

Dominant Market Position in Telecommunications

Consultative Paper

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Malta Communications Authority

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1 Introduction

1.1 Background to DMP

The Telecommunications (Regulation) Act provides that specific obligations may be imposed on authorised providers having a Dominant Market Position (“DMP”). The Act itself does not prescribe neither the criteria nor the obligations, however these are established by regulations made under the same Act. The regulations¹ prescribing the criteria for establishing which operators have a DMP and the obligations which follow, are the:

- Telecommunications Services (General) Regulations, 2000²; and
- Internet and Other Data Networks (Service Providers) Regulations, 1999³; and
- Cable Systems (General) Regulations, 2001⁴.

The determination of DMP assumes a critical importance because it means that certain authorised providers have to comply with additional legal obligations as a measure against abuse of their dominant position.

1.2 Consultation Process

One of the functions of the Malta Communications Authority (“MCA”) as the designated competent authority is to identify organisations that have DMP in specific telecommunications markets in accordance with the powers and duties conferred on the MCA by the aforementioned legislation.

The MCA recognises the need to communicate its decision on the subject in question and recognises the importance of consultation and input from all interested parties. The purpose of this document is to obtain the views of all interested parties on the proposed methodology and approach to the determination of organisations having a DMP in the relevant markets.

This document is without prejudice to the legal position or the rights and duties of the MCA to regulate the market generally. This is not a legal document; the MCA is not bound by this document and may amend it from time to time.

¹ The following regulations are henceforth collectively referred to as “the Regulations”.

² Legal Notice 151 of 2000 as amended by LN70 of 2001, henceforth referred to as “the Telecommunications Services Regulations”.

³ Legal Notice 170 of 1999 as amended by LN223 of 2000, henceforth referred to as “the Internet Service Providers Regulations”.

⁴ Legal Notice 167 of 2001, henceforth referred to as “the Cable Systems Regulations”.

2 The Framework for DMP

2.1 Purpose of the Determination of DMP

Operators who are determined by the MCA to have a DMP are subject to a set of obligations designed to ensure transparency, non-discrimination and cost orientation. Particular importance is laid on requirements for securing interconnection of networks and interoperability of systems. The objective of the DMP framework is to control operators' ability to distort competition or to maintain barriers to entry.

The Regulations require the MCA to keep a register of operators having a DMP and to revise this register at least once a year. The MCA is required to keep under review the criteria for determining whether an operator has a DMP in a particular telecommunications market. The MCA may also propose to make changes to the DMP framework with a view of further refining the regulation of competition that is specific to the telecommunications sector.

2.2 Steps in the Determination of DMP

The Regulations establish a framework for the determination of operators with Dominant Market Power in which:

1. The relevant markets are defined both in terms of the product or service as well as in terms of geographical coverage;
2. The market share of each licensed operator within these markets is calculated; and
3. Those operators having a market share exceeding 25% are presumed to have a DMP, subject to the MCA taking into account other market power criteria listed within the Regulations, such as an operator's ability to influence market conditions, the availability of financial resources, and other factors discussed further on in this document.

2.3 Definition of the Relevant Markets

The relevant markets must be defined both in terms of products and services and in terms of geographical coverage. The geographical scope of each of the markets analysed, based upon the existing licences, is currently nationwide and no further consideration is required.

As regards the definition of markets in terms of products and services, the Regulations identify a number of markets which are defined either by reference to the Regulations themselves or to the Telecommunications (Regulations) Act:

Market	Definition
Public fixed telephony	The Telecommunications Services Regulations require the determination of DMP in the “public fixed telephony” market. This service means the provision to end users at fixed locations of a service for the originating and receiving of real time speech such that any user can use equipment connected to a network termination point to communicate with another user of equipment connected to another termination point.
Mobile telephony	The Telecommunications Services Regulations require the determination of DMP in the “mobile telephony” market. This service means the provision to end users of a public telephone network where the network termination points are not at fixed locations.
Telecommunications Transport Providers Internet and Other Data Networks Service Providers	The Internet Service Providers Regulations require the determination of DMP in the “telecommunications transport” market. A telecommunications transport provider means a person who provides a service consisting in the conveyance by means of a telecommunications system of publicly available telecommunications services of any form of telecommunications without regard to the content of the message transmitted.
Cable systems services	The Cable Systems Regulations require the determination of DMP in the “cable systems” market. A cable system means any system operating by means of coaxial cable, optical fibre, or other transmission lines or forms of transmission, the primary function of which is to receive and distribute the signals of one or more broadcast television or radio, or other sources of video, audio or data signals but does not include telecommunications services or systems which require another licence.

