



MALTA COMMUNICATIONS AUTHORITY

Notification of re-assessment of the wholesale fixed access market(s) in Malta

Reference: MCA/O/24-5379

Date: 30th July 2024

Notification of re-assessment of the wholesale fixed access market(s) in Malta

1. Context

Society is increasingly relying on access to high-quality broadband electronic communications networks, services and applications that support its social and economic needs. The Malta Communications Authority (hereafter ‘MCA’) has a central role in ensuring that consumers and businesses obtain the maximum benefit in terms of choice, price and quality of electronic communications services. The MCA does this through ongoing monitoring and regulation to promote an environment that contributes to efficient investment, encourages innovation and empowers consumers to choose and use electronic communications services.

This document outlines the status regarding the analysis of significant market power (hereafter ‘SMP’) concerning access to wholesale network elements that are necessary for the provision of fixed electronic communications services in Malta, particularly the provision of retail fixed broadband services. The primary wholesale products of relevance in the underlying assessment are bitstream access, virtual unbundled local access (hereafter ‘VULA’) and physical infrastructure access (hereafter ‘PIA’).

The purpose of an *ex ante* market analysis is to determine whether any operator(s) has SMP, within the European sector-specific regulatory analytical framework. If SMP can be found, appropriate *ex ante* SMP remedies would be imposed to address structural market shortcomings and thus ensure sustainable competition to the benefit of end-users. If the MCA concludes that the imposition of regulatory obligations in the relevant market is no longer justified, it withdraws such obligations.

In December 2023, the MCA notified a draft measure with a proposal to implement *ex ante* regulatory remedies concerning the provision of wholesale local access (hereafter ‘WLA’) and PIA. The MCA proposal aimed to enhance infrastructure-based competition, ultimately enabling the development of more effective and sustainable retail market competition in Malta.

The draft measure was subject to serious doubts and a second phase assessment by the European Commission (hereafter ‘EC’). The Body of European Regulators for Electronic Communications (hereafter ‘BEREC’) also assigned an Expert Working Group (hereafter ‘BEREC EWG’) to assess the case. BEREC issued its Opinion with conclusions that did not support any of the EC serious doubts (for additional reference see sub-section 1.2 below).

Following further correspondence with the EC, on 27 March 2024, the EC issued a decision detailing several factors that, in its view, justified its request to the MCA to withdraw the draft measure and to start a new market analysis (for additional reference see sub-section 1.1 below).

In view of this, the MCA has initiated a new market analysis that concerns access to wholesale network elements that are necessary for the provision of retail fixed electronic communications services in Malta. The MCA will take into account the views of the EC, BEREC and all the relevant stakeholders in this new analysis.

The opinions and conclusions expressed by the MCA in its 2023 consultation document titled "MCA Analysis of the Market for the Provision of Wholesale Physical and Virtual Infrastructure"¹ will not condition the new analysis. Alongside the views expressed by the EC, BEREC and stakeholders to the now withdrawn draft measure, the new analysis will consider ongoing and new market developments that are relevant in view of the forward-looking nature of this *ex ante* assessment.

The new market analysis exercise will further demonstrate the MCA's commitment to ensuring a fair and competitive electronic communications landscape in Malta, benefiting both consumers and industry stakeholders. This commitment has guided the MCA in its efforts over the years to evaluate competitive dynamics, propose and implement proportionate, pro-investment regulatory measures, and withdraw *ex ante* regulation when appropriate. Both investment and competition should be encouraged, in order to increase economic growth, innovation and consumer choice.

1.1. The EC decision subsequent to the MCA notified draft measure

On the 28th December 2023, the MCA notified its draft measure titled '*MCA DRAFT DECISION DOCUMENT - Based on the analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta*'. The EC registered the notification as Case MT/2024/2484.

On 29th January 2024, the EC initiated a Phase II investigation, pursuant to Article 32 of Directive (EU) 2018/1972 (the 'Code'), the relevant Serious Doubts letter having been issued to the MCA on 26 January 2024.²

¹ Link to MCA 2023 Consultation:

<https://www.mca.org.mt/consultations-decisions/mca-analysis-market-provision-wholesale-physical-and-virtual-infrastructure>

² [Commission opens in-depth investigation into the proposed regulation of the wholesale broadband market in Malta | Shaping Europe's digital future \(europa.eu\)](#)



MALTA COMMUNICATIONS AUTHORITY

On the 2nd April 2024, the EC adopted a decision requiring the MCA to withdraw its proposed draft measure, which had foreseen the imposition of *ex ante* remedies on the wholesale physical and virtual infrastructure access market in Malta.³ The EC decision to veto the aforementioned draft measure came after BEREC had issued an opinion with its assessment of the EC serious doubts. BEREC had disagreed with the EC's findings and serious doubts.⁴

The EC decision essentially concludes (on p. 21) that:

