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

Relevant markets, assessment of SMP & regulatory intervention

RESPONSES TO CONSULTATION AND FINAL DECISION

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EXECUTIVE SUMMARY

The Malta Communications Authority (MCA) is hereby presenting its final decision on the markets for wholesale voice call termination on individual public telephone networks provided at a fixed location in Malta.

This decision follows a national public consultation exercise carried out between the 4th of December 2013 and the 17th of January 2014. Comments to the national consultation were submitted by GO plc., Vodafone Malta Ltd. and the Malta Competition and Consumer Affairs Authority ('the MCCAA'). These submissions together with the respective MCA reactions are integrated into this document in earmarked sections.

Following the closure of the consultation period and in line with the requirements set out in Article 7(3) of the Framework Directive, the MCA notified its response to consultation and draft decisions to the EU Commission and the body of European Regulators for Electronic Communications (BEREC).

The notified documents were registered by the EU Commission under Case MT/2014/1567 on the 20th of February 2014. In this regard, a request for information (RFI) was also made by the EU Commission. The necessary information to the aforementioned RFI was provided in full by the MCA on the 25th of February 2014.

The EU Commission published its no comments letter on Case MT/2013/1567 on the 11th of March 2014. The relevant document is being published together with this decision.

DECISIONS

The MCA concluded its third round market review concerning the provision of wholesale voice call termination on individual public telephone networks provided at a fixed location in Malta.

Its decisions on relevant markets, SMP assessment and ex ante regulatory approach are briefly described below.

RELEVANT MARKETS

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

- a market for the provision of fixed voice call termination services by GO plc. on its own individual public telephone network;
- a market for the provision of fixed voice call termination services by Melita plc. on its own individual public telephone network;
- a market for the provision of fixed voice call termination services by Vodafone (Malta) Ltd. on its own individual public telephone network;
- a market for the provision of fixed voice call termination services by Ozone (Malta) Ltd. on its own individual public telephone network; and
- a market for the provision of fixed voice call termination services by Solutions & Infrastructure Services (SIS) Ltd. on its own individual public telephone network.

The geographical scope of each relevant market corresponds to the physical coverage of the fixed network operator (FNO) characterizing the market.

Full details of the MCA decision on market definition are contained in Section 4 of this review.

ASSESSMENT OF SIGNIFICANT MARKET POWER

The MCA considers that GO plc, Melita plc, Vodafone (Malta) Ltd, Ozone (Malta) Ltd and SIS Ltd enjoy significant market power (SMP) in the provision of wholesale fixed voice call termination on their own individual public telephone network.

The SMP designations are based on the following findings:

- A 100% share in terms of voice call traffic terminating on each individual public telephone network provided at a fixed location, irrespective of its size and technological platform.
- Each FNO can act independently of end-users and independently of other network operators in the setting of fixed termination charges.
- FNOs have an incentive to keep fixed termination charges above the competitive level and to price discriminate when charging for their voice call termination services.
- In a scenario where FNOs can freely set or maintain their termination charges above the competitive level, the scope for price competition is reduced.

Full details of the MCA's assessment of competition in the markets under investigation are contained in Section 5 of this review.

REGULATORY APPROACH

GO plc, Melita plc, Vodafone (Malta) Ltd, Ozone (Malta) Ltd and SIS Ltd are able to set their fixed termination charges independently of competitors, customers and consumers. In this regard, these FNOs are able to set excessive termination charges and to discriminate between network operators when setting these charges.

The MCA is therefore to maintain the following regulatory obligations on all SMP operators, namely:

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

The MCA is also maintaining the obligations of accounting separation and cost accounting on GO plc and Melita plc.

The MCA's regulatory approach is based on the nature of the identified competition problems. The MCA considers that the imposition of the above-mentioned regulatory obligations is proportionate and justified in light of the objectives set out in Article 4 of the Electronic Communications (Regulation) Act.

Full details of the MCA's regulatory approach, are contained in Section 6 of this review.

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1.0 INTRODUCTION

1.1 PURPOSE AND CONTEXT

The MCA carries out regular reviews of competition in electronic communications markets, as listed by the European Commission in the 'Commission Recommendation of the 17 December 2007 on relevant Product and Services markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European parliament and of the Council on a common regulatory framework for electronic communications networks and services (2007/879/EC) or earlier versions of the same Recommendation'.

The methodology used for carrying out the analysis is established under the Commission Guidelines on market analysis and the assessment of SMP under the Community regulatory framework for electronic communications networks and services (2002/C 165/03).

The whole process ultimately determines whether or not ex ante regulatory intervention is required in the markets under investigation.

There are three sub sections to this Section:

- Sub section 1.2 provides an introduction and some background information on fixed line voice call termination;
- Sub section 1.3 explains the methodology used by the MCA in defining and analyzing the market(s) for the service under investigation; and
- Sub section 1.4 provides information related to the public consultation exercise initiated through the publication of this market review.

1.2 FIXED VOICE CALL TERMINATION

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

1.2.1 The delineation between fixed wholesale inputs

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

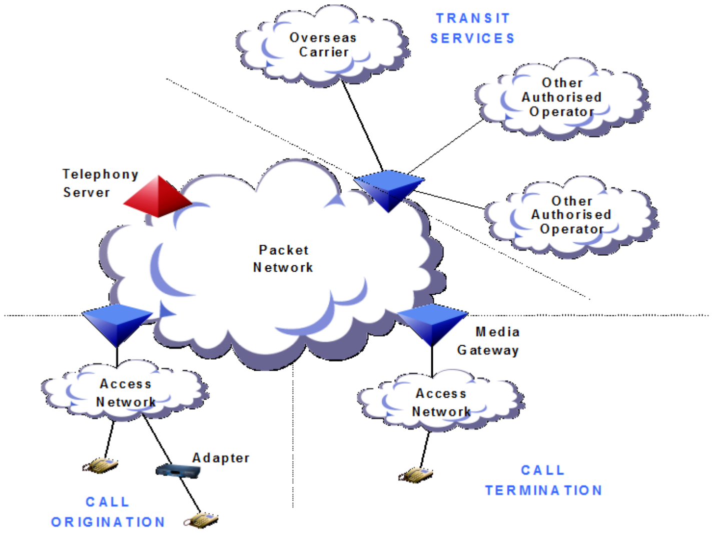

FIGURE 1

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

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

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

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

Of relevance here is the explanatory note to the Commission Recommendation on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU (hereafter, referred to as the 'Recommendation on termination rates')[1], which states that '*call termination can only be supplied by the network provider to which the called party is connected*'. This Recommendation also underlines that '*termination has been analyzed as a situation of 'two-way' interconnection whereby two wholesale prices have to be negotiated*'.

1.2.2 The Calling Party Pays (CPP) Principle

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

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

voice call termination are borne in full by the network operator requesting or purchasing the termination service.

1.2.3 The link between wholesale and retail levels

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

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

1.3 THE MARKET REVIEW PROCESS

The MCA is carrying out this market review in line with the prevailing legal and economic standards established under EU Community competition law.

The market review process follows three main stages:

- the definition of one or more relevant market(s);
- an assessment of the state of competition in identified market(s), specifically investigating whether any undertaking is deemed to have SMP in the provision of the service in question; and
- a regulatory assessment, outlining whether to maintain, amend or withdraw regulatory obligations in order to ensure that ex ante regulatory intervention remains appropriate in the light of changing market conditions.

More information as to this three-stage market analysis process is provided below.

1.3.1 The market definition stage

The market definition exercise aims to identify the competitive constraints faced by undertakings in the provision of fixed line voice call termination services, thereby also facilitating the subsequent market analysis procedure.

The assessment is forward looking in nature, taking into account 'expected or foreseeable technological or economic developments over a reasonable horizon'[2]. In this regard, the timeframe of this analysis is notionally set at approximately three years.
The exercise takes utmost account of the Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation (hereinafter referred to as 'the Recommendation') [3] when the relevant product and service markets are defined.

