



MALTA COMMUNICATIONS AUTHORITY

Please quote our ref DIS. 232`

19<sup>th</sup> November 2014

Mr. Yiannos Michaelides  
Chief Executive Officer  
GO Plc  
PO Box 40, Marsa MRS 1001

Sir,

**Re: Final decision further to the Complaint by Melita plc alleging breach by GO plc of the Pricing of Leased Lines and Ethernet Connection Decision**

#### **Preliminary**

Melita plc (hereafter 'Melita') as per a communication dated 13<sup>th</sup> June 2014<sup>1</sup> filed a complaint (hereafter the 'Complaint') with the Malta Communications Authority (hereafter 'MCA') alleging a breach of MCA's regulatory decision entitled the "Pricing of Leased Lines and Ethernet Connections – Response to Consultation and Decision" (hereafter the '2013 Decision')<sup>2</sup> by GO plc (hereafter 'GO'). The MCA communicated with GO requesting GO's submissions on the Complaint. Subsequently GO was asked to provide information within the context of the Complaint to enable the MCA to have a better understanding of the facts.

Before issuing this final decision the MCA wrote to GO providing it with the MCA's draft decision, thus giving GO the opportunity to make its final submissions prior to the issue of a final decision. The MCA also sent GO a separate document under confidential cover providing GO more detailed justification for its decision, factoring information of a commercially sensitive nature that GO had provided during the course of the MCA's investigations.

#### **The Complaint**

In the Complaint, Melita contends that GO is in breach of its obligations in its bid (hereafter the 'Bid') for the tender issued by the Malta Information Technology Agency (hereafter 'MITA') entitled the "Next Generation WAN connectivity by Government – Invitation to Tender" (hereafter the

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<sup>1</sup> A hard copy of the Complaint was received by the MCA on the 16<sup>th</sup> June 2014.

<sup>2</sup> The said Decision was published by the MCA on the 8<sup>th</sup> August 2013.

'Tender').<sup>3</sup> Melita alleges that in its Bid, GO did not adhere to the price for wholesale leased lines set out in the 2013 Decision. Melita thus contends that GO is in breach of the wholesale regulatory conditions imposed on it in respect of the provision of these services. Furthermore, Melita states that GO is also in breach of the obligations imposed on it as an operator with significant market power ('SMP') status according to the Leased Lines Market Analysis (hereafter 'Market Analysis') carried out by the MCA in 2013, specifically the obligations of non-discrimination and price control and cost-accounting.

Melita contends that GO is obliged to adhere to ex-ante conditions and the revised annual charges for the wholesale regulated services including Leased Lines and Ethernet Connections as result from the 2013 Decision.

Melita alleges that in the Bid GO acted contrary to the 2013 Decision by offering services – namely the wholesale local leased lines and Ethernet connection services - at a lower price than the regulated annual prices. Melita states that it arrived at its conclusions from information it deems evident and contained in a table it submitted as part of the documentation supporting its complaint<sup>4</sup> to the MCA. In the table, Melita inputted the price for Ethernet connections offered at different bandwidths which MITA can opt for in terms of the Tender.

According to Melita, from calculations based on the prices inputted in the aforesaid table<sup>5</sup>, it results that GO tendered services to MITA which are significantly lower than the annual regulated prices set by the MCA in the 2013 Decision. Melita argues that, in doing so, GO would be benefitting from cost advantages and efficiencies not achievable by any other operator in the local market. Melita also alleges that GO is exploiting economies of scope to its advantage since GO is able to share the cost of supplying trunk services to MITA with that of other electronic communications products (namely access to fixed telephony).<sup>6</sup>

### **Relief sought from the MCA**

In its complaint, Melita is requesting that the MCA intervenes in the Tender process:

- (i) To determine that GO's Bid does not reflect the regulated prices in the 2013 Decision;
- (ii) To determine that as a result, GO is in breach of its obligations, including those relating to non-discrimination, price control, and cost-accounting, arising from the Leased Lines Market Analysis;
- (iii) Pursuant to (i) and (ii) to take all such other action as may be necessary.

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<sup>3</sup> MITA reference number T008/14. The call for tender closed on the 11<sup>th</sup> April 2014.

<sup>4</sup> See doc M6 which Melita included with its complaint to the MCA. See also page 7 of the Complaint.

<sup>5</sup> See the Complaint at page 7, second paragraph et seq.

<sup>6</sup> Ibid at page 7, fifth paragraph et seq.



