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BEREC Opinion on
Phase II investigation
pursuant to Article 32 of Directive (EU) 2018/1972

Case MT/2024/2484

Wholesale physical and virtual infrastructure access market

23 February 2024

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1. Executive Summary

On 28 December 2023, the European Commission (**EC**) registered a notification from the Maltese national regulatory authority (**NRA**), the Malta Communications Authority (**MCA**), concerning the wholesale physical and virtual infrastructure access (**PVIA**) market in Malta.

The MCA, in its Draft Measure,[1] finds that GO holds significant market power (**SMP**) on the PVIA market. The MCA excludes from the PVIA product market technologies such as coaxial cable, and concludes that GO maintains a very high market share in physical and virtual unbundled access. With regard to physical infrastructure (ducts), the MCA excludes non-electronic communications networks from the scope of the PVIA market. As a consequence, the MCA intends to impose (both active and passive) access regulation on GO's physical and virtual infrastructure.

On 29 January 2024, the EC sent a serious doubts letter opening a Phase II investigation pursuant to Article 32 of Directive (EU) 2018/1972 to the MCA (the '**Serious Doubts letter**').

Based on the analysis set out in this Opinion, BEREC considers that the EC's serious doubts are not justified.

2. Introduction

On 28 December 2023, the EC registered a notification from the Maltese NRA, the MCA,[2] concerning the Maltese wholesale PVIA market (the '**Draft Measure**').

The EC sent a request for information (**RFI**)[3] to the MCA on 8 January 2024 and received a reply on 11 January 2024. Subsequently, the MCA received two additional requests for information from the EC. A second RFI issued on 12 February to which the MCA replied on 15 February, and a third RFI issued on 16 February, to which the MCA replied on 21 February.

On 29 January 2024, the EC initiated a Phase II investigation, pursuant to Article 32 of Directive (EU) 2018/1972 (the '**Code**'), the relevant Serious Doubts letter having issued to the MCA on 26 January 2024.

On 2 February 2024, in accordance with Article 32 of the Code, BEREC established a dedicated Expert Working Group (**EWG**) with the mandate to prepare an Opinion concerning the justification of EC's serious doubts in the aforementioned case.

On 7 February 2024, the EWG held a virtual kick-off meeting. On 9 February 2024, the EWG held two virtual meetings. One meeting included interviews with relevant colleagues from the MCA, and the other included interviews with relevant colleagues from the EC. The EWG continued the meeting with the EC on 12 February 2024. The objective of the EWG was to reach a clear conclusion on whether or not the EC's serious doubts are justified.

[1] MCA DRAFT DECISION DOCUMENT Based on the analysis of the market for the provision of wholesale physical and virtual infrastructure access in Malta. MCA Reference: MCA-POL/kc/23 – 5135 (the '**Draft Measure**').

[2] Under Article 32 of Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (the Code) (OJ L 321, 17.12.2018, p. 36).

[3] In accordance with Article 20(2) of the Code.

The EWG finalised its draft Opinion on 16 February 2024, with a final Opinion presented and adopted by a majority of the BEREC Board of Regulators on 23 February 2024. This Opinion is now issued by BEREC in accordance with Article 32(5) of the Code.

3. Background

Previous notifications

The market for wholesale local access (**WLA**) in Malta was previously notified to, and assessed by, the EC under case MT/2012/1374.[4]

The relevant product market included all unbundled access products provided over copper and unbundled access services provided over fibre. The MCA defined the relevant geographic market as being national in scope. GO plc (**GO**), being the sole provider of wholesale unbundled access in Malta, was designated as having significant market power (**SMP**). Consequently, the MCA imposed the following obligations on GO:

(i) access;[5]
(ii) non-discrimination;
(iii) price control and cost accounting;
(iv) transparency; and
(v) accounting separation.

The EC commented on the need for the MCA to impose proper access obligations on fibre infrastructures and to review its legacy costing methodology in line with the Non-Discrimination and Costing Methodologies Recommendation.[6] The EC also proposed imposing a price control obligation on future fibre infrastructure.

Subsequently, under case MT/2015/1803,[7] an amendment to the regulatory remedies in this market was notified to, and assessed by, the EC. This draft measure set out the principles and methodology under which the virtual unbundled local access (**VULA**) remedy was to be implemented and the changes that GO needed to implement in its VULA reference offer. The EC commented on the need to:

(i) align the MCA's approach with the Non-Discrimination and Costing Methodologies Recommendation; and
(ii) carry out a new market review as soon as possible and demonstrate competitive safeguards.

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[4] C(2012) 8499.

[5] Namely local loop unbundling (**LLU**) access, sub-loop unbundling (**SLU**) access, including associated facilities (duct access, dark fibre or ethernet for backhaul), and co-location for legacy products. Regarding fibre infrastructure, the MCA proposed imposing an unbundling obligation only as and when GO further rolled out FTTH/FTTB. The MCA proposed to impose an access obligation at the optical distribution frame (**ODF**) if the SMP operator deployed a point-to-point architecture and virtual unbundling (**VULA**) if a passive optical network architecture (**PON**) was chosen instead.

[6] Commission Recommendation of 11 September 2013 on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment (OJ L 251, 21.9.2013, p. 13).

[7] C(2015) 9203.

The EC also urged the MCA to notify its market review as soon as possible, and no later than 3 years from the adoption of the previous market review, which expired on 6 March 2016.

Finally, under case MT/2018/2127,[8] the MCA notified its draft measure setting out the technical details for the implementation of VULA to fibre to the home (**FTTH**), which aimed to improve the non-discrimination obligation in Malta. The notified draft measure set out the key performance indicators (**KPIs**) and service level guarantees (**SLGs**) that apply to the corresponding service level agreements (**SLAs**).

Current notification and the EC's serious doubts

Current notification

In its analysis, the MCA concludes that the scope of the wholesale product market encompasses access to copper and fibre networks, as well as access to physical infrastructure (ducts).

Currently, in Malta there are two nationwide broadband networks:

(i) GO, the incumbent, provides xDSL services based on its legacy copper and FTTC network, and also, increasingly, on its FTTH network, which passes approximately 70% (and growing) of households; and

(ii) Melita, which operates a coaxial cable network with full nationwide coverage (and which has also initiated limited fibre deployment in specific areas).

