# Retail access to the public telephone network at a fixed location

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

Consultation Document

19th September 2011

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## Contents

# Executive Summary

The Malta Communications Authority (MCA) is hereby presenting, for national consultation, its proposed 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 consultation period shall run from the 19th September 2011 till the 21st October 2011.

**Summary of Conclusions**

*Identification of Markets*

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

1. Residential lower level access to the public telephone network at a fixed location.

2. Non- residential lower level access to the public telephone network at a fixed location.

3. 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.

4. 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.

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 do 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 also upholds the distinction between residential and non-residential access market given that a customer may only apply for a residential service if he/she intends to use the channel for purely residential purposes. Likewise, a customer is left with no choice but to apply for a business service if he intends to use the telephone access for commercial requirements.

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 four relevant markets that comprise retail fixed access in Malta, the MCA shall now analyse these markets to assess whether any undertaking has significant market power (SMP).

The findings that emerge from this analysis suggest that GO plc. enjoys significant market power in all of the access markets previously identified. This evidence is mainly supported by the fact that GO plc. has a market share that well exceeds the 50% benchmark, in all the four relevant markets defined and that no alternative operator seems to be in a position to erode this market power within the timeframe of the review .

Barriers to market entry associated with economies of scale and scope, vertical integration, sunk costs, and barriers to switching continue to hold back new entrants from competing at par with GO plc., especially in the absence of regulation. Barriers to switching, on the other hand, neutralize countervailing buyer power which in turn reinforces the incumbent's market position.

In view of all this, the MCA therefore concludes that GO plc. has significant market power in the provision of retail fixed access services in all the markets identified in this review.

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

*Regulatory Implications*

Given the position of dominance held by GO plc. in all of the access markets identified the MCA is imposing the following remedies:

1. Measures to counter excessive pricing charges or predatory pricing;
2. Measures to counter undue preference to specific end users;
3. Measures to counter the unreasonable bundling of services

Full details of these remedies, including their effect and the reasons for proposing to set these conditions, are contained in **Chapter 5** of this document.

# Chapter 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 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 companies have Significant Market Power (SMP) in a given market; and
- assessment of the appropriate regulatory obligations which should be imposed, given the findings on 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. As required at law, in conducting this review, the MCA has taken the utmost account of the two European Commission documents discussed below.

## 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. The revised Recommendation presents a much short 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"). 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[1]. 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 legal principles. The MCA is also taking the 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 has concluded a two-week consultation process with the MCCAA. The MCCAA has forwarded its comments to the MCA and can be found in Appendix 1.

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

## 1.3 Structure of the document

The rest of the document is structured as follows:

**Chapter 2** provides a brief description to 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 proposed 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 this market is effectively competitive or not; and

**Chapter 5** sets the general principles associated with the imposition of remedies.

## 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.

# Chapter 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 [2] 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:

1. Residential lower level access to the public telephone network at a fixed location via standard exchange line, cable and broadband wireless.

2. Non-residential lower level access to the public telephone network at a fixed location via standard exchange line, cable and broadband wireless.

3. Residential higher level access to the public telephone network at a fixed location via ISDN BRA.

4. Non-residential higher level access to the public telephone network at a fixed location via ISDN BRA.

5. Non-residential enhanced higher level access to the public telephone network at a fixed location via ISDN PRA.

The MCA had concluded that GO plc., 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 plc. 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 plc. 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 to holding back new entrants and thus underlining the incumbent's dominant position.

Consequent to the above findings, the MCA imposed on GO plc. a number of remedial measures, at wholesale and retail level. At the wholesale level, the MCA imposed on GO plc. 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.

[2] Link to MCA Decision:
http://www.mca.org.mt/sites/default/files/consultations/Decision - Fixed Access Report.pdf

***The second market review (2009)***

In 2009[3], a second round review of the retail fixed access market had been carried out by the MCA and published for consultation. This second review was characterised by a number of new developments that had taken place since the first review, especially with Melita's provision of standard IP telephony over the cable network.

In the 2009 market review, the MCA had established three retail access markets in accordance with competition law principles, namely:

1. Lower level access to the public telephone network at a fixed location.

2. Higher level access via ISDN BRA and Centrex supporting a maximum of two telephone trunks to the public telephone network at a fixed location.

3. Enhanced higher level access via ISDN PRA/FRA and Centrex supporting more than two telephone trunks to the public telephone network at a fixed location.

The MCA had underlined that standard exchange line connections and standard cable modem connections fall within the lower level access market. ISDN connections and Centrex solutions (enhanced fixed access products offered over the cable network) had been categorised as higher level access products. It had also determined that access to public telephone services via Vodafone's wireless connections does not fall within the scope of this market review as this type of access is only provided as an add-on to a broadband connection and not on a standalone basis.

An important development described in the 2009 review was the MCA's conclusion not to uphold the distinction between residential and non-residential access markets (as opposed to the 2006 decision), given that Melita plc. was not applying the distinction between the two categories. At the time the MCA had deemed that there was sufficient evidence to suggest that Melita plc. was posing a direct constraint on GO plc. through its single price structure for both business and residential customers. Therefore, following a hypothetical SSNIP applied by GO plc. it had been established that both residential and business customers could switch to Melita plc. and obtain the service at one rate.

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 plc. enjoying economies of scale and scope, and also being a vertically integrated operator, the MCA had concluded that other operators, namely Melita plc., also enjoyed similar conditions and could therefore compete with the incumbent, GO plc. The MCA had also concluded that despite the presence of high sunk costs in deploying a new access network, with the emergence of wireless broadband networks, new operators had managed to enter the market and somewhat posed an indirect constraint.

From a consumer's perspective, the MCA did not find any particular barriers to switching between access providers. The assessment of countervailing buyer power had also shown that through switching, customers can effectively constrain the behaviour of operators in the identified markets. In addition, the MCA had noted that with alternative operators joining the fixed access markets, GO plc. had started to lose its market share as users started switching to these new operators.

[3] The 2009 market analysis had been withdrawn by the MCA for reasons explained in this document and therefore no electronic link is available for reference.

Based on these findings, the MCA had concluded that no operator was able to behave independently from the others in the market and therefore no operator held significant market power in any of the identified markets. Given the finding of no SMP in any of the above mentioned markets, the MCA had concluded that regulatory intervention in local markets for retail access to the public telephone network was no longer warranted. This conclusion was also supported by the imposition of wholesale remedies that guaranteed wholesale access to alterative operators.

***Notification of the second review and eventual withdrawal***

After taking into consideration any comments received during the national consultation period, which ran from the 27th May 2009 till the 31st July 2009, the MCA notified the EU Commission on the 23rd September 2009 with the proposed decision for the retail fixed access market.

During the Phase 1 notification period, on the 30th September 2009, the MCA received a request for information from the EU Commission, to which the MCA sent a reply on the 2nd October 2009. The EU Commission had requested a clarification as to whether Sky Telecom Ltd. was the only operator using Wholesale Line Rental in Malta. It also requested a forecasted market share of the same operator for the next 2 years. The MCA provided a reply to both questions and the EU Commission was satisfied with the responses provided.

Nevertheless, on the 19th October 2009 the EU Commission requested an urgent meeting with the MCA to discuss a forthcoming Serious Doubts Letter. To this end the MCA and the EU Commission held a conference call on the same day. During the conference call the EU Commission raised the following issues with respect to the notification:

1. The reason behind the shrinking volumes of the Higher-level (ISDN BRA) and Enhanced Higher-level (ISDN PRA) connections.

2. The price level of access services in Malta in relation to other EU countries seemed to be on the high side.

3. The market share of the incumbent operator GO plc. in all the retail access markets remained strong at 76% of the market. This high market share raises strong presumption of SMP. The EU Commission also argued that although the cable operator Melita plc. gained some market share it did not seem to be able to compete aggressively in this market.

4. The WLR obligation was not functioning well as Sky Telecom Ltd. had to shift its customers to its own wireless network SKYNet.

During the meeting the MCA tried to uphold its case to the EU Commission in relation to these doubts. However, given the short timeframe, the MCA could not at that stage provide sufficiently comprehensive responses. Consequently, on the 20th October 2009 the MCA decided to withdraw the notification to enable it to make a stronger case for its proposed decision and re-notify the decision at a later stage.

Following the withdrawal, on the 17th February 2010 the MCA held another pre-notification meeting with the EU Commission whereby it presented additional evidence to address the serious doubts as expressed by the EU Commission.

The MCA sought to provide additional evidence to support its case for a competitive retail access markets. The most important factor determining this conclusion was the fact that there were at least 3 network operators offering access services. All alternative networks operate at a national level and are offering equivalent products as offered by the incumbent and in some instance at cheaper prices. In addition the MCA provided evidence in relation to each of the four issues raised by the EU Commission.

With reference to the decline in the number of ISDN BRA and PRA connections the MCA explained to the EU Commission that the decline in ISDN BRA was a result of under-reporting in the data by GO plc. After a rectification by GO, the figures for ISDN BRA did not show a decline but rather remained stable over time. In the case of ISDN PRA, the number of connections remained stable at around 350 lines in absolute terms. In both instances the MCA highlighted the fact that ISDN lines in Malta are only used by a few hundred businesses and that such products are only used to address the particular needs of large business.

On its part the EU Commission agreed that after rectification of the figures, no abnormal activity was observed in the market, and that ISDN connections remained stable up to the period under review. The EU Commission also acknowledged that these products are provided on a very limited scope in Malta, but nevertheless prior to deregulating these markets the MCA needs to ensure that the provision of these services faces sufficient competitive constraints.

With respect to the concern expressed by the EU Commission regarding the price levels of access services in Malta when compared to those of other Member States, the MCA provided benchmark data that showed that retail prices of access services in Malta are amongst the cheapest in the EU. The benchmarking data was obtained from the latest 'Progress Report on the Single European Electronic Communications Market' published by the EU Commission. From the benchmarking data it emerged that whilst the EU average retail access rate was increasing over time, retail fixed access prices in Malta have remained at a low level and stable over the past years. Furthermore, in addition to low access prices, local operators were also offering free minutes bundled within the access fees, thereby making the fixed access services more affordable.

The EU Commission took note of this MCA pricing analysis, which provided for a more detailed and a clearer view of the access pricing levels in Malta.

The main discussion revolved around the high market share which the incumbent still holds in the retail access market. The EU Commission's main argument was that despite the fact that the incumbent, GO plc., had lost some of its market share to the cable operator Melita plc., GO was still holding in excess of 76% share of the lower level access market, and in excess of 90% share in the higher level access markets. The EU Commission argued that although Melita's retail offers were cheaper when compared to GO, the latter was still able to hold such a large market share. Furthermore, smaller alternative operators such as Vodafone Ltd. and Sky Telecom Ltd. did not seem to pose a credible constraint on GO plc. given that their combined market share was around 1%. The EU Commission was therefore of the opinion that no alternative operator was in a position to constrain GO plc. effectively such that the market would not require regulation.

On its part, the MCA acknowledged that GO plc. still maintained the lead in the market and held the largest market share. Nonetheless alternative operators, namely the cable operator, had still managed to gain 25% market share in 3 years. The MCA also argued that because of Melita's cheap offers, the incumbent GO had to react and offer new and cheaper products itself. The MCA argued that there were other instances where markets have been declared competitive in spite of the fact that an operator had a market share in excess of 50%.

The MCA argued that irrespective of the high market share, the incumbent GO was at the time not able to exert significant market power due to the presence of alternative network operators. Furthermore, the wholesale line rental obligation (imposed on the incumbent GO plc. under Market 2), ensured that any excessive profits in the retail market could lead to a potential new entry.

