

Wholesale voice call termination on individual mobile networks
Report on consultation and Decision

21st December 2005

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Executive Summary

A new regulatory framework for electronic communications networks and services entered into force in Malta on the 14th September 2004. The framework is designed to create harmonised regulation across Europe and is aimed at reducing entry barriers and fostering prospects for effective competition to the benefit of consumers. The basis for the new regulatory framework are the five new EU Communications Directives.

The new Directives require National Regulatory Authorities (NRAs), amongst other things, to carry out reviews of competition in communications markets to ensure that regulation remains appropriate in the light of changing market conditions. For a limited period, while those reviews are conducted and until the new Significant Market Power (SMP) conditions are imposed, some of the regulatory regime which existed prior to the 14th September 2004 continue to be in force in line with Article 39 and 40 of the Electronic Communications (Regulation) Act.

This document sets out the Malta Communications Authority's (MCA's) decision with regards to the market definition, market power determination and regulatory obligations. This decision is being published following a national consultation and notification to the European Commission.

The national consultation period and the notification to the European Commission were carried out in parallel from the 04th July 2005 till the 04th August 2005. Following a number of requests from interested parties the MCA granted a one week extension to the national consultation period which effectively ended on the 12th August 2005. The MCA received responses from the following operators:

1. Vodafone Malta Ltd.
2. Mobisle Communications Ltd. (Go Mobile)

All comments arising from the consultation process have been carefully analysed and are discussed in detail in this final document together with the final position adopted by the Authority.

As required by Article 4 of the Electronic Communications (Regulations) (Article 7 of the Framework Directive), the MCA's final decision is also being notified to the European Commission and to other NRAs.

Summary of Findings and Decisions

Markets Identified

The group of products and services under consideration in this document consist of wholesale call termination services on individual mobile networks. Wholesale services are those sold and purchased by electronic communications providers rather than end users. In this market the wholesale of such services enables electronic communications providers to sell to end users the ability to receive calls on their network.

In relation to these services, the MCA has identified the following two relevant markets in accordance with competition law principles:

1. Wholesale voice call termination provided by Vodafone Malta Ltd.
2. Wholesale voice call termination provide by Mobisle Communications Ltd

Further details including the MCA findings, response to consultation and final decision, are contained in **Chapter 02** of this document.

Determination of Significant Market Power

Based on the evidence available to the MCA and after having analysed the operation of these markets, and taken due account of the comments elicited during the consultation period the MCA identified:

- o Vodafone Malta Ltd. as having significant market power in the market for ‘Wholesale voice call termination provided by Vodafone Malta Ltd.’; and
- o Mobisle Communications Ltd. as having significant market power in the market for ‘Wholesale voice call termination provide by Mobisle Communications Ltd.’

The main criteria used for justification of the proposed designations are:

- o Market share analysis;
- o Barriers to entry and potential competition;
- o Countervailing buyer power; and
- o Pricing structure.

Full details of the MCA’s designations and reasoning are contained in **Chapter 03** to this document.

Regulatory Implications

Given the position of dominance held by all providers providing wholesale mobile voice call termination on their respective networks – i.e. their ability to behave to an appreciable extent independently of competitors, customers and ultimately consumers – the MCA is hereby imposing on designated SMP operators the following obligations:

- (a) Access to/and use of specific network facilities;
- (b) Non-discrimination;
- (c) Transparency;
- (d) Price control and Cost accounting; and
- (e) Accounting Separation.

Full details of the decisions on the regulatory obligations, including their effect and the reasons for imposing this set of conditions, are contained in **Chapter 04** of this document.

Chapter 01 – Introduction

A new regulatory framework for electronic communications networks and services entered into force on the 14th September 2004. The framework is designed to create harmonised regulation across Europe and is aimed at reducing entry barriers and fostering prospects for effective competition to the benefit of consumers. The basis for the new regulatory framework are the five new EU Communications Directives:

- 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 Privacy Directive”).

The Framework Directive provides the overall structure for the new regulatory regime and sets out fundamental rules and objectives, which read across all the new directives. Article 8 of the Framework Directive sets out three key policy objectives, which have been taken into account in the preparation of this consultation document, namely promotion of competition, development of the internal market and the promotion of the interests of the citizens of the European Union.

The Authorisation Directive establishes a new 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.

These four Directives were implemented in Malta on the 14th September 2004. This was achieved via the Electronic Communications (Regulation) Act, 2004 (hereinafter referred to “ECRA”) and the Electronic Communications Networks and Services (General) Regulations, 2004 (hereinafter referred to “ECNSR”). The fifth Directive on Privacy establishes users’ rights with regard to the privacy of their communications. This Directive was adopted slightly later than the other four Directives and has an implementation date of 10th January 2003 (Legal Notice 16 of 2003 under the Data Protection Act).

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

Each market review has three parts:

- definition of the relevant market or markets;

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

More detailed requirements and guidance concerning the conduct of market reviews are provided in the Directives, the ECRA, the ECNSR and in additional documents issued by the European Commission and the MCA. As required by the new regime, in conducting this review, the MCA has taken the utmost account of the two European Commission documents discussed below.

01.1 Market Review Methodology

The European Commission has identified in its Recommendation, a set of 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).

The European Commission has also issued Guidelines on market analysis and the assessment of SMP ("SMP Guidelines"). The MCA has also published a document entitled 'Market Review Methodology' outlining the methodology to be used for assessing effective competition in the Maltese electronic communications sector¹. The MCA is required to take these guidelines into utmost account when analysing a product or service market in order to assess whether the market under investigation is effectively competitive or otherwise (refer to Regulation 8 of the ECNSR).

As required Regulation 6 of the ECNSR (Article 7 of the Framework Directive), the results of this market review and the proposed draft measures need to be notified to the European Commission and to other NRAs. The Commission and other NRAs may make comments within the one month consultation period. If the Commission is of the opinion that the market definition, or proposals to designate an operator with SMP or proposals to designate no operator with SMP, would create a barrier to the single market or if the Commission has serious doubts as to its compatibility with Community law, and issues a notice under Article 7(4) of the Framework Directive, the MCA is required by Regulation 6 of the ECNSR to delay adoption of these draft measures for a further period of 2 months while the Commission considers its position.

The MCA has collected market data from a variety of internal and external sources, including users and providers of electronic communications networks and services and from consumer surveys commissioned by the MCA, in order to carry out thoroughly its respective market definition and market analysis procedures based on established economic and legal principles, and taking the utmost account of the Relevant Markets Recommendation and the Guidelines.

¹ Link to MCA market review methodology: <http://www.mca.org.mt/library/show.asp?id=513&lc=1>

01.2 Consultation

As required by Article 10 of the ECRA, the MCA is to publish the results of the market reviews and to provide operators the opportunity to comment on the findings prior to adopting the final proposals.

Furthermore, Regulation 6 of the ECNSR establishes that prior to adopting the draft measures proposed in the market review the MCA is required to notify the Commission with the findings of the market reviews, the proposed remedies and the outcome of the national consultation process.

On the 4th of July 2005 the MCA published a consultation document entitled “Wholesale voice call termination on individual mobile networks – Identification and analysis of markets, determination of market power and setting of SMP conditions”. The national consultation period ended on the 12th August 2005 and the MCA received response from the two mobile operators, Vodafone Malta Ltd. and Mobisle Communications Ltd. The MCA has also notified the EU Commission with the results of this review in parallel with the national consultation in Malta. On the 11th of July 2005, the Commission requested the MCA to provide additional information with regards to the notification of this market review to which the MCA forwarded this additional information on the 13th July 2005. The Commission issued its official position on this review with a No Comments letter on the 3rd of August 2005.²

01.3 Liaison with Competition Authority

There is a requirement on the MCA under Regulation 10 of the ECNSR 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 co-operation agreement signed on the 20th May 2005 between the MCA and the Office of Fair Competition (OFC)³, the MCA has carried out a two week consultation process with the OFC. The MCA has forwarded and presented the results of this review to the OFC. On the 12th of July 2005 the OFC forwarded to the MCA a letter outlining its views on the findings of this market review. From its investigations the OFC concluded that it agrees in principle with the findings of the MCA’s analysis and conclusions.⁴

01.4 Scope of this Review

This review considers the markets for wholesale voice call termination on individual mobile networks in Malta (hereafter referred to as the ‘mobile termination markets’), which includes termination services over mobile networks.

² <http://www.mca.org.mt/library/show.asp?id=683&lc=1>

³ <http://www.mca.org.mt/library/show.asp?id=656&lc=1>

⁴ <http://www.mca.org.mt/library/show.asp?id=673&lc=1>

01.5 Summary of responses and reply to issues regarding the scope of this review

In its consultation document the MCA requested the opinion of interested parties on whether they agree with the scope of this review. Vodafone did not subscribe to the scope of this review and argued that the wholesale voice termination market is not an economic market as mobile termination is never provided as a stand alone service but as part of a bundle of services including call access and origination. Vodafone argues that it is incorrect to analyse termination rates in isolation as termination charges are not only influenced by costs of termination but also by “the state of the market for access and origination services and the level of fixed and common costs”. In its submission Go mobile similarly agrees with this view and states that it feels that there is “a clear economic linkage between origination and termination services which are provided over a common infrastructure.” Go mobile therefore suggests that this market should not be analysed in isolation but together with access and origination services.

The MCA accepts the view that termination services are provided as part of a bundle of services together with call access and origination in order to enable customers to make and receive calls to/from other mobile subscribers. The MCA however does not agree with respondents that the state of the mobile access and origination market can significantly impact wholesale mobile termination rates. As argued in this report and also based on the Commission’s Recommendation on Relevant Markets, the termination rate is set by the called network, a network that is chosen by the called party. Since it is the called party that pays for the call, the caller has no influence on the termination charge. This externality limits the influence which the caller (whose behaviour is indirectly observed in the call access and origination market) has on the termination rate which is included in the retail charge which s/he incurs. As a result, although in principle call origination and termination are two essential components to complete a particular call, the underlying market conditions impacting the two components are different. While the calling party can influence the origination charges which are set by the originating network operator to which s/he chooses to subscribe, the termination rate is set by the called network operator to which the called party chooses to subscribe.

The MCA agrees with delineation of the market as specified in the Commission’s Recommendation on Relevant markets and identifies that the wholesale market for call termination on mobile networks is a relevant market for Malta and warrants investigation for the purpose of ex-ante regulation.

01.6 Structure of the Document

The rest of the document is structured as follows:

Chapter 02 presents the MCA’s conclusions including the replies to the consultation issues and the MCA decision on the definition of the markets for wholesale voice call termination on individual mobile networks in Malta. This section consists of a review of the market definition procedure as well as demand side and supply side assessments at the retail and wholesale level;

Chapter 03 presents MCA’s market analysis for the mobile termination market and outlines the reasons behind the MCA decision that wholesale voice call termination markets in Malta are not effectively competitive. This section also identifies undertakings having significant market power.

Chapter 04 provides a discussion of the general principles associated with remedies and outlines the decision on the imposition of remedies on SMP operators, under the new regulatory framework.

Chapter 02 - Market Definition

Regulation 10 of the ECNSR provides that before an SMP determination may be considered, the MCA must identify the markets with respect to which, in the circumstances of Malta, it is, in its opinion, appropriate to consider such a determination and to analyse those markets. In identifying the relevant markets, the MCA is required to take utmost account of all applicable guidelines and recommendations issued by the European Commission.

In formulating the MCA approach to market definition, the MCA has paid the utmost regard to the Commission's Recommendation.

Where the proposed market definition differs from the Commission's Recommendation the difference is identified and justification is given in the light of the national circumstances which justify this departure, in the manner prescribed by the Commission's Recommendation.

