



Market potential and regulatory aspects concerning VHC broadband competition in Malta

Some preliminary considerations and a follow-up to the 'Notification of re-assessment by the MCA of the wholesale fixed broadband access market in Malta' published in June 2021

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1. Scope

The MCA is hereby outlining its preliminary considerations on the market potential and regulatory aspects in view of the provision of Very High Capacity (VHC) broadband in Malta. This exercise forms part of a wider project which also includes the SMP-based analysis of the wholesale broadband access market that was published by the MCA for consultation in May 2020¹. Following the closure of the above-mentioned consultation, one of the market players, namely Epic, relayed information relative to its new investment in fixed network infrastructure and subsequent commercial launch of products and services based on this infrastructure.

Given this development the MCA deemed it opportune to re-assess its public consultation findings and operators' submissions. Eventually, the MCA notified the market last June that it would be drafting a new consultation document on the relevant market(s)². The MCA underlined that, given market developments, it would re-evaluate the state and potential future development of infrastructure-based competition within the timeframe of the envisaged new market analysis. As stated in the 2020 EU Recommendation on relevant markets³, *'the possibilities to overcome barriers to entry within the relevant time horizon should also be taken into consideration when identifying the relevant markets for possible ex ante regulation'*.

Before moving forward with any such analysis, however, the MCA needs to gather a more comprehensive insight concerning the facts on the ground in light of the evolving new scenario. A key consideration in this respect concerns the availability and usage of physical infrastructure (whether underground or via aerial means) for the deployment of VHC broadband networks.

The MCA also commissioned WIK-Consult GmbH to conduct a study examining the regulatory parameters and options that could contribute to infrastructure-based competition in Gigabit broadband in Malta.

Overall, the underlying premise is that infrastructure-based competition can be an important catalyst to enhance investment in VHC infrastructure and to ensure greater choice to consumers, both in terms of quality and price.

Given the above, the MCA is hereunder outlining the potential market and regulatory contributors towards the achievement of these goals:

¹ See: <https://www.mca.org.mt/consultations-decisions/wholesale-broadband-access-market>

² See: <https://www.mca.org.mt/articles/notification-re-assessment-mca-wholesale-fixed-broadband-access-market-malta>

³ See: <https://digital-strategy.ec.europa.eu/en/news/commission-updated-recommendation-relevant-markets>

- a) Due to the high costs associated with deployment of network infrastructures of FTTH networks, the re-use of passive infrastructure should serve as a key facilitator to such deployment(s). At the same time, such a process also guarantees a green approach and significantly less disruption from a town-and-country-planning perspective.

The usage by electronic communications service operators, of existing physical infrastructure in Malta, including whether via underground or via aerial means (for example via ducts, masts, poles and brackets) can ultimately improve both the business case and the lead-time of FTTH projects, thus enabling faster delivery to end users.

In this context, the Broadband Cost Reduction Directive (BCRD) Directive 2014/61/EU, as transposed into CAP 81 of the Laws of Malta⁴ is particularly relevant for the rights of access by electronic communications network (ECN) providers, to the physical infrastructure of electricity, water and transport networks, and also of the physical infrastructure of other ECN providers.

- b) Cooperation arrangements and commercial agreements, particularly if such agreements have been entered into on a lasting basis, can also result in significant efficiencies for the parties involved, whilst minimizing, or potentially even eliminating, the need for regulatory intervention.

The European Electronic Communications Code (EECC)⁵ provides the assessment criteria upon which to pursue regulatory intervention in the context of cooperative arrangements and commercial agreements and co-investment.

- c) Market reviews with a view to implementing SMP-based regulation remain an essential tool for the regulatory oversight of electronic communications markets. In this regard, the MCA plans to carry out the market analysis concerning 'Market 1: Wholesale local access provided at a fixed location', identified by the Recommendation on relevant markets published in 2020 as a market susceptible to ex ante regulation.

The MCA will consider the possibility of Physical Infrastructure Access (PIA) as a relevant market. In this respect, the MCA is assessing the approach adopted by certain NRAs at

⁴ See: UTILITIES AND SERVICES (REGULATION OF CERTAIN WORKS) ACT.

⁵ See: Directive 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast).
<https://eur-lex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:32018L1972&from=EN>.



identifying a separate relevant market for physical infrastructure access upstream from the wholesale local access market.

The MCA has already initiated a fact-finding exercise to gain more insight into the kind of issues encountered by electronic communications networks (ECNs) when seeking access and / or providing access. The MCA is anticipating to receive indications from several market participants in this regard. The MCA will take these indications into utmost account going forward.

