

Report of the Malta Communications Authority on its monitoring and findings in accordance with Article 5 of Regulation (EU) 2015/2120 concerning the European Net Neutrality Rules.

Report to the European Commission

Published: 30th June 2022

Reference: MCA/R/22-4632

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1. INTRODUCTION

The Malta Communications Authority (MCA) is the authority responsible for enforcing Regulation (EU) 2015/2120 (the 'EU Regulation'), which came into force on 30th April 2016. To this effect, the MCA has prepared this report, covering the period between 1st May 2021 and 30th April 2022, in compliance with the annual reporting obligations specified in Article 5 of the EU Regulation. This report is also in line with the relevant BEREC Guidelines on the Implementation by National Regulators of the European Net Neutrality Rules.

The report considers the MCA's work regarding the supervision and monitoring of open internet access rules as reflected in the EU Regulation.

The MCA is the national authority responsible for enforcing the EU Regulation. The Regulation establishes various obligations onerous on Internet Access Services ('IAS') providers, including ensuring that:

- i. All end-users of IAS can access and distribute information and content, use and provide applications and services of their choice, irrespective of the location of their device or the location, origin and/or destination of the information, content, application or service;
- ii. IAS providers apply fair traffic management policies which respect the EU Regulation and the rights of end-users;
- iii. IAS providers clearly explain their traffic management policies and how these may affect end-'users' experience as well as how these could impact their privacy and personal data;
- iv. End-users can access clear information regarding the IAS they use (such as speeds, volume limitations and other quality parameters);
- v. IAS providers have simple and clear mechanisms which end-users may use to make complaints; and
- vi. IAS providers clearly explain the remedies available to end-users in cases where their experience deviates significantly and repeatedly from the IAS to which they are subscribed.

The Office of the Information and Data Protection Commissioner (IDPC) is the entity responsible for enforcing the data protection obligations arising from the EU Regulation. The MCA actively collaborates with the IDPC on such matters.

Section 2 provides a high-level market overview and an overall description of the national situation regarding compliance with the EU Regulation.

Section 3 provides a high-level overview of the main activities carried out by the MCA in order to fulfil its monitoring and supervisory functions.

Section 4 provides a detailed account of the monitoring and supervisory functions carried by the MCA based on an article-by-article basis.

The MCA notes that, in general, there are no major concerns regarding open internet access in Malta. As will be noted in section 3, the MCA has ongoing activity aiming toward the phasing out of the existing zero-rated offers in the market. At the time of writing, the MCA is analysing GO's approach to execute this phase-out. Further reporting will be included in the report dated 2023.

The MCA will continue to monitor the market in order to ensure that compliance is maintained and, where this is not the case, will ensure that compliance is efficiently restored.

2. MARKET OVERVIEW¹

The largest three fixed IAS providers in the Maltese market, namely GO plc ('GO'), Melita Ltd ('Melita') and Epic Communications Ltd ('Epic'), together account for over 99% of the clients of internet services in Malta.

In terms of market shares by the end of December 2021, Melita and GO accounted for 48.4% and 46.9% of the local client base of fixed broadband services, respectively. Epic accounted for a 4.6% market share at the end of the current reporting period, whilst Vanilla Telecoms Ltd ('Vanilla') accounted for a 0.1% market share.

GO and Melita operate their own fixed wired network infrastructures. Epic provides its fixed services using either wireless infrastructure based on its mobile network or fixed services using either GO's FTTH network or its own deployed FTTH network, which EPIC started to deploy last year. Vanilla operates its own wireless infrastructure suitable to provide fixed broadband services².

Figure 1 depicts the market shares in the fixed broadband segment as reported at the end of December of 2021³.

¹ All statistics quoted in this section are valid as at 31st December 2021.

² Vanilla Telecoms operates its wireless network using spectrum under the light-licencing regime.

