

Bottom-up Cost Model for Mobile Networks and Mobile Interconnection Pricing

Response to Consultation and Decision

Final Decision

MCA/D/14-1802

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EXECUTIVE SUMMARY

In line with previous decisions on mobile termination rates, the Malta Communications Authority (hereafter 'MCA') has set cost-oriented prices for mobile wholesale termination on the three Mobile Network Operators that have been designated as having Significant Market Power in Malta.

For this purpose, the MCA has developed a bottom-up long-run incremental cost (BU-LRIC) Model to calculate the costs incurred by a typically efficient mobile network operator in Malta to provide voice termination services.

The costing methodology used for this purpose is based on the 'pure LRIC' concept featured in the European Commission's Recommendation on Termination Rates of 2009. The MCA had decided to adopt the 'pure LRIC' methodology in its decision entitled "Interconnection Pricing Strategy for the Electronic Communications Sector in Malta" published in May 2010.

The public consultation document entitled "The MCA's Bottom-up Cost Model for Mobile Networks and Proposed Mobile Interconnection Pricing: Consultation and Proposed Decision", published in August 2013, summarised the model structure, the main network configuration assumptions and issues encountered. The model has been developed based on data provided by the operators, either specifically for this project or as part of the quarterly statistics and additional data gathered by the MCA, as well as assumptions made by Analysys Mason Limited¹. At numerous stages during this process, mobile network operators (GO plc, Vodafone Malta Limited, Melita plc) have been consulted privately on a one-to-one basis. The model yielded a pure-LRIC based wholesale mobile termination service of 0.40 Euro cent per minute.

Following the issuance of the public consultation, on 17 August 2013, Vodafone Malta Limited (hereafter "VFM") sent an early response requesting the MCA to consider a glidepath towards the modelled rate. To address this early response and to pre-empt the need for further consultations and possibly prolonging the consultative process, the MCA published the 'Addendum to the MCA's Consultation of 16 August 2013: Bottom Up Cost Model for Mobile Networks and Proposed Mobile Interconnection Pricing: Further Consultation' (hereafter 'Addendum') requesting interested parties to comment on the potential introduction of a glide path.

Any Interested Parties had till 20 September 2013 to reply to the Public Consultation document and to the Addendum. The MCA received feedback from Melita plc and VFM.

This document includes the MCA's responses to the Operators' feedback on the Public Consultation Document and the Addendum, as well as the European Commission's comments. This decision notice directs that the wholesale mobile termination rate of 0.4045 Euro cent per minute will be applicable as from 1 April 2014.

¹ Analysys Mason are the consultants commissioned by the Authority to develop this model.

TABLE OF CONTENTS

1.	INTRODUCTION	1
2.	SUMMARY OF RESPONSES RECEIVED FROM LOCAL OPERATORS.....	3
2.1	Response received from local operators.....	3
2.2	Cost model.....	3
2.2.1	Responses received.....	3
2.2.2	MCA's reply	5
2.3	Published Addendum and glide path	6
2.3.1	Responses received.....	6
2.3.2	MCA's reply	7
2.4	Pure LRIC rate	7
2.4.1	Responses received.....	7
2.4.2	MCA's reply	9
2.5	Regulation on mobile termination rates	11
2.5.1	Responses received.....	11
2.5.2	MCA's reply	12
2.6	Confidentiality and transparency	13
2.6.1	Responses received.....	13
2.6.2	MCA's reply	15
2.7	Discrimination	18
2.7.1	Responses received.....	18
2.7.2	MCA's reply	19
2.8	Timelines	19
2.8.1	Responses received.....	19
2.8.2	MCA's reply	20
2.9	Additional feedback received from VFM.....	20
3.	RESPONSES RECEIVED FROM THE EU COMMISSION.....	22
4.	MCA'S DECISION ON MOBILE INTERCONNECTION PRICING.....	23
4.1	Summary of MCA's conclusions	23
4.2	MCA decision.....	23

1. INTRODUCTION

On 16 August 2013 the Malta Communications Authority (hereafter 'the Authority' or 'MCA') published a Consultation and Proposed Decision entitled 'The MCA's Bottom-up Cost Model for Mobile Networks and Proposed Mobile Interconnection Pricing: Consultation and Proposed Decision'² (hereafter the 'Public Consultation Document'). This document proposed a wholesale mobile termination rate (hereafter 'MTR') based on the Authority's newly developed Bottom-up Cost Model (hereafter 'MUCM') of 0.40 Euro cent per minute.

The model has been developed based on data provided by the operators, either specifically for this project³ or as part of the quarterly statistics and additional data gathered by the MCA, as well as assumptions made by Analysys Mason Limited⁴ (hereafter 'Analysys Mason'). At numerous stages during this process, mobile network operators⁵ (hereafter "MNOs" or "Operators") have been privately consulted⁶ (also referred to as "Technical Consultations") and one-to-one meetings⁷ with MNOs were held.

Following the issuance of the Public Consultation Document, on 17 August 2013, Vodafone Malta Limited (hereafter 'VFM') sent an early response requesting the MCA to consider a glidepath towards the modelled rate.

To this effect the MCA published the 'Addendum to the MCA's Consultation of 16 August 2013: Bottom Up Cost Model for Mobile Networks and Proposed Mobile Interconnection Pricing: Further Consultation'⁸ (hereafter the 'Addendum') requesting any interested parties to comment on the prospects of a potential introduction of a glide path.

The consultation period for the aforementioned Public Consultation and the Addendum thereto ended on the 20 September 2013, with two operators Melita plc (hereafter 'Melita') and VFM, submitting their formal feedback. The Authority would like to take the opportunity to thank the respondents for their contributions.

This Final Decision and Response to the Public Consultation Document contains a summary of the feedback received from respondents and the European Commission (hereafter 'EU Commission'), the Authority's position in relation to these comments, and subsequently the Authority's corresponding final decision.

² Available at: <http://www.mca.org.mt/consultations/mcas-bottom-cost-model-mobile-networks-and-proposed-mobile-interconnection-pricing>

³ Including the document "Data request documentation for Maltese Mobile Network Operators" (28 March 2013), an email sent on 11 April 2013 to Operators entitled "Coverage Questions" and several clarification emails sent to Operators throughout the entire process.

⁴ Analysys Mason are the consultants commissioned by the Authority to develop this model.

⁵ GO plc, Vodafone Malta Limited and Melita plc

⁶ These being "Proposed methodological modelling and network design choices" (11 March 2013), and "Private consultation document on the mobile MUCM" (28 June 2013) (also referred to as "Technical Consultation Document").

⁷ One-to-one meetings held with MNOs between 27-28 March 2013 and 10-11 July 2013.

⁸ Available at: <http://www.mca.org.mt/consultations/addendum-mcas-consultation-16-august-2013-bottom-cost-model-mobile-networks-and>

The report on consultation is organised as follows:

- Section 2 summarises the feedback received from local operators to the Public Consultation Document and contains the MCA's response to the Operators' feedback;
- Section 3 summarises the EU Commission's feedback; and
- Section 4 contains the MCA's conclusions and final decision on the proposed interconnection charges.