2. Context

In general, there are three primary fixed broadband technologies in use today in Malta. FTTC (fibre to the cabinet) and FTTH/B (fibre to the home or building) are both deployed by the incumbent Go. DOCSIS 3.1 hybrid fibre coaxial cable infrastructure has been deployed nationwide by Melita. More recently Epic also announced the launch of a 2Gbit/s broadband offer based on FTTH infrastructure, starting with the locality of Mosta.

All of Melita's fixed broadband clients are served by this operator's coaxial cable infrastructure, via a ubiquitous DOCSIS 3.1 Gigabit-capable network. Melita's market share stood at 48.5% by the end of September 2021.

Market share as at end of September 2021	GO	Melita	epic	Other
	46.9%	48.5%	4.4%	0.2%

Table 1: Market shares by operator, end of September 2021

GO had an overall market share of 46.9% in the retail broadband market. This share consists mainly of copper-DSL and FTTH subscriptions. A portion of GO's client base is on a fixed broadband wireless platform.

A third competitor Epic recorded an overall market share of only 4.4% in the broadband market. Moreover, this market share mostly consists of fixed wireless broadband subscriptions. When fixed wireless subscriptions are excluded, Epic's retail market share is much smaller, given also the as-yet limited geographical footprint of its fibre-based network infrastructure.

Overall, the demand for high speed connectivity in Malta is likely to expand further over the coming months. Already 61.3% of all fixed broadband subscriptions in Malta are sold with headline download speeds of 100Mbps or more. Given the trends towards home working and

the use of applications⁶, demand for very high speed broadband is likely to continue rising in the coming months.

Therefore, in order to ensure a competitive and adequate supply of high bandwidth offers, it will be necessary for all players in the market to provide offers based on Gigabit network capable technologies. Moreover, in time, the upstream and downstream bandwidth required are likely to necessitate further investments to bring fibre closer to the end-user for both suppliers of FTTx and cable technologies. This is a matter of utmost significance for Malta, particularly in the context of network deployment and competition, and inevitably raises questions as to what might be appropriate regulatory responses to these developments. Whilst reference to experience from other countries within the EU is highly relevant in this respect, the MCA remains committed to take utmost account of national circumstances when devising its regulatory approach.

It is in this context that Sections 3 to 5 highlight on the following:

- a) the 2014 Broadband Cost Reduction Directive (BCRD), aimed to enable market entry via access to physical infrastructure on a non-discriminatory basis⁷;
- b) commercially negotiated commitments, such as in the case of cooperative arrangements and commercial agreements (including co-investment), with the EECC putting strong emphasis on the importance for NRAs to take them into account when assessing the competitive dynamic of a particular wholesale market in lieu of wholesale ex ante regulation⁸; and
- c) SMP-based market reviews taking the utmost account of the SMP guidelines⁹ published by the European Commission and also referring to the EC 2020 Recommendation on Relevant Markets.

⁶ For example, data from the Eurostat survey shows that, as of 2020, 54% of Internet users in Malta made use of cloud computing services, while more than 95% used the Internet for entertainment, including services such as streaming or online games.

⁷ See: <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32014L0061>.

⁸ See also: Article 63 of Subsidiary Legislation 399.48: <https://legislation.mt/eli/si/399.48/eng>

⁹ See: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018XC0507\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018XC0507(01)&from=EN)

3. The Broadband Cost-Reduction Directive

The Broadband cost-reduction Directive (BCRD), currently transposed in the Utilities and Services Act (Cap 81), focuses on the requirement for all utilities and electronic communications network providers to share passive infrastructure in order to **reduce the cost of deploying high-speed electronic communications networks**. The MCA espouses the principles of infrastructure sharing as raised in the BCRD.

Of significance to note is that, in Malta, arrangements for access via passive infrastructure actually pre-date the transposition of the BCRD. Along the course of several meetings with relevant entities, the MCA confirmed the existence of long-standing arrangements between utilities undertakings and ECN providers alongside the existence of other commercially-based arrangements between ECN providers themselves. These arrangements materialized also at a time when all major ECN providers built greenfield passive infrastructures on their own. This is a significant development, given that in other EU countries, such as Spain, France, Germany, and Sweden, the respective NRAs implemented regulated duct and pole access, first to the incumbent telco and thereafter to other utilities and municipalities, in order to foster duct and pole access, say to would-be FTTH operators.