A third network, based on fibre and owned by Epic, covers only part of Malta (5.8% coverage as of March 2023, rising to 7.2% at August 2023). To date, in addition to developing its own network, Epic offers retail services relying on VULA provided by GO on a regulated basis to access the majority of its customers (according to the MCA, 62.8% as of March 2023 and 60.5% as of September 2023).[9]

The MCA defined the relevant retail product market as comprising fixed broadband supplied over GO's copper network, over GO's and Epic's fibre networks, and over Melita's cable DOCSIS 3.1 network. Broadband services provided over fixed wireless access (**FWA**) and mobile access technologies are not considered part of the market.

The relevant retail market is national in scope.

Since 2018, Melita has retained the highest, and most stable, retail fixed broadband market share. At the same time, GO's market share has declined slightly, but consistently, while Epic had only achieved a modest 2% market share by June 2023 and 2.2% by September 2023.

At the wholesale level, the MCA defined a physical and virtual infrastructure access (**PVIA**) market consisting of:

(i) The provision of wholesale physical access over the copper network;

(ii) The provision of FTTx virtual unbundled access (VULA); and

(iii) access to physical infrastructure via ducts deployed for the purpose of providing electronic communications.

[8] C(2018) 8398.

[9] Draft Measure, p.46.

The wholesale product market definition explicitly excludes cable, because IP bitstream over cable does not offer access seekers the same functionality as FTTH VULA. The MCA also argues that there is currently no demand for bitstream access in the market nor a commercial wholesale bitstream offer from the cable operator. Furthermore, for Epic – the main access seeker – transitioning from VULA provided by GO to a cable-based bitstream offering would incur substantial switching costs.

The MCA also excluded the physical infrastructure of non-electronic communications network (non-ECN) providers from the scope of the defined wholesale market. This is because such infrastructure assets are typically used as a complement, rather than as a substitute, to telecoms physical infrastructure. Non-ECN physical infrastructure also presents operational complexities for FTTH network deployment, such as the lack of digital mapping systems, the application of different procedures by different non-ECN entities, and administrative hurdles.

The geographic scope of the wholesale PVIA market is also national.

Based on a Three Criteria Test (**3CT**) assessment, the MCA concluded that the wholesale PVIA market is susceptible to *ex ante* regulation. Having then carried out an SMP assessment, the MCA determined that GO has SMP on this market.

The MCA proposes to impose two types of access remedies on GO:

(i) Geographically differentiated access remedies in the case of FTTH VULA; and
(ii) Nationwide access remedies in the case of physical infrastructure access (**PIA**), i.e. duct access.

EC's serious doubts

In its Serious Doubts letter opening the Phase II investigation, the EC focused on the situation at retail level, given that:

(i) in a market with a population of 500,000 inhabitants, two parallel networks already provide gigabit connectivity, with a third operator which entered the market with its own network and progresses with investment, albeit with a low take-up;
(ii) the prices for standalone broadband or broadband bundled with fixed telephony are significantly and slightly higher, respectively, than the EU average, but the price trend is downwards, as in 2023 both GO and Melita offer better quality for the same price, or lower price for the same quality/speed compared to 2019. Prices for triple play offers (fixed internet and telephony, in addition to TV services) are below the EU average; and
(iii) the number of households that consider the internet to be expensive is falling, as recorded in market research conducted on behalf of the MCA.

Given the current level of investments, retail prices, and existing infrastructure-based competition, the retail market appears to the EC to tend towards effective competition. The EC considers that the MCA did not provide sufficient evidence to conclude that there is a problem at retail level that would justify maintaining *ex ante* regulation.

The EC further questioned the MCA's approach to the definition of the relevant wholesale PVIA market, its application of the 3CT for this market, and its SMP assessment.

The EC expressed doubt that the second 3CT criterion – that there is no tendency towards effective competition – is met. According to the EC, most signs point to the downstream retail broadband market tending towards effective competition, given the limited size of the market, and the presence of two (and in some areas, three) broadband networks delivering gigabit internet speeds at prices close to the EU average.

The EC considered that the MCA did not sufficiently assess the constraint from cable in its analysis of the PVIA market. This is irrespective of whether any comparable virtual access products provided over cable are economically or technically feasible on a forward-looking basis in Malta.

Given that a cable network provides retail services that are substitutable with GO's (Melita being the largest broadband provider in Malta, measured by retail subscriptions), the MCA should have considered Melita's self-supply on its own cable infrastructure when defining the wholesale PVIA market.

The EC finally expressed serious doubts about the MCA's SMP assessment and called on the MCA to assess whether a new wholesale market, which could include cable infrastructure, would be effectively competitive. The EC does not consider that the MCA has sufficiently taken cable into account in its finding that GO has SMP on the wholesale PVIA market. This is because, in the downstream retail market, GO's market power is constrained by Melita, which only partly relies on a wholesale input that GO controls (i.e. access to passive infrastructure).

Arising from the foregoing, the EC expressed serious doubts about the compatibility of the Draft Measure with EU law and considered it necessary to initiate an in-depth investigation.

4. Assessment of the serious doubts

On 29 January 2024, the EC initiated a Phase II investigation pursuant to Article 32 of the Code, with a Serious Doubts letter having first issued to the MCA on 26 January 2024.

4.1 Serious Doubt 1: A lack of sufficient justification that the wholesale market should continue to be regulated

Concerns of the EC

Ex ante regulation of upstream wholesale markets should be applied only where this is needed to address (under the Modified Greenfield approach), a lack of effective retail competition. The EC is of the opinion that a lack of competition on the downstream retail market is not proven:

(i) Two nationwide infrastructures are already present and capable of providing gigabit connectivity to retail customers, and

(ii) Retail prices for fixed broadband are slightly higher than the EU average (but do not deviate significantly from the average least expensive offers), with a downward trend.

The EC points out that the MCA's assessment of competition in the retail market is centred around Epic's impact on the market, while the assessment does not include information on competitive pressure from Melita or competition between Melita and GO. The EC expressed doubts that the current level of prices results from competitive pressure exerted by Epic (which has own network coverage of around 7% and around 2% retail market share) and that Epic is unlikely to be capable of significantly influencing the pricing strategy of GO and Melita. Epic's current pricing strategy has not yet led to stronger price competition, evidence of which might be the stable growth of ARPU of both GO and Melita.

