# The provision of call termination on individual public telephone networks at a fixed location in Malta

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

Final Decision

MCA/D/15-2442

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# EXECUTIVE SUMMARY

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

The MCA has carried out a national consultation process during the period running from the 1st September 2015 to the 9th October 2015. The MCA received one response from Vodafone which has been taken into account in this final decision.

Pursuant to Regulation 7 of the Electronic Communications Networks and Services Regulations (ECNSR), the MCA is required to notify its proposed decision to the EU Commission and the body of European Regulators for Electronic Communications (BEREC) which may make comments on notified draft measures. To this effect, the MCA notified its draft decision on 3rd November 2015.

During the Phase 1 evaluation, on 11th November 2015, the Commission requested additional information to which the MCA responded to such request on 16th November 2015. On the basis of the additional information provided by the MCA and the notification document, on 30th November 2015, the Commission issued its comments letter.

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

## SUMMARY OF CONCLUSIONS

### Identification of Markets

The MCA identifies six relevant wholesale markets for the provision of fixed voice call termination on individual public telephone networks in Malta. These are:

- a market for the provision of fixed voice call termination services by GO;
- a market for the provision of fixed voice call termination services by Melita;
- a market for the provision of fixed voice call termination services by Vodafone;
- a market for the provision of fixed voice call termination services by SIS;
- a market for the provision of fixed voice call termination services by Ozone; and
- a market for the provision of fixed voice call termination services by Vanilla Telecoms.

Each relevant market includes call termination services provided by each fixed network operator (FNO) to third party operators and as well as self-supplied termination.

The geographical scope of each relevant market corresponds to the physical coverage of the fixed network operator characterising the market.

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

## Assessment of Market Power

Based on the findings and discussion presented in the market analysis, the MCA concludes that the wholesale markets under consideration are not competitive and will not retract from this position during the timeframe of this review.

This conclusion is supported by a number of factors, namely that:

- Each FNO holds a 100% share of the market in terms of voice call traffic terminating on its own network, irrespective of its size and technological platform.

- Each FNO can act independently of retail customers and other network operators in the setting of fixed termination charges. Due to the CPP mechanism, retail customers are typically insensitive or unaware of fixed termination charges. In addition, network operators have no alternative for terminating a call other than the FNO to which the called number belongs.

- In the absence of regulation, FNOs have a strong incentive to price discriminate when charging for their voice call termination services and thus foreclose markets.

- In the absence of regulation, FNOs are likely to increase their fixed termination charges, thereby increasing the risk of price distortions.

- In a scenario where FNOs can freely set high termination charges, the scope for price competition is reduced to the detriment of retail customers.

In view of all this the MCA therefore considers that the following FNOs hold significant market power (SMP) in their respective wholesale fixed termination market:

- GO;
- Melita;
- Vodafone;
- Ozone;
- SIS; and
- Vanilla Telecoms

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

## Regulatory Approach

With reference to the evidence presented in the market analysis and after having identified the potential competition problems that may arise in the wholesale markets under investigation the MCA considers that ex ante regulatory intervention is required. To this effect, the MCA is mandating a number of obligations on SMP operators.

The MCA is to impose the following regulatory obligations on all FNOs designated with SMP in this market review:

- access to/and use of specific facilities;
- non-discrimination;
- transparency; and
- price control.

In addition the MCA is also imposing the cost accounting obligation on GO and Melita.

However, the MCA shall be withdrawing the accounting separation obligation from GO and Melita to the extent of the accounting separation required on this particular market i.e. call termination on public telephone networks at a fixed location.

All remedial action is based on the nature of the competition problems that have been identified in this market review. The MCA thus believes that these regulatory obligations are the most appropriate in the current circumstances and timeframe of this review. Each obligation is also considered to be proportionate and justified in light of the objectives set out in Article 4 of the Electronic Communications (Regulation) Act.

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

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# 1. INTRODUCTION

## 1.1 THE EU REGULATORY FRAMEWORK

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 Authorisation Directive establishes a system whereby any person will be generally authorised to provide electronic communications services and/or networks without prior approval. The general authorisation replaces the former licensing regime.

The Universal Service Directive defines a basic set of services that must be provided to end-users.

The Access and Interconnection Directive sets out the terms on which providers may access each others' networks and services with a view to providing publicly available electronic communications services.

The fifth Directive on Privacy establishing users' rights with regard to the privacy of their communications was transposed on 10th January 2003 (Legal Notice 16 of 2003 under the Data Protection Act).

## 1.2 THE LOCAL LEGISLATIVE FRAMEWORK

The Directives comprising the EU Regulatory Framework were first transposed into Maltese legislation on the 14th of September 2004 and further amended on the 12th of July 2011.

The relevant national legislation are the Malta Communications Authority Act (Cap 418); the Electronic Communications (Regulation) Act (Cap. 399) (hereinafter referred to as 'ECRA'); and the Electronic Communications Networks and Services (General) Regulations of 2011 (hereinafter referred to 'ECNSR').

The Directives require National Regulatory Authorities (NRAs) such as the MCA to periodically carry out reviews of competition in communications markets to ensure that regulation remains appropriate in the light of changing market conditions.

Each market review is divided into three main parts:

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

## 1.3 MARKET REVIEW METHODOLOGY

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

In December 2007 the EU Commission adopted its revised Recommendation on relevant markets[1]. The revised Recommendation presented a much shorter list of markets which NRAs are required to analyse for the purpose of ex ante regulation. In October 2014 the Recommendation was once again revised to include a shorter list of markets – four markets in total – that are susceptible to ex ante

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

regulation[2]. The provision of wholesale fixed call termination services has been retained as a relevant market in the 2014 Recommendation and the MCA is thus required to continue carrying out periodic reviews of competition of this market.

The European Commission has also issued guidelines on market analysis and the assessment of SMP (“SMP Guidelines")[3]. 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[4]. 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 6 of the ECNSR).

As required by Regulation 7 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 7 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 utmost account of the Recommendation on relevant markets and the SMP Guidelines.

## 1.4 SCOPE OF THIS REVIEW

This review considers the market for the provision of fixed voice call termination on individual public telephone networks in Malta.

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[2] Commission Recommendation of 9 October 2014 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services. Available at:
http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.295.01.0079.01.ENG

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

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

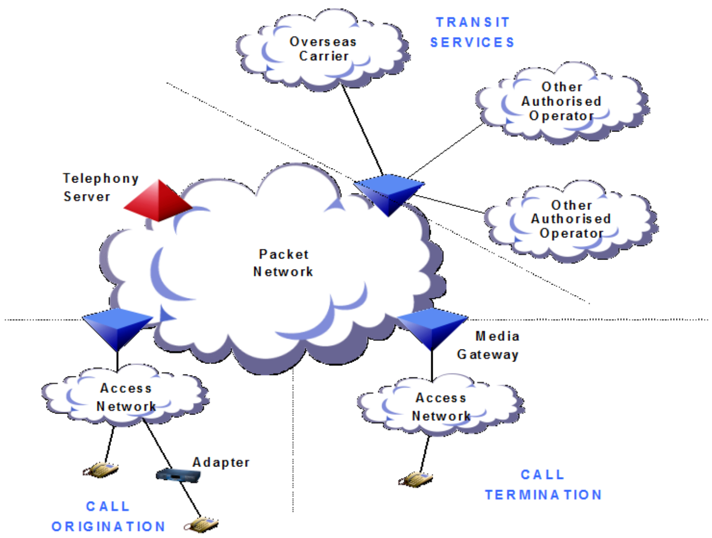
## 1.5 FIXED VOICE CALL TERMINATION

Fixed line voice call termination is a wholesale service requested by network operators in order to enable their subscribers to successfully complete a call to another subscriber connected to a Fixed Network Operator (FNO). This termination service is considered as the least replicable element in the series of fixed wholesale services or inputs, including fixed access and call origination, which are required by FNOs to provide retail fixed voice call services.

### 1.5.1 FIXED WHOLESALE INPUTS

The MCA notes that local FNOs are all operating IP-based networks. The boundaries concerning the different wholesale services required in providing retail fixed voice call services are depicted below.

**FIGURE 1**




By way of description, the relevant fixed wholesale inputs are delineated as follows:

- Fixed voice call origination comprises call set-up, switching / conveyance, and connection for the initial stage of the call. It incorporates conveyance from an end-user to the next stage in the call routing path (either call termination or to the point of interconnection).

- Fixed transit comprises the conveyance of traffic through, at least, one national and/or international media gateway.

- Fixed voice call termination comprises call completion and the switching functionality at the terminating end of a call. This would entail the conveyance of a call from the end of the previous stage (either call origination or to the point of interconnection) to the called end-user via the local-loop.

Of relevance here is the explanatory note to the 2009 Commission Recommendation on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU (hereafter, referred to as the 'Recommendation on termination rates')[5], which states that '*call termination can only be supplied by the network provider to which the called party is connected*'. This Recommendation also underlines that *'termination has been analysed as a situation of 'two-way' interconnection whereby two wholesale prices have to be negotiated*'.

### 1.5.2 THE CALLING PARTY PAYS (CPP) PRINCIPLE

The payment mechanism concerning fixed termination services is governed by the CPP principle, whereby the FNO hosting the called party expects the originating operator to pay the network costs incurred to terminate the relevant call. Effectively, this means that the costs associated with fixed voice call termination are borne in full by the network operator requesting or purchasing the termination service.

### 1.5.3 THE LINK BETWEEN WHOLESALE AND RETAIL LEVELS

At the retail level, subscribers require the ability to communicate and complete calls with other retail users irrespective of the FNO to which the called party is connected. This means that although fixed voice call termination is sold and purchased by network operators, it is effectively a wholesale input required for the provision of retail fixed voice call services. Hence, demand at the wholesale level for fixed termination services is derived from demand at the retail level for fixed voice call services.

Interconnection plays an important role in this aspect. Indeed, network operators need to interconnect to each other in order to allow calls to be seamlessly conveyed and terminated on the network hosting the called party. Locally, all FNOs and mobile network operators (MNOs) are directly interconnected with each other, which means that all local network operators are in a position to terminate a call on any local FNO.

## 1.6 LIAISON WITH COMPETITION AUTHORITY

Under Regulation 5 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

[5] The Commission Recommendation 2009/396/EC of 7 May 2009 on the regulatory treatment of fixed and mobile termination rates in the EU also sets out the principles for national regulators to follow when setting a fair price for terminating calls on fixed and mobile networks. The recommended methodology is a Long Run Incremental Costing (LRIC) model, which aims to ensure that termination rates will be based on the cost of an efficient operator.

Competition and Consumer Affairs Authority (MCCAA), the MCA also consulted with the MCCAA the findings of this analysis. The MCCAA has forwarded its comments to the MCA and can be found in Appendix 1.

## 1.7 STRUCTURE OF THE DOCUMENT

The rest of the document is structured as follows:

**Chapter 2** provides an overview of the previous consultations and decisions on the market for the provision of voice call termination on individual public telephone networks at a fixed location in Malta. This chapter also outlines the key market trends and developments of the fixed telephony sector in Malta over the past few years;

**Chapter 3** presents the MCA's conclusions on the definition of the market for the provision of fixed voice call termination on individual public telephone networks in Malta;

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

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

# 2. BACKGROUND

## 2.1 PREVIOUS DECISIONS AND CONSULTATIONS

The MCA has already carried out three market reviews on the provision of wholesale fixed voice call termination services on individual public telephone networks in Malta. The first market review was published in 2006 while that corresponding to the second round market review was published in 2010. The third market review decision was only published last year, in 2014.

