

**DECISION OF THE OFFICE FOR COMPETITION**

**of 21.06.2022**

**ON FULL-FUNCTION JOINT VENTURE**

**ADDRESSED TO BIANCHI AND SONS LIMITED,  
MERILL INVEST LIMITED AND ZITI TECHNOLOGIES LIMITED**

**DECLARING THAT THE CONCENTRATION IS LAWFUL  
IN TERMS OF THE PROVISIONS OF THE CONTROL OF  
CONCENTRATION REGULATIONS, 2002**

**OFFICE FOR COMPETITION – CASE COMP/MCCAA/09/2021**

**NON-CONFIDENTIAL VERSION**

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The Office for Competition would also like to thank Alexia Farrugia (Economics Officer) for her valuable contributions and reviews.

**Note: Confidential information in the original version of this Decision has been redacted from the published version available on the MCAA website. Redacted confidential information in the text of the published version of the Decision is indicated by [X].**

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## List of Abbreviations

API	Application Programming Interface
APP	Application
EC	European Commission
EU	European Union
FRAND	Equal, Fair, Reasonable and Non-Discriminatory
GDPR	General Data Protection Regulation
GFFL	Gozo Fast Ferry Limited
MCCAA	Malta Competition and Consumer Affairs Authority
MPT	Malta Public Transport Services (Operations) Limited
MT	Malta
RFI	Request for Information
SLC	Substantial Lessening of Competition
SO	Statement of Objections
TFEU	Treaty on the Functioning of the European Union
TM	Transport Malta
TTL	Tallinja Technology Limited
VFL	Virtu Ferries Limited
ZITI	Ziti Technologies Limited

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## DECISION OF THE OFFICE FOR COMPETITION

of 21 June 2022

**on Proposed Full-Function Joint Venture in terms of Regulations 6(1)(ii) and 8(2) of the Control of Concentrations Regulations (LN 294 of 2002 as subsequently amended)**

**COMP/MCCAA/09/2021 – Assessment of Proposed Full-Function Joint Venture between Bianchi and Sons Limited, Merrill Invest Limited and Ziti Technologies Limited.**

The Office for Competition,

Having regard to the Control of Concentrations Regulations (Subsidiary Legislation 379.08),

Having regard to all the information and supporting documentation submitted by the parties,

Having regard to the Office's decision of 21 October 2021 to initiate a Phase II investigation on this proposed concentration,

Having recourse to the judgements of the Court of Justice of the European Union, and to relevant decisions and statements of the European Commission including interpretative notices on the relevant provisions of the TFEU and secondary legislation relative to competition,

Having recourse to past decisions of the Office for Competition

Having considered European case-law and foreign jurisprudence,

Having given the undertaking concerned the opportunity to make known their views on the findings of the Office for Competition,

Having considered the Final Commitments submitted by the Notifying Parties pursuant to Regulation 6(2), 8(2) and the proviso to Regulation 9(2) of the Control of Concentrations Regulations, 2002,

Whereas:

## Chapter 1: Introduction

1. On 21 October 2021, the Office for Competition (hereinafter referred to as 'the Office') initiated proceedings for an in-depth investigation to assess whether the proposed full-function joint venture between Bianchi and Sons Limited, Merill Invest Limited and Ziti Technologies Limited (hereinafter jointly referred to as 'the Notifying Parties') is in line with the Control of Concentrations Regulations (Subsidiary Legislation 379.08) (hereinafter referred to as 'the Regulations').
2. If the Notifying Parties' request is acceded by the Office, Ziti Technologies Limited (hereinafter referred to as 'ZITI') will become a shareholder in the already incorporated company Gozo Fast Ferry Limited (hereinafter referred to as 'GFFL'), which currently has Bianchi and Sons Limited and Merill Invest Limited as shareholders. Following this transaction, Bianchi and Sons Limited, Merill Invest Limited and ZITI will each own an equal share of GFFL, which manages and operates passenger fast ferry services between Valletta, Malta and Mġarr, Gozo.
3. The Parties to this transaction signed a Shareholders Agreement on 1 April 2021, whereby GFFL was incorporated by Bianchi and Sons Limited and Merill Invest Limited, each acquiring 50% of the issued share capital in GFFL. The company then commenced its commercial operations in Malta and Gozo on 1 June 2021.
4. As per the same Shareholders Agreement, ZITI would initially participate in this venture through the provision of a convertible loan as set out in terms of the Loan Agreement entered with Merill Invest Limited.
5. Following the commencement date of operations of GFFL, the Notifying Parties agreed that ZITI would become a shareholder in GFFL, subject to the conditions specified in its Loan Agreement with Merill Invest Limited, and conditional on the decision of the Director General of the Office, declaring the transaction a lawful concentration in terms of the Regulations.
6. Following several meetings convened between the authorised representatives of the Notifying Parties and the Office, a notification of concentration was deemed complete on 1 September 2021.
7. The filing and acceptance of the concentration of notification was notified to the public through a public notice in the Government Gazette (No. 20,696) on 7 September 2021 and a notice that appeared in a local newspaper and on the Malta Competition and Consumer Affairs Authority's (hereinafter referred to as 'MCCAA') website on the same date. In that notification, the Office invited third parties to submit their objections on the proposed concentration.

8. Following a preliminary market investigation of the concentration, the Office concluded in its Phase I decision that the proposed concentration could *prima facie* limit competition in the market for passenger fast ferry services between Valletta, Malta and Mġarr, Gozo. The Office expressed concerns that the proposed concentration could lead to adverse non-horizontal competition effects arising through input foreclosure; harming competition and consumer welfare in the process. For these reasons, the Office concluded that *prima facie* the proposed concentration may lead to a substantial lessening of competition (hereinafter referred to as 'SLC') in the market for passenger fast ferry services at the national level. To confirm these concerns, the Office required to undertake a more in-depth quantitative and qualitative assessment on the effects of this joint venture on competition.
9. On 13 October 2021, a state of play meeting between the Office and Notifying Parties was convened, whereby the Office informed the Notifying Parties that it intends to initiate proceedings for an in-depth investigation in accordance with Regulation 6(1)(iii) and the outcomes of the preliminary market investigation were discussed.
10. The Office initiated proceedings for an in-depth investigation in accordance with Regulation 6(1)(iii) of the Regulations by means of a decision sent to the Notifying Parties on 21 October 2021 (hereinafter referred to as 'Regulation 6(1)(iii) Decision'). Following the adoption of the Regulation 6(1)(iii) Decision, the Notifying Parties were requested to submit written comments. A non-confidential version of the decision was published on the MCCA's website on 29 October 2021.
11. The objective of the foregoing investigation was for the Office to undertake a deeper examination of the proposed concentration and assess whether the proposed concentration could result into an SLC within any market or markets in Malta.
12. Hence, the Office initiated its assessment of the effect that the proposed concentration would have on competition; here referring to the process of rivalry between businesses seeking to win customers by offering them a better deal. An SLC occurs when rivalry is substantially less intense after a concentration than would have otherwise been the case, resulting in a worse outcome for customers, through, for example, higher prices, lower quality, worse after-sales service, or reduced choice.
13. To this end, the Office has relied extensively on the relevant guidelines on the assessment of non-horizontal mergers<sup>1</sup> issued by the European Commission (hereinafter referred to as 'EC'), and on European competition case law.

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<sup>1</sup> Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2008/C 265/07).

14. In its assessment, the Office relied on three main sources of data: (i) Requests for Information (hereinafter referred to as 'RFI') sent to the Parties involved in this proposed concentration; (ii) RFIs sent to the undertakings involved in the market being studied; and (iii) third-party objections on the proposed concentration.
15. On the basis of preliminary evidence and its provisional assessment, the Office issued a Statement of Objections (hereinafter referred to as "SO") to the Notifying Parties, in terms of Regulations 16(1)(b) of the Regulations on 13 April 2022. The Office was of the provisional view that the proposed joint venture may lead to an SLC as a result of vertical effects arising from input foreclosure, and other non-coordinated effects in the passenger fast ferry market between Valletta, Malta and Mġarr, Gozo.
16. The Notifying Parties provided their written submissions, pursuant to Regulation 16(1)(b), in response to the SO issued by the Office on 5 May 2021. Subsequently, a meeting was held with the Notifying Parties on 6 May 2021, whereby the Notifying Parties put forward their oral submissions, pursuant to Regulation 16(1)(c) of the Regulations.
17. In order to render the proposed full-function joint venture compatible with the Regulations, each of the Notifying Parties, ZITI and GFFL, submitted a set of commitments under Regulation 6(2), 8(2) and the proviso to Regulation 9(2) of the Regulations on 17 May 2022 (hereinafter referred to as "Initial Commitments").
18. The Initial Commitments submitted by the Notifying Parties were market tested and reviewed by the Office. Following a period of discussion with the Notifying Parties, the amended commitments were submitted to the Office on 14 June 2022 (hereinafter referred to as "Final Commitments"). The Final Commitments are annexed to this decision (Final Commitments by ZITI in Annex 1 and Final Commitments by GFFL in Annex 2) and form an integral part of this Decision.
19. The Office considered all the additional gathered information and the Final Commitments submitted by the Notifying Parties before issuing its final decision on the proposed joint venture.
20. The rest of the Decision is structured as follows: Chapter 2 provides information on the undertakings concerned, the proposed concentration and a summary of third-party objections received on the proposed transaction. Chapter 3 gives an overview of the legal basis and jurisdiction. Chapter 4 provides the theoretical framework for assessing the proposed concentration and a summarised literature of similar concentration decisions within the European framework. Chapter 5 provides an overview of the markets considered while Chapter 6 deals with the market definition. Chapter 7 presents the competitive assessment conducted by the Office. Chapter 8 provides a summary of the Commitments put forward by the Notifying Parties. Chapter 9 concludes with the decision of the Office.

## Chapter 2: Assessment

### 2.1 Parties

21. Bianchi and Sons Limited is a limited liability company registered in Malta with company registration number C 14. Its registered office is situated at Palazzo Marina, 143, St Christopher Street, Valletta. Bianchi and Sons Limited is involved in trades or businesses of shippers, ship and yacht owners/brokers, shipping and yachting agents, amongst others. Bianchi and Sons Limited forms part of the group of companies under Bianchi Group Ltd (C 88160), a limited liability company registered in Malta at the same aforementioned address, which operates in different activities and areas, mostly related to the service sector, in Malta and internationally. Bianchi Group Ltd is active, amongst others, in shipping and logistics, travel, insurance and investments, real estate and hospitality, retail and maritime transportation services.
22. Based on audited financial statements for the year ended 31 December 2020, Bianchi Group Ltd generated a total turnover of [REDACTED], while the turnover related specifically to Bianchi and Sons Limited amounted to [REDACTED].
23. Merrill Invest Limited is a holding company registered in Malta with company registration number C 95969. It has its registered office situated at 68, Tunny Net, Triq il-Mithna l-Ġdida, Mellieħa. Merrill Invest Limited, holds shares in companies operating in the tourism sector. The company was established in 2020 [REDACTED].
24. GFFL is a private exempt limited liability company registered in Malta with company registration number C 98702. Its registered office is situated at Palazzo Marina, 143, St Christopher Street, Valletta. GFFL owns, provides, manages and operates commercial fast ferry services between Valletta, Malta and Mġarr, Gozo.
25. On 1 April 2021, Bianchi and Sons Limited and Merrill Invest Limited incorporated GFFL, each holding 50% of the issued share capital. The company commenced its commercial operations in Malta on 1 June 2021, and in the period from 1 June 2021 to 31 December 2021 generated a total turnover of [REDACTED].
26. ZITI is a holding company that operates in the technology sector. The company is registered in Malta with company registration number C 81835 and has its registered office situated at Sqaq il-Fdal tal-Fadid, Valletta Road, Luqa. Amongst others, the company owns Tallinja Technology Limited

(hereinafter referred to as 'TTL'). Based on audited financial statements for the year ended 31 December 2020, ZITI group of companies generated a total turnover of [€], while the turnover related specifically to ZITI amounted to [€].

27. TTL is a limited liability company that provides ticketing technology services to transport companies both on land and at sea. The company is registered in Malta with company registration number C 81766 and has its registered office situated at Sqaq il-Fdal tal-Ħadid, Valletta Road, Luqa. Based on audited statements for the year ended 31 December 2020, TTL generated a total turnover of [€].
28. Malta Public Transport Services (Operations) Limited (hereinafter referred to as 'MPT') is a limited liability company registered in Malta with company registration number C 48875 and has its registered office situated at Sqaq il-Fdal tal-Ħadid, Valletta Road, Luqa. MPT is the national bus operator and is responsible in the operation of all scheduled public bus transport services in Malta and Gozo. The company issues the tallinja transport cards but makes use of ticketing technology services, provided by TTL, to operate tallinja card. This company is fully owned by Malta Lines Limited (registered in Malta under company registration number C 66131), which is in turn fully owned by Autobuses de Leon S.L. (registered in Madrid, Spain).
29. ZITI and, therefore, TTL, as well as MPT, Malta Lines Limited and Autobuses de Leon S.L., form part of the same group of companies owned by Cofinex, S.L., registered in Madrid, Spain, which is the ultimate parent company of these companies (owning 100% shareholding). Since Cofinex, S.L. exercises significant control over the affairs of all entities when making financial and operating decisions, the Office considers these entities to constitute a single economic unit.
30. When a company exercises decisive influence over another company they form a single economic entity, meaning that these companies are so closely related to each other that it would be artificial to treat them as separate economic units for purpose of competition, and thus, are part of the same undertaking.<sup>2</sup> Thus, a parent company and its wholly owned subsidiaries, even if they have distinct legal personalities, are considered to form a single economic entity. This argument was also put forward by a third-party in its submissions to this concentration.
31. For the purpose of this Decision, the undertakings referred to in paragraph 29 will be jointly referred to as the "Single Economic Unit".

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<sup>2</sup> See Joined Cases C-588/15 P and C-622/15 P *LG Electronics Inc. and Koninklijke Philips Electronics NV* ECLI:EU:C:2017:679, paragraph 71.

## 2.2 Transaction

32. The nature of the proposed concentration is a full-function joint venture between Bianchi and Sons Limited and Merrill Invest Limited, already incorporated in GFFL, and ZITI.
33. Bianchi and Sons Limited and Merrill Invest Limited incorporated GFFL on 1 April 2021, with an authorised share capital of EUR3 million constituting of three million ordinary shares of EUR1 each and an issued share capital of one-thousand and two-hundred shares of EUR1 each. On the incorporation of the GFFL, Bianchi and Sons Limited and Merrill Invest Limited subscribed to six-hundred shares of EUR1 each, thereby each acquiring 50% of the shareholding rights in GFFL.
34. Should the Office give its approval to the proposed full-function joint venture, ZITI will become a shareholder in GFFL, subscribing to six-hundred ordinary shares of EUR1 each, within twenty-five days following the decision by the Office.
35. Upon completion of the transaction, all shares issued in the capital of GFFL will be owned equally by Bianchi and Sons Limited, Merrill Invest Limited and ZITI.

## 2.3 Collaboration Agreements

36. GFFL and Virtu Ferries Limited (hereinafter referred to as 'VFL')<sup>3</sup> entered into separate Collaboration Agreements<sup>4</sup> with TTL that stipulate that customers using the newly introduced fast ferry service between Valletta, Malta and Mġarr, Gozo can also pay by a personalised or non-personalised tallinja card issued by MPT. TTL has a [redacted] and a [redacted] term Collaboration Agreement with GFFL and VFL, respectively.
37. Through this collaboration, TTL would be offering ticketing technology services to the fast ferry operators such that all tallinja card holders would be able to use their personalised tallinja cards to purchase fast ferry tickets at a discounted rate, compared to the standard fares charged to non-tallinja card holders. Although the fares are established by the respective fast ferry operators, both Collaboration Agreements stipulate that the fares charged to tallinja card holders are to be least [redacted] lower than the retail price at which the same service is offered to non-tallinja card holders. The ferry operators charge the tallinja card the respective fares through an existing API connection<sup>5</sup>. It should

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<sup>3</sup> The two operators on the fast ferry market between Valletta, Malta and Mġarr, Gozo.

<sup>4</sup> A Collaboration Agreement signed between TTL and GFFL on 1 April 2021, and another Collaboration Agreement signed between TTL and VFL on 12 May 2021.

<sup>5</sup> As submitted by TTL in reply to the RFI sent by the Office on 6 September 2021.

be noted that during the assessment period of the proposed joint venture, TTL agreed to remove this clause in the Collaboration Agreements after it was brought to their attention by the Office.

38. Moreover, customers of the fast ferry service would also be able to use their non-personalised tallinja cards on fast ferry services, such as the use of the Explore Flex card, which is purchased together with other bundled transport options and offers. TTL would also commit to develop and manage an inter-modal ticketing system that is fully integrated.
39. The Collaboration Agreements include the main components of the ticketing technology package being offered by TTL to the respective fast ferry operators, including any set-up pricing and annual maintenance fees, and any processing and licensing fees for the provision of this service. The main features of the ticketing technology used for the operation of the tallinja card and the list of services offered by TTL to the respective fast ferry operators are discussed in more detail in Chapter 5.2 of this Decision.
40. During its assessment of this concentration, the Office noted that with effect as from 1 March 2022, both GFFL and VFL removed the possibility of effecting a payment for the use of the fast ferry service using tallinja card. Furthermore, standard fares for the different passenger types have been updated, together with the different passenger categories.
41. When contacted by the Office on this development, GFFL replied that *“Gozo Fast Ferry Limited has suspended the use of the Tallinja card as a means of payment for use of the fast ferry services it operates. This notwithstanding, Gozo Fast Ferry Limited does not exclude the possibility of resuming the use of the Tallinja card as a means of payment for the use of the service it operates should Gozo Fast Ferry Limited deem this to be in its commercial interest.”*
42. Following this communication with one of the Notifying Parties, the Office is of the opinion that this recent development will not impact its assessment of the proposed concentration as the Collaboration Agreement between TTL and GFFL remained still in force and thus there is still the possibility of resuming the use of tallinja card as a means of payment in the foreseeable future. Furthermore, as stipulated in paragraph 65 of this Decision, the Office will be considering the period June to December 2021 for its competitive assessment of the proposed concentration.

## **2.4 Third-Party Views**

43. On 7 September 2021, the Office notified for general information that it received notification of a proposed concentration between Bianchi and Sons Limited, Merill Invest Limited and ZITI. The concentration notification was notified to the public through a public notice in the Government Gazette

(No. 20,696) and a notice that appeared in a local newspaper and on the MCCA's website on the same day. In that notification, the Office invited third parties to submit their objections on the proposed concentration.

44. The Office received two third-party submissions, which raised competition concerns regarding the effects of this concentration. In summary, the arguments put forward by third parties discuss the potential negative non-horizontal consequences in the market for passenger fast ferry services if the proposed concentration is to be approved by the Office.
45. One third-party argued that the Notifying Parties to this concentration already enjoyed a high degree of market power in their respective markets, and that by joining forces, they would be increasing their overall strength in the market, with the risk of lessening competition. Another third-party argued that their access to the market would be likely hampered or eliminated as result of this concentration.
46. A third-party competitor in the market asserted that the proposed concentration would result in foreclosure effects that will hinder its ability to operate in the market. Given that ZITI forms part of the same group that owns and operates tallinja card<sup>6</sup>, this third-party is of the view that the proposed joint venture could have the ability to foreclose access to the tallinja card, either by *“removing access completely, by charging unfairly high price for access, or by degrading the access to tallinja card”*.
47. Moreover, it was further argued that the proposed concentration could have both short-term and long-term incentives to foreclose access to inputs. Limiting access of tallinja card usage to one operator, GFFL, could cause customers to switch their demand to the one operator that forms part of the proposed joint venture, and in turn force competitors to exit the market. This could lead to consumer harm in the form of an increase in price and/or less consumer choice. This point was also put forward by the other third-party, arguing that by eliminating competition it would in turn reduce any effective choice a consumer might have.
48. One third-party was concerned by the access that the proposed concentration would have to commercially sensitive data, given that the owner of the tallinja card, which forms part of the Single Economic Unit, has access to valuable commercial data relating to passenger trends and demographic.
49. The third parties that submitted their relevant objections to the Office called for the Office to conduct a careful evaluation and analysis of the competitive effects on the market that could arise from the proposed concentration, including a thorough examination of the aforementioned objections. The

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<sup>6</sup> as already outlined in paragraph 29 of this Decision.

Office considered all the arguments made in the submitted third-party objections when assessing the proposed concentration as follows in the rest of the Decision.

### Chapter 3: Legal Basis and Jurisdiction

50. As stipulated in Regulation 4 of the Regulations it is the duty of the Director General to determine whether a concentration leads to an SLC in the Maltese market, or a part thereof and if so, prohibit it.
51. The Office considers that the proposed joint venture will perform on a lasting basis all the functions of an autonomous economic entity within the meaning of Regulation 2 of the Regulations and that the proposed transaction thus constitutes a concentration.
52. Furthermore, Regulation 6(1) (iii) of the Regulations holds that where the Director General of the Office finds that the anticipated concentration raises serious doubts as to its lawfulness in terms of the provisions of these regulations, he shall decide to initiate proceedings.
53. The Director General of the Office informed the Notifying Parties of his decision on 21 June 2022 in accordance with the time limits stipulated in Regulation 9(3) of Regulations.
54. Also, in line with the proviso to Regulation 6(2) and Regulation 8(2) of the Regulations, the Director General of the Office “...*may attach to his decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-a-vis the Director General with a view to rendering the concentration lawful in terms of these regulations*”.
55. In fact, in order to render the proposed full-function joint venture compatible with the Regulations, the Notifying Parties submitted a set of commitments under the proviso to Regulation 6(2), Regulation 8(2) and the proviso to Regulation 9(2) of the Regulations.
56. The proposed concentration is not subject to review by any other foreign competition authority.

## Chapter 4: Literature Review

### 4.1 Theoretical Overview – Assessment of competitive effects

57. This Chapter explains in general terms the theories of harm considered in such concentrations and how each of these theories of harm operates.

#### 4.1.1 Outline of the Theories of Harm

58. Theories of harm provide a framework for assessing the effects of a concentration. A theory of harm describes the possible ways in which changes to the structure of a market will provide the merged or the acquiring entity with the ability and incentive to exercise market power that will lead to an SLC. Thus, a theory of harm explains a conduct that causes harm to competition, constituting a breach of competition law, and should be prohibited. Furthermore, a theory of harm describes possible changes arising from the concentration and compares any impact on rivalry and expected harm to consumers as compared to the situation pre-concentration.

59. The following vertical theories of harm are considered by the Office when assessing any competitive concerns that might arise as a result of the proposed concentration:

- i. Vertical effects arising through input foreclosure;
- ii. Other non-coordinated effects through misuse of commercial sensitive information.

