parties as specified in the RUO. For this reason the MCA is proposing three levels of information, with the level of commitment from the OAO increasing at each stage, as shown hereunder:

LEVEL 1 Information: Submitted to OAO upon signing of an Non-Disclosure Agreement (NDA)

LEVEL 2 Information: Submitted to OAO following the signing of the Unbundled Access to Local Loop Agreement (UALL)

LEVEL 3 Information: Submitted to OAO upon signing of a co-location agreement

2.2.1. Level 1 Information

This level of information is aimed at providing the OAO with a snapshot of the current status of GO's network. Hence the MCA is proposing that upon the signature of an NDA GO is to make available the following information items to the OAO:

- Number of inactive cabinets (cabinets that do not house active DSL equipment) per exchange
- Number of active cabinets per exchange
- Number of terminated secondary pairs for each cabinet

This information should be given, in addition to that already mandated in the RUO as per the MCA's LLU Review decision, within three working days from the signing of the NDA. The above information shall be provided by means of a secure access over GO's website.

2.2.2. Level 2 Information

2.2.2.1. Contents and Format

This level of information is aimed at giving sufficient visibility to the OAO to be able to plan its network deployment, and hence formulate a schedule for drafting the required co-location agreements. This level of information should take the form of a 5-year forward looking plan of GO's network structured as shown in Appendix 1 (Panel A) of this document.

As shown in the stylised extract therein, the MCA is proposing to split the report in four distinct information categories.

- **Category 1:** Represents the space where GO will be registering those cabinets earmarked for an upgrade in a particular year within the first three years (Columns: Yr1 to Yr3 of Panel A) of the plan. Category 1 data can be extended as shown in Panel B of Appendix 1, which depicts an additional column in which GO might insert any cabinets that can be committed for an upgrade in Years 4 and 5 of the plan
- **Category 2:** Represents the space wherein those cabinets considered for upgrade between the fourth and fifth year (Column: Considered Yr4/Yr5 in Panel A) of the plan are to be inputted.
- **Category 3:** Represents the space where to input those cabinets that are either just considered for subsequent years or their status remains indeterminate.
- **Category 4:** Represents the space wherein the cabinets that GO has already upgraded are to be inputted.

For ease of reference this plan will be referred to as '**Plan 0**' throughout the rest of the document. The OAO shall be given access to Plan 0 within two weeks from the signature of the UALL agreement. The above information shall be provided by means of a secure

access over GO's website. This is also without prejudice to any other provision featured in the RUO that are directly or indirectly linked with the signature of the UALL agreement.

2.2.2.2. Compilation of Plan 0 and Refresh Rate

So as to minimise as much as possible the effort required to produce this report, the MCA is proposing to base it on the structure of the periodical network updates that GO submits to the Authority. The MCA is also sensitive to the fact that a certain amount of time would be needed to formalise a multi-year plan from GO's side. For this reason the MCA is proposing that Plan 0 should be finalised and submitted for the MCA's review within one month from the publication of the MCA's decision notice.

In the interim period, GO is still obliged to give access to its network, including also the availability of necessary information, according to the obligations imposed upon it in the LLU Market analysis decision currently in force. Hence the lead time to the publication of a final decision from the MCA, in no way exonerates GO from relaying sufficient information and granting access to OAOs who would have already signed UALL and co-location agreements with GO. This is also in line with the NGA recommendation which advocates (see Recitals (39) and (41) amongst others) for the continuation of the existing SMP obligations during the course of network changes and the right (with appropriate safeguards for confidentiality) of the OAO to be given timely information about expected network changes and upgrades

Furthermore the MCA is proposing that an update of Plan 0 is to be made available to the OAO in question on the lapse of every subsequent 12-month (calendar) period. As will be explained in Section 2.3.2, this does not mean that obligations related to changes in plans will remain onerous on GO indeterminately. These subsequent updated plans will be referred to with the generic term of '**Plan i**' throughout the remainder of this document

2.2.3. Level 3 Information

Level 3 information is targeted at obtaining the most up-to-date status on that portion of the network that the OAO would have shown interest and commitment in. In fact this level of information is linked with the signing of individual co-location agreements at each individual exchange site² in GO's network. The information contained in these plans, which for ease of reference will be called '**Plans E_i**' throughout the rest of the document³, will be strictly limited to those cabinets falling within the catchment area of an exchange site, upon which a co-location agreement would have been agreed upon between GO and the OAO.