Paragraph 3.1 of the Commission's Recommendation states that *'Because market analysis is forward-looking, markets are defined prospectively taking account of expected or foreseeable technological or economic developments over a reasonable horizon linked to the timing of the next market review'*. The market analysis has been carried out on a forward looking basis and, where it is thought possible that market conditions may change significantly during the timeframe of this review, these changes are identified and discussed.

Paragraph 4 of the Recommendation states that retail markets should be examined in a way which is independent of the infrastructure being used, as well as in accordance with the principles of Competition Law. Again this approach is at the heart of the MCA's analysis. The MCA's approach is based on a Competition Law-based assessment of markets and an assessment of the extent to which switching among services by consumers constrains prices, irrespective of the infrastructure used by the providers of those services.

In its recommendation the Commission advises that NRAs should analyse the relevant market for 'voice call termination on individual mobile networks'. It based its conclusions on the following reasoning:

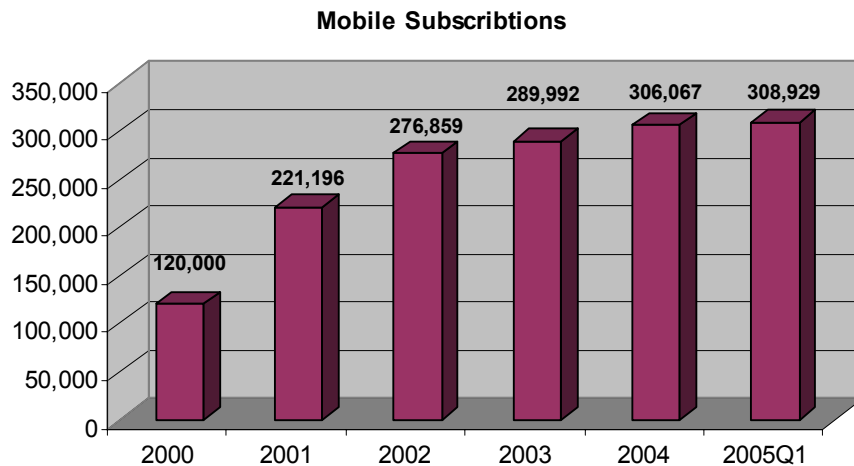
- the role of the Calling Party Pays (CCP) principle;
- lack of demand side substitution at both the wholesale and the retail levels;
- lack of supply side substitution at the wholesale level; and
- the inability of mobile operators to price discriminate between individual mobile numbers.

The MCA has conducted an assessment of the markets for wholesale voice call termination on individual mobile networks in order to validate its appropriateness in the Maltese context, and as preparatory work for the assessment of SMP in this market.

This chapter outlines the MCA's findings setting out the different markets that the MCA has identified, and giving reasoning for the proposed conclusions.

02.1 Background to the mobile sector in Malta

There are two mobile networks in Malta owned and managed by Vodafone Malta Ltd. and Mobisle Communications Ltd., operating under the brand name of 'Vodafone' and 'go Mobile' respectively. go mobile launched their services in December 2000 whilst Vodafone started its operations way back in 1990. As at March 2005 the market shares for mobile subscriptions were split at 52% for Vodafone and 48% for Go Mobile. Overall mobile penetration stood at 76% at just under 309,000 subscribers. It exceeds fixed line penetration which is slightly over the 200,000 lines mark. Since the introduction of the second mobile operator in Malta the number of mobile subscribers has experienced an impressive growth as depicted in the graph below.



02.2 Market Definition Process

The purpose of the market definition process is to identify the competitive constraints that electronic communications service providers face. There are two dimensions to the definition of a relevant market: the relevant products to be included in the same market and the geographic extent of the market. The MCA's approach to market definition follows that identified in its market review methodology.

Recital (7) of the Recommendation clearly states that the starting point for market definition is a characterisation of the retail market over a given time horizon, taking into account the possibilities for demand and supply-side substitution. The wholesale market is then identified subsequently to this exercise being carried out in relation to the retail market. This approach is repeated in paragraph 3.1 of the main Recommendation and is exactly that followed by the MCA in the following sections.

02.3 Delineation of the retail mobile termination markets

2.3.1 Retail demand side substitutability

Demand-side substitutability refers to the extent that customers can substitute the products and services under review for alternatives.

Under normal circumstances customers would be price sensitive to the cost of purchasing a good or service and therefore suppliers face a direct pricing constraint from their customers. This however is not the case with mobile termination services. At present the mobile

termination market is characterised by the “Calling Party Principle” (CPP), which means that the originator of the call pays for the cost of the call. The recipient of the call incurs no charge for answering an incoming call. The cost of terminating a call is absorbed as part of the retail rate that subscribers are charged for making a mobile call. Under this system the calling party pays for the voice call but the mobile subscriber receiving the call selects the network where the call is being terminated.

Under the CPP system mobile network operators (MNO) do not face a direct pricing constraint and therefore have no incentive to decrease mobile termination rates. It is therefore important to examine the behaviour of the calling party and assess the impact of termination rates on mobile call patterns.

1. Calling Party Behaviour

The MCA has examined customer behaviour and perception at the retail level as part of the holistic approach in reviewing the market. MNOs generally cater for termination charges by reflecting them in their retail tariffs and therefore charge them to their own subscribers.

In assessing constraints on termination rates two important factors need to be considered, namely price sensitivity and customer awareness. These factors impact on the competitiveness at the wholesale level. Another important issue to examine is the existence of alternative means of communication that could act as a substitute to mobile calls. The availability of such substitutes would directly constrain termination rates charged by MNOs.

As a result the MCA has assessed the response of subscribers to changes in the prices of calls and the existence of any products that could act as a substitute to mobile calls.

1A. Awareness of price of calls

In order for subscribers originating a call to be price sensitive they must be aware of the costs of the call and the network being called. An independent qualitative survey commissioned by the MCA in January 2005 showed that 59.3% of respondents were not aware of the cost of a mobile call⁵. This is probably due to the fact that mobile operators provide various tariff plans for different customer groups and different rates for different time windows.

It is important to note that due to the fact that there are only two mobile operators and one fixed network on the island, it is likely that a significant number of consumers are aware of which network they are calling. In Malta the two mobile operators have different prefixes to their numbers, one starting with ‘99’ and the other starting with ‘79’. This increases the awareness of consumers as to which mobile network they are terminating their call to. The fixed line operator has a prefix starting with ‘21’ and it is therefore easy for the caller to identify a call to a fixed number.

Number portability is not yet offered locally. However, once offered, it may impact on the ability of consumers to identify the network they are calling. The MCA has taken steps to ensure that mobile operators in Malta provide number portability services⁶. The take up of number portability in terms of the actual numbers ported will greatly influence the awareness

⁵ Link to mobile consumer perceptions survey: <http://www.mca.org.mt/library/show.asp?id=636&lc=1>

⁶ Link to Number Portability Decision: <http://www.mca.org.mt/library/show.asp?id=624&lc=1>

of consumers as to which mobile network they are terminating their call onto. The MCA, together with MNOs, is planning to introduce a system whereby for an initial period of time (e.g. first month), a caller calling a ported number would be advised by a short voice message that the number called has been ported to a different network. This is likely to mitigate to some extent the lack of awareness by customers when calling a ported number.

Nevertheless, this does not mean that awareness of the network being called is sufficient to create price sensitivity on its own, as callers must be cognisant of the price of a call, as stated above.

The MCA is of the opinion that price sensitivity by the calling party is inadequate to impact mobile termination rates on the wholesale side.

1B. The Use of Alternative Services

In order to influence mobile termination rates, price sensitive callers must have an alternative means of communication which they would be able to use when mobile termination rates increase. If appropriate substitutes exist this behaviour could act as a competitive check on mobile termination rates. The MCA is considering a range of possible demand side substitutes at a retail level, which could act as a constraint on termination rates.

1B.1 Calls to a fixed number

If a customer is faced by high termination rates when calling on a mobile phone s/he may decide to make the call to a fixed number rather than to a mobile number. If it is possible to substitute any call to mobile with a call to a fixed line number it could influence mobile termination rates, as such calls do not involve call termination charges due to mobile operators. This scenario does not however cater for the fundamental principle that mobile numbers are intrinsically by nature 'mobile' and not set at fixed locations as a fixed line number. Therefore a customer calling someone on a mobile number might not have the choice to call that person on a fixed line number. It is therefore not appropriate to consider calls to fixed number as a sufficient strong substitute for calls to mobile in order to constrain mobile termination rates.

1B.2 Mobile to mobile calls as a substitute to fixed to mobile calls

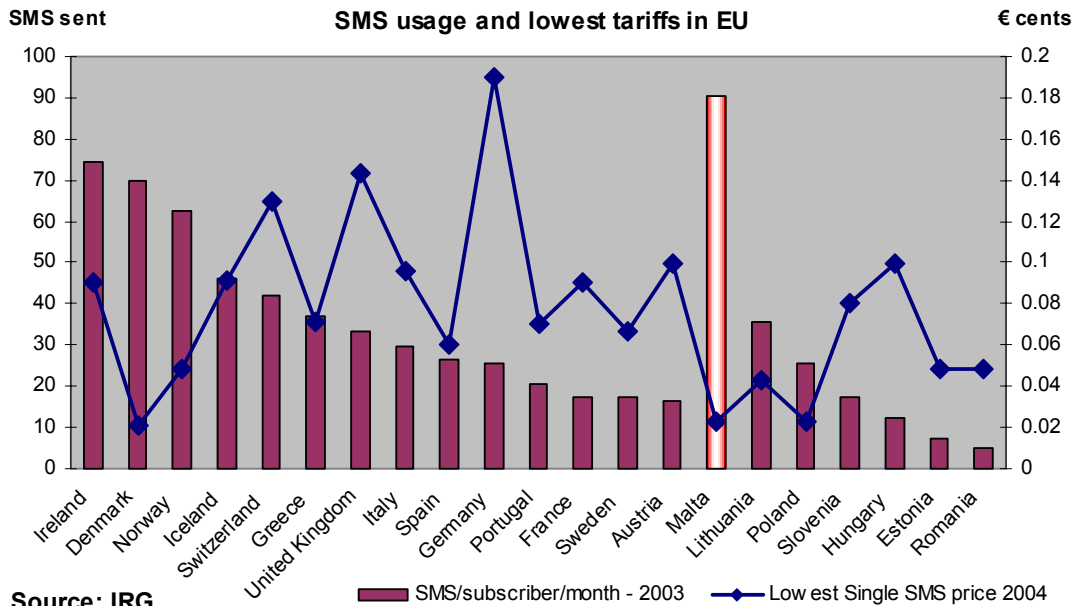
Substitution from fixed to mobile calls to mobile-to-mobile calls is unlikely to impact wholesale termination rates. Such rates are transparent in the sense that there is no discrimination if it is a fixed or a mobile network that originates the call, as the termination rate is identical, whatever the network. Therefore a customer calling a mobile number would be indifferent to whether the call is originated from a fixed or mobile line for the purpose of termination rates. This further reduces the impact on mobile termination rates.

1B.3 Mobile on net calls as a substitute to off net calls and fixed to mobile calls

The option of always originating an on net call seems unlikely to be a realistic alternative. Having to change SIM cards to make a call is not practicable or realistic. The more networks are in operation in a country the more SIM cards would need to be changed every time a call has to be made to another network. The MCA is therefore of the view that the extent of substitution between mobile on-net calls and fixed to mobile calls or mobile off-net calls is insufficient at this time to constrain mobile termination charges, particularly since currently there is no difference in on-net and off-net mobile voice call charges in Malta.