During the meeting, the EU Commission acknowledged that the additional evidence provided by the MCA would suggest that the retail access markets were showing initial signs of competition, however according to established competition law, a market share of 50% or more would generally raise the presumption of dominance. In this case the EU Commission considered that the current level of competition in the market coupled with the 76% market share of GO plc. would still necessitate a finding of SMP. While also acknowledging that alternative infrastructures are present, and that the WLR obligation has been in place for some time and will continue to be available for the timeframe of this review, the EU Commission was still not convinced that the market was competitive enough. Consequently, the EU Commission believed that lifting regulation at that point in time would have been premature and would have endangered further competition in the market.

With respect to the issue raised by the EU Commission on the effectiveness of the WLR obligation, the MCA gave an overview of the WLR obligation imposed on the incumbent GO plc. and which would have been again enforced under the obligations imposed in Market 2 – Wholesale call origination on the fixed network[4].

The MCA explained to the EU Commission that whilst Sky Telecom Ltd. was using the WLR product made available by the incumbent, it had also deployed its own BWA network (SKYNet) through which Sky Telecom was offering retail access services. Consequently, given that Sky Telecom now had its own access network, it was logical to actively migrate its clients hosted on the WLR product to its own network. Apart from providing retail access services, Sky Telecom Ltd. was now in a position to provide its clients with a cluster of services and therefore was able to increase its revenues. The decline in WLR connections was therefore not the result of a problem with the WLR obligation as imposed by the MCA but rather the result of a positive development by Sky Telecom in deploying its own network infrastructure.

In the end the EU Commission acknowledged that with the presence of three alternative infrastructures, there were visible signs of competition in the access markets. Nevertheless, there was still the possibility that the incumbent could abuse of its strong market base and try to prevent alternative operators from participating effectively. The EU Commission therefore invited the MCA to incorporate the additional evidence gathered in the revised analysis and also to take into consideration its concerns.

[4] Link to MCA Decision:
http://www.mca.org.mt/sites/default/files/articles/Decision-Wholesale_call_orig_FN.pdf

***Revised analysis and new developments***

Following these meetings held with the EU Commission, the MCA took the utmost account of the concerns raised and sought to address these through a revised analysis of the market.

During the revision of the analysis the MCA observed a number of unforeseen developments in the market that warranted further investigation. These developments include the following:

- In 2010 Melita started to distinguish between residential and business customers and applied different pricing policies for the two groups of customers.

- Vodafone, which was offering fixed access services as an add-on to its broadband service, started to experience difficulties in providing its WiMax broadband services to new customers and in fact stopped offering its BWA service in April 2011. Existing customers still continue to receive the services, however no new services are being offered for the time being. In addition the market share of Vodafone in the fixed access market over the last two years has remained negligible at 0.2%.

- After migrating most of its customers from the WLR access solution to its own SKYNet access product, Sky Telecom started to register a decrease in its market share. During 2010 its market share dropped to a mere 0.2% from 1% in 2008.

- During 2010 GO managed to increase both its market share and its absolute number of access connections, whilst Melita registered a slight decrease in both its market share and in the number of actual access connections.

- The MCA observed that since 2009, when Melita plc. started to charge for its fixed access service, its growth in fixed access connections stopped. This indicates that the market share that Melita obtained between 2006 and 2008 was the result of an initial practice by the cable operator to provide the fixed access service for free as an add-on to customers already subscribed to its broadband service. In addition, the MCA also noted that although GO lost 24% of its market share to Melita, in absolute terms GO did not lose much customers, suggesting that most of the customers having a Melita access connection did not remove their 'old' GO fixed access line connection. The fact that these households maintained two access lines indicates that customers are not ready to give up their GO access connection.

Following these observations, the MCA decided to carry out a fresh market review of the fixed retail access markets. Accordingly this is expected to capture these latest developments and also to address the concerns expressed by the EU Commission. The revised market review will be presented in the subsequent sections of this report.

# Chapter 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[5] appropriate to national circumstances, in particular the relevant geographic markets[6] 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 locations
- Fixed and Mobile access
- Different technologies of fixed voice access
- Residential and Non-Residential access
- Geographic Market

Central to the various dimensions of the market definition procedure are the demand-side and supply-side substitutability. As per the Commission's guidelines on market analysis and the assessment of significant market power (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, whereas supply-side substitutability 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.

In view of the forthcoming demand-side and supply-side substitutability analysis, the market analysis carried out by the MCA will review 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.

[5] 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.

[6] 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.

### 3.1.1 Access via standard exchange line connections

Access via standard exchange line connections is provided by two operators, namely the incumbent undertaking; GO plc. (formerly known as Maltacom plc.), and Sky Telecom Ltd. Until some time ago, GO plc. used to provide fixed telephone access via conventional 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 plc. 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 2010, GO plc. had 187,941 registered standard connections, representing a decline of more than 14,100 connections when compared to the same corresponding period in 2005. Sky Telecom Ltd. – an operator buying wholesale access[7] from GO plc. – reported 970 standard exchange line connections as at the end of 2010; the lowest level number of subscribers since its inception in 2007.

### 3.1.2 Access via digital ISDN exchange line connections

The incumbent operator GO plc. and Sky Telecom Ltd. 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 conventional 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.

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).

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

[7] 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.

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 2010, the number of ISDN BRA connections with GO plc. stood at 2,519 whilst the number of ISDN PRA connections with the same operator stood at 336. As evidenced by these small figures, ISDN connections in Malta are not in much demand.

### 3.1.3 Access via cable-modem connections

Melita plc. is currently providing standard IP connectivity over the cable television 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[8] connection. As at the end of Q4 2010, the number of active Melita cable modem connections stood at 54,970.

Melita is also currently offering business connections, under the brand name of Melita Business Telephony, which offers PBX-interfaced services without actually requiring end-users to buy their own telephone system. A business connection telephone line represents 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 interfaced directly with the end-user's PBX system, and thereby supporting all the standard features including Direct Dial In[9] (DDI). For ease of reference, this document will hereafter refer to this product as the multiple line solution.

### 3.1.4 Access via wireless solutions

Vodafone (Malta) Ltd. 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. In a recent development, the MCA also notes that while Vodafone Ltd. continued to fulfil its service obligation towards present subscribers, it ceased to continue offering this service to any new customers. For the record, as at the end of Q4 2010, the number of subscribers to Vodafone's fixed telephony package amounted to 393.

Additional to Vodafone Ltd., Sky Telecom Ltd. – apart from offering fixed line access via the CS facility hosted by GO plc. – also offers voice over IP services through its wireless broadband infrastructure, under its brand name SKYNet.

[8] A cable modem is a device that allows high-speed data transmission via a cable network. Melita plc 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.
[9] The provision of Direct-Dial In (DDI) numbers allows for company staff members to have individual telephone numbers that clients can call directly.

## 3.2 Delineation of retail access markets in Malta

### 3.2.1 Access and Calls at a fixed location

As already outlined, one of the considerations made by the MCA in its market definition process is to assess whether retail fixed line access and fixed line calls could be substitutable to each other. In this regard the MCA has established that, to date, customers purchase fixed access and calls as a combined package of services. However, this does not necessarily entail that these two services fall within the same relevant market. More so, the MCA continues to note 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 but under distinct itemisation. Ultimately, the MCA's assessment on this will lie 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. In other words, customers will only be capable of making calls over the fixed line network once they have 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.

Nonetheless, this document goes on to recognise that 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), thereby enabling an operator to offer only call services, as customers have the facility to purchase the access from the incumbent undertaking.

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 Telephone Line* product, which to date enjoys the highest number of subscriptions, applies this billing mechanism. This goes on to confirm the MCA's proposition 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 – 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. Accordingly, this continues to suggest that, despite being less apparent, the tariff distinction between access and usage still inherently holds true and that these packages may possibly be catered towards consolidation of business given that with CS and CPS development customers can purchase access from one undertaking while call services from another.

***Supply-side substitution***

The MCA is of the opinion that a 5 to 10 per cent 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 construction 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 suggests 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 suggesting that access and call products belong to separate markets.

### 3.2.2 Fixed and mobile access

Given the recent growth in the mobile market, with 31% more active connections over a four year period, the MCA feels it is also relevant to consider whether mobile access falls within the scope of this market definition and subsequent review. The MCA looks into the extent to which a customer would consider switching between mobile access network 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 retail fixed line access; the most salient difference being the mobility factor. In fact, 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 by 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 partly on the mobile phone set, partly 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.

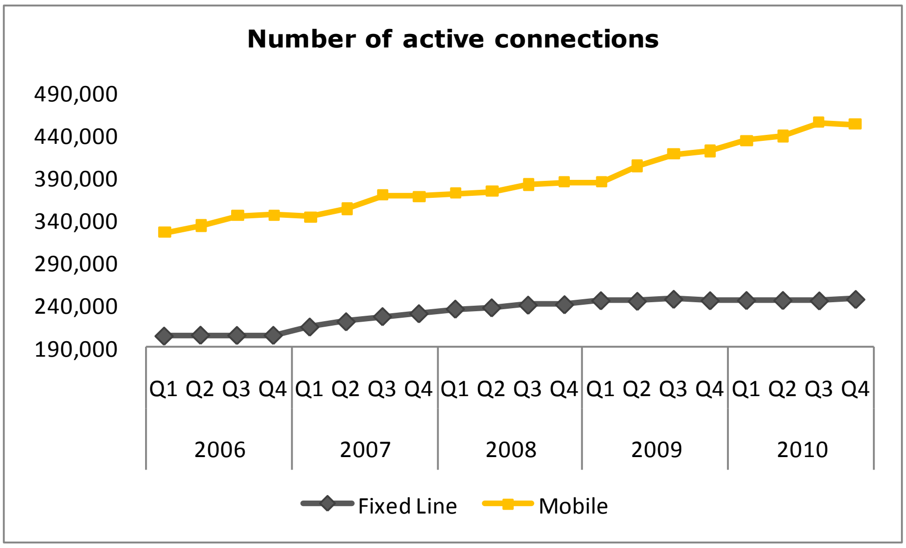
In terms of usage, fixed line access and mobile access provide users with a variety of 'secondary' services that continue to highlight the distinctive properties of the two. Fixed access, for example, facilitates services such as fax and dial-up internet; with the latter however now rendered obsolete with just 50 households in Malta using this technology. Mobile access, on the other hand, facilitates data services by way of text messaging, with more than 10 million SMSs sent during 2010. 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. In fact, over 2010 more than 279 million calls had originated from mobile telephony.

Statistical evidence continues to suggest that there has been no net substitution between mobile access and fixed line access, provided that both the number of fixed line connections and mobile connection has been increasing. In absolute terms, the number of active fixed line subscriptions in Q4 2010 increased by 1,497 over the corresponding period a year earlier, to reach a total of 247,345 active connections.

The MCA underlines that the increase in fixed line connections materialised at a time when more aggressive mobile plans have been launched. In fact the number of active mobile subscriptions stood at 453,793 as at the end of 2010, nearly an 8% growth over a 12 month period. Accordingly, developments in fixed line access cannot represent fixed to mobile substitution as consumers prefer to have fixed line connection even if their mobile usage increases, as actually happened over the four year period between 2006 and 2010.

**Chart 1**



Somewhat critical to the MCA's review and demand-side substitutability analysis is the consideration of the extent to which fixed access users would switch their fixed line access with mobile access if the price of the former service had to increase. 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 separate 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 Telephone Line* product; the most sought on the Island. However, other fixed telephone access products currently being offered by local operators, GO plc. included, bundle a number of free minutes[10] 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 *Talk 200* offered by GO plc. and the *Medium* and *Large* packages offered by Melita plc. 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 / SMS 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, costs 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 cost €0.20 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

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

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.

