

Report of the Malta Communications Authority on its monitoring and findings in accordance with Article 5 of Regulation (EU) 2015/2120 concerning the European Net Neutrality Rules.

Report to the European Commission

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1. INTRODUCTION

The Malta Communications Authority (MCA) is the authority responsible for enforcing Regulation (EU) 2015/2120 (the 'EU Regulation'), which came into force on 30th April 2016. To this effect, the MCA has prepared this report, covering the period between 1st May 2020 and 30th April 2021, in compliance with the annual reporting obligations specified in Article 5 of the EU Regulation. This report is also in line with the relevant BEREC Guidelines on the Implementation by National Regulators of the European Net Neutrality Rules.

The report considers the MCA's work regarding the supervision and monitoring concerning open internet access rules as reflected in the EU Regulation.

The MCA is the national authority responsible for enforcing the EU Regulation. The regulation establishes various obligations onerous on Internet Access Services ('IAS') providers, including ensuring that:

- i. All end-users of IAS can access and distribute information and content, use and provide applications and services of their choice, irrespective of the location of their device or the location, origin and/or destination of the information, content, application or service;
- ii. IAS providers apply fair traffic management policies which respect the EU Regulation and the rights of end-users;
- iii. IAS providers clearly explain their traffic management policies and how these may affect end-'users' experience as well as how these could impact their privacy and personal data;
- iv. End-users can access clear information regarding the IAS they use (such as speeds, volume limitations and other quality parameters);
- v. IAS providers have simple and clear mechanisms which end-users may use to make complaints; and
- vi. IAS providers clearly explain the remedies available to end-users in cases where their experience deviates significantly and repeatedly from the IAS to which they are subscribed.

The Office of the Information and Data Protection Commissioner (IDPC) is the entity responsible for enforcing the data protection obligations arising from the EU Regulation. The MCA actively collaborates with the IDPC on such matters.

Section 2 provides a high-level market overview and an overall description of the national situation regarding compliance with the EU Regulation.

Section 3 provides a high level overview of the main activities carried out by the MCA in order to fulfil its monitoring and supervisory functions.

Section 4 provides a detailed account of the monitoring and supervisory functions carried by the MCA based on an article by article basis.

The MCA positively notes that there are no major concerns regarding open internet access in Malta. The MCA will continue to monitor the market in order to ensure that compliance is maintained and, where this is not the case, will ensure that compliance is efficiently restored.

2. MARKET OVERVIEW¹

The largest three fixed IAS providers in the Maltese market, namely GO plc ('GO'), Melita Ltd ('Melita') and Epic Communications Ltd ('Epic')², together account for over 99% of users of internet services in Malta.

In terms of market shares by the end of March 2021, Melita and GO accounted for 48.7% and 46.8% of the local client base of fixed broadband services, respectively. Epic accounted for a 4.4% market share at the end of the current reporting period, whilst Vanilla Telecoms Ltd ('Vanilla') accounted for a 0.1% market share.

GO and Melita operate their own fixed wired network infrastructures, whilst Epic and Vanilla operate wireless infrastructure suitable to provide fixed broadband services³.

Also of relevance to underline that Ozone Malta Ltd ('Ozone Malta') no longer operates in the market⁴.

Figure 1 depicts the market shares in the fixed broadband segment as reported at the end of March of 2021⁵.

¹ All statistics quoted in this section are valid as at 31st March 2021.

² Vodafone Malta rebranded as 'Epic' in November 2020.

³ Epic's wireless network operates on the licensed band, whilst the wireless network of Vanilla Telecoms operate within the unlicensed bands.

⁴ In April 2020, Ozone Malta submitted a cessation notification form to the MCA for its operations with effect from the 29th April 2020. The MCA processed this notification and removed the company from the register of authorised ECS undertakings.

⁵ Latest MCA Data Report Sheet publication: <https://www.mca.org.mt/articles/key-market-indicators-electronic-communications-and-post-q1-2017-q1-2021>

