Wholesale physical and virtual infrastructure access in Malta - assessment of MCA's market analysis

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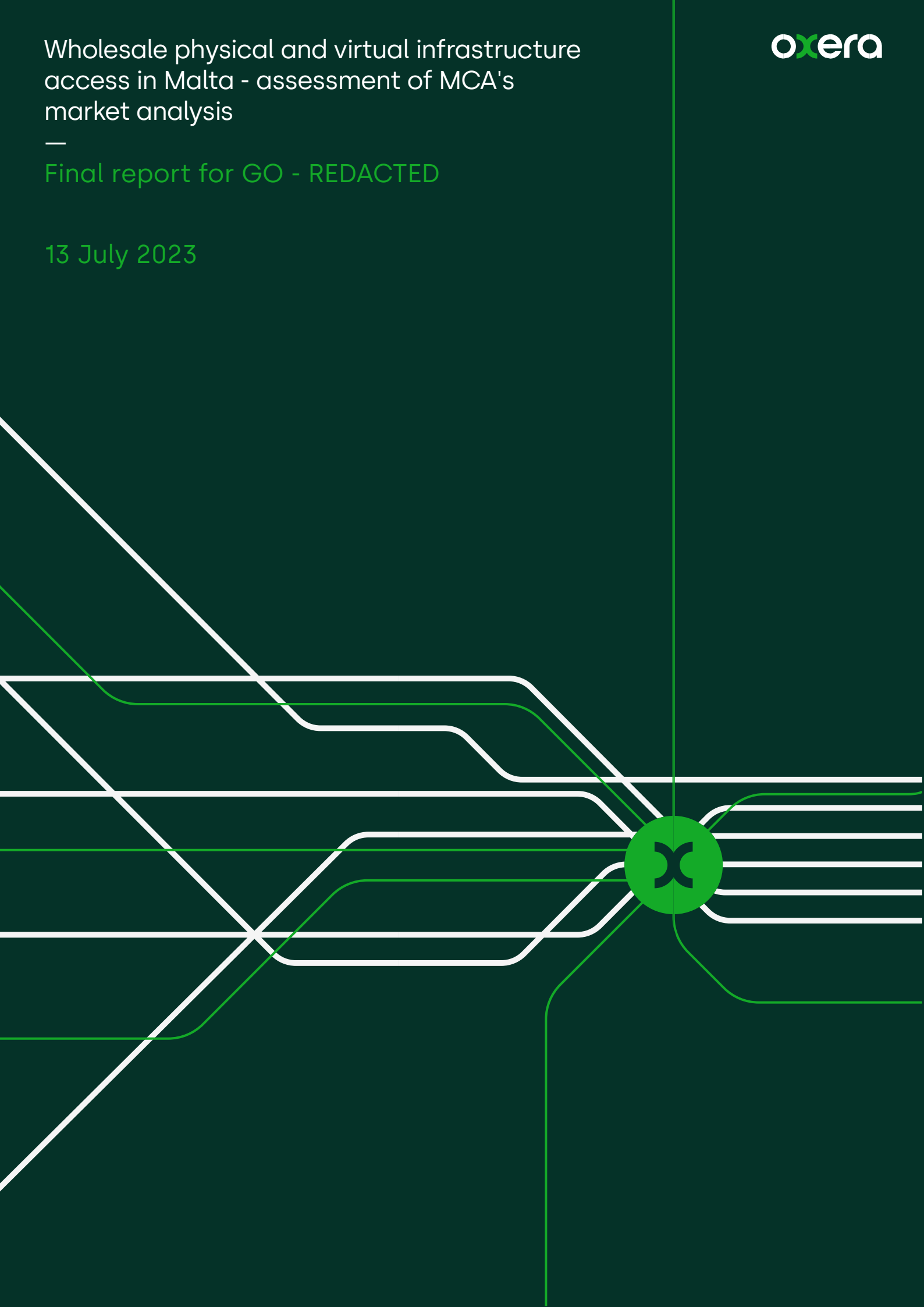
Final report for GO - REDACTED

13 July 2023



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1 Introduction

1.1 The context for this report

On 28 April 2023, the Malta Communications Authority ('MCA') published a consultation on the regulation of wholesale access services for fixed broadband in Malta.[1] In its consultation, the regulator argues that:

- absent regulatory intervention, competition in Malta's retail market for fixed broadband services may be limited;[2]
- its findings from its analysis of the retail market justify an analysis of the underlying wholesale market;
- the wholesale market should be defined to include virtual unbundled local access (VULA) and physical infrastructure access (PIA);[3]
- GO plc ('GO') has significant market power ('SMP') in these wholesale markets.[4]

The MCA then proceeds to propose that SMP remedies be imposed on GO, including an updated VULA remedy and a new PIA remedy.

Against this backdrop, GO has commissioned Oxera Consulting LLP ('Oxera') to provide an economic analysis of the evidence in order to assess the appropriateness of the findings proposed in the MCA's market analysis. This report documents our findings.

1.2 Summary of Oxera's assessment

1.2.1 The retail market is competitive, absent SMP remedies

A careful examination demonstrates that the retail market in Malta is characterised by effective competition, and that this is not a recent phenomenon brought about the recent entry of Epic. As demonstrated by our analysis of the evolution of speed offerings (section 3.1.2), network investments over the last decade have led to 'technology leapfrogging' between the operators, including in the period prior to Epic's entry. This evidence of ongoing technical advances by different

[1] MCA (2023), 'Wholesale physical and virtual infrastructure access market in Malta', MCA/C/23 – 4925, 28 April.
[2] MCA (2023), 'Wholesale physical and virtual infrastructure access market in Malta', MCA/C/23 – 4925, 28 April, section 3.4.
[3] MCA (2023), 'Wholesale physical and virtual infrastructure access market in Malta', MCA/C/23 – 4925, 28 April, section 4.6.
[4] MCA (2023), 'Wholesale physical and virtual infrastructure access market in Malta', MCA/C/23 – 4925, 28 April, section 5.4.

providers is stimulated by strong competition between the companies, as they seek to exploit a period of technical superiority for the short time that it persists.

Similar evidence is borne out in data on prices. As our analysis in section 3.1.4 shows, the trend of price per Mbps for dual-play entry-level packages has been consistently declining since 2018. This further demonstrates the positive impact which competition is delivering for end users of fixed broadband services.

In its consultation, the MCA points to rising average revenues per user ('ARPUs') for the two established operators in recent years, suggesting that this provides evidence that competition in Malta's retail market may be limited. However, our analysis of GO's ARPU (see section 3.1.4) shows that, when split by technology type, ARPUs remain broadly stable over time. This suggests that recent increases in GO's overall ARPU are more likely to be driven by customers migrating from services provided on GO's legacy copper network to services provided on its fibre network, rather than being a symptom of a reduction in competition at the retail level.

The available evidence also suggests that the competitive dynamics currently observed in the retail market are likely to persist. We note, in particular, that GO is expected to make significant additional investments in its fibre network in order to reach nationwide coverage by 2025, allowing it to compete more effectively with Melita, which already has a nationwide gigabit offer (see section 3.2). If this target is achieved, all consumers in Malta will benefit from access to at least two competing very high capacity networks ('VHCNs') by the middle of this decade. This compares very favourably to the EU goal of all households being covered by at least one gigabit network by 2030.

In summary, our review of the evidence demonstrates that the retail market in Malta is characterised by strong levels of competition, and that this has occurred, and is likely to persist, irrespective of any SMP remedies that might be applied. In light of this, there would be no basis under the European telecommunications regulatory framework for the MCA to proceed with an analysis of the underlying wholesale market. Indeed, the MCA's proposal to apply wholesale SMP remedies on GO is inconsistent with the Commission's SMP guidelines, which state that:

'if the underlying retail market(s) is (are) prospectively competitive under the Modified Greenfield Approach, the NRA [national regulatory

authority] should conclude that regulation is no longer needed at wholesale level'.[5]

1.2.2 The MCA's wholesale market analysis does not reflect competitive dynamics in the retail market

Notwithstanding the outcome of our retail market analysis, which implies that there is no basis to impose remedies in the wholesale market, we have examined the MCA's analysis and conclusions in its wholesale market review. We consider there are two basic flaws with the MCA's assessment.

First, **there is a disconnect between the MCA's retail market analysis and its wholesale product market definition**.

The MCA adopts a broad product market definition for the retail market, encompassing fixed broadband supplied over GO's copper network, fixed broadband supplied over GO's and Epic's fibre networks, and fixed broadband supplied over Melita's DOCSIS 3.1 network. However, its proposed wholesale market definition—the 'wholesale fixed market for physical and virtual infrastructure access'—is comparatively narrow, exclusively focusing only on the provision of wholesale physical access over the copper network; the provision of VULA over GO's FTTx[6] network; and access to GO's physical duct infrastructure. In other words, Melita's DOCSIS 3.1 network is completely excluded from the analysis.

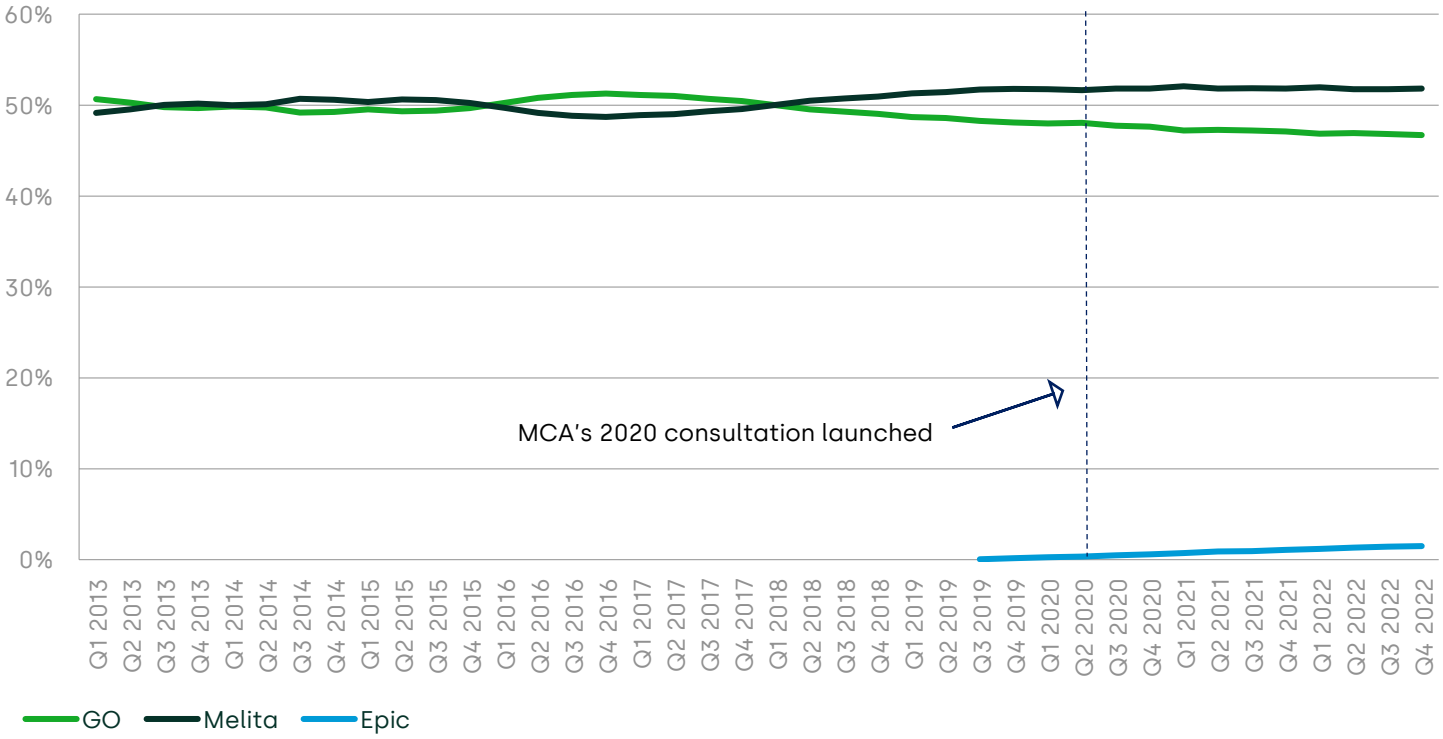
Demand for wholesale access services is derived from demand in the downstream retail market. As such, a more appropriate starting point for the MCA's assessment would have been to investigate whether the wholesale market is as broad as the retail market: a point which the MCA recognised when it last consulted on wholesale market regulation, in 2020, and which has also been recognised by other NRAs in other European member states where cable broadband plays an important nationwide role.

Importantly, the MCA's wholesale market definition ignores the key role played by Melita, which currently enjoys over 50% market share. In contrast, GO's retail market share has declined in recent years, and is

[5] European Commission (2018), 'Communication from the Commission — Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services', C/2018/2374, para. 17.
[6] 'Fibre to the x' (or 'FTTx') is a collective term used to describe a range of fixed broadband network architecture options utilizing optical fibre for some or all of their last mile connectivity. This includes 'fibre-to-the-cabinet' (or 'FTTC') as well as 'fibre-to-the-home' (or 'FTTH').

now below the levels observed at the time of the MCA's 2020 consultation (see Figure 1.1).

Figure 1.1 Market shares in the fixed broadband market (2013—22)



Note: Market shares are computed in terms of number of subscriptions.
Source: Oxera analysis of MCA data. MCA (2023), 'Key market indicators for electronic communications and post: Q1 2018 to Q4 2022' https://www.mca.org.mt/articles/key-market-indicators-electronic-communications-and-post-q1-2018-q4-2022

Given these market developments, the MCA's proposed wholesale market definition is difficult to justify, since it:

1 excludes the wholesale service which can be provided on the largest operator's network (namely cable-based bitstream), which the MCA has previously described as 'functionally equivalent' to wholesale services provided via GO's FTTH network;[7]

[7] MCA (2020), 'The provision of wholesale fixed broadband access in Malta—Definition, assessment of SMP & regulation of relevant markets: Consultation', MCA/C/20-3864, 22 May, p. 7.

2 focuses exclusively on the access services provided by GO, which the MCA argued in 2020 was not subject to a finding of single-firm SMP (and which now has even lower market share).[8]

The second flaw with the MCA's analysis of the wholesale market is that, in practice, **GO lacks the ability to distort downstream competition or harm consumers**. In particular, the regulator has given insufficient attention to the role that non-SMP remedies and commercial agreements with infrastructure owners other than GO can play in facilitating access to physical infrastructure, including:

- **the Broadband Cost Reduction Directive (BCRD)**—as we explain in section 4.2.3, under this Directive GO is obliged to provide access to telecommunications companies such as Epic that are seeking to lay VHC networks. Furthermore, such access must be provided on fair, reasonable and non-discriminatory ('FRAND') terms;
- **existing commercial agreements and the potential to extend these**—these include the agreement between Melita and Epic, which has facilitated Epic's coverage of roughly 6% of all dwellings in Malta to date.[9] The MCA states it is 'not aware' of any plans to extend this agreement, but makes limited attempts to explain why the agreement could not be extended, considering Melita's nationwide coverage. The MCA also seeks to minimise the importance of Melita's own infrastructure as a viable alternative to GO's infrastructure by reference to the GO–Melita historical infrastructure agreement for the latter's use of the former's infrastructure. However, as we explain in section 4.2.1, the existence of this agreement does not diminish the ability of Melita to act as a viable alternative infrastructure provider to facilitate rollout of gigabit-capable networks, owing to its ubiquitous VHCN presence across Malta;
- **non-ECN (electronic communications networks) physical infrastructure**—as the MCA itself notes, GO, Melita and Epic all make use of Enemalta's aerial poles or brackets infrastructure for last-mile connectivity. In addition, the MCA fails to mention the ongoing investment undertaken by Infrastructure Malta, which has been a key facilitator of VHCN rollout across the country and facilitated GO's FTTH rollout.

[8] See section 2.1.2 for further detail on the MCA's 2020 consultation.
[9] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, p. 1.

1.3 Structure of this report

The report is structured as follows.

- Section 2 provides an overview of the broader regulatory context within which the MCA's current consultation is situated. This includes a brief overview of key MCA consultations and decisions over the last decade, as well as an overview of the MCA's most recent consultation.
- Section 3 outlines our analysis of competitive dynamics in the retail fixed broadband market in Malta, including showing how the market is characterised by effective competition and that SMP remedies are not central to this finding.
- Section 4 outlines the main flaws with the MCA's analysis of the wholesale market. These include the fact that the MCA has inappropriately specified the wholesale product market and that its SMP finding is incorrect, as GO lacks the ability to behave in ways that could distort competition and/or harm consumers.

2 Regulatory context

In this section, we provide an overview of the broader regulatory context within which the MCA's current consultation is situated. This includes a brief overview of key MCA consultations and decisions since 2012, including the MCA's most recent consultation. (In Appendix 1, we provide a more comprehensive overview of these MCA decisions and consultations, for reference.) Finally, we outline Oxera's assessment of the MCA's most recent market analysis, which is the focus of the remainder of this report.

2.1 Background—key MCA consultations and decisions since 2012

2.1.1 The MCA's 2012 market analysis

The MCA consulted on its market analysis for fixed broadband services in 2012, with the resulting decision published in 2013. This was the most recent market analysis completed by the regulator for which a final decision was issued.[10]

In the MCA's 2012 consultation, GO was found to be dominant in the 'wholesale unbundled infrastructure access market' ('market 4').[11],[12] To mitigate market power concerns, the regulator applied SMP remedies to GO, including directing it to offer a VULA product where it had deployed an FTTH network.[13] The MCA implemented this remedy in 2016.[14]

2.1.2 The MCA's 2020 consultation

The MCA launched its subsequent market analysis in 2020.[15] In this, the MCA defined the retail fixed broadband market to include fixed broadband products supplied over GO's copper-DSL network; fixed

[10] As we explain in section 2.1.2, the MCA issued a consultation on its subsequent market analysis in 2020, but this was later withdrawn with no resulting decisions implemented.
[11] MCA (2013), 'Market 4 – Wholesale Unbundled Infrastructure Access Market—Identification and Analysis of Markets, Determination of Market Power and Setting of Remedies: Final Decision', MCA/D/13-1520, 6 March.
[12] This definition of market 4 is consistent with European Commission guidance on market definition prevailing at the time. See European Commission (2007), '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).
[13] MCA (2013), 'Market 4 – Wholesale Unbundled Infrastructure Access Market—Identification and Analysis of Markets, Determination of Market Power and Setting of Remedies: Final Decision', MCA/D/13-1520, 6 March, p. 26.
[14] MCA (2016), 'VIRTUAL UNBUNDLED ACCESS TO FIBRE-TO-THE-HOME: Implementing the VULA Remedy—Response to Consultation and Decision', MCA/D/16-2513, 26 February.
[15] MCA (2020), 'The provision of wholesale fixed broadband access in Malta—Definition, assessment of SMP & regulation of relevant markets: Consultation', MCA/C/20-3864, 22 May.

broadband products supplied over GO's fibre network; and fixed broadband products supplied over Melita's HFC DOCSIS 3.1 network.[16]

The MCA's subsequent dominance analysis did not indicate a finding of single-firm dominance. It justified this decision on the grounds that Melita and GO enjoyed similar positions in the market, 'with no operator enjoying a significant competitive advantage over the other'.[17] Instead, the MCA concluded that GO and Melita had joint SMP in the retail fixed broadband market.[18]

In its wholesale market analysis, the MCA then defined the product market as widely as the relevant retail market, so as to include:

- unbundled access (including shared access) via the copper network;
- virtual unbundled access to the copper network;
- bitstream access via the copper network;
- virtual unbundled access to the fibre network;
- bitstream access via the fibre network; and bitstream access via the cable network.

