MALTA COMMUNICATIONS AUTHORITY

Retail Access to the Public Telephone Network at a Fixed Location

Identification and Analysis of Markets, Determination of Market Power and Setting of Remedies

Final Decision

MCA/D/15-2220

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EXECUTIVE SUMMARY

The Malta Communications Authority (MCA) is hereby presenting its final decision on the markets for retail access to the public telephone network provided at a fixed location in Malta, in accordance with the EU regulatory framework of electronic communications networks and services.

The MCA has carried out a national consultation process during the period running from the 19th September 2014 to the 20th October 2014. The MCA received three responses from GO, Melita and Vodafone. All responses elicited during the consultation process have been taken into account in this final decision.

Pursuant to Regulation 7 of the Electronic Communications Networks and Services Regulations (ECNSR), the MCA is required to notify its proposed decision to the EU Commission and the body of European Regulators for Electronic Communications (BEREC) which may make comments on notified draft measures. To this effect, the MCA notified its draft decision on 21st November 2014.

During the Phase 1 evaluation, on 26th November 2014, the Commission requested additional information to which the MCA responded to such request on 1st December 2014. On the basis of the additional information provided by the MCA and the notification document, on 17th December 2014, the Commission issued its comments letter.

In this letter the Commission agreed with the conclusions in the draft decision and had no further comments to make.

SUMMARY OF CONCLUSIONS

Identification of Markets

The MCA has identified the following relevant markets in accordance with competition law principles:

- Lower level access to the public telephone network at a fixed location.
- Higher level access with a maximum of two telephone connections to the public telephone network at a fixed location.
- Enhanced higher level access with more than two telephone connections to the public telephone network at a fixed location.

The MCA underlines that standard exchange lines and standard cable modem connections fall within the lower level access market. Access to public telephone services via wireless networks does not fall within the scope of this market review provided it is not offered on a stand-alone basis, but as an add-on to wireless broadband packages.

ISDN connections and Melita's multiple line solutions are categorised as higher level access products. In this regard, the MCA distinguishes between higher level access and the enhanced version of this type of access.

The MCA no longer upholds the former distinction between residential and non-residential access markets, given that access to business and residential customers is functionally homogenous, provided over the same infrastructure and provides the same quality of services. Moreover, the common practice to restrict business customers to only purchase business packages has declined over the years due to competitive forces. In this context, the strict distinction between residential and business users is fading quickly in the marketplace and the MCA defines a single market comprising both the residential and non-residential customers.

Finally, the MCA reiterates that the relevant geographic market for the provision of retail fixed access to the public telephone network in Malta is national in scope. This view is supported by the fact that all authorised or licensed operators providing retail fixed access in the identified markets are operating under sufficiently similar conditions of competition, subject to common constraints in terms of pricing and marketing arrangements, and common conditions of supply across the national territory.

Further details to the market definition exercise are contained in **Chapter 3** of this document.

Assessment of Market Power

Having identified the relevant markets that comprise retail fixed access in Malta, the MCA analysed these markets to assess whether any undertaking has significant market power (SMP).

In its analysis of the identified markets, the MCA did not identify any significant barriers to market entry that could inhibit effective market competition. Despite GO enjoying economies of scale and scope, and also being a vertically integrated operator, the MCA concludes that other operators, namely Melita, also enjoy similar conditions and are therefore competing at par with the incumbent, GO. The MCA also concludes that despite the presence of high sunk costs in deploying a new access network, new entry has happened. Moreover, with the emergence of wireless broadband networks, new operators have managed to enter the market and are somewhat posing an indirect constraint.

From a consumer's perspective, the assessment of countervailing buyer power also shows that through switching, customers can effectively constrain the behaviour of operators in the identified markets. In addition, the MCA notes that with alternative operators joining the fixed access markets, GO consistently lost its market share as users started to switch to these new operators, most especially Melita. Similarly, large business clients enjoy countervailing buyer power in the higher level access markets as operators compete aggressively to provide these clients with a full suite of services.

At the same time, the MCA notes that even if there were no alternative fixed telephony operators, GO would still be indirectly constrained by mobile voice telephony services and OTT services.

Based on these findings, the MCA thus concludes that no operator is able to behave independently from the others in the market and therefore no operator holds significant market power in any of the identified markets. In the absence of regulation it would be very unlikely, therefore, for GO to act in an uncompetitive way or increase tariffs of fixed access and/or fixed calls beyond the competitive level without losing customers to Melita or facing a drop in usage to mobile telephony.

Full details of the MCA's decision and reasoning are contained in **Chapter 4** of this document.

Regulatory Implications

Given the finding of no SMP, the MCA notes that regulatory intervention in local markets for retail access to the public telephone network at a fixed location is no longer warranted. Consequently, the MCA is withdrawing the remedies imposed in these markets. This withdrawal shall however be implemented without prejudice to any other general obligations at law or remedies emanating from other market analysis decisions, particularly wholesale obligations which will be dealt with under a separate market review.

Full details on the regulatory approach proposed by the MCA are contained in **Chapter 5** of this document.

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1. INTRODUCTION

The European Union regulatory framework for electronic communications networks and services is designed to create harmonised regulation across Europe and aims at reducing barriers to market entry while fostering effective competition to the benefit of industry and consumers. The basis for the regulatory framework is five directives which were originally adopted in the European Union in 2002 and later amended in 2009:

- Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (“the Framework Directive”);
- Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities (“the Access Directive”);
- Directive 2002/20/EC on the authorisation of electronic communications networks and services (“the Authorisation Directive”);
- Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services (“the Universal Service Directive”); and
- Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector (“the ePrivacy Directive”).

The Framework Directive provides the overall structure for the regulatory regime and sets out fundamental rules and objectives. Article 8 of the Framework Directive sets out the key policy objectives, which have been taken into account in the preparation of this consultation document, in particular, the promotion of competition, development of the internal market and the promotion of the interests of citizens of the European Union.

The Maltese legislation transposing the latest version of the said directives came into effect on 12 July 2011. The relevant national legislation are the Malta Communications Authority Act (Cap 418); the Electronic Communications (Regulation) Act(Cap. 399) (hereinafter referred to as ‘ECRA’); and the Electronic Communications Networks and Services (General) Regulations of 2011 (hereinafter referred to ‘ECNSR’).The Directives require National Regulatory Authorities (NRAs) such as the MCA to periodically carry out reviews of competition in communications markets to ensure that regulation remains appropriate in the light of changing market conditions.

Each market review is divided into three main parts:

- definition of the relevant market or markets;
- assessment of competition in each market, in particular whether any undertakings have Significant Market Power (SMP) in a given market; and
- assessment of the appropriate regulatory obligations which should be imposed, given the findings of SMP (NRAs are obliged to impose some form of regulation where there is SMP).

More detailed requirements and guidance concerning the conduct of market reviews are provided in the Directives, the ECRA, the ECNSR and in additional documents issued by the European Commission and the MCA.

1.1 MARKET REVIEW METHODOLOGY

In 2003 the EU Commission published its first Recommendation on relevant markets, which identifies a set of eighteen markets in which ex ante regulation may be warranted. The Recommendation seeks to promote harmonisation across the European Community by ensuring that the same product and service markets are subject to a market analysis in all Member States. However, NRAs are able to regulate markets that differ from those identified in the Recommendation where this is justified by national circumstances. Accordingly, NRAs are to define relevant markets appropriate to national circumstances, provided that the utmost account is taken of the product markets listed in the Recommendation (Regulation 6 of the ECNSR).

In December 2007 the EU Commission adopted its revised Recommendation on relevant markets[1]. The revised Recommendation presents a much shorter list of markets which NRAs are required to analyse for the purpose of ex ante regulation.

The European Commission has also issued guidelines on market analysis and the assessment of SMP ("SMP Guidelines")[2]. The MCA has also published a document outlining the guidelines on the methodology to be used for assessing effective competition in the Maltese electronic communications sector[3]. The MCA is required to take these guidelines into utmost account when analysing a product or service market in order to assess whether the market under investigation is effectively competitive or otherwise (refer to Regulation 8 of the ECNSR).

As required by Regulation 6 of the ECNSR, the results of these market reviews and the proposed draft measures need to be notified to the European Commission and to other NRAs. The Commission and other NRAs may make comments within the one month consultation period. If the Commission is of the opinion that the market definition, or proposals to designate an operator with SMP, or proposals to designate no operator with SMP, would create a barrier to the single market, or if the Commission has serious doubts as to its compatibility with Community law and issues a notice under Article 7(4) of the Framework Directive, the MCA is required by Regulation 6 of the ECNSR to delay adoption of these draft measures for a further period of 2 months while the Commission considers its position.

The MCA has collected market data from a variety of internal and external sources, including providers of electronic communications networks and services, in order to carry out thoroughly its respective market definition and market analysis procedures based on established economic and

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[1] Commission Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (notified under document number C(2007) 5406) (2007/879/EC). Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:344:0065:0069:en:PDF

[2] Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (2002/C 165/03). Available at:
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2002:165:0006:0031:EN:PDF

[3] Link to market review methodology:
http://www.mca.org.mt/sites/default/files/articles/marketreviewmethod.04.pdf

legal principles. The MCA is also taking utmost account of the Recommendation on relevant markets and the SMP Guidelines.

1.2 LIAISON WITH COMPETITION AUTHORITY

Under Regulation 10 of the ECNSR, there is a requirement on the MCA to carry out an analysis of a relevant market within the electronic communications sector. This analysis must be carried out in accordance, where appropriate, with an agreement with the National Competition Authorities (NCA) under Regulation 10 of the ECRA.

In line with the cooperation agreement signed on the 20th May 2005 between the MCA and the Office of Fair Competition, succeeded by the Office for Competition forming part of the Malta Competition and Consumer Affairs Authority (MCCAA), the MCA also consulted with the MCCAA the findings of this analysis. The MCCAA has forwarded its comments to the MCA and can be found in Appendix 2.

1.3 STRUCTURE OF THE DOCUMENT

The rest of the document is structured as follows:

Chapter 2 provides an overview of the previous consultations and decisions on the market for retail access to the public telephone network at a fixed location in Malta;

Chapter 3 presents the MCA's conclusions on the definition of the market for retail access to the public telephone network at a fixed location in Malta;

Chapter 4 outlines the MCA's market analysis for the markets identified and determines whether these markets are effectively competitive or not; and

Chapter 5 sets the regulatory approach that the MCA is adopting for the markets under consideration.

1.4 SCOPE OF THIS REVIEW

This review considers the market for retail access to the public telephone network at a fixed location in Malta.

2. BACKGROUND TO PREVIOUS DECISIONS AND CONSULTATIONS

The first market review decision (2006)

The first market review on retail fixed access was carried out by the MCA during 2006[4] and the subsequent consultation and decision document was published thereafter in September of that same year. The MCA had at the time identified five retail fixed access markets in Malta, namely:

- Residential lower level access to the public telephone network at a fixed location via standard exchange line, cable and broadband wireless.
- Non-residential lower level access to the public telephone network at a fixed location via standard exchange line, cable and broadband wireless.
- Residential higher level access to the public telephone network at a fixed location via ISDN BRA.
- Non-residential higher level access to the public telephone network at a fixed location via ISDN BRA.
- Non-residential enhanced higher level access to the public telephone network at a fixed location via ISDN PRA.

The MCA had concluded that GO, known as Maltacom during the time of this review, enjoyed significant market power in all of the access markets identified. This conclusion had been supported by the fact that GO was the sole operator providing fixed telephony access to residential and business subscribers in Malta, and had therefore 100% market share in the provision of both ISDN exchange lines and standard exchange connections. Similarly, it had also been argued that GO was a vertically integrated provider supplying a full range of electronic communications services at wholesale and retail level, thus placing this operator in a favourable position to leverage market power from upstream to downstream markets. The presence of high barriers to entry in the access markets was also determined to be central in holding back new entrants and thus underlining the incumbent's dominant position.

Consequent to the above findings, the MCA imposed on GO a number of remedial measures, at wholesale and retail level. At the wholesale level, the MCA imposed on GO the obligation to provide a Carrier Selection and Carrier Pre-selection facility to access seekers, and wholesale line rental and single billing solutions. These access obligations were supported by other remedies such as price control and accounting separation amongst others. At the retail level, the MCA imposed remedies associated with cost orientation of retail prices, transparency and non-discrimination, cost accounting and accounting separation, and measures to counter the unreasonable bundling of services.

[4] Link to MCA Decision: http://www.mca.org.mt/sites/default/files/attachments/consultations/2012/decision-fixed-access-report.pdf

The second market review (2011)

In 2011[5], a second round review of the retail fixed access market had been carried out by the MCA and published for consultation. The subsequent decision document was published thereafter in February 2012.

In the 2011 market review, the MCA identified the following relevant markets in accordance with competition law principle:

- Residential lower level access to the public telephone network at a fixed location.
- Non-residential lower level access to the public telephone network at a fixed location.
- Non-residential higher level access via ISDN BRA and Melita's multiple line solution with a maximum of two telephone trunks to the public telephone network at a fixed location.
- Non-residential enhanced higher level access via ISDN PRA/FRA and Melita's multiple line solution with more than 2 telephone trunks to the public telephone network at a fixed location.

In its analysis of the identified markets, the MCA concluded that GO continued to enjoy significant market power in all of the above access markets and this despite the fact that a number of developments had taken place since the first review, most notably the provision of IP telephony over the cable network by Melita. This conclusion had been supported by the fact that GO had very high market shares in all the four relevant markets defined.

Similarly the MCA had argued that no alternative operator was in a position to erode this market power within the timeframe of the review. This is because barriers to market entry associated with economies of scale and scope, vertical integration, sunk costs, and barriers to switching continued to hold back new entrants from competing at par with GO, especially in the absence of regulation. Barriers to switching, on the other hand, appeared to neutralize countervailing buyer power which in turn reaffirmed the incumbent's market position.

In view of all this, the MCA therefore concluded that GO was enjoying significant market power in the provision of retail fixed access services in all the markets identified in this review. Consequently, the MCA imposed the following remedies on the dominant operator GO:

- Measures to counter excessive pricing charges or predatory pricing;
- Measures to counter undue preference to specific end users;
- Measures to counter the unreasonable bundling of services

Meanwhile, on 8th March 2012 the local Administrative Review Tribunal notified the MCA that it had received submissions from Melita, asking the Tribunal to annul and revoke that part of this decision that dealt with remedial measures put in place to counter the unreasonable bundling of services. In its submissions Melita had argued that the regulatory obligations imposed by the MCA on GO with respect to the unreasonable bundling of services were insufficient.

5 Link to MCA Decision:
http://www.mca.org.mt/decisions/mca-decision-access-public-telephone-network-fixed-location

Notwithstanding submissions presented by the MCA to counter Melita's arguments on this issue, the Administrative Review Tribunal upheld Melita's request on 13th June 2013[6]. To this effect, the Tribunal directed the MCA to annul and revoke, as well as revise, that part of the decision taken by the MCA on 7th February 2011 that dealt with remedial measures to counter the unreasonable bundling of services. This judgment is now currently sub-judice, awaiting final decision by the Court of Appeal, after an appeal was filed by the MCA on 3rd July 2013.

[6] Link to the Administrative Review Tribunal Judgment: http://www.justiceservices.gov.mt/courtservices/Judgements/search.aspx?func=all

3. OUTLINE TO THE MARKET DEFINITION EXERCISE

3.1 INTRODUCTION

The EU Regulatory Framework for Electronic Communications requires National Regulatory Authorities (NRA) to define relevant markets[7] appropriate to national circumstances, in particular the relevant geographic markets[8] in our territory. The purpose of the market definition procedure is to identify, in a methodical way, the competitive constraints faced by undertakings, thereby also facilitating the subsequent market analysis procedure.

In essence, there may be various dimensions related to the market definition procedure. Paragraph 3.1 of the Commission's Explanatory Memorandum to the Recommendation of relevant product and service markets states that '*as the market analysis carried out by the NRAs have to be forward-looking, markets are defined prospectively. Their definitions take account of expected or foreseeable technological or economic developments over a reasonable horizon linked to the timing of the next market review*'.

The Malta Communications Authority (MCA) will assess the following areas in its market definition exercise:

- Access and Calls at a fixed location
- Fixed and Mobile access
- Different technologies of fixed voice access
- Residential and Non-Residential access
- Geographic Market

Central to the market definition procedure are the demand-side and supply-side substitutability analysis. As per the Commission's guidelines on market analysis and the assessment of SMP, demand-side substitutability is used to measure the extent to which consumers are prepared to substitute other services or products for the service or product under investigation. Supply-side substitutability, on the other hand, indicates whether suppliers other than those offering the product or service in question would switch in the immediate to short term their line of production to offer the relevant products or services without incurring considerable additional costs.

The existence of any demand and supply side substitution is determined through the hypothetical monopolist test. The hypothetical monopolist test is used as a framework for market definition purposes in both the product and geographical dimensions. The test, used in competition analysis, seeks to define a market by establishing the closest substitute to the product being considered. The

[7] A relevant market is made up of all those products and/or services which are regarded as interchangeable or substitutable by the end user due to products' characteristics, prices and intended use.

[8] A relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products and /or services, in which the conditions of competition are sufficiently homogenous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different to those areas.

hypothetical monopolist test identifies products as being substitutes by evaluating what will happen if there was a small but significant, lasting increase in the price of a given product, assuming that the prices of all other products remain constant.

In view of the forthcoming demand-side and supply-side substitutability analysis, the MCA will start by reviewing all the technologies of local access connections supporting the provision of public telephone services at a fixed location in Malta, namely via standard exchange line connections, ISDN (Integrated Services Digital Network) connections, cable modem connections and access via wireless solutions. This document will, hereby, provide a brief overview of the above mentioned access technologies.

Access via standard exchange line connections

Access via standard exchange line connections is provided by two operators, namely the incumbent operator GO and Ozone (formerly known as Sky Telecom). Prior to 2007, GO used to provide fixed telephone access via PSTN (Public Switched Telephone Network) connections. However, in 2007 the PSTN incumbent upgraded its circuit-switched network to a packet-switched alternative. The soft-switch solution adopted by GO changed the circuit-switched core network to a multi-service network capable of carrying voice, enhanced services and packet-based broadband traffic.

As at the end of Q4 2013, GO had 158,886 registered standard connections, representing a decline of 15% (circa 29,000 connections) when compared to the corresponding period in 2010. Ozone – an operator buying wholesale access[9] from GO – reported 353 standard exchange line connections as at the end of 2013; the lowest level number of subscribers since its inception in 2007. For the record, the number of registered standard connections provided by Ozone in 2013 via GO's wholesale access fell by 87% when compared to Q4 2007.

Access via digital ISDN exchange line connections

The incumbent operator GO and Ozone both provide connections on digital ISDN exchange lines. These connections offer a similar quality of access service to that provided through connections on standard exchange lines. In fact, connections on digital ISDN exchange lines are also used for the purposes of making or receiving voice calls and faxes, and in support of data communications.

The main difference between standard exchange connections and digital ISDN connections lies in the fact that the ISDN product is a 'multiple' version of the standard type. The ISDN product is intended for end-users requiring more than one voice channel, a mix of voice and data channels, or higher speed channels. The ISDN product is a higher level access product intended to satisfy users with higher capacity requirements.

Access via standard connections on digital ISDN exchange lines can be categorised under two main headings, namely the Basic Rate Access (BRA) and the Primary Rate Access (PRA).

[9] An important facility that Carrier Select (CS) and Carrier Pre-Select (CPS) operators require to be able to match the full retail offering of the network provider is wholesale line rental (WLR). Through WLR, a service provider can offer both access and calls to the end-user.

The ***Basic Rate Access (BRA)*** is provided over the existing twisted pair subscriber line and can carry up to two simultaneous voice or data conversations (to the same or different locations). This product is composed of two B-channels (Bearer channels) and one D-channel (Data channel). The two B channels can be used simultaneously and can also be combined for transmitting data at uncompressed speeds of up to 128Kbps. Since BRA provides two B-channels, this product can be used as a replacement for two conventional telephone lines. The availability of the D-channel allows for improvements upon standard call features such as in the case of call waiting, and new voice mail messages.

Primary Rate Access (PRA) is mainly associated with large volume users, usually medium-sized and large enterprises. This product supports up to thirty 64kbp/s B-channels and one 64kbp/s D-channel, thereby enabling a maximum of 30 channels of simultaneous communication. A 64kbp/s channel is used for synchronisation purposes. Primary Rate Access ISDN can handle a total bandwidth of 2,048kbp/s. PRA connections require only 1, 2, or 4 copper pairs to give 30 channels of simultaneous communication, instead of 30 copper pairs.

As at the end of Q4 2013, the number of GO ISDN BRA subscriptions stood at 2,333 whilst the number of ISDN PRA subscribers with the same operator amounted to 351. On the other hand, Ozone – which provides connections on digital ISDN exchange lines via GO's wholesale access – reported 38 ISDN BRA and 10 ISDN PRA subscriptions by the end of 2013. In essence, these figures show that ISDN connections in Malta are not in high demand.