### 2.1.1 THE FIRST MARKET REVIEW DECISION (2006)

The first market review decision was published in September 2006.[6]

At the time, the MCA designated GO (formerly, Maltacom) and Melita with SMP in the provision of voice call termination services on their own individual public telephone networks. In essence, both operators enjoyed 100% market share of minutes terminated on own network. Moreover, evidence showed that there was lack of effective countervailing buyer power from other wholesale market operators and retail customers for the provision of such services and lack of potential market constraints.

In view of the identified competition problems and the designation of SMP, the MCA imposed the obligations of access, transparency, non-discrimination, cost orientation, cost accounting, and accounting separation on GO. As with respect to Melita, the MCA imposed the obligations of access, transparency and non-discrimination. The obligations of cost orientation, cost accounting and accounting separation were not imposed on this operator at the time.

### 2.1.2 THE SECOND MARKET REVIEW DECISION (2010)

The MCA published its second round of market review with respect to wholesale fixed voice call termination services in May 2010.[7] In this decision the MCA maintained the designation of SMP on GO and Melita. Other fixed network operators (FNOs), then considered to be new to the market, namely SKY Telecom (rebranded to Ozone in January 2012), Vodafone and SIS, were also designated with SMP in the provision of fixed voice call termination on their individual public telephone networks.

The conclusion that all local FNOs had SMP in the provision of voice call termination services over their individual public telephone network was supported by the fact that each FNO exerted a control

[6] Link to 2006 MCA Decision on wholesale fixed voice call termination on individual public telephone networks in Malta: http://www.mca.org.mt/sites/default/files/articles/Wholesale_call_OrigTerm%26TransFixed.pdf

[7] Link to 2010 MCA Decision on wholesale fixed voice call termination on individual public telephone networks in Malta: http://www.mca.org.mt/sites/default/files/attachments/decisions/2012/m3-mt-final-decison.pdf

over all traffic terminating on its own network. This is because all calls to a particular FNO had to be ultimately terminated on that particular network. Each FNO was in fact deemed to have a 100% market share in the provision of termination services over its own network, irrespective of its size and technological platform.

Furthermore the MCA concluded that termination services of individual FNOs were not substitutable to each other. No network operator could therefore constrain the termination charges set by local FNOs.

At the wholesale level, no originating operator could successfully purchase voice call termination to a fixed line number other than from the fixed network operator hosting the called party. Meanwhile, at the retail level, the calling party had no choice to terminate a call other than on the fixed network hosting the called number. Neither operators nor subscribers could therefore effectively prevent, by way of countervailing buyer power, any FNO from setting fixed termination charges above the competitive level.

In view of this evidence, the MCA imposed regulatory obligations on GO, Melita, Ozone, SIS and Vodafone. All regulatory obligations imposed on GO and Melita in 2006 were maintained, although this time round the obligations of price control, cost accounting and accounting separation were also enforced on Melita.

Meanwhile, the obligations of access, transparency (including a reference offer), non-discrimination and price control were imposed on Ozone, SIS and Vodafone, but it was not deemed appropriate to impose cost-accounting and accounting separation obligations on these operators, given their size and market presence.

### 2.1.3 THE THIRD MARKET REVIEW DECISION (2014)

The third and last market review to be carried out on wholesale fixed voice call termination services was published in April 2014.[8]

In this market review decision the MCA concluded that all FNOs, that is GO, Melita, Vodafone, Ozone and SIS, enjoyed SMP in the provision of wholesale fixed voice call termination on their own individual public telephone network. The SMP designation was based on the following findings:

- A 100% share in terms of voice call traffic terminating on each individual public telephone network provided at a fixed location, irrespective of its size and technological platform.

- Each FNO could act independently of end-users and independently of other network operators in the setting of fixed termination charges.

[8] Link to 2014 MCA Decision on wholesale fixed voice call termination on individual public telephone networks in Malta: https://www.mca.org.mt/decisions/mca-decision-market-definition-assessment-competition-and-regulation-call-termination

- FNOs had an incentive to keep fixed termination charges above the competitive level and to price discriminate when charging for their voice call termination services.

- In a scenario where FNOs can freely set or maintain their termination charges above the competitive level, the scope for price competition is reduced.

The MCA concluded that GO, Melita, Vodafone, Ozone and SIS are able to set their fixed termination charges independently of competitors, customers and consumers. Likewise it was concluded that these FNOs are able to set excessive termination charges and to discriminate between network operators when setting these charges.

In this regard, the MCA had therefore decided to maintain the following regulatory obligations on all SMP operators:

- Access to/and use of specific facilities for interconnection;
- Non-discrimination;
- Transparency; and
- Price control.

In this decision the MCA also maintained the obligations of accounting separation and cost accounting on GO and Melita.

## 2.2 LATEST MARKET DEVELOPMENTS

The MCA notes that market reviews are carried out with a forward-looking perspective, typically covering a timeframe period of three years. The MCA however explains that while the last market review on wholesale fixed voice call termination services was carried out last year a fresh market review is warranted before the three year timeframe period is up. This is to take into account the latest market developments concerning the wholesale fixed voice call termination services.

The MCA notes that a new operator joined the fixed telephony market at the beginning of 2014. The operator, under the brand name of Vanilla Telecoms, offers Internet access and fixed voice telephony services via wireless solutions. Likewise Vanilla Telecoms offers wholesale fixed voice call termination services in order to be able to terminate receiving calls on its own network. The third round of market review carried out during 2014 did not capture this new operator.

Consequently, the MCA deems it necessary to carry out a fresh market analysis and review the Decision taken in 2014 to include this new operator and establish whether it holds SMP in the provision of wholesale fixed call termination services. This market analysis will also assess the type of ex ante regulatory obligations that are to be imposed in the event of SMP.

## 2.3 THE FIXED TELEPHONY SECTOR IN MALTA

The focus of this section is to provide some background on the fixed telephony sector in Malta, specifically on the distribution of market shares in terms of subscriptions and traffic volumes and on developments of local fixed termination charges and retail fixed voice call tariffs over the past years.

### 2.3.1 MARKET PLAYERS

There are currently six FNOs providing fixed line telephony services in Malta. These FNOs comply with all Publicly Available Telephone Service (PATS) obligations in terms of interconnection, 112, location and CLI, and portability amongst others. A brief description of each of these FNOs is provided below:

#### *GO*

GO currently operates an IP fixed telephony network based on an NGN setup[9]. GO is able to cover the national territory with four fully-meshed media gateways as opposed to the fifteen PSTN switches previously in operation.

GO offers fixed line, mobile telephony, broadband Internet services, including voice over Internet protocol ("VoIP") services, and broadcasting digital Pay TV services. In the meantime GO has started to deploy a nationwide fibre network. This latest development shall however have no impact on the way fixed termination services are provided within the timeframe of this review.

#### *Melita*

Melita operates a hybrid fibre coaxial (HFC) cable network, deployed in an NGN setup and with nationwide coverage, which is interconnected with all other local network operators.

This operator also offers high speed Internet access, VoIP services and IP-based digital Pay TV services. In 2009, Melita also launched its mobile telephony and data services.

#### *Vodafone*

In October 2005 the MCA assigned spectrum for the deployment of a national broadband wireless access (BWA) network. Vodafone Malta was one of the successful applicants and in 2007 this undertaking rolled out its BWA network using WiMax technology to offer broadband Internet and VoIP telephony services. The latter services were never offered on a stand-alone basis, but specifically as an add-on to wireless broadband packages.

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[9] Since NGNs rely on packet-based rather than circuit-switched solutions, NGNs are more streamlined in the way they convey calls.

Four years down the line, Vodafone (Malta) decided to stop providing WiMax-based services to new customers although it continues to fulfil its service obligation of running the service and supporting existing customers.

Vodafone's network is also based on an NGN setup and has a nationwide coverage.

### *Ozone*

Ozone currently offers IP telephony and broadband Internet services over its own separate BWA network, which was deployed in 2008 using a proprietary Motorola standard – PTP600. This standard provides an air interface that is totally independent of WiMAX BWA and operates in the 5.4Ghz 'unlicensed' band.

In addition to telephony offerings over its wireless solution Ozone also provides fixed line access services via the Carrier Select (CS) facility hosted by GO. An important facility that CS operators require to be able to match the full retail offering of the network provider is wholesale line rental (WLR). Through WLR, Ozone offers both access and calls to the end-user.

### *SIS*

SIS currently offers IP-based telephony and Internet services via its Network Operating Centre at Tigne` Point, Malta. This operator provides self-supplied wholesale call origination for the purposes of providing retail call services to its clients within a private area. SIS has two interconnection agreements, one with GO and another with Vodafone. SIS's infrastructure occupies a small geographic footprint and services a very small number of end-users. It has its own network switch, and can therefore terminate calls over its own network.

### *Vanilla Telecoms*

Vanilla Telecoms was originally launched as an Internet service provider in 2005. In October 2013 Vanilla Telecoms was authorised by the MCA to start offering IP-based telephony services. Vanilla Telecoms has its own network switch and can therefore terminate calls over its own network. Vanilla Telecoms however has an arrangement with SIS to use its infrastructure in order to be able to convey voice traffic.

## 2.3.2 OVERVIEW OF FIXED TELEPHONY MARKET

Table 1 shows the retail market shares for the above-mentioned fixed network operators in terms of retail subscriptions and volumes of originating voice traffic in minutes. The relevant market outcomes are described below:

- GO accounted for 66.3% of total fixed line telephony subscriptions by the end of 2014, down from 76.9% registered in 2009. This operator also accounted for 66.8% of total voice call minutes originated by the fixed line sector in 2014.

- Meanwhile, Melita accounted for 33% of subscriptions and 30.1% of voice call minutes.

- Ozone accounted for 0.3% of subscriptions at the end of 2014 and 0.99% of outgoing fixed line traffic volumes.