The Maltese legislative framework for DMP differs from the approach taken in other countries, in that it does not require a separate determination of DMP in the voice telephony market, in the national market for interconnection, and in the leased lined market ⁵. However the consequences of a DMP determination under the Maltese framework includes both the obligations relating to voice telephony DMP (e.g. quality

⁵ Directive 97/33/EC on Interconnection in Telecommunications; and Directive 98/10/EC on Voice Telephony and Universal Service for Telecommunications in a Competitive Environment - European Parliament and Council

of service and cost-oriented tariffs) as well as interconnection DMP (e.g. obligation to interconnect, cost oriented rates) under the foreign models. The MCA will consider both the share of retail revenues as well as share of interconnection revenues in its determination of DMP.

Furthermore, although the Internet Service Providers Regulations do not require a determination of DMP in the Internet Service Provider (“ISP”) market, these regulations provide that if a telecommunications transport provider’s subsidiary has a share of 25% or greater in the ISP market, that operator would be determined to have a DMP in the telecommunications transport provider market even though it might not have a 25% market share in that same market.

2.4 Obligations of Operators who have DMP

Operators who are determined to have a DMP in one of the specified telecommunications market will be subject to the obligations laid out in the Regulations and which may be summarised as follows:

	Fixed Telephony	Mobile Telephony	Telecommunications Transport Providers	Cable Systems & Services
Quality of service targets and submission of quarterly reports to the regulator	√ ⁶	√ ⁶		√ ⁷
Obligation to interconnect promptly at transparent, cost-oriented and unbundled rates	√ ⁸	√ ⁸		
Publication of Reference Interconnection Offer (RIO)	√ ⁹	√ ⁹		
Adoption of cost-based accounting systems	√ ¹⁰	√ ¹⁰		
Carrier selection & pre-selection	√ ¹¹			
Obligation to offer cost-oriented unbundled retail tariffs	√ ¹²			√ ¹³
Regulatory control of retail tariffs	√ ¹⁴	√ ¹⁵		√ ¹⁶
Obligation to interconnect with ISPs			√ ¹⁷	

⁶ As per Regulation 8 of the Telecommunications Services Regulations.

⁷ As per Regulations 7 and 8(2) of the Cable Systems Regulations.

⁸ As per Regulation 10 of the Telecommunications Services Regulations.

⁹ *Ibid.*, Regulation 10.

¹⁰ *Ibid.*, Regulation 13.

¹¹ *Ibid.*, Regulation 24.

¹² *Ibid.*, Regulation 30.

¹³ Subject to conditions, as per Regulation 11 of the Cable Systems Regulations.

¹⁴ As per Regulation 31 of the Telecommunications Services Regulations.

¹⁵ Subject to effective competition, *Ibid.*, Regulation 32.

¹⁶ As per Regulation 12 of the Cable Systems Regulations.

¹⁷ As per Regulations 8(1) and 9 of the Internet Service Providers Regulations.

All ISPs are also required to prepare and publish a Code of Practice laying out, amongst others, information with regard to the charges and other terms and conditions and accounting arrangements which are to apply in respect of the ISP's services.

DMP is determined separately in each of the above markets. As a result it is possible that one operator might be determined to have a DMP in one particular market but not in another. For example:

- an operator who is determined to have a DMP in the telecommunications transport provider market may not necessarily be determined to have a DMP in the mobile telephony market; and
- an operator who is determined to have a DMP in the cable systems and services market may not necessarily be determined to have a DMP in the telecommunications transport provider market.

In such cases the operator would be subject only to the obligations pertinent to the market in which it is determined to have a DMP and would not be subject to other obligations in the other telecommunications services markets in which it operates.

2.5 Development of the Framework

The MCA is aware that the regulatory framework for telecommunications should be adapted to suit the nature of a dynamic market which is constantly evolving and opening to competition. While the framework is intended to foster the growth of competition in a market that has been recently liberalised, it has been argued that the same framework may have the opposite effect with the result of over-regulating and consequent stifling of competition.

The MCA looks for guidance in such matters at the EU framework, independently of Malta's eventual accession to the EU or otherwise, because it believes that this framework has been tested under various circumstances and represents best practice in the process of liberalisation of the market.