As in its retail market analysis, the MCA concluded that a finding of single-firm SMP could not be attributed to either player in the wholesale fixed broadband access ('WFBA') market. Instead, the MCA once again concluded that, absent regulation, GO and Melita had joint SMP in the wholesale market.[19]

To minimise the risk that GO and Melita might distort competition through price and non-price actions, the MCA proposed SMP remedies in its consultation, including an access obligation for GO to continue providing VULA access on its fibre network, and a new requirement for Melita to provide bitstream access on its DOCSIS 3.1 network. However, the MCA later withdrew its consultation, in 2021. The regulator later justified this decision on the basis that Epic began rolling out FTTH

[16] MCA (2020), 'The provision of wholesale fixed broadband access in Malta—Definition, assessment of SMP & regulation of relevant markets: Consultation', MCA/C/20-3864, 22 May, p. 3.
[17] MCA (2020), 'The provision of wholesale fixed broadband access in Malta—Definition, assessment of SMP & regulation of relevant markets: Consultation', MCA/C/20-3864, 22 May, p. 5.
[18] MCA (2020), 'The provision of wholesale fixed broadband access in Malta—Definition, assessment of SMP & regulation of relevant markets: Consultation', MCA/C/20-3864, 22 May, pp.4–5.
[19] MCA (2020), 'The provision of wholesale fixed broadband access in Malta—Definition, assessment of SMP & regulation of relevant markets: Consultation', MCA/C/20-3864, 22 May, pp. 8–9.

infrastructure in 2021, prompting the regulator to reassess the evolving situation on the ground and its implications.[20]

We note for transparency that Oxera was previously commissioned by Melita to help it respond to the MCA's 2020 consultation.[21]

2.2 The MCA's 2023 consultation

In April 2023, the MCA published a new consultation setting out its views on the regulation of the wholesale market concerning the supply of access for the provision of fixed broadband services in Malta.[22] The regulator asserts that its approach is consistent with the 'Modified Greenfield Approach' referenced in the EU's guidelines, which indicates that the starting point for the identification of wholesale markets susceptible to ex ante regulation should always be the analysis of corresponding retail market(s).[23]

2.2.1 The MCA's retail market analysis

The MCA's proposed retail product market definition encompasses fixed broadband supplied over GO's copper network, fixed broadband supplied over GO's and Epic's fibre networks, and fixed broadband supplied over Melita's DOCSIS 3.1 network. It excludes services provided over fixed wireless access and mobile access technologies, as well as high-quality connectivity services designed for business use.

In contrast to its 2020 consultation, **the MCA does not explicitly identify any operator—either jointly or individually—as having SMP in the retail market**. Instead, it concludes its retail market analysis by arguing that:

'in the absence of regulatory intervention, competition in Malta's retail market for fixed broadband services **may be limited**. Even in areas where competition has emerged, the MCA is concerned that it may not last or may only be limited to locations where Epic has implemented an FTTH network. An analysis of the underlying wholesale market is therefore required.'[24] [emphasis added]

[20] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, p. 40.
[21] Oxera (2020), 'Economic review of the MCA's conclusions on the provision of wholesale fixed broadband access in Malta—Final report prepared for Prepared for Melita Ltd', 22 July
[22] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April.
[23] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, p. 3.
[24] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, p. 5.

2.2.2 MCA's wholesale market analysis

The MCA's wholesale market analysis begins by identifying VULA as a focal product.[25] It then argues that cable-based bitstream access is not part of the same market.[26] Finally, after arguing that the nature of GO's physical infrastructure is unique, the MCA proceeds to conclude that:

'the physical infrastructure element for the scope of the current analysis should focus on physical infrastructure via ducts owned by ECN providers, in this case owned by GO, and thus exclude other forms of physical infrastructure, namely that owned by non-ECN providers and the physical infrastructure that currently features under the swap agreement by Melita and Epic.'[27]

MCA then proceeds to undertake the 'three criteria test',[28] to determine whether its proposed wholesale market definition—the wholesale market for the provision of virtual and physical access in Malta—is susceptible to ex ante regulation. The MCA concludes that the wholesale market should be subject to ex ante regulation for the following reasons:

1. structural barriers resulting from significant economies of scale associated with physical and virtual infrastructure deployment, and legal and regulatory barriers, since entrants 'have not been and cannot be afforded the same access conditions as those which benefited from public funds or access agreements during the period of GO's state ownership';[29]
2. factors limiting the scope for the market to tend towards effective competition, including economies of scale which limit the scope for end-to-end infrastructure-based competition in certain areas.[30]

[25] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, p. 48.
[26] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, p. 48–51.
[27] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, p. 55.
[28] This test is outlined the European Electronic Communications Code. See Commission (2020), 'DIRECTIVE (EU) 2018/1972 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 December 2018—establishing the European Electronic Communications Code', L 321/36, Article 67 (1).
[29] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, pp. 60–61.
[30] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, p. 61.

3 an inadequacy of competition law to address risks to competition, including the MCA's perceived inadequacy of the BCRD.

2.2.3 The MCA's SMP assessment and proposed remedies

After determining that the wholesale market for the provision of virtual and physical access in Malta is susceptible to ex ante regulation, the MCA proceeds to undertake its SMP assessment. The regulator points to a number of factors, including:

- **GO's overall size** in the market for physical and virtual unbundled access, given that it accounts for 93% of all duct infrastructure that is currently available/utilised for the provision of physical and virtual unbundled access and 98.9% of all wholesale VULA-based services (taking into account self-supply);[31]
- **barriers to entry and expansion**—due to the substantial upfront costs involved in building an FTTH network, and as the MCA claims is evidenced by Epic's limited retail market share of 1.5%;[32]
- **control of infrastructure not easily duplicated**—with the MCA suggesting that GO can leverage its duct access advantages.[33]

These observations lead the MCA to conclude that GO has SMP in the wholesale market for the provision of virtual and physical access. It states that, absent wholesale regulation, GO's SMP would give it the ability and incentive to engage in various forms of conduct that could distort downstream competition and/or harm consumers, including: refusing to supply access to its physical infrastructure to Epic; to restrict access to VULA or provide access on less favourable terms; and to set excessive wholesale charges for access to its physical infrastructure and VULA access.[34]

The MCA then outlines its proposed remedies to apply to GO as the SMP operator, as follows.

[31] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, pp. 63.
[32] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, pp. 2.
[33] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, pp. 62–69.
[34] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, p. 70.

1 **An updated VULA remedy**—which, according to the MCA, is needed to 'reflect developments in regulatory practices and market realities'. This includes adjusting the 'Equally Efficient Operator' ('EEO') downstream cost standard, to reflect different assumptions regarding the market share achievable by an efficient entrant.[35]

2 **Mandating the provision of duct access**—the MCA states that since access to GO's ducts is already provided to Melita and since GO is subject to a non-discrimination obligation linked to its SMP designation, 'the MCA presumes that the price offered to other alternative operators requesting access to ducts will be the same as that already made available to Melita.' The regulator also notes that it may in future require prices for duct access and associated facilities to be cost-oriented.[36]

The MCA concludes by stating that if a commercial agreement were reached between GO and Epic for access to VULA and PIA, it would consider the implications for the market analysis, 'but this is not the case, at this time'.[37]

2.3 Key issues with the MCA's market analysis

There are many problems with the MCA's market analysis, which we focus on in the remainder of this report. Before considering these issues in detail, however, it is instructive to consider more broadly how the MCA's assessments have evolved.

As our review of the regulatory context demonstrates, **the MCA's positions have materially shifted over time in ways that are difficult to reconcile with the evidence**.

First, **it is counterintuitive that—after declaring in 2020 that no operator was individually dominant at the wholesale level—the MCA now identifies GO as having SMP at the wholesale level**. This is especially difficult to justify, given that GO has since lost market share in the

[35] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, p. 81.
[36] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, p. 89.
[37] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, p. 90.

intervening period, with Melita now the leading player in Malta for fixed broadband services.[38]

Second, **it is unclear why the MCA has adopted a completely different approach to defining the wholesale market**. In its 2020 consultation, the MCA adopted a product market definition for the wholesale market which was as broad as the underlying retail market, on the grounds that demand for the former was derived from demand in the latter. In contrast, in its latest consultation, the MCA adopts a strikingly narrow wholesale product market definition.[39]

More specifically, **it is difficult to justify the MCA's decision to exclude cable-based bitstream services from its wholesale market definition**, having originally included this service in its product market definition in 2020. Two specific considerations here include that:

1. in 2020 the MCA argued that wholesale bitstream access supplied via Melita's cable network and services supplied via GO's FTTH network were 'functionally equivalent', with the substitutability of these services driven by Melita's upgrade of its coaxial-based network to the DOCSIS 3.1 standard;[40],[41]
2. the MCA now proposes to exclude cable-based bitstream access from its product market definition, on the grounds that Epic, having now deployed its own FTTH network, would incur switching costs if it were to use cable-based access.[42] However, given that Epic's FTTH network covers under 6% of dwellings in Malta, it is unclear why the MCA deems these costs would be significant.

In general, we consider that **many of the issues with the MCA's analysis can be traced back to its incorrect assessment of competition within the retail market**, which is not supported by the evidence. As we demonstrate in section 3 below, the retail market in Malta is competitive

[38] For completeness, however, we note that the MCA's original conclusion in 2020 of joint dominance at the wholesale and retail level was also not supported by evidence, as demonstrated in Oxera's report for Melita.
[39] MCA (2020), 'The provision of wholesale fixed broadband access in Malta—Definition, assessment of SMP & regulation of relevant markets: Consultation', MCA/C/20-3864, 22 May, p. 6.
[40] MCA (2020), 'The provision of wholesale fixed broadband access in Malta—Definition, assessment of SMP & regulation of relevant markets: Consultation', MCA/C/20-3864, 22 May, p. 7.
[41] The MCA further substantiated this argument by pointing to evidence which suggested that end users considered the fixed broadband products supplied by Melita and GO to be 'similar to very similar', such that switching behaviour would lead them to the cheaper option. See MCA (2020), 'The provision of wholesale fixed broadband access in Malta', 22 May, p. 6.
[42] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, pp. 48–51.

absent SMP remedies, such that an analysis of the underlying wholesale market is not required.

Furthermore, **the MCA's analysis incorrectly assumes that Epic requires access to GO's infrastructure via SMP remedies to compete as an end-to-end network provider**. However, as we demonstrate in section 4, there are a number of alternative options available to Epic including:

- **the BCRD**—under which GO must provide access to companies such as Epic on FRAND terms;
- **existing commercial agreements and the potential to extend these**—including the agreement between Melita and Epic, which to date has facilitated Epic's coverage of roughly 6% of dwellings in Malta;
- **non-ECN physical infrastructure**—including that of Enemalta, which is used by each of GO, Melita and Epic for last-mile connectivity, and Infrastructure Malta, which has facilitated GO's FTTH rollout.

3 The retail market is competitive, absent SMP remedies

In this section, we outline our analysis of the competitive dynamics of the retail fixed broadband market in Malta.

Our analysis reveals that **the retail market is characterised by effective competition**. In particular, we find that:

1. **strong levels of competition can be observed over the last ten years, well before Epic began to roll out its own FTTH network** (i.e. when GO and Melita were the only end-to-end infrastructure competitors). This is demonstrated by a wide range of evidence, including the evolution of maximum broadband speeds, the change in price per Mbps, and the evolution of market shares;
2. **these competitive dynamics are likely to persist, and may well intensify in future**. In particular, GO's aims to reach national VHC network coverage by the middle of this decade mean that all consumers in Malta will benefit from access to at least two different VHCN providers. Furthermore, expected improvements in mobile and 5G technology will provide additional impetus for networks to innovate, placing further competitive pressure on existing players.

Importantly, as explained in section 3.3, **SMP regulation is not central to the finding of a competitive retail market**.

3.1 The competitive landscape in Malta

3.1.1 Broadband speeds and availability of gigabit-capable networks

A useful starting point for assessing competition in the retail market for fixed broadband services is to examine the broadband speeds available to end users.

There are two operators in Malta, GO and Melita, offering nationwide broadband coverage based on their own end-to-end networks. However, only Melita currently offers nationwide gigabit coverage.[43] It provides

[43] In its 2023 consultation, the MCA states that 'Gigabit offers are available to around 90% of households in Malta via Melita's cable network.' See MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, p. 1.

this service using its cable HFC network, based on the DOCSIS 3.1 standard.[44] This enables Melita to provide speeds of up to 1Gbps nationwide, and up to 1.2Gbps to roughly 50% of dwellings in Malta.[45]

Currently, GO offers nationwide broadband coverage only through a mix of its copper and fibre network, offering gigabit speeds to only 67% of dwellings.[46] However, as outlined in section 3.2, we understand GO plans to achieve full nationwide coverage with its fibre network by the end of 2025. Meanwhile, Epic's fibre coverage has so far reached c. 6% of all dwellings in Malta, with plans to cover 25% of all dwellings by 2024, supporting download speeds of 2Gbps.[47]

The EU's goal is for all households to be covered by a gigabit network by 2030.[48] As at 2021, average VHCN coverage across EU countries was just 70%.[49] Malta is therefore a clear leader in VHCN coverage—not only has it already met the EU's goal, but the majority of households in Malta can already choose between at least two gigabit-capable networks. Survey evidence indicates that Malta's telecommunications infrastructure is a key driver of foreign direct investment into the country.[50]

3.1.2 Evolution of product offerings and innovations

Developments in fixed broadband technology over the last decade have greatly improved the speeds which operators are able to provide to customers. Accordingly, in a competitive market, one would expect such benefits to be passed on to consumers over time.

This is exactly what has occurred in Malta, as shown in Figure 3.1 below. Over the last decade, GO and Melita have sought to differentiate themselves by offering higher headline internet speeds and/or more

However, this is inconsistent with previous statements from the MCA, which indicate that Melita is capable of providing gigabit broadband on a nationwide basis. See, for example, MCA (2021), 'Broadband as a Universal Service— Ensuring the availability of an adequate broadband internet access service, including the underlying connection, at a fixed location: Decision notice', MCA/D/21-4417, 22 October, p. 9, Table 2.

[44] European Commission (2022), 'Digital Economy and Society Index (DESI) 2022—Malta', p. 4.

[45] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, p. 23.

[46] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, p. 47.

[47] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, pp. 21 and 35.

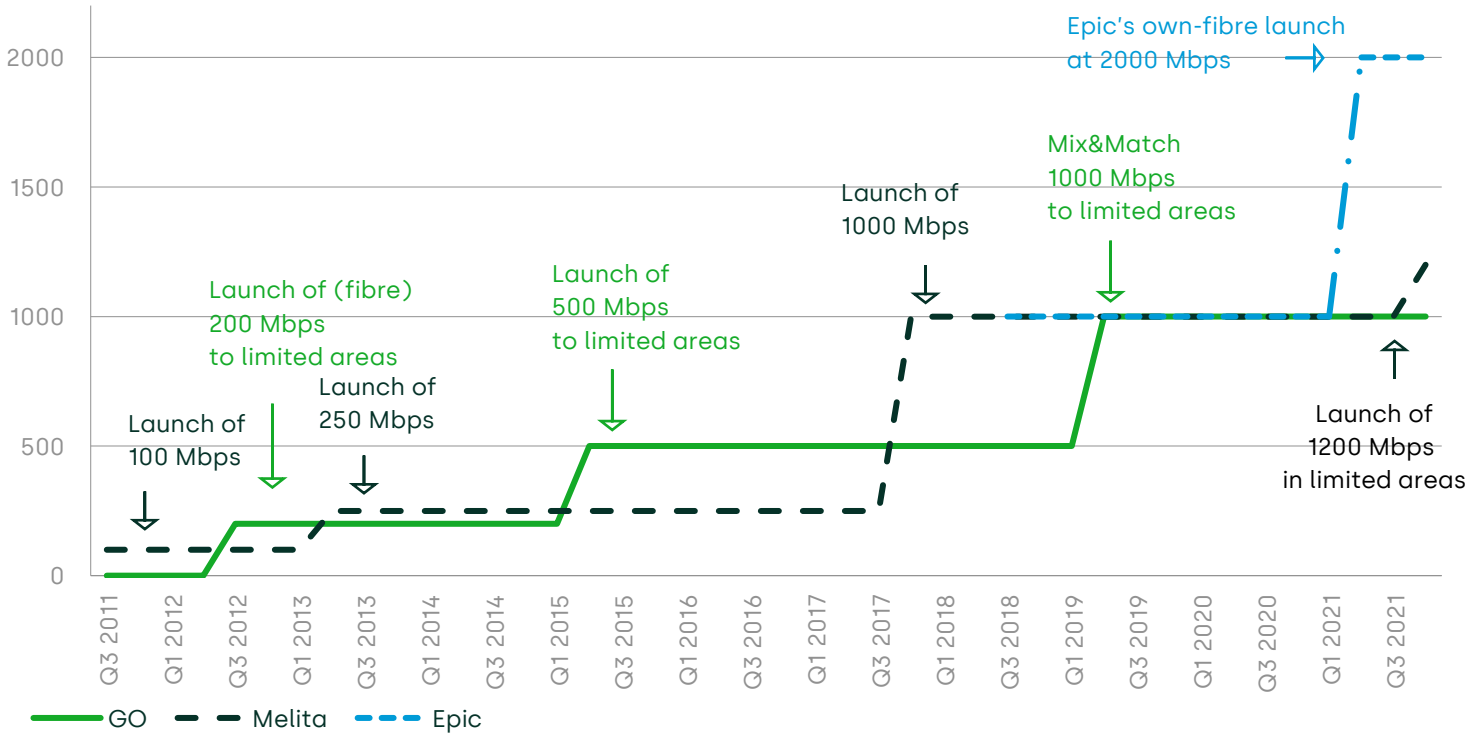
[48] European Commission (2023), 'Support for Broadband rollout', 5 May, https://digital-strategy.ec.europa.eu/en/policies/broadband-support#:~:text=The%20EU's%20broadband%20strategy&text=Gigabit%20connectivity%20for%20all%20of,Mbps%20for%20all%20European%20households, accessed 21 June 2023.

[49] European Commission (2022), 'Digital Economy and Society Index (DESI) 2022—Digital infrastructures', Table 1.

[50] See EY (2022), 'EY Attractiveness Survey—Malta', October, p. 24.

attractive multi-play bundles. This required both companies to continually invest in their networks to meet growing consumer demand for faster speeds and more attractive product offerings. For example, at the end of 2018, Melita introduced Plume Mesh Wi-Fi, one of the most advanced Wi-Fi technologies for in-home usage.[51] GO responded by introducing an equivalent in late 2020.[52]

Figure 3.1 Evolution of maximum broadband speeds (Mbps) and key offers



Note: Melita launched a flexi bundle in Q1 2017, allowing customers to pick and choose the specific services requested and ultimately the price paid, similar to the Mix&Match option provided by GO from Q2 2019. Epic was Vodafone Malta before Q3 2019, and used VULA to access GO's network before rolling out its own fibre infrastructure in Q2 2021.
Source: Oxera figure based on public information and data provided by GO.

[51] Times Malta (2018), 'Melita partners with Plume to launch Stellar WiFi in Malta', 21 December, https://timesofmalta.com/articles/view/melita-partnerswith-plume-to-launch-stellar-wifi-in-malta.697332
[52] Digital TV Europe (2021), 'GO Malta taps Divitel for mesh WiFi', 7 January, https://www.digitaltveurope.com/2021/01/07/go-malta-taps-divitel-for-mesh-wifi/#close-modal

This constant 'leap-frogging' of technical advances by each provider is clearly stimulated by strong competition between the parties, which have an incentive to continue to invest in their networks to remain competitive and not risk falling behind competitors. Against this backdrop, Epic's launch in 2021 of a 2000 Mbps service based on its own FTTH infrastructure should be seen as a continuation of a long-standing trend in improvements in maximum download speeds offered to customers in Malta. It is notable that Epic has been able to deliver this without access to GO's physical infrastructure.