³ Latest MCA Data Report Sheet publication: <https://www.mca.org.mt/articles/key-market-indicators-electronic-communications-and-post-q1-2017-q4-2021>

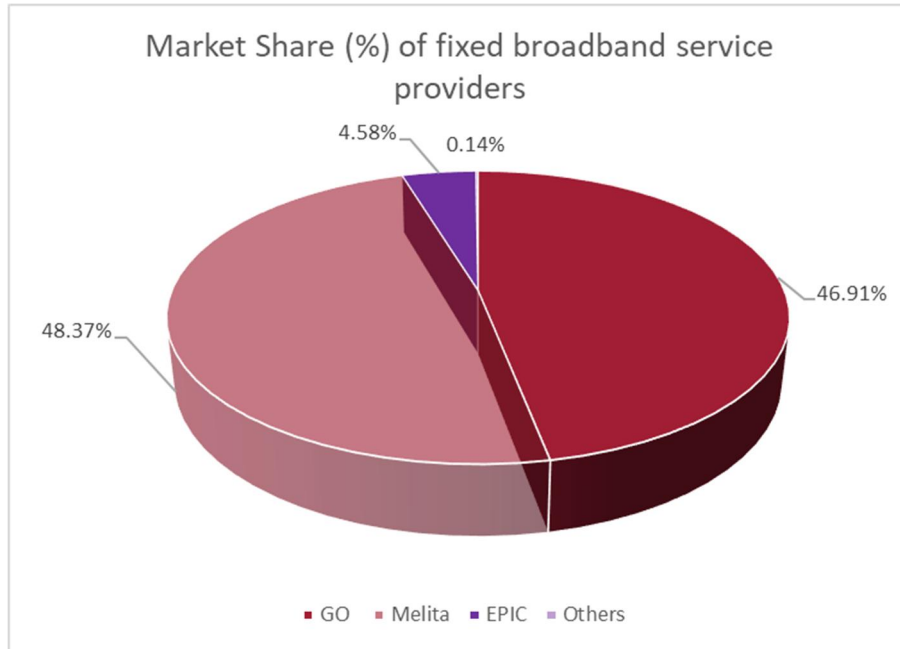


Figure 1 Market share of fixed broadband service providers

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

At the end of December 2021, the number of mobile telephony subscriptions totalled 644,955, corresponding to a mobile penetration rate of approximately 124%.

GO's subscribers accounted for a 37.5% market share, followed by EPIC's at 36.9% and Melita's at 25.6%.

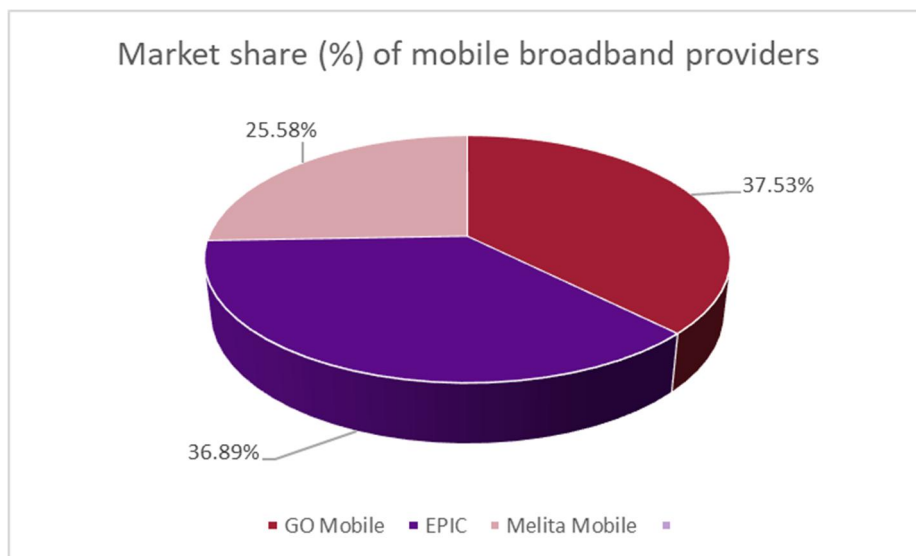


Figure 2 Market share of mobile providers based on the number of subscriptions

While all mobile subscriptions in Malta have access to mobile broadband, not all users actively use the service. Referring to the latest DESI figures for 2021, updated and published by the European Commission, 71% of all individuals in Malta (aged 16 to 74 years) took mobile broadband. The EU average also stood at 71% for the same cohort of people⁴.

