

Please quote our ref. DIS 233 / MCA-LEG/mb/16-2617

12 July 2016

Mr. Harald Rösch
Chief Executive Officer
Melita Limited

Ms. Amanda Nelson
Chief Executive Officer
Vodafone Malta Limited

Re: Final decision further to the Complaint by Melita Ltd alleging a breach by Vodafone Malta Ltd of MCA's decision entitled "Broadband Internet Quality of Service Framework Decision" issued in 2013

Reference is made to the complaint filed by Melita Ltd (formerly Melita plc, hereafter 'Melita') with the Malta Communications Authority (hereafter 'the Authority') alleging a breach of Authority's regulatory decision entitled the "Broadband Internet Quality of Service Framework Decision" (hereafter the 'Decision')¹ by Vodafone Malta Ltd (hereafter 'Vodafone') and of Regulations 35, 37 and 39 of the Electronic Communications Networks and Services (General) Regulations² (hereafter the 'ECNSR'). The following tackles the grounds of the complaint raised by Melita in its Complaint and the Authority's considerations and decision.

Preliminary

1. Melita as per a communication, dated 27th January 2016,³ filed a complaint with the Authority alleging a breach of the Decision⁴ by Vodafone and of Regulations 35, 37 and 39 of the ECNSR. The Authority communicated with Vodafone requesting the latter's submissions on the Complaint. Subsequently, Vodafone was asked to provide further information relating to the Complaint to enable the Authority to have a better understanding of the facts.

¹ The said Decision was published by the MCA on the 1st February 2013.

² S.L. 399.28 of the Laws of Malta

³ A hard copy of the Complaint was received by the MCA on the 28th January 2016.

⁴ The said Decision was published by the MCA on the 1st February 2013.

The Complaint

2. In the Complaint, Melita contends that Vodafone is in breach of its obligations in providing fixed broadband services, through its 'Link Plans', whilst not adhering to the requirements tied with the provision of these services as established in the Decision. Melita argues that since Vodafone is marketing and selling the Link Plans services as a substitute for other fixed broadband services, Vodafone should likewise be subject to all requirements established in the Decision, including the indication of the Typical Speed Range (hereafter 'TSR') in any advertising material, in the subscriber's contract and at the point of sale.

Relief sought from the MCA

3. In its Complaint, Melita is requesting that the Authority intervenes to ensure that regulatory obligations are imposed on all service providers in a uniform manner and to take all such other action as may be necessary. In particular, Melita is requesting that Vodafone is made to publish the TSR and to keep to the data reporting and publishing obligations established in the Decision.

Vodafone's response to the Complaint

4. In its initial submission to the Authority, after the communication of Melita's Complaint, Vodafone contested the claims being made by Melita. Vodafone stated that it operates a mobile access network and provides broadband packages over its Long-Term Evolution (hereafter 'LTE') network. Vodafone in this regard referred to its Link Plans⁵ product, which because of the nature and setup of the service, is perceived as having a number of fixed qualities though it is delivered over a mobile access network. Vodafone referred to the fact that the Decision does not apply to broadband Internet services that are delivered over a mobile access network and that consequently, Vodafone's broadband services do not fall within the scope of the Decision.

5. Vodafone denied any breach of the ECNSR and stated that Vodafone's broadband services contract terms and conditions are in line with and adhere to all the requirements stipulated under Regulations 35, 37 and 39. Vodafone also observed that Melita in its complaint did not explain how Vodafone was acting in breach of Regulations 37 and 39.

⁵ This is a broadband service offered by Vodafone as either a standalone service or as part of a bundle as from March and August 2015 respectively.

6. Vodafone in its initial submission, while reiterating its position that its Link Plans product is outside the scope of the Decision, acknowledged the fact that due to the fixed qualities of the service in question, the aforesaid product is perceived by the average consumer as being a substitute for other fixed broadband services. Vodafone expressed its willingness, once certain clarifications were obtained from the Authority and once the subscriber base is large enough to generate statistically significant data, to adhere to the requirements as set out in the Decision.