Access via cable-modem connections

Melita is currently providing standard IP connectivity over the cable network. This platform supports a broad range of IP-based solutions, including IP-based voice telephony. Access to public telephone services via Melita’s cable network is possible once the customer is supplied with a cable modem[10] connection. As at the end of 2013, the number of active Melita cable modem connections stood at 68,420, representing a growth of more than 13,400 connections (or 24%) over the three year period between Q4 2010 and Q4 2013.

Melita is also providing multiple line connections. These multiple line connections represent an enhanced and scalable version of a standard cable-modem connection, tailored to the requirements of the end-user. As the name suggests, Melita Business telephony is geared for large volume users, usually medium-sized and large businesses, and comes with 1, 2, 4, 8, 16, and 30 telephone lines and thereby supporting all the standard features including Direct Dial In[11] (DDI). For ease of reference, this document will hereafter refer to this product as the multiple line solution.

[10] A cable modem is a device that allows high-speed data transmission via a cable network. Melita states that cable modem systems provide standard IP connectivity over the cable television network supporting a broad range of IP based applications. The cable modem must always be plugged into an electrical outlet in order to access Melita telephony services.

[11] The provision of Direct-Dial In (DDI) numbers allows for company staff members to have individual telephone numbers that clients can call directly.

Access via wireless solutions

Vodafone is currently offering connectivity to its Voice over IP services through its Broadband Wireless Access (BWA) network, namely through its fixed WiMAX on the 3.5GHz spectrum.

The MCA notes that both internet (broadband) and voice services can actually be delivered to end users over the fixed WiMAX platform. Fixed WiMAX can be used for several applications including wireless broadband connections at home and for connecting multiple internet users. However, Vodafone's VoIP-based services have not been offered on a stand-alone basis, but specifically as an add-on to wireless broadband packages. Furthermore, the MCA also notes that while Vodafone continued to fulfil its service obligation towards present subscribers, in 2011 it ceased to continue offering this service to any new customers. For the record, as at the end of Q4 2013, the number of subscribers to Vodafone's fixed telephony package amounted to 321.

Additional to Vodafone, Ozone – apart from offering fixed line access via the CS facility hosted by GO – also offers voice over IP services through its wireless broadband infrastructure. As at the end of Q4 2013, Ozone had 389 connections over its wireless infrastructure. In the mean time, at the beginning of 2014, Vanilla Telecoms, an existing Internet Service Provider (ISP), started to offer voice services over similar wireless broadband infrastructures.

Meanwhile the MCA also notes that Vodafone is offering a variety of fixed line products, earmarked towards key corporate clients with high capacity requirements, via an E1 interface or through SIP on an Ethernet interface.[12]

3.2 DELINEATION OF RETAIL ACCESS MARKETS IN MALTA

3.2.1 ACCESS AND CALLS AT A FIXED LOCATION

As already outlined in the introduction to this chapter, the MCA will assess in its market definition process whether retail fixed line access and fixed line calls could be substitutable to each other. At the outset, the MCA establishes that customers commonly purchase fixed access and calls as a combined package of services. The MCA, however, also notes that the cost of the two services can be distinguished provided that the cost for access and the cost for calls (usage) are generally sent to customers in one bill under distinct itemisation. In view of this, the MCA's assessment on whether or not these two services fall within the same relevant market will therefore be based upon the demand-side and supply-side substitutability analysis.

Demand-side substitution

Despite the fact that most customers perceive access and call services as being one product – possibly because they are received in one bill – in reality they are functionally different services. In essence, access services are an input to the capability of making calls over the fixed network. Put differently, customers will only be capable of making calls over the fixed line network once they have

[12] Vodafone's fixed telephony solutions:
https://www.vodafone.com.mt/fixedtelephony

acquired or purchased retail access to the public fixed telephone network. In this sense, the MCA concludes that rather than being substitutable, retail fixed access and fixed line calls are complementary in nature. Therefore, in the event of a small but significant non-transitory increase in the price of retail fixed access customers cannot substitute fixed access to fixed calls since the latter are dependent on the former.

Although end-users typically prefer to purchase both access services and call services from the same operator, some purchase access from one undertaking but procure call services from another, via Carrier Select (CS) and Carrier Pre-Select (CPS). This enables an operator to offer only call services, as customers would have the facility to purchase the access from the incumbent undertaking. Nonetheless, one would not be able to make fixed calls without first having access to a fixed line network. To this effect the MCA reiterates that, rather than being substitutable, retail fixed access and fixed line calls are complementary in nature.

The MCA also notes that operators apply distinct charging mechanisms in relation to different retail fixed line services. In fact, telephone bills received by customers typically list the rental costs for accessing the public telephone network under a separate category to that for its usage. Additionally, the cost of access is paid on a regular basis in equal instalments, and this is worked out irrespective of the number of calls made by the customer. On the other hand, operators charge different rates for calls made by the customer, depending on the type of package that has been purchased and usage. GO's classic *Talk* plan, which to date enjoys the highest number of subscriptions, applies this billing mechanism. This goes on to confirm the MCA's conclusion to consider fixed access and fixed calls as complements rather than forming part of a single market.

Notwithstanding the above assessment, the MCA underlines that in more recent years local operators started to offer a number of fixed line calling plans that charge a monthly flat rate that covers both access and calls. Typically, these calling plans – such as GO's *Talk Anytime* package and Melita's *Medium* telephony plan – bundle a number of free minutes in the monthly rental charge, with tariffs for calls beyond the free minute allotment varying according to the choice of the calling plan. Nonetheless, this continues to suggest that, despite being less apparent, the tariff distinction between access and usage inherently holds true.

Supply-side substitution

The MCA is of the opinion that a 5 to 10 percent increase in the price of retail fixed line access is unlikely to incentivise operators providing retail calls only – such as may be the case with CS and CPS operators – to enter into direct provision of access. Fundamentally, this conclusion stems from the fact that significant economies of scale and sunk costs are involved in the development of access networks, and the process to build a fixed network goes well beyond the timeframe of this review.

Conversely, operators providing retail access would be willing to compete in the retail calls market in the event of a small but significant non-transitory increase in the price (SSNIP) of national and/or international calls, as is already the case with all access operators in Malta. Nevertheless, this one way substitution is not considered enough to pose a realistic constraint on a hypothetical increase in the price of retail access. The MCA therefore concludes that, from a supply-side perspective, the provision of retail fixed line access and the provision of fixed line calls belong to separate markets and the latter shall not be considered for the scope of this market definition.

Conclusion

The MCA considers fixed line calls as complementary to retail fixed access, thereby concluding that access and call products belong to separate markets.

3.2.2 FIXED AND MOBILE ACCESS

The MCA will now assess the extent with which a customer would consider switching between mobile access networks and retail fixed line access, and whether supply-side substitution between the two forms of access infrastructures is plausible.

Demand-side substitution

The MCA believes that mobile access is functionally different from fixed line access; the most salient difference being the mobility factor. In essence, an individual can access a mobile network independently of location, but is on the other hand constrained to access a fixed line from a fixed access point. In this regard, substitutability is likely to be in one direction only as customers would consider replacing fixed access with a mobile access service but not vice versa.

Another functional characteristic differentiating between mobile and fixed line access relates to the reliability of the service. The reliability of mobile access essentially depends on the mobile phone set, on the network, and partly on other electronic communication services to which the network is connected. In view of this, mobile access may occasionally be adversely affected by a number of factors including:

- high usage of the network at a particular point in time within the area covered by a particular base station;
- restrictive physical features (such as high buildings, tunnels and densely built-up areas);
- interfering atmospheric conditions; or
- any other form of interference.

Comparatively, access via a standard fixed telephone network is more reliable than access through a mobile network as most of the above adverse effects are not commonly experienced.

In terms of usage, fixed line access and mobile access provide users with a variety of 'secondary' services that continue to highlight the distinctive properties of the two. Fixed access, for example, facilitates services such as fax. Mobile access, on the other hand, facilitates data services by way of text messaging. Similarly, the use of mobile technology to access the internet is becoming increasingly popular and is expected to continue grow especially among the younger generation. In any event, irrespective of the successful penetration or otherwise of these related services, consumers continue to subscribe to both fixed line access and mobile access for the core purpose of voice telephony.

This said, statistical evidence continues to suggest that there has been no net substitution between mobile access and fixed line access, and this at a time when mobile penetration rates reached 131%

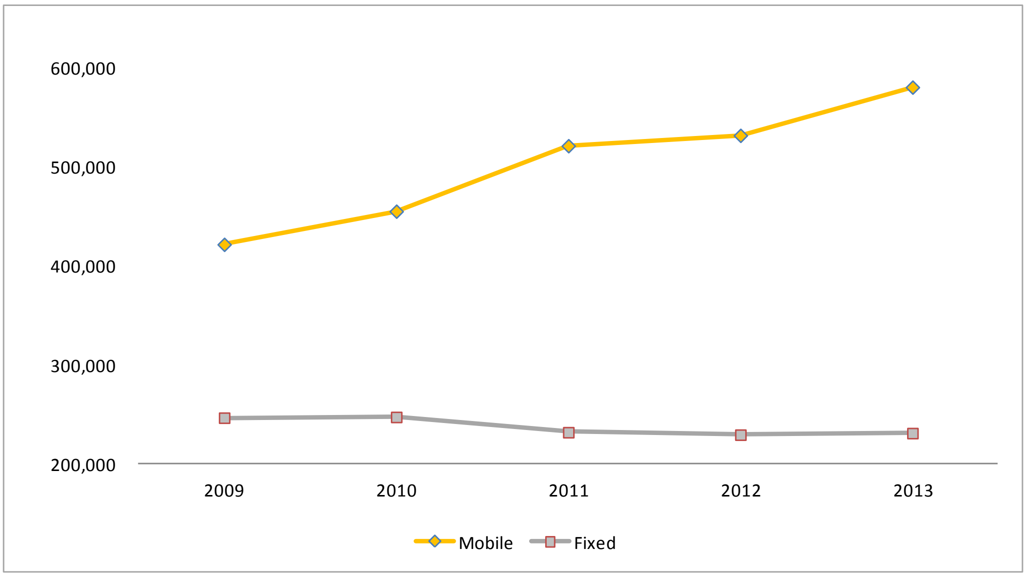
by the end of 2013. For the record, in 2011 the number of fixed line subscriptions fell by circa 6% over the previous year. The MCA however explains that this drop does not represent fixed to mobile substitution but is rather related to GO's decision to remove any inactive customers from its database, specifically those subscribed to the Easyline prepaid service.

In essence, GO's Easyline prepaid plan requires customers to make a minimum of €88.52 worth of calls annually to continue to enjoy the Easyline service. However, prior to 2011, GO never enforced such a condition with the result that a large number of inactive accounts had accumulated over the years. Eventually, GO decided to terminate, following due notice, those Easyline subscriptions that did not meet the minimum yearly spend as specified by the Terms and Conditions of the tariff plan. Consequently, by the end of 2011 the number of fixed line connections stood at 232,203 from 247,635 a year before.

Following this development, the level of fixed line connections remained at, more or less, the same level for the subsequent year. In 2013 the number of active fixed line subscriptions actually increased by 1,591 over the corresponding period a year earlier, to reach a total of 231,331 active connections.

To this effect, the MCA therefore concludes that developments in fixed line access cannot be taken to represent fixed to mobile substitution. Likewise the MCA believes that consumers in Malta still prefer to have a fixed line connection even though their mobile usage has increased significantly in recent years.

CHART 1 - NUMBER OF ACTIVE CONNECTIONS



Also somewhat critical to the MCA's review and demand-side substitutability analysis is the consideration of the extent with which fixed access users would switch their fixed line access with mobile access if the price of the former service had to increase. In this regard the MCA, however, notes that there may be differences between how mobile tariffs and fixed line tariffs are computed, thus making it somewhat difficult to compare the pricing of the two services.

The difference in the respective pricing structures boils down to the fact that mobile access and calls, for both post-paid and pre-paid services, are sold as a single bundle. This makes it difficult to distinguish between the charges due for access and usage. Conversely, the cost of fixed line access is generally identifiable; with the billing system namely distinguishing between the monthly rental charge and the cost of calls for the period under consideration. This is true for GO's classic *Talk* plan; the most sought on the Island. However, other fixed telephone access products currently being offered by local operators bundle a number of free minutes[13] in the monthly rental access charge, with tariffs for calls beyond the free minute allotment varying according to the choice of the calling plan. The *Talk Anytime* and *Business Talk 500* offered by GO and the *Medium*, *Large* and *Business Extra Large* packages offered by Melita are examples of this.

Accordingly, the MCA notes that in this case one would be able to distinguish between fixed access and mobile access charges, although at the same time remarks that it may not necessarily be indicative for the substitution analysis. This is because a higher monthly rental charge for fixed access may be justified by a higher number of free minutes. Likewise, the monthly rental charge for mobile access typically includes a number of free text messages and free mobile internet usage not included in the fixed access package. Therefore, in the event of a SSNIP of fixed access, users may still not be willing to switch to a mobile alternative because of the price differential between fixed and mobile connection.

In the same way, users will also factor in the cost rate per minute of usage for calls outside the bundle when making substitution considerations. In fact, during the period of this review, the MCA highlights that calls originating from a fixed connection to another fixed line, cost significantly less than calls originating from a mobile telephone to a fixed line. For the record, calls via a fixed connection to another fixed line cost an average of €0.035 per minute while calls from a mobile phone to a fixed telephone network at best cost €0.10 per minute. Consequently, a SSNIP of fixed access may not drive users to switch to mobile access given that calls from a mobile phone remain substantially more expensive.

It is also worth noting at this stage that, in order to purchase mobile access, an individual does not have to pay a one-time connection fee. On the other hand, local fixed line telephony operators generally charge their customers a one-time connection fee for purchasing access to the public telephone network. A monthly rental (access) charge would thereafter apply.

Supply-side substitution

Undertakings may decide to enter a product or service market in the event of a small but significant non-transitory increase in the price of a relevant product or service by a hypothetical monopoly. Supply-side substitution between retail fixed line access and mobile access would involve a mobile operator responding to a price increase in fixed access by switching production and ultimately starting to offer such access through a product that would match the price and quality of access via a fixed line. This would require either the construction of a fixed access network or the development of a wireless product with functional attributes of a fixed access product. In each case, a mobile operator interested in providing fixed access is faced with significant sunk costs and long timeframes in implementing the project.

[13] In most cases, a higher number of free minutes entail higher monthly rental charges.

It is therefore very unlikely that the SSNIP would entice switching in these circumstances. The MCA believes that the high costs involved in developing fixed access infrastructures render supply-side substitution between mobile access and fixed line access unlikely during the time frame of this review, thus suggesting that fixed access and mobile access fall within two separate markets. Consequently, mobile access will be excluded from the scope of this market definition and the successive competitive analysis.

Conclusion

In view of the above, the MCA finds no justifiable grounds on which to define a single market for fixed and mobile access. Fixed access and mobile access therefore pertain to separate markets.

3.2.3 FIXED ACCESS SERVICES PROVIDED OVER DIFFERENT NETWORKS AND TECHNOLOGIES

Another aspect to the market definition on retail fixed access is the analysis of the different technologies and networks available (highlighted previously) and the extent to which they are substitutable, both from a demand and supply side perspective. This assessment will determine the extent to which consumers and suppliers alike would be prepared to switch from one type of network to another, and similarly from one type of technology to another, in response to a small but significant non-transitory price increase.

Demand-side substitution

The following demand-side substitutability analysis determines whether and to what extent different access networks are substitutable with each other, namely on the basis of functionality and price.

In terms of functionality, the underlying characteristic that guides the assessment across all access technologies relates to the scope and purpose of usage. Indeed, end-user requirements vary according to the time, type and place of the service consumption, thereby determining which form of access is selected. In this respect and in view of the technological properties previously outlined in this chapter, the MCA distinguishes between lower level and higher level access services.

Lower level access

This type of access is typically earmarked for low volume users, that is, customers requiring not more than one channel for the purposes of accessing fixed line services such as voice telephony and/or the transfer of data services by way of faxes. In general, lower level access comprises access via standard analogue connections, access via standard cable-modem connections, and access via wireless connections. Typically, these access products broadly reflect similar functional attributes irrespective of the distinctive underlying technological qualities; thus are by definition easily substitutable. Table 1 below lists all the available postpaid and prepaid products requiring low level access, as being currently offered in Malta by GO, Melita, Ozone and Vodafone.

TABLE 1

Lower Level Access Products				
Operator	Type of connection	Product by Brand Name		Type of use
		Postpaid	Prepaid	
GO	Standard exchange line connection	Talk, Talk Anytime Business Talk, Business Talk 500	Easyline ----	residential business
Ozone	CS service (standard exchange line connection hosted by GO)	Talk	Ozone prepaid	all
Melita	Cable-modem connection	Medium (M), Large (L) Large (L), Extra Large (XL)	Flex Telephony ----	residential business
Vodafone	Wireless connection	Talk Unlimited (Dream Pack)	----	all
Ozone	Wireless connection	Small, Medium, Large Package	----	all

Data as at May 2014

TABLE 2

Operator	Connection Type	Data as at May 2014	
		Connection fee (€)	Rental charge per annum (€ incl. VAT)
GO	Connection on standard exchange line		
	Talk (postpaid)		
	Residential	54.97	71.88
	Business	109.95	186.96
	Talk Anytime (postpaid)		
	Residential	54.97	119.88
	Talk 500 - Business (postpaid)		
	Business	109.95	222.24
	Easyline (prepaid)		
	Residential	54.97	0.00
Melita	Cable-modem connection		
	Medium (postpaid)		
	Residential	19.99	71.88
	Large (postpaid)		
	Residential	19.99	119.88
	Business	20.00	222.00
	Extra Large (postpaid)		
	Business	20.00	342.00
	Flex Telephony (prepaid)		
	Residential	32.00	0.00
Ozone	CS service (connection on standard exchange line hosted by GO)		
	Talk (postpaid)		
	Residential / Business	Free	63.72
	Prepaid		
	Residential / Business	Free	0.00

The MCA also considers the pricing differentials and/or similarities that exist between the products identified in Table 1. Through website scanning and product surveying, the MCA notes that in order to buy access to the public telephone network, a user typically pays a one-time connection fee and a monthly rental charge. In this respect, the MCA establishes (Table 2) that in order to access the public telephone network via a standard analogue connection offered by GO, a customer has to pay a one-time connection fee of €54.97 for a residential connection and €109.95 for a business connection. This is applicable for both prepaid and postpaid schemes. On the other hand, a customer subscribing to one of Melita's postpaid plans via cable modem will only have to pay a one-time connection fee of €20; applicable to both residential and business customers. Subscribers to

Melita's prepaid *flex Telephony* are asked to pay a one-time connection fee of €32.00 which includes a €12.00 pre-paid card.

In terms of annual rental charges, prepaid customers are exempted while postpaid customers pay according to the type of subscription package. This is true for both GO and Melita.

The MCA also notes that Ozone provides access to the public telephone network via a wholesale line rental (WLR) analogue hosted by GO. In this case, no connection fees apply for a standard analogue exchange line connection with Ozone.

The MCA also observes that low level access to the public telephone network is also supplied by Vodafone via a wireless solution/connection operating in WiMAX. However, this type of access network is only available for present subscribers, with no new clients being currently targeted. Similarly, Ozone and Vanilla Telecoms are also offering voice over IP services through their wireless broadband infrastructure. Access to the public telephone network via these infrastructures can only, however, be purchased as an add-on to the purchase of a wireless broadband connection. Therefore, users wishing to subscribe or switch from any other operator to Vodafone, Ozone or Vanilla Telecoms must first invest in a wireless broadband connection before actually being able to access the network for the purposes of making voice calls.

Inherently, these access requirements pose a constraint on the potential demand-side substitutability between Vodafone's, Ozone's or Vanilla's wireless access to the public telephone network and other forms of lower level access. In this regard, the revised 2007 EU Recommendation states that, generally, consumers will not upgrade to a broadband services solely for the purpose of accessing voice services[14]. Along the same lines, the MCA is of the opinion that users purchasing fixed access via a wireless broadband connection primarily do so to get access to higher-speed internet services and not essentially to avail of telephony services.

The MCA therefore concludes that the very limited migration to Vodafone's, Ozone's or Vanilla's wireless access network is happening independently of price, and more as a result of demand for wireless broadband access. In this sense, commercial offerings of fixed telephony access services over wireless network operators are not substitutable with offerings over other platforms of lower level access, given that access via a wireless connection can only pose, at best, an indirect competitive constraint on other forms of lower level access.

On the other hand, the MCA notes that fixed telephony access services over the other platforms illustrated in Table 2 above are substitutable to each other and thus constitute the lower level access service. Table 2 highlights the annual rental charges applicable to GO, Melita and Ozone customers, with differences in rental charges for access essentially reflecting different calling plans. However, a small but significant (5 to 10 percent) increase in the price of access, say, via GO's standard analogue exchange, may very well entice subscribers to switch to one of the alternative operators listed, provided that they will turn out to be cheaper while at the same time continue to offer the same level of functionality despite using a different technological platform. This assessment explains the

[14] Commission of the European Communities. (2007) Explanatory note accompanying document to the Commission Recommendation on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services.