- *The MCA (i) assessment of whether coaxial cable is a sufficient direct or indirect competitive constraint on copper/fibre on the relevant wholesale market and (ii) the resulting finding that GO has SMP at wholesale level, is not compliant with the principles of competition law.*
- *The MCA needs to carry out a new market analysis, which, following the possible finding of the existence of a problem at retail level based on the assessment of an updated, correct and complete set of data relating to the entire period following the previous market review, thoroughly assesses the relevant wholesale market in Malta by taking into account: (i) the extent of direct or indirect competitive constraint applied by coaxial cable on VULA provided over fibre; and (ii) the viability of access to alternative physical infrastructure owned by undertakings that are not providing electronic communications services, such as utilities.*

More specifically, the EC decision (on p.19) states that *'The assessment of market power in a wholesale market, which includes nation-wide cable infrastructures, could potentially lead to the following conclusions: (i) none of the operators has SMP; (ii) one of the two operators (GO or Melita) is dominant; (iii) both operators are jointly dominant; or (iv) both operators are dominant in their separate wholesale markets. Such market power at wholesale level would also be reflected in market dynamics at the downstream retail level where the wholesale inputs provided are used to supply consumers.'*

The EC decision (on p. 18) states that *'In the recent years, the EC has been indicating that the presence of three networks as one of the conditions for deregulation seems to be conservative, while the criteria identified should be appropriate to reflect the competitive conditions in a given settlement with a sufficient forward-looking approach.'*

³ [European Commission vetoes proposed regulation of the wholesale broadband market in Malta following in-depth investigation | Shaping Europe's digital future \(europa.eu\).](#)

⁴ [BEREC Opinion on Phase II investigation pursuant to Article 32 of European Electronic Communications Code \(EECC\) | BEREC \(europa.eu\)](#)



MALTA COMMUNICATIONS AUTHORITY

The EC decision (on p. 18) also notes that *‘the EC disagrees with BEREC’s Opinion which suggests that the presence of at least three networks is conducive to effective competition. Such a high threshold for deregulation, in particular in the national circumstances of Malta, could lead to the continuing regulation instead of progressively reducing ex ante sector-specific rules, if justified by the level of effective competition in the market. Indeed, an efficient level of infrastructure-based competition is the extent of infrastructure duplication at which investors can reasonably be expected to make a fair return based on reasonable expectations about the evolution of market shares.’*

1.2. The BEREC Opinion on Case MT/2024/2484

The BEREC EWG finalised its draft Opinion on 16 February 2024, with a final Opinion presented and adopted by the BEREC Board of Regulators on 23 February 2024. This Opinion was issued in accordance with Article 32(5) of the Directive (EU) 2018/1972 (hereafter the ‘European Electronic Communications Code’, ‘EECC’ or the ‘Code’).

The BEREC Opinion essentially concludes (on p.21 and p.22) that:

- *‘Pursuant to Article 32(5) of the Code, BEREC shall publish an opinion on the Commission’s reservations referred to in paragraph 4, indicating whether it considers that the draft measure should be maintained, amended or withdrawn and shall, where appropriate, provide specific proposals to that end. BEREC is of the opinion that none of the EC’s four serious doubts are justified. BEREC is accordingly of the view that there are insufficient grounds to justify the withdrawal or amendment of the Draft Measure, based specifically on the reservations arising from the EC’s Serious Doubts. BEREC does not agree with the EC that the draft measure:*
 - (i) Is characterised by a lack of sufficient justification that the wholesale market should continue to be regulated;*
 - (ii) Provides insufficient evidence that the PVIA market passes Criterion 2 of the three criteria test (3CT)⁵;*
 - (iii) Incorrectly excluded the direct constraint arising from Melita self-supply of cable in its product market definition; and*

⁵ Article 67(1) of the Code.



MALTA COMMUNICATIONS AUTHORITY

- (iv) *Has failed to justify a finding of SMP on the PVIA market arising in particular from an improperly defined PVIA market definition (arising from the exclusion of self-supply of cable as a direct constraint).'*
- *'Serious Doubt 2 relies to a non-trivial extent on analysis set out in Serious Doubt 1, and, similarly, Serious Doubt 4 relies to a non-trivial extent on analysis set out in Serious Doubt 3. BEREC is particularly unconvinced of the EC's assumption that downstream retail broadband markets would be effectively competitive absent regulation in the presence of just two networks, only one of which currently offers wholesale services on a regulated basis.'*
 - *'For the avoidance of doubt, the BEREC conclusions do not amount to a positive endorsement of the findings of the MCA Draft Measure in all material respects.'*

2. Stakeholders' input in view of market developments

The new market analysis, similar to the principles upheld for earlier analyses, will prioritise stakeholder input, especially for the collection of new data and information on market developments, ongoing and foreseen.

The main stakeholders include the operators providing fixed broadband services in Malta. The two nationwide operators, namely GO and Melita offer services through various networks. GO has continued to roll out its FTTH network, with national coverage expected by the end of this year as it migrates its clients away from its legacy copper-based DSL network. Melita owns a nationwide cable network based on DOCSIS 3.1 standard, whilst also deploying a FTTH network. Epic offers fixed broadband services over GO's FTTH network in addition to also having deployed its own FTTH network. In the case of Melita and Epic, fibre deployment is currently limited to a number of localities.

