

Report of the Malta Communications Authority on its monitoring and findings in accordance with Article 5 of Regulation (EU) 2015/2190 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 2018 and 30th April 2019, in compliance with the annual reporting obligations as specified in Article 5 of the EU Regulation. This report is also in accordance to the relevant BEREC Guidelines on the Implementation by National Regulators of the European Net Neutrality Rules.

The report takes into consideration the MCA's work with regards to 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. This 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 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 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'), which together account for over 99% of users of internet services in Malta.

The fixed broadband segment is mainly characterised by Melita and GO, with the former's market share at 48.2% by the end of December 2018 compared to 46.4% of the latter. Vodafone Malta recorded a 5% market share at the end of 2018, followed by 0.2% 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 Malta, Ozone Malta and Vanilla are based on wireless technologies¹.

Figure 1 depicts the market shares in the fixed broadband segment as at the end of 2018².

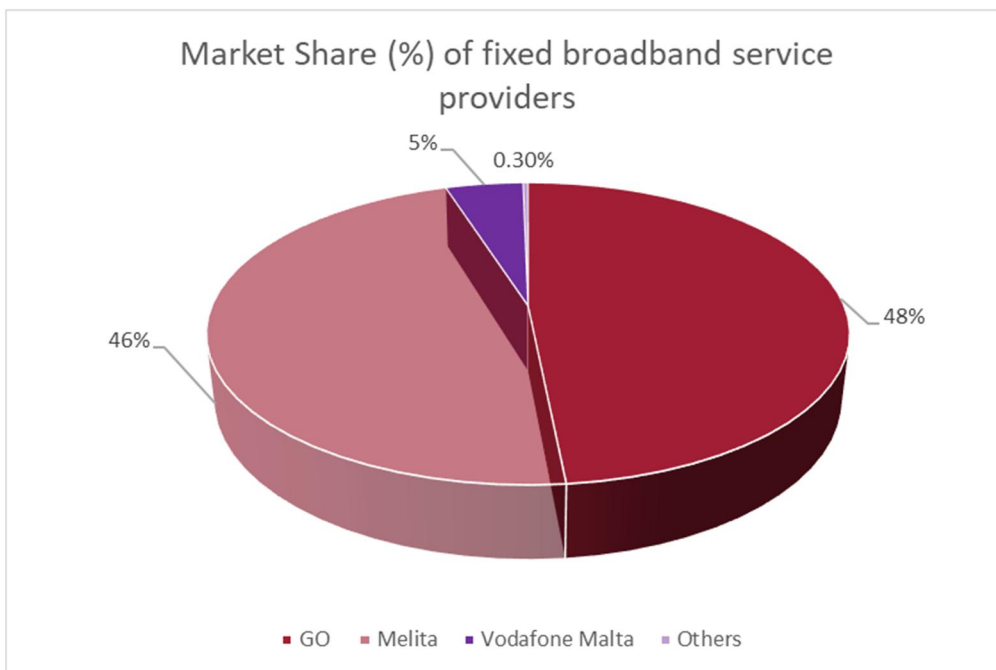


Figure 1 Market share of fixed broadband service providers

¹ 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.

² Latest MCA Data Report Sheet publication: <https://mca.org.mt/articles/data-report-sheet-drs-latest-figures-published-2>

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 126.27% which amount to 615,843 mobile subscriptions. Vodafone Malta has a 41.4% market share, while GO and Melita have market shares of 36.1% and 21% respectively.

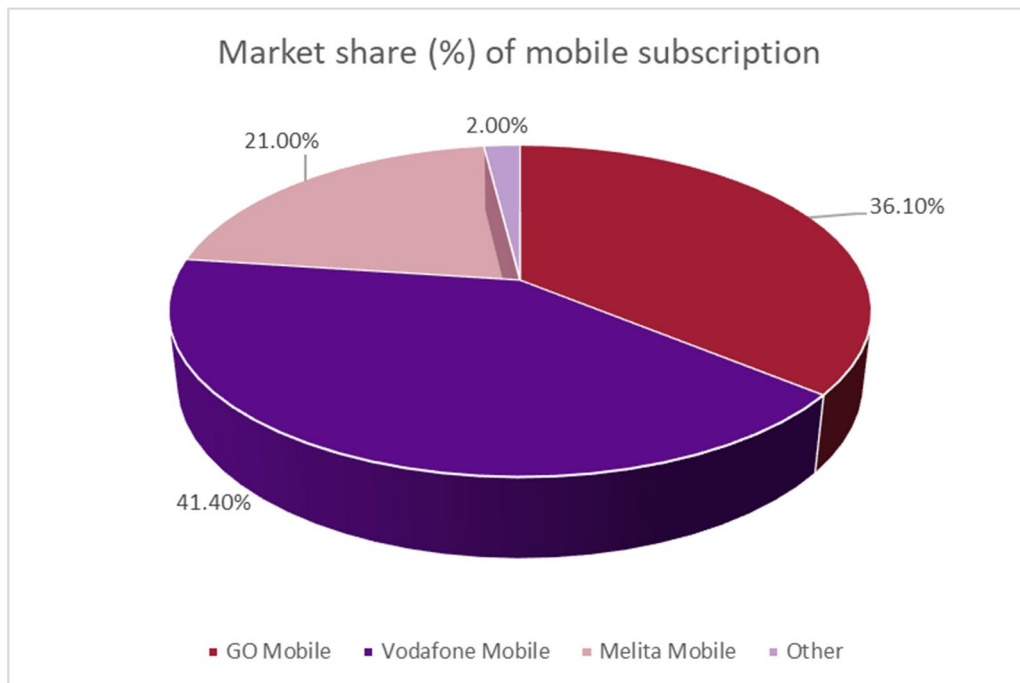


Figure 2 Market share of mobile providers based on the number of subscriptions

While all mobile subscriptions in Malta have access to a mobile broadband, not all users make use of such service. Referring to the Digital Scoreboard published by the European Commission, it is stated that the take-up of mobile broadband stands at 97.2%³ of the total population in Malta. Considering the data in conjunction with the penetration rate for the same period and applying the principles of proportionality, it is established that 76%⁴ of actual mobile subscriptions are also used for mobile broadband access.