Plans E_i will serve as 'time stamps' from which any changes that might subsequently occur in GO's network upgrade plans (related to those specific exchanges covered by a co-location agreement entered into by that specific OAO) might trigger certain rights to be exercised by the OAO. The underlying rules for applicability of such rights are treated in Section 2.3 hereunder. This process will on the other hand ensure that GO will be free to effect any changes in other areas to the network that would not have been covered by any co-location commitments.

The format of this report should be the same as that of Plan 0, however as explained earlier, the content would be restricted to a particular area of a specific exchange. Plans E_i should be accessible to the OAO within five working days of the signing of the corresponding collocation agreements. The above information shall be provided by means of a secure access over GOs website.

² The term "exchange site" refers to a site housing Main Distribution Frames (MDFs) giving access to GO's copper access network as listed in Annex I of the RUO.

³ E_i refer to a given number of individual sites upon which a co-location agreement exists between GO and the OAO.

2.2.4. Detailed Synchronisation information on cabinet upgrades and other additional requests for information

The level of information contained in Plan 0 (and subsequently Plans 1...i) and Plans Ei will not be detailed to the level of the day and/or month of when a particular cabinet, or cluster thereof, is expected to be upgraded. This is because the MCA is sensitive to fact that such planned upgrades might entail a number of logistical, managerial and operational challenges. This notwithstanding the MCA is proposing that more detailed logistical information on a cabinet-by-cabinet basis should be relayed to the OAO by not later than 5 months before the actual related works start on the first cabinet of the planned cluster of cabinets. Furthermore the MCA is of the opinion that changes to these synchronisation plans should not carry further regulatory obligations. The MCA expects both parties to act in good faith and co-operate with each other at such an advanced stage of the SLU process. The MCA nonetheless remains amenable to intervene on an *ad hoc* basis should any of the parties wish to bring any such logistical problems to the Authority's attention. In this regard reference is also made to the dispute resolution provision already established in the RUO.

GO should also consider any additional ad hoc information that might be requested by the OAO provided that this is within reason. GO should act in good faith and endeavour to furnish the OAO with the most accurate information being requested. Although no further information-related obligations are being imposed on GO apart from those proposed in Sections 2.2.1-2.2.3 above, the MCA remains amenable to intervene and mediate between the parties in conjunction with any additional information requests that the OAO might have.

2.2.5. Concluding Summary and Proposed Decision

Figure 1 hereunder depicts a schematic summary of the information levels referred to in Section 2.2 above. As seen hereunder the information submitted is gradated with the level of commitment between the parties.