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 infrastructure 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***

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

A further 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 i.) functionality and ii.) the pricing element.

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 conventional 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 plc., Sky Telecom Ltd., Melita plc., and Vodafone Ltd.

## Table 1

| Lower Level Access Products | | | | |
|---|---|---|---|---|
| Operator | Type of connection | Product by Brand Name: Postpaid | Product by Brand Name: Prepaid | Type of use |
| Go plc. | Standard exchange line connection | Standard connection, Talk 200, Talk Anytime | Easyline | residential |
| | | Standard connection, Talk 500 | Easyline | business |
| Sky Telecom Ltd. | CS service (standard exchange line connection hosted by Go plc.) | SKY Home Package 1, SKY Home Package 2 | Sky LINE | residential |
| | | SKY TALK | ---- | business |
| Melita plc. | Cable-modem connection | Medium (M), Large (L), Extra Large (XL) | Telephony *flex* | residential |
| | | Large (L), Extra Large (XL) | ---- | business |
| Vodafone Ltd. | Wireless connection | Talk Unlimited (Dream Pack) | ---- | all |
| Sky Telecom Ltd. | Wireless connection | SKYNet | ---- | all |

*Data as at March 2011*

## Table 2

| Operator | Connection Type | Connection fee (€) | Rental charge per annum (€) |
|---|---|---|---|
| | | Data as at March 2011 | |
| | Connection on standard exchange line | | |
| Go plc. | Classic Telephone Line (postpaid) | | |
| | Residential | 54.97 | 71.70 |
| | Business | 109.95 | 186.91 |
| | Talk Anytime (postpaid) | | |
| | Residential | 54.97 | 119.88 |
| | Talk 200 (postpaid) | | |
| | Residential | 54.97 | 110.40 |
| | Talk 500 - Business (postpaid) | | |
| | Business | 109.95 | 222.24 |
| | Prepaid: Easyline (prepaid) | | |
| | Residential | 54.97 | 0.00 |
| | Business | 109.95 | 0.00 |
| | Cable-modem connection | | |
| Melita plc. | Medium (postpaid) | | |
| | Residential | 10.00 | 71.88 |
| | Large (postpaid) | | |
| | Residential | 10.00 | 119.88 |
| | Extra Large (postpaid) | | |
| | Residential | 10.00 | 155.88 |
| | Telephony Flex (prepaid) | | |
| | Residential | 23.53 | 0.00 |
| | Large (postpaid) | | |
| | Business | 10.00 | 222.00 |
| | Extra Large (postpaid) | | |
| | Business | 10.00 | 342.00 |
| | CS service (connection on standard exchange line hosted by Go plc.) | | |
| Sky Telecom Ltd. | Sky Home Package 1 (postpaid) | | |
| | Residential | Free | 119.40 |
| | Sky Home Package 2 (postpaid) | | |
| | Residential | Free | 81.12 |
| | Sky Talk | | |
| | Business | 74.52 | 54.00 |
| | Sky Line (Prepaid) | | |
| | Residential | Free | 0.00 |
| | 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 conventional standard connection offered by GO plc., 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 €10; applicable to both residential and business customers. Subscribers to Melita's prepaid are asked to pay a one-time connection fee of €23.53.

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 the incumbent operator GO plc. and Melita plc. It is important to also note that, as per the MCA's September 2006 decision on access to the public telephone network at a fixed location, the connection fees and the rental charges by GO plc. are subject to regulation.

The MCA also notes that Sky Telecom provides access to the public telephone network via a wholesale line rental (WLR) conventional analogue hosted by GO plc. In this case, no connection fees apply for a conventional exchange line connection with Sky Telecom, except for the *Sky Talk* service aimed for business customers and who are required to pay €74.52 for connection.

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, Sky Telecom Ltd. is also offering voice over IP services through its wireless broadband infrastructure, under its brand name SKYNet. 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 or SKYNet 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 or SKYNet's wireless access to the public telephone network and other forms of lower level access. In this regard, the revised EU Recommendation states that, generally, consumers will not upgrade to a broadband service solely for the purpose of accessing voice services[11]. 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. Statistical records as at Q4 2010 support this, whereby only 9% of the total Vodafone broadband wireless users have subscribed to public telephone network access.

The MCA therefore concludes that the very limited migration to Vodafone's or Sky Telecom'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 Vodafone's or Sky's wireless network 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.

[11] 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.

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. In essence, table 2 highlights the annual rental charges applicable to GO plc., Sky Telecom Ltd. and Melita plc. customers, with differences in access rental charges essentially reflecting different calling plans. However, a small but significant (5 to 10 percent) increase in the price of access, say, via Melita's standard cable modem, 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 MCA's proposition to classify access via GO's standard exchange line, Melita's cable modem and Sky's Telecom CS facility within the same relevant market.

***Conclusion on lower level access***

On the basis of the above, the MCA proposes that standard connections and standard cable modem connections are substitutable from a demand-side perspective and can therefore be considered to constitute 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 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 conventional 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 conventional 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 conventional 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, Table 3 below suggests that if a residential customer requires two channels of fixed access, the annual rental charge for purchasing two *Classic Telephone Lines* from GO plc. would be cheaper than the ISDN BRA option offered by the same operator and by Sky Telecom. Alternatively, there is no difference in the rental charge between the two conventional connections by GO plc. and the *multiple line* option based on the *Medium* plan offered by Melita plc.

**Table 3**

| Operator | Product | Scheme | Number of lines | Connection Fee (€) | Annual Rental Charge (€) | Type of use |
|---|---|---|---|---|---|---|
| Go plc. | Standard Connection | Postpaid (Classic Telephone Line) | 1 | 54.97 | 71.70 | Residential |
| Sky Telecom | CS Connection | Postpaid (Sky Home Package 2) | 1 | Free | 81.12 | Residential |
| Melita plc. | Cable Connection | Postpaid (Medium) | 1 | 10.00 | 71.88 | Residential |
| Go plc. | Standard Connection | Postpaid (Classic Telephone Line) | 2 | 109.94 | 143.40 | Residential |
| Sky Telecom | CS Connection | Postpaid (Sky Home Package 2) | 2 | Free | 162.24 | Residential |
| Melita plc. | Cable Connection | Postpaid (Medium) | 2 | 20.00 | 143.76 | Residential |
| Go plc. | ISDN BRA | Postpaid (Classic Telephone Line) | 2 | 69.88 | 177.03 | Residential |
| Sky Telecom | ISDN BRA | Postpaid (Sky Home Package 2) | 2 | 51.00 | 168.00 | Residential |
| Melita plc. | *Multiple Line Solution* | Postpaid (Medium) | 2 | 20.00 | 143.76 | Residential |

This suggests that in the event of a small but significant increase in the price of a conventional standard connection offered by GO plc., a customer requiring two channels to access voice calls and related data services may decide to switch to Melita's *multiple line* solution as it will turn out to be cheaper. Conversely, it would be more economically feasible for customers to subscribe to another *Classic Telephone Line* offered by GO plc. rather than opting for the ISDN BRA option by the same operator and that offered by Sky Telecom. 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.

It also stands to reason that residential consumers requiring only one channel to access the public telephone network would simply purchase a conventional standard connection being offered by GO plc. or some other lower level access connection from the alternative operators; Sky Telecom Ltd. and Melita plc. In fact, a small but significant (5 to 10 percent) increase in the price of access via a Sky Telecom's conventional 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. On the other hand, if two channels are required, the said price movement is more likely to entice a conventional standard exchange line residential customer with Sky Telecom to consider switching to an ISDN BRA connection offered by the same operator or else to Melita's *multiple line* solution with a maximum of two telephone trunks.

Again it would be very unlikely for customers with ISDN BRA or *multiple line* connections to switch to two conventional standard channels offered by Sky Telecom in view of the said price movement. This proposition stems out from the fact that both ISDN BRA and Melita's *multiple line* solution with a maximum of two telephone trunks may offer additional or advanced call features that are not accessible via a conventional connection. Furthermore, ISDN BRA and Melita's *multiple line* solution with a maximum of two telephone trunks customers may have invested money in customising their network infrastructure to support such features.

With regards to Melita plc., in the event of a 5 to 10 percent increase in the annual charge for access via a standard cable modem connection, a customer with requirements that are met by such a connection would not consider switching to ISDN BRA or Melita's *multiple line* product with a maximum of two telephone trunks. Indeed, the cost of an ISDN BRA connection or a *multiple line* connection would still be higher than in the case of a standard cable modem connection, even if the price of the latter type of connection increases by 10 percent. If, on the other hand, an additional channel / line is required by this customer, there would be scope to switch to *multiple line* solutions, especially in view of the applicable charges and the availability of advanced call features.

The MCA however notes that the unique requirements of some consumers, primarily businesses, and the presence of advanced call features leaves little scope for subscribers of Melita's *multiple line* solution with a maximum of two telephone trunks to switch or revert to two standard cable modem connections with the same operator or else to switch to alternative connections offered by other operators. This situation is unlikely to change within the time frame of this review.

Additionally, the MCA notes that the underlying functional characteristics and the pricing levels of ISDN connections suggest that these products are largely designed for addressing the requirements of business customers. Residential customers, on the other hand, though not excluded from receiving these products have their specific needs generally satisfied with just one standard connection. Thus ISDN connections are most of the time not considered. Alternatively, even those residential customers that require two lines would generally opt for the standard product rather than an ISDN connection, because as has been determined by the analysis above, purchasing two conventional exchange lines would turn out to be cheaper than any other ISDN connection. Statistical evidence as at Q4 2010 confirms this; showing that out of an actual total of 2,553 ISDN BRA connections only 48 customers or 2% are residential subscribers. Moreover, out of an actual total number of active fixed line access connections only a negligible 0.02% are residential ISDN BRA subscribers. Accordingly, and in view of the gradual decline in this limited number of residential ISDN BRA subscribers, the MCA will only define a non-residential ISDN BRA access market.

***Conclusion on standard exchange / cable connections vs. ISDN BRA connections***

On the basis of the above assessment, the MCA concludes that conventional 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 conventional connections and standard cable modem connections. The MCA therefore suggests 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.

With respect to the latter, the MCA concludes that the ISDN BRA market shall only include non-residential subscribers. Although residential customers are not precluded from acquiring such connections, in general residential customer have their specific needs satisfied by lower level access services, both in terms of functionality and lower pricing. This conclusion is supported by the decreasing number of residential users acquiring such service which as at Q4 2010 stood at a mere 48 connections in absolute terms. Therefore, given these very small number of connections, the MCA shall not define a separate market for residential ISDN BRA connections as this would be superfluous given the local circumstances.

- 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 plc. and Sky Telecom 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* service can support up to 30 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 the conventional connections on standard 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 conventional 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 exchange lines and access via standard cable-modem connections as falling under the lower level access category. The MCA also considers wireless access to public telephone services via Vodafone's network 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 plc., 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

As highlighted in the Commission's Explanatory Memorandum to the Recommendation on relevant markets, it may be appropriate to distinguish end user categories in the markets defined between business and residential provided that the contractual terms of access and service may vary and because the economics of serving customers in the two locations may be significantly different.

As it stands today, a customer may only apply for a residential service if he/she intends to use the channel for purely residential purposes. Likewise, a customer is left with no choice but to apply for a business service if he intends to use the telephone access for commercial requirements. Nonetheless, the demand and supply side substitution analysis will still apply.

***Demand-side substitution***

Despite the fact that access to business and residential customers is functionally the same, since it is provided over the same infrastructure and provide same quality of services, business and residential users have different requirements. 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, business subscribers very often require more than one exchange line and are as a result an important customer to the ISDN BRA and ISDN PRA market. Residential users, on the other hand, need fewer value-added services and use their access line for making calls.

