

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

Published: 30th June 2020

Reference: MCA/R/20-3899

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1. INTRODUCTION

The Malta Communications Authority (MCA) is the authority responsible for enforcing Regulation (EU) 2015/2120 (the 'EU Regulation') concerning open Internet access rules, which came into force on 30th April 2016. To this effect, the MCA has prepared this report, covering the period between 1st May 2019 and 30th April 2020, in compliance with the annual reporting obligations as required in Article 5 of the EU Regulation. This report is also in accordance with the relevant BEREC Guidelines on the Implementation by National Regulators of the European Net Neutrality Rules.

The supervision and monitoring of the EU Regulation entails several 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 their own location or that of the provider, 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 in order 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 out 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 Authority will continue to supervise the market to ensure compliance.

2. MARKET OVERVIEW

There are currently three fixed IAS providers in the Maltese market, namely GO plc ('GO'), Melita Ltd ('Melita') and Vodafone Malta Ltd ('Vodafone Malta')¹, which together account for over 99% of users of internet services in Malta.

The fixed broadband segment is mainly characterised by Melita and GO. As at the end of 2019², Melita accounted for a market share of 48.8% compared to a market share of 46.3% for GO. Vodafone Malta recorded a 4.6% market share at the end of 2019, followed by 0.1% for Ozone Malta Ltd ('Ozone Malta') and 0.1% for Vanilla Telecoms Ltd ('Vanilla'). All the providers mentioned above have their own fixed network infrastructures in place, although the network infrastructures owned by Vodafone Malta³, Ozone Malta and Vanilla are based on wireless technologies⁴. Figure 1 depicts the market shares in the fixed broadband segment as at the end of 2019.

¹ On the 1st April 2020, Monaco Telecom completed the acquisition of Vodafone Malta Ltd.

² <https://www.mca.org.mt/articles/key-market-indicators-electronic-communications-and-post-q1-2015-q4-2019-0>

³ Vodafone Malta is also offering FTTH-based plans as it is making use of regulated wholesale access to GO's access network infrastructure (based on VULA). However, only 284 of Vodafone's fixed broadband subscriptions are on FTTH.

⁴ Vodafone Malta's wireless network operates on the licensed band, whilst the wireless networks of Ozone Malta and Vanilla Telecoms operate within the unlicensed bands.

