



Report on the Malta Communications Authority's work on the implementation of the EU Net Neutrality Regulation

Report to the European Commission

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1. INTRODUCTION

The Malta Communication Authority, hereinafter referred to as the MCA, has prepared this report in compliance with the annual reporting obligations arising from EU Regulation 2015/2120¹ and further clarified in paragraph 182 of the BEREC Guidelines² on the Implementation by National Regulators of European Net Neutrality Rules. The report details the MCA's approach to compliance activities with Regulation 2015/2120 concerning open internet access which came into force on the 30th April 2016. The report, therefore, covers the period from the 30th April 2016 till the 30th April 2017.

The MCA is the main Authority responsible for enforcing the Regulation and this entails several obligations, including ensuring that:

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

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

Sections 2 and 3 provide a high-level market overview and an overall description of the national situation regarding compliance with the Regulation respectively. Section 4 provides a summary of the non-compliance issues identified by the MCA and the remedial actions undertaken. Section 5 provides a more detailed analysis of the obligations prescribed by Articles 3, 4 and 6 and the remedial activities undertaken by the MCA to ensure compliance in the national market.

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

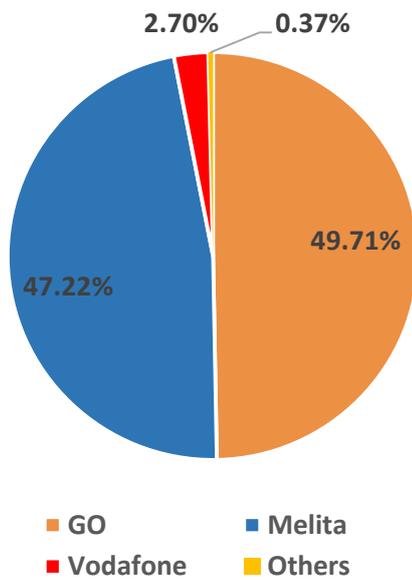
¹ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015R2120>

² http://berec.europa.eu/eng/document_register/subject_matter/berec/regulatory_best_practices/guidelines/6160-berec-guidelines-on-the-implementation-by-national-regulators-of-european-net-neutrality-rules

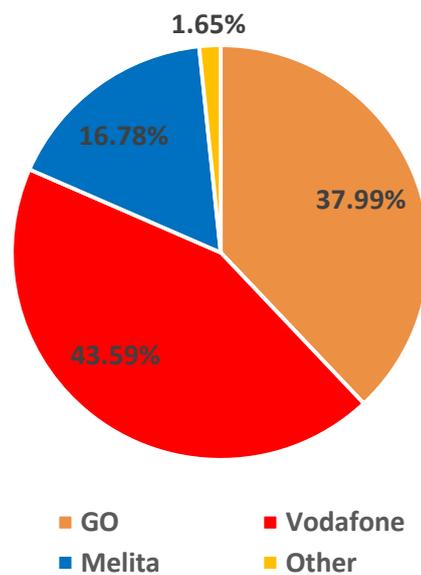
2. MARKET OVERVIEW

There are currently three main fixed IAS providers in the Maltese market, with three smaller operators collectively holding 0.37% of the total market share. The same main three providers also offer mobile broadband services through their mobile networks. The providers' market share in the fixed and mobile markets is represented below:³

Market Share (%) of fixed broadband providers



Market share (%) of mobile broadband providers



³ Data sourced from the "Communications Market Review – July to December 2016" as published at http://www.mca.org.mt/sites/default/files/cmr_sh_2016_report_16%2006%202017.pdf on 16th June 2017

3. THE NATIONAL SITUATION REGARDING COMPLIANCE WITH THE REGULATION

In the course of implementing the Regulation the MCA prioritised the transparency aspects of the Regulation as laid down in Article 4, followed by the remaining articles.

In Malta there are currently three main IAS providers, followed by a number of smaller operators. During the course of its work the MCA considered all IAS providers in order to ensure market-wide compliance with the Regulation.

Non-compliance with the Regulation mainly concerned contract transparency, particularly:

- the provision of IAS speeds where these were found to be missing,
- the adequate provision of IAS speeds where these were found to be incomplete,
- traffic management policies and remedies available to the consumer in cases of any continuous or regularly recurring discrepancies between the actual performance of the IAS and that set out in the contract.

Following a programme of engagement with all IAS providers the MCA can verify that all the relevant providers are compliant with Articles 3 and 4 of the Regulation at the date of publication. The MCA also notes that compliance in relation to Articles 5 and 6 of the Regulation is in place.