### TABLE 1 – MARKET SHARES BY OPERATOR

### SUBSCRIPTIONS AND TRAFFIC VOLUMES (MINUTES)

| | Absolute figures | | | | | |
|---|---|---|---|---|---|---|
| | 2009 | 2010 | 2011 | 2012 | 2013 | 2014 |
| **Subscriptions** | **246,890** | **247,635** | **232,293** | **229,740** | **231,331** | **230,361** |
| GO | 189,946 | 190,796 | 170,763 | 163,265 | 161,570 | 152,716 |
| Melita | 55,231 | 54,970 | 59,838 | 64,948 | 68,420 | 76,178 |
| Vodafone | 539 | 671 | 544 | 346 | 321 | 403 |
| Ozone | 1,073 | 1,021 | 943 | 963 | 790 | 787 |
| SIS | 101 | 177 | 205 | 218 | 230 | 223 |
| Vanilla Telecoms | - | - | - | - | - | 54 |
| **Originating voice traffic volumes (minutes)** | **742,901,290** | **726,806,367** | **670,787,876** | **653,815,560** | **611,795,870** | **575,719,089** |
| GO | 550,941,487 | 532,852,758 | 482,863,911 | 448,926,953 | 414,783,885 | 384,744,344 |
| Melita | 183,034,239 | 185,228,747 | 176,572,169 | 189,085,818 | 180,023,295 | 173,650,779 |
| Vodafone | 630,004 | 779,017 | 4,124,284 | 7,617,396 | 10,341,880 | 11,051,932 |
| Ozone | 8,295,560 | 7,945,845 | 7,227,512 | 8,185,393 | 6,646,810 | 5,688,029 |
| SIS | 695,012 | 1,219,529 | 1,963,642 | 2,033,839 | 2,067,906 | 1,380,242 |
| Vanilla Telecoms | - | - | - | - | - | 584,005 |
| | **Market shares** | | | | | |
| | 2009 | 2010 | 2011 | 2012 | 2013 | 2014 |
| **Subscriptions** | | | | | | |
| GO | 76.94% | 77.05% | 73.51% | 71.07% | 69.84% | 66.29% |
| Melita | 22.37% | 22.20% | 25.76% | 28.27% | 29.58% | 33.07% |
| Vodafone | 0.22% | 0.27% | 0.23% | 0.15% | 0.14% | 0.17% |
| Ozone | 0.43% | 0.41% | 0.41% | 0.42% | 0.34% | 0.34% |
| SIS | 0.04% | 0.07% | 0.09% | 0.09% | 0.10% | 0.10% |
| Vanilla Telecoms | 0.00% | 0.00% | 0.00% | 0.00% | 0.00% | 0.02% |
| **Originating voice traffic volumes (minutes)** | | | | | | |
| GO | 74.16% | 73.31% | 71.98% | 68.66% | 67.80% | 66.83% |
| Melita | 24.64% | 25.49% | 26.32% | 28.92% | 29.43% | 30.16% |
| Vodafone | 0.08% | 0.11% | 0.61% | 1.17% | 1.69% | 1.92% |
| Ozone | 1.12% | 1.09% | 1.08% | 1.25% | 1.09% | 0.99% |
| SIS | 0.09% | 0.17% | 0.29% | 0.31% | 0.34% | 0.24% |
| Vanilla Telecoms | - | - | - | - | - | 0.10% |

- Vodafone accounted for a market share of 0.17% in terms of subscriptions and 1.92% in terms of outgoing fixed line traffic volumes.

- SIS accounted for just 0.1% of subscriptions in 2014 and 0.24% of outgoing fixed line traffic volumes recorded in the same year.

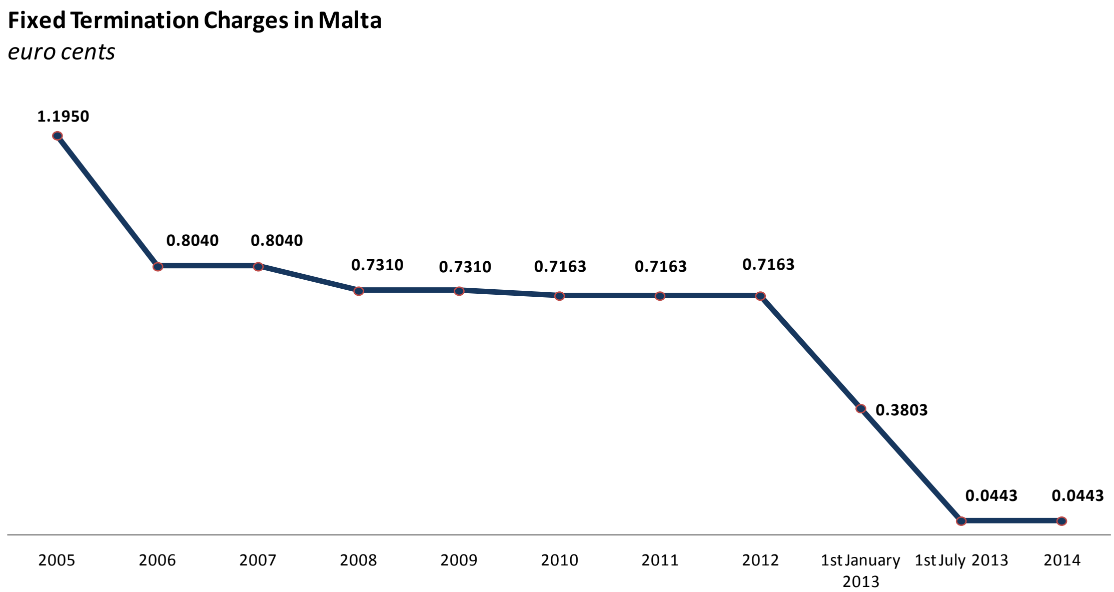
- The latest operator to join the fixed telephony sector, Vanilla Telecoms, has 54 subscriptions or 0.02% share of the total market. Vanilla Telecoms also accounted for 0.1% of outgoing fixed line traffic volumes registered in 2014.

## 2.3.3 DEVELOPMENTS IN THE LOCAL FIXED CALL TERMINATION CHARGES

Local fixed call termination charges have gone down over the last few years as a result of regulatory intervention.

The average fixed call termination charge fell by approximately 39% between 2005 and 2009, from 1.195 euro cents per minute to 0.731 euro cents per minute, as a result of the Bottom-Up Cost Model (BUCM) methodology used for the purpose of costing fixed termination charges and the associated glide-paths.

**CHART 1 – FIXED TERMINATION CHARGES IN MALTA**




Fixed call termination charges fell drastically in the following years, by approximately 94%, from 0.731 euro cents per minute in 2009 to 0.044 euro cents per minute in July 2013. The fixed call termination charge that came into force since 1st January 2013 is calculated on the basis of a long run incremental costing methodology supported by the BUCM2 model, which was adopted in December 2012[10]. As from 1st July 2013, the local fixed termination charge remains at 0.0443 euro cents per minute.

## 2.3.4 THE IMPACT OF LOWER TERMINATION CHARGES ON RETAIL PRICES

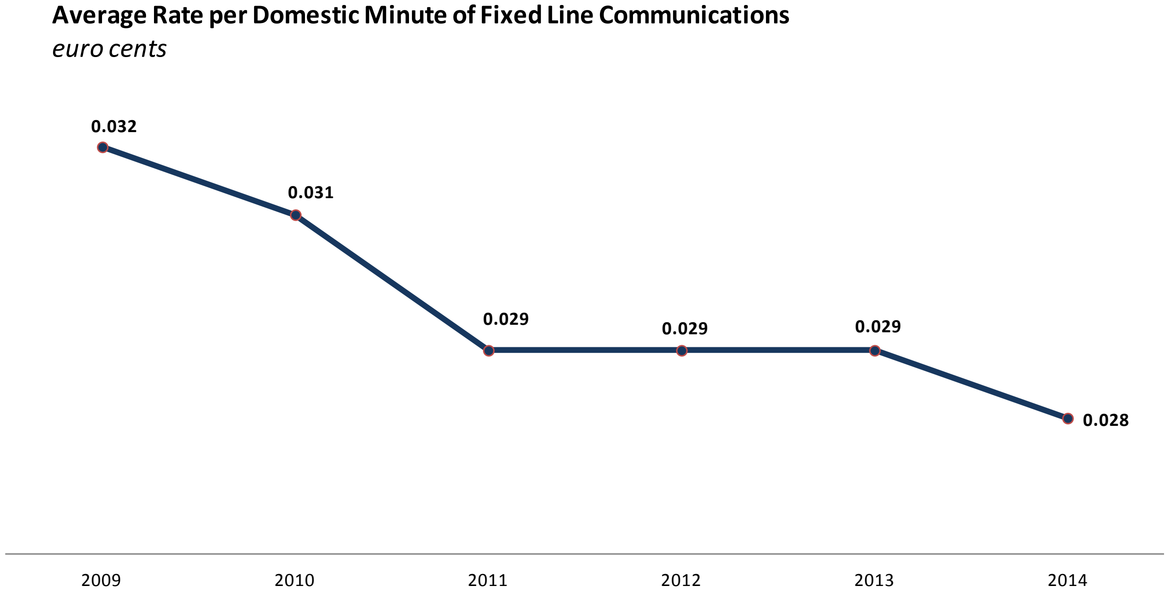
Fixed termination charges are an important determinant in the setting of retail fixed line prices as these typically find their way in the final retail tariff paid by the calling party upon completing a call to a particular fixed line number.

[10] Link to MCA's new BUCM model for fixed networks and fixed interconnection prices decision: https://www.mca.org.mt/service-providers/decisions/mcas-new-bottom-cost-model-fixed-networks-and-fixed-interconnection

As has already been stated regulatory decisions by the MCA have gradually pushed down the level of fixed call termination charges. This is considered to have contributed towards lower retail fixed line tariffs and thus to stronger competition at the retail level.

On the basis of calculations for the average rate per minute (ARPM) of fixed line communications, the MCA explains that domestically bound fixed line voice call tariffs went down by a good margin since 2009. In fact, as illustrated in Chart 2 below, the ARPM for domestic fixed line calls was down by 12.5% between 2009 and 2014, from an ARPM of €0.032 to €0.028.

### CHART 2 – AVERAGE RATE PER DOMESTIC MINUTE OF FIXED LINE COMMUNICATIONS



# 3. MARKET DEFINITION EXERCISE

## 3.1 INTRODUCTION

The EU Regulatory Framework for Electronic Communications requires National Regulatory Authorities (NRA) to define relevant markets[11] appropriate to national circumstances, in particular the relevant geographic markets[12] 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.

The provision of voice call termination on individual public telephone networks provided at a fixed location is considered by the 2014 EU Commission's Recommendation[13] on relevant markets as being characterised by a lack of effective competition and thus susceptible to ex ante regulation.

In the previous market reviews, the MCA defined five separate markets for the provision of fixed voice call termination in Malta. The current review determines whether such a conclusion shall remain appropriate in view of '*expected or foreseeable market developments*'[14] over the next two to three years. In this regard, the MCA addresses the following issues:

- the relevance of wholesale fixed call voice call termination in the provision of retail fixed telephony services;
- the principles governing the payment mechanisms for the service in question; and
- the extent to which the provision of voice call termination on individual public telephone networks and the setting of fixed call termination charges by a local FNO might be constrained via demand-side and supply-side substitution possibilities at the retail and wholesale levels.

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[11] 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.

[12] 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.

[13] Commission Recommendation of 9 October 2014 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services. Available at:
http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.295.01.0079.01.ENG

[14] See Section 2.1 of the Explanatory Memorandum to the Recommendation.

## 3.2 FIXED VOICE CALL TERMINATION AND RETAIL TELEPHONY SERVICES

Wholesale fixed voice call termination services are offered by FNOs to other network operators. Together with wholesale fixed call access and call origination services, fixed call termination enables the provision of various types of fixed telephony services at the retail level, whereby other network operators buy call termination to enable their subscribers to make end-to-end calls.