MCA's proposition to classify access via GO's standard exchange line, Melita's cable modem and Ozone's CS facility within the same relevant market.

Conclusion on lower level access

On the basis of the above, the MCA concludes that standard analogue connections and standard cable modem connections are substitutable from a demand-side perspective and can therefore be considered to fall within the same relevant market. On the other hand, fixed access services over wireless networks are not substitutable with offerings over other platforms of lower level access, and can at best pose an indirect competitive constraint on other forms of lower level access.

Standard exchange line / cable connections vs. ISDN BRA / Multiple line connections

In this analysis, the MCA also assesses whether ISDN BRA and Melita's multiple line solution with a maximum of two telephone trunks can be classified under the lower level access category, provided that as with analogue exchange connections and standard cable connections the former two technologies also serve the same underlying function; namely the provision of voice call services. The MCA however notes that, while standard analogue connections only support one DDI number, ISDN BRA supports up to a maximum of two telephone numbers including default, DDI, and the Multiple Subscriber Number (MSN). Correspondingly, a standard cable-modem connection supports only one line, whilst Melita's multiple line solution with a maximum of two telephone trunks (i.e. two telephone trunks interfaced directly with the end-user's PBX system) can support up to a maximum of two lines, thereby allowing two calls to be made simultaneously. Melita's multiple line solution with a maximum of two telephone trunks support all the standard features including DDI.

Additionally, ISDN BRA and Melita's multiple line technologies have the facility to provide customers with a variety of advanced call features over and above those available with standard exchange lines and standard cable-modem systems. These advanced features typically include: code controlled barring, call transfer, call waiting, conference calls, calling line identification, call forwarding, anonymous call rejection, 'do not disturb' function, advice of charge during or at end of call, hunting methods, malicious call identification, and DDI.

Charges may however apply for the provision of such advanced call features. In view of this, the MCA underlines that, given the extended services offered along with ISDN BRA and Melita's multiple line solutions, their functional interchangeability with standard analogue connections, standard cable-modem connections, and wireless solutions is, at best, limited. Accordingly, this means that from a functional perspective ISDN BRA and Melita's multiple line solution with a maximum of two telephone trunks cannot be considered under the lower level access category.

In terms of pricing, the MCA explains that if a residential customer requires two channels of fixed access, the annual rental charge for purchasing two standard connections from GO or an alternative operator would be cheaper than the ISDN BRA option offered by GO and by Ozone and the multiple line solution offered by Melita. This suggests that in the event of a small but significant increase in the price of a standard analogue connection, a customer requiring two channels to access voice calls and related data services would more likely subscribe to another standard connection rather than opting for the ISDN BRA option or the multiple line solution.

It is very unlikely, on the other hand, for Melita's multiple line solution with a maximum of two telephone trunks and ISDN BRA subscribers to switch to two standard exchange lines given a small but significant price rise in the former two technologies. Even if it were to be financially cheaper, users would not be willing to switch unless they are ready to give up the extra functionalities for which they had originally subscribed. This situation is unlikely to change within the timeframe of this review.

It also stands to reason that consumers requiring only one channel to access the public telephone network would simply purchase a standard analogue connection being offered by GO or some other lower level access connection from the alternative operators; Ozone and Melita. In fact, a small but significant (5 to 10 percent) increase in the price of access via a standard analogue connection would not be enough to incentivise a customer requiring just one channel / line to switch to ISDN BRA or to Melita's multiple line product, given that the price differential between a standard connection and ISDN BRA is too high to be curtailed by the 10% increase in the price of the former.

Conclusion on standard exchange / cable connections vs. ISDN BRA / Multiple line connections

On the basis of the above assessment, the MCA concludes that standard forms of access are not substitutable with ISDN BRA and Melita's multiple line solution with a maximum of two telephone trunks. This is because the ISDN BRA and Melita's multiple line solution support a number of advanced call features and supplementary services which are not available when purchasing standard analogue connections and standard cable modem connections. The MCA therefore concludes that ISDN BRA and Melita's multiple line solution with a maximum of two telephone trunks shall not form part of the lower level access market and will constitute a separate fixed access market.

Higher level access

The MCA also takes into account those forms of access earmarked for users with higher capacity requirements, that is, customers requiring more than one channel for the purposes of accessing services such as voice telephony and/or the transfer of data services.

A standard connection on a digital ISDN exchange line can support more than one DDI. Indeed, the digital ISDN products offered by GO and Ozone provide thirty 64Kbps channels and a block of 50 DDI numbers connected to a PBX system. This means that a digital ISDN product actually supports a bundle of multiple standard exchange lines. Correspondingly, Melita's multiple line solution can support up to thirty telephone trunk lines interfaced directly with the subscriber's PBX over the fibre network.

Higher level access products can handle a higher traffic load given that these allow for the possibility of accessing data together with voice telephony at a greater bandwidth. Furthermore, higher level access products provide a wider range of advanced call features and business application services (such as abbreviated dialling and sign-up services) which are generally not offered with lower level access products.

Although the MCA considers access to the public telephone network via digital ISDN exchange lines and multiple line solutions as higher level access products, it underlines that there is little scope for demand-side substitution between ISDN BRA, Melita's multiple line solution with a maximum of two telephone trunks on one side, and ISDN PRA/FRA, and multiple line solutions supporting four or more telephone trunk lines on the other. Indeed, demand for ISDN PRA/FRA and multiple lines supporting 4, 8, 16 and 30 telephone trunks is likely to arise from customers that generate a traffic load that cannot be handled by ISDN BRA or Melita's multiple line solution with a maximum of two telephone trunks, let alone being handled by lower level access products.

In this regard, the MCA notes that only a small number of users, namely medium sized and large enterprises, are currently accessing the public telephone network via ISDN PRA/FRA or via multiple line solutions supporting four or more telephone trunks. The MCA underlines that these entities have unique business requirements and therefore cannot actually switch to lower level access products, or to ISDN BRA, and Melita's multiple line solution with a maximum of two telephone trunks.

Conclusion on higher level access

The MCA believes that there may be scope for substitution between higher level access products supplied over different network technologies, provided that they are functionally equivalent and subject to a common price constraint. The MCA has found sufficient evidence to suggest that higher level access services provided over the copper and cable networks are substitutable and therefore fall within the same market.

On the other hand the MCA has concluded that due to price differentials, limitations in equipment interoperability, unique business requirements, and customised network build, demand-side substitution between lower level and higher level access products is unlikely to happen. These factors also limit substitution between higher level access products, namely ISDN BRA and Melita's multiple line solution with a maximum of two telephone trunks, and their 'enhanced' version, namely ISDN PRA/FRA and Melita's multiple line solutions supporting more than two telephone trunks (i.e. multiple lines 4, 8, 16, and 30).

Supply-side substitution

In considering supply side substitution, the MCA asks whether an existing supplier would enter the market in response to a small but significant increase in the price (5 to 10 percent above the competitive level) of fixed access by a hypothetical monopolist.

In the event of a non-transitory 5 to 10 percent increase in the price of access via standard connections by a hypothetical monopolist, it is highly unlikely for a new service provider to join in and start offering access via this platform. In fact, the investment needed to enter the market for this type of access is a significant one, whilst the deployment of a network with nation-wide coverage would entail a significant time delay.

Similarly, the MCA believes that in the process of a non-transitory 5 to 10 percent increase in the price of access via standard connections, it would be highly unlikely for providers of access via standard cable modem connections or via wireless connections to purchase the necessary infrastructure required to provide access via connections on standard analogue exchange lines. The MCA argues that the provider of access via the standard cable modem or any other platform would rather intensify its effort to win a larger share of consumers within the lower level access category, mainly by encouraging these consumers to switch from the analogue connections to cable connections.

The MCA also notes that the possibility for supply-side substitution between lower level access and higher level access is very limited, especially across technological platforms. Therefore, in the event of a small and significant price increase for a product within the higher level access category, an undertaking would rather enhance its infrastructure to start offering a product with similar functional attributes rather than switching from one network to another. The latter scenario would entail significant costs for the service provider, depending on the extent or promptness of any switch that might be contemplated, and the changes in marketing and network arrangements that might be involved.

Furthermore, the provision of higher level access products entails a higher, and scalable, upfront cost for customers requiring these products, than is the case for customers requiring a product from the lower level access category. The prospect of low demand for higher level access products, at least in the immediate future, may limit the scope and feasibility of a shift from one network platform to another. To a certain extent, it would make more sense for the service provider to invest further in its infrastructure and start providing higher level access in parallel to lower level access.

Overall Conclusion

The MCA concludes that there are three main access categories, namely lower level access, higher level access, and ‘enhanced’ higher level access. This distinction allows the MCA to categorise the identified retail access products according to functionality and price.

The MCA considers access via connections on standard analogue exchange lines and access via standard cable-modem connections as falling under the lower level access category. The MCA also considers access to public telephone services via wireless broadband networks to fall within this category. However, the latter form of access is not substitutable with other elements in the same category, and therefore does not fall within the scope of the lower level access market.

On the other hand, the MCA considers multiple lines offered by Melita, ISDN BRA, and ISDN PRA/FRA as falling under one of the two categories encompassing higher level access products. It also underlines that multiples of ISDN BRA or multiples of Melita’s multiple line solution with a maximum of two telephone trunks are not substitutable with ISDN PRA/FRA or else with multiple line solutions supporting four or more telephone trunks.

3.2.4 RESIDENTIAL AND NON-RESIDENTIAL ACCESS

Another major consideration in this market definition exercise is to assess whether the MCA should distinguish between two types of customers, namely between residential and non-residential (or business) customers in view of the current contractual terms of agreement binding the provision of retail fixed access.

The Commission's 2007 Recommendation clearly specifies that the relevant market for retail narrowband access services is one that encompasses both residential and non-residential customers.[15] In its Explanatory Memorandum accompanying this revised Recommendation, the Commission explained that the distinction that had existed between residential and non-residential customers in the original 2003 Recommendation had been dropped due to the fact that market review notifications to it by NRAs had shown that, in most Member States, contractual terms of access did not significantly and systematically differ between residential and non-residential access.[16] The Commission went on to state, however, that NRAs were free to decide on the basis of national circumstances and in line with competition law principles if they wished to segment this market further where this would be appropriate and, in this regard, the Commission pointed to the possibility of '*identifying distinct product markets for different types of access lines*'.[17]

The MCA will once again rely on demand and supply side substitution analysis to determine whether this distinction should apply.

Demand-side substitution

Typically, business customers tend to require a greater range and volume of services and use access primarily to make calls and for other ancillary services such as fax. Moreover, in order to be able to fulfil their commercial requirements, large businesses may require more than one fixed access line and are as a result an important customer to the ISDN BRA and ISDN PRA market. Residential users, on the other hand, although not excluded from purchasing these higher level access services, need fewer value-added services and use their access line for making calls.

At present all local undertakings offer different packages targeted towards residential and business customers when marketing their products on their websites. From Table 3 below it is evident that the two main operators in Malta offer products designed towards particular customers, such as GO's *Talk Anytime* and Melita's *Medium* plan earmarked towards the residential category and GO's *Business Talk 500* and Melita's *Extra Large* intended for the business community.

Despite this, the MCA notes that access to business and residential customers is functionally homogenous, since it is provided over the same infrastructure and provides the same quality of services. It is true that there are instances, mainly in relation to higher level products, where

15 Commission Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (notified under document number C(2007) 5406) (2007/879/EC). Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:344:0065:0069:en:PDF

16 Explanatory Note to the Commission Recommendation on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, Commission Staff Working Document, C(2007)5406, page 22 ("the Commission's Explanatory Note")

17 Ibid., pages 22/3.

marketing strategies differ, such as in terms of pricing plans and discount schemes. However, such differences are only intended to meet the different requirements of different customers rather than to create separate markets based on the type of customer. In essence, the price-quality relationship of both residential and non-residential access is actually determined on the basis of a common competition platform, namely the capacity requirements in terms of usage and not necessarily customer type.

TABLE 3

Operator	Connection Type	Data as at May 2014	
		Connection fee (€)	**Rental charge per annum (€ incl. VAT)**
GO	Connection on standard exchange line		
	Talk (postpaid)		
	Residential	54.97	71.88
	Business	109.95	186.96
	Talk Anytime (postpaid)		
	Residential	54.97	119.88
	Business Talk 500 (postpaid)		
	Business	109.95	222.24
Melita	Cable-modem connection		
	Medium (postpaid)		
	Residential	19.99	71.88
	Large (postpaid)		
	Residential	19.99	119.88
	Business	20.00	222.00
	Extra Large (postpaid)		
	Business	20.00	342.00
Ozone	CS service (connection on standard exchange line hosted by GO)		
	Talk (postpaid)		
	Residential / Business	Free	63.72

Whilst it has been common practice for operators to mainly restrict business customers to purchase exclusively business packages, this practice has declined over the years due to competitive forces. In fact, Melita and Ozone do not differentiate between residential and non-residential according to the type of user but on the basis of usage factor. Consequently, following a hypothetical SSNIP applied by GO, both residential and business customers could switch to Melita or Ozone and subscribe to any one of their services. On the other hand, all operators allow residential users to pick any package, including the packages targeted towards business users. Therefore the strict distinction between residential and business users is fading quickly in the marketplace.

Another important consideration in this assessment is the size of a typical business entity in Malta. According to the National Statistics Office (NSO) 97% of all registered businesses in Malta are made up of self-employed and micro enterprises which engage between 0 - 9 employees. With this context, the MCA argues that the majority of businesses in Malta may very well meet their telephony capacity requirements by purchasing a residential type of telephony plan, more so if they conduct their business activities from their homes. In these instances it is very difficult for any operator to single out residential and non-residential users with sufficient accuracy.

Considering the factors above the MCA concludes that from a demand side perspective, the distinction between a traditional business and residential customer is fading and that current market offerings allow for substitution between different packages offered by different operators.

Supply-side substitution

As argued above, the provision of fixed telephone access to both residential and business customers is offered over the same infrastructure and with the same quality of service. With this in mind, the MCA therefore underlines that the costs associated with supply are not substantially different for business and residential customers and that an undertaking serving the business market may easily switch to supplying residential in response to a small but non-transitory price increase by a hypothetical monopolist. In actual fact, all major fixed operators are currently offering their services to all customers on a nationwide basis.

Conclusion

The MCA's analysis indicates that substitution is possible both from the demand and supply perspective. Hence residential and non-residential services in Malta fall within the same relevant market.

3.2.5 GEOGRAPHIC MARKET

According to the EU Commission guidelines, a relevant geographic market *'comprises an area in which the undertakings concerned are involved in the supply and demand of the relevant products and services in which area the conditions of competition are similar or sufficiently homogeneous and which can be distinguished from neighbouring areas in which the prevailing conditions of competition are appreciably different'*. The Commission's SMP Guidelines also refer to the use of two criteria in determining the geographical scope of a relevant market, namely the area covered by a network, and the existence of legal and other regulatory instruments.

On the basis of the above-mentioned guidelines, the MCA found sufficient evidence to justify a national market definition for retail fixed access. The market definition exercise suggests that there is sufficient demand-side and supply-side substitution in the provision of retail access to the public telephone network given that retail fixed access is being provided by operators located within the same geographical area.

The MCA has also considered the possibility of specific national circumstances that would justify the existence of a sub-geographic market(s) for retail access in Malta. One such circumstance could arise when a property developer plans for and provides access facilities to public electronic communications under an exclusive agreement between the developer and a service provider, reserving the aforementioned facilities for the exclusive use of the respective 'authorised' operator. In this sense, specific attention was given to the property development at Tigne` Point. The MCA notes that the developer, namely MIDI plc., has entered into a commercial agreement with SIS, a fully licensed telephony and internet service provider, to offer access to fully digital IP telephony and data services under the brand name SISCOM within the confines of the Tigne` Point development.

The MCA has looked into whether such an agreement poses a significant barrier to entry for market players located outside Tigne` Point, and whereby customers are restricted from switching to these operators in response to a 5 to 10 percent increase in the price of fixed access services provided by SIS. The MCA notes that GO, Melita, and other fixed line operators can actually provide access to the public telephone network at Tigne` Point. This means that operators can actually provide related fixed access services within this area[18]. Therefore, in the event that SIS Ltd increases the price of its fixed access services, SIS customers are not inhibited from switching to some other operator providing access services at Tigne` Point. The MCA therefore finds no justification to classify Tigne` Point as a sub-geographic market for the provision of retail access. The MCA also notes that, in light of the current commercial realities, the market presence of SIS Ltd remains negligible. This explains why SIS Ltd has not been included in any of the discussions above.

Conclusion

The MCA maintains that the relevant geographic market for the provision of retail fixed access to the public telephone network in Malta is national in scope. This view is supported by the fact that all authorised or licensed operators providing retail fixed line access in the identified markets are operating under sufficiently similar conditions of competition, subject to common constraints in terms of pricing and marketing arrangements, and common conditions of supply across the national territory.

3.3 SUMMARY OF RESPONSES TO THE NATIONAL CONSULTATION AND MCA REPLIES RELATED TO THE MARKET DEFINITION

The MCA notes that there has been broad agreement with respect to its conclusions on the relevant markets. To this effect, the MCA has no further comments or clarifications to make.

3.4 CONCLUSION ON RELEVANT MARKETS

Following the analysis and discussion presented above, the MCA concludes the following product markets in Malta:

- Lower level access to the public telephone network at a fixed location.
- Higher level access with a maximum of two telephone connections to the public telephone network at a fixed location.
- Enhanced higher level access with more than two telephone connections to the public telephone network at a fixed location.

[18] Local legislation, namely Article 4(2) of Chapter 81 of the Utilities and Services Regulation Act, ensures that even in the case of exclusive agreements, the Malta Transport Authority, following consultation with the MCA, may intervene to impose terms and conditions on the issues specified in Article 4(2), whilst having due regard to the interests of customers and operators.

4. MARKET ANALYSIS

Having identified, in the previous chapter, the three relevant markets that comprise retail fixed access in Malta, this section shall now analyse these markets to assess whether any undertaking has significant market power (SMP) as defined in and required by Regulation 8 of the ECNSR (Article 14 of the Framework Directive).

4.1 BACKGROUND TO MARKET ANALYSIS

According to Article 14 of the framework directive *'an undertaking shall be deemed to have significant market power if, either individually or jointly with others, it enjoys a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers'*.

Article 14 also states that *'where an undertaking has significant market power on a specific market, it may also be deemed to have significant market power on a closely related market, where the links between the two markets are such as to allow the market power held in one market to be leveraged into the other market, thereby strengthening the market power of the undertaking'*.

Therefore, in view of the above, one or more undertakings in the relevant markets may be designated as having SMP where that undertaking(s), enjoys a position of dominance. Similarly, an undertaking may be designated as having SMP where it is in a position to leverage market power across closely related markets.

To carry out this analysis, the MCA takes full account of the Commission's guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communication networks and services, as well as the MCA's 2004 market review methodology.

4.2 ASSESSMENT OF SIGNIFICANT MARKET POWER

In this review, the MCA's assessment of whether any local fixed access provider is likely to possess SMP in each of the relevant markets identified previously, is fully compliant with the Commission's Guidelines, whereby a dominant position is found by reference to a number of criteria and its assessment is based on a forward-looking market analysis based on existing market conditions and evidence.

In the MCA's view, the most relevant criteria that shall be used to establish the presence of a dominant position in fixed access markets are:

- Market share
- Barriers to entry
    - Economies of scale and scope

- Vertical integration
- Sunk costs
- Potential competition
- Countervailing buyer power

In carrying out this analysis the MCA will also take into account other aspects of the fixed telephony sector. The MCA will investigate a number of structural and behavioural aspects of the retail fixed access markets and consider evidence of actual market performance to assess whether or not, over the time period considered, these markets have characteristics which may be such as to justify the imposition of regulatory obligations. In doing so, the MCA will look at market factors, such as trends in voice traffic and external-indirect constraints.

4.2.1 MARKET SHARE ANALYSIS

In competition law assessment, market shares are commonly used as a proxy for market power. Since there is a positive association between market share and market power, a first step in the analysis of market power of a firm is by measuring its market share.

Although high market shares are not, by themselves, sufficient to conclude whether an undertaking enjoys SMP in a market, market shares exceeding the 50 percent mark may give rise to the presumption that the firm has market dominance. This notion stems from established European case-law underlying that market shares in excess of 50 percent are in themselves, save in exceptional circumstances, evidence of the existence of a dominant position. The market share analysis, based on available statistical evidence and trends over the 2006 - 2013 period, shall establish whether any operator providing access to the public telephone network in Malta is in a position to exert market power.

GO is the main operator in Malta offering fixed access line services to both residential and non-residential customers. Together with Ozone (via the CS facility), GO provides all standard and ISDN exchange lines in Malta. Access to the public telephone network via basic cable modem connections is provided by Melita, while access to voice telephony via wireless connections is locally provided by Vodafone, Ozone and Vanilla Telecoms. While the MCA reiterates that wireless solutions are not substitutable with offerings over other technologies of fixed access, they will not be excluded from the analysis of this review provided they indirectly influence the relevant markets, especially the lower level access market.