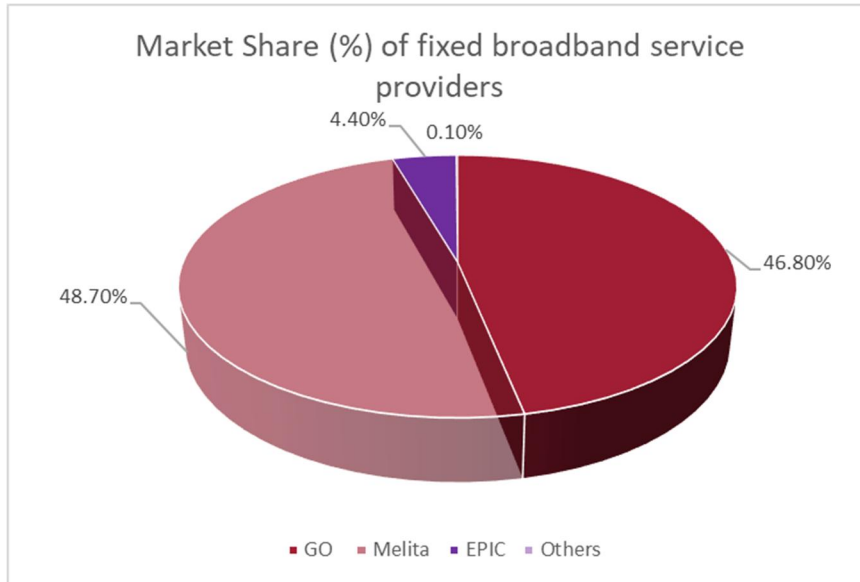


Figure 1 Market share of fixed broadband service providers

Epic, GO and Melita also own a nationwide mobile infrastructure over which they offer mobile broadband services in Malta.

The number of mobile telephone subscriptions totalled 636,070 by the end of March 2021, corresponding to a mobile penetration rate of 123.7%. GO accounted for a 38.6% market share, followed by Epic at 36.9% and Melita at 24.5%.

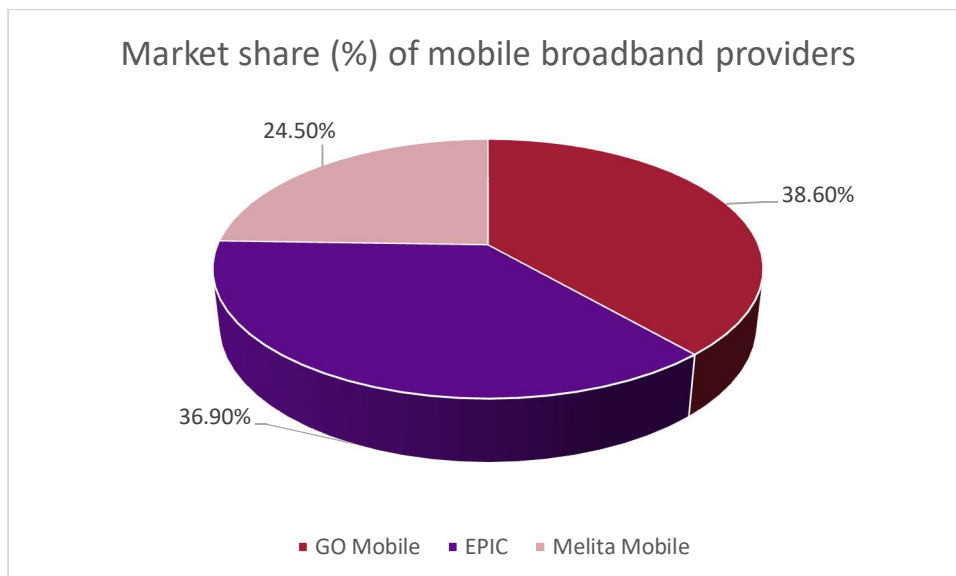


Figure 2 Market share of mobile providers based on the number of subscriptions

While all mobile subscriptions in Malta have access to mobile broadband, not all users actively use the service. Referring to the Digital Scoreboard updated and published by the European

Commission, it is stated that the take-up of mobile broadband in Malta as at June 2020 stood at 78 subscriptions per 100 people⁶, compared to an EU average of 104 subscriptions per 100 people.

⁶ The EC defines 'Mobile Broadband penetration' as the number of active mobile broadband SIM cards per 100 people.

3. THE NATIONAL SITUATION REGARDING COMPLIANCE WITH THE EU REGULATION

During the current reporting period, the MCA analysed all IAS products that were newly placed on the market as well as those which were modified and/or updated in due course. As part of this regulatory activity, the applicable terms and conditions offered by IAS providers were analysed and matched against the requirements prescribed by the EU Regulation in order to study the extent of compliance or lack thereof.

As part of its monitoring tasks, during this reporting period, the MCA recorded thirteen (13) complaints regarding discrepancies between the contracted speed and the actual speed performance of the service (three of these complaints related to internet speed issues arising from the configuration and setup at the end-users end).