At present all local undertakings distinguish between residential and business customers when marketing their products on their websites. Operators not only offer products designed towards particular customers, such as the GO's T*alk Anytime* and Melita's *Medium* plan, offered only to the residential category, but distinguish between residential and business customers even when offering the same plan or service package.

Table 4 below makes this distinction very clearly, whereby for the same *Classic Telephone Line* service, business subscribers with GO plc. pay a higher annual rental charge and connection fee. As with regards to Melita plc., the connection fee is €10 for both categories while the annual charge for both the *Large* and *Extra Large* plans is higher for business subscribers. Conversely, the MCA notes that business subscriptions with Sky Telecom Ltd., although subject to a connection fee of €74.52, are cheaper than the residential alternative offered by the CS operator. The business annual rental, charged by Sky Telecom Ltd., is also far more competitive than the business packages being marketed by the other two undertakings; GO plc. and Melita plc.

**Table 4**

| Operator | Connection Type | Data as at March 2011 | |
|---|---|---|---|
| | | Connection fee (€) | Rental charge per annum (€) |
| | Connection on standard exchange line | | |
| Go plc. | Classic Telephone Line (postpaid) | | |
| | Residential | 54.97 | 71.70 |
| | Business | 109.95 | 186.91 |
| | Cable-modem connection | | |
| Melita plc. | Medium (postpaid) | | |
| | Residential | 10.00 | 71.88 |
| | Large (postpaid) | | |
| | Residential | 10.00 | 119.88 |
| | Business | 10.00 | 222.00 |
| | Extra Large (postpaid) | | |
| | Residential | 10.00 | 155.88 |
| | Business | 10.00 | 342.00 |
| | CS service (connection on standard exchange line hosted by Go plc.) | | |
| Sky Telecom Ltd. | Sky Home Package 1 (postpaid) | | |
| | Residential | Free | 119.40 |
| | Sky Home Package 2 (postpaid) | | |
| | Residential | Free | 81.12 |
| | Sky Talk | | |
| | Business | 74.52 | 54.00 |

According to Table 4 above, even if the customer had the possibility to choose under which group to be categorised, no residential subscriber with GO plc. or Melita plc. would switch to the other's business package in the event of a SSNIP, as the latter will remain far more expensive. In the same event, switching to Sky Telecom business would be rational but then again, subscribers are not free to choose. Similarly, it is not possible for a business subscriber to switch to a residential package when faced by a hypothetical price increase in access. No undertaking will supply the residential service to a subscriber who has filed his address for commercial use. Under these conditions, the MCA therefore proposes, that from a demand side perspective, the possibility of substitution is ineffective.

### *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.

### *Conclusion*

The MCA's analysis indicates that despite the potential supply side substitution, demand side substitution is not effective. Hence residential and non-residential services in Malta fall in separate relevant markets.

### 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 telecommunications 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 property development at Tigne` Point. The MCA notes that the developer, namely MIDI plc., has entered into a commercial agreement with SIS Ltd, 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 per cent 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[12]. 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 the 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 regarding ISDN.

***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

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[12] 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.

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 Conclusion on relevant markets

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

1. Residential lower level access to the public telephone network at a fixed location.

2. Non- residential lower level access to the public telephone network at a fixed location.

3. 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.

4. 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.

**Q1. Do you agree with the above preliminary conclusions regarding the market definition for the retail fixed access markets?**

# Chapter 4 Market Analysis

Having identified, in the previous chapter, the four 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
- Barriers to switching for consumers
- Countervailing buyer power

### 4.2.1 Market Share Analysis

In competition law assessment market shares are commonly used as a proxy for market power. Although high market shares are not, by themselves, sufficient to conclude whether an undertaking enjoys SMP in a market, market shares exceeding the 50 per cent mark are indicative of SMP. This notion emerges from the EU Commission Guidelines; underlying that according to established case-law, market shares in excess of 50% are in themselves, save in exceptional circumstances, evidence of the existence of a dominant position. In view of this, the market share analysis, based on available statistical evidence and trends over the 2005-2010 period, shall establish whether any one of the undertakings providing access to the public telephone network in Malta is in a position to exert market power.

GO plc. (formerly known as Maltacom), having been established in the telecoms industry for many years, is the main operator in Malta offering fixed access line services to both residential and non-residential customers. Together with Sky Telecom Ltd. (via the CS facility), GO plc. provides all standard and ISDN exchange lines in Malta. Access to the public telephone network via basic cable modem connections is provided by Melita plc., while access to voice telephony via wireless connections is locally provided by Vodafone Ltd. and Sky Telecom Ltd. under its brand name SKYNet. 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 5 below, GO plc. and Melita plc. are the two main players within the lower level access market. Collectively, the other undertakings only share 0.9% of the market; which given their business objectives or statistical trends are not expected to grow during the timeframe of this review.

**Table 5**

| ACTIVE FIXED LOWER LINE ACCESS CONNECTIONS | 2005 Q4 | 2006 Q4 | 2007 Q4 | 2008 Q4 | 2009 Q4 | 2010 Q4 |
|---|---|---|---|---|---|---|
| **Total number of active fixed line access connections** | **202,116** | **208,361** | **228,262** | **239,252** | **243,005** | **244,441** |
| GO | 100.0% | 97.1% | 85.7% | 77.6% | 76.6% | 76.9% |
| Melita | - | 2.9% | 13.1% | 21.2% | 22.7% | 22.5% |
| SKY Telecom | - | - | 1.2% | 1.0% | 0.3% | 0.2% |
| SKYNet | - | - | - | - | 0.1% | 0.2% |
| Vodafone (Malta) | - | - | - | 0.2% | 0.2% | 0.2% |
| SIS | - | - | - | - | - | 0.1% |

On one hand, Vodafone Ltd. and SKYNet 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 Ltd. 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 plc. and Melita plc. 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 lately, Vodafone Ltd. is no longer providing this service to new subscribers, thus automatically eliminating any further growth in its market presence.

On the other hand, Sky Telecom Ltd. has been consistently losing its market share since 2008 to reach 0.4% as at Q4 2010, and on the basis of this trend the MCA is not expecting any significant changes to its position in the market. It is worth noting that Sky Telecom, which uses a CS/CPS solution via GO plc. has been migrating its customers from this solution to its own access services provided over its wireless network. However, even the combined market share of these two access services still shows a decline over time.

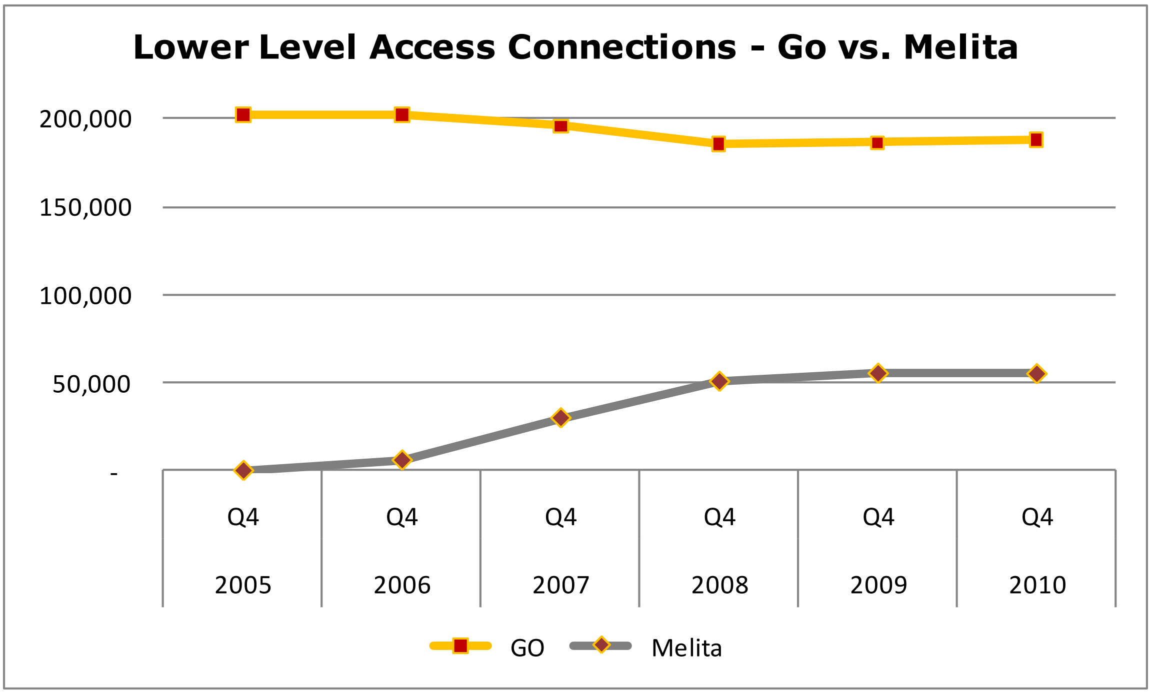
SIS Ltd. which is licensed to offer telephony and internet access services within the confines of the Tigne` Point development is not expected to expand its business portfolio beyond this location in an attempt to gain a higher market share. The fact that its network is confined to a specific area implies that it can only pose a credible constraint on GO plc. and Melita plc. 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 plc. and Melita plc. will continue to determine the main competitive developments in the lower level access market, with little or no pressure from alternative operators.

Prior the entry of Melita plc. in the market, GO plc. had full control over the fixed telephony market, with an actual total of 202,116 connections by Q4 2005. In early 2006, Melita plc. started offering 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 three years, Melita's market share grew to reach 22.7% by the end of 2009. Consequently, GO's market share in terms of lower level access connections fell to 76.6% by the end of that same year as some 16,000 connections had been lost to the new competition.

However, Melita's growth in the number of low level access connections, with a standing of 55,231 subscribers during 2009, was more than the 16,000 subscriptions competed away from GO plc.; with the rest translating into new subscriptions. Notably, this development came at a time when, between 2006 and 2008, Melita plc. was offering free fixed telephony access and on-net calls as an add-on to its broadband packages. Notwithstanding this offer, however, only 16,000 of the original 202,116 GO connections or an equivalent of 8% have been enticed to switch to Melita plc., with a good number of subscribers opting to take up this Melita offer while at the same time retaining the GO connection. Graphically, this assessment is also highlighted in chart 2 below by the slope of the two curves, whereby Melita's rate of growth in the number of connections is much steeper than GO's downward slope.

**Chart 2**




Since 2009, when Melita plc. started to charge for telephone line access and call services, its rate of growth in the number of lower level access connections appears to have stabilised. In actual terms, Melita plc. registered some 260 connections less by the end of 2010, implying that some of these subscribers are no longer continuing their fixed access service with Melita.

On the contrary, between 2009 and 2010, GO plc. increased the number of its low level access connections by 1,742. Subsequently, as per 2010 developments, GO plc. managed to consolidate nearly 77% of the market and also appears close to regaining 2008 market share levels, thus gaining lost ground in terms of subscription levels.

The MCA therefore concludes that with these developments in the low level access market, GO plc., although having lost 23 percentage points of its market share over a five year period to Melita plc., still holds SMP and more so appears not to detract from it during the time frame of this review. On the contrary, it appears that during 2010 GO plc. has managed to change its negative trend to a positive one with net additions of 1,742 subscriptions.

- Lower level access – Residential vs. Business

As has already been determined in the market definition chapter, the MCA shall distinguish between two lower level access markets – residential and non-residential lower level access markets. Subsequently, the market analysis will also assess these two markets separately for evidence of SMP by any undertakings in these markets.

