The provision of call termination on individual public telephone networks at a fixed location in Malta

Definition, assessment of SMP & regulation of relevant markets

Responses to consultation and final decision

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Executive Summary

The Malta Communications Authority ('MCA') is hereby publishing its final decision concerning the regulatory treatment of the provision of wholesale call termination services on individual public telephone networks at a fixed location in Malta. This is in accordance with article 9 of the Electronic Communications (Regulation) Act, Chapter 399 of the Laws of Malta, obliging the MCA to carry out regular reviews of competition in communications markets.

All network operators in Malta are interconnected, with mobile network operators (MNOs) and fixed network operators (FNOs) capable of conveying calls originating from their network to the network operators hosting the called party. Fixed call termination specifically concerns the function of the FNO to terminate calls on a number hosted on its network.

Conclusion on the definition of relevant markets

The MCA identifies five relevant wholesale markets for the provision of call termination on individual public telephone networks in Malta. These are:

- a market for the provision of fixed voice call termination services by GO;
- a market for the provision of fixed voice call termination services by Melita;
- a market for the provision of fixed voice call termination services by Vodafone Malta;
- a market for the provision of fixed voice call termination services by Ozone Malta; and
- a market for the provision of fixed voice call termination services by Vanilla Telecoms.

Each relevant market includes call termination services provided by each FNO to third party operators and self-supplied termination.

The geographical scope of each relevant market corresponds to the physical coverage of the fixed network operator characterising the market.

Further details to the market definition exercise are contained in Chapter 2 of this document.

Conclusion on the assessment of Significant Market Power (SMP)

Based on the findings and discussion presented in the market analysis, the MCA designates each FNO with SMP in the provision of wholesale fixed voice call termination. This is because:

- Each FNO holds a 100% market share in terms of voice traffic terminating on its own network;

- Each FNO can act independently of retail customers and other network operators in the setting of fixed termination charges. Due to the CPP mechanism, retail customers are typically insensitive or unaware of fixed termination charges. In addition, network operators have no alternative for terminating a call other than the FNO to which the called number belongs.

- Absent regulation, FNOs have a strong incentive to price discriminate when charging for fixed voice call termination and are likely to increase their fixed termination charges;

- In a scenario where FNOs can freely set high termination charges, the scope for price competition would be reduced to the detriment of retail customers.

Given the above, the MCA considers that each of the following FNOs holds SMP in its respective wholesale fixed termination market:

- GO plc. (hereafter GO);
- Melita Ltd. (hereafter Melita);
- Vodafone Malta Ltd. (hereafter Vodafone Malta);
- Ozone Malta Ltd. (hereafter Ozone Malta); and
- Vanilla Telecoms Ltd. (hereafter Vanilla Telecoms).

Full details of the MCA's assessment of SMP are contained in Chapter 3 of this document.

Conclusion on the ex ante regulatory approach

With reference to the evidence presented in the market analysis and after having identified the potential competition problems, the MCA is proposing to maintain regulatory intervention in the identified fixed voice call termination markets.

The MCA is to impose the following regulatory obligations on all FNOs designated with SMP in this market review:

- access to/and use of specific facilities;
- non-discrimination;
- transparency; and
- price control.

In addition the MCA is also imposing the cost accounting obligation on GO and Melita.

All remedial action is based on the nature of the competition problems that have been identified in this market review. The MCA thus believes that these regulatory obligations are the most appropriate in the current circumstances and timeframe of this review. Each obligation is also considered to be proportionate and justified in light of the objectives set out in Article 4 of the Electronic Communications (Regulation) Act.

Local FNOs shall maintain the fixed termination rate as set by the MCA on the basis of the BUCM2 model, which rate has been specified in the MCA Decision published in December 2012[1]. This rate has been established in line to the principles set forth in the 2009 EC Recommendation on fixed and mobile termination rates. The current regulated termination rates shall remain in force, meanwhile the MCA intends to closely monitor and participate in the process whereby the EU Commission is expected to implement a common fixed termination rate in Europe (planned for 2020) based on parameters yet to be formalized. In this regard, it is anticipated that the 'new' fixed termination rates shall be aligned to the relevant provisions of the Directive of the European Parliament and of the Council establishing the European Electronic Communications Code (EECC).

[1] Link to MCA Decision entitled 'The MCA's New Bottom-up Cost Model for Fixed Networks and Fixed Interconnection Prices': https://www.mca.org.mt/sites/default/files/decisions/decision-on-bucm-2-ftr-2012.pdf

Full details of the MCA's regulatory measures are contained in Chapter 4 to this document.

Consultation and notification

As required by regulation 7 of the Electronic Communications Networks and Services (General) Regulations, Subsidiary Legislation 399.28, the MCA notified the relevant draft measure to the European Commission (the 'EC' or the 'Commission'), BEREC and to other National Regulatory Authorities (NRAs). This notified draft measure was registered by the European Commission on the 13th of November 2018 as Case MT/2018/2128. Eventually, the MCA received a comments letter from the EU Commission on the 3rd of December 2018, which indicated that the draft measure notified by the MCA was adopted.

The notification of the draft measure followed the closure of the national consultation exercise, which was carried out between the 24th of September 2018 and the 26th of October 2018. The MCA received two submissions to consultation, from the Malta Consumer and Competition Affairs Authority (MCCAA) and Vodafone Malta.

Vodafone Malta submitted feedback to consultation, with this operator expressing agreement with the market definition, assessment of SMP and regulatory intervention outlined in this decision.

The MCCAA did not submit any adverse comments on the main findings and conclusions outlined at consultation stage by the MCA.

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1 Introduction

This chapter outlines the regulatory and methodological aspects underpinning the MCA's approach in identifying and analysing the relevant wholesale call termination market(s) on individual public telephone networks in Malta.

Sections 1.1 and 1.2 provide a brief general insight into the regulation of electronic communications markets, with reference to the European Union and Maltese legislative framework for electronic communications;

Section 1.3 outlines the methodology used by the MCA in defining and analyzing the market(s) for the service in question, taking utmost account of the product and service markets listed in the EU Commission Recommendation on relevant markets susceptible to ex ante regulation;

Section 1.4 provides general background to the public consultation exercise and the related notification process.

1.1 The EU Regulatory Framework for electronic communications

The current EU regulatory framework for electronic communications[2] encompasses five Directives:

- Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services ('the Framework Directive'), which provides the overall structure for the regulatory regime governing the provision of electronic communications products and services and sets out the fundamental rules, policy objectives and regulatory principles that NRAs must follow in regulating relevant markets;
- Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities ('the Access Directive');
- Directive 2002/20/EC on the authorization of electronic communications networks and services ('the Authorization Directive');
- Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services ('the Universal Service Directive'); and
- Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector ('the ePrivacy Directive').

Particularly of note is Article 8 of the Framework Directive, which stipulates that the key policy objectives of the NRAs shall be the promotion of competition, the development of the internal market and the promotion of the interests of citizens of the European Union.

[2] Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services and Directive of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws.

1.2 The Maltese legislative framework for electronic communications

The Directives comprising the EU Regulatory Framework were first transposed into Maltese legislation on the 14th of September 2004 and subsequently amended on various occasions in part to reflect changes to the regulatory framework introduced by the EU[3].

The relevant national legislation are the Malta Communications Authority Act (Cap 418) (hereinafter referred to as the 'MCA Act'); the Electronic Communications (Regulation) Act (Cap. 399) (hereinafter referred to as 'ECRA'); and the Electronic Communications Networks and Services (General) Regulations of 2011 (hereinafter referred to 'ECNSR').

The local regulations guiding each stage of the market review process are described below.

- Regulation 5 of the ECNSR stipulates that the MCA tailors its market definition on national circumstances, taking utmost account of all applicable guidelines issued by the European Commission in accordance with Article 15 of the Framework Directive and taking into account the revised EU Recommendation on relevant markets and other recommendations issued by the European Commission.

- Regulation 6(2) of the ECNSR states that '*an undertaking shall be deemed to have significant market power if, either individually or jointly with others, it enjoys a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers*'.

- Regulation 6(4) of the ECNSR states that '*where an undertaking has significant market power on a specific market, it may also be deemed to have significant market power on a closely related market, where the links between the two markets are such as to allow the market power held in one market to be leveraged into the other market, thereby strengthening the market power of the undertaking*'.

- Regulation 5(4) of the ECNSR underlines that the MCA is obliged to impose regulatory obligations if an operator is designated as having SMP on a relevant market, either individually or jointly with others, as referred to in regulation 5(2) of the ECNSR.