This constant process of innovation through competition has delivered tangible benefits to consumers. As the MCA's consumer satisfaction survey shows, as at last year only 5% of consumers were dissatisfied with their main internet subscription.[53]

3.1.3 Market shares across products

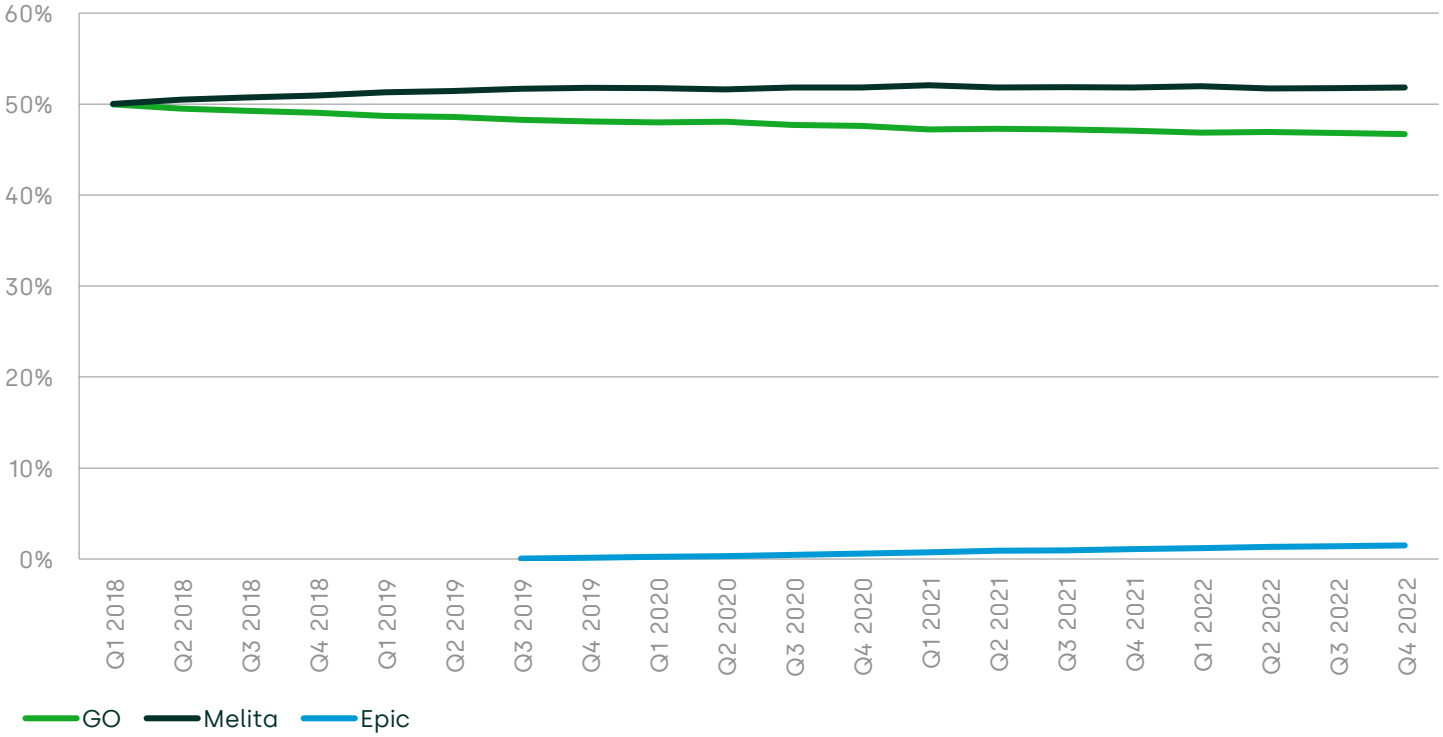
Variation in market shares provides another indication of competitive dynamics. Examination of both the levels of market share and how these levels evolve over time can be instructive. In particular, where there are differences in firms' market shares across products, or changes in firms' market shares over time, this is likely to suggest that there are strong levels of competition within a market.

Accordingly, in this section we show the evolution of market shares of the main operators in the market for the main products offered: specifically broadband—including broadband service provided on VHC networks—fixed line telephony and pay TV. We estimate market shares on the basis of subscriber numbers.

Figure 3.2 below shows the market shares of GO, Melita and Epic between 2018 and 2022 in the fixed broadband market. The market shares of each operator have evolved over the last five years: at the start of 2018, GO and Melita had nearly identical market shares. Since then, GO has gradually lost market share, to the benefit of Melita, which is now the market leader. Epic's market share has increased since entering the market, but it remains a relatively minor player.

[53] MCA (2022), 'Consumer Perceptions Survey – Fixed Broadband', November, slide 29.

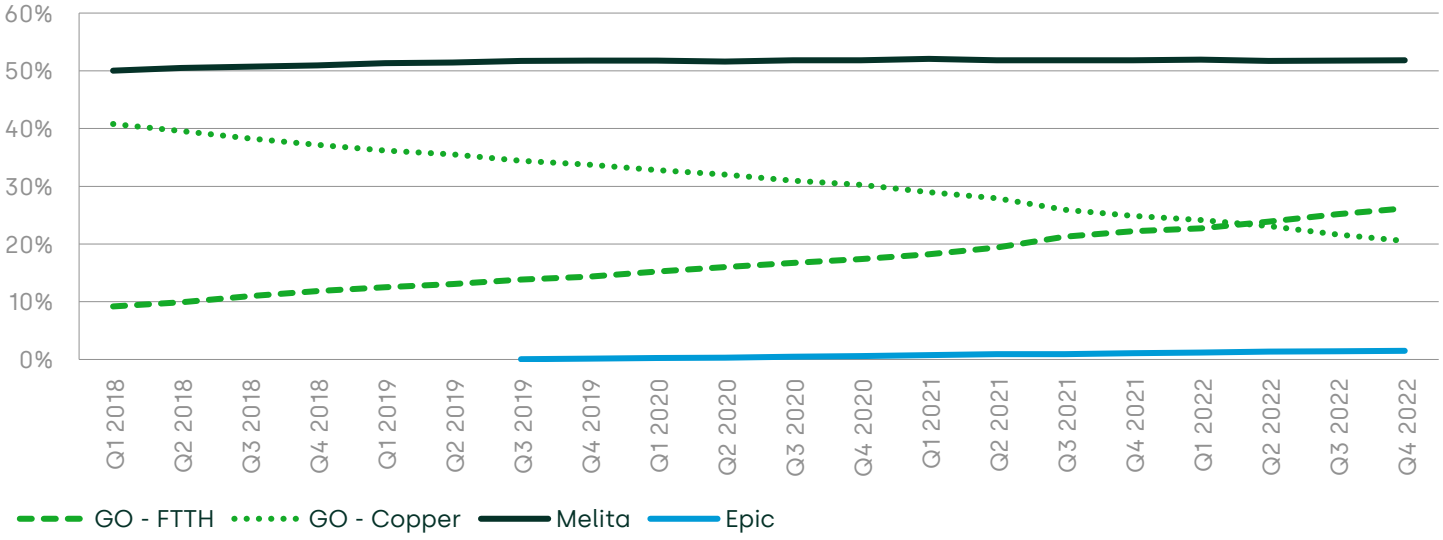
Figure 3.2 Market shares in the fixed broadband market (2018—22)



Note: Market shares are computed in terms of number of subscriptions.
Source: Oxera analysis of MCA data. MCA (2023), 'Key market indicators for electronic communications and post: Q1 2018 to Q4 2022', 23 March, https://www.mca.org.mt/articles/key-market-indicators-electronic-communications-and-post-q1-2018-q4-2022.

Figure 3.3 below provides greater detail behind these changes, by breaking down GO's market share into DSL and fibre lines. This shows how GO has progressively lost subscribers on its copper lines, although this loss has been partially offset by gaining fibre subscribers. Nevertheless, as noted earlier, GO's market share has decreased in this period: this suggests that **had GO not invested in its fibre network, it might have lost these copper subscribers to VHCN competitors**, including Epic (given that GO's decline in copper subscriptions coincided with its entry into the market) or Melita (which could have extended its lead as the largest VHCN operator in Malta).

Figure 3.3 Number of broadband subscriptions in Malta (2018—22)

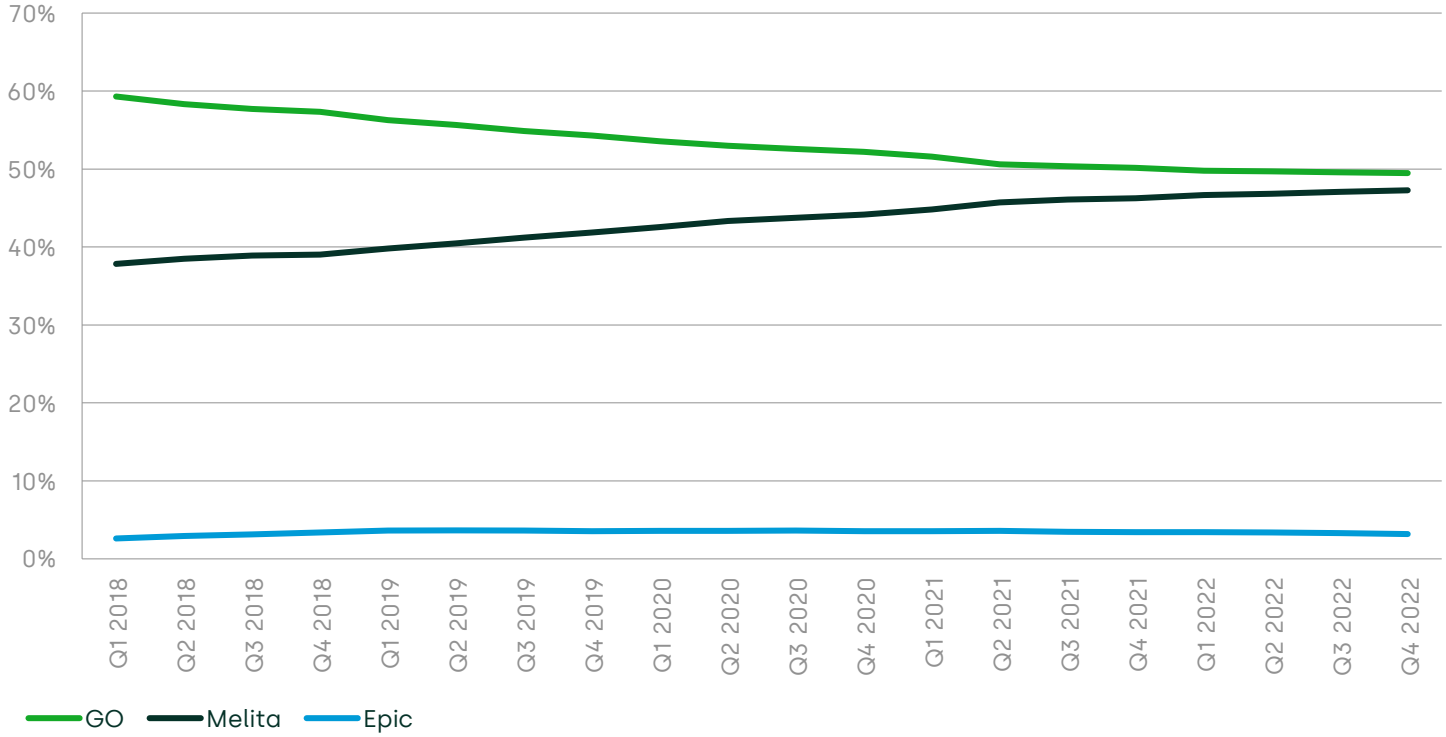


Source: Oxera analysis of MCA data. MCA (2023), 'Key market indicators for electronic communications and post: Q1 2018 to Q4 2022', 23 March, https://www.mca.org.mt/articles/key-market-indicators-electronic-communications-and-post-q1-2018-q4-2022.

We now focus on retail market shares in the fixed line telephony and pay TV, as both services are available in combination with fixed internet via bundle offers.

Figure 3.4 shows the trend in market shares for fixed line telephony services. While GO remains the leading operator, its presence in the market has reduced significantly over time, with Melita gaining at its expense.

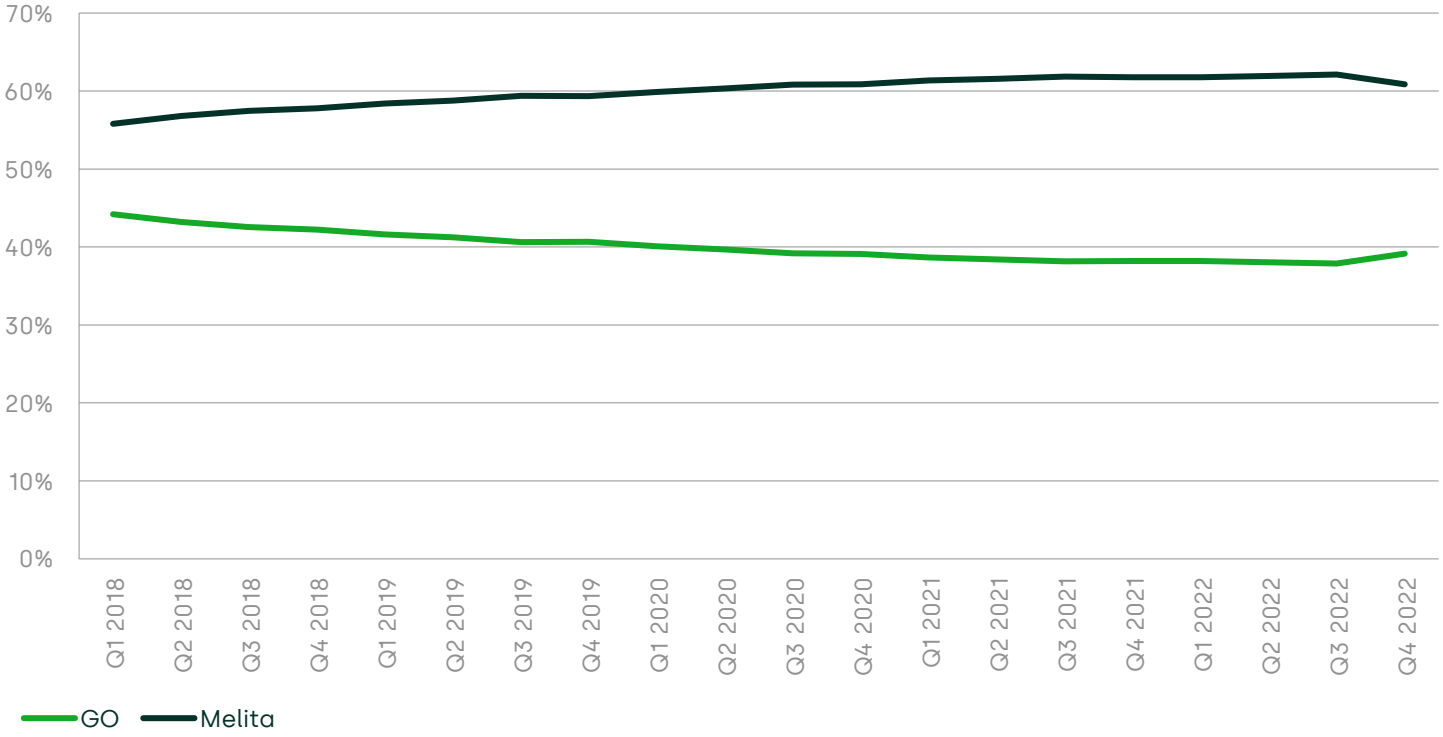
Figure 3.4 Fixed line telephony subscriptions (2018–22)



Note: Market shares are computed in terms of number of subscriptions. Ozone Malta and Vanilla Telecoms are present in the market too, although with a small share.
Source: Oxera analysis of MCA data. MCA (2023), 'Key market indicators for electronic communications and post: Q1 2018 to Q4 2022', 23 March, https://www.mca.org.mt/articles/key-market-indicators-electronic-communications-and-post-q1-2018-q4-2022.

Meanwhile, Figure 3.5 below shows the trend over time for pay TV services. Melita is the leading operator in the market, has remained the market leader in the last few years, and has even managed to increase its market share over time by capturing approximately 5% market share from GO since 2018.

Figure 3.5 Pay TV subscriptions (2018–22)



Note: Market shares are computed in terms of number of subscriptions.
Source: Oxera analysis of MCA data. MCA (2023), 'Key market indicators for electronic communications and post: Q1 2018 to Q4 2022', 23 March, https://www.mca.org.mt/articles/key-market-indicators-electronic-communications-and-post-q1-2018-q4-2022.

Our analysis demonstrates both that market shares per product differ across the main products (for example, with GO the market leader for fixed telephony but Melita the market leader in fixed broadband) and that these shares have been changing over time (for example, with Melita increasing its share of the fixed broadband market, which is likely to be due to the nationwide gigabit coverage it offers). These trends pre-date Epic's entry into the market, including in pay TV services, a service Epic only started providing earlier this year.

3.1.4 Broadband prices in Malta

Next we look at prices, which provide key information regarding levels of competition within a given market.

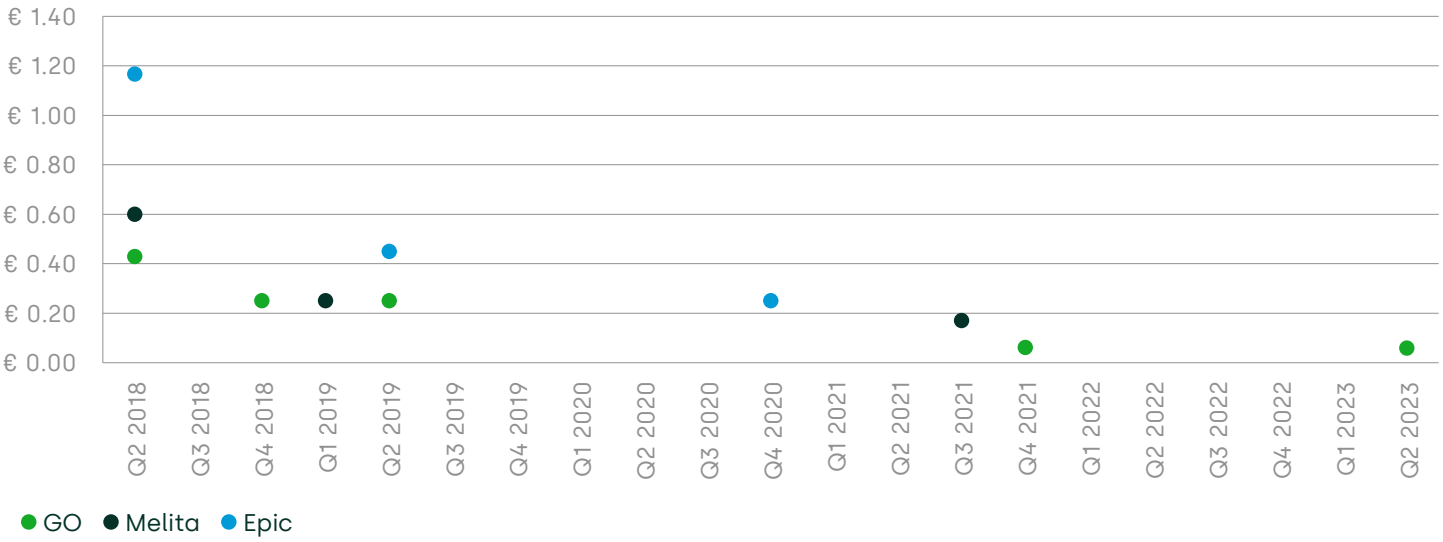
Price–speed ratios

First we examine trends in prices paid per megabit—or 'price–speed ratios'—for dual-play packages (since these are offered by Melita, GO

and Epic, although Epic has not historically provided pay TV services). We use this metric rather than looking at the unadjusted prices of bundles, since focusing on the latter metric would fail to recognise the benefits reaped by customers when headline prices are unchanged but download speeds increase.

Figure 3.6 illustrates the trend in price–speed ratios for residential, entry-level dual-play offers for each of GO, Melita and Epic since 2018. This shows how, despite prices having remained broadly stable over the last few years, price–speed ratios have been on a consistent downwards trend over the last five years. This is driven by considerable increases in download speeds offered by entry-level dual-play packages.

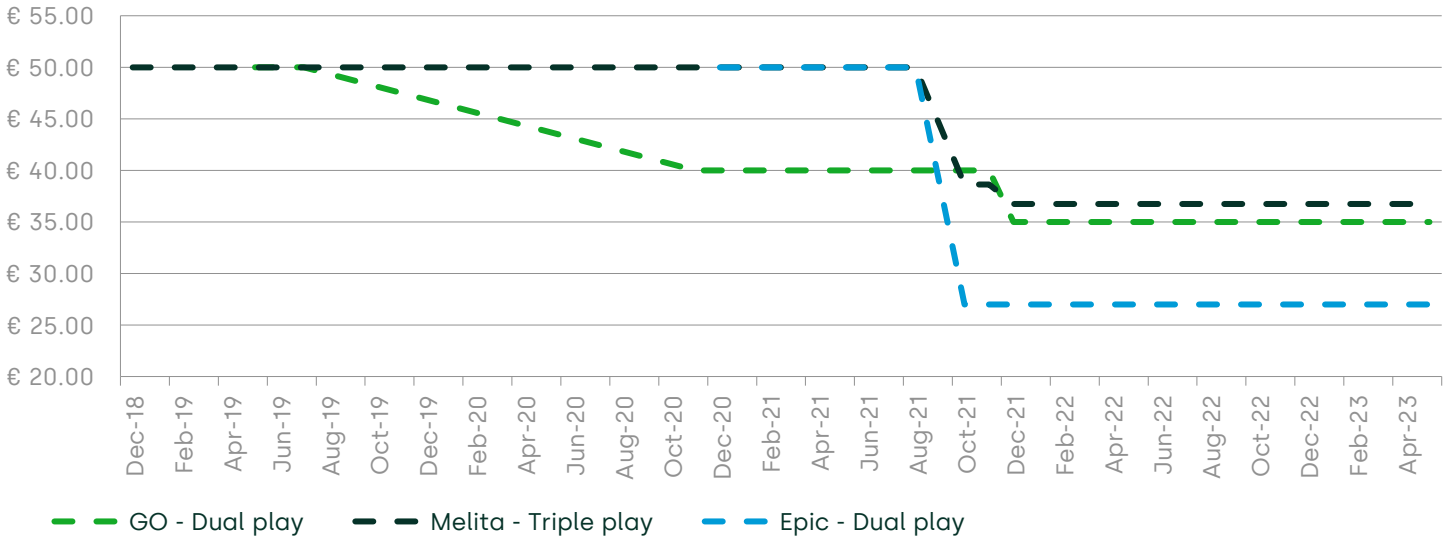
Figure 3.6 Price–speed ratios (€/Mbit) of entry-level dual-play offerings for residential customers (2018–23)



Note: Price-speed ratios for Epic's services in Q2 2018 and Q2 2019 relate to offers provided by Vodafone Malta via fixed wireless technology.
Source: Oxera, based on data received from GO.