60. Foreclosure is a situation whereby vertical integration enables a firm to gain control over the supply chain and foreclose the market upstream or downstream, either by excluding competitors (total foreclosure) or by raising rivals' costs (partial foreclosure). Thus, actual or potential rivals' access to supplies or markets is hampered or eliminated as a result of the concentration, reducing these firms' ability and incentive to compete. The merging firms may then be able to profitably increase the price charged to consumers.

61. Vertically-integrated firms could unilaterally harm competition by engaging in *input foreclosure*<sup>7</sup>, whereby a vertically-integrated firm either refuses to supply an input to a downstream competitor (total foreclosure), or deteriorates the conditions under which an input is provided, for example, by increasing its price or lowering its quality (partial foreclosure).

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<sup>7</sup> References to 'foreclosure' in this decision should be read as references to input foreclosure. The term 'foreclosure' refers to either partial or total foreclosure unless stated otherwise.

62. The Office’s primary vertical concern in the proposed concentration relates to input foreclosure, which posits that the merged entity could worsen the terms on which downstream rivals could access upstream inputs it supplies. As set out in the EC Guidelines on the assessment of non-horizontal merger, which were closely followed when considering the aforementioned theories of harm, the Office assesses the likelihood of foreclosure by considering the ability and incentive of the merged entity to pursue such a strategy, as well as the overall effect on competition.
63. We adopt a methodology in our analysis of the theories of harm, whereby we examine the proposed concentration under the three-step **ability-incentive-effect** analytical framework<sup>8</sup>.
64. The first step is to assess whether the merging entity has the ability to harm competition post-concentration, which would require the merging entity to have at least some degree of market power. The second step is to analyse if the merging entity has an incentive to foreclose rivals, meaning having a profit motive to distort the competition post-concentration. The final step in this methodology is to examine the effect of the proposed vertical joint venture on competition; provided that both ability and incentive have been established in the previous two steps of our analysis.
65. In analysing the Notifying Parties’ abilities and incentives to engage in such foreclosure strategies, the Office focussed on both quantitative and qualitative evidence. The Office put weight on evidence from internal documents and replies to RFIs provided by the Notifying Parties, as well as views provided by competitors on the market. The competitive assessment analysis focuses on the period June to December 2021.

#### **4.2 Concentration Decisions within the European framework**

66. One of the first cases in which the EC had to apply the methodology described in the non-horizontal guidelines was the acquisition by TomTom of Tele Atlas in 2008<sup>9</sup>. TomTom, a leading firm in the market at that time, produces portable navigation devices. Tele Atlas produced the maps required by such devices and was the largest of only two producers of navigable maps in the European Union (hereinafter referred to as “the EU”) in that period. The EC’s main competition concern was related to input foreclosure in supplying maps to TomTom’s rivals. Although the EC concluded that the merged entity had the ability to do so, it did not find evidence of an incentive to foreclose rivals, based only on a quantitative analysis that was undertaken by the EC.
67. A more recent case assessed by the EC in 2014 is the proposed acquisition by Liberty Global plc, which is an international cable operator in a number of EU countries, including the Netherlands, of

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<sup>8</sup> Refer to Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2008/C 265/07).

<sup>9</sup> M.4854 - TOMTOM/TELE ATLAS, 14 May 2008.

sole control over Ziggo N.V., which owns and operates a broadband cable network which covers more than half of the Netherlands<sup>10</sup>. The EC, amongst others, had competition concerns of a vertical nature as a result of input foreclosure if the concentration remained as it was notified. The EC provided evidence that the proposed merger would have hindered competition by forcing out of the market two close competitors of Liberty Global, thus removing important competitive forces in the Dutch market for the wholesale of premium Pay TV film channels.

68. Liberty Global plc offered commitments to the concentration to stave off the EC's competitive concerns. As a first commitment Liberty Global plc offered to sell its premium pay TV channel, Film1. Liberty Global also committed to terminate clauses in channel carriage agreements that limit broadcasters' ability to offer their channels and content over the Internet, and not to include such clauses in future channel carriage agreements for eight years.
69. The EC was satisfied with these commitments and opined that they are suitable and sufficient to eliminate the competition concerns. The EC also concluded that the final commitments provided by Liberty Global plc are capable of being implemented effectively within a short period of time.
70. This vertical merger was then re-approved by the EC in 2018, condition on full compliance with the new commitments, after it was annulled by the General Court in October 2017<sup>11</sup>. Similar commitments to those highlighted in paragraph 68 of this Decision were proposed by Liberty Global plc, together with a further commitment to maintain adequate interconnection capacity through at least three uncongested routes into its internet network in the Netherlands also for eight years from the decision date and to not re-acquire the Film1 channel, which it has already sold to Sony, thus ensuring that the divestment is a structural change to the market.
71. In 2017, MEO announced its acquisition of GMC to the Portuguese Competition Authority (hereinafter referred to as 'AdC')<sup>12</sup>. MEO, a wholly owned subsidiary of Altice Europe, is a main telecom operator in Portugal, providing telecom services through mobile and fixed networks including paid television channels. GMC is the main media company in Portugal, controlling TV studio and content producer Plural, as well as several Portuguese speaking TV channels (under TVI brand) and radio stations.
72. After the AdC assessed that TVI channels are an important input in MEO's competitors with no good substitutes available, the AdC analysed whether the merged entity would have an incentive to exclude competitors or to raise rivals' costs, using data collected from the parties and from consumer surveys. The AdC found that both strategies would be profitable, though it considered it more likely that the merged entity would attempt to raise rivals' costs through partial foreclosure instead of entirely denying access to TVI channels. The AdC concluded that the merger would not only enable MEO to

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<sup>10</sup> M.7000 - LIBERTY GLOBAL / ZIGGO with conditions and obligations, 10 October 2014.

<sup>11</sup> M.7000 - LIBERTY GLOBAL / ZIGGO with conditions and obligations, 30 May 2018.

<sup>12</sup> MEO/GMC (Altice/Media Capital), Case Ccent. 35/2017. AdC Decision of 19 June 2018.

increase prices and deteriorate quality due to less competitive pressure from current competitors, but it would also create barriers to entry of alternative low-cost online providers.

73. In 2018, the AdC terminated the merger proceedings after the Notifying Parties decided to withdraw the notification. Even though the merging parties proposed a set of behavioural remedies to provide MEO's rivals with access to the TVI channels, the AdC found the commitments insufficient to address the competition concerns, since the remedies proposed would require constant monitoring and could be circumvented or manipulated by the merged entity.
74. In 2019, UK Competition and Markets Authority (hereinafter referred to as 'CMA') considered that the acquisition of Gatan supplies cameras and filter for the use of 'electron microscopes', a peripheral business of Roper Technologies, by Thermo Fisher, a producer of such 'electron microscopes', would result in an SLC as a result of vertical effects arising from input foreclosure of Gatan's cameras and filters<sup>13</sup>. The effect of this input foreclosure would be to enhance Thermo Fisher's market position, which was already strong, thus reducing its incentive to innovate, increasing prices and reducing service and quality for customers. The CMA established that Thermo Fisher has both the ability and incentive to foreclose the markets to rival competitors. In June 2019, Thermo Fisher abandoned this proposed acquisition.
75. In another vertical merger, Intercontinental Exchange Inc., a global operator of financial exchanges and clearinghouses, trading in energy commodities and utilities derivatives, acquired the entire issued share capital of Trayport Limited, which is a software provider in the trading of energy market derivatives<sup>14</sup>. In 2016, the CMA ruled that this acquisition would give rise to a realistic prospect of an SLC resulting from vertical effects arising from input foreclosure of Trayport's software to Intercontinental Exchange Inc.'s rival trading venues. Post-merger, the Parties to this acquisition would have been able to increase prices of services to traders. Moreover, the CMA also considered access to commercially sensitive information to be a relevant factor in its consideration of the competitive effects of this vertical merger.
76. On 1 October 2018, Tobii AB acquired Smartbox Assistive Technology Limited and Sensory Software International Limited (hereinafter jointly referred to as 'Smartbox'). Both parties provide hardware and software of augmentative and assistive communication solutions to customers with communication difficulties<sup>15</sup>. In August 2019, the CMA published a report requiring Tobii to fully divest its recent acquisition of Smartbox. One of the reasons for this decision was that the CMA opined that the merger

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<sup>13</sup> CMA Report on the anticipated acquisition by Thermo Fisher Scientific Inc. of the electron microscope peripherals business of Roper Technologies, Inc., 21 January 2019.

<sup>14</sup> CMA Report on the completed acquisition by Intercontinental exchange Inc. of Trayport Limited, 26 May 2016.

<sup>15</sup> CMA Report on the completed acquisition by Tobii AB of Smartbox Assistive Technology Limited and Sensory Software International Limited, 21 August 2019.

would result in an SLC due to input foreclosure of Smartbox's software to rival suppliers of dedicated competitors of augmentative and assistive communication solutions in the UK.

## Chapter 5: Background to the markets

### 5.1 Fast Ferry Services

77. The market under study relates to the newly introduced commercial fast ferry service between Valletta, Malta and Mġarr, Gozo. Based on the number of Commercial Vessel Operator License issued by Transport Malta (hereinafter referred to as 'TM'), the inter-island fast ferry service is being offered by two operators, namely, GFFL<sup>16</sup> and VFL<sup>17</sup>. The fast ferry service commenced on 1 June 2021 and allows passengers to travel from Malta to Gozo, and vice versa, in less than 45 minutes.
78. Both operators are making this route possible by utilising two vessels each<sup>18</sup>, and by offering different schedules for weekdays covering Monday to Friday, and for weekends and public holidays. The scheduling for both operators has been subject to changes during the assessment of the proposed concentration. In fact, the Office has observed that during the off-peak season, the number of trips have been reduced by both operators. Also, as submitted by GFFL and VFL, the schedule changes from time to time due to a variety of reasons, including seasonal factors and passenger demand.
79. The demand for the newly introduced fast ferry service is reflected in the number of passenger movements for both operators from June to December 2021. Data collected by the Office from the respective fast ferry operators shows that a total of [redacted] passengers were transported between Valletta, Malta and Mġarr, Gozo during the seven-month operation of the fast ferry service. In this period, GFFL accounted for [redacted]% of the total passenger movements, while the remaining [redacted]% passengers were carried by VFL.

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<sup>16</sup> <https://gozofastferry.com/>

<sup>17</sup> <https://virtugozo.com/>

<sup>18</sup> <https://gozofastferry.com/our-ferries/> and [https://www.virtuferries.com/san\\_frangisk\\_san\\_pawl/37](https://www.virtuferries.com/san_frangisk_san_pawl/37)

Table 1: Total number of Passenger movements between June - December 2021

	Virtu Ferries Limited	Gozo Fast Ferry Limited	Total No. of Passengers
June	[REDACTED]	[REDACTED]	[REDACTED]
July	[REDACTED]	[REDACTED]	[REDACTED]
August	[REDACTED]	[REDACTED]	[REDACTED]
September	[REDACTED]	[REDACTED]	[REDACTED]
October	[REDACTED]	[REDACTED]	[REDACTED]
November	[REDACTED]	[REDACTED]	[REDACTED]
December	[REDACTED]	[REDACTED]	[REDACTED]
<b>Totals</b>	<b>[REDACTED]</b>	<b>[REDACTED]</b>	<b>[REDACTED]</b>

Source: Data provided by VFL and GFFL<sup>19</sup>

## 5.2 Ticketing Technology

80. As already mentioned in Section 2.3 of this Decision, GFFL and VFL entered into separate Collaboration Agreements<sup>20</sup> with TTL to provide the fast ferry operators with the ticketing technology services that allows the tallinja card (both personalised and non-personalised) to be accepted as a payment card. The differences in the terms of the respective Collaboration Agreements are a result of discussions and requested services from TTL by GFFL and VFL, respectively. However, both Collaboration Agreements cover the integration feature service which allows third parties to connect to the tallinja payment system by using the tallinja card.

Table 2: Summary of the Collaboration Agreements

Items	Gozo Fast Ferry's use of the service [Yes/No]	Virtu Ferries Limited's use of the service [Yes/No]
[REDACTED]	[REDACTED]	[REDACTED]

Source: Internal Data Collected by the Office<sup>21</sup>

<sup>19</sup> As submitted by GFFL in its reply to the RFIs dated 25 September 2021, 25 November 2021, and 10 March 2022, and as submitted by VFL in its reply to the RFIs dated 22 November 2021 and 9 March 2022.

<sup>20</sup> A Collaboration Agreement signed between TTL and GFFL on 1 April 2021, and another Collaboration Agreement signed between TTL and VFL 12 May 2021.

<sup>21</sup> As submitted by TTL in its reply to the RFI on 16 September 2021.

81. The [redacted] feature enables third parties to connect to the tallinja payment system and send [redacted] to charge a fare on that account<sup>22</sup>.

82. The other services available from TTL include:

[redacted]<sup>23</sup>

### 5.3 Passenger categories and Pricing

83. For the period under assessment by the Office, that is June to December 2021, tickets for use on fast ferry services between Valletta, Malta and Mġarr, Gozo, could be purchased either online through each operator's website, on-site at the terminal before boarding the ferry, or in the case of GFFL, through their fast ferry APP. Methods of payment varied from cash to the use of debit and credit cards. For this period, payments by customers could also be made using their tallinja card, whereby a customer would benefit from a discounted price compared to the standard price. In the case of GFFL, customers could also pay for the fast ferry services using non-personalised tallinja cards, such as the Explore Flex card. This is a pay-as-you-go system that can be used for different transport services and offers that are bundled together into one travel card.

84. The prices that prevailed during the period between June 2021 and December 2021 are shown in Table 3. The price varies by type of passenger and personalised tallinja card holders paid a reduced rate over their indicated price for their respective category.

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<sup>22</sup> As submitted by TTL in its reply to the RFI on 30 September 2021.

<sup>23</sup> As submitted by TTL in its reply to RFI on 30 September 2021.

Table 3: Standard Fares and Personalised Tallinja Card Holders' Fares by Passenger Type as at December 2021

Virtu Ferries Limited			Gozo Fast Ferry Limited			
Passenger Type	Standard Fare (€)	Personalised Tallinja Card Holders' Fare (€)	Passenger Type	Online Standard Fares (€)	Last Minute Standard Fares (€)	Personalised Tallinja Card Holders' Fare (€)
Infant (<3 years)	Free	Free	Infant (<4 years)	Free	Free	Free
Child (3 to 10 years)	€6.00	€3.50	Child (4 to 10 years)	€4.50	€6.00	€3.99
Adult	€12.00	€7.50	Adult	€9.99	€12.00	€7.99
Senior Citizen and Disability Card Holder	€4.00	€3.50	Senior Citizen and Disability Card Holder	€3.99	€3.99	€3.99
Gozo Resident/Child	€3.50	€3.50	Gozo Resident	€4.50	€4.50	€4.50
Gozo Resident/Adult	€4.50	€4.50				

Source: Data collected by the Office<sup>24</sup>

<sup>24</sup> From Gozo Fast Ferry Limited and Virtu Ferries Gozo websites accessed in December 2021. Passenger categories and prices have changed with effect from 1 March 2022, so the prices presented in the table are no longer publicly available.

## Chapter 6: Relevant Market

85. The purpose of the market definition is to provide a framework for the analysis of the competitive effects of the concentration. The relevant markets are the markets within which the concentration may give rise to an SLC and contain the most significant competitive alternatives available to the customers of the Notifying Parties. Defining relevant markets is therefore useful in identifying, in a systematic way, the immediate competitive constraints facing the parties in the concentration.
86. Market definition is a useful analytical tool, but not an end in itself, and identifying the relevant market involves an element of judgement and does not prevent the Office from considering constraints outside the relevant markets in the Office's competitive assessment.

### 6.1 Legal and Economic Background for Defining the Relevant Markets

87. The concept of the relevant market implies the existence of effective competition between the products forming part of it, which "*...presupposes that there is sufficient degree of interchangeability between all products forming part of the same market in so far as a specific use of such products is concerned.*"<sup>25</sup>
88. Regulation 2 of the Regulations defines the relevant market as "*...the market for the products or services whether within Malta or limited to any particular area or locality within Malta or outside Malta, and whether or not restricted to a particular period of time or season of the year.*"<sup>26</sup>
89. Moreover, as stated in the EC's notice on the definition of the relevant market (97/C/372/03), "*...the main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved face. The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings' behaviour and of preventing them from behaving independently of effective competitive pressure.*"<sup>27</sup>

### 6.2 Product Market

90. The concept of the relevant market implies that there can be effective competition between the products which form part of it. In fact, the EC's Notice on market definition states that "*a relevant*

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<sup>25</sup> Case 85/76 Hoffman-La Roche & Co. v Commission of the European Communities. Judgment of the Court of 13 February 1979, paragraph 28.

<sup>26</sup> Control of Concentrations Regulations, Subsidiary Legislation 379.08 of the Laws of Malta, Regulation 2.

<sup>27</sup> See Commission Notice on the definition of the relevant market for the purposes of Community competition law (97/C 372/03), paragraph 2.

*product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use.*"<sup>28</sup>

91. In its competitive assessment, the Office considers the downstream supply of passenger fast ferry transport between Valletta, Malta and Mġarr, Gozo; and the upstream supply of ticketing technology services to the two fast ferry operators, including the operation of the same ticketing technology used in the related market of scheduled land transport by bus. Given the establishment of the Single Economic Unit argument in paragraph 29 of this Decision, the Office has to also consider in the upstream market the scheduled bus services market, which is 100% owned by the Single Economic Unit.
92. The relevant product market *"is to be defined by reference to the facts in any given case, taking into account the whole economic context"*.<sup>29</sup> The economic context that may be taken into account includes, but is not limited to: (i) the objective characteristics of the fast ferry services and ticketing technology services; (ii) the degree of substitutability or interchangeability between the different fast ferry operators; (iii) the competitive conditions; (iv) the structure of supply and demand; and (v) the attitudes of consumers.<sup>30</sup> These factors are not, however, fixed or exhaustive and each will depend on its own facts.<sup>31</sup>
93. The process of defining a market typically begins by establishing the closest substitutes and rivals to the Notifying Parties. As is stated in the EC's Notice on market definition, based on preliminary information available or information submitted by the parties involved, the Office will usually be in a position to broadly establish the possible relevant markets within which for instance, a restriction of competition has to be assessed. *"In general, and for all practical purposes when handling individual cases, the question will usually be to decide on a few alternative possible relevant markets. For instance, with respect to the product market, the issue will often be to establish whether product A and product B belong or do not belong to the same product market"*.<sup>32</sup>
94. The process of gathering evidence on the relevant market included written RFIs to the market players involved in the markets as identified in Chapter 5. The Office defines separate product markets for the downstream and upstream markets, for the different levels of production and/or distribution of the products/services in question.<sup>33</sup> The RFIs included, amongst others, questions relating to their views

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<sup>28</sup> Ibid, paragraph 7.

<sup>29</sup> Aberdeen Journals I, [101], cited in Case CE/9742-13 Unfair pricing in respect of the supply of phenytoin sodium capsules in the UK, December 2016.

<sup>30</sup> Ibid.

<sup>31</sup> Aberdeen Journals v Director General of Fair Trading (1005/1/1/01). Competition Appeal Tribunal, [2002] CAT 4 [2002] Comp.A.R. 167, paragraph 97.

<sup>32</sup> Commission Notice on the definition of the relevant market for the purposes of Community competition law (97/C 372/03), paragraph 26.

<sup>33</sup> Ibid, paragraph 33.

of the boundaries of the relevant market and factual information that the Office deemed necessary to reach a conclusion on the extent of the relevant market.<sup>34</sup>

95. The EC's Notice on market definition explicates that firms are subject to three core competitive constraints: demand substitutability, supply substitutability and potential competition. "*From an economic point of view, for the definition of the relevant market, demand substitution constitutes the most immediate and effective disciplinary force on the suppliers of a given product, in particular in relation to their pricing decisions.*"<sup>35</sup> Demand substitution constitutes customers switching some or their entire purchases from the focal product.
96. The boundaries of the relevant product market are generally determined by reference to demand-side substitution alone.<sup>36</sup> In fact, the Office considers supply substitutability and potential competition to be limited within the context of this assessment.

### 6.2.1 Fast ferry services

97. Fast ferry services between Valletta, Malta and Mġarr, Gozo are supplied by GFFL and by one other competitor, VFL. The service that the two companies offer (hereinafter referred to as the 'Valletta-Mġarr fast ferry service') is differentiated from that of others offering transport services between Malta and Gozo on the basis of the location of departure/arrival and type of service.
98. The Valletta-Mġarr fast ferry service operators are in the business of transporting passengers but are not authorised to carry vehicles. This is not the case for another carrier that accounts for the majority of passenger movements between the two islands, Gozo Channel (Operations) Ltd (hereinafter referred to as 'Gozo Channel'). Gozo Channel is in the business of transporting both passengers and cars, and departs Malta from a different location, Ċirkewwa, Malta.
99. The Notifying Parties in the Concentration Notification Form (hereinafter referred to as 'CN Form') also submitted that they do not consider Gozo Channel to be in the same relevant market as that of the Valletta-Mġarr fast ferry service. Moreover, in the submissions to the Office dated 30 September 2021, GFFL reiterated that:

*"As indicated in the Form CN, Gozo Channel offers an entirely different service to that offered by Gozo fast Ferry Limited. Gozo Channel is not a fast ferry service, and its service is not limited to the carriage of passengers unlike that of Gozo Fast Ferry Limited."*

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<sup>34</sup> Ibid, paragraph 34.

<sup>35</sup> Commission Notice on the definition of the relevant market for the purposes of Community competition law (97/C 372/03), paragraph 13.

<sup>36</sup> Office of Fair Trading. Merger Assessment Guidelines, September 2010. Joint Publication of the Competition Commission and the Office of Fair Trading, paragraph 5.2.17.

100. In the submissions by VFL on 30 September 2021, it is also argued that the constraint which Gozo Channel places on the fast ferry operators is likely to be limited:

*“For a business traveller, the speed at which the journey can be made on a fast ferry service means that there is likely to be little or no substitution to the Mgarr (Gozo) – Cirkewwa service provided by Gozo Channel, and therefore it is likely that the service provided by Gozo Channel should not be considered to be within the same product market as the fast ferry service. Accordingly, it is submitted that this route constitutes a market in its own right in so far as non-tourist travel is concerned. It is likely that for this traveller a small but significant non-transitory increase in the price of the fast ferry service would not lead him to switch his custom to Gozo Channel.*

*As regards the tourist passenger services, it is possible that the Mgarr (Gozo) – Cirkewwa service may be in the same market as the Mgarr (Gozo) – Valletta route, though this proposition is also uncertain insofar as many tourists may not have access to a car and may find it more favourable to travel quickly to Gozo from Valletta, since Valletta is a central tourist location. Again, it is likely that even here a small but significant non-transitory increase in the price of the fast ferry service would not lead a tourist passenger to switch his custom to Gozo Channel.*

*On the basis of the above, it is Virtu’s firm view that the only real competitor to Virtu’s fast ferry service is Gozo Fast Ferry Limited (“GFF”), in so far as GFF provides a service which is practically identical to Virtu’s.”*

101. Although there are no regulations that prohibit the entry of new players into the market for the Valletta-Mgarr fast ferry service, significant barriers to entry exist in terms of capacity constraints. These relate to the conditions listed in Port Notice 02/2021<sup>37</sup>, issued by TM on 24 February 2021, that needs to be adhered to by fast ferry service operators, as well as the nature and extent of investment required in order to purchase the vessels required to provide the service.