- Where such obligations already exist in the market(s) under investigation, a new finding of SMP would lead the MCA to maintain or amend the existing regulatory conditions accordingly. If, on the other hand, the finding of SMP cannot be ascertained, the MCA would have to withdraw such regulation, in accordance with regulation 5(3) of the ECNSR, subject to an appropriate period of notice given to all parties affected by such withdrawal.

- Regulation 4 of the ECNSR states that the MCA carries out its market reviews and in doing so may seek the advice of the competent authority responsible for completion ('National Competition Authority' or 'the NCA').

[3] The EU regulatory framework was initially implemented under Maltese law following the enactment of Act VII of 2004 which amended various laws including notably the Malta Communications Authority Act and the Electronic Communications (Regulation) Act. The changes introduced were complemented by subsidiary legislation notably the Electronic Communications Networks and Services (General) Regulations [S.L.399.28].

- Regulation 7 of the ECNSR stipulates that the MCA is to notify the results of its market reviews and the corresponding draft measures to the Commission and to other NRAs in Europe following the closure of the national consultation exercise.

It is noted that following the political agreement reached on the 5th of June 2018 on the new set of rules that are to regulate the electronic communications sector as from 2020[4], the MCA is now looking forward to the implementation of the Directive establishing a new European Electronic Communications Code (EECC) into national legislation. Furthermore, the EECC will determine how fixed termination rates will be set across Europe in the future starting in 2020. However, the methodology that will be used to price fixed termination has not yet been formalized or released by the Commission. The MCA will continue to monitor the situation and will account for any significant changes in subsequent analyses when and if required.

1.3 The market review methodology

When carrying out market reviews the MCA follows legal and economic standards as outlined under EU competition law. The market review process encompasses three main stages:

- The definition of the relevant market or markets;
- An assessment of the state of competition in each relevant market, in order to determine whether any undertaking has SMP in the market under investigation; and
- A proposal for regulatory intervention in case SMP is determined, by way of introducing new regulatory measures and / or by way of maintaining, or amending existing regulatory remedies in markets that are already regulated. A proposal to withdraw regulatory intervention would be made in case no SMP is determined in markets that are regulated at the time of assessment. This in order to ensure an appropriate ex ante regulatory intervention in the light of changing market conditions.

The market review is forward looking in nature, taking into account expected or foreseeable technological or economic developments over a reasonable horizon. In this regard, the timeframe of this analysis is notionally set at approximately three years, reflecting the characteristics of local retail and wholesale markets and the factors that are likely to influence their competitive development during this timeframe.

More detailed requirements and guidance on the market review process are provided in the EU Directives, the ECRA, and the ECNSR and in additional documents issued by the European Commission

1.3.1 The EU Recommendation on relevant markets

The European Commission identifies in its Recommendation on relevant markets a set of markets in which ex ante regulation might be warranted. Whilst the Recommendation seeks to promote harmonisation across the European Union by ensuring that the same product and service markets are subject to a market analysis in all Member States, NRAs are still able to regulate markets that differ from those identified in the Recommendation, where this is justified by national circumstances.

[4] This agreement still needs to be formally approved by the European Parliament and Council plenaries.

Accordingly, NRAs are to define relevant markets appropriate to national circumstances, provided that the utmost account is taken of the product markets listed in the Recommendation (Regulation 6 of the ECNSR).

It is noted that the Recommendation was last been updated and published in 2014. The Recommendation includes four markets that are deemed as being susceptible to ex ante regulatory intervention. The provision of wholesale fixed call termination services has been retained as a relevant market in the 2014 Recommendation and the MCA is thus required to continue carrying out periodic reviews of competition in this market. The 2014 Recommendation on relevant markets is preceded by two other Recommendations, published in 2003 and 2007 respectively.

1.3.2 EU Communication on SMP Guidelines

In 2002, the Commission published guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services (the 2002 SMP Guidelines). These guidelines are addressed to the National Regulatory Authorities (NRAs) that have to take them into utmost account when defining relevant markets and assigning telecommunications operators with SMP in view of imposing on them appropriate regulatory obligations to redress competition problems identified on a forward looking basis.

In 2017, the European Commission initiated a review of the SMP Guidelines of 2002, in view of the new EECC set to be implemented by 2020. The new guidelines on Significant Market Power in the telecoms sector were officially published on 26th April 2018[5].

The MCA is required to take these guidelines into utmost account when analysing a product or service market in order to assess whether the market under investigation is effectively competitive or otherwise (refer to Regulation 6 of the ECNSR).

1.3.3 EU Recommendation on the treatment of termination rates

The Commission Recommendation 2009/396/EC of 7 May 2009 on the regulatory treatment of fixed and mobile termination rates in the EU[6] (hereafter, referred to as the 'Recommendation on termination rates') also provides context to the current review. This Recommendation sets out the principles for national regulators to follow when setting a fair price for terminating calls on fixed and mobile networks. The recommended methodology is a Long Run Incremental Costing model (LRIC), which aims to ensure that termination rates will be based on the cost of an efficient operator.

1.4 Public consultation and notification process

The current decision follows a national consultation exercise that provided market players and interested parties with the opportunity to comment on the relevant findings and regulatory proposals. The MCA received two submissions to consultation, from the Malta Consumer and Competition Affairs

[5] Link to the EU Commission Communication on SMP Guidelines: https://ec.europa.eu/digital-single-market/en/news/communication-smp-guidelines

[6] The Commission Recommendation of 7 May 2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU is available on the following link:

https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32009H0396

Authority (MCCAA) and Vodafone Malta. All submissions are duly referred into in this document, alongside the reactions of the MCA.

It is noted that the MCA also carried out this market review after consulting the National Competition Authority ('the NCA'). This is in line with the cooperation agreement signed on 20th May 2005 between the MCA and the then Office of Fair Competition, whose role was subsequently assumed by the Office for Competition forming part of the Malta Competition and Consumer Affairs Authority ('the MCCAA'). To this effect, the MCA initiated a two-week consultation exercise with the MCCAA. The MCCAA submitted its feedback to consultation on the 30th of October 2018. The relevant submission is available in the Annex to this decision.

As required by regulation 7 of the Electronic Communications Networks and Services (General) Regulations, Subsidiary Legislation 399.28, the MCA also notified the relevant draft measure to the European Commission (the 'EC' or the 'Commission'), BEREC and to other National Regulatory Authorities (NRAs). This notified draft measure was registered by the European Commission on the 13th of November 2018 as Case MT/2018/2128. Eventually, the MCA received a comments letter from the EU Commission on the 3rd of December 2018, which indicated that the draft measure notified by the MCA was adopted.

The MCA has taken into account the comments made by the Commission following the notification of the draft measure. The Commission has not expressed any serious doubts as to this decision's compatibility with EU law.

2 Background

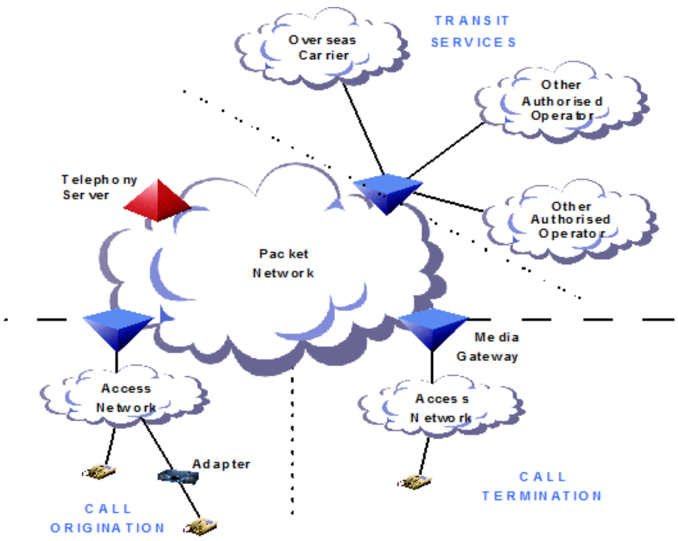
This section provides a general description of the wholesale call termination service on individual public telephone networks and highlights upon the relevant MCA Decisions published to date.

2.1 A general description of voice call termination on fixed networks

Wholesale fixed voice call termination is a service offered by FNOs at the operator level. It is recalled that, together with wholesale fixed call access and call origination services, fixed call termination enables the provision of various types of fixed telephony services at the retail level, whereby other network operators buy call termination to enable their subscribers to make end-to-end calls. More specifically, the wholesale fixed voice call termination service allows end-users to receive calls initiated by end-users subscribed to other FNOs and MNOs.

