

**Report of the Malta Communications Authority on its monitoring and findings in accordance with Article 5 of Regulation (EU) 2015/2190 concerning the European Net Neutrality Rules.**

*Report to the European Commission*

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# 1. INTRODUCTION

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The Malta Communications Authority (MCA) has prepared this report in compliance with the annual reporting obligations as specified in Article 5 of Regulation (EU) 2015/2120 (the ‘EU Regulation’) and in accordance to the relevant BEREC Guidelines on the Implementation by National Regulators of the European Net Neutrality Rules. The report takes into consideration the MCA’s work with regards to the supervision and monitoring concerning open internet access rules as reflected in the EU Regulation, which rules came into force on 30<sup>th</sup> April 2016. This report covers the period between 1<sup>st</sup> May 2017 and 30<sup>th</sup> April 2018.

The MCA is the main authority responsible for enforcing the Regulation and this entails several obligations onerous on Internet Access Services (‘IAS’) providers, including ensuring that:

- i. All end-users of Internet Access Services (IAS) can access and distribute information and content, use and provide applications and services of their choice, irrespective of their own location or that of the provider, or the location, origin and/or destination of the information, content, application or service;
- ii. IAS providers apply fair traffic management policies which respect the EU Regulation and the rights of end-users;
- iii. IAS providers clearly explain their traffic management policies and how these may affect end-users’ experience as well as how these could impact their privacy and personal data;
- iv. End-users can access clear information regarding the IAS they use (such as speeds, volume limitations and other quality parameters);
- v. IAS providers have simple and clear mechanisms which end-users may make complaints; and
- vi. IAS providers clearly explain the remedies available to end-users in cases where their experience deviates significantly and repeatedly from the IAS to which they are subscribed.

The Office of the Information and Data Protection Commissioner (IDPC) is the entity responsible for enforcing the data protection obligations arising from the EU Regulation. The MCA actively collaborates with the IDPC on issues falling within the remit of both entities.

**Section 2** provides a high-level market overview and an overall description of the national situation regarding compliance with the EU Regulation.

**Section 3** provides a high level overview of the main activities carried out by the MCA in order to fulfil its monitoring and supervisory functions.

**Section 4** provides a detailed account of the monitoring and supervisory functions carried by the MCA based on an article by article basis.

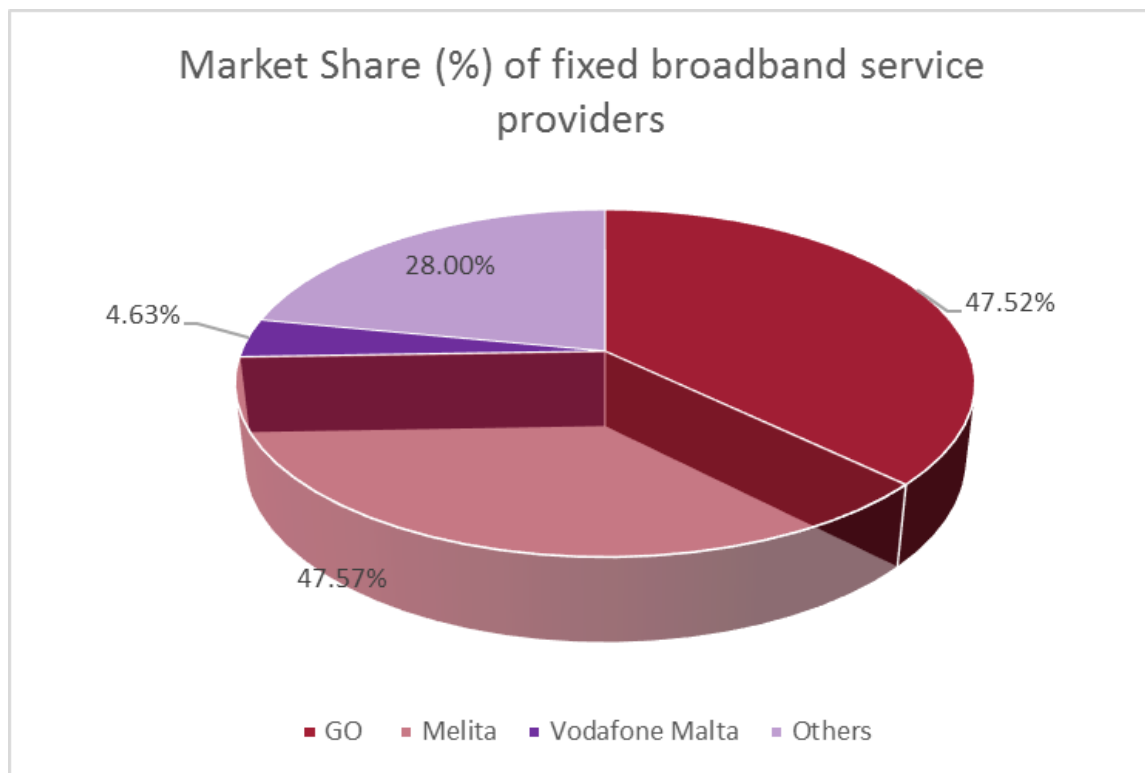
The MCA positively notes that there are no major concerns regarding open internet access in Malta. The Authority will continue to monitor the market in order to ensure that compliance is maintained and where this is not the case, will ensure that compliance is efficiently restored.