Lower Level Access

As supported by the statistical evidence in Table 4 below, GO and Melita are the two main players within the lower level access market. Collectively, the other undertakings only share 0.5% of the market in terms of subscriptions; which given their business objectives or statistical trends are not expected to grow during the timeframe of this review.

TABLE 4

ACTIVE FIXED LOWER LINE ACCESS CONNECTIONS	2006 Q4	2007 Q4	2008 Q4	2009 Q4	2010 Q4	2011 Q4	2012 Q4	2013 Q4
Total number of active fixed line access connections	208,361	228,262	239,252	244,043	244,729	229,377	226,916	228,599
GO	97.2%	85.7%	77.6%	76.7%	76.8%	73.2%	70.7%	69.5%
Melita	2.8%	13.1%	21.2%	22.6%	22.5%	26.1%	28.6%	30.0%
Ozone	-	1.2%	1.0%	0.4%	0.4%	0.4%	0.4%	0.3%
Vodafone	-	-	0.2%	0.2%	0.2%	0.2%	0.2%	0.1%
SIS	-	-	-	0.1%	0.1%	0.1%	0.1%	0.1%

On one hand, Vodafone, Ozone and Vanilla Telecoms can at best pose an indirect competitive constraint on other forms of lower level access as their wireless solution is primarily intended towards the provision of broadband access.

This is especially so since Vodafone does not enable its customers to purchase fixed telephony on a standalone basis but only as an add-on to its broadband services. Such a limitation implies that Vodafone's fixed access service can only be considered to be a feasible or realistic alternative to that offered by GO and Melita where the customer is also intent on obtaining the broadband connection from Vodafone. A customer who is only interested in purchasing a fixed access service would not consider Vodafone's service an option. It therefore follows that Vodafone's fixed access services may at best act as an indirect constraint only for Vodafone's broadband customers. In addition, as of 2011, Vodafone is no longer providing this service to new subscribers, thus automatically eliminating any further growth in its market presence.

On the other hand, Ozone, while still enjoying a slightly higher market share than Vodafone, has continued to lose out in this respect reaching a market share of just 0.3% as at Q4 2013. On the basis of this trend the MCA is therefore not expecting any significant changes to its position in the market. Meanwhile, the MCA has no data on Vanilla Telecoms given that this operator only started to offer voice telephony via wireless solutions at the beginning of 2014.

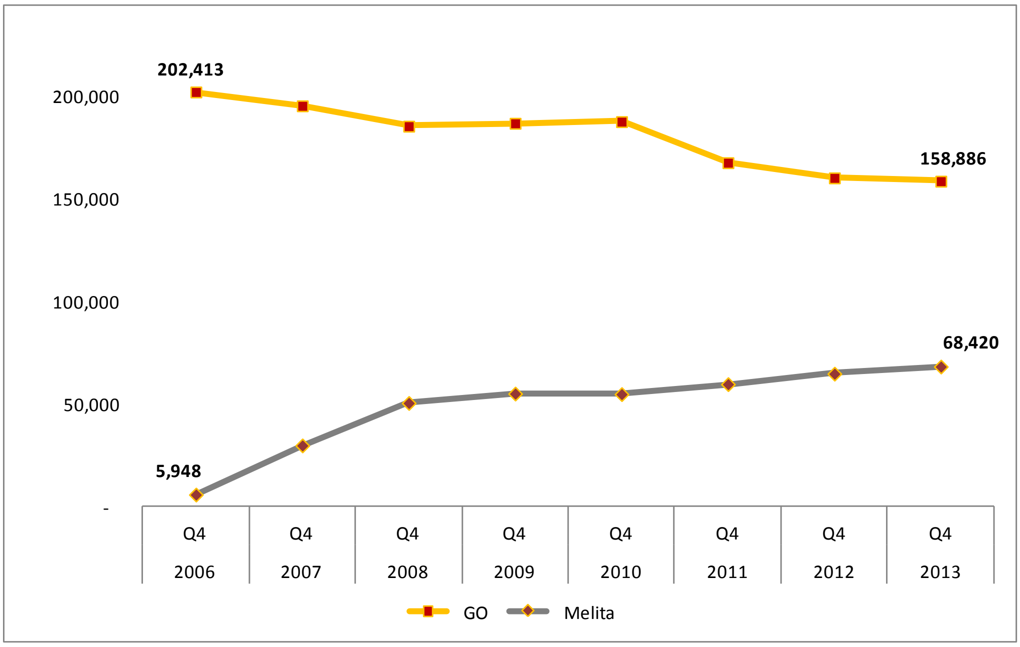
SIS offers telephony and internet access services within the Tigne` Point development. The fact that its network covers a limited area implies that it can only pose a credible constraint on GO and Melita within the Tigne' area. Its potential growth therefore depends on the growth of residents within this private area and its ability to keep these customers on its network.

Therefore, on the basis of this evidence, the MCA concludes that during the period of this review, GO and Melita will continue to determine the main competitive developments in the lower level access market, with little or no pressure from alternative operators.

Prior to 2006, GO had full control over the fixed telephony market, with an actual total of 202,116 connections by Q4 2005. GO's position started however to be challenged in early 2006 when Melita began to offer cable access for the provision of IP based telephony services and had by the end of that same year captured 2.9% of the market. Over the successive years, Melita's market share grew steadily to reach 30% by the end of 2013. Consequently, GO's market share in terms of lower level access connections fell below 70% by the end of 2013 as some 44,000 connections had been lost to the new competition over the 2006 - 2013 period.

Furthermore, Melita's growth in the number of lower level access connections, with a standing of 68,420 subscribers during 2013, was more than the 44,000 subscriptions competed away from GO. This therefore implies that Melita has also been able to capture a significant number of new fixed access subscribers. These movements are graphically highlighted in Chart 2 below.

CHART 2 - LOWER LEVEL ACCESS CONNECTIONS: GO VERSUS MELITA



In view of these developments, the MCA therefore concludes that while GO still enjoys 69.5% share of the lower level access market, Melita has nonetheless managed to successfully penetrate this market and erode the incumbent's dominant position. Furthermore, the MCA believes that this trend will continue to materialise during the time frame of this review and that Melita will continue to pose a strong and direct competitive constraint on the incumbent GO.

Higher Level Access

The incumbent operator, GO, and Ozone both provide connections on digital ISDN exchange lines. These connections offer a similar quality of access service to that provided through connections on standard exchange lines. In fact, connections on digital ISDN exchange lines are also used for the purposes of making or receiving voice calls and faxes, and in support of data communications.

The main difference between standard analogue connections and digital ISDN connections lies in the fact that the ISDN product is a 'multiple' version of the conventional type. The ISDN product is intended for end-users requiring more than one voice channel, a mix of voice and data channels, or higher speed channels. The ISDN product is a higher level access product intended to satisfy users with higher capacity requirements.

As at the end of Q4 2013, the number of GO ISDN subscriptions stood at 2,333 whilst the number of ISDN PRA subscribers with the same operator stood at 351. On the other hand, Ozone – which provides connections on digital ISDN exchange lines via GO's wholesale access – reported 38 ISDN BRA and 10 ISDN PRA subscriptions by the end of 2013. In essence, these figures show that ISDN connections in Malta are extremely low, making up just 1% of the total number of active fixed line access connections in Malta.

Meanwhile, Melita is also providing multiple line connections, offering an equivalent service to the traditional ISDN connections. These multiple line connections represent an enhanced and scalable version of the standard cable-modem connection, tailored to the requirements of the end-user. Typically these multiple line solutions are geared towards large volume users, usually medium-sized and large businesses, and are therefore defined within the higher level access market. Consequently, Melita's multiple line solutions are in direct competition with the ISDN products offered by GO and Ozone. As at the end of Q2 2014, Melita had circa 225 customers subscribed to the multiple line solution product.

In addition to the above, the MCA also notes that Vodafone is offering a variety of fixed line products, earmarked towards key corporate clients, via an E1 interface or through SIP on an Ethernet interface. In essence, Vodafone has a long standing relationship with large corporate businesses through its mobile telephony services and is now trying to leverage on this relationship to also offer these clients a host of other services, including fixed telephony. The MCA has no visibility on the pricing of these ad hoc products and services, as these are negotiated on a case-by-case basis and incorporate a suite of services not just telephony services.

Within this context it is important to highlight that apart from Vodafone, both GO and Melita are actively competing with ad hoc service packages to cater for large businesses that are typically high value clients. This practice is in fact posing a significant indirect constraint on the demand and pricing of standalone ISDN connections.

In view of the above assessment the MCA thus concludes that while GO is the main operator providing traditional ISDN services in the higher level access markets and still enjoys a significant market share, other operators are also catering for such services, making it easier for end users to switch between operators. In fact, alternative operators, such as Melita and Vodafone, typically address the requirements of large businesses via ad hoc packages rather than standalone fixed access services. This is indicative of the low volumes of standalone multiple line services as reported by alternative operators. Furthermore, this trend of ad hoc packages explains why the absolute number of ISDN connections has remained stable over the past years despite a significant increase in the number of businesses registered in Malta and the increased demands for communications services by these same businesses. It is evident that the small number of existing higher level access products can be considered as traditional legacy services.

Moreover, the MCA notes that the underlying functional characteristics and the pricing levels of higher level access connections suggest that these products are largely designed to address the requirements of business customers which typically have countervailing buyer power. This said, the MCA explains that even businesses that require two lines can generally opt for the standard product rather than a higher level access connection because purchasing two standard exchange lines would turn out to be cheaper than any other higher level access connection. To this effect, only a small number of users, namely medium sized and large enterprises, are currently accessing the public telephone network via higher level access services.

Therefore, given that competition in the higher level access markets is concentrated on a limited number of users, and that alternative operators are actively present in the market, the MCA argues that GO will find it extremely difficult to behave independently of competitors and consumers.

4.2.2 BARRIERS TO ENTRY

The MCA considers that an SMP operator has a strong incentive to exclude new entrants from the market in an attempt to secure its market power. Barriers to entry typically serve as obstacles for potential operators to enter the market and compete with the incumbents. This document will, therefore, investigate whether the market is characterised by such barriers to entry. In so doing, the MCA remarks that barriers to entry can be of various types, however, economies of scale and scope, significant sunk costs and vertical integration will be the major elements that are addressed in this assessment.

Economies of scale

Economies of scale refer to the cost reductions that a business may enjoy as it expands its production and penetrates the market in which it operates. Economies of scale are generally achieved because as production increases, the cost of producing each additional unit falls, provided that fixed costs, among other elements, are shared over an increased number of units. On the same lines, the additional costs incurred by a fixed telephone operator will fall as more subscribers are roped in.

With reference to the local scenario, GO, having been providing retail fixed access services for a long time, has managed to establish itself as the main service provider of fixed telephony access. Given this ubiquity and the high density of the network, GO, at more than 160,000 connections continues to hold the largest customer base and likewise benefits from significant economies of scale in Malta. Consequently, the average cost per line for providing access services are more likely to be lower than those faced by new entrants.

Additionally, GO is also likely to experience economies of scale in the provision of associated supply services. In effect, since GO provides for the majority of access lines in the market, the average cost per line for providing associated services, like billing and customer support, would be much lower than the cost incurred by the other operators or new entrants. Fundamentally, these ancillary services would be catering for a larger number of users and the related costs are therefore spread over a larger customer base.

A new entrant would, on the other hand, need to capture a large share of the market if it is to effectively achieve some economies of scale and compete with the incumbent. This may prove to be difficult as the cost of infrastructure investment will be considerable and market penetration will be no match for the established incumbent operator.

Notwithstanding this assessment, the MCA notes that new entry has occurred and GO today no longer enjoys the monopoly dominance it once had. Inherently, this has been possible as other technological infrastructures available in disparate markets, such as TV and broadband access, have been adapted to offer also voice telephony. Melita, for instance, is currently providing standard IP voice connectivity over the cable network, which had originally been intended for pay television access. In this regard, since Melita holds a large customer base in other electronic communications markets and is a fully fledged vertical and horizontal integrated network operator, it also enjoys significant economies of scale in the provision of retail fixed access services.

Moreover, the MCA has already shown in the market share analysis that over recent years Melita has managed to intensify its market presence in the fixed telephony sector, reaching more than 68,000 subscribers by the end of 2013. The MCA has also noted that this growth in Melita's number of fixed access subscribers has happened at the expense of the incumbent operator GO, as in fact confirmed by shifts in the customer base.

With this outlook, the MCA therefore concludes that while economies of scale for GO are expected to remain high, these are not and should not pose a significant constraint on market entry within the timeframe of this review. Likewise the MCA believes that given its market presence Melita is also enjoying economies of scale. In this regard, GO has no competitive advantage over Melita and both operators are in fact competing at par with each other.

Economies of scope

Economies of scope refer to the unit cost reduction of a particular service as it results from being produced jointly with another service by the same firm. In this regard, costs may be saved where common processes or technological infrastructures are used in the provision of a group of services. Likewise, when an operator is present in a large number of markets it can share common cost over a greater range of services.

With reference to this, the MCA notes that GO and Melita are both offering multiple services directly to the consumer, including but not limited to Ethernet connections, fixed calls, TV and broadband access and mobile services. This horizontal integration enables established networks to benefit from economies of scope, where the average costs of production are lower given that these are shared over a greater range of services. To a much lesser extent, Vodafone, Ozone and Vanilla Telecoms also offer multiple services which can lead to cost savings on common processes. However, their market presence is much smaller compared to GO and Melita, such as to be able to achieve the same level of economies of scope in the provision of fixed line access services.

Whilst established network operators can benefit from economies of scope, new entrants, on the other hand, can achieve such economies of scope only if they enter a large number of markets and with sufficient scale. This may once again prove to be difficult as the entry costs involved would be high and similarly it would be difficult to recoup such costs on exit. Therefore, economies of scope, like economies of scale may impede new operators from entering the market.

However, the MCA is of the opinion that whilst GO enjoys economies of scope, new entry has not been deterred. Thus the MCA suggests that economies of scope, although beneficial to the operator that enjoys them, do not pose a significant constraint to market entry during the timeframe of this review.

Furthermore, the MCA notes that Melita also benefits from economies of scope in the retail fixed access market. Provided that Melita, like GO, is horizontally integrated with offerings of TV, broadband access and mobile services, economies of scope are likely to be enjoyed and costs are likely to be saved over common processes.

In view of this assessment the MCA therefore concludes that economies of scope do not pose a sufficient constraint on market entry. Likewise the MCA suggests that the incumbent operator GO has no competitive advantage over Melita as both operators are horizontally integrated and thus benefit from economies of scope.

Vertical Integration

Vertical integration, essentially involves an undertaking operating in a given market, while also being operative in a market that is at a higher or lower level in the chain of provision. Put differently, an undertaking may decide to enter a market by investing in both upstream access to infrastructure markets and downstream service provision markets, as this may give the undertaking a competitive edge over existent and potential competitors by way of market power leverage from upstream to downstream markets. Ultimately, vertical integration may deter potential entry in such markets.

In principle, the integrated provider can make it difficult for new entrants at the retail level to obtain the necessary inputs at a competitive price in the absence of regulation. Similarly, the vertically integrated provider can engage itself in a number of non-price leveraging strategies that may take the form of delaying tactics and withholding of information, amongst others. In view of this, it may therefore be difficult for a new entrant to effectively compete with the integrated operator unless it has its own built network.

With reference to the local fixed telephony market, GO and Melita are both vertically integrated operators, in that they are active at both the wholesale and the retail level on a nationwide basis. For this reason, the MCA concludes that the main fixed line providers in Malta can compete at par on this matter for they are all vertically integrated to the point that any single operator may equally leverage market power from upstream to downstream markets. For the record, Vodafone, Ozone and Vanilla Telecoms are also present in the wholesale and the retail level of fixed access, through the wireless solution, mainly intended for broadband access.

All in all the MCA therefore concludes that new operators have set up their own network and are currently competing with the incumbent operator GO. To this effect, the MCA believes that vertical integration does not and should not pose a constraint on market entry within the timeframe of this review.

Sunk Costs

Sunk costs are the costs that a new market entrant must incur when investing in the network required to provide retail fixed access services and which are not recovered on market exit.

The MCA notes that a new market entrant can offer access products in any of the identified markets by primarily investing in an own-built network. It may also make use of the incumbent’s network by purchasing a wholesale solution such as WLR. Commonly, the former option requires a large upfront investment, most of which will be considered as sunk cost given that investment cannot be recovered if the entrant decides to exit the market.

The MCA, however, has already noted that notwithstanding the significant upfront investment needed, most of which can be considered to be sunk cost upon exit, new entry still took place by way of Melita setting up its own fixed network and competing directly with GO.

The MCA also notes that with the deployment of a national broadband wireless access (BWA) network, over which operators could also offer retail fixed line access, the element of sunk costs associated with the development of an access network has been somewhat abated. To this effect, Vodafone, Ozone and Vanilla Telecoms offer voice over IP services through their wireless broadband infrastructure. Similarly, the MCA has already mentioned that Vodafone is also offering fixed telephony products earmarked towards key corporate clients, via an E1 interface or through SIP on an Ethernet interface.

In view of this evidence, the MCA therefore concludes that while sunk costs are surely to be significant in the retail fixed access markets, new entry has happened by way of both investments in a new fixed access network and new technological infrastructures available in unrelated markets. To this effect the MCA believes that sunk costs, whilst remaining high, will not act as a barrier to market entry during the timeframe of this review.

4.2.3 POTENTIAL COMPETITION

Potential competition refers to the prospect of new undertakings joining the market within a short period of time or existing operators capable of competing with the incumbent operators. In essence, the sheer threat of competition may be sufficient to constraint the incumbent's dominant position behaviour.

The MCA has already highlighted that over the last few years the local telephony sector has witnessed the arrival of a number of new market players.

In July 2005, Melita started offering cable access for the provision of IP based telephony services. Over successive years, Melita's market share grew steadily to reach 30% by the end of 2013. Consequently, GO's market share in terms of lower level access connections fell below 70% by the end of 2013 as some 44,000 connections had been lost to Melita over the 2006 - 2013 period. Moreover, in the market share analysis above, the MCA also explained that Melita's growth in the number of lower level access connections is more than the number of subscriptions competed away from GO. This therefore implies that Melita has also been able to capture a significant number of new fixed access subscribers.

In view of this, the MCA thus argues that Melita is competing at par with GO, and likewise exerting a competitive constraint on GO, by offering retail lower level access services which are fully substitutable with GO's offerings. Moreover the MCA believes that this trend will continue to materialise during the time frame of this review and that GO's market share will be further eroded by the new competition.

Meanwhile, the MCA notes that Melita is also competing directly with GO in the provision of higher level access telephony services. The MCA has already explained that Melita is offering multiple line solutions. In essence these offerings are substitutable with GO's ISDN products and the MCA thus concludes that the incumbent's position in the higher level access markets is also being constrained by these alternative products. Similarly, Vodafone is also offering fixed telephony products earmarked towards key corporate clients requiring high access capacity, via an E1 interface or through SIP on an Ethernet interface.

In view of this assessment, the MCA thus suggests that potential competition also exists in the higher level access markets. In essence, end users requiring high capacity access services can choose from any one of the three operators mentioned, as well as Ozone which also provides ISDN offerings. Likewise they can switch between operators if the alternative offerings by the other operators are deemed to be better in terms of quality and/or price.

Moreover, the MCA explains that since demand for these high level access services is low due to the fact that only a small number of end users require such high capacity services, operators will have to ensure that they are not outplayed in the market on the basis of quality and price. In this sense, local operators will remain under intense pressure in their efforts and drive to remain competitive and consolidate their restricted customer base. As argued earlier, all operators are actively competing and targeting large businesses with ad hoc packages offering a full suite of communications services.

On the basis of these considerations the MCA thus believes that no operator in the lower and higher level access markets is in a position to behave independently of competitors and ultimately consumers.

4.2.4 COUNTERVAILING BUYER POWER

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

The MCA notes that customers have the possibility of acquiring retail access to the public telephone network from a number of operators. In view of this, customers can potentially exert countervailing buyer power to sufficiently constrain any market power enjoyed by a local operator. However the ease with which consumers can switch between one option and another does not solely depend on the range of services available by different operators. In essence, it also depends on whether barriers to switching are significant and therefore pose a constraint on consumers to change a particular service or an operator altogether.

Similarly if customers are satisfied by the services being offered or have had a long-term relationship with their operator, or perceive it as an unnecessary inconvenience to switch to another provider, then customers would be unwilling to exert countervailing power by way of subscribing to an alternative operator. The MCA also notes that the possibility to purchase packaged products bundling two or more electronic communication services may also hinder countervailing buyer power as customers subscribing to such bundles may find it difficult to discontinue any one of the services included in the package.

In terms of the availability of alternatives to the fixed telephony services offered by GO, both Melita and Ozone offer a range of packages to equivalently match, in terms of quality, service and pricing, those being offered by GO. Vodafone, Ozone and Vanilla Telecoms also offer telephony access via their wireless solution. This level of access, however, cannot be purchased as a standalone but is available only with broadband access and thus cannot be considered as a direct alternative to fixed telephony services offered by GO. At best, these wireless connections will nonetheless pose an indirect competitive constraint on other forms of lower level access.

