

Market 5 - Wholesale Broadband Access Market

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

Final Decision

Document No.	MCA/D/13-1521
Date	6 th March 2013

Contents

1.	Executive summary	2
2.	Introduction	4
2.1	Market review methodology	4
2.2	Consultation	6
2.3	Liaison with the Competition Authority	6
2.4	Structure of the document	6
3.	Definition of the wholesale broadband access market	8
3.1	Main players and wholesale broadband offers	8
3.2	Summary of the Definition of the wholesale broadband market	9
3.3	Responses to Consultation and the MCA's replies regarding the market definition	12
3.4	Decision on the market definition	15
4.	Analysis of the wholesale broadband access market	16
4.1	Overview of the wholesale broadband access market	16
4.2	Summary of the analysis of the wholesale broadband access market	16
4.3	Responses to Consultation and the MCA's replies regarding the market analysis	22
4.4	Decision on the assessment of SMP	23
5.	Approach to Regulation	24
5.1	Responses to Consultation and the MCA's replies regarding the remedies	24
5.2	Decision on the non imposition of remedies	25

1. Executive summary

In accordance with Article 9 of the Electronic Communications (Regulation) Act, the Malta Communications Authority (MCA) is obliged, amongst other things, to carry out reviews of competition in communications markets to ensure that regulation remains appropriate in the light of changing market conditions.

This decision sets out the MCA's conclusions on the market review of the wholesale broadband access market in Malta. In carrying out of this analysis the MCA was assisted by independent consultants Analysys Mason.

This decision summarises the findings of a more detailed study that was published for national consultation¹ on the 15th June 2012. During this consultation period the MCA received three responses from Melita plc., GO plc., and Vodafone Malta Ltd.

As required by Regulation 7 of the Electronic Communications Networks and Services (General) Regulations, 2011, the MCA's proposals including the responses received during the national consultation, were notified to the European Commission (the 'EU Commission or 'Commission') and to other National Regulatory Authorities (NRAs) as well as the Body of European regulators (BEREC) on the 15th October 2012.

On the 15th November 2012 the Commission concluded its investigation and published its Comments Letter. The EU Commission did not make any comment specific with respect to the conclusions of the review of the wholesale broadband access market.

Based on the analysis carried out, the MCA arrives to the following conclusions:

Definition of relevant market

According to the analysis carried out and evidence available to the MCA, the MCA concludes that the wholesale broadband market is national in scope and:

- includes wholesale broadband access over DSL
- includes wholesale broadband access over cable
- excludes wholesale broadband access over WiMAX
- includes wholesale broadband access over fibre
- includes DSL and cable self-supply.

Assessment of significant market power

Throughout its analysis, the MCA has found that Melita and GO could not behave independently from one another and *in fine* independently from other players.

¹ <http://www.mca.org.mt/consultations/review-wholesale-broadband-access-markets-consultation-mcac12-0898>

Consequently, the MCA considers that at present there is no clear evidence that supports the finding of single market dominance at the wholesale level.

Nevertheless, the MCA is of the opinion that given the similar position held by Melita and GO at the wholesale level, this market merits a further assessment for the potential finding of joint dominance.

In its last market review in 2008, the MCA carried out an extensive review of the conditions which would lead to joint dominance. Since then, the retail market has undergone a positive evolution, as GO and Melita have a more differentiated behaviour and position in 2012 than in 2008. Therefore, the MCA believes that there is not sufficient evidence to prove that GO and Melita enjoy a joint dominant position. Therefore, the MCA concludes that no operator in the wholesale broadband access market enjoys SMP.

Approach to Regulation

No regulatory obligations are currently imposed in the market. Given that no SMP designation is made within this market review, the MCA will continue not to impose any *ex ante* regulatory obligations on the Maltese wholesale broadband access market.

2. Introduction

The regulatory framework for electronic communications networks and services in the European Union (EU) is designed to create harmonised regulation across Europe and aims at reducing barriers to market entry, while fostering effective competition to the benefit of industry and consumers. The basis for this regulatory framework are five Directives which were first implemented in the EU in 2002 and later amended in 2009².

The EU Directives were transposed into Maltese law on 12 July 2011. The relevant national legislation is the Malta Communications Authority Act (Cap 418); the Electronic Communications (Regulation) Act (Cap 399) (hereinafter referred to as 'ECRA'); and the Electronic Communications Networks and Services (General) Regulations of 2011 (hereinafter referred to as the 'ECNSR').

As required at law, the MCA is obliged to periodically carry out reviews of competition in communications markets to ensure that regulation remains appropriate in the light of changing market conditions.

Each market review is divided into three main parts:

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

More detailed requirements and guidance on the market review process are provided in the Directives, the ECRA, the ECNSR and in additional documents issued by the European Commission and the MCA.

2.1 Market review methodology

In 2003 the Commission published its first Recommendation on relevant markets, which identifies a set of 18 markets in which *ex ante* regulation may be warranted³.

² 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 authorisation 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.

³ Commission Recommendation of 11 February 2003 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 communication networks and

The Recommendation seeks to promote harmonisation across the EU by ensuring that the same product and service markets are subject to a market analysis in all Member States. In December 2007 the Commission adopted its revised Recommendation on relevant markets⁴. This revised Recommendation presents a much shorter list of seven markets that NRAs are required to analyse for the purpose of ex ante regulation.