7. Subsequently, Vodafone was asked to provide further information to enable the Authority to have a better understanding of the facts. In its final submissions to the Authority, Vodafone reiterated that the service, being the subject of the Complaint, is delivered on a mobile access network and as such has a number of limitations, which are beyond Vodafone's control, and which limitations impact considerably the level of service. Vodafone also restated its willingness to provide TSR information in line with the Decision once it is provided with the clarifications sought from the Authority, and once the subscriber base is large enough to generate statistically significant data.

Considerations

8. In its Complaint, Melita alleges a breach of Regulations 35, 37 and 39 of the ECNSR and of the Decision.

9. Regulation 35 (1) (b) (iv) (5) requires that in the case of internet services, service providers are to provide their subscribers with a contract that includes - as a minimum unless determined otherwise by the Authority - minimum access speeds, ensuring that these do not differ significantly from the marketed upper levels; and where appropriate from other quality of service parameters as defined by the Authority. In the case of services falling within the scope of the Decision, these parameters are defined in Part 7 thereof and include the obligation to include the TSR in any advertising material or at any point of sale.

10. Melita argues that since Vodafone is marketing and selling its Link Plans product as a substitute for other fixed broadband services, Vodafone should likewise be subject to all requirements set out in the Decision, including the indication of the TSR in any advertising material, in the subscriber's contract and at the point of sale. Melita presented the terms and conditions of the Link Plans product and a copy of an advert, which appeared on Facebook, and pointed out that in none of these documents was the TSR indicated.

11. In support of its argument, Melita quoted an extract from Part 2 of the Decision:

'This Decision is limited to: Broadband Internet service which is delivered using fixed access networks. These include both wired access networks and fixed wireless access networks.'

Melita however, failed to quote the next sentence of the Decision, which states:

'For the avoidance of doubt, broadband Internet service which is delivered over mobile access networks is outside the scope of this Decision.' (Emphasis added)

The scope of the Decision in question is therefore clearly delineated. While it applies to broadband Internet service delivered over fixed access networks, it does not apply to Internet service delivered over mobile access networks.

12. While the Link Plans product is being marketed as a fixed service, it is delivered over a mobile platform. Given these circumstances, the Authority determines that Vodafone is not in breach of the Decision since the product in question cannot be classified as a service which is delivered over a fixed access network.

13. Vodafone is likewise not in breach of Regulations 37 and 39 of the ECNSR in so far as they relate to the transparency and publication obligations associated with the regulatory norms set out in the Decision.

14. Without prejudice to what is stated above in respect to Melita's Complaint, the Authority recognises that recent developments in the market have shown that there is the need to revise the existing regulatory framework. While for the reasons stated above, Vodafone is not acting in breach of the Decision, it is also an established fact that it is marketing and selling its Link Plans product as a substitute for the fixed broadband Internet services provided by the other operators.

15. The Authority recognises that this state of play places Vodafone in a less onerous position when compared to the other operators who have to abide by the regulatory norms set out in the Decision, and therefore is committed to taking action to remedy this situation. On the 11th July 2016, the Authority launched a Public Consultation proposing amendments to the Decision. The Authority's proposals aim to amend the Decision so that it may reflect better the developments that have taken place in the market since its publication in February 2013.

16. In the aforesaid public consultation, the Authority is proposing, among other things, that all broadband Internet services marketed as fixed or which are designed to serve as a direct replacement to the fixed broadband services, will fall within the scope of the Decision as amended. On the basis of the proposed changes to the Decision, Vodafone's Link Plans product will thus fall within the scope of the Decision as amended, and would consequently need to abide with all the applicable regulatory obligations. Under the proposed changes to the Decision, any operator who markets a broadband service as fixed must abide fully by the Decision. Failure or inability to do so will result in the operator having to stop marketing the service in question as a fixed broadband service. This without prejudice to any regulatory measures that the Authority may then consider appropriate in the circumstances.

The Authority considers that the proposed changes, once implemented, should address the current situation adequately, leading to a more level playing field for all the operators.

Decision

The Authority, for the reasons aforementioned, determines that the Vodafone is not in breach of the Decision or of the relevant provisions of the ECNSR. The Authority as already stated above appreciates that developments in the market have shown that there is the need to revise the existing regulatory framework and is committed to implement the necessary changes as evidenced by its intention to amend the Decision.



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