However, while a range of telephony services by alternative operators is available, the ease with which consumers can switch between one option and another may not always be possible. An important consideration in analysing the ease with which consumers can switch between one provider and another relates to the emergence of bundles. In essence, customers can subscribe to packaged products bundling two or more electronic communication services offered by the same provider. Although, in themselves bundles provide certain advantages to consumers in terms of cost savings and single billing, bundles may limit switching between providers where the customer is locked for a particularly long period of time and where the costs of exit are high.

Statistical data collected by the MCA shows that those subscribing to a bundle offer have been increasing significantly over the years. In actual terms, the number of consumers signing up to a bundle offer comprising fixed line telephony increased to circa 97,000 by the end of 2013 or 51% of all post-paid fixed telephony subscriptions. In this regard, undertakings not present across a wide range of electronic communication services may lose ground in terms of competition, as they are excluded from this growing activity.

This said, it is to be clarified that the two main fixed telephony operators in Malta, GO and Melita, are both offering bundle packages comprising two or more electronic communication services. For the record, 48% of fixed telephony subscriptions forming part of a bundle are Melita connections; 52% are GO subscriptions. In view of this, the MCA thus argues that no operator appears to have a competitive advantage over the other by way of the bundle packages being offered and that GO and Melita are competing at par on this level. Likewise consumers wishing to subscribe to a bundle service that comprises fixed telephony have the option to choose between the two operators and are thus in a position to exert some degree of countervailing buyer power on both GO and Melita.

Moreover, the MCA notes that Vodafone, Ozone and Vanilla Telecoms are also offering bundle packages over their wireless solution. These offerings are however limited to fixed telephony and broadband Internet services only. In this regard, consumers wanting to subscribe to a bundle offer comprising other electronic communication services must refer to GO or Melita. Notwithstanding this, the MCA argues that bundle offerings over wireless networks, limited as they may be, can still pose a competitive constraint on similar packages offered by GO and Melita.

All in all the MCA thus finds no reason to conclude that GO's bundle offerings serve as a competitive advantage over other operators. Furthermore the MCA has no evidence to suggest that bundle offerings are holding back people from switching operators or from going back to standalone services.

A survey on bundle services carried out by the MCA between August and October 2013[19] shows that that 70% of households claim to be satisfied or highly satisfied with their current bundle service. To this effect these households would not consider switching operators. However, 43% of households that are not satisfied with the bundle service consider changing the bundle provider. In fact, 9% of dissatisfied households claim to have already switched operators for the bundle. Interestingly, the majority of those that switched (64%) claim it was not difficult to change the original operator. Moreover, only 8% of those that switched and found it difficult relate this to the fact that they were bound by a contract.

Indeed when customers subscribe to a bundle offer they are locked by a contract for a particular period of time and would have to pay termination fees if they decide to terminate their contract prematurely. This said the MCA notes that a number of bundle contracts[20] have by now expired and thus households can choose to discontinue their bundle service without incurring any termination fees.[21] The MCA concludes that this development will continue to materialise during the timeframe of this review, in which case more and more consumers would be able to switch operators without any hindrance if they deem the competition to be offering a better alternative.

Meanwhile the MCA notes that the remaining 49% of post-paid fixed telephony connections and all prepaid subscriptions are procured on a standalone basis; amounting to 131,022 subscriptions as at the end of 2013. The MCA thus argues that while bundles have become increasingly popular over recent years a significant number of customers still choose to purchase different standalone electronic communication services from different operators. Evidently, customers with standalone fixed telephony services still make up for a significant number of connections and therefore these customers might be in a position to exert considerable countervailing buyer power on the local operators.

The MCA already noted that customers can acquire retail access to the public telephone network from a number of operators, all of which are offering ubiquitous connectivity to all networks. To this effect switching between operators is and has been possible. In the market share analysis above the MCA explained that over the 2006 - 2013 period GO's market share in terms of lower level access connections fell below 70% as some 44,000 connections had been lost to Melita.

Interestingly, more customers would consider changing their fixed telephone operator if the price of fixed access and calls were to increase by 5% to 10%. According to the 2013 survey, carried out by the MCA to gauge consumer perceptions on fixed telephony services[22], 54% of households claim they would switch to another operator if their fixed telephone provider were to increase the tariffs

[19] Consumer Perception Survey Results on Bundled Offers:
http://www.mca.org.mt/surveys/consumer-perception-survey-bundled-offers-2013

[20] The 2013 survey results on bundled offers reports that 14% of households already have an expired bundle contract.

[21] Regulation 36 (2) of S.L. 399.28 Electronic Communications Networks and Services (General) Regulations:
http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=10563&l=1

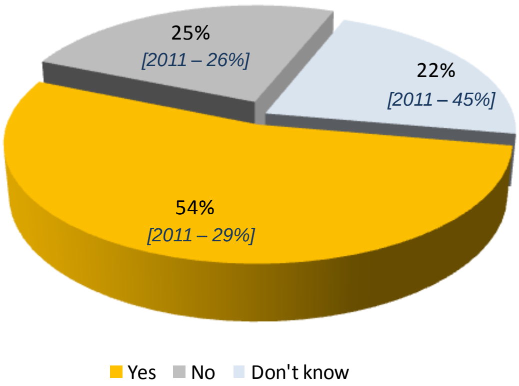
[22] Consumer Perception Survey Results on the Fixed Telephony Sector 2013:
http://www.mca.org.mt/surveys/consumer-perception-survey-fixed-telephony-sector-2013

for access and calls. In a similar survey carried out by the MCA in 2011[23], only 29% of households were ready to change operators if the price of access and calls increased. In this context, the MCA believes that the strong long-term relationship that had traditionally existed between fixed telephony users and the incumbent operator GO has somewhat diminished over the years. As a result customers today are more open to switching between operators if they deem the competition to be offering a better alternative. Likewise customers are more willing to exert countervailing buyer power by way of subscribing to an alternative operator.

CHART 3 - CONSUMER PERCEPTION SURVEY ON FIXED TELEPHONY: CHURN ANALYSIS

If your fixed telephone operator increases the price of access and calls by 5%-10% (€1 - €2 per month), would you switch to another operator?

Sample Size – 800

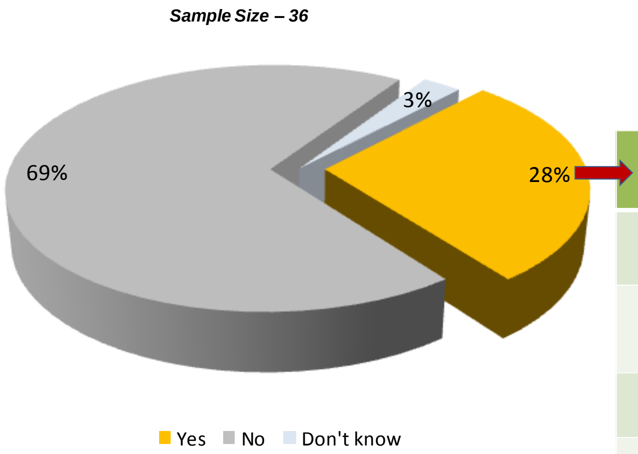


Moreover, the 2013 survey results also suggest that it would be relatively easy to switch between fixed line operators. In fact according to the survey, 69% of households that had actually changed operators over the previous two years did not find it difficult to switch. In this regard, the MCA thus affirms that barriers to switching are not sufficient and fixed telephony users are in a position to exert countervailing buyer power on local operators.

[23] Consumer Perception Survey Results on the Fixed Telephony Sector 2011: http://www.mca.org.mt/consumer/surveys/consumer-perception-survey-fixed-telephony

CHART 4 - CONSUMER PERCEPTION SURVEY ON FIXED TELEPHONY: EASE OF SWITCHING BETWEEN OPERATORS

Was it difficult to change from one operator to another?



Most Stated Reasons	% of those households who claim to have found switching difficult
Customer care not helpful enough	50%
Delays in number porting	30%
Inconvenience of switching	20%
High exit fees	10%

With respect to the provision of higher level access services the MCA explains that, in view of the fact that the number of current and potential customers continues to remain low (circa 1% of the total number of active fixed line access connections), the existence of countervailing buyer power is likely to be more prevalent. The MCA argues that since competition in the higher level access markets is concentrated on a limited number of high capacity users, operators will strive to maintain and even possibly enhance their customer base. In order to achieve this, operators will have to ensure that they are not outplayed by the competition and will thus want to provide services that will meet the quality and price requirements of these users. Fully aware of this strong bargaining position, high capacity users are therefore likely to exert considerable influence on their provider and no operator, more so the incumbent GO, is thus in a position to behave independently of such customers.

4.2.5 OTHER LOCAL MARKET DEVELOPMENTS

In carrying out this market analysis the MCA will also take into account other aspects of the fixed telephony sector. The MCA will investigate a number of structural aspects of the local retail fixed access markets and consider evidence of actual market performance to assess whether or not, over the timeframe of this review, these markets have characteristics which may be such as to justify the imposition of regulatory obligations. In doing so, the MCA will look at market factors, such as trends in voice traffic and external-indirect constraints.

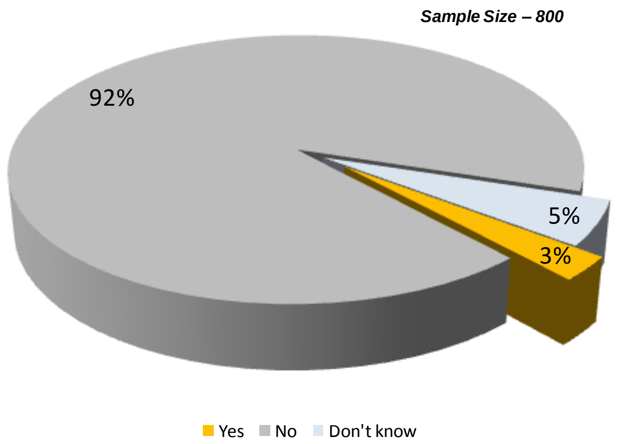
According to 2013 statistics the penetration rate for fixed telephony services in Malta is 97.7%. Furthermore, the 2013 survey[24] results show that only 3% of all household respondents consider

[24] Consumer Perception Survey Results on the Fixed Telephony Sector 2013: http://www.mca.org.mt/surveys/consumer-perception-survey-fixed-telephony-sector-2013

terminating their fixed line connection during the next 12 months presumably to use other means of communications such as mobile telephony.

CHART 5 - CONSUMER PERCEPTION SURVEY ON FIXED TELEPHONY: TERMINATION OF FIXED LINE CONNECTION

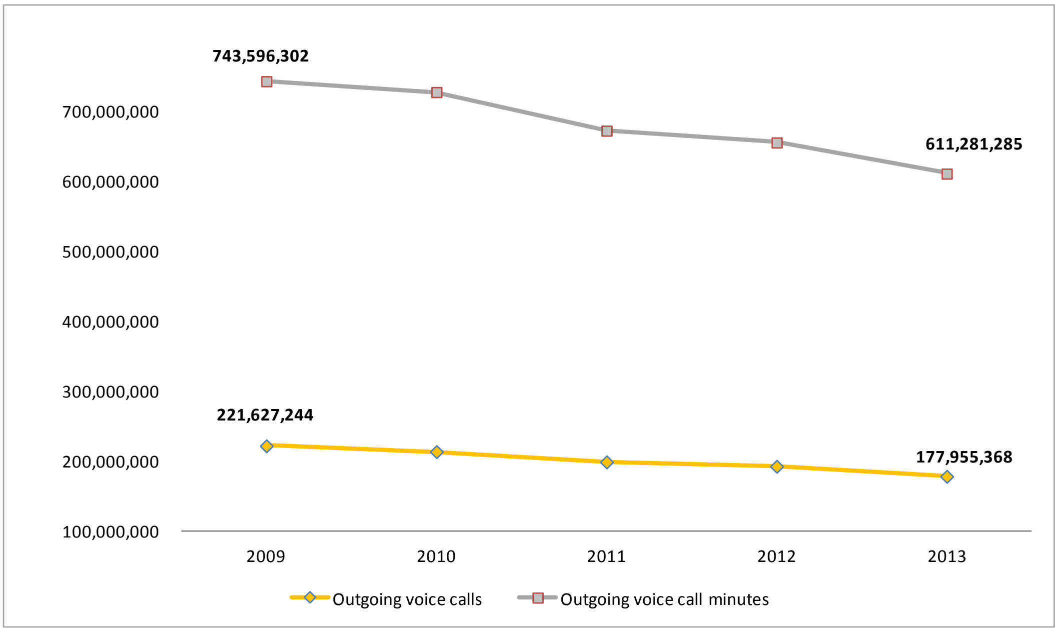
Are you considering terminating your fixed line connection throughout the next 12 months?



In this context, the MCA thus argues that fixed telephony services are still considered to be an important component of the Maltese household. Consequently, this should serve as an incentive for new entry and current market players to compete in order to rope in more subscribers and acquire more presence in a market that so far caters for 97% of all households and registered businesses in Malta.

Having said this, the MCA also explains that traffic volumes with respect to the number of calls and originating minutes over the fixed telephony networks have fallen during recent years. For instance over the 5 year period between 2009 and 2013 the number of fixed telephony voice calls fell by 20% while the number of fixed telephony voice call minutes fell by 18% over the same period.

CHART 6 - FIXED TELEPHONY VOICE TRAFFIC VOLUMES



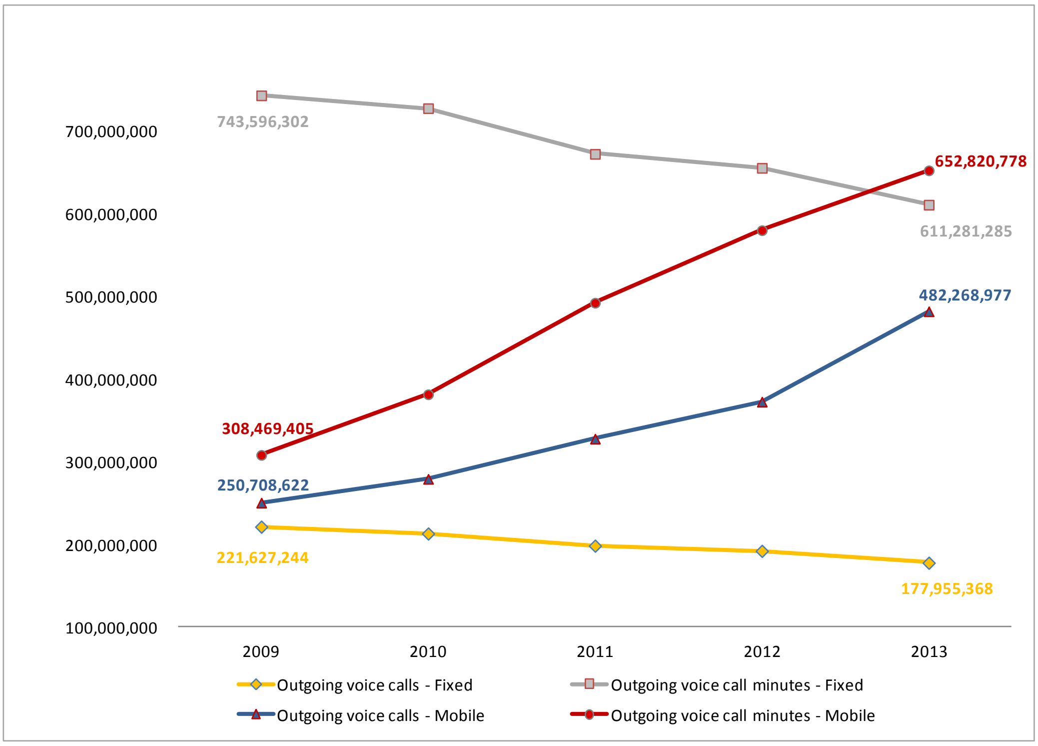
The MCA explains that this development in the fixed telephony traffic volumes has been mainly the result of consumers using other channels of communication, namely mobile telephony and over-the-top (OTT) content such as Skype.

With reference to mobile telephony, the MCA has already explained in the market definition exercise that mobile access is functionally different from retail fixed access; the most salient difference being the mobility factor. Similarly, mobile telephony is also different from fixed telephony in terms of pricing. The MCA has also explained with reference to statistical evidence that there had been no net substitution over the years between mobile access and fixed line access connections. The MCA thus argues that consumers in Malta still prefer to have a fixed line connection even though their mobile usage has increased significantly in recent years. Consequently, the MCA has concluded that fixed access and mobile access pertain to separate markets.

Despite falling within separate markets, the significant increase in mobile usage over recent years is nonetheless posing an indirect competitive constraint on fixed telephony services. In terms of usage, fixed line access and mobile access provide users with a variety of 'secondary' services that continue to highlight the distinctive properties of the two. Fixed access, for example, facilitates services such as fax. Mobile access, on the other hand, facilitates data services by way of text messaging. Similarly, the use of mobile technology to access the internet is becoming increasingly popular. In any event, irrespective of the successful penetration or otherwise of these related services, consumers continue to subscribe to both fixed line access and mobile access for the core purpose of voice telephony.

To this effect fixed line operators are not only competing directly between themselves for market share but are also indirectly competing with mobile telephony for voice traffic. Statistical evidence over the 5 year period between 2009 and 2013 shows that the number of mobile telephony voice calls increased by 92% while the number of mobile telephony voice call minutes more than doubled over the same period. On the other hand, fixed telephony voice traffic volumes have fallen to the extent that the number of voice calls and voice call minutes originating from fixed telephony is today lower than the number of calls and minutes originating from mobile telephony.

CHART 7 - VOICE TRAFFIC VOLUMES: FIXED VERSUS MOBILE



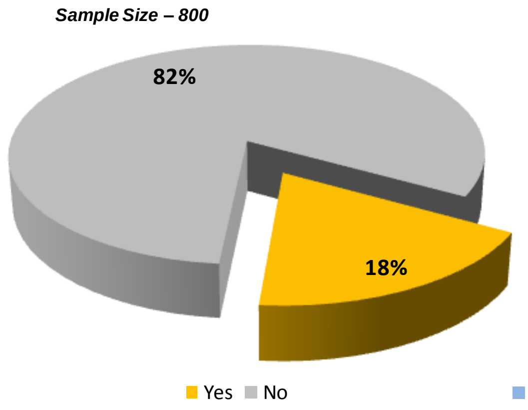
In view of this, the MCA thus argues that even if there were no alternative fixed telephony operators, GO would still be indirectly constrained by mobile voice telephony services. In the absence of regulation it would be very unlikely, therefore, for GO or any other fixed telephony operator to increase the tariffs of fixed access and/or fixed calls beyond the competitive level. This is because if fixed access and/or fixed call tariffs were to significantly increase, the extent with which people are using their mobile phone to make voice calls will further intensify as the price differential between fixed and mobile telephony would continue to narrow. The MCA thus believes that mobile voice telephony services serve as an indirect constraint to the behaviour of fixed telephony operators in the absence of regulation.

Similarly, the MCA argues that OTT services are also likely to be posing an indirect competitive constraint on the fixed telephony markets. In fact according to the 2013 survey[25] 18% of households claim to use OTT services such as Skype and MSN to make local calls. Furthermore, the majority of respondents that make local calls over these services believe that they are a good substitute to fixed line telephony. In view of this, the MCA once again reaffirms that in order to consolidate voice traffic volumes, GO cannot act in an uncompetitive way in the absence of regulation without facing a drop in usage or subscriptions.

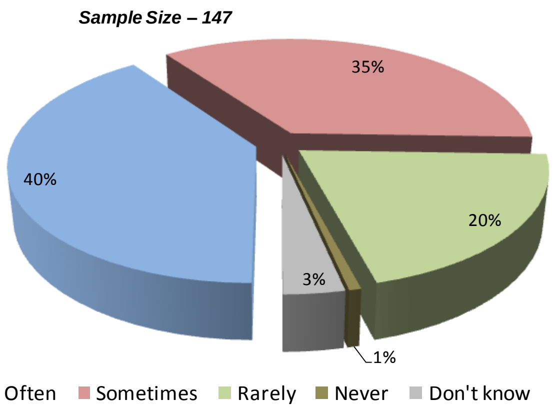
25 Ibid

CHART 8 - FIXED TELEPHONE VERSUS OVER-THE-TOP SERVICES

Do you use the Internet to make local calls (e.g. Skype, MSN etc.)?



If yes, how often do you find that calls over the Internet are a good substitute to fixed line?



Meanwhile, the MCA has already explained that the number of current and potential customers requiring higher level access services is expected to remain low during the timeframe of this review. The MCA notes that the underlying functional characteristics and the pricing levels of higher level access connections suggest that these products are largely designed to address the requirements of business customers. This said, the MCA explains that even businesses that require two lines would generally opt for the standard product rather than a higher level access connection because purchasing two standard exchange lines would turn out to be cheaper than any other higher level access connection. To this effect, only a small number of users, namely medium sized and large enterprises, are currently accessing the public telephone network via higher level access services.