From the information being gathered from utilities undertakings and ECN providers (the request for information to the latter taking the form of a questionnaire), the MCA is building a picture of what is happening on the ground. Whilst the MCA is still some way from a conclusive assessment of the situation, the following are of relevance:

- a) There is availability of duct and overhead routes open to ECN providers that can be reused in the last drop for the deployment of fibre networks. The extent of such availability is however still being evaluated. Access to such infrastructure should ultimately serve to save a lot of time and expense for new entrants to improve their business case for market entry. Besides this, duct and pole access allow for full flexibility in product design without restricting competitors to the pace and location of the deployment of another operator.
- b) The MCA is still gathering relevant information on the various duct and overhead routes that are available, and the extent of coordination and management of relevant data / information on the availability / use of such infrastructure at a national level.
- c) In case of failed negotiations for access to passive infrastructure aggrieved parties can file a case before the relevant Dispute Resolution Board. To date, no such action has been undertaken in Malta.

- d) The Inter-Authority Advisory Committee, established under Cap 89, namely the Utilities Services Advisory Committee (USAC), should serve a very useful purpose in this regard. The MCA is an active member on USAC and will contribute by sharing its views and opinions within the parameters of USAC's remit.
- e) The BCRD is currently in course of being reviewed by the EU with a view to improving its effectiveness to date. The MCA is providing the necessary input to Government in addressing the relevant EU proposals.

Overall, the MCA considers that the opportunities for infrastructure-based competition in Gigabit broadband in Malta could be maximized if there is effective and non-discriminatory access to physical infrastructure, including ducts and poles, via the BCRD.

4. Cooperation arrangements and commercial agreements

The MCA considers that cooperation arrangements and commercial agreements (incl. co-investments) could be sufficiently pro-competitive such as to enable the withdrawal of SMP designation and regulation on the network concerned. This consideration is also envisaged by the European Electronic Communications Code (EECC), which has been recently transposed into national legislation¹⁰.

The EECC effectively provides for two main routes through which an NRA can signal the threshold that must be met to withdraw wholesale access regulation currently applied on an SMP operator.

- a) Article 76 of the EECC notes that SMP operators may offer commitments to open deployment of new VHC networks to third parties which involve co-ownership or long-term risk sharing¹¹. The EECC provides that when the offer meets certain conditions – i.e. offer is open at any moment during the lifetime of the network, allows others to compete effectively based on terms which are fair, reasonable and non-discriminatory, is made public and complies with certain additional criteria – then the NRA may not impose any additional access obligations, providing at least one potential co-investor has entered into

¹⁰ See: <https://legislation.mt/eli/cap/399/eng>

¹¹ This is subject to the commitments procedure under Article 79, which applies to the provisions concerning co-investment in very high capacity networks in Article 76.

such an arrangement. The relevant national provisions are transposed in Article 63 of Subsidiary Legislation (SL) 399.48¹².

- b) The other route under which SMP obligations may be withdrawn at the wholesale level is if the NRA finds in the course of the market analysis conducted under article 67 of the EECC, that the retail market would be effectively or prospectively competitive in the absence of regulatory intervention at the wholesale level, for example as a result of “market developments affecting the likelihood of the relevant market tending towards effective competition”. Article 68 of the EECC also requires NRAs, when considering the imposition or withdrawal of obligations on SMP operators, to consider “the impact of new market developments, such as in relation to commercial agreements, including co-investment agreements, influencing competitive dynamics”.¹³

The MCA is committed to consider any such cooperation arrangement and commercial agreements in light of the above-mentioned regulatory possibilities. For example, in a scenario where SMP operators propose commitments for the provision of wholesale high-capacity services, the MCA would ask for these commitments to be made binding under the terms of the EECC, which could be in lieu of SMP obligations. Ultimately, the long-term impact of commercially negotiated infrastructure sharing on competitive parameters is likely to be positive on network coverage, rate of deployment and the spread of new technologies.

5. SMP-based regulation

When carrying out SMP-based market analyses, the MCA will take utmost account of the most recent EU guidance on the assessment of markets. The EU Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation (published in December 2020) lists two markets that are deemed as requiring such intervention. The market of relevance to the current exercise is ‘Market 1 - Wholesale local access (WLA) provided at a fixed location’.

The MCA will also take utmost account of national circumstances when defining the market/s for the new analysis.

¹² See: <https://legislation.mt/eli/sl/399.48/eng>

¹³ See also articles 51, articles 55 and 63 of SL 399.48.

5.1. Wholesale local access

The MCA has in June 2021 given notice to the market that it was not pursuing further the notification of a draft decision to the EU Commission on the basis of its 2020 consultation document entitled *'The provision of wholesale fixed broadband access in Malta - Definition, assessment of SMP & regulation of relevant markets'*¹⁴.