There are two dimensions to the market definition exercise:

The product market dimension

The main consideration here relates to the demand-side and supply-side substitutability conditions amongst the different products and services that could potentially form part of the market(s) under investigation.

Demand-side substitutability is used to measure the extent to which consumers are prepared to substitute other services or products for the service or product under investigation. Supply-side substitutability, on the other hand, indicates whether in the immediate to short term, suppliers other than those offering the product or service in question would switch their line of production to offer the relevant products or services without incurring considerable additional costs.

The Hypothetical Monopolist Test (the 'HMT Test'), otherwise commonly referred to as the SSNIP test (meaning 'small but significant non-transitory increase in price') is a key element in the substitutability assessment. This test considers the interchangeability of products in the case of a hypothetical small increase in price, usually understood as being an increase in the range of 5 to 10 percent, in any of the products/services under investigation. Overall, the HMT test would determine whether a hypothetical monopolist would be in a position to sustain a 5 to 10 percent increase in price because of significant demand-side and supply-side substitution effects.

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

The geographic market dimension

The Recommendation on relevant markets states that '*a relevant geographic market comprises an area in which the undertakings concerned are involved in the supply and demand of the relevant*

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

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

This Recommendation is accompanied by an 'Explanatory Note', which is available on the following link: http://ec.europa.eu/information_society/policy/ecomm/doc/implementation_enforcement/eu_consultation_procedures/sec_2007_1483_2.pdf *products or services, in which area the conditions of competition are similar or sufficiently homogenous and which can be distinguished from neighboring areas in which the prevailing conditions of competition are appreciably different'*.

To this effect, the MCA defines relevant geographic markets on the basis of an interchangeability assessment between products and services following a SSNIP. It applies two main criteria in its assessment of the geographic dimension of the market definition exercise. These are:

- the area covered by the network; and
- the scope of application of legal and other regulatory instruments.

The market definition exercise abides by the principle of technological neutrality and takes into account all network platforms in Malta, irrespective of the underlying technology.

1.3.2 The analysis of competition

This market review determines whether or not effective competition prevails in the market(s) under investigation.

The assessment is carried out in a manner consistent with the Commission's 'Guidelines for market analysis and the assessment of significant market power' (the 'SMP Guidelines', referred to in Article 15(2) of the Framework Directive) and the MCA's 'Market Review Methodology'[4].

Accordingly, a number of criteria can be assessed to determine whether an SMP position or effective competition exists in a given market, including:

- market shares, in relation to the size of the undertaking in the relevant market, as well as the development of the relevant market position of the different market players over time;
- the extent of barriers to market entry;
- the degree of potential market competition;
- the degree of countervailing buyer power (CBP);
- the existence of economies of scale and scope;
- control over infrastructure not easily duplicated;
- the degree of vertical and horizontal integration;
- the extent of product / service diversification; and
- market behavior in general, particularly that related to the evolution of prices.

The analysis of SMP is undertaken against the background of a 'modified green-field approach', whereby it is assumed that none of the ex ante regulations affecting a given market are in place.

[4] Link to MCA Market Review Methodology:
http://www.mca.org.mt/sites/default/files/articles/marketreviewmethod.04.pdf

A finding of dominance or designation of SMP would arise if an undertaking, either individually or jointly with others, affords to behave to an appreciable extent independently of competitors, customers and ultimately consumers. On the other hand, effective competition would prevail if no undertaking enjoys a position of SMP.

1.4 THE ANALYSIS OF COMPETITION IN WHOLESALE FIXED VOICE CALL TERMINATION MARKETS

From past experience, the criteria considered most relevant when assessing SMP in the market(s) for voice call termination on individual public telephone networks provided at a fixed location in Malta are the following:

- market shares;
- potential competition;
- countervailing buyer power ('CBP'); and
- the scope for price competition[5].

More detail as to the main conclusions reached by the MCA when assessing the above-mentioned criteria is provided at a later stage in this review.

1.5 CLOSURE OF PUBLIC CONSULTATION AND NOTIFICATION OF DRAFT DECISION

On the 17th of January 2014, the MCA concluded its national consultation exercise concerning the provision of wholesale fixed voice call termination on individual public telephone networks provided at a fixed location in Malta.

Comments to this consultation were submitted by GO plc. and Vodafone (Malta) Ltd.

As specified by Regulation 4 of the ECNSR and in line with the cooperation agreement signed on 20th May 2005 between the MCA and the Office of Fair Competition, the MCA has also asked the Office for Competition, which forms part of the Malta Competition and Consumer Affairs Authority ('the MCCAA'). The MCCAA submitted its opinion on the market definition and analysis of the products and services under investigation on the 14th of January 2014.

The MCCAA expressed agreement on the MCA's 'identification and analysis of the markets concerned'. The MCCAA's comments letter is provided as an annex to this document.

As required by Regulation 7 of the ECNSR, the MCA also notified the results of this market review and the regulatory measures to the Commission and to other NRAs in Europe.

[5] The analysis concerned is supported by market data, which is collected from various internal and external sources, including users and providers of electronic communications networks and services and from regular consumer surveys.

1.6 STRUCTURE OF THE DOCUMENT

The remainder of this document is structured as follows:

- Section 2 highlights upon the MCA’s previous market review decisions concerning the provision of voice call termination on individual public telephone networks provided at a fixed location in Malta. This section also outlines the key market trends and developments for the fixed line sector in Malta over the last few years, mainly in terms of the competitive structure, retail demand and take-up, retail fixed line tariffs and wholesale fixed call termination charges.

- Section 3 focuses on the legislative framework governing the provision of electronic communications products and services in Malta.

- Section 4 defines the relevant product and geographic markets concerning the provision of fixed voice call termination on individual public telephone networks in Malta.

- Section 5 analyses the state of competition in the identified wholesale markets by considering a number of criteria for the assessment of SMP.

- Section 6 addresses the potential risks to competition arising from the SMP position of FNOs in the markets in question and puts forward the MCA's regulatory approach to counter these risks.

2.0 BACKGROUND

This section highlights the key issues, findings and conclusions in past Decisions concerning the provision of voice call termination on individual public telephone networks provided at a fixed location in Malta. It also looks into the evolution of local fixed line termination charges and retail fixed line tariffs.

2.1 PREVIOUS MCA DECISIONS

The MCA has already carried out two market reviews concerning the provision of wholesale fixed voice call termination on individual public telephone networks in Malta. The MCA decision corresponding to the first round market review was published in 2006, whilst that corresponding to the second round market review was published in 2010.

2.1.1 The first market review decision (2006)

The first review of this market was notified to the EU Commission in 2006 (see Case MT/2006/0388[6]) and the corresponding decision was published in September of the same year[7].

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

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

2.1.2 The second market review decision (2010)

The MCA notified the EU Commission with its second round market review of fixed voice call termination on 13 April 2010 (see case MT/2010/1071). The corresponding decision was published

[6] Link to notification documents: http://circa.europa.eu/Public/irc/infso/ecctf/library?l=/malta/registered_notifications/mt20060387

[7] Link to MCA 2006 Decision: http://www.mca.org.mt/sites/default/files/articles/Wholesale_call_OrigTerm%26TransFixed.pdf

on 17th May 2010[8], whereby the MCA maintained the designation of SMP on GO plc and Melita plc. Other FNOs, then considered as newer market entrants, namely SKY Telecom Ltd (rebranded to Ozone Ltd in January 2012), Vodafone (Malta) Ltd and SIS Ltd, were also designated with SMP in the provision of fixed voice call termination on their individual public telephone networks.

The conclusion that all local FNOs had SMP in the provision of voice call termination over their individual public telephone network was based on the following evidence:

100% market share of minutes terminated on own network

Each FNO exerted a 'bottleneck' control over all traffic terminating on its own network as all calls to a particular FNO had to ultimately be terminated on that particular network. Each FNO was in fact deemed to have a 100 percent market share in the provision of termination services over its own network, both in terms of the volume of minutes terminated and in terms of the revenues generated, irrespective of its size and technological platform.