The distinction between wholesale voice call origination, voice call transit and voice call termination is outlined below:

- Fixed voice call origination comprises call set-up, switching / conveyance, and connection for the initial stage of the call. It incorporates conveyance from an end-user to the next stage in the call routing path (either call termination or to the point of interconnection).
- Fixed transit comprises the conveyance of traffic through, at least, one national and/or international media gateway.
- Fixed voice call termination comprises call completion and the switching functionality at the terminating end of a call. This would entail the conveyance of a call from the end of the previous stage (either call origination or to the point of interconnection) to the called end-user via the local-loop.



Of relevance here is the explanatory note to the Commission Recommendation on termination rates[7], which states that 'call termination can only be supplied by the network provider to which the called

[7] The Commission Recommendation 2009/396/EC of 7 May 2009 on the regulatory treatment of fixed and mobile termination rates in the EU also sets out the principles for national regulators to follow when setting a fair price for terminating calls on fixed

party is connected'. The Recommendation also underlines that 'termination has been analysed as a situation of 'two-way' interconnection whereby two wholesale prices have to be negotiated'.

2.1.1 Link between wholesale and retail fixed line markets

At the retail level, subscribers require the ability to communicate and complete calls with other retail users irrespective of the FNO to which the called party is connected. This means that although fixed voice call termination is sold and purchased by network operators, it is effectively a wholesale input required for the provision of retail fixed voice call services. Hence, demand at the wholesale level for fixed termination services is derived from demand at the retail level for fixed voice call services.

Interconnection plays an important role in this aspect. Indeed, network operators need to interconnect to each other in order to allow calls to be seamlessly conveyed for termination on the network hosting the called party. Locally, all FNOs and MNOs are directly interconnected with each other, which means that all local network operators are in a position to convey a call for termination on any local FNO.

2.1.2 Transactions based on the CPP arrangement

It is relevant to underline a distinction that arises between the network operator to which the end-user making the call is subscribed (i.e. the FNO or MNO hosting the calling party) and the FNO hosting the number of the end-user receiving the call (i.e. the FNO hosting the called party).

Under current commercial agreements, local network operators abide by the principles of the so-called 'calling party pays' (CPP) model for transactions related to termination services. The CPP principle dictates that the FNO originating the call incurs the cost of the call termination, not the FNO hosting the called (receiving) party. Put otherwise, the termination service must be purchased by the network operator originating the call. The originating operator would subsequently recover this charge, together with the costs it incurs for originating the call, through the retail tariffs charged to the calling party. Effectively this means that the calling party pays for the entire cost of call termination, whilst the called party does not pay anything for receiving a call.

The CPP arrangement therefore bears much relevance in the analysis of whether a 5 to 10% increase in price of call termination triggers change in the behaviour of the end-user involved in making or receiving a fixed line call. This issue will be considered at a later stage.

2.1.3 Market presence by different network operators

The Maltese fixed telephony market is comprised of five participants, being: GO, Melita, Vodafone Malta, Ozone Malta, and Vanilla Telecoms.

GO currently operates an IP telephony network based on an NGN setup. NGNs rely on packet-based solutions and are thus more streamlined. In addition to fixed and mobile telephony, GO also offers nationwide coverage for internet, voice over internet protocol (VOIP) services, and digital pay-TV.

and mobile networks. The recommended methodology is a Long Run Incremental Costing (LRIC) model, which aims to ensure that termination rates will be based on the cost of an efficient operator.

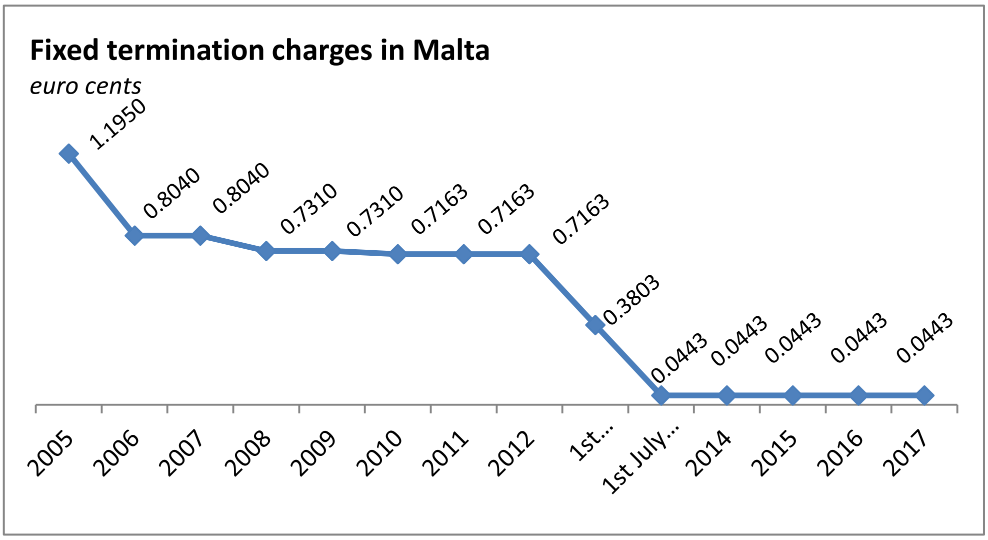
Melita uses a Hybrid Fibre Coaxial (HFC) cable network. Like GO, Melita also has an NGN setup and offers nation-wide coverage. Melita customers may benefit from internet, VOIP services, digital pay-TV and mobile telephony services.

Vodafone Malta also has an NGN setup with nationwide coverage. It offers wireless voice and broadband services. The MCA notes that Vodafone has discontinued its broadband wireless access service which was based on WiMAX technology.

Ozone Malta and Vanilla Telecoms offer fixed telephony and internet services through fixed wireless access solutions, which utilise the 'unlicensed' bands.

2.1.4 Current fixed termination charges

Due to regulatory intervention, local FNOs currently apply the same FTR when terminating a call, irrespective of the network operator originating the call. The logic behind the application of a uniform fixed termination charge rests on the reasoning that a call terminated on a fixed network uses the same network elements, and therefore incurs the same cost, regardless of the origination network being either fixed or mobile.



Local fixed call termination charges have gone down over the last few years as a result of regulatory intervention. The average fixed call termination charge fell by approximately 39% between 2005 and 2009, from 1.195 euro cents per minute to 0.731 euro cents per minute, as a result of the Bottom-Up Cost Model (BUCM) methodology used for the purpose of costing fixed termination charges and the associated glide-paths.

Fixed call termination charges fell drastically in the following years, by approximately 94%, from 0.731 euro cents per minute in 2009 to 0.0443 euro cents per minute in July 2013. The fixed call termination charge that came into force since June 2013 is calculated on the basis of a pure long run incremental costing methodology supported by the BUCM2 model, which was adopted in December 2012. As from 1st July 2013, the local fixed termination charge remains at 0.0443 euro cents per minute.

2.2 Previous MCA decisions concerning wholesale fixed call termination

The current market review concerning the provision of wholesale fixed voice termination networks in Malta is preceded by four market reviews, with decisions published in 2006, 2010, 2014, and 2015.

2.2.1 The first market review decision (2006)

The first review of this market was notified to the EU Commission in 2006 (see Case MT/2006/0388) and the corresponding decision was published in September of the same year.

The MCA designated GO (formerly, Maltacom) and Melita. with SMP in the provision of voice call termination on their own individual public telephone networks given their 100% market share of minutes terminated on own network, the lack of effective countervailing buyer power (CBP) from other wholesale market operators and retail customers on the provision of such services and the lack of potential market constraints.

In view of this the MCA imposed the following obligations on GO: (i) obligations of access; (ii) transparency; (iii) non-discrimination; (iv) cost oriented pricing; (v) cost accounting; and (vi) accounting separation. The MCA only imposed obligations under (i), (ii) and (iii) listed above on Melita.

2.2.2 The second market review decision (2010)

The MCA notified the EU Commission with its second round market review of fixed voice call termination on 13 April 2010 (see case MT/2010/1071). The corresponding decision was published on 17th May 2010, whereby the MCA maintained the designation of SMP on GO and Melita. Newer market entrants, namely SKY Telecom (rebranded Ozone Malta in January 2012), Vodafone Malta and SIS[8], were also designated with SMP in the provision of fixed voice call termination on their individual public telephone networks.