This course of action was taken following the announcement of the deployment of a third network and relevant commercial offering in April 2021. The below are amongst the most relevant factors that are expected to characterize the new assessment:

- a) New market entry in the provision of wholesale fixed broadband access in Malta, by way of Epic launching its own fibre-based network in Mosta and the relevant retail commercial offers for fixed broadband.
- b) The nature and extent of the above-mentioned deployment, including the fact that this was accompanied by the launch of a retail commercial offering by Epic, are such as to compel the Authority to pause and review the stance taken in its 2020 consultation document.
- c) As stated in the 2020 EU Recommendation, *'the possibilities to overcome barriers to entry within the relevant time horizon should also be taken into consideration when identifying the relevant markets for possible ex ante regulation'*.
- d) In assessing the adequacy of competition and the need for regulatory intervention, the MCA will consider the continued relevance of wholesale access for competitive market outcomes, with special attention to the impact on consumer welfare in terms of price, quality and choice.
- e) The MCA is cognizant of the time factor involved in the rollout of a national fibre infrastructure. This aspect needs to be taken in due consideration, carefully weighing the evolving rights, obligations and relationships of all stakeholders over the relevant timeframe of the review.

It is also recalled that the VULA remedy currently mandated on Go has been imposed in the context of SMP wholesale access obligations in Malta. Nevertheless, the MCA considers that any

¹⁴ See <https://www.mca.org.mt/articles/notification-re-assessment-mca-wholesale-fixed-broadband-access-market-malta>

wholesale access concerning the provision of VHC broadband, including VULA, could also be offered on a commercial basis.

Aspects related to duct access and dark fibre will be taken into consideration in the course of the new SMP-based review process.

5.2. Access to physical infrastructure

As already highlighted at an earlier stage, access to physical infrastructure is an important way to reduce the costs of deploying broadband infrastructure. This is also why the MCA is seeking to acquire as much information as possible to determine the extent to which non-ECN infrastructure is currently available and being used to host ECNs, and to what extent it is contributing or could contribute to high-speed electronic communications network rollout in Malta.

From an SMP-based point of view, it is relevant to underline that certain NRAs have identified a separate relevant market for physical infrastructure access upstream from the wholesale local access market. As of 2020, two European NRAs had identified separate relevant markets for physical infrastructure access. These are Ofcom in the UK and ARCEP in France¹⁵.

- a) Ofcom defined a separate product market for the “supply of wholesale access to telecoms physical infrastructure for deploying a telecoms network” in June 2019. Ofcom justified its focus on physical infrastructure on the basis that it was preferable to intervene in the most upstream market possible, that the deployment of FTTH offered the potential to encourage greater network competition, and also cited provisions in the EECC that suggest that access to physical infrastructure should be considered as a remedy, before assessing the need to impose any other potential remedies.
- b) ARCEP concludes that the market for physical infrastructure access is upstream from the wholesale local access and business connectivity markets (markets 3a and 4 of the 2014 EC Recommendation on Relevant Markets). The value chain, and the relationship of ducts and poles to downstream product markets is described in the analysis to support its conclusion that civil infrastructure for the local loop is at the top of the structure of the fixed market value chain. Also, ARCEP notes that the deployment of fibre connections,

¹⁵ WIK (2020) study ‘Future electronic communications product and service markets subject to ex ante regulation’. See <https://op.europa.eu/mt/publication-detail/-/publication/89a885c9-b754-11ea-bb7a-01aa75ed71a1/language-en/format-PDF/source-search>

which are replacing copper connections, are difficult to realize in the absence of access to ducts and poles.

A potential identification of PIA as a separate local market would take into account national circumstances, and the guidelines and considerations in the EC 2020 Relevant Market Recommendation and the respective Annex.

6. Way forward

The MCA remains committed to monitor market developments and to ensure competition in the provision of downstream VHC broadband services. At this juncture, the MCA is compiling all the necessary evidence to determine what regulatory approach to pursue for the relevant Maltese market(s). The key elements envisaged for assessment in the forthcoming review period are outlined hereunder:

- a) Progress on the rate of network deployment and the re-use of physical infrastructure as a facilitator to such deployment. The MCA anticipates concluding its fact-finding exercise on this aspect early next year.
- b) SMP-based regulation, with findings of the analysis published for consultation to allow interested parties and stakeholders to react and submit their responses within a specified time window.
- c) Commercial negotiations leading to cooperation arrangements and commercial agreements (including co-investment agreements), taking these into account when assessing the competitive dynamic of a particular wholesale market and possibly contributing to the conclusion that a particular wholesale market does not warrant ex ante regulation.

The MCA aims at concluding its SMP-based regulatory exercise, concerning wholesale access provided at a fixed location, in the course of the first semester of 2022. The MCA will monitor market developments and adapt accordingly.