³ <https://ec.europa.eu/digital-single-market/en/digital-scoreboard> (Q2 2018 as per latest published figures)

⁴ Based on Q2 2018 data which is the latest available at the time of publication

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. 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, the MCA notes that during this reporting period it received eleven (11) complaints regarding discrepancies between the contracted speed and the actual speed performance of the service (two of these complaints related to internet speed issues originating from the end-users' Wi-Fi set-up, and two complaints related to alleged excessive usage). Whilst the MCA considers this as an indication that there are no major issues in the market, it remains committed in 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.

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

The self-assessment questionnaire sent to all the providers of fixed and mobile broadband IAS 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; 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.

During 2018, the MCA assessed three product offers that included a zero-rating element. This assessment was concluded and a detailed report was published by the MCA⁵.

In the previous report⁶, the MCA reported that it was assessing an offer launched by the operator GO that included a zero-rating element. This offer provided an opportunity for GO's quad-play bundle subscribers to access a portion of the IPTV channel line-up (forming part of the quad play bundle) on their mobile device on a zero rated basis. This means that when the eligible end-user accesses such IPTV channels from a mobile IAS provided by GO, the data consumed for this purpose would not count towards the consumption of the mobile data cap (or allowance).

The assessment took into account the recommendations as set in the BEREC Guidelines. These Guidelines identify one type of zero-rating practice that would render such an offer as automatically in breach of the EU Regulation i.e. when the zero rated traffic is allowed to flow freely while other traffic is blocked or slowed down due to the exhaustion of an existing data cap. In its assessment, the MCA concluded that this was not the case in the zero-rated offer

⁵ <https://www.mca.org.mt/consultations-decisions/regulatory-assessment-go-plc%E2%80%99s-zero-rating-offers-go-tv-anywhere-go-tv>

⁶ [Report on the Malta Communications Authority's work on the implementation of the EU Net Neutrality Regulation](#), Section 5

being assessed. GO did not implement traffic management practices to give any form of preference to its zero-rated applications.

The MCA's assessment also delved on other factors, taking into account the BEREC Guidelines, namely:

- i. the market positions of the ISP and Content and Application Providers ('CAP') involved;
- ii. the effects on consumer and business customer end-user rights;
- iii. the effects on CAP end-user rights; and,
- iv. the scale of the practice and presence of alternatives.

The analysis undertaken shows that the practice in question does not pose a material impact on competition in the market, mainly because of three main findings:

- (i) the small take-up of the offer and the very limited potential for growth in the number of end-users that could make use of the zero-rated offers;
- (ii) no direct payments to CAPs are involved for content available; and
- (iii) no impact on the market position of IAS providers and CAPs has been detected.

Overall, the zero-rated offer under investigation was not deemed to be discriminatory with respect to end-user rights and other IAS providers.

Another zero-rated offer assessed by the MCA concerns GO's Music WildCard Offer, which is available to GO mobile customers on selected plans. This offer provides the facility to these customers to stream music content from specific application providers. Initially, GO had only included the Spotify and Deezer applications on the Music WildCard offer. Eventually, GO added the Apple Music and the Amazon Music platforms to the list of zero-rated applications to its offer.

The MCA has again referred to the BEREC Guidelines when carrying out the assessment. In this regard, the MCA determined that GO is not applying any specific traffic management practice with respect to the Music WildCard offer that goes beyond the provisions of Article 3(3) of the EU Regulation. The MCA also reached the following conclusions:

- (i) the current penetration level of the offer under investigation is small and would not therefore influence market outcomes from a net neutrality stand point;
- (ii) given the small size of the local market in a global scenario and given that the offer is only temporary in nature, the Music WildCard offer would have very limited impact (if any) on the competition between the CAPs involved;

- (iii) there is no plausible reason to argue that GO's zero-rated offer is meant to foreclose competition in the CAP market, also considering that the Music WildCard app does not involve payments from CAPs to GO.

Notwithstanding the above, the MCA noted that, in view of maintaining the internet's function as an engine of innovation, GO's current approach to the zero-rating of music streaming has to be amended to ensure that there is no negative discrimination on alternatives to Spotify, Amazon Music, Apple Music and Deezer. To this effect, the MCA recommended that future zero-rated offers concerning music streaming apps should be extended to all music streaming CAPs on the market.

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 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 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 main broadband providers in Malta each offer a speed testing facility using a server installed within their networks running Ookla’s speed test software. In the meantime, 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 future.

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.

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. Published in 2013 and revised later in 2016, the framework requires fixed broadband service providers to measure a number of QoS parameters and submit their report to the MCA. IAS providers are also required to publish the TSR information related to each IAS product, and in doing so would commit 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 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 2018/2019 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.