102. In their submissions to the Office dated 24 September 2021, GFFL stated that

*“The barriers to entry that exist are those listed in the Port Notice that was issued by Transport Malta on the 24 February 2021 with respect to the designation of landing places and conditions of operations for the provision of a fast ferry service between the Grand Harbour in Valletta and the Mgarr Harbour in Gozo.....Another potential barrier to entry is the capital requirements required for an operator to purchase a passenger High-Speed Craft that is compliance with the requirements*

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<sup>37</sup> <https://www.transport.gov.mt/include/filestreaming.asp?fileid=6054>

*listed in the aforementioned Port Notice. While there are barriers to entry these barriers are not insurmountable by new entrants on the market.*

*There are no barriers to exit.”*

103. For the reasons outlined above, the Office considers the relevant downstream market to consist of the fast-ferry service between Valletta, Malta and Mġarr, Gozo. Both the Notifying Parties and VFL concurred with this definition for the relevant market in their respective submissions to the Office.

## **6.2.2 Ticketing technology**

104. The two Valletta-Mġarr fast ferry service providers use the ticketing technology supplied by TTL. As further explained by ZITI<sup>38</sup> in their response to the SO on 5 May 2022,

*“Ticketing technology encompasses all technology that permits a service provider to charge a fee for its service, receive that fee in its bank account and also allows it to issue a ticket to the client if necessary (e.g. for transport providers). Both locally and abroad, various ticketing technology service providers exist meaning that a ticketing technology system provided by one supplier might not be exactly the same as that provided by another.”*

105. As further reiterated by ZITI in their response to the SO on 5 May 2022

*“...the technology that allows the TC<sup>39</sup> to be accepted as payment card by various transport service provider (such as Malta Public Transport on its buses, and prior to their unilateral termination/suspension of the TC’s acceptance, Virtu Ferries Limited [‘VFL’] and Gozo Fast Ferry Limited [‘GFFL’] on their fast ferries), is one such form of ticketing technology. This Tallinja Payment Platform is owned by TTL, whose target is that of extending the platform’s transport service providers subscribers so that TC holders can benefit from seamless transport experience when travelling in Malta and Gozo. Through the TPP, TC holders can pay for the transport services subscribed to the TC network, using their TC.”*

106. Although alternative ticketing technologies are available on the market, the service supplied by TTL is the only one that provides access to over 340,000 personalised tallinja card subscribers<sup>40</sup> that mainly use the card for land transport by bus, of which “160,000 have been active in the last 6

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<sup>38</sup> The Office, in its SO submitted to the Notifying Parties on 13 April 2022, provided a narrow view of what the ticketing technology supplied by TTL actually encompassed.

<sup>39</sup> TC in this paragraph refers to “tallinja card”.

<sup>40</sup> <https://www.publictransport.com.mt/en/news-details/register-for-your-new-tallinja-card-and-get-10-free-credit>

*months*<sup>41</sup>. This pool of customers is accessible through a related market in which the Single Economic Unit operates.

107. Moreover, the ticketing technology provided by TTL is also used for accepting the non-personalised tallinja card, such as the Explore Flex card, as a means of payment, for customers using fast ferry service provided by GFFL. The Explore Flex card is one type of travel card which can be topped and used for pay-as-you-go for different transport services and offers, which are bundled together into one travel card.

108. For the reasons outlined above, the Office is of the view that there are several ticketing technologies, but only that offered by TTL can process payments through the personalised and non-personalised tallinja cards. Therefore, the ticketing technology supplied by TTL makes the Valletta-Mġarr fast ferry service more accessible to the large number of users of land transport by bus."

### 6.3 Geographic Market

109. The EC defines the relevant geographic market as *"comprising the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous, and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area"*.<sup>42</sup>

110. In relation to the geographic scope of this decision, the Office assessed the impact of this concentration at the national level, for the upstream market. TTL provides ticketing technology services through the use of tallinja card, to different transport companies in Malta, both for land and sea transport, such as MPT, GFFL and VFL, amongst others.

111. In the downstream supply of fast ferry passenger transport, the Office believes that for the scope of this decision, the geographic market to be considered is national territorial waters between Valletta, Malta and Mġarr, Gozo.

112. Furthermore, in their submissions to the Office, both the Notifying parties and VFL argued that the relevant geographic market that should be considered for this transaction is the passenger sea transport by fast ferry service between the territorial waters of Malta and Gozo, specifically between Valletta, Malta and Mġarr, Gozo.

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<sup>41</sup> Ziti submissions in response to the SO dated 5 May 2022.

<sup>42</sup> Commission Notice on the definition of the relevant market for the purposes of Community competition law (97/C 372/03), paragraph 8.

## Chapter 7: Competitive Assessment

### 7.1 Introduction

113. As provided in Regulation 4 of the Regulations, in assessing whether a concentration leads to a substantial lessening of competition in the Maltese market, the Director General shall consider, *inter alia*:

- a. *“the need to maintain and develop effective competition in the Maltese market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or outside Malta;*
- b. *whether the business, or part of the business, of a party to the concentration, has failed or is likely to fail;*
- c. *the nature and extent of development and innovation in a relevant market;*
- d. *the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers’ advantage and does not form an obstacle to competition.”*

114. To set the framework for the analysis of the competitive effects of the concentration, the Office refers to the Schedule of the Regulations specifically Section 6(III) of the CN Form whereby *affected markets* are defined as relevant product markets where in the Maltese territory or a relevant part thereof:

- a. two or more of the parties to a concentration are engaged in business activities in the same product market and where the concentration will lead to a combined market share of 15% or more, or
- b. one or more of the parties to the concentration are engaged in business activities in a product market, which is upstream or downstream of a product market in which any other party to the concentration is engaged, and any of their individual or combined market share is 25% or more, regardless of whether there is or is not any existing supplier customer relationship between the parties to the concentration.

115. The activities of the Parties subject to this concentration have a 'vertical' relationship which the EC defines as a relationship involving "*companies operating at different levels of the supply chain.*"<sup>43</sup>

116. In their submission, the Notifying Parties argued that although there is a vertical relationship between TTL (subsidiary of ZITI) and GFFL, this is only to a limited extent.

117. However, on the basis of the definition presented in paragraph 115 of this Decision, the Office considers the Parties involved in the concentration, that is, GFFL and ZITI, to be vertically related. ZITI (the upstream firm), through its subsidiary company TTL, provides ticketing technology services for the fast ferry service provided by GFFL (the downstream firm), so that fast ferry service customers can pay with tallinja card.

118. In assessing any competitive concerns regarding the proposed concentration, the Office considers whether the market situation that would prevail with the proposed concentration is likely to be characterised by any of the below anti-competitive effects:

- a. **Vertical effects arising through input foreclosure<sup>44</sup>:** these occur where, as a result of the concentration, the new entity would be likely to restrict access to the products or services that it would have otherwise supplied absent the concentration, thereby raising its downstream rivals' costs by making it harder for them to obtain supplies of the input under similar prices and conditions as absent the concentration. Input foreclosure could thus result in increases in prices in the downstream market, thus impeding effective competition.
- b. **Other non-coordinated effects:** by vertically integrating, Parties in this concentration may gain access to commercially sensitive information regarding the upstream or downstream activities of rivals and their importance to competing rivals.

119. The Office's analysis of each of these theories of harm is set out below.

## 7.2 Definition and characterisation of the input

120. The input considered in the assessment of the proposed concentration is the tallinja ticketing technology service that allows the tallinja card (both personalised and non-personalised) to be accepted as a payment card. The technology is supplied by TTL, a subsidiary of ZITI (the upstream

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<sup>43</sup> Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2008/C 265/07), paragraph 4.

<sup>44</sup> References to 'foreclosure' in this decision should be read as references to input foreclosure. The term 'foreclosure' refers to either partial or total foreclosure unless stated otherwise.

firm forming part of the proposed joint venture), to operators of the fast ferry services between Valletta, Malta and Mġarr, Gozo (the downstream firms).

121. As per the signed Collaboration Agreements<sup>45</sup> with the two operators, TTL's obligation is to provide the operators in the fast ferry services market with connectivity between each operator's online channel and the tallinja webservice platform to enable all tallinja card holders to use their tallinja card to book and purchase a fast ferry ticket, using their tallinja card.
122. As postulated in Chapter 5.2 of this Decision, the respective Collaboration Agreements with GFFL and VFL cover different levels of ticketing technology services. However, both agreements cover the integration feature service which enables third parties to connect to the tallinja payment system by using the tallinja card.
123. As set out in the EC Guidelines on the assessment of non-horizontal mergers, an input may be important for a number of reasons such as when the remaining upstream suppliers offer less preferred alternatives<sup>46</sup>. For all the reasons presented below, the Office considers that the tallinja card to be an important input.
124. The Office is of the view that the tallinja ticketing technology that enables the tallinja card (both personalised and non-personalised) to be accepted as a mode of payment has several advantages. These include the ease of payment a customer can enjoy when using tallinja card<sup>47</sup>, as a result of the tap-and-go system it employs and the quickness to top-up the tallinja card. The tallinja card also has a strong client base given the unique group of subscribers it enjoys and is an integral part of the public transportation system of Malta and Gozo.
125. The Office believes that a unique feature of the ticketing technology employed by tallinja card is the potential for bundling tallinja card with other transport services in the country, such as the case with the Explore Flex card. Such bundles would be in the form of offers and/or special discounts when using the tallinja card on different transport modes for travelling within Malta and Gozo.
126. In addition to the above observations, during the period under review, the only mode of payment that offered a discount was the tallinja card. The customer got a daily discount when paying for a fast ferry ticket using the tallinja card; which was not the case when effecting payment either by cash or through the use of a normal debit/credit card, with either fast ferry operator.

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<sup>45</sup> A Collaboration Agreement signed between TTL and GFFL on 1 April 2021, and another Collaboration Agreement signed between TTL and VFL 12 May 2021.

<sup>46</sup> Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2008/C 265/07), paragraphs 34 and 36.

<sup>47</sup> As also stated by MPT on their website: <https://www.publictransport.com.mt/en/tallinja-card>

127. In Table 3 in Chapter 5.3, the Office presents the fast ferry ticket prices of both GFFL and VFL for the different passenger categories. These prices were gathered from the operators' respective websites and their social media pages. Both operators differentiate between tallinja card subscribers and non-subscribers by charging them a *standard fare* and *tallinja personalised card holders' fare*, respectively.

128. The Notifying Parties argued that payments effected by customers using tallinja card are not distinguishable from payments effected using a normal credit/debit card, and that the tallinja card is just another payment card. In their responses on 12 October 2021 to the objections by VFL, GFFL argued that:

*"It is important to understand that the Tallinja card is a payment card which its holders top up with credit which is subsequently used on those transport services that accept it, including therefore, the fast ferry service (both that operated by Virtu and that operated by GFF). In the case of the fast ferry service, whilst a discount is associated with the use of the card, the fares are always ultimately set by the fast ferry operator providers themselves."*

129. On the 13 October 2021, ZITI replied to the third-party objections lodged by VFL as follows:

*"a. Overview of the tallinja card*

*The tallinja card is a payment card that one can avail of when using certain transport services that recognise and accept it. Through said card its holder is afforded not only the ability to pay for transport services but also, in some cases, to benefit from reduced fares. In all cases however, the fares charged to the card are set exclusively by the transport service providers themselves and not by the card's owner (MPT) and/or manager of the card (TTL).*

*In order to obtain a personalised tallinja card, one has to fill in an online application. Details on the applicant are requested (such as name, surname, residential address, ID card number, photo and so on). Once these are collected, a personalised tallinja card is issued in that person's name. This card cannot be shared with others and must only be used by its registered holder. Depending on the application filled in applicants are issued with a certain type of card (such as an adult, student or concession card). Depending on the card's type and the transport service being used, different fares apply.*

*In the case of the two fast ferry operators, and as is clear from the Collaboration Agreements signed with each of them by TTL, a minimum discount of [€] in the retail price charged to non-tallinja card holders was requested. The fare ultimately charged however, was left entirely in the hands of the operators themselves..."*

130. In their response to the SO on 5 May 2021, GFFL further reiterated that

*“It is pertinent to point out that the ticketing technology TTL is supply GFF and Virtu with consists in the ability of a consumer to effect payment when boarding a fast ferry through his Tallinja card. While the Tallinja card offers consumers the ease of paying by means of this card, payment through the Tallinja card is not the only method through which consumers can pay for a ticket to use GFF’s service.<sup>48</sup>”*

131. In their response to the SO on 5 May 2022, ZITI further reiterated that

*“...although it is true that there are around 340,000 TC holders in Malta, other payment cards, such as those owned by VISA and Mastercard, have a much higher number of subscribers. So do banks....”*

132. In their objections to the proposed concentration<sup>48</sup>, VFL argued that tallinja card is not just another payment card:

*“It is not possible for Virtu to substitute the Tallinja Card for other technology, in so far as the Tallinja Card grants access to much of the land based public transport system. Any card substituted by Virtu would not grant its customers access to the rest of public transport, and would therefore be a poor substitute for the Tallinja Card.*

133. Moreover, in their submissions on 29 October 2021, VFL also stated that:

*“With the recent announcement that public land based transport will be free of charge – and on the reasonable assumption that access to this free service will be contingent on a customer possessing a Tallinja card – it is likely that this cohort of customers will grow in importance.”*

134. The Office notes that the pool of tallinja card users is expected to grow once public transport is made free to all residents in Malta as from 1 October 2022<sup>49</sup>.

135. Essentially the Notifying Parties argued that the tallinja card cannot be considered as a critical input as the tallinja card is not the only tool available to the fast ferry operator to determine whether customers can be entitled to a daily discount.

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<sup>48</sup> Submissions on 14<sup>th</sup> September 2021

<sup>49</sup> <https://timesofmalta.com/articles/view/budget-2022-free-bus-service-for-all-by-next-year.907165>

136. While the Office recognises that potentially the daily discounts a customer gets by using his/her personalised tallinja cards for the fast ferry service can be replicated with other similar modes of payments and/or loyalty programs in the market, as stated previously, however for the period under review, no other modes of payments and/or loyalty programs offered such daily discounts. While one operator operated a loyalty programme for the period under review, the discounts offered therein were of no comparison to the daily discounts offered by the tallinja card. This demonstrates that for the period under review, the tallinja card was to be considered an important input in so far as other modes of payment were to be considered less preferred alternatives for the consumers and thus less attractive. Hence, for a number of the passenger categories<sup>50</sup>, the fast ferry operators' prices for tallinja card holders were discounted, making the use of tallinja card a more favourable option for consumers.

137. Moreover, the Office notes that the discounts a customer could get by using tallinja card were massive, as illustrated in Table 3 in Chapter 5.3 of this Decision, where, for example, an adult customer opting for the fast ferry service offered by GFFL would get a discount from a standard price of €12.00 to €7.99, whereas an adult customer opting for the same service from VFL would benefit from a discounted price from €12.00 to €7.50. For the period under review, although customers had the possibility to switch to other modes of payment, they had no real alternatives which offered the same advantageous daily discounts which were offered by the tallinja card. This distinguishes tallinja card from any other current mode of payment system, moreover, given that it is a platform that provides access to over 340,000 personalised tallinja card subscribers<sup>51</sup> that use tallinja card for land transport by bus, of which "160,000 have been active in the last 6 months"<sup>52</sup>.

138. In addition to the above observations, it should be stated that for the period under review, both GFFL and VFL, in their respective Collaboration Agreements with TTL, were bound to give tallinja card holders at least a minimum discount of [✂] on the retail price charged to non-tallinja card holders. Even though there is a minimum discount that each operator is obliged to give to the customer, it is ultimately in the hand of each operator what fee is charged to the customer availing of the fast ferry service, and what additional discounts are given. This means that in view of this provision, for the period under review, the fast ferry operators were bound to provide the highest discount only to tallinja card holders. In the view of the above, the Office considers that this provision made other modes of payment less preferred alternatives for the consumers.

139. Based on the above, the Office is of the view that, for the period under review, other modes of payment are to be considered a less preferred alternative for the consumers and, thus, the ticketing

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<sup>50</sup> Except for the infant category where for both the standard fare and the tallinja card holders' fare it is for free.

<sup>51</sup> <https://www.publictransport.com.mt/en/news-details/register-for-your-new-tallinja-card-and-get-10-free-credit>

<sup>52</sup> Ziti submissions in response to the SO dated 5 May 2022.

technology that allows the tallinja card (both personalised and non-personalised) to be accepted as a payment card is to be considered an important input<sup>53</sup> in the downstream market.

140. The importance of the ticketing technology is further emphasized when it comes to non-personalised tallinja cards. The tallinja ticketing technology service by TTL also gives access to non-personalised tallinja cards, such as the Explore Flex card, which is typically used by tourists. The Flex card is a ready to use card that customers can buy over the counter for immediate use on the bus and other transport services. It can be topped up with credit and be used for pay-as-you-go transport while still offering reduced rates on different transport options. The Flex card may be linked with tallinja App and also offers customers the possibility to buy bundles of services using tallinja APP. Bundles could also be in the form of offers and/or special discounts.

141. The frequent use of the fast ferry service by tourists is substantiated by GFFL in its submissions of 12 October 2021, where GFFL also mentions the importance of tallinja card when it comes to tourists:

*“While the use of the Tallinja card is an important aspect of the fast ferry service, it should be kept in mind that many passengers travelling on Gozo Fast Ferry, or Virtu, will not have the Tallinja card. In fact, as can be seen from the document that was made available to the Office for Competition which outlines the number of tickets sold by GFFL, the majority of consumers travelling aboard Gozo Fast Ferry did not use the Tallinja card (This document is being re-attached and marked as ‘Doc A’). Moreover, it is expected that this service be more popular with tourists.”*

142. The Office notes that tourists typically purchase an Explore card – rather than a personalised tallinja card – that bundles together a number of transport services around Malta and Gozo. Thus, the non-personalised tallinja card plays an important role when it comes to the use of fast ferry services by tourists. The use of this card is expected to increase in 2022 as the tourism sector continues to recover from the effect of COVID-19.

143. The Office is of the view that bundles offered through the use of the non-personalised tallinja cards cannot be easily replicated in the market by GFF and VFL and the bundles on offer are not dependant on the operator of the fast ferry service, being GFFL or VFL. As an example, for the period under review, the Explore flex cards contained bundles such as unlimited travel for six days on the scheduled bus service or the reduced fares on various modes of transport. Moreover, the creation of new bundles in the future, being those created by MPT or even other individualised bundles, makes the tallinja card in this instance a unique asset that cannot be easily replicated.

144. The Office took a somewhat narrow view in the SO presented on 13 April 2022, where the main focus was on the daily discount offered through the use of personalised tallinja card. The tallinja card has

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<sup>53</sup> Also keeping in mind, the advantages mentioned in paragraphs 124 and 125 of this Decision.

more value given the possibility of it being bundled with other transport services, and other advantages as already mentioned in paragraph 124 and 125 of this Decision. Furthermore, a consideration that the Office is making in its assessment of the input is that new bundles of other services and/or discounts/offers using tallinja card could be easily created in the future.

145. These arguments further enhance the Office's view presented in paragraph 139 of this Decision that the tallinja ticketing technology services that allows tallinja card to be utilised as a means of payment is to be considered an important input. In the case of non-personalised cards, and in any other cases where tallinja card could be included as part of a bundle of services/offers/discounts, is considered to be a critical input in the downstream market, since bundles are unique in their nature and there are no close substitutes to these products.

### 7.3 Vertical effects arising through input foreclosure

146. Vertical effects arise when a concentration involves firms at different level of the supply chain, as for example in this case a concentration between an upstream supplier and a downstream competitor of the supplier's customers.

147. Vertical mergers may be competitively benign or even efficiency-enhancing, but in certain circumstances can weaken rivalry, for example when they result in foreclosure of the merged firms' competitors. The Office only regards such foreclosure to be anticompetitive when it results in an SLC foreclosed market, not merely when it disadvantages one or more competitors.

148. The Office considered whether the proposed concentration could engage in input foreclosure in relation to the provision of ticketing technology services to the downstream competitor. The Office applies the ability-incentive-effect analytical framework:

- i. **Ability to foreclose access to inputs:** would the merged entity have the ability to harm rivals, for example, by raising prices or refuse to supply inputs to competitors on the market?
- ii. **Incentive to foreclose access to inputs:** would it be profitable to do so?
- iii. **Effect on competition:** after establishing ability and incentive, would the effect of any action taken by the merged entity be sufficient to reduce competition in the affected market to the extent that, in the context of the market in question, it gives rise to an SLC?

149. The Office assessed whether the proposed joint venture would have the ability and incentive to engage in any total or partial foreclosure strategies. Total input foreclosure means that the merged entity could stop supplying its rivals altogether. Partial input foreclosure would entail the merged entity

to harm its downstream rivals by, for example; (i) price increases of the input, or through non-price partial foreclosure such as (ii) deterioration of ticketing technology services, (iii) delays in the service or reduced access to future improvements or innovation in service, and/or reduced collaboration with respect to future development affecting integration of the service.

### 7.3.1 Ability to foreclose access to inputs

150. The first step in any assessment of whether a joint venture is likely to give rise to anti-competitive input foreclosure is a consideration of whether the joint venture would have the *ability* to increase the cost incurred by downstream rivals in the procurement of an important input.

151. The joint venture would only have the ability to foreclose downstream competitors if, by reducing access to its own upstream products or services, it could negatively affect the overall availability of inputs for the downstream market in a way that significantly impacts on the downstream rivals' costs.<sup>54</sup> If in response to an increase in the price of the input the joint venture's customers could switch to an alternative supplier offering a similar input on only marginally inferior terms to those initially offered by the joint venture, then the joint venture would not have the ability to materially raise the cost of its downstream rivals. Even if the joint venture can substantially increase the market price that its downstream rivals must pay for an input, this will not necessarily have a material impact on downstream rivals' costs of production, if the input represents a small share of the downstream firms' overall costs.<sup>55</sup>

152. Based on the above, the Office's assessment of the joint venture's ability to foreclose considered: (i) whether the joint venture has significant market power in the upstream market; and (ii) whether the input it supplies represents an important component of the service offered in the downstream market. Both these conditions must hold in order for an ability to foreclose to exist. In addition, the Office also considered the potential foreclosure strategies.

