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Malta Communications Authority
(MCA)

Valletta Waterfront — Pinto Wharf
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Malta

For the attention of:
Mr Philip Micallef
Executive Chairman

Fax: +35621336846

Dear Mr Micallef,

Subject: Commission Decision concerning Case MT/2012/1374: Wholesale network infrastructure access at a fixed location in Malta

Commission Decision concerning Case MT/2012/1375: Wholesale broadband access in Malta

Comments pursuant to Article 7(3) of Directive 2002/21/EC

I. PROCEDURE

On 15 October 2012, the Commission registered a notification from the Maltese national regulatory authority, Malta Communications Authority (MCA),¹ concerning the market for wholesale network infrastructure access at a fixed location² in Malta and the market for wholesale broadband access (WBA)³ in Malta.

¹ Under Article 7 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108, 24.4.2002, p. 33, as amended by Directive 2009/140/EC, OJ L 337, 18.12.2009, p. 37, and Regulation (EC) No 544/2009, OJ L 167, 29.6.2009, p. 12.

² Corresponding to market 4 in Commission Recommendation 2007/879/EC 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 (Recommendation on Relevant Markets), OJ L 344, 28.12.2007, p. 65.

³ Corresponding to market 5 in Commission Recommendation 2007/879/EC 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 (Commission européenne/Europese Commissie, 1049 Bruxelles/Brussel, BELGIQUE/BELGIË — Tel. +32 22991111

The national consultation⁴ ran from 15 June 2012 to 3 September 2012.

On 24 October 2012, a request for information⁵ (RFI) was sent to MCA and a response was received on 29 October 2012.

Pursuant to Article 7(3) of the Framework Directive, national regulatory authorities (NRAs), the Body of European Regulators for Electronic Communications (BEREC) and the Commission may make comments on notified draft measures to the NRA concerned.

II. DESCRIPTION OF THE DRAFT MEASURE

II.1. Background

Market 4

The market for wholesale network infrastructure access at a fixed location in Malta was previously notified to and assessed by the Commission under case MT/2006/0549. The relevant market was defined as wholesale unbundled access, including shared access to metallic local loops and sub-loops. Fibre-based services were not included in the relevant market. MCA imposed the full set of obligations on GO plc (GO), including provision of a reference unbundling offer (RUO). The Commission had no comments.

In case MT/2010/1087, MCA notified further details of GO's RUO,⁶ on which the Commission did not comment. In its latest notification, assessed under case MT/2011/1263, MCA proposed additional amendments to GO's RUO to introduce migration rules regulating GO's planned transition to its New Generation Access (NGA) network (GO had started rolling out a Fibre-to-the-Cabinet (FTTC) network). The Commission welcomed the introduction of migration rules, but expressed concerns about the imposition of a temporary virtual access obligation (TVA) over an FTTC network, since fibre-based access products were excluded from market 4 at the time. The Commission also invited MCA to assess in the forthcoming review of market 4 the need to impose TVA as a permanent virtual access remedy should the sub-loop unbundling (SLU) obligation prove insufficient to address the competition problems identified.

Market 5

The market for wholesale broadband access in Malta was previously notified to and assessed by the Commission under case MT/2008/803. MCA defined the relevant market as including wholesale products provided over all existing broadband platforms, namely cable, DSL and WiMax. MCA found that no operator had significant market power (SMP), nor that the two biggest operators held a position of joint dominance, and therefore proposed the withdrawal of existing obligations. The Commission invited MCA to closely follow the impact of NGA roll-out on the development of market conditions and revisit its analysis if needed.

(Recommendation on Relevant Markets), OJ L 344, 28.12.2007, p. 65.

⁴ In accordance with Article 6 of the Framework Directive.

⁵ In accordance with Article 5(2) of the Framework Directive.

⁶ Including information on the main distribution frames (MDFs) and co-location facilities, service-level agreements, timelines and the determination of charges not established *a priori*.

II.2. Market definition

Market 4

On the basis of a substitutability analysis, MCA finds that the relevant market includes all unbundled access products provided over the copper network and unbundled access services provided over fibre. Describing the existing fibre-based infrastructures, MCA explains that currently neither residential Fibre-To-The-Home (FTTH) nor Fibre-To-The-Building (FTTB) connections are offered in Malta,⁷ but that this is likely to change in the near future.⁸

The relevant geographic market is national.

Market 5

MCA concludes that the wholesale broadband market includes WBA services, provided over DSL, fibre and cable (including self-supply). Regarding substitutability between cable and DSL wholesale offers, MCA finds the services substitutable from a demand-side standpoint, as they are equivalent in terms of functionality (both services are inputs for substitutable retail products and both require similar additional components), in coverage (both networks cover the whole territory), interconnection (core networks are largely similar) and prices. Furthermore, MCA notes the existence of a wholesale agreement between the cable operator Melita and the government agency MITA.⁹

The relevant geographic market is national.