As noted earlier, the nature of fixed broadband services means price–speed ratios provide a better indicator of improving service levels than headline prices. Nevertheless, it should be noted that headline prices for high-speed packages have declined over the last five years. This is shown in Figure 3.7, which plots the evolution of prices for dual-play packages including 1000Mbps download speeds.

Figure 3.7 Evolution of prices for 1000Mbps residential offerings (2018—23)



Note: Triple-play prices are shown for Melita because it provides TV free of charge as part of its gigabit dual-play package.
Source: Oxera, based on data received from GO.

Broadband prices across Europe

Examining how fixed broadband prices compare with other countries is also useful. The MCA cites a recent study carried out by the Commission: 'Mobile and Fixed Broadband Prices in Europe in 2021',[54] and provides the following quote from the study:

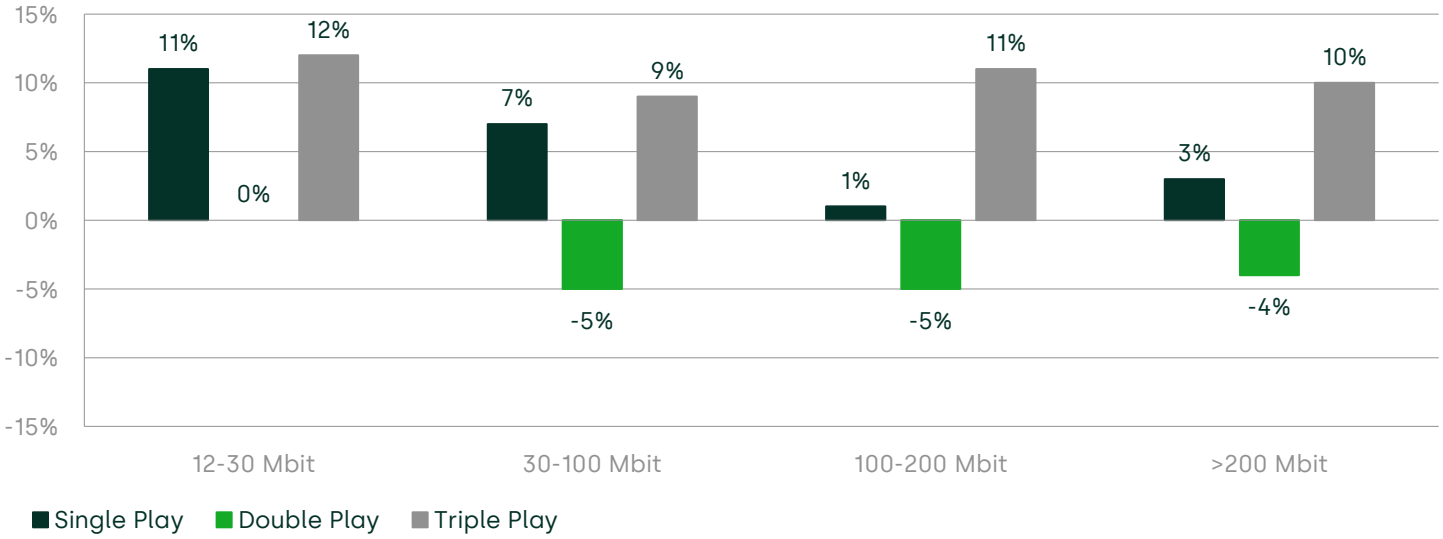
'Malta [...] despite having the majority of offers in the "relatively expensive" and "expensive" clusters, provide[s] consumers with relatively inexpensive Double and Triple Play bundles for the top speed category 200+ Mbps.'[55],[56]

The same study reveals that prices for fixed broadband in Malta tend to be higher than the EU average for single- and triple-play offers, but lower for double-play offers. This is shown in Figure 3.8, which outlines

[54] European Commission (2022), 'Mobile and Fixed Broadband Prices in Europe in 2021', 28 July, https://digital-strategy.ec.europa.eu/en/library/mobile-and-fixed-broadband-prices-europe-2021.
[55] European Commission (2022), 'Mobile and Fixed Broadband Prices in Europe in 2021', 28 July, p. 81.
[56] The Commission's cluster analysis is distinct from the comparison of average prices shown in Figure 3.8. This explains why, even though prices for top-speed triple-play bundles in Malta exceeded the EU average, Malta was nevertheless deemed to be in the 'relatively inexpensive' cluster for these services.

the percentage deviation of prices in Malta from the EU average for different combinations of packages.

Figure 3.8 Prices in Malta compared with EU average (2021)

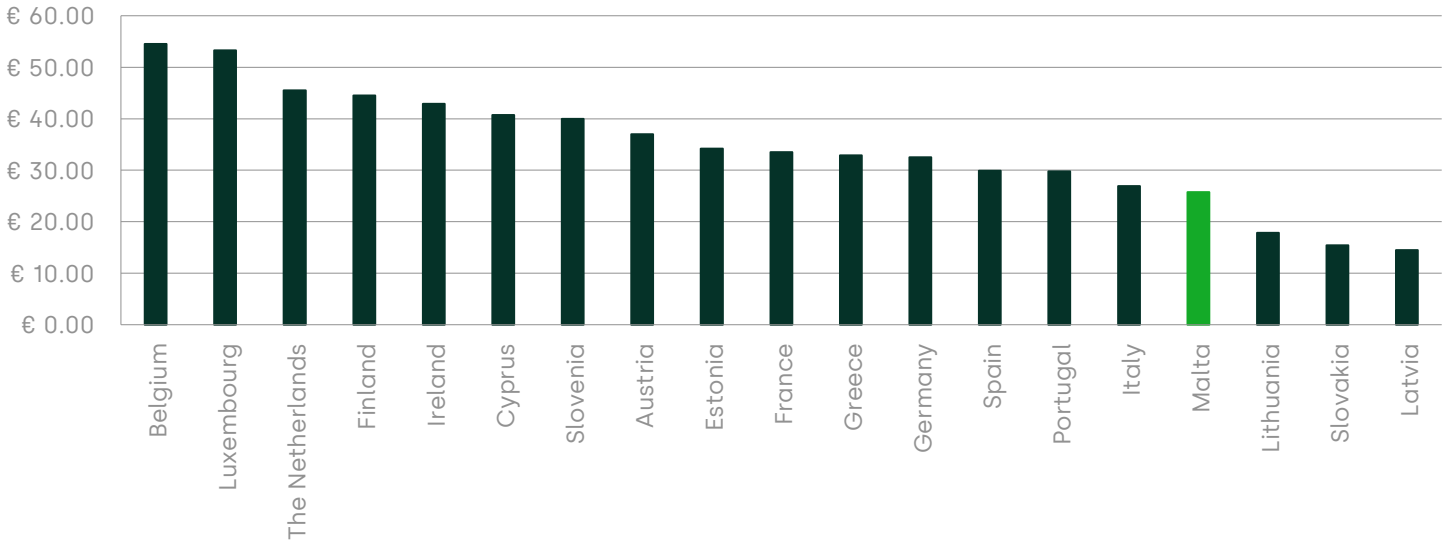


Source: European Commission (2022), 'Mobile and Fixed Broadband Prices in Europe in 2021', 28 July, p. 264, https://digital-strategy.ec.europa.eu/en/library/mobile-and-fixed-broadband-prices-europe-2021

Separately, more recent data compiled by Cable, an established broadband price comparison site in the UK, suggests that broadband prices in Malta in 2023 are actually among the least expensive in the eurozone.[57] This is highlighted in Figure 3.9, which shows the average package cost per month in the eurozone, and Figure 3.10 below, which shows the cost per megabit per month in the eurozone.[58] Both metrics suggest that Malta, compared to its peers, offers customers value for money.

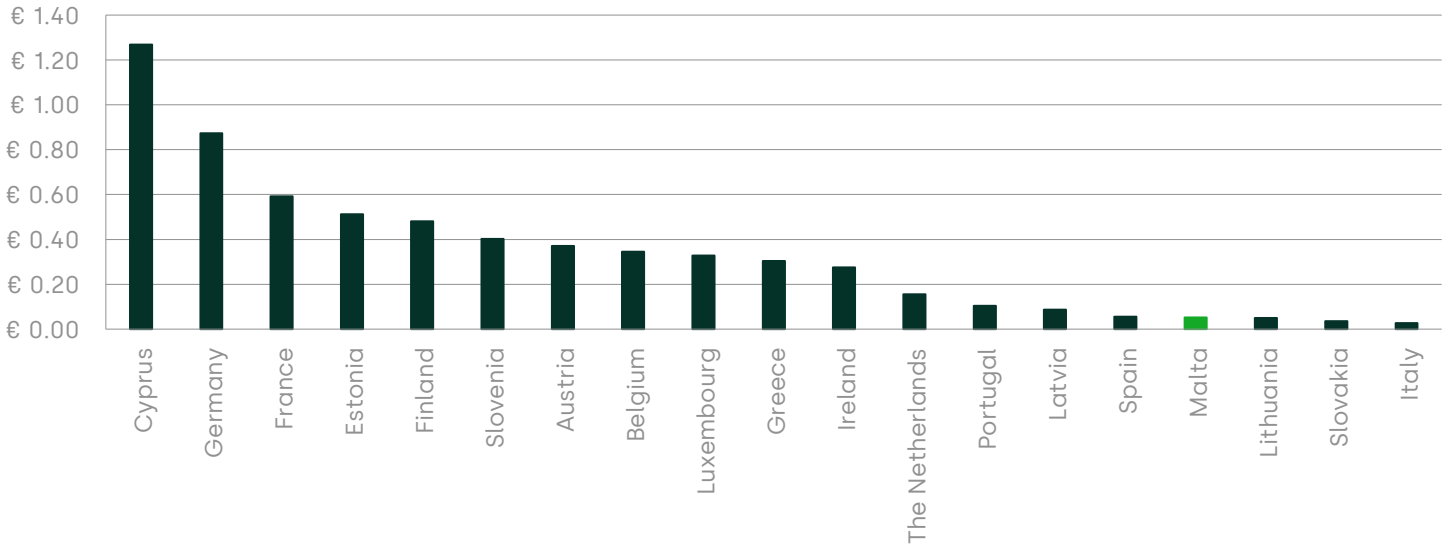
[57] See https://www.cable.co.uk/broadband/pricing/worldwide-comparison/.
[58] The average package cost per month is calculated as the 'median average of all qualifying packages sampled in that country' while the cost per megabit per month is calculated by taking the cost per megabit for each package sampled and then taking the median cost per megabit of that range. For more detail, see Cable (2023), 'Methodology: The cost of fixed-line broadband provision in 220 countries', https://www.cable.co.uk/broadband/worldwide-pricing/2023/broadband_price_comparison_methodology.pdf.

Figure 3.9 Average package cost per month in Eurozone countries (2023)



Source: Oxera analysis based on a global broadband pricing league table for 2023, https://www.cable.co.uk/broadband/pricing/worldwide-comparison/.

Figure 3.10 Cost per megabit per month, in eurozone countries (2023)



Source: Oxera analysis based on a global broadband pricing league table for 2023, https://www.cable.co.uk/broadband/pricing/worldwide-comparison/

Taken together, these comparisons provide a mixed picture, with Malta performing better in certain areas (e.g. dual-play packages and speed–price ratios) than others (e.g. triple-play packages). That said, Malta

performs considerably better than certain other small countries such as Luxembourg and Cyprus. Smaller countries are likely to provide more apt comparators for this analysis, since network operators in these jurisdictions are less able to benefit from economies of scale in infrastructure deployment.

GO's ARPU

As ARPUs reflect discounts that operators may apply to attract consumers, they can provide useful information regarding competitive dynamics in a given market, in contrast to using list prices.

In its consultation, in order to assess competition in the retail market, the MCA considers the evolution of operators' ARPUs between 2021 and 2022. The MCA notes that Melita's and GO's ARPUs are not only significantly higher than those of Epic, but have also been increasing in recent years.[59]

We do not have access to the ARPUs of either Melita or Epic, and therefore cannot provided detailed comments on these. Nevertheless, there are different reasons why Epic's ARPU may be lower than those of GO and Melita, including:

- the fact that the MCA calculates a single ARPU covering bundled services. While GO and Melita both provide pay TV, Epic did not provide this service until recently;
- Epic's offer period of six months free for two-year fixed broadband contracts.[60],[61]

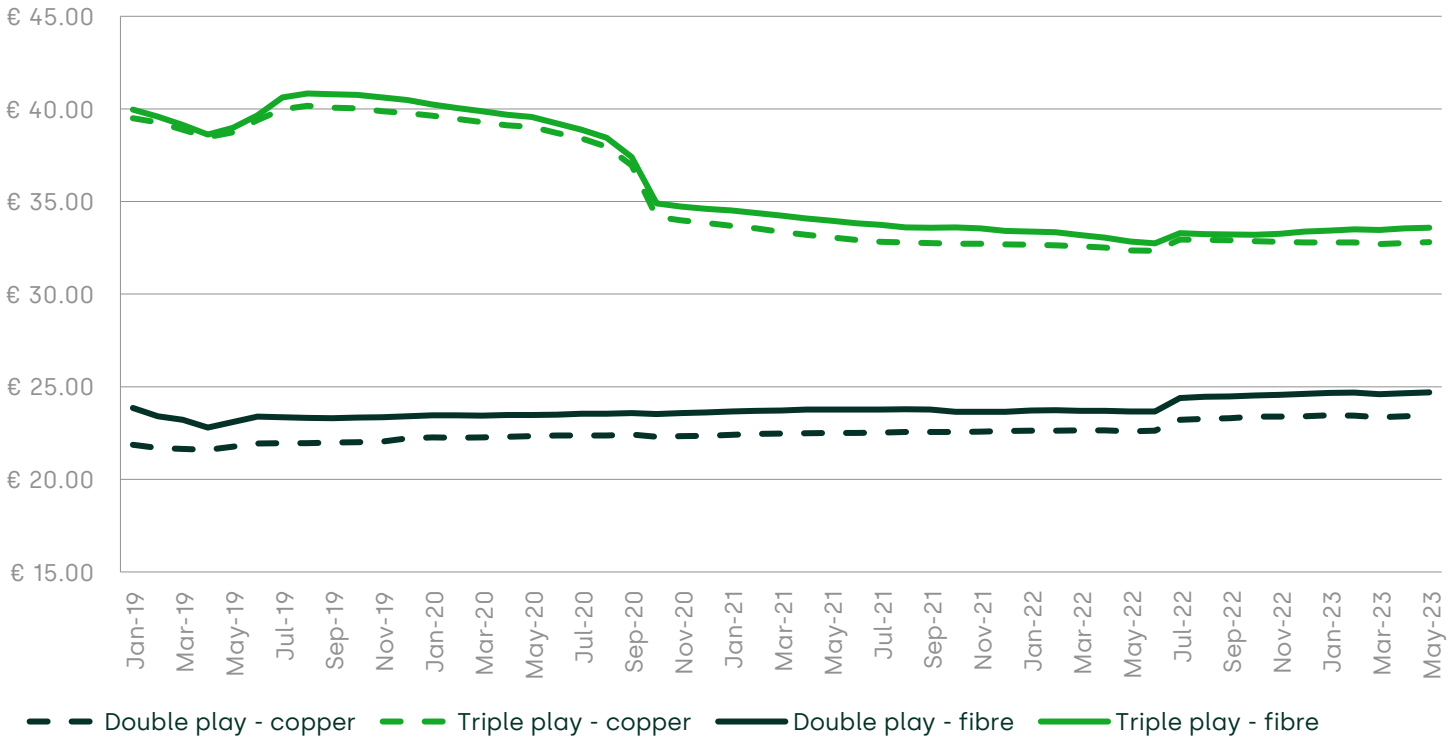
In addition, it is important to recognise that, in its analysis, the MCA provides a single ARPU for GO which aggregates together its copper and fibre network subscribers. In doing so, the MCA fails to consider whether observed changes in ARPUs might be driven by a changing product mix. For example, if a firm sells two products that are priced differently and both have decreasing average prices (and therefore ARPUs) over time, the firm's overall ARPU could be stable over time if

[59] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, p. 41.
[60] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, p. 37.
[61] While GO and Melita might have 'followed' Epic by providing similar offers, it is likely that a smaller proportion of these operators' overall subscriber base has benefited from this to date, which would serve to dampen the effect of the discount on their corresponding ARPUs.

consumers are gradually switching from the least expensive, lower-quality product towards the more expensive, higher-quality one.

Figure 3.11 below shows GO's ARPU for double- and triple-play customers split by technology type. As expected, the APRU for fibre services (whether dual or triple play) consistently exceeds the ARPU for the corresponding copper service. Figure 3.11 also shows how ARPUs for dual-play services remained broadly stable between 2019 and 2022. This suggests that the increase in GO's ARPU for double-play services could be driven by the gradual shift of customers from copper to fibre services, as discussed in section 3.1.3.

Figure 3.11 GO's ARPUs



Source: Oxera, based on data received from GO.

This suggests that the increasing ARPU values reported by the MCA may reflect a change in the product mix, rather than a lack of effective competition in the retail market.[62]

3.1.5 Profitability benchmarking

Another way to assess competition in a given market is through an analysis of profitability. If competition in a given market is limited, we should expect to see operators earning margins significantly and persistently in excess of benchmark levels of competitive returns.

In its report, the MCA states that:

'the profitability of established operators remains strong, despite competition from Epic, including a significant discount in the monthly access fee for the first six months of subscription.' [63]

However, the MCA provides limited evidence to substantiate this statement, beyond asserting that:

'even in the presence of regulation, **GO has been able to achieve healthy margins. Its EBITDA margin improved from 39% in 2020 to 41% in 2021**. Melita's performance in this area has also been strong, but reliant nonetheless on access to GO's duct infrastructure.'[64] [emphasis added]

There are three issues with this argument.

1 **No reference is made to any suitable profitability benchmarks.** Without such benchmarks for comparison, no inferences can be made regarding the reasonableness (or lack thereof) of GO's or Melita's profitability.

2 **EBITDA[65] may be an inappropriate benchmark of profitability in capital-intensive sectors such as telecommunications**. This is because, by stripping out depreciation, the metric masks the impact that capital expenditure has on profits, which, in the case of ECNs, can be very high.

[62] We understand from GO that another factor which explains the growth in its ARPU reported in the MCA's consultation relates to the treatment of discounts. More specifically, in February 2022 GO launched its 'TV free stream' to customers, which provided a significant discount on the list price of the standard package. However, this discount was not reflected in the financial information GO provided to the MCA.
[63] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, p. 4.
[64] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, p. 69.
[65] EBITDA measures the earnings before interest, tax, depreciation and amortisation.

3 **GO's sales of VULA services are relatively limited**. Given that VULA is the only price-regulated service sold by GO, the impact of the present VULA remedy on GO's margins is likely to be immaterial. In other words, GO's observed profitability is not affected by existing SMP regulation.[66]

In this section, we carry out a profitability benchmarking exercise for GO; for completeness, in our assessment we also consider Melita's profitability.[67,68]

In theory, the correct way of assessing profitability within a given sector is to compare:

- the internal rate of return (IRR)[69] for the project(s) in question; with
- the relevant weighted average cost of capital (WACC).