Figure 1. Information Flow Model

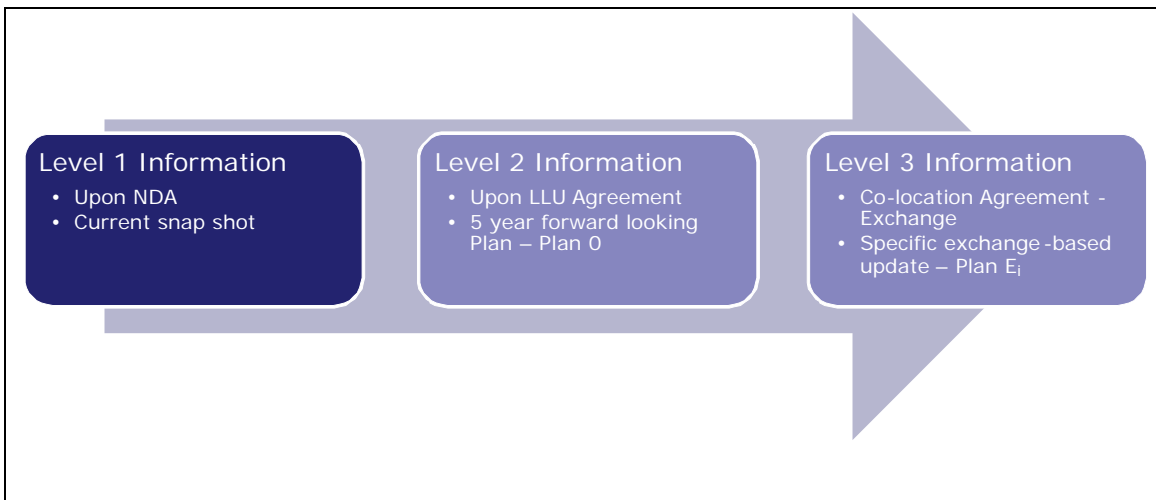
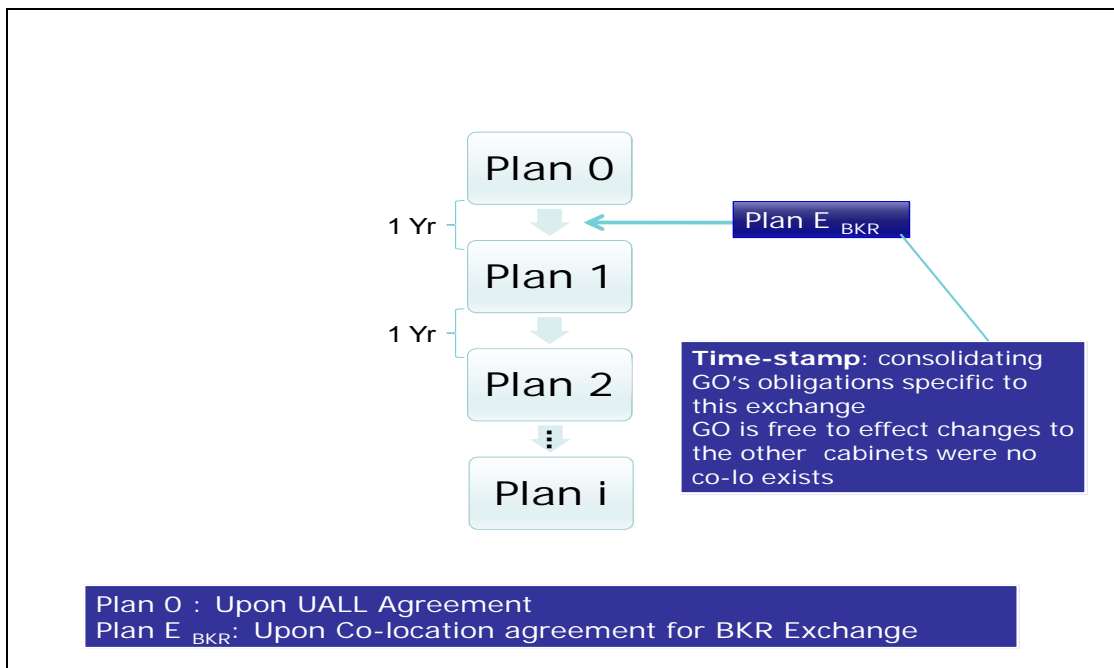


Figure 2 on the other hand shows the relationship between Level 2 and 3 information. It shows the forward looking plans being refreshed at 12-month frequency starting from Plan 0 as well as a hypothetical example of a co-location agreement being signed at a determinate point in time after Plan 0 for the Birkirkara exchange (Plan E_{BKR} is in this case substituting the generic Plan E_i referred to in Section 2.2.3 above). In this example only subsequent changes to the plans pertaining to the cabinets in the catchment area of the Birkirkara exchange will be subject to obligations featured in Section 2.3 of this document.

Figure 2: Example on the relationship between Level 2 and 3 information,



Proposed Decision 1:

The MCA hereby mandates the information flow model detailed in Section 2.2 above inclusive of all the detailed timings and content featured therein.

GO is directed to incorporate this information flow model in a appropriate annex in the RUO and submit it for the Authority's final approval by not later than six weeks from the publishing of the MCA's final decision notice.

GO is directed to give logistical details on when each planned cabinet committed for that particular year is to be upgraded to allow the OAO the possibility to synchronise its operations. This information is to reach the OAO by not later than 5 months before the commencement of work on the first cabinet of a given planned cluster

What are your views on the MCA's Proposed Decision 1? Please indicate the specific numbered sections when commenting on specific aspects of the information flow model.

Proposed Decision 2:

For those OAOs that have already signed an NDA, UALL and/or Co-location agreements, GO is to implement the applicable stages of the migration plans information flow model with immediate effect following the publishing of this decision notice as well as the MCA's review of Plan 0.

The refresh rate of Plan 0 should be set at a 12-month interval from the submission of the said plan (Plan 0).

This decision may be waived if GO can prove that an alternative and equivalent arrangement along the parameters of what is being proposed herein is already in place and is acceptable to both parties.

Do you agree with Decision 2 above? Please state justified reasons for any disagreement or comments.