The actual total number of lower level access connections as at the end of 2010 was 244,441, of which circa 211,089 or 86% are residential subscribers and 33,352 or 14% are business users. Graph 3 below – showing the residential and business market shares by operator under the lower level access category as at the end of 2010 – would indicate that GO plc. holds SMP in both distinct markets.

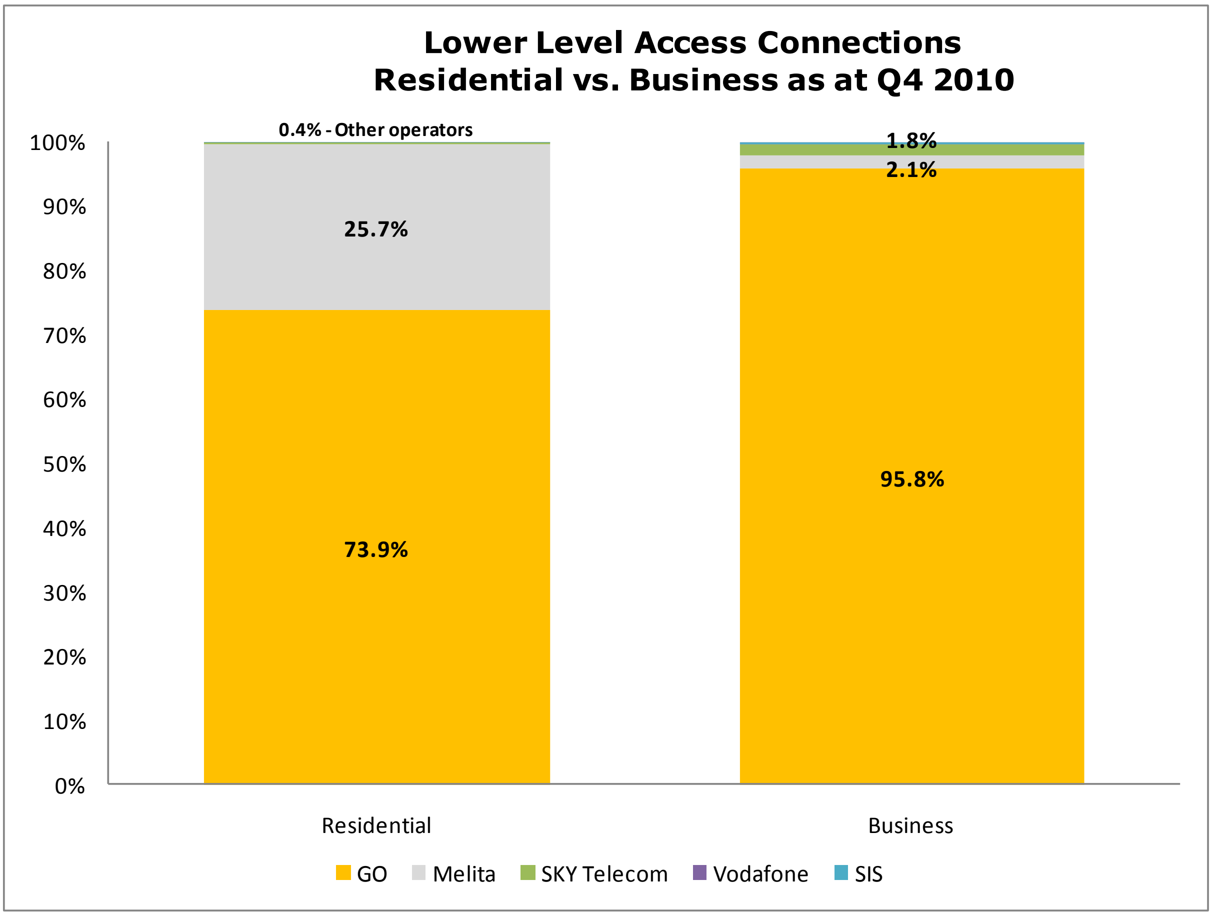
With regards to the residential lower level access market, GO plc. holds 74% of the market while Melita plc. controls more or less the rest. In the case of business lower level access connections, GO plc. has an even stronger market foothold with a share of almost 96%. Melita plc., on the other hand, enjoys 2.1% while SKY Telecom Ltd., which is more oriented towards business telephony and broadband services, makes up 1.8% of the market.

Melita's small business market share can be explained by the fact that up to some time ago Melita plc. did not distinguish between residential and business categories and had considered all customers to fall within the same classification. To this effect, Melita plc. only offered the *Medium* residential service plan, which was also available for business subscribers. Consequently, business customers subscribing to this Melita service were statistically recorded under the residential category. It is only after the MCA's 2009 market review, that Melita plc. started to distinguish between residential and business customer products, and likewise provide the MCA with separate statistical data for both categories. Hence the reason behind Melita's relatively low business market shares.

Vodafone Ltd. and SIS Ltd., although having subscribers from both residential and business categories, are limited in their scope and scale of fixed telephony services and thus hold less than 0.4% of the market.

In view of this assessment, the MCA concludes that during the timeframe of this review, GO plc., although exposed to some competitive forces from Melita plc. will continue to have SMP in both the residential and business lower level access markets.

**Chart 3**



- Higher level access

Higher level access connections comprise access to the telephone network via ISDN BRA and ISDN PRA/FRA offered by GO plc. and Sky Telecom Ltd., and *multiple line* solutions offered by Melita plc. From table 6 below, it is clear that GO plc. enjoys SMP in both higher level access and enhanced higher level access markets, given that it controls more than 90% of each market.

For the record, GO's ISDN BRA connections cater for both residential and business customers. The MCA, however, has already noted that the underlying functional characteristics and the pricing levels of ISDN connections suggest that these products are largely designed for addressing the requirements of business customers. Residential customers, on the other hand, though not excluded from receiving these products have their specific needs generally satisfied with just one standard connection, and even those residential customers who require two lines would generally opt for the standard product rather than an ISDN connection, because purchasing two conventional exchange lines would turn out to be cheaper than any other ISDN connection.

Statistical evidence as at Q4 2010 confirms this; showing that out of an actual total of 2,553 ISDN BRA connections only a mere 48 customers or 2% are residential subscribers. Moreover, out of an actual total number of active fixed line access connections only a negligible 0.02% are residential ISDN BRA subscribers. Accordingly, and in view of the gradual decline in this limited number of residential ISDN BRA subscribers, the MCA has only defined a non-residential ISDN BRA access market.

**Table 6**

| ACTIVE FIXED LINE ACCESS CONNECTIONS | 2005 Q4 | 2006 Q4 | 2007 Q4 | 2008 Q4 | 2009 Q4 | 2010 Q4 |
|---|---|---|---|---|---|---|
| **Number of active higher level access connections (ISDN BRA)** | **1,778** | **2,026** | **2,293** | **2,430** | **2,505** | **2,553** |
| GO | 1,778 | 2,026 | 2,293 | 2,430 | 2,473 | 2,519 |
| SKY Telecom | - | - | - | - | 32 | 34 |
| **Number of active enhanced higher level access connections (ISDN PRA)** | **328** | **309** | **332** | **372** | **338** | **344** |
| GO | 328 | 309 | 332 | 372 | 338 | 336 |
| SKY Telecom | - | - | - | - | - | 8 |

The statistical data in the table above suggests that GO's presence in the higher access markets has been slowly growing over the years, reaching 2,519 ISDN BRA connections by Q4 2010. Conversely, GO's ISDN PRA connections, used exclusively by business users, have remained relatively stable over the last five years, with a registered growth of only 2.4%. Graphically, these developments are illustrated in chart 4 and 5 below.

**Chart 4**

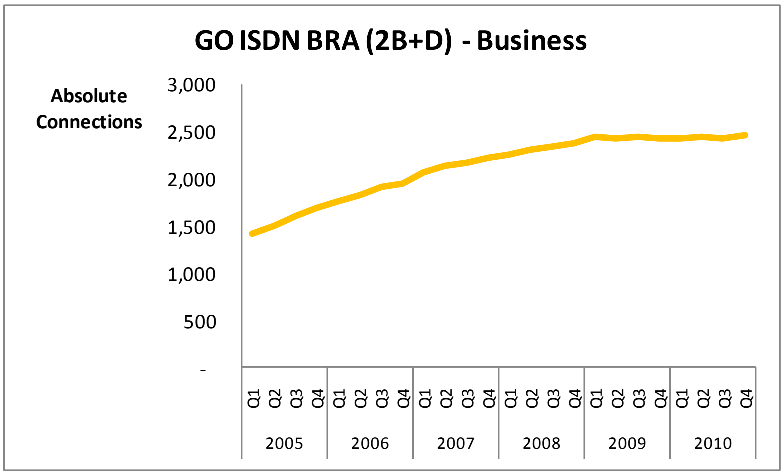
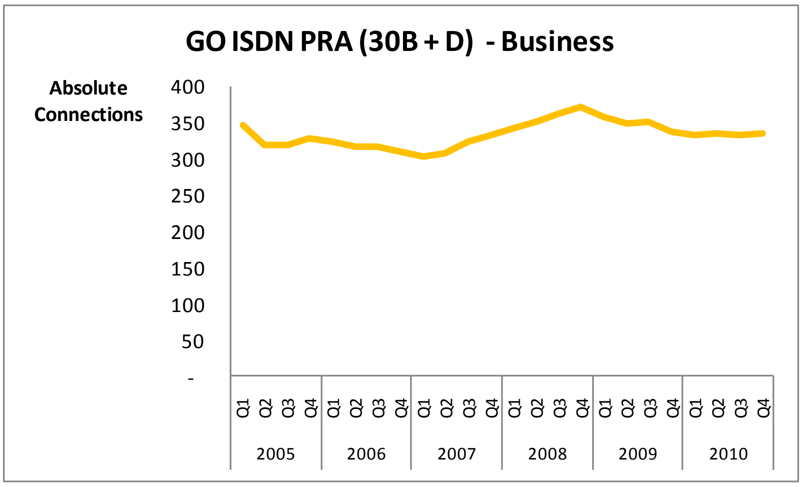



**Chart 5**




Data on Melita's *multiple line* connections is not provided as dual lines are simply being considered as two 'standard' connections and are therefore recorded under the lower level access category. Notwithstanding this, however, the MCA does not expect Melita plc. to have particular influence over this type of access, provided it does not offer a particular product for ISDN BRA or PRA but simply bundles a number of lines together to replicate the ISDN product at a much cheaper rate.

Higher level access connections via ISDN BRA and PRA offered by GO plc. only constitute some 1% of the total active number of connections. The reason being that higher level access products are designed to meet the requirements of large business users, which is a much smaller category than the residential users. Additionally, more than 90% of all businesses in Malta are micro or small enterprise employing less than 49 employees, and thus may very well have their business requirements satisfied by obtaining multiple lower level access products. Ultimately, from a financial perspective, it would also be feasible for someone requiring two lines to purchase two conventional exchange lines rather than any other ISDN connection, as the former solution would turn out to be cheaper.

With this assessment in mind, the MCA therefore concludes that given current trends and market realities GO plc. will, during the timeframe of this review, continue to enjoy a very high market share which raises the presumption of SMP in all the lower level and higher level access markets.

### 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 pronounced most 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. In general, economies of scale are 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. Likewise, the additional costs incurred by a fixed telephony operator will fall as more subscribers are roped in.

With reference to the local scenario, GO plc., having been providing retail fixed access services for more than three decades[13], has managed to establish itself, among both residential and business customers, as the leading nationwide service provider of fixed telephony access. Given this ubiquity and the high density of the network, GO plc., at more than 190,000 connections holds 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 plc. is also likely to experience economies of scale in the provision of associated supply services. In effect, since GO plc. 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 in theory 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.