The EC points out that market research carried out on behalf of the MCA indicates that the number of households that consider the internet to be expensive is falling and that 59% of the respondents found their subscriptions to be *“neither expensive nor cheap”*.

The MCA admits that wholesale regulation may not be sufficient to support further development of infrastructure competition on its own. The EC is of the opinion that this is because it does not address barriers such as low levels of consumer switching (bundling-switching barriers) and a lack of standalone products.

In its interview with the EWG, the EC expressed the opinion that the retail broadband market may be saturated and that the size of Malta is not sufficient to allow sustainable business cases for other players. The EC further averred that a duopoly market structure does not necessarily lead to consumer harm. The EC’s opinion is that competitive conditions on the downstream retail market do not justify ongoing regulation of the wholesale PVIA market.

Views of the MCA

The telecommunications market in Malta is undergoing a significant change, with potential for competition to evolve on the basis of the duplication and replication of networks. Infrastructure competition brings significant challenges, such as high costs of building and maintaining infrastructure, difficulty in gaining access to existing infrastructure, and limitations in expanding service coverage. It also requires significant investments in technology and, potentially, content to be able to offer the latest services to customers.

The MCA identified several retail competition shortcomings in a duopolistic market where the presence of a weak third player (Epic) is significantly dependent on the regulated VULA offer. The MCA outlined that the duopolistic market was characterized by high and relatively stable market shares for Melita and GO.[10] The MCA also noted the potential harm to consumers that could result from the loss of Epic as a potential third operator, absent wholesale regulation.

The MCA found that, following years of stagnation with similar offers from the incumbent and cable operators, since Epic’s market entry, the retail broadband market has begun to show some signs of dynamics, with GO and Melita seeking to match Epic’s discounts. GO also responded by pursuing its FTTH deployment at a slightly faster pace. However, the MCA noted that this dynamic would be likely to stall and potentially go into reverse if existing regulation (on which Epic relies for 60% of its current customer base) were removed. Moreover, if access to GO’s ducts is not regulated to allow Epic to benefit from the same access terms as are already available to both GO and Melita, Epic’s ability to reach (and potentially exceed) its 25% coverage target profitably would be undermined.

Thus, the MCA concluded that the retail market would not be sustainably competitive in the absence of wholesale regulation. The MCA justified this conclusion with reference to current and historic experience with denial of access (including following the deregulation of bitstream in 2008)[11] and subsequent market exit as well as the impact on Epic’s business case (as assessed using theoretical models constructed on behalf of the MCA by WIK-Consult) which can only be supported if it does not bear higher costs than its rivals (implying equivalent access

[10] Draft Measure, p.39.

[11] MCA decision on Wholesale Broadband Access Market, 14 November 2008.

to GO's ducts) and its market share is increased (which would be undermined by the withdrawal of VULA).

BEREC's Assessment

One of the general regulatory objectives listed at Article 3.2 of the Code is to enable maximum benefits for citizens in terms of choice, price and quality. Recital 27 of the Code states that competition can best be fostered through an economically efficient level of investment in new and existing infrastructure, complemented by regulation, where necessary, to achieve effective competition in retail services. Based on these provisions, BEREC considers that the EC's observation that there are two nationwide infrastructures capable of providing gigabit connectivity to retail customers does not appear sufficient to rebut the MCA's finding that the downstream retail market would not be effectively competitive, absent regulation.

The academic literature and NRA and National Competition Authority ('**NCA**') decisions generally suggest that the presence of at least three firms[12] is conducive to effective competition:

(i) In its 2014 Review of wholesale broadband markets, Ofcom considered that the presence of two or more competitors to the incumbent at an exchange was sufficient to lead to significant declines in BT's market share. In contrast, exchanges with only one operator in addition to BT were included in the same market as monopoly exchanges, as Ofcom considered the competitive conditions to be sufficiently homogeneous;[13]

(ii) Bresnahan and Reiss[14] showed that, in certain oligopolistic retail markets, the largest benefits to competition come with the addition of the third firm in a market;

(iii) The Dutch NRA concluded that, while there is no 'magic number' for the minimum number of competitors necessary for effective competition, unless significant economies of scale are apparent, competition is unlikely to be effective with just two firms, and the social optimal is a market with more than two firms;[15]

(iv) In considering BT's appeal of Ofcom's 2016 Business Connectivity Market Review, the UK Competition Appeals Tribunal heard expert evidence that *"mergers from five to four firms are nearly always approved by competition authorities and four to three mergers are sometimes approved, suggesting that between three and four competitors is judged sufficient for effective competition"*.[16]

BEREC underlines that various NRAs have relied on a number of operators greater than two as a criterion to assess a market's competitiveness for geographic segmentation or geographic

[12] Bearing in mind the variety of markets listed, this refers to the number of firms present on a market, and does not necessarily imply the presence of three separate infrastructures in each case.

[13] Ofcom Review of the Wholesale broadband access markets, Statement, 26 June 2014, paragraphs 4.132 – 4.133 and 4.139 – 4.141. https://www.ofcom.org.uk/__data/assets/pdf_file/0021/57810/WBAFinal-statement.pdf

[14] Bresnahan, T.F., & P.C. Reiss. "Entry and Competition in Concentrated Markets". The Journal of Political Economy, Vol. 99, No. 5. (Oct., 1991), at Figure 4 (p.996).

[15] OPTA, 2006, page 10. http://www.opta.nl/en/news/all-publications/publication/?id=2051.

[16] CAT case 1260/3/3/16, British Telecommunications v Office of Communications (BCMR). First expert report of Chris Osborne, paragraph 4.20.

differentiation of remedies. The EC has not, in these cases, criticised the application of a 'greater than two' operator presence criterion.[17]

As regards the possible impact of market saturation, BEREC recognizes that the size of the Maltese market is indeed small. Malta is, however, the most densely populated Member State in the EU and over half of its population lives in the dense urban area around Valletta.[18] This may imply that competition between more than two infrastructures may be economically viable at least in part of the territory of Malta. The WIK Study on behalf of the MCA illustrates that, subject to certain conditions regarding costs and market shares, three networks may be economically viable in areas representing 53% of the population.[19] BEREC therefore disagrees with the view that the Maltese market is necessarily saturated. It also disagrees that the saturation level would necessarily be a relevant criterion to assess market competitiveness.

