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Malta Communications Authority (MCA)

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Malta

For the attention of:
Mr Jesmond Bugeja
Chief Executive Officer

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Subject: Case MT/2022/2420: Wholesale dedicated capacity in Malta

Article 32(3) of Directive (EU) 2018/1972: No comments

Dear Mr Bugeja,

1. PROCEDURE

On 18 November 2022, the Commission registered a notification from the Maltese national regulatory authority (NRA), the Malta Communications Authority (MCA) ([1]), about Malta's market for wholesale dedicated capacity ([2]).

The national consultation ([3]) ran from 30 September 2022 to 1 November 2022.

([1]) Under Article 32 of Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (the Code) (OJ L 321, 17.12.2018, p. 36).

([2]) Corresponding to market 2 in Commission Recommendation (EU) 2020/2245 of 18 December 2020 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with the Code (the 2020 Recommendation on Relevant Markets) (OJ L 439, 29.12.2020, p. 23).

The Commission sent a request for information ([4]) to the MCA on 24 November 2022 and received a reply on 29 November 2022.

Under Article 32(3) of the Code, NRAs, the Body of European Regulators for Electronic Communications (BEREC) and the Commission may make comments on notified draft measures to the NRA concerned.

2. DESCRIPTION OF THE DRAFT MEASURE

The notification concerns the review of the wholesale dedicated capacity market in Malta.

2.1. Background

The last review of Malta's wholesale dedicated capacity market was previously notified to and assessed by the Commission under case MT/2016/1957 ([5]) concerning both retail and wholesale high-quality access provided at a fixed location ([6]).

The MCA identified a retail market and a wholesale market for the provision of high-quality access and connectivity services over national leased lines in Malta. On the basis of a substitutability assessment, both markets comprised leased lines provided over analogue, semi-digital, synchronous digital hierarchy (SDH), Ethernet and wavelength-division multiplexing (WDM) solutions, with all bandwidths included. The MCA found the scope of both markets to be national.

The MCA found that the retail market did not pass the three-criteria test, while it concluded that the wholesale market was not competitive, with the incumbent GO still having significant market power (SMP). On the basis of these findings, the MCA maintained all the wholesale regulatory measures imposed on GO in the previous market review:

i) access to/and use of specific network facilities;

ii) transparency;

iii) non-discrimination;

([3]) In accordance with Article 23 of the Code.

([4]) In accordance with Article 23 of the Code.

([5]) C(2016) 8822.

([6]) The MCA considers that the wholesale market for the provision of dedicated capacity corresponds to the market for wholesale high-quality access provided at a fixed location listed as market 4 in Commission Recommendation 2014/710/EU of 9 October 2014 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 (the 2014 Recommendation on Relevant Markets), OJ L 295, 11.10.2014, p. 79.

iv) price control ([7]);

v) cost accounting;

vi) accounting separation.

The Commission commented, asking the MCA to promptly adjust its regulatory costing model, which implied the double counting of installation costs in the annual rental charges. In the context of the previous case MT/2013/1480 ([8]), the MCA said it would carry out adjustments to the model, but ultimately did not do so due to resource prioritisation ([9]). The Commission stressed the need to ensure that regulated prices are set in a cost-oriented and transparent manner and, in particular, that wholesale leased lines prices resulting from the BUCM2 model accurately reflect the pricing structure envisaged by the MCA, especially because of the significant changes occurred in the wholesale market for leased lines since the development of the BUCM2 model ([10]) .

2.2. Market definition

Having identified the relevant retail market taking into account the demand-side and supply-side substitutability of products using the small but significant and non-transitory increase in price (SSNIP) test methodology, the MCA considers that the wholesale market comprises the provision of dedicated capacity using the following product interfaces: Ethernet, WDM and business-to-business (B2B). Traditional interfaces ([11]), included in the market definition in the context of the previous market review, are no longer considered part of the wholesale market. The MCA says that they have been largely phased out and are no longer offered commercially. They are therefore not a competitive constraint on the other three product interfaces.

Five operators in total provide dedicated capacity services in Malta. Three of them, GO, Melita and Epic, are network operators active both at wholesale and retail level; Space Hellas and BMIT are value-added resellers active exclusively at retail level, operating on the basis of commercial resale agreements with the three network operators. GO, Melita and Epic supply Ethernet and B2B products. GO also supplies WDM-based solutions, while Melita is considered in a position to provide such services as well, as it used to do so in the past.

With competitive conditions sufficiently homogenous across the country, the MCA considers the wholesale market for dedicated capacity to be national in scope.

([7]) The cost model BUCM2 has remained unchanged compared to the previous decision.

([8]) C(2013) 4961.

([9]) As the MCA indicated in its response to the Commission’s request for information.

([10]) Notably the entry into the market of alternative operators and the steady migration of end-users from traditional interfaces leased lines to Ethernet and WDM-type connections.

([11]) Traditional interfaces include analogue, semi-digital and (SDH) connections.

2.3. SMP assessment

The MCA carried out an SMP assessment ([12]) using the following criteria from the Commission's SMP Guidelines ([13]) which it deemed most relevant in the current case:

i) market shares and market share trends;

ii) duplication of infrastructure;

iii) economies of scale and scope;

iv) vertical integration;

v) potential competition;

vi) switching and countervailing buyer power.