The existing EU framework is being reviewed with the purpose of addressing the above concerns and a final position has not yet been agreed. The principal elements which constitute the revision have centred on, amongst others:

- the issue of whether organisations that are determined to have a DMP should be regulated on an ex-ante or on an ex-post basis;
- the definition of what constitutes a market from a supply-side and demand-side substitutability analysis;
- the convergence of the SMP framework based on the 25% rule towards the general competition framework based on the 40% rule;

- the right of access by National Regulatory Authorities of information held by National Competition Authorities, including any confidential information held by the latter;
- the possibility that dominance may be exercised jointly by more than one organisation; and
- the assessment that organisations may be able to leverage their market power in which they have a DMP to a closely related market in which they do not.

The MCA is mindful of these developments and invites all interested parties to forward suggestions on how the existing framework can be modified to better fulfil the purposes of enhancing competition in the telecommunications market.

3 Proposed Methodology for determining DMP

3.1 Market Share Criteria

The Regulations create a presumption that operators with a 25% share of the relevant market have a DMP and stipulate that *an operator shall be presumed to have a dominant market power when it has twenty five percent of the particular telecommunications market in the geographical area within which it is authorised to operate. The said percentage shall be based on the operator's percentage of gross revenues in the particular telecommunications market.*

This presumption of DMP applies to each of the markets identified. It is therefore necessary to calculate the market shares of the firms operating in the relevant markets. This presumption of DMP is referred to as *the 25% rule*.

3.2 Special Considerations for the Telecommunications Transport Provider Market

Operators in the Telecommunications Transport Provider market are subject to the following criteria in assessing DMP:

- A telecommunications transport provider will be deemed to have a DMP in this market if it is also licensed to operate public fixed telecommunications systems and services or public mobile telecommunications systems and services.¹⁸ Under this rule Maltacom plc, Vodafone Malta Ltd and Mobisle Communications Ltd are automatically determined to have a DMP in telecommunication transport provision. Melita Cable plc is not considered to have a DMP in this market under this rule.
- A telecommunications transport provider will be determined to have a DMP if a subsidiary company has 25% or more of the market for services licensed under the Internet Service Providers Regulations.¹⁹ This is particularly relevant for the purpose of determining whether Melita Cable has a DMP in the telecommunication transport provider market. As a result the MCA must determine the share of Melita Cable plc's subsidiary (Video On-line Limited) in the ISP market.

3.3 Market Power Criteria

The Regulations do not require the MCA to base DMP determinations solely on the 25% rule. In exceptional circumstances, the Regulations authorise the MCA to designate certain operators as having a DMP even if such operators do not qualify to be presumed to have a DMP under the 25% rule. Any operator who has a significant ability to influence market conditions may be determined as having DMP. The

¹⁸ As per Regulation 5(1)(c) of the Internet Service Providers Regulations.

¹⁹ As per Regulation 5(1)(a) of the Internet Service Providers Regulations.

criteria which should be considered in such cases are referred to as *market power criteria*.

These criteria could materially affect the balance in determining a DMP should any of the operators be close to meeting the 25% in the specific market. The Regulations specify that the determination of the MCA in such cases shall take into account the following factors:

3.3.1 The Operator's Ability to Influence Market Conditions

Market power is the ability of an operator to raise and sustain prices above the competitive level. This power is usually held by providers who have been operating in the market for a number of years within a monopolistic environment. These operators command product differentiation, brand loyalty and tend to have a solid high usage client base that remains loyal to the operator even though its prices may be higher than those of competitors. An operator may have market power if competitive pressure from outside the market is weak (i.e. barriers to entry exist) or competitive pressure on the market is weak (i.e. a high market share and competition absent). New entrants are usually constrained to adopt a pricing strategy that aims to achieve price leadership over the incumbent operator in order to penetrate the market.

3.3.2 Control of the Means of Access to End Use

The Telecommunications Services Regulations also state that when establishing which organisations are determined to have a DMP the control of the means of access to end use should also be considered.

3.3.3 Financial Resources

Some operators may have greater access to capital and financial resources sufficient to enable them to invest significantly in the network and range of services offered. Operators who have access to such financial resources are in a better position to offer value-added services which attract the high end of the market in which they operate.

3.3.4 Experience in providing Products and Services in the Market

An operator may have a considerable level of experience in providing products and services and may have positioned itself in the market well before its competitors. Some operators may also be associated with large global players, giving them access to financial, technical and marketing resources. Such a strategic association can be a source of competitive advantage arising through strong branding enabling them to differentiate their products and charge a premium price.

3.3.5 Other Considerations as may be Applicable

The MCA is bound to keep under review the criteria for determining whether an operator has a DMP as appropriate with the objective of promoting competition that is specific to the telecommunications sector.

3.4 Measurement of Market Shares

This document is accompanied by a questionnaire which is directed at licensed operators and service providers in telecommunications markets. The questionnaire covers the period 1 January 2001 to 31 December 2001 and will form the basis of the determination of DMP.