2.3. Migration Rules

2.3.1. Rules and Obligations emanating from Plan 0 (No Change Scenario)

The aim of this section is to lay down the proposed rules and obligations emanating from Plan 0. For ease of clarity and understanding this section does not contemplate the eventuality of a change in plans, but rather assumes that all the information given in Plan 0 stays constant. The proposed rules and obligations to manage the possible changes to the mentioned plans (Plan 1...i) will in turn be presented in Section 2.3.2.

2.3.1.1. Pre-Reserved space on active cabinets committed for upgrade in the determinate future

Article (29) of the NGA recommendation states that '*NRAs should, where appropriate, organise a prior consultation of alternative operators potentially interested in sharing street cabinets, and on this basis determine where street cabinets should be adapted and how costs should be allocated*'. Furthermore, the current RUO already permits co-location at the sub-loop level where this is technically feasible.

In view of the above, the MCA feels that GO should give the opportunity to OAOs to share the cabinets that GO is planning to upgrade in the determinate future.

The MCA is hereby proposing that for those cabinets that are listed as planned for upgrade in a specific and determinate year of Plan 0, GO should offer the opportunity to eligible⁴ OAOs to pre-reserve space in the cabinets in question. This should be subject to the following proposed provisions:

1. At no point in time should GO be requested to alter the specifications of these cabinets. These specifications are to be relayed to the OAO for decision making purposes only and shall not be subject to any request for changes.
2. Given that space at the cabinet is limited and co-mingling of equipment cannot take place within respective shelves, the total OAOs request for pre-reserved space must take the form of 'one shelf⁵ space' of GO's current cabinet chassis
3. If more space is required by an eligible OAO, it is to procure its own cabinet. Go shall not be liable for any civil/permitting requirements related to the instalment of the OAO's own cabinets.
4. Pre-reserved space shall be allotted on a first-come-first-served basis.
5. In Plan 0 GO is to insert a note in a prominent position stating that for cabinets tagged as planned for upgrade in the plan, the OAO is entitled to request pre-reserved space.

⁴ Eligible OAO refers to an authorised undertaking having signed a UALL agreement with GO.

⁵ This maximum available space is based on the current cabinet specification chosen by GO. This limit will be revised by the MCA when, and if, the mentioned cabinet specification change.

6. A reservation shall be concluded by not later than three months before GO orders the said cabinet and its ancillary components. GO shall therefore give ample notice to the OAO on when it intends to procure the said cabinet such that the OAO will be able to conclude the reservation within the three-months-notice referred to above.
7. The pre-reserved space shall be granted on an Indefeasible Right of Use basis (IRU); hence:
 - a. Upfront committed payments should be made by OAO in exchange to such pre-reserved allotment;
 - b. GO is to price this access according to best practice governing IRU contracts and on a non-discriminatory basis. The pricing of such a contract may include a recurrent maintenance fee in line with best practice in the field;
 - c. GO is to hold sufficiently detailed computations to be able to defend its position in the eventuality of a dispute arising on the price of this pre-reserved allotment.

Proposed Decision 3

GO is to grant pre-reserved committed space to those active cabinets that would be listed as committed for upgrade in Plan 0 along the parameters set out in Section 2.3.1.1 of this consultation document.

GO is to incorporate these provisions together with the necessary contract and documentation in its RUO under its SLU offer by not later than six weeks from the publication of this decision notice.

The appropriate SLU additions referred to above shall also incorporate appropriate annexes detailing the escorted access to the cabinets by the OAOs authorised personnel.

What are your views on the MCA's Proposed Decision 3? Please indicate the specific numbered sections when commenting on specific aspects of the text in this consultation document.

2.3.1.2. Proposed basic rules and obligations on Plan 0

1. For planned cabinet upgrades listed as committed in a particular year of Plan 0 (Category 1 Information in Appendix 1)

- 1.1. GO is to maintain its disposition to offer Full Loop services according to its obligations set in the LLU market analysis currently in force, provided that these are within the parameters of Annex E10 of GO's RUO (Spectrum Management Specification for Systems to be Connected to GO's Copper Access Network).
- 1.2. When/if the upgrade occurs as planned all the associated migration costs are to be borne solely by the OAO.
- 1.3. The OAO is to effectively synchronise with GO and shall at no point, or for any reason, delay GO's migratory plans. The MCA will intervene immediately should issues of this nature arise.
- 1.4. For those cabinets planned for upgrade (Category 1) in Plan 0, GO is to offer the possibility of a temporary virtual access (TVA) alternative. TVA is being proposed so as to give the OAO a temporary alternative to that of investing at the MDF level for a relatively short period of time. The specifications of this access alternative are laid down in Section 2.5 hereunder.
- 1.5. TVA is to be offered for a maximum of six months following the actual cabinet upgrade is finalised.