### Assessment of market power in the upstream market

153. In the EC Guidelines on the assessment of non-horizontal mergers, it is noted that "*for input foreclosure to be a concern, the vertically integrated firm resulting from the joint venture must have a significant degree of market power in the upstream market.*"<sup>56</sup> It is only in these circumstances that

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<sup>54</sup> See *The Economic Assessment of Mergers under European Competition Law* by Gore et al. published in 2015.

<sup>55</sup> *Ibid.*

<sup>56</sup> Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2008/C 265/07), paragraph 35.

the merged firm can be expected to have a significant influence on the conditions of competition in the upstream market and thus, possibly, on prices and supply conditions in the downstream market.

154. As identified in paragraph 120 of this Decision, the input under consideration is the tallinja ticketing technology service that allows the tallinja card (both personalised and non-personalised cards) to be accepted as a payment card. This provides downstream firms with access to over 340,000 personalised tallinja card subscribers<sup>57</sup> of which “160,000 have been active in the last 6 months”<sup>58</sup>, that primarily use the card in the related market for scheduled land transport by bus, and to an unlimited number of customers that can purchase a non-personalised tallinja card, such as the Explore Flex card, which includes as part of its bundle offers/discounts for the use of the fast ferry service. As already indicated in paragraph 140 of this Decision, these Explore cards are typically purchased by tourists.

155. Based on the details of the signed Collaboration Agreements, [REDACTED].

156. As also outlined in paragraph 140 of this Decision, the Flex card is a ready to use card which customers can buy over the counter for immediate use on the bus and other transport services on offer. It can be topped up with credit and be used for pay-as-you-go transport whilst still offering reduced rates/offers/discounts on different transport options. The Flex card may be linked with tallinja App and also offers customers the possibility to buy bundles of services using tallinja APP.

157. With specific reference to the tallinja Explore Flex card<sup>59</sup>, this provides a discount to those customers who make use of the fast ferry service through boarding with the provider GFFL. Instead of the regular price of 12 Euros, an Explore Flex card holder only pays a price of 9.99 Euros. Moreover, the Office notes that with the use of the Explore Flex card, a customer would be entitled to 1 free return trip to Gozo using the provider GFFL.

158. In its submissions on 25 November 2021, GFFL confirmed that

*“This is a bundle that is being offered by TTL in conjunction with Malta Public Transport and GFFL. Nothing is free of charge. The bundle is €29 including six days of unlimited travel on buses, one return trip on GFFL. Every time someone validates their Explore Flex Card using this bundle, a charge of €9.99 less commission/processing fees is payable by TTL to GFFL Limited”*

159. Furthermore, data provided by the Notifying Parties shows that the amount of GFFL trips utilising the tallinja Flex card bundles have been on an upward trend since its launching during summer of 2021.

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<sup>57</sup> <https://www.publictransport.com.mt/en/news-details/register-for-your-new-tallinja-card-and-get-10-free-credit>

<sup>58</sup> Ziti submissions in response to the SO dated 5 May 2022.

<sup>59</sup> Till 28 February 2022, since use of tallinja card is currently suspended as already indicated in paragraph 40 of this Decision.

160. From the data provided by GFFL, the Office estimated that [X%] of all tallinja card users for fast ferry service on GFFL between June 2021 and December 2021 made use of a Flex card.
161. As this requires no registration (compared to personalised tallinja card), it is easy for a consumer, being it a resident of Malta or typically being a tourist visiting Malta, to buy the tallinja Flex card and thus with the only option being GFFL, this pool of demand is being all diverted to GFFL.
162. Furthermore, as already indicated in paragraph 143 of this Decision, the Office also considers the possibility of the personalised tallinja card to be also included within new bundles of other services and/or discounts/offers that could be created in the future.
163. Since tallinja card holders benefit from discounted prices, they generate substantial demand for the fast ferry services offered by the downstream firms. Specifically, as outlined in upcoming Table 5 in paragraph 173 of this Decision, in the period between June 2021 and December 2021, they accounted for [X%] of total passenger movements reported by VFL and [X%] of total passenger movements reported by GFFL.
164. As already outlined in paragraph 136 of this Decision, the Office is of the view that when considering the daily discounts a customer gets by using his/her personalised tallinja cards for the fast ferry service, although discounts can be replicated with other similar modes of payment and/or loyalty programs in the market that use alternative ticketing technology in the market, however, for the period under review, only the tallinja card offered massive daily discounts when compared to the standard prices, making other modes of payments less preferred alternatives for customers of the fast ferry services.
165. In their submissions, the Notifying Parties argued that TTL's market share in the market for the provision of ticketing technology services for fast ferry services does not exceed 25% of the total services provided by TTL.
166. On the other hand, a third party argued that it should be beyond contention that MPT, as the sole and exclusive operator of the scheduled bus transport service, has a 100% market share of this market.
167. When it comes to the ticketing technology that allows the tallinja card to be utilised as a means of payment, including instances where it is utilised as a means of payment for non-personalised tallinja cards (such as the Explore Flex cards), and in any other instances where the tallinja card could be included as part of a bundle of services/offers/discounts (also considering possible new bundles created in the future), the Office considers the tallinja ticketing technology as being a critical input in the downstream market. The Office is of the view that the type of bundles offered with the non-personalised card are unique feature and there are no close substitutes to these products.

168. Moreover, as already outlined in paragraph 143 of this Decision, the bundles on offer when using non-personalised tallinja cards cannot be easily replicated in the market by the fast ferry operators, being either GFFL or VFL. Moreover, the creation of new bundles in the future, being those created by MPT or even other individualised bundles, makes the tallinja card in this instance a unique asset that cannot be easily replicated.

169. Since the tallinja ticketing technology is the only one that provides access to the pool of tallinja card holders (being personalised and/or non-personalised card holders), and as outlined above confers multiple advantages and has unique features, the Office considers the ticketing technology service supplied by TTL to be of an important value to the market in question. Thus, the joint venture could have the ability to foreclose its rivals in the downstream market.

### **Assessment of whether the input is an important component of the downstream service**

170. In the EC Guidelines on the assessment of non-horizontal mergers, it is noted that *“input foreclosure may raise competition problems only if it concerns an important input for the downstream product or service.”*<sup>60</sup> This is the case, for example, when the input concerned represents a significant cost factor relative to the price of the downstream product; but it may also be sufficiently important for other reasons. For instance, the input may be a critical component without which the downstream product could not be effectively sold on the market.

171. The Office assessed the importance of the input, in this case the tallinja ticketing technology, and the importance of any related market, in this case the scheduled bus service, to the downstream market of the fast ferry service. In fact, the Single Economic Unit (which includes ZITI) also holds the exclusive right to provide scheduled bus services in Malta until the year 2030. The fast ferry service is largely dependent on the availability of scheduled bus services, since customers using the fast ferry service are unable to board the vessels with their personal car. So, a view also shared by a third-party, some form of public transport service is also important in the operations of the downstream market. As already stated in paragraph 91 of this Decision, the scheduled bus services in Malta are 100% owned by the Single Economic Unit.

172. On the basis of the above, the Office considers whether the tallinja ticketing technology as an input accounts for a substantial portion of the downstream firms' costs. The analysis is based on data compiled by the Office through the RFIs sent to the companies operating in the downstream market, namely, GFFL and VFL.

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<sup>60</sup> Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2008/C 265/07), paragraph 34.

173. The information on costs compiled through the RFIs is presented in Table 4. For each of the two downstream market players, it shows the fixed and variable costs incurred in relation to the tallinja ticketing technology as well as other fixed and variable costs incurred in their operations:

**Table 4 – Breakdown of total costs for downstream operators**

	Tallinja fixed and variable costs	Other fixed and variable costs	Total Cost	Input cost as a share of total cost
<b>Virtu Ferries Limited</b>				
Jun	[X]	[X]	[X]	[X]
Jul	[X]	[X]	[X]	[X]
Aug	[X]	[X]	[X]	[X]
Sep	[X]	[X]	[X]	[X]
Oct	[X]	[X]	[X]	[X]
Nov	[X]	[X]	[X]	[X]
Dec	[X]	[X]	[X]	[X]
<b>Total</b>	<b>[X]</b>	<b>[X]</b>	<b>[X]</b>	<b>[X]</b>
<b>Gozo Fast Ferry Limited</b>				
Jun	[X]	[X]	[X]	[X]
Jul	[X]	[X]	[X]	[X]
Aug	[X]	[X]	[X]	[X]
Sep	[X]	[X]	[X]	[X]
Oct	[X]	[X]	[X]	[X]
Nov	[X]	[X]	[X]	[X]
Dec	[X]	[X]	[X]	[X]
<b>Total</b>	<b>[X]</b>	<b>[X]</b>	<b>[X]</b>	<b>[X]</b>

Source: Data provided by VFL and GFFL<sup>61</sup>

174. For VFL, the cost associated with the tallinja ticketing technology amounted to only [X]% of the operator’s total cost, while for GFFL the cost associated the tallinja ticketing technology amounted to only [X]% of the operator’s total cost. Thus, even a significant increase in the input price is unlikely to have a material effect on competition in the downstream market. Based on this information, the Office cannot conclude that the tallinja ticketing technology is a significant component of the cost incurred for the provision of the fast ferry services provided in the downstream market.

175. However, in line with the EC assessments of other cases, the Office also considered whether the tallinja ticketing technology is an important input for other reasons. For example, in the Nokia/Navteq case, the EC considered the importance of the input for downstream competitors, noting that,

<sup>61</sup> As submitted by GFFL in its reply to the RFIs dated 25 November 2021, 11 February 2022 and 10 March 2022, and as submitted by VFL in its reply to the RFIs dated 22 November 2021, 7 December 2021 and 9 March 2022.

irrespective of the input's share in downstream costs, an input may be important on account of being a critical component.<sup>62</sup>

176. If the proposed joint venture, through its presence in the upstream market, partially or totally restricts the supply of the input to its competitor in the downstream market, it would effectively limit VFL's access to tallinja card users in so far as effecting payments using tallinja cards (being personalised and/or non-personalised) can only be processed using TTL's ticketing technology.

177. In this regard, the Office considered the portion of total passengers that purchased the ticket for fast ferry services using the tallinja card. This information was compiled by the Office through the RFI sent to the companies operating in the downstream market. The information is presented in Table 5. For each of the two downstream market players, it shows the total passenger movements and provides a breakdown by method of payment, i.e. whether the ticket was purchased using tallinja card or some other method (cash, online, etc.). This information is provided for June to December 2021:

**Table 5 – Passenger movements by method of payment**

	Tallinja	Other	Total	Tallinja share in total
<b>Virtu Ferries Limited</b>				
Jun	[X]	[X]	[X]	[X]
Jul	[X]	[X]	[X]	[X]
Aug	[X]	[X]	[X]	[X]
Sep	[X]	[X]	[X]	[X]
Oct	[X]	[X]	[X]	[X]
Nov	[X]	[X]	[X]	[X]
Dec	[X]	[X]	[X]	[X]
<b>Total</b>	<b>[X]</b>	<b>[X]</b>	<b>[X]</b>	<b>[X]</b>
<b>Gozo Fast Ferry Limited</b>				
Jun	[X]	[X]	[X]	[X]
Jul	[X]	[X]	[X]	[X]
Aug	[X]	[X]	[X]	[X]
Sep	[X]	[X]	[X]	[X]
Oct	[X]	[X]	[X]	[X]
Nov	[X]	[X]	[X]	[X]
Dec	[X]	[X]	[X]	[X]
<b>Total</b>	<b>[X]</b>	<b>[X]</b>	<b>[X]</b>	<b>[X]</b>

Source: Data provided by VFL and GFFL<sup>63</sup>

<sup>62</sup> Case COMP/M.4942 – Nokia/Navteq, Commission decision of 2 July 2008.

<sup>63</sup> As submitted by GFFL in its reply to the RFIs dated 25 September 2021, 25 November 2021, and 10 March 2022, and as submitted by VFL in its reply to the RFIs dated 22 November 2021 and 9 March 2022.

178. Over this period, VFL recorded [x] passenger movements. Of these, [x] or [x]% purchased their ticket using the tallinja card. In the view of the Office, this represents an important percentage of the operator's total number of passenger movements. The comparable figures for GFFL show that, over the period under analysis, passenger movements amounted to [x]. Of these, [x] or [x]% purchased their ticket using tallinja card; an important percentage of the total number of passenger movements.

179. Furthermore, the data provided by GFFL, the Office estimated that [x]% of all tallinja card users for fast ferry service on GFFL between June 2021 and December 2021 made use of a Flex card.

180. The Office considers that the provision of tallinja ticketing technology services utilised in affecting payments using tallinja cards (being personalised and non-personalised) to be critical in the provision of fast ferry services on the Valletta-Mġarr market. Thus, if total input foreclosure would occur, this would have material impact on the profitability and sustainability of the competitor's operations.

181. In ZITI's replies to the SO dated 5 May 2022, it contests the Office's arguments of the importance of the tallinja card

*"...Ziti cannot see how the fact that [x]% of passengers for both VFL or GFFL – renders the TC a critical input – which can be used to foreclose the market diverting passengers away from VFL and towards GFFL.*

182. However, the Office would like to emphasise further that this assessment only covers the first few months of this new fast ferry market and thus the business is still in its infancy, so demand is expected to be higher in the near future, even more so that GFFL and VFL started to operate in the uncertain times of the Covid-19 pandemic, so tourism was quite on the low side and is expected to start its recovery from 2022 onwards as we exist these uncertain times. As already stated previously in this decision, tourists are the customers that typically purchase bundled offers to use on transport services, so the use of Flex cards such as the Explore Flex card, is expected to be in higher demand in the future.

183. Furthermore, submissions by GFFL on 30 September 2021 also reiterated on the importance of the tallinja card to their operations:

*"Tallinja Card (TC) is a platform which used for the acquisition of transport services by the community at large. It stands to reason that any agreement reached for the use of the TC will benefit GFFL or any operator in this service. Given the wide use of the TC, it's in GFFL's interest to ensure the possibility of acquisition of ferry tickets using the TC is availed of by any consumer".*

184. In its objections to the proposed joint venture, VFL submitted on 14 September 2021:

*“...the proposed [joint venture] will have the ability to foreclose Virtu’s access to the tallinja card, either by removing access completely, by charging unfairly high prices for access, or by degrading Virtu’s access to the Tallinja Card. In so far as a significant percentage of Virtu’s customers make use of the ferry service using the tallinja card, it is clear that the tallinja card is a critical input for the service offered by Virtu”.*

185. The Office concludes that the ticketing technology provided by TTL, the subsidiary of ZITI, is of importance for the operations in the downstream market.

### **Potential foreclosure strategies**

186. In the EC Guidelines on the assessment of non-horizontal mergers, it is noted that *“input foreclosure may occur in various forms.”*<sup>64</sup> The joint venture may decide not to deal with its actual or potential competitors in the downstream market. Alternatively, the joint venture may decide to restrict supplies and/or to raise the price it charges when supplying competitors and/or to otherwise make the conditions of supply less favourable than they would have been absent the joint venture. Furthermore, the joint venture may opt for a specific choice of technology which is not compatible with the technologies chosen by rival firms. Foreclosure may also take more subtle forms, such as the degradation of the quality of input supplied.

187. Based on the above, in its assessment of the proposed joint venture’s *ability* to foreclose, the Office analysed potential foreclosure strategies. Specifically, the joint venture may foreclose rivals in the downstream market for fast ferry services by: (i) refusing to supply the tallinja ticketing technology; (ii) increasing the price and/or commission fees for the technology; (iii) degrading the quality of the offering; and (iv) using commercially sensitive information to obtain a competitive advantage. The latter is discussed in Chapter 7.4.

188. Based on information compiled from the RFIs, the Office notes that the Collaboration Agreement for the provision of the tallinja ticketing technology services between TTL and VFL is for a term of [X] years. Once the agreement expires, TTL, the subsidiary of ZITI, through its presence in the upstream market, could refuse to supply the technology to its competitor in the downstream market.

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<sup>64</sup> Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2008/C 265/07), paragraph 33.

189. Even if there is agreement to renew the Collaboration Agreements, TTL could ask for a higher price. Based on the information in paragraph 173 of this Decision, it is clear that the cost associated with the tallinja ticketing technology is low relative to other costs incurred by the two downstream operators. Hence, even a substantial increase in price for the tallinja ticketing technology is unlikely to materially affect competition in the downstream market. However, the agreement between the upstream supplier of the tallinja ticketing technology and the downstream operators demonstrates that, through its presence in the upstream market, TTL earns a commission of [X] % of the ticket price for personalised tallinja cards, and [X] % commission in the case of tickets purchased with a non-personalised tallinja card. Any increases in the commission rate would quickly eat into the revenues of the downstream operators. Hence, it could be possible that the joint venture forecloses the downstream competitor, VFL, by increasing prices.

190. Following the formulation of the joint venture, there could be a possibility that ZITI, through its subsidiary TTL, degrade the quality of the service being offered to its competitor in the downstream market. Such degradation need not apply to the technology itself, but may occur in respect of related services, such as after-sales service or optional features. It is also possible that the joint venture invests in technology that renders it incompatible with the system used by the downstream competitor or introduce tailor improvements to the technology to the benefit of the undertakings forming part of the joint venture.

191. Following the approval of the joint venture, there could be a possibility that the merged entity partially forecloses the input to VFL by offering inferior or unequal bundles whether through personalised or non-personalised cards thus rendering bundles packages given to GFFL more attractive to tourists.

192. VFL raised concerns on bundling possibility as a result of the proposed concentration in its submissions on 30 September 2021:

*“it will allow the group of which Ziti forms part to sell bundled offers to customers, covering both scheduled bus transport and fast ferry transport in one single package. This will clearly place Virtu at a competitive disadvantage, as it will be unable to match such offers.”*

193. In its response to the SO on 5 May 2022, ZITI disagreed with the above considerations

*“...it is Ziti’s opinion that in this consideration the OfC failed to keep in mind TTL’s main commercial goal – that of widening the TC’s network by including as many transport operators as possible and therefore, rendering the TC’s network more attractive to the end customer (i.e.. the people actually using the card). It, therefore, makes no commercial sense for TTL to take any action that would in any way limit VFL or GFFL’s access to the TC.”*

194. The Office considers that these competition concerns have been eliminated and are sufficiently addressed in the Final Commitments entered into by ZITI, which are set out in Annex 1 of this decision under Section B Commitment 2, whereby ZITI commits to ensure that TTL provides commercial access to the tallinja card (being both personalised and non-personalised) and the related ticketing technology on fair, reasonable and non-discriminatory (hereinafter referred to as “FRAND”) terms and in particular on no less favourable terms than the ones granted to GFFL in all respects through standard terms of service and prices, which shall be available on demand to all fast ferry operators that currently operate or will enter in the future the Valletta-Mġarr fast ferry market.

195. In addition, ZITI commits to ensure that TTL undertakes in its role as supplier of the tallinja card (both personalised and non-personalised) and the related ticketing technology required to allow its acceptance as a mode of payment, not to take any measure that provides a competitive advantage to GFFL. For example, TTL commits to offer and/or provide tallinja card and related ticketing technology updates, functionalities and support services to all Fast Ferry Operators that currently operate, or those that may wish to enter the Valletta-Mġarr Fast Ferry market on no less favourable terms than those granted to GFFL, including on aspects related to availability and timing.

#### **Importance of the Scheduled Bus service to the fast ferry service**

196. As already outlined in paragraph 171 of this Decision, the Office assessed the importance of the input and any related market, in this case the scheduled bus service, to the downstream market of the fast ferry service.

197. The Office has considered the importance of the scheduled bus service to assess ZITI's alleged ability, whilst forming part of the same undertaking as that controlling MPT as operators of the public transport services by bus in Malta and Gozo, to foreclose access to public transportation services to and from the Valletta-Mġarr Fast Ferries.

198. Evidence on the importance of public transportation for the operations of the fast ferry service is further enhanced by the announcement at the start of the fast ferry service of MPT on 1 June 2021 that new scheduled bus services were introduced with the explicit aim to provide connectivity to the fast ferry services providers<sup>65</sup>. A further bus route was introduced on 14 September 2021<sup>66</sup>.

199. Furthermore, following recent changes in ferry schedules, MPT also announced on 28 February 2022 that bus timetables were being updated to provide “*seamless connectivity between Valletta,*

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<sup>65</sup> <https://www.publictransport.com.mt/en/news-details/new-bus-routes-offering-connections-from-the-fast-ferry-service-between-malta-and-gozo->

<sup>66</sup> <https://www.publictransport.com.mt/en/news-details/route-150-lascaris-to-mcast-paola>

university, hospital, MCAST and the Valletta fast ferry terminal<sup>67</sup>, aligning them with fast ferry providers' updated timetables.

200. Thus, the Office is of the view that the fast ferry market is reliant on public land transportation and an important upstream market for the operations of the fast ferry services since consumers are very likely to require the use of the scheduled bus transport services to arrive at their port of arrival or depart from their port of departure. Thus, the fast ferry service and the scheduled bus transport services are to a certain extent, complementary services to each other.

201. The Office is of the view that the related market of the scheduled bus service is important in the operations of the downstream market of the fast ferry service and is effectively free of charge to the operators of the fast ferry services.

202. Moreover, the tallinja card is described on the MPT website as follows<sup>68</sup>:

*"The tallinja card is an intelligent contactless bus card designed to make it easy for you to use the bus. The card is personalised with your photo and name and can be topped up with credit easily online, over the phone, at any of our sales outlets or at any MaltaPost post office. This card can be used to travel on all the buses in Malta and Gozo. Your credit will not expire.*

*When using your tallinja card you will benefit from cheaper fares than when you pay on the bus. Every time you board the bus simply touch the reader on the bus with your tallinja card. A fare for every journey will be deducted automatically from your available credit. It's that easy and much quicker! Different cards and fares are available for Children, Students, Adults, Kartanzjan Holders, Holders of EU Disability Card with "MT" mark or Special ID Card issued by the the Commissions for the Rights of Persons with Disabilities (CRPD) and Gozo Residents."*

203. In submissions by VFL on 24 September 2021 they argued that:

*"From the terms and conditions related to the Tallinja Card, the Tallinja Card appears to be a card owned and operated by Malta Public Transport Services (Operations) Limited. This card serves the dual purpose of a loyalty card (in so far as holders of the card may obtain certain price reductions) as well as simplifying the payment process for customers of the scheduled bus service. Its use has been extended to other transportation services, including the Fast Ferry Services such that passengers making use of the Tallinja Card gain access to favourable rates and can travel seamlessly over various transportation modalities."*

204. In further submissions by VFL on 24 September 2021 they argued that:

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<sup>67</sup> <https://www.publictransport.com.mt/en/news-details/updated-time-tables-at-lascaris-bus-stop>

<sup>68</sup> <https://www.publictransport.com.mt/en/tallinja-card>

*“It should therefore be clear that the Tallinja Card is a card with massive reach and usage, particularly as a result of the fact that customers of scheduled bus services face a captive market. There is no alternative to the scheduled bus service; there is no alternative to the Tallinja Card.”*

205. In their reply to the SO on 5 May 2022, ZITI disagreed on the Office’s views of the importance of the scheduled bus service to the fast ferry market. ZITI submitted that in their view, there are a number of multi-modal transportation options which a customer can use to get to his/her final destination such as; private personal cars, white taxis, other transportation services such as cab-services and ride-sharing, and also through walking.