In addition, BEREC notes a number of elements that appear to contradict the view that the Maltese broadband market would be effectively competitive, or would tend to effective competition, in the absence of regulation:

(i) The retail market seems to be structurally divided between two incumbent operators (GO and Melita), whose market shares observed between 2017 and Q3 2023 appear to be similar and stable with only small percentage gains or losses;[20]

(ii) GO and Melita seem to implement similar retail strategies, consisting in bundling broadband with other services in the context of long-term contracts (24 months), while applying high early termination fees (€150-200).[21] This may affect consumers' incentives to switch, with the indirect effect of preventing a new entrant from gaining market shares and making it more difficult to reach the critical market share needed to invest in its own infrastructure. The EC itself seems to recognizes, as does the MCA, that the lack of more diverse offers (in particular, standalone offers) and low customer switching rates between operators may constitute problematic issues;[22]

(iii) BEREC observes that both GO and Melita are vertically integrated, and currently have no or only limited wholesale sales. Melita does not currently offer wholesale virtual access to third parties, but has reciprocal duct access arrangements with both GO and Epic (although, in practice, GO does not make use of Melita duct access, and reciprocal arrangements between Melita and Epic are at a comparatively small scale). GO wholesales only to a small extent, as a result of regulatory provisions (VULA) or as a result of an historic situation (the duct access

[17] E.g. cases ES/2021/2330, IT/2019/2181-2182, AT/2022/2389, SI/2021/2355. Additionally, the 2018 *BEREC Report on the application of the Common Position on geographic aspects of market analysis* indicates (at Table 10) that both the Spanish and Hungarian NRAs assessed the presence of two significant alternative operators, together with the incumbent (that is, at least three operators), in their analyses of the WLA market.

[18] Draft Measure, p. 124.

[19] Study for MCA, Malta. Market potential and regulatory options to support VHC infrastructure competition in Malta, 2021 (the '**WIK Study**'), at p.12.

[20] Excel file provided as an annex to the MCA's answer to the EC's RFI.

[21] MCA's answer to question 5 of the EC's RFI.

[22] Serious Doubts letter, at p.10. Additionally, the Draft Measure notes at p.62 that standalone products offering gigabit speeds are not available in Malta.

sold by GO to Melita is originally granted as a result of an agreement concluded in 1992 where these assets were State-owned);

(iv) In the absence of regulation on the PVIA market, it is uncertain that Epic could obtain the appropriate access products (ducts and/or VULA) it needs to maintain or further expand its activities. This would likely lead to a duopolistic market and foreclosure of the market for a third operator to the detriment of end users. Furthermore, the data show that Epic network coverage has increased from 5.8% in March 2023 to 7.2% by August 2023. It seems to be a reasonable assumption that Epic would develop its network in areas where it has been able to develop a customer base based on VULA wholesale input. Accordingly, VULA can be an important factor for network rollout in line with the ladder of investment concept;

(v) As set out in the MCA market research, the majority (59%) of respondents perceive prices to be neither expensive, nor cheap, but 40% perceive prices to be expensive or very expensive. The fact that those 40% of customers generally do not switch provider may notably result from GO's and Melita's strategy described above. In respect of retail prices, BEREC also refers to the considerations it sets out concerning Serious Doubt 2 (3CT Criterion 2);

(vi) In a Modified Greenfield approach and on a forward-looking analysis, it cannot be excluded that retail prices could increase in future, absent regulation. Indeed, not only Epic's competitive pressure would be reduced (as described in the previous point), but GO's and Melita's incentives to compete on prices would also be affected; and

(vii) The EC expresses doubts regarding the competitive pressure exerted by Epic,[23] but nevertheless considers Epic's impact as relevant when it underlines the presence of *"two networks (and in some regions three) delivering gigabit internet speeds"*.[24] BEREC adds that, according to a 2021 survey carried out on behalf of the EC, *"Epic provides a slightly higher number of the least expensive offers across all service bundles on the market in Malta (9 of 13) in comparison to the rest of the providers"*.[25] BEREC notes that there appears to be evidence that Epic has contributed to the current level of retail prices in the market. Prior to 2023, competition was less focused on pricing and was aligned between GO and Melita as Epic did not yet provide triple play bundles that account for the vast majority of retail subscriptions. However, after Epic launched triple play offers in April 2023, Melita and GO reacted with more aggressive pricing and included free TV service in their bundles.[26] This suggests that the impact of Epic on the market dynamics is not limited (due to its relatively low market share and footprint) as suggested by the EC but rather national (primarily due to Epic's ability to access regulated VULA outside its own network footprint). Therefore, it is of common interest of GO and Melita to deny access to their networks, which would eventually harm end users.

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[23] Serious Doubts letter, at p.8.

[24] Serious Doubts letter, at p.11.

[25] "Mobile and Fixed Broadband Prices in Europe 2021 - A study prepared for the European Commission DG Communications Networks, Content & Technology by empirica and TÜV Rheinland" (the '**2021 Pricing Survey**'), at p.264. Available online at https://ec.europa.eu/newsroom/dae/redirection/document/88311

[26] As set out at Annex 3 of Epic's observations on the Serious Doubts letter, issued to the EC on 7 February 2024.

The MCA admits that wholesale regulation may not be sufficient to support further development of infrastructure competition on its own. The EC is of the opinion that this is because it does not address (by means of consumer protection measures) barriers such as low share of consumer switching (bundling-switching barriers) and a lack of standalone products. BEREC understands that addressing the above-mentioned barriers with symmetric regulation may be appropriate. BEREC, however, does not consider that these measures alone would necessarily be sufficient to solve all the competition issues identified above. In BEREC's view, an effectively competitive market may require the presence of more than two operators (supported, when appropriate, by *ex ante* regulation) as well as contractual terms and operational processes that facilitate customer switching.

For the reasons stated above, in conclusion, BEREC does not share the EC's serious doubts that the MCA has not provided sufficient evidence to conclude that there is a problem at retail level that would justify maintaining *ex ante* regulation on the upstream wholesale PVIA market.

4.2 Serious Doubt 2: A lack of sufficient evidence that the market for wholesale physical and virtual infrastructure access market, as notified, meets the three criteria, justifying the imposition of *ex ante* regulation

Concerns of the EC

The EC queried whether the MCA provided sufficient justification to warrant the wholesale PVIA market passing the Three Criteria Test ('**3CT**'). The EC confirmed to the EWG that its serious doubts apply in respect of Criterion 2 of the 3CT only. The EC did not issue serious doubts in respect of either Criterion 1 or Criterion 3.