More specifically, fixed line voice call termination services allow end-users to receive calls initiated by end-users subscribed to other FNOs and MNOs. In this regard, a distinction arises between the network operator to which the end-user making the call is subscribed (i.e. the FNO or MNO hosting the calling party) and the FNO hosting the number of the end-user receiving the call (i.e. the FNO hosting the called party). This distinction shall assume significant relevance in the following market definition exercise.

## 3.3 PAYMENT MECHANISM FOR FIXED CALL TERMINATION

Under current commercial agreements, local FNOs and MNOs abide by the so-called 'calling party pays' (CPP) mechanism for transactions related to fixed voice call termination services. With this mechanism, the originating MNO or FNO pays a termination charge to the FNO hosting the called number.

The originating operator would subsequently recover this charge, together with the costs it incurs for originating the call, through the retail tariffs charged to the calling party. Effectively this means that the calling party pays for the entire cost of call termination, whilst the called party does not pay anything for receiving a call.

The CPP arrangement therefore bears much relevance in the analysis of whether a 5 to 10% increase in the price of call termination triggers change in the behaviour of the consumer making or receiving a fixed line call. The question that will be considered later on in the analysis is whether consumers are sufficiently aware and sensitive to fixed call termination charges and whether they could pose a competitive constraint on the setting of fixed call termination charges.

## 3.4 SUBSTITUTABILITY ASSESSMENT

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

The existence of any demand and supply side substitution is determined through the hypothetical monopolist test. The hypothetical monopolist test is used as a framework for market definition purposes in both the product and geographical dimensions. The test, used in competition analysis, seeks to define a market by establishing the closest substitute to the product being considered. The hypothetical monopolist test identifies products as being substitutes by evaluating what will happen if there was a small but significant, lasting increase in the price of a given product, usually understood as being an increase in the range of 5 to 10 percent, in any of the products/services under investigation. Overall, the hypothetical monopolist test would determine whether a hypothetical monopolist would be in a position to sustain a 5 to 10 percent increase in price because of significant demand-side and supply-side substitution effects.

To this effect, the relevant product and service market(s) shall comprise all those products and services that are substitutable, not only in terms of the price and the intended use of the product under investigation, but also in terms of the overall conditions of supply and demand.

In this context two main considerations are particularly relevant:

- the extent of indirect constraints or degree of retaliation at the retail level (demand-side substitution) in response to a 5 to 10% increase in the price of wholesale fixed call termination services supplied by a hypothetical monopolist; and

- the extent of direct constraints or the effectiveness and immediacy with which additional supply of termination services could be made available at the wholesale level in response to a 5 to 10% increase in price.

The assessment is carried out in the knowledge that there is a certain degree of interrelationship between the wholesale and retail levels of competition in the provision of fixed termination services.

### 3.4.1 DEMAND-SIDE SUBSTITUTABILITY

Demand-side substitutability determines the range of products which are viewed as substitutes by retail consumers and wholesale customers.

The analysis starts at the retail level, with an assessment undertaken to determine whether consumer behaviour is likely to pose an indirect pricing constraint on a hypothetical monopolist supplying fixed call termination services. Put it differently the analysis will establish whether retail consumers can opt for alternative ways of reaching or communicating with the intended called party in order to avoid an increase in the fixed termination charge implemented by a hypothetical monopolist.

The subsequent analysis at the wholesale level will assess whether other network operators can pose a direct pricing constraint on a hypothetical monopolist supplying fixed call termination services. The issue here is whether it is technically feasible for network operators to substitute fixed voice call termination supplied by a hypothetical monopolist and thus whether it is possible for different network operators to avoid paying termination dues to the FNO hosting the called party.

### Demand-side substitutability at the retail level

A retail demand-side constraint would arise if a 5 to 10% increase in the fixed call termination charge becomes unprofitable for the hypothetical monopolist as a result of retail customers managing to bypass the FNO hosting the called number and successfully reaching the called party via alternative means of communication.

As has already been described above, the provision of wholesale voice call termination services provided on local public telephone networks upholds the CPP mechanism. Given that the termination charge is fully absorbed by the calling party, the called party is typically indifferent to call termination charges imposed by its network operator. By implication, the called party has no particular interest in exercising pressure on its network operator to reduce the termination charges paid by the calling party. The called party would instead care most about the subscription fees and retail call tariffs that would apply once subscribed to a particular network operator, rather than what others had to pay in order to reach his/her number.

The onus for demand-side substitutability at the retail level therefore rests on the ability of the calling party to react in response to changes in fixed call termination charges. It may be deemed possible for the calling-party to react to an increase in fixed termination charges by:

a) calling a mobile number instead of calling a fixed line number;
b) calling from a mobile number instead of calling from a fixed line number;
c) making an on-net fixed-to-fixed (FTF) call instead of an off-net FTF call or mobile-to-fixed (MTF) call;
d) making use of unmanaged VoIP services;
e) using call back and call forwarding solutions; and
f) taking up a fixed line subscription in a bundle.

The costs associated with terminating a call on a public telephone network are ultimately passed on to the calling party in the final retail price that is paid for making a call. Therefore, the likelihood of the calling party resorting to one of the options highlighted above would only materialize if it is familiar with the applicable retail voice call tariffs and is sufficiently aware of the termination cost element included in these tariffs.

The Consumer Perception Surveys carried out by the MCA in 2013 with respect to fixed line[15] and mobile telephony[16] services in Malta provide important information on this matter. Both surveys show that retail consumers lack awareness when it comes to the tariffs they pay when making a call, which goes to suggest that that they possess very little knowledge (if any) of local voice call termination charges.

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

[16] Consumer Perception Survey Results on the Mobile Telephony Sector 2013: http://www.mca.org.mt/surveys/consumer-perception-survey-mobile-sector-2013

Furthermore, there are instances where the calling party may lack information as to the fixed network terminating the call, given that a fixed line number may have been ported without the end-user's knowledge. Local fixed line operators may also offer various calling plans bundling a varying number of 'free' on-net and off-net FTF minutes in the monthly rental charge. This would complicate matters for the end-user as it makes it more difficult to correlate differences between on-net and off-net call rates on the basis of the termination charges implemented by competing operators.

In view of all the above mentioned reasons, the ability of the calling party to constrain an increase in wholesale voice call termination charges through one of the bypass options highlighted previously may already seem to be compromised. A more detailed assessment of the likelihood of each bypass option is provided below.

### *Opting for mobile*

The MCA considers whether a price increase in fixed line call termination could, in theory, encourage the calling party to switch to mobile telephony services such as to effectively constrain the increase in price. Throughout the following discussion, end-users are assumed to own both a mobile subscription and a fixed line subscription.

- *Substitution from FTF calls to MTF calls*

MCA revenue-based workings[17] show that a MTF call is considerably more expensive than an on-net FTF or an off-net FTF call. This goes to suggest that, if the calling party is aware of these differences in retail tariffs, he/she would not prefer to make a MTF call unless required to do so for immediate/emergency communication.

**TABLE 2 – AVERAGE REVENUE PER MINUTE (ARPM)**

| ARPM | 2009 | 2010 | 2011 | 2012 | 2013 | 2014 |
|---|---|---|---|---|---|---|
| on-net FTF call | € 0.016 | € 0.013 | € 0.010 | € 0.011 | € 0.011 | € 0.010 |
| off-net FTF call | € 0.017 | € 0.015 | € 0.014 | € 0.012 | € 0.013 | € 0.013 |
| FTM call | € 0.195 | € 0.212 | € 0.200 | € 0.184 | € 0.191 | € 0.173 |
| FTI call | € 0.089 | € 0.091 | € 0.089 | € 0.084 | € 0.083 | € 0.093 |
| MTM/MTF call | € 0.192 | € 0.169 | € 0.120 | € 0.101 | € 0.093 | € 0.086 |
| MTI call | € 0.530 | € 0.497 | € 0.313 | € 0.189 | € 0.154 | € 0.128 |

Furthermore, opting for a MTF call would leave the calling party in a similar position to that observed for a FTF call, given that the cost of terminating a call on a fixed line network is the same for a call originating from a mobile network.

[17] The MCA uses the average revenue per minute (ARPM) methodology to derive figures that are used as a proxy for local retail voice call prices. For example, the ARPM for a MTF call is calculated by dividing the total revenues recorded under this heading (including termination revenues) with the total number of MTF minutes recorded during the reference period.

- *Substitution from FTF calls to fixed-to-mobile (FTM) calls*

Table 2 above shows that a FTM call is significantly more expensive than an on-net or an off-net FTF call. If the calling party is aware of these retail price differences, substitution from FTF calls to FTM calls is unlikely to happen in response to an increase in fixed termination charges.

It is also relevant to underline that local mobile termination charges are higher than local fixed call termination charges. In a scenario where there is perfect knowledge of both mobile and fixed retail voice call tariffs and awareness of the termination element included in these tariffs, the calling party's choice would likely stick to the cheapest option, in this case being a FTF call.

- *Substitution from MTF calls to mobile-to-mobile calls (MTM) calls*

This section assesses whether the calling party would make use of a MTM call instead of a MTF call to avoid an increase in fixed termination charges. In the assumption that the consumer has full knowledge of local termination charges, the calling party is unlikely to resort to the former type of call, given that the mobile termination charge is much higher than the fixed termination charge.

It may however be argued that on-net MTM calls (and sometimes even off-net MTM calls) are generally cheaper than MTF calls and possibly fixed line originated calls, given the predisposition of MNOs to offer 'flat-rate' packages that combine a bundle of free on-net and off-net MTM minutes with flat-rate tariff plans[18]. Nevertheless, such mobile telephony flat-rate tariffs are mostly available on postpaid plans, which accounted for only around 24% of total mobile subscriptions reported at the end of 2014. Meanwhile, fixed telephony flat rate plans are also available and thus provide for a counter effect.

The MCA therefore considers that substitution between MTF calls and MTM calls is unlikely to materialize in response to an increase in local fixed termination charges and that if such substitution materializes, numbers would not be sufficiently strong as to constrain the behaviour of a hypothetical monopolist in setting its fixed termination charges.

### *Opting for an on-net FTF call instead of an off-net FTF call*

If a fixed line operator - say 'FNO A' - increases its termination charges, a calling party subscribed with one or more competing FNOs would have to face higher termination costs when making a call to a number hosted by 'FNO A'.

In response, a calling party that is aware of termination charges would have an incentive to switch to potential constraining substitutes, such as by considering switching its FNO or else by avoiding (or bypassing) 'FNO A', which hosts the third party being sought for contact / communication.

[18] This argument also rests on the assumption that MNOs apply similar on-net and off-net MTM call rates and that free minute bundles combine an equal amount of free on-net MTM and off-net MTM minutes. However, in reality, most flat-rate mobile call plans are inclined to favor on-net traffic, with relatively cheaper on-net call rates and a higher number of free on-net MTM minutes. In some instances, these plans even include free MTF minutes instead of off-net MTM minutes and/or cheaper MTF calls than off-net MTM calls.

The MCA however reiterates that retail consumers are typically not aware of the applicable fixed termination charges and hence not sensitive to the impact of changing fixed termination charges on retail voice call tariffs. This suggestion is confirmed by the MCA's 2013 Consumer Perception Survey results on fixed line telephony[19]. The survey shows that the majority of respondents (59%) did not know how much it costs to make an on-net FTF call. This percentage rose to 85% in the case of an off-net FTF call.