## 2. MARKET OVERVIEW

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There are currently three fixed IAS providers in the Maltese market which together hold in excess of 99% of the market, namely GO plc, Melita Ltd and Vodafone Malta Ltd. A 0.3% of the market share is held by two other providers, namely Ozone Malta Ltd and Vanilla Telecoms Ltd. All the providers have their own fixed network infrastructures. The same main three providers also offer mobile broadband services through their mobile networks. An additional mobile service provider, Redtouch fone, makes use of the radio network of one of the main networks.

Figures 1 and 2 below respectively show the market shares in the fixed broadband service and mobile services as at the end of March 2018<sup>1</sup>. It should be noted that the figures relating to the market share of mobile broadband are derived from the number of mobile subscriptions. It is assumed that each mobile subscription includes access to mobile broadband services.



*Figure 1 Market share of fixed broadband service providers*

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<sup>1</sup> <https://mca.org.mt/articles/data-report-sheet-drs-latest-figures-published>

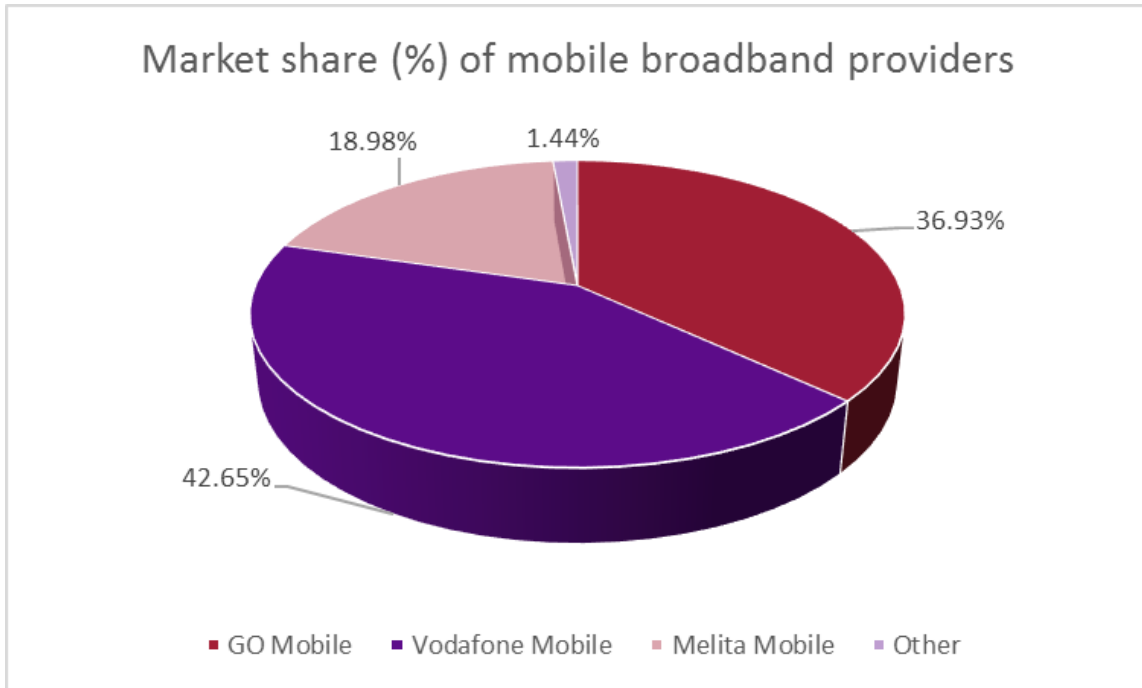


Figure 2 Market share of mobile providers based on the number of subscriptions

The MCA positively notes that the network providers constantly invest and upgrade their network infrastructure. During the reporting period, the MCA assigned spectrum within the 800MHz, and 2.6GHz bands. These spectrum holdings will enable mobile network providers to expand their networks and eventually pave the way for enhanced mobile internet access services. Investment on the fixed broadband side is ongoing with both operators announcing higher speed offers in the market.