The Opinion accordingly focuses on the EC's serious doubts in respect of the MCA's analysis of Criterion 2 (whether the PVIA market structure tends towards effective competition within the relevant time horizon). The EC advised, in discussions with the EWG, that much of its assessment of retail competition at Serious Doubt 1 informed its reasoning on Criterion 2, and that the serious doubts should be read holistically.

The EC has serious doubts that Criterion 2 – and therefore the entire 3CT - has been passed on the PVIA market, and argues that *"Most signs point to the market tending towards effective competition given the limited size of the market (….)"*.[27] These signs are as follows:

(i) Retail prices are not excessively high, and, in particular, gigabit speeds are delivered at prices close to the EU average;
(ii) Gigabit speeds are delivered by two (and in some regions three) networks; and
(iii) According to market research, a falling number of households consider the cost of their internet subscription to be expensive.

Views of the MCA

In its Draft Measure, the MCA argued that the same set of factors led to both Criterion 1 and Criterion 2 of the 3CT passing in respect of the PVIA market. These factors include:

(i) Structural barriers to entry arising from the significant economies of scale associated with the deployment of physical and virtual local infrastructure, and

[27] Serious Doubts letter, at p.11.

(ii) Legal or regulatory barriers arising from the deployment of GO network assets when it was a state-owned monopoly, leading to historical asymmetries in the treatment of market entrants.[28]

The MCA argued that economies of scale limit the scope for infrastructure-based competition in certain areas, and that new entrants face challenges due to imbalances in access to physical infrastructure and market share thresholds needed to sustain additional networks.

The MCA also cited difficulties faced by access seekers in securing access to PIA or VULA in the absence of regulation, and the withdrawal of wholesale bitstream access when regulation was removed.

BEREC's Assessment

Given that the EC's serious doubts on Criterion 2 are informed by its analysis of its serious doubts on the justification for wholesale market regulation, BEREC's assessment of Serious Doubt 2 should be read together with its assessment of Serious Doubt 1.

The EC suggests that there is a tendency towards effective retail competition *"given the limited size of the market"*. It is, however, not clear whether the EC intends that the Maltese market tends towards effective competition due to, or in spite of, its limited size.

In respect of **retail prices**, the EC asserts that, while Maltese retail prices are higher than the EU average, the price trend is clearly downward – although the EC does not comment on the fact that this is in the presence of VULA regulation and following the entrance of Epic to the market in 2019. However, these data (which appear to be based on the 2021 Pricing Survey carried out on behalf of the EC) concern entry-level residential plans on a two-year contract only. Other plans such as non-entry level double play plans, or all single-play plans are, as the EC notes, more expensive than the EU average. In any case, an NRA should not rely solely on comparisons with EU average prices as, in isolation, they may not be reliable indicators of what the 'competitive' level of retail prices *should* be in any given Member State (as, for example, retail prices may be affected by *ex ante* regulation in all or part of the territory of various Member States).

Additionally, although other NRAs have continued to regulate similar wholesale markets where downstream fixed broadband retail prices were lower than in Malta (as measured by the 2021 Pricing Survey), the EC has not issued serious doubts in respect of these other market reviews.[29] This suggests that the EC recognises that upstream regulation (in respect of WLA) may be warranted, even where downstream retail prices are lower than the EU average across all measured categories. The retail pricing trends relied on by the EC in its Serious Doubts letter do not, therefore, appear to provide especially strong evidence of a tendency towards effective competition on the upstream PVIA market, especially given – as set out above - that these retail prices often occur in the presence of upstream wholesale market regulation.

[28] Draft Measure, at pp.86-87.

[29] The 2021 Pricing Survey reported that the prices of all measured categories of fixed broadband were cheaper than the EU average in Bulgaria, Czechia, Finland, France, Germany, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, and Slovenia. The provision of WLA continues to be regulated in the entirety of, or the majority of, 9 of these 12 Member States (Finland, France, Germany, Hungary, Latvia, Lithuania, Poland, Slovakia, and Slovenia).

In respect of **network presence**, the EC notes *"the presence of two, and in some regions, three, networks capable of delivering gigabit speeds."* The EC and the MCA both argue that Epic has not significantly constrained GO or Melita at retail level.[30] It follows in the EC's reasoning that the presence of two networks may be sufficient to ensure effective retail competition and that, by implication, the PVIA market structure – which is properly the subject of the 3CT – tends towards effective competition.

The Draft Measure indicates[31] that *"only about half of the end-users in Malta have access to two or more Gigabit offerings"*, which implies that about half of end users have access to one gigabit offering.

As set out in the Draft Measure and repeated in the Serious Doubts letter, as of March 2023, gigabit retail broadband delivered by GO over its own FTTH network was available at 66.7% of Maltese dwellings, while Melita offered gigabit speeds, largely on its own cable network, 'nationwide', relying on GO physical infrastructure for 40% of its duct usage requirements. Epic relies on a mixture of own-network FTTH rollout (passing 7.2% of dwellings, as of August 2023) and regulated access to GO VULA to offer retail services to end users.

The 2020 Explanatory Note indicates[32] that a retail market may be prospectively competitive. In assessing whether a market may become effectively competitive after the market review period, there should be clear evidence of market dynamics, even geographically limited, which indicate that the market will become effectively competitive in the near future even without the imposition of *ex ante* regulation.

Absent regulation, GO and Melita would likely have the capacity to remain active in the provision of retail broadband on the basis of their own network infrastructure, while Epic would likely face significant challenges in extending its reach if regulated VULA were withdrawn and if it could not obtain access to GO's extended physical infrastructure. Given this risk, it is not clear that, absent upstream market regulation, the presence of just two operators on the downstream retail broadband market would assure a tendency towards effective competition.

In respect of **expenditure on internet subscriptions**, the market research carried out on behalf of the MCA in summer 2022[33] showed that 59% of survey respondents replied that the cost of their main internet subscription was *"neither expensive not cheap"*, compared to 48% and 50% respectively responding to this effect in similar surveys carried out in 2017 and 2019. However, the number of respondents to the same survey indicating that the cost of their subscription is *"expensive"* or *"very expensive"*, although declining over time, remains high, at 40%. BEREC is of the view that, where 40% of respondents consider prices to be *"expensive"* or *"very expensive"*, but only 1% of respondents consider prices to be *"cheap"* this does not constitute clear evidence of effective retail competition.