The Commission has issued guidelines on market analysis and the assessment of SMP ('SMP Guidelines')⁵. These guidelines set out the principles for use by NRAs in the analysis of markets and effective competition under the regulatory framework for electronic communications networks and services. The MCA has also published its own document⁶ outlining the guidelines on the methodology to be used for assessing effective competition in the Maltese electronic communications sector. The MCA is required to take these guidelines into account when analysing a product or service market in order to assess whether the market under investigation is effectively competitive.

As required by Regulation 7 of the ECNSR, the results of these market reviews and the proposed draft measures need to be notified to the Commission and to other NRAs in Europe. The Commission and other NRAs are invited to comment within the one-month consultation period. If the Commission believes that the market definition, proposals to designate an operator with SMP, or proposals to designate no operator with SMP, would create a barrier to the single market, or if the Commission has serious doubts as to its compatibility with Community law and issues a notice under Article 7(4) of the Framework Directive, the MCA is required by Regulation 8 of the ECNSR to delay the adoption of these draft measures for a further period of two months while the Commission considers its position.

The MCA has collected market data from a variety of internal and external sources, including providers of electronic communications networks and services, in order to carry out its market definition and market analysis procedures thoroughly, based on established economic and legal principles.

The MCA commissioned Analysys Mason to assist it in conducting its market review of the broadband markets.

services (notified under document number C(2003) 497) (2003/311/EC). Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:114:0045:0045:EN:PDF>

⁴ Commission Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (notified under document number C(2007) 5406) (2007/879/EC). Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:344:0065:0069:en:PDF>

⁵ Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (2002/C 165/03). Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2002:165:0006:0031:EN:PDF>

⁶ <http://www.mca.org.mt/article/market-review-methodology>

2.2 Consultation

As required by Regulation 5(7) of the ECNSR, the MCA published the results of the market review and provided market players with the opportunity to comment on the findings prior to adopting its final proposals.

The national consultation period ran from the 15th June 2012 to the 3rd September 2012. In response to the national consultation, the MCA received contributions from three market players: GO plc., Melita plc. and Vodafone Malta Ltd..

GO complemented its contribution with two documents: an opinion paper by Professor Nicolas Petit of the University of Liège, commenting on the MCA's finding in relation to the wholesale broadband access market; and a report by Plum Consulting related to the determination of market power and setting of remedies for fibre access in the market for unbundled access. For sake of clarity, the MCA included these contributions under GO's response.

The three responses to the consultation are referred to in the relevant sections of this decision.

2.3 Liaison with the Competition Authority

Under Article 9 of the ECRA, there is a requirement on the MCA to carry out an analysis of a relevant market within the electronic communications sector. This analysis must be carried out in accordance, where appropriate, with an agreement with the National Competition Authorities (NCA) under Article 4 of the MCA Act.

In line with the co-operation agreement signed on 20th May 2005 between the MCA and the Office of Fair Competition, succeeded by the Office for Competition forming part of the Malta Competition and Consumer Affairs Authority (MCCAA), the MCA has concluded a two-week consultation process with the MCCAA.

The MCCAA agreed with the findings of the MCA and in the comments letter invited the MCA to continue to monitor the market to ensure that market remains competitive.

2.4 Structure of the document

The remainder of this document is structured as follows:

- **Section 3** provides a summary of the market definition of the wholesale broadband access market, including the responses received during the consultation process and the MCA final decision; and

- **Section 4** presents an overview of the market analysis of the wholesale broadband access market, including the responses received during the consultation process and the MCA decision with respect to the finding of SMP.
- **Section 5** outlines the MCA's final decision on the approach to regulation and the feedback received during the consultation period.

3. Definition of the wholesale broadband access market

This section provides an overview and summary of the analysis carried out by the MCA to define the wholesale broadband access market in Malta. The findings and conclusions outlined below are explained in further detail in the national consultation document published by the MCA in June 2012, and the response to consultation and draft decision document notified to the EU Commission on the 15th October 2012.

3.1 Main players and wholesale broadband offers

In Malta, there are currently a small number of ISPs which are making use of wholesale broadband access offers.

GO's wholesale broadband access offer

Despite having no regulatory obligation to do so, GO was still providing the wholesale broadband offer it was required to offer until 2008. This offer has since then remained largely the same.

ISPs are therefore able to create a retail offer based on the most appropriate wholesale offer, depending on their capabilities/expertise and level of investment.

Melita's wholesale broadband access offer to MITA

At the time of the last round of the MCA's review of Market 5⁷, Melita provided wholesale third-party broadband access to at least one client, the Malta Information Technology Agency (MITA). This was still the case in 2012.

MITA is a Government agency specialized in Information and Communications Technology (ICT), with a mandate spanning from ICT policy to ICT programmes and initiatives in Malta. With regard to broadband, MITA acts as a state-controlled ISP for government end users. It serves essentially non-residential end users (e.g. schools, hospitals and the university) but also residential end users (e.g. selected government employees). The service provided by MITA allows end users to access MITA Intranet and the public Internet, via (*inter alia*) cable modem. As an alternative, MITA also provides a similar service over the DSL infrastructure (on the basis of GO's wholesale inputs).