Lack of potential market constraints

The MCA concluded that, in the absence of regulation, and irrespective of the operator's size and market presence, termination services of individual FNOs were not substitutable for each other. All FNOs had to rely on the termination of each other to be able to terminate all calls of their subscribers.

No network operator could therefore constrain the termination charges set by local FNOs.

Lack of effective CBP

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

It was also considered that, under the prevailing CPP arrangement, the originating operator had to pay a termination charge to the FNO terminating the call. The originating operator would then recover the costs of termination from the subscriber making the call, by including the termination cost element in the retail voice call tariff charged for the call. Given that the called party is unlikely to be concerned about the cost incurred by the calling party to complete the call and given that subscribers typically lack awareness of fixed voice call termination charges, consumers were deemed unlikely to constitute any CBP on the level of termination fees charged by any of the local FNOs.

[8] Link to MCA 2010 Decision: http://www.mca.org.mt/sites/default/files/attachments/decisions/2012/m3-mt-final-decison.pdf

Regulatory approach in 2010

The MCA imposed regulatory obligations on GO, Melita, Ozone, SIS and Vodafone (Malta). All regulatory obligations imposed on GO and Melita in 2006 were maintained, although this time round the obligations of price control, cost accounting and accounting separation were also enforced on Melita.
Meanwhile, the obligations of access, transparency (including a reference offer), non-discrimination and price control were imposed on Ozone, SIS and Vodafone (Malta), but it was not deemed appropriate to impose cost-accounting and accounting separation obligations on these operators, given their size and market presence.

As for the price control obligation, the MCA expressed its commitment to build and implement a long-run incremental cost (LRIC) model, in line with the Termination Rates Recommendation. It also stated at the time that, until the completion of the new LRIC model, it would, as an interim measure, continue setting fixed termination charges on the basis of a bottom-up cost model (BUCM).

2.2 THE FIXED LINE SECTOR IN MALTA

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

2.2.1 Market presence

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

- GO plc

GO currently operates an IP fixed telephony network based on an NGN setup[9]. GO is able to cover the national territory with four fully-meshed media gateways as opposed to the fifteen PSTN switches previously in operation[10].

GO offers fixed line and mobile telephony services, broadband and Internet services, including voice over Internet protocol (“VoIP”) services, and broadcasting digital Pay TV services. It also offers mobile telephony services via its subsidiary Mobisle Communications Ltd (known as GO Mobile).

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

[10] The copper network owned by GO and the cable network owned by Melita have so far been upgraded to fibre to the cabinet (FTTC) but none of these operators offer any mainstream commercial offerings based on fibre.

- Melita plc

Melita operates a hybrid fibre coaxial (HFC) cable network, deployed in an NGN setup and with nationwide coverage[11], which is interconnected with all other local network operators.

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

- Vodafone (Malta) Ltd

On the 12th October 2005 the MCA assigned spectrum for the deployment of a national broadband wireless access (BWA) network. Vodafone Malta Ltd. was one of the successful applicants and in 2007 this undertaking rolled out its BWA network using WiMax technology (802.16d) to offer broadband Internet and VoIP telephony services. The latter services were never offered on a stand-alone basis, but specifically as an add-on to wireless broadband packages.

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

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

- Ozone (Malta) Ltd

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

- SIS Ltd.

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

2.2.2 Distribution of market shares

Table 1 presents data on market shares for the above-mentioned FNOs on the basis of subscriptions and volumes of originating voice traffic volumes. The relevant market outcomes are as follows:

[11] Ibid.

- GO accounted for 70.3% of total fixed line telephony subscriptions at the end of June 2013, down from 71.1% at the end of the previous year. This operator also accounted for 67.8% of total voice call minutes originated by the fixed line sector in the first half of 2013.

- Meanwhile, Melita accounted for 29.1% of subscriptions and 29.5% of voice call minutes.

- Ozone (Malta) accounted for 0.4% of subscriptions at the end of the reference period and 1.2% of outgoing fixed line traffic volumes.

	Absolute figures					Market shares				
	2009	2010	2011	2012	FH 2013	2009	2010	2011	2012	FH 2013
Subscriptions (end of period)	**246,890**	**247,635**	**232,293**	**229,740**	**229,997**					
GO	189,946	190,796	170,763	163,265	161,682	76.94%	77.05%	73.51%	71.07%	70.30%
Melita	55,231	54,970	59,838	64,948	66,852	22.37%	22.20%	25.76%	28.27%	29.07%
Vodafone (Malta)	539	671	544	346	425	0.22%	0.27%	0.23%	0.15%	0.18%
Ozone (Malta)	1,073	1,021	943	963	814	0.43%	0.41%	0.41%	0.42%	0.35%
SIS	101	177	205	218	224	0.04%	0.07%	0.09%	0.09%	0.10%
Originating voice traffic volumes (minutes)	**743,596,302**	**728,025,896**	**672,751,518**	**655,849,173**	**315,144,601**					
GO	550,941,487	532,852,758	482,863,911	448,926,953	213,662,009	74.09%	73.19%	71.77%	68.45%	67.80%
Melita	183,034,239	185,228,747	176,572,169	189,085,818	92,874,675	24.61%	25.44%	26.25%	28.83%	29.47%
Vodafone (Malta)	630,004	779,017	4,124,284	7,617,396	3,691,437	0.08%	0.11%	0.61%	1.16%	1.17%
Ozone (Malta)	8,295,560	7,945,845	7,227,512	8,185,167	3,730,426	1.12%	1.09%	1.07%	1.25%	1.18%
SIS	695,012	1,219,529	1,963,642	2,033,839	1,186,054	0.09%	0.17%	0.29%	0.31%	0.38%

Table 1: Market shares by operator, in terms of subscriptions and volumes of minutes

- Vodafone (Malta) accounted for a market share of around 0.2% in terms of subscriptions and 1.2% in terms of outgoing fixed line traffic volumes.

- SIS accounted for just 0.1% of subscriptions at the end of June 2013 and 0.4% of fixed line traffic volumes recorded in the first half of this year.

2.2.3 Developments in local fixed call termination charges

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

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

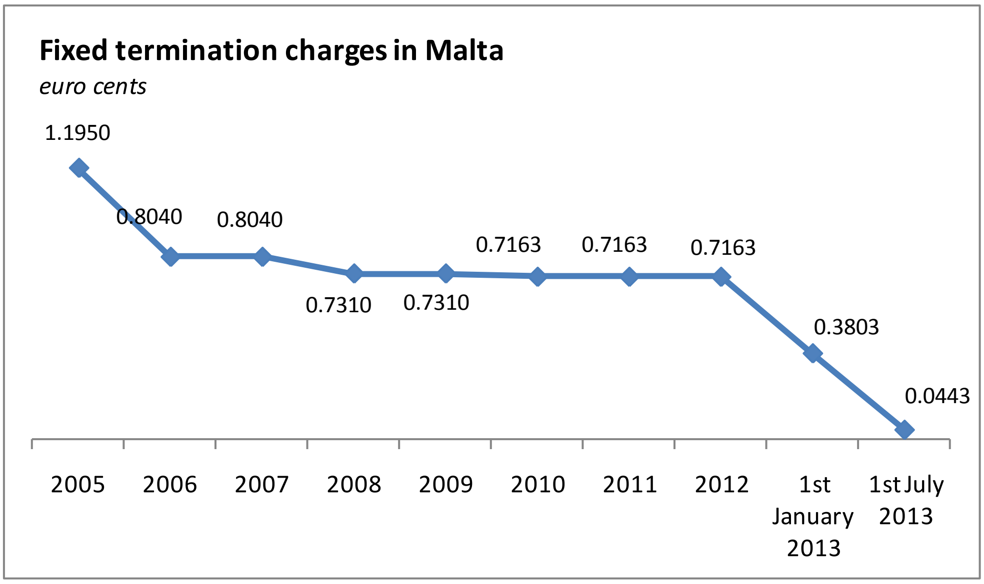

Chart 1: Fixed line termination charges in Malta

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

2.2.4 The impact of lower termination charges on retail prices

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

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

MCA workings show that, on the basis of calculations for the average rate per minute (ARPM) of fixed line communications, domestically bound fixed line voice call tariffs went down by a good margin since 2009.