⁴ The EC defines 'Mobile Broadband penetration' as the number of active mobile broadband SIM cards per 100 people

3. THE NATIONAL SITUATION REGARDING COMPLIANCE WITH THE EU REGULATION

During the current reporting period, the MCA analysed all IAS products that were newly placed on the market as well as those which were modified and/or updated in due course. As part of this regulatory activity, the applicable terms and conditions offered by IAS providers were analysed and matched against the requirements prescribed by the EU Regulation in order to study the extent of compliance or lack thereof.

As part of its monitoring tasks, during this reporting period, the MCA recorded five (5) complaints regarding discrepancies between the contracted speed and the actual speed performance of the service; one (1) complaint regarding intermittent internet connection and eight (8) complaints regarding faults to an internet service.

While the MCA considers this as an indication that there are no significant issues in the market, it remains committed to maintaining an ongoing assessment of new IAS products on the market to ensure that these are in line with the requirements of the EU Regulation.

Moreover, based on its powers as described in Article 5(2) of the EU Regulation, the MCA requested EPIC Ltd, GO Plc, and Melita Ltd, all fixed and mobile IAS providers, to complete a self-assessment questionnaire aimed at providing the MCA with details about their commercial and technical practices in relation to the products they offer. The results obtained from the questionnaire will be expanded upon in the subsequent sections according to the relevant article of the EU Regulation.

4. DETAILED ANALYSIS OF COMPLIANCE IN RELATION TO ARTICLES 3, 4, 5 AND 6

Article 3 – Safeguarding of Open Internet Access

Article 3 of the EU Regulation

1. *End-users shall have the right to access and distribute information and content, use and provide applications and services, and use terminal equipment of their choice, irrespective of the end-user's or provider's location or the location, origin or destination of the information, content, application or service, via their internet access service.*

This paragraph is without prejudice to Union law, or national law that complies with Union law, related to the lawfulness of the content, applications or services.

2. *Agreements between providers of internet access services and end-users on commercial and technical conditions and the characteristics of internet access services such as price, data volumes or speed, and any commercial practices conducted by providers of internet access services, shall not limit the exercise of the rights of end-users laid down in paragraph 1*

As part of the self-assessment questionnaire sent to all IAS providers, respondents were asked to submit information pertaining to the technical and commercial practices in the context of their impact on end-users.

The MCA also monitored the commercial and technical conditions related to the provision of Internet access services by checking all the publicly available information primarily available on IAS providers' web pages, including relevant terms and conditions and other material. Such monitoring is an ongoing activity to ensure that compliance is maintained.

The self-assessment questionnaire, sent to all fixed and mobile broadband IAS providers, requested information about the traffic management practices they apply and about those product ranges to which they apply volume data caps. The MCA also queried about the potential existence of commercial practices that IAS providers may offer to their subscribers which may, in the long term, have an impact on end-users' rights. From this market research, the following main findings emerge:

- i. none of the operators engaged in traffic management practices that are in breach of the EU Regulation
- ii. none of the operators engaged in commercial practices that may restrict end-users' rights to choose and transmit content of their choice.

Zero-rated commercial practices

The EU Regulation prohibits IAS providers from engaging in commercial practices that limit end-users' rights as specified in the said EU Regulation. Since the publication of the Regulation, zero-rating practices have been discussed at great length within BEREC, and it was established that while zero-rated offers present their own risks to end-user rights, these were not considered out rightly incompatible with the Regulation. Within this context, BEREC Guidelines have provided guidance to the NRAs on how to assess such offers.