2. SUMMARY OF RESPONSES RECEIVED FROM LOCAL OPERATORS

2.1 RESPONSE RECEIVED FROM LOCAL OPERATORS

This section includes a summary of the feedback received from Melita and VFM grouped by subject matter. It is pertinent to note that the feedback covered hereunder is in relation to issues that were the subject of the Public Consultation Document. However VFM has also included comments in relation to issues raised and already addressed in the detailed private technical consultations previously undertaken with VFM, GO plc (hereafter 'GO') and Melita before the publication of the Public Consultation Document. Specific to these instances, this document will limit itself to list these issues indicating where these were addressed (see section 2.9).

2.2 COST MODEL

2.2.1 RESPONSES RECEIVED

Melita did not have any issues in relation to the principles of Long-Run Incremental Costing or the structure and detailed configuration of the model. As stated in its response "*Melita is in full agreement with how the BUCM has been developed*".

On the contrary, VFM commented extensively on the cost model. The salient comments are being highlighted hereunder.

VFM expressed its opinion that the model appears to have insufficient incurred costs incorporated within it, made evident by VFM's interpretation of allegedly 'conflicting' information provided by the MCA namely:

- The pure LRIC termination rate is low because of low subscriber usage combined with the need to deploy equipment with large capacity which remains underutilised;
- LRIC+ rates are in line with other Member States - VFM was of the opinion that the local LRIC+ rate should be significantly higher than LRIC+ rates of other Member States;
- VFM's cost is relatively high compared to other operators because of its market share;
- The very low pure-LRIC termination rate implies that all costs are driven by coverage. Therefore VFM argued that its total costs should be broadly similar to other operators;
- VFM stated that if the CAPEX costs as modelled by the MCA and its consultants are correct, VFM's CAPEX profile would feature chunks of investment at regular intervals. However, according to VFM, this does not reflect its network investment experience.

VFM expressed its concern that the private consultation document dated 28 June 2013 issued by the MCA (hereafter 'Technical Consultation Document') explicitly states that several costs are being treated as "sunk" and as such are being ignored in the MBUCM. VFM indicated that it suspects that several costs considered as fixed by the MCA are only fixed within certain intervals of existing traffic, and that additional investment would be necessary as soon as the traffic exceeds such interval. VFM argued, on the basis of its experience of investment, that such assumption is incorrect and goes

against the European Commission's Recommendation on Termination Rates of 2009⁹ (hereafter 'EC Recommendation'). VFM further argued that "even if certain costs are fixed over some traffic intervals, once those intervals are exceeded, additional costs need to be incurred".

VFM also stated that if an increment of a minute of terminating traffic was considered at any point of discontinuity within the capital cost function, and assuming everything else remains equal, additional capital investment would be needed to accommodate that unitary increment of terminating traffic. VFM argued that such costs constitute traffic-related costs and cannot be subsumed under call origination. VFM commented that investment in switching equipment is undertaken modularly and needs to take account of both call termination traffic and call origination traffic. Accordingly, VFM also submitted that the claim stating that there is little contribution to the incremental cost from the large modular capacities of switches and servers is not tenable. VFM continued to state that this depends on which point of the capital cost function one takes the unitary increase in terminating traffic when establishing the incremental cost. This depends also on the capital cost function which is characterised by discontinuities at several intervals or ranges of traffic.

VFM expressed its agreement with the MCA in using actual levels of coverage given the regulatory coverage obligations and also the assurance of quality of service to the consumer. However, VFM was of the opinion that the proposed coverage levels are somewhat dissonant with the minimum-efficient scale criteria adopted to develop the model and hence requested access to the MBUCM to verify this.

VFM disputed also the relevance of the hilliness index indicated in the Addendum to the Consultation and it did not believe that the methodology employed in the computation of the index gives any indication of what it is trying to establish.

With respect to the unitary service costing of termination traffic, VFM also commented that it failed to "*understand how lower voice usage can result in lower termination rate rather than a higher one since costs are being divided by a smaller denominator when traffic is lower.*" VFM was of the opinion that this should have the opposite effect.

Furthermore, VFM commented that given that the MCA did not publish the model, it was not clear how the local specificities have been borne in the cost model. VFM commented on the use of benchmark unit costs arguing that it was contradictory to state that the case of Malta was *sui generis* on the one hand, while using benchmarks from other European cost models on the other. VFM was concerned that possible inconsistencies in methodology might have resulted in termination rates that are prejudicial to VFM's legitimate business concerns.

VFM enquired whether the Authority has carried out any studies to assess the impact which the proposed MTR rates would have on the mobile sector in Malta as a whole, on the industry structure, on competition within the sector, on the operators individually and on consumers of mobile services in both the short-run and the long-run. In the event that such an impact assessment has been carried out, VFM argued that in order to ensure transparency, the result should be published.

⁹ Commission of the European Communities, COMMISSION RECOMMENDATION of 7.5.2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU, 7 May 2009.

2.2.2 MCA'S REPLY

VFM's opinion that the model appears to have insufficient incurred costs incorporated is unfounded. In the document "Data request documentation for Maltese Mobile Network Operators" (28 March 2013) (hereafter "Data Request Document"), that the MCA had submitted to MNOs - including VFM - the MCA has dedicated a full section on cost data particularly top-down costs relating to both capital and operating expenditure incurred by the same MNOs. The aim of this data request was, amongst others, to ensure that the modelled hypothetical operator costs would be based on local realities. Indeed as communicated to MNOs during the Technical Consultations, the total modelled costs (both capital and operational) were found to be generally in line with the actual costs of local operators, hence indicating that the modelled costs were not unreasonably aggressive.

With respect to the alleged contradictions listed by VFM, the MCA fails to understand how these indicate that the model features insufficient incurred costs. These alleged contradictions will be treated in more detail throughout this document.

VFM's argument on costs taken to be fixed is largely based on the view that costs are only assumed to be fixed with a specific interval of traffic, and therefore if different traffic volumes were considered then "fixed" costs would become variable.

It is clear that if ever increasing volumes of traffic were assumed, then eventually more and more network equipment would become capacity constrained and thus capacity driven. However the model is based upon traffic levels observed in Malta, as well as on reasonable traffic forecasts, which were in turn disclosed to operators for feedback. Hence for more costs to become more variable, the model would have had to assume unrealistically high volumes of traffic relative to that observed or anticipated for Malta, which in itself would have been a flawed course of action.

The MCA would also like to point out that information on coverage was already given in the Technical Consultation Document. During the technical consultations, the MCA gave operators the opportunity to compare the coverage modelled, with their actual levels and comment accordingly. In contrast with other MNOs who gave the MCA feedback on these comparisons, which was in turn taken into account, VFM chose not to engage in these discussions when it was opportune to do so. The MCA therefore feels that VFM's request to revive these issues is ill-timed and out of scope.

With regards to VFM's statement on voice usage, that lower levels should result in higher termination rates, the MCA is disappointed to note that VFM failed to understand the basic principles of pure LRIC methodology and how it differs from its LRAIC+ counterpart. Indeed the more spare capacity left on the network, the fewer propensities for the pure incremental costs to occur with respect to the service being modelled.