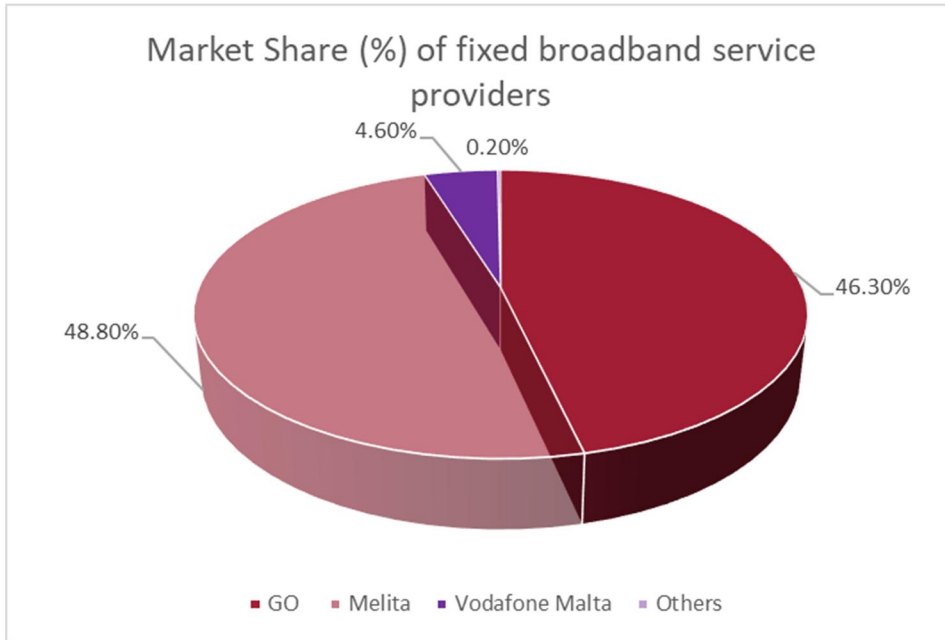


Figure 1 Market share of fixed broadband service providers

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

The penetration rate of mobile connections in Malta stands at 124.9% which amount to 634,386 mobile subscriptions. Vodafone Malta has a 39.3% market share, while GO and Melita have market shares of 37% and 23.7% respectively.

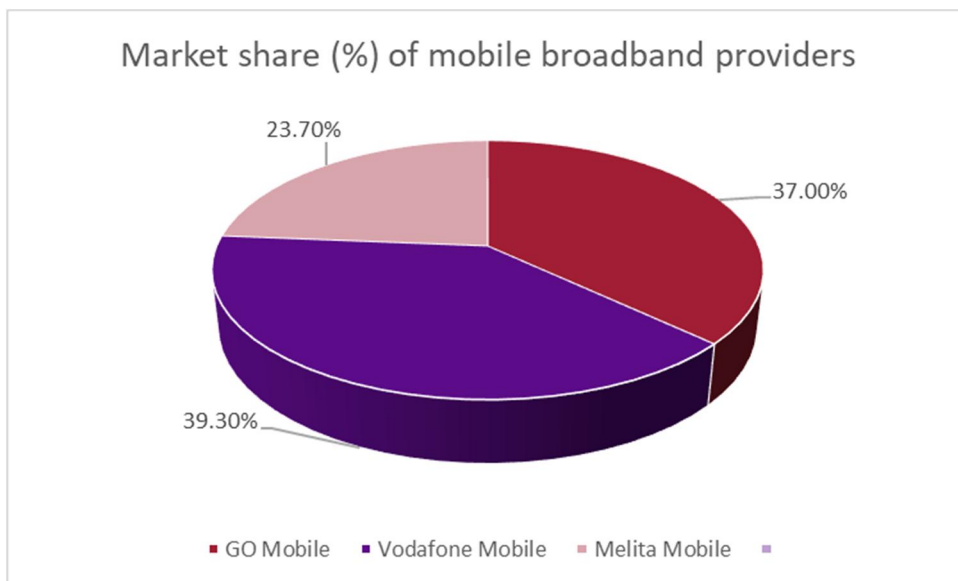


Figure 2 Market share of mobile providers based on the number of subscriptions

Referring to the Digital Scoreboard published by the European Commission⁵, it is stated that the take-up of mobile broadband stands at 83% of the total population in Malta.

⁵ Digital Scoreboard Report 2020 - https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=66923

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. 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.

The MCA notes that during this reporting period it received twelve (12) complaints regarding discrepancies between the contracted speed and the actual speed performance of the service (five of these complaints related to internet speed issues originating from the end-users' Wi-Fi set-up or other end user device used to connect to the Internet such as routers and mobile phones). In addition, one complaint regarding the application of Traffic Management policy in case of alleged excessive usage of the internet connection was recorded. Whilst the MCA considers this as an indication that there are no major issues in the market, it remains committed to maintaining an on-going 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.

3. 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*

The MCA 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. This exercise was first carried out between 2016 and 2017 and the MCA has since ensured that compliance is maintained.

In addition, using a self-assessment questionnaire sent to all the providers of fixed and mobile broadband, IAS were requested information about the traffic management practices they apply and about the product 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; and

- ii. none of the operators engaged in commercial practices that may restrict end-users' rights to choose and transmit content of their choice.