The agreement between MITA and Melita is a commercial offer, several terms of which are confidential. However this offer exhibits many functional and technical characteristics that are similar to those of DSL wholesale broadband.

⁷ "Wholesale Broadband Access Market, Identification and Analysis of Markets, Determination of Market Power and Setting of Remedies" released by MCA in 2008.

3.2 Summary of the Definition of the wholesale broadband market

As underlined by the Commission, *“the relevant product/service market comprises all those products or services that are sufficiently interchangeable or substitutable, not only in terms of their objective characteristics, by virtue of which they are particularly suitable for satisfying the constant needs of consumers, their prices or their intended use, but also in terms of the conditions of competition and/or the structure of supply and demand on the market in question”*⁸.

The definition of the relevant product market is based on an analysis of demand and supply-side substitutability between different products and services which could potentially form part of the market under investigation.

In order to define the wholesale broadband market in Malta the MCA examined whether:

1. wholesale broadband access services available over DSL and cable are part of the same market
2. wholesale broadband access services available over DSL and WiMAX are part of the same market
3. wholesale broadband access over DSL and wholesale broadband access over fibre are part of the same market
4. self-supply and wholesale broadband access are part of the same market.

3.2.1 Wholesale broadband access over DSL and cable

The MCA carried out a technical analysis to assess whether wholesale access services can be provided over DSL and cable. At present the cable operator has a working wholesale agreement with MITA which has several characteristics similar to a wholesale broadband access, which demonstrates the feasibility of a wholesale broadband access over cable.

Secondly, wholesale access products over the cable network and over the DSL network are equivalent in terms of functionality, coverage, interconnection and pricing.

Finally, the MCA also concluded that if the cable network operator offered a wholesale access solution to ISPs, these ISPs could take up the offer in case that the DSL incumbent applies a small but significant hypothetical price increase to its wholesale DSL product.

From a supply side perspective the MCA concluded that there is limited or no basis for supply side substitution to be observed in practice if the DSL provider increases the

⁸ Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (2002/C165/03), §44.

price of wholesale broadband access or vice versa due to the significant investment costs.

On the basis of this analysis, the MCA concludes that wholesale broadband access over DSL and cable networks forms part of the same relevant product market.

3.2.2 Wholesale broadband access over DSL and WiMAX

In its previous market analysis, the MCA believed that wholesale access on WiMAX was an option which would be available in the near future, especially since Vodafone has an access obligation as part of its licence conditions. However, no ISP has ever requested Vodafone to offer a wholesale access offer, and Vodafone has now ceased offering WiMAX itself to new retail clients. As a result, no wholesale broadband offer over WiMAX is likely to exist in Malta.

Given the inexistence of a WiMAX wholesale offer, and the low take-up of the service at retail level the MCA concludes that the wholesale broadband market currently does not include WiMAX.

3.2.3 Wholesale broadband access over DSL and fibre

In the NGA Recommendation⁹, the Commission highlights that the review of the broadband markets (Market 4 and Market 5) should take account of NGA networks. In addition, as highlighted by BEREC¹⁰, most Member States (17 NRAs) have decided to include fibre-based services in the relevant product market for Market 5.

At the time the consultation document was published in June 2012, GO had an extensive deployment of FTTC but had not started any FTTH deployment. However in October 2012 whilst the proposed decision was being reviewed by the EU Commission, GO announced the launched of its FTTH network in Malta under the brand name '*rapido*'¹¹. As at the date of publication of this decision, GO has confirmed that they have deployed FTTH in Tal-Mirakli area in Lija, which covers a very small geographic area with less than 300 residential units. GO has also deployed FTTH in some other upmarket multi-dwelling developments which in total account for around 1000 connections passed.

In this final decision the MCA is taking into account this new development, whilst at the same time confirming the analysis and conclusions put forward in the consultation document.

⁹ Commission Recommendation of 20 September 2010 on regulated access to NGA (2010/572/EU), Article 5.

¹⁰ Draft BEREC report on Co-investment and SMP in NGA networks, BoR(11)69, 8 December 2011.

¹¹ <http://www.go.com.mt/Default.aspx?ID=2234>

In the consultation document the MCA concluded that when GO deploys the fibre network as a replacement for its copper network, the wholesale broadband access service it provides is likely to be very similar to the existing copper-based wholesale broadband access service, with higher speeds. Therefore, in the event of a SSNIP of the copper-based wholesale broadband access service, an alternative operator could switch to the wholesale broadband access service provided over the fibre network (but not *vice versa*). The MCA therefore concluded that where the two products co-exist there will be substitution from copper to fibre.

From a supply-side perspective the MCA also concluded that there is one way substitution. In the case where a SSNIP is applied on copper wholesale access offers, any operator using fibre unbundling or having a fibre network can offer a fibre-based wholesale broadband access product.

Based on these findings and the current FTTH deployment by GO, the MCA concludes that wholesale broadband access over DSL and over fibre fall within the same relevant product market. This is in line with the most recent practice in other EU countries, since publication of the Commission's NGA Recommendation.

3.2.4 Wholesale broadband access and self-supply

It is a common practice for the network operator of a broadband infrastructure to supply services internally to its retail arm (which may be a wholly-owned subsidiary ISP of the same entity).