With respect to the use of benchmarks, it is both unreasonable and unjustifiable for VFM to argue that the methodology to use benchmarks in absence of operator data is inappropriate when none of the Maltese MNOs, including VFM, provided the required local data. Despite giving precedence to actual costs, the MCA was left with no other option but to use alternative sources. This approach was also communicated during the one-to-one meeting with VFM on 11 July 2013 where the MCA informed VFM that in the absence of actual data, it intended to proceed as follows:

- for unit costs which were in themselves wholesale services (e.g. backhaul) the MCA would adopt (and in fact it did) the costs indicated in any regulatory decision as appropriate; and

- for other unit costs, the MCA would use (and in fact it did) benchmarks from other European cost models.

Furthermore, VFM admitted that it was not providing such information because it considered such information to be confidential, clearly demonstrating that VFM itself preferred, and contributed to, the second best option (i.e. the use of benchmarking) being used in MBUCM.

The benefits of the regulation in line with the principles of the EC Recommendation have been amply documented. Apart from the EU Commission's impact assessments and staff working papers, this documentation includes the MCA's interconnection strategy of 2010¹⁰, as well as the July 2013 Market Analysis Consultation Document on Market 7¹¹. With respect to VFM's comments regarding the impact assessment on the proposed rates, one does not need to publish such an analysis to conclude that, on aggregate, the result is a zero-sum, with net losers being offset by net gainers. On aggregate, this result is also independent of the level of the termination rates proposed. As an impartial regulator, the MCA cannot, and will not, pick individual winners between operators.

2.3 PUBLISHED ADDENDUM AND GLIDE PATH

2.3.1 RESPONSES RECEIVED

Melita was concerned about the proposal included in the Addendum due to the manner in which it has arisen particularly how, as alleged by Melita, the Authority has allowed the regulatory process to be hijacked by one of the stakeholders.

Melita argued that the MCA's decision to alter the terms of an open consultation at the request of one stakeholder, constitutes a clear abuse of the regulatory process and that responses should have only been considered after the deadline for responses had expired.

On its part, VFM appreciated the MCA's proposal to introduce a glide path in response to its earlier request. However, VFM strongly disagreed with the statement that the MCA was of the view that the market was given ample visibility of the regulatory process related to MTRs. VFM feels that this process has given rise to regulatory uncertainty which has unsettled VFM's investment recoupment plans and forecasting processes. For these reasons VFM expressed its disagreement with the proposed glide path trajectory.

¹⁰ "Interconnection Pricing Strategy for the Electronic Communications Sector - Decision", May 2010, Available at: <http://www.mca.org.mt/service-providers/decisions/interconnection-pricing-strategy-electronic-communications-sector>

¹¹ "Wholesale voice call termination on individual mobile networks in Malta, Definition, assessment of SMP & regulation of relevant markets", July 2013, Available at <http://www.mca.org.mt/consultations/mca-consultation-provision-voice-call-termination-individual-mobile-networks-malta>

2.3.2 MCA'S REPLY

With respect to Melita's criticism on the timing of the publishing of the Addendum, the MCA considers that the parallel issuance of the aforesaid Addendum was intended to expedite the process of the consultation. If the MCA had waited till the end of the consultation period to reply to VFM's early response, as Melita suggested, then the MCA would have had to consider VFM's response and to consult once more by publishing the Addendum after the consultation period ended. This would have further delayed the process of introducing the model-based pure LRIC rate which, to the MCA's understanding, is the opposite of what Melita is proposing in its response.

On the other hand, in conjunction with Melita's proposed implementation target rate of October 2013, Melita probably did not take into account the Article 7 notification process with the EU Commission. Whilst reiterating its commitment to implement the cost-orientated MTR as soon as possible, the Authority would like to make it clear that it is duty bound to take the utmost account of operators' feedback and ultimately ensure a fair and proportionate decision.

As regards to VFM's comment on the lack of visibility of the regulatory process, the MCA would like to highlight the timelines of the MBUCM. At this stage it is enough to state that the operators knew about the MCA's Decision¹² to follow the EC Recommendation on the use of Pure LRIC at least since 2010. Furthermore, after taking into account the technical consultation phases, it transpires that as far as operators were concerned, the process had spanned over 10 months. Moreover, the MCA kept MNOs abreast with expected timelines of the project specific milestones to provide maximum transparency in this regard.

With respect to the proposed glidepath, the MCA would like to note that both VFM and Melita were not supportive of its proposals. In fact whilst Melita disagreed categorically with the introduction of a glidepath, VFM did not support this trajectory failing to suggest any alternatives.

2.4 PURE LRIC RATE

2.4.1 RESPONSES RECEIVED

With respect to the rate calculated from MBUCM, Melita supported the MCA's proposal to set the cost-based rate at 0.40 Euro cent per minute, claiming that such "*true cost-based MTR*" would put an end to the "*monopoly rents*" from mobile termination that certain operators have enjoyed thus far.

On the other hand, VFM claimed that the pure LRIC rate was far below expectations as well as possibly being the lowest in the European Union. In VFM's opinion, the MCA has not sufficiently "*take[n] account of prices available in comparable competitive markets*", as allegedly required by

¹² Available at: <http://www.mca.org.mt/service-providers/decisions/interconnection-pricing-strategy-electronic-communications-sector>

Article 13(2) of the Access Directive¹³, reflected in regulation 16(2) of the Electronic Communications Networks and Services (General) Regulations¹⁴ (hereinafter "ECNSR")¹⁵.

VFM made reference to Analysys Mason's document named "*Pure LRIC results from the Maltese mobile model*" included in the Addendum. This document concluded that the key factors identified in this document dilute significantly the relevance of comparison with the featured range of pure LRIC results in other Member States, since by definition they reflect the specific differences observed in the Maltese market when compared to its European counterparts. In this respect VFM stated that it failed to understand how such factors could dilute the relevance of comparison with the featured range of pure LRIC results in other Member States.

Furthermore, VFM expressed its concern that the evidence provided both in the Public Consultation Document and in the Addendum does not sufficiently explain the outlier position of the proposed pure-LRIC rate. VFM considered the explanation provided by Analysys Mason on the pure-LRIC rate as a back-solve exercise to support the position adopted by the Authority. On the contrary, VFM was of the opinion that the MCA should have assessed all the factors that could contribute to the pure-LRIC rate in Malta being above or below that of other Member States and then assessing which of the factors qualify as major drivers for these variances.

VFM made reference to MCA's decision entitled "Interim Review of Wholesale Mobile Termination Rate - Response to Consultation & Decision, June 2012"¹⁶ (hereafter "2012 Decision"), whereby the MCA mentioned a 1.03 Euro cent per minute indicative target rate. VFM stated that it did not expect that the model-based rate would be less than half of the indicative target rate mentioned above thus increasing regulatory uncertainty as a result. VFM was also of the opinion that this ran counter to Article 3(3) of the Framework Directive¹⁷.

VFM also made reference to the provisions at law dealing with price control and cost accounting obligations, and the manner in which these are to be implemented by an NRA (Article 13(1) of the Access Directive²). VFM was of the opinion that these provisions of the law have not been upheld in the Public Consultation Document as the proposed rates do not allow a reasonable return on capital employed by VFM.

VFM also commented that the pure LRIC MTR proposed by the MCA was below average cost but should in principle be amended to be above variable cost. VFM was of the opinion that this will elongate the timeframes for the recoupment of investment, thereby defeating the purposes of the Digital Agenda and the Europe 2020 strategy¹⁸, as well as the principles of the Framework Directive.