2. For cabinet upgrades listed as 'considered' or 'indeterminate' in Plan 0 (Category 2 and 3 information in Appendix 1)

- 2.1. **Go is to maintain its disposition to offer Full Loop services according to its obligations set in the LLU market analysis,** provided that these are within the parameters of Annex E10 of GO's RUO (Spectrum Management Specification for Systems to be Connected to GO's Copper Access Network).

- 2.2. When the upgrade is to occur, GO is to bear the eligible migration-related costs ('eligible costs' hereafter⁶). The MCA's aim in this regard, is to ensure that an OAO can invest, and be operational, in a timely manner whilst knowing that its investment will not be left stranded by GO's migratory path. This does not mean that all the investment made, or cost incurred, should be eligible for compensation.
- 2.3. The OAO is to effectively synchronise with GO and shall at no point or for any reason delay GO's migratory plans. The MCA will intervene immediately should issues of this nature arise.
- 2.4. GO **can voluntarily** offer TVA, and if accepted by the OAO, GO will not be liable for any eligible costs.

Proposed Decision 4

GO is to be directed by the rules listed in Section 2.3.1.2 of this consultation document. These provisions are to be added and reflected in an appropriate annex/s to the co-location agreement.

What are your views on the MCA's Proposed Decision 4? Please indicate the specific numbered sections when commenting on specific aspects of the text in this consultation document.

⁶ In this respect Section 2.4 hereunder contains a detailed treatment on the principles and nature of these eligible costs as proposed by the MCA.

2.3.2. Rules and Obligations emanating from eventual changes in the cabinet upgrade plans (Change Management)

This section of the document contains the basic rules and obligations aimed at managing potential changes in GO's FTTC migratory plans and their impact on the Company's existing wholesale unbundling offers.

This is without prejudice to the MCA intervening in this process if it would have reasons to believe that a systematic pattern of changes reflecting a strategic behaviour to disrupt or influence the OAOs deployment is occurring.

2.3.2.1. Scenario 1: Cabinets Planned/Considered/Indeterminate are anticipated

For cabinets fed by an exchange site, which is in turn covered by a co-location agreement and which would eventually exhibit an **anticipated** migratory path (following Plan Ei) in subsequent updates of Plan 0, GO **would be liable for eligible migratory costs (see Section 2.4 for a detailed treatment of these eligible costs)**.

The MCA is however proposing that this eligibility window expires on the elapse of a five-year period from the signing of the UALL agreement. This therefore results in Plan 5 as being the last update of Plan 0 for which GO would be liable for any potential compensation of eligible costs. Annual subsequent updates (Plan 6...i) should still be submitted by GO, albeit purely for visibility purposes. The MCA is of the opinion that a 5-year visibility window, with the safeguards for risks and uncertainty highlighted in this document, is sufficient to safeguard the initial investment of the OAO.

In the case that the **OAO would have opted for TVA** in line with the provisions laid out in Section 2.3.1.2 above, this type of access should be maintained for:

- **1 year** following the actual cabinet upgrade, in the case of movement in cabinets listed originally in Plan Ei as Category 1 and 2 (i.e. committed/considered to a specific year in the Plans 1...5); information;
- **2 years** following the actual cabinet upgrade in the case that a cabinet listed as indeterminate (Category 3) in Plan Ei moves to Yr1-3 (Category 1) in plans 1...5).

2.3.2.2. Scenario 2: Cabinets Planned/Considered/Indeterminate are postponed

For cabinets fed by an exchange site which is in turn covered by a co-location agreement and which would exhibit a **delayed or postponed** path (following Plan Ei) in subsequent updates of Plan 0, no eligible migratory costs will be imposed on GO

In the case the OAO would have opted for TVA in line with the provisions laid out in 2.3.1.2 above, this type of access should be maintained for 6 months following the upgrade of the cabinet in question

2.3.2.3. Demonstration on the applicability of the change management rules

For ease of understanding, Appendix 2 exhibits a number of examples simulating hypothetical changes in the migration plans and their resulting regulatory outcomes in line with what is being proposed in this consultation document.

Proposed Decision 5

GO is to be directed by the rules listed in 2.3.2.1., 2.3.2.2 and 2.3.2.3 above. These provisions are to be added and reflected in an appropriate annex/s to the co-location agreement effected by these plans.