The merits of zero-rated offers were revisited again by the ECJ after three cases were referred to it by different German courts. In its judgements dated September 2021, the ECJ concluded that the zero-tariff option resulted in different streams of internet traffic being effectively subjected to different treatment in terms of pricing. The judgements, therefore, concluded that such treatment would not fulfil the requirements of the equal treatment of traffic as specified in Article 3(3) of the OIR, and hence such offers are not deemed compliant with the Regulation. This interpretation is different from that prevalent before the publication of these judgements, and hence changes to the market are necessary to ensure compliance with the interpretation of the Regulation as provided by the ECJ rulings.

GO has two market products, namely Music WildCard and GO TV⁵, which include zero-rated offers in 2018. The details of the offers can be referred to in the MCA Decision published in 2018, whereby the offers were analysed in detail and deemed acceptable within the Maltese context on the condition of an ongoing market monitoring by the Authority. Ongoing monitoring of market conditions was maintained and concluded that the zero-rated offers do not pose any immediate threat to the end-users in terms of the rights of end-users that the OIR seeks to protect.

Considering that the ECJ judgements published in September 2021 necessitate the eventual phasing out of the zero-tariff offers from the market, and considering that discussions within BEREC leading to an update of the BEREC guidelines to the Regulation were ongoing until

⁵ GO TV substituted GO TV Anywhere, and GO TV Anywhere Lite

mid-June 2022, and considering further the outcome of the monitoring efforts, the MCA concluded that the IAS providers and their subscribers alike would benefit from long-term regulatory stability. Therefore, while the MCA participated fully in the aforementioned BEREC discussions, the MCA postponed its active plans to phase out the zero-tariff options from the market to a date after the finalised guidelines are published.

Considering that GO is providing zero-tariff options to a substantial number of its subscribers, the MCA engaged with the provider to chart out a way forward on how the zero-tariff offers will be phased out of the market. By the end of the reporting period, the Authority has collected detailed information about the number of subscriptions that contain zero-tariff options, including their expiry. The MCA also asked GO to stop marketing and selling the zero-tariff options while requesting it to provide the Authority with an outline plan of how it intends to phase out the existing zero-rated offers. Further reporting on the conclusion of this process will be provided in the 2023 report as necessary.

The MCA was also informed that GO zero-rates access to its web page, or parts thereof, primarily to provide self-care service to its subscribers. This zero-rating is deemed useful for fixed broadband subscribers who have mobile subscriptions with a fixed download limit to purchase additional credit when their limits are exhausted. The MCA is also monitoring this situation and will be taking the relevant and necessary action.

The MCA also contacted Melita and EPIC, requesting confirmation on their part that none of their offers contain zero-tariff options. Both providers confirmed the non-existence of such offers.

Article 3 (3) of the EU Regulation

- 1. Providers of internet access services shall treat all traffic equally, when providing internet access services, without discrimination, restriction or interference, and irrespective of the sender and receiver, the content accessed or distributed, the applications or services used or provided, or the terminal equipment used.*

The first subparagraph shall not prevent providers of internet access services from implementing reasonable traffic management measures. In order to be deemed to be reasonable, such measures shall be transparent, non-discriminatory and proportionate, and shall not be based on commercial considerations but on

objectively different technical quality of service requirements of specific categories of traffic. Such measures shall not monitor the specific content and shall not be maintained for longer than necessary. [...]

Traffic management practices

Where applicable, the MCA monitored the traffic management policies established by IAS providers as published in their relevant terms and conditions. The policies were found to be in compliance with the EU Regulation in terms of the technical aspects as well as in terms of the level of information required.

The self-assessment questionnaire sent to all IAS providers also treated the subject of technical practices. The results indicate that currently, there are no issues in the market, and all IAS providers have been compliant with the EU Regulation in this respect.

Article 3 (3) of the EU Regulation

...

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

- (a) comply with Union legislative acts, or national legislation that complies with Union law, to which the provider of internet access services is subject, or with measures that comply with Union law giving effect to such Union legislative acts or national legislation, including with orders by courts or public authorities vested with relevant powers;*

...