II.3. Finding of significant market power

Market 4

MCA designates the operator GO as holding SMP. GO is the sole provider of wholesale unbundled access in Malta.¹⁰ In addition, MCA concludes that: (i) GO enjoys economies of scale and scope, (ii) barriers to entry are high, (iii) GO is vertically and horizontally integrated, (iv) GO faces no competitive threat from alternative operators in terms of customer switching, and (v) GO would not face any countervailing buyer power from its customers.

Market 5

MCA concludes that there is no single operator that holds SMP, as both Melita and GO (i) have very similar market shares,¹¹ (ii) enjoy a similar level of economies of scale and

⁷ So far, GO has deployed FTTH in a very small geographic area, covering a total of only around 1250 households. In addition, both GO and Melita provide tailored bundles to business customers mainly through Ethernet-based connections using their FTTB networks.

⁸ In its reply to the RFI, MCA notes that GO started advertising its FTTH network on 26 October 2012 under the brand name 'Rapido'. Go announced that, following successful trials in parts of Malta, it is now pioneering an extensive rollout of FTTH. MCA also mentions the Maltese government's FTTH initiative, which aims to promote a country-wide open-access FTTH network based on co-investment and government subsidies.

⁹ MCA explains that according to the agreement in place, MITA has control over the end-user connection (it provides its own IP address and a possibly differentiated service). The traffic is handed from Melita to MITA at layer 3, which enables MITA to control the quality of services delivered. The costs for providing WBA over cable are not prohibitive according to MCA.

¹⁰ However, to date, no operator has taken up the offer and there are currently no unbundled lines in Malta.

¹¹ In 2011, GO had a 53% market share and Melita 47%, including self-supply.

scope, (iii) own an infrastructure that provides similar coverage and is not easily replicable, (iv) are vertically and horizontally integrated, (v) are active in a market where barriers to entry are high, and (iv) do not face any significant countervailing buyer power.

The similar market positions held by GO and Melita led MCA to analyse whether they might together hold a position of joint dominance.¹² In this regard, however, MCA observes that GO and Melita's retail offers have considerably improved in terms of prices, speeds and download limits and that the broadband market features increased product differentiation with the provision of a vast array of bundles. In addition, there is the prospect that new fibre-based infrastructure will be rolled out, so product offerings are likely to continue to improve further in the near future. As a result, there is no sufficient evidence to support a finding of joint dominance.

II.4. Regulatory remedies

Market 4

MCA proposes to impose on GO the following remedies:

- i. Access obligation;

MCA proposes to maintain the existing remedies for copper, namely LLU access, SLU access including associated facilities (duct access, dark fibre or Ethernet for backhaul) and co-location.

Regarding fibre infrastructure, MCA proposes to impose an unbundling obligation only as and when GO further rolls out FTTH/FTTB. MCA will impose an access obligation at the optical distribution frame (ODF) if the SMP operator deploys a point-to-point (P-T-P) architecture and virtual unbundling (VULA) if a passive optical network architecture (PON) is chosen instead.¹³

- ii. Non-discrimination obligation;

GO is required to apply equivalent conditions in equivalent circumstances to all operators when providing equivalent services and to provide services and information to access seekers under the same conditions and of the same quality as it provides to its own downstream provider. Furthermore, MCA is reserving its right to introduce key performance indicators (KPIs) following services take-up.

- iii. Price control and cost accounting;

MCA proposes to keep the existing cost-orientation remedy under which copper access prices are calculated using the Fully Distributed Costs (FDC) methodology, based on historical costs.¹⁴

Regarding fibre access prices, MCA proposes to impose cost orientation based on a new LRIC model.¹⁵

¹² In 2008, MCA already carried out such an analysis and concluded that there was insufficient evidence to support a finding of joint dominance.

¹³ MCA refers as well to a temporary virtual access (TVA) solution accessible from the MDFs that has been mandated as part of the migration rules imposed on GO in order to ensure the transition from local loop (LLU) to sub-loop unbundling (SLU) in instances where the FTTC upgrade is underway (See case MT/2011/1263).

¹⁴ Access to ducts and dark fibre serving as backhaul to SLU are subject to commercial negotiations and MCA may intervene on a case-by-case basis if these negotiations fail.

¹⁵ MCA explains that the model is currently being consulted on at national level, and will be notified to

- iv. Transparency obligation;¹⁶ and
- v. Accounting separation.

III. COMMENTS

The Commission has examined the notification and the additional information provided by MCA and has the following comments:¹⁷

Need to impose proper access obligations on fibre infrastructures

The Commission notes that MCA proposes to impose an unbundling obligation on fibre only as and when FTTH/FTTB is deployed, as it considers these infrastructures to be at a very early stage of development. However, the Commission notes that FTTH/FTTB lines are already available to some households and businesses, and, furthermore, that GO is already advertising the upcoming commercial launch of its FTTH network while pioneering a more extensive roll-out. As a result, FTTH lines will certainly become available on a larger scale within the next regulatory period. Against this background, in order to ensure regulatory predictability and to prevent possible competition problems at an early stage, the Commission invites MCA to revise the proposed fibre access obligation, and to make it immediately applicable and no longer conditional on the level of fibre deployment. In order to ensure transparency, a reference offer should also be provided by the SMP operator.