Therefore, given that competition in the higher level access markets is concentrated on a limited number of high capacity users, the MCA argues that operators will strive to maintain and, where possible, enhance their customer base. In order to achieve this, operators will have to ensure that they are not outplayed by the competition and will thus want to provide services that will meet the quality and price requirements of these users. High capacity users are therefore likely to exert considerable influence on their provider and no operator, more so the incumbent GO, is thus in a position to exercise its dominant position and behave independently of such customers.

4.3 SUMMARY OF RESPONSES TO THE NATIONAL CONSULTATION AND MCA REPLIES RELATED TO THE MARKET ANALYSIS

In relation to the market analysis presented above, the MCA received responses from GO, Melita and Vodafone. In its response, GO agrees with and supports the finding that no undertaking enjoys SMP in the markets under review. GO also welcomes the subsequent withdrawal of existing ex ante regulations imposed in the retail fixed access markets.

On the other hand, Melita and Vodafone disagree and express a number of reservations with the conclusions reached by the MCA in its analysis of the retail fixed access markets.

In this section the MCA will seek to further explain and clarify its position with respect to these reservations.

Market Share Analysis

In their submissions, Melita and Vodafone both argue that GO's share of the market remains *"extremely"* high and well above the level at which a presumption of dominance should be made. In essence, both operators acknowledge that GO's market share is declining. However, they maintain that this decline is gradual and the rate at which GO's market share is falling has not picked up pace when compared to the previous review undertaken in 2011.

Melita also argues that GO's market share in the higher level access market is strikingly higher. In order to highlight this, Melita has used the information provided by the MCA in the Consultation Document and presented a table as part of its response to consultation[26] showing that GO holds 89.9% of the total 2,987 connections within the higher level access market. This table is being reproduced below:

TABLE 5 - RETAIL FIXED HIGHER LEVEL ACCESS CONNECTIONS

	GO	Ozone	Melita
ISDN connections	2,333	38	0
ISDN PRA connections	351	10	0
Multiple lines (cable)	0	0	255
Total connections:	2,684	48	255
Market share (%)	*89.9*	*1.6*	*8.5*

In view of all this, it is the opinion of both Melita and Vodafone that GO retains market power in both the lower level and higher level fixed access markets. According to Melita and Vodafone, the finding that no operator enjoys SMP within the relevant markets at this point in time, therefore does not appear to make any sense. In addition, Melita asserts that the MCA's conclusion is also not in accordance with the European Commission's Guidelines stating that *"according to established case-law, very large market shares – in excess of 50% – are in themselves, save in exceptional circumstances, evidence of the existence of a dominant position."*

In reply to these responses, the MCA explains that market shares are commonly used as a proxy for market power. Consequently, a first step in the analysis of market power of a firm is by measuring its market share. Indeed, market shares exceeding the 50 percent mark may give rise to the presumption that the firm enjoys market dominance. This stems from established European case-law. The European Commission makes reference to this notion in its SMP Guidelines for electronic

[26] Melita's Response to Consultation, page 3

communication services[27] when it states that "*very large market shares – in excess of 50% – are in themselves, save in exceptional circumstances, evidence of the existence of a dominant position."*

At the same time, the MCA however explains that the European Commission Guidelines provide further arguments to qualify this point on market share analysis. For instance, the Guidelines state that *"an undertaking with a large market share may be presumed to have SMP, that is, to be in a dominant position, if its market share has remained stable over time".*[28] Furthermore the Guidelines go on to state that *"it is important to stress that the existence of a dominant position cannot be established on the sole basis of large market shares ... The existence of high market shares simply means that the operator concerned might be in a dominant position. Therefore, NRAs should undertake a thorough and overall analysis of the economic characteristics of the relevant market before coming to a conclusion as to the existence of significant market power".*[29]

In a nutshell, a dominant position must therefore derive from a combination of criteria, *"which taken separately may not necessarily be determinative".*[30] For the record the Guidelines also state that *"it is for NRA's to decide which criteria are most appropriate for measuring market presence".*[31]

It is within this context that the MCA has undertaken a thorough review of the market for retail fixed access to the public telephone network. The analysis goes beyond the mere market shares and takes into consideration the market structure and the characteristics of demand and supply of retail fixed access services. Indeed, there have been other cases in the past where a market was deregulated and a market player held a market share in excess of 50%. To this effect, the MCA's analysis and conclusions are in accordance with the European Commission's Guidelines and Melita's assertion is based on a flawed interpretation of these guidelines.

As to the actual market share analysis, the MCA establishes that GO and Melita are the two main players that will continue to determine the main competitive developments in the lower level access market. Other undertakings collectively share 0.5% of the market in terms of subscriptions and operate mainly for specific niches of clients.

In the market share analysis carried out in Section 4.2.1 above the MCA shows how GO's market share has fallen below 70% by the end of 2013 as some 44,000 connections had been lost to Melita over the 2006 – 2013 period. Furthermore, the MCA also explained that Melita's growth in the number of lower level access connections, with a standing of 68,420 subscribers during 2013, was more than the 44,000 subscriptions competed away from GO. This therefore implies that Melita is able to compete and attract customers from GO and was also able to capture a significant number of

[27] Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (2002/C 165/03). Available at:
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2002:165:0006:0031:EN:PDF

[28] ibid., Para. 75.

[29] Ibid., Para. 78.

[30] Ibid., Para. 79.

[31] Ibid., Para. 77.

new fixed access subscribers. This shows that Melita is a credible alternative to GO and the change in market share is a reflection of this.

In view of these developments, the MCA therefore concludes that while GO still enjoys 69.5% share of the lower level access market, Melita is a successful market player and today enjoys a market share of 30% in the lower fixed access market. Furthermore, the MCA believes that this trend, whereby GO continues to lose its market share, will continue during the timeframe of this review. Likewise there is no reason to believe that Melita will not continue to be a credible alternative to GO over the coming years.

As a matter of fact, new data shows that the market shares for GO in the lower level access market as at 2014 Q3 continued to fall reaching 66.9% while Melita's share of the market grew to 32.5%. Likewise the number of Melita's active fixed line connections increased from 68,420 as at the end of 2013 to 74,639 as at 2014 Q3. To this effect the MCA believes that the high market share of GO will continue to be eroded during the timeframe of this review and is not by itself reflective of SMP in this market.

TABLE 6 – MARKET SHARE UPDATE AS AT 2014 Q3

ACTIVE FIXED LOWER LINE ACCESS CONNECTIONS	2006 Q4	2007 Q4	2008 Q4	2009 Q4	2010 Q4	2011 Q4	2012 Q4	2013 Q4	2014 Q3
Total number of active fixed line access connections	208,361	228,262	239,252	244,043	244,729	229,377	226,916	228,599	229,376
GO	97.2%	85.7%	77.6%	76.7%	76.8%	73.2%	70.7%	69.5%	66.9%
Melita	2.8%	13.1%	21.2%	22.6%	22.5%	26.1%	28.6%	30.0%	32.5%
Ozone	-	1.2%	1.0%	0.4%	0.4%	0.4%	0.4%	0.3%	0.3%
Vodafone	-	-	0.2%	0.2%	0.2%	0.2%	0.2%	0.1%	0.1%
SIS	-	-	-	0.1%	0.1%	0.1%	0.1%	0.1%	0.1%

Meanwhile, the MCA also argues that it is extremely difficult for GO to behave independently of competitors and consumers in the high level access market and this despite the fact that the incumbent operator still enjoys a significant market share.

Once again the existence of a dominant position cannot be established on the sole basis of large market shares. To this effect, the MCA takes into consideration other economic characteristics of the high level access market before reaching its conclusions.

To begin with, ISDN connections in Malta are extremely low, making up just 1% of the total number of active fixed line access connections in Malta. In essence, someone requiring two or more lines can generally opt for the standard product rather than a higher level access connection because purchasing standard exchange lines would turn out to be cheaper than any other higher level access connection. To this effect, only a small number of users, namely medium sized and large enterprises, are currently accessing the public telephone network via higher level access services. In this context, competition in the higher level access markets is thus concentrated on a limited number of high capacity users.

Moreover, in order to maintain and even possibly enhance their limited customer base, operators will have to ensure that they are not outplayed by the competition and will therefore provide services that will meet the quality and the price requirements of these users. For instance, the MCA explains that Melita is also providing multiple line connections, offering an equivalent service to the traditional ISDN connections. Consequently, Melita's multiple line solutions are in direct competition with the ISDN products.

The MCA also notes that Vodafone is offering a variety of fixed line products, earmarked towards key corporate clients, via an E1 interface or through SIP on an Ethernet interface. Furthermore, Vodafone is also using other technologies such as microwave links and its mobile network to provide these key clients with a suite of services including IP telephony. Likewise, GO and Melita are also actively competing with ad hoc service packages to cater for large businesses that are typically high value clients.

The MCA has no visibility on the pricing of these ad hoc products and services, as these are negotiated on a case-by-case basis and incorporate a suite of services not just telephony services. Identifying the cost of the fixed element within these packages is problematic given that the fixed telephony component is many times offered in the form of IP telephony as part of the broadband service. Furthermore, the MCA cannot identify these types of packages and the resulting price given that these are not advertised or made public but are negotiated privately. Even if the MCA had to obtain this information, it would be difficult to position these packages within a particular market for individual services.

However, it is certain that these new technologies and bundled packages are posing a significant constraint on the demand and pricing of standalone ISDN connections which are considered as traditional legacy services. A survey carried out by the MCA in 2012 with the business community[32] in fact shows that 22% of medium to large sized businesses in Malta use high-end data services such as Ethernet, IP-VPN and Microwave links. This goes on to explain why the absolute number of ISDN connections has remained stable over the past years despite a significant increase in the number of businesses registered in Malta and the increased demands for communications services by these same businesses. Likewise, the fact that more businesses are using these high end-data services is also indicative of the low volumes of standalone multiple line services as reported by Melita and Ozone.

In view of this assessment, the MCA thus concludes that while there is no doubt that GO is the main operator providing traditional ISDN services in the higher level access markets and still enjoys a significant market share, other operators are also catering for such services, making it easier for end users to choose between operators. GO’s market position in the higher level access market is therefore being constrained by these alternative products making it difficult for the incumbent to behave independently of competitors. Likewise, high capacity users, fully aware of their strong bargaining position, are likely to exert considerable influence on their provider and no operator is thus in a position to behave independently of such customers.

Additionally, the MCA concludes that while GO enjoys high market shares in the provision of ISDN products, these services today only represent a very small number of connections and these higher level products are considered as traditional legacy services. In effect, ISDN products are facing significant competition from single line connections and also alternative products which are negotiated on a case-by-case basis and incorporate a suite of services not just telephony services.

[32] 2012 Business Perception Survey Results on Electronic Communication Services: http://www.mca.org.mt/service-providers/surveys/business-perception-survey

Barriers to Entry

According to Melita and Vodafone, the shortcomings in the MCA's market analysis are further underlined when the *"contrasting"* positions adopted by the MCA in this market review with respect to barriers to entry are compared to the review it undertook in 2011.

In its response Vodafone questions how the very same market deemed not be competitive in 2011 is now assessed as being competitive when there have only been marginal changes in the competitive landscape since 2011. Similarly, Melita argues that *"the complete shift undertaken by the MCA on these issues is extremely stark."*[33] Melita acknowledges that *"market share movements support the proposition that competition is on the increase to some degree"*, however *"it cannot justify the MCA's conclusion in this review that barriers to entry have now vanished and that a market shift to effective competition is inexorable."*[34]

Furthermore, Melita seeks to downplay new market entry, arguing that at the end of 2013 operators such as Ozone and Vodafone had only managed to secure a combined market share of 0.5% and that this total is lower than the 0.6% held by this cohort in the last market review. In view of this, Melita thus believes that the MCA is emphasising market entry and the consequent diminution in entry barriers over the past three years.

Related to this, Vodafone also comments that Ozone is mentioned a number of times throughout the Consultation Document, thus *"giving the misleading impression that this operator is a strong competitor against GO"*[35] when in actual fact Ozone's market share is equivalent to a total of 686 subscribers. In its response, Vodafone also refers to its wireless solution to confirm that it is no longer providing this service to new subscribers.

On these grounds Vodafone therefore argues that its presence in the retail fixed access market has significantly fallen and therefore cannot understand how the MCA continues to suggest that Vodafone's fixed access services may at best act as an indirect constraint.

In reply the MCA argues that, contrary to what has been suggested by the above responses, barriers to entry have not been overlooked in the market review.

The MCA acknowledges that potential barriers to entry are still inherently present. In fact, the MCA states more than once that GO benefits from economies of scale and scope. It also recognises that GO is a vertically integrated operator and thus is able to leverage market power from upstream to downstream markets. Likewise the Consultation Document states that sunk costs in the retail fixed access markets are significant. This said, the MCA however cannot dismiss the fact that new entry has happened and that Melita today is a successful player in the market and is competing directly with GO. To this effect, Vodafone's assessment that there have only been marginal changes in the competitive landscape since 2011 is incorrect.

[33] Melita's Response to Consultation, page 7

[34] Ibid

[35] Vodafone's Response to Consultation, pg 6

In the last market review carried out in 2011 the MCA felt it was premature to deregulate the market. In essence, the impact of bundles was not so strong at the time and Melita's ability to keep increasing its market share was not yet sufficiently tested. Furthermore, the constraints from mobile in terms of usage were much lower at the time. Hence, in the 2011 market review the MCA concluded that GO's position in the retail fixed access market, while starting to be challenged, had not yet been effectively constrained.

The market has since then continued to evolve and GO today no longer enjoys a position to strongly influence the competitive market conditions for its competitors and customers.

At the outset the MCA explains that Melita has continued to increase its market presence and erode the incumbent's dominant position. To this effect new data shows that GO's market share in the lower level access market as at 2014 Q3 continued to fall reaching 66.9% while Melita's share of the market grew to 32.5%. This evidence also confirms the MCA's assessment in the Consultation Document that this trend will continue to materialise during the timeframe of this review. In fact the MCA expects such trend to continue in the coming years.

Moreover, on the basis of market share analysis it is evident that Melita has managed to intensify its market presence in the fixed telephony sector, reaching more than 74,639 subscribers as at 2014 Q3. With this outlook the MCA thus concludes that Melita is able to enjoy economies of scale. Consequently, GO has no competitive advantage over Melita and both operators are in fact competing at par with each other. This is also reflected in the product offerings of both operators and the pricing strategies adopted which mimic each other.

Likewise the MCA notes that Melita also benefits from economies of scope in the retail fixed access market. Provided that Melita, like GO, is horizontally integrated with offerings of TV, broadband access and mobile services, the MCA suggests that GO has no competitive advantage over Melita as both benefit from economies of scope and have the potential to save costs over common processes.

This is further reflected when looking at the statistics of bundle services where both GO and Melita have similar bundle offerings, pricing, and more importantly same market share. In fact it is very relevant to note that 48% of fixed telephony subscriptions forming part of a bundle are Melita connections whilst the remaining 52% are GO subscriptions. In view of this, the MCA thus confirms that no operator has a competitive advantage over the other by way of the bundle packages, and both GO and Melita are competing at par on this level.

Meanwhile, the MCA also explains that GO and Melita are both vertically integrated operators, and thus can compete at par on this matter to the point that any single operator may equally leverage market power from upstream to downstream markets.

In its response, Melita agrees with this assessment but then argues that GO enjoys economies of scale and scope, as well as vertical integration to a far greater extent.[36] Melita however stops short in its response from providing evidence to the MCA to explain how this is true. The MCA, on the other hand, dismisses this claim and has to this effect shown that Melita enjoys similar conditions in particular within the provision of fixed access services within a bundle, which is the most popular

[36] Melita's Response to Consultation, pg 7

product in the market. The MCA therefore concludes that Melita does not face any disadvantage with respect to GO.

Moreover, the MCA also notes that new entry has materialized via fixed wireless networks without the need to deploy a fully fletched wired network. The MCA acknowledges in its Consultation Document that the presence and scope of these wireless networks is not directly comparable to GO or Melita. To this effect the MCA has excluded these networks from the market definition given that they cannot pose a direct constraint on GO and Melita. Likewise the MCA has stated more than once that GO and Melita will continue to determine the main competitive developments in the lower level access market. Nevertheless fixed telephony services over wireless solutions still present an indirect constraint and offer the possibility for consumers to switch to these networks if they so wish.

Their inclusion in the Consultation Document has thus been made with reference to this and it is only Vodafone's and Melita's impression that the presence of these wireless network operators has been overstated in the market review. Excluding these networks would not be correct and would not present a true picture of the market since these operators are authorised with the MCA to offer electronic communications services and are in actual fact offering services to customers.

Countervailing Buyer Power

In their responses, Vodafone and Melita raise a number of issues to counter the arguments brought forward by the MCA on countervailing buyer power in the Consultation Document. The MCA will once again seek to further explain its position on these issues.

Interpretation of MCA Survey Results

At the outset, the MCA wishes to remark that some of the MCA survey results cited in the Consultation Document have been wrongly interpreted by these two operators and thus some clarifications would be in order. For instance, in trying to argue that the MCA is overlooking the unwillingness of customers to switch operators, Melita refers to the statistical result that 70% of all households responding to the MCA's perception survey would not consider switching operators.

In reaction, the MCA stresses that Melita's interpretation of this result is only partial and any statistical inference made to imply that GO has a competitive advantage over Melita is therefore incorrect.

The MCA clearly states that the result is referring to those households that procure telecom services as part of a bundle. Consequently, the 70% of households that are not willing to switch their current bundle operator also include Melita subscribers which as a matter of fact has 48% of all bundle subscribers in Malta. In this regard, it is erroneous to imply that the 70% households not willing to switch between operators are all GO subscribers. Using the same logic, it can be argued that half of these households would not consider switching from Melita to GO. Consequently, both operators have the same strength in respect to their customers making use of bundles.

GO's Bundle Offerings

Likewise this survey result and actual statistics dispel comments made by Vodafone and Melita in their response to consultation that GO's bundle offerings serve as a competitive advantage over other operators.

Given that Melita holds 48% of subscribers on a bundle product featuring fixed telephony connection, the MCA concludes that no operator has a competitive advantage over the other by way of the bundle packages. GO and Melita are competing at par on this level. Likewise consumers wishing to subscribe to a bundle service that comprises fixed telephony have the option to choose between the two operators and are thus in a position to exert some degree of countervailing buyer power on both GO and Melita.

Furthermore the MCA has found no evidence to suggest that bundle offerings are holding back people from switching operators or from going back to standalone services. Indeed when customers subscribe to a bundle offer they are locked by a contract for a particular period of time and would have to pay termination fees if they decide to terminate their contract prematurely. This said the MCA notes that a number of bundle contracts have by now expired and thus households can choose to discontinue their bundle service without incurring any termination fees. The MCA concludes that this development will continue to materialise during the timeframe of this review, in which case more and more consumers would be able to switch operators without any hindrance if they deem the competition to be offering a better alternative.

Switching Analysis

Meanwhile, the MCA has already explained in the Consultation Document that 49% of post-paid fixed telephony connections and all prepaid subscriptions are procured as a standalone service. On this basis, customers with standalone fixed telephony services still make up a significant number of connections and therefore these customers are in a position to exert considerable countervailing buyer power on the local operators. Moreover the MCA notes that customers can acquire retail access to the public telephone network from more than one operator, all of which are offering ubiquitous connectivity to all networks. To this effect switching between operators is and has been possible.

Similarly, according to survey results published by the MCA and cited in the Consultation Document it is evident that the majority of households would switch to another operator if their fixed telephone provider were to increase the tariffs for access and calls. In view of this the MCA thus argues that not only is there the possibility to switch between operators but subscribers today also have the propensity to change their fixed telephony operator if there is a decline in the quality of service or an increase in the price.