The MCA notes that operators already competing with the incumbent have intensified their market presence at the expense of the latter, as confirmed by shifts in the customer base. 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 plc., 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, it can be argued that since Melita holds a large customer base in other electronic communications markets, it can also enjoy significant economies of scale in the provision of retail fixed access services.

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[13] http://www.GO.com.mt/Default.aspx?ID=178

Nonetheless, the MCA believes that GO's market penetration and strong customer base continues to underline its market dominance in the retail access markets by way of high economies of scale, in relation to any other provider. Also the fact that Melita plc. may enjoy some form of economies of scale does not automatically imply that Melita is able to effectively constrain GO, since the latter is also bound to enjoy these economies of scale in a greater magnitude.

With this outlook, the MCA therefore suggests that economies of scale for the local incumbent GO remain high as opposed to those of existing operators and to any potential new entrants.

*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 plc. and Melita plc., are offering multiple services directly to the consumer, including but not limited to leased lines, fixed calls, TV and broadband access. This horizontal integration may, in fact, enable 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 Ltd. and SKY Telecom Ltd. through its SKYNet network, also offer multiple services which can lead to cost savings on common processes. However, their market presence is much smaller compared to GO plc., such as to be able to achieve the same level of economies of scope in the provision of fixed line access services.

This ability of established networks to benefit from economies of scope can act as a barrier to entry for new competitors. New entrants can achieve such economies of scope only if they enter a large number of markets and with sufficient scale. In reality, this may however prove to be difficult as the entry costs involved would be high and likewise it would be difficult to recoup such costs on exit. Therefore, with this assessment, the MCA believes that economies of scope, like economies of scale, may impede new operators from entering the market or compete at par with the incumbent GO plc.

*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 the local context, GO plc. and Melita plc. are the largest vertically integrated operators, in that they are active at both the wholesale level and the retail level on a nationwide basis. For the record, Vodafone and SKYNet are also present in the wholesale and the retail level of fixed access, through the wireless solution, mainly intended for broadband access. The fact that both Vodafone and SKYNet offer fixed access services only as an add-on to broadband indicates that their main product offering is broadband not fixed access.

This setting seems to reiterate the claim that it may be difficult for new entrants to effectively compete with the integrated operator unless they have their own-built network. Partly, this claim may be true, as the integrated provider can make it difficult for new entrants at a retail level to obtain the necessary inputs at a competitive price (i.e. cost based) in the absence of regulation. Likewise, 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 other.

Yet again, even operators that are already in play with their own built network and are thus vertically integrated, have no firm guarantee that they will be able to effectively compete with the incumbent operator. Thus, although Melita's vertical integration places it in a better position to compete with GO plc. than any other operator; in the sense that it does not depend on the latter for upstream access to market inputs as new potential entrants with no infrastructure would, GO's strong market presence and long-standing customer base continue to support its substantial market size in relation to other operators. Accordingly, GO plc. continues to remain the largest vertically integrated operator in this market with nearly 77% of all retail fixed access lines.

Therefore the MCA concludes, that GO's vertical integration would continue to represent a significant barrier to entry in the retail fixed access markets.

*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. This option, however, has so far been guaranteed through regulatory intervention. On the other hand, 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 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. Nevertheless, the presence of BWA operators has not constrained GO plc. in such a way as to erode its market power. In actual fact, as can be seen from the market share analysis above, GO plc. still retains the majority of access lines in Malta and BWA operators only hold a mere 0.4% of fixed access lines. Therefore, even though new market entry has taken place via BWA, this has not resulted in increased competition.

Consequently, the MCA believes that investing in a fixed access network, similar to that of GO plc. would involve significantly high sunk costs. A potential market entrant will therefore find it hard to incur an investment where the returns do not justify initial investment costs. This will deter effective competition and reduce potential impact on the incumbent's market presence. The MCA, therefore concludes that sunk costs can act as a barrier to entry and the replication of a fixed access network, such that the market power of GO plc. is eroded, is very unlikely to happen during the time period 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 operator. In essence, the sheer threat of competition may prevent incumbent operators from raising prices above competitive levels; an attempt that can lead to a margin squeeze and thus keep back potential entrants.

The MCA notes 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 plc. started offering cable access for the provision of IP based telephony services. Between 2006 and 2008, Melita plc. offered fixed telephony access and on-net calls for free with its broadband packages. As a result, Melita plc. had experienced significant growth in the level of subscriptions and managed to capture 21% of the market by the end of 2008. Notwithstanding this, only 16,000 of the original 202,116 GO connections have been enticed to switch to Melita plc., with a good number of subscribers opting to take up this Melita offer while at the same time retain the GO connection.

Melita's market share, however, was more or less stable by the end of 2009 as it no longer provided fixed access and call services for free. In actual terms, Melita plc. lost some 260 connection lines by Q4 2010. On the other hand, GO's market share started to improve and in terms of subscription levels GO increased the number of active connection lines by 1,742 as at Q4 2010.

In view of this, the MCA believes that whilst there is a potential constraint from Melita plc. on GO plc., in practice this has only led to a brief decline in GO's market share and strength. Moreover, the MCA does not expect that within the timeframe of this review Melita plc. will manage to erode the market share of GO plc. to an extent that GO will lose SMP position.

In addition, in October 2005, frequency spectrum had been allocated by the MCA for the deployment of a national broadband wireless access (BWA) network, over which operators could also potentially offer retail fixed line access. However, with respect to the latter, the MCA believes that this form of access only poses an indirect constraint on other forms of lower level access, provided it operates under different price constraints since it is currently only offered as an add-on service to wireless broadband. Therefore, the MCA is of the opinion that access to the public telephone network via wireless connections is not expected to have significant impact on competition during the timeframe of this review, more so since Vodafone Ltd. is no longer offering this service to new customers.

In view of the above assessment and the presence of barriers to entry, the MCA does not expect that within the timeframe of this review conditions will change to sufficiently promote effective competition. As a result, the MCA believes that GO plc. will continue to hold onto its market power in spite of the existing or potential new market entrants.

### 4.2.4 Barriers to Switching for Consumers

Effectively, barriers to switching for consumers are generally delineated by what alternatives consumers have to switch to and the ease with which they can switch between one option and another, and may therefore pose a significant constraint on market entry and the resultant competition.

In terms of the availability of alternatives to the fixed telephony services offered by GO plc., both Melita plc. and SKY Telecom Ltd. (via the CS facility) offer a range of packages to equivalently match, in terms of quality, service and pricing, those being offered by GO. Vodafone Ltd. and SKY Telecom Ltd. (under their brand name SKYNet) 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 plc.

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. Where switching costs are high or where subscribers are bound by a contract, then switching to alternative options is difficult. Likewise, new operators are likely to find it difficult to penetrate the market and effectively compete with the incumbent.

A new consideration in analysing the ease with which consumers can switch between one provider and another relates to the emergence of bundles. Today, 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.

From table 7 below those subscribing to a bundle offer have been increasing significantly between 2009 and 2010. In actual terms, the number of consumers signing up to a bundle offer comprising fixed line telephony increased to circa 70,000 by the end of 2010 or 37% of all postpaid fixed telephony subscriptions.

**Table 7**

| Fixed postpaid subscriptions on a bundled offer | 2009 Q1 | 2009 Q2 | 2009 Q3 | 2009 Q4 | 2010 Q1 | 2010 Q2 | 2010 Q3 | 2010 Q4 |
|---|---|---|---|---|---|---|---|---|
| Fixed postpaid subscriptions on two-play bundled offers | 14,740 | 15,756 | 15,516 | 12,559 | 11,327 | 8,062 | 8,360 | 6,952 |
| Fixed postpaid subscriptions on triple-play bundled offers | 4,973 | 5,477 | 4,446 | 4,448 | 4,757 | 5,098 | 5,444 | 5,934 |
| Fixed postpaid subscriptions on quadruple-play bundled offers | 15,369 | 21,002 | 26,706 | 30,488 | 37,812 | 43,044 | 49,657 | 57,135 |
| Total number of fixed postpaid subscriptions bundled with other electronic communication services | 35,082 | 42,235 | 46,668 | 47,495 | 53,896 | 56,204 | 63,461 | 70,021 |
| *as a percentage of total fixed postpaid subscriptions* | *17.82%* | *22.32%* | *24.58%* | *25.18%* | *28.58%* | *29.86%* | *33.80%* | *36.98%* |

Clearly, this evidence shows that bundle packages are becoming increasingly popular among households, especially so with GO subscribers. In fact, the MCA established that 29% of households subscribing to GO fixed telephony as at Q4 2010, have this service forming part of a bundle. Consequently, GO plc. has much more control over its customer base than other operators.

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.

In the end barriers to switching may also result from public awareness and perception. On one hand, public awareness refers to consumers' knowledge about alternative services and network providers, while perception essentially refers to consumers' insight on the ease or difficulty of switching among service providers. Insufficiency of one or the other, or both, may prompt these barriers to switching for consumers and hinder effective competition.

In this matter, GO plc. is most likely to have an advantage over other operators, given it was the first mover in the fixed access markets and held a de facto monopoly until 2005. Consequently, it enjoys the largest market presence. In fact, consumers, the majority of which are subscribed with GO plc., may at first be reluctant to switch to other operators given their long term relationship and loyalty to their fixed line service provider. This consideration can also be affirmed by the previous market share analysis, whereby despite the fact that new operators have entered the access market and are shifting a number of subscribers towards their services, market penetration is rather gradual, with GO plc. continuing to enjoy large market shares and strong customer loyalty. In fact, over the period 2005-2009, only 16,000 of the total 55,231 Melita connections have been competed away from GO plc., with the remaining connections representing additional telephone lines. Moreover, the number of GO connections started to increase again during 2010 as Melita plc. witnessed some small setbacks in its level of subscriptions.

In view of all this, the MCA believes that consumer awareness has improved and expected to continue to improve, with increased marketing efforts and the possibility of number portability. However, the MCA advocates that barriers to switching, resulting from customer loyalty and satisfaction and the market developments with bundles, are still strong and likely to hinder the competitive process.

### 4.2.5 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 a 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, all of which are offering extensive connectivity to all networks. In view of this, customers can potentially exert countervailing buyer power to sufficiently constrain any market power enjoyed by a local operator. However, the extent of countervailing buyer power will not solely depend on customers' ability to switch between alternative operators but also on their willingness to try a new provider.

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 therefore concludes that, notwithstanding the fact that customers can switch between alternative operators, their long term relationship with GO plc. may stop them from exerting such power. The MCA also notes that the possibility to purchase packaged products bundling two or more electronic communication services – which as suggested by table 7 above and the respective assessment are becoming increasingly popular within the local context – 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.

## 4.3 Conclusion and SMP designations

The evidence presented above suggests that GO plc. enjoys significant market power in all of the access markets previously identified. This evidence is mainly supported by the fact that GO plc. has a market share that well exceeds the 50% benchmark, in all the four relevant markets defined and that no alternative operator seems to be in a position to erode this market power within the timeframe of the review .

While the MCA is aware that GO's dominant position has been somewhat challenged since the last market review in 2006, where the incumbent operator had enjoyed 100% control of the market, there is however evidence to suggest that during the timeframe of this review it can continue to strongly influence the competitive market conditions for its competitors and customers. Barriers to market entry associated with economies of scale and scope, vertical integration, sunk costs, and barriers to switching continue to hold back new entrants from competing at par with GO plc., especially in the absence of regulation. Barriers to switching, on the other hand, neutralize countervailing buyer power which in turn reinforces the incumbent's market position.

In the 2009 review the MCA had proposed that the retail fixed access markets were tending towards competition with the main arguments being that new entrants have managed to join the market via wireless networks, and that through wholesale regulation market entry was possible within the short term. The MCA had also observed a decline in the market share of GO as a result of increased competition from Melita plc. The MCA therefore expected that new market entrants would continue to erode the market power of GO plc. and as a result the market will continue to evolve into a competitive one.