### **3. THE NATIONAL SITUATION REGARDING COMPLIANCE WITH THE EU REGULATION**

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In 2016 the MCA appointed a multi-disciplinary team whose members come from different backgrounds: technical, legal, policy and consumer affairs. The team has been instrumental in the effective implementation of the EU Regulation as well as with the relevant BEREC guidelines. In the MCA's last reporting period the team encountered several instances of non-compliance with the EU Regulation and took the necessary steps to ensure full compliance.

During the current reporting period the team studied the various IAS products that emerged on the market as well as products whose characteristics were modified. As part of this activity, the applicable terms and conditions, offered by IAS providers were analysed and matched against the requirements prescribed by the EU Regulation in order to study the extent of compliance or lack thereof. In contrast with the last reporting period, there were no instances which necessitated regulatory intervention. This may indicate that the local IAS providers are more aware of the EU Regulation and are also more conversant with its requirements.

As part of its monitoring tasks, the MCA takes note that during this reporting period it received fourteen (14) complaints regarding discrepancies between the contracted speed and the actual speed performance of the service, and one (1) complaint related to traffic management practices. The MCA considers this number of complaints to be relatively low for the twelve month period covered, indicating that there are no major issues in the market. Nevertheless, the MCA continued with its ongoing assessment of new IAS products on the market to ensure that these are in line with the requirements of the EU Regulation.

Moreover based on its powers as described in Art. 5(2) of the EU Regulation, the MCA requested all fixed and mobile IAS providers to complete a self-assessment questionnaire aimed at providing the MCA with details about their commercial and technical practices of the products they offer. The results obtained from the questionnaire will be expanded upon in the subsequent sections according to the relevant article of the EU Regulation.

## 4. DETAILED ANALYSIS OF COMPLIANCE IN RELATION TO ARTICLES 3, 4, 5 AND 6

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### *Article 3 – Safeguarding of Open Internet Access*

#### **Article 3 of the EU Regulation**

- 1. End-users shall have the right to access and distribute information and content, use and provide applications and services, and use terminal equipment of their choice, irrespective of the end-user's or provider's location or the location, origin or destination of the information, content, application or service, via their internet access service.*

*This paragraph is without prejudice to Union law, or national law that complies with Union law, related to the lawfulness of the content, applications or services.*

- 2. Agreements between providers of internet access services and end-users on commercial and technical conditions and the characteristics of internet access services such as price, data volumes or speed, and any commercial practices conducted by providers of internet access services, shall not limit the exercise of the rights of end-users laid down in paragraph 1.*

As part of the self-assessment questionnaire that was sent to all IAS providers, respondents were asked to submit information pertaining to the technical and commercial practices in the context of their impact on end-users.

The MCA also monitored the commercial and technical conditions related to the provision of Internet access services by checking all the publicly available information primarily available on IAS providers' web pages including relevant terms and conditions and other material. This exercise was first carried out between 2016 and 2017 and the MCA has since ensured that compliance is maintained.

The self-assessment questionnaire sent to all the providers of fixed and mobile broadband IAS requested information about the traffic management practices they apply, and about their products ranges to which they apply volume data caps. The MCA also queried about the potential existence of commercial practices that IAS providers may offer to their subscribers which may, in the long term, have an impact on the end-users' rights. From this study, the MCA concluded that:

- i. none of the operators engage in traffic management practices that are in breach of the EU Regulation; and
- ii. none of the operators engage in commercial practices which may restrict end-users' rights to choose and transmit content of their choice.

## Commercial practices

The EU Regulation prohibits IAS providers from engaging in commercial practices that limit end-users' rights as specified in the said EU Regulation. Zero-rating practices have been discussed at great length by several European NRAs and identified as a potential risk to end-users' rights. In this regard the BEREC Guidelines note that IAS offers with zero-rated elements should be monitored by the NRAs to ensure that such offers do not undermine the essence and the goals of the EU Regulation.