¹³ Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities

¹⁴ Chapter 399.28 of the Laws of Malta

¹⁵ Article 13(1) of the ECNSR states "To encourage investments by the operator, including in next generation networks, national regulatory authorities shall take into account the investment made by the operator, and allow him a reasonable rate of return on adequate capital employed, taking into account any risks specific to a particular new investment network project." Vodafone also quotes Article 13(2) of the Access Directive, reflected in Article 16(2) of the ECNSR states that "national regulatory authorities shall ensure that any cost recovery mechanism or pricing methodology that is mandated serves to promote efficiency and sustainable competition and maximise consumer benefits"

¹⁶ Available at: <http://www.mca.org.mt/decisions/interim-review-wholesale-mobile-termination-rate-response-consultation-decision-june-2012>

¹⁷ Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:108:0033:0050:EN:PDF>

¹⁸ Regulation Of The European Parliament And Of The Council laying down measures concerning the European single

VFM enquired whether the model factors in that a percentage of the derived termination rate is paid back to the MCA as regulatory fees.

2.4.2 MCA'S REPLY

In regard to VFM's comparisons with the featured range of pure LRIC results in other Member states, the MCA notes that the particular national specificities explained in the consultation distort and to a certain extent dilute, comparisons with other Member States. This reality has also been acknowledged by Vodafone Group itself which contested Comreg's decision¹⁹ to use benchmarks for setting the MTRs in Ireland specifically on this point; stating that "*actual costs in the Irish market are significantly different from those in other Member States*".

The MCA considers that Article 13(2) of the Access Directive is intended to be applied in the event that a NRA does not have the necessary tools to implement cost orientation. Indeed, Reg. 16(2) of SL 399.28 clearly provides that it is at the discretion of the Authority as to whether the Authority should take into account prices available in comparable competitive markets. The relevant provision at law states that: "the Authority **MAY ALSO** take account of prices available in comparable competitive markets" [emphasis added]. The wording in reg. 16(2) reflects the wording used in Article 13(2) of the Access Directive.

The issue of lack of comparability due to national specific characteristics is also at the centre of the MCA's disagreement with VFM's suggested methodology to study the underpinnings of the calculated MBUCM rate. The mere fact that the Authority chose to publish this study reflects the transparency credentials of the MCA. Furthermore the objective of such a study was not to assess all factors that could contribute to the pure-LRIC rate being above or below the pure-LRIC of other Member States, but rather to look at the way the model behaves and provide explanations to the MNOs to understand the reasons why the results in Malta are what they are, regardless of how they compare with those of other Member States. This is the only way to achieve an unbiased conclusion on the model's behaviour and subsequently the drivers behind its output.

VFM alleged also that this study was a back-solve exercise to accommodate the MCA's intended outcomes. The MCA considers such an allegation to be entirely unfounded. Indeed, the reverse was the case. The MCA had built the technical components (both financial and engineering) of the model, which are in turn the determinants of the calculated rates, in consultation with all MNOs during the technical consultation phases of this project. Ironically, during this opportune time, VFM on various occasions agreed with the MCA's proposals or else chose not to comment. In this respect, the MCA considers that it was consistent and transparent throughout the process and cannot be accused of having conducted a back-solve exercise. The sequence of events demonstrates that it was VFM that chose to change its stance on previously discussed matters only at the point that the rate became public. The fact that the documentation of VFM's response to the public consultation is roughly double that submitted during all the Technical Consultation put together -

market for electronic communications and to achieve a Connected Continent, and amending Directives 2002/20/EC, 2002/21/EC and 2002/22/EC and Regulations (EC) No 1211/2009 and (EU) No 531/2012

¹⁹ Available at:

<http://www.courts.ie/Judgments.nsf/09859e7a3f34669680256ef3004a27de/005d4340da18896480257bc7003cd090?OpenDocument>. "ComReg" is the Irish electronic communications regulator.

while still not sending costing details which it continued to consider as confidential - further confirms this conclusion.

Indeed the MCA finds VFM's change in stance at the public consultation phase to be lacking in consistency as against what the company had contributed during the technical consultation phases. The MCA provided all mobile network stakeholders with a number of opportunities to participate and contribute to the lengthy modelling process through various meetings as well as through documented consultations and it took particular care to ensure that such input was put across and understood clearly.

In this regard, with respect to the number of issues that VFM included in its feedback that had already been addressed in the private consultation documents of March 2013 and June 2013, as listed in Section 2.9, at this stage the MCA would like to make it absolutely clear that, as a matter of due process, it cannot re-open for discussion matters that were addressed and closed in the previous consultation phases. This notwithstanding, the MCA will reply separately to VFM in more detail with regard to the issues raised in its response that are confidential in nature²⁰.

The MCA would also like to rectify VFM's statements referring to the indicative target published in the 2012 MCA Decision, since they are based on an incorrect portrayal of the regulatory history related to MTR regulation. Contrary to what was implied by Vodafone, this rate was not an expected modelled rate, but was only disclosed so as to provide the required transparency on the derivation of the rate benchmarked in 2012.

VFM's comments that the proposed pure-LRIC rate was below the average cost, and hence resulting to an elongation of the investment recovery period, is flawed on a number of fronts. First and foremost, VFM fails to substantiate its claims on the comparison between average costs and the pure-LRIC costs. Besides comparability itself between these two components is theoretically suspect. This is because Total average costs curves are generally constructed in relation to total output whilst the Pure-LRIC rate reflects the avoidable average costs in relation to a pure increment, in this case third party termination, which is a specific subset of total output. As already stated, the pure-LRIC increment had been decided in the Decision Notice issued by the MCA in 2010.

VFM furthermore fails to elaborate which principles as provided for under article 8 of the Framework Directive have not been complied with, and more importantly, the reasons why MCA has supposedly not complied with these principles.

VFM also refers to Article 3(3) of the EU Framework Directive and proceeds to cite provisions which are supposedly part of this article, the MCA would like to make the following observations:

1. Article 3(3) of the Framework Directive does not include the wording cited by VFM. One assumes therefore that there is a mistake on the part of VFM in that it is inadvertently citing a wrong provision;

²⁰ The MCA will separately write to VFM in more detail on the confidentiality issues raised since in doing so the MCA will have to refer to certain issues which because of their very nature are considered as confidential and cannot therefore be mentioned in a public document such as this present decision.

2. The MCA assumes that VFM actually is referring to the provisions of Article 8.5 of the Framework Directive which provision forms part of the article of the said Directive stating the policy objectives and regulatory principles to be followed by Member States. The MCA considers that in the issuance of this decision and the process it followed, it acted in due accordance with policy objectives cited by VFM and that VFM does not make any substantive arguments to demonstrate otherwise.

The comment by VFM on the provisions of Article 13(1) of the Access Directive (as reflected in regulation 16(1) of SL 399.28), is a purely subjective comment by VFM. VFM has not supported its comment by any tangible facts that may illustrate that the MCA did not abide with the requirements of this provision - specifically that the proposed rates do not allow a reasonable return on capital employed (by VFM). Indeed, the weighted average cost of capital was addressed in the technical consultation document and was subject of a dedicated consultation exercise.