What are your views on the MCA's Proposed Decision 5? Please indicate the specific numbered sections when commenting on specific aspects of the text in this consultation document.

2.3.3. Rules and obligations related to Exchange Decommissioning

In proposing the parameters regulating the decommissioning of exchanges the MCA kept the following Articles from the NGA recommendation at the fore.

Article (39). *"Existing SMP obligations in relation to Markets 4 and 5 should continue and should not be undone by changes to the existing network architecture and technology, unless agreement is reached on an appropriate migration path between the SMP operator and operators currently enjoying access to the SMP operator's network. In the absence of such agreement, NRAs should ensure that alternative operators are informed no less than 5 years, where appropriate taking into account national circumstances, before any de-commissioning of points of interconnection such as the local loop exchange. This period may be less than 5 years if fully equivalent access is provided at the point of interconnection".*

Article (41). *"Where the SMP operator envisages to replace part of its existing copper access network with fibre and plans to de-commission currently used points of interconnection, NRAs should under Article 9(1) of Directive 2002/19/EC ensure that undertakings enjoying access to the SMP operator's network receive all necessary information in timely fashion to adjust their own networks and network extension plans accordingly. NRAs should define the format and level of detail of such information, and ensure that strict confidentiality of the information disclosed is respected".*

In view of the above the MCA is proposing the following rules:

- 1. If an exchange site is to be decommissioned and a co-location agreement exists:**
 - 1.1 OAO is to be given a five-year notice period.

- 1.2 Earlier decommissioning would be possible provided that:
- a. A minimum notice period of one year is given to the OAO. This notice cannot be given to the OAO unless 25% of GO's customers served by the exchange in question would have already been disconnected.
 - b. GO grants access to an alternative site offering the equivalent interconnection level or if this would not be technically possible (or causing disruption in the service provision of GO's clients), offering access at the next most viable type of unbundling (e.g. from MDF level to the Sub-loop).
 - c. GO compensates the OAO the eligible migratory costs involved in either an eventual relocation of the same service at an equivalent interconnection level (another exchange site) or the movement to the next possible equivalent level of interconnection (e.g. from MDF level to Sub-loop).
 - d. These eligible migratory costs shall be regulated by the same principles laid down in Section 2.4 of this consultation document
 - e. The access alternatives offered should be governed by the principle of non-discrimination.
 - f. Alternatively to (b.) above, a shorter notice period would also be possible if both parties agree on TVA

2 If an exchange site is to be decommissioned and a co-location agreement does not exist:

- 2.1 A minimum notice period of six months is to be given to OAO. This notice cannot be given to the OAO unless 25% of GO's customers served by the exchange in question would have been already disconnected.
- 2.2 In the case that interest is shown in this site and /or the parties are in the process of signing a co-location agreement, GO is to inform immediately the OAO concerned.

- 3 Content of Decommissioning Notice:** The decommissioning notice shall reflect a concrete state of play with regards to GO's plans related to the site in question. This should be backed by all the relevant information that would give the OAO the required level of confidence that the decommissioning plans are concrete. For this reason, to be considered as such, a decommissioning notice shall not contain uncertain or conditional references to other circumstances occurring, except for any

required permits applied for or granted. All relevant documentation shall be given to the OAO in conjunction with the said decommissioning notice. The decommissioning notice shall also contain the options available to the OAO in line with 2.3.3 above (particularly 2.3.3(1)).

- 4 **Applicability of these rules:** To all present and future sites listed in Annex I of the RUO, including cases of Co-location agreements containing multiple sites, wherein the decommissioning provisions laid out in this section shall apply to each site separately and individually.
- 5 **General:** If any clause/s in the UALL and/or Co-location agreement shall be in conflict with the applicability and the provisions listed in 2.3.3 above, the provisions in 2.3.3. of this document shall supersede the provisions found in any of the present UALL and/or Co-location agreements and any future UALL and/or Co-location agreements which have not yet come into force.

Proposed Decision 6

GO is to be directed by the rules listed in 2.3.3 of this document. These provisions are to be added and reflected in an appropriate annex/s to the co-location agreement/s.

What are your views on the MCA's Proposed Decision 6? Please indicate the specific numbered sections when commenting on specific aspects of the text in this consultation document.

2.4. Principles regulating eligible migratory costs

2.4.1. Scope

The aim of this section is to lay down the proposed guiding principles that are to regulate the costs that would be eligible for refund from GO in conjunction with changes in the Company's network plans.