4. SUMMARY OF NON-COMPLIANCE ISSUES

ARTICLE	NON-COMPLIANCE ISSUES	ACTION TAKEN AND STATUS
<p>Article 3: Traffic management policies</p>	<p>Not all IAS providers included traffic management policies in their contracts. Existing traffic management policies were inadequate in terms of the level of detail regarding how IAS providers actually carry out traffic management.</p>	<p>The MCA engaged in discussions with the relevant IAS providers and requested information in relation to the implementation of such practices. Additionally, IAS providers were required to make public their traffic management policy and ensure that the relevant details were included in subscriber contracts.</p> <p>The MCA notes that, following its intervention, all IAS providers now fulfil this requirement.</p>
<p>Article 4(1)(a): information on how traffic management measures applied by that provider could impact on the quality of the internet access services, on the privacy of end-users and on the protection of their personal data</p>	<p>Existing traffic management policies were not sufficiently detailed as to the information relating to the impact of traffic management measures on end-users' privacy, personal information and the quality of their IAS.</p>	<p>The MCA invited IAS providers to provide substantial information in relation to this sub-article including revisions to the information made available to end-users.</p> <p>The MCA notes that, following its intervention, all IAS providers now fulfil this requirement.</p>
<p>Article 4(1)(b): a clear and comprehensible explanation as to how any volume limitation, speed and other quality of service parameters may in practice have an impact on internet access services, and in particular on the use of content, applications and services</p>	<p>Only one operator was found to be non-compliant with this sub-article.</p> <p>The relevant fixed broadband service did not meet the requirements set out in this sub-article for a comprehensible explanation on volume limitations.</p>	<p>The MCA requested the IAS provider to update the relevant information.</p> <p>The MCA notes that, following its intervention, all IAS providers now fulfil this requirement.</p>

ARTICLE	NON-COMPLIANCE ISSUES	ACTION TAKEN AND STATUS
<p>Article 4(1)(c): a clear and comprehensible explanation of how any services referred to in Article 3(5) to which the end-user subscribes might in practice have an impact on the internet access services provided to that end-user</p>	<p>Only one operator currently offers specialised services (IPTV service). While the MCA was carrying out its market compliance investigations the terms and conditions of this particular product failed to provide information regarding any possible impact the specialised service might have on end-users' IAS.</p>	<p>The MCA requested the IAS provider to update the relevant information</p> <p>The MCA notes that, following its intervention, all IAS providers now fulfil this requirement.</p>
<p>Article 4(1)(d): a clear and comprehensible explanation of IAS speeds pertaining to fixed and mobile networks, and how significant deviations from the respective advertised download and upload speeds could impact the exercise of end-users' rights</p>	<p>IAS providers showed varying degrees of non-compliance with respect to this requirement; some IAS providers omitted IAS speeds for mobile services whilst others failed to include IAS speeds altogether</p>	<p>The MCA requested IAS providers to update the relevant information proportionate to the level of detail required by this Article</p> <p>The MCA notes that, following its intervention, all IAS providers now fulfil this requirement.</p>
<p>Article 4(1)(e): a clear and comprehensible explanation of the remedies available to consumers in the event of any continuous or regularly recurring discrepancy between the actual performance of the IAS regarding speed or other quality of service parameters</p>	<p>IAS providers showed varying degrees of compliance; some IAS providers offered remedies for instances such as service outages while others gave examples of available remedies (e.g. pro-rata compensation)</p>	<p>IAS providers were requested to provide clear information regarding the remedies and compensation available to their end-users.</p> <p>The MCA notes that, following its intervention, all IAS providers now fulfil this requirement.</p>
<p>Article 4(2): transparent, simple and efficient procedures to address complaints of end-users relating to their rights and obligations in Articles 3 and 4</p>	<p>All IAS providers were found to be compliant with this sub-article – existing procedures for addressing complaints were extended to cover the scope of this Regulation.</p>	<p>Following its review, the MCA positively noted that no further action was required for the implementation of this article; all IAS providers had existing processes and procedures in place to deal with end-user complaints.</p>

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

The following section provides a more detailed analysis of the obligations prescribed by Articles 3, 4 and 6 in relation to the compliance achieved in the national market and the remedial activities undertaken by the MCA where applicable.

To ensure compliance with the Regulation, over the past year, the MCA has complemented information requests to the IAS providers with on-going reviews of consumer and industry complaints, market place developments and relevant communications as issued by IAS providers through their public channels.

ARTICLE 3 - SAFEGUARDING OF OPEN INTERNET ACCESS

ARTICLE 3(1) & 3(2) – END-USER RIGHT TO OPEN INTERNET ACCESS

The MCA undertook an analysis of the various IAS products (both fixed and mobile) available on the market. This entailed accessing the products' relevant literature as published on the IAS providers' websites and examining the terms and conditions attached to the individual products. The exercise was complemented with information requests to the IAS providers in order to bridge any remaining information gaps.