VFM's comments on the link with the investment recovery period and to a greater extent the Digital Agenda and Europe 2020, particularly in the Maltese context, is also entirely subjective and a completely opposite interpretation can be made by other mobile network operators competing with VFM. The MCA had disclosed and consulted upon the annualisation methods and their respective lifetime during the technical consultation phase (Section 6.4). The MCA would like to remind VFM that it had agreed with the suggested depreciation method in the technical consultation. Once again this reflects VFM's inconsistent feedback given during different stages of the process.

In addition, the principles of the EC Recommendation point towards the retail side of the business as the most efficient channel through which an MNO is to recover its investment, leaving the recovery of third party termination costs on a pure incremental basis.

In view of VFM's query on the treatment of regulatory fees, the MCA refined its methodology and treatment of regulatory fees. This had an immaterial impact on the pure LRIC rate.

2.5 REGULATION ON MOBILE TERMINATION RATES

2.5.1 RESPONSES RECEIVED

VFM was of the opinion that the proposed MTR regulation will hinder investment without bringing about any tangible benefits to the consumer neither in the short-run nor in the long-run. VFM stated that the proposed model-based rates are unsustainable as the vast impact on revenue may result in VFM not being able to maintain the quality of its services at the current retail prices. VFM also stated that the low MTR rates resulting from the MBUCM model will dent its ability to undertake infrastructural and innovation investment in the future.

VFM also commented that the interconnection rates do not affect consumers directly. In fact, VFM believes that the low termination rates do not result in better prices for consumers. VFM argues that it is competition that results in better prices for consumers.

VFM cited also Article 288 of the Treaty on the Functioning of European Union²¹ (hereafter TFEU) which states that recommendations shall have no binding force.

VFM questioned the MCA's heavy reliance on the EC Recommendation as well as the lack of detailed studies as to its applicability in the Maltese context. VFM quoted recital 20²² of the 2009 EC Recommendation, which advocates the need for NRAs not to preclude the possibilities for alternative arrangements given that these are consistent with competitive markets. VFM asked the MCA to clarify how this Recital has been taken into account in the Authority's proposed Decision.

VFM concluded that in light of the relatively low rate produced by the model, the decision to implement the pure LRIC methodology should be reconsidered. VFM expressed its opinion that a LRIC+ rate is a sufficient remedy to the main competition problem identified and therefore there was no justification for the use of "*the more draconian and heavy-handed pure LRIC approach.*" VFM was also of the opinion that if the alleged methodological shortfalls and misinterpretations of the same EU Recommendation had to be rectified, the termination rate for Malta would be at the higher end of the spectrum of pure LRIC results.

2.5.2 MCA'S REPLY

From VFM's comments it is clear that VFM is against the use of Pure LRIC as a matter of principle. VFM went on to describe this regulation as a possible disincentive for future investment and that this regulation will not result in better prices for consumers.

With respect to VFM's opinion on the Pure-LRIC regulation, the MCA would like to note that in the interest of regulatory certainty the decision to uphold the principles of the EC Recommendation and go for this type of methodology, was taken way back in 2010, following consultation with stakeholders. This Decision, entitled "Interconnection Pricing Strategy for the Electronic Communications Sector in Malta" dated May 2010²³, was not contested by any of the stakeholders, VFM included. At this stage, it is therefore worthwhile to clarify that the purpose of the present consultation was restricted to the implementation of the Pure-LRIC rate and hence any issues related to the principles of the regulation are at this stage out of scope.

Following the 2010 Decision in favour of Pure-LRIC, the MCA had also concluded the review of fixed termination rates based on the same principles. Again this regulation was not contested by any of the MNOs, including VFM. Hence a change in the regulatory stance for mobile termination on a matter of principle would have been inconsistent and counter intuitive, whilst if it had to be justified on a matter of quantum, it would have been reflective of a back-solve exercise.

With respect to VFM's claims on the relevance of such regulation to retail prices and consumer welfare, the MCA notes that VFM did not substantiate its claims with any evidence. In this regard,

²¹ Consolidated version of the Treaty on the Functioning of European Union, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:en:PDF>

²² "when regulating wholesale termination charges, NRAs should neither preclude nor inhibit operators from moving to alternative arrangements for the exchange of terminating traffic in the future to the extent that these arrangements are consistent with a competitive market" Commission Recommendation of 7 May 2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU

²³ Available at: <http://www.mca.org.mt/service-providers/decisions/interconnection-pricing-strategy-electronic-communications-sector>

on a conceptual level there is a difference between a claim that a regulatory measure is insufficient, as opposed to a claim that the same intervention is not necessary. Hence, although it could be argued that such regulation is not sufficient in maximising consumer welfare, this does not mean that it is not necessary.

Furthermore, Vodafone's reference to recital 20 of the 2009 EC Recommendation is entirely mistaken. In the first instance the market in question is not a competitive market - MCA notes that the recital specifically refers and applies only to a competitive market. Secondly, this recital must be read in the context of the "alternative arrangements" mentioned in the Explanatory Memorandum to the Recommendation -i.e. commercially negotiated scenarios of Bill and Keep, Reciprocity, and Receiving Party Pays - which commercial agreements have not materialised.

The merits of establishing a level playing field at a wholesale level amongst networks (fixed and mobile) have been amply documented and are also enshrined in the EC Recommendation. The MCA therefore believes that the Authority's regulatory stance, including the Pure-LRIC methodology adopted, is necessary for consumer welfare. On the other hand, the question of sufficiency enters the scope of market analyses directly. VFM is therefore separately invited to make any representations on the effect of wholesale regulation on the retail market, and hence any proposals that it may have with regard to specific retail regulation, in order to address the problem of unresponsive retail pricing claimed by the Company.

Finally, whilst EU Commission recommendations do not have a binding force, Member States are expected to abide with such recommendations unless there are valid reasons at law not to do so. This is the approach that has been consistently taken by the EU institutions and by the Member States. No such valid reasons at law were submitted by VFM in order to justify with the MCA as to why the EC Recommendation to implement Pure LRIC should not be followed²⁴.

As a concluding note on this particular issue, the MCA notes that VFM had not contested the application of the EC Recommendation insofar as the fixed termination rate²⁵ is concerned.

2.6 CONFIDENTIALITY AND TRANSPARENCY

2.6.1 RESPONSES RECEIVED

Melita was concerned about transparency in relation to the issues raised by VFM in its early reply to the Public Consultation Document which in turn led to the publication of the Addendum itself. Melita stated that the MCA described only an outline of the arguments put forward by VFM.

On its part, VFM claimed a lack of transparency in the model-related details disclosed by the Authority. In this respect VFM asked the Authority to publish key inputs to the model, namely unit

²⁴ See ECJ decision in C-322/88 Grimaldi whereby it was held that national courts are bound to take into account recommendations in order to decide disputes referred to them in particular where they are capable of casting light on the interpretation of other provisions of national or Community law.

²⁵ Available at: <http://www.mca.org.mt/service-providers/decisions/mcas-new-bottom-cost-model-fixed-networks-and-fixed-interconnection>

costs and total network costs, along with the results of the LRAIC+ rate. VFM alleged that, in not receiving such information, it has been denied its right to comment adequately and made reference to Article 4A of the Malta Communications Authority Act²⁶ and Article 6 of the Framework Directive.