In Malta, both cable and DSL providers offer self-supply broadband access to their downstream ISPs. GO provides its own downstream ISP with a self-supplied product, while it offers ISPs a wholesale third-party product. The cable operator does not provide third-party access to its network and, in fact, cable broadband is sold almost exclusively on a "self-supply" basis (with the exception of MITA).

The MCA has concluded that based on a number of considerations particular to the Maltese situation self-supply services over the DSL and the cable network should be included in the wholesale broadband access market. These considerations include:

- *network roll-out and geographical coverage* – these are basically identical for cable and DSL in Malta
- *availability of spare capacity* – this is clearly not an issue in Malta, due to the ability for one party to respond immediately to increased demand or new services offered by the other players
- *existence of wholesale billing and account management systems* – this is not a problem for GO or Melita, since these systems already exist (in the case of GO) or can easily be implemented (in the case of Melita)

- *low switching costs* – switching costs are almost negligible at the retail level and contained at the wholesale level¹².

3.2.5 Relevant geographical market

As underlined by the Commission in the guidelines on market analysis (the “SMP Guidelines”)¹³, a relevant geographical market comprises the area in which the undertakings concerned are involved in the supply and demand of products and/or services, in relation to which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different to those areas.

According to the SMP Guidelines, in the electronic communications sector, the definition of the geographical scope of the relevant market is generally determined with reference to the area covered by a network and to the existence of legal and other regulatory instruments¹⁴.

Locally, both DSL and cable broadband infrastructures have been extended to cover almost the entire national territory, and services are sold in exactly the same way regardless of location.

Based on the abovementioned characterisation and market conditions, the MCA takes the view that the relevant geographical market for the relevant product and service markets under consideration is the national territory of Malta.

3.3 Responses to Consultation and the MCA’s replies regarding the market definition

In its response to the consultation document, Vodafone made a number of observations regarding the definition of the retail and wholesale broadband market. Vodafone invited the MCA to further explore the impact of differences in speeds between broadband packages offered by GO (up to 35Mbit/s) and broadband packages offered by Melita (up to 100Mbit/s) on the substitutability between broadband packages.

Notwithstanding the broadband platforms used for broadband delivery in respect of the principle of technology neutrality, the MCA acknowledges there is a speed difference between product speeds of 35Mbit/s (currently provided by GO) and product speeds up to 100Mbit/s provided by Melita. However, with a forward-looking

¹² The MCA acknowledges the operational complexity involved when an ISP switches from one infrastructure to the other, particularly as regards migration of the user base. However, the possibility to “make before break” still proves that there is a possibility for minimal end-user impact, provided the migration plan is properly executed.

¹³ Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (2002/C 165/03), paragraph 56.

¹⁴ Ibid. paragraph 59.

view, the MCA believes that it is very likely that GO's current 35Mbit/s products will evolve further towards 100Mbit/s offers. This has in fact already materialised, albeit on a very limited geographical scale, with the launch of the *rapido* service.

Furthermore, using chain substitution analysis, it is widely acknowledged that it is possible to demonstrate that broadband products at 20Mbit/s and at higher speeds are substitutable. This is because 20Mbit/s products are substitutable with 35Mbit/s products which are themselves substitutable with 50Mbit/s products and so forth. As a result, the MCA confirms its view that there is sufficient substitutability to conclude that all broadband products offered belong to the same market. This conclusion is also in line with current practice across the EU.

Similarly to the previous rounds of market review in 2006 and 2008, Melita argued that cable should not be included in the market definition of Market 5, as Melita's arrangement with MITA is not equivalent to wholesale broadband access and the cost of providing wholesale broadband access may not be reasonable.

The MCA notes that Melita provided some rather vague information about MITA migrating to cloud-based arrangement, but did not submit any detailed explanation to support its argument.

The MCA cannot but recall all the points made in its last 2008 decision and again in this current analysis:

- The inclusion of cable networks in the market for wholesale broadband access in Malta is a market reality, resulting from the fact that wholesale broadband access offer over cable is technically, economically and functionally possible.
- Current MITA arrangements are sufficiently similar to wholesale broadband access no matter what happens in the future. In particular, the fact is and will remain that wholesale broadband access on cable is possible and has happened in Malta.
- The European Commission has already accepted this market definition, and other NRAs such as those in the UK and Austria have also included cable networks in the market definition of the wholesale broadband access market.

Melita also argued that self-supply should not be included in the market definition, because of the Commission's recently articulated position on self-supply in the Finnish and Czech cases¹⁵. Melita also challenged the MCA's understanding of the research paper by Cave, Stumpf & Valetti¹⁶ by concluding that this source was cautious about the inclusion of self-supply in the market definition.

¹⁵ Letter to FICORA from the European Commission dated 18/6/2012 (Cases FI/2012/1328-1329), and Letter to CTU from the European Commission Decision dated 10/8/2012 (Case CZ/2012/1322).

¹⁶ Review of certain markets included in the Commission's Recommendation on Relevant Markets subject to *ex ante* Regulation, Martin Cave, Ulrich Stumpf, Tommaso Valetti, July 2006.

The MCA believes that the competitive constraints stemming from cable should be sufficiently strong in order to be automatically taken into account at the market definition stage. It agrees with the Commission that *"it is essential that the degree or strength of the constraint posed by vertically-integrated companies is correctly estimated in the assessment"*¹⁷.