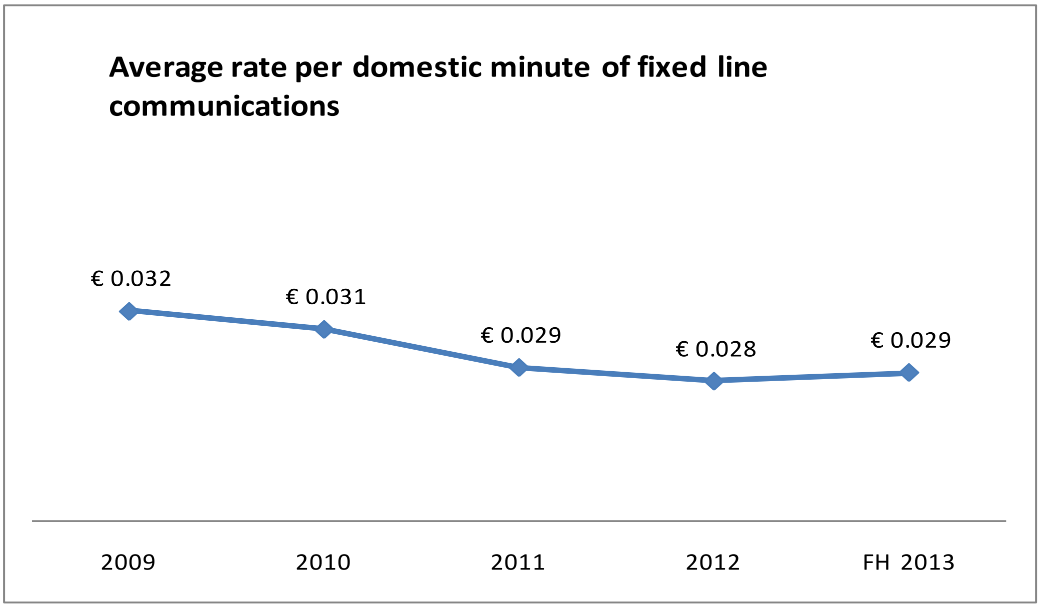

Chart 2: Average rate per minute of fixed line communications

In fact, the ARPM for domestic fixed line calls was down by 9.4% between 2009 and June 2013, from an ARPM of €0.032 to €0.029.

3.0 LEGAL BASIS

As defined in the Electronic Communications (Regulation) Act (the 'ECRA', Cap 399), the MCA is responsible for the regulation of electronic communications networks and services, radio communications equipment and the management and use of the radio frequency spectrum and telephone numbers.

3.1 THE EU REGULATORY FRAMEWORK

The EU Regulatory Framework for Electronic Communications consists of a set of five directives, which were first implemented in the EU in 2002 and later amended in 2009[12]. These directives are listed hereunder:

- Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (’the Framework Directive’);
- Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities (‘the Access Directive’);
- Directive 2002/20/EC on the authorisation of electronic communications networks and services (‘the Authorisation Directive’);
- Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services (‘the Universal Service Directive’); and
- Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector (‘the ePrivacy Directive’).

Of note here is the Framework Directive, which provides the overall structure for the local regulatory regime and sets out fundamental rules and objectives reading across all the directives. Article 8 of the Framework Directive stipulates the key policy objectives of NRAs in their regulatory approach, namely:

- the promotion of competition;
- the development of the internal market; and
- the promotion of the interests of citizens of the European Union.

[12] Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorization of electronic communications networks and services and Directive of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users’ rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws.

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

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

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

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

3.2 THE LOCAL LEGISLATIVE FRAMEWORK

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

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

3.2.1 The legal principles guiding the market review process

In accordance with article 9 of the ECRA, the MCA carried out this market review to ensure that regulation in the markets under investigation remains appropriate in the light of changing market conditions. This market review follows a three-stage process, as described below.

The market definition stage

Regulation 5 of the ECNSR stipulates that the MCA tailors its market definition on national circumstances, taking utmost account of all applicable guidelines issued by the European Commission in accordance with Article 15 of the Framework Directive and taking into account the revised EU Recommendation on relevant markets and other recommendations issued by the European Commission.

The market analysis stage

This stage is governed by Regulation 6(2) of the ECNSR which 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*'.

Regulation 6(4) of the ECNSR also states that '*where an undertaking has significant market power on a specific market, it may also be deemed to have significant market power on a closely related market, where the links between the two markets are such as to allow the market power held in one market to be leveraged into the other market, thereby strengthening the market power of the undertaking*'.

The imposition / maintenance / withdrawal of regulatory obligations

In accordance with Regulation (6) of the ECNSR, the MCA is obliged to impose regulatory obligations if an operator is designated as having SMP on a relevant market, either individually or jointly with others, as referred to in sub regulation (2) of regulation 5 of the ECNSR.

Where such obligations already exist in the market(s) under investigation, a new finding of SMP would lead the MCA to maintain or amend the existing regulatory conditions accordingly. If, on the other hand, the finding of SMP cannot be ascertained, the MCA would have to withdraw such regulation, in accordance with Regulation (5) of the ECNSR, subject to an appropriate period of notice given to all parties affected by such withdrawal.

3.2.2 The legal basis for national and EU wide consultation

As specified by Regulation 4 of the ECNSR, the MCA has carried out this market review in accordance, where appropriate, with an agreement with the National Competition Authority ('the NCA') under article 4 of the MCA Act.

As required by Regulation 7 of the ECNSR, the MCA notified its market review results and the corresponding regulatory measures to the Commission and to other NRAs in Europe following the closure of the national consultation exercise.

4.0 MARKET DEFINITION

4.1 KEY CONSIDERATIONS

The provision of voice call termination on individual public telephone networks provided at a fixed location is considered by the EU Commission's Recommendation on relevant markets as being characterized by a lack of effective competition and thus susceptible to ex ante regulation. The Recommendation also argues for a market that is defined at the individual network level, which effectively means that each FNO, being the sole supplier of termination services on its own network, would constitute a separate call termination market.

The MCA's second round market review decision on the markets under investigation (2010) concurs with the Recommendation, in that it defines five separate markets for the provision of fixed voice call termination in Malta that are as wide as the FNO characterizing the market. The current review determines whether such a conclusion remains appropriate in view of '*expected or foreseeable technological or economic developments*'[13] over the next two to three years. In this regard, the MCA addresses the following issues:

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

4.2 FIXED VOICE CALL TERMINATION AND RETAIL TELEPHONY SERVICES

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

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

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

4.3 THE PAYMENT MECHANISM FOR FIXED CALL TERMINATION

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

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

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

4.4 THE SUBSTITUTABILITY ASSESSMENT

The substitutability assessment considers whether retail customers and other network operators are in a position to constrain the price-setting behavior of a hypothetical monopolist supplying fixed voice call termination services, such as to render the price increase unprofitable.

Here, two main considerations are particularly relevant:

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

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

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

4.4.1 Demand-side substitutability

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

The analysis starts at the retail level, with the assessment undertaken in relation to whether consumer behavior is likely to pose an indirect pricing constraint on a hypothetical monopolist supplying fixed call termination services. The question here is whether the retail consumer can opt for alternatives ways of reaching or communicating with the intended called party in order to avoid an increase in the fixed termination charge implemented by a hypothetical monopolist.