In a competitive market, the IRR for firms within the sector should be (roughly) equal to the relevant WACC benchmark. This is because, if the IRR consistently exceeded the WACC over a long enough timeframe, one would expect more investment and entry within the sector which, in turn, would depress profits. In contrast, if the IRR is lower than the WACC over a long enough timeframe, one would expect firms to exit the sector, which could increase profits.[70] Thus, if the IRR consistently exceeds the relevant WACC benchmark, this might indicate a lack of competition within the relevant sector.[71]

In practice, however, there are practical difficulties with estimating IRRs for companies that have made significant investments over many years. For example, IRRs should be estimated over the lifetime of the

[66] In particular, total Epic subscriptions based on VULA stood at 2,091 subscriptions, while GO had just under 100,000 subscriptions on its own retail network at the end of December 2022. See MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, p. 69, footnote 75.
[67] We have excluded Epic from our profitability benchmarking given that the vast majority of its business is generated from mobile customers rather than through the sale of fixed broadband or bundles including fixed broadband. As at December 2022, Epic had 278,243 mobile telephony subscriptions, accounting for c. 40% of the market in Malta. On the other hand, Epic had only 3,174 FTTH subscriptions, accounting for c. 1.5% of the fixed broadband market (excluding fixed wireless subscriptions). See MCA (2023), 'Key market indicators for electronic communications and post: Q1 2018 to Q4 2022', 28 March.
[68] We focus on the performance of GO and Melita at the company level rather than the group level.
[69] The IRR is the discount rate that will bring a series of cash flows to a net present value of zero.
[70] Oxera (2003), 'Assessing profitability in competition policy analysis ', July, para. 1.17.
[71] A possible exception to this rule exists where firms are exposed to material non-systematic risks that are not captured in the WACC. In this case, returns in excess of the WACC might be justified to enable investors to bear these risks.

investment(s) in question, including in future periods (for which the outcome is not yet known). Because of this, the return on capital employed (ROCE)[72] is often used as a proxy for the IRR.[73] The ROCE is a practical alternative since it can be calculated based on readily available accounting data.

We now carry out a comparison of the ROCE to the WACC estimates historically provided by the MCA, as well as a comparison of GO's and Melita's ROCEs with those of international comparator firms.

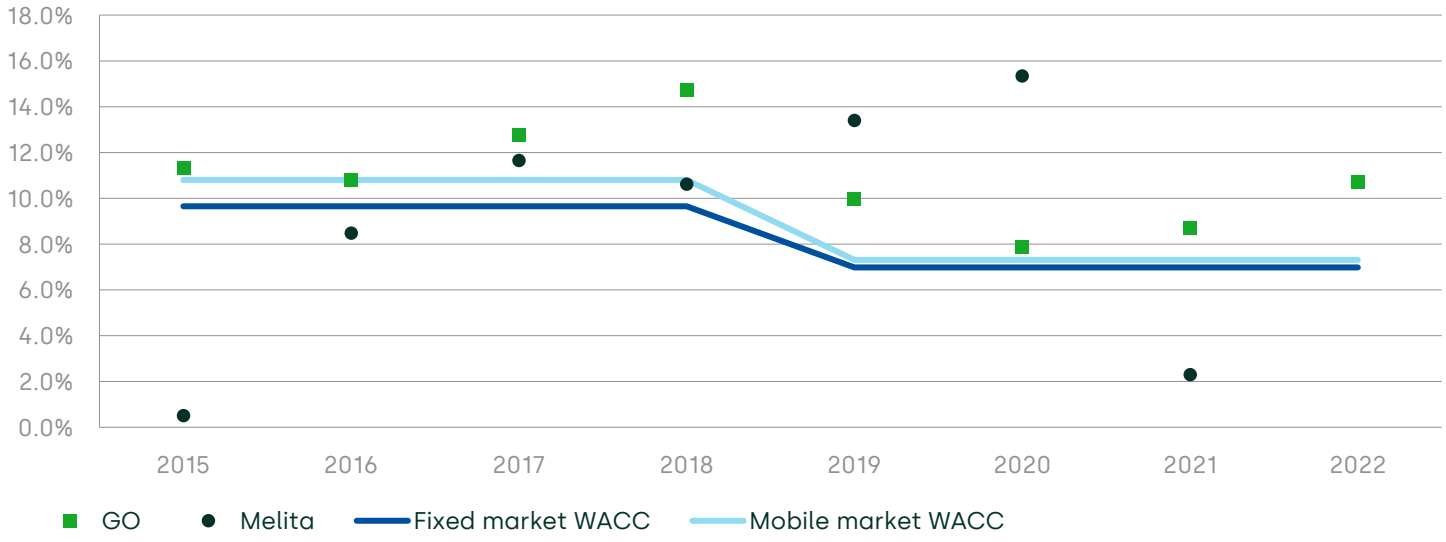
We also carry out an EBIT[74] margin benchmarking exercise to complement our ROCE benchmarking.[75] For the latter analysis, however, we cannot compare EBIT margins to the WACC, so we compare GO's and Melita's performance to that of international comparator firms only.

We first calculate GO's and Melita's ROCEs and EBIT margins using the companies' annual statements. For our ROCE benchmarking, we rely on the WACCs estimated by the MCA in its 2012 and 2020 decisions. In 2012, pre-tax nominal WACCs of 9.65% and 10.8% were set for the fixed and mobile markets respectively,[76] while in 2019, pre-tax nominal WACCs of 6.98% and 7.31% were set for the fixed and mobile markets respectively.[77]

As shown in Figure 3.12, **GO's and Melita's ROCEs are broadly comparable to the WACCs set by the MCA over the relevant period**, indicating returns to shareholders consistent with those which could be expected within a competitive market. In some years the ROCE is higher than the WACC, however, as explained earlier, this is not inconsistent with the finding of competitive returns, since there are reasons why returns may exceed the WACC benchmark in any one year.

[72] ROCE measures the return on capital, which is calculated by dividing EBIT by the capital employed (defined as total assets less current liabilities), and thus adjusts for the company's ability to earn a return on its investments.
[73] For example, see Ofcom (2017), 'The review of the market for standalone landline telephone services – Annexes', para. A5.10.
[74] EBIT measures earnings before interest and tax (i.e. after depreciation and amortisation).
[75] There are potential issues with using ROCEs, including the fact that capital employed may not be properly measured, for example, if it does not include intangible assets that are not reported in the financial accounts as they may not have been recognised.
[76] These WACCs applied to regulatory accounting periods ending on or after 31 December 2012. MCA (2012), 'Estimating the cost of capital—Response to Consultation and Decision', 20 November, p. 18.
[77] These WACCs applied to regulatory accounting periods ending on or after 31 December 2019. MCA (2020), 'Weighted average cost of capital—Response to Consultation and Decision', 23 January, p. 32.

Figure 3.12 GO's and Melita's ROCEs benchmarked against the WACC



Note: No data is available for Melita in 2022 as its financial accounts were not yet available. In 2021, following a merger, Melita's intangible assets increased from €22m at the end of 2020 to €539m at the end of 2021, causing a significant decrease in the ROCE.
Source: Oxera calculations based on data from Melita's and GO's annual financial statements, and MCA WACC decisions.

Next, we show how GO's and Melita's ROCEs compare to those of international comparator firms. To do so, we first needed to select suitable comparators. We use the list of European telecommunications comparators selected by Professor Damodaran,[78] focusing on companies he classifies as providing 'Telecom Services'.[79] We note that

[78] Professor Damodaran teaches Corporate Finance and Valuation at the Stern School of Business at New York University. He runs a website on which he publishes data on industry averages for US and global companies on both corporate finance and valuation metrics, among other data. See https://pages.stern.nyu.edu/~adamodar/.

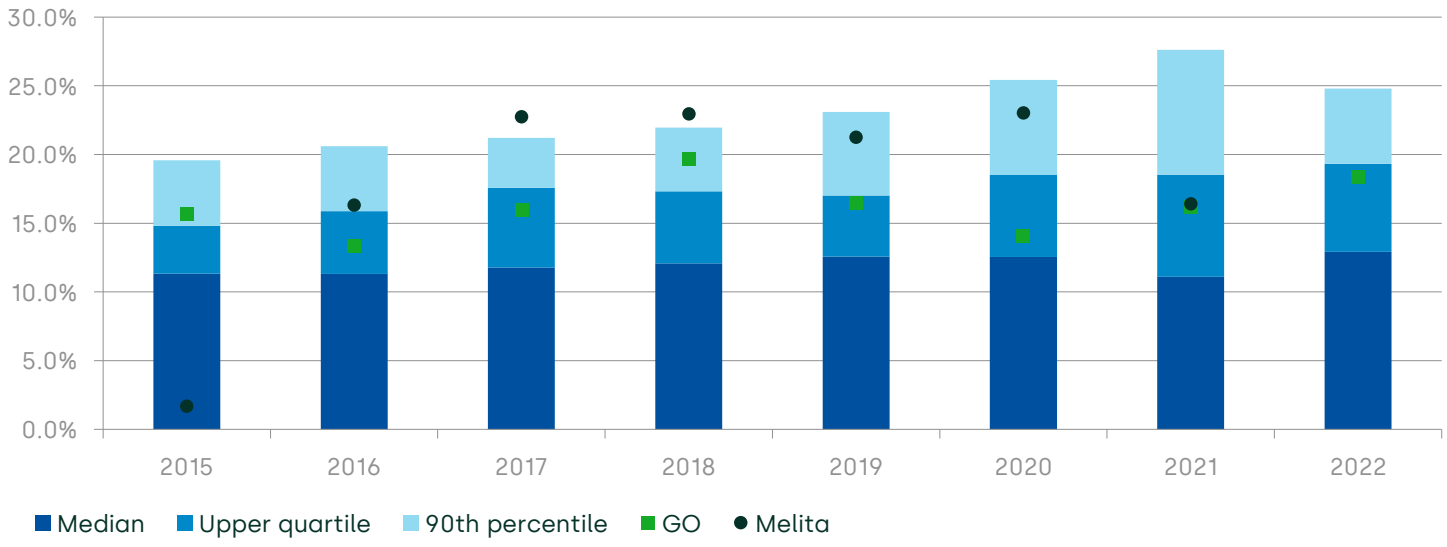
[79] The industry grouping was done by Professor Damodaran based on raw data groupings available to him. The following companies are classified under 'Telecom Services': Siminn hf., Syn hf., Aiton Caldwell SA, Bahnhof AB, Bredband 2 i Skandinavien AB, Cellnex Telecom S.A., Convergenze S.p.A. Società Benefit, Delta Technologies Nyrt., Deutsche Telekom AG, DG-Net S.A., easyCALL.pl S.A., ecotel communication ag, Elisa Oyj, Go internet S.p.A., GO plc, Hellenic Telecommunications Organization S.A., Ifrastrutture Wireless Italiane S.p.A., Internet Union S.A., Intred S.p.A, Koninklijke KPN N.V., Korbank S.A., LleideNetworks Serveis Telematics S.A., Magyar Telekom Távközlési Nyilvánosan Müködö Részvénytársaság, Néocom Multimedia SA, NFON AG, Nordtelekom Távközlési Szolgáltató Nyrt., NOS S.G.P.S. S.A., OptiMobile AB, Orange Polska S.A., Orange S.A., Ovzon AB, Parlem Telecoms companyia de Telecomunicacions S.A., Pharol SGPS S.A., Planetel S.p.A., Proximus, Przedsiebiorstwa Telekomunikacyjnego TELGAM S.A., R22 S.A., Rai Way S.p.A., SferaNet Spòlka Akcyjna, Sonetel AB, Swisscom AG, Telecom Italia S.p.A., Telefónica Deutschland, Telefónica S.A., Telekom Austria AG, Telenor ASA, TELES AG Informationstechnologies, Telestrada SA, Telia Company AB, Th1NG AB, Tiscali Spa, Transtema Group AB, Türk Telekomünikasyon Anonim Sirketi, Unidata S.p.A., Unima 2000 Systemy Teleinformatyczne S.A., United Internet AG, Vantage Towers AG, Verbicom S.A., Wyld Networks AB, AdEPT Technology Group, Bigblu Broadband plc, Gamma Communications plc, Helios Towers plc, IHS Holding Limited, Liberty Global plc, Zegona Communications plc.
See https://pages.stern.nyu.edu/~adamodar/New_Home_Page/home.htm.

GO is in fact one of the comparators included in Professor Damodaran's sample, which justifies its use in this exercise.[80] We then compile summary statistics on the comparator set—calculating the median, the upper quartile and the 90th percentile—and compare GO's and Melita's performance against these firms. We calculate metrics for the international comparator firms by using data downloaded from Reuters.

As our results in Figure 3.13 and Figure 3.14 show, **there is no evidence to suggest that GO's or Melita's profits exceed those that would be expected in markets subject to competition**. More specifically:

- **GO** is a relatively strong performer when benchmarked based on EBIT performance, generally falling between the median and upper quartile of the sample. Nevertheless, its performance is always significantly below the 90th percentile. Its ROCE performance compared to international comparators is somewhat weaker, with the company remaining mostly in the upper quartile over the sample period.
- **Melita** performs better than GO on an EBIT basis. However, its performance against European peers is generally weaker when measured on a ROCE basis.

Figure 3.13 EBIT margins across European telecoms companies

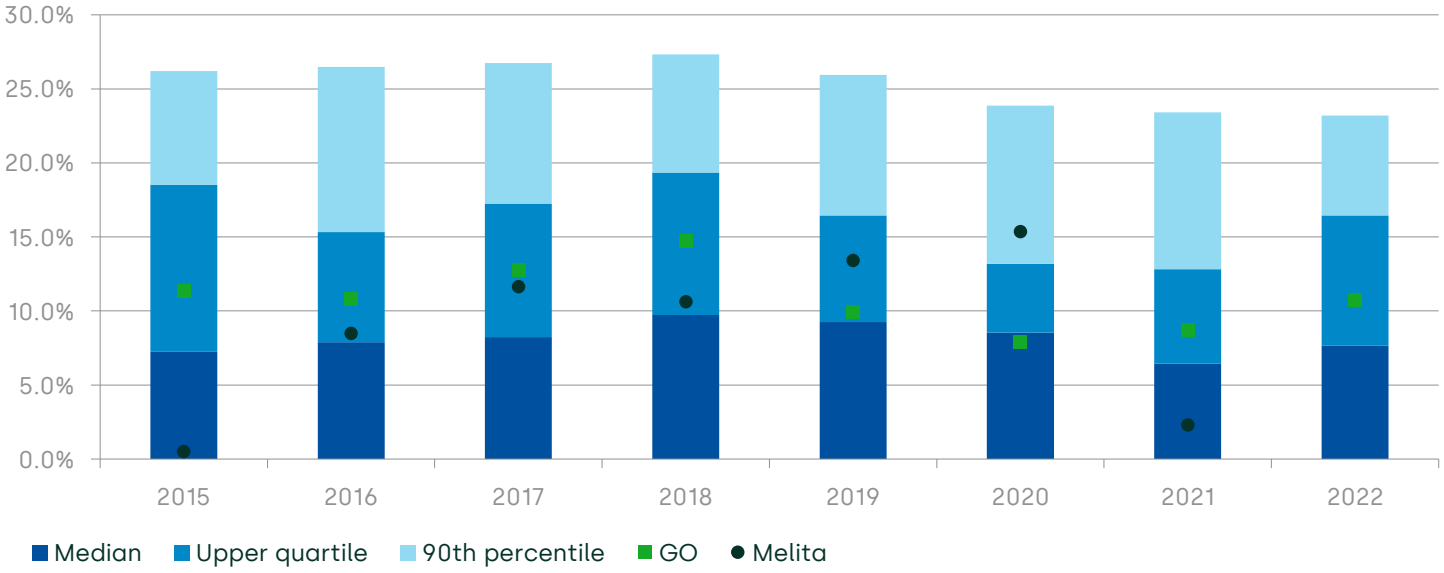


Note: No data is available for Melita in 2022 as its financial accounts were not yet available.

[80] For the purposes of our exercise, we have removed GO plc from the sample.

Source: Oxera calculations based on data published on 'Damodaran Online', data downloaded from Refinitiv Eikon and data from Melita's and GO's annual financial statements.

Figure 3.14 ROCE across European telecoms companies



Note: No data is available for Melita in 2022 as its financial accounts were not yet available. In 2021, following a merger, Melita's intangible assets increased from €22m at the end of 2020 to €539m at the end of 2021, causing a significant decrease in the ROCE.
Source: Oxera calculations based on data published on 'Damodaran Online', data downloaded from Refinitiv Eikon and data from Melita's and GO's annual financial statements.

3.2 Expected VHCN deployment suggests vigorous retail competition will continue

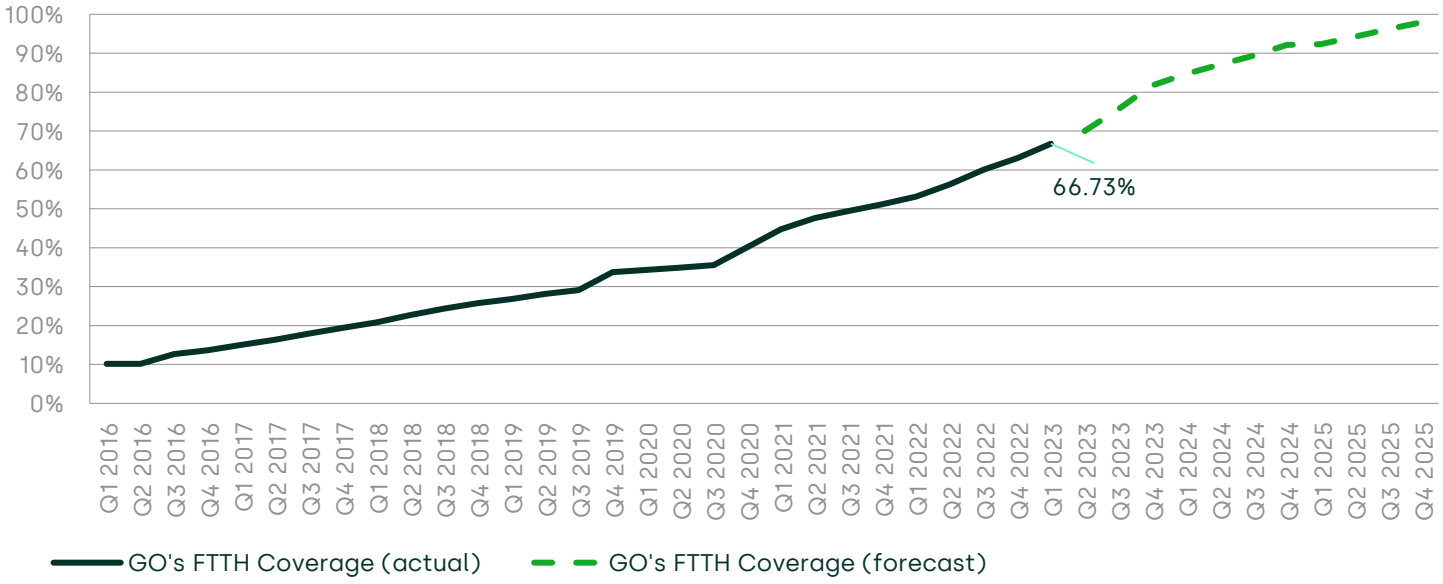
Given the forward-looking nature of market analyses, a key question for the NRAs is how competitive circumstances are likely to evolve over the time horizon under consideration. In this context, expectations of future network rollout provide important evidence since, all else equal, greater access to VHCNs among end users will deliver an intensification of fixed broadband competition among operators.

As noted in the MCA's consultation, Malta already benefits from high levels of VHCN connectivity. Melita's cable network, which operates at

DOCSIS 3.1 standard,[81] provides connections of up to 1Gbps nationwide and up to 1.2Gbps in areas covering roughly 50% of dwellings in Malta.[82] Meanwhile, Epic's coverage has so far reached roughly 6% of all dwellings in Malta, and Epic has plans to cover 25% of all dwellings by 2024.[83]

At present, GO has reached under 70% VHCN coverage in Malta via its FTTH network. However, having invested significantly in its network in recent years, GO is now expected to make significant additional investments in order to reach nationwide coverage with its fibre network towards the middle of this decade, as shown in Figure 3.15.

Figure 3.15 GO's FTTH coverage (2016–25)



Note: The data provided by GO did not have any data points for Q1 2020, Q2 2020 and Q4 2020. For these data points, we used linear interpolation to estimate the coverage.
Source: Oxera analysis based on data provided by GO.

GO's plans to continue rolling out its FTTH network mean that, by 2025, consumers in Malta will benefit from nationwide access to at least two gigabit capable networks. Increased levels of coverage will mean greater competition in the provision of VHCN services. Against this

[81] European Commission (2022), 'Digital Economy and Society Index (DESI) 2022—Malta', p. 4.
[82] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, p. 22.
[83] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, p. 35.

backdrop, it is difficult to justify the MCA's concerns regarding competition when it states that:

'Consumer harm may also occur in the form of reduced investment in network infrastructure and less incentive to upgrade networks and services, which would ultimately translate in poor quality of experience for end users.'[84]

3.3 SMP regulation is not central to the finding of a competitive retail market

The evidence presented earlier demonstrates how the retail market in Malta is indeed competitive, and there are forces at play to suggest that this competition will intensify in future.

In particular, **by 2025 all Maltese consumers will benefit from access to at least two separate VHC networks**. Meanwhile, Epic has already covered over 5% of dwellings in Malta via a combination of its own ducts and an infrastructure access agreement with Melita, and expects to expand its coverage in the years to come.