Whilst the MCA considers this as an indication that there are no significant issues in the market, it remains committed to maintaining an ongoing assessment of new IAS products on the market to ensure that these are in line with the requirements of the EU Regulation.

Moreover, based on its powers as described in Article 5(2) of the EU Regulation, the MCA requested all fixed and mobile IAS providers to complete a self-assessment questionnaire aimed at providing the MCA with details about their commercial and technical practices in relation to the products they offer. The results obtained from the questionnaire will be expanded upon in the subsequent sections according to the relevant article of the EU Regulation.

4. DETAILED ANALYSIS OF COMPLIANCE IN RELATION TO ARTICLES 3, 4, 5 AND 6

Article 3 – Safeguarding of Open Internet Access

Article 3 of the EU Regulation

1. *End-users shall have the right to access and distribute information and content, use and provide applications and services, and use terminal equipment of their choice, irrespective of the end-user's or provider's location or the location, origin or destination of the information, content, application or service, via their internet access service.*

This paragraph is without prejudice to Union law, or national law that complies with Union law, related to the lawfulness of the content, applications or services.

2. *Agreements between providers of internet access services and end-users on commercial and technical conditions and the characteristics of internet access services such as price, data volumes or speed, and any commercial practices conducted by providers of internet access services, shall not limit the exercise of the rights of end-users laid down in paragraph 1*

As part of the self-assessment questionnaire sent to all IAS providers, respondents were asked to submit information pertaining to the technical and commercial practices in the context of their impact on end-users.

The MCA also monitored the commercial and technical conditions related to the provision of Internet access services by checking all the publicly available information primarily available on IAS providers' web pages, including relevant terms and conditions and other material. Such monitoring is an ongoing activity to ensure that compliance is maintained.

The self-assessment questionnaire sent to all fixed and mobile broadband IAS providers requested information about the traffic management practices they apply, and about their products ranges to which they apply volume data caps. The MCA also queried about the potential existence of commercial practices that IAS providers may offer to their subscribers which may, in the long term, have an impact on end-users' rights. From this market research, the following main findings emerge:

- i. none of the operators engaged in traffic management practices that are in breach of the EU Regulation, however an investigation on the blocking of some IP addresses is ongoing; and
- ii. none of the operators engaged in commercial practices that may restrict end-users' rights to choose and transmit content of their choice.

Zero-rated commercial practices

The EU Regulation prohibits IAS providers from engaging in commercial practices that limit end-users' rights as specified in the said EU Regulation. Zero-rating practices have been discussed at great length by several European NRAs and identified as a potential risk to end-users' rights. In this regard the BEREC Guidelines note that IAS offerings with zero-rated elements should be monitored by the NRAs to ensure that such offers do not undermine the essence and the goals of the EU Regulation.

In 2018, GO launched to the market three products which include zero-rated offers. Music Wildcard offers music streaming from selected music platforms, while two, rather similar offers, GO TV Anywhere and GO TV Anywhere Lite offer streaming of Live TV content. The Authority had assessed these offers in details and monitors these offers on a quarterly basis. GO has stopped offering GO TV Anwhere products to new customers; however the product is still available to those already signed up. In the meantime, GO has launched a similar product GO TV App, which has similar characteristics to its TV Anywhereproducts.

In all instances highlighted above, GO specifies that normal Pay Per Use (PPU) data charges would apply once the customers' mobile data bundle allowance is used up or has expired,.

The MCA constantly monitors market developments in view of the above-mentioned zero-rating offers. The ongoing assessment by the MCA since 2018 shows that the offers in question do not pose a material impact on competition in the market, mainly because of the considerations highlighted below:

- (i) the limited take-up of the offers and limited potential for growth;
- (ii) the fact that no direct payments to CAPs are involved for the zero-rated material/content being made available, thus implying no plausible reason to argue that the respective offers are foreclosing competition; and that
- (iii) no impact on overall competition dynamics between CAPs given the small size of the local market in a global scenario.

Also, the zero-rated offers in questions are not deemed to be discriminatory with respect to end-user rights and other IAS providers.

The MCA notes that similar offers may feature in the market in the future, and the MCA will keep monitoring and assessing such offers.