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

Demand-side substitutability at the retail level

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

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

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

- calling a mobile number instead of calling a fixed line number;
- calling from a mobile number instead of calling from a fixed line number;
- calling from a fixed line number instead of calling from a mobile number;
- making an on-net FTF call instead of an off-net FTF call or MTF call;
- making use of unmanaged voice VoIP services;
- using call back and call forwarding solutions; and
- taking up a fixed line subscription in a bundle.

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

The MCA Consumer Perceptions Surveys on fixed line and mobile telephony in Malta carried out in 2011 provide important information on this matter. Both surveys show that retail consumers lack awareness when it comes to the tariffs they pay when making a call, which goes to suggest that that they possess very little knowledge (if any) of local voice call termination charges.

Furthermore, there are instances, for example, where the calling party may lack information as to the fixed network terminating the call, given that a fixed line number may have been ported without the end-user's knowledge.

Local fixed line operators may also offer various calling plans bundling a varying number of 'free' on-net and off-net FTF minutes in the monthly rental charge. This would complicate matters for the end-user as it makes it more difficult to correlate differences between on-net and off-net call rates on the basis of the termination charges implemented by competing operators.

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

Opting for mobile

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

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

MCA revenue-based workings[14] show that a MTF call is more expensive than an on-net FTF or an off-net FTF call. This goes to suggest that, if the calling party is aware of these differences in retail tariffs, it would not undertake a MTF call unless required to do so for immediate / emergency communication.

ARPM	2009	2010	2011	2012	FH 2013
on-net FTF call	€ 0.016	€ 0.013	€ 0.010	€ 0.011	€ 0.010
off-net FTF call	€ 0.017	€ 0.015	€ 0.014	€ 0.012	€ 0.013
FTM call	€ 0.195	€ 0.212	€ 0.200	€ 0.175	€ 0.178
FTI call	€ 0.096	€ 0.097	€ 0.094	€ 0.087	€ 0.088
MTM/MTF call	€ 0.192	€ 0.169	€ 0.120	€ 0.102	€ 0.097
MTI call	€ 0.530	€ 0.497	€ 0.313	€ 0.189	€ 0.163

Table 2: Average revenue per minute (ARPM) figures

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

Furthermore, opting for a MTF call would leave the calling party in a similar position to that observed for a FTF call, given that the cost of terminating a call on a fixed line network is likely to be the same (or at times even higher absent regulation) for a call originated from a mobile network.

- *Substitution from FTF calls to FTM calls*

Table 2 shows that a FTM call is significantly more expensive than an on-net or an off-net FTF call. If the calling party is aware of these retail price differences, substitution from FTF calls to FTM calls is not likely to happen in response to an increase in fixed termination charges.

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

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

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

It may however be argued that on-net MTM calls (and sometimes even off-net MTM calls) are generally cheaper than MTF calls and possibly fixed line originated calls, given the predisposition of MNOs to offer 'flat-rate' packages that combine a bundle of free on-net and off-net MTM minutes with flat-rate tariff plans[15]. Nevertheless, such mobile telephony flat-rate tariffs are mostly available on postpaid plans, which accounted for only around 21% of total mobile subscriptions reported at the end of June 2013. Meanwhile, fixed telephony flat rate plans are also available and thus provide for a counter effect.

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

- *Opting for FTF calls instead of MTF calls*

If a fixed network operator - say, 'FNO A' - increases the termination charge for calls originating from MNOs, the calling party may seek to use its fixed line subscription rather than its mobile subscription to reach a third party hosted by 'FNO A'. This substitution is most likely to happen when the calling

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

party is located at a specific location - most likely being its private residence - and fixed line telephony is available.

However, in a scenario whereby many people are increasingly on the move, substitution between MTF calls and FTF calls is unlikely to happen in sufficient numbers as to impose an effective constraint on the setting of fixed call termination charges.

A FNO may also own a mobile subsidiary, such as is the case locally with GO plc and Melita plc. This means that if, for example, 'FNO A' owns a mobile subsidiary that benefits from lower MTF termination charges than those applicable for competing MNOs, a calling party hosted by one of the competing MNOs may consider making a call from the MNO owned by 'FNO A' rather than from its fixed line subscription[16]. This type of substitution would further lessen the possibility of the calling party substituting a MTF call with a FTF call.

It is recalled here that consumers lack awareness on local retail mobile tariffs. This finding has been confirmed by the latest MCA Consumer Perceptions Survey on mobile telephony carried out in October 2011[17], whereby it resulted that 82% of respondents are not aware of the cost of a one-minute mobile-originated call. This in itself suggests that mobile users are unlikely to adapt their calling behavior according to the level of local termination charges.

It is therefore considered that substitution between MTF calls and FTF calls is unlikely to impose a sufficient pricing constraint on the setting of local fixed termination charges.

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

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

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

The MCA however reiterates that retail consumers are typically not aware of the applicable fixed termination charges and hence not sensitive to the impact of changing fixed termination charges on retail voice call tariffs. This reasoning is based on the MCA findings concerning its Consumer Perceptions Survey on fixed line telephony[18]. This survey shows that 73% of respondents did not

[16] Switching may not even be necessary when end-users own multiple mobile subscriptions, including a subscription with the mobile subsidiary owned by 'FNO A'. However, the latest MCA Consumer Perceptions Survey on mobile telephony shows that only 9% of mobile users have more than one mobile subscription. This would effectively mean that multiple mobile subscriptions are not likely to pose a sufficient pricing constraint on the setting of fixed call termination charges.

[17] Link to MCA Consumer Perceptions Survey on mobile telephony usage in Malta: http://www.mca.org.mt/sites/default/files/attachments/surveys/2012/110824-consumer-perception-survey-mobile-media.pdf

[18] Link to MCA Consumer Perceptions Survey on fixed line telephony usage in Malta: http://www.mca.org.mt/consumer/surveys/consumer-perception-survey-fixed-telephony

know how much it costs to make an on-net FTF call. This percentage rose to 88% in the case of an off-net FTF call.

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

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

It may be argued here that an indirect constraint on wholesale fixed termination charges may arise from end-users having multiple fixed line subscriptions at home, including a subscription with 'FNO A'. The MCA however notes that only a small share of local end-users have multiple fixed line subscriptions. In fact, the MCA's Consumer Perceptions Survey on fixed line telephony shows that only 8% of respondents have multiple subscriptions at home. This effectively means that end-users having multiple subscriptions are not in a sufficiently large number as to pose a credible indirect price constraint on a hypothetical monopolist supplying fixed termination services.

Opting for unmanaged VoIP services

The consumer has to install a particular type of software on its computer, smartphone or tablet in order to access unmanaged VoIP telephony services. This software would than enable the end-user to communicate with other end-users on these devices via, for example, Skype.

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

It is therefore considered that, in the current circumstances and the foreseeable future, unmanaged VoIP telephony services are unlikely to act as an effective constraint on wholesale voice call termination on local FNOs.

Using call-back and call-forwarding solutions

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

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

Taking a fixed line subscription in a bundle

The number of fixed line subscriptions on a bundle grew significantly over the last few years. Currently, around 35% of local fixed line subscriptions are in fact taken up as part of a bundle offer, typically combining fixed broadband and Pay TV with fixed telephony. This trend is expected to persist in the coming years. The question therefore arises as to whether this development could have an impact on the behavior of FNOs when these are setting their fixed call termination charges.

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

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

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

Demand-side substitutability at the wholesale level

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

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

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

Conclusion on demand-side substitutability

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

- end-users lack awareness of fixed call termination charges and are typically insensitive to changes in these charges;

- there are no products that are sufficiently interchangeable with the termination of a call on a number hosted by a particular FNO; and

- network operators cannot terminate a call other than on the FNO to which the called party is subscribed.

4.4.2 Supply-side substitutability

Here, the MCA takes into account the effectiveness and immediacy of a supplier's response to a small but significant increase in price for wholesale voice call termination implemented by a hypothetical monopolist. This must happen fast enough in order to prevent the price rise of the product from being profitable.