In terms of market share and market share trends, the MCA observes that while the size of the market remains relatively small in terms of the number of customers ([14]), Melita and Epic are overall increasing their market shares at the expense of the incumbent GO. The three network operators compete at wholesale level, self-supplying their retail arms and serving the value-added resellers. Both at retail and wholesale level, GO's market share in terms of the number of connections and revenues has constantly and significantly decreased since 2017, while the market shares of Melita and Epic have overall increased ([15]). The MCA observes that there is substitution between GO and alternative providers and this trend is likely to continue in the future.

On the duplication of physical infrastructure, the MCA recognises that alternative operators are unable or lack incentives to further duplicate GO's physical infrastructure, the only ubiquitous one, in particular given the high sunk costs and the limited number of potential customers. However, alternative operators have managed to accommodate new retail and wholesale demand for dedicated capacity services and to establish their presence in commercial centres and business districts. All network operators have signed commercial resale agreements with value-added resellers. These agreements are considered sustainable. Epic's infrastructure is overall significantly smaller than GO's and Melita's and, unlike the latter, Epic does

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([12]) In accordance with Article 67(3) of the Code.

([13]) Communication from the Commission C/2018/2374 — Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services, OJ C 159, 7.5.2018, p. 1.

([14]) 396 connections by the end of March 2022.

([15]) At retail level, GO's market share in terms of the number of connections decreased from 74% in 2017 to 49% in Q1 2022, in terms of revenues from 34% in 2017 to 22% in Q1 2022. At wholesale level, in terms of the number of connections, it decreased from 77% in 2017 to 57% in Q1 2022, and in terms of revenues from 54% in 2017 to 44% in Q1 2022. In the same period, in the number of connections, Melita went from 7% to 13% at retail level and from 8% to 13% at wholesale level, while Epic went from 15% to 19% at retail level and from 15% to 21% at wholesale level. In revenues, Melita went from 27% to 42% at retail level and from 17% to 31% at wholesale level, while Epic slightly increased its retail market share (from 23% to 24%) and decreased its wholesale market share (from 29% to 26%).

not have a commercial access agreement with GO ([16]). However, the MCA believes that Epic is able to fulfil most market requirements relatively quickly, as it has shown by tailoring its infrastructure investments to reach most sites requiring the supply of wholesale dedicated products and services.

The MCA considers that, generally speaking, GO, Melita and Epic have similar-scale economies in the wholesale dedicated capacity market ([17]). In terms of economies of scope, Epic does not have the same position as GO and Melita. This is because GO and Melita can share their production costs between a wider range of services.

On vertical integration, the MCA notes that all network operators are vertically integrated and alternative operators do not rely on GO's supply of dedicated capacity. GO is therefore not in a position to favour its retail arm by applying different prices and conditions to its competitors.

Finally, on switching and countervailing buyer power and potential competition, the MCA believes that the availability of alternative providers and the shift from low bandwidth to high bandwidth connectivity, a segment in which alternative operators are particularly strong, means that users of dedicated capacity products have sufficient countervailing buyer power. This is because GO is faced with a credible switching threat if its quality fails and its prices are not competitive. Given how operators' market shares have developed since the previous market review and operators' plans to extend infrastructure, the MCA believes that the prospect of competition and the constraints that alternative operators bring to bear on GO will remain strong on the market being assessed.

For all the above reasons, the MCA believes that the wholesale dedicated capacity market is competitive and so does not need *ex ante* regulation.

2.4. Regulatory remedies

On the strength of its review of the wholesale dedicated capacity market, the MCA proposes to lift all regulatory obligations imposed on GO in the previous round of market analysis. However, to give all stakeholders time to make the necessary arrangements for a smooth transition from a regulated to an unregulated market, the MCA proposes to lift the existing obligations within 90 calendar days of the publication of the final decision.

([16]) Melita has an agreement with GO since 1992, allowing it to avail itself of GO's passive infrastructure to deliver its services to its customers. The agreement was last revised in 2002. This legacy agreement between GO and Melita is from a time when GO was still government-owned. The agreement remained valid to date, even after GO's privatisation in 2006.

([17]) GO can spread its costs over a larger customer base, but the evolution of Melita's and Epic's market shares in terms of revenues suggest that they may have better economies of scale in the high-end client segment.

3. NO COMMENTS

The Commission has examined the notification and the additional information provided by the MCA and has no comments ([18]).

Under Article 32(9) of the Code, the MCA may adopt the draft measure and, where it does so, shall communicate it to the Commission.

The Commission's position on this particular notification is without prejudice to any position it may take on other notified draft measures.

Pursuant to Point 6 of Recommendation 2021/554 ([19]) the Commission will publish this document on its website. If the MCA considers that, in accordance with EU and national rules on business confidentiality, this document contains confidential information that you wish to have deleted prior to publication, please inform the Commission ([20]) within three working days of receipt ([21]). Please give reasons for any such request.

Yours sincerely,

For the Commission
Roberto Viola
Director-General

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([18]) In accordance with Article 32(3) of the Code.

([19]) Commission Recommendation (EU) 2021/554 of 30 March 2021 on the form, content, time limits and level of detail to be given in notifications under the procedures set in Article 32 of Directive (EU) 2018/1972 of the European Parliament and of the Council establishing the European Electronic Communications Code OJ L 112, 31.3.2021, p. 5

([20]) By email: CNECT-markets-notifications@ec.europa.eu

([21]) The Commission may inform the public of the result of its assessment before the end of this three-day period.