In the Consultation Document, the MCA highlighted several market justifications demonstrating that the inclusion of self-supply in the market definition reflects Malta's particular national circumstances, while respecting the principles laid out by the Commission. The MCA's assessment of the Maltese market situation is also shared by Professor Nicolas Petit of the University of Liège, as part of GO's contribution. In his opinion paper on the findings of the Consultation Document in relation to the wholesale broadband access market dated 31 August 2012, Professor Petit highlighted that he concurs with the various market definitions reached by the MCA. Professor Petit points out that *"a large proportion of the supply of wholesale broadband access services is captive, i.e. it is almost exclusively made up of internal supplies by the two incumbent players, GO and Melita, to their downstream retail subsidiaries"*.

Furthermore, as mentioned in the Consultation Document, the MCA also explored whether the exclusion of self-supply from the market definition would lead to a different regulatory outcome and concluded that, in any case, the exclusion of self-supply from the market definition would not change the outcome of the market review.

Finally, in the Finnish case, FICORA came to the same conclusion, and the Commission considered that *"since a conclusion on the exact scope of the market is not relevant in the present case for the purpose of the SMP assessment and the imposition of regulatory obligations, the inclusion of cable-based broadband access in the market definition can be left open"*¹⁸. Therefore, even if the Commission expressed comments on FICORA's market definition, it did not contest FICORA's conclusion regarding the inclusion of self-supply in the market definition.

¹⁷ Letter to FICORA from the European Commission dated 18/06/2012 (Cases FI/2012/1328-1329)

¹⁸ Ibid. page 6

3.4 Decision on the market definition

According to the analysis carried out and evidence available to the MCA, the MCA concludes that the wholesale broadband market has a national geographical scope and:

- includes wholesale broadband access over DSL
- includes wholesale broadband access over cable
- excludes wholesale broadband access over WiMAX
- includes wholesale broadband access over fibre
- includes DSL and cable self-supply.

4. Analysis of the wholesale broadband access market

4.1 Overview of the wholesale broadband access market

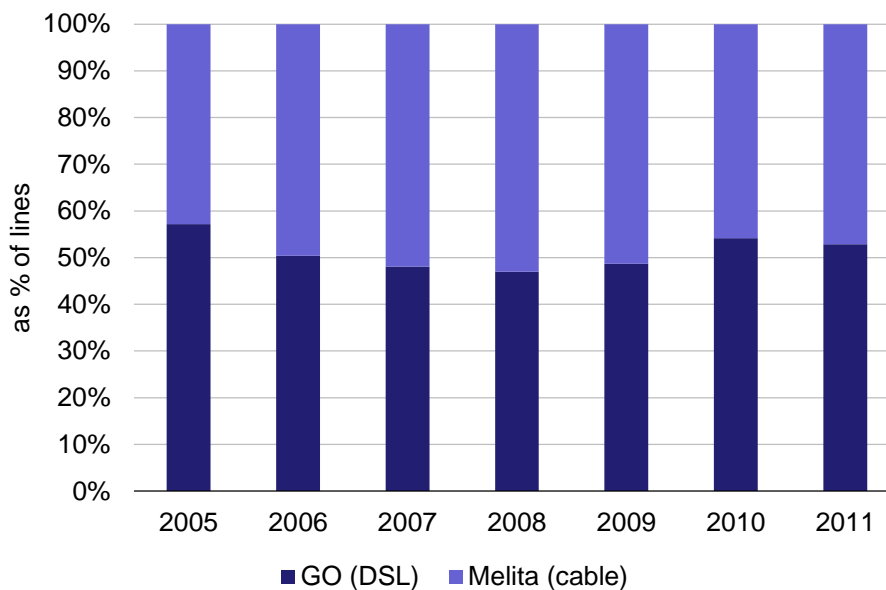
At the end of 2011 there were around 900 wholesale broadband access lines in Malta in absolute terms, of which:

- around 600 were wholesale broadband access lines over DSL (down from around 10 000 lines in 2007)
- around 300 were wholesale broadband access over cable purchased by MITA¹⁹.

Thus, excluding self-supply, GO has a 67% market share and Melita has 33%.

When taking into account self-supply, the wholesale broadband market includes all retail DSL and cable lines, i.e. 125 000 lines. GO and Melita each have around 50% of the market, with slight variations over time: GO's market share declined from 57% of the lines in 2005 to 47% in 2008, and then rose again to represent 53% of lines in 2011, as shown below.

Evolution of wholesale broadband market shares (taking into account self-supply)
[Source: MCA, EU Commission]



4.2 Summary of the analysis of the wholesale broadband access market

Following the 2008 review of the wholesale broadband access market the MCA concluded that no operator enjoyed single or collective SMP and therefore no regulation was imposed in this market since then.

¹⁹ Source: interviews with MITA.

As a result prices and access offers are no longer regulated and are thus subject of commercial negotiations (which means they are covered by business confidentiality). However, the MCA understands that both wholesale offers and prices have not evolved significantly during the last few years.

4.2.1 Other factors affecting competition in the market

The MCA also assessed a number of factors that have an impact on competition in the wholesale market:

- economies of scale and scope
- sunk costs and infrastructure not easily replicable
- vertical and horizontal integration
- barriers to switching
- countervailing buyer power.