Importantly, **competition in the retail market cannot be attributed to the presence of SMP remedies**, specifically the VULA access remedy. As at December 2022, Epic had managed to gain roughly only 1% market share:[85] six years after the MCA's final decision on the technical specification of the VULA remedy, and four years after Vodafone Malta/Epic agreed to purchase lines via VULA. This demonstrates that existing SMP regulations have had limited impact to date, and, when coupled with evidence that the retail market is competitive, suggests future levels of retail market competition may be invariant to Epic's performance in the coming years.

[84] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, p. 23.
[85] Based on Epic having 2,091 subscriptions based on VULA, with a total number of retail broadband subscriptions (excluding Fixed Wireless Access subscriptions) at the end of December 2022 amounting to 212,321. See MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, p. 69, footnote 75.

4 The MCA's wholesale market analysis does not reflect competitive dynamics in the retail market

Section 3 has demonstrated how the retail market for fixed broadband services in Malta is characterised by effective competition. In light of this, an analysis of the underlying wholesale market would not be justified since it is unclear what issues such analysis—including any resulting remedies—would be seeking to rectify.

Nevertheless, notwithstanding the outcome of our retail market analysis, we now examine the MCA's wholesale market analysis. We consider there are two basic flaws with its assessment, which are:

- the narrow focus of the MCA's wholesale product market definition (section 4.1);
- the MCA's incorrect conclusion that GO has the ability to act independently in the market under investigation in ways that could distort competition and harm consumers (section 4.2).

4.1 The MCA has inappropriately specified the wholesale product market

4.1.1 Demand for wholesale services is a derived demand

In its consultation, the MCA adopts a broad definition of the retail market for fixed broadband services, so as to encompass:

- fixed broadband supplied over GO's copper network;
- fixed broadband supplied over GO's and Epic's fibre networks;
- fixed broadband supplied over Melita's HFC DOCSIS 3.1 network.[86]

However, the MCA then proceeds to adopt a far narrower definition of the relevant wholesale market including only: (i) the provision of wholesale physical access over the copper network; (ii) the provision of FTTx VULA; and (iii) access to physical infrastructure via ducts deployed for the purpose of providing electronic communications.[87] The effect is to define 'the wholesale market for the provision of virtual and physical

[86] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, p. 4.
[87] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, pp. 5–6.

access in Malta' such that it expressly excludes any wholesale infrastructure not managed by GO—in particular, including any services that might be provided via Melita's cable network, or other non-ECN infrastructures.

In the following sections, we outline the specific errors in the MCA's logic which result in an inappropriate definition of the wholesale market.

Before doing so, however, we note that **the MCA's product market definition fails to recognise that demand for wholesale services are derived from demand in the underlying retail market**. This point is recognised in the Commission's market analysis and SMP guidelines:

'The starting point for the identification of wholesale markets susceptible for ex ante regulation should always be the analysis of corresponding retail market(s).'[88]

The implication is that where an NRA analyses the wholesale market due to competition concerns in the retail market, its starting point should be to define the product market in a manner consistent with its retail market analysis.

More pertinently, the MCA also recognised this point in its 2020 consultation, where—despite the regulator adopting the same retail market definition to that proposed in its current consultation[89]—its proposed wholesale market definition also included bitstream access via the cable network.[90] At the time, the MCA justified its decision on the following grounds:

'The MCA defines the relevant product market on the basis of a demand-side and supply-side substitutability assessment to identify the products encompassing the relevant wholesale market. Direct pricing pressures at wholesale level and indirect pricing pressures arising via the underlying retail market are taken into account. **The MCA underlines**

[88] European Commission (2018), 'Communication from the Commission — Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services', C/2018/2374, para. 15.
[89] The one exception was fixed broadband supplied over Epic's fibre network, since Epic only began rolling out its FTTH network in 2021.
[90] The MCA's proposed wholesale market definition in 2020 also included: unbundled access (including shared access) via the copper network; virtual unbundled access to the copper network; bitstream access via the copper network; virtual unbundled access to the fibre network; and bitstream access via the fibre network. See MCA (2020), 'The provision of wholesale fixed broadband access in Malta—Definition, assessment of SMP & regulation of relevant markets: Consultation', MCA/C/20-3864, 22 May, p. 7.

that demand for wholesale access services is derived from demand within the downstream retail market, which means that the relevant wholesale market(s) would be as broad as the relevant retail markets.'[91] [emphasis added]

It is unclear what is driving the MCA's change of approach to product market definition, which is difficult to justify based on any change in circumstances since its last consultation.

4.1.2 The MCA's exclusion of cable technologies from the relevant market stems from an incorrect application of the hypothetical monopolist test for market definition, and is not supported by the evidence

After deciding that VULA over GO's FTTH network constitutes the focal product for its wholesale market definition, the MCA then considers whether access over Melita's cable DOCSIS 3.1 network (i.e. cable-based bitstream access) represents an effective substitute for access seekers. The MCA bases its assessment on:

- the **functional replicability** in terms of the technical characteristics supported by each product;
- the **willingness of the access seeker to migrate** between access points or to make use of various handover points within the network architecture (effectively focusing on the cost to switch from one product to the other);
- an **indirect constraint from cable broadband**, insofar as a hypothetical increase in the price of VULA would lead to a loss of wholesale market share as a result of consumers switching to cable.

Based on these criteria, the MCA concludes that cable-based bitstream does not represent an effective substitute for VULA, on the grounds that:

1 it does not functionally replicate the same flexibility offered by VULA;
2 Epic would need to undertake significant additional investments to utilise cable-based access, thus leading to high switching costs;[92]

[91] MCA (2020), 'The provision of wholesale fixed broadband access in Malta—Definition, assessment of SMP & regulation of relevant markets: Consultation', MCA/C/20-3864, 22 May, p. 6.
[92] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, pp. 49–50.

3 given that the share of customers making use of VULA is extremely low, the MCA alleges that GO could increase the VULA price without any significant impact on its wholesale market share or revenues.[93]

The MCA's wholesale product market definition is incorrect, due to a number of flaws in its analysis

First, whether cable-based bitstream offers can **functionally replicate** the exact technical characteristics of VULA services is a purely technical argument, and says little about whether these products are substitutes from the perspective of a potential access seeker.

Two products do not need to possess the exact same characteristics to be considered substitutes. Indeed, the MCA itself argues in the same consultation that PIA and VULA should be considered substitutes, since these represent two different ways in which an operator like Epic could provide services in a given area.[94] The MCA advances this argument despite the fact that the two forms of access do not have the same functional characteristics: it does so on the basis that VULA and PIA are part of the same value chain, providing different entry points and different quality/risk trade-offs that a potential access seeker will evaluate on a case-by-case basis.

By the same reasoning, despite the fact that cable bitstream may not allow for the same level of control over network assets as VULA does, it provides a different entry point to the market with a specific quality/risk proposition that an access seeker can consider when making its entry decision.

Indeed, given the ubiquity of a cable-based bitstream product, it could be a useful alternative for Epic in specific areas, particularly where Melita's network is superior to GO's and where Epic has not yet rolled out its own FTTH.

Second, the MCA's arguments regarding **the willingness of access seekers to migrate** due to high switching costs fails to take into account that Epic's retail market share is currently just 1.5%, with approximately two-thirds of this reliant on GO's regulated VULA service. Given such limited levels of market share, most of Epic's future growth in lines could

[93] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, p. 51.
[94] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, p. 56.

conceivably come from a cable bitstream access product, for which (by definition) it would incur no switching costs, given these would all be newly activated lines. Hence, any switching costs that Epic would incur if it decided to migrate its existing VULA lines to cable bitstream would be relatively minor, in particular when assessed in aggregate relative to the firm's growth potential.

Furthermore, completely new entrants would not incur any switching costs, as these firms would be making entry decisions without an existing customer base.

Similarly, when considering its lower capital intensity and hence lower investment risk, **cable-based bitstream may be a preferable form of wholesale access for Epic and other potential entrants in different regions of Malta**. Indeed, although the MCA notes that there is currently no demand for wholesale bitstream access, it is important to recognise that this may be due to lack of supply, rather than lack of demand.[95]

Finally, the MCA's argument that GO's limited VULA sales mean that cable-based broadband does not indirectly constrain its price is fundamentally flawed, and appears to rest on a misunderstanding of how critical loss tests used in market definition exercises work. Box 4.1 below explains how critical loss analysis operates in practice.

[95] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, p. 46.

Box 4.1 The 'hypothetical monopolist test' for market definition: Critical loss analysis

Critical loss analysis is a method of applying the hypothetical monopolist (or 'significant and non-transitory price increase'/'SSNIP'[1]) test for market definition. The idea behind critical loss is straightforward and intuitive—any price rise will normally have two effects:

1 a fall in sales, as some consumers are no longer willing to buy the focal product at the higher price and will switch to alternative, substitute products, or exit the market altogether;
2 a higher profit margin, made on sales to those consumers who continue to buy the focal product at the higher price.

These two effects work in opposite directions: the first lowers profits, while the second raises them.

Economists have developed the concept of **critical loss**, which refers to the **proportion** of sales lost after a given price increase for which the two effects exactly offset each other. This critical level then provides a benchmark against which to estimate the actual sales loss that would occur following a price increase.

If the actual loss in sales driven by a SSNIP exceeds the critical loss, the hypothetical monopolist would find it unprofitable to raise the price of the focal product, with the implication being that the relevant product market is wider than the focal product, and would typically include the closest substitute to which customers switched in response to the SSNIP.

Note: [1] For the purposes of market definition, competition authorities usually consider a SSNIP of roughly 5–10%.

Source: Oxera.

Had the MCA correctly implemented the critical loss analysis framework to inform its wholesale product market definition, it would have considered whether a SSNIP of VULA would have been profitable given

the anticipated loss in sales (or, more specifically, whether the degree of switching was expected to exceed the 'critical loss').

Instead of doing this, however, the MCA simply observes that GO's sales of VULA are relatively limited, and uses this to conclude that GO could increase the VULA price without any significant impact on its wholesale market share or revenues. This misses the point, since, as explained in Box 4.1, what matters in critical loss analysis is not the absolute level of sales, but the **proportion** of switchers relative to the existing customer base.

Hence, even if the existing customer base to which a SSNIP is applied is small, if a sufficiently large proportion of VULA customers in the downstream market (i.e. Epic's customers served by VULA access) decided to switch to Melita's network following a SSNIP in VULA which was 'passed on' in retail prices, this SSNIP would be unprofitable for GO. In turn, this would suggest that the wholesale product market was wider, and should include cable broadband.

These flaws inevitably lead to an incorrect definition of the wholesale market, which is inconsistent with European regulatory practice

We explained earlier why the MCA's market definition reflects an incorrect application of competition economics and is not supported by the evidence. However, to understand the significance of the flaws in the MCA's logic, it is instructive to consider a thought experiment in which Melita has 85% retail market share, GO has 10% and Epic (through a combination of VULA access and own-FTTH) has 5%.

Under these circumstances the MCA would be likely to conclude that the retail market was not competitive, identifying Melita as an operator with SMP in the retail market. The regulator would use this finding to justify an analysis of the underlying wholesale market. However, were it to use the same approach to market definition as that outlined in its current consultation, the MCA would still conclude that the relevant wholesale market excluded the main access service which the largest operator—in this case Melita—was capable of providing.

In addition to delivering an incorrect and counterintuitive result, the MCA's approach to excluding cable access services from its wholesale product market definition is also inconsistent with wider European practice. For example, the Dutch regulator ACM, in its 2018 analysis of wholesale fixed access ('WFA') in the Netherlands, concluded that the WFA market comprised:

- the national market for unbundled access (virtual or otherwise) to the copper and fibre-optic network (SDF-access, MDF-access, OLT-access and ODF-access);
- wholesale broadband access to copper networks, fibre-optic networks, and cable networks.

The ACM justified its decision on the following grounds:

'access to cable networks also belongs to the relevant market because (i) the available capacity of cable networks will increase in the upcoming regulatory period, (ii) comparable retail services can be offered based on access to cable networks, and (iii) indirect price pressure is exerted by retail services over cable on retail services over copper and fibreoptic networks.'[96]

In the UK, the regulator Ofcom decided in its Wholesale Local Access Market Review that—after taking account of direct and indirect constraints acting on a hypothetical monopolist at the wholesale level—the relevant market for wholesale local access comprised services supplied over both copper/fibre and cable connections.[97] Ofcom justified this decision on the basis that:

- all retail services provided over a copper/fibre connection—i.e. fixed voice services, internet access, and TV content—could be (and were) provided over cable infrastructures;
- while the incumbent operator (BT) and the main cable operator (Virgin Media) offered packages of different speeds, their offers had several similar characteristics and were targeted at similar customers and at comparable prices, with both also offering triple-play bundles;
- information available to consumers, including via price comparison websites, set out cable-based services alongside copper/fibre services and typically emphasised the range of services (broadband speed, download limits, inclusive voice calls, etc), rather than the underlying access connection.

Ofcom concluded that:

[96] ACM (2018), 'Market analysis of Wholesale Fixed Access—summary', ACM/17/019945, 27 September, p. 3.
[97] Ofcom (2018), 'Wholesale Local Access Market Review: Statement – Volume 1: Markets, market power determinations and remedies', 28 March, p. 56.

'In light of the above evidence and reasoning, we consider that a hypothetical monopolist of copper/fibre connections, either vertically integrated or wholesale-only, is unlikely to be able to profitably impose a SSNIP above the competitive level due to substitution to retail packages over cable.'[98]

One European country in which the regulator determined that wholesale local access via copper/fibre networks and cable networks lay in separate markets is Belgium. Specifically, while the BIPT, in its market analysis covering broadband and television broadcasting, adopted a broad definition of the retail market encompassing various technologies including copper, fibre, cable,[99] it proceeded to define the following separate wholesale markets:

1 the local access wholesale market—including the passive physical access and the virtual access to copper and fibre networks at a local level;
2 central access via copper and fibre networks (i.e. bitstream);
3 central access via cable networks (i.e. cable-based bitstream);
4 broadcasting access (provided via cable).[100],[101]

Importantly however, **despite these four markets being defined as distinct, the BIPT proceeded to identify operators having SMP in each of the markets identified**,[102] and applied remedies accordingly.

This demonstrates how, despite the different approach taken by the BIPT, the starting point for identification of wholesale markets susceptible to ex ante regulation should always be the analysis of corresponding retail markets. While, in this case, the regulator decided that services provided via different technologies which fell within the same retail market did not comprise the same wholesale market, in aggregate the BIPT's wholesale market definition nevertheless corresponded to the perimeter of analysis covered in its corresponding retail market analysis.

[98] Ofcom (2018), 'Wholesale Local Access Market Review: Statement – Volume 1: Markets, market power determinations and remedies', 28 March, pp. 44–48.
[99] BIPT (2018), 'Analyse van de markten voor breedband en televisieomroep— Publieke versie', 29 June, p. 31.
[100] BIPT (2018), 'Analyse van de markten voor breedband en televisieomroep— Publieke versie', 29 June, p. 32.
[101] While the first two markets were deemed to be national in scope, the latter two were deemed to be regional owing to the numerous separate cable operators in Belgium, covering largely distinct geographical areas.
[102] Specifically: Proximus (the Belgian incumbent) was identified as having SMP in markets 1 and 2; Brutélé, Nethys and Telenet (including SFR) were deemed to have SMP in their respective coverage areas in market 3; and Brutélé and Telenet (including SFR) were deemed to have SMP in their respective coverage areas in market 4.

4.2 The MCA's SMP finding is incorrect—GO lacks the ability to distort downstream competition or harm consumers

The evidence presented in section 4.1 demonstrates how the MCA's approach results in an inappropriate definition of the wholesale product market. The issues with the MCA's overall assessment can be traced back to this inappropriate wholesale market definition, as well as its incorrect assessment of competition in the retail market, which we outlined in section 3.

Nevertheless, **even taking its wholesale market definition as given, the MCA is incorrect to assert that GO has SMP** in the market for physical and virtual infrastructure access. We now explain why this is.

4.2.1 The market for physical and virtual infrastructure access should not be subject to ex ante regulation

The MCA accepts that, due to the inclusion of PIA, its proposed wholesale product market definition diverges from the list of markets that, under Commission guidelines, are presumed to be subject to ex ante regulation.[103] Accordingly, the MCA undertakes a three criteria test to assess whether the imposition of ex ante regulatory remedies in the market for physical and virtual infrastructure access market can be justified.[104] The regulator argues that:

1 there are **structural barriers** including economies of scale, along with **legal and regulatory barriers** since entrants cannot be afforded the same access conditions as those that benefited from public funds or access agreements secured during the period of GO's state ownership;[105]
2 the market does not **tend towards effective competition**, for the same reasons outlined above (i.e. economies of scale and legal/regulatory barriers), as evidenced by the difficulties faced

[103] Commission Recommendation (EU) 2020/2245 of 18 December 2020 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive (EU) 2018/1972 of the European Parliament and of the Council establishing the European Electronic Communications Code (notified under document C(2020) 8750).
[104] The three criteria for this assessment are outlined in the European Electronic Communications Code. See European Commission (2020), 'DIRECTIVE (EU) 2018/1972 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 December 2018—establishing the European Electronic Communications Code', L 321/36, Article 67 (1).
[105] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, pp. 60–61.

by access seekers in securing wholesale access to PIA or VULA in the absence of regulation;[106]

3 that **competition law is insufficient**, including on the grounds that the BCRD is not deemed sufficient or well suited to address wholesale access issues.[107]

Based on its assessment, the MCA concludes that the market for PIA passes the three criteria test, and can therefore be subject to ex ante regulation. However, this assessment is incorrect for the following reasons.

The MCA does not adequately consider alternative infrastructure available to ECNs in Malta

This relates to the MCA's assessment of barriers to entry (i.e. the first criterion).

In its consultation, the MCA provides numerous examples of how fixed broadband operators have secured access to physical infrastructure via various routes. For example, it highlights how:

- GO, Melita and Epic all use Enemalta's aerial poles or brackets infrastructure for last-mile connectivity;[108]
- Melita makes use of alternative ducts (i.e. not GO's infrastructure) for 60% of its transport network.[109]

Nevertheless, the MCA emphasises how important access to GO's physical infrastructure is to its competitors, citing statements from Melita that access secured through its legacy agreement with GO is critical to its operations.[110] However, beyond summarising feedback from operators in response to an MCA survey issued in 2021,[111] **the regulator provides limited evidence to demonstrate the criticality of access to GO's infrastructure for other ECNs**.

[106] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, p. 61.
[107] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, p. 61.
[108] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, p. 54.
[109] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, p. 52.
[110] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, p. 55.
[111] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, pp. 52–53.

The MCA has not published the responses it received to its 2021 consultation, which makes it difficult to comment on the inferences the regulator has drawn from this evidence. Nevertheless, information we have received from GO suggests the MCA may be overstating the importance of GO's infrastructure to Melita's operations.

We understand from GO that **CONFIDENTIAL [...]**

Similarly, **the MCA fails to explore the alternative avenues for FTTH deployment available to Epic**. For example, the regulator notes that Epic has already covered 5.8% of all dwellings in Malta without access to GO's physical infrastructure,[112] but fails to mention how it has achieved this.

The MCA also mentions the company's plan to reach 25% of Malta's households by 2024, including how this has been part financed via a EUR 20m loan from the European Investment Bank ('EIB').[113] To secure this funding, it is reasonable to assume that Epic will have provided a detailed business plan to the EIB, outlining key assumptions underpinning delivery of the 2024 target, including (but not limited to) its planned use of physical infrastructure. However, it is unclear from the consultation whether the MCA has considered this.

The regulator also makes reference to an existing reciprocal swap agreement in place between Melita and Epic, covering 20km of local duct rental and fibre swaps. The MCA provides limited commentary regarding the nature of this agreement, beyond noting that it does not allow for a similar territorial reach as would be the case with access to GO's physical infrastructure, and the fact that the MCA:

'is not aware of any plans by Melita and Epic to make significant use of each other's physical infrastructure [...] at least to a bigger extent than that observed to date.'[114]

This statement provides limited evidence of the MCA having properly explored the avenues available for ECNs to collaborate to facilitate the deployment of end-to-end VHC networks.

[112] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, p. 1.
[113] EIB (2022), 'Malta: EIB financing of €20 million for Epic to accelerate its mobile network modernisation programme and the rollout of 5G and fibre to the home', 5 September.
[114] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, p. 55.