VFM also asked for the publication of the cost model as it argued that it is essential to validate the results that it produced. VFM stated that it is not aware of any Member State where the MTR regulation has been implemented and the cost model was consequently not subject to operator review and comment. VFM referred to Ofcom's Mobile Termination Review Statement²⁷ where the model (barring some confidential information) was provided to the stakeholders.

VFM commented also that the recent corrections²⁸ by Ofcom provide an example of an instance where a minor inaccuracy in the cost model can produce significant variations in the results derived. VFM argued that it cannot exclude a similar occurrence in the MBUCM developed by the MCA or its consultants. In support of this concern VFM alleged that the MCA had already found inaccuracies in the model related to data and voice traffic in the busy hour.

Furthermore, VFM requested to have access to all reconciliations between bottom-up costs as modelled and top-down costs that have been performed, in line with Recital 11 of the EC Recommendation²⁹.

VFM argued that whereas the Authority did not publish the said information due to confidentiality obligations, VFM was of the opinion that such action was in conflict with the MCA's own Internal Guidelines on Confidentiality as issued on the 16 December 2004³⁰ (hereafter 'Confidentiality Guidelines'). In particular, VFM quoted guideline 1 which states that information received from MNOs is potentially public unless the MCA, in line with the relevant provisions at law, considers the information to be of a confidential nature. VFM argued that all information received by the MCA was public by default since the Company was not aware of evidence that a claim of confidential information has been made by other stakeholders. VFM stated that the MCA did not provide a reasoned decision as to why certain information couldn't be published. VFM argued that the MCA has not merely removed confidential information from the Public Consultation Document, but has in fact desisted from publishing the proposed cost model. This being an action which VFM contended goes beyond the MCA's confidential obligations.

VFM also quoted guideline 3³¹ of the Confidentiality Guidelines, arguing that it was a duty of the Authority not to withhold such information, except for extremely sensitive information, marked as such by the operator submitting it.

²⁶ Chapter 418 of the Laws of Malta

²⁷ Available at: <http://stakeholders.ofcom.org.uk/consultations/mtr/statement>

²⁸ Available at: <http://stakeholders.ofcom.org.uk/binaries/consultations/llu-wlr-cc-13/correction.pdf>

²⁹ Recital 11 states: "Given the fact that a bottom-up model is based largely on derived data, e.g. network costs are computed using information from equipment vendors, regulators may wish to reconcile the results of a bottom-up model with the results of a top-down model in order to produce as robust results as possible and to avoid large discrepancies in operating cost, capital cost and cost allocation between a hypothetical and a real operator. In order to identify and improve possible shortcomings of the bottom-up model, such as information asymmetry, the NRA may compare the results of the bottom-up modelling approach with those resulting from a corresponding top-down model which uses audited data."

³⁰ http://www.mca.org.mt/sites/default/files/articles/confidentialityguidelinesFINAL_0.pdf

³¹ Guideline 3 of the Internal Guidelines on Confidentiality, 2004, state "the most common instances of commercial confidentiality claims emanate from the submission of detailed cost accounting information that goes beyond the standard accounts submitted to other Authorities. Any such information should be considered as confidential unless the Authority

2.6.2 MCA'S REPLY

With respect to Melita's comments on the reporting of VFM's feedback in its early response, the MCA would like to assure Melita that these were reproduced faithfully in the Addendum. The transparency of the publication of the consultation document was therefore never detracted.

With regards to VFM's comments, the Technical Consultation Document included all the information required except for some unit-costs which were modelled with data from only one of the MNOs, and hence being confidential. As mentioned earlier, VFM itself, in the various exchanges with the MCA and with Analysys Mason, chose not to provide its own unit costs for confidentiality reasons. If all MNOs had provided data on their unit costs as required of them primarily during the data collection phase and later during the course of the model development process, it would have been possible for the MCA to publish the average-based unit costs used for the modelled operator.

Apart from these particular components, all unit costs that could be disclosed were in actual fact disclosed, such as for example:

- backhaul microwave links;
- dark fibre;
- switching sites;
- EIR, AUC, IN, VAS, SMSC, MMSC, NMS, MGW STM1 ports;
- 2G and 3G licensing fees;
- backhaul leased lines; and
- International leased lines.

VFM knows very well that the model was subject to operator participation and that all stakeholders had the opportunity to go through the Technical Consultation Document and contribute accordingly. The MCA, in order to further enable MNO's involvement, has organised one-to-one meetings with all operators including VFM. During these meetings each operator had the opportunity to ask for any clarification needed prior to submitting their responses in writing. The MCA would also like to remind VFM that MNOs (including VFM) in fact did comment and provide the MCA with detailed and technical responses to the Technical Consultation Document. These comments brought about changes to the model. The MCA firmly rebuts any claim that VFM's chosen level of involvement in these technical consultations was constrained by the lack of transparency by the MCA. Given the same opportunity, other operators had engaged the MCA at a more detailed level, discussing at times very specific network and modelling aspects. Furthermore, the fact that VFM itself was capable to treat certain detailed issues during the public consultation reflects that VFM's lower level of involvement when technical consultations were still open was not a question of transparency.

In relation to VFM's comparison with the practices of certain NRAs in terms of their specific regulatory processes, the MCA, as an independent regulator, is not bound to follow the practices of any particular European counterpart. In any case, the Authority cannot but note the diversity in approaches throughout Europe. The MCA is also duty bound to safeguard MNOs' confidentiality, and hence it strives to strike the right balance between confidentiality and transparency. The MCA has a proven track record in achieving this balance since the regulatory process that has been used

determines that there is a necessity to publish it in whole or in part in support of decisions taken by the authority, which need to be public."

in this instance is consistent with all the models (related to both electronic communications and postal services) that the Authority has developed and consulted upon in the past.

Article 4A(1) of Cap. 418 provides [other than in the instances specifically mentioned therein] that the MCA when taking a decision which has a significant impact on a market, shall give the parties concerned the "opportunity to comment on the proposed decision within a period which the Authority considers reasonable". The MCA, as explained in detail elsewhere in this decision (see Section 2.8.2), considers that it gave the parties concerned ample opportunity to make their submissions at various stages in writing and whilst undertaking fairly extensive one-to-one meetings with each of the MNOs involved, including VFM. In the circumstances the MCA considers that VFM has no valid grounds at law - specifically within the context of article 4A - to claim that it was not given the opportunity to comment.

In any case, in relation to VFM's direct reference to Ofcom, the fact that this NRA published unit costs in the statements needs to be put in the context that it aggregated data from various operators, thus eliminating confidentiality issues. The MCA would like to highlight paragraphs A6.22 to A6.24³² of this statement, which confirms that Ofcom received responses from several operators. Paragraph A6.133 is another good example, which indicates that a given unit cost has been based on data received from four operators.

The MCA would also like to clarify that the restatement of the data and voice traffic table mentioned by Vodafone was due to a proofing error in the Technical Consultation Document and not in the cost model. Although VFM itself had agreed to the misstated contents, the MCA had immediately disclosed the corrected table in MCA's reply to Operators' feedback to the Technical Consultation Document. Indeed, this incident proves the MCA's transparency and the thoroughness of this process. MCA regrets that Vodafone in its public consultation feedback portrayed this incident as a model inaccuracy when it had been made aware that this was not the case.