The measurement period of one whole calendar year is in accordance with best practice adopted by National Regulatory Authorities in other countries. A time frame which spans over one calendar year evens out any seasonal or temporary fluctuations which might occur in market shares. The determination of whether an operator has a DMP in a specific market is made over a long-term horizon and is not intended to be a static representation of the market at one particular moment in time.

3.4.1 Fixed Telephony

Only one operator, Maltacom plc, is authorised to provide fixed telephony service in Malta until 31st December 2002. As a result Maltacom plc has an unqualified DMP in the *fixed telephony* market as it does not share this market with any other competing operator.

3.4.2 Mobile Telephony

The Telecommunications Services Regulations prescribe that the measure of market share for mobile telephony is to be calculated on the basis of the share of gross revenues. This includes gross retail revenues from calls originating on own network together with interconnection revenue from terminating calls originating from other networks.

The operators reviewed for DMP in the *mobile telephony* market are Vodafone Malta Limited and Mobisle Communications Limited.

3.4.3 Telecommunications Transport Providers and Internet and Other Data Networks Service Providers

The Internet Service Providers Regulations prescribe that the measure of market share is the share of the combined gross revenues.

The operators reviewed for DMP in the *telecommunications transport provider* market are Maltacom plc, Vodafone Malta Limited, Mobisle Communications Limited and Melita Cable plc.

Melita Cable plc will be determined to have a DMP if it has 25% or more of the telecommunications transport market or if Video On-line has 25% or more of the ISP market. All ISPs will be taken into consideration for this purpose, and the calculation of market share will be based on the share of gross revenues including revenues from network access charges for broadband services (ADSL/Cable).

3.4.4 Cable Systems and Services

Only one operator, Melita Cable plc, is authorised to provide such services in Malta. As a result Melita Cable has an unqualified DMP in the *cable systems and services market* since it does not share this market with any other competing operator.

4 Consultation Framework

4.1 Consultation Period

The consultation period will run until Thursday 31st January 2002. Comments should be sent before noon on Thursday 31st January 2002 to:

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4.2 Questionnaire

This document is accompanied by a questionnaire which is directed at licensed operators in the telecommunications markets under review. The questionnaire covers the period 1 January 2001 to 31 December 2001 and will form the basis of the determination of DMP as described in this document. Notwithstanding any possible amendments of the methodology following receipt and examination of comments, the information requested in this questionnaire will be required by the MCA for carrying out its analysis. Licensees are asked to respond to this questionnaire by Thursday 31st January 2002 – responses should be sent to the same contact name and address as above. The production of the questionnaire does not preclude the MCA from seeking further information or altering the format of information requested.

4.3 Finalisation of the Authority's Position

The MCA will consider comments received in response to this consultative document before publishing a final methodology which will be used to measure DMP. The MCA will also publish the results of an examination of the relevant markets and a determination of which operators have DMP in those markets.

5 Conclusion

In conclusion, this methodology for determining DMP is proposed by the MCA for comment by interested parties. The MCA recognises the concept of DMP to be a very important one for the regulation of the telecommunications market, both now and in the future. This methodology has been prepared with a view to being comprehensive, clear and accurate with the flexibility to be amended mindful of the changing structure and nature of the telecommunications market in Malta and globally.

Appendix: Questionnaire

(Period 1 January 2001 to 31 December 2001)

A. Fixed Telephony

Only one operator, *Maltacom plc*, is authorised to provide fixed telephony in Malta.

B. Mobile Telephony

Information requested from:

Vodafone Malta Limited and Mobisle Communications Limited

Retail revenues from:	Set up/connection charges	Lm _____
	Subscriber rental	Lm _____
	Call charges	Lm _____
Interconnection revenues from call termination:		Lm _____
	TOTAL	Lm _____

C. Telecommunications Transport Providers

i) Information requested from:

Maltacom plc, Vodafone Malta Limited, Mobisle Communications Limited, Melita Cable plc.

Retail revenues from:	Set up/connection charges	Lm _____
	Subscriber rental	Lm _____
	Call charges	Lm _____
Interconnection revenues from call termination:		Lm _____
	TOTAL	Lm _____

ii) Information requested from:

All licensed Internet and Other Data Networks Service Providers

Revenue from Internet and Other Data Networks Services:

Access Charges ADSL/Cable	Lm _____
Internet Service Provision	Lm _____
TOTAL	Lm _____

D. Cable systems and services

Only one operator, Melita Cable plc, is authorised to provide such services in Malta.