206. Contrary to ZITI’s claims, the Office is of the view that the connectivity that the scheduled bus service can give to the consumers cannot be replicated by other modes of transport. Moreover, as also claimed by one of the Notifying Party, the fast ferry service is popular mainly with tourists, that typically purchase Explore cards which bundles a number of transport services, including the use of both the fast ferry service to travel from Malta to Gozo, and the scheduled bus service which would be both included in such bundle.

207. In the same submissions, ZITI also stated that:

*“...MPT does **not** have the power or ability to change the public transport bus schedule of its own motion and without TM’s oversight and approval. MPT operates two types of bus routes:*

- a. those mandated by TM as part of the Concession Agreement which form the bus route schedule across all Malta and Gozo and which MPT is bound to operate according to TM’s schedule (and subject to the imposition of fines in cases if missed trips). These scheduled bus services include but are not limited to Routes 301, 303, 322 and 323 that serve the Mgarr Ferry Terminal, and Routes X133, 300, 150, and 133 that serve the Valletta Ferry Terminal; and*
- b. other “optional”, commercial routes which MPT can decide to operate (subject to commercial feasibility) and add its schedule of bus routes and trips in Malta and Gozo. During Summer 2021, MPT had launched two direct services in Mgarr, Gozo to link the Ferry Terminal to Xlendi and Marsalforn. These services TD30 and TD31 were operate with equal frequency for both ferry operators so as to encourage as any people possible to use public transport in conjunction with the fast ferry services.”*

208. ZITI further distinguishes between two types of bus routes; “Non-Commercial Routes” which are mandated by TM as part of the Concession Agreement and “Commercial Routes” that are at the discretion of MPT to operate.

209. Finally, VFL has alleged that, should the joint venture be approved, *“It will also allow the group of which Ziti forms part the opportunity to schedule bus services in a manner which places Virtu at a competitive disadvantage such as, for example, ensuring that scheduled bus services arrive at departure points at times which ensure that customers will make use of the service offered by GFF, rather than that offered by Virtu”*.

210. The Office took note of all the evidence and arguments outlined above. The Office considers that the above competitive concerns have been sufficiently eliminated in the Final Commitments presented by ZITI, as set out in Annex 1 of this Decision under Section B Commitment 1, whereby ZITI commits to ensure that MPT will treat all present and future Valletta-Mġarr fast ferry operators on FRAND terms when it comes to the scheduling and operation of scheduled bus services to and from the Valletta and/or Mġarr fast ferry terminals.

### **Conclusion on the ability to foreclose**

211. On the basis of the above assessment, the Office is of the opinion that the joint venture could have the ability to influence the price and quality of the ticketing technology used by downstream service providers, as well as other factors, such as totally or partially foreclosing the supply of the tallinja ticketing technology and therefore could have the ability to harm its downstream competitors through input foreclosure.

212. The Final Commitments and the Office’s views on these commitments are presented in more detail in Chapter 8 of this Decision.

### **7.3.2 Incentive to foreclose access to inputs**

213. The incentive to foreclose depends on the degree to which foreclosure would be profitable. As postulated in the EC Guidelines on the assessment of non-horizontal mergers *“The vertically integrated firm will take into account how its supplies of inputs to competitors downstream will affect not only the profits of its upstream division, but also of its downstream division. Essentially, the merged entity faces a trade-off between the profit lost in the upstream market due to a reduction of input sales to (actual or potential) rivals and the profit gain, in the short or longer term, from expanding sales downstream or, as the case may be, being able to raise prices to consumers.”*<sup>69</sup>

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<sup>69</sup> Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2008/C 265/07), paragraph 40.

214. In view of the potential anti-competitive motivations behind a vertical concentration, it is important to assess whether the theory of harm considered is consistent with *profit incentives*. The Office therefore considered whether the joint venture would have the incentive to pursue a foreclosure strategy by considering the magnitude and likelihood of the costs and benefits that arise from it. The Office considered the level of sales lost and/or gained by the proposed joint venture following a vertical anti-competitive strategy.
215. The assessment of incentives typically involves a combination of quantitative and qualitative evidence. A vertically integrated firm may have either the incentive to refuse to supply an input to a downstream competitor (total foreclosure) or raise the competitor's costs, such as by increasing the price of the input or lowering its quality (partial foreclosure).
216. The incentive to further raise rivals' costs depends on the extent "*to which downstream demand is likely to be diverted away from foreclosed rivals and the share of that diverted demand that the downstream division of the integrated firm can capture*"<sup>70</sup>, thus diverting customers from the downstream competitors to the vertically integrated concentration.
217. The extent to which the Single Economic Unit would profit by foreclosing the use of the tallinja ticketing technology to rival firms in the downstream market depends on the extent to which GFFL and its sole competitor VFL compete in the downstream market. Based on the information presented in paragraph 177 in Chapter 7.3.1 of this Decision, it is clear that GFF and VFF are close competitors.

#### **Total foreclosure – Loss of profits upstream and gain in profits downstream**

218. A foreclosure strategy in this case implies a loss of profits in the input market upstream in the sales of the ticketing technology services to GFFL's sole competitor VFL, and a larger profit gain in the market for the Valletta-Mġarr fast ferry services downstream.
219. Total input foreclosure results if TTL, the subsidiary of ZITI, refuses to supply the input (the ticketing technology services) to VFL. Given that VFL is the only competitor of GFFL in the downstream market for fast ferry services, the Office makes the assumption that all of VFL's passengers that use tallinja card as a method of payment would switch to GFFL in the eventuality of total input foreclosure.<sup>71</sup>

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<sup>70</sup> Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2008/C 265/07), paragraph 42.

<sup>71</sup> This does not imply that VFL is driven immediately out of the market, as it maintains its customer base that does not use tallinja card as a method of payment.

220. Therefore, in the upstream market, the proposed joint venture would lose the revenue earned from the licensing fees and the [X] % sales commission earned on the selling price of VFL. The cost of the initial set-up of the system is assumed to be a sunk cost and is therefore excluded from the calculation. At the same time, it would gain the additional sales commission from GFFL resulting from the additional tallinja passengers that switch to GFFL. In the downstream market, the proposed concentration would gain in terms of revenue from the additional sales of tallinja ticket passengers. The relevant figures are presented in Table 6:

**Table 6 – Total Foreclosure Scenario for the period June 2021 to December 2021**

<b>Revenue lost by Joint Venture upstream</b>		
Processing fees ([X] % of ticket selling price)	[X]	
License fees	[X]	[X]
<b>Revenue gained by Joint Venture upstream<sup>72</sup></b>		
Processing fees ([X] % of ticket selling price)		[X]
<b>Net Revenue lost by Joint Venture upstream</b>		[X]
<b>Revenue gained by Joint Venture downstream</b>		
Income from passengers diverted from VFL to GFFL <sup>73</sup>	[X]	
Less Commission paid to TTL <sup>74</sup>	[X]	[X]
<b>Revenue Gain for Joint Venture from Total Foreclosure</b>		[X]

221. An outright refusal to supply the tallinja ticketing technology to VFL for the period June 2021 to December 2021 would have resulted in a loss in revenue in the upstream market of [X]. For the same period, in the downstream market, the joint venture would gain from additional sales using tallinja card of [X].

222. Total foreclosure by the proposed joint venture would have led to an increase in revenues of [X].

Therefore, based on historical data, the joint venture could have an incentive to (totally) foreclose. In

<sup>72</sup> The revenue gained by the joint venture upstream is estimated as follows: Passenger movements diverted to the joint venture multiplied by the Price per passenger and by the [X] % Commission paid to TTL for ticketing technology service. The passenger movements represent the total tallinja passengers for VFL. The Price per passenger is an estimate of the average price per tallinja passenger movement with GFFL, excluding non-Flex tallinja passengers.

<sup>73</sup> The income from passengers diverted from VFL to GFFL is estimated as follows: Passenger movements diverted to the joint venture multiplied by the Price per passenger. The passenger movements represent the total tallinja passengers for VFL. The Price per passenger is an estimate of the average price per tallinja passenger movement with GFFL, excluding non-Flex tallinja passengers.

<sup>74</sup> The Commission paid to TTL represents the [X] % processing fees paid to TTL for the ticketing technology service.

part, this reflects that GFFL charges a higher price than VFL for most tallinja passenger categories.<sup>75</sup> The Office notes that this assessment only covers 7 months, and that the business is still in its infancy, so demand is expected to be higher in the near future, even more so given that GFFL and VFL started to operate the new fast ferry service in the uncertain times of the Covid-19 pandemic, which are expected to ease off this year, so tourism (the customers that typically purchase bundled offers to use on transport services) is expected to start recovering from 2022. This increase in demand would bring about higher profits, thus further increasing the incentive to adopt a total foreclosure strategy.

223. The Office is of the view the potential benefits of (totally) foreclosing the input of tallinja ticketing technology services are greater than the estimates of the potential costs from this foreclosure strategy.

224. The concerns of the Office presented above have been addressed by Commitment 2 in the Final Commitments entered into by ZITI, which can be found in Annex 1 of this decision under Section B.

### **Partial foreclosure – Gain in profits downstream**

225. In a partial foreclosure scenario, it is difficult to estimate quantitatively the precise magnitude of costs and benefits, as this will depend on which of the range of methods the proposed concentration adopts to foreclose its competitors.

### ***Increase in the cost of the input***

226. In terms of the costs of partial foreclosure, any upstream loss of sales would depend on the number of passengers that would switch from VFF to GFFL say in the context of a rise in price of the input of ticketing technology services provided to the competitor of the proposed concentration. Moreover, the fact that the proposed joint venture has a wider range of (partial) foreclosure strategies available means that it has substantial strategic flexibility to mitigate the loss of profits upstream by carefully choosing the best strategy to adopt.

227. With a partial foreclosure strategy, ZITI could still maintain some of the revenue it earns from licensing fees from VFL and would only be losing part of the commission it earns from bookings using tallinja card. The loss of profits upstream would be negligible.

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<sup>75</sup> As illustrated in Table 3 in Chapter 5.3 of this Decision.

228. In terms of benefits of partial foreclosure, these are likely to still be considerable though lower than under total foreclosure. The proposed concentration would be capturing a proportion of sales from diverted demand from its downstream competitor.

229. The possibility of partial foreclosure by the proposed joint venture was a view also shared by VFL in their submissions. VFL argued that higher licensing fees in the future might force them to increase their ticketing prices, thereby leading a number of their customers to switch to the sole competitor in the market, GFFL. The Office also notes that the shorter-term duration of TTL's agreement with VFL raises the risk of higher fees being imposed on VFL upon renewal of the agreement, at a time when GFFL would still be benefiting from the current fee structures.

230. Furthermore, the Office notes that in the Collaboration Agreement between TTL and GFFL, as found in Annex 2 of the Collaboration Agreement, only the *"licensing fees will increase after [X] months by [X]%..."* On the other hand, in Annex 2 of the collaboration agreement between TTL and VFL, both *"Processing and License Fees will increase after [X] months by [X]%..."* The Collaboration Agreement thus, does not establish whether or when the processing fees will increase for GFFL. In addition, whereas the licensing fees will increase for GFFL only [X] from the signing of the collaboration agreement, in the case of VFL both processing and licensing fees will increase [X]. In view of these considerations, the Office considers that GFFL has been given preferential and discriminatory treatment when compared to VFL.

### **Lowering of the quality of the input**

231. VFL showed the following concern in their submissions on 30 September 2021:

*"Other more subtle methods of degrading Virtu's use of the service would also be possible, such as, for example, reducing the level of system support provided to Virtu by delaying the resolution of technical problems, or by delaying the installation of additional hardware required by Virtu."*

232. The Office notes that it is very difficult to ascertain whether any glitches in the ticketing technology system would be specific to one operator in the downstream market, or to all downstream users of the ticketing technology system.

233. The Office, thus, opines that partial foreclosure strategies are less likely to be quickly detected by the proposed concentration's competitors, as it may be difficult to detect and prove the 'soft biases' of a non-price partial foreclosure strategy and are therefore less likely to trigger a timely response.

## **Conclusion**

234. On the basis of the above evidence, the Office opines that the proposed concentration has the incentive to partially foreclose the input of tallinja ticketing technology through price increase of the input and/or through non-price foreclosure by lowering the quality of the input.

235. As already stated in paragraphs 194 and 195 of this Decision, the Office considers that these competition concerns have been sufficiently addressed by the Final Commitments presented by ZITI, which can be found in Annex 1 of this decision under Commitment 2 Section B of the Final Commitments.

## **Partial Foreclosure – Differences in the Collaboration Agreements**

236. TTL, a subsidiary of ZITI (which forms part of the proposed concentration), and part of the Single Economic Unit as defined in paragraph 29 of this Decision, entered into a separate collaboration agreement with the passenger fast ferry operators between Valletta, Malta and Mġarr, Gozo<sup>76</sup>. Through this collaboration, TTL would be offering ticketing technology services to the fast ferry operators such that all tallinja card holders would be able to use their tallinja cards to purchase fast ferry tickets at a reduced fare, compared to the standard fares charged to the different passenger types. The main terms of the respective collaboration agreements and the list of services offered by TTL to the respective fast ferry operators are discussed in more detail in Chapter 5.2 of this Decision.

## **Duration of the Collaboration Agreement and differences in the type of services offered in relation to the input of ticketing technology services**

237. The Office notes that the duration of the respective collaborative agreement varies with the different fast ferry operators. While TTL has a [§<]-year collaboration agreement with GFFL, the duration of the collaboration agreement signed with VFL is just for [§<] years.

238. Submissions by the Notifying Parties indicated that discussions were held between TTL and GFFL. In their submissions on 25<sup>th</sup> November 2021, GFFL indicated that the duration of the agreement was “*due to wide scope of services being developed combined with the business relationship between the parties...*”, as TTL had already provided GFFL with other technology and ticketing services in the

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<sup>76</sup> A Collaboration Agreement signed between TTL and GFFL on 1 April 2021, and another Collaboration Agreement signed between TTL and VFL on 12 May 2021.

past dealings and as such, GFFL approached TTL for the provision of similar ticketing technology services.

239. Submissions by TTL on 30 September 2021 had already indicated that:

*“A [redacted]-year agreement was established for the TTL-GFF Agreement **in view of the wider type of services requested by GFF** and the fact that the partners of GFF has an established business relationship with TTL (as it had provided them with other technology and ticketing services in the past) and therefore, both parties felt comfortable to committing to a longer period of time.” (Emphasis by the Office)*

240. Submissions by TTL on 30 September 2021 also indicated that discussions had been held with VFL whereby:

*“A [redacted]-year term agreement was established for the TTL-VF agreement **in view of the services requested by VF** and the fact that a new business relationship between the two was being established by means of this agreement.” (Emphasis by the Office)*

241. However, following a meeting held between the Office and VFL on 4 November 2021 and submissions provided on 22 November 2021 by VFL, [redacted].

242. Furthermore, during the same meeting held on 4 November 2021 and confirmed by VFL in their submissions on 22 November 2021, [redacted].

243. In their submissions of 30 September 2021, TTL argue that its business approach is that of:

*“allowing its clients/potential clients to come up with their own ideas and services request, which ideas and services request then TTL considers and determines (through its technology and experience) it can provide.*

*[...]*

*The above was the approach adopted in TTL’s dealings with GFF and VFL.”*

244. From the evidence presented above, the Office was of the view that ticketing technology services would not be provided to an undertaking unless that undertaking makes requests specifically for those services. Thus, VFL cannot be aware and cannot have the knowledge of the full range of ticketing technology services it could avail of from TTL and could not request any of the additional services without prior knowledge of them.

245. Following this evidence, the Office had concluded in the SO presented to the Notifying Parties on 13 April 2022 that there could be an element of partial foreclosure given that TTL did not pro-actively market its full range of services to VFL, and that there could be an element of discrimination against VFL which put it at a disadvantage with its competitor. Moreover, from this evidence, GFFL seemed to have prior knowledge of the ticketing technology services it could request due to prior relationship it had with TTL. Furthermore, when it comes to the tallinja Flex card, as this requires no registration (compared to personalised tallinja card), it is easy for a consumer, being it a resident of Malta or tourist, to buy the tallinja Flex card and thus with the only option being GFFL, this pool of demand is being all diverted to GFFL.

246. However, in its response to the SO on 5 May 2022, ZITI reiterated that

*“1. At the time of signing the Collaboration Agreement, TTL and GFFL’s partners already had an established business relationship between them following negotiation and conclusion of other agreements (dating back to 2018) related to GFFL’s partners and related entities’ other transport services and the acceptance of the TC on them. Given this business relationship, both parties felt comfortable with committing for a longer term of [redacted] years.*

*2. at the time of signing the Collaboration Agreement, TTL and VFL’s business relationship was still very much in its infancy. In view of this, both TTL and VFL were comfortable with a [redacted]-year agreement*

*3. GFFL requested a considerable number of services, one of which was the implementation of the overall ticketing technology system they required. This resulted in a high investment by GFFL, which investment they needed for several years.*

*4. on the other hand, VFL requested much less services, and this given that they already had their own ticketing technology system. Given the level of services requested and the level of investment made, [redacted] years were deemed to be the right term.”*

247. Furthermore, ZITI provided the Office with evidence that shows that the agreement was subject to negotiation with VFL and that TTL had given VFL time to propose any changes to the collaboration agreement. ZITI also submitted that *“had VFL requested a shorter or longer agreement time frame, TTL would have considered this request and discussed it with them. VFL however, never raised this with TTL, presumably, because they were more than happy with the term clause as drafted, and this given the length of the business relationship between it and TTL at the time.”*

248. ZITI also provided counterevidence in their response to the SO dated 5 May 2022, to VFL’s claims that [redacted] and offering the possibility to use tallinja Flex card as part of its operations. In fact, ZITI presented the Office with evidence that in fact such services were proposed to VFL.

249. The Office considers that the evidence submitted by the Notifying Parties [redacted] as sufficient to prove that such TTL services were in fact offered to all market players on the fast ferry market.

250. The Office also considers that the submitted Final Commitments by ZITI clear doubts of any partial foreclosure that could arise from differences in the Collaboration Agreement, given that TTL has now committed to a standard terms of reference/business terms which shall be disclosed to the fast ferry operators and applied on an equal, fair, reasonable and non-discriminatory basis to all Fast Ferry Operators and in particular on no less favourable terms than the ones granted to GFFL and which will regulate any contractual details and will replace the current and existing Collaboration Agreements. This will be discussed in more detail in Chapter 8 of this decision.

### **Bundled Offers**

251. Based on the details of the signed Collaboration Agreement and the submissions of the different parties, [redacted]. From publicly available information, for the period under review, i.e. June to December 2021 the Flex card can only be used in conjunction with services offered by GFFL and not with the services offered by VFL. However, the Office notes that as established in paragraph 248 of this decision, the Flex card option was offered by TTL to VFL as part of the negotiation of services on offer.

252. The Flex card is a ready to use card which customers can buy over the counter for immediate use on the bus and other transport services on offer. It can be topped up with credit and be used for pay-as-you-go transport whilst still offering reduced rates on different transport options. The Flex card may be linked with tallinja App and also offers customers the possibility to buy bundles of services using tallinja APP.

253. With specific reference to the tallinja Explore Flex card<sup>77</sup>, this provides a discount to those customers who make use of the fast ferry service through boarding with the provider GFFL. Instead of the regular price of 12 Euros, an Explore Flex card holder only pays a price of 9.99 Euros. Thus, bundling seems to be already taking place and the office considers *prima facie* that GFFL is being privileged and that there seems to be discrimination against its competitors.

254. Moreover, the Office notes that with the use of the Explore Flex card, a customer would be entitled to 1 free return trip to Gozo using the provider GFFL.

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<sup>77</sup> Till 28 February 2022, since use of tallinja card is currently suspended as already indicated in Paragraph 33 of this Decision.

255. In their submissions on 25 November 2021, GFFL confirmed that:

*“This is a bundle that is being offered by TTL in conjunction with Malta Public Transport and GFFL. Nothing is free of charge. The bundle is €29 including six days of unlimited travel on buses, one return trip on GFFL. Every time someone validates their Explore Flex Card using this bundle, a charge of €9.99 less commission/processing fees is payable by TTL to GFFL Limited”*

256. Furthermore, data provided by the Notifying Parties shows that the amount of GFFL trips utilising the tallinja Flex card bundles have been on an upward trend its launching during summer of 2021.

257. From the data provided by GFFL, the Office estimated that [x] % of all tallinja card users for fast ferry service on GFFL between June 2021 and December 2021 made use of a Flex card.

258. From the evidence gathered by the Office, TTL receives [x] % commission fees from ticket sales by GFFL with the use of the Explore Flex card (compared to [x] % commission fees earned from both operators with the use of other personalised tallinja card). Thus, the Office considers that TTL should not have the profit incentive to exclude VFL from the use of the Flex card.

259. VFL raised concerns on bundling possibility as a result of the proposed concentration in its submissions on 30 September 2021:

*“it will allow the group of which Ziti forms part to sell bundled offers to customers, covering both scheduled bus transport and fast ferry transport in one single package. This will clearly place Virtu at a competitive disadvantage, as it will be unable to match such offers.”*

260. In fact, submissions by GFFL on 23 November 2021 already indicate evidence of the bundling through the possibility of purchasing a combined ticket that covers the Valletta ferry service and the Gozo fast ferry service:

*“...one can purchase a combined ticket from Marsamxetto Steamferry Services that includes a return ticket on the Valletta Ferry and a return trip on the Gozo Fast Ferry for a combined price of €12, between 1<sup>st</sup> July and 31<sup>st</sup> October 2021, there were 170 such return tickets sold...”*

261. As such, the Single Economic Unit, of which ZITI (part of the proposed joint venture) forms part, could be incentivised to sell bundled offers to customers, covering both scheduled bus transport and different fast ferry transport, something that from the evidence gathered, the Office is already seeing with the example of the Explore Flex card and bundled tickets covering multiple ferry services.