1B.4 SMS as alternative to any type of call

SMS is, in certain circumstances considered as an alternative to a voice call. In Malta the price of an SMS is amongst the cheapest in the EU whilst that of retail voice calls is relatively high. This pricing structure has contributed towards a very high take-up of SMS in Malta. In fact in 2004 Maltese mobile users averaged over 90 SMS sent per month, which ranks the highest in the EU. The figure below depicts this situation graphically.



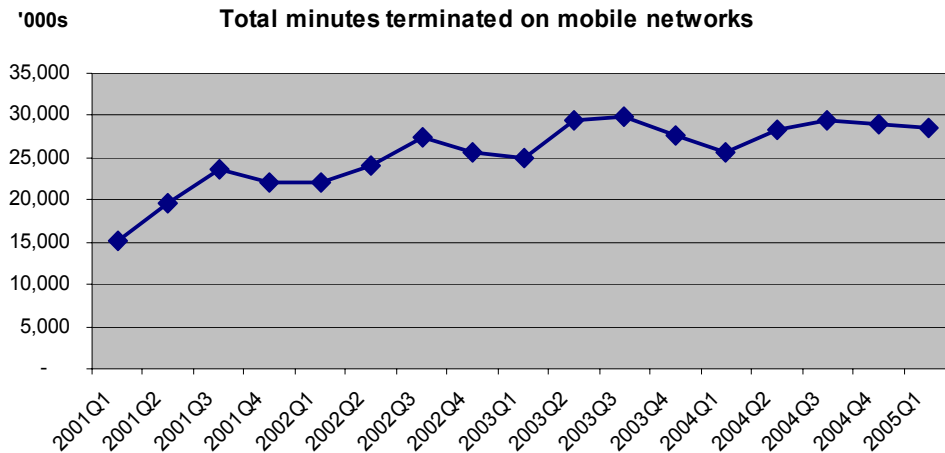
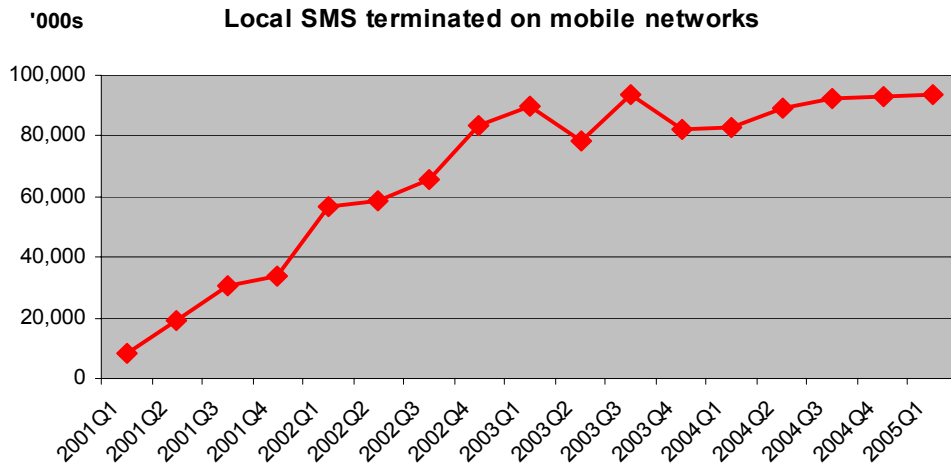
This would suggest that mobile users find SMS as an effective means of communication. Results of a mobile perception survey carried out on behalf of the MCA indicates that, 23.2% of respondents indicated that they *always* consider SMS to be a good substitute for mobile voice calls and 29.2% consider SMS *very often* be a good substitute. Another 21.1% state that SMS is *sometimes* an alternative to a voice call. On the other hand, when asked how they would rate the price of mobile voice calls, 12.1% said that it is *too expensive* and another 48.6% said it is *expensive*.

However the MCA does not consider SMS to be a complete substitute to voice calls for a number of reasons. Firstly, SMS differs from voice calls in a number of ways:

1. an SMS can convey only a limited number of characters per message (160 alphanumeric characters);
2. Unlike voice calls, SMS is stored and forwarded between networks; and
3. SMS is not transmitted in real time and can therefore experience delays.

These characteristics make text messages different from mobile voice calls.

Another factor that can be considered in this regard, is the fact that the price differential between mobile voice calls and SMS is such, that SMS is perceived to be an adequate substitute to voice calls when in reality it would not be. In actual fact, market data clearly shows that both SMS and mobile call minutes are increasing as shown below.



This would suggest that, even though SMS usage is very high, SMS and voice calls are complementary services rather than substitutes. Another point that confirms this view is the fact that when retail SMS rates have decreased no corresponding decrease in mobile minutes was experienced. Instead, both mobile minutes and SMS continued with their upward trend. This suggests that a decrease in the price of SMS did not incentivise customers to substitute voice calls with SMS which in turn would indicate substitutability.

The MCA therefore concludes that SMS usage is not sufficient to constrain mobile termination rates in absence of regulation. In actual fact, mobile termination rates have only decreased following regulatory intervention.

1B.5 Call back Solutions

The MCA has found no evidence that a call back solution is in any way able to impact mobile termination rates. This is further compounded by the fact that retail voice call charges are very similar or identical when calling from one mobile network to another.

After reviewing the aspects discussed above the MCA is of the view that price sensitivity on

the part of the calling party is insufficient to impact mobile termination rates in absence of regulation.

2. Called Party Behaviour

The fact that it is the individual originating the call that pays for it, results directly in price insensitivity on the part of the party receiving the call. Subsequently consumers are indifferent to the cost of a mobile termination rate when selecting a network to subscribe to.

It is unlikely that consumers would rate the cost other consumers had to pay in order to contact them as more important than the cost they would incur to make calls. This means that due to CCP arrangement the impact of the called party on mobile termination charges will be minimal.

Closed user groups are specifically tailored to keep traffic within the community of family and friends or business network. Such schemes are targeted to maintain voice calls within the group by offering cheaper calls to numbers within that group. As consumers become more attracted to these groups, the potential constraint on mobile termination rates increases.

However many counter arguments exist in this respect and include the fact that there is no local evidence to confirm the fact mobile users select their service providers based on Closed User Group tariff structures. Other network operators can counter this by offering better on net prices. In Malta, network wide Closed User Groups tariff schemes have not yet been launched commercially by MNOs.

Another important factor to note is that mobile operators will counter any services influenced by price sensitivities on specific customer segments. One such example has been the successful deployment of GSM gateways in the local market. The use of GSM gateways allows MNOs to limit churn and enable much traffic, that would have been originated through a PSTN line to a mobile number, to remain on net. This is achieved by programming a PABX to automatically route calls dialled to mobile numbers to the GSM gateway which then sets-up an 'on-net' mobile to mobile call to complete the call.

The only way that mobile termination rates can be constrained is if mobile users are able to receive their incoming calls on networks other than the one they subscriber to. However this would also entail changing SIM cards to be able to receive the call. The MCA does not consider this as a practicable and is not therefore sufficient to constrain termination rates.

With the principle that the Calling Party Pays the MCA is of the opinion that demand side substitutability on the retail level from called parties is limited.

2.3.2 Retail supply side substitutability

Retail supply-side substitution would be possible if there are operators which do not currently provide calls to mobiles that can switch into such provision and thus pose a competitive constraint on mobile termination rates.

For this substitution to be feasible, the new provider would have to be able to provide a service which does not rely on the provision of termination from the MNO to which the called party subscribes.

The MCA does not have any evidence that any such provider is able to start providing calls to mobile that would not depend on the MNO to which the called party subscribes to terminate the calls.

Based on the evidence provided above, the MCA is of the opinion that currently there are no effective retail demand side substitutes that could constrain mobile termination charges to the competitive level in absence of regulation.

02.4 Delineation of the wholesale mobile termination markets

2.4.1 Wholesale demand side substitutability

Substitution of wholesale voice call termination on an MNO's network with wholesale voice call termination on a different MNO's network cannot provide any direct constraint on termination charges, since an operator wishing to offer calls to a customer of a specific MNO must purchase termination from that MNO or it will not be able to terminate the calls.

The necessity for a call to be made to a specific mobile number in turn means that there is no demand side substitution as the call cannot be terminated elsewhere.

The MCA is of the opinion that currently there are no demand side substitutes at the wholesale level able to constrain mobile termination rates.

2.4.2 Wholesale supply side substitutability

Supply side substitution occurs when an increase in the price of a particular product or service results in alternative suppliers of other products and services shifting their resources to supply the product whose price increased, without necessarily incurring additional significant investment.

Wholesale supply substitution could come from other MNO's. This would require that users would be able to select the desired network for termination of calls. However under the current 'caller party pays principle', callers cannot select the network they want to terminate the call on. This therefore eliminates any possibility for wholesale substitution.

Broadband Wireless Access (BWA) networks could in theory provide competition in the voice market and therefore impact mobile voice call termination charges. However in Malta the spectrum for BWA is expected to be allocated soon and a great deal will depend on the services offered and the coverage area. The MCA considers that the deployment of BWA would not influence mobile call termination rates within the timeframe of this review.

The MCA has reached the conclusion that there is no supply side substitution for mobile termination services at the wholesale level.

02.5 Termination services on 3G networks

Based on the principle of technology neutrality, voice call termination on a 3G network would be no different to voice call termination on a 2G network in terms of the character of the service provided. The MCA is of the opinion that the termination of voice calls on a 3G network should be included within the scope of this market. To date, 3G services have not

been introduced locally. However a call for applications for the assignment of spectrum to offer 3G services was made in March 2005. The MCA has to date allocated 3G spectrum licences to two operators Vodafone Malta Ltd. and Mobisle Communications Ltd. in October 2005, whilst a third licence remains unassigned as at date of writing of this document. .

02.6 Relevant geographic market

A relevant geographical market comprises the area in which the undertakings concerned are involved in the supply and demand of products and/or services, in relation to which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different to those areas.

On the basis of this definition, the MCA takes the view that the relevant geographic market for the provision of mobile voice call termination services by individual mobile operators is national in scope.

This view is based primarily on the fact that, as each individual mobile operator is considered to be a separate relevant product market for the provision of voice termination services, the geographic scope reflects the extent of physical coverage that characterises each mobile operator. Furthermore, each operator is licensed on a national basis and offers geographically uniform termination rates.

02.7 Summary of responses and replies to issues related to market definition

The two mobile operators have commented on a number of issues arising from the market definition outlined above. The main issues can be summarised as follows:

1. Competitive pressures on mobile termination rates
2. The 'Waterbed effect' and excess profits in the wholesale termination market
3. Inclusion of 2G and 3G termination in the same market
4. Reliability of evidence from consumer surveys

These issues have been considered in detail and what follows is a description of the issue identified by the respondents together with the MCA's final position.

2.7.1 Competitive pressures on mobile termination rates

In its response to consultation, one respondent argued that mobile termination rates are subject to competitive pressures from fixed-to-mobile calls (F2M), mobile-to-mobile calls and off-net calls. It argued that F2M calls act as a competitive constraint on termination rates especially for closed user groups which would be sensitive to F2M call charges when selecting a mobile operator. Since the termination rates are identical for both F2M and M2M calls, it argued that mobile operators are constrained in setting termination rates.

The MCA agrees that mobile operators have one termination rate and do not distinguish between F2M and M2M call termination. The MCA believes that a call terminated on a mobile network will use the same network elements (and therefore incur the same cost) regardless of the origination network being it fixed or mobile. However the MCA is of the opinion that a fixed operator would not be in a position to constrain the mobile termination rates set by mobile operators since it is a price taker for the purpose of mobile termination services. The respondent referred to above argued that corporate customers having a large

number of F2M calls would be sensitive to the costs incurred for such calls. The MCA concurs with this statement and, in fact, had taken account of this issue in its consultation paper. The MCA had argued that the existence of closed user groups could in theory constrain mobile termination rates for that particular group. However, the deployment of GSM gateways has provided mobile operators with an alternative solution to convert fixed voice calls into mobile on net traffic. Through the application of these gateways MNOs have successfully relieved the pressure exerted on mobile termination rates from closed user groups' customers. Another important aspect already mentioned in the consultation document is that, to date, both mobile operators have not launched network-wide closed-user-group schemes and therefore the MCA considers that closed user groups are limited in number.