[30] Serious Doubts letter, at p.8 and Draft Measure at p.94.

[31] At p.47.

[32] At p.13.

[33] "MCA Market Research: Consumer Perceptions Survey – Fixed Broadband". Available online at https://www.mca.org.mt/sites/default/files/MCA%20CPS%20-%20FIXED%20BROADBAND%20-%20PRES.pdf

As set out at p.11 of the 2020 Explanatory Note,[34] a 3CT analysis may take into account all relevant constraints, irrespective of whether they form part of the relevant market. In that regard, the EC assessment of Criterion 2 focusses on the extent of competition at the retail level to ground its serious doubts that Criterion 2 does not pass on the upstream PVIA market. However, as set out above, the MCA grounded its Criterion 2 assessment in market dynamics on the PVIA market. The EC does not appear to have addressed in its serious doubts the MCA's analysis of Criterion 2 on the PVIA market, and has not, therefore, indicated whether, in its view, the PVIA market, as defined in the Draft Measure, could likely tend towards effective competition. Since the EC has not addressed the MCA's Criterion 2 reasoning (economies of scale, market asymmetries and so on), BEREC does not have grounds to assess the validity of this analysis. BEREC however refers to its comments in the context of Serious Doubt 1 regarding the limited wholesale sales by GO and Melita to third parties and their uncertain existence in the absence of regulation, which does not appear to be consistent with anticipating a wholesale market structure tending towards effective competition.

Accordingly, BEREC does not agree with the EC's serious doubts in respect of Criterion 2 of the 3CT.

4.3 Serious Doubt 3: The need to determine whether cable is a competitive constraint on copper/fibre on the relevant wholesale market

Concerns of the EC

The EC considers that the MCA has not assessed the boundaries of the relevant market adequately because it has not considered the constraint exerted by cable (including cable self-supply) in the market analysis. As confirmed by the EC to the EWG, the EC expressed serious doubts in this case because the MCA did not include cable in the wholesale market as a **direct** constraint.

In Malta, both VULA (a Layer 2 access product) and bitstream (a Layer 3 access product) can, while fulfilling different capabilities and service levels, be delivered nationwide through a single point of interconnection. This appears to be different from larger markets, where locally provided access requires significant network investments compared to upstream centrally provided access.

The EC therefore considers that the MCA, as part of its substitutability analysis, should have examined factors such as product features and the willingness of access seekers to migrate between access points or to make use of various handover points. In addition, the MCA should have assessed whether a cable network may support wholesale access services on the basis of virtually unbundled access in the timeframe of this market review, particularly if there was demand for such a service.

More generally, the EC considers that Melita's and GO's networks may meet the criteria to be considered as sufficiently interchangeable or substitutable, not only in terms of their objective

[34] SWD(2020) 337 final. COMMISSION STAFF WORKING DOCUMENT EXPLANATORY NOTE *Accompanying the document* COMMISSION RECOMMENDATION 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 of 11 December 2018 establishing the European Electronic Communications Code {C(2020) 8750 final (the '**2020 Explanatory Note**').

characteristics, prices or intended use, but also in terms of the conditions of competition and/or the structure of supply and demand in the market in question. This, according to the EC, follows from the fact that both GO's copper/fibre network and Melita's cable network can be used anywhere in Malta as a wholesale input to satisfy the needs of consumers.

Furthermore, the EC considers that, given that there is a cable network providing a retail service that is substitutable with GO's, the MCA should have taken into account Melita's self-supply on its own cable infrastructure when defining the wholesale market subject to the current market review.

Views of the MCA

The product market definition excludes cable as a direct constraint for various reasons. It is not possible to implement physical unbundling of cable, given the shared nature of the access. DOCSIS 3.1 cable technology is deemed to be already capable of providing IP-based bitstream but there is a difference in flexibility between Layer 3 cable bitstream access and Layer 2 FTTx access. The MCA also notes the absence of demand for cable bitstream and the fact that the existing access seeker (Epic) on FTTx VULA would incur substantial costs in switching to a cable-based bitstream offering. An entirely new entrant would not face such switching costs, however the prospect for additional new entry in Malta is very low at this stage. With the transition to DOCSIS 3.1 FD (4.0) accompanied by the full digital use of the coax cable spectrum, a VULA equivalent could be defined for DOCSIS-based access networks. This is however not yet the case in Malta, nor is it anticipated that this scenario will likely materialise within the timeframe of this review.

In addition, the MCA considers that cable DOCSIS 3.1 does not provide an indirect constraint on the supply of FTTx VULA. This results from the fact that the proportion of VULA lines in relation to broadband subscribers is so low that GO, the only VULA supplier, would not be at risk of losing significant market share to retail cable if it increased the wholesale price of VULA by a small but significant amount. Furthermore, GO could likely regain this small market share at retail level on its network from Epic.

BEREC's Assessment

As noted in the 2020 Explanatory Note,[35] the vast majority of NRAs exclude cable from the WLA market on the basis that it does not directly constrain physical unbundling and VULA services. Additionally, the 2020 Explanatory Note argues that, subject to conditions, cable should generally be included in the WCA market.[36] For the reasons set out below, BEREC considers that cable is unlikely to be a direct competitive constraint on the PVIA market defined by the MCA.

In its argumentation, the EC notes that the 2020 Explanatory Note states that virtual access products may be designed in such a way that they display similar or equal product features, regardless of the location of the handover point for access. Therefore, it could be technically possible to provide wholesale broadband access at central or local level with comparable quality of service from both access seeker and end user perspectives. In particular, the

[35] At p.50.

[36] At p.53.

characteristics of high quality virtual access products provided at central level could be set equivalent to those of VULA, allowing access seekers to provide similar retail services based on either product. In addition, the EC also mentions in its Serious Doubts letter the statement in the 2020 Explanatory Note[37] that both the product features and the willingness of access seekers to migrate between access points or to make use of various handover points within the network architecture need to be analysed.