Article 3 (1) of the EU Regulation

1. *Providers of internet access services shall treat all traffic equally, when providing internet access services, without discrimination, restriction or interference, and irrespective of the sender and receiver, the content accessed or distributed, the applications or services used or provided, or the terminal equipment used.*

The first subparagraph shall not prevent providers of internet access services from implementing reasonable traffic management measures. In order to be deemed to be reasonable, such measures shall be transparent, non-discriminatory and proportionate, and shall not be based on commercial considerations but on objectively different technical quality of service requirements of specific categories of traffic. Such measures shall not monitor the specific content and shall not be maintained for longer than necessary. [...]

Traffic management practices

Where applicable, the MCA monitored the traffic management policies established by IAS providers as published in their relevant terms and conditions. The policies were found to be in compliance with the EU Regulation in terms of the technical aspects as well as in terms of the level of information required.

The self-assessment questionnaire sent to all IAS providers also treated the subject of technical practices. The results indicate that currently, there are no issues in the market and all IAS providers have been compliant with the EU Regulation in this respect.

Article 3(5) of the EU Regulation

5. Providers of electronic communications to the public, including providers of internet access services, and providers of content, applications and services shall be free to offer services other than internet access services which are optimised for specific content, applications or services, or a combination thereof, where the optimisation is necessary in order to meet requirements of the content, applications or services for a specific level of quality.

Providers of electronic communications to the public, including providers of internet access services, may offer or facilitate such services only if the network capacity is sufficient to provide them in addition to any internet access services provided. Such services shall not be usable or offered as a replacement for internet access services, and shall not be to the detriment of the availability or general quality of internet access services for end-users.

The status related to specialised services remains unchanged since the last report. The specialised services offered in Malta include voice telephony and live TV streaming services. There are no indications that the offer of specialised services has a negative impact on the IAS. Hence the MCA concluded that a formal assessment of the provision of specialised services was not necessary.

Given the current market situation, the MCA did not provide additional interpretation of or guidance on the term "services other than internet access services"⁷.

⁷ See Article 3(5) of the EU Regulation

Article 4 – Transparency Measures

Article 4 (1) of the EU Regulation

1. Providers of internet access services shall ensure that any contract which includes internet access services specifies at least the following:
 - (a) information on how traffic management measures applied by that provider could impact on the quality of the internet access services, on the privacy of end-users and on the protection of their personal data;
 - (b) a clear and comprehensible explanation as to how any volume limitation, speed and other quality of service parameters may in practice have an impact on internet access services, and in particular on the use of content, applications and services;
 - (c) a clear and comprehensible explanation of how any services referred to in Article 3(5) to which the end-user subscribes might in practice have an impact on the internet access services provided to that end-user;
 - (d) a clear and comprehensible explanation of the minimum, normally available, maximum and advertised download and upload speed of the internet access services in the case of fixed networks, or of the estimated maximum and advertised download and upload speed of the internet access services in the case of mobile networks, and how significant deviations from the respective advertised download and upload speeds could impact the exercise of the end-users' rights laid down in Article 3(1);
 - (e) a clear and comprehensible explanation of the remedies available to the consumer in accordance with national law in the event of any continuous or regularly recurring discrepancy between the actual performance of the internet access service regarding speed or other quality of service parameters and the performance indicated in accordance with points (a) to (d).

The MCA continued its monitoring activity whereby the terms and conditions of new products launched on the market or changes to the terms of existing products were reviewed. The terms and conditions were deemed to be compliant with the EU Regulation and therefore the MCA did not consider it necessary to engage with the IAS providers.

Article 4 (2) of the EU Regulation

2 Providers of internet access services shall put in place transparent, simple and efficient procedures to address complaints of end-users relating to the rights and obligations laid down in Article 3 and paragraph 1 of this Article.

IAS providers had already established transparent, simple and efficient procedures to address end-user complaints as prescribed by national legislation. The MCA frequently carries out testing in relation to such procedures and all IAS providers maintain effective channels of communication with their customers such as online chat services, customer care helplines and dedicated email addresses.

No change was registered compared to the MCA's previous reporting period.

Article 4 (3) of the EU Regulation

3. The requirements laid down in paragraphs 1 and 2 are in addition to those provided for in Directive 2002/22/EC and shall not prevent Member States from maintaining or introducing additional monitoring, information and transparency requirements, including those concerning the content, form and manner of the information to be published. Those requirements shall comply with this Regulation and the relevant provisions of Directives 2002/21/EC and 2002/22/EC.

Given the market-wide state of compliance, as well as the various measures already in place as prescribed by existing national and European legislation, the MCA did not deem it necessary to impose any further requirements other than those imposed by such legislation.