These decisions were taken due to similarities in the conditions of the operators, namely:

(1) Each operator has a 100% share of minutes terminated on their own network;

(2) Given (1), termination services are thus non-substitutable;

(3) The originating party has no buying power, as it cannot bypass the FNO hosting the called party; similarly, it has no other options by which to terminate the call. Also, retail customers demonstrate little knowledge on fixed call rates and by implication on termination charges.

2.2.3 The third market review decision (2014)

The third review of this market was carried out in July 2013 (see case MT/2013/1510) and the respective MCA Decision published in 2014. As such, the review confirmed the findings of the prior decision. GO, Melita, Vodafone Malta, Ozone Malta and SIS were designated with SMP in the provision of wholesale fixed voice call termination on their own individual public telephone network. The MCA maintained ex ante regulatory obligations on SMP operators.

[8] It is noted that in the first quarter of 2017 SIS Ltd. has notified the MCA that it was ceasing operations.

2.2.4 The fourth market review decision (2015)

In 2015, the MCA carried a new market review, which confirmed the main findings outlined in the previous round of analysis. This market review also identified Vanilla Telecoms with SMP in the provision of fixed voice call termination services on its own network, in addition to the SMP designation imposed on GO, Melita, Ozone Malta and Vodafone Malta.

The MCA therefore maintained its regulatory stance in the identified fixed termination markets by imposing a suite of remedies on SMP market players, but removed the accounting separation obligations that were previously placed upon GO and Melita. This change came in part due to the introduction of the Bottom-Up Cost Model (BUCM) the year prior, which set fixed termination rates according to the costs of an efficient operator.

3 Market definition

3.1 Background to defining relevant markets

The market definition exercise seeks to identify the relevant markets in the provision of wholesale call termination on individual public telephone networks in Malta. There are two dimensions to the market definition exercise, namely (i) the product market dimension; and (ii) the geographic market dimension.

For a product to be considered in a particular market, the MCA tests its substitutability with alternatives both on the demand-side and the supply-side. Demand-side substitutability measures, in essence, the ability or willingness of consumers to consume an alternative product given changes in prices of the product under investigation. Supply-side substitutability on the other hand measures whether, in the immediate to short term, suppliers other than those offering the product in question would switch their line of production to offer the relevant products or services without incurring considerable additional costs. To this effect, the relevant product market shall comprise all those products and services that are substitutable, not only in terms of the price and the intended use of the product under investigation, but also in terms of the overall conditions of supply and demand.

The most common test utilized for the product market definition exercise is the Hypothetical Monopolist Test (the 'HMT Test'), often known as a measure of the retail and wholesale reaction to a 'short but significant non-transitory increase in price' (SSNIP). This test requires one to picture what would happen in the hypothetical case in which prices are raised 5 – 10% for any of the products or services under investigation. An important consideration in this regard would be whether a hypothetical monopolist is able to implement and sustain prices that are not competitive.

With respect to the geographic market definition, the Recommendation states that 'a relevant geographic market comprises an area in which the undertakings concerned are involved in the supply and demand of the relevant products or services, in which area the conditions of competition are similar or sufficiently homogenous and which can be distinguished from neighbouring areas in which the prevailing conditions of competition are appreciably different'.

The MCA defines relevant geographic markets on the basis of an interchangeability assessment between products and services following a SSNIP. It applies two main criteria in its assessment of the geographic dimension of the market definition exercise, namely: (i) the area covered by the network; and (ii) the scope of application of legal and other regulatory instruments.

3.2 The substitutability assessment

The substitutability assessment considers whether retail customers and other network operators are in a position to constrain the price-setting behaviour of a hypothetical monopolist supplying fixed voice call termination services, such as to render the price increase unprofitable. Here, two main considerations are particularly relevant:

- the extent of indirect constraints or degree of retaliation at the retail level (demand-side substitution) in response to a 5 to 10% increase in the price of wholesale fixed call termination services supplied by a hypothetical monopolist; and
- the extent of direct constraints or the effectiveness and immediacy with which additional supply of termination services could be made available at the wholesale level in response to a 5 to 10% increase in price.

The assessment is carried out in the knowledge that there is a certain degree of interrelationship between the wholesale and retail levels of competition in the provision of fixed termination services.

3.3 Demand-side substitutability

Demand-side substitutability entails a determination of the range of products which are viewed as substitutes by retail consumers and wholesale customers. The analysis starts at the retail level, with the assessment undertaken in relation to whether consumer behaviour is likely to pose an indirect pricing constraint on a hypothetical monopolist supplying fixed call termination services. The question here is whether the retail consumer can opt for alternatives in order to reach or communicate with the intended called party, such as to avoid an increase in the fixed termination charge implemented by a hypothetical monopolist.

The subsequent analysis at the wholesale level assesses whether other network operators can pose a direct pricing constraint on a hypothetical monopolist supplying fixed call termination services. The question here is whether it is technically feasible for network operators to substitute fixed voice call termination supplied by a hypothetical monopolist and thus whether it is possible for different network operators to avoid paying termination dues to the FNO hosting the called party.

3.3.1 Demand-side substitutability at the wholesale level

Technically speaking, network operators have no capability to determine where a call originating from their network is terminated, as this is dependent on the requirements of the calling party. Also, a call intended for a number hosted by a specific FNO cannot be terminated onto another network operator, as this would result in the call simply being unsuccessful at reaching the intended recipient.

This means that there is no potential for demand-side constraints to arise at the wholesale level. The lack of demand-side substitution for wholesale fixed line voice call termination suggests that the purchaser of call termination (or the originating network operator) cannot bring pressure to bear on the supplier of termination (or the terminating network operator) as such as to constrain a price increase for the service it is buying.

3.3.2 Demand-side substitutability at the retail level

At the retail level, the MCA investigates whether a hypothetical 5 to 10% increase in the fixed call termination charge becomes unprofitable as a result of the retail customer managing to 'bypass' the FNO hosting the called number and successfully reaching the called party via alternative ways or means of communication.

The key consideration at this juncture is the overall bargaining position of consumers at the retail level, and thus whether retail customers could constrain a 5 to 10% rise in fixed termination charges by seeking alternative ways to avoid terminating a call on the FNO that is hosting the number of the called party. However, keeping in mind that the called party is indifferent to the costs of the termination charges, which have to be fully absorbed by the calling party, it is safe for the MCA to assume that the called party has no incentive to pressure the FNO into charging lower termination fees, and would instead care mostly about his/her own monthly subscription costs and voice minute call rates.

The constraining effects on wholesale fixed termination charges therefore depend on the behaviour of the calling party in response to a 5 to 10% rise in the fixed termination charge. Ultimately, the calling party's knowledge on the composition of retail voice telephony rates and the availability of alternatives that could be resorted to in order to avoid paying the termination charges are important considerations when determining the constraining effect on fixed termination charges.

3.3.3 Opting for originating a call via mobile instead

The most obvious alternative to reaching the called party is by resorting to mobile communication. The effectiveness of such substitutes would depend both on consumer preferences and the applicable retail voice calling rates.

In view of knowledge on retail voice calling rates, MCA Perception Surveys have consistently shown that retail customers are typically unaware of and / or insensitive to the applicable voice calling rates (these being either mobile or fixed) and the general expenditure on the fixed telephony service. This finding has been confirmed by the latest MCA Consumer Perceptions Survey on fixed telephony carried out in June 2018, whereby it resulted that 78% of respondents were not aware of their monthly expenditure on fixed telephony.

Therefore, given the above survey findings, it would be relevant to underline that most consumers lack knowledge on the exact cost of making a call. By implication, calling parties are considered to have little or no knowledge of the existence of fixed voice call termination charges and the impact of these charges on voice calling rates. In addition, a fixed line number of the called party may have been ported without the calling party's knowledge, making it less likely for the calling party to know the applicable termination charge.

This lack of sensitivity and awareness of voice calling rates and of fixed voice call termination charges dilutes the 'negotiating' position of consumers in influencing the setting of fixed termination charges.

It is also relevant to underline that, in general, average rate per minute (ARPM) calculations carried out by the MCA show that mobile-to-fixed (MTF) calls are more expensive than fixed-to-fixed (FTF) calls. On the basis of this, it would seem unlikely that an informed consumer would ever rationally switch to calling a mobile number instead of a fixed number to cushion against fixed termination charges, so long as both options are available.