Regarding the EC's comment that MCA should have assessed whether a cable network may support wholesale access services on the basis of virtually unbundled access in the timeframe of this market review, BEREC recognizes that cable cannot be physically unbundled, but a direct constraint from cable could however materialize from a VULA-equivalent access product. The 2020 Explanatory Note sets criteria[38] whereby a VULA product should, as far as possible, be functionally equivalent to physical unbundling.[39] BEREC agrees that one of these criteria (i.e. location) could be satisfied in Malta as it was already noted that, due to the small size of the country, both VULA and cable bitstream could be delivered nationwide through a single point of interconnection.[40] BEREC however understands that the other criteria are not met. According to a study prepared for the EC,[41] wholesale products made available via DOCSIS 3.1 are not capable of meeting the functionalities associated with VULA, and therefore would normally (based on direct constraints) not be considered for inclusion in the WLA market, although they may provide an indirect constraint. The draft measure seems to confirm that, in Malta, VULA over fibre and (theoretically possible) bitstream over cable would not provide comparable functionality or quality of service from an access seeker perspective. To the best of BEREC's understanding, the product features of the two wholesale products are not the same[42] and there is no evidence of access seeker willingness to migrate between access points (in this case, between platforms).

DOCSIS 4.0 may be capable of meeting all three criteria, but it is not expected to be widely deployed during the period of the 2020 Recommendation. The 2020 Explanatory Note also refers[43] to the need for DOCSIS 4.0 in order to provide VULA over cable networks. BEREC however understands from the Draft Measure[44] that the transition to DOCSIS 4.0 is neither accomplished nor anticipated in Malta.

[37] At p.45.

[38] At p.49.

[39] Access should (i) in principle occur locally; (ii) be generic and provide access seekers with a service-agnostic transmission capacity which is uncontended in practice; and (iii) provide access seekers with sufficient control over the transmission network to allow for product differentiation and innovation similar to LLU.

[40] The provision of wholesale access over cable *may* exist, depending on national market circumstances. Five European NRAs regulate wholesale bitstream access to cable on the basis of a finding of SMP (Belgium, Denmark, Hungary, Serbia and North Macedonia), and this remedy has also been imposed symmetrically (Poland) and as part of merger commitments (in France and Germany).

[41] WIK Consult, *Future electronic communications product and service markets subject to ex-ante regulation*, 2020, at p. VIII. Available online at [Future electronic communications product and service markets subject to ex-ante regulation - Publications Office of the EU (europa.eu)]

[42] Draft Measure at pp. 67-68 and MCAs' answer to questions 25 and 28(b) of the EC's RFI.

[43] At p.49.

[44] At p.68.

In its recent Notice on the definition of the relevant market for the purposes of competition law,[45] the EC underlines (at paragraph 33) that for the market to be broadened based on supply substitution, a necessary condition is that suppliers have the incentive to switch production and would do so when relative prices or demand conditions change. The same principle is recognised in prior caselaw, EC decisions and economic theory.[46] BEREC does not identify, in the submitted material, any clear evidence that this would be the case in Malta. As Melita does not provide cable-based bitstream[47] (given the possibility of doing so under DOCSIS 3.1), there are strong doubts that Melita would provide VULA over cable after a possible transition to DOCSIS 4.0. BEREC also notes that, on a forward-looking basis, access seekers may express a preference for FTTH over cable, even if VULA-like bitstream were made available over DOCSIS 3.1. On the supply side, BEREC notes that there is evidence in some Member States of cable operators replacing cable infrastructure with FTTH to future-proof their networks.[48] In the present case, Melita only initiated limited fibre deployment in specific areas.

The EC also refers to the existence of (potential) demand or the willingness of access seekers to migrate between access solutions, including cable. The EC does not, however, challenge the MCA's observations that

(i) there is no demand for bitstream access in the market,
(ii) existing access seekers on FTTx VULA would encounter substantial costs to switch to cable and
(iii) the prospect for additional new entry in Malta (in which case the entrant would not face such switching costs) is very low.[49]

As regards the possibility that cable exerts an indirect constraint on GO's wholesale prices, BEREC refers to the criteria defined in the 2020 Explanatory Note to assess such a constraint.[50] The MCA's conclusion that cable does not present an indirect constraint on FTTx networks at wholesale level[51] is however not challenged by the EC. Therefore, BEREC in its Opinion does not comment on the analysis of indirect constraints of cable in the market.

[45] Communication from the Commission, Commission Notice on the definition of the relevant market for the purposes of Union competition law, 8 February 2024, C(2023) 6789 final.

[46] EFTA Court judgment of 5 May 2022, Telenor and Telenor Norge v EFTA Surveillance Authority, E-12/20, paragraph 161. Commission Decision of 17.12.2008 declaring a concentration to be compatible with the common market and the EEA Agreement (Case M.5046 Friesland Foods/Campina), paragraph 159. O'Donoghue Robert, Padilla Jorge (2020), *The Law and Economics of Article 102 TFEU*, Hart Publishing, 3rd edition.

[47] Draft Measure, p. 80.

[48] For example, in Ireland the sole cable operator (Virgin Media) has commenced overlay of its cable network with FTTH and has also shifted from a self-supply only model on its cable network to the provision of wholesale access to retail operators on its FTTH network.

[49] MCA's answer to question 25 of the EC's RFI.

[50] The cumulative conditions are: (i) access seekers would be forced to pass a hypothetical wholesale price increase onto their consumers at the retail level based on the wholesale/retail price ratio; (ii) there would be sufficient demand substitution at the retail level based on indirect constraints such as to render the wholesale price increase unprofitable; and (iii) the customers of the access seekers would not switch to a significant extent to the retail arm of the integrated hypothetical monopolist, in particular if the latter does not raise its own retail prices.

[51] Footnote 17 of the Serious Doubts letter.

BEREC does not share the EC's view that *"Given that there is a cable network providing a retail service that is substitutable with GO's, the MCA should have taken into account Melita's self-supply on its own cable infrastructure when defining the wholesale market subject to the current market review"*.[52]

Self-supply can be either non-captive or captive.[53] If non-captive, self-supply capacity could, theoretically, exert a direct constraint similar to that exerted by a supply-side substitute. If captive, self-supply capacity cannot exert a direct constraint but may still exert an indirect constraint. In the absence of a direct or indirect constraint, the mere existence of self-supply by a vertically-integrated operator does not justify broadening the relevant product market. Product market definitions on retail and wholesale markets do not necessarily mirror each other, as illustrated by the Google Android case[54] where the EC considered that operating systems exclusively used by vertically-integrated developers (like Apple iOS or Blackberry) were not part of the same market as Android because they are not available for licence by third party device manufacturers.[55]

For the reasons stated above, in conclusion, BEREC does not share the EC's serious doubts that the MCA has not assessed the boundaries of the relevant market adequately because it has not included cable in the market *as a direct constraint*.