Therefore the MCA cannot understand how Vodafone is trying, in its response[37], to interpret these survey results to mean that there exists some form of problem for customers to switch between operators. In essence, according to the 2013 survey, carried out by the MCA to gauge consumer

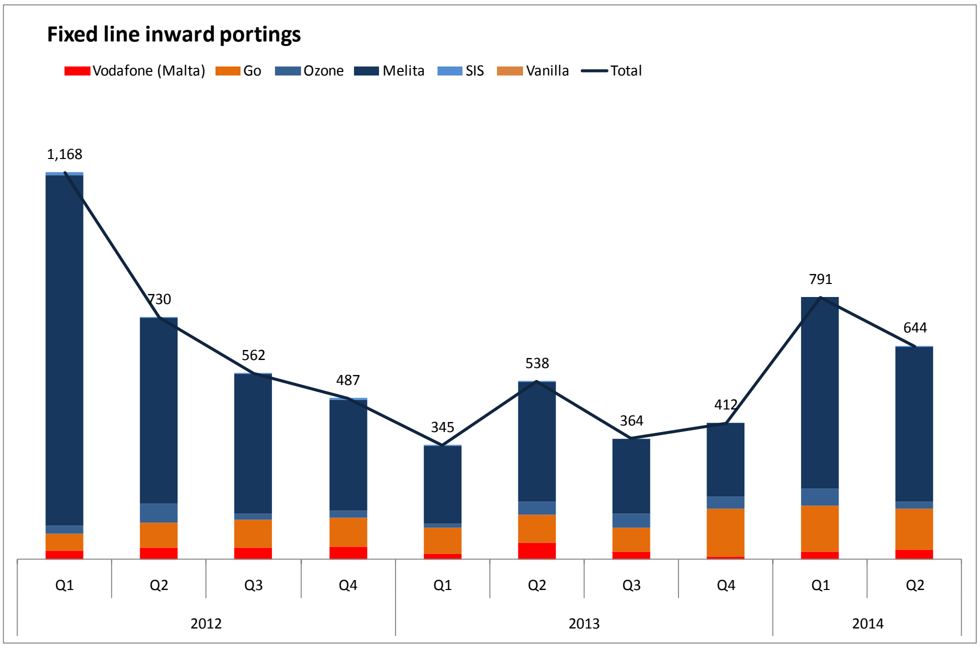
[37] Vodafone's Response to Consultation, pg 12

perceptions on fixed telephony services, 54% of households claim they would switch to another operator if their fixed telephony provider were to increase the tariffs for access and calls. On the other hand only 25% of households confirmed that they would not switch. In its interpretation of results Vodafone puts more weight on the latter cohort to argue that there is a switching problem and that GO will continue to retain its market power in the fixed access market. The MCA believes that this interpretation is totally flawed in that Vodafone has missed out on the fact that 54% is the absolute majority.

In a similar survey carried out by the MCA in 2011 it resulted that 71% of households were not ready to change operators if the price of access and calls increased. Given that the majority of consumers were at the time not willing to switch between operators, such as result led to the uncertainty of whether Melita could continue to make inroads in this market. Hence it was one of the reasons why regulation was not removed by the MCA at the time. The latest surveys however show that the majority are now willing to switch. The MCA thus believes that the strong long-term relationship that had traditionally existed between fixed telephony users and the incumbent operator GO has diminished over the years to the extent that, as the survey results show, it is no longer significant.

Another important factor which facilitates switching is the availability of number portability whereby consumers can keep their fixed line contact number when switching from one operator to another. Statistical data collected by the MCA shows that this option is quite popular and users are making use of this facility as depicted below. More importantly the MCA notes that Melita is consistently gaining the majority of subscribers at the expense of GO.

CHART 9 - NUMBER OF INWARD PORTINGS: FIXED TELEPHONY



As a result customers today are more open to switching between operators if they deem the competition to be offering a better alternative. Consequently, customers are in a better position to exert countervailing buyer power by way of subscribing to an alternative operator.

GO's Broadband Services

On a separate but related note, Vodafone and Melita both remark that in its Consultation document the MCA failed to mention the fact that GO's broadband product is linked to its fixed telephony services. Consequently, a prospective customer cannot take GO's broadband service without also having to take GO's fixed telephony offer. Vodafone also argues that in this respect a GO fixed telephony and broadband customer wishing to terminate or switch the fixed telephony service only is not permitted to do so without also terminating the broadband service.

The MCA responds to this by referring Vodafone and Melita to a separate market review decision dealing with wholesale broadband markets.[38] This is because the fact that GO's broadband product is linked to its fixed telephony services is, if anything, a constraint on broadband and not fixed telephony services. Moreover, the MCA had concluded that no operator in the wholesale broadband access market enjoys SMP and it thus follows that this condition does not result in any competitive advantages for GO over other operators. As for access to fixed telephony services, the MCA already explained that fixed telephony services can be procured either as part of a bundle or on a standalone basis. In both instances, the MCA has shown that customers have the option to choose between different operators. Furthermore, with the increase in the take up of bundles this factor is becoming less prominent. In a market where 51% of customers already take their fixed access service as part of a bundle, the majority of which on a triple play bundle, the argument that GO is gaining some unfair advantage over other operators through this practice is not correct. This is especially so when other operators can replicate the fixed and broadband bundle and also given that GO is still providing fixed access telephony services on a standalone basis.

In view of this, the MCA therefore deems that this argument does not prove in any way that GO holds some competitive advantage over other operators with respect to retail fixed access services. Likewise, the MCA concludes that this has no or very limited impact on the switching possibilities of customers subscribing to fixed telephony services.

Other Market Developments

In its response Vodafone also argues that the market analysis presented for consultation *"makes no reference to the level of prices and the extent to which theses are in line with the level one would expect if the market was competitive".*[39] According to Vodafone there has not been any decrease in the retail prices of fixed telephony for both access and call charges.

[38] Link to MCA Decision on Wholesale broadband markets: http://www.mca.org.mt/service-providers/decisions/final-decisions-market-review-wholesale-broadband-markets-market-4-and

[39] Vodafone's Response to Consultation, pg 14

The MCA on the other hand explains that pricing levels have been considered in the market definition exercise. In reference to this, the MCA agrees that retail fixed access prices have remained constant over the previous review period. In practice, retail fixed access prices have remained stable since 2004 whereby the price of fixed access services provided by GO were subject to regulation. It is therefore evident that the stability in prices over the past ten years was not the result of lack of competition, as Vodafone asserts, but rather that prices were kept at a competitive level as a result of regulation.

In addition, the MCA notes that Vodafone have not provided any evidence to support its argument that fixed access prices in Malta are not at *"the level one would expect if the market was competitive"*. In this regard the MCA argues that fixed telephony access prices as charged by GO and subject to regulation are also at a competitive level. The MCA also has evidence in hand to show that fixed access prices in Malta are among the cheapest in the EU and therefore Vodafone's comment to imply otherwise is unsubstantiated. Further information is being supplied in Appendix 1 (Confidential).

In addition, the MCA notes that customers have the possibility to choose between different operators. Likewise customers can choose between different fixed telephony packages designed to meet the requirements of different users. Consequently, subscribers to retail fixed telephony services are not constrained by one operator and/or one telephony package but can choose from more than one operator the service they want based on their requirements. To this effect fixed access subscribers have the leverage to respond to changes in price levels or the quality of service by switching to alternative operators or different fixed telephony products.

With respect to the pricing levels of fixed telephone calls, these have been analysed in a separate market analysis[40] and the MCA had found this market to be competitive way back in 2009. The MCA has never received any complaints or information which suggests that these markets are not competitive. From the ongoing monitoring and data collection process the MCA has never found any evidence which would indicate that there is some form of abuse by some fixed operator in the fixed telephony calls market. Prices have not increased and the average price per minute of a fixed call stood at €0.01 in the second half of 2013.[41] Retail fixed call rates are therefore considered to be competitive.

Moreover, with the constraints coming from mobile telephony it is very improbable that any fixed operator would consider increasing the prices for fixed telephony services beyond the competitive level. Such a price increase would clearly lead to consumers making use of mobile telephony as opposed to fixed telephony. The MCA has already highlighted elsewhere in this document that over the years mobile usage has by far outstripped fixed telephony usage.

The MCA explains that over the 5 year period between 2009 and 2013 the number of fixed telephony voice calls fell by 20% while the number of fixed telephony voice call minutes fell by 18% over the same period. On the other hand, statistical evidence over the same period shows that the

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[40] Link to MCA Decision on Retail public telephone call services provided at a fixed location: http://www.mca.org.mt/decisions/retail-public-telephone-call-services-provided-fixed-location

[41] MCA Communication Market Review: July – December 2013: http://www.mca.org.mt/reports/communications-market-review-july-december-2013

number of mobile telephony voice calls increased by 92% while the number of mobile telephony voice call minutes more than doubled over the same period. As a result, the number of voice calls and voice call minutes originating from fixed telephony is today significantly lower than the number of calls and minutes originating from mobile telephony.

It is therefore evident, that despite falling within separate markets, the significant increase in mobile usage over recent years is posing a strong indirect constraint on fixed telephony services. In view of this, the MCA thus argues that even in the hypothetical scenario that there were no alternative fixed telephony operators, GO would still be indirectly constrained by mobile voice telephony services.

With reference to the inclusion of OTT services in the market analysis, Vodafone recognises the reality of such services in the market. However, according to Vodafone, such a complex topic is the subject of a consultation in itself and should not be introduced in such a light manner.

The MCA agrees with Vodafone that the emergence and impact of OTT services on traditional fixed and mobile telephony markets is a delicate and complex topic. The MCA explains that it was not the aim of this analysis to carry out such a study or overemphasize the presence of OTT services in the market. Nevertheless, as confirmed by the consumer surveys, consumers are increasingly making use of OTT services and this is a reality in the market. The MCA however explains that at this stage such services only pose an indirect competitive constraint on fixed telephony markets and are not considered to fall within the retail fixed access markets. Substitution between OTT and fixed access services is still rather limited and the use of OTT is generally associated with particular users who are savvy with social media apps and with users who make international calls. Therefore it is clear that at the present time OTT will not act as a substitute to traditional telephony services. Nonetheless, the MCA believes that it is correct to mention in its analysis that OTT, taken as a genre, is an emerging alternative medium through which consumers can communicate, and that in the future the increased usage of OTT may pose further constraints on fixed and mobile telephony providers. Given that this is a forward looking analysis, not mentioning such services in the market analysis would be equivalent to ignoring another market reality which consumers are already using today.

4.4 COMMENTS BY THE MALTA COMPETITION AND CONSUMER AFFAIRS AUTHORITY

In essence, the MCCAA response raises some concerns regarding the MCA's conclusion to deregulate the market where the only competitor to GO is Melita and the latter is making slow inroads in terms of market share. In its response the MCCAA does not dispute the MCA's findings but neither does it support them.

The MCA has explained in detail above that while GO's market share remains above the 50% mark, it no longer enjoys a position to strongly influence the competitive market conditions for its competitors and customers. Moreover, the MCA notes that, given the characteristics of the examined market, none of the local operators can afford to engage in anti-competitive behaviour by increasing the price of their services or decrease the level of their service quality without losing customers to competitors or to mobile telephony usage. Whilst it is true that Melita's gains in market share cannot be deemed as rapid, it is a fact that Melita is consistently, over time, gaining more subscribers at GO's expense. The trend is clear. In a mature market characterised by a rather standardised service it is unlikely to observe large swings in market share over short periods of time.

The MCA has already indicated that consumers are switching and that there are no barriers to switching. Consequently, the MCA expects that Melita will continue to slowly erode market share from GO and there is no reason to doubt that Melita offers a strong competitive constraint to GO. The MCA reiterates that the market share criterion by itself is not a sufficient indicator for the determination of SMP.

The MCA therefore concludes that this market is structurally conducive to competition and therefore customers are protected through market forces. Consequently, there remains limited scope for ex ante regulatory intervention. The MCA deems it very unlikely for these factors to change within the timeframe of this review. Even so, in the absence of ex ante regulation, the MCA is confident that ex post competition law can effectively deal with any potential issues that may arise in the local retail fixed access market.

4.5 OVERALL CONCLUSION ON THE MARKET ANALYSIS

Based on the findings and discussion presented above, the MCA concludes that no operator is able to behave independently from the others in the retail fixed access market and therefore no operator holds significant market power in the following markets:

- Lower level access to the public telephone network at a fixed location.
- Higher level access with a maximum of two telephone connections to the public telephone network at a fixed location.
- Enhanced higher level access with more than two telephone connections to the public telephone network at a fixed location.

This conclusion is supported by a number of factors including:

Market structure

- Slow but constant decline in the market share of the incumbent GO over the past five years
- No significant barriers to market entry that could inhibit effective market competition
- Melita, like GO, is a vertically and horizontally integrated operator enjoying economies of scale and scope
- Sunk costs have not deterred market entry especially with the deployment of fixed wireless networks

Retail offerings

- Variety of fixed access products has increased and prices have remained stable over the previous review period

- Ad hoc products have been developed by operators to address the needs of high value customers

Customer demand and perspectives

- Switching between fixed packages offered by different operators is happening. Most customers believe switching is easy

- The strong long-term relationship that had traditionally existed between fixed telephony users and the incumbent operator GO has diminished over the years. The majority of households would switch to another operator if their fixed telephone provider were to increase the tariffs for access and calls

- Mobile usage poses a significant indirect constraint on the prices of fixed services as customers are originating more calls from mobile networks

- Increased awareness and usage of OTT services will in the coming years increase the pressure on fixed services

- Large business clients enjoy countervailing buyer power as operators aggressively compete to provide these clients with a full suite of services

Ultimately, the MCA believes that these factors will not change within the timeframe of this review and therefore concludes that there is limited scope for competitive shortcomings in the retail fixed access market in the foreseeable future. Even so, in the absence of ex ante regulation, the Office of Fair Competition can effectively deal with any potential issues that may arise in the local retail fixed access market, through vested ex post powers.

4.6 THREE CRITERIA TEST

During the national consultation process on the market review of retail fixed access markets, the EU Commission revised its Recommendation on relevant markets within the electronic communications sector. With effect to this revision the retail market for access to the public telephone network at a fixed location has been removed from the list of markets susceptible to ex ante regulation. However, according to the same Recommendation, it is possible for NRAs to regulate non-listed markets where this is justified by national circumstances.

To establish whether non-listed markets still warrant ex ante regulatory intervention NRAs need to carry out a three criteria test. An identified market would be subject to ex ante regulation only if the three criteria are met cumulatively. If on the other hand, the market assessment fails any of the three criteria, no ex ante regulation would be warranted. If the said market is already subject to ex ante regulation, existing regulation would then have to be withdrawn.

Within this context, regulatory intervention on the local retail fixed access markets would only be warranted if:

1. The identified markets are subject to the presence of high and non-transitory barriers to entry, being either of a structural, legal, or regulatory nature;

2. The identified markets have those characteristics, such as barriers to entry, which do not allow for effective competition without regulatory intervention within the timeframe of this review; and that

3. Competition law by itself is inadequate to address any potential market failure in the absence of ex ante regulation.

Assessment of first criterion

In assessing whether the identified retail fixed access markets are subject to high and non-transitory barriers to entry, the MCA analyses a number of factors that can possibly give rise to such barriers and deter entry in the fixed access market.

From the evidence presented above the MCA did not identify any barriers to market entry that could inhibit effective market competition. Despite GO enjoying economies of scale and scope, and also being a vertically integrated operator, the MCA concludes that Melita today is a successful player in the market enjoying similar conditions and is therefore competing at par with the incumbent, GO. The MCA concludes that despite the presence of high sunk costs in deploying a new access network, new entry has happened. Moreover, with the emergence of wireless broadband networks, new operators have managed to enter the market and are posing an indirect constraint.

In view of this, the MCA therefore concludes that while potential barriers to entry exist, they have not restrained market entry.

Subsequently, this also implies that the first criterion has not been met and therefore the market for retail fixed access should not be any longer subject to ex ante regulation. The EU Commission has also provided for such a possibility in its explanatory notes to the 2007 recommendation on relevant product and service markets within the electronic communications sector susceptible to ex-ante regulation.

According to the EU Commission *'the presence of high and non-transitory entry barriers, although a necessary condition, is not of itself a sufficient condition to warrant inclusion of a given defined market.'* The Commission goes on to underline that *'given the dynamic character of electronic communications markets, possibilities for the market to tend towards a competitive outcome, in spite of high and non-transitory barriers to entry, need also to be taken into consideration.'*

In sustaining its conclusion of a competitive outcome for the retail fixed access market as resulting from assessment of the first criterion, the MCA also examines the state of competition in this market. In doing so the MCA has taken account of the fact that even when a market is characterised by high barriers to entry, other structural factors or market characteristics may mean that the market tends towards effective competition.

Assessment of second criterion

The application of the second criterion involves examining whether or not the market has characteristics such that it will tend over time towards effective competition without the need for ex ante regulatory intervention, and this despite the reality of the market being possibly characterised by high barriers to entry. As per the 2007 EU Commission Recommendation the second criterion *'is a dynamic one and takes into account a number of structural and behavioural aspects which on balance indicate whether or not, over the time period considered, the market has characteristics which may be such as to justify the imposition of regulatory obligations as set out in the specific directives of the new regulatory framework'.*

In this second part assessment, the MCA looks at and investigates a number of market characteristics and indicators that will shed light on whether or not the retail fixed access market is moving towards a competitive outcome.

The MCA has explained above that since the last market review in 2011 the market has continued to evolve and GO today no longer enjoys a position to strongly influence the competitive market conditions for its competitors and customers.

At the outset the MCA shows that GO's market share has fallen below 70% by the end of 2013 as some 44,000 connections had been lost to Melita over the 2006 – 2013 period. Furthermore, the MCA also explained that Melita's growth in the number of lower level access connections, with a standing of 68,420 subscribers during 2013, was more than the 44,000 subscriptions competed away from GO. This therefore implies that Melita is able to compete and attract customers from GO and was also able to capture a significant number of new fixed access subscribers. This shows that Melita is a credible alternative to GO and the change in market share is a reflection of this.

Moreover new data shows that GO's market share in the lower level access market as at 2014 Q3 continued to fall reaching 66.9% while Melita's share of the market grew to 32.5%. This evidence confirms the MCA's assessment that this trend will continue to materialise during the timeframe of this review. In fact the MCA expects such trend to continue in the coming years.

In terms of the availability of alternatives to the fixed telephony services offered by GO, both Melita and Ozone offer a range of packages to equivalently match, in terms of quality, service and pricing, those being offered by GO. In this regard the MCA concludes that customers have the possibility to switch between operators and choose an equivalent fixed telephony service from any one of these operators.

An important consideration taken by the MCA in analysing the ease with which consumers can switch between one provider and another relates to the emergence of bundles. Statistical data collected by the MCA shows that those subscribing to a bundle offer have been increasing significantly over the years. In actual terms, the number of consumers signing up to a bundle offer comprising fixed line telephony increased to 51% of all post-paid fixed telephony subscriptions by the end of 2013.

This said, it has been clearly clarified that the two main fixed telephony operators in Malta, GO and Melita, are both offering bundle packages comprising two or more electronic communication services. For the record, 48% of fixed telephony subscriptions forming part of a bundle are Melita connections whilst the remaining 52% are GO subscriptions. In view of this, the MCA thus argues that no operator appears to have a competitive advantage over the other by way of the bundle packages being offered and that GO and Melita are competing at par on this level. Likewise consumers wishing to subscribe to a bundle service that comprises fixed telephony have the option to choose between the two operators and are thus in a position to exert some degree of countervailing buyer power on both GO and Melita.

All in all the MCA thus finds no reason to conclude that GO's bundle offerings serve as a competitive advantage over other operators. Furthermore the MCA has no evidence to suggest that bundle offerings are holding back people from switching operators or from going back to standalone services.

Meanwhile the MCA notes that the remaining 49% of post-paid fixed telephony connections and all prepaid subscriptions are procured on a standalone basis; amounting to 131,022 subscriptions as at the end of 2013. The MCA thus argues that while bundles have become increasingly popular over recent years a significant number of customers still choose to purchase different standalone electronic communication services from different operators. Evidently, customers with standalone fixed telephony services still make up for a significant number of connections and therefore these customers might be in a position to exert considerable countervailing buyer power on the local operators.

The MCA already noted that customers can acquire retail access to the public telephone network from a number of operators, all of which are offering ubiquitous connectivity to all networks. To this effect switching between operators is and has been possible. In the market share analysis above the MCA explained that over the 2006 - 2013 period GO's market share in terms of lower level access connections fell below 70% as some 44,000 connections had been lost to Melita. This trend continued to materialise and GO’s market share in the lower level access market as at 2014 Q3 continued to fall reaching 66.9%.

According to the 2013 survey, carried out by the MCA to gauge consumer perceptions on fixed telephony services more customers would consider changing their fixed telephone operator if the price of fixed access and calls were to increase by 5% to 10%. In fact 54% of households claim they would switch to another operator if their fixed telephone provider were to increase the tariffs for access and calls. In a similar survey carried out by the MCA in 2011, only 29% of households were ready to change operators if the price of access and calls increased. In this context, the MCA believes that the strong long-term relationship that had traditionally existed between fixed telephony users and the incumbent operator GO has diminished over the years. In view of this the MCA thus argues that not only is there the possibility to switch between operators but customers today also have the propensity to change their fixed telephony operator if there is a decline in the quality of service or an increase in the price.

Another important factor which facilitates switching is the availability of number portability whereby consumers can keep their fixed line contact number when switching from one operator to another. Statistical data collected by the MCA shows that this option is quite popular and users are making use of this facility. More importantly the MCA notes that Melita is consistently gaining the majority of subscribers at the expense of GO.

As a result customers today are more open to switching between operators if they deem the competition to be offering a better alternative. Consequently, customers are in a better position to exert countervailing buyer power by way of subscribing to an alternative operator.

With respect to the provision of higher level access services the MCA explains that, in view of the fact that the number of current and potential customers continues to remain low (circa 1% of the total number of active fixed line access connections), the existence of countervailing buyer power is likely to be more prevalent. The MCA argues that since competition in the higher level access markets is concentrated on a limited number of high capacity users, operators will strive to maintain and even possibly enhance their customer base. In order to achieve this, operators will have to ensure that they are not outplayed by the competition and will thus want to provide services that will meet the quality and price requirements of these users. To this effect GO, Melita and Vodafone are actively competing with ad hoc service packages to cater for large businesses that are typically high value clients. These ad hoc products and services are negotiated on a case-by-case basis and incorporate a suite of services not just telephony services.