More specifically, the supply-side substitutability assessment considers if it is technically feasible for network operators to switch production into the supply of fixed call termination services on the network of a hypothetical monopolist, following a 5 to 10% increase in price for terminating a call on such a network.

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

Conclusion on supply-side substitutability

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

4.5 RESPONSES TO CONSULTATION

The MCCAA, GO plc. and Vodafone (Malta) Ltd. agree in principle with the MCA’s conclusions on the market definition.

However, GO plc. and Vodafone (Malta) Ltd. argue that the market definition has to be widened to include a market for the provision of fixed voice termination services by Vanilla Telecoms Ltd.

In this regard, the MCA notes that it has only recently granted authorization to this operator to provide Publicly Available Telephone Services (PATS) and that this operator is still negotiating interconnection with other undertakings. Therefore, the MCA will need to redefine the market for this new entrant providing voice call termination services once these interconnection agreements are in place and this operator starts providing termination services.

4.6 DECISION ON RELEVANT MARKETS

In respect of the analysis presented above, and in accordance with competition law principles, the MCA identifies the provision of wholesale voice call termination on individual public telephone networks provided at a fixed location in Malta as relevant for the purposes of ex ante regulation.

4.6.1 Relevant wholesale markets

On the basis of the substitutability assessment, the MCA identifies five distinct wholesale fixed termination markets in Malta. These are:

- a market for the provision of fixed voice call termination services by GO plc.;
- a market for the provision of fixed voice call termination services by Melita plc.;
- a market for the provision of fixed voice call termination services by Vodafone (Malta) Ltd.;
- a market for the provision of fixed voice call termination services by SIS Ltd.;
- a market for the provision of fixed voice call termination services by Ozone (Malta) Ltd.

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

4.6.2 Geographic scope of identified markets

A relevant geographical market comprises the area in which the undertakings concerned are involved in the demand and supply of a product / service in relation to which the conditions of competition are sufficiently similar or sufficiently homogeneous and which can be distinguished from neighboring areas in which the prevailing conditions of competition are appreciably different to those areas.

The current conditions of competition are deemed to be geographically homogenous in the identified wholesale markets. The markets in question are indeed subject to a national pricing constraint, as all authorized or licensed FNOs offer fixed termination services for calls originated from any other network operator. FNOs also charge geographically uniform fixed voice call termination charges, without differentiating by reference to geographic location of the network operator originating the call.

5.0 MARKET ANALYSIS

5.1 THE ASSESSMENT OF SMP

Having identified the relevant wholesale markets for the provision of fixed voice call termination in Malta, the next step analyzes whether any undertaking holds a position of SMP in the relevant market, as defined in and required by Regulation 5 of the ECNSR (Article 16 of the Framework Directive).

5.2 CRITERIA USED IN DETERMINING SMP

For the purposes of this assessment, a number of criteria are investigated to determine whether the identified wholesale markets are subject to potential market shortcomings.

The criteria taken into account are the following:

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

The analysis takes full account of the Commission's guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communication networks and services, as well as the MCA's market review methodology.

5.3 DISTRIBUTION OF MARKET SHARES

Each FNO has a 100% market share in terms of voice call traffic volumes terminating on its own network. This market share is the result of the way termination services are provided exclusively on each individual FNO, with no alternatives available for those purchasing the service. By definition, therefore, each FNO is a monopolist when terminating calls on its own network.

Conclusion

If left unregulated, each FNO would be a monopolist in the setting of its own termination charge. Since the payment of fixed termination charges abides by the CPP arrangement and the network operator purchasing the termination service is a price-taker, FNOs have an incentive to set their termination charges above the competitive level.

5.4 POTENTIAL MARKET ENTRY

As described earlier on, the provision of fixed voice call termination services is governed by the CPP arrangement, which eliminates any opportunity for supply-side substitutability. There is indeed no possibility for network operators to terminate a call other than on the fixed network to which the called party is subscribed.

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

This means that local FNOs are not in any way threatened by potential competition in their supply of fixed voice call termination services.

Conclusion

Technical barriers and the CPP principle makes the terminating network dominant over its own network and therefore the number of players present in the market has very little constraining behavior on the setting of fixed voice call termination charges.

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

5.5 COUNTERVAILING BUYER POWER (CBP)

There are two economic agents that have an interest in keeping fixed termination charges as low as possible. These are end-users (the retail consumers) paying for call completion and network operators (the wholesale customers) purchasing termination from local FNOs.

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

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

5.5.1 The bargaining position of retail customers

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

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

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

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

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

Conclusion on CBP at the retail level

Retail customers do not have sufficient CBP to constrain local FNOs in the setting of fixed termination charges. This means that local FNOs have an ability to set fixed termination charges independently of end-users.

5.5.2 The bargaining position of wholesale customers

Another consideration in the assessment of CPB relates to market dynamics at the wholesale level. The question here is whether a service provider or network operator purchasing fixed voice call termination could be sufficiently important to its supplier as to influence the price it is charged for the service.

The MCA considers that wholesale CBP may arise in the context of the following scenarios.

- The mobile-to-fixed scenario

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

Of particular significance here is the possibility for a MNO to seek to use its bargaining power in securing a lower termination charge by threatening / refusing direct interconnection with a FNO. For example, a local MNO may hypothetically refuse / deny interconnection with a FNO charging excessive fixed termination charges, unless these are brought down to a reasonable level. There is however a general obligation at law, apart from any decision by the MCA to designate undertakings with SMP, that obliges local network operators to ensure end-to-end connectivity and to interconnect their networks where this is not already the case. This general obligation at law effectively means that local MNOs cannot therefore refuse and / or cut-off interconnection.

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

Minutes terminating on local FNOs	2009	2010	2011	2012
MTF traffic share	4.07%	5.44%	9.25%	10.92%
On-net FTF traffic share	73.29%	70.25%	65.57%	62.27%
Off-net FTF traffic share	19.58%	21.54%	22.34%	23.93%
International-to-fixed traffic share	3.06%	2.77%	2.84%	2.88%

Table 3: Minutes terminating on local FNOs - market share by type of traffic

It can also be argued that the relative bargaining strength of MNOs in determining the setting of fixed termination charges depends upon their share of call termination minutes supplied by local FNOs. Table 3 above shows that MNOs catered for just around 11% of all voice call minutes terminating on local FNOs in 2012. Although this share has been on the rise since 2009, it is not considered to be of an extent as to credibly threaten the monopoly power enjoyed by FNOs in the provision of fixed termination services and the setting of fixed termination charges.

It is therefore considered that, absent regulation, local MNOs cannot effectively exert strong CBP on the setting of fixed termination charges in Malta.

- The fixed-to-fixed scenario

FNOs themselves purchase termination services from each other. Hence, the main consideration here is whether, absent regulation, FNOs are in a sufficiently strong bargaining position as to constrain the setting of fixed termination charges by their market competitors. The CBP of FNOs in the setting of fixed termination charges by other FNOs is to be assessed against their level of purchases made from the FNO providing the call termination service and the possibility to threaten interconnection.

So far it has already emerged that FNOs have an incentive to increase or maintain their fixed termination charges above the competitive level. Indeed, FNOs are aware that, due to the CPP principle, setting a high termination charge will not impact their own subscribers, but subscribers of other FNOs[19]. Meanwhile, the realization that a cost would still have to be incurred when

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

terminating a voice call over an own network provides an incentive to FNOs to discriminate in their favor by implementing off-net termination charges that are higher than their own internal (on-net) termination charges.