262. The Office considers in its analysis the possibility that personalised tallinja cards could be included within a bundle of other transport services and/or discounts/offers that could be created in the future, as is already the case when a customer purchases a non-personalised tallinja card, such as the Explore Flex card, which is already bundled with a number of transport services and reduced prices/offers.

263. The Office is thus of the provisional view that offering different levels of services related to the input of ticketing technology services as set out in the respective collaboration agreements with the competitors in the downstream fast ferry market or potentially offering unequal bundled services to one operator compared to another, constitutes an element of partial foreclosure.

### **Importance of the Scheduled Bus service to the fast ferry service**

264. As already outlined in paragraph 171 of this Decision, the Office assessed the importance of the input and any related market, in this case the scheduled bus service, to the downstream market of the fast ferry service. The Single Economic Unit (which includes ZITI) also holds the exclusive right to provide scheduled bus services in Malta until the year 2030. The fast ferry service is largely dependent on the availability of scheduled bus services, since customers using the fast ferry service are unable to board the vessels with their personal car. So, a view also shared by a third-party, some form of public transport service is also important in the operations of the downstream market. As already stated in paragraph 91 of this Decision, the scheduled services in Malta are 100% owned by the Single Economic Unit.

265. Evidence has already been presented on the importance of the scheduled bus service in Section 7.3.1 of this Decision, on the ability to foreclose the input, more specifically in paragraphs 196 to 210. The Office is of the view that the related market of the scheduled bus service is important in the operations of the downstream market of the fast ferry service.

266. The arguments and evidence presented in aforementioned paragraphs also apply when assessing the incentive to foreclose the input. The Office noted all the Notifying Parties' arguments and evidence outlined during its competitive assessment of the proposed joint venture. The Office opines that the Single Economic Unit could have the incentive to schedule the public bus service to favour of one of the downstream market operators.

The Office considers that the commitments presented by ZITI more specifically Commitment 1 in Section B of the attached Final Commitments in Annex 1 of this decision remove the competition concerns regarding the scheduled Bus service in relation to the fast ferry service.

## Conclusion on the incentive to foreclose the input

267. On the basis of its assessment, the Office is of the opinion that by restricting the overall provision of the ticketing technology to existing rivals or by adopting different partial foreclosure strategies, the profit gained by the joint venture from expanding sales downstream outweighs the profit lost from reduced input sales, and thus there could be an incentive to foreclose the market.

268. The Final Commitments, which eliminate these concerns, and the Office's views on these commitments are presented in more detail in Chapter 8 of this decision.

### 7.3.3 Effect on Competition

269. As postulated in the EC Guidelines on the assessment of non-horizontal mergers *"In general, a [joint venture] will raise competition concerns because of input foreclosure when it would lead to increased prices in the downstream market thereby significantly impeding effective competition."*<sup>78</sup>

270. According to the EC Guidelines on the assessment of non-horizontal mergers, the extent to which the increase in competitors' costs caused by input foreclosure can be expected to give rise to higher downstream prices depends significantly on whether *"firms play a sufficiently important role in the competitive process on the downstream market."*<sup>79</sup> Moreover, if the firms that are the subject of foreclosure are particularly close competitors for the joint venture's downstream firm, this will increase the scope of joint venture to increase price.

271. Therefore, in this part of the assessment, the Office establishes whether the ability and incentive to foreclose competitors will result in substantial harm to overall competition in the downstream market. The analysis builds on the same evidence as the assessment of the ability and incentive to foreclose.

272. On the basis of data presented in Table 5 in paragraph 173 of this Decision, it is clear that the firm that may be the subject of foreclosure, VFL, forms a significant part of the market and represents a significant source of competition. Specifically, VFL accounted for [x%] of total passenger movements in the market for fast ferry services between Valletta, Malta and Mgarr, Gozo; and for [x%] of all passengers that purchased their fast ferry ticket using tallinja card.

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<sup>78</sup> Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2008/C 265/07), paragraph 47.

<sup>79</sup> Ibid, paragraph 48.

273. Furthermore, the firm that may be subject to foreclosure, VFL, is the only competitor to GFFL in the downstream market. The Office is of the view that this makes it more likely that the proposed joint venture would increase its price in the downstream market.

274. Effective competition may be also impeded by high barriers to entry to potential competitors, an impact that would take some time to materialise. As postulated in the EC Guidelines on the assessment of non-horizontal mergers *“the mere likelihood that the merged entity would carry out a foreclosure strategy post-merger may already create a strong deterrent effect on potential entrants.”*<sup>80</sup>

275. The anticompetitive effect of the proposed concentration partially foreclosing tallinja ticketing technology services utilised for affecting payments by both personalised and non-personalised tallinja cards (such as by increasing the cost of the input or lowering the quality of the service) to its sole competitor in the downstream market could result into an increase in the costs of VFL thereby leading to an upward pressure on their sales price.

276. In their objections to the proposed concentration on 14 September 2021, VFL stated that:

*“The impact on competition of the proposed JV is likely to be adverse both in the short and long term. Increased prices are likely in the event that Virtu is forced to exit the market. Furthermore, the proposed JV will also raise barriers to entry insofar as new entrants, aware of difficulties of obtaining access to the Tallinja Card, will be unlikely to enter the market. Structural harm to the market is likely.*

277. VFL's submissions of 24 September 2021, further emphasized the point on the impact that the proposed concentration could have on effective competition in the downstream market:

*“It should be clear that the Proposed Concentration will give the merged entity the ability to place Virtu at a significant competitive disadvantage by depriving Virtu of material access to customers. This, ultimately, may have the effect of forcing Virtu to exit the Fast Ferry Services market, thereby leaving only one player in the market. Unconstrained by market forces, and further protected by significant barriers to entry, the merged entity left alone in the market will have the ability to raise prices to the detriment of consumers.*

278. On the basis of the above, the Office is of the view that if the proposed concentration's rivals were to be foreclosed downstream, this would harm effective competition between fast ferry providers downstream.

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<sup>80</sup> Ibid, paragraph 49.

279. The effect on competition needs to be also assessed in light of any efficiencies put forward by the Notifying Parties and assess whether these efficiency claims outweigh the anti-competitive effects that potentially be associated with the proposed concentration.

280. As is postulated in Regulation 4 of the Regulations:

*“Concentrations that bring about or are likely to bring about gains in efficiency that will be greater than and will offset the effects of any prevention or lessening of competition resulting from or likely to result from the concentration shall not be prohibited if the undertakings concerned prove that such efficiency gains cannot otherwise be attained, are verifiable and likely to be passed on to consumers in the form of lower prices, or greater innovation, choice or quality of products or services.”*

281. In their submissions, the Notifying Parties argued that the concentration would give access to GFFL to equal financial support provided by ZITI as a shareholder. Moreover, ZITI would provide technical expertise with the experience it has in mass transport services, which would ultimately benefit consumers at large as GFFL would be able to provide a better service to its customers.

282. After thoroughly examining the efficiency arguments brought forward by the Notifying Parties, the Office is of the view that although these have their merits, the efficiencies substantiated by the Notifying Parties are not strong enough to outweigh the anti-competitive effects resulting from the concentration.

### **Conclusion on vertical effects**

283. For the arguments set out above, the Office is of the view that the proposed concentration could give rise to the possibility of an SLC as a result of vertical effects. For the reasons set out in this decision, the Office believes that the undertakings forming part of the proposed joint venture could have the ability and incentive to engage in input foreclosure strategies as outlined in the arguments put forward by the Office in its competitive assessment of the proposed concentration.

284. The Office notes however, that these concerns to the possibility of an SLC as a result of vertical effects have been addressed and covered in the Final Commitments presented by the Notifying Parties. The Final Commitments are annexed to this decision (Final Commitment by ZITI in Annex 1 and Final Commitments by GFFL in Annex 2). The Final Commitments and the Office's views on these commitments are presented in more detail in Chapter 8 of this decision.

## 7.4 Other non-coordinated effects – Access to commercially sensitive information

285. The following are third party objections and the Notifying Parties' arguments regarding the theory of harm concerning access to commercially sensitive information.

### Submissions by Virtu Ferries Limited

286. In view of the Office's invitation to submit any third-party objections to the proposed concentration, on the 14 September 2021 VFL raised the following concern:

*“Use of the Tallinja Card on any service, including Virtu's, gives the owner of the Tallinja Card access to valuable commercial data relating to passenger trends and demographics.*

*It should be noted that the Commission Guidelines explicitly refer to this as an issue of concern which must be taken into account in the assessment of non-horizontal mergers:*

*78 The merged entity may, by vertically integrating, gain access to commercially sensitive information regarding the upstream or downstream activities of rivals. For instance, by becoming the supplier of a downstream competitor, a company may obtain critical information, which allows it to price less aggressively in the downstream market to the detriment of consumers. It may also put competitors at a competitive disadvantage, thereby dissuading them to enter or expand in the market.*

*This is an evident issue of concern raised by the proposed concentration.”*

287. On the 24 September 2021, VFL submitted the following observations:

*“The Tallinja Card allows the operator of the card – in effect, the New Joint Venturer – access to all data relating to its use, including its use for the purposes of purchasing Fast Ferry Services. The New Joint Venturer will, therefore, have access to granular detail of any passengers who travel on Virtu's vessels making use of the Tallinja Card. The Non-Horizontal Merger Guidelines highlight this scenario as a particular concern:*

*The merged entity may, by vertically integrating, gain access to commercially sensitive information regarding the upstream or downstream activities of rivals. For instance, by becoming the supplier of a downstream competitor, a company may obtain critical information, which allows it to price less aggressively in the downstream market to the detriment of consumers. It may also put competitors at a competitive disadvantage, thereby dissuading them to enter or expand in the market.*

*In effect, the Proposed Concentration will lead to a situation where Virtu's only rival will have full and unfettered access to Virtu's data in so far as customers using the Tallinja card are concerned. Indeed, it is critical to note that since the Tallinja Card is owned by the New Joint Venturer that has full data on Tallinja Card users – data which is not even accessible to Virtu itself – the New Joint Venturer will have even more data about an important segment of Virtu's customers than Virtu itself. This will place Virtu at a clear competitive disadvantage."*

288. Moreover, in replies to an RFI on the 30 September 2021 VFL submitted that:

*"Additionally, Virtu is very concerned by the fact that the Tallinja Card grants the owner of the card system access to all data relating to its use. The merged entity will therefore have access to granular detail of any passengers who travel on Virtu's vessels using the Tallinja Card. The Non- Horizontal Merger Guidelines highlight this scenario as a particular concern:*

*The merged entity may, by vertically integrating, gain access to commercially sensitive information regarding the upstream or downstream activities of rivals. For instance, by becoming the supplier of a downstream competitor, a company may obtain critical information, which allows it to price less aggressively in the downstream market to the detriment of consumers. It may also put competitors at a competitive disadvantage, thereby dissuading them to enter or expand in the market.*

*In effect, the proposed concentration will lead to a situation where Virtu's only rival will have full and unfettered access to Virtu's data in so far as customers using the Tallinja card are concerned. Indeed, it is critical to note that since the Tallinja Card is owned by the group of which Ziti forms part, the proposed concentration will gain access to full data on Tallinja Card users – data which is not even accessible to Virtu itself. The merged entity will, perversely, have even more data about an important segment of Virtu's customers than Virtu itself. This will enable the merged entity to create targeted campaigns aimed specifically at Virtu's customers, with the aim of drawing customers away from the services offered by Virtu."*

289. On the 19 October 2021, with reference to a letter from TTL, VFL reiterated its view that:

*"[...] we note that the group of companies of which Tallinja Tech Limited forms part is currently seeking to obtain approval of a merger with our sole competitor for the provision of the fast ferry service between Malta and Gozo. As you know, use by our customers of the Tallinja App, the Tallinja Tap and Go programme, and indeed the Tallinja Card in general gives Tallinja Tech Limited full and unfettered access to details and usage patterns of our customers. Indeed, the information about Virtu's customers obtained by Tallinja Tech Limited exceeds that obtained by Virtu itself when the Tallinja Card is used. This raises concern on our part that, in the event that the aforementioned*

*merger is approved, our competitor will in effect gain access to sensitive commercial data about our customers and operations.”*

290. On the 29 October 2021, VFL replied to the submissions by ZITI and argued that:

*“The Joint Venture Potentially acquiring sensitive commercial data on its competitor*

*Ziti contends in its submissions that data obtained in relation to usage of the Tallinja Card is not disclosed to third parties. Reference is made, in this context, to the privacy policy which can be found at <https://www.publictransport.com.mt/en/privacy-policy>*

*Reference is made, in particular, to the heading “Sharing your Information” in the policy. In terms of this policy, data can be shared with “Companies in the group to which Malta Public Transport belongs - **related entities and subsidiaries** use the information collected to help us improve the content and functionality of our websites; to better understand our customers and markets; and to improve our products and services. Members of the group vary from time to time” (emphasis added)*

*It is not correct, in Virtu’s view, to state that data relating to Tallinja card usage cannot– in the event of the joint venture being approved – be disclosed to the joint venture, in so far as it would be considered to be a related entity.*

*Whilst Ziti is correct to state that not all of Virtu’s customers are Tallinja card users, Virtu has in previous submissions highlighted the size of this particular cohort of customers, which is clearly material. With the recent announcement that public land based transport will be free of charge – and on the reasonable assumption that access to this free service will be contingent on a customer possessing a Tallinja card – it is likely that this cohort of customers will grow in importance.”*

291. On the 9 March 2022, in a reply to several questions from the Office, VFL submitted *inter alia* that:

*“Virtu would in this context refer once more to paragraph 78 of the Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, which explicitly acknowledges gaining access to sensitive information as an issue of potential competitive concern. In Virtu’s view, allowing a competitor to have access to Virtu’s customer database would allow the merged entity to obtain access to confidential data on the business activities of Virtu, with a chilling effect on competition. From the perspective of the merged vertically integrated company, Virtu will be a competitor on the downstream market) and simultaneously a customer on the upstream market. The merged vertically integrated company will have the ability to detect and indeed preempt commercial strategies adopted by Virtu for the purposes of winning customers from Virtu. In the long-run, this may lead to Virtu exiting the market.*

*We assume that this question is being asked in the context of the questions preceding it, and that therefore the concerns that competitive disadvantages which might result from a competitor having access to an important portion of Virtu's customer data. In brief, access to this data would enable Virtu's only competitor to engage in customer foreclosure, i.e. to eliminate or hamper Virtu's access to customers, including by unfairly and selectively targeting Virtu's customers in the short term. In the long run, this could in effect make Virtu unable to sustain operations in the market."*

## **Notifying Parties' arguments**

### **Submissions by ZITI Technologies Limited**

292. On the 13 October 2021, ZITI replied to the third-party objections lodged by VFL as follows:

*"The Joint Venture potentially acquiring sensitive commercial data on its competitor*

#### *a. Overview of the tallinja card*

*The tallinja card is a payment card that one can avail of when using certain transport services that recognise and accept it. Through said card its holder is afforded not only the ability to pay for transport services but also, in some cases, to benefit from reduced fares. In all cases however, the fares charged to the card are set exclusively by the transport service providers themselves and not by the card's owner (MPT) and/or manager of the card (TTL).*

*In order to obtain a personalised tallinja card, one has to fill in an online application. Details on the applicant are requested (such as name, surname, residential address, ID card number, photo and so on). Once these are collected, a personalised tallinja card is issued in that person's name. This card cannot be shared with others and must only be used by its registered holder. Depending on the application filled in applicants are issued with a certain type of card (such as an adult, student or concession card). Depending on the card's type and the transport service being used, different fares apply.*

*In the case of the two fast ferry operators, and as is clear from the Collaboration Agreements signed with each of them by TTL, a minimum discount of [2%] in the retail price charged to non-tallinja card holders was requested. The fare ultimately charged however, was left entirely in the hands of the operators themselves.*

#### *b. Data concerns expressed by Virtu*

*Due to the nature of the tallinja card certain information about its user is collected. The data collected is held by MPT but may be accessed, to a certain extent, by TTL as the latter is the manager and operator of the card. TTL's access to the data collected is limited to that outlined in MPT's privacy policy and the instructions given to it from time to time by MPT.*

*The information collected essentially includes the tallinja card holder's personal details (such as name, surname, photo, address, email address, ID card number and mobile number) and his/her transaction history (each time that a tallinja card holder taps the card certain details such as the transport service used, the time and date of use, and the fare deducted are collected).*

*As is outlined in MPT's privacy policy the information above-mentioned is collected so that:*

- The applicant can be issued with a tallinja card;*
- The tallinja card holder can benefit from the expected payment service and transport service;*
- Queries posed by the tallinja card holder can be addressed after his/her identity is verified (for security purposes);*
- The tallinja card holder, who tops up his/her card so as to be able to use the credit on transport services, remains fully aware of how his/her credit is being spent, when and on what service;*
- Transport service providers can be billed the processing fees due for each transaction carried out on their service; and*
- Transport service providers can receive the amounts due to them following the tallinja card holder's use of the card on their transport service.*

*Use of the information collected is limited to the above and, as also specifically stated in MPT's privacy policy, the sale of data to third parties is not permitted.*

*With regards to the sharing of data with third parties, this is only limited to those instances outlined in the privacy policy and even in such instances only that data which is strictly necessary is shared.*

*Both MPT and TTL also ensure that as much as possible no data is shared with the transport service providers forming part of the tallinja card network. In those instances where however, data needs to be shared only that data relating to the transport service provider making the request is disclosed. Transport service providers do not and cannot gain access to information about other transport service providers. Moreover, any data that may be shared as outlined above will be as much as possible devoid of any details, especially relating to specific or identifiable tallinja card users. This point is specifically outlined in both Collaboration Agreements signed with the fast ferry operators.*

*It is also important to point out that MPT's commitment to protect the data that it holds and TTL's commitment to protect that data that it can access is not just enshrined in their policies, values and agreements, but also constitutes a legal obligation on their part under the GDPR. A legal obligation that if breached carries fines up to 20 million euros or 4% of the annual global group turnover, whichever is highest.*

*In view of the above, it is clear that the data collected through the tallinja card - held by MPT and accessed by TTL - is one that only these two companies can see in its totality. Other companies have none or only limited access to this data, and where any access is granted it is only to data that as much as possible is devoid of any information and that only relates to that company itself. These restrictions also apply to Ziti, which in fact has no access nor visibility of the data collected by MPT and TTL.*

*c. Addressing Virtu's statement that MPT has access to valuable commercial data relating to passenger trends and demographics.*

*In addition to that stated in point 3 (b) above, MPT and TTL only have access to data generated by holders of the tallinja card each time they make use of it. They, however, do not have access to data generated by users (of the same transport services) that pay through different means (such as by cash or credit card). This essentially means that the data generated by tallinja card users can never be said or interpreted as representing the full picture of Virtu's (or any other transport provider for that matter) passenger trends.*

*Moreover, MPT and TTL always insist that any commercial data that is or may be made available to them by transport service providers is always covered by a Non-Disclosure Agreement or confidentiality clauses that clearly outline the limits of disclosure. Likewise, use of such information is also strictly limited to the purposes outlined in said agreements.*

*Finally, (i) Ziti does not have, will not have nor does it or will it ever need access to any of the information mentioned above and (ii) for the reasons and as per the restrictions above-mentioned neither GFF nor Ziti can ever be given access to data relating to Virtu or any other transport service provider that accepts the tallinja card as a form of payment."*

293. On the 24 September 2021, the Office asked TTL regarding the type of commercial data that is stored by TTL in relation to VFL and GFFL. On the 30 September 2021, TTL replied that:

*"TTL records the following commercial data each time a tallinja card is used to purchase a ferry ticket/to make a query*

*The customer number of the tallinja card used.*

*The UID (meaning the barcode card number of the Tallinja card used)*

*The date and time when the tallinja card is used on a ferry trip*

*The fare charged/to be charged*

*An external booking reference which is used during the reconciliation process*

*The above data is stored so that TTL can provide the contracted services to the fast ferry operators concerned. This essentially means that TTL stores the above data so as to be able to confirm a query and/or charge the necessary amount of the fare from the correct Tallinja card and to disburse the funds back to the fast ferry operator concerned.*

*Please note that the above data is treated as sensitive confidential data and as such TTL does not share and will never share information relating to one fast ferry operator with the other, nor with any other company.”*

### **Assessment by the Office**

294. According to the EC Guidelines on the assessment of non-horizontal mergers, “*a merged entity, by vertically integrating, may gain access to commercially sensitive information regarding the upstream or downstream activities of rivals.*”<sup>81</sup> Such information may be used by the merged entity to undertake conducts which would put competitors at a competitive disadvantage.

295. In its third-party objections and subsequent submissions VFL raised the concern that there could be a risk of an undue exchange of commercially sensitive information as a result of the proposed full-function joint venture between Bianchi and Sons Limited, Merrill Invest Limited and ZITI.

296. In its submissions TTL replied *inter alia* that MPT and TTL always insist that any commercial data that is or may be made available to them by transport service providers is always covered by a Non-Disclosure Agreement or confidentiality clauses that clearly outline the limits of disclosure. Likewise, use of such information is also strictly limited to the purposes outlined in said agreements.

297. In this Chapter of the Decision, the Office considers whether post-transaction, GFFL could potentially exploit commercially sensitive information obtained from its rival VFL to benefit its own position in the market for passenger fast ferry services between Valletta, Malta and Mgarr, Gozo.

298. While this concern relates to a possible distinct behaviour by the proposed concentration that has the potential to harm the competing rival VFL in and of itself, if combined with the foreclosure strategy

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<sup>81</sup> Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2008/C 265/07), paragraph 78.

discussed in rest of Chapter 7 above, it has the potential to exacerbate the possible negative effects of such strategy on competition in the market for passenger fast ferry services between Valletta, Malta and Mġarr, Gozo.

299. To assess the effects of this potential conduct, the Office first considered whether the information that GFFL could acquire as a result of the proposed joint venture constituted “*commercially sensitive information*”. Then, it has assessed the competitive disadvantage that VFL could suffer as a result of GFFL potentially making use of that information.

300. For a finding of anticompetitive effects pursuant to paragraph 78 of the Non-Horizontal Merger Guidelines, it is not sufficient to demonstrate that, through a merger, the merged entity would gain access to commercially sensitive information on its rivals, but that it is also necessary to show that access to that information could have a negative impact on competition.

### **Commercially sensitive information**

301. Primarily the Office analysed whether through the proposed concentration, post transaction, GFFL could gain insights into users who use the services of VFL.