In the previous report<sup>2</sup>, the MCA reported that it was assessing an offer that included a zero-rating element. The provider in question offers its consumers quad-play services and this particular product enabled its IPTV subscribers to access a portion of the IPTV catalogue on a mobile device. When accessing such content from a mobile IAS provided by the same ISP, the data consumed by the video product would not count towards the subscribers' data cap.

During the course of its work the MCA analysed the product taking into account the recommendations as set in the BEREC Guidelines. These Guidelines identify one type of zero-rating practice which would render such an offer as automatically in breach of the EU Regulation. In this practice, zero rated traffic is allowed to flow freely while other traffic is blocked or slowed down due to the exhaustion of an existing data cap. In its assessment, the MCA concluded that the type of zero-rating that it has analysed does not classify as such practice. The MCA's assessment in this regard was based on a number of principles established in the BEREC Guidelines. These principles were as follows:

- i. the goals of the EU Regulation;
- ii. the market positions of the ISP and Content and Application Providers ('CAP') involved;
- iii. the effects on consumer and business customer end-user rights;
- iv. the effects on CAP end-user rights; and,
- v. the scale of the practice and presence of alternatives

The analysis undertaken shows that, given the impact on the market in terms of subscribers who can make use of this service, the type of content available and the market position of the IAS provider, the practice in question does not pose material impact on the overall market.

The MCA therefore concluded that, given the product's scale and scope, it was unlikely that the product could have a negative effect on either the subscribers or other CAP providers that want to access the market in the future.

During the course of its investigations the MCA also tested another product offered by another provider also offering TV Services, fixed and mobile broadband service, for zero-rating characteristics.

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<sup>2</sup> [Report on the Malta Communications Authority's work on the implementation of the EU Net Neutrality Regulation, Section 5](#)



This particular product exhibited similar characteristics to the product described above. It was determined that, while the IAS over which the product was delivered was indeed subject to the EU Regulation, the content was restricted to the confines of the provider's network. Hence the content was not considered to be available over the open Internet and therefore not subject to the EU Regulation. The MCA ultimately came to the conclusion that the content was not zero-rated and therefore no regulatory intervention was required. This offer was eventually replaced by another similar offer which, however, has no zero-rating aspects.

The MCA notes that similar offers may feature in the market in the future, and the MCA will keep monitoring and assessing such offers.

**Article 3 (1) of the EU Regulation**

- 1. Providers of internet access services shall treat all traffic equally, when providing internet access services, without discrimination, restriction or interference, and irrespective of the sender and receiver, the content accessed or distributed, the applications or services used or provided, or the terminal equipment used.*

*The first subparagraph shall not prevent providers of internet access services from implementing reasonable traffic management measures. In order to be deemed to be reasonable, such measures shall be transparent, non-discriminatory and proportionate, and shall not be based on commercial considerations but on objectively different technical quality of service requirements of specific categories of traffic. Such measures shall not monitor the specific content and shall not be maintained for longer than necessary. [...]*

Where applicable the MCA monitored the traffic management policies established by IAS providers as published in their relevant terms and conditions. The policies were in compliance with the EU Regulation in terms of the technical aspects as well as in terms of the level of information required. No further engagement with stakeholders was deemed necessary.

The self-assessment questionnaire sent to all IAS providers also treated the subject of technical practices. The results indicate that currently there are no issues in the market and all IAS providers are deemed to be compliant with the EU Regulation in this respect, further confirming the MCA's findings.

#### **Article 3(5) of the EU Regulation**

5. *Providers of electronic communications to the public, including providers of internet access services, and providers of content, applications and services shall be free to offer services other than internet access services which are optimised for specific content, applications or services, or a combination thereof, where the optimisation is necessary in order to meet requirements of the content, applications or services for a specific level of quality.*

*Providers of electronic communications to the public, including providers of internet access services, may offer or facilitate such services only if the network capacity is sufficient to provide them in addition to any internet access services provided. Such services shall not be usable or offered as a replacement for internet access services, and shall not be to the detriment of the availability or general quality of internet access services for end-users.*

The MCA is aware of two IAS providers currently offering specialised services. These services relate to voice telephony and to live TV streaming services. No change was observed since the last reporting period. On assessing the market situation of specialised services as opposed to IAS services offered in Malta, the MCA concluded that there are no indications that the offer of specialised services is carried out to the detriment of IAS. Hence the MCA concluded that a formal assessment of the provision of specialised services was not necessary.