The abovementioned respondent also argued that M2M calls and Off-net calls act as a competitive constraint on mobile termination rates as mobile operators do not have an incentive to set mobile termination rates higher than the competitive level since this would be detrimental for their customers' welfare. The said respondent argued that by increasing termination charges MNOs would be increasing both their revenues and the cost of purchasing termination services from each other if termination charges are reciprocal.

The MCA shares the same opinion expressed by the said respondent that high mobile termination rates are detrimental to the customers' welfare. However the MCA does not consider that mobile operators can set termination rates at effectively competitive levels in the absence of regulation. Contrary to what is suggested by the respondent, the MCA believes that MNOs have an incentive to increase termination rates since this increases their revenues from off-net calls and also increases the cost of competing operators. Due to the CPP principle such an increase in wholesale termination rates will have to be borne by the customers of the competing operator and not its own subscribers. As a result, all MNOs present in the market would have an incentive to deviate from the competitive level termination rate. The MCA considers that in order to maximise consumer surplus wholesale termination rates need to be constrained through appropriate regulation.

The MCA considers that, with the present level of technology, the CPP arrangement and lack of a sufficient competitive constraint from F2M, M2M and off-net calls, mobile network operators have an incentive and are able to set termination rates beyond competitive levels.

2.7.2 The 'Waterbed effect' and excess profits in the wholesale termination market

In their responses to consultation, both mobile operators made reference to the existence of the 'waterbed' effect whereby any excess profits in the wholesale termination market are competed away in the retail market. Respondents contend that since mobile termination services are not provided as a stand alone service but as a part of a cluster of mobile services including access, subscription and origination, any excess profits from termination will be used to subsidise other retail services. Respondents therefore argue that since the retail market exhibits clear signs of competition then the waterbed effect is present and exerts sufficient pressure on mobile termination rates.

The MCA disagrees with the argumentation that any excess profits from termination rates are competed away in other mobile services and therefore the overall impact on the end users is neutral. The MCA considers that in a non-competitive market, operators would have an incentive to increase mobile termination rates in order to maximise their profits. This incentive is further reinforced by the fact that mobile penetration in Malta is high at around 81 per cent and by the fact that competition at the retail level has over the past year remained stable.

The MCA does not share the view expressed by both mobile operators that competition at the retail level is sufficiently strong to the extent that an increase in termination rates would lead to increased competition between mobile operators in order to attract new customers. This view is substantiated by the fact that none of the mobile operators ever decreased mobile termination rates on their own initiative so as to relieve themselves of competitive pressures. It was only following MCA intervention that termination rates were reduced significantly. Another clear indicator that the mobile operators do not have an incentive to decrease wholesale termination rates is the fact that the reductions in termination rates did not result in lower retail charges.

Both operators contend that since the introduction of the second mobile operator retail rates have been reduced significantly. The MCA notes that since the introduction of the second mobile operator retail rates have decreased for an initial time period, however over the past two years no permanent reductions in voice call charges have been recorded. The MCA also acknowledges the fact from time to time operators introduce special offers in the market, however these are only for a limited period of time and usually do not concern voice call tariffs but rather complementary services such as SMS, MMS or GPRS. For these reasons the MCA considers that competition at the retail market level is insufficient to pose a serious constraint on the incentive for mobile operators to increase termination rates.

High termination rates are also undesirable since a large difference between wholesale prices and retail costs may lead to anticompetitive behaviour. As presented in the analysis above, at present retail voice call tariffs are on average three times higher than wholesale termination rates. The MCA considers that this ratio is significantly high and considers that reductions in retail voice tariffs (which are unregulated) have been more contained than reductions in the wholesale market (which is regulated). The MCA expects that if mobile operators have an incentive to maintain mobile termination rates low, this should also be reflected in lower retail tariffs. This is clearly not the case since wholesale rates have decreased only following the MCA intervention, whilst retail rates have not been reduced following reductions in wholesale rates.

Moreover, both operators are arguing that competition at the retail level is sufficiently strong that any excess profits made in the wholesale termination market are competed away in the retail market through subsidies of other mobile services. However the MCA cannot observe any particular reductions in the price of retail voice call tariffs over the past two years. This shows that there is no tangible evidence of the existence of the waterbed effect in the market. Furthermore, the lack of reductions in retail voice call tariffs indicate that competition at retail level is limited and is not sufficient to allow for the 'waterbed effect' to be present.

The MCA finally notes that the potential for operators to make excess profits in the wholesale mobile termination market is an inherent problem due to the structure of this market, i.e. that each and every mobile network operator is dominant on its own network. This implicitly implies that there is very limited, if any, potential constraints on a mobile operator in setting termination rates above competitive levels. The MCA believes that the potential for operators to make excess profits is precisely based on the dominance held by each MNO on its own network. This dominance is further reinforced if the same operators are found to hold dominance in the wholesale access and call origination market, and consequently the retail market.

The MCA concludes that from the facts presented above the 'waterbed effect' is not sufficient to constrain mobile operators from setting termination rates above the competitive level. Any excess profits made in the wholesale termination market will not be competed away in the retail market. As a result high termination rates would be detrimental for consumer welfare. Moreover, the MCA does not support the view that subsidising retail charges from high termination rates is economically efficient and will in the end increase consumers welfare.

2.7.3 Inclusion of 2G and 3G termination in the same market

One of the respondents believes that the inclusion of voice call termination services over 3G networks should not be in the same market for 2G termination. The respondent argues that 3G services should not be regulated for a number of reasons including the lack of information on market take up, the new significant investment required to deploy such networks and the differences in service package offered over such networks. Furthermore the said operator argues that since there is no empirical data on the volume split between voice and data usage for 3G services, adopting the same regulatory model as for 2G would be erroneous. Finally, the respondent concludes that the MCA failed to provide a clear need or clear welfare benefits for consumers from the regulation of 3G termination services at this stage.

The MCA considers that based on the principle of technology neutrality the termination of mobile voice calls on 2G or 3G network will not be different. In practice a mobile user would not be aware whether the call originated to another mobile phone would be terminated over 2G or 3G equipment. The choice of equipment over which a mobile voice call is terminated will not differentiate the product. The MCA considers that for a technology and functional point of view voice calls terminating over 2G and 3G networks will not be different.

The MCA agrees with the respondent that the rollout of 3G networks in Malta is still in its infancy and therefore no market information is available. However the MCA considers that the deployment of 3G infrastructure is a backhaul process which will not affect the end-user in make voice calls. The end-user would not be able to choose where the mobile call will be terminated whether on a 2G or 3G network. As a result the end-user would likely be charged the same charge for originating a voice call whether it is terminated over a 2G or 3G network, as is common practice in countries where 3G services are offered commercially.

In its response the operator argues that since there is no empirical evidence on 3G services, the MCA cannot conclude that the same traffic patterns and cost models utilised for 2G networks would remain applicable for 3G networks. The MCA agrees that there is no empirical evidence on 3G services, however the basic service of voice calls will be provided over 3G networks. As explained earlier the consumer would not notice the difference between originating and terminating a call over 2G or 3G networks since the basic service of making a voice call would remain identical. The MCA therefore can safely presume that current voice call traffic patterns and user profiles would remain stable. The Authority has no reason to believe that voice call patterns would change significantly following the introduction of 3G networks. Users currently making voice calls over mobile networks would still need to make such calls in the future when 3G networks are deployed. With respect to data services which are not being included in this market (and therefore are not regulated), the situation is much different since 3G technology would be able to support additional services to the current 2G data services. The MCA therefore concludes that voice call traffic patterns should continue to grow in a stable fashion whilst no projection or conclusion can be safely reached for data services and additional 3G services at this point in time.

The operator finally suggest that the MCA has no need to regulated 3G services at such an early stage, since there is no clear benefit for the customer. The MCA does not concord with this view and strongly believes that in order for end-users to have a smooth transition from 2G to 3G networks would still need the protection of regulation. The MCA considers that the incentive for MNOs to set high termination rates for 2G networks still applies for 3G networks since both technologies will operate using the CPP principle. Moreover, termination services over a 3G network can only be provided by the operator owning the network. As a result customers calling a particular a number on a 3G network cannot terminate that particular call over a different network, other than the network to which the called number belongs. The MCA therefore believes that, similar to the need and the benefits resulting from regulation of

2G networks, there is clearly a strong incentive in regulating voice call termination services over 3G networks. This will ensure that the benefits resulting from regulation of termination rates over 2G networks would be carried forward for 3G networks in order to protect consumers' welfare.

2.7.4 Reliability of evidence from consumer surveys

One respondent questioned the reliability of evidence extracted from the consumer perceptions survey carried out by the MCA during January 2005, and argues that relying exclusively on the evidence obtained through consumer surveys may lead to unrealistic conclusions. The respondent suggests that the opinions expressed by respondents when faced by a hypothetical scenario may differ from actual behaviour when such a situation occurs in reality. Such a limitation would limit the accuracy of the inferred conclusions. The said operator also expresses the view that the survey methodology overestimates the potential saving available to consumers. Moreover, the respondent criticise the lack of importance that the survey gives to non-price factors which consumers value as important when choosing the network. Apart from tariff plans, consumers choose a particular network also based on the different services offered by the network operator and the quality of the services provided. Therefore consumers may choose a package of mobile services which may not necessarily be the cheapest for them but which would meet a number of personal requirements.

The MCA agrees with the view that consumer behaviour is complex and that consumer surveys capture only perceived responses to hypothetical scenarios at a particular point in time. As a result, the MCA considers that the results of consumer surveys should be interpreted with caution. Nevertheless, the MCA considers these surveys are a good first-hand indicator of the behaviour most likely to be observed in the market place if a hypothetical situation occurs in practice. As opposed to the claims of the respondent, the MCA did not base its analysis exclusively on the results of the consumer perception survey but only used such evidence to reinforce argumentation presented in the document. The MCA notes the results of the consumer survey have been used only in two instances a) to support evidence that due to the large number of different price plans, awareness of the prices charged by MNOs is limited and b) to support the view that SMS is not always a substitute to voice calls. In both instances the MCA provided a detailed explanation of how it arrived to its conclusions including a price and functionality analysis, and considers that in addition to this analysis, the results of the consumer survey further reinforce the conclusions of the Authority. The MCA also notes that in their submission the respondents did not present any analysis or contrasting evidence that may lead the Authority to believe that the results of the consumer survey are incorrect.

The MCA therefore concludes that the supporting evidence extracted from the consumer survey carried out by the MCA does not lead to incorrect conclusions and therefore has no reason to believe that such information cannot be utilised in its review of the market.

1. Decision on relevant market boundaries

Based on the analysis presented above the MCA is hereby identifying two relevant markets concerning the provision of wholesale mobile termination services:

1. Wholesale voice call termination provided by Vodafone Malta Ltd.
2. Wholesale voice call termination provide by Mobisle Communications Ltd.⁷

The two markets include wholesale voice call termination services provide over 2G and/or 3G network equipment and each market boundary is delineated by the network coverage of the respective mobile network operator.

⁷ A reference in this section to Vodafone Malta Ltd and Mobisle Communications Ltd. shall be deemed to include that undertaking and any undertaking which is associated with, or is controlled by, or controls, directly or indirectly, the undertaking in question and which carries out business activities in Malta, where the activities engaged in (either directly or indirectly) are activities falling within the scope of the relevant markets defined above.