Article 4(4) of the EU Regulation

4. Any significant discrepancy, continuous or regularly recurring, between the actual performance of the internet access service regarding speed or other quality of service parameters and the performance indicated by the provider of internet access services in accordance with points (a) to (d) of paragraph 1 shall, where the relevant facts are established by a monitoring mechanism certified by the national regulatory authority, be deemed to constitute non-conformity of performance for the purposes of triggering the remedies available to the consumer in accordance with national law.

Fixed broadband providers are required to provide the Typical Speed Range (TSR), calculated on the basis of the access speed performance of a statistically sound sample taken from broadband connections of a given product. The TSR is established as the 20th and 80th percentile of the measured speeds at the access network level for each product used. Therefore, any connections performing at speeds that are lower than the 20th percentile are considered as being "significantly discrepant". No interpretation of the term 'regularly recurring' has been published.

At present, the remedies available to end-users, including IAS quality monitoring mechanisms available to them, are deemed to be adequate. For this reason, no additional remedies have been introduced for consumer redress in relation to the non-conformance of IAS with the contract terms.

Article 5 – Supervision and Enforcement

Article 5 (1) of the EU Regulation

1. National regulatory authorities shall closely monitor and ensure compliance with Articles 3 and 4, and shall promote the continued availability of non-discriminatory internet access services at levels of quality that reflect advances in technology. For those purposes, national regulatory authorities may impose requirements concerning technical characteristics, minimum quality of service requirements and other appropriate and necessary measures on one or more providers of electronic communications to the public, including providers of internet access services. [...]

At present, the MCA does not consider deployment of specialised services to be to the detriment of IAS. The MCA, therefore, does not impose minimum QoS requirements on any IAS provider other than the definition of 'contractual speeds'.

QoS - a broadband quality of service

As part of its monitoring efforts the MCA monitors the quality of broadband services based on the regulatory framework established in 2013 and revised later in 2016. The framework requires fixed broadband internet access service providers to measure a number of QoS parameters and submit their report to the MCA. IAS providers are also required to publish the Typical Speed Range (TSR) information related to each IAS product, as a means of committing to a minimum access speed.

In this regard, the MCA ensures the availability of high-quality IAS by means of information requests from IAS providers.

The MCA currently relies on broadband QoS data measured and reported by fixed broadband providers as part of their requirements under the fixed broadband quality of service framework. Data currently available does not indicate any variances which may be of concern.

Article 5(2) of the EU Regulation

2. At the request of the national regulatory authority, providers of electronic communications to the public, including providers of internet access services, shall make available to that national regulatory authority information relevant to the obligations set out in Articles 3 and 4, in particular information concerning the management of their network capacity and traffic, as well as justifications for any traffic management measures applied. [...].

The MCA sent all IAS providers a self-assessment questionnaire in line with this article. The information was then used as a basis for corroborating the MCA's market monitoring of IAS providers' published information i.e. terms and conditions.

Article 6 - Penalties

Article 6 of the EU Regulation

6. Member States shall lay down the rules on penalties applicable to infringements of Articles 3, 4 and 5 and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive. Member States shall notify the Commission of those rules and measures by 30 April 2016 and shall notify the Commission without delay of any subsequent amendment affecting them.

Under article 33 of Chapter 418 of the Laws of Malta (the Malta Communications Authority Act) the Authority may impose an administrative fine not exceeding three hundred and fifty thousand euro (€350,000) for each infringement or failure to comply and, or twelve thousand euro (€12,000) for each day of infringement or non-compliance. In determining the amount the MCA is required to give particular regard to the nature and extent of the infringement and its impact on competition and on consumers.

If the MCA considers that the act/omission has especially significant effects on the market it may increase the administrative fine imposed to not more than 5% of the turnover of the

undertaking concerned in the calendar year immediately preceding the year when the infringement was committed.

Due to existing provisions in national legislation the MCA has not implemented further rules on penalties under this article. In this reporting period no cases of non-compliance were identified and therefore no penalties were imposed.

Other activities

MCA officials actively participate and collaborate with other EU regulatory authorities within BEREC on matters concerning the regulation.

5. Conclusion

After having carried out its work programme for the year 2020/2021 in ensuring the availability of open internet access services in line with the requirements of the EU Regulation, the MCA concludes that all IAS providers in Malta were compliant with the requirements of the EU Regulation. The MCA also notes that ongoing monitoring and review of the terms and conditions remain important given that this sector undergoes continuous changes.