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

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

In this regard, even if the obligation to interconnect is not mandated, a threat from a FNO not to purchase call termination from another FNO by cutting-off interconnection would carry limited significance. There are two main reasons for this. Firstly, FNOs threatening interconnection would inflict more harm on their subscribers rather than on the network to which interconnection is at risk of being cut-off. Indeed, FNOs trying to exercise CBP in this way would damage their own reputation as their own subscribers would not be able to make calls to all local fixed networks, thereby ending up getting 'less value' from their subscription. Secondly, Table 3 shows that the off-net FTF traffic share of minutes terminating on local FNOs in 2012 corresponded to just around 24% of all terminating traffic volumes reported that year. Although the percentage recorded in 2012 is higher than that reported in 2009, it can be presumed that FNOs do not in reality possess a sufficiently strong negotiating position on what other FNOs charge them for terminating calls made by their subscribers.

It is therefore considered that, absent regulation, FNOs cannot pose CBP in the setting of fixed termination charges by rival operators.

- The international-to-fixed scenario

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

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

Conclusion on CBP at the wholesale level

In the absence of regulation, neither MNOs nor competing FNOs can exert CBP to constrain the setting of termination charges by a particular FNO. This is a result of the intrinsic problem that termination services on a particular network are subject to monopoly pricing.

The MCA considers that local FNOs face the same identical 'monopolist conditions' for the setting of their own fixed call termination charges. Absent regulation, therefore, local FNOs cannot be constrained in setting such charges at the competitive level.

5.6 THE SCOPE FOR PRICE COMPETITION

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

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

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

On average, local fixed termination charges went down significantly between 2009 and July 2013, from 0.7310 eurocents/minute to 0.0443 eurocents/minute (See Chart 1). Meanwhile, the average rate per minute of fixed line communications for domestic fixed calls (used here as a proxy for the actual retail price movements) fell by 9.4%, from €0.032 to €0.029 (see Chart 2).

Conclusion on the scope for price competition

The MCA considers that regulation to reduce FTRs to their efficient level does in fact contribute positively towards stronger price competition. Absent regulation, FNOs are likely to implement / maintain fixed termination charges that are above the competitive level, thereby reducing the scope for price competition.

5.7 RESPONSES TO CONSULTATION

Vodafone and the MCCAA express agreement with the conclusions of the MCA concerning the assessment of SMP in the identified markets.

However, Vodafone underlines that the market analysis is 'likely to be revised in the coming months' to take into account the arrival of Vanilla Telecoms. The MCA is of the opinion that such an analysis would be carried out once a market for the provision of fixed voice call termination services provided by Vanilla Telecoms is defined.

5.8 DECISION ON THE DESIGNATION OF SMP

The wholesale markets under consideration are not competitive and will not retract from this position during the timeframe of this review.

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

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

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

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

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

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

The MCA therefore considers that the following FNOs hold significant market power (SMP) in their respective wholesale fixed termination market:

- GO plc.;
- Melita plc;
- Vodafone (Malta) Ltd.;
- SIS Ltd.; and
- Ozone (Malta) Ltd.

6.0 REGULATORY APPROACH

Following the market analysis, GO, Melita, Vodafone (Malta), Ozone (Malta) and SIS have been designated with SMP in the provision of fixed call termination services on their own individual public telephone network.

Regulatory intervention is therefore required to address the potential competition problems that have been identified in the preceding analysis. Ex ante regulatory intervention would ensure that SMP operators are prevented from exploiting their position of dominance and would thus guarantee that the markets in question work effectively to deliver enhanced consumer benefits.

This section is structured as follows:

Sub section 6.1 underlines the legal provisions guiding the MCA's regulatory approach.

Sub section 6.2 recalls the potential risks to competition arising from the SMP position of FNOs with respect to the provision of wholesale voice call termination on their individual public telephone networks.

Sub section 6.3 lists the regulatory obligations that are currently enforced on GO, Melita, Ozone (Malta), Vodafone (Malta) and SIS in the markets under investigation.

Sub section 6.4 highlights upon the obligations that are to be imposed on the FNOs identified with SMP in the current review.

6.1 BACKGROUND TO REGULATORY APPROACH

In accordance with regulation 11(1) of the ECNSR, where an operator is found to have SMP on a relevant market, the MCA is obliged to impose on such an operator appropriate regulatory obligations or to revise such obligations where they already exist.

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

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

6.2 POTENTIAL COMPETITION PROBLEMS

As explained in the previous section, each FNO enjoys SMP in the provision of wholesale fixed voice call termination over its own individual public telephone network.

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

- Excessive pricing

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

This practice would also distort competition as it safeguards / enhances the market standing of the FNO that is implementing excessive termination prices whilst diluting the viability for new undertakings to consider market entry.

- Price discrimination

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

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

6.3 CURRENT REGULATORY OBLIGATIONS

In its second market review decision concerning wholesale fixed voice call termination on individual public telephone networks in Malta (published in May 2010), the MCA established that all FNOs designated with SMP in the markets under investigation - namely GO, Melita, Vodafone (Malta), Ozone (Malta) and SIS - had to comply with the following set of obligations:

- an obligation to meet reasonable requests for access to / and use of specific network facilities, in order to ensure end-to-end connectivity;

- an obligation not to show undue preference or undue discrimination in the provision of interconnection services;

- an obligation to ensure transparency on information related to termination charges and transparency on accounting information, technical specifications, network characteristics, terms and conditions for supply and use, and prices; and

- an obligation to implement price control, mandating cost-oriented wholesale termination charges.

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

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

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

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

6.4 REGULATORY APPROACH

Following the evidence and conclusions provided at market analysis stage, the MCA is mandating a number of obligations on SMP operators to ensure that efficient termination charges prevail in the identified markets.

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

6.4.1 Access

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

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

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

- give third parties access to their infrastructure for the purpose of voice call termination on their own network and interoperability of network services (subregulations 2(a) and 2(e) of regulation 15 of the ECNSR);
-
- meet reasonable requests to interconnect networks and network facilities (subregulation 2(i) of regulation 15 of the ECNSR);

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

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

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

6.4.2 Non-discrimination

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

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

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

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

- to provide services and information to other undertakings under the same conditions and of the same quality as they provide for their own services, or those of their subsidiaries or partners[20].

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

6.4.3 Transparency

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

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

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

In accordance with regulation 12 of the ECNSR, Melita, GO, Vodafone (Malta), Ozone (Malta) and SIS shall be subject to the transparency obligation and thus be required to make public specified information, such as accounting information, technical specifications, network characteristics, terms and conditions for supply and use, including any conditions limiting access to and, or use of services and applications, and prices where applicable.

The transparency obligation also requires identified SMP operators:

- to make public information concerning call termination rates, network and technical specifications, terms and conditions for supply and use, and accounting information, as required by the MCA;
- to deliver services of equivalent quality to all operators;
- to provide sufficient information on relevant matters, including the publication of appropriate manuals, order forms and processes that alternative operators would not otherwise have access to, in order to assist with their entry into the market; and
- to publish a RIO, sufficiently unbundled to ensure that undertakings are not required to pay for facilities that are not necessary for the services requested, giving a description of the relevant offerings broken down into components according to market needs, and the associated terms and conditions including prices, subject to the approval of the MCA.

In accordance with regulation 12(4) of the ECNSR, changes may be imposed by the MCA to RIOs, in order to give effect to the obligations imposed under the ECNSR. The MCA may also specify the precise information to be made available, the level of detail required, and the manner of publication.

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

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

6.4.4 Price control

The MCA considers that, due to a lack of competition and CBP resulting from the CPP principle, the identified SMP operators have no incentive to reduce termination charges to cost oriented levels through self-initiative.

In order to counteract the incentive of SMP operators to charge excessive termination charges and so as to further strengthen the obligations of non-discrimination and transparency, the MCA is of the opinion that a price control remedy is necessary in accordance with regulation 16(2) of the ECNSR.

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

Given that the competitive conditions in the markets under investigation have not changed materially since 2010 and given the reconfirmation of the SMP status on GO, Melita, Ozone (Malta), Vodafone (Malta) and SIS, the price control remedy is to be maintained on all identified SMP operators, in accordance with regulation 16 of the ECNSR.