Blocking of IP traffic to prevent the transmission of unlicensed content

As reported in the 2021 report, the Authority was investigating a case where an IAS provider was reporting that it was blocking a number of IP addresses. The investigation has since been concluded. The concerned IAS provider in question was acting upon a request for a

prohibitory injunction requested by IMG Media Limited, representative of the Serie A league. In 2021, IMG Media Limited sought a prohibitory injunction against the largest three IAS providers in Malta, namely GO Plc, Melita Limited and Vodafone Malta Limited. One of the IAS providers, Vodafone, contested the prohibitory injunction on both substantive and procedural grounds, whereas the other two IAS providers stated that they did not have any objection to the requests as filed by IMG. Initially, the Court provisionally issued a decree upholding the prohibitory injunctions against all three IAS providers. Subsequently, however, the Court revoked its decree *contrario-imperio* upholding Vodafone's objections on substantive and procedural grounds, notably that IMG did not demonstrate to the Court that they were duly authorised to represent the Serie A rights holder in Malta and that IMG Media Limited should have had recourse to other remedies in seeking redress.

In January 2022, La Liga Nacional e Futbol Profesional, (La Liga) a legal entity registered in Spain holding the international audiovisual rights of the matches of the first and second divisions of the Spanish football league, filed an application in Court requesting the issue of warrants of prohibitory injunction against the three largest IAS providers, Melita Limited ('Melita'), GO plc ('GO') and Epic Communications Limited ('Epic'). The Court was asked to issue a precautionary order against the respondent companies in order to prevent their IAS services from being used to infringe the intellectual property rights of the applicant and to order the respondent companies to suspend access to the audiovisual content of the matches of the first and second divisions of the Spanish football league La Liga. A study carried out by PriceWaterhouseCoopers (PwC) established a number of IP addresses which were transmitting/streaming football matches in violation of the copyright held by La Liga. Such audiovisual content could be transmitted/streamed illegally in Malta through websites, mobile device apps and/or software accessible from set-top boxes, media players, computers or other electronic devices through the IAS services offered by the respondents.

La Liga based its application on Article 8 of the Enforcement of Intellectual Property Rights (Regulation) Act, whereby it requested the Court to issue a precautionary order against the respondent companies in order to prevent their internet services from being used to infringe the La Liga's intellectual property rights. More specifically, La Liga requested the issue of a court order requiring the respondent companies to suspend access to the audiovisual content of the matches of the first and second divisions of the Spanish football league transmitted/streamed in violation of the copyright held by La Liga by blocking access to all IP addresses indicated.

The Court upheld La Liga's request and ordered the respondent companies to ensure that their services are not used to infringe La Liga's intellectual property rights. In its order, the Court directed the respondents to suspend access to the audiovisual content of the matches of the first and second divisions of the Spanish football league broadcast/streamed via the IP addresses as indicated by PriceWater House Coopers in violation of the applicant's rights, by blocking access to such IP addresses.

Blocking of DNS resolution

On 1st March 2022, the EU Council published Regulation (EU) 2022/350, requiring all operators, including IAS providers, to block any content transmitted by those legal entities identified in the Regulation. The Sanctions Monitoring Board within the Ministry of Foreign and European Affairs and Trade notified all authorised ECS providers, including IAS providers, informing them of the Regulation while suggesting that the requirements of the Regulation would be fulfilled when they apply DNS resolution blocking of an indicated set of domain addresses related to the persons and entities identified by the Regulation.

Provided that the blocking of the resolution of DNS addresses is the result of an action required in the fulfilment of the requirements of an EU Regulation, then the provisions in Article 3 (3) sub paragraph 3 (a) become applicable and, therefore, the blocking of IP traffic is deemed permissible.

Article 3(5) of the EU Regulation

5. Providers of electronic communications to the public, including providers of internet access services, and providers of content, applications and services shall be free to offer services other than internet access services which are optimised for specific content, applications or services, or a combination thereof, where the optimisation is necessary in order to meet requirements of the content, applications or services for a specific level of quality.