Furthermore, local FNOs currently offer various calling plans that bundle a varying number of 'free' on-net and off-net fixed-to-fixed ("FTF") minutes in the monthly rental charge. This would further distort the consumer's visibility as to the applicable fixed termination charges and their relevance in determining retail voice call tariffs.

The MCA is therefore of the view that substitution between on-net and off-net FTF calls is unlikely to materialize in sufficient numbers as to pose an effective constraint on the setting of wholesale fixed termination charges.

In the mean time it may be argued that an indirect constraint on wholesale fixed termination charges may arise from end-users having multiple fixed line subscriptions at home, including a subscription with 'FNO A'. The MCA however had already noted in previous market reviews that only a small share of local end-users, circa 8%, have multiple fixed line subscriptions. This effectively means that end-users having multiple subscriptions are not in a sufficiently large number as to pose a credible indirect price constraint on a hypothetical monopolist supplying fixed termination services.

### *Opting for unmanaged VoIP services*

In order to be able to access unmanaged VoIP telephony services consumers will have to install a particular type of application on their computer, smartphone or tablet. This software would enable the end-user to communicate with other end-users on these devices via, for example, Skype.

The Explanatory Note to the Relevant Markets Recommendation of 2007 states that, on the basis of quality differences and product characteristics, unmanaged voice call services appear for the time being to be less of a substitute for narrowband telephony than managed services. However, the Recommendation notes that this '*distinction may disappear over time as the quality of unmanaged VoIP services improves and technical features change*'.

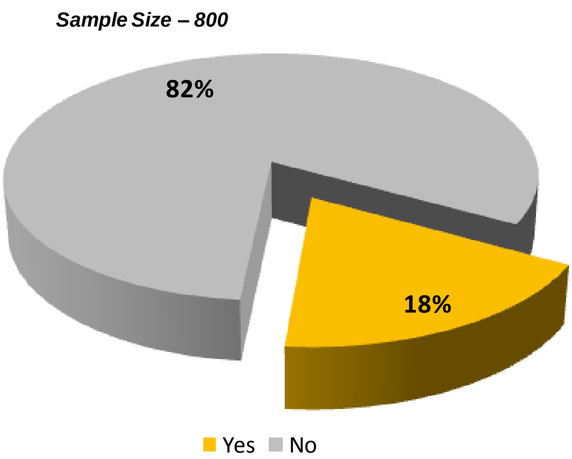
The revised EU Recommendation, while maintaining its 2007 position, explains that in some Member States it seems possible to offer unmanaged VoIP services at a quality and prices comparable from end-users' perspective to that of narrowband telephony services. In this case, the Recommendation suggests that this type of unmanaged VoIP service appears to be a substitute from the end user's perspective.

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

As for the local context, the MCA maintains that in the current circumstances and the foreseeable future, unmanaged VoIP telephony services are unlikely to act as an effective constraint on wholesale voice call termination on local FNOs. This conclusion is also supported by statistical evidence. In fact the Consumer Perception Survey carried out by the MCA in 2013 with respect to fixed line[20] shows that only 18% of all households have used applications such as Skype to make local calls. Moreover one would also need to assess the frequency with which these applications are used in order to be able to conclude that they are substitutes. To this effect the MCA argues that unmanaged VoIP services do not appear to be a strong substitute from the end user's perspective and likewise shall not be included in the local relevant market definition.

**FIGURE 2**

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




### *Using call-back and call-forwarding solutions*

Call-back and call-forwarding solutions are automatically established to re-route calls for traffic intensive users. In general, however, these solutions are not widely in demand.

Take-up of these solutions is limited at this time and the situation is unlikely to change within the timeframe of this review. This means that the usage of call-back and call-forwarding solutions is unlikely to have an impact on the setting of local fixed call termination charges.

### *Taking a fixed line subscription in a bundle*

Statistical data collected by the MCA shows that those subscribing to a bundle offer have been increasing significantly over the years. In actual terms the number of consumers signing up to a

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

bundle offer comprising fixed line telephony increased to 117,867 by the end of 2014 or 57% of all post-paid fixed telephony subscriptions. This trend is expected to persist in the coming years. The question therefore arises as to whether this development could have an impact on the behaviour of FNOs when these are setting their fixed call termination charges.

It is important to note that fixed line subscriptions in a bundle typically include the same 'flat-rate' tariffs, free minutes and price differentials (between on-net and off-net call rates) that characterise stand-alone subscriptions. This in itself suggests that the choice of whether to take-up a fixed line subscription that forms part of a bundle or on a stand-alone basis depends on a range of considerations other than retail fixed line tariffs and the corresponding termination charges.

There is also no reason to believe that retail fixed customers on a bundled subscription are more aware and sensitive than customers on a stand-alone fixed line subscription when it comes to retail voice call tariffs and the impact of changes in fixed termination charges on these tariffs.

The MCA therefore considers that bundled fixed line subscriptions do not pose a constraint on the setting of fixed call termination charges.

### Demand-side substitutability at the wholesale level

From a technical point of view, network operators cannot terminate a call to a number assigned with a particular FNO on some other network operator, otherwise the call would turn out to be unsuccessful.

In other words, a network operator originating a call to a fixed line number has no alternative but to terminate the call on the FNO hosting the called party.

This means that there is no potential for demand-side constraints to take effect at the wholesale level. The lack of demand-side substitution for wholesale fixed line call termination suggests that the purchaser of call termination (or originating network) cannot bring pressure to bear on its supplier (or terminating network) to constrain a price increase for the service it is buying.

### Conclusion on demand-side substitutability

The MCA considers that there is no potential for retail and wholesale demand-side constraints in the provision of wholesale voice call termination services on individual public telephone networks in Malta. This is mainly because:

- end-users lack awareness of fixed call termination charges and are typically insensitive to changes in these charges;
- there are no products that are sufficiently interchangeable with the termination of a call on a number hosted by a particular FNO; and
- network operators cannot terminate a call other than on the FNO to which the called party is subscribed.

### 3.4.2 SUPPLY-SIDE SUBSTITUTABILITY

The MCA shall now take into account the effectiveness and immediacy of a supplier's response to a small but significant increase in the price of wholesale voice call termination services implemented by a hypothetical monopolist. More specifically, the supply-side substitutability assessment considers if it would be technically feasible for network operators to switch production for the supply of fixed call termination services to the network of a hypothetical monopolist, following a 5 to 10% increase in the price for terminating a call on such a network.

The MCA however argues that this is not possible. The MCA explains that no network operator could readily substitute call termination supplied by a local FNO hosting the called party. Effectively, it is the called party that chooses the network on which the call is to be terminated.

#### Conclusion on supply-side substitutability

In these circumstances, therefore, supply-side substitution for voice call termination on individual public telephone networks is not possible.

## 3.5 DECISION ON RELEVANT MARKETS

In respect to the analysis presented above, and in accordance with competition law principles, the MCA identifies six distinct wholesale fixed termination markets in Malta. These are:

- a market for the provision of fixed voice call termination services by GO;
- a market for the provision of fixed voice call termination services by Melita;
- a market for the provision of fixed voice call termination services by Vodafone;
- a market for the provision of fixed voice call termination services by SIS;
- a market for the provision of fixed voice call termination services by Ozone; and
- a market for the provision of fixed voice call termination services by Vanilla Telecoms.

Each relevant market includes call termination services provided by each FNO to third party operators and as well as self-supplied termination.

## 3.6 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 maintains that the relevant geographic market for the provision of wholesale voice call termination services on individual public telephone networks in Malta is national in scope but limited to the individual network coverage identified above. This view is supported by the fact that all authorised or licensed operators providing fixed termination services in the above 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. To this effect, FNOs have uniform fixed voice call termination charges, without differentiating by reference to the geographic location of the network operator originating the call.

## 3.7 SUMMARY OF RESPONSES AND MCA REPLIES RELATED TO THE MARKET DEFINITION

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

# 4. MARKET ANALYSIS

Having identified, in the previous chapter, the relevant wholesale markets for the provision of fixed voice call termination 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 5 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 should be used to establish the presence of a dominant position in wholesale fixed termination markets are:

- distribution of market shares;
- the potential of market entry;
- the extent of countervailing buyer power (CBP); and
- the scope for price competition.

### 4.2.1 DISTRIBUTION OF MARKET SHARES

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

In the provision of wholesale fixed termination services the MCA explains that each FNO has a 100% market share. This is because termination services are provided exclusively on each individual FNO and there are thus no alternatives available for those purchasing the service.

#### Conclusion

The MCA thus concludes that each FNO is a monopolist when terminating calls on its own network. Likewise each FNO is a monopolist in the setting of its own termination charges and if left unregulated FNOs will have all the incentive to use their monopoly position in the market and set termination charges which are above the competitive level.

### 4.2.2 POTENTIAL MARKET ENTRY

As described in the market definition exercise, the CPP mechanism eliminates any opportunity for supply-side substitutability. There is indeed no possibility for network operators to terminate a call other than on the fixed network to which the called party is subscribed.

There have also been no technological breakthroughs, nor are these being envisaged within the timeframe of this review, that would allow for an alteration in the supply dynamics of fixed voice call termination services.

As a result, local FNOs are not in any way threatened by potential competition in their supply of fixed voice call termination services.

#### Conclusion

Technical barriers and the CPP principle makes the terminating network dominant over other operators and therefore the number of players present in the market have very little constraining behaviour on the setting of fixed voice call termination charges.

This again implies that FNOs are free to set wholesale termination charges above competitive levels, in order to maximize revenues and at the same time increase the cost of other network operators when purchasing termination.

### 4.2.3 COUNTERVAILING BUYER POWER

Customers with a strong negotiating position may significantly shape the level of competition in a market as this will tend to restrict the undertakings’ ability to exercise market power and to act independently of their customers. In effect, when customers can exert significant pressure on the supplier of a good or service, they can effectively stop an attempt to increase prices by service providers. The extent of countervailing buyer power (CBP) 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 suggests that there are two economic agents that have an interest in keeping fixed termination charges as low as possible. These are end-users (the retail consumers) paying for call completion and network operators (the wholesale customers) purchasing termination from local FNOs.

The assessment of CBP shall therefore determine the ability of these economic agents to exercise market power and to constrain the setting of fixed termination charges by local FNOs.

The stronger the CBP of end-users and network operators, the more FNOs would be restricted from exercising market power, and the less likely to act independently in setting termination charges.

### The bargaining position of retail customers

The bargaining position of retail customers to influence fixed termination charges rests on their ability to reach a third party on a fixed number without having to terminate the call on the FNO to which the called number is assigned or else to reach that same third party via alternative means of communication.

It has already been shown that, with the present technology, a customer wishing to contact a person on a fixed line number can only do so by terminating the call on the FNO hosting the called number.

In those instances where alternative means of communication can be used to reach a third party, substitution is not considered to happen in sufficient numbers so as to effectively constrain a FNO from increasing the price of termination services offered on its own network.