4.4 Serious Doubt 4: The need to assess whether there is significant market power on the wholesale market

Concerns of the EC

The EC considers that an SMP assessment, carried out in a properly defined wholesale market could yield different results to those set out in the Draft Measure. This assessment would consider the extent to which a cable operator (even if only self-supplying at wholesale level) exerts competitive pressure on GO in this specific case. The MCA should therefore assess whether a new wholesale market, which could include cable infrastructures, is effectively competitive or not and decide which specific appropriate regulatory obligations (if any) should then be imposed. The assessment of market power in a wholesale market, which includes cable infrastructures, could potentially lead to different conclusions.

The EC does not consider that the MCA has sufficiently justified its finding that GO has SMP at the wholesale level. This is because, in a retail market that is directly downstream, GO's market power is constrained by Melita, which only partly relies on a wholesale input that GO controls (i.e. access to passive infrastructure).

Views of the MCA

[52] Serious Doubts letter, p.13.

[53] For example, see *"Indirect Constraints and Captive Sales: Overview of regulatory practice and competition case law with regard to indirect constraints and captive sales in market definition and market power assessment"*, a 2006 report prepared for Ofcom by CRA International, at pp.8-10.

[54] Commission decision of 18.7.2018 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (the Treaty) and Article 54 of the EEA Agreement (AT.40099 – Google Android).

[55] EC press release, 18 July 2018.

The MCA concludes that other technologies such as cable do not provide a direct constraint in the wholesale market, and do not provide an indirect constraint, primarily due to the very low proportion of wholesale lines, which would limit the financial impact on GO if it increased charges for VULA.

The MCA states that GO maintains a very high market share in PVIA over FTTx.[56] Effectively, GO accounts for circa 93% of all duct infrastructure that is currently available / utilized for the provision of PVIA, whilst it accounts for 98% of all wholesale VULA-based services (taking into account self-supply).

In response to queries from the EWG, the MCA explained why indirect constraints from cable are not strong enough to be taken into account at the wholesale level. If GO raised the price of FTTx VULA and did not raise its own retail prices:

(i) Access seekers would not be in a position to raise their retail prices. Access seekers have a very low retail market share (<2% broadband market) and need to set prices to attract new customers/switching customers. Instead they would most likely face a margin squeeze and exit the market. A similar result can be seen when GO raised bitstream wholesale prices after the removal of regulation by the MCA in its 2008 decision[57] following serious doubts raised by the EC in response to the MCA's 2007 draft measure;[58]

(ii) GO would not face any significant loss of wholesale market share/revenue or profits because at worst it would lose less than 2% share, if it lost all wholesale customers to cable. At the same time, it would benefit from reduced competitive pressure and could also potentially further raise retail prices; and

(iii) Switching patterns show that there has been switching from Epic to GO. GO could expect to regain at least a portion of customers at retail level if it increased wholesale prices and Epic was forced to increase its retail price (although as noted in (i) it is more likely that Epic would exit the market based on VULA in this eventuality).

Also, in its interview with the EWG the MCA stated that Melita does not impose any indirect constraints at all that should be taken into account in the SMP assessment.

BEREC's Assessment

BEREC notes that the serious doubts regarding the SMP assessment in this case are directly linked to the serious doubts expressed by the EC on whether cable is a competitive constraint on copper/fibre in the relevant wholesale market.

The 2020 Explanatory Note[59] also refers to indirect constraints when assessing SMP. If indirect constraints are found to exist but are not strong enough to constrain the price of other WLA products, they should be taken into account when assessing whether the incumbent operator

[56] Draft Measure, at p.89.

[57] MCA decision on Wholesale Broadband Access Market, 14 November 2008.

[58] Case MT/2007/0563: Wholesale broadband access. Letter to MCA opening Phase II investigation pursuant to Article 7(4) of Directive 2002/21/EC.

[59] At p.50.

has SMP on the relevant market. However, the EC did not challenge this in this case. As set out in the discussion of Serious Doubt 3 at section 4.3 above, the EC expressed serious doubts in this case because cable was not included in the wholesale PVIA market as a direct constraint. As a consequence, BEREC does not comment further on this topic in its Opinion, however it does not exclude that the MCA could further develop its argumentation about indirect constraints in the context of the SMP assessment.

Therefore, as the EC only emphasizes that the SMP assessment would be different if cable were included in the wholesale market, taking into account BEREC's assessment at point 4.3 above, BEREC does not share the EC's serious doubts that the MCA's finding that GO holds a position of SMP on the market for wholesale PVIA complies with Article 67 of the Code.

5. Conclusions

Pursuant to Article 32(5) of the Code, BEREC shall publish an opinion on the Commission's reservations referred to in paragraph 4, indicating whether it considers that the draft measure should be maintained, amended or withdrawn and shall, where appropriate, provide specific proposals to that end. BEREC is of the opinion that none of the EC's four serious doubts are justified. BEREC is accordingly of the view that there are insufficient grounds to justify the withdrawal or amendment of the Draft Measure, based specifically on the reservations arising from the EC's Serious Doubts. BEREC does not agree with the EC that the draft measure:

- (i) Is characterised by a lack of sufficient justification that the wholesale market should continue to be regulated;
- (ii) Provides insufficient evidence that the PVIA market passes Criterion 2 of the 3CT;
- (iii) Incorrectly excluded the direct constraint arising from Melita self-supply of cable in its product market definition; and
- (iv) Has failed to justify a finding of SMP on the PVIA market arising in particular from an improperly-defined PVIA market definition (arising from the exclusion of self-supply of cable as a direct constraint).

BEREC notes that Serious Doubt 2 relies to a non-trivial extent on analysis set out in Serious Doubt 1, and, similarly, Serious Doubt 4 relies to a non-trivial extent on analysis set out in Serious Doubt 3. BEREC is particularly unconvinced of the EC's assumption that downstream retail broadband markets would be effectively competitive absent regulation in the presence of just two networks, only one of which currently offers wholesale services on a regulated basis.

For the avoidance of doubt, the BEREC conclusions do not amount to a positive endorsement of the findings of the MCA Draft Measure in all material respects.