Providers of electronic communications to the public, including providers of internet access services, may offer or facilitate such services only if the network capacity is sufficient to provide them in addition to any internet access services provided. Such services shall not be usable or offered as a replacement for internet access services, and shall not be to the detriment of the availability or general quality of internet access services for end-users.

The status related to specialised services has remained unchanged since the last report. The specialised services offered in Malta include voice telephony and live TV streaming services. There are no indications that the offer of specialised services has a negative impact on the IAS. Hence the MCA concluded that a formal assessment of the provision of specialised services was not necessary.

Given the current market situation, the MCA did not provide additional interpretation of or guidance on the term "services other than internet access services"⁶.

⁶ See Article 3(5) of the EU Regulation

Article 4 – Transparency Measures

Article 4 (1) of the EU Regulation

1. Providers of internet access services shall ensure that any contract which includes internet access services specifies at least the following:
 - (a) information on how traffic management measures applied by that provider could impact on the quality of the internet access services, on the privacy of end-users and on the protection of their personal data;
 - (b) a clear and comprehensible explanation as to how any volume limitation, speed and other quality of service parameters may in practice have an impact on internet access services, and in particular on the use of content, applications and services;
 - (c) a clear and comprehensible explanation of how any services referred to in Article 3(5) to which the end-user subscribes might in practice have an impact on the internet access services provided to that end-user;
 - (d) a clear and comprehensible explanation of the minimum, normally available, maximum and advertised download and upload speed of the internet access services in the case of fixed networks, or of the estimated maximum and advertised download and upload speed of the internet access services in the case of mobile networks, and how significant deviations from the respective advertised download and upload speeds could impact the exercise of the end-users' rights laid down in Article 3(1);
 - (e) a clear and comprehensible explanation of the remedies available to the consumer in accordance with national law in the event of any continuous or regularly recurring discrepancy between the actual performance of the internet access service regarding speed or other quality of service parameters and the performance indicated in accordance with points (a) to (d).

The MCA continued its monitoring activity whereby the terms and conditions of new products launched on the market or changes to the terms of existing products were reviewed. The terms and conditions were deemed to be compliant with the EU Regulation, and therefore, the MCA did not consider it necessary to engage with the IAS providers.

Article 4 (2) of the EU Regulation

2 Providers of internet access services shall put in place transparent, simple and efficient procedures to address complaints of end-users relating to the rights and obligations laid down in Article 3 and paragraph 1 of this Article.

IAS providers had already established transparent, simple and efficient procedures to address end-user complaints as prescribed by national legislation. The MCA frequently carries out testing in relation to such procedures, and all IAS providers maintain effective channels of communication with their customers, such as online chat services, customer care helplines and dedicated email addresses.

No change was registered compared to the MCA's previous reporting period.

Article 4 (3) of the EU Regulation

3. The requirements laid down in paragraphs 1 and 2 are in addition to those provided for in Directive 2002/22/EC and shall not prevent Member States from maintaining or introducing additional monitoring, information and transparency requirements, including those concerning the content, form and manner of the information to be published. Those requirements shall comply with this Regulation and the relevant provisions of Directives 2002/21/EC and 2002/22/EC.

Given the market-wide state of compliance, as well as the various measures already in place as prescribed by existing national and European legislation, the MCA did not deem it necessary to impose any further requirements other than those imposed by such legislation.

Article 4(4) of the EU Regulation

4. Any significant discrepancy, continuous or regularly recurring, between the actual performance of the internet access service regarding speed or other quality of service parameters and the performance indicated by the provider of internet access services in accordance with points (a) to (d) of paragraph 1 shall, where the relevant facts are established by a monitoring mechanism certified by the national regulatory authority, be deemed to constitute non-conformity of performance for the purposes of triggering the remedies available to the consumer in accordance with national law.