Chapter 03 - Market Analysis

Having identified the relevant market as discussed in **Chapter 02** the MCA is required to analyse the market in order to assess whether any services provider/s have significant market power as defined in Regulation 8 of the ECNSR (Article 14 of the Framework Directive).

03.1 Method to Assess Significant Market Power

Under the new EU Communications Directives and Article 4(8) of the ECRA, SMP has been newly defined so that it is equivalent to the competition law concept of dominance. Article 14(2) of the Framework Directive states that:

"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."

Further, Article 14(3) of the Framework Directive 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 the relevant market, one or more undertakings may be designated as having SMP where that undertaking, or undertakings, enjoys a position of dominance. Also, an undertaking may be designated as having SMP where it could lever its market power from a closely related market into the relevant market, thereby strengthening its market power in the relevant market.

In assessing whether an undertaking has SMP, this review takes the utmost account of the Commission's SMP Guidelines as well as the MCA's equivalent guidelines, as referred to in Chapter 01 above.

03.2 Assessment of SMP Against Relevant Criteria

The remainder of this chapter considers whether single dominance is likely to exist in the identified markets. In the MCA's view the assessment is fully compliant with the Commission's Guidelines. The SMP assessment set out is based on the evidence available to the MCA.

Single dominance can be assessed using a large number of criteria, as described in the Commission's and the MCA's guidelines on SMP assessment. In the MCA 's view, the most important ones are

- Market share analysis
- Barriers to entry and potential competition
- Countervailing buyer power
- Pricing structure

3.2.1 Analysis of market shares

Although, high market shares are not in themselves decisive as to whether an undertaking enjoys SMP in a market, the MCA is of the opinion that market shares higher than 50 per cent would necessitate the designation of SMP. Paragraph 75 of the Commission Guidelines states that, “according to established case-law, very large market shares – in excess of 50% - are in themselves, save in exceptional circumstances, evidence of the existence of dominant position.”

As concluded in the market definition section, the area covered by each mobile network operator is considered to constitute a separate wholesale termination market. This conclusion is based on the fact that termination on a particular network cannot be substituted by termination on another network. This implies that termination of voice calls over a particular network will have to be terminated on the network of that particular mobile operator. Therefore for the purpose of market share analysis, every mobile operator providing voice calls has a 100 per cent market share in terminating calls on its network. This market share applies for both volumes and revenues of mobile termination minutes.

3.2.2 Potential Market Entry

Termination of voice calls is governed by the calling party pays principle and as described earlier on, this arrangement does not provide any opportunity for any supply side substitutability. Similarly, this arrangement eliminates any possibility for potential competition in the wholesale mobile termination market.

Another major entry barrier is the current level of technological development, which allows MNOs to terminate a call to a mobile number only on the called network. The MCA is not aware of any technology developments that during the timeframe of this review will allow MNOs to terminate the calls of their subscribers on alternative networks other than the network to which the called number belongs.

Potential entry from 3G operators is not likely to create a difference in the structure of the mobile termination market. A new entrant would have to buy termination from the other network operators to enable its subscribers to call users subscribed to other networks and the existing MNOs would have to buy termination from the new entrant to guarantee end-to-end connectivity for their subscribers. This would result in the new entrant having a 100 per cent market share for termination services on its own network.

The MCA is therefore of the opinion that potential market entry will not exert sufficient pressure on mobile termination rates in absence of regulation.

3.2.3 Countervailing buyer power

The existence of customers with a strong negotiating position, which can be exercised to produce a significant impact on competition, will tend to restrict the ability of providers to act independently of their customers. When buyers of a certain product or service are large and powerful, they can effectively stop an attempt to increase prices by service providers.

The extent of countervailing buyer power depends on the ability of large customers to switch to alternative providers or not to purchase the service or product from that particular provider within a short period of time.

The table below illustrates the share of mobile termination minutes purchased by voice telephony providers. It clearly transpires that the fixed network operator Maltacom plc. is the

biggest purchaser of mobile termination minutes, although its share is decreasing over time due to increased mobile penetration. Therefore in theory, Maltacom could exert sufficient pressure on both mobile network operators to reduce termination rates or to at least not increase termination prices. Notwithstanding, it is not possible for Maltacom to exert any pressure on mobile operators since Maltacom under the Universal Service Obligations is obliged to terminate all calls in order to ensure end-to-end connectivity. As a result, Maltacom is not considered to have sufficient countervailing buyer power to constrain mobile termination rates.

Termination on Mobile Networks	2001	2002	2003	2004
Fixed to Mobile	65.6%	58.4%	52.5%	46.8%
Mobile to Mobile (off-net)	16.1%	26.3%	33.9%	41.6%
International to Mobile	18.3%	15.3%	13.6%	11.6%

Under the CPP arrangement retail customers are likely to give more consideration to the price of outgoing calls rather than the cost that other users would have to incur when calling them. Therefore, customers are likely to be indifferent to mobile termination charges which their network provider charges. This eliminates the possibility of countervailing buyer power from retail customers on wholesale termination rates.

The MCA is therefore of the opinion that no wholesale or retail customer or group of customers are/is in a position to constrain mobile termination rates during the timeframe of this review.

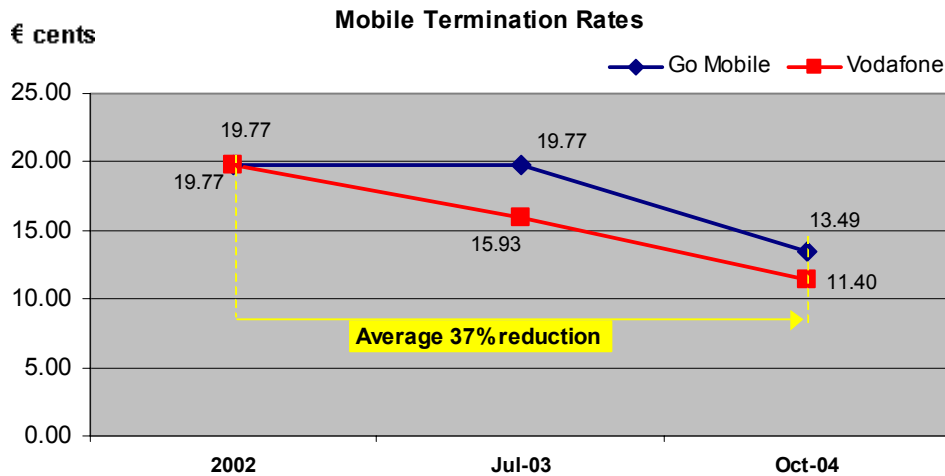
3.2.4 Pricing structure

Mobile subscriptions have increased considerably since the commercial launch of Go Mobile on 2001. Currently there are more than 309,000 mobile subscribers in Malta – many more than fixed line subscriptions which stand at slightly more than 200,000 lines. During the past three years both mobile operators and the fixed local network have reduced termination rates a number of times following regulatory intervention.

The graph below shows the reduction in the mobile termination rates over the past three years. To date decreases in termination rates have been exclusively the result of regulatory pressure from the MCA.⁸ Under the old legislative framework the MCA has designated both Vodafone since 2002 and Go Mobile since 2003 as having a dominant position in the mobile telephony market. The regulation of mobile termination rates was based following these decisions.⁹

⁸ Decisions on termination rates: <http://www.mca.org.mt/library/show.asp?id=266&lc=1> and <http://www.mca.org.mt/library/show.asp?id=536&lc=1>

⁹ Decision on dominance held by mobile operators: <http://www.mca.org.mt/library/show.asp?id=335&lc=1>



The above suggests that regulatory pressure, and not countervailing bargaining power or self-interest, has been the main factor behind reductions in the mobile termination rates. Without regulatory pressure mobile operators will not have an incentive to lower their termination rates. Furthermore, the MCA notes that following reductions in wholesale termination rates no corresponding decrease in the retail prices of mobile calls was recorded. This suggests that in the absence regulation mobile operators in Malta do not have an incentive to decrease mobile termination rates at a wholesale level and correspondingly at a retail level.

Another important factor to note is that to date mobile operators have not introduced on-net tariffs in Malta. To date a mobile-to-mobile call is charged at the same rate whether it is an on-net or off-net call by both mobile networks. Currently, retail prices in Malta are nearly identical for both mobile operators as can be seen from the table in **Appendix 1**.

The MCA is of the opinion that the pricing structure adopted to date by both mobile operators does not lead to the conclusion that termination rates will decrease further in the future in absence of regulation.

03.3 Summary of responses and replies to issues regarding market analysis

The respondents have raised a number of issues related to the market analysis presented above. The main issues can be summarised under two main areas:

1. Retail competition and reduction in prices
2. Efficiency of fixed-to-mobile and mobile-to-mobile termination rates

The next section provides a description of these issues as identified by the respondents and the MCA's final position.

3.3.1 Retail competition and reductions in prices

In their submissions both mobile operators have repeatedly claimed that the retail market is effectively competitive and therefore the wholesale mobile termination market is also subject to competitive forces. Respondents claim that the significant reductions in mobile tariffs in the past years is a clear indicator of the competitive nature of the mobile market and that consumers would still be reaping the benefits of competition in absence of regulation.

The MCA agrees with the respondents that following the entry of the second mobile network operator in Malta, consumers are benefiting from an increased number services and a better quality-price relation. Nevertheless, the MCA does not concord with the view that the so called 'mobile market' does not require further regulation. Under the new regulatory framework, the MCA is analysing mobile services from two dimensions, the access and origination part and the termination part. Therefore, the MCA considers that the claim that the 'mobile market' is competitive is not relevant anymore under the new framework. In this document the MCA is only reviewing the level of competition in the provision of wholesale mobile voice call termination services, whilst the level of competition in the mobile access and origination market will be assessed in a separate review. Consequently, the MCA will limit its analysis and conclusions for the markets identified earlier.

One of the respondents contend that since the entry of the second mobile operator in December 2000 its termination rate has decreased by 75% and it stands at –18.5% from the EU SMP average termination rate. As presented in the analysis above, to the knowledge of the Authority, the termination rate of this operator has for the first time been regulated and decreased in 2003 from 19.77 to 15.93 Euro cents and subsequently reduced again in October 2004 to 11.4 Euro cents. These reductions amount to a 42% decrease in the termination rate and not 75% as claimed by this operator. Moreover, in their submission the said respondent does not provide any evidence on the claim that their termination rate is currently 18.5% less than the EU SMP average. The MCA considers that the figures provide by this respondent are not sufficiently substantiated in order to invalidate the analysis provide by the MCA. Consequently the MCA maintains that the analysis provided above provides a true picture of the wholesale termination rates in Malta.

As stated earlier in this document, both mobile operators have not reduced termination rates on their own initiative but only following regulatory intervention. Moreover, the MCA has no evidence that following reductions in wholesale termination rates, retail tariffs have been decreased accordingly. One respondent disagrees with the statement and states that retail rates have been continuously on the downward trend and that decreases in retail rates were never dependent on reductions in wholesale rates. This operator further states that retail tariffs should be driven by demand side price sensitivity, quality of services, innovation and differentiation between service providers. The MCA agrees that retail tariffs should be driven by market forces, however such a statement implies that the market is subject to effective competition. As stated above the review of the retail market and wholesale access and call origination market will be dealt with in another market review. Nevertheless, from evidence available to the MCA permanent reductions in voce call tariffs have over the past eighteen months stalled and the only observed reductions in voice call price have been only limited to special offers for limited time periods. This indicates that demand side price sensitivity as claimed by this respondent has been low in pushing retail rates down. The MCA does not agree that reductions in wholesale rates should not have an impact on retail prices since wholesale rates are an important cost element in setting off-net call tariffs. Consequently, the MCA considers that reductions in interconnection rates are essential for permanent reductions in tariffs of off-net voice calls.