Moreover the integrity of the model has been developed and assured by Analysys Mason, an independent reputable consultant with vast experience in such models. The cost model was subjected to internal review by the MCA's own experts. During which process nothing has come to the MCA's attention that causes the Authority to believe that there may be any misstatements or miscalculations that may impact the resulting rate.

VFM also failed to put forward any justifications why publication of the LRAIC+ rate, apart from the pure-LRIC rate, is relevant in a public consultation about a MTR rate calculated on a Pure-LRIC approach. Given the different methodologies underpinning the two rates, as well as the fact that the consultation document is restricted to the Pure LRIC MTR, the MCA is of the view that this request is out of scope, given that the decision to go for a Pure-LRIC methodology was already taken in 2010.

With respect to VFM's queries on the extent of reconciliations between the figures produced by the model against top-down data, the MCA confirms that it did perform such an exercise. This included a reconciliation of the total network costs in the model with those featured in the regulated accounts of each individual operator in order to come up with a common cost value. This was

³² Available at: http://stakeholders.ofcom.org.uk/binaries/consultations/mtr/statement/MCT_statement_Annex_6-10.pdf

explained in the Technical Consultation Document in section 7. Furthermore, figure 7.1 included the total network costs for 2012 for the generic operator. VFM therefore had the visibility to compare its network with the generic model disclosed in the Technical Consultation Document.

VFM commented also on the way the MCA exercised its confidentiality obligation vis-à-vis the applicable legal provisions and its published Confidential Guidelines. The MCA would like to highlight that the cited Confidentiality Guidelines, in fact, give the MCA the right to decide whether the information received is of a confidential nature or not. Furthermore, the MCA is not obliged to inform MNOs whether other operators have responded under confidential cover or otherwise. However, in this particular occasion, the MCA can divulge that most responses (including some from VFM) were marked as private and confidential. The MCA would also like to remind VFM that it also assured MNOs of its intentions to protect confidentiality of individual operator's data received in meetings held between the 10th and 11th July 2013 and has in its email correspondence with MNOs marked clarification emails as confidential. VFM is well aware of this procedure since this is also the manner in which MCA acted with the same company.

As regards to the Confidentiality Guidelines, there are various points to make in this regard:

- It is to be noted that during the one-to-one technical meetings with VFM, the issue of confidentiality had in fact arisen, and VFM had queried with MCA as to why certain costs were not revealed. The MCA had in this regard informed VFM that for reasons of confidentiality such costs could not be communicated as the communication of such information would impact other MNOs negatively through disclosure of highly commercially sensitive information. VFM did not then object to the matter any further.
- With VFM's reference to the Confidential Guidelines, the MCA notes that the Confidential Guidelines expressly state that "They [the Confidential Guidelines] are not meant to be taken as rigid rules in that ultimately every case needs to be assessed on its own merits." Therefore reference to the Confidential Guidelines should always factor in this practical consideration (see the 'Introduction' to the aforesaid Confidential Guidelines).
- VFM quotes Guideline No. 1 from the Confidential Guidelines which provides that information received from an operator following a request from the Authority, is potentially public. This is however expressly qualified by the consideration that the Authority may in line with the applicable provisions at law, notwithstanding consider the information to be of a confidential nature.
- VFM refers to Guideline No. 3 from the Confidential Guidelines which also treats detailed cost accounting information. The Confidential Guidelines provide that such information should be considered as confidential unless the Authority determines that there is a necessity to publish it in whole or in part in support of decisions taken by the Authority which need to be made public. VFM argues that the Authority can nonetheless publish such information where the Authority "deems it necessary". VFM claims that since its business "very heavily" depends on the results of this consultation, then it is incumbent upon the Authority not to withhold any information except for extremely sensitive information and then only (according to VFM) "where it has been expressly marked as confidential by the operator submitting it".

- The MCA in this regard considers that under the Confidential Guidelines and applicable legislation, it is the MCA which has the final say in determining whether any information submitted to it by an operator - even if this information has not been marked by the operator as confidential - should be considered as confidential. Reference in this regard is also made to Guideline No.2 of the Confidential Guidelines, which in dealing with criteria for confidentiality where this for example reveals the commercial strategy of an operator, the MCA, even if the document has not been marked as confidential by the operator, may notwithstanding still consider the document as confidential.
- It is pertinent to note that in the consultation processes in question during which the operators submitted various documents of a confidential nature, the MNOs involved did where applicable state that the said documentation so submitted should be treated as confidential. The MCA in these instances - given also the subject nature of the documentation in question - recognized the commercial sensitivity of the information submitted and accepted that these should be treated as confidential.

Finally one should appreciate that the MCA in these circumstances exercised its judgment to keep a balance between, on the one hand, ensuring that the process was transparent, and on the other, that the information provided by the MNOs involved was, where appropriate, treated as confidential. It is relevant in this regard to note that VFM itself during this process submitted documentation which VFM felt was confidential, and which was similar in nature to that submitted by the other operators. The MCA accordingly did not divulge any of the information so submitted.

The MCA considers that there were valid reasons in justifying its stance to withhold sensitive and confidential data of a commercial nature received. The MCA considers that it had a duty to curb any attempt by competing MNOs to have access to information that potentially could be used for their own benefit in order to gain an unfair competitive advantage to the detriment of their direct competitors by amongst other matters having access to their competitors' data. It is specifically in this context that the MCA considers that VFM's arguments in this regard are unjustified.

2.7 DISCRIMINATION

2.7.1 RESPONSES RECEIVED

VFM stressed that its business depended heavily on the outcome of this public consultation. VFM continued to state that it feels compelled to safeguard its sustainability in the market through this response to the present consultation given that it is the operator that stands to suffer most from the implementation of this regulatory decision.

VFM was concerned that the rates proposed in the public consultation favour quad-play operators while discouraging single-play operators from entering or remaining within the Maltese mobile market.

VFM felt also that the Public Consultation Document, for the reasons mentioned above, may not be compliant with Article 102 of the TFEU³³.

On its part, in view of the MCA's proposed glidepath in response to VFM's request, Melita felt discriminated against since the Authority has allowed one player - VFM - to influence unilaterally the consultation process.

2.7.2 MCA'S REPLY

Both MNOs have claimed that the MCA engaged discriminatory behaviour, albeit for opposing reasons. On the one hand, VFM claimed that the MCA's regulation will favour GO plc and Melita plc as quad-play operators, while on the other, Melita stated that the MCA's proposed decision favours VFM.

At the outset, the fact that both respondents claimed that the MCA is discriminating against each one of them in favour of the other, demonstrates the MCA's unbiased intentions to implement MTR regulation for the long-term benefits of competition and the end-user.

In terms of VFM's comments on quad-play operators, both technical and public consultation documents stated clearly that the hypothetical operator modeled in MBUCM reflected strictly a stand-alone mobile operator.