The MCA conclusions from the new market analysis on the current state and potential future development of service-based / infrastructure-based competition will draw from data and information provided by stakeholders, including operators. Key considerations include:

- the coverage of very high-capacity fixed networks (VHCN) across Malta;
- operators' continued investment in fibre deployment and FTTH coverage;
- the availability and use of physical infrastructure by owners and third parties;
- market share developments at retail level;



MALTA COMMUNICATIONS AUTHORITY

- changes in market structure;
- commercial offerings at both wholesale and retail levels; and
- evolving indicators with respect to choice, quality of service, and price.

The MCA will evaluate these factors, among others, to assess the level of competition and decide whether continued regulatory intervention or deregulation is necessary.

3. *Ex ante* SMP regulation currently in force and the BCRD / GIA

The current *ex ante* SMP regulation, based on a 2013 MCA Decision,⁶ will remain in effect through a remedy implemented in 2016 requiring GO to provide Virtual Unbundled Access (hereafter 'VULA')⁷ to its FTTH network. This regulation has enabled the presence of a third operator, Epic, in the provision of retail fixed broadband services, whilst providing safeguards to ensure GO's ongoing investment in fibre roll-out. The *ex ante* VULA regulation will remain in effect until the MCA publishes a new decision to either maintain, review or withdraw it. However, any future MCA decision would first require the EC's acceptance of a future MCA notified draft measure, based on the new market analysis.

The MCA also notes that the applicability of *ex ante* SMP regulation and the ongoing market analysis is without prejudice to the applicability of the Broadband Cost Reduction Directive (hereafter the 'BCRD') as transposed in Malta.⁸ The measures contemplated by the BCRD apply in the context of dispute resolution regarding specific generic issues related to physical infrastructure, including non-telecom infrastructure. The Gigabit Infrastructure Act⁹ (hereinafter 'GIA'), which entered into force on the 11th May 2024, has now replaced the BCRD. The GIA aims to further facilitate and stimulate the widespread roll-out of VHCNs by promoting the joint use of existing physical infrastructure and by

⁶ Link to the 2013 MCA Decision titled '*Market 4 – Wholesale Unbundled Infrastructure Access Market*':

<https://www.mca.org.mt/sites/default/files/decisions/final-decision-market-analysis-of-the-wholesale-infrastructure-access-market-market-4-060313.pdf>

⁷ Link to the 2016 MCA Decision titled '*Virtual Unbundled Access to Fibre-to-the-Home. Response to Consultation and Decision*':

<https://www.mca.org.mt/consultations-decisions/virtual-unbundled-access-fibre-home-response-consultation-and-decision>

⁸ [Directive 2014/61/EU](#) transposed under the Utilities and Services (Regulation of Certain Works) Act, Cap. 81, Electronic Communications Networks and Services (General) Regulations, S.L 399.48 (Regulation 49: Access to in-building physical infrastructure), and In-Building Physical Infrastructure (Access to Electronic Communications Services) Regulations, S.L. 623.05.

⁹ [Regulation \(EU\) 2024/1309](#)



MALTA COMMUNICATIONS AUTHORITY

enabling more efficient deployment of new physical infrastructure so that such networks can be rolled out faster and at a lower cost. In contrast, *ex ante* regulation through a SMP-based market analysis aims to address competition issues in markets where SMP is present.

Finally, the MCA commends any commercial initiatives for access to both virtual and physical infrastructure. In line with previous efforts, the MCA will pursue the conclusion of commercial agreements involving operators, which may have not materialized so far. The MCA remains open to consider any commitments offered by the currently designated SMP operator to facilitate market access. As also stipulated by the Code, such arrangements / agreements would provide a solid foundation for considering future deregulation of the market.

4. Timelines for the new analysis and public consultation

The MCA will take into account national circumstances when seeking to determine its way forward on the regulatory approach in the relevant market(s), this being either continued regulation or deregulation.

As already highlighted in previous sections, the MCA will take into account the EC Decision on Case MT/2024/2484, the BEREC views on the now withdrawn MCA draft measure and stakeholder input. It also remains committed to take utmost account of the most recent EU guidance on the assessment of markets. It is of note that, in December 2020, the EC published a new Recommendation on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation, in accordance with Directive (EU) 2018/1972 of the European Parliament and of the Council establishing the European Electronic Communications Code (hereafter referred to as the '2020 EU Recommendation')¹⁰. This replaced the 2014 EU Recommendation.

The MCA aims to publish the new market analysis for public consultation by the end of 2024. The consultation exercise will allow interested parties and stakeholders to react and submit their responses within a specified time window. This will be followed by a notification of the MCA's proposed draft measure to the EC.

¹⁰ Link to the 2020 EU Recommendation:

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32020H2245>