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In this regard the MCA would like to state that following the receipt of the Complaint, it wrote to Melita to emphasise that the role of the MCA in dealing with the Complaint at hand would be limited to a determination of whether or not GO committed a breach of any regulatory decision issued by the MCA [in this case the 2013 Decision]. The MCA could not, in any way, intervene in the tender process itself.

### **GO's response to the Complaint**

In its initial submissions to the MCA after the communication of Melita's complaint, GO denies the claims being made by Melita that the Bid, as submitted by GO, is in breach of GO's obligations under the 2013 Decision. GO argues that the Tender does not specify or quantify the exact type of technology or configuration to be used to provide the services requested. GO makes the point that best practice has evolved to a stage where telecoms operators compete by using a mix of technologies to deliver communications services, observing that the Tender by MITA is a case in point. GO further states that its Ethernet point-to-point connections represent a very small minority of the total technology mix which it proposes to provide in the Bid.

In its final submissions to the MCA after the communication of the MCA's draft decision, GO states that the Bid was made in good faith taking into consideration the budget cap in the Tender keeping in mind that the services were required to enable operations that have national importance. **GO does not in its final submissions contest the MCA's findings that its Bid is in breach of the 2013 Decision.**

### **Considerations**

During the course of its investigations, the MCA sought further information and clarifications both from Melita and later from GO. In the case of Melita, clarifications were sought, and subsequently submitted, in relation to Melita's calculations allegedly substantiating its claim that GO's Bid is in breach of the 2013 Decision. In the case of GO, further information was sought, and subsequently submitted, to enable the MCA to have a better understanding of the Bid and the nature of the services being offered.

In reaching its conclusions the MCA has taken into account the following, namely that:

1. The role of the MCA in relation to the Complaint is to determine if GO's bid included traditional leased lines based on analogue or Synchronous Digital Hierarchy ('SDH') connectivity, and/or Ethernet point-to-point links; and if the Bid did include such leased lines and/or such links, whether the price included in the Bid is in conformity with the prices established in the Decision.
2. In conducting its investigations further to the Complaint, the MCA has no power to intervene in the tender process in question or in its eventual adjudication. The task of the MCA is strictly to

determine whether there is a breach by GO of the 2013 Decision taken by the MCA, and if the MCA determines that there is a breach, then subsequently to take such regulatory measures as it considers appropriate in accordance with its powers at law.

3. Some aspects of the information submitted by GO to the MCA in the course of the MCA's investigations cannot be divulged in public due to the commercially sensitive nature of the said information.

### Decision

Following the investigations undertaken, the MCA established that GO's Bid included the provision of a number of fibre links using Ethernet point-to-point connectivity. Such fibre links fall with the scope of the 2013 Decision and are regulated by the prices therein stated.

The regulated prices for these links as established in the 2013 Decision<sup>7</sup> are:

**Table 4: Prices for Wholesale Ethernet Connections**

Prices quoted are exclusive of VAT.

	Connection Fee	Annual Rental Prices
		Half-Circuit Connection (One terminating segment plus half trunk segment)
	€	€
<b>10 Mbit/s</b>	280	1,994
<b>100 Mbit/s</b>	280	8,366
<b>1 Gbit/s</b>	280	43,110

The prices for some of the links quoted by GO in its Bid are in breach of the 2013 Decision as they do not comply with the prices as stated in the Table above.

To this effect, the MCA considers that the Bid, as submitted by GO, is partially in breach of the 2013 Decision. The MCA is therefore in line with its powers under the Malta Communications Authority Act (cap. 418 of the Laws of Malta) imposing an administrative fine of ten thousand euro (€10,000) on GO.

<sup>7</sup> See the Decision Table 4 at page 13 thereof.



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Without prejudice to the above, if the MCA considers that there is a continuing breach of the 2013 Decision by GO, it then reserves the right to take such further regulatory action as it may consider appropriate in accordance with its powers at law.

A handwritten signature in black ink, appearing to read 'Paul Micallef', written in a cursive style.

Paul Edgar Micallef  
Chief Legal Adviser

Philippa Gingell Littlejohn  
Legal Adviser

cc. [1] Mr. Stefan Briffa, Senior Manager Regulatory Affairs, GO plc PO Box 40, Marsa MRS 1001

[2] Dr. Gertrude Borg Micallef – senior legal counsel, Legal & Regulatory Affairs, Melita plc, Mriehel By-Pass, Mriehel BKR 3000;

[2] Mr. Victor Camilleri, Head Contracts Management Department, Malta Information Technology Agency, Gattard House, National Road, Blata I-Bajda HMR 9010.