This remedy obliges the identified SMP operators to set their fixed termination charges equal to the regulated efficient rate established by the MCA, which is based on a bottom-up long-run incremental cost (BU-LRIC) model developed in 2012 (the BUCM 2)[21]. As from 1st July 2013, the local fixed termination charge stood at 0.0443 euro cents.

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

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

6.4.5 Cost accounting

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

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[21] The previous model prepared by the MCA in 2005 as refined in 2007 is referred to as BUCM or BUCM 1.

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

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

It is relevant to underline here that, in view of a clear difference in the market position occupied by the different operators designated with SMP in this market review, the MCA believes that it would not be proportionate to impose a cost-accounting obligation on Ozone (Malta), Vodafone (Malta), and SIS. The MCA remains committed to monitor developments in the identified wholesale markets and to constantly review its position[22].

In accordance with regulation 16 of the ECNSR, the MCA is to maintain the cost accounting obligation on Melita and GO, as it does not consider the imposition of such an obligation to constitute an unreasonable burden on the said operators. GO and Melita shall therefore be required to supply detailed information to the MCA regarding the allocation of costs onto different services.

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

6.4.6 Accounting separation

The MCA believes that effective monitoring of the transparency and non-discrimination obligations relies on the existence of accounting separation. In this regard, separated accounts help disclose possible market failures and provide evidence in relevant markets of the presence, or absence, of discrimination. These also support the imposition of transparency as it makes visible the wholesale prices and internal transfer prices of the operators' products and services. Separated accounts also allow the MCA to check compliance with obligations of non-discrimination and to address price competition problems. Accounting separation also provides support to the price control obligation so as to ensure that wholesale prices are set in a transparent and non-discriminatory manner.

More specifically, the obligation of accounting separation would ensure that operators with SMP keep separate accounts to reflect, as closely as possible, the performance of separate business activities that they operate. It would also enable the MCA to make certain that the costs allocated by an operator to an individual fixed service are the actual costs being incurred to provide the respective service.

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

It has also been stated in the previous sections that FNOs are able to cross-subsidize between services through an internal transfer pricing mechanism that is likely to be distorted in favor of their own retail operations, to the detriment of existing or potential competitors and to the disadvantage of end users purchasing other related services. This is more so since all local FNOs, which were identified as having SMP, typically offer more than one type of fixed service in a bundle. The imposition of accounting separation would therefore preclude cross-subsidization and would thereby avoid any inefficient pricing strategies that favor discriminatory behavior. Accounting separation would also provide improved transparency in the accounting arrangements of operators and would also encourage non-discrimination.

The MCA therefore considers that an obligation of accounting separation in conjunction with a price control measure would ultimately ensure that:

- wholesale prices are set in an efficient, transparent and non-discriminatory manner; and that

- the accounting arrangements of operators are transparent to such an extent that facilitates the verification of compliance in respect of services that the identified FNOs provide to other operators.

The MCA however reiterates that its approach to regulatory intervention remains guided by the principles of proportionality and reasonableness. Based on this reasoning, the MCA feels that the imposition of an accounting separation obligation is only deemed appropriate on GO and Melita[23] but not on the remaining SMP operators identified in this market review. The imposition of an accounting separation obligation on Ozone (Malta), Vodafone (Malta) and SIS would, at this point in time, be too onerous in view of their small customer base for voice services provided by the said operators.

Therefore, in accordance with regulation 14 of the ECNSR, only GO and Melita shall be required:

- to make transparent wholesale retail prices and internal transfer prices to the MCA, whenever such information is requested by the said Authority, without prejudice to the generality of regulation 14(2); and

- to make available accounting records to the MCA, including data on revenues received from third parties, whenever such information is requested by the said Authority, without prejudice to the provision of articles 4(10) to (14) of the Malta Communications Authority Act.

[23] This obligation has already been mandated on GO and Melita by virtue of their SMP position designated under the previous MCA Decision published in 2010 (see Footnote 7).

Unless otherwise directed by the MCA, GO and Melita shall keep the existent methodology and level of accounting separation[24].

Conclusion on the ex ante regulatory approach

The MCA considers that its decision on the ex ante regulatory approach in the markets under investigation is proportionate in the circumstances and justified in the light of the objectives as set out in the Framework. It also believes that the imposition of the above-mentioned set of remedies is the most appropriate in the current circumstances and the timeframe of this review. The MCA will continue to monitor developments in the market to ensure that it is applying justified remedies.

6.5 RESPONSES TO CONSULTATION

Vodafone and the MCCAA express agreement with the MCA's regulatory approach, with the former also stating that Vanilla Telecoms should be obliged to observe the access, non-discrimination, transparency, and price control obligations, once Vanilla Telecoms is identified as an SMP operator.

In this regard, the MCA reiterates that it shall be revisiting its market review once Vanilla Telecoms concludes its interconnection agreements.

Meanwhile, GO plc. argues that 'the requirement and scope for the cost accounting obligation are greatly diminished' given the applicability of a BU-LRIC price control obligation. This operator adds that 'such an obligation should be removed or at the very least greatly relaxed, considering also the great cost for the operators that have to carry out yearly exercises and audits'.

The MCA reiterates that, due to a lack of competition and CBP resulting from the CPP principle and no possibility for network operators to terminate a call other than the network to which the called party is subscribed, FNOs have no incentive to set efficient termination rates through self-initiative.

The imposition of the cost accounting obligation serves to monitor and enhance the effectiveness of the transparency and non-discrimination obligations. The accounting separation obligation ensures that operators with SMP keep separate accounts to reflect, as closely as possible, the performance of separate business activities that they operate. This would in turn ensure that the costs allocated by an operator to an individual service are the actual costs being incurred to provide the respective service.

The MCA is aware of the risk that FNOs designated with SMP embark on cross-subsidisation between services. This may happen through an internal transfer pricing mechanism that is distorted in favour of own retail operations, to the detriment of existing or potential competitors and to the disadvantage of end users purchasing other services. This is more so since all FNOs identified as having SMP are at least triple-play providers. In this scenario, accounting separation would therefore serve to preclude cross-subsidisation and thereby avoid any inefficient pricing strategies that favour

[24] The methodology on how to implement the accounting separation obligation has already been outlined in an MCA decision published in 2009 (Link: http://www.mca.org.mt/sites/default/files/attachments/decisions/2012/09-07-accounting-separation-july-09.pdf).

discriminatory behaviour. Accounting separation ultimately provides improved transparency in the accounting arrangements of operators and therefore encourages non-discrimination.

The MCA therefore believes that for the time being the cost accounting and accounting separation obligations should be maintained on GO plc. and Melita plc.

6.6 DECISION ON THE EX ANTE REGULATORY APPROACH

After having identified the potential competition problems that may arise in the wholesale markets under investigation, the MCA considers that ex ante regulatory intervention is required. To this effect, the MCA is to impose the following regulatory obligations on all FNOs designated with SMP in this market review:

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

The MCA is also mandating the following obligations on GO plc and Melita plc.:

- accounting separation; and
- cost accounting

All remedial action is based on the nature of the competition problems that are identified in this market review. Each obligation is considered proportionate and justified in light of the objectives set out in Article 4 of the Electronic Communications (Regulation) Act.

6.7 MONITORING OF FUTURE MARKET DEVELOPMENTS

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

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

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

7.0 ANNEX

MCCAA
MALTA COMPETITION AND CONSUMER AFFAIRS AUTHORITY

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Office for Competition

14 January, 2013

The Executive Chairman,
Malta Communications Authority,
Valletta Waterfront,
Pinto Wharf,
Floriana FRN1913.

Dear Sir,

The Office for Competition has been asked to provide its opinion on the third round market review concerning the provision of wholesale voice call termination on individual public telephone networks provided at a fixed location in Malta carried out by Malta Communications Authority (MCA).

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

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

Yours faithfully,

S. Aquilina Zahra

Dr Sylvann Aquilina Zahra
Director General