Nevertheless, as presented above, the market has since 2010 stagnated and the trend towards a competitive market seems to be stalled. The market share analysis shows that new entrants decreased their market presence and failed to continue increasing their subscriber base. Sky Telecom Ltd. saw an overall decrease in its market share from both clients hosted on the CS/CPS facility and customers using its own wireless services via SKYNet. The impact of Vodafone in these markets remained negligible and as of April 2011 no new services are being offered.

Effectively the retail access markets are characterised by two operators, namely Melita plc. and GO plc. As discussed at length above, since 2010 Melita started to experience a slight decline in market share rather than continuing to gain ground. Furthermore, in absolute terms, GO remains much larger than Melita in terms of access connections. Therefore, whilst competition started to appear in the period from 2007 till 2009, it has not evolved as one would have expected further beyond.

In view of all this, the MCA therefore concludes that GO plc. has significant market power in the provision of retail fixed access services in all the markets identified in this review.

**Q2. Do you agree with the above preliminary conclusions regarding the market analysis for the retail fixed access markets?**

# Chapter 5 Regulatory Implications

In accordance with Regulation 10(4) of the Electronic Communications Networks and Services (General) Regulations (ECNSR), where an operator is found to have significant market power on a relevant market the MCA is obliged to impose on such an operator specific regulatory obligations or revise such obligations where they already exist. Consequent to the above findings, the MCA has concluded that GO plc. has SMP in all the said fixed telephony markets, previously identified in the market definition exercise, and thus warrant to be regulated.

This chapter will highlight the potential competition problems that can exist in the defined markets, and propose the adequate remedies to be imposed on GO plc. in order to address these problems. Subsequently, this exercise will have to be carried out with the previous market reviews in mind; where a number of regulatory measures had already been imposed in the 2006 decision, and may therefore need to be revisited in order to reflect today's market realities.

Ultimately, any obligations imposed by the MCA upon an SMP operator should:

- be based on the nature of the problem identified;
- be proportionate and justified in the light of the objectives laid down in article 4 of the ECRA; and
- only be imposed following consultation in accordance with article 10 of the ECRA and regulation 6 of the ECNSR.

## 5.1 Competition Problems

From the market analysis chapter it has become evident that the retail fixed telephony access markets can be characterised by a number of potential competition challenges that *could arise* from the SMP finding. In the main, the MCA has identified two categories of potential competition problems that may arise.

### 5.1.1 Vertical Leveraging

Vertical leveraging stems out from the fact that at least one undertaking in a given market, operates at both the higher and lower levels in the chain of provision. By investing in both upstream access to infrastructure markets and downstream service provision markets, the undertaking can have vertical leverage over existent and potential competitors by way of denying proper access to an essential input it produces to some users of this input, with the intent of extending its monopoly power. Such practice may be both price-related and/or otherwise.

As per the MCA's conclusions in the market analysis chapter, GO plc. is the largest vertically integrated operator in terms of subscriber base on the island. Consequently, it has been established that the integrated provider can make it difficult for new entrants at a retail level to obtain the necessary inputs at a competitive price (i.e. cost based); an attempt that can lead to a margin squeeze. Additionally, this vertical leverage, fuelled with GO's ability to access economies of scale and scope that are not readily available to potential operators competing at the retail level with a smaller customer base, may bear extra pressure on the margins available for competing downstream operators.

Similarly, the vertically integrated provider can also engage itself in a number of non-price leveraging strategies that may take the form of delaying tactics and withholding of information, amongst other.

The MCA believes that, in the event that no regulatory obligations are set to mitigate the problem of a margin squeeze, GO plc. could in the first instance refuse access to potential entrants, and secondly engage in price discrimination against the access seeker.

Currently, the rates which GO plc. applies for the provision of a Wholesale Line Rental offer are regulated in Market 2 – Wholesale call origination services provided over fixed networks. This regulation has to date mitigated the aforementioned competition problem. The MCA, therefore, deems appropriate to restate these wholesale obligations at the retail fixed access level.

### 5.1.2 Horizontal Leveraging

Horizontal leveraging is the result of an undertaking being present in a large number of markets and thus being able to use its dominant position in one market to exert undue influence on the other markets. In this regard, the MCA identifies two main potential competition problems.

At the outset, horizontally integrated operators may very well benefit from economies of scope, as costs are generally saved where common processes or technological infrastructures are used in the provision of a group of services. Put differently, this horizontal integration may, in fact, enable established networks such as GO plc. to lower the average costs of production, given that these are shared over a greater range of services. Thus horizontal leveraging could be used in an attempt to drive competitors out of the market by setting a price below costs, with the reassurance that the resulting losses will be covered by profits from the other markets.

Secondly, horizontally integrated operators have the capacity to package a number of different services into one bundle; of which fixed telephony is a salient service. In Malta, the number of those signing up to an offer bundling two or more electronic communications services increased significantly in 2009 and 2010. In this regard, the number of consumers signing up to a bundle offer comprising fixed line telephony increased from 47,495 as at the end of Q4 2009 to 70,021 as at the end of 2010. Accordingly, this translates to nearly 37% of all postpaid fixed telephony subscriptions.

Therefore there is the risk that if not properly monitored, GO may utilise its market power position in the retail fixed access market to leverage this position into other markets through bundling, for example by linking new products to the fixed telephone access line. Apart from anti-competitive pricing mechanisms GO plc. may also decide to use non-price factors to leverage its market power, for example by setting uncompetitive terms and conditions associated with their products.

An additional problem arising from horizontal leveraging is the fact that undertakings not present across a wide range of electronic communication services stand to lose in terms of competition, as they are not in a position to replicate the incumbent’s offers. As more subscribers are signing up to a bundle offer, potential undertakings providing a single service would only have a narrower customer base to compete for.

## 5.2 Available Retail Remedies

Under the electronic communications framework, where the Authority determines, as a result of a market analysis exercise, that a given retail market is not effectively competitive, and simultaneously the Authority concludes that obligations imposed under Part III or Regulation 39 would not result in the achievement of the objectives set out in Article 4 of the Act, the Authority shall impose obligations to ensure that the SMP undertaking concerned does not:

- charge excessive pricing;
- inhibit market entry or restrict competition by setting predatory prices;
- show undue preference to specific end-users, or
- unreasonably bundle services.

In order to counter these problems and protect end-user interests whilst promoting competition, Regulation 37 (3) enables the Authority to impose:

- appropriate retail price cap measures;
- measures to control individual tariffs, or
- measures to orient tariffs toward costs or prices on comparable markets.

## 5.3 Principles Applied in Selecting Remedies

In accordance with regulation 37(2) of the ECNSR, the MCA is obliged to ensure that any obligations imposed under subregulation (1) of the said regulation, shall be based on the nature of the problem identified and be proportionate and justified in the light of the objectives laid down in Article 4 of the Electronic Communications Regulation Act.

Within the timeframe of this review, the MCA believes it is unlikely that there will be any independent development of effective competition in the identified markets relating to retail access to the public telephone network at a fixed location. Consequently, the MCA is imposing on the SMP operator; GO plc., those appropriate obligations that it believes will encourage efficient investment and innovation and further promote competition in the relevant markets under review.

In selecting these remedies, the MCA has considered the nature of the problems identified and, in accordance with the principle of proportionality, will impose a range of remedies which are deemed to be the least burdensome effective remedies. In view of this, the MCA has also taken account of any potential effects on related markets. Finally, the MCA has been quite vigilant to make sure that selected and designed remedies will ensure full and effective compliance by the designated SMP operator.

Conclusively, it is unlikely that any single remedy can achieve all this, so the remedies outlined below should be seen as complementary in supporting and reinforcing each other.

Prior to imposing any retail remedies, the MCA has also taken into account a number of wholesale remedies that have already been imposed on GO plc. 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[14]. This decision mandates on GO plc. the following wholesale obligations:

[14] Link to MCA Decision:
http://www.mca.org.mt/sites/default/files/articles/Decision-Wholesale_call_orig_FN.pdf

1. *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;
2. *Non-discrimination* – to apply equivalent conditions of access to third party access seekers as with its own retail arm;
3. *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;
4. *Accounting separation* – to provide separated accounts for wholesale access and call origination services; and
5. *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.

The wholesale remedies imposed in this decision were aimed at providing alternative operators with sufficient access to wholesale inputs, so that access and call services may be offered over GO's existing infrastructure. In view of this, the MCA believes that the wholesale remedies that have already been imposed in this decision have a direct bearing on the achievement of competitive retail access markets.

The MCA is of the opinion that these wholesale remedies, together with the proposed retail remedies imposed hereunder should provide a holistic and effective measure for access seekers to enter the retail access markets easily.

## 5.4 Retail Remedies

On the basis of what has been just stated, the MCA deems that the imposition of wholesale remedies will not, by themselves, suffice to reach the objectives set out in Article 4 of the ECRA to ensure effective competition in the retail fixed access markets. Therefore, the MCA feels that, unless, the said wholesale remedies are further complemented by measures at the retail level, as highlighted below, the objectives set out in Article 4 of the ECRA will not be fulfilled.

Accordingly, the MCA considers that the market requires the imposition of retail remedies as per Regulation 37 of the ECNSR. In this respect the MCA will impose obligations to ensure that the GO plc. does not:

- charge excessive pricing,
- inhibit market entry or restrict competition by setting predatory prices,
- show undue preference to specific end-users, or
- unreasonably bundle services.

Having said this, the MCA will however continue to monitor market developments and where it deems appropriate shall issue directions to further fine-tune the remedies to the needs of the market. Moreover, where the desired levels of competition in the market are deemed to have been reached, the MCA shall consider lessening the burden of the obligations and possibly withdraw them altogether.

### 5.4.1 Measures to counter excessive pricing charges or predatory pricing

a) *Retail Price Control*

As per the 2006 decision, GO plc. is currently subject to apply a cost orientation approach as the basis for its price control obligation in relation to retail fixed access services. The MCA had at the time imposed such an obligation to ensure that GO plc. does not charge excessive prices to retail customers, nor does it attempt to restrict market entry by charging unreasonably low prices or unfairly squeezing the margins of competitors or potential competitors to the detriment of competition. In 2006 the market was almost entirely occupied by GO plc. as it had around 98% share of all standard access lines and 100% of the higher level access lines. Furthermore, no alternative operator was in a position to offer an equivalent ubiquitous retail access service as GO plc. The cost orientation obligation was therefore essential to ensure that competition could be fostered in the market.

As argued in the market analysis section, today the situation has somewhat improved as there are a number of alternative operators providing retail access services. Although GO plc. continues to enjoy significant market power, the presence of alternative infrastructures poses some form of constraint on GO plc. in terms of the ability to raise its prices above the competitive level without incurring losses in its market share. Although, the MCA believes that the majority of consumers, at present, still have a strong preference to have a GO fixed access line, as evidenced by its market share, in the event that GO plc. raises its prices well above its competitors, consumers have the facility to switch service providers.

The MCA has also taken into consideration the fact that the retail fixed access prices of GO plc. have always been regulated and that since 2004 the retail access prices charged by GO plc. have not changed. Furthermore, demand for higher level access products has either decreased or remained stable over time with only a few hundred lines in operation, given that these products are only used by large business enterprise and their use is being replicated by way of new technologies and advanced telephone sets.

Given this scenario the MCA believes that continuing to impose a cost orientation on GO plc. is not required and would likely be an undue remedy in these circumstances. The MCA therefore believes that at this stage of development in the market, the price control obligation can take the lighter form of prior notification and approval in the case of a price increase.