Furthermore, retail customers are typically unaware of and / or insensitive to fixed voice call termination charges. The market definition exercise has shown that consumers on the receiving end of a call (the called parties) are typically indifferent to termination charges applied by their network operator and have no particular interest in what other consumers pay in order to reach them. Meanwhile, consumers making a call (the calling parties) typically do not know the exact cost of making a call. By implication, calling parties are considered to have little or no knowledge of fixed voice call termination charges.

This lack of sensitivity and awareness of fixed voice call termination charges further dilutes the 'negotiating' position of consumers to influence the behaviour of FNOs in the setting of such charges.

In view of this, the MCA therefore concludes that retail customers do not have sufficient countervailing buyer power to constrain local FNOs in the setting of fixed termination charges. Put it differently, local FNOs have an ability to set fixed termination charges independently of end-users.

### The bargaining position of wholesale customers

A second consideration in the assessment of countervailing buyer power relates to market dynamics at wholesale levels. In this case, the MCA will investigate whether a service provider or network operator purchasing fixed voice call termination could sufficiently influence the price charged by the supplier for the provision of fixed termination services.

The MCA considers that wholesale countervailing buyer power may arise in the context of the following scenarios.

- *The mobile-to-fixed scenario*

The main consideration in this part of the analysis is whether local mobile network operators in Malta, namely GO, Vodafone and Melita, have a strong bargaining position to influence the setting of fixed termination charges. The assessment is undertaken under the assumption that fixed termination charges are not regulated (which effectively means that FNOs can freely set their own termination charges) whilst regulatory intervention remains applicable with respect to the setting of mobile termination charges.

As part of this assessment it is very important to establish whether it would be possible for a particular MNO to use its bargaining power in order to secure a lower termination charge by threatening / refusing direct interconnection with a FNO. For example, a local MNO may hypothetically refuse / deny interconnection with a FNO charging excessive fixed termination charges, unless these are brought down to a reasonable level. There is however a general obligation at law, apart from any decision by the MCA designating undertakings with SMP, that obliges local network operators to ensure end-to-end connectivity and to interconnect their networks where this is not already the case. This general obligation at law effectively means that local MNOs cannot therefore refuse and / or cut-off interconnection.

It is also the MCA's view that, even if the obligation to provide interconnection is no longer mandated, a threat by a MNO to limit or suspend interconnection with any of the local FNOs would not enhance its countervailing buyer power, especially when dealing with the larger FNOs. On the contrary, such course of action is more likely to inflict harm on the subscribers of the MNO threatening interconnection rather than on the FNO to which such action is supposed to be directed. This is because the MNO's subscribers would get less value for their subscription given their inability to reach all local fixed numbers. In these circumstances, therefore, a MNO's threat to interconnection is counterproductive and would not prevent the FNO from implementing an increase in its termination charges.

### TABLE 3 – MINUTES TERMINATING ON LOCAL FIXED NETWORK OPERATORS

### MARKET SHARE BY TYPE OF TRAFFIC

| Minutes terminating on local FNOs | 2009 | 2010 | 2011 | 2012 | 2013 | 2014 |
|---|---|---|---|---|---|---|
| MTF traffic share | 4.07% | 5.44% | 9.25% | 10.92% | 12.03% | 13.30% |
| On-net FTF traffic share | 72.77% | 69.93% | 65.35% | 62.12% | 60.26% | 59.05% |
| Off-net FTF traffic share | 20.10% | 21.86% | 22.56% | 24.10% | 24.11% | 24.31% |
| International-to-fixed traffic share | 3.06% | 2.77% | 2.84% | 2.85% | 3.60% | 3.34% |

Moreover it is also argued that the relative bargaining strength of MNOs in determining fixed termination charges depends upon their share of call termination minutes supplied by local FNOs. Table 3 above shows that MNOs catered for just around 13% of all voice call minutes terminating on local FNOs during 2014. Although this share has been on the rise since 2009, it is not considered to be of an extent as to credibly threaten the monopoly power enjoyed by FNOs in the provision of fixed termination services and the setting of fixed termination charges.

In view of all this the MCA therefore believes that in the absence of regulation local MNOs cannot effectively exert strong countervailing buyer power on the setting of fixed termination charges in Malta.

- *The fixed-to-fixed scenario*

FNOs themselves purchase termination services from each other. To this effect the MCA will also consider whether, in absence of regulations, FNOs have a strong bargaining position to constrain the setting of fixed termination charges by their market competitors. The countervailing buyer power of FNOs is assessed by their level of purchases made from the FNO providing the call termination service and the possibility to threaten interconnection.

So far it has already emerged that FNOs have an incentive to increase or maintain their fixed termination charges above the competitive level. Indeed, FNOs are aware that, due to the CPP principle, setting a high termination charge will not impact their own subscribers, but subscribers of other FNOs[21]. Meanwhile, the realization that a cost would still have to be incurred when terminating a voice call over an own network provides an incentive for FNOs to discriminate in their favour by implementing off-net termination charges that are higher than their own internal (on-net) termination charges.

This state of affairs would allow FNOs to pass-through (either partially or in full) the excess revenues from incoming off-net FTF calls to cheaper retail prices for on-net FTF calls. The resulting price differentials would in turn contribute to higher turnover levels and wider profit margins for the FNO implementing discriminatory termination charges, especially if the FNO in question enjoys a large market share of fixed line subscriptions. Meanwhile, rival and / or smaller network operators would be less price competitive and therefore less likely to appeal to customers at the retail level.

[21] In this regard, FNOs purchasing termination would have to face increased costs for off-net FTF calls and thus end-up charging higher rates for such calls at the retail level.

All of this could be avoided if FNOs purchasing termination from other FNOs are in a position to exercise CBP and thus negotiate lower fixed call termination charges. The higher their market share of minutes terminated on another FNO the more likely it is for them to be in a position to exercise bargaining power by, for example, threatening to refuse, delay or block interconnection. It is however important to mention that all local FNOs are required to have interconnection agreements in place with existing network operators and to negotiate similar interconnection agreements in good faith with new market entrants.

In this regard, even if the obligation to interconnect is not mandated, a threat from a FNO not to purchase call termination from another FNO by cutting-off interconnection would carry limited significance. There are two main reasons for this.

Firstly, FNOs threatening interconnection would inflict more harm to their subscribers than to the network to which interconnection is at risk of being cut-off. Indeed, FNOs trying to exercise CBP in this way would damage their own reputation as their own subscribers would not be able to make calls to all local fixed networks, thereby ending up getting 'less value' from their subscription. Secondly, Table 3 shows that the off-net FTF traffic share of minutes terminating on local FNOs in 2014 corresponded to around 24% of all terminating traffic volumes reported that year. Although the percentage recorded in 2014 is higher than that reported in 2009, it can be presumed that FNOs do not in reality possess a sufficiently strong negotiating position on what other FNOs charge them for terminating calls made by their subscribers.

In view of all this the MCA therefore believes that in the absence of regulation FNOs cannot pose CBP in the setting of fixed termination charges by rival operators.

- *The international-to-fixed scenario*

FNOs also terminate calls originating from another jurisdiction on their own network. The share of international traffic terminating on local FNOs however remains small, standing at just 3% (see Table 3 above).

It is therefore considered that, in the absence of regulation, international-to-fixed traffic does not pose CBP on local FNOs when these are setting their fixed termination charges. It is also relevant to point out that there is no international wholesale operator or group of operators that could effectively constrain local fixed termination charges to a level commensurate with a competitive outcome.

### Overall conclusion on countervailing buyer power

In view of the full assessment carried out above the MCA thus concludes that retail customers do not have sufficient countervailing buyer power to constrain local FNOs in the setting of fixed termination charges. Put it differently, local FNOs have an ability to set fixed termination charges independently of end-users.

Likewise the MCA also concludes that in the absence of regulation, neither MNOs nor competing FNOs can exert countervailing buyer power to constrain the setting of termination charges by a particular FNO. Typically, this results from the intrinsic problem that termination services on a particular network are subject to monopoly pricing.

The MCA considers that local FNOs face the same identical 'monopolist conditions' when setting their own fixed call termination charges. In the absence of regulations local FNOs cannot therefore be constrained from setting such charges above the competitive level.

### 4.2.4 SCOPE FOR PRICE COMPETITION

A FNO faces no competition in the provision of voice call termination over its own network. This is because other network operators have no option but to purchase termination from the FNO to which the called number is assigned. It is also clear that, due to the CPP principle, the retail customer is insensitive to and not sufficiently aware of fixed termination charges. In addition, no CBP can be exercised on the setting of fixed termination charges.

The overall implication of these conditions is that, in absence of regulation, FNOs can charge an excessive price for termination over their own network, which would ultimately impinge negatively on retail fixed voice call tariffs.

It is of significance to underline that the reductions in local fixed termination charges observed over the last few years have been exclusively the result of regulatory intervention by the MCA.

On average, local fixed termination charges went down significantly between 2009 and July 2013, from 0.7310 eurocents/minute to 0.0443 eurocents/minute (See Chart 1). Meanwhile, the average rate per minute of fixed line communications for domestic fixed calls (used here as a proxy for the actual retail price movements) fell by 12.5%, from €0.032 to €0.028 (see Chart 2).

#### Conclusion

The MCA considers that regulation to reduce fixed termination rates to their efficient level will contribute positively towards stronger price competition. On the contrary, in the absence of regulation, FNOs are likely to implement / maintain fixed termination charges that are above the competitive level, thereby reducing the scope for price competition.

### 4.2.5 OVERALL CONCLUSION ON THE MARKET ANALYSIS

Based on the findings and discussion presented above, the MCA concludes that the wholesale markets under consideration are not competitive and will not retract from this position during the timeframe of this review.

This conclusion is supported by a number of factors, namely that:

- Each FNO holds a 100% share of the market in terms of voice call traffic terminating on its own network, irrespective of its size and technological platform.

- Each FNO can act independently of retail customers and other network operators in the setting of fixed termination charges. Due to the CPP mechanism, retail customers are typically insensitive or unaware of fixed termination charges. In addition, network operators have no alternative for terminating a call other than the FNO to which the called number belongs.

- In the absence of regulation, FNOs have a strong incentive to price discriminate when charging for their voice call termination services and thus foreclose markets.

- In the absence of regulation, FNOs are likely to increase their fixed termination charges, thereby increasing the risk of price distortions.

- In a scenario where FNOs can freely set high termination charges, the scope for price competition is reduced to the detriment of retail customers.

In view of all this the MCA therefore considers that the following FNOs hold significant market power (SMP) in their respective wholesale fixed termination market:

- GO;
- Melita;
- Vodafone;
- Ozone;
- SIS; and
- Vanilla Telecoms

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

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

# 5. REGULATORY APPROACH

## 5.1 BACKGROUND TO REGULATORY APPROACH

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

The MCA must ensure that the selected remedies are in accordance with regulation 11(4) of the ECNSR and Article 8.4 of the Access Directive, in that these are:

- based on the nature of the competition problems that have been identified;
- proportionate and justified, in light of the objectives laid down in Article 4 of the ECRA; and
- only be imposed following consultation, in accordance with regulation 7 and Article 4A of the MCA Act.