The MCA has also failed to adequately consider the scope for Maltese operators to make use of non-ECN infrastructure to lay their networks, including:

- the **BCRD**, which we discuss later in this section;
- **Infrastructure Malta**. It is unclear why the MCA makes no reference to this agency in its consultation. Infrastructure Malta, which is entrusted with developing, maintaining and upgrading roads and other infrastructure in Malta, has provided opportunities for ECN operators to apply for space to be made as part of broader roadworks for deployment of VHCN infrastructure.[115] We understand from GO that it has made use of Infrastructure Malta's offer to facilitate the deployment of its FTTH network. It is unclear why other operators such as Epic appear not to have made use of Infrastructure Malta's offer in the same way, and why the MCA considers that this is not relevant to its assessment.

In addition, the MCA's analysis does not recognise that **the Go–Melita agreement will remain in place regardless of the outcome of the MCA's market analysis**. A proper application of the Modified Greenfield Approach requires that the MCA takes this agreement into account when assessing competitive dynamics in the market (while abstracting from SMP remedies). Its failure to do this leads it to the incorrect conclusion that the wholesale market will be uncompetitive absent regulatory intervention.

The MCA has taken insufficient account of the Broadband Cost Reduction Directive

This relates to the third criterion (i.e. whether competition law is sufficient).

In its consultation, the MCA makes only passing reference to the BCRD, noting that:

'BCRD measures are also not deemed sufficient and well-suited in that these address only physical infrastructure access and not VULA, can only be applied "ex post" following a dispute, and are based on "fair and reasonable" pricing, which may not be adequate to ensure that PIA is

[115] For more detail on Infrastructure Malta, see https://www.infrastructuremalta.com/about-us.

available on terms which support effective competition in downstream markets.'[116]

However, this is a mischaracterisation of how the Directive operates. In particular, as explained in section 4.2.3, **under the Directive, GO cannot refuse to provide access to its physical infrastructure**. The regulator is therefore incorrect to state that GO can refuse to supply access to its physical infrastructure to Epic.[117] This is because, under the Modified Greenfield Approach,[118] any wholesale market analysis should abstract from SMP remedies, but take account of existing (horizontal) regulation, such as the BCRD.

Furthermore, it is unclear why the MCA considers that GO providing access to its physical infrastructure on FRAND terms would represent an inadequate outcome. FRAND access is a recognised and accepted benchmark for assessing the appropriateness of price and non-price terms offered for access to infrastructure. Furthermore, the fact that the BCRD contains a dispute resolution process does not make it any less effective as a mechanism for facilitating access than the imposition of SMP remedies, as implied by the MCA's suggestion that BCRD can be applied only 'ex post' following a dispute.

We further note that the BCRD will soon be replaced by the Gigabit Infrastructure Act, which the European Commission has recently published in draft form.[119] This is expected to be potentially even more ambitious than the BCRD, with the Commission stating that the Act:

'aims to overcome the challenge of slow and costly deployment of the underlying physical infrastructure sustaining advanced Gigabit networks. It will reduce 'red tape' and the costs and administrative burden associated with the deployment of Gigabit networks'.[120]

With the BCRD currently active and enforceable in Malta and the new Act expected to enter into force during the period covered by the MCA's

[116] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, p. 87.
[117] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, p. 70.
[118] We explain this approach in Box A1.1.
[119] European Commission (2023), 'Proposal for a regulation of the European parliament and of the council on measures to reduce the cost of deploying gigabit electronic communications networks and repealing Directive 2014/61/EU (Gigabit Infrastructure Act)', 2023/0046 (COD), 23 February.
[120] European Commission (2023), 'Commission presents new initiatives, laying the ground for the transformation of the connectivity sector in the EU', press release, 23 February.

review, the regulator should have placed greater weight on it in its assessment.

We provide more details on the BCRD in section 4.2.3.

4.2.2 The MCA's focus on PIA is inconsistent with shifts in the fixed access broadband market in Malta

As section 4.2.1 demonstrates, the MCA's assessment of its proposed wholesale market definition against the three criteria test is incorrect: the market for physical and virtual infrastructure access fails to meet the three cumulative criteria outlined in the test and should therefore not be subject to ex ante regulation.

More generally, however, the **MCA's focus on PIA is at odds with recent market developments in Malta**. This is made clear in a 2019 report by BEREC examining the approaches adopted by NRAs to PIA in the context of market analyses.[121]

BEREC's report reveals that the MCA was one of eight NRAs which—as at 2019—had not imposed any form of PIA remedies on the grounds that either:

- the relevant market was deregulated; or
- other remedies/legal instruments were deemed to be sufficient or more appropriate.[122]

For example, the report highlights how the Danish NRA, the DBA, ultimately withdrew its duct access obligation because it considered that the obligations from the BCRD were sufficient.[123]

As noted in section 2, PIA remedies have not been applied in Malta over the last decade, including prior to Epic's entry when only two end-to-end infrastructure competitors were present. Now, despite the fact that there is a third operator laying its own VHC network, the MCA is focused on regulating PIA.

Expanding the perimeter of the wholesale market under examination to include PIA following an intensification of competition is therefore

[121] BEREC (2019), 'BEREC Report on Access to physical infrastructure in the context of market analyses', BoR (19) 94, 13 June.
[122] BEREC (2019), 'BEREC Report on Access to physical infrastructure in the context of market analyses', BoR (19) 94, 13 June, p. 8.
[123] BEREC (2019), 'BEREC Report on Access to physical infrastructure in the context of market analyses', BoR (19) 94, 13 June, p. 14.

counterintuitive, and cannot be justified on the basis of the available evidence.

4.2.3 GO's ability to limit competition is severely constrained

In its consultation, the MCA argues that, absent SMP remedies, GO would have:

'the ability and incentive to engage in various forms of conduct that could distort downstream competition and/or harm consumers including:

- GO could refuse to supply access to its physical infrastructure to Epic, and thus restrict the ability of Epic to deploy its own FTTH network;
- GO could also restrict access to VULA or provide access on less favourable terms compared to those obtained by its own downstream businesses; and,
- GO could set excessive wholesale charges for access to its physical infrastructure and for VULA access or engage in price squeeze behaviour.'[124]

However, the MCA's assessment gives inadequate weight to two factors which severely constrain GO's ability to distort competition, as set out below.

The Broadband Cost Reduction Directive

The aim of the BCRD is to facilitate the rollout of VHCNs across the EU.[125] The legislation seeks to address inefficiencies of telecommunications network deployment, particularly by making use of existing infrastructure to reduce the cost of rollouts. It achieves this by establishing an obligation for network operators to respond and meet all reasonable requests for access to physical infrastructure,[126] by stating that:

'Member States shall ensure that, upon written request of an undertaking providing or authorised to provide public communications

[124] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, p. 70.
[125] European Parliament and the Council of the European Union (2014), 'DIRECTIVE 2014/61/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 15 May 2014 on measures to reduce the cost of deploying high-speed electronic communications networks', *Official Journal of the European Union*, 15 May, recital 11.
[126] European Parliament and the Council of the European Union (2014), 'DIRECTIVE 2014/61/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 15 May 2014 on measures to reduce the cost of deploying high-speed electronic communications networks', *Official Journal of the European Union*, 15 May, recital 9.

networks, **any network operator has the obligation to meet all reasonable requests for access to its physical infrastructure under fair and reasonable terms and conditions**, including price, with a view to deploying elements of high-speed electronic communications networks.' [emphasis added]

The BCRD is not prescriptive as to what constitutes a reasonable request, leaving it to the two parties in question to reach an agreement on the terms of access in the first instance. Where agreement cannot be reached between the network operator and access seeker, either party involved is permitted to refer the case to a national dispute settlement body:

'Where access is refused or agreement on specific terms and conditions, including price, has not been reached within two months from the date of receipt of the request for access, Member States shall ensure that either party is entitled to refer the issue to the competent national dispute settlement body.'[127]

Accordingly, the MCA's assertion that the BCRD can be applied only ex post following a dispute is inaccurate.[128] While the legislation gives either party the right to make representations to a dispute settlement body, this is not the primary route through which access under BCRD should be sought.

Second, if pricing does not support competition in downstream markets, then, by definition, the price offered by the infrastructure operator cannot be described as 'fair and reasonable'. In fact, in countries where access to infrastructure has been secured under the BCRD, the price of access has been determined using cost-orientation principles (including with reference to the business plan of the access provider) and via benchmarking against existing market prices.[129] In this respect, there is limited difference between the way the BCRD and SMP remedies operate, in particular wherever SMP remedies specify that access must

[127] European Parliament and the Council of the European Union (2014), 'DIRECTIVE 2014/61/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 15 May 2014 on measures to reduce the cost of deploying high-speed electronic communications networks', *Official Journal of the European Union*, 15 May, Article 3(4).
[128] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta—Findings and proposals for consultation', MCA/C/23 – 4925, 28 April, p. 61.
[129] For an explanation of the different interpretations of 'fair and reasonable' pricing under the BRCD, see BEREC (2019) 'BEREC report on pricing for access to infrastructure and civil works according to the BCRD', BoR (19) 23, 7 March, section 1.2.

be provided on FRAND terms but the regulator does not specify what these conditions look like in practice.

In summary, it is therefore not possible for GO refuse to supply access to its physical infrastructure or set excessive wholesale charges for access to it. In fact, GO has had an obligation to provide access to its physical infrastructure upon request on FRAND terms since the BCRD was transposed into Maltese law in 2016.[130]

In addition, as noted in section 4.2.1, the new Gigabit Infrastructure Act will further facilitate access to physical infrastructure, including by:

- simplifying and digitalising permitting procedures;
- enhancing the coordination of civil works between network operators to deploy underlying physical infrastructure.[131]

The availability of ECN and non-ECN infrastructure

We explained in section 4.2.1 how the MCA fails to adequately consider options for operators to access physical infrastructure via routes other than GO's network, and why this means that the MCA's proposed wholesale product market definition does not meet the cumulative criteria outlined in the three criteria test. The same reasons also explain why GO lacks the ability to act in ways that would distort downstream competition, since:

- **the Go–Melita agreement will remain in place, regardless of the outcome of the MCA's market analysis**. Accordingly, to the extent that Melita's ability to exert competitive pressure on GO depends on access to the latter's ducts, even absent SMP remedies this agreement will ensure Melita's access to GO's ducts will be preserved;
- **Melita relies on other (i.e. non-GO) ducts to service 60% of its transport needs.**[132] If this figure is accurate,[133] it is unclear why Melita and other access seekers, such as Epic, cannot use similar routes to deploy their own VHC networks, or indeed why

[130] Chapter 81 of the Laws of Malta, Utilities and Services (Regulation of certain works) Act, Article 14.
[131] European Commission (2023), 'Commission presents new initiatives, laying the ground for the transformation of the connectivity sector in the EU', press release, 23 February.
[132] In its consultation, the MCA states that Melita makes use of GO's duct infrastructure for around 40% of its transport network. The corollary to this is that Melita relies on other (i.e. non-GO) ducts to service 60% of its transport needs. See MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, p. 52.
[133] **CONFIDENTIAL [...]**.

Epic cannot use Melita's infrastructure to continue rolling out its FTTH network;

- **Epic has achieved 5.8% coverage[134] without access to GO's infrastructure, and has plans to cover 25% by next year.** This further indicates that VHCN rollout is possible absent access to GO's ducts.

These points suggest that the MCA's claims regarding GO's ability to distort competition by limiting access to its ducts lack credibility. When considered alongside the MCA's limited examination of the swap agreement between Epic and Melita and the absence of any references in its consultation to Infrastructure Malta, it is clear that the MCA's conclusion is driven by inadequate consideration of the options available to ECN operators for access to physical infrastructure.

4.3 GO may have incentives to provide VULA access on commercial terms

We outlined in section 4.2.3 why, contrary to the MCA's assertions, GO lacks the ability to distort downstream competition. This demonstrates that GO does not have SMP at wholesale level, meaning the regulator's proposed VULA and PIA remedies cannot be justified.

However, even if GO did have the ability to distort downstream competition, **it might still have incentives to provide VULA access to other operators**, for two reasons:

1 it is clear that access seekers such as Epic are capable of rolling out VHC networks without relying on GO's physical infrastructure. Accordingly, if GO has concerns that it risks losing market share to Epic, it might deem it preferable to offer Epic VULA access in order to ensure that it continues earning wholesale margins for these end users (rather than risk losing both the retail and wholesale margins);

2 if GO considered that it was likely to lose market share to Melita, it might decide to offer entrants such as Epic VULA access as a mechanism for mitigating this risk (rather than risk losing both the retail and wholesale margins, as before).

[134] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, p. 1.

We understand that **GO is committing to retain its wholesale VULA service in future**, should the MCA's present SMP remedies be lifted. While we have not examined this commitment in detail, this may be relevant to the MCA's assessment under Article 79 of the European Electronic Communications Code.[135]

[135] European Commission (2018), 'DIRECTIVE (EU) 2018/1972 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 December 2018—establishing the European Electronic Communications Code', L 321/36, Article 79 (2).

5 Conclusion

Our review of the evidence demonstrates that **the imposition of wholesale SMP remedies on GO cannot be justified**. There are a number of reasons for this.

To begin with, **a careful examination of the retail market in Malta reveals that it is characterised by effective competition**, and that this is not a recent phenomenon brought about the recent entry of Epic. This finding is underpinned by a range of evidence, including the evolution of speed offerings over time; changes in price–speed ratios; and profitability benchmarking.

Crucially, our assessment indicates that these levels of competition have occurred—and are likely to persist—irrespective of any SMP remedies that are currently in place, or which might be introduced in future. As such, there is no basis under the European regulatory framework for the MCA to undertake an analysis of the underlying wholesale market.

Nevertheless, notwithstanding this finding of competition in the retail market, our assessment also demonstrates that **there are two basic flaws with the MCA's analysis of the wholesale market**, as follows.

1 **The disconnect between the MCA's retail market analysis and its wholesale product market definition**.

The regulator's decision to exclude Melita's DOCSIS 3.1 network from its analysis fails to recognise that demand for wholesale access services is derived from demand in the downstream retail market. It is also at odds with observed market shares—given Melita is the leading operator within the retail market—and inconsistent with previous arguments advanced by the MCA regarding the functional equivalence of cable-based bitstream services and wholesale services provided via GO's FTTH network.[136]

[136] MCA (2020), 'The provision of wholesale fixed broadband access in Malta—Definition, assessment of SMP & regulation of relevant markets: Consultation', MCA/C/20-3864, 22 May, p. 7

2 GO lacks the ability to distort downstream competition or harm consumers

The MCA has given insufficient attention to the role which non-SMP remedies and commercial agreements with infrastructure owners other than GO can play in facilitating access to physical infrastructure. These include the BCRD; existing commercial agreements which will remain in future (such as that between GO and Melita) or which might be extended (such as the Melita–Epic swap agreement); and non-ECN physical infrastructure, such as that made available by Enemalta and Infrastructure Malta.

Finally, and more generally, our review of the regulatory context in Malta demonstrates how **the MCA's positions have shifted over time in ways that are difficult to reconcile with the evidence**. In particular, it is counterintuitive that—after declaring in 2020 that no operator was individually dominant at the wholesale level—the MCA now identifies GO as having SMP at the wholesale level. This is especially difficult to justify given that GO has lost market share in the intervening period, with Melita now the leading player in Malta for fixed broadband services.[137]

[137] Nevertheless, we once again note, for completeness, that the MCA's original conclusion in 2020 of joint dominance at the wholesale and retail level was also not supported by evidence, as demonstrated in Oxera's report for Melita.

A1 History of the MCA's decisions and consultations

Here we provide greater detail on relevant MCA decisions and consultations since 2012, including the MCA's most recent consultation.

A1.1 Background—key MCA consultations and decisions since 2012

A1.1.1 The MCA's 2012 market analysis

The MCA consulted on its market analysis for fixed broadband services in 2012, with the resulting decision published in 2013. This was the most recent market analysis completed by the regulator for which a final decision was issued.[138]

In its 2012 consultation, the MCA defined two wholesale markets:[139]

- **'wholesale unbundled infrastructure access'** (market 4), which included shared access to metallic loops and sub-loops made available for the purpose of providing broadband and voice services;[140]
- **'wholesale broadband access'** (market 5), which included all self-supplied wholesale broadband products supplied over the copper, cable and wireless networks and those wholesale access products supplied via existing broadband networks to third-party internet service providers.[141],[142]

[138] As we explained in section 2.1.2, the MCA issued a consultation on its subsequent market analysis in 2020, but this was later withdrawn with no resulting decisions implemented.
[139] In its 2012 market analysis, the MCA did not undertake a thorough investigation of the retail market before proceeding with an analysis of the underlying wholesale market. This contrasts with the approach outlined in the SMP guidelines (introduced in 2018) that currently apply, according to which: 'The starting point for the identification of wholesale markets susceptible for ex ante regulation should always be the analysis of corresponding retail market(s).' See European Commission (2018), 'Communication from the Commission — Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services', C/2018/2374, para. 15.
[140] MCA (2013), 'Market 4 – Wholesale Unbundled Infrastructure Access Market—Identification and Analysis of Markets, Determination of Market Power and Setting of Remedies: Final Decision', MCA/D/13-1520, 6 March.
[141] MCA (2013), 'Market 5 - Wholesale Broadband Access—Market Identification and Analysis of Markets, Determination of Market Power and Setting of Remedies', MCA/D/13-1521, 6 March, p. 15.
[142] These definitions for markets 4 and 5 are consistent with the European Commission guidance on market definition prevailing at the time. See European Commission (2007), '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

While no SMP was found in the wholesale broadband access market, GO was found to be dominant in the wholesale unbundled infrastructure access market.

The MCA proceeded to apply SMP remedies on GO to mitigate market power concerns, including directing GO to offer a VULA product where it had deployed an FTTH network.[143] The MCA implemented this remedy in 2016.[144]

A1.1.2 The MCA's 2020 consultation

The MCA launched its subsequent market analysis in 2020.[145] In this, the MCA defined the retail fixed broadband market to include fixed broadband products supplied over GO's copper-DSL network; fixed broadband products supplied over GO's fibre network; and fixed broadband products supplied over Melita's HFC DOCSIS 3.1 network.[146] The MCA made a number of observations regarding the price and variety of offers in this market, including that:

- GO and Melita had historically exhibited strong price alignment, with each operator also charging similar prices;
- price reductions had been rare
- retail fixed broadband prices in Malta were higher than the EU average.

The MCA's subsequent dominance analysis did not indicate a finding of single-firm dominance. The regulator outlined its reasoning as follows:

'the MCA does not determine single-firm SMP in the retail fixed broadband market. **This is because Melita and GO enjoy a similar position in this market, with no operator enjoying a significant competitive advantage over the other.** GO and Melita are both horizontally and vertically integrated and are deemed to be in a position to benefit equally from economies of scale and scope. Both operators

electronic communications networks and services (notified under document number C(2007) 5406)', (2007/879/EC).
[143] MCA (2013), 'Market 4 – Wholesale Unbundled Infrastructure Access Market—Identification and Analysis of Markets, Determination of Market Power and Setting of Remedies: Final Decision', MCA/D/13-1520, 6 March, p. 26.
[144] MCA (2016), 'VIRTUAL UNBUNDLED ACCESS TO FIBRE-TO-THE-HOME: Implementing the VULA Remedy—Response to Consultation and Decision', MCA/D/16-2513, 26 February.
[145] MCA (2020), 'The provision of wholesale fixed broadband access in Malta—Definition, assessment of SMP & regulation of relevant markets: Consultation', MCA/C/20-3864, 22 May.
[146] MCA (2020), 'The provision of wholesale fixed broadband access in Malta—Definition, assessment of SMP & regulation of relevant markets: Consultation', MCA/C/20-3864, 22 May, p. 3.

enjoy national coverage and are effectively at the same level from a technological standpoint, with no network technology exhibiting a marked superiority over the other. GO and Melita also employ an integrated approach to the marketing, sales and retailing activities for their retail product range of electronic communications products and services.'[147] [emphasis added]

Instead of proposing a finding of single-firm dominance, the MCA argued that the evidence on price and quality in the retail market reflected a strategic choice by GO and Melita to tacitly coordinate in order to preserve stable market shares and sustain higher profitability. The MCA also pointed to certain market characteristics—including transparent prices and limited risk of external factors disrupting the market—as evidence that the market exhibited the necessary conditions for coordination on price to be sustainable. The regulator therefore concluded that GO and Melita had joint SMP in the retail fixed broadband market.[148]

The MCA proceeded to analyse the underlying wholesale market. It began by defining the product market as widely as the relevant retail market, on the basis that:

'demand for wholesale access services is derived from demand within the downstream retail market, which means that the relevant wholesale market(s) would be as broad as the relevant retail markets.'[149]

Reflecting this approach, MCA defined the WFBA market to include:

- unbundled access (including shared access) via the copper network;
- virtual unbundled access to the copper network;
- bitstream access via the copper network;
- virtual unbundled access to the fibre network;
- bitstream access via the fibre network; and bitstream access via the cable network.