At the outset it is worthwhile to note that the aim of the compensation being contemplated in the migration framework is solely spurred by the MCA's regulatory target to ensure that no stranded investment occurs needlessly and unfairly during this process. Therefore, these compensation flows should in no way be interpreted as aiming to target some form of penalties or compensation for any alleged contractual or consequential liabilities. The MCA feels that the latter fall within the realms of commercial contractual provisions and hence any redress in this regard should be sought through such channels, as opposed to regulatory provisions.

2.4.2. Definition and specification of the eligible migratory costs

The MCA is proposing that in principle the costs incurred by the OAO eligible for compensation should be those that were incurred unnecessarily strictly because of the fact that a given migration plan eventually changes. **These cost would have been avoided had the OAO known that these original plans were going to be different. These costs shall be eligible for compensation if their underlying assets or service procured cannot in any way be scaled down or re-used elsewhere.** For ease of reference and limited solely to the scope of this consultation document, these general principles are referred to '**avoidable costs principles**' throughout the rest of the document.

The MCA feels that in order to minimise unnecessary disputes on how and where the underlying assets and/or services (risking remaining stranded) can be re-used; as a starting point it is being proposed that the catchment area of the corresponding exchange site is to be established as the primary domain wherein these assets can be

reused. This can be subsequently extended further if any of the parties can prove that there is concrete commitment in other exchange sites and hence these assets can effectively be reused elsewhere. Furthermore it is also being proposed that if a tangible asset becomes eligible for compensation, and such compensation occurs, the ownership of the asset will be relented to GO from then onwards.

The avoidable costs principle referred to above shall remain distinct from the characteristics of general common costs. In other words, the avoidable costs principles do not contemplate compensation for assets/services that for any reason were incurred and would still remain in use to service a remaining and significant cluster of cabinets within an exchange area.

For example, if an exchange site would hypothetically continue to serve a significant portion of cabinets whilst some others will be upgraded, the common costs incurred at the MDF level shall not be considered as eligible. The avoidable costs principles will also preclude any investment, including the backhaul and DSLAMs, needed at each upgraded cabinet to be considered as eligible costs since these would have been required anyway regardless of the changes in the migratory plans.

On the other hand, the downsizing of backhaul requirements may be considered for eligibility unless this can be used to aggregate traffic from cabinets. By the same token since tie cables in the RUO are ordered in terms of stepped-fixed amounts, a fixed increment that would no longer be required would be eligible for compensation.

If justified the relative useful life of the investment may also be considered.

In an effort to shed more light on the eligible migratory costs, the MCA is also putting the following list for consultation. This list contains the costs elements that in the MCA's opinion can potentially be considered as eligible for compensation. The list is in no way exhaustive and interested parties are encouraged to give their feedback, particularly by proposing additions and/or omissions thereto.

2.4.3. Stylised list of potentially eligible costs

- Racking structures (incl. Space Rental and other related operating costs)
- DSLAMs at exchange

- Tie Cables (including any operational costs related to provisioning)
- Costs related to reconfiguration requirements at OAO's core equipment
- Backhaul at exchange site (e.g. fibre connections, cards etc)
- Co-location Room⁷ (including also MDF blocks)
- Power Supply Meters
- Batteries

Question 2: What are your views on this eligibility list? Please state justifiable reasons for other suggested inclusions and/or omissions

Proposed Decision 7: GO and the eligible OAO shall be guided by the principles and specifications laid down in 2.4 above when claiming/granting compensation related to migration issues.

Do you agree with the MCA's proposed decision 7? Please state your reasons making reference to the applicable sections of the consultation document.

⁷ If applicable and if OAO can successfully demonstrate that this was strictly required in the first place.

2.5. Specification of the Temporary Virtual Access (TVA)

2.5.1. Scope

The purpose of the proposed TVA is not to substitute physical unbundling, but rather to bridge the interim period until a specific area is upgraded with active equipment at the cabinet. In this sense, by means of TVA, the OAO would have a possibility to obtain wholesale access without being forced to invest for an unreasonably short a time window, whilst on the other hand also affording GO an alternative to that of having to be liable for compensation claims from the access seeker.

In designing and proposing this alternative, the MCA is cognisant of the fact that currently GO has no obligations under the current market analysis of the wholesale broadband access market⁸ to offer wholesale broadband access (WBA) services. For this reason it is worthwhile to duly highlight the fundamental difference between the form of access typically imposed in the WBA market and TVA. Basically, while WBA remedies empower the OAO to choose itself when to terminate the service (being for the purpose of ceasing operation as well as moving up the ladder of investment), the duration of TVA is finite in nature. Hence from the point of view of an OAO, TVA can hardly be seen as a substitute of WBA service, nor in the MCA's opinion, can it be seen as a long-term substitute for physical unbundling.