Fixed broadband providers are required to provide the Typical Speed Range (TSR), calculated on the basis of the access speed performance of a statistically sound sample taken from broadband connections of a given product. The TSR is established as the 20th and 80th percentile of the measured speeds at the access network level for each product used. Therefore, any connections performing at speeds that are lower than the 20th percentile are considered as being "significantly discrepant". No interpretation of the term 'regularly recurring' has been published.

At present, the remedies available to end-users, including IAS quality monitoring mechanisms available to them, are deemed to be adequate. For this reason, no additional remedies have been introduced for consumer redress in relation to the non-conformance of IAS with the contract terms.

Article 5 – Supervision and Enforcement

Article 5 (1) of the EU Regulation

1. National regulatory authorities shall closely monitor and ensure compliance with Articles 3 and 4, and shall promote the continued availability of non-discriminatory internet access services at levels of quality that reflect advances in technology. For those purposes, national regulatory authorities may impose requirements concerning technical characteristics, minimum quality of service requirements and other appropriate and necessary measures on one or more providers of electronic communications to the public, including providers of internet access services. [...]

At present, the MCA does not consider the deployment of specialised services to be to the detriment of IAS. The MCA, therefore, does not impose minimum QoS requirements on any IAS provider other than the definition of 'contractual speeds'.

QoS - a broadband quality of service

As part of its monitoring efforts, the MCA monitors the quality of broadband services based on the regulatory framework established in 2013 and revised later in 2016. The framework requires fixed broadband internet access service providers to measure a number of QoS parameters and submit their report to the MCA. IAS providers are also required to publish the Typical Speed Range (TSR) information related to each IAS product as a means of committing to a minimum access speed.

In this regard, the MCA ensures the availability of high-quality IAS by means of information requests from IAS providers.

The MCA currently relies on broadband QoS data measured and reported by fixed broadband providers as part of their requirements under the fixed broadband quality of service framework. Data currently available does not indicate any variances which may be of concern.

Article 5(2) of the EU Regulation

2. At the request of the national regulatory authority, providers of electronic communications to the public, including providers of internet access services, shall make available to that national regulatory authority information relevant to the obligations set out in Articles 3 and 4, in particular information concerning the management of their network capacity and traffic, as well as justifications for any traffic management measures applied. [...].

The MCA sent all IAS providers a self-assessment questionnaire in line with this article. The information was then used as a basis for corroborating the MCA's market monitoring of IAS providers' published information i.e. terms and conditions.

Article 6 - Penalties

Article 6 of the EU Regulation

6. Member States shall lay down the rules on penalties applicable to infringements of Articles 3, 4 and 5 and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive. Member States shall notify the Commission of those rules and measures by 30 April 2016 and shall notify the Commission without delay of any subsequent amendment affecting them.

Under Article 33 of Chapter 418 of the Laws of Malta (the Malta Communications Authority Act), the Authority may impose an administrative fine not exceeding three hundred and fifty thousand Euros (€350,000) for each infringement or failure to comply and, or twelve thousand euro (€12,000) for each day of infringement or non-compliance. In determining the amount, the MCA is required to give particular regard to the nature and extent of the infringement and its impact on competition and on consumers.

If the MCA considers that the act/omission has especially significant effects on the market it may increase the administrative fine imposed to not more than 5% of the turnover of the

undertaking concerned in the calendar year immediately preceding the year when the infringement was committed.

Due to existing provisions in national legislation, the MCA has not implemented further rules on penalties under this article. In this reporting period, no cases of non-compliance were identified, and therefore no penalties were imposed.

Other activities

MCA officials actively participate and collaborate with other EU regulatory authorities within BEREC on matters concerning the Regulation.

5. Conclusion

After having carried out its work programme for the year 2021/2022 in ensuring the availability of open internet access services in line with the requirements of the EU Regulation, the MCA concludes that IAS providers in Malta were generally compliant with the requirements of the EU Regulation, while issues arising from the zero-tariff options that are currently on offer in the market are being addressed. The MCA also notes that ongoing monitoring and review of the terms and conditions remain important given that this sector undergoes continuous changes.