## 5.2 CURRENT REGULATORY OBLIGATIONS

In its third market review decision on wholesale fixed voice call termination on individual public telephone networks in Malta (published in April 2014)[22], the MCA established that all FNOs designated with SMP in the markets under investigation – namely GO, Melita, Vodafone, Ozone and SIS – had to comply with the following set of obligations:

- an obligation to meet reasonable requests for access to / and use of specific network facilities, in order to ensure end-to-end connectivity;
- an obligation not to show undue preference or undue discrimination in the provision of interconnection services;
- an obligation to ensure transparency on information related to termination charges and transparency on accounting information, technical specifications, network characteristics, terms and conditions for supply and use, and prices; and
- an obligation to implement price control, mandating cost-oriented wholesale termination charges.

[22] Link to 2014 MCA Decision on wholesale fixed voice call termination on individual public telephone networks in Malta: https://www.mca.org.mt/decisions/mca-decision-market-definition-assessment-competition-and-regulation-call-termination

The MCA also mandated the following obligations on GO and Melita:

- an obligation of cost accounting to ensure that the applicable termination charges reflect the costs incurred by FNOs to supply wholesale termination services; and

- an obligation of accounting separation to facilitate the verification of compliance for services that FNOs provide to other operators.

Based on the principles of reasonableness and proportionality, the MCA considered that it was not appropriate at the time to impose the cost accounting and accounting separation obligations on Vodafone, Ozone and SIS.

## 5.3 POTENTIAL COMPETITION PROBLEMS

Following the market analysis presented above, GO, Melita, Vodafone, Ozone, SIS and Vanilla Telecoms have been designated with SMP in the provision of fixed call termination services over their own individual public telephone network.

The designation of SMP signals that, in absence of regulation, these network operators could potentially abuse their monopoly position in the provision of termination services by engaging in the following practices if left unregulated:

- *Excessive pricing*

Each FNO has an incentive to charge excessive rates for voice call termination services supplied on its own network. This is more likely to happen with the FNO charging high termination rates for MTF calls and off-net FTF calls in order to increase the inflow of termination revenues and subsequently cross-subsidise its on-net FTF call tariffs.

This practice would also distort competition as it enhances the revenues of the FNO that is implementing excessive termination and increasing the cost for other FNOs and MNOs. Ultimately, higher termination rates will be passed on to the end-users in the form of higher retail prices, thus decreasing competition in the market.

- *Price discrimination*

A FNO could charge itself or its subsidiary a lower fixed termination rate than that applicable to other network operators. Through these price discriminatory practices a FNO could ultimately foreclose the retail market for its competitors.

For example, a FNO could set high off-net termination charges in order to cross-subsidise cheaper on-net FTF call rates. In this sense, other network operators would find it more difficult to compete in the retail market given that these will face much higher costs for completing off-net calls to the FNO charging excessively high off-net termination rates.

## 5.4 DECISION ON REGULATORY INTERVENTION

With reference to the evidence presented in the market analysis and after having identified the potential competition problems that may arise in the wholesale markets under investigation the MCA considers that ex ante regulatory intervention is required. To this effect, the MCA is mandating a number of obligations on SMP operators.

Ex ante regulatory intervention would ensure that efficient termination charges prevail in the identified markets and would likewise guarantee that these markets work effectively to deliver enhanced consumer benefits.

The MCA notes that it is unlikely for any single regulatory obligation to ensure effective competition by itself. Hence, the imposition of a suite of obligations that complement, support and reinforce each other.

### *Access*

The imposition of an access obligation would provide greater certainty in the market as it would complement the general obligation at law on network operators to provide access to all reasonable requests for the granting of interconnection. This is in accordance with the objectives specified under the ECRA (Article 13 and Article 14) and the MCA Act.

The MCA is of the opinion that the access obligation shall be imposed on GO, Melita, Vodafone, Ozone, SIS and Vanilla Telecoms. As stipulated by regulation 15 of the ECNSR, this obligation is to ensure that the identified operators provide end-to-end connectivity through the appropriate granting of access to, or interconnection with, other networks.

The access obligation poses a number of specific requirements on the identified SMP operators. Some of these requirements are listed below:

- give third parties access to their infrastructure for the purpose of voice call termination on their own network and interoperability of network services (sub regulations 2(a) and 2(e) of regulation 15 of the ECNSR);

- meet reasonable requests to interconnect networks and network facilities (sub regulation 2(i) of regulation 15 of the ECNSR);

- negotiate in good faith with undertakings making new requests for access and interconnection services (sub regulation 2(b) of regulation 15 of the ECNSR); and

- not to withdraw access to facilities already granted (sub regulation 2(c) of regulation 15 of the ECNSR).

In accordance with regulation 15 (3) of the ECNSR, the MCA may attach to any of the requirements encompassing the access obligation, conditions covering fairness, reasonableness and timeliness.

### *Non-discrimination*

The obligation of non-discrimination would ensure that no SMP operator exercises any discriminatory behaviour in relation to the provision of wholesale termination services on its own individual public telephone network.

More specifically, the obligation of non-discrimination is to ensure that GO, Melita, Ozone, SIS, Vodafone and Vanilla Telecoms would not have the ability to exploit their market power in order to discriminate in their favour or in favour of a particular undertaking (such as own subsidiaries and partners), when providing other undertakings with wholesale termination services on their own network.

To this effect and in accordance with regulation 13 of the ECNSR, the identified SMP operators shall be required:

- to apply equivalent conditions in equivalent circumstances to other undertakings providing equivalent services; and

- to provide services and information to other undertakings under the same conditions and of the same quality as they provide for their own services, or those of their subsidiaries or partners.[23]

### *Transparency*

The relevance of the transparency obligation has to be seen in the context of various purposes, including that of supporting other regulatory remedies such as the obligations of access and non-discrimination.

This obligation will enable the MCA to monitor any anti-competitive behaviour with respect to the terms and conditions of services being offered by FNOs in relation to access and/or interconnection.

Meanwhile, it would also ensure that network operators have sufficient information and clear processes to which they would not otherwise have access. For example, the transparency obligation would assist market entry by helping FNOs comply with elements of the obligation of non-discrimination and in so doing speed up negotiation.

In accordance with regulation 12 of the ECNSR, Melita, GO, Vodafone, Ozone, SIS and Vanilla Telecoms shall be subject to the transparency obligation. These operators will thus be required to make available specific information, such as accounting information, technical specifications, network characteristics, terms and conditions for supply and use, including any conditions limiting access to use of services and applications, and prices where applicable.

[23] In this regard, the MCA deems it important that information gained by SMP operators as a result of their provision of voice call termination services is not used by downstream retail providers in any manner as to favour their own operations.

The transparency obligation shall also require identified SMP operators:

- to make available information concerning call termination rates, network and technical specifications, terms and conditions for supply and use, and accounting information, as required by the MCA;

- to deliver services of equivalent quality to all operators;

- to provide sufficient information on relevant matters, including the publication of appropriate manuals, order forms and processes that alternative operators would not otherwise have access to, in order to assist with their entry into the market; and

- to publish a request interconnection offer (RIO), which shall be sufficiently unbundled to ensure that undertakings are not required to pay for facilities that are not necessary for the services requested, giving a description of the relevant offerings broken down into components according to market needs, and the associated terms and conditions including prices, subject to the approval of the MCA.

In accordance with regulation 12(4) of the ECNSR, the MCA may impose changes to RIOs. The MCA may also specify the precise information to be made available, the level of detail required, and the manner of publication.

The transparency obligation would instil confidence in the market by ensuring that services are not provided on a discriminatory basis. It would also help avoid any possible disputes and accelerates negotiations between existing and potential operators.

The MCA maintains the right to establish or alter the extent of the obligation to publish information in the reference offer at a later stage.

### *Price Control*

The MCA argues that, due to lack of competition and countervailing buyer power resulting from the CPP mechanism, SMP operators have no incentive to reduce termination charges to cost oriented levels.

In order to prevent SMP operators from charging excessive termination rates the MCA is of the opinion that a price control remedy is necessary in accordance with regulation 16(2) of the ECNSR. Likewise this remedy is also intended to further strengthen the obligations of non-discrimination and transparency.

The imposition of the price control obligation shall ensure symmetric fixed termination charges that are set at levels corresponding to the costs of an efficient operator, thereby allowing for efficient, fair and reasonable termination charges. This reasoning is in line with the EU Commission Recommendation on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU which states that '*NRAs should set termination rates based on the costs incurred by an efficient operator*'.

Given the reconfirmation of SMP status on GO, Melita, Ozone, Vodafone and SIS the price control remedy is to be maintained on all identified SMP operators, in accordance with regulation 16 of the ECNSR. To this effect, the price control remedy is also to be imposed on Vanilla Telecoms given it also enjoys SMP in the wholesale fixed termination market.

This remedy obliges the identified SMP operators to set their fixed termination charges equal to the regulated efficient rate established by the MCA, which is based on a bottom-up long-run incremental cost (BU-LRIC) model developed in 2012 (the BUCM 2)[24]. As from 1st July 2013, the local fixed termination charge stood at 0.0443 euro cents.

The price control remedy also obliges SMP operators to make reference to downward changes they may implement with respect to the regulated termination rates in the RIO contracts.

The price control obligation is to be maintained as imposed by the decisions of the MCA in force at the time of publication of the decision concerning this market review.

### *Cost Accounting*

The cost accounting obligation complements the application of other regulatory measures, such as transparency and non-discrimination, whilst enabling the MCA to monitor on an on-going basis, and to request information for specific purposes, on the costs incurred by FNOs in relation to the provision of fixed call termination services.

The imposition of the cost accounting obligation shall therefore provide the MCA with the necessary oversight to ensure that FNOs apply fair, objective and transparent methodologies in allocating costs to the identified regulated products. It shall also contribute to ensuring effective price controls in the markets under investigation and thus prevent potential market failure.

However, the MCA believes that, in determining the level of regulatory intervention to ensure efficient fixed termination rates, it would be appropriate in the circumstances to take into account the requirement of proportionality. To this effect, the MCA considers that there are factors such as the size of the undertaking in a specific market, the share of the said undertaking in terms of the local subscriber base, its position vis-à-vis competing operators, and the time of entry in the market, which could determine the extent of regulatory remedies that could be imposed.

It is relevant to underline that, in view of a clear difference in the market position held by the different operators designated with SMP in this market review, the MCA believes that it would not be proportionate to impose a cost-accounting obligation on Ozone, Vodafone, SIS and Vanilla Telecoms. This said, the MCA remains committed to monitor developments in the identified wholesale markets and to constantly review its position[25].

[24] The previous model prepared by the MCA in 2005 as refined in 2007 is referred to as BUCM or BUCM 1. Link to MCA's new BUCM model for fixed networks and fixed interconnection prices decision: https://www.mca.org.mt/service-providers/decisions/mcas-new-bottom-cost-model-fixed-networks-and-fixed-interconnection

[25] Amendments in this regard shall only be implemented following consultation with all interested parties.

In accordance with regulation 16 of the ECNSR, the MCA shall however maintain the cost accounting obligation on Melita and GO, as it does not consider the imposition of such an obligation to constitute an unreasonable burden on the said operators particularly so in the context that such an obligation is already in place and in operation by the same operators. The MCA is therefore proposing to retain the cost accounting obligation to the extent that this is required to entertain any requests for information in relation to this market to be in a position to assess any changes in market conditions and in the context of monitoring future market development.