The review undertaken by the MCA did not suggest any restrictions to end-user rights in relation to the access and distribution of information and content, as well as to the use of terminal equipment of their choice. Additionally, the information gathered did not suggest that agreements between providers of IAS and end-users limit the exercise of end-user rights as laid down in Article 3.1 of the regulation.

ZERO-RATING PRACTICE

Through the various activities undertaken, the MCA did not identify any zero-rating or other traffic / price discrimination practices / offers on the Maltese market, which are outright in breach of the Regulation. The MCA is, however, assessing whether IAS providers offering access to their IPTV platform, on a free-of-charge basis to their own mobile subscribers, constitutes a breach of the Regulation in line with the BEREC guidelines.

ARTICLE 3(3) – NON-DISCRIMINATION BY IAS PROVIDERS

The MCA places great emphasis on traffic management policies. In order to assess compliance with the Regulation the MCA once again analysed the various IAS products (both fixed and mobile) and the relevant terms and conditions. This activity was complemented with information requests to the relevant IAS providers.

The MCA reviewed the traffic management policies of all IAS providers and ensured that these were in line with the requirements of the Regulation. In instances where no traffic management policies were available the IAS providers were obliged to submit their proposals to the MCA prior to publication in view of ensuring compliance with the Regulation. The MCA also took the necessary action to notify and oversee that, where the traffic management policies of IAS providers were not strictly in line with the Regulation, said policies were amended appropriately.

As part of its future work and in order to ensure continued compliance with the Regulation, the MCA is actively looking into means of verifying that the traffic management policies laid down in subscriber contracts are appropriately reflected in practice.

In order to ensure the appropriate application of traffic management practices in line with Article 3(3)(b), the MCA has requested direct information from IAS providers of both fixed and mobile services about the use of port blocking techniques for the purpose of safeguarding the integrity and security of their networks. The responses gathered showed that IAS providers block specific ports which are normally used to deliver unsolicited email. IAS providers further stated that other ports may be blocked from time to time on a temporary basis in order to address specific network threats.

ARTICLE 3(4) – PROTECTION OF PERSONAL DATA IN THE CONTEXT OF TRAFFIC MANAGEMENT

The enforcement of this particular Article is mainly the responsibility of the Office of the Information Data Protection Commissioner (IDPC). The work carried out by the MCA does not suggest any major concerns in relation to the protection of personal data in the context of traffic management.

ARTICLE 3(5) – SPECIALISED SERVICES

In line with the BEREC Guidelines, the MCA monitored and analysed specialised services on a case-by-case basis and opted not give a formal interpretation of or guidance on “services other than internet access services”. In its assessment the MCA considered the provision of IPTV service offered over access networks which may suffer from localised bottlenecks. In future assessments, the MCA does not exclude the inclusion of other IP-based services as specialised services which merit closer assessment.

Initiatives carried out in this respect focused on ensuring that specialised services are not offered at the expense of IAS. The MCA referred to the terms and conditions of the various IAS products available. Where information was insufficient, the MCA engaged in discussions with the individual providers to address outstanding issues and amend subscriber contracts in line with the Regulation. In conclusion the terms and conditions examined by the MCA did not suggest that specialised services currently offered on the market are hindering access or restricting capacity to the open Internet.

As part of its future work, and in line with the BEREC work programme on net neutrality tools, the MCA is looking into the availability and feasibility of tools which provide a quantitative assessment of the openness of the Internet. This work will complement existing initiatives on the quality of service of both fixed and mobile broadband networks.

ARTICLE 4

ARTICLE 4(1) – TRANSPARENCY IN CONTRACTS

The MCA analysed the terms and conditions associated with currently available IAS products in order to assess the level of compliance. This was further complimented by direct information requests sent to the IAS providers where information was found to be insufficient.

Once the MCA had visibility of the extent of IAS providers' compliance with the Regulation, and following discussion with the IAS providers, amendments to the appropriate terms and conditions were requested. The Authority further requested IAS providers to inform subscribers by notifying them of the changes implemented.

During this process, the main shortcoming observed by the MCA was related to the appropriate disclosure of traffic management policies. While the majority of IAS providers referred to the applicability of a traffic management policy in their contracts the information provided in this respect lacked the level of detail required by the Regulation.

The MCA also observed that traffic management policies published at the time did not indicate how IAS providers treated their subscribers' personal data while exercising traffic management. The Authority requested reassurance from the IAS providers as to the treatment of their subscribers' personal data and the impact, if any, that traffic management measures applied by IAS providers would have on such data.