Given the current market situation, the MCA did not provide additional interpretation of or guidance on the term “services other than internet access services”<sup>3</sup>.

#### **Article 4 – Transparency Measures**

##### **Article 4 (1) of the EU Regulation**

1. *Providers of internet access services shall ensure that any contract which includes internet access services specifies at least the following:*

- (a) information on how traffic management measures applied by that provider could impact on the quality of the internet access services, on the privacy of end-users and on the protection of their personal data;*

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<sup>3</sup> See Article 3(5) of the EU Regulation

- (b) a clear and comprehensible explanation as to how any volume limitation, speed and other quality of service parameters may in practice have an impact on internet access services, and in particular on the use of content, applications and services;*
- (c) a clear and comprehensible explanation of how any services referred to in Article 3(5) to which the end-user subscribes might in practice have an impact on the internet access services provided to that end-user;*
- (d) a clear and comprehensible explanation of the minimum, normally available, maximum and advertised download and upload speed of the internet access services in the case of fixed networks, or of the estimated maximum and advertised download and upload speed of the internet access services in the case of mobile networks, and how significant deviations from the respective advertised download and upload speeds could impact the exercise of the end-users' rights laid down in Article 3(1);*
- (e) a clear and comprehensible explanation of the remedies available to the consumer in accordance with national law in the event of any continuous or regularly recurring discrepancy between the actual performance of the internet access service regarding speed or other quality of service parameters and the performance indicated in accordance with points (a) to (d).*

The MCA continued its monitoring activity in which the terms and conditions of new products launched on the market, or changes to the terms of existing products were reviewed. The terms and conditions were deemed to be compliant with the EU Regulation and therefore the MCA did not deem it necessary to engage with the IAS providers.

#### **Article 4 (2) of the EU Regulation**

*2 Providers of internet access services shall put in place transparent, simple and efficient procedures to address complaints of end-users relating to the rights and obligations laid down in Article 3 and paragraph 1 of this Article.*

IAS providers had already established transparent, simple and efficient procedures to address end-user complaints as prescribed by national legislation. The MCA frequently carries out testing in relation to such procedures and all IAS providers maintain effective channels of communication with their customers such as online chat services, customer care helplines and dedicated email addresses.

No change was registered compared to the MCA's previous reporting period.

#### **Article 4 (3) of the EU Regulation**

*3. The requirements laid down in paragraphs 1 and 2 are in addition to those provided for in Directive 2002/22/EC and shall not prevent Member States from maintaining or introducing additional monitoring, information and transparency requirements, including those concerning the content, form and manner of the information to be published. Those requirements shall comply with this Regulation and the relevant provisions of Directives 2002/21/EC and 2002/22/EC.*

Given the market-wide state of compliance, as well as the various measures already in place as prescribed by existing national and European legislation, the MCA did not deem it necessary to impose any further requirements other than those imposed by such legislation.

#### **Article 4(4) of the EU Regulation**

*4. Any significant discrepancy, continuous or regularly recurring, between the actual performance of the internet access service regarding speed or other quality of service parameters and the performance indicated by the provider of internet access services in accordance with points (a) to (d) of paragraph 1 shall, where the relevant facts are established by a monitoring mechanism certified by the national regulatory authority, be deemed to constitute non-conformity of performance for the purposes of triggering the remedies available to the consumer in accordance with national law.*

Fixed broadband providers are required to provide the Typical Speed Range (TSR), calculated on the basis of the access speed performance of a statistically sound sample taken from broadband connections of a given product. The TSR is established as the 20<sup>th</sup> and 80<sup>th</sup> percentile of the measured speeds at the access network level for each product used. Therefore, any connections performing at speeds which are lower than the 20<sup>th</sup> percentile are considered as being “significantly discrepant”. No interpretation of the term ‘regularly recurring’ has been published.

The main broadband providers in Malta each offer a speed testing facility using a server installed within their networks running Ookla’s speed test software. In the meantime, the MCA is following closely BEREC’s initiative in relation to the development of a common net neutrality tool to be implemented by NRAs, with a view to a possible adoption of such a tool in the future.

At present the remedies available to end-users, as well as IAS quality monitoring mechanisms available to them, are deemed to be adequate. For this reason no additional remedies have been introduced for consumer redress in relation to non-conformance of IAS with the contract terms.