ARPM	2012	2013	2014	2015	2016	2017
on-net FTF call	€ 0.011	€ 0.011	€ 0.010	€ 0.010	€ 0.009	€ 0.008
off-net FTF call	€ 0.012	€ 0.013	€ 0.013	€ 0.013	€ 0.011	€ 0.010
FTM call	€ 0.175	€ 0.191	€ 0.173	€ 0.156	€ 0.140	€ 0.124
FTI call	€ 0.084	€ 0.083	€ 0.093	€ 0.092	€ 0.090	€ 0.096
MTM/MTF call	€ 0.102	€ 0.102	€ 0.102	€ 0.102	€ 0.102	€ 0.102
MTI call	€ 0.189	€ 0.151	€ 0.128	€ 0.091	€ 0.099	€ 0.080

Figure 1 Average Rates per Minute for Different Call Types

Furthermore, opting for a MTF call would leave the calling party in a similar position to that observed for a FTF call, given that the cost of terminating a call on a fixed line network is likely to be the same irrespective of whether the call is originating from a mobile network or a fixed line, unless of course local network operators that offer both fixed and mobile telephony services implement the same termination charges for on-net FTM and on-net MTM calls.

Also, assuming the consumer has full knowledge of local termination charges, the calling party is unlikely to resort to MTM calls, since the mobile voice call termination charge would typically be higher than the fixed voice call termination charge.

It is relevant to underline at this juncture that on-net MTM calls (and sometimes even off-net MTM calls) are generally cheaper than MTF calls and possibly even cheaper from fixed line originated calls, since MNOs offer 'flat-rate' packages that combine a bundle of free on-net and off-net MTM minutes with flat-rate tariff plans. Nevertheless, such mobile telephony flat-rate tariffs are mostly available on post-paid plans, which accounted for only around 35% of total mobile subscriptions reported at the end of 2017. Meanwhile, fixed telephony flat rate plans are more universally available and thus provide for a counter effect.

Given the above, the MCA does not see scope for MTF and MTM substitutability to present real constraints on the hypothetical monopolist's power and thus its ability to influence the setting of fixed termination charges.

In view of the above, the MCA considers that the ability of the calling party to constrain an increase in wholesale voice call termination charges through mobile voice calling is deemed not sufficiently strong and effective.

3.3.4 Opting for on-net FTF voice calling instead of off-net FTF voice calling

If a fixed line operator - say 'FNO A' - increases its termination charges for calls originating from competing FNOs, a calling party subscribed with one or more competing FNOs would have to face higher termination costs when making a call to a number hosted by 'FNO A'.

In response, a calling party that is aware of termination charges would have an incentive to switch to potential constraining substitutes, such as by considering switching its FNO or else by avoiding (or bypassing) 'FNO A', which hosts the third party being sought for contact / communication.

The MCA however reiterates that retail consumers are typically not aware of the applicable fixed termination charges and hence not sensitive to the impact of changing fixed termination charges on retail voice call tariffs. This reasoning is based on the MCA findings concerning its Consumer Perceptions Survey on fixed line telephony. This survey shows that 75% of respondents did not know how much it costs to make a one-minute on-net FTF call. This percentage rose to 92% in the case of a one-minute off-net FTF call. [9]

Furthermore, local FNOs currently offer various calling plans that bundle a varying number of 'free' on-net and off-net FTF minutes in the monthly rental charge. This would further distort the consumer's visibility as to the applicable fixed termination charges and their relevance in determining retail voice call tariffs.

The MCA is therefore of the view that substitution between on-net and off-net FTF calls is unlikely to materialize in sufficient numbers as to pose an effective indirect constraint on the setting of wholesale fixed termination charges.

It may be argued here that an indirect constraint on wholesale fixed termination charges may arise from end-users having multiple fixed line subscriptions at home, including a subscription with 'FNO A'. The MCA however notes that only a small share of local end-users report having multiple fixed line subscriptions. In fact, the latest Consumer Perceptions Survey carried out by the MCA on fixed line

[9] Link to survey findings: https://www.mca.org.mt/sites/default/files/mca_cps_fixed%20telephony_pr_0.pdf

telephony[10] shows that only 4% of respondents have multiple subscriptions at home. This effectively means that end-users having multiple subscriptions are not in a sufficiently large number as to pose a credible indirect price constraint on a hypothetical monopolist supplying fixed termination services.

3.3.5 Making use of over-the-top (OTT) services

In recent years, usage of OTT-based applications for voice telephony and OTT-based messaging services has gained traction in Malta. This is confirmed by findings of the Consumer Perception Surveys carried out by the MCA in the period 2013 to 2017.

For example, in the case of end-users with a mobile subscription, the trend is clear in showing that, for example, the percentage of end-users (excluding businesses) that are using OTT-based voice calling services, such as Viber, Skype, WhatsApp or Messenger, increased consistently over the period in question, from 12% in 2013 to 32% in 2017. In the case of business users, the percentage of respondents saying that they use voice calling OTT-based services over their mobile stood at 15% in 2017. As for usage of OTT-based voice calling services over fixed broadband, the percentage of end-users (excluding businesses) saying they used OTT-based voice calling services stood at 50% in 2017, whilst that for business users stood at 29%.

Another finding reported in 2017 is that in the case all end-users making use of some kind of OTT service over their mobile, not just for voice calling, 69% of these consider OTT-based voice calling as being substitutable to the traditional voice calling services.

However, the MCA recognises that the window of opportunity to substitute OTT-based voice calling with other traditional voice calling methods is not without limitations and outright substitutability is therefore not as straightforward to argue. In fact, the MCA's Consumer Perception Survey carried out last year finds that only 17% of end-users with a mobile subscription 'often' make use of OTT-based voice calling applications. The rate rises to 58% in the case of fixed broadband users. However, it would be unwise to fully attribute the decline in fixed calling patterns to OTT-based voice calling and in the process ignore the changing preferences and requirements of end end-users with respect to voice communication. For example, mobile voice traffic volumes have been going up year-on-year despite the rise usage of OTT-based voice calling activity. Also, it is noted that OTT-based applications can only be accessed if the end-user has access to broadband or Wi-Fi. Also, access to mobile and fixed broadband, and sometimes even access to Wi-Fi, entails a cost which would unlikely be carried for the sole purpose of using OTT-based voice call services but rather to get fixed or mobile data for the purposes of accessing a wide array of online services.

The MCA therefore considers that usage of OTT-based voice calling services does not pose a sufficiently strong constraint on the setting of fixed termination charges at this juncture.

3.3.6 Bundled subscriptions

The number of fixed line subscriptions on a bundle grew significantly over the last few years. Currently, around 64% of local fixed line subscriptions are in fact taken up as part of a bundle offer, typically combining fixed broadband and pay-tv with fixed telephony. This trend is expected to persist in the coming years. The question therefore arises as to whether this development could have an impact on the behaviour of FNOs when these are setting their fixed call termination charges.

[10] Link to survey findings: https://www.mca.org.mt/sites/default/files/mca_cps_fixed%20telephony_pr_0.pdf

It is of note here that fixed line subscriptions in a bundle, which are currently offered by all FNOs identified in this market review, typically consist of the same 'flat-rate' tariffs, free minutes and price differentials (between on-net and off-net call rates) that characterize stand-alone subscriptions. This in itself suggests that the choice of whether to take up a fixed line subscription in a bundle or on a stand-alone basis depends on a range of considerations other than retail fixed line tariffs and the corresponding termination charges.

There is also no reason to believe that retail fixed customers on a bundled subscription are more aware and more sensitive than customers on a stand-alone fixed line subscription, particularly when it comes to retail voice call tariffs and the impact of changes in fixed termination charges on these tariffs. Hence, end-users on a bundled subscription are not in a better position to influence fixed termination charges than is the case for end-users on a stand-alone subscription.

The MCA therefore considers that bundling of fixed telephony does not enable end-users to pose a constraint on the setting of fixed voice call termination charges.

3.3.7 Conclusion on demand-side substitutability

The MCA considers that the provision of mobile voice call termination by a particular FNO and, by extension, the setting of relevant termination charges, cannot be constrained by consumers and other network operators. This situation is not expected to change within the timeframe of this review.

The calling party does not have at its disposal substitutes which are effective at posing an effective constraint on the setting of mobile voice call termination charges.

At a wholesale level, networks operators have no alternative but to buy termination from the FNO hosting the number of the called party.

3.4 Supply-side substitutability

This section takes into account the effectiveness and immediacy of a network operator's response to a small but significant increase in the price of wholesale fixed voice call termination services implemented by a hypothetical monopolist. In the context of the provision of fixed termination, the MCA considers that this is not possible because no network operator could readily substitute call termination supplied by a local FNO hosting the called party. Effectively, the choice of the network terminating a call is made at the retail level by the called party.