The MCA considers the lack of reduction in wholesale rates through self-initiative and subsequent reductions of retail rates, indicate that mobile operators do not have an incentive to lower interconnection rates in absence of regulation.

3.3.2 Efficiency of fixed-to-mobile and mobile-to-mobile termination rates

One of the respondents argues that there is a possibility that, as opposed to mobile-to-mobile termination rates, there is insufficient demand or supply-side constraints ensuring that fixed-to-mobile call termination will be priced efficiently in the absence of some form of regulation. However, this respondent further states that the MCA overstates the extent to which fixed-to-mobile termination rates may be set without regard to their impact.

The MCA disagrees with these statements on a number of counts. Firstly, the MCA never distinguishes between termination rates for a fixed-to-mobile or mobile-to-mobile call on a particular mobile network. Secondly, as stated earlier the cost of terminating a call on a particular mobile network is the same regardless of the originating network. Therefore, it is incorrect to assume that mobile-to-mobile termination rates are more efficient than fixed-to-mobile rates. Thirdly, there is only one termination rate for terminating a call over a particular mobile network, which needs to be equally efficient for both mobile and fixed originated calls. Consequently, the MCA considers that mobile operators have insufficient demand and supply-side constraints which fail to ensure that mobile termination rates (which equally apply for both fixed-to-mobile and mobile-to-mobile) are set at competitive levels.

2. Decision on operators designated as having Significant Market Power

Based on the evidence presented above the MCA is hereby identifying;

1. Vodafone Malta Ltd. as having significant market power in the market for 'Wholesale voice call termination provided by Vodafone Malta Ltd.'
2. Mobisle Communications Ltd. as having significant market power in the market for 'Wholesale voice call termination provided by Mobisle Communications Ltd.'

Chapter 04 – Regulatory Implications

As evidenced above, this market review has defined two relevant markets in Malta with respect to wholesale voice call termination on individual mobile networks. Pursuant to the analysis of the characteristics of these markets, the MCA has concluded that Vodafone and go Mobile enjoy SMP for termination services over their individual markets.

In accordance with Regulation 10(4) of the ECNSR, where an operator is designated as having significant market power on a relevant market in accordance with Regulation 8 of the same ECNSR the MCA is obliged to impose on such operator such appropriate specific regulatory obligations referred to in subregulation (2) of regulation 10 of the ECNSR or to maintain or amend such obligations where they already exist.

Moreover, Regulation 37 of the ECNSR requires the MCA, after having designated an operator as having significant market power on a relevant retail market, to impose on such operator such obligations as it considers appropriate to achieve those objectives set out in Article 4 of the Electronic Communications Regulation Act, where it concludes that the obligations imposed under Part III or regulation 39 of the said regulations would not result in the achievement of those objectives.

This section thus aims at discussing the actual and potential competition problems that exist in the defined markets, and proposing adequate remedies to address these problems.

04.1 Selecting Remedies – Principles Applied

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

The MCA has above established that the relevant market for voice call termination services on individual mobile networks is not effectively competitive. The market analysis proves that market forces are insufficient to impact call termination rates in absence of regulation. To date decreases in mobile termination rates have only been the result of regulatory intervention and therefore the MCA believes that the imposition of remedies is required. In selecting the remedies to impose on the designated SMP operators, the MCA has considered the nature of the problems identified and based its proposed remedies in line with the principle of proportionality. The MCA is proposing to impose a range of effective remedies which it considers to be the least burdensome. The MCA has also taken account of potential effects on any related markets.

It is unlikely that any single remedy can prove sufficiently efficient and hence a suite of remedies are being proposed, as evidenced below.

04.2 Current Remedies

Under the previous regulatory framework the MCA had already identified both mobile network operators as having a dominant position in the provision of mobile telephony

services. Vodafone Malta Ltd¹⁰ and Mobisle Communications Ltd¹¹ had been designated as having a dominant market position in May 2002 and August 2003 respectively. Consequently the MCA had imposed on both operators the following remedies:

- To ensure that the access or service provided meets certain specified quality of service standards, and to keep records and furnish to the MCA details of compliance with those performance standards;
- To interconnect promptly, publish a Reference Interconnection Offer (RIO) and ensure that charges for access / services are cost-orientated, transparent, unbundled and independent of the application to which they are put;
- To operate a cost accounting system which is suitable for implementation of the tariff requirements imposed on dominant operators and the calculation of charges for network elements used to provide interconnection; and
- To be subject to certain regulatory controls over retail tariffs as required by the Regulations.

All of the above obligations are still incumbent on the two mobile network operators with the exception of the last remedy, which has been removed following the adoption of the new regulatory framework in September 2004. Even though the MCA had imposed this remedy on mobile operators, the MCA had refrained from setting or adjusting retail mobile tariffs limiting its regulatory controls to the approval or refusal of changes in such tariffs.

04.3 Competition Problems

The MCA has identified four broad categories of existing and potential competition problems that arise due to the SMP enjoyed in the identified mobile termination markets.

4.3.1 Tacit Collusion

Tacit collusion is a competition problem pertaining to mobile-to-mobile interconnection and occurs when operators use their market power in the termination market in a coordinated manner to the detriment of competition. The possibility of tacit collusion is enhanced by the stability of the Maltese markets, by the similar size and network structures of the two main mobile operators and by the fact that traffic between the networks is largely symmetrical. This could lead to a situation whereby operators could maintain excessive prices (as well as below-cost prices) in the form of reciprocal termination charges.

4.3.2 Excessive Pricing

Since each operator enjoys a 100 per cent market share of the individual termination market, this is likely to incentivise the charging of excessive prices for the termination services. In view of the fact that in such cases, recipients of the call do not give sufficient heed to the costs other parties incur when calling them, there is no countervailing buyer power. This is likely to lead to inefficiencies and a distorted pricing structure.

¹⁰ Decision on dominance held by Vodafone: <http://www.mca.org.mt/library/show.asp?id=100&lc=1>

¹¹ Decision on dominance held by Go Mobile: <http://www.mca.org.mt/library/show.asp?id=335&lc=1>

4.3.3 Price Discrimination

Another potential standard competition problem relates to the possibility of foreclosing the retail market by charging a high termination rate to other networks whereas implicitly charging a lower rate internally. This would lead to high costs for off-net calls for other operators at the wholesale level when compared to the lower wholesale costs for on-net calls. Such a price structure would put small networks with a small number of subscribers at a disadvantage, especially if the difference between the on-net termination differs significantly from that of off-net termination.

4.3.4 Denial to Interconnect

A denial to interconnect is also a potential competition problem that could possibly be utilised to foreclose markets by inhibiting a new entrant from being connected to established networks.

04.4 Summary of responses and replies to issues regarding remedies in general

In its submission one of the respondents argued that the MCA should not move to a more onerous regulatory regime than the present one, and that if it did so, the failure of the current regime should be clearly defined. Said respondent expressed the view that regulation in this market is unnecessary since mobile termination rates have over the past years been reduced to levels which are below those of the EU. Moreover, it stated that any remedies imposed in this market should be symmetrical and obligations should be tailored to take into account the incentive to invest in new technology.

Both respondents expressed the view that the MCA did not back the proposed competition problems with any evidence and that consequently it is not justified to impose any remedies for problems which are not manifested in the market. Furthermore, one respondent argued that the basis for the decision to impose remedies was not sufficiently substantiated.

The MCA opines that the arguments and facts exposed above clearly evidence that the market for the provision of wholesale mobile voice call termination services is not effectively competitive and therefore requires ex ante regulation. Contrary to what is being argued by one of the respondents, the MCA believes that ex post regulation is not sufficient to regulate the competition problems described above.

The MCA has in this document proved that the market for wholesale mobile voice call termination exists in Malta and is therefore subject to review for the purpose of ex ante regulation. The MCA considers that ex ante regulation will be required to mitigate the problems identified with respect to this wholesale market.

The MCA also disagrees with the statement made by one of the respondents that the MCA failed to provide any evidence of the existence of such competition problems in Malta and hence failed to make its case for the imposition of ex ante remedies. The MCA submits that, in determining the need, or otherwise, of imposing ex ante remedies, NRAs do not need to provide evidence of the actual existence of these potential competition problems, but rather they need solely identify the **potential and/or ability** for these problems manifesting themselves. The concept of ex ante regulation lies precisely in identifying potential problems and imposing obligations prior to, and to avoid, such problems actually materialising.

As will be discussed in further detail below, as opposed to what was alleged by one of the respondents, the MCA is not imposing more onerous obligations on the mobile operators. The MCA is in fact proposing to maintain the current regulatory obligations and merely adjust

some of them so as to render them more effective. The MCA considers that the current regulatory regime has been instrumental in achieving low mobile termination rates, as stated by one of the respondents, and should therefore be carried forward. The MCA is also proposing to impose symmetric remedies on both the identified SMP mobile operators. In defining the proposed remedies the MCA has also taken into consideration the cost of implementing such remedies and the incentive for such operators to continue to invest in their sector. The obligations being set here are targeted towards addressing any potential problems that may occur in the market and to foster competitive practices in the market such that customers will reap the benefits of competition.

04.5 Remedies

The MCA believes that as a result of the SMP position held by Vodafone and Go Mobile in the wholesale market for the termination of voice calls on their own network, the imposition of remedies is necessary.

The MCA is of the opinion that the remedies it is proposing to impose are based on the nature of the competition problems it has identified in the relevant market, and are proportionate and justified in light of the objectives set out in Article 4 of the Electronic Communications (Regulation) Act.

The MCA will however continue to monitor market developments and, where appropriate, may issue further directions refining these remedies.

4.5.1 Access

Under the new regulatory framework, in particular regulation 15 of the ECNSR, the MCA has the function of ensuring end-to-end connectivity by imposing obligations on undertakings that control access to end-users including, in justified cases, the obligation to interconnect their networks where this is not already the case. This is without prejudice to the obligations imposed as a result of an SMP designation.

A mobile operator must have interconnection agreements with all other operators for the termination of voice calls on its network. Currently this obligation is imposed on Vodafone and Go Mobile and both publish a cost oriented reference interconnection offer, which is also subject to transparency and non-discriminatory obligations.

Following the finding of SMP with respect to the two MNOs the MCA is of the opinion that the current access obligation on both Vodafone and Go Mobile should be maintained. The MCA believes that each MNO should provide network access for the provision of voice call termination services to every public electronic communications network providers who reasonably request such access. Moreover, access to the network should be provided together with any services, facilities or arrangements which are necessary for the provision of such services.

The MCA is therefore proposing to maintain the access obligation on Vodafone and Go Mobile in accordance with regulation 21 of the ECNSR.

This notwithstanding the MCA believes that such an obligation would not on its own suffice to address the failures in the market as highlighted above.

4.5.2 Summary of responses and replies to issues regarding the access obligation

One of the respondents argued that the imposition of the access obligation under the new regulatory framework differs from and is more intrusive than the 'maintenance of' the obligation to provide interconnection provided for under the previous regulatory framework. It also argued that the access obligation should be imposed only after the analysis of the wholesale access and origination market has been completed. Finally the said respondent suggested that this remedy is not necessary since in its case it has and will continue to provide "access and/or other specific/special requirements " to third parties through commercial negotiation.

The other respondent argued that the imposition of the access obligation as proposed in the consultation document is not clear and that the MCA has not fulfilled the obligations listed under Regulation 21 of the ECNSR. Said respondent further argued that the imposition of an access obligation on non-replicable access networks, such as fixed networks, might be required to ensure competition but the imposition of such an obligation on mobile networks is debatable due to the possibility of an increase in the number of competing infrastructures in the future.