The methodology to be employed by GO and Melita for the cost accounting obligation is already set by virtue of an MCA decision concerning the requirements imposed on operators designated with SMP status that are obliged to support a cost accounting system.

### *Accounting Separation*

As stated above fixed termination rates in Malta reflect efficient regulated wholesale charges in accordance with the 2009 Commission Recommendation on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU.

Following this development and the applicability of the revised FTRs for all fixed operators in Malta, the MCA is assessing the requirement to maintain the obligation of accounting separation on GO and Melita (all other fixed operators are at present exempt from such obligation).

In view of the efficient regulated wholesale fixed termination rate currently in force coupled with the transparency and non-discrimination obligations, the MCA is of the view that it would not be proportionate to continue to impose the accounting separation obligation on GO and Melita indefinitely.

Consequently, the MCA shall withdraw the accounting separation obligation starting with financial years ending in December 2015. For the avoidance of doubt, GO and Melita shall submit to the MCA separated accounts for the financial years which have already ended as stipulated under the present decision. Insofar as GO, the obligation on separated accounts beyond financial year end 2014 is only being withdrawn to the extent of the accounting separation obligation on this market under review i.e. the call termination on public telephone networks at a fixed location.

This obligation is being withdrawn in the context of the ex ante regulatory framework and is not in any way related to any other general obligations at law or specific obligations falling under the ex post competition law regime. Furthermore, the MCA shall be reserving the right to reverse this decision should it consider that market conditions deteriorate in such a way that it warrants such a change, following appropriate consultation.

### *Overall Conclusion*

The MCA is to impose the following regulatory obligations on all FNOs designated with SMP in this market review:

- access to/and use of specific facilities;

- non-discrimination;
- transparency; and
- price control.

In addition the MCA shall also impose the following obligation on GO and Melita:

- cost accounting.

As explained above, the MCA shall be withdrawing the accounting separation obligation from GO and Melita to the extent of the accounting separation required on this particular market i.e. call termination on public telephone networks at a fixed location.

All remedial action is based on the nature of the competition problems that have been identified in this market review. The MCA thus believes that these regulatory obligations are the most appropriate in the current circumstances and timeframe of this review. Each obligation is also considered to be proportionate and justified in light of the objectives set out in Article 4 of the Electronic Communications (Regulation) Act.

## 5.5 SUMMARY OF RESPONSES AND MCA REPLIES RELATED TO THE REGULATORY APPROACH

The MCA received one response from Vodafone. In this response Vodafone agrees that the MCA should retain the imposition of access obligations, non-discrimination obligations, transparency obligations and price control on all SMP operators. Vodafone also agrees with the MCA's approach to retain the cost accounting obligation imposed on GO and Melita.

In the mean time, whilst agreeing in principle with the removal of the accounting separation, Vodafone questions the reasoning behind this removal. According to Vodafone, GO's and Melita's strong presence in the market and the increased take up of bundle offers comprising fixed telephony would tend to be arguments in favour of retaining the obligation of accounting separation on both these operators in order to ensure efficient competition.

In response the MCA reiterates that the removal of the accounting separation obligation is justified on grounds that fixed termination rates in Malta reflect efficient regulated wholesale charges in accordance with the 2009 Commission Recommendation on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU.

Moreover, the transparency and non-discrimination obligations as well as the cost accounting obligation, which will allow the MCA to monitor on an on-going basis and to request information for specific purposes on the costs incurred by operator, will continue to provide a safeguard against abusive behaviour. It is therefore the MCA's view that it would not be proportionate to continue to impose the accounting separation obligation on GO and Melita indefinitely.

## 5.6 COMMENTS BY THE MALTA COMPETITION AND CONSUMER AFFAIRS AUTHORITY

In its comments letter the MCCAA agrees with the analysis carried out by and the conclusions of the MCA. At the same time, the MCCAA claims to differ on the following aspects:

- The definition does not distinguish between business and domestic users on the retail end whose countervailing buying power might be different;

- The question of how bundles affect the operation of fixed telephony was not investigated in depth;

- The Office for Competition (OC) submits that removing the accounting separation obligation could potentially prejudice future ex post competition analyses in electronic communications.

As to the first point made by the MCCAA, the MCA explains that there is no difference in the fixed termination services offered, at wholesale level, between domestic and business users. Both users types are the final (downstream) recipients of the same type of wholesale service and both are constrained by the fact that if they want to call someone hosted over a particular local fixed network operator, it is the calling party which will have to pay the termination charges, irrespective of whether the calling party is a domestic or business user.

Likewise termination rates applied are the same to both domestic and business users and no customer, be it domestic or business, would be in a position to influence the setting of termination charges by fixed network operators. For this reason the definition makes no distinction between the two types of users. Ultimately, regulatory obligations are being imposed on all fixed network operators to protect all customers from any potential abusive behaviour in the setting of fixed termination charges.

On the bundles comment made by the MCCAA, the MCA must emphasise that the scope of this market review is to investigate wholesale fixed termination services, (which by definition fall in a wholesale market involving just fixed network operators) and not bundle services, which constitute a retail product. To this effect bundle services do not fall within the scope of this market analysis. Having said this, the fixed termination element is being regulated irrespective of whether fixed telephony services are offered as a standalone or as part of a bundle.

Finally the MCA cannot agree with the Office for Competition, when it submits that the removal of the accounting separation obligation could prejudice future ex post competition analyses in electronic communications. Ex post and ex ante powers are independent of each other and the removal of the accounting separation obligation should in no way impact ex post powers to carry out separate competition analysis. The MCA notes that this has been in fact acknowledged by the MCCAA itself in its comments letter when in the front page it lists the main differences between the MCA and the OC. The MCA argues that the OC has all the powers at law to investigate any or all of the issues underlying MCA’s recommendations as it deems fit from an ex post point of view and in no way should it be hindered by what is decided in the ex ante sphere.

Ultimately the MCA explains that the removal of the accounting separation obligation is justified on grounds that fixed termination rates in Malta reflect efficient regulated wholesale charges.

## 5.7 MONITORING OF FUTURE MARKET DEVELOPMENTS

The MCA considers that it is sensible to keep a close watch on the progress of the wholesale fixed termination markets in Malta.

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

In accordance with its powers at law, the MCA is also reserving the right to change any of the above mentioned regulatory obligations following changes in the market structure.

## *Appendix 1 – MCCAA comments letter (3 pages)*

**MCCAA**
**MALTA COMPETITION AND CONSUMER AFFAIRS AUTHORITY**

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**Office for Competition**

9 October 2015

The Executive Chairman
Malta Communications Authority
Valletta Waterfront
Pinto Wharf
Floriana FRN 1913

Dear Sir,

The Office for Competition (OC) has been consulted with regard to the Malta Communications Authority's (MCA) market analysis entitled "The provision of call termination on individual public telephone networks at a fixed location in Malta" dated 01 September 2015.

The following is the OC's position on the Review and Market Analysis in question.

1. Given that MCA and OC have a different mode of application of general competition rules and concepts;

2. Given that the MCA deals with the sectoral application ofcompetition law whilst the OC deals with mainstream competition law;

3. Given that the MCA follows an ex ante procedure of analysis of markets within the telcommunications sector whilst the OC follows a strict post facto analysis of markets;

4. Given that the MCA is a sector-specific regulator of electronic communications whilst OC has the role of investigating infringements of the Competition Act and therefore, that the OC can has a different manner of analysing markets than that used by the MCA; however, while each not being bound by the other's findings, the two entities may arrive at the same conclusions notwithstanding;

6. Given also that OC and MCA have different fields of jurisdiction, whereby as regulator the MCA can impose mandatory conditions of conduct including but not limited to price regulation on the operators within a particular sector;

The fixed network operators (FNO) have a monopoly on the market for call termination on their own respective networks. As pointed out in page 27 of the report, based on MCA's market definition, each fixed telephone operator has a 100% market share of the relevant market (i.e. call termination on its own network) and that for each FNO, for the period in which they have operated in this market, this position has been sustained. One must consider that there are currently no competitors in the relevant markets identified by the MCA. Moreover it does not seem that customers are of sufficient size to be in a position to effectively switch to alternative sources of supply. Hence customers are not in a position to constrain the seller from enhancing profits by increasing its prices. Hence the presence of high market shares, the absence of competition and the lack of countervailing buying power are a clear indication that each FNO enjoys Significant Market Power on the relevant markets.

Keeping in mind the above statement, OC believes that MCA was correct in ascertaining that:

"Each FNO can act independently of retail customers and other network operators in the setting of fixed termination charges. Due to the CPP mechanism, retail customers are typically insensitive or unaware of fixed termination charges. In addition, network operators have no alternative for terminating a call other than the FNO to which the called number belongs" (Page 33).

Moreover, the Report continues to say that:

"In the absence of regulation, FNOs have a strong incentive to price discriminate when charging for their voice call termination services and thus foreclose markets" (Page 33).

This would typically occur in an unregulated situation.

It is to be observed that GO and Melita still have very large market shares; and in the case of a market share exceeding 40%, this is presumed to amount to dominance. Paragraph 75 of the SMP Guidelines indicates clearly that a market share of over 40% would give rise to single dominance concerns. The same paragraph indicates that dominance can also exist in cases of lower market shares. The Commission refers to established case law whereby a 50% or larger market share would be treated as a dominant position, save in very exceptional cases. The current consolidated version of the Framework Directive treats significant market power in the same way as dominance as defined by European case law. While it is recognised that market shares are not the *only* factor establishing dominance (or significant market power, which is now treated in the same way as dominance in the electronic communications sector), the presence of a large market share is a good indicator of it.

Hence fixed termination charges ought to be regulated. Moreover the various FNO's ought to be made to comply with the various obligations imposed by MCA.

7. The OC agrees with the analysis carried out by and the conclusions of the MCA. It is clear that there can be an evidence of a market failure due to the fact that there is no incentive for the parties to compete on price; however, it begs to differ on the following:

a) The definition was specifically centred on the volume of traffic, without further distinguishing between business users and domestic users for this type of service on the retail end, whose countervailing buying power might be different;

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b) The question of how bundles affect the operation of fixed telephony as featured in the MCA report was not investigated in depth. From the perspective of an *ex post* analysis, leverage is possible from fixed telephony to the internet and mobile telephony markets (albeit theoretically); therefore, by implication it means that those operators who have a very strong position in the fixed telephony market can force out entrants in the mobile and internet market. Therefore, the importance of distinguishing the business from the residential market clearly emerges;

c) Therefore, operators in the fixed telephony market must be impeded from offering their service free of charge when part of a bundle, especially for domestic users.

d) The OC submits that removing the accounting separation obligation could potentially prejudice future *ex post* competition analyses in electronic communications.

In view of the different remits of the OC and the MCA, the OC's position and views are being submitted in the context of the specific provisions of the SMP guidelines (paragraph 73) 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 (*ex post*) cases before it, particularly reserving the right as National Competition Authority to reach different conclusions when investigating cases or complaints *ex post*.

Yours faithfully

Godwin Mangion
Acting Director General – Office for Competition

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