In terms of economies of scale and scope and vertical and horizontal integration, Melita and GO share very similar positions. Both network operators acquired significant economies of scale and scope over their respective networks, mainly as a result of their periods as monopoly operators prior to liberalisation, as well as the provision of additional services such as broadband over their networks.

Melita and GO are also both vertically and horizontally integrated. Consequently, it is clear that Melita and GO gain advantage from this vertical and horizontal integration, through a good alignment between the objectives of their retail-like (sales and marketing) and wholesale-like (network and operation) divisions, as well as through multiple service offerings and their ability to leverage from their presence in other markets.

The costs of building a nationwide wired network remain very significant. Given the support that GO and Melita received from the Government when building their networks, it would be extremely difficult for another player to replicate either of these infrastructures, as the legal environment and the economics of the roll-out would necessarily be much less favourable today.

For an ISP, the costs of switching between wholesale broadband access over DSL and wholesale broadband access over cable are relatively manageable. Indeed, the MCA believes that, from a technical perspective, there is likely to be little difference between the technical interface for a wholesale broadband product over cable and that for DSL. In both cases, an ISP would require network equipment such as routers and firewalls to collect the traffic at the operator network edge. However, there would be more operational complexity (and hence costs) associated with migration of the ISP's customer base from one platform to another. This would typically involve obtaining new CPE and migrating customers individually, which could incur significant

operational costs. However, the possibility of activating the new line before cancelling the old one would most probably minimise end-user disruption and prevent revenue loss from the ISP's perspective. Furthermore, since in Malta the CPE is owned by the network operator rather than the ISP, the switching process is further facilitated for the ISP.

In terms of countervailing buyer power MITA has been able to exert pressure on GO and Melita, because it has a captive user base that GO and Melita cannot address at the retail level. In practice, MITA uses this countervailing buyer power to obtain a better quality of service (faster escalation process, shorter time to repair or lead time, etc.) compared to the market average. However, apart from MITA, other ISPs are not in a position to exert such pressure given that only GO is currently offering wholesale broadband access to third parties.

4.2.2 Single market dominance

Throughout its analysis of the retail and wholesale broadband access markets, the MCA has found that Melita and GO appear to have similar positions. The MCA considers that, at a wholesale level, both Melita and GO:

- have highly similar market shares (including or excluding self-supply)
- enjoy a similar level of economies of scale and scope
- own an infrastructure that provides similar coverage and is not easily replicable (without involving very large sunk costs for an ISP)
- are vertically and horizontally integrated
- operate in a wholesale broadband market that has high barriers to entry, and
- do not face any credible countervailing buyer power.

Consequently, the MCA concluded that at present there is no clear evidence to support a finding of single market dominance at the wholesale level. Indeed, neither GO nor Melita can act independently of the other operator (and ultimately of customers) in this wholesale market.

Nevertheless, given the similar positions held by Melita and GO at the wholesale level, in its consultation document the MCA made a further assessment for the potential finding of joint dominance.

4.2.3 Joint market dominance

The MCA assessed whether in line with Regulation 8(3) of the ECNSR *“Two or more undertakings can be found to be in a joint dominant position within the meaning of regulation 8 of these Regulations if, even in the absence of structural or other links*

between them, they operate in a market the structure of which is considered to be conducive to coordinated effects”.

Conditions prevailing in the previous 2008 round of market analysis

In the 2008 review of the wholesale broadband market, the MCA conducted an extensive review of the conditions that would lead to joint dominance, including:

- whether the characteristics of the market make it conducive to tacit co-ordination, and
- whether such form of co-ordination is sustainable.

Having taken into consideration an extensive number of factors, the MCA concluded that the following criteria give an incentive to GO and Melita to co-ordinate in a potentially sustainable way:

- **High and similar market shares** – both Melita and GO had market shares almost equal in terms of lines or revenue in the wholesale broadband market
- **Highly concentrated market** – the Herfindahl-Hirschman Index (HHI), which is a single measure of concentration in a given market, indicated that both the wholesale and the retail markets were highly concentrated
- **Similar costs and prices** – GO and Melita had a tendency to often match each other’s retail offers with relative ease and within a short period of time, such that the retail prices for the products of both players remained relatively similar over time. The MCA further inferred from this trend that the wholesale costs of producing these retail products must also be fairly similar.
- **Vertical and horizontal integration** – both GO and Melita are vertically and horizontally integrated
- **Market transparency** – movements in retail pricing are immediately known by the other operator, and each operator has developed means to observe or even anticipate the other’s marketing strategy or network deployment
- **Market approaching maturity** – given the high level of penetration at the time (around 75% in mid-2008), the broadband market was considered a mature market with limited growth prospects (in terms of the number of lines)
- **Lack of countervailing buyer power** – there was no credible countervailing buyer power that could be exerted on GO or Melita at the wholesale level
- **High barriers to entry** – because of the significant sunk costs involved in building a national network, the wholesale broadband market is characterized by high barriers to entry.