3.5 Response to consultation and MCA reaction

The MCA notes that Vodafone Malta expresses agreement with the market definition outlined in this decision. However, this operator underlines that the current usage of VoIP indicates that it is an effective demand-side substitute for a fixed voice call for a growing number of customers.

The increasing usage of OTT-based voice calling and messaging services is confirmed by the Consumer and Business Perception Surveys carried out regularly by the MCA. However, there are various factors to consider when it comes to frequency of usage, changing consumer preferences in an increasingly mobile environment, Wi-Fi availability and interoperability issues between various OTT-based apps that render less effective the direct constraint on the price setting behaviour of traditional voice calling services.

No adverse comments were submitted by the MCCAA on the main findings and conclusions on the market definition outlined in this draft Decision.

3.6 Final decision on market definition

On the basis of the substitutability assessment, the MCA identifies five distinct wholesale fixed termination markets in Malta. These are:

- a market for the provision of fixed voice call termination services by GO;
- a market for the provision of fixed voice call termination services by Melita;
- a market for the provision of fixed voice call termination services by Vodafone Malta;
- a market for the provision of fixed voice call termination services by Vanilla Telecoms;
- a market for the provision of fixed voice call termination services by Ozone Malta.

Each relevant market includes call termination services provided by each FNO to third party operators and also self-supplied termination.

3.5.1 Geographic scope of identified markets

A relevant geographical market comprises the area in which the undertakings concerned are involved in the demand and supply of a product / service in relation to which the conditions of competition are sufficiently similar or sufficiently homogeneous and which can be distinguished from neighbouring areas in which the prevailing conditions of competition are appreciably different to those areas.

The current conditions of competition are deemed to be geographically homogenous in the identified wholesale markets. The markets in question are indeed subject to a national pricing constraint, as all authorized FNOs offer fixed termination services for calls originated from any other network operator. FNOs also charge geographically uniform fixed voice call termination charges, without differentiating by reference to geographic location of the network operator originating the call.

4 Market analysis

Having identified the relevant wholesale markets for the provision of fixed voice call termination in Malta, the next step is to determine whether any undertaking holds a position of SMP in the relevant market, as defined in and required by Regulation 5 of the ECNSR (which implements to Article 16 of the Framework Directive). A designation of SMP would implicate a market player that can operate independently of or unconstrained by competitors, customers and consumers. The SMP analysis is supported by market data, which is collected from various internal and external sources, including users and providers of electronic communications networks and services and from regular consumer surveys.

The SMP analysis utilizes a 'modified green-field approach'. This approach assumes that no ex ante regulation obligations are in place and considers the below criteria:

- Distribution of market shares;
- Potential market entry;
- Countervailing buying power; and
- The scope of price competition.

4.1 Distribution of market shares

As argued in market definition stage, each FNO is a monopolist in the provision of fixed voice call termination over its own network. Since by economic definition, network termination is an exclusive good, each network operator is considered to be controlling a 100% share of its own individual market. This means that each FNO would have absolute power in the setting of fixed termination prices with no external constraints imposed on them. Also, the CPP arrangement, whereby the purchaser of the termination service is a price-taker, gives the FNOs the ability to raise termination prices above competitive levels.

4.2 Potential market entry

As explained already, supply substitution is impossible for voice call termination services. Firstly, the calling party requires a specific network to route its call to, otherwise the call is unsuccessful. Secondly, the calling party is a price-taker, as the termination price is paid by the calling party but quoted by the operator hosting the called party.

To the MCA's knowledge no new technologies to offer voice call termination competitively are envisaged and thus the MCA does not believe that the dynamics of the current market will be subject to any major technological changes in the foreseeable future. The FNOs supplying termination services are therefore neither now, nor in the foreseeable future, threatened by potential market entry, substitution, or competition, and will maintain 100% market share over their own network.

4.3 Countervailing buyer power (CBP)

Customers with a strong negotiating position may significantly shape the level of competition in a market as this will tend to restrict the undertakings' ability to exercise market power and to act independently of their customers. In effect, when customers can exert significant pressure on the supplier of a good or service, they can effectively stop an attempt to increase prices by service providers. The extent of CBP will however depend on whether customers could, at the outset, choose to discontinue the service being provided by a particular supplier and switch to alternative providers, within a short period of time.

End-users (retail consumers) and network operators (wholesale consumers) both have an interest in keeping fixed termination charges as low as possible, since the former are paying for call completion, and the latter are purchasing termination from local FNOs.

To analyze CBP, consideration has to be applied to the ability of end-users and network operators to exercise market power and to constrain the setting of fixed termination charges. Ultimately, the more CBP end-users and network operators enjoy, if such CBP exists, the more restricted FNOs are at acting independently when setting termination charges.

4.3.1 Bargaining power of retail customers

The bargaining position of retail customers to influence fixed termination charges rests on their ability to reach a third party on a fixed number without having to terminate the call on the FNO to which the called number is assigned or else to reach that same third party via alternative means of communication.

It has already been shown at an earlier stage that the retail consumer is not in a position to influence the setting of termination charges. Firstly, the calling party has no sufficiently strong substitution possibilities to conveying and completing a call to a fixed number other than via the fixed network operator hosting the respective fixed line number. Whilst alternative means of communication can be used to reach a third party, an assessment of consumer preferences and price considerations would lead to the conclusion that such substitution will not happen in sufficient numbers so as to effectively constrain a FNO. Meanwhile, an overwhelming amount of end-users are unfamiliar with the applicable monthly access fees and ‘per minute’ calling rates. This, together with the implementation of the CPP principle further dilute the 'negotiating' position of consumers to influence the behaviour of FNOs in the setting of such charges.

In view of this, the MCA therefore concludes that retail customers do not have sufficient CBP to constrain local FNOs in the setting of fixed termination charges.

4.3.2 Bargaining power of wholesale customers

This section seeks to determine whether there are wholesale customers with a strong negotiating position or CBP who can restrict the ability of FNOs to act independently when setting fixed termination charges. The extent of CBP would effectively depend on the ability of these wholesale customers to switch to alternative providers or not to purchase the service or product from that particular provider within a short period of time.

The table below illustrates the share of fixed termination minutes purchased by voice telephony providers. It clearly transpires that the mobile network operators (MNOs), namely GO, Vodafone Malta and Melita, are not the biggest purchasers of fixed termination services, although their share is increasing over time due to increased mobile penetration and higher mobile voice telephony usage. Although, in theory, MNOs could exert some pressure on FNOs to reduce termination rates or to at least not increase termination prices by not interconnecting, this is not possible to happen since MNOs are obliged to ensure end-to-end connectivity with all local voice telephony operators[11]. As a result, MNOs not considered to have sufficient CBP to constrain fixed termination rates.

[11] There is a general obligation at Maltese Law that obliges local network operators to interconnect and to provide end-to-end connectivity. Therefore, MNOs cannot legally refuse and/or cut-off interconnection.

It is also the MCA's view that, even if the obligation to provide interconnection is no longer mandated, a threat by one or more local MNOs to limit or suspend interconnection with any of the local FNOs would not enhance their CBP, especially when dealing with the larger FNOs. This is because, such a course of action would translate into a significant setback for consumers of mobile services, who want as much connectivity as possible for their subscription. In such circumstances, the MNO's subscribers would get less value for their subscription given their inability to reach all local fixed numbers. Therefore, a MNO's threat to interconnection is counterproductive and would not prevent the FNO from implementing an increase in its termination charges.

Minutes terminating on local FNOs	2012	2013	2014	2015	2016	2017
MTF traffic share	10.92%	14.40%	13.30%	15.08%	16.88%	19.38%
On-net FTF traffic share	62.13%	52.77%	59.05%	57.31%	56.62%	53.63%
Off-net FTF traffic share	24.10%	28.56%	24.31%	24.22%	23.70%	23.52%
International-to-fixed traffic share	2.85%	4.27%	3.34%	3.40%	2.79%	3.46%

Figure 2 Minutes Termination on Local FNOs - Market Shares

FNOs also purchase termination services from one another. In theory, the CBP of FNOs has to be assessed by their level of purchases made from other FNOs providing the termination service. The stronger the purchases, the more likely it would get for the originating FNO(s) to threaten interconnection.