Moreover, as regards the SMP operator's FTTC infrastructure, the Commission notes that MCA proposes to keep the currently imposed SLU remedy supplemented by appropriate backhaul, along with a temporary virtual access (TVA) solution until the migration period is over. The Commission stresses that the sub-loop unbundling (SLU) access obligation has so far not been taken up by any of the alternative operators in Malta. The absence of a regulated price for backhaul makes this offer even less attractive. Moreover, as recognised by MCA itself, the Commission points out that SLU deployment may become even more problematic for access seekers entering the market at this stage, given that the transition to FTTC is almost finalised¹⁸ and that a further transition to FTTH is likely to happen. In this respect, the Commission re-iterates its comments in case MT/2011/1263 and invites MCA to impose as well in its final measure a virtual access product on the SMP operator's FTTC infrastructures that would be maintained even after the migration period, should the SLU obligation not prove sufficient to address the competition problem identified in the market.

the Commission. In its reply to the RfI, MCA explains that the new model would use modified tilted annuities and a discounted cash flow (DCF) model in line with parameters to be set by MCA in order to ensure that while the principle of cost orientation is maintained, GO is granted flexibility in setting access prices that would incentivise investment in FTTH.

¹⁶ A reference offer for fibre unbundling is not required at the moment, and will be only when FTTH/FTTB starts to be available. Furthermore, GO is to comply with both the RUO amendments notified under case MT/2012/1087, and with migration rules notified under case MT/2011/1263.

¹⁷ In accordance with Article 7(3) of the Framework Directive.

¹⁸ MCA notes that more than 75% of the cabinets have already been upgraded to FTTC while the remainder will be upgraded over the coming months.

Price regulation and forthcoming guidance on non-discrimination and costing methodologies

The Commission notes that MCA considers using a historic cost-based FDC methodology for setting copper access prices, and is currently developing an LRIC model as a basis for setting fibre access prices.

Given the importance of regulating key wholesale access products in the transition period to NGA networks in an effective and consistent manner across the EU, the Commission is currently working on a recommendation to provide guidance on the implementation of the non-discrimination obligation and costing methodologies for key access prices.

The Commission stresses that it is unclear whether a historic cost-based methodology for copper access prices would send reliable buy or build signals for investment in NGA infrastructures. The Commission therefore invites MCA to review its costing methodology for setting copper access prices, also in the light of the forthcoming recommendation once adopted.

With regard to fibre infrastructure, the Commission points out that an *ex ante* price control obligation for fibre infrastructure would not be necessary if there were sufficient competition safeguards in place. In the latter case, MCA should consider imposing at least implement the following:

- (a) Equivalence of input (EoI), which generally requires SMP operators' own downstream operations to use the same products, processes, and prices as those used by their retail rivals. As equivalence of input can only be fully implemented over a longer time period, this requirement could consist in immediate terms in a firm obligation on and commitment by the SMP operator to undertake certain key initiatives over a set time period. Since the SMP operator has recently announced its intention to embark upon a more extensive FTTH rollout phase, MCA may consider engaging as soon as possible in dialogue with stakeholders to assess the feasibility of implementing EoI in Malta;
- (b) A transparency obligation regarding fibre, comprising a number of clearly specified KPIs, an effective enforcement and monitoring mechanism (such as internal or external regular audits) and publication of the KPIs;
- (c) A replicability requirement also for fibre-based retail products;
- (d) An accounting separation obligation also covering fibre products.

Against this background, MCA could consider lifting the cost orientation requirement for the SMP operator's fibre lines as soon as the above safeguards are effective in Malta and MCA would establish that the SMP operator's pricing behaviour is properly constrained by either cost-oriented copper prices or by significant competitive constraints, indicated in particular by the presence of well-developed alternative infrastructures with comparable reach.

Pursuant to Article 7(7) of the Framework Directive, MCA shall take the utmost account of the comments of other NRAs, BEREC and the Commission and may adopt the resulting draft measure and, where it does so, shall communicate them to the Commission.

The Commission's position on this particular notification is without prejudice to any position it may take *vis-à-vis* other notified draft measures.

Pursuant to Point 15 of Recommendation 2008/850/EC¹⁹ the Commission will publish this document on its website. The Commission does not consider the information it contained herein to be confidential. You are invited to inform the Commission²⁰ within three working days following receipt whether you consider that, in accordance with EU and national rules on business confidentiality, this document contains confidential information which you wish to have deleted prior to such publication.²¹ You should give reasons for any such request.

Yours sincerely,
For the Commission,
Robert Madelin
Director-General

¹⁹ Commission Recommendation 2008/850/EC of 15 October 2008 on notifications, time limits and consultations provided for in Article 7 of Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, OJ L 301, 12.11.2008, p. 23.

²⁰ Your request should be sent either by email: CNECT-ARTICLE7@ec.europa.eu or by fax: +32 2298 87 82.

²¹ The Commission may inform the public of the result of its assessment before the end of this three-day period.