## **Article 5 – Supervision and Enforcement**

### **Article 5 (1) of the EU Regulation**

*1. National regulatory authorities shall closely monitor and ensure compliance with Articles 3 and 4, and shall promote the continued availability of non-discriminatory internet access services at levels of quality that reflect advances in technology. For those purposes, national regulatory authorities may impose requirements concerning technical characteristics, minimum quality of service requirements and other appropriate and necessary measures on one or more providers of electronic communications to the public, including providers of internet access services. [...]*

At present the MCA does not consider deployment of specialised services to be to the detriment of IAS. The MCA therefore does not impose minimum QoS requirements on any IAS provider other than the definition of contractual speeds.

As part of its monitoring efforts the MCA established a broadband quality of service framework. Published in 2013, the framework requires fixed broadband service providers to measure a number of QoS parameters and submit their report to the MCA. IAS providers are also required to publish the TSR information related to each IAS product, and in doing so would commit to a minimum access speed. In this regard the MCA ensures the availability of high-quality IAS by means of information requests from IAS providers.

The MCA currently relies on broadband QoS data measured and reported by fixed broadband providers as part of their obligations under the fixed broadband quality of service framework. Data currently available does not indicate any variances which may be of concern.

The MCA has also explored the use of speed test and other QoS data collected through the *speedtest.net* platform by procuring a data set from Ookla. The current data set at hand covering the reporting period provides information about both the fixed and mobile IAS performance. The MCA is analysing the data and is expected to publish its findings later during 2018.

As part of its initiatives to monitor closely QoS performance of mobile IAS, the MCA will, by mid-2018, publish a consultation with the national stakeholders on the establishment of a broadband Quality of Service framework tailored for mobile services. The MCA shall be proposing mechanisms to collect

periodic data on the quality of service offered by the mobile network operators across the whole territory of Malta. It is expected that the data collected will be also map based and will provide the MCA sufficiently detailed QoS information suitable for monitoring QoS within the context of Net Neutrality.

#### **Article 5(2) of the EU Regulation**

*2. At the request of the national regulatory authority, providers of electronic communications to the public, including providers of internet access services, shall make available to that national regulatory authority information relevant to the obligations set out in Articles 3 and 4, in particular information concerning the management of their network capacity and traffic, as well as justifications for any traffic management measures applied. [...].*

The MCA sent all IAS providers a self-assessment questionnaire in line with this article. The information was then used as a basis for corroborating the MCA's market monitoring of IAS providers' published information i.e. terms and conditions.

#### **Article 6 - Penalties**

##### **Article 6 of the EU Regulation**

*6. Member States shall lay down the rules on penalties applicable to infringements of Articles 3, 4 and 5 and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive. Member States shall notify the Commission of those rules and measures by 30 April 2016 and shall notify the Commission without delay of any subsequent amendment affecting them.*

Under Article 33 of Chapter 418 of the Laws of Malta (the Malta Communications Authority Act) the Authority may impose an administrative fine which generally may not exceed three hundred and fifty thousand euro (€350,000) for each infringement or failure to comply and, or twelve thousand euro (€12,000) for each day of infringement or non-compliance. In determining the amount the MCA gives particular regard to the nature and extent of the infringement.

If the MCA considers that the act/omission has especially significant effects on the market it may increase the administrative fine imposed to not more than 5% of the turnover of the undertaking concerned in the calendar year when the infringement was committed.

Due to existing provisions in national legislation the MCA has not implemented further rules on penalties under this article. In this reporting period no cases of non-compliance were identified and therefore no penalties were imposed.

### ***Other activities***

MCA officials actively participate and collaborate with other EU regulatory authorities within BEREC as necessary from time to time. MCA officials also contributed in the preparation of BEREC's procurement documents related to the Net Neutrality tool.

In 2017, considering that the topic of Net Neutrality was still relatively new to the market, the MCA embarked on an educational campaign to inform the public on various aspects of the Internet. The campaign delved into the subject of Net Neutrality whereby the MCA gave an overview of the principle of the applicable net neutrality rules, explained how and in what circumstances internet service providers can implement traffic management measures and from where end-users can obtain information about the traffic management measures implemented by their service providers. More information is available by accessing the following link <https://www.mca.org.mt/internet>.

## **5. CONCLUSION**

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After having carried out its work programme for the year 2017/2018 in ensuring the availability of open internet access services in line with the requirements of the EU Regulation, the MCA concludes that all IAS providers in Malta were compliant with the requirements of the EU Regulation. The MCA also notes that ongoing monitoring and review of the terms and conditions remain important given that this sector undergoes continuous changes.