Article 4(1)(d) requires IAS providers to include in their contracts detailed information about their broadband speed offers. In 2013 the MCA published a binding Decision addressing the information which fixed IAS providers must publish in their contracts, specifically the upload and download Typical Speed Range (commonly referred to as TSR). The TSR is a mechanism which indicates what the expected speed of a given broadband access connection shall be. The TSR is expressed as two figures comprising the minimum and maximum speeds. The Decision also states that in those cases where the headline speed includes a numerical figure to describe speed, the IAS provider is expected to provide a connection which can physically achieve the stated headline speed. The same rules were then made applicable to broadband services which are marketed as fixed, even if these are provided over mobile platforms, through an amendment of the Decision published in 2016⁴. For this reason, it was not necessary for the MCA to provide any clarification to the interpretation of the terms maximum, minimum and typically available speed as listed in the Regulation. The MCA is currently working on the initiative to set up a broadband Quality of Service framework applicable to mobile services, in which document, the MCA contemplates to define how mobile IAS providers disclose their estimated speeds.

Some IAS providers' information relating to speeds was found to be insufficient, in particular the attainable speeds relevant to mobile services. None of the mobile IAS providers advertise their products' speeds and therefore, in line with BEREC Guidelines, they were not requested to advertise any such speeds. However, these providers were required to include the estimated maximum speed performance in their subscribers' contracts in line with the Regulation.

⁴ <http://www.mca.org.mt/consultations-decisions/broadband-qos-framework-extended>

Additionally, one particular fixed IAS product was found to lack the appropriate information relating to volume limitations. The MCA through discussions with this provider, requested amendment to the contract to reflect the requirements of the regulation.

In line with the requirement under this Article, the MCA, following discussions with the respective IAS providers, further requested IAS providers to ensure that their contracts include clear information relating to the applicable remedies in the case of discrepancies between the actual performance of the IAS product and that indicated in the contract.

ARTICLE 4(2) – COMPLAINT-HANDLING MECHANISM

The Authority has ascertained that all IAS providers have adequate and simple customer support to address any queries or complaints arising from the Regulation. Customer support varies from one IAS provider to another but all providers offer support via telephone, email and retail outlets. This approach is industry-wide and is voluntarily agreed upon by the market players.

Between the 1st May 2016 and the end of May 2017 the MCA received a total of 8 complaints from end-users claiming that they were experiencing discrepancies between the actual speeds being received and the speeds included in their fixed IAS contracts. The MCA ensured that, where the issue fell within the IAS provider’s responsibility, timely action was taken to address any shortcomings.

ARTICLE 4(3) – FURTHER REQUIREMENTS IMPOSED BY NRA

The MCA does not impose any additional transparency information requirements other than those prescribed by the Regulation.

ARTICLE 4(4) – ESTABLISHMENT OF NON-CONFORMITY

Fixed IAS providers are required to provide the Typical Speed Range which is calculated as the 20th and 80th percentile of speed at the access network level for each product used. Therefore, any speeds which are lower than the 20th percentile are considered as giving rise to a “significant discrepancy”. No interpretation of the term ‘regularly recurring’ has been published. To date any complaints received related to speed have been treated individually and on their own merits. Should the need arise, however, the MCA will define the term ‘regularly recurring’.

ARTICLE 5

ARTICLE 5(1) – NRA-IMPOSED REQUIREMENTS FOR MONITORING AND COMPLIANCE

While the MCA did not impose minimum QoS requirements on any IAS provider under Article 5(1), the national broadband quality of service framework, as published in 2013, requires fixed IAS providers to measure relevant QoS parameters and provide their report to the MCA on a quarterly basis. IAS providers are also required to publish the TSR information related to each IAS product and, in doing so, commit to a minimum access speed. The available data does not indicate any variances which may be of concern.

The MCA is currently working on an initiative to establish a quality of service framework for mobile IAS providers. As part of its future work, and in line with the BEREC work programme on net neutrality tools, the MCA is also looking into the availability and feasibility of tools which provide a quantitative assessment of the openness of the Internet. The MCA has also trialled a QoS measurement and traffic management assessment tool provided by MLabs (Neubot). The data available from this platform was studied to the extent permissible by the tool and the trial set-up adopted. This work complements existing initiatives aimed at establishing independent monitoring of the quality of service of both fixed and mobile broadband networks.

ARTICLE 6 – PENALTIES

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

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

6. CONCLUSION

After having carried out its programme of activities in view of ensuring open internet access, the MCA can confirm that all IAS providers in Malta are currently compliant with the Regulation. Moreover, the MCA notes that end users of IAS have been informed in relation to the rights granted to them under this Regulation through the updating of subscribers' contracts and the related notifications. The compliance covers the technical, contractual and consumer aspects of the Regulation.

The MCA will continue monitoring the market in order to ensure that compliance is maintained in the long-term and, where this is not the case, will take the necessary steps to ensure that compliance is restored efficiently.