In other words, the higher the market share of minutes terminated on another FNO, the more likely it is for the originating FNO to be in a position to exercise CBP by, for example, threatening to refuse / delay / block interconnection. However, it is worth reiterating that all local FNOs are required by law to have interconnection agreements in place with existing network operators and to negotiate similar interconnection agreements in good faith with new market entrants.

In this regard, even if it is assumed that the obligation to interconnect is not mandated, the MCA would still argue that a threat from a FNO not to purchase call termination from another FNO by cutting-off interconnection would carry limited significance. There are two main reasons for this. First, FNOs threatening on interconnection would inflict harm on their own subscribers, who would have to settle for an inferior product in terms of reachability and conveyance in the market. This would also have reputation costs for the FNO as consumers would inevitably choose to switch to other FNOs with universal interconnection. Second, Figure 4 shows that the off-net FTF traffic share of minutes terminating on local FNOs in 2017 corresponds to just around 24% of all terminating traffic volumes reported that year. Therefore, FNOs do not in reality possess a sufficiently strong negotiating position on the setting of termination charges by other FNOs.

In view of the above the MCA believes that, in the absence of regulation, voice telephony operators cannot pose CBP in the setting of fixed termination charges by a FNO.

i. International-to-Fixed

FNOs also terminate calls originating from another jurisdiction on their own network. It is therefore considered that, absent regulation, international-to-fixed traffic does not pose CBP issues on local FNOs when these are setting their fixed termination charges. The inability to exert CBP in this instance would fall on the international operator originating the call, which falls beyond the scope of this review. It is also relevant to point out that there is no international wholesale operator or group of operators that could effectively constrain local fixed termination charges to a level commensurate with a competitive outcome.

4.4 The scope for price competition

FNOs face no competition in the provision of voice call termination over their own network given that: (i) the purchasing network operator has no other options but to use the service from the FNO to which the called party is subscribed; (ii) the retail customer is generally insensitive to or uninformed about fixed termination charges; and (iii) no CBP exists in wholesale fixed call termination markets.

The overall implication of these conditions is that, absent regulation, FNOs are likely to charge an excessive price for termination over their own network, which would ultimately impinge negatively on retail fixed voice call tariffs.

It is of significance to reiterate here that the reductions in local fixed termination charges observed over the last few years have been exclusively the result of regulatory intervention by the MCA.

4.5 Response to consultation and MCA reaction

The MCA notes that Vodafone Malta expresses agreement with the findings at market analysis stage outlined in this decision.

No adverse comments were submitted by the MCCAA on the main findings and conclusions on the market analysis outlined in this decision.

4.6 Final decision on the SMP assessment

Based on the findings presented above, the wholesale markets under consideration are not competitive. This situation will not change within the timeframe of this review.

The main findings at market analysis stage are the following:

- Each FNO holds 100% market share on termination on its own network;
- Each FNO can act independently of retail customers. Due to the CPP, the retail consumer is often unaware of, insensitive to or unable to influence fixed call termination rates. The wholesale consumer (the purchasing network) also has no substitutable network on which to terminate any specific call.
- Absent regulation, FNOs have an incentive to price discriminate in the setting of termination charges or charge at non-competitive rates.
- In a scenario where FNOs can freely set high termination charges, the scope for price competition would be reduced to the detriment of retail customers.

Based on these findings, the MCA is set to designate SMP on the following FNOs:

- GO;
- Melita;
- Vodafone Malta;
- Vanilla Telecoms; and
- Ozone Malta.

5 Regulatory approach

On the basis of the findings at market analysis stage, the MCA is designating GO, Melita, Vodafone Malta, Ozone Malta and Vanilla Telecoms with SMP in the provision of fixed voice call termination on their own individual public telephone networks.

Ex ante regulatory obligations will therefore be imposed on these market players to avoid abuse of market power.

5.1 Structure of the chapter

Section 5.2 underlines the legal provisions guiding the MCA's regulatory approach.

Section 5.3 recalls the potential risks to competition arising in the markets identified in this review.

Section 5.4 lists the ex ante regulatory obligations that are currently enforced in the relevant markets.

Section 5.5 highlights upon the obligations to be imposed on the FNOs identified with SMP in the current review.

5.2 Background to legal provision guiding the MCA's regulatory approach

As stated in regulation 11(1) of the ECNSR, the MCA is obliged to impose relevant regulatory obligations or to revise them when they already exist, when or if a market player is designated with SMP status.

The MCA is to ensure that the selected remedies are in accordance with regulation 11(4) of the ECNSR and Article 8.4 of the Access Directive, in that these are:

- based on the nature of the competition problems that have been identified;
- proportionate and justified in light of the objective laid down in Article 4 of the ECRA; and
- only be imposed following consultation, in accordance with regulation 7 of the ECNSR and article 4A of the MCA Act.

5.3 Potential competition problems

As explained in the previous section, each FNO enjoys SMP in the provision of wholesale fixed voice call termination over its own individual public telephone network. The designation of SMP signals that, absent regulation, these network operators could potentially abuse of their monopoly position in the provision of termination services by engaging in uncompetitive practices.

5.3.1 Excessive pricing

Each FNO has an incentive to charge excessive charges for voice call termination services supplied on its own network. This is more likely to happen with the FNO charging high termination charges for MTF calls and off-net FTF calls in order to increase the inflow of termination revenues and subsequently cross-subsidise its on-net FTF call tariffs.

This would ultimately strengthen the position of the FNO who acts first or who is already in the market, and even dilute the potential for new entry.

5.3.2 Pricing discrimination

A FNO could charge itself or its subsidiary a lower fixed termination charge than that applicable to other network operators. Through these price discriminatory practices a FNO could ultimately foreclose the retail market from its competitors.

For example, a FNO could set high off-net termination charges in order to cross-subsidise cheaper on-net FTF call rates. In this sense, other network operators would find it more difficult to compete in the retail market given that these are faced by much higher costs for completing off-net calls to the FNO charging excessively high off-net termination charges.

5.4 Obligations currently in place

In its 2015 market review decision concerning wholesale fixed voice call termination on individual public telephone networks in Malta, the MCA established that all FNOs designated with SMP in the markets under investigation - namely GO, Melita, Vodafone Malta, Ozone Malta and SIS[12] had to comply with the following:

- an obligation to meet reasonable requests for access to / and use of specific network facilities, in order to ensure end-to-end connectivity;
- an obligation not to show undue preference or undue discrimination in the provision of interconnection services;
- an obligation to ensure transparency on information related to termination charges and transparency on accounting information, technical specifications, network characteristics, terms and conditions for supply and use, and prices; and
- an obligation to implement price control, mandating cost-oriented wholesale termination charges.

The MCA also mandated the following obligation on GO and Melita:

- an obligation of cost accounting to ensure that the applicable termination charges reflect the costs incurred by FNOs to supply wholesale termination services.

Based on the principles of reasonableness and proportionality, the MCA considered that it was not appropriate at the time to impose the cost accounting obligation on other FNOs with SMP.

Furthermore, the MCA did not impose accounting separation on either GO or Melita, given the effectiveness of BUCM2 in setting efficient fixed call termination rates.

5.5 Proposed Regulatory Approach

Given the evidence and conclusions provided at the market analysis stage, the MCA is to maintain the same set of ex ante regulatory obligations on GO, Melita, Ozone Malta, Vodafone Malta; and Vanilla Telecoms. The extent of imposition of ex ante regulatory obligations is guided by the principle of proportionality, as explained further down in this document.

[12] As already indicated earlier in this document SIS has ceased operations in 2016.

5.5.1 Access Obligation

The MCA is proposing that the access obligation is maintained and implemented for all SMP operators identified in this market review, in accordance with regulation 15 of the ECNSR.

The imposition of an access obligation would provide greater certainty in the market as it would supplement the general obligation at law on network operators to provide access to all reasonable requests for the granting of interconnection. This is in accordance with the objectives specified under the ECRA (see in particular articles 4, 13 and 14 thereof) and under the MCA Act (article 4 thereof).

The access obligation poses a number of specific requirements on the identified SMP operators. Some of these requirements are listed below:

- allowing third parties access to infrastructure for the purpose of voice call termination on their own network and interoperability of network services (regulation 15(2) (a) and (b) of the ECNSR);
- meet reasonable requests to interconnect networks and network facilities (regulation 15(2) (i) of the ECNSR);
- negotiate in good faith with undertakings making new requests for access and interconnection services (regulation 15(2)(b) of the ECNSR); and
- not to withdraw access to facilities already granted (regulation 15(2) (c) of the ECNSR).