In view of this assessment, the MCA thus concludes that while there is no doubt that GO is the main operator providing traditional ISDN services in the higher level access markets and still enjoys a significant market share, other operators are also catering for such services, making it easier for end users to choose between operators. GO's market position in the higher level access market is therefore being constrained by these alternative products making it difficult for the incumbent to behave independently of competitors. Likewise, high capacity users, fully aware of their strong bargaining position, are likely to exert considerable influence on their provider and no operator is thus in a position to behave independently of such customers.

In addition, the MCA notes that retail fixed access prices have remained stable since 2004. The MCA has also made the point that fixed access prices in Malta are among the cheapest in the EU.

Moreover, with the constraints coming from mobile telephony it is very improbable that any fixed operator would consider increasing the prices for fixed telephony services. Such a price increase would clearly lead to consumers making use of mobile telephony as opposed to fixed telephony. The MCA explains that over the 5 year period between 2009 and 2013 the number of fixed telephony voice calls fell by 20% while the number of fixed telephony voice call minutes fell by 18% over the same period. On the other hand, statistical evidence over the same period shows that the number of mobile telephony voice calls increased by 92% while the number of mobile telephony voice call minutes more than doubled over the same period. As a result, mobile usage has by far outstripped fixed telephony usage.

It is therefore evident, that despite falling within separate markets, the significant increase in mobile usage over recent years is posing a strong indirect constraint on fixed telephony services. The MCA thus argues that even if there were no alternative fixed telephony operators, GO would still be indirectly constrained by mobile voice telephony services.

The MCA also argues that the increased awareness and usage of OTT services will in the coming years increase the pressure on fixed service. In view of this, the MCA once again reaffirms that in order to consolidate voice traffic volumes, GO would not act in an uncompetitive way in the absence of regulation.

With reference to the assessment of the second criterion above, the MCA therefore maintains that it has enough evidence to conclude that no operator is able to behave independently from the others in the retail fixed access market and therefore no operator holds significant market power in any of the identified markets.

Assessment of third criterion

In its assessment of the first and second criteria the MCA has given careful consideration to factors which could inhibit market entry and potentially restrict competition within the timeframe of this review. In this respect, the MCA did not identify any significant barriers to market entry that could inhibit effective market competition. It also establishes that no operator enjoys dominance in the retail fixed access market and that this market is effectively competitive. To this result, the MCA can conclude that the first two criteria are not met with respect to the fixed access market.

In its assessment of the third criterion, which is being carried out independently of the findings and conclusions in the assessment of the first two criteria, the MCA considers to what extent it is possible to assume that restrictions on competition or potential market failures may still arise in the fixed access market. In this perspective, the MCA assesses whether competition law by itself is sufficient to provide adequate redress to market shortcomings.

The MCA notes that, given the characteristics of the examined market, none of the local operators can afford to engage in anti-competitive behaviour by increasing the price of their services above the competitive level or decrease the level of their service quality without losing customers to competitors or to mobile telephony usage. No supplier can actually behave independently of competitors as all network providers are offering a ubiquitous service and have sufficient capacity to handle larger volumes of traffic. Any such price increase would therefore result in a shift of customers from that operator to the competition. Mobile telephony usage has also been shown to be posing a strong indirect constraint on fixed telephony services. In view of this the MCA thus maintains that in order to consolidate voice traffic volumes, none of the local operators would act uncompetitively in the absence of regulation or increase tariffs of fixed access and/or fixed calls beyond the competitive level.

The MCA therefore concludes that this market is structurally conducive to competition and therefore customers are protected through market forces. Consequently, there remains limited scope for ex ante regulatory intervention. The MCA deems it very unlikely for these factors to change within the timeframe of this review and therefore concludes that there is limited scope for competitive shortcomings in the retail fixed access market in the foreseeable future. Even so, in the absence of ex ante regulation, the MCCAA can effectively deal with any potential issues that may arise in the local retail fixed access market, through vested ex post powers.

5. REGULATORY IMPLICATIONS

5.1 BACKGROUND TO REGULATIONS

In accordance with regulation 5(4) of the ECNSR, where an operator is designated as having significant market power (SMP) on a relevant market, either individually or jointly with others, the MCA is obliged to impose on such operator appropriate regulatory obligations, referred to in sub regulation (2) of regulation 5 of the ECNSR, or to maintain or amend such obligations where they already exist.

However, in accordance with regulation 5(3) of the ECNSR, where the MCA concludes that a finding of dominance cannot be ascertained, the MCA is not allowed to impose or maintain any specific ex ante regulatory obligations. In the case where no SMP designation is made and where regulatory obligations already exist in the market, the MCA, in accordance with regulation 5(3) of the ECNSR, is to withdraw such obligations placed on undertakings subject to an appropriate period of notice to be given to all parties affected by such withdrawal of obligations.

5.2 EXISTING OBLIGATIONS

The last market review with respect to the provision of retail fixed access services, was carried out in 2011.[42] Under this review the MCA had established that GO held significant market power in all the identified retail access markets. To this effect, the MCA had therefore concluded that the relevant markets for the provision of retail fixed access services were not effectively competitive.

Given the position of dominance held by GO in all of the access markets identified the MCA imposed the following retail measures:

- to counter excessive pricing charges or predatory pricing;
- to counter undue preference to specific end users;
- to counter the unreasonable bundling of services.

However, prior to imposing any of the above retail remedies, the MCA had also taken into account a number of wholesale remedies that had already been imposed on GO through other decisions, particularly the wholesale remedies imposed under the decision entitled ‘Wholesale call origination services provided over fixed networks’ published on the 18th January 2010[43]. This decision mandates on GO the following wholesale obligations:

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[42] Link to 2011 MCA Decision on access to the public telephone network at a fixed location: http://www.mca.org.mt/decisions/mca-decision-access-public-telephone-network-fixed-location

[43] Link to 2010 MCA Decision on wholesale call origination services provided over fixed networks : http://www.mca.org.mt/sites/default/files/articles/Decision-Wholesale_call_orig_FN.pdf

- Access to wholesale services – mainly to provide a wholesale line rental offer, a carrier selection and carrier pre-selection offer, and any associated access services;
- Non-discrimination – to apply equivalent conditions of access to third party access seekers as with its own retail arm;
- Transparency – to publish a reference interconnect offer (RIO) and a WLR offer, and any other information as established by the MCA to facilitate access and interconnection;
- Accounting separation – to provide separated accounts for wholesale access and call origination services; and
- Price control and cost accounting – to apply cost orientation methodology for wholesale call origination services namely CS and CPS services, and a retail-minus methodology for the WLR services.

5.3 DECISION ON REGULATORY INTERVENTION

With reference to the evidence presented in the market analysis above the MCA concludes that no undertaking enjoys SMP in any of the identified retail fixed access markets and that these markets are effectively competitive.

Given these conclusions and considerations, and the provisions under regulation 5(3) of the ECNSR, the MCA does not deem it justifiable to mandate regulatory obligations on undertakings active in the retail fixed access markets. To this effect, the MCA shall therefore withdraw existing retail regulatory measures governing the provisions of GO. This withdrawal shall however be implemented without prejudice to any other general obligations at law or remedies emanating from other market analysis decision.

The MCA underlines that whilst all retail obligations are being withdrawn from the access markets identified in this document, the withdrawal of regulations at retail level shall not affect existing wholesale obligations imposed on GO through other decisions, particularly the wholesale remedies imposed under the decision entitled 'Wholesale call origination services provided over fixed networks' published on the 18th January 2010. Any wholesale obligations listed in this decision were made for ease of reference and the removal or otherwise of these wholesale obligations will be dealt with under a separate market review.

In order to have a smooth transition from a regulated market to a non-regulated market, the MCA shall withdraw the existing obligations within 90 calendar days following the publication of the final decision concerning these markets. This is in accordance with regulation 5(3) of the ECNSR. The MCA believes that this notice period is justified and sufficient to allow all stakeholders to make necessary arrangements for the new regulatory approach to the retail fixed access markets.

5.4 SUMMARY OF RESPONSES TO THE NATIONAL CONSULTATION AND MCA REPLIES RELATED TO THE REGULATORY APPROACH

In its response, GO agrees with the finding that no undertaking enjoys SMP in the markets under review. Likewise GO welcomes the subsequent withdrawal of existing ex ante regulations imposed in the retail fixed access markets.

On the other hand, in view of their comments with respect to the market analysis, Melita and Vodafone both disagree with the MCA's regulatory approach within the retail fixed access market. According to Vodafone and Melita, GO still enjoys SMP in the retail fixed access market and therefore regulation still has a key role to play in this market.

The removal of SMP status on GO will, according to Vodafone, increase the risk of predatory pricing and abusive bundling of services. With reference to the latter concern, Melita also commented on the issue, mentioning that over the last number of years it had made a number of attempts to seek regulatory redress to prevent unreasonable bundling. In its response, Melita explains that it has written to the MCA in 2010 alleging, inter alia, that GO was engaging in unreasonable bundling. Melita also mentions that it has submitted four complaints between 2012 and 2014 to the Malta Competition and Consumer Affairs Authority (MCCAA) alleging, inter alia, further instances of unreasonable bundling on the part of GO. According to Melita these complaints are still pending, awaiting decision by the Competition Authority. In view of this, Melita argues that competition law does not represent an acceptable substitute to ex ante regulation in this instance. Consequently Melita calls for stronger ex ante controls in this area.

With reference to the evidence presented in the market analysis above the MCA reiterates its position that no operator is able to behave independently from the others in the retail fixed access market and therefore no operator holds significant market power in any of the identified markets. Given these conclusions and considerations, and the provisions under regulation 5(3) of the ECNSR, the MCA therefore cannot mandate regulatory obligations on any undertakings active in the retail fixed access markets. The MCA shall therefore withdraw existing retail regulatory measures governing the provisions of GO.

In the absence of regulation, GO is unlikely to increase its fixed access prices beyond the competitive level or decrease the level of service quality as this would see consumers switching to Melita or increase usage of mobile telephony. On the other hand, if GO decides to decrease its price levels then this will benefit consumers themselves. If this is however done as an attempt to foreclose the market by way of predatory pricing, as alleged by Vodafone, the MCA maintains that issues related to predatory pricing can be sufficiently dealt with under competition law articles.[44] The MCA therefore concludes that this market is structurally conducive to competition and therefore customers are protected through market forces. Consequently, there remains limited scope for ex ante regulatory intervention.

Moreover, it is also very relevant to note that 48% of fixed telephony subscriptions forming part of a bundle are Melita connections whilst the remaining 52% are GO subscriptions. In view of this, the MCA thus confirms that no operator has a competitive advantage over the other by way of the

[44] Link to Competition Act, Cap. 379, Article 9: http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8846&l=1

bundle packages, and both GO and Melita are competing at par on this level. In addition, the MCA notes that Melita has never specified exactly what in their view is the potential risk for consumers when alleging unreasonable bundling on the part of GO. The lack of evidence to support such claims is a very important consideration in view that Melita itself is replicating bundles provided by GO at similar if not identical prices. Once again, the MCA reiterates that Melita holds 48% of bundles in Malta. The MCA therefore believes that Melita is in a position to compete with GO in respect of bundles.

In relation to the arguments brought forward by Melita to suggest that competition law is not an adequate substitute to ex ante regulation, the MCA agrees with such statement. The MCA maintains that competition law is a complement to ex ante regulation with the two regimes targeting different regulatory objectives. On one hand, ex ante regulation is the tool that drives a market from a situation where one or more operators hold a position of SMP to a market where consumers are safeguarded through competitive forces. On the other hand, ex post regulation is the tool that addresses market failure on a case by case basis within a competitive market.

The MCA believes that the retail fixed access market is now at a mature stage where ex ante regulation is no longer justified in the absence of any operator holding SMP. The analysis above showed that the market structure is one that supports competition by itself. Therefore in line with the provisions under regulation 5(3) of the ECNSR ex ante regulation has to be withdrawn. In the absence of such ex ante regulation, ex post regulation should be sufficient to address any market failures that can potentially arise. The MCA believes that the argument brought forward by Melita, that the number of pending cases before the MCCAA is a valid reason why the MCA should continue to regulate ex ante, is simply not acceptable. The ex ante regulatory regime is not a substitute to the ex post regime. The MCA believes that the principles of ex post competition law are universal and should be equally applicable and sufficient in dealing with any problems that arise in a competitive market. Therefore the MCA reiterates that any potential market failure in this market can be sufficiently addressed under the ex post framework.

In addition, Melita also refers to the appeal lodged on the 8th March 2012 with the local Administrative Tribunal requesting it to annul and revoke that part of the 2012 Decision titled 'MCA decision on access to the public telephone network at a fixed location'[45] that dealt with remedial measures put in place to counter the unreasonable bundling of services. In its submissions Melita had argued that the regulatory obligations imposed in 2012 by the MCA on GO with respect to the unreasonable bundling of services were insufficient. Melita notes that the Tribunal upheld its request and so revoked and annulled that part of the MCA's Decision.

The MCA explains that this judgement is now currently sub-judice, awaiting final decision by the Court of Appeal, after an appeal was filed by the MCA on 3rd July 2013. Consequently, the MCA will not pronounce itself on the matter per se. However the MCA would like to explain that in its judgement the Tribunal upheld Melita's request that the MCA has the powers at law to consider bundles which are composed of regulated and unregulated products. The MCA contended that such powers go beyond existing powers at law and consequently has appealed this Tribunal's decision. In this respect the MCA therefore clarifies that the Tribunal did not identify any specific market failure attributable to GO in respect to its bundling of services but simply limited its decision to express the

[45] Link to MCA Decision:
http://www.mca.org.mt/decisions/mca-decision-access-public-telephone-network-fixed-location

view that the MCA has the powers to consider such bundles in its entirety and should therefore consider bundles within this widened context.

On a separate but related note, Vodafone also questions the MCA's regulatory approach in this market by making reference to the fact that only three of the 28 EU Member States determined this market as being competitive. Therefore, according to Vodafone, it is surprising that in the absence of any evidence to support a competitive outlook, the MCA has deemed this market as being prospectively competitive.

The MCA cannot understand Vodafone's logic for continued regulatory intervention on the basis that only three out of 28 EU Member States have determined the retail fixed market to be competitive. National Regulatory Authorities are to decide whether a market is effectively competitive or not, on the basis of market characteristics prevailing in their particular country and definitely not on the basis of what is happening with other Member States. In the mean time, the MCA notes that the European Commission has updated the Recommendation on Relevant Markets.[46] Under this revised Recommendation, the market for retail fixed access services is no longer included as a market that is susceptible to ex-ante regulation. This latest development therefore happens to dismiss what Vodafone is trying to imply as it is clear that the Commission did not share the same reasoning when revising its Recommendation. This said the MCA continues to stress that the finding of SMP should be based on market characteristics and conditions prevailing in Malta and not influenced by what is happening with other Member states.

5.5 MONITORING OF FUTURE MARKET DEVELOPMENTS

The MCA considers that, given the dynamic nature of the local retail fixed access markets and the fact that all existing retail regulations are being withdrawn, it is important to keep a close watch on the progress and developments in these markets.

To this end, the MCA intends to analyse market trends and developments on an ongoing basis, and remains committed to issue a new market analysis at any point in time in response to any deterioration in the competitive level of the market.

The MCA will also keep the market under close observation in accordance with the reservations expressed by the OFC in its response to the consultation. In particular, in the unlikely event that competition in the retail fixed access market deteriorates, the MCA will pass on any evidence to the OFC for further investigation. Should this investigation show that ex post competition law cannot adequately address this market failure, the MCA would initiate a new analysis in order to re-establish ex ante regulatory controls as appropriate.

[46] Commission Recommendation of 09.10.2014 on relevant product and service markets susceptible to ex ante regulation, C(2014) 7174, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.295.01.0079.01.ENG

APPENDIX 1 - CONFIDENTIAL

[✂] – Additional confidential information disclosed in a separate document to the EU Commission

APPENDIX 2 – MCCAA COMMENTS LETTER (3 PAGES)

MCCAA
MALTA COMPETITION AND
CONSUMER AFFAIRS AUTHORITY

18 November 2014

Dr Edward Woods
Chairman
Malta Communications Authority
Valletta Waterfront
Pinto Wharf
Floriana

Dear Dr Woods

Retail Access to the Public Telephone Network at a Fixed Location

The Office for Competition (OC) has been consulted with regard to the Malta Communications Authority's (MCA) Report entitled *"Retail Access to the Public Telephone Network at a Fixed Location".* The following are the OC's observations on the matter.

As per the SMP guidelines, the OC understands that the said report constitutes an *ex ante* analysis in accordance with its remit under the electronic communications legislation, in order to examine current *ex ante* measures in place, and to evaluate whether, in accordance with the Electronic Communications Regulatory framework, these should be retained or otherwise. This is the limited scope of such market reviews as the one under discussion.

Paragraph 72 of the SMP Guidelines observes that the ECJ's has clarified that the fact that there is dominance in a market does not preclude some competition, but merely enables an undertaking to have an appreciable effect on competitors in the market.

Paragraph 75 of the SMP Guidelines indicates clearly that a market share of over 40% would give rise to single dominance concerns. The same paragraph indicates that dominance can also exist in cases of lower market shares. The Commission refers to established case law whereby a 50% or larger market share would be treated as a dominant position, save in very exceptional cases. The current consolidated version

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of the Framework Directive treats significant market power in the same way as dominance as defined by European case law. While it is recognised that market shares are not by themselves the only factor establishing dominance (or significant market power, which is now treated in the same way as dominance in the electronic communications sector), the presence of a large market share is a good indicator of it.

The OC wishes to express some concern that GO has not been found to have significant market power. This particularly in the lower level access to the public telephone network at a fixed location, where GO has a market share of 69.5% as at Q4 2013. This market share meets the requirements of dominance or, in this case, significant market power[1]. While the market share has not remained stable (since it has declined slightly due to Melita's entry), the decline of GO's market share has been slow. In the words of the Commission (para 75, SMP Guidelines):

"The fact that an undertaking with a significant position on the market is gradually losing market share may well indicate that the market is becoming more competitive, but it does not preclude a finding of significant market power".

In this context, the Report does not seem to deal with the question of whether another operator using a technology similar to that of GO and Melita can and would enter the market at present under the same conditions. The other market players in fixed telephony have a very insignificant market share (three entities collectively having 0.5% of the market). GO's only serious competitor is Melita. Even Melita's market share is less than half that of GO.

GO's first-mover advantage, brought about by long-standing monopoly being the incumbent since its inception, is also relevant. Melita has had first mover advantage in fixed cable technology and retains this exclusive access to date. These respective positions have enabled both companies to penetrate the retail public fixed telephony markets with considerable ease compared to other competitors, such that the competitors' market shares have remained insignificant.

The current infrastructure and Malta's geographic logistics entail that it is not technically feasible for a new operator with like technology to consider investing in a new infrastructure, even were it to be financially feasible. Paragraph 74 of the SMP Guidelines states that an "NRA should take into account the likelihood that undertakings not currently active on the relevant product market may in the medium term decide to enter the market following a small but significant non-transitory price increase. Undertakings which, in case of such a price increase, are in a position to switch or extend their line of production/services and enter the market should be

Note – AKZO vs. Commission and *Hoffman La Roche vs. Commission* – over 50% was considered to be a dominant position.

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treated by NRAs as potential market participants even if they do not currently produce the relevant product or offer the relevant service." A new operator would not find it practical to enter the market and build its own like infrastructure. This is also somewhat alluded to in the Report.

During the past 5 years GO's market shares have declined at very slow pace from 2009 to 2013 where GO has lost only 7.2% of the market. The market share of Melita during this time has increased at slow pace: it has gained only 7.4% of the market, not all of which is composed of subscribers who have switched from GO. This ought to raise concerns as to how far the market can be considered to be competitive: that there is some competition cannot be denied, but it is not clear as to whether the market shares will shift significantly in the near future. In particular the Report outlines that 70% of households are generally satisfied with their service and only 54% would switch in the event of a price increase.

The MCA seems to regard the market as competitive, but in fact the only real competition in the market is between Melita and GO due to the small size of any other competitor. To this end, it is unclear to what extent (healthy or otherwise) the MCA considers the market to be competitive. The existence of a single competitor may not necessarily amount to healthy competition.

The OC has, in submitting the above observations, consulted the full text of the Report available on the MCA's website. These observations are being submitted in the context of the specific provisions of the SMP Guidelines in the particular sector of Electronic Communications. As the authority vested with *ex post* powers, the OC reserves the right to re-examine any or all of MCA's recommendations in the light of facts and evidence that may arise in future cases or matters referred to it and to reach different conclusions. The OC's position is being taken in accordance with the SMP Guidelines (para 73) to the effect that a National Competition Authority may find different examples of dominance when examining *ex post*.

Yours sincerely

Marcel Pizzuto

Acting Director General
Office for Competition