However, the MCA also noted that there were some criteria that did not point towards joint dominance, such as:

- **The entry of Vodafone on the basis of its WiMAX network** – after Vodafone launched attractive offerings in 2007, GO and Melita reacted to this new market constraint by upgrading their products and reducing their prices. The potential new competition from Vodafone was seen as a constraint on the behaviour of Melita and GO, both in terms of improved new offers at the retail level, but also in terms of co-ordinated behaviour. Finally, Vodafone’s commitment to provide wholesale access was assumed to lead to the entry of this player in the wholesale broadband market.
- **The potential for new broadband wireless access (BWA) networks** – the MCA awarded three BWA licences in 2005 (to Vodafone, Cellcom²⁰ and MobIsle²¹), with an obligation to cover more than 90% of the population within three years of award. The MCA considered that additional potential competition would also create a further potential constraint on the behaviour of Melita and GO.
- **The evolution of broadband offers** – a few months before the MCA released the new decision for the previous market review, significant changes had occurred, with GO and Melita revamping their product offering to include new improved packages (higher speeds, higher download limits). This intensified competition on the retail market, both in terms of prices and in terms of product characteristics, suggested to the MCA that a positive change in market dynamics was occurring, pointing towards a more competitive market.

On the basis of these findings, the MCA concluded that there was insufficient evidence to determine that Melita and GO had a joint dominant position. This resulted in the withdrawal of all regulation from the wholesale broadband market, even though the MCA recognised that there was probably still a good case for regulation at wholesale level.

Evolved market environment in 2012

Of the three main criteria that did not point towards joint dominance, the first two have failed to materialise: Vodafone and other potential BWA players failed to make a real impact on the retail broadband market (and Vodafone eventually did not offer wholesale access to its WiMAX network as there was never a request for such access).

However, regarding the third criterion, it is clear that the retail broadband offers from GO and Melita have continued to evolve, with continual reductions in prices, and

²⁰ Cellcom used to be a consortium of ISPs that also purchased wholesale broadband access from GO.

²¹ MobIsle has since been acquired by GO.

increases in speeds and volume caps. These developments are partly a result of substantial technical innovation since 2008, with Melita deploying DOCSIS3.0 and GO rolling out FTTC. The strong levels of innovation and the existing competition based on both price and services tend to contradict any potential finding of joint dominance.

In addition, absent regulation in the wholesale broadband market, the retail broadband market has evolved in a positive manner, with continued growth in terms of broadband penetration, and increased take-up of higher-speed packages and bundles.

Although several of the factors that pointed towards joint dominance in 2008 are still valid (such as market transparency and concentration or high barriers to entry), others are no longer true:

- Retail prices and products are now less similar than they used to be. For example, while Melita now offers speeds up to 100Mbit/s, GO still only offers packages up to 35Mbit/s. Nevertheless, all packages have registered huge improvements in terms of speeds.
- The market is now evolving under a new growth paradigm: towards higher speeds and more bundling. While it is unclear whether much higher speeds (e.g. 100Mbit/s) will justify higher broadband prices than today, it is a market reality that significant revenue growth may be achieved from a massive conversion of the broadband user base to multiple-play products. Thus, although the market may soon reach saturation in terms of number of lines, additional revenue growth can still be expected.

In addition, the deployment of a newly-built fibre-based infrastructure (either provided by GO alone or under the Government's national broadband plan) means it is possible that new players could enter the wholesale broadband market.

As a result, the MCA concludes that there is no sufficient evidence to prove that GO and Melita enjoy a joint dominant position. Since the last review, the retail market has undergone a positive evolution, with a greater differentiation between the behaviour and positions of GO and Melita in 2012 than there was in 2008.

The MCA acknowledges that until a new fibre-based infrastructure has been built, there may still be a good case for regulation at the wholesale level. However, given the insufficiency of evidence, the MCA declares that no operator in the wholesale broadband access market has been demonstrated to enjoy a position of SMP.

A full assessment of the conditions of competition in the retail broadband and wholesale broadband access markets can be found in Sections 4.3 and 6.2 of the consultation document.

4.3 Responses to Consultation and the MCA's replies regarding the market analysis

In its response to the consultation document, Vodafone mentioned that the current state of the market with only two major broadband providers was detrimental to consumers, as they had no choice if they were dissatisfied with the two major broadband providers.

While it is true that consumers have limited choice besides the two major broadband providers, the MCA wishes to recall that it would welcome the entry of a new major player in this market, and where possible, would support the development of such a new entrant, which would increase competition to the benefit of end users. In the current context, however, the MCA believes it is creating a balanced framework to safeguard competition and lower market entry barriers, taking into account the current status of the Maltese broadband market, where prices are reasonably low and penetration continues to increase. The MCA's regulatory approach to wholesale access (in particular remedies imposed in the upstream physical infrastructure access market) specifically ensures a balanced approach to regulation, such that it allows for efficient market entry but at the same time allows the market itself to develop based on existing infrastructure competition.

In response to the MCA's analysis, Melita argued that GO has been engaging in anti-competitive practices through service bundling and the acquisition of DSL-based ISPs in the context of "*vigorous platform competition between GO and Melita*". Melita further argues that this alleged problem of anti-competitive behaviour was the MCA's fault, since the MCA's decision to de-regulate Market 5 in 2008 led to the disappearance of wholesale access.