The MCA acknowledges that under the previous framework the obligation was for operators to provide interconnection whilst under the present regulatory framework there is the obligation to provide access. Nevertheless, the MCA notes that under both frameworks the dominant undertaking was obliged to provide 'access' to termination services, whether under the form of interconnection or access to associated facilities or services for the purpose of interconnection. Contrary to what is implied by the two respondents, the obligation to provide access under this market effectively means that SMP operators are required to provide access to their infrastructure for the purpose of providing termination (interconnection) services.

The access obligation under the wholesale access and origination market is different from that being imposed here, since the imposition of such an obligation would imply that mobile operators need to provide open access to network facilities to third parties in order for the latter to provide a full range of services, including the provision of retail calls. Therefore, the obligation under this market relates only to the provision of termination services rather than full access to other wholesale services. Based on this reasoning the MCA considers inappropriate the claim made by one of the respondents regarding the lack of consideration given to the objectives set out in Regulation 21 of the ECNSR for the imposition of an access obligation. When imposing this obligation the MCA has given due consideration to the burden that both Vodafone and Go Mobile will carry in complying with this remedy and also to the possibility that in the near future a number of new electronic communications networks will be deployed. The MCA considers that the imposition of the access obligation is justified, proportional and essential in order to ensure that new entrants would gain access to termination services provided by Vodafone and Go Mobile and vice-versa.

Finally, the MCA positively notes that one of the respondents has stated its readiness to negotiate in good faith any reasonable request for access for termination services on its network.

3. Decision regarding the Access obligation

In view of the above considerations and in accordance with Regulation 21 of the ECNSR, the MCA directs Vodafone and go Mobile to maintain the current access obligations for the provision of termination services on their respective networks, not to withdraw access to facilities already granted, to interconnect networks or network facilities and publish a cost oriented reference interconnection offer. Moreover, such MNOs should give third parties access to specified network elements and, or facilities when reasonable requests for such access are made, as well as negotiate in good faith with undertakings requesting access for termination. Access to the network for termination services should be provided together with any services, facilities or arrangements which are necessary for the provision of such access. The said MNOs shall ensure that all reasonable requests for access for the purpose of termination services are expedited in a fair, reasonable and timely manner.

4.5.3 Non-discrimination

In the absence of proper regulation, an operator may be incentivised to provide wholesale services on terms and conditions that discriminate in favour of a particular undertaking in such a way as to have a material effect on competition.

Besides tackling price-related competition problems, the obligation of non-discrimination can directly target non-price parameters, such as the withholding of information, delaying tactics, undue requirements, low or discriminatory quality, strategic design of products, and discriminatory use of information, which would disadvantage competing providers and in turn consumers.

Presently, non-discrimination obligations are imposed on Vodafone and Go Mobile as current dominant operators. These are aimed at preventing a situation where an SMP operator could offer different terms and conditions to different purchasers of voice call termination services and distort competition.

The MCA is therefore of the opinion that the non-discrimination obligation, in accordance with regulation 19 of the ECNSR, should be maintained on both Vodafone and Go mobile. This obligation will ensure that the SMP operators will not be able to discriminate against alternative operators in order to gain a competitive advantage over competing undertakings.

4.5.4 Summary of responses and replies to issues regarding the obligation of non-discrimination

In its submission one of the respondents agreed with the principle that a non-discrimination obligation serves to enhance competition in the market. On the other hand, it manifested its concern with the fact that the MCA did not specify what forms of discrimination are being targeted by the imposition of this regulation. The respondent provides 4 potential types of discriminatory treatment:

- Type A – mobile operators discriminating between other mobile operators and fixed operators;
- Type B – mobile operators discriminating between other fixed operators;
- Type C – mobile operators discriminating between other mobile operators;
- Type D – mobile operators discriminating between themselves and other mobile and/or fixed operators.

The same respondent argued that the MCA did not specify which of these actions would, in its opinion, constitute discriminatory behaviour. This respondent concludes by arguing that non-discrimination may be an efficient remedy in the absence of other regulations, though if other obligations are imposed it is not necessary to impose non-discrimination.

Irrespective of the type of discrimination as described by the respondent, and/or of the operator requesting termination service, the imposition of a non-discrimination obligation is intended to avoid a situation whereby an SMP operator would have the ability to exploit its market power in order to discriminate when providing termination services to other operators. The MCA considers that any behaviour which results in discrimination between those services supplied by an SMP operator to itself and those supplied to third parties constitutes a breach of the non-discrimination obligation. The non-discrimination obligation as laid down in law under Regulation 19 of the ECNSR is not limited to a particular form of non-discrimination or a particular behaviour, but relates to any discriminatory behaviour in relation to interconnection and, or access.

In view of the above, the MCA considers that the non-discrimination obligation is required to prevent the exercise of any unfair or discriminatory behaviour by the operator with SMP.

4. Decision regarding the non-discrimination obligation

In accordance with Regulation 19 of the ECNSR, the MCA directs Vodafone and go Mobile to:

- a. apply equivalent conditions in equivalent circumstances to other undertakings seeking access for termination services and providing equivalent services; and
- b. provide services and information to others under the same conditions and of the same quality as they provide for their own services or those of their subsidiaries or partners.

4.5.5 Transparency

The MCA believes it is proportionate and justified to impose a transparency obligation on mobile operators to demonstrate that they deliver services of equivalent quality to other operators. The imposition of such remedy ensures that alternative operators have sufficient information and clear processes to which they would not otherwise have access. This would assist their entry into the market and directly targets the nature of such problems.

Regulation 18 of the ECNSR authorises the Authority to impose transparency obligations on undertakings holding significant market power in relation to interconnection and, or access, requiring operators to make public specified information, such as accounting information, technical specifications, network characteristics, terms and conditions for supply and use, and prices.

Moreover, in particular where an operator has obligations of non-discrimination, the Authority may, require that operator which has significant market power to publish a reference offer, which shall be sufficiently unbundled to ensure that undertakings are not required to pay for facilities which 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. In such instances, the Authority will be able to impose changes to reference offers to give effect to the obligations imposed under the Act. The Authority may also specify the precise information to be made available, the level of detail required and the manner of publication.

Currently both Vodafone and Go Mobile have the obligation of transparency. This obligation requires both operators to publish information regarding call termination rates, network and technical specifications and accounting information to the MCA. The MCA is proposing to maintain the transparency obligation on Vodafone and Go Mobile as specified under regulation 18 of the ECNSR. The MCA reserves the right to specify the precise information to be made available, the level of detail required and the manner of publication of this information.

The MCA believes that the imposition of transparency obligations aids in giving the market confidence that services are not provided on a discriminatory basis and helps avoid any possible disputes and accelerate negotiations between existing and potential operators. The MCA believes that the requirements outlined are not excessively burdensome and will assist competition in the market.

4.5.6 Summary of responses and replies to issues regarding the transparency obligation

In its responses to the consultation document one of the respondents stated that this remedy is already in place with respect to both mobile operators and specifies that the current transparency obligation requires both operators to provide information related to retail tariffs, call termination rates, network and technical specifications, as well as accounting information. However, the same respondent expressed concern at the proposal made by the MCA to the imposition of a 'sufficiently unbundled reference offer' stating that such an 'unbundled offer' constitutes an extension to the application of the current obligation. In this respondent's view any extensions to the current transparency obligation will not benefit the consumers and are therefore unjustified.

In its consultation document the MCA had made it clear that, at present, its proposal with respect to the transparency obligation is to maintain the current level of detail of this obligation with respect to the two mobile operators and is not extending the application of the obligation in any way. Hence, for the time being, the MCA is not proposing to increase the requirements of publication of information with respect to the reference offer. This notwithstanding, the MCA maintains the right to establish or alter the degree of the obligation of publication of information in the reference offer. The MCA would also like to point out that any regulatory obligations in relation to retail mobile tariffs were withdrawn in December 2004.

The MCA considers that the imposition of the transparency obligation as being essential for it allows the MCA, as NRA, to monitor compliance with the obligations imposed and ensures certainty and clarity for all stakeholders in the market.

5. Decision regarding the transparency obligation

In accordance with Regulation 18 of the ECNSR, the MCA directs Vodafone and go Mobile to publish a reference offer, which shall be sufficiently unbundled so as to ensure that alternative operators are not required to pay for facilities which are not necessary for the services requested, giving a description of the relevant offerings broken down into components according to market needs. Moreover, the reference offer shall include pricing, terms and conditions as directed by the MCA. In doing so, the MCA reserves the right to specify further the precise information to be made available, the level of detail required and the manner of publication of this information.

Vodafone and go Mobile are also directed to make public accounting information, technical specifications, network characteristics, terms and conditions for supply and use, and prices as required by the MCA.

4.5.7 Accounting Separation

Part of the effectiveness of the non-discrimination obligation is reliant on the introduction of the obligation of accounting separation to facilitate the verification of compliance for services that the mobile operators provide to other operators.

This obligation is currently imposed upon both Go Mobile and Vodafone as both operators were identified as having a dominant market position under the previous legislative framework.

Separated accounts help disclose possible market failures and provide evidence in relevant markets of the presence, or absence of discrimination. Accounting separation supports the imposition of transparency as it makes visible the wholesale prices and internal transfer prices of the operators products and services. It also allows the MCA to check compliance with obligations of non-discrimination and to address the price competition problems. The MCA considers that the effectiveness of the transparency and non-discrimination obligations is reliant on the obligation of accounting separation to facilitate the verification of compliance.

This obligation is already imposed on Vodafone and Go Mobile and the MCA has already issued guidelines on how this remedy should be implemented.¹² The MCA proposes to maintain such an obligation and believes that if it were to withdraw this obligation, it would have limited means of monitoring non-discrimination and transparency obligations.

¹² "Accounting Separation and Publication of Financial Information for Telecommunications Operators - Report on Consultation and Decision", MCA, October 2002 - <http://www.mca.org.mt/library/show.asp?id=177&lc=1>

"Amendment to the Decision Notice published in October 2002" MCA, July 2003 - <http://www.mca.org.mt/library/show.asp?id=323&lc=1>.

"Implementation of Cost Based Accounting Systems and Accounting Separation, Mobile Communications", MCA, April 2004. - <http://www.mca.org.mt/library/show.asp?id=583&lc=1>

4.5.8 Summary of responses and replies to issues in relation to accounting separation

In its response to consultation, one of the respondents argued that the obligation of accounting separation, where the price control obligation is also imposed, is unnecessary and amounts to an excessive regulatory burden. The same respondent argued that a price control obligation will by itself suffice to ensure that operators do not engage in discriminatory practices.

The MCA is not in agreement with this view and believes that the obligation of accounting separation is essential to ensure that the transparency and non-discrimination obligations are met and to support the price control obligation. Mobile operators with SMP are able to cross-subsidise certain services to the detriment of others with the end-result being inefficient pricing structures. Moreover, through cross-subsidisation the internal transfer price may be distorted in favour of internal retail operations while inefficient prices may be charged to other operators or passed on to end-users when purchasing other services. Such a practice is detrimental to the consumers.

Accounting separation is therefore central to the monitoring of the way in which costs are allocated to individual services, particularly to avoiding any inefficient pricing strategies and to ensuring that the cost allocations required to set termination rates are not tailored in such a way as to favour discriminatory behaviour.

In conclusion, the MCA considers that the obligation of accounting separation ought to be imposed in conjunction with that of price control so as to ensure that wholesale prices are set in a transparent and non-discriminatory manner .