The MCA justified its decision to include services supplied by GO's copper and fibre networks in the same market on the grounds that they

[147] MCA (2020), 'The provision of wholesale fixed broadband access in Malta—Definition, assessment of SMP & regulation of relevant markets: Consultation', MCA/C/20-3864, 22 May, p. 5.
[148] MCA (2020), 'The provision of wholesale fixed broadband access in Malta—Definition, assessment of SMP & regulation of relevant markets: Consultation', MCA/C/20-3864, 22 May, pp. 4–5.
[149] MCA (2020), 'The provision of wholesale fixed broadband access in Malta—Definition, assessment of SMP & regulation of relevant markets: Consultation', MCA/C/20-3864, 22 May, p. 6.

were functionally equivalent, notwithstanding the technical distinctions between physical and virtual unbundled access services. The MCA similarly argued that wholesale bitstream access supplied via Melita's cable network and services supplied via GO's FTTH network were functionally equivalent, stating that the substitutability of these services reflected:

1 potential **direct pricing constraints** if Melita opened wholesale access to its network;[150]
2 strong **indirect pricing constraints** emanating at the retail level;
3 the **functional similarity of cable and fibre technologies**, following Melita's upgrade of its coaxial-based network to the DOCSIS 3.1 standard.[151],[152]

As in its retail market analysis, the MCA concluded that a finding of single-firm SMP could not be attributed to either player in the WFBA market. The regulator justified this decision on the grounds that GO and Melita had similar market shares that were envisaged to remain stable over the time horizon of the market analysis, and that each operator was both vertically and horizontally integrated, with neither enjoying a competitive advantage over the other in terms of economies of scale and scope.[153]

As a result, the MCA concluded that, absent regulation, GO and Melita had joint SMP in the WFBA market. It argued that this was due to the WFBA market being characterised by product homogeneity and similar cost structures; GO and Melita having the same ability to shape the market and the level of competition to the desired level; and the WFBA market being sufficiently transparent to facilitate tacit collusion between GO and Melita on the refusal to grant access.[154]

To minimise the risk that GO and Melita might distort competition through price and non-price actions, the MCA proposed a number of

[150] At the time of the 2020 consultation, Melita did not, and still does not, provide wholesale access to its cable network to prospective access seekers.
[151] MCA (2020), 'The provision of wholesale fixed broadband access in Malta—Definition, assessment of SMP & regulation of relevant markets: Consultation', MCA/C/20-3864, 22 May, p. 7.
[152] The MCA further substantiated this argument by pointing to evidence which suggested that end users considered the fixed broadband products supplied by Melita and GO to be 'similar to very similar', such that switching behaviour would lead them to the cheaper option. See MCA (2020), 'The provision of wholesale fixed broadband access in Malta', 22 May, p. 6.
[153] MCA (2020), 'The provision of wholesale fixed broadband access in Malta—Definition, assessment of SMP & regulation of relevant markets: Consultation', MCA/C/20-3864, 22 May, pp. 7–8.
[154] MCA (2020), 'The provision of wholesale fixed broadband access in Malta—Definition, assessment of SMP & regulation of relevant markets: Consultation', MCA/C/20-3864, 22 May, pp. 8–9.

SMP remedies in its consultation. These included an access obligation for GO to continue providing VULA access on its fibre network, and a new requirement for Melita to provide bitstream access on its DOCSIS 3.1 network. In its consultation, the regulator noted:

'The MCA is also keen to ensure a fair distribution of the regulatory burden between GO and Melita. To this effect, the MCA considers that the current VULA-based remedy imposed on GO alongside the opening of the cable network via bitstream access would be adequate to address current and future demand for WFBA. This means that, in the case of GO, the VULA access remedy would be maintained, also considering that such access served to bring about new entry in the retail fixed broadband market. The opening of the cable network would essentially translate into a new access platform for alternative providers. The availability of both an FTTH-based and cable-based access options would place alternative providers in a better and more informed position when it comes to the selection of the access option that best represents their interest in establishing retail market presence.'[155]

The MCA also proposed obligations in respect of non-discrimination; transparency; price control and cost-accounting; and accounting separation.[156]

As noted in section 2.1.2, Oxera was previously commissioned by Melita to help it respond to the MCA's 2020 consultation. Our report demonstrated that, in the absence of wholesale access regulation, the incentives of GO and Melita to compete and the actual degree of competition between them was sufficiently strong to rule out the risk of joint SMP, such that the retail market was characterised by effective competition. Our report also showed that the available evidence confirmed there was insufficient scope for coordination between GO and Melita in the wholesale market, such that the finding of joint SMP at the wholesale level could not be substantiated.[157]

[155] MCA (2020), 'The provision of wholesale fixed broadband access in Malta—Definition, assessment of SMP & regulation of relevant markets: Consultation', MCA/C/20-3864, 22 May, pp. 143–144.
[156] MCA (2020), 'The provision of wholesale fixed broadband access in Malta—Definition, assessment of SMP & regulation of relevant markets: Consultation', MCA/C/20-3864, 22 May, p. 9.
[157] Oxera (2020), 'Economic review of the MCA's conclusions on the provision of wholesale fixed broadband access in Malta—Final report prepared for Prepared for Melita Ltd', 22 July.

Despite the positions outlined in its 2020 consultation, the MCA later withdrew its consultation in 2021, later explaining its decision as follows:

'after the consultation closed in July 2020, Epic announced plans to invest in a pilot project for the deployment of FTTH infrastructure, which it started rolling out in April 2021. Shortly after, Epic advertised FTTH-based commercial offers, thus prompting the MCA to re-evaluate its position and subsequently withdraw the 2020 consultation in order to be able to re-assess the evolving situation on the ground and the relevant implications.'[158]

A1.2 The MCA's 2023 consultation

In April 2023, the MCA published a new consultation setting out its views on the regulation of the wholesale market concerning the supply of access for the provision of fixed broadband services in Malta.[159] The regulator asserts that its approach—which begins by evaluating levels of competition in the retail market, before analysing the underlying wholesale market—is consistent with the Modified Greenfield Approach referenced in the EU's guidelines.[160] We provide a brief overview of the Modified Greenfield Approach in Box A1.1 below.

[158] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, p. 40.
[159] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April.
[160] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, p. 3.

Box A1.1 The Modified Greenfield Approach

The European Commission provides guidelines ('the guidelines') on how NRAs should conduct market analyses and assess SMP within the market for electronic communications networks and services. These guidelines state that NRAs should not conclude that regulation in telecommunications markets is needed if the existing and expected conditions of the underlying retail markets are deemed competitive under the 'Modified Greenfield Approach'.

Under this approach, NRAs should assess existing market conditions as well as expected conditions over the course of the review period, **in the absence of regulation based on SMP**. This is stated in the Commission's guidelines as follows:

'The starting point for the identification of wholesale markets susceptible for ex ante regulation should always be the analysis of corresponding retail market(s) [...] NRAs should determine whether the underlying retail market(s) is (are) prospectively competitive in absence of wholesale regulation based on a finding of single or collective significant market power, and thus whether any lack of effective competition is durable [...]'

In particular, the guidelines state that:

'if the underlying retail market(s) is (are) prospectively competitive under the Modified Greenfield Approach, the NRA should conclude that regulation is no longer needed at wholesale level'.

Source: European Commission (2018), 'Communication from the Commission — Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services', C/2018/2374, paras 15–17.

A1.2.1 The MCA's retail market analysis

The MCA's proposed retail product market definition encompasses fixed broadband supplied over GO's copper network, fixed broadband supplied over GO's and Epic's fibre networks, and fixed broadband supplied over Melita's DOCSIS 3.1 network. It excludes services provided over fixed wireless access and mobile access technologies, as well as high-quality connectivity services designed for business use.

The MCA's retail market analysis focuses extensively on the role played by Epic following its entry into the market, including especially following its decision to begin deploying its own FTTH network. The regulator argues that while Epic has had some impact on established operators—for example, encouraging them to offer discounted access fees for a limited time—it is unclear whether such competitive responses will persist over the timeframe of the MCA's review. The regulator also observes that:

1. Epic has not succeeded in significantly increasing its market share, which stood at under 2% nationally and around 2.5% in areas where it had deployed its own FTTH network by the end of 2022;
2. Melita and GO's fixed ARPU levels remain significantly higher than Epic's;
3. the profitability of the two established operators remains strong
4. end users' choices remain limited in several respects, particularly in terms of the availability of gigabit offers.[161]

In contrast to its 2020 consultation, **the MCA does not explicitly identify any operator, either jointly or individually, as having SMP in the retail market**. Despite this, it concludes its retail market analysis by arguing that:

'in the absence of regulatory intervention, competition in Malta's retail market for fixed broadband services **may be limited**. Even in areas where competition has emerged, the MCA is concerned that it may not last or may only be limited to locations where Epic has implemented an FTTH network. An analysis of the underlying wholesale market is therefore required.'[162] [emphasis added]

[161] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, p. 4.
[162] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, p. 5.

A1.2.2 The MCA's wholesale market analysis

The MCA's latest consultation also deviates from its 2020 market analysis with respect to its approach to the wholesale product market definition. Specifically, while, in 2020, the MCA had defined the wholesale market as broadly as the retail market, the MCA now proposes a considerably narrower wholesale market, such as to encompass the provision of wholesale physical access over the copper network; the provision of FTTx VULA; and access to physical infrastructure via ducts deployed for the purpose of providing electronic communications. The steps followed by the MCA to reach this product market definition are as follows.

First, the MCA determines that the focal product in the wholesale market encompasses the provision of VULA. It argues this is the viable future-proof substitute for physical unbundled access over GO's copper network, since unbundled access to the local loop and to the sub-loop are not feasible options in practice. It also notes that physical unbundled access is not viable over GO's FTTH network, and emphasises that 'virtual unbundled local access over GO's FTTH network offers access seekers (such as Epic) a highly flexible and customizable solution that utilizes advanced virtualization technologies, providing the same functionalities as physical access, while enabling them to offer advanced network services to their end customers.'[163]

Second—and in contrast to its 2020 consultation—the MCA now argues that cable-based bitstream access is not part of the market comprising VULA over GO's network. The regulator notes that while DOCSIS 3.1 cable technology is deemed to be already capable of providing IP-based bitstream access:

- there are differences in functional replicability between this service and fibre-based VULA;
- Epic already has an agreement to utilise regulated VULA on the GO network and has also deployed its own FTTH infrastructure, meaning it would incur switching costs if it were to utilise cable-based access.[164]

Finally, with regard to physical infrastructure, the MCA highlights that:

[163] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, p. 48.
[164] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, pp. 48–51.

- GO operates an extensive duct network across the whole national territory, designed specifically for laying wholesale local access infrastructure;
- other infrastructure-based providers have constructed some ducts, but these cover a very minor proportion of the duct infrastructure covered by GO;
- Melita makes use of access to GO's duct infrastructure for around 40% of its transport network, under an agreement signed in 1992;[165]
- survey evidence suggests that while other operators make use of physical infrastructure owned by non-ECN providers, the use of non-telecommunications infrastructure presents operational complexities.

Based on this evidence, the regulator concludes that:

'the physical infrastructure element for the scope of the current analysis should focus on physical infrastructure via ducts owned by ECN providers, in this case owned by GO, and thus exclude other forms of physical infrastructure, namely that owned by non-ECN providers and the physical infrastructure that currently features under the swap agreement by Melita and Epic.'[166]

The MCA then proceeds to undertake the three criteria test,[167] to determine whether the wholesale market for the provision of virtual and physical access in Malta is susceptible to ex ante regulation. For context, we explain the regulatory underpinnings for this assessment in Box A1.2 below.

[165] This agreement was signed when GO was still a government-owned entity known as Maltacom.
[166] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, p. 55.
[167] This test is outlined the European Electronic Communications Code. See Commission (2020), 'DIRECTIVE (EU) 2018/1972 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 December 2018—establishing the European Electronic Communications Code', L 321/36, Article 67 (1).

Box A1.2 The three criteria test

The Recommendation on relevant product and service markets (the 'Recommendation'), as referred to in the European Electronic Communication Code, identifies two markets that still warrant ex ante regulation at the EU level, in order to promote and safeguard competition and maximise consumer benefits:

- the market for wholesale local access provided at a fixed location (market 1);
- the market for wholesale access to dedicated capacity (market 2).

NRAs can also regulate markets that are not listed in the Recommendation based on national circumstances, provided that the three-criteria test is met. Specifically, for such markets to justify the imposition of regulatory obligations set out in the European Electronic Communication Code, each of the following criteria must be met:

1. high and non-transitory **structural, legal or regulatory barriers** to entry are present;
2. there is a market structure which **does not tend towards effective competition** within the relevant time horizon, having regard to the state of infrastructure-based competition and other sources of competition behind the barriers to entry;
3. **competition law alone is insufficient** to adequately address the identified market failure(s).

Sources: Commission Recommendation (EU) 2020/2245 of 18 December 2020 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive (EU) 2018/1972 of the European Parliament and of the Council establishing the European Electronic Communications Code (notified under document C(2020) 8750); and European Commission (2018), 'DIRECTIVE (EU) 2018/1972 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 December 2018—establishing the European Electronic Communications Code', L 321/36, Article 67 (1).

The MCA concludes that the market for PIA passes the three criteria test for the following reasons.

First, the MCA identifies **structural barriers** resulting from significant economies of scale associated with physical and virtual infrastructure deployment. It argues that duplicating such infrastructure nationwide is financially unviable, and, even if feasible, requires substantial market shares that new entrants struggle to attain due to a mature retail market and limited customer switching. In terms of **legal and regulatory barriers**, the MCA notes that GO's physical infrastructure as well as copper network were deployed at a time when it enjoyed a monopoly and was publicly owned, and that these historical aspects lead to market asymmetries whereby entrants have not been and cannot be afforded the same access conditions as those which benefited from public funds or access agreements during the period of GO's state ownership.[168]

The MCA then argues that the same factors which present high entry barriers also limit the prospects for the wholesale market for fixed physical and virtual infrastructure access to **tend towards effective competition**. Economies of scale limit the scope for end-to-end infrastructure-based competition in certain areas, and significant challenges exist to an entrant seeking to disrupt the status quo, due to imbalances in access to essential physical infrastructure and the market share thresholds needed to sustain additional networks. The MCA also points to the history of difficulties faced by access seekers in securing wholesale access to PIA or VULA in the absence of regulation and the withdrawal of access when regulation was removed as evidence that the market is not tending towards effective competition. In this regard, the MCA notes that the existence of long-term commercial offers could potentially pave the way towards effective competition, but have not been secured despite negotiation attempts by Epic.[169]

Finally, with respect to **the sufficiency of competition law**, the MCA argues that the removal of wholesale access following the lifting of regulation in the past and the MCA's experience in mandating and implementing the VULA remedy suggest that ex ante rules and continued monitoring and enforcement are needed to support

[168] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, pp. 60–61.
[169] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, p. 61.

competition. The MCA highlights in particular its perceived inadequacy of the BCRD in addressing some of these issues by noting the following:

'Clear ex-ante intervention will also be vital to ensure the timely provision of duct access such that it can support the deployment of competing FTTH networks. In view of the above, the MCA considers that competition law is unsuited in addressing the very detailed requirements needed to render VULA and duct access agreements effective. BCRD measures are also not deemed sufficient and well-suited in that these address only physical infrastructure access and not VULA, can only be applied 'ex post' following a dispute, and are based on 'fair and reasonable' pricing, which may not be adequate to ensure that PIA is available on terms which support effective competition in downstream markets.'[170]

A1.2.3 MCA's SMP assessment and proposed remedies

After determining that the wholesale market for the provision of virtual and physical access in Malta is susceptible to ex ante regulation, the MCA proceeds to undertake its SMP assessment. The MCA focuses on a select subset of criteria outlined in the Commission's SMP guidelines, which the regulator argues are 'most appropriate for the relevant market under investigation.'[171] These are:

- **the overall size of the undertaking**—the MCA notes that GO holds a dominant position in physical and virtual unbundled access, accounting for 93% of all duct infrastructure that is currently available/utilised for the provision of physical and virtual unbundled access and 98.9% of all wholesale VULA-based services (taking into account self-supply);
- **barriers to entry and expansion**—the MCA argues that the relevant market in Malta exhibits significant barriers that hinder new players from entering and expanding. It points to Epic's limited retail market share of 1.5% as evidence of this, and highlights that building a new FTTH network involves substantial upfront costs, with full duplication of the infrastructure being economically unviable nationwide;
- **control of infrastructure not easily duplicated**—the MCA argues that while FTTH should be replicable in at least some portion of the territory, the potential for GO to leverage its advantages in

[170] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, p. 61.
[171] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, p. 62.

duct access into FTTH deployment reduces the prospects for replicability of FTTH. The regulator adds that GO also controls FTTx access infrastructure in areas of the country where network replication would not be economically viable, even with the support of duct access;

- **vertical integration**—the MCA concludes that GO benefits from vertical integration which could result in market foreclosure, absent regulation. The regulator states that a failure to provide duct access to Epic and early challenges with the implementation of the regulated VULA service confirm GO's ability and incentive to deny access on reasonable terms;
- **economies of scale**—the MCA states that GO's strong position is due to its nationwide coverage, and large customer base, and that, while GO's market share has declined, it nevertheless remains dominant. The regulator argues that the high cost of infrastructure investment makes it difficult for new entrants to achieve economies of scale and compete effectively;
- **economies of scope**—the MCA highlights how GO's horizontal integration secured by providing multiple services directly to consumers enables it to benefit from strong economies of scope. The regulator notes that, in contrast, Epic faces challenges in attracting new customers to its fixed network, as it provides fixed broadband and telephony services only, with limited FTTH coverage;
- **absence of potential competition**—the MCA argues there are limited prospects for competition in the wholesale market for physical and virtual access. It notes that GO is the only nationwide physical and virtual access, and that Epic's presence via its own infrastructure reaches only 5.8% of all dwellings in Malta. The MCA also notes that GO faces minimal competition from Melita's duct network infrastructure, stating that Melita relies on GO for 40% of its duct network operations. The regulator emphasises that there are drawbacks when it comes to access to physical infrastructure owned by non-telecommunications providers, such that Melita cannot credibly threaten GO to switch;
- **lack of countervailing buyer power**—the MCA notes that, at the retail level, customers' ability to negotiate prices and terms for broadband services is limited by the prevalence of bundled services, reducing switching. It states that only GO has the ability to supply access on a nationwide scale at the wholesale level, giving it significant bargaining power. The regulator

therefore concludes that, without regulation, GO could increase wholesale prices or deny access.[172]

These observations lead the MCA to conclude that GO has SMP in the wholesale market for the provision of virtual and physical access. The regulator concludes its SMP assessment by asserting that:

'in the absence of wholesale regulation, GO's SMP would give it the ability and incentive to engage in various forms of conduct that could distort downstream competition and/or harm consumers including:

- GO could refuse to supply access to its physical infrastructure to Epic, and thus restrict the ability of Epic to deploy its own FTTH network
- GO could also restrict access to VULA or provide access on less favourable terms compared to those obtained by its own downstream businesses; and
- GO could set excessive wholesale charges for access to its physical infrastructure and for VULA access or engage in price squeeze behaviour.

Ultimately, GO can act independently of customers and other network operators in its wholesale pricing structure for the wholesale market under investigation. Hence, the MCA will take ex ante regulatory measures to address these market shortcomings.'[173]

The MCA then proceeds to outline its proposed remedies to apply to GO as the SMP operator, as follows.

1 **An updated VULA remedy**—which it states is needed to 'reflect developments in regulatory practices and market realities'. This includes adjusting the EEO downstream cost standard to reflect different assumptions regarding the market share achievable by an efficient entrant. [174]

2 **Mandating the provision of duct access**—the MCA states that since access to GO's ducts is already provided to Melita and GO is subject to a non-discrimination obligation linked to its SMP

[172] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, pp. 62–69.
[173] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, p. 70.
[174] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, p. 81.

designation, 'the MCA presumes that the price offered to other alternative operators requesting access to ducts will be the same as that already made available to Melita.' The regulator also notes that it may in future require prices for duct access and associated facilities to be cost-oriented.[175]

The MCA concludes by stating that:

'The MCA provided time for negotiations between GO and Epic regarding access to VULA and PIA, and no agreement has so far been reached between the parties. If any agreement is reached, and in particular if GO offers adequate commitments regarding the terms of access to the NRA, MCA would consider the implications for the market analysis and imposition of remedies, but this is not the case, at this time.'[176]

[175] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, p. 89.
[176] MCA (2023), 'MCA analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta', 28 April, p. 90.

Contact

Felipe Florez Duncan
Partner
+44 (0) 20 7776 6654
felipe.florez.duncan@oxera.com

oxera.com