302. As stated by TTL the information collected essentially includes the tallinja card holder’s personal details (such as name, surname, photo, address, email address, ID card number and mobile number) and his/her transaction history (each time that a tallinja card holder taps the card certain details such as the transport service used, the time and date of use, and the fare deducted are collected)<sup>82</sup>. Thus, the Office considers that TTL possesses commercially sensitive information about the passengers making use of the fast ferry services between Valletta, Malta and Mġarr, Gozo, including names, addresses, purchasing history and product and service preferences. In view of the above, the Office considers that TTL would be in possession of valuable commercially sensitive information on the purchasing habits, history and behaviour pertaining to VFL customers.

### **The exchange of commercial sensitive information as a result of the new proposed joint venture is unlikely to have a significant detrimental effect on competition**

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<sup>82</sup> Submissions dated 13 October 2021. See also replies by TTL dated 30 September 2021.

## **Statement of Objections**

303. In its SO the Office had provisionally concluded that the potential misuse of commercial sensitive information by the proposed joint venture would likely have a significant detrimental effect on competition in the market for passenger fast ferry services between Valletta, Malta and Mġarr, Gozo that would enable it to put VFL at a competitive disadvantage compared to the situation prior to the proposed concentration.

304. In its SO the Office provisionally considered that post transaction the proposed concentration would create an unfair competitive advantage between TTL and GFFL based on the flow of potential commercial sensitive information for example by GFFL's increased ability of winning more customers either by:

- i. having access to those passengers who make use of VFL, thereby deriving a customer list which can be used by GFFL post transaction to directly target VFL's customers and encourage them to use the services of GFFL through selective targeted advertising or marketing campaign by offering price reductions and/or other offers to draw away customers from VFL;
- ii. having access to information regarding for instance the fare deducted or usage patterns GFFL could get insight into promotional offers or price reductions made by VFL to their customers and utilizing such information by either responding more quickly to the rival's activities with its own price reductions or offers or by pre-empting any incentives and initiatives of rival VFL. However, VFL's motivations to make procompetitive moves would be diminished in view of this swift response by GFFL, as their first-mover advantages would be lessened. As a result, consumers may be harmed as a result of the fact that the competitors' information being misused.

305. In view of the above considerations in its SO, the Office provisionally considered that GFFL's position in the fast ferry service market between Gozo and Malta will be strengthened since the merged entity will be armed with knowledge of its competitor's customers information and may engage in targeted offers to draw away customers from using the VFL ferry service. For the reasons above mentioned the Office has come to the provisional view that the concentration as notified will strengthen the position of GFFL in the market as a result of which effective competition will be significantly impeded. The Office considers that it will make VFL a less effective competitor.

## **Post Statement of Objections**

306. The Office re-assessed whether in view of the information stored by MPT/TTL, post transaction GFFL would be able to access commercial sensitive information that could have a negative impact on competition and that could undermine the growth of the rivals of GFFL, in this case, VFL.

307. Further to internal considerations on the characteristics of the fast ferry market operating between Valletta and Mġarr, the Office discarded its views regarding the impact on competition that the flow of commercial sensitive information could have on the market under consideration and reconsidered that even if the merged entity might have the ability and incentive to share commercially sensitive information, the proposed transaction is not likely to significantly impede effective competition due to confidentiality concerns.

308. Hence more importantly after the issuing of the SO, the Office considers that, even if the merged entity were to have the ability and incentives to put VFL at a competitive disadvantage by using the Customer Information, the related practices, such as targeted advertising, are unlikely to have a negative impact on effective competition in the market for ferry services between Valletta, Malta and Mġarr, Gozo for the reasons outlined hereunder.

309. The Office understands that VFL has terminated the collaboration agreement with TTL and stopped accepting the payment of its passenger fares through the tallinja card. This means that, as a matter of fact and at this particular point in time, TTL cannot obtain confidential information from VFL. Therefore, any competition concerns related to information exchange are no longer in existence.

310. However, without prejudice to the above, even if VFL still accepted payments through the tallinja card, the Office considers the following:

311. The Office also assessed whether the proposed merged entity could use information to foresee Virtu's pricing and discounts and adjust its offers accordingly or price less aggressively.

312. The Office here makes reference to a merger investigated by the Swedish Competition Authority in the technology sector, i.e. Assa Abloy's acquisition of Swesafe AB Case, where the Authority analysed whether the sharing of sensitive commercial information between the parties could potentially harm effective competition. The Swedish Competition Authority investigated whether there was the *"the likelihood of Swesafe using information regarding Assa's discounts to other locksmiths, in other words competitors to Swesafe, in an anticompetitive way. The Swedish Competition Authority investigated if Swesafe's knowledge of Assa's discount would be merger specific, and whether Swesafe could use the information to foresee its competitors' pricing and adjust its offers*

accordingly”<sup>83</sup>. It was found inter alia that, “ *The investigation showed that Assa’s discounts, to a large extent, were known on the market since they were based on publicly available price lists and volume discounts. Further, the investigation showed that the price was determined by other significant posts, such as material and labour costs. Hence, the Swedish Competition Authority found that Swesafe would not get enough information to foresee its competitors’ pricing.*

313. It is to be mentioned that both standard prices and discounted prices through tallinja card and any discounts through Virtu’s loyalty programme pre-March 2022 were known to the market since they were publicly available.

314. When this is considered in combination with the fact that VFL can offer price discounts and offers through means other than Tallinja card (e.g. sms, email, private message through social media) and customers of VFL can pay through other means not utilising the Tallinja Technology (e.g. cash, debit, credit card through online or POS) means that the merged entity would not be able to use information on Virtu’s pricing/discounts/offers to such an extent that effective competition would be substantially lessened.

315. Hence, the Office’s view is that the proposed merged entity would not be able to acquire sensitive competitive information re: offers and discounts from VFL and utilize it to respond more quickly to the VFL’s activities with its own price reductions or product upgrades.

316. Moreover, without prejudice to the above, the Office is of the view that there are factors other than price that determine whether a consumer will use one service operator or another (e.g. the time of the ferry service).

317. In view of the above, the Office considers that any targeted advertising through potential flow of commercially sensitive information is unlikely to have a substantial negative impact on effective competition which could lead to non-horizontal non-coordinated effects and by reducing the ability and incentive of Virtu to compete.

### **Conclusion on the impact on competition**

318. In light of the above, the Office considers that the concentration would not significantly impede effective competition as a result of non-coordinated effects due to access to commercially sensitive information.

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<sup>83</sup> [https://one.oecd.org/document/DAF/COMP/WD\(2019\)21/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2019)21/en/pdf)

## **Chapter 8: Commitments**

319. In order to render the proposed full-function joint venture compatible with the Regulations, each of the Notifying Parties, ZITI and GFFL, submitted a set of commitments under the proviso to Regulation 6(2), Regulation 8(2) and the proviso to Regulation 9(2) of the Regulations on 17 May 2022 (hereinafter referred to as “Initial Commitments”).

320. The Office analysed and reviewed the submitted Initial Commitments. Moreover, these Initial Commitments were market tested in order to assess whether they are sufficient and suitable to remedy the concerns identified by the Office.

321. Following the reviewing period and the market testing, amended commitments were submitted by the Notifying Parties on 14 June 2022 (hereinafter referred to as “Final Commitments”). The Final Commitments are annexed to this decision (Final Commitment by ZITI in Annex 1 and Final Commitments by GFFL in Annex 2) and form an integral part thereof.

### **8.1 Final Commitments**

322. The Final Commitments by ZITI consisted of two parts; one commitment seeks to address the Office’s concerns in relation to the scheduling and operation of scheduled bus services to and from the Valletta/Mġarr fast ferry terminals in terms of Port Notice 02/2021, and the other to ensure that TTL, the subsidiary of ZITI, provides commercial access to the tallinja card (both personalised and non-personalised) and the related ticketing technology to all fast ferry operators on the Valletta-Mġarr fast ferry route.

#### *Commitment 1*

323. The first commitment consisted in ZITI ensuring that MPT will treat all present and future Valletta-Mġarr fast ferry operators on FRAND terms, in relation to the scheduling and operation of scheduled bus services to and from the Valletta/Mġarr fast ferry terminals.

324. In the commitment, it is noted that there are two types of bus routes; “Non-Commercial Routes” which are mandated by TM as part of the Concession Agreement and “Commercial Routes” that are at the discretion of MPT to operate.

325. MPT commits that the agreed Summer and Winter schedules as agreed and authorised by TM, shall be published on MPT’s website and therefore made public. These Non-Commercial routes will be

communicated to all the fast ferry operators and that the Office will have access to such Non-Commercial schedules from the MPT website in order to ensure that there is no preferential nor discriminatory treatment afforded to any of the fast ferry operators on an ongoing basis.

326. Finally, any fares to be charged in terms of the scheduled bus services (be it Commercial and Non-Commercial routes) which shall be provided by MPT to the passengers of any of the fast ferry operators operating to and from the Valletta/Mġarr fast ferry terminal, shall be charged at FRAND terms and equal rates to all the operators in the fast ferry market that MPT is aware of at the time.
327. ZITI shall also ensure to notify the Office and the fast ferry operators of any changes to the schedule of MPT's Commercial routes and Non-Commercial routes within reasonable time.

#### *Commitment 2*

328. Under the second commitment, ZITI ensures that TTL provides commercial access to the tallinja card (being both personalised and non-personalised) and the related ticketing technology on FRAND terms and in particular on no less favourable terms than the ones granted to GFFL in all respects through standard terms of service and prices, which shall be available on demand to all fast ferry operators that currently operate, or those that may wish to enter, the Valletta-Mġarr fast ferry market in line with Port Notice 02/2021 and subject to the signing of the necessary Non-Disclosure Agreements.
329. TTL shall thus commit to a standard 'reference letter' or 'terms of business' that will regulate contractual details such as duration, price, extent of service, commission rates, etc., which will replace the current Collaboration Agreements with the different operators. This reference offer/business terms will consist of standard terms and conditions applicable equally and fairly to all fast ferry operators who choose to be bound with them, and that they will be able to freely choose the services they would like form TTL.
330. Under the proposed terms of reference/business terms, TTL shall be removing the clause in the current Collaboration Agreements that stipulates that the fares charged to tallinja card holders are at least [~~3~~] $\%$  lower than the retail price at which the same service is offered to non-tallinja card holders. Instead the fast ferry operator shall at its own discretion provide a discount on the standard rate when a customer uses tallinja card; in the event that the discount rate is of or exceeds [~~3~~] $\%$ , the fast ferry operator shall benefit from lower processing fees.
331. ZITI commits to ensure that TTL grants access to the tallinja card (being personalised and non-personalised) and the required ticketing technology to access tallinja card as a payment to all fast

ferry operators under FRAND terms, and not to take any measure that provides a competitive advantage to GFFL.

#### *Monitoring Trustee*

332. As part of the Final Commitments, a Monitoring Trustee shall be appointed by ZITI and is obliged to monitor ZITI's (through MPT for Commitment 1 and TTL for Commitment 2) compliance with the conditions and obligations imposed by the Final Commitments, and FRAND obligations including pricing commitments, and to report back to the Office on the matter. The Monitoring Trustee shall also monitor GFFL's compliance with its commitment (outlined in paragraph 334). Also, the Monitoring Trustee is tasked with providing an objective, appropriate and independent management of such confidential information. The tasks and reporting obligations of the Monitoring Trustee are outlined in more detail in Annex 1 Section C of this Decision.

333. Moreover, the Monitoring Trustee shall be granted access to data by ZITI, TTL and each operating fast ferry operator, for which all Notifying Parties are obliged to provide such data and the necessary documentation that is requested for its assessment. The duties and obligations of ZITI through TTL are listed in Annex 1 Section D of the Final Commitments. On the other hand, a separate commitment has been made by GFFL, for which GFFL also commits to provide the necessary requested data and cooperation with the Monitoring Trustee which are listed in Annex 2 Section B of the Final Commitments.

334. The Monitoring Trustee is tasked to immediately report to the Office should any of the Notifying Parties fail to cooperate with their duties and obligations as set out in the Final Commitments.

#### *Other Provisions*

335. The mandate of the Monitoring Trustee may only be amended in writing and with prior approval from the Office.

336. The Office may where necessary and upon written request from ZITI, or in appropriate cases under its own initiative, waive, modify or substitute the Final Commitments.

337. The Final Commitments are to remain into effect for a minimum duration of six years, potentially renewable at the discretion of the Office.

338. The above are just a summary description of the commitments as found in Annex 1 and 2. The full commitments and described in greater detail in Annex 1 and 2 which are attached to this Decision.

## 8.2 The Office's assessment of the Final Commitments

339. For the reasons set out below, the Office considers the Commitments to be sufficient in scope and suitable to eliminate the serious doubts as to the compatibility of the Transaction with the Regulations in relation to the market for fast-ferry service between Valletta, Malta and Mġarr, Gozo.

340. The Office opines that the serious doubts raised in its competitive assessment of a possible SLC as a result of vertical effects, for both possible total and partial foreclosure strategies, have been sufficiently eliminated through the provisions presented in the Final Commitments put forward by the Notifying Parties and agreed upon with the Office.

341. In reaching the decision to accept the Final Commitments, the Office has fully considered all the evidence and the representations made by the Notifying Parties and by third party objectors.

342. The Office had concerns that through the Single Economic Unit's (which ZITI forms part thereof) dominance in the related market for public land transport by bus, once the proposed joint venture goes through, could have the ability and incentive to put the competitors in the market for the fast ferry services at a competitive disadvantage by altering the scheduling and operation of scheduled bus services in favour of the joint venture. These competition concerns have been removed following the commitment made by ZITI to ensure that all present and future fast ferry operators on the Valletta-Mġarr fast ferry route will be treated on FRAND terms and that there will be full transparency of any changes in future changes in the scheduling of bus routes.

343. The concerns that the Office had with regards to any potential foreclosure strategies resulting in either (i) refusing to supply the tallinja ticketing technology; (ii) increasing the price and/or commission fees for the technology; or (iii) degrading the quality of the offering, have been removed with the commitment made by ZITI, through TTL, that commercial access to the tallinja card (both personalised and non-personalised) and the related ticketing technology shall be provided on FRAND terms for all fast ferry operators on the Valletta-Mġarr fast ferry route and in particular on no less favourable terms than the ones granted to GFFL in all respects *inter alia* including without limitation price conditions, quality of service, maintenance and future upgrades. The Office is of the view that through this commitment, any possible partial foreclosure presented in Chapter 7 of this Decision are being covered.

344. In addition, TTL undertakes in its role as supplier of the tallinja Card (both personalised and non-personalised) and the related ticketing technology required to allow its acceptance as a payment card, not to take any measure that provides a competitive advantage to GFFL. For example, TTL commits to offer and/or provide tallinja card and related ticketing technology updates, functionalities

and support services to all Fast Ferry Operators that currently operate, or those that may wish to enter the Valletta-Mġarr Fast Ferry market on no less favourable terms than those granted to GFFL, including on aspects related to availability and timing.

345. Moreover, the concerns put forward by the Office in relation to the perceived differences in the Collaboration Agreement entered into separately by GFFL and VFL with TTL, have been removed through the commitment made by TTL to replace the existing Collaboration Agreements with a 'reference offer' or 'terms of business' applied on FRAND terms which, in the Office's view, regulates contractual details in a more transparent and equal manner. The Office notes that any changes in pricing or charges contractually imposed by TTL shall be applied in a non-discriminatory manner to all fast ferry operators.
346. The Office also considers of essence the commitment to appoint a Monitoring Trustee that will monitor compliance of the Notifying Parties with the Final Commitments. The Office notes that the monitoring Trustee shall be appointed and approved effectively and within a short period of time from the effective date of the Final Commitments. The Office's view is that the Monitoring Trustee, acting on behalf of the Office, shall effectively monitor the Notifying Parties' compliance with the Final Commitments.
347. Thus, the Office is of the view that the Final Commitments presented in Annex 1 and Annex 2 of this Decision, will be safeguarding against any future developments with regards to the tallinja card that could have resulted in potential foreclosure strategies in the market under review.

## Chapter 9: Conclusion and Decision

348. For the reasons outlined above, the Office considers the Commitments to be sufficient in scope and suitable to eliminate the serious doubts as to the compatibility of the Transaction with the Regulations in relation to the market for fast-ferry service between Valletta, Malta and Mġarr, Gozo.

349. Where the undertakings concerned commit a breach of the Commitments, the Director General may revoke the clearance decision in accordance with regulation 6(3) of the Regulations. The undertakings concerned may also be subject to fines and periodic penalty payments under Articles 13(2) and 14(1) of the Regulations.

350. Pursuant to the proviso to regulation 6(2) and 8(2) of the Regulations, the Office may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-a-vis the Director General with a view to rendering the concentration lawful in terms of the provisions of these regulations.

351. The Decision in this case is conditioned on full compliance with the Final Commitments as set out in Annex 1 and 2 to this Decision.

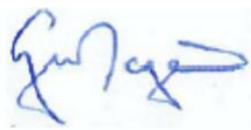
352. The full text of the commitments is attached as Annex 1 and 2 to this Decision and forms an integral part thereof.

353. The Notifying Parties have accepted the commitments and agreed to comply fully with the commitments as per email of the 8 June 2022 from GFFL and letter from ZITI dated 14 June 2022.

354. For the above reasons set out in this Decision, the Director General of the Office for Competition has decided, in terms of regulation 6(1)(ii) and 8(2) of the Control of Concentrations Regulations,

- i. that the notified Concentration as modified by the Commitments does not raise serious doubts about its lawfulness;
- ii. not to oppose the notified Concentration as modified by the Commitments; and
- iii. to declare it a lawful Concentration, subject to the Notifying Parties' full compliance with the Final Commitments.

Signed by:

A handwritten signature in blue ink, appearing to read 'Godwin Mangion', with a long horizontal stroke extending to the right.

Mr. Godwin Mangion,  
Director General,  
for and on behalf of the Office for Competition

**ANNEX 1**

**Case COMP – MCCA/09/2021**

**COMMITMENTS OFFERED BY ZITI TECHNOLOGIES LIMITED TO THE OFFICE FOR  
COMPETITION**

**Object: Commitment package offered by ZITI Technologies Limited (hereinafter 'Ziti') to the Office for Competition in relation to the full function joint venture between Bianchi and Sons Limited, Merrill Invest Limited and Ziti Technologies Limited**

Pursuant to regulation 6(2), 8(2) and the proviso to regulation 9(2) of the Control of Concentrations Regulations (the "Regulations"), Ziti hereby enters into the following Commitments (the "Commitments") vis-a-vis the Office for Competition (the "OfC") with a view to rendering the creation of the full function joint venture between Bianchi and Sons Limited, Merrill Invest Limited and Ziti Technologies Limited (the "Concentration") compatible with the Regulations by its decision pursuant to Article 6(1)(ii) and 8(2) of the Regulations (the "Decision").

The Commitments shall take effect upon the date of notification of the Decision.

This text shall be interpreted in light of the Decision, in the general framework of Maltese law, in particular in light of the Regulations.

## **SECTION A**

### **DEFINITIONS**

For the purposes of these Commitments, the terms below shall have the following meanings, whether used in the singular or plural:

**Affiliated undertakings:** undertakings controlled by the Notifying Parties and/or by the ultimate parents of the Notifying Parties whereby the notion of control shall be interpreted pursuant to Article 3 of Council Regulation (EC) No 139/2004 and in light of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings.

**Confidential Information:** any business secrets, know-how, commercial information, or any other information of a proprietary nature that is not in the public domain.

**Conflict of Interest:** any conflict of interest that impairs the Monitoring Trustee's objectivity and independence in discharging its duties under the Commitments.

**Effective Date:** the date of notification of the Decision.

**Monitoring Trustee:** one or more natural or legal person(s), represented by one or several individuals, independent of the Notifying Parties and Fast Ferry Operators operating on the Valletta-Mġarr Ferry market in line with Port Notice 02/2021 who is/are approved by the OfC and appointed by Ziti, and who has/have the duty to monitor compliance of the Notifying Parties with the conditions and obligations contained in the commitments as set out in Annex 1 and Annex 2 appended to the Decision.

**Notifying Parties:** Ziti Technologies Limited (including Tallinja Technologies Limited) and Gozo Fast Ferry Limited

**OfC** – Office for Competition

## **SECTION B**

### **COMMITMENTS**

#### **COMMITMENT 1**

Ziti undertakes to ensure that Malta Public Transport Services (Operations) Limited (hereinafter 'MPT') will treat all present and future Valletta-Mġarr Fast Ferry operators<sup>84</sup> (operating between Valletta/Mġarr in terms of of Port Notice 02/2021 – hereinafter "Fast Ferry Operators") on equal, fair, reasonable and non-discriminatory (hereinafter 'FRAND') terms, in relation to the scheduling and operation of scheduled bus services to and from the Valletta / Mġarr Fast Ferry terminals.

In this regard, it is important to note that certain scheduled bus services to and from the Valletta and Mġarr Fast Ferry terminals are established and agreed upon between MPT and the Authority for Transport in Malta (hereinafter 'TM') which is the relevant transport authority in terms of Maltese law, and who in turn decides whether or not to synchronise the bus services with the above fast ferry services. These agreed-upon routes are the following:

- X133 – Ferry Terminal – Valletta Terminus;
- 300 – Ferry Terminal – MDH via University;
- 150 – Ferry Terminal – MCAST; and
- 301 – operates from the Ferry in Mġarr to Victoria but it should be noted that so far, this has not been synchronised with the fast ferry scheduled times;

There are other routes that operate from the Mġarr Ferry Terminal in Gozo with lower frequencies which are also not synchronised with the Fast Ferry services.

The above routes are deemed to be "Non-Commercial Routes".

Therefore, in case of Non-Commercial Routes, MPT cannot unilaterally change bus schedules and timetables without TM's prior approval.

There are other commercial routes that are established and set freely by MPT without TM's

authorisation or intervention which in Summer 2021, included the following:

- TD30 – Ferry in Mġarr to Xlendi; and
- TD31 – Ferry in Mġarr to Marsalforn

The above routes are deemed to be "Commercial Routes".

With regards to these commercial routes (which are at the sole discretion of MPT) MPT undertakes and commits to treat all Fast Ferry Operators equally and without distinction when it comes to the commercial routes scheduling to and from the Valletta [bus stop name: "Lascaris"] and Mġarr, Gozo [bus stop name: "Vapur"]

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<sup>84</sup> There are currently two Valletta-Mġarr Fast Ferry Operators in terms of Port Notice 02/2021 namely, Virtu Fast Ferry and Gozo Fast Ferry.

terminals.

For avoidance of doubt, this part of the commitment does not extend to the Non-Commercial Routes. This is also not a commitment to operate the Commercial Routes indefinitely, but rather a commitment by MPT to operate them in a way that ensures that both fast ferry operators will be treated equally.