6. Decision regarding the imposition of accounting separation

The MCA directs Vodafone and go Mobile to continue to abide by their accounting separation obligation as exemplified in the MCA decision entitled “Accounting Separation and Publication of Financial Information for Telecommunications Operators - Report on Consultation and Decision”¹³, and published in October 2002 . This notwithstanding, the MCA reserves the right to amend the current obligation in accordance with its powers at law, in particular Regulation 20 of the ECNSR, and the principles of reasonableness and proportionality.

4.5.9 Price Control and Cost Accounting

Regulation 22 of the Electronic Communications Networks and Services (General) Regulations authorises the imposition of obligations relating to cost recovery and price controls, including obligations for cost orientation of prices and obligations concerning cost accounting systems, for the provision of specific types of interconnection and, or access.

The MCA has already mandated this obligation on Vodafone and Go Mobile in July 2002 and April 2004 respectively. This provision is today governed by virtue of the provisions set in Regulation 22 of the ECNSR. The Authority believes that a cost accounting system is necessary to ensure that the price charged by SMP operators are not excessively high in absence of competition.

¹³ *ibid.*

The MCA is of the view that if it were to relax this obligation, it would not have the necessary means of ensuring price controls in the market and prevent potential market failures. The MCA does not consider that this obligation will constitute an unreasonable burden on MNOs given that both undertakings are already under the obligation to support such a system by virtue of a previous MCA decision and that this has already been in place for some time¹⁴.

The MCA therefore proposes the maintenance of the existing level of cost accounting system obligation on Vodafone and Go Mobile until such time that any further consultation on the issue is deemed necessary.

In March 2005 the MCA published a report following a consultation document published in July 2004 entitled “Interconnection Strategy for the Electronic Communications Sector in Malta”¹⁵ outlining the way forward in ensuring interconnection in the electronic communications market. The report explores several options that the MCA, in close collaboration with all stakeholders, will evaluate in the coming months so as to update its current interconnection strategy. Amongst the topics discussed are the move from Historic cost accounting to Current cost accounting and the introduction of glide paths for mobile termination rates. Currently the MCA has initiated discussions with operators to explore the viability and the best way forward in the regulation of interconnection rates.

4.5.10 Summary of responses and replies to issues regarding price control and cost accounting obligations

Both respondents to the consultation document suggested that the imposition of price control and cost accounting obligation is not required. One of the respondents argued that the MCA has not carried out a cost benefit analysis to assess the benefits of imposing such obligations, nor has it substantiated its claims that price control and accounting separation are warranted. The other respondent claimed that even though it may be true that the fixed-to-mobile rates may be set at supra-efficient levels and therefore require some cost-based remedy, the imposition of the price control and cost accounting remedy on all termination rates is excessive.

The MCA does not share the respondents’ views and considers that the imposition of price control and cost accounting obligations are essential to bring termination rates down to cost oriented levels. The MCA reiterates that, due to a lack of competition and countervailing buyer power resulting from the CPP principle and technology barriers that do not allow operators to choose on which network to terminate a call MNOs do not have any incentive to reduce termination rates to cost oriented levels through self-initiative.

¹⁴ Implementation of Cost Based Accounting Systems for the Telecommunications Sector - Report on Consultation and Decision - July 2002 - <http://www.mca.org.mt/library/show.asp?id=132&lc=1>

Implementation of Cost Based Accounting Systems and Accounting Separation, Mobile Communications, April 2004. - <http://www.mca.org.mt/library/show.asp?id=583&lc=1>

Guidance on Accounting Methodologies for Regulatory Accounting Purposes, March 2003 - <http://www.mca.org.mt/library/show.asp?id=245&lc=1>

¹⁵ Interconnection Strategy for the Electronic Communications Sector in Malta, March 2005 - <http://www.mca.org.mt/library/show.asp?id=593&lc=1>

The MCA feels that, having identified the major competition problems with respect to this market and having outlined the need for and resulting benefits from the imposition of ex ante regulation, it has sufficiently proven for ex ante regulation. The MCA disagrees with the view expressed by one of the respondents that it failed to assess the costs vs. the benefits resulting from the imposition of price control and cost accounting remedies. On the contrary to what is argued by respondents, the MCA considers that cost oriented mobile termination rates are essential to maintain low and affordable retail rates for the end-users.

In this regard and in line with the consultation process on the interconnection strategy for Malta, the MCA is also publishing a decision on the introduction of a glide path to ensure symmetric, cost oriented mobile termination rates in Malta. This document outlines the MCA proposed strategy, whilst incorporating inputs from mobile operators, in ensuring compliance with this regulation. The document has been subject to a consultation period.

7. Decision regarding the Price Control and Cost Accounting obligation

In accordance with Regulation 22 of the ECNSR, Vodafone and go Mobile shall continue to abide by their current obligation of price controls and cost accounting as imposed by the decisions in force at the time of publication of this decision¹⁶ and implemented by means of the decision on the introduction of a glidepath mentioned above. The MCA reserves the right to amend this level of control in accordance with its powers at law.

04.6 Remedies Imposed on new entrants in the mobile termination market

The MCA is cognisant of the possibility of the entry of a third mobile operator and therefore is hereby outlining its intentions with respect to regulation of the new entrant in order to ensure end-to-end connectivity with the existing operators.

As explained earlier on in the market analysis section the new entrant would upon entry in the market have a 100 per cent market share on termination over its own network independently from the actual volumes of minutes that the operator would be able to terminate on its network. Given that the new entrant would only have a relatively small impact on the structure of the mobile market for an initial period of time, the MCA is of the opinion that any regulation with respect to new entrants should be limited and proportionate.

As a result the MCA is proposing to impose the following remedies on the new entrant in the wholesale mobile termination market:

1. Transparency obligation;
2. Non-discrimination obligation;
3. Access Obligation (to apply a fair and reasonable price for interconnection); and
4. Accounting separation obligation – to provide the MCA upon request with specified cost revenues for interconnection services, including internal prices. The MCA will request separated accounts only when it feels necessary, in order to monitor the appropriateness of the interconnection rate charge by the new entrant.

The MCA feels that the imposition of additional remedies such as cost orientation would be disproportionate to be imposed at such an early stage of entry in the mobile market.

¹⁶ refer to Footnote 14 above.

However, the MCA will monitor closely the development of this market over the timeframe of this review and will consider updating its position at any point in time it deems necessary.

4.6.1 Summary of responses and replies regarding the imposition of obligations on new entrants

Both respondents suggested that the imposition of asymmetric remedies in this market is discriminatory and would lead to a distortion in the market. One respondent argued that given the way the market is defined it is not possible for an operator to be *'a little bit dominant, since every operator enjoys an equivalent level of dominance'*. Thus the remedies applied by the MCA should be symmetric.

The MCA considers that the starting point for imposing remedies is to assess the potential competition problems that may arise in the market due to the dominant operator(s) and impose appropriate remedies to counter such problems. Operators with SMP may be potentially prone to different problems from each other and hence remedies should be proportionate and tailored to the specific operator.

In view of their lesser degree of ability to exert market power, the MCA believes that new entrants have little, if any, incentive to refuse access for termination services to other operators. This notwithstanding, the MCA believes it reasonable and adequate to require such new entrants to meet reasonable requests for access to, and use of, such wholesale access products, features or additional associated facilities by undertakings requesting access or use of such access products, features or additional associated facilities, which form part of the market for wholesale call termination services used to provide retail calls to end-users. Moreover, the MCA considers that this offer should be transparent and non-discriminatory.

The MCA considers that the imposition of a cost-orientation obligation on the new entrant would be excessive since the new operator has no incentive to set termination rates to interconnect with existing operators above the prevailing market termination rates. An attempt to charge unreasonable high termination rates would lead existing operators to refuse to interconnect with the new entrant and this would work counter to the latter's interest which is that of attracting customers to its network. Hence, the desire of the new entrant to attract customers would constrain any behaviour on its part to charge excessive high termination.

On the other hand, existing operators have already gained a significant market share and therefore their ability to exert market power is much higher. This calls for the imposition of the price control and cost accounting obligation upon them. The MCA considers that the imposition of asymmetric remedies is not inconsistent with its powers at law and has in the past resorted to such a policy when the second mobile operator entered the market.

Finally, the MCA does not agree with the claim that imposing asymmetric remedies would lead to a distortion rather than a strengthening of the market. The MCA considers that the set of remedies imposed on SMP operators are tailored to enhance competitive pricing in the market. Nevertheless, the MCA will continuously monitor the market and consider revising its position if required.

8. Decision regarding remedies to be imposed on new entrants

In view of their *ipso facto* SMP status, the MCA directs new entrants to abide by the following obligations:

8.1 Access:

New entrants are to publish a reference interconnection offer, give third parties access to specified network elements and/or facilities and to interconnect networks or network facilities when reasonable requests for such access and interconnection are made, as well as negotiate in good faith with undertakings requesting such access for termination. Access to the network for termination services should be provided together with any services, facilities or arrangements which are necessary for the provision of such access. The said MNOs shall ensure that all reasonable requests for access for the provision of termination services are expedited in a fair, reasonable and timely manner.

8.2 Transparency:

New entrants are to make public the termination rates and any proposed changes to such rates in advance of the change taking place, as well as information regarding retail tariffs, network and technical specifications and accounting information.

8.3 Non-Discrimination:

New entrants are to apply equivalent conditions in equivalent circumstances to other undertakings seeking access and providing equivalent services and to provide services and information to others under the same conditions and of the same quality as they provide for their own services or those of their subsidiaries or partners.

8.4 Accounting separation:

New entrants are to provide the MCA, upon request, with specified cost revenues for interconnection services, including internal prices.

04.7 Monitoring Market Developments

The MCA considers that it would be sensible to keep a reasonably close watch on market developments following this review. This would ensure that current and proposed obligations on the SMP operator identified earlier on, would be justified throughout the duration of this market review. If the MCA deems necessary or appropriate a new market review would be undertaken at any time in response to changing market conditions.

04.8 Effective Date

This Decision shall be effective from the date of its publication and shall remain in force until further notice by the MCA.

Appendix 1

	1 min peak ¹ call (weekdays)		3 min peak call (weekdays)	
	Mobile - Fixed	Mobile- Mobile	Mobile - Fixed	Mobile- Mobile
Vodafone				
Pre-paid Scheme				
eone	30c	20c	90c	60c
etwo	22c	22c	66c	66c
ethree	18c	18c	54c	54c
Family & Friends ²	12c	12c	36c	36c
Post-paid Scheme				
Lite (calls in bundle)	22c85	22c85	68c55	68c55
Lite (outside bundle)	14c	14c	42c	42c
Active(calls in Bundle)	12c14	12c14	36c42	36c42
Active(outside bundle)	12c	12c	36c	36c
extra (calls in Bundle)	10c54	10c54	31c62	31c62
extra (outside bundle)	10c	10c	30c	30c
Go Mobile				
Pre-paid Scheme				
Ready to go	20c	20c	44c	44c
Ready to go Club ³	12c	12c	36c	36c
Post-paid Scheme				
On the go (calls in bundle)	26c67	26c67	80c01	80c01
On the go (outside bundle)	11c5	11c5	34c5	34c5
Go together (calls in bundle)	20c	20c	60c	60c
Go together (outside bundle)	10c	10c	30c	30c
Business go (calls in bundle)	12c14	12c14	36c42	36c42
Business go (outside bundle)	10c	10c	30c	30c

Sources: Go Mobile, Vodafone - as at April 05

All charges are inclusive of the applicable VAT rates.

'Calls in bundle' for post-paid schemes has been estimated as the monthly rate divided by the free minutes in bundle.

1. Peak hours for mobile operators are from 8.00am – 8.00pm.
2. Family & Friends scheme includes only 3 numbers (fixed and/or mobile), which the customer can choose to call at reduced rate.
3. Ready to go scheme includes only 3 numbers (fixed and/or mobile), which the customer can choose to call at reduced rate.