The MCA therefore proposes that, in the case where GO plc. intends to raise its retail price for any of its retail fixed access products falling within the four markets identified above, the price control obligation shall be implemented as follows:

1. GO plc. is to inform the MCA in writing of the proposed increase in price of the retail fixed access product or service at least 10 working days prior to the date when such increase is to come into effect;

2. In order to enable the MCA to analyse the request for an increase in price GO plc. should clearly set out the following information:
   - Detailed description of the product or service;
   - Existing price and the proposed increase in the price;
   - Full terms and conditions of the package or tariff;

- Reasons including any cost justifications for the proposed increase in price;
- Target customer group and any applicability conditions; and
- Evidence that all the other retail obligations set out in this decision are complied with.

3. The MCA will analyse the request and provide its final decision on whether the increase has been approved or otherwise within 10 working days. The approval of this request is without prejudice to any other general obligations that are incumbent upon GO plc. through other MCA decisions and/or at law.

4. The MCA reserves the right to request additional information at the evaluation stage, and upon appropriate justification, shall if required, extend the 10 working day evaluation stage until all information required to analyse the proposed price increase is made available by GO plc.

5. Where the proposed increase in price is approved by the MCA, and prior to the launch of the new price, GO plc. is to inform any alternative operators making use of the WLR offer with the proposed increase in the retail price of the access product or service, together with any corresponding changes in the wholesale price.

6. In any event, the MCA reserves the right to mandate any changes to this proposed price control method, as it deems appropriate, to ensure that this method operates effectively, and to ensure that retail and wholesale customers are well protected in the case of a price increase.

In the case where GO plc. is to make a price increase, to any retail fixed access product or service falling within the four identified markets above, and which is part of a bundle, GO plc. is to follow the same procedure set out above. In addition to the above conditions, where the retail access product or service forms part of a bundle, GO plc. also needs to ensure that the specific obligations set out below in Section 5.5.3, in relation to unreasonable unbundling of access products and services, are fully met.

In the case where GO plc. is to make a reduction in price, or implement a change to a non-price parameter in any of its retail access products and services, including retail access products or services falling within a bundle, the MCA proposes that GO plc. notifies the MCA of these proposed changes at least 5 working days prior to the date when such a change is to be applied. In these cases, GO plc. does not require prior approval from the MCA to make these changes. Nevertheless, the MCA will monitor the impact of these changes in the market and reserves the right to stop and/or revert such changes at its discretion, should these changes result in any uncompetitive practice or fail to meet the obligations set out in this decision.

In addition, when GO plc. intends to apply a reduction in the retail price, prior to the launch of the new price GO plc. is to make the necessary and corresponding changes to its wholesale line rental offer, as to enable alternative operators to make the necessary changes in line with the new price. The MCA anticipates that such a change in the WLR offer should run smoothly for both GO plc. and the access seeker given that the price control method applied for the wholesale line rental offer is based on a Retail-Minus methodology. This method of price regulation ensures that, whatever the retail price charged by GO plc., the alternative access seeker is guaranteed a wholesale price which is a set percentage lower than this retail price.

The MCA believes that such a process ensures that GO plc. does not abuse from its SMP position by engaging in unjustified increases in prices for retail access services. At the same time GO plc. would have enough flexibility to improve its retail offerings.

In order to ensure that GO plc. does not on the other hand abuse of its SMP position in the market through the adoption of below the cost pricing practices, that could lead to a margin squeeze or inhibit market entry, the MCA proposes to address this problem via the accounting separation obligation detailed below. This remedy is also being complemented by the retail-minus price control remedy applied at wholesale level as the pricing methodology of the WLR offer. Through retail-minus the MCA ensures that the wholesale price of the WLR offer set by GO plc. would never be below the retail price set by GO plc.

*b) Accounting Separation*

As an undertaking that is subject to retail tariff regulations or other relevant retail control, GO plc. is obliged, under Regulation 37 of the ECNSR, to operate and maintain a cost accounting system. This should also include related regulatory accounts that are based on generally accepted accounting practices, suitable for ensuring compliance with retail obligations and capable for verification by the MCA.

The MCA believes that the obligation of accounting separation is necessary to be imposed on GO plc. in order to enable the MCA to monitor the undertaking's actions against margin squeeze and any other market power exercise to influence related markets. Through the accounting separation obligation the MCA can monitor whether the incumbent GO plc. is adopting any uncompetitive pricing policies that could result in price dumping or margin squeeze which will ultimately harm competition by driving out competitors.

The MCA is therefore proposing that GO plc. continues to keep separated accounts for the retail access products and services that fall within the markets established above. GO plc. is to conform with the decisions published by the MCA in relation to the implementation of the accounting separation obligations as published from time to time[15].

### 5.4.2 Measures to counter undue preference to specific end-users

*a) Non-Discrimination*

A potential competition problem highlighted above is that an undertaking enjoying a position of significant market power may have an incentive to provide its services on terms and conditions that discriminate in favour of particular customers in such a manner as to have a detrimental effect on competition.

Besides price-related competition problems, an SMP operator may also resort to non-price anti-competitive tactics such as the withholding of information, delaying tactics, undue requirements, low or discriminatory quality, strategic design of products, and discriminatory or unclear use of information, that ultimately harms the end-users.

In this light, the MCA is of the view that it is necessary that the non-discrimination obligation is imposed on GO plc. The MCA believes that such a non-discrimination obligation shall counteract price parameters as well as target non-price parameters. The

[15] Link to MCA Decision: http://www.mca.org.mt/sites/default/files/articles/Accounting_Separation.pdf

MCA believes that GO plc. is to charge transparent and non-discriminatory tariffs, which shall be appropriately and clearly disclosed to the consumer.

*b) Transparency*

Closely linked to the obligation of non-discrimination is the requirement of transparency. As a matter of fact, the two remedies may be said to complement each other in ensuring that the SMP operator does not act incoherently when providing the retail services.

Specifically, under Regulation 41 of the ECNSR, the MCA shall ensure that transparent and up-to-date information on applicable terms and conditions as well as prices on access services is readily available to end-users. Information relating to the identity and contact details of the operator, the description of the service being offered and what is covered by the charges being levied, as well as standard tariffs covering access and all types of usage charges, maintenance, details of standard discounts that will apply and special and targeted tariff schemes, the compensation and, or refund policy, the types of maintenance service offered, standard contract conditions, dispute settlement mechanisms and customer rights ought to also be published by the SMP operator[16]. Moreover, the MCA shall, as far as congruent, encourage the provision of information to end-users to enable them to make an independent evaluation of the cost of alternative usage patterns by means of interactive guides.[17]

In accordance with Regulation 40 of the ECNSR, an undertaking providing connection and/or access to the public telephone network is obliged to provide its subscribers with a written contract identifying a number of minimum specifications. These relate to the identity and address of the supplier, the services provided, the service quality levels offered, as well as the time for the initial connection, the types of maintenance service offered, price and tariff information and the means by which up-to-date information on all applicable tariffs and maintenance charges may be obtained, the duration of the contract, the conditions for its renewal and termination of services and of the contract, any compensation and the refund arrangements which apply if contracted service quality levels are not met, and the method of initiating procedures for settlement of disputes. In the mean time, any proposed changes to any one of the conditions of the contract must be notified to the subscriber not less than thirty days prior to their taking of effect, followed up with the notification that the said subscriber may withdraw without penalty from such a contract.[18]

Ultimately, the MCA concludes that in view of the transparency principle, GO plc. should also continue to inform the MCA of any modifications to the terms and conditions prior to their coming into effect.

### 5.4.3 Measures to counter the unreasonable bundling of services

One of the major concerns of the MCA, as guarantor of effective competition in the retail access markets, is the ability of GO plc. as an SMP operator to bundle its retail products by leveraging into related markets and distorting pricing. However, the MCA recognises that such bundling of retail products may lead to economies of scale or scope for the operator and this in turn can lead to savings for the consumer.

In considering the above, the MCA believes that there is a need to counter the risk of anti-competitive behaviour through bundling by means of an obligation to be imposed on

[16] Regulation 41(1) and Ninth Schedule of the ECNSR
[17] Regulation 41(2) of the ECNSR.
[18] Article 22(4) of the ECRA.

GO plc. over and above those mentioned earlier on with respect to transparency. The main aim of such obligation would be that of preventing foreclosure of the retail access markets.

One must note that under the regulatory regime currently in force, GO plc. is already obliged not to exclusively bundle any of the retail access services identified in this decision with other electronic communications services into a single tariff without also offering the fixed access service as a stand-alone product. In line with this approach, the MCA feels that it will benefit the competitiveness of the retail access markets if this obligation continues to be imposed on all of GO's retail fixed access products falling within the markets identified above, to the effect that the said operator shall not unreasonably bundle retail fixed access services.

## 5.5 Monitoring of market developments

The MCA will continue to monitor market developments and where appropriate shall issue direction to further fine-tune these remedies to be in line with the needs of the market. Similarly, where the desired levels of competition in the market are deemed to have been reached, the MCA shall consider lessening the burden of the obligations and possibly withdrawing them altogether.

**Q3. Do you agree with the above preliminary conclusions regarding the regulatory obligations for the retail fixed access markets?**

## Submission of comments

The MCA welcomes written comments and representations to this report during the national consultation period, which shall run from the **19th September 2011 to the 21st October 2011.**

The MCA appreciates that respondents may provide confidential information in their comments. This information is to be included in a separate annex to their response and should be clearly marked as being confidential.

After due consideration of the comments and representations received, the MCA will review this analysis and publish a report summarising the responses to the consultation.

For the sake of openness and transparency the MCA will publish the names of all respondents to this consultation. To this end, all representations will be published, except where respondents indicate that a response, or part of it, is confidential[19]. The MCA will take steps to protect the confidentiality of all such material from the moment that it is received at MCA's offices. Respondents should however avoid applying confidential markings wherever possible.

All responses must be submitted to the MCA by no later than **noon of the 21st October 2011.**

Extensions to the consultation deadline will only be permitted in exceptional circumstances and where the Authority deems fit. The MCA reserves the right to grant or refuse any such request at its discretion. Requests for extensions are to be made in writing within the first ten (10) working days of the consultation period.

All submissions should be made in writing and sent by email to patrick.b.vella@mca.org.mt. Hard copies may also be posted or faxed to the address below.

Chief Policy and Planning
Malta Communications Authority
Valletta Waterfront, Pinto Wharf,
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Malta
Europe
tel: +356 21 336840
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[19] In accordance with the MCA's confidentiality guidelines and procedures - http://www.mca.org.mt/sites/default/files/articles/confidentialityguidelinesFINAL_0.pdf

# Appendix 1

MCCAA
MALTA COMPETITION AND CONSUMER AFFAIRS AUTHORITY
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Office for Competition

Our Ref.: COMP-CCD/46/08

16 September, 2011

Ing. Philip Micallef,
Executive Chairman,
Malta Communications Authority,
Valletta Waterfront,
Pinto Wharf,
Floriana FRN1913.

Dear Ing. Micallef,

The Office for Competition (OC) has been asked to provide its opinion on the review and market analysis concerning retail access to the public telephone network at a fixed location carried out by Malta Communications Authority (MCA).

The OC agrees with the identification and analysis of the markets concerned for the period under review. Nonetheless, the MCA should continually monitor any market developments in this regard.

The OC would like to point out that its views are being submitted in the context of the specific provisions of the SMP guidelines and it reserves the right to re-examine any or all of the issues underlying MCA's recommendations in the light of facts and evidence that may arise in specific future cases before it.

Yours sincerely,

S. Aquilina Zahra

Dr Sylvann Aquilina Zahra
Director General (Competition)