VFM states that the Consultation Document may not be compliant with article 102 of Treaty on the Functioning of the European Union (TFEU). The article in question states that the abuse by an undertaking of its dominant position within the internal market or in a substantial part of it, shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. VFM however failed to elaborate why and where the MCA is non-compliant with this article. Therefore the MCA considers that VFM has no valid grounds at law to allege such non-compliance.

On the other hand, Melita's comments in conjunction with the MCA's motivations behind the proposal of the glidepath, were already addressed in section 2.3 above.

2.8 TIMELINES

2.8.1 RESPONSES RECEIVED

VFM commented on what it called "the very brief timelines" allowed for feedback on the Public Consultation Document and its Addendum. While thanking the MCA for having extended the period, VFM pointed out that one month to respond to the said public consultation was a tight timeframe, considering the complexity of the subject-matter, the unexpectedly low rates being proposed and the expected significant impact on VFM's business.

³³ Consolidated version of the Treaty on the Functioning of European Union, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:en:PDF>

On the contrary, Melita acknowledged positively the whole consultation process including the technical aspects of the BUCM cost model. However, Melita noted that given the MCA's initial target to implement cost-based MTR within the six months of 2013³⁴, the revised target rate of the 1 December represented an unjustified delay. Melita argued that the delay in the finalisation of the BUCM would be giving a significant 'grace' period to net beneficiaries of MTR revenues. In this regard, Melita felt that the new cost-based rate should have been implemented in full by October 2013, stating that additional delays would be detrimental to Melita and end-users into 2014.

2.8.2 MCA'S REPLY

In terms of the comments related to the timelines of the consultation process, the MCA notes also that the respondents expressed diametrically opposed views, with VFM claiming a rushed consultation process, whilst Melita opining that the conclusion of the exercise was overdue.

The MCA would like to clarify, in response to VFM's comments that the consultation process on this project started in earnest in the beginning of 2013. Taking into account the technical consultations along with their public counterpart reveals that this consultation included a total of 14 weeks' worth of consultation, making it one of the longest processes undertaken by the Authority.

In response to Melita's comments, the MCA was always committed to finalize this process in the shortest timeframes possible, without however jeopardizing the due process. Testimony of this commitment was the upfront timelines that the MCA communicated from time to time to MNOs. Despite this commitment, in view of certain developments that were beyond the control of the Authority, the June implementation target could not be achieved. Apart from delays attributable to the public procurement process, requests for extension from MNOs (including that from Melita itself) exacerbated the risks that such timelines would not be met.

In conclusion the delays beyond December are directly attributable to the public consultation process itself, wherein the Authority, as it is legally bound to do, took utmost account of all the issues raised by the local MNOs.

2.9 ADDITIONAL FEEDBACK RECEIVED FROM VFM

VFM in its response dated 19 September 2013 (hereafter 'VFM's response') raised a number of issues that had already been consulted upon in the private consultation documents of March 2013 and June 2013 as listed below. At the time, the MCA took into consideration the feedback received from the MNOs, adjusted the model where appropriate, and individually replied comprehensively to all Operators.

³⁴ Interim Review of Wholesale Mobile Termination Rate, Response to Consultation and Decision, MCA, June 2012, Available at: <http://www.mca.org.mt/decisions/interim-review-wholesale-mobile-termination-rate-response-consultation-decision-june-2012>

ISSUES RAISED BY VFM	CONSULTED IN
1/N market share	Section 3.1 of the Network Design Document (March 13)
Annualisation methods	Section 5.2 of the Technical Consultation Document (June 13)
Asset sharing between quad-play operators	Section 3.1 of the Network Design Document (March 13)
Cell radii	Section 6.3.2 of the Technical Consultation Document (June 13)
Market forecasts	Section 4 of the Technical Consultation Document (June 13)
Network configuration	Section 6 of the Technical Consultation Document (June 13)
Resiliency	Section 6.3.2 of the Technical Consultation Document (June 13)
WACC rate used	Section 6.7 of the Network Design Document (March 13)

As referred to in Section 2.4, due to confidentiality issues, these issues will be addressed in a separate written communication to VFM which will be sent in parallel with the publication of this decision. This notwithstanding, the MCA would like to make it absolutely clear that, in the interest of regulatory certainty, no such issue will be re-opened for discussion at this late stage of the consultation.

3. RESPONSES RECEIVED FROM THE EU COMMISSION

In its comments letter, the EU Commission stated that it examined the notification and took note of the MCA's efforts to have an extensive consultation with the industry. It noted also the MCA's conclusion that it is not appropriate to compare the MTR emitting from the MBUCM with the MTRs of other Member States.

The EU Commission also noted the reasons identified by the MCA underpinning the low MTR rates calculated by MBUCM, namely:

- Geographical and demographic characteristics (hilly terrain, high indoor coverage requirements and high population density)³⁵;
- Relatively low voice usage and network deployment driven by data services (not affecting voice-call termination and hence not included in incremental costs); and
- Redundancy and over-capacity of switching equipment (the large modular capacities of switches and servers contribute only to a limited extent to incremental costs).

The EU Commission stated that following its examination of the notified draft decision it had no comments, and that the MCA may adopt the draft measure.

³⁵ High population density results in operators requiring high nationally available coverage and capacity.

4. MCA'S DECISION ON MOBILE INTERCONNECTION PRICING

4.1 SUMMARY OF MCA'S CONCLUSIONS

Following operators' and EU Commission responses, the MCA concluded that:

- The issues that were addressed in the technical consultation but were re-opened by VFM in the public consultation are deemed as being out of scope in the interest of regulatory certainty (See also sections 2.2, 2.4 and 2.9). Nonetheless, and without prejudice to the foregoing, the MCA is responding individually to Vodafone on the matters raised.
- For the reasons explained in section 2.7, the claims of discrimination in favour of individual operators and deliberate delays in the implementation of this regulation were unfounded.
- In view of the fact that the consultation timelines did not permit the 1 December interim target to be achieved, the MCA is not implementing any glidepaths towards the MBUCM rate. This decision is also motivated by the lapse of time that will have taken place by the time this Decision actually comes into force. It is to be noted that until such date, the MTR will have remained stable and unchanged at 2.07 Euro cents per minute. Furthermore, this decision takes also into account the lack of support showed by both operators, in terms of principle and substance, on the glidepath as proposed by the Authority (See also section 2.3).
- In view of feedback in VFM's response to the public consultation document, regulatory fees have been refined in the model with negligible effect on the pure LRIC rate (See also section 2.4).
- The MCA performed legal and technical reviews of the whole project. Following this reviews, the MCA concluded that there were no valid legal or technical grounds that warrant a revision of the proposed MTR as calculated from MBUCM.
- For the sake of consistency with the FTR decision³⁶, the pure LRIC rate will be presented in four decimal places of the Euro cent.

4.2 MCA DECISION

After taking into account the feedback from respondents and the EU Commission, the MCA is hereby mandating the mobile termination rate of 0.4045 Euro cent per minute, which rate shall be applicable as from 1 April 2014.

The charges shall be applicable to all those operators having SMP in the wholesale mobile termination market.

Going forward, the MCA will be issuing an annual statement, notifying all stakeholders if it would be starting the review process of the model/rates in the subsequent year.

³⁶ <http://www.mca.org.mt/service-providers/decisions/mcas-new-bottom-cost-model-fixed-networks-and-fixed-interconnection>