The MCA observes that Melita has submitted no specific proof of anti-competitive behaviour arising from the use of bundles, and recalls that if Melita can prove such behaviour, it could resort to *ex post* competition law. The MCA also remarks that Melita is replicating GO's bundles, and in some cases provides more attractive bundles using its own network and without resorting to any wholesale access from other operators. Furthermore, the MCA notes that although the wholesale broadband market is de-regulated with no obligation currently imposed on players in this market, wholesale access may still be provided on a commercial basis. Thus, wholesale access may be provided on a voluntary basis by GO (which has a commercial offer in place) and/or by Melita itself (which has no commercial offer in place and has persistently refused to engage in any commercial negotiations in this regard).

On another note, through the opinion paper from Professor Nicolas Petit, GO supported the MCA's position with regard to analysis of the wholesale broadband market.

In particular, the opinion paper highlighted that a finding of single dominance would be ruled out by the structure of the wholesale broadband market, where the two incumbents compete on equal footing with similar market positions and on the basis of proprietary infrastructures. Any attempt to lay down regulatory obligations on either of the operators through this doctrine would thus be discriminatory.

The position paper also concluded that the two broadband incumbents could not be deemed to jointly occupy a dominant position, despite the fact that they formed a tight symmetrical duopoly, because their commercial conduct differed significantly and several ongoing market trends undermined the potential for co-ordination (e.g. demand growth, horizontal integration, etc.).

4.4 Decision on the assessment of SMP

Throughout its analysis, the MCA has found that Melita and GO could not act independently of each other and, ultimately, independently of other players. Consequently, the MCA considers that at present there is no clear evidence to support a finding of single market dominance at the wholesale level.

Furthermore, given the similar positions held by Melita and GO at the wholesale level, the MCA carried out a further assessment for the potential finding of joint dominance.

In its last market review in 2008, the MCA carried out an extensive review of the conditions which would lead to joint dominance. Since then, the retail market has undergone a positive evolution with a greater differentiation between the behaviour and positions of GO and Melita in 2012 than there was in 2008. As a result, the MCA believes that there is no sufficient evidence to prove that GO and Melita enjoy a joint dominant position.

Therefore, the MCA declares that no operator in the wholesale broadband access market has been demonstrated to enjoy a position of SMP

5. Approach to Regulation

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

However, in accordance with Article 5(3) of the ECNSR, where the MCA concludes that a finding of dominance cannot be ascertained, the MCA is not allowed to impose or maintain any specific ex-ante regulatory obligations.

Following the market analysis, the MCA concluded that no operator holds single or joint SMP in the wholesale broadband access market and therefore the MCA cannot impose any regulatory obligations in the market.

5.1 Responses to Consultation and the MCA's replies regarding the remedies

Vodafone raised its concern that in the absence of regulation in the wholesale broadband market, an undertaking would have no possible means of entering the broadband market, thus precluding end users from benefiting from more-advantageous and innovative retail propositions. Vodafone further commented that the MCA should impose obligations on GO and/or Melita to "*meet reasonable request for access to, and use of,*" their network to provide wholesale broadband access.

The MCA recalls that as part of the review of the wholesale broadband market, the MCA may not impose obligations on GO and/or Melita unless they are deemed to have SMP in this market. However, if an undertaking were to be refused reasonable access, then this undertaking may either resort to *ex post* competition law or enter a dispute resolution process²². To the extent permitted by its regulatory powers, the MCA remains committed to assisting any undertaking to gain access to the existing networks, if operators were acting in an anti-competitive way to prevent this from happening.

Melita expressed concern about GO's unregulated wholesale broadband offer, pointing out the shortcomings of this offer with regard to market expectations.

While the MCA acknowledges that GO's commercial wholesale broadband offer may have deficiencies in comparison to a regulated offer, the fact remains that GO has an existing wholesale offer in place (in the absence of wholesale regulation), which may serve as an initial entry point for discussions leading to potential market entry. The

²² MCA Act, Article 43

MCA also recalls that Melita has no such wholesale broadband offer and understands that Melita has always refused to take part in any negotiation regarding wholesale access, even though Melita might very well be in a position to provide an offer in the market which could better meet market expectations if it wanted to.

Melita further made the allegation that MCA's approach to regulation in the wholesale broadband market will damage the future availability of NGA-based services, as GO will not be obliged to offer fibre-based wholesale broadband access, notably virtual unbundled local access (VULA).

The MCA confirms that as a result of the review of the wholesale unbundled infrastructure access market, fibre unbundled access and VULA access are to be regulated when and if FTTH was deployed by GO. The MCA also highlights that according to the NGA Recommendation²³, the obligation of fibre wholesale broadband access may not be necessary if an obligation of wholesale unbundled fibre access already effectively exists. For instance, this is the situation in France, among other countries, where fibre-based wholesale broadband access has not been imposed due to other existing obligations in upstream markets. Several other regulators in Europe, such as ANACOM in Portugal, have also not chosen not to impose fibre-based wholesale broadband access.

Finally, the MCA wishes to note that Melita is already offering very high speeds in the retail market and could therefore make a high-speed wholesale broadband offer available if it believed such a step was crucial to the development of the market.

5.2 Decision on the non imposition of remedies

Currently no regulatory obligations exist in the market.

Given that no SMP designation is made in this market, the MCA will not impose any ex-ante regulatory obligations on the Maltese wholesale broadband market.

²³ Paragraph 37