2.5.2. Specifications of TVA

GO already offers wholesale broadband access service on a voluntary basis. The MCA is of the opinion that the technical/operational specifications of TVA can therefore be modelled upon this commercial offer. However, the MCA is hereby highlighting a number of aspects where TVA will be directed to differ.

⁸ 'Wholesale Broadband Access Market – Identification and Analysis of Markets, Determination of Market Power and Setting of Remedies' (November 2008).

1. **Speed-capabilities**: TVA is to offer OAOs the capability to compete at the same, non-discriminatory level with GO's retail arm, in term of speed offered to end users. This also applies to the enhanced capabilities offered by GO's retail arm resulting from any type of network upgrade in the future. These additional speed capabilities are to be made available to the OAO as soon as it is made available to GO's retail arm.
2. **Points of Interconnection**: The point of interconnection for TVA shall in principle be at each available exchange site. This means that if for example the OAO wants to apply for a TVA service in the Birkirkara Exchange area, then it will have to interconnect at that given exchange site. This in effect is another point of differentiation between TVA and WBA, as the latter would only require the OAO to interconnect at a single point of presence. Notwithstanding, this does not exclude that agreement could be reached between GO and the OAO to have distant interconnection at a central point in respect of any exchange.
3. **Duration**: Finite and as stipulated in Section 2.3 of this consultation document.
4. **Applicability**: An OAO shall be permitted to avail itself of this offer only if it has signed a UALL agreement. It shall be possible for an operator to avail itself of this offer in conjunction with Wholesale Line Rental (WLR) and Carrier Pre-selection (CPS) currently offered by GO.
5. **Pricing**: No price control obligation is being proposed except for non-discrimination and transparency.
6. **Service Level**: Level of service to be provisioned on a non-discriminatory basis as well as in line with the provisions already applicable in the RUO.
7. **Customer Premises Equipment (CPE)**: OAO to be permitted to use its own CPES following testing and white-listing from GO's part. This does not exclude the possibility of an OAO making use of GO's own modems.
8. **Procedure**: In case of TVA take-up, a modified co-location agreement is to be drawn up to log the OAO's interest in that particular exchange site. The provisions of the modified co-location agreement should reflect the specifications listed above,

including those related to the duration of the TVA as stipulated in Section 2.3 of this consultation document.

Proposed Decision 8: The MCA directs GO to incorporate all the specifications listed in Section 2.5.2 above when offering TVA.

Do you agree with the scope and TVA specifications as laid down in section 2.5.2 of this consultation document? If not please state your reasons making reference to the applicable sections of the consultation document.

3. Consultation Framework

The MCA invites comments from interested parties regarding this Statement of Proposed Decision. Comments which are not specifically dealt with in this Consultation but are directly related to the subject matter under this Review are also welcome. Written representations will be made public by the MCA subject to the MCA's Internal Guidelines on Confidentiality published on 16 December 2004.

The consultation period will run until close of business of 13th May 2011. Comments should be sent to:

Chief of Operations
Malta Communications Authority
Valletta Waterfront
Pinto Wharf

Ing. Philip Micallef
Executive Chairman

15 April 2011

APPENDIX 2

Example	Time	Cabinet ID & Address	Category 1			Category 2	Category 3	Outcome
			Planned	Planned	Planned	Considered	Indeterminate	
			Yr1	Yr2	Yr3	Yr4/5		
1	t ₀	Cab 1.		■			No eligible costs involved : natural movement	
	t ₁	Cab 1.	■					
2	t ₀	Cab 1.	■				If TVA: keep service (see section 2.3.2.1 for duration); If Co-location agreement exist no eligible costs appli	
	t ₁	Cab 1.				■		
3	t ₀	Cab 1.				■	If TVA: keep service (see section 2.3.2.1 for duration); If Co-location agreement exists: GO liable to compe (See section 2.4 for more details on applicable eligible costs)	
	t ₁	Cab 1.	■					
4	t ₀	Cab 1.			■		If TVA: keep service (see section 2.3.2.1 for duration); If Co-location agreement exist GO liable to compens (See section 2.4 for more details on applicable eligible costs)	
	t ₁	Cab 1.	■					