For full transparency, the agreed Summer and Winter schedules as agreed and authorised by TM, will be published on MPT's website and therefore made public. MPT will communicate these Non-Commercial Routes schedules to all the Fast Ferry Operators that MPT is aware of at the time of communication. The OfC will have access to such Non-Commercial schedules from the MPT website and this in order to ensure that the OfC is satisfied that no preferential treatment or discriminatory treatment is afforded to any of the Fast Ferry Operators on an ongoing basis.

Any fares to be charged in terms of the scheduled bus services (be it for commercial and non-commercial routes) provided by MPT to the passengers of any of the Fast Ferry Operators, shall be charged at FRAND terms and equal rates to all the operators in the Fast Ferry Market that MPT is aware of at the time.

Ziti shall ensure that MPT undertakes to formally notify (i) the OfC and (ii) any Fast Ferry Operators that provide it with an email address for this purpose, of any changes to the schedules of MPT's commercial routes (which are put into place following a decision taken by MPT) and non-commercial routes (which are mandated by the Authority for Transport in Malta) operating from the bus stops "Vapur" in Mgarr, Gozo and "Lascaris" in Valletta, Malta, within reasonable notice, taking into consideration MPT's operational and logistical requirements.

## **COMMITMENT 2**

Ziti shall ensure that Tallinja Technologies Limited (hereinafter 'TTL') adheres to the below:

TTL is to provide commercial access to the Tallinja Card (both personalised and non-personalised) and the related ticketing technology, on equal, fair, reasonable and non-discriminatory ('FRAND') terms and in particular on no less favourable terms than the ones granted to Gozo Fast Ferry Limited (hereinafter 'GFFL') in all respects through standard terms of service and prices, which shall be available on demand to all Fast Ferry Operators that currently operate, or those that may wish to enter, the Valletta-Mgarr Fast Ferry market in line with Port Notice 02/2021 and subject to the signing of the necessary Non-Disclosure Agreements (hereinafter 'NDAs').

As stated in previous Requests for Information to the OfC, TTL has always acted in an open and transparent manner with all transport providers (not limited solely to Fast Ferry Operators) with the aim of establishing the Tallinja Card as a "one-stop-shop" transport card in Malta and Gozo. For this purpose, the increased use of the Tallinja Card and the increase in the number of transport-service providers accepting to implement the Tallinja Card as part of their services, falls squarely within the strategic aims and objectives of TTL.

In order to ensure that the OfC's concerns regarding the potential foreclosure of this input are allayed and dispelled, TTL shall commit to a standard 'reference offer' or 'terms of business' which regulate contractual details such as the:

- Duration
- Price
- Extent of services
- Commission rates and fees
- Opt-in and opt-out requirements and process for Fast Ferry Operators
- Other standard clauses such as confidentiality, termination, applicable law and jurisdiction etc.

and which shall be disclosed and applied on an equal non-discriminatory basis to all Fast Ferry Operators, and this subject to standard NDAs to be entered into between the parties concerned.

To clarify, once the terms of reference / business terms above-mentioned are approved, TTL will be terminating the current Collaboration Agreements entered into with GFFL and Virtu Ferries Limited (hereinafter 'VFL'), respectively, and have them replaced by the standard 'reference offer' or 'business terms'. This would essentially mean that the relationship between TTL and GFFL, the relationship between TTL and VFL, and the relationship between TTL and any other new player in the Valletta-Mġarr fast ferry market, with regards to the commercial access to the Tallinja card (both personalized and non-personalised) and the related ticketing technology to allow the Tallinja card to be accepted as a payment card, will be regulated by the above-mentioned common, sole, and standard reference offer / business terms.

This reference offer / business terms will consist of standard terms and conditions applicable equally and fairly to all Fast Ferry Operators who choose to be bound by them, together with a list of services on offer and their respective prices. Fast Ferry Operators will be free to choose which services they would like from TTL at the rates outlined in the reference offer.

Until the above-mentioned terms of reference / business terms are approved, TTL shall also be removing clause 3.1.2. (iii) from the Collaboration Agreements currently in place and will inform the respective parties accordingly in writing. In the new terms of reference

/ business terms, TTL shall instead be replacing this clause with the following standard provision:

*The Company [being the fast ferry operator signing the reference offer / business terms] shall be free to grant customers paying for a trip on its fast ferry service using a tallinja card, a discount on the standard rate. In the event that the discount is of [~~8~~] % or more (calculated on the standard rate), the Company shall benefit from the lower processing fee outlined in Schedule [XXX].*

TTL shall also commit that any change in pricing or any charges contractually imposed by TTL shall be applied similarly to all operators without any distinction.

For the avoidance of doubt Ziti shall ensure that TTL commits to grant access to the Tallinja Card (both personalised and non-personalised) and the required ticketing technology for the tallinja card to be accepted as a payment card, under FRAND terms to all Fast Ferry Operators (current and future) , and particularly, on no less favourable terms than the ones granted to GFFL in all respects, including without limitation price conditions, quality of service, maintenance, future upgrades and other standard clauses such as confidentiality, termination possibilities, applicable law and jurisdiction, etc.

It is specified that TTL will propose the above-mentioned reference offer/business

terms under FRAND terms to all Fast Ferry Operators (current and future). However, these operators are free to accept these terms but shall not in any case whatsoever be obliged to do so.

TTL is free to grant better price conditions in consideration of specific requests, but in any case, it commits not to grant Fast Ferry Operators less favourable price conditions than those granted to GFFL.

In addition, TTL undertakes in its role as supplier of the Tallinja Card (both personalised and non-personalised) and the related ticketing technology required to allow its acceptance as a payment card, not to take any measure that provides a competitive advantage to GFFL. For example, TTL commits to offer and/or provide Tallinja card and related ticketing technology updates, functionalities and support services to all Fast Ferry Operators that currently operate, or those that may wish to enter the Valletta-Mġarr Fast Ferry market on no less favourable terms than those granted to GFFL, including on aspects related to availability and timing.

## **SECTION C**

### **MONITORING TRUSTEE**

#### **The Monitoring Trustee's Appointment**

The Monitoring Trustee shall be appointed by Ziti after being approved by the OfC. To this end, Ziti shall, within 20 days from the Effective Date, submit one or more names of a potential Monitoring Trustee to the OfC for its approval. The OfC will consider this name and approve it (or otherwise) within 10 days from its submission. Once approved, Ziti shall proceed with the appointment of the (or one of the) approved Monitoring Trustee within 7 days. Ziti shall propose a maximum of three names.

If all the names of the Monitoring Trustees put forward are rejected by the OfC, the latter shall propose one or more several trustees itself, from which Ziti must appoint or have appointed one in accordance with the below mandate or in accordance with the mandate as modified by the OfC.

The Monitoring Trustee shall be in the form of one or more natural or legal person(s). S/he shall be obliged to monitor Ziti's (and as a consequence TTL's and MPT's) compliance with the conditions and obligations imposed by the commitments, and this according to the mandate outlined further below.

The Monitoring Trustee shall:

- a) at the time of appointment, be independent of the Notifying Parties and their Affiliated Undertakings and other Fast Ferry Operators;
- b) possess the necessary qualifications to carry out its mandate, for example have sufficient relevant experience as an auditor;
- c) neither have nor become exposed to a Conflict of Interest; and
- d) be remunerated by Ziti in a way that does not impede the independent and effective fulfilment of its mandate.

The proposal regarding the name of the Monitoring Trustee shall contain sufficient

information for the OfC to verify that the person or persons proposed as Monitoring Trustee fulfil the requirements set out in the foregoing paragraph. Once the Monitoring Trustee is appointed, s/he shall within 2 weeks submit an outline of the workplan which describes how the Monitoring Trustee intends to carry out its assigned tasks which are referred to below under the heading, '**The Monitoring Trustee's mandate**'.

### **Approval decision of the Monitoring Trustee**

The approval decision and the name and details of the Monitoring Trustee chosen by Ziti and approved by the OfC shall be published on the website of the Malta Competition and Consumers Affairs Authority on the page on which the Decision is published.

### **Monitoring Trustee's replacement, discharge and reappointment**

The Monitoring Trustee may be replaced if s/he ceases to perform its functions under the Commitments, or if there exists any other good cause, including the exposure of the Monitoring Trustee to a Conflict of Interest, that justifies its replacement.

The Monitoring Trustee replacement can either be:

a) imposed by the OfC, after hearing the Monitoring Trustee and Ziti. In such case Ziti will be required to replace the Monitoring Trustee;

or

b) requested by ZITI who may then with the prior approval of the OfC, replace the Monitoring Trustee.

If the Monitoring Trustee is removed according to the above, the Monitoring Trustee may be required to continue in its function until a new Monitoring Trustee is in place, to whom the Monitoring Trustee has affected a full hand over of all relevant information. The new Monitoring Trustee shall be appointed in accordance with the procedure referred to in the section titled 'The Monitoring Trustee's appointment'.

Except in the case of removal as defined in the section '**Monitoring Trustee's replacement, discharge and reappointment**', the Monitoring Trustee may only cease to act as Monitoring Trustee after the OfC has discharged it from its duties, after the completion of the mandate for which the Monitoring Trustee in question is responsible. However, the OfC may, at any time, ask for the Monitoring Trustee to be reappointed if it decides that the mandate concerned has not been fully or properly implemented.

### **Duties and obligations of the Monitoring Trustee**

The Monitoring Trustee acts on behalf of the OfC to ensure that the Notifying Parties (i.e., Ziti through TTL and MPT in terms of annex 1 appended to the Decision and GFFL in terms of Annex 2 appended to the Decision) comply with their Commitments.

The Monitoring Trustee will be appointed to supervise compliance with the Commitments and to report to the OfC.

The OfC may, on its own initiative or on the request of the Monitoring Trustee or Ziti, give the Monitoring Trustee any order or instruction with a view to ensuring

that the conditions and obligations arising from the Decision are met. In no case may Ziti give instructions to the Monitoring Trustee.

### **The Monitoring Trustee's mandate**

The Monitoring Trustee's function of (i) monitoring Ziti (through MPT for commitment 1, and TTL for commitment 2) with the proposed commitments and FRAND obligations including pricing commitments, (ii) monitoring of GFFL's compliance with its commitment; (iii) reporting back to the OfC on this matter and (iv) provide an objective, appropriate and independent management of such confidential information, shall consist of the following tasks:

1. To monitor Ziti's obligation pursuant to commitment 2, effectively ensuring that TTL complies with its FRAND obligations, including pricing commitments, by referring to and comparing the contracts, pricing and invoicing conditions entered into between Ziti/TTL and GFFL with the contracts, pricing and invoicing conditions entered into between Ziti/TTL and VFL, and any other players that might enter into the fast ferry Valletta – Mġarr market under Port Notice 02/2021.
2. To monitor Ziti's obligation pursuant to commitment 1, effectively ensuring that MPT will treat all present and future Valletta-Mġarr Fast Ferry operators on equal, fair, reasonable and non-discriminatory ("FRAND") terms, in relation to the scheduling and operation of scheduled bus services to and from the Valletta / Mġarr Fast Ferry terminals.
3. To carry out an initial benchmarking of the terms and conditions within 4 months of the Effective Date and report back to the OfC (with a non-confidential copy to Ziti) and to thereafter, carry out the benchmarking of the terms and conditions and report back to the OfC (with a non-confidential copy to Ziti) on an annual basis, or at more frequent intervals if requested by the OfC to do so:

Provided that on a non-confidential basis the Monitoring Trustee shall also inform the Fast Ferry Operators of its results without delay.

4. To act as a contact point for any requests by any Fast Ferry Operator that believe that there has been a failure, or partial failure to comply with the commitments.
5. To propose to Ziti such measures as the Monitoring Trustee considers necessary to ensure that the commitments are met.
6. To promptly report in writing to the OfC, sending Ziti a non-confidential copy at the same time, if it concludes on reasonable grounds that Ziti through TTL is failing to comply with the commitments.
7. To promptly report in writing to the OfC, should Ziti through TTL fail to cooperate with its duties and obligations as outlined in these commitments.

### **The Monitoring Trustee's access to data and reporting obligations**

#### **Access to data**

Within 4 months from the Effective Date, the Monitoring Trustee shall be granted access by Ziti, TTL and each operating Fast Ferry Operator, to all the necessary information to ensure compliance with the commitments, including but not limited to the contracts, pricing and invoicing conditions (the "Data") entered into by Ziti through TTL with each Fast Ferry Operator concerned. Thereafter, and regarding:

-Ziti, TTL and GFFL, the Monitoring Trustee shall be granted access to the Data on

a quarterly basis. The Monitoring Trustee will also be allowed more frequent access should s/he so require.

-Any other Fast Ferry Operator, the Monitoring Trustee shall be granted access to the Data on a yearly basis.

A refusal by any of the Fast Ferry Operators which is not party to the Notifying Parties and to the joint venture to grant the Monitoring Trustee with access to the requested documentation, is to be noted by the Monitoring Trustee in his/her report to the OfC but such refusal shall not be considered in anyway by the OfC as breach of the commitments by Ziti.

Provided that the OfC may use its powers at law to request such Fast Ferry Operators to submit the necessary documents and information.

## **SECTION D**

### **DUTIES AND OBLIGATIONS OF Ziti THROUGH TTL**

Ziti, through TTL, shall provide and shall cause its legal advisors/counsels to provide (except for legally privileged documents, correspondence and communication) the Monitoring Trustee with all such co-operation, assistance and information as the Monitoring Trustee may reasonably require to perform its tasks. The Monitoring Trustee shall have full and complete access to any of Ziti and TTL's books, records, documents, management or other personnel, facilities, sites and technical information necessary for fulfilling its duties under the Commitments and Ziti and TTL shall provide the Monitoring Trustee upon request with copies of any document/information. Ziti and TTL shall also be available for meetings in order to provide the Monitoring Trustee with all information necessary for the performance of its tasks.

Ziti shall indemnify the Monitoring Trustee and its employees and agents (each an "Indemnified Party") and hold each Indemnified Party harmless against, and hereby agree that an Indemnified Party shall have no liability to Ziti for any liabilities arising out of the performance of the Monitoring Trustee's duties under the Commitments, except to the extent that such liabilities result from the wilful default, recklessness, gross negligence or bad faith of the Monitoring Trustee, its employees, agents or advisors. The Monitoring Trustee shall also set and communicate to Ziti and TTL fixed deadlines within which s/he is to receive the requested information, which deadline shall be of a fixed term of not more than 20 days.

To be able to carry out the above mandate the Monitoring Trustee shall also have the authority to request and receive from other Fast Ferry Operators currently operating and any other new player that enters the fast ferry Valletta-Mġarr market under Port Notice 02/2021 that documentation necessary for him/her to be able to adhere to the mandate given to him/her. In return, such Fast Ferry Operators will be obliged to provide the requested documentation to the Monitoring Trustee upon his/her request and this within no later than the deadline set which shall not exceed 20 days:

Provided that a refusal by any of the Fast Ferry Operators which are not a party

to the Notifying Parties and of the joint venture, to submit the requested documentation to the Monitoring Trustee is to be noted by the Monitoring Trustee in his/her report to the OfC but such refusal shall not be considered in anyway as a breach of the commitments by Ziti.

Provided further that the OfC may use its powers at law to request such Fast Ferry Operators to submit the necessary documents and information.

## **SECTION E**

### **CONFIDENTIALITY**

The Monitoring Trustee recognises that it is required to observe the strictest confidentiality regarding all aspects of the mandate and its execution. To this end, the Monitoring Trustee undertakes, as soon as it takes up the position, to avoid divulging for any reason and to any third party– with the exception of the OfC and members of the Monitoring Trustee Team:

- a) the content of their mandate, (unless such information is already in the Decision which has been made public), including any appendices and any amendments:

Provided that any amendments to the mandate can be divulged to the Notifying Parties.

- b) documents and information of any kind (industrial, commercial, fiscal, legal or administrative) concerning the Notifying Parties and any Fast Ferry Operator that it may encounter in the execution of their assignment;
- c) the content of its communications and reports to the OfC in relation to the execution of the Commitments and their assignment;
- d) more generally, any information concerning the Notifying Parties and any Fast Ferry Operator that is not public.

The Monitoring Trustee undertakes to ensure that their Team complies with this confidentiality commitment and acts as guarantor in this respect.

This confidentiality commitment does not prevent:

- a) the Monitoring Trustee from communicating the aforementioned information and documents to the OfC,
- b) the Monitoring Trustee from communicating non-confidential versions of any document and information to Ziti or any Fast Ferry Operator under the conditions set out in the commitments package as set out in Annex 1 appended to the Decision; and
- c) the communication of information required by law.

This requirement to maintain confidentiality shall remain applicable indefinitely following the expiry of the mandate.

## **SECTION F**

### **OTHER PROVISIONS**

#### **Revising the mandate**

The mandate may only be amended in writing and with the OfC's prior approval. The Notifying Parties agree to amend the mandate if required by the OfC, after consultation with the Notifying Parties and the Monitoring Trustee, to ensure strict compliance with the Commitments.

#### **Further monitoring processes**

For a period of 6 years from the Effective Date and for any further years should the commitments be renewed, the OfC may request all information from the Notifying Parties and any Fast Ferry Operator that is reasonably necessary to monitor the effective implementation of these Commitments.

#### **Review Clause**

The OfC may extend the time periods foreseen in the Commitments in response to a request from Ziti or, in appropriate cases, on its own initiative. Where Ziti requests an extension of a time period, it shall submit a reasoned request to the OfC no later than one month before the expiry of that period, showing good cause. This request shall be accompanied by a report from the Monitoring Trustee, who shall, at the same time send a non-confidential copy of the report to Ziti. Only in exceptional circumstances shall Ziti be entitled to request an extension within the last month of any period.

The OfC may where necessary and upon a written request from Ziti, showing good cause and in exceptional circumstances, waive, modify or substitute the commitments.

Furthermore, given that the OfC and Ziti cannot at this stage anticipate all contingencies in relation to the implementation of such commitments, where Ziti or the OfC, believe that the original commitments do not achieve the envisaged results as set out, and therefore do not effectively remove the competition concerns, Ziti and/or the OfC may propose a change or modification to them in order to achieve the intended results. Should the OfC be itself proposing the change or modification to the commitments, it shall only change or modify the latter after hearing the parties concerned. Should Ziti propose a change or modification to the Commitments, the OfC shall assess and decide whether such change or modification should take place. Modifications proposed shall be limited to cases where specific modalities risk jeopardising the effective implementation of the Commitments.

For any waiver, modification or substitution of Commitments, the OfC may also take into account the view of third parties and the impact a modification may have on the position of third parties and thereby on the overall effectiveness of the remedy.

#### **Duration**

The Commitments are to remain in effect for a minimum duration of six years, potentially renewable at the discretion of the OfC. Provided that should at any point in time throughout this 6-year period, and/or any renewed term, TTL and/or

MPT cease to be Affiliated Undertakings of ZITI, ZITI must make a request to the OfC (in accordance with the procedure listed under the review clause) demonstrating that there is good cause for it to no longer be bound by the Commitments, and that it is an exceptional circumstance. The OfC will then assess such request and communicate its decision to Ziti.

### **Entry into force**

The Commitments shall take effect upon the date of Notification of the Decision.

**ANNEX 2**

**Case COMP – MCCA/09/2021**

**COMMITMENTS OFFERED BY GOZO FAST FERRY LIMITED TO THE OFFICE  
FOR COMPETITION**

**Object: Commitments offered by Gozo Fast Ferry Limited to the Office for Competition in relation to the full function joint venture between Bianchi and Sons Limited, Merrill Invest Limited and Ziti Technologies Limited**

Pursuant to regulation 6(2), 8(2) and the proviso to regulation 9(2) of the Control of Concentrations Regulations (the "Regulations"), Gozo Fast Ferry Limited ("GFFL") hereby enters into the following Commitments (the "Commitments") vis-a-vis the Office for Competition (the "OfC") with a view to rendering the creation of the full function joint venture between Bianchi and Sons Limited, Merrill Invest Limited and Ziti Technologies Limited (the "Concentration") compatible with the Regulations by its decision pursuant to Article 6(1)(ii) and 8(2) of the Regulations (the "Decision").

The Commitments shall take effect upon the date of notification of the Decision.

This text shall be interpreted in light of the Decision, in the general framework of Maltese law, in particular in light of the Regulations.

## **SECTION A**

### **DEFINITIONS**

For the purposes of these Commitments, the terms below shall have the following meanings, whether used in the singular or plural:

**Monitoring Trustee:** one or more natural or legal person(s), represented by one or several individuals, independent of the notifying parties and Fast Ferry Operators operating on the Valletta-Mġarr Ferry market in line with Port Notice 02/2021 who is/are approved by the OfC and appointed by Ziti, and who has/have the duty to monitor compliance of the Notifying Parties with the conditions and obligations contained in the commitments as set out in Annex 1 and Annex 2 appended to the Decision.

**Notifying Parties:** Ziti Technologies Limited (including Tallinja Technologies Limited) and Gozo Fast Ferry Limited

**OfC:** Office for Competition

## **SECTION B**

### **DUTIES AND OBLIGATIONS OF GFFL**

GFFL shall provide and shall cause their legal advisors/counsels to provide (except for legally privileged documents, correspondence and communication) the Monitoring Trustee with all such cooperation, assistance and information as the Monitoring Trustee may reasonably require to perform its tasks. The Monitoring Trustee shall have full and complete access to any of books, records, documents, management or other personnel, facilities, sites and technical information

necessary for fulfilling its duties under the Commitments and GFFL shall provide the Monitoring Trustee upon request with copies of any document/information. GFFL shall also be available for meetings in order to provide the Monitoring Trustee with all information necessary for the performance of its tasks.

To be able to carry out the mandate as described in annex 1 the Monitoring Trustee shall also have the authority to request and receive from other Fast Ferry Operators currently operating and any other new player that enters the fast ferry Valletta-Mġarr market that documentation necessary for him/her to be able to adhere to the terms of reference given to him/her. In return, such Fast Ferry Operators will be obliged to provide the requested documentation to the Monitoring Trustee upon his/her request and this within no later than the deadline set which shall not exceed 20 days:

Provided that a refusal to submit the requested documentation to the Monitoring Trustee by any of the Fast Ferry Operators which are not a party to the notifying parties and of the joint venture is to be noted by the Monitoring Trustee in his/her report to the OfC but such refusal shall not be considered in anyway as a breach of the commitments.

Provided further that the OfC may use its powers at law to request such Fast Ferry Operators to submit the necessary documents and information.

## **SECTION C**

### **MONITORING TRUSTEE**

#### **The Monitoring Trustee's mandate**

In view of the above, as part of the Monitoring Trustee's tasks as part of his/her mandate as described in Annex 1 will also include:

To promptly report in writing to the OfC, should GFFL being one of the Notifying Parties and party to the joint venture fail to cooperate with their duties and obligations above mentioned.