Regulation 15(3) of the ECNSR further allows the MCA to increase regulation in the future, if deemed necessary, on conditions of *fairness*, *reasonableness* and/or *timeliness*.

5.5.2 Non-discrimination

The obligation of non-discrimination is to ensure that GO, Melita, Ozone Malta, Vodafone Malta and Vanilla Telecoms would not have the ability to exploit their market power in order to discriminate in their favour or in favour of a particular undertaking (such as own subsidiaries and partners), when providing other undertakings with wholesale termination services on their own network.

To this effect and in accordance with regulation 13 of the ECNSR, identified SMP operators are:

- to apply equivalent conditions in equivalent circumstances to other undertakings providing equivalent services; and
- to provide services and information to other undertakings under the same conditions and of the same quality as they provide for their own services, or those of subsidiaries or partners.

5.5.3 Transparency Obligation

The MCA is proposing to maintain a transparency obligation on all identified SMP operators to ensure effective implementation of the access and nondiscrimination obligations. In accordance with regulation 12 of the ECNSR, Melita, GO, Vodafone Malta, Ozone Malta and Vanilla Telecoms shall be required to make public specified information, such as accounting information, technical specifications, network characteristics, terms and conditions for supply and use, including any conditions limiting access to and, or use of services and applications, and prices where applicable.

The transparency obligation also requires identified SMP operators to observe the following conditions:

- deliver services of equivalent quality to all operators;
- provide sufficient information on relevant matters, including the publication of appropriate manuals, order forms and processes that alternative operators would not otherwise have access to, in order to assist with their entry into the market; and
- publish a RIO, sufficiently unbundled to ensure that undertakings are not required to pay for facilities that are not necessary for the services requested, giving a description of the relevant offerings broken down into components according to market needs, and the associated terms and conditions including prices, subject to the approval of the MCA.

In accordance with regulation 12(4) of the ECNSR, changes may be imposed by the MCA to RIOs, in order to give effect to the obligations imposed under the ECNSR. The MCA may also specify the precise information to be made available, the level of detail required, and the manner of publication.

The transparency obligation will therefore enable the MCA to monitor any anti-competitive behavior with respect to the terms and conditions of services being offered by FNOs in relation to access and, or interconnection. It would also instill confidence in the market that services are not provided on a discriminatory basis and thus help avoid any possible disputes and accelerates negotiations between existing and potential operators.

The MCA maintains the right to establish or alter the extent of the obligation to publish information in the reference offer at a later stage.

5.5.6 Price control

The MCA considers that, due to a lack of competition and CBP resulting from the CPP principle, the identified SMP operators have no incentive to reduce termination charges to cost oriented levels through self-initiative. This given the competitive obstacles highlighted earlier that may come about as a result of a lack of countervailing buying power and the applicability of the CPP principle.

In order to counteract the incentive of SMP operators to charge excessive termination charges and so as to further strengthen the obligations of non-discrimination and transparency, the MCA is of the opinion that the price control remedy is maintained, in accordance with regulation 16(2) of the ECNSR.

The imposition of the price control obligation shall ensure symmetric fixed termination charges that are set at levels corresponding to the costs of an efficient operator, based on a bottom-up long-run incremental cost (BU-LRIC) model developed in 2012 (the BUCM 2)[13], thereby allowing for efficient, fair and reasonable termination charges. This reasoning is in line with the EU Commission Recommendation on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU which states that 'NRAs should set termination rates based on the costs incurred by an efficient operator'. This remedy obliges the identified SMP operators to set their fixed termination charges equal to the regulated efficient rate established by the MCA. This regulated rate, derived from the BUCM 2 model, incorporates within it enough information to make the obligation of accounting separation redundant.

The price control remedy also obliges SMP operators to make reference to downward changes they may implement with respect to the regulated termination rates in the RIO contracts.

[13] The previous model prepared by the MCA in 2005 as refined in 2007 is referred to as BUCM or BUCM 1.

The price control obligation is to be maintained as imposed by the decisions of the MCA in force at the time of publication of the decision concerning this market review.

5.5.7 Cost accounting

In accordance with regulation 16 of the ECNSR, the MCA is to maintain the cost accounting obligation on Melita and GO, as it does not consider the imposition of such an obligation to constitute an unreasonable burden on the said operators. GO and Melita shall therefore be required to supply detailed information to the MCA regarding the allocation of costs onto different services. This will allow the MCA to monitor, on an on-going basis, the costs incurred by the above-mentioned FNOs in relation to the provision of fixed call termination services and thus to ensure that Melita and GO apply fair, objective and transparent charges that can be matched against costs.

The MCA believes that the imposition of a cost accounting obligation only on Melita and GO takes into account the requirement for proportionality, considering factors such as the size and market share of the undertaking, its position vis-à-vis competing operators, and the time of entry in the market.

Based on these factors, MCA believes that it would not be proportionate to impose a cost-accounting obligation on Ozone Malta, Vodafone Malta and Vanilla Telecoms. The MCA remains committed to monitor developments in the identified wholesale markets and to constantly review its position.

5.6 Response to consultation and MCA reaction

The MCA notes that Vodafone Malta expresses general agreement with the proposed regulatory approach outlined in this decision. However, this operator also calls for the accounting separation obligation to be imposed on GO and Melita, even in view of bundling practices by these operators.

However, the MCA notes that in view of the efficient regulated wholesale fixed termination rate currently in force[14] coupled with the transparency and non-discrimination obligations, it would not be proportionate to re-impose the accounting separation obligation on GO and Melita. This obligation had indeed been withdrawn in the Fourth Market Review carried out in 2015. For the avoidance of doubt, as stated in the 2015 Decision Notice, the MCA reiterates that its assessment in this respect affects only this market under review i.e. the call termination on public telephone networks at a fixed location, and is not in any way related to the ex-ante regulatory framework of other relevant markets, any other general obligations at law or specific obligations falling under the ex-post competition law regime. The MCA had also reserved the right to reverse this decision should it consider that market conditions deteriorate in such a way that it warrants such a change, following appropriate consultation.

It is noted that the transparency and non-discrimination obligations as well as the cost accounting obligation will allow the MCA to monitor on an on-going basis and to request information for specific purposes on the costs incurred by operator, will continue to provide a safeguard against abusive behaviour.

No adverse comments were submitted by the MCCAA on the main findings and conclusions concerning the regulatory approach outlined in this decision.

[14] This is in accordance with the 2009 Commission Recommendation on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU.

5.7 Final decision on ex ante regulatory approach

The MCA considers that ex ante regulatory intervention is required in the wholesale markets under investigation. To this effect, the MCA is to maintain the following regulatory obligations:

- access to/and use of specific facilities;
- non-discrimination;
- transparency; and
- price control.

The MCA is also mandating the cost accounting obligation on GO and Melita.

The above-mentioned set of remedies is deemed as the most appropriate in the current circumstances and the timeframe of this review. Each obligation is considered proportionate and justified in light of the objectives set out in article 4 of the Electronic Communications (Regulation) Act.

5.8 Monitoring market developments

The MCA considers that it is sensible to keep a close watch on the progress of the wholesale fixed termination markets in Malta. To this end, the MCA intends to analyse market trends and developments on an ongoing basis, and remains committed to issue a new market analysis at any point in time in response to a significant change in market conditions.

In accordance with its powers at law, the MCA is also reserving the right to change any of the above mentioned regulatory obligations following changes in the market structure.

6 Annex

MCCAA

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Office for Competition

30th October 2018

Mr Patrick Vella
Chief, Policy and Planning
Malta Communications Authority
Valletta Waterfront,
Pinto Wharf, Floriana FRN 1913

By post and by email

Dear Mr Vella,

Re: MCA Public Consultation: The provision of call termination on individual public telephone networks at a fixed location in Malta

Reference is made to your recent consultation document as captioned above.

The Office for Competition (OC) contends that the market assessment as conducted by the MCA follows standards that are in line with best practices normally used when defining relevant markets in competition analysis. To this end, the OC takes note of the preliminary conclusions on the Significant Market Power (SMP) assessment and the obligations to be imposed on FNOs designated as having SMP. Notwithstanding this, MCA should continue to monitor any market developments in this regard.

The OC would like to point out that its views are being submitted in the context of the specific provisions of the SMP guidelines relating to the relationship between markets defined for the purpose of ex-ante regulation vis-à-vis competition law enforcement. The OC reserves the right to re-examine any or all of the issues underlying MCA's recommendations in the light of facts and evidence that may arise in specific future cases before it.

Yours sincerely,

Godwin Mangion
Director General