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 offers 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 three distinct offers all containing zero-rating elements targeting music streaming applications and IPTV streaming. These services were offered over mobile access service while zero-rating the volume of traffic. The MCA has analysed these offers in detail and concluded that given the uptake of the offers and the prevailing market conditions, the offers were allowed. As part of the decision⁶, the MCA maintained quarterly monitoring of the uptake of the offers and other market related parameters and indicators. Following analysis of this data, it is concluded that although there has been an increase in the uptake of the zero-rated offers, this is not deemed to be detrimental competition, in terms of the market position of service providers themselves and the market position of CAPs.

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

⁶ <https://www.mca.org.mt/sites/default/files/Final%20Report%20-%2020181217.pdf>

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(3) of the EU Regulation (Extract)

3. 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.

Providers of internet access services shall not engage in traffic management measures going beyond those set out in the second subparagraph, and in particular shall not block, slow down, alter, restrict, interfere with, degrade or discriminate between specific content, applications or services, or specific categories thereof, except as necessary, and only for as long as necessary, in order to:

- (a) comply with Union legislative acts, or national legislation that complies with Union law, to which the provider of internet access services is subject, or with measures that comply with Union law giving effect to such Union legislative acts or national legislation, including with orders by courts or public authorities vested with relevant powers;
- (b) preserve the integrity and security of the network, of services provided via that network, and of the terminal equipment of end-users;
- (c) prevent impending network congestion and mitigate the effects of exceptional or temporary network congestion, provided that equivalent categories of traffic are treated equally.

Between 12 March 2020 and 5th June 2020, the Government of Malta has taken a number of wide-ranging measures aimed towards the prevention and containment of the SARS-CoV-2 virus. These measures included the closure of all schools, the requirement for several employees to resume their duties while at home as well as the closure of those establishments which were not considered to offer essential services.

This situation gave rise to an increase in the use of electronic communication services, in particular, access to the internet to support entertainment requirements, home-schooling, connections to office networks and teleconferencing to mention a few. Increase in network traffic demands could potentially lead to network congestion, hence requiring providers to apply traffic management measures which go beyond those reasonable under Article 3(2) of the Regulation.

In preparation for such eventuality, the Authority requested all IAS providers to report on their traffic volume within their core networks and the international connectivity gateways. This provided the necessary information for the Authority to conduct proper monitoring of any traffic management measures applied. The Authority notes with satisfaction that although there was a significant shift in network traffic and a broadened busy hour period as anticipated, the IAS networks in Malta were properly dimensioned to take up the load and no congestion issues were recorded during the period.

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 specialized services remains unchanged since the last report. The specialized services offered in Malta include voice telephony and live TV streaming services. There are no indications that the offer of specialised services is carried out to the detriment of 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 as a result of which, the terms and conditions of new products launched on the market, or changes to the terms of existing products were reviewed. The main change observed in the market concerns mobile IAS offers. Whereas in the past mobile offers were only advertised on the basis of the size of the data bundle, Vodafone and Melita are now both offering mobile IAS packages which are defined by speed and have no data capping. The terms and conditions of these products were duly verified to ensure that the obligations related to advertising of speed in relation to mobile access service is fulfilled. The terms and conditions were deemed to be compliant with the EU Regulation and therefore the MCA did not deem 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 which are lower than the 20th percentile are considered as being “significantly discrepant”. No interpretation of the term ‘regularly recurring’ has been published.

The MCA is following closely BEREC’s initiative in relation to the development of a common net neutrality tool to be implemented by NRAs, with a view to a possible adoption of such a tool in the future⁸.

At present the remedies available to end-users, as well as 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 non-conformance of IAS with the contract terms.

⁸ Note – In view of the situation COVID-19, and in view of a review of the business plan for 2020, this assessment may be delayed.

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 established a broadband quality of service framework which has been in force since 2013. During 2019, the MCA continued its work in relation to quality of service, with particular focus on mobile QoS as well as aspects concerning customer experience (QoE) and fault management. A consultation will be published in 2020.

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 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.

4. Conclusion

After having carried out its work programme for the year 2019/2020 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.