

Wholesale Access to Data for the Provision of Publicly Available Directory Information Services

Consultation and Proposed Decision

Consultation document

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EXECUTIVE SUMMARY

Providers of Publicly Available Telephone Services (PATS) are required to ensure that their subscribers are given the option to feature in directory information services. The Malta Communications Authority (MCA) has identified the need to elaborate and give further clarity to the overall framework and process by which PATS providers obtain and share their subscribers' personal data for the purposes of the directory information services which they, and other directory information service providers, may offer.

To this effect, this consultation document aims to establish industry-wide clarity and harmonisation on the elements of consent required to be given by subscribers prior to the transfer of their personal data from the PATS provider of their choice to other undertakings providing directory information services.

The consultation process therefore lists a number of core elements that the MCA considers should feature as part of the clauses where subscribers give their consent, or otherwise, for their data to be shared for the purposes of directory information services. The consultation suggests that the subscriber is given a clear explanation in writing of what the implications of all his or her choices may be and that the subscriber clearly signifies his or her decisions on these matters, with no possibility of a default position being adopted by the PATS providers in case such preferences are not indicated.

It also puts for consultation what it understands should be the prerequisites that must be met by the requesting directory information service provider, such as the need for the appropriate authorisation, in order for the PATS provider to consider the request for data as well as the methodology that must be followed by such PATS provider in order for such data to be shared, whether the data is being shared for directory enquiry services or for the purposes of compiling telephone directories.

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1. INTRODUCTION

Directory information services remain an essential service, the provision of which is required both by law as well as - and as a result of - the market itself. It is for this reason that aspects of such services continue to form a part of the universal service in the telephony services sector.

The provision of such services is reliant on the effective and efficient cooperation between the relevant service providers. Such cooperation must also be legally compliant.

The MCA is seeking to strengthen the regulatory framework currently in place for the sharing of subscriber data for directory information services in order to facilitate the progress of such sharing. Such a framework is particularly important given that PATS providers are under a legal obligation to share such data on a local as well as a European level.

This consultation document precedes an eventual regulatory decision that aims to clarify and build upon those data protection obligations which are found within the legal framework for electronic communications and which apply to PATS providers and providers of directory information services within the telephony sector. To this effect, it puts forward a methodology for the sharing of personal subscriber data by PATS providers for the purpose of the provision of directory services.

In putting forward this proposed framework for the sharing of directory data, the Authority has taken into consideration all relevant legal rights and obligations within the spheres of both data protection and the provision of PATS as well as matters related to commercial data sensitivity and inter-operator cooperation, the developments in any relevant technology and the need for increased legal certainty and clarity in this area.

This consultation document is being published following input from the Office of the Information and Data Protection Commissioner (IDPC).

It is intended that any eventual decision issued by the MCA, following this consultation process, shall become effective within four months of publication.

1.1 DEFINITIONS

For the purpose of this decision, the following definitions are being given for the proper understanding and interpretation of this document¹:

'Data Protection Regulations' refers to the Processing of Personal Data (Electronic Communications Sector) Regulations, Subsidiary Legislation 440.01 made under the Data Protection Act (Cap 440 of the Laws of Malta);

¹ Unless otherwise stated, the definitions provided in Article 2 of the ECRA also apply to this consultation document and the eventual final MCA decision.

'directory information' refers to the names, addresses and telephone numbers and any other information given by consenting subscribers to a publicly available telephone service, whether they are individuals or corporate entities, for the purpose of being entered into a database with the objective of providing a directory information service. In the case of ex-directory subscribers, it is the notification or inference, as the case may be, that such information is not available to directory users, provided that similar data may be disclosed to competent authorities legally empowered to have access to such information;

'directory information service' means any format of directory information which users can access with a view to finding the telephone number by looking up other personal data that a given subscriber may have consented to being released for the purposes of such a request. It includes directory enquiry services and telephone directories where:

- 'directory enquiry service' means an operator-assisted directory information service. Unless the contrary is specified, it also includes on-line directory information services where directory users submit search requirements through a website in the expectation of receiving the directory information they are looking for;² and
- 'telephone directory' refers to a printed phonebook and/or other data services, such as an electronic directory on CD-ROM, containing aggregated directory information of subscribers to a publicly available telephone service and which is made available to members of the public;

'directory information service provider' means an undertaking authorised to provide publicly available directory information services;

'ECRA' refers to the Electronic Communications (Regulation) Act, Chapter 399 of the Laws of Malta;

'ECNS Regulations' refers to the Electronic Communications Networks and Services (General) Regulations, Subsidiary Legislation 399.28, made under the ECRA;

'ex-directory' refers to those subscribers opting not to have their personal directory information listed in directory information services;

'MCA Act' refers to the Malta Communications Authority Act, Chapter 418 of the Laws of Malta;

'PATS provider' means a provider of a publicly available telephone service as defined in article 2 of the ECRA; and

² All relevant legislation and EU Directives currently only make reference to Directory Enquiry Services and/or Directories, without defining either concept. From inferences, however, and because no specific reference is made to them, notwithstanding the fact that they are another form of directory information services well-used by directory users and which cannot be ignored for the purposes of this consultation process, Online Directory Information Services are being included within the concept of Directory Enquiry Services. This is also being done for the sake of consistency and clarity. Online Directory Information Services may, however, be specifically referred to and singled out in specific contexts within the consultation document, in view of their distinct features and search functions.

'Subscriber' means a person who or which is party to a contract with the provider of a publicly available telephone service for the supply of such services.

2. LEGAL BASIS

The relevant extracts of the ECRA, as well as the ECNS Regulations, are reproduced hereunder for ease of reference. The respective provisions of the European Directives which they transpose are also set out hereunder:

- Article 4(1)(c)(iii) of the ECRA

"4. (1) The objectives of the Authority, to the extent that it is empowered at law, in the exercise of its functions under this Act shall include:

(...)

(c) to promote the interests and rights of users within the European Union by -

(...)

(iii) contributing towards ensuring a high level protection of personal data and privacy;"

- Regulation 42, of the ECNS Regulations entitled 'Telephone directory enquiry services and directories,' which transposes Article 25 of the Universal Service Directive³:

"42. (1) An undertaking providing a publicly available telephone service shall ensure that subscribers may without charge, and subject to their prior approval:

(a) have an entry in a directory provided in accordance with regulation 24 and verify, correct and withdraw their data, upon request; and

(b) have their information made available to providers of directory enquiry services and, or directories in accordance with subregulation (2).

(2) An undertaking which assigns telephone numbers to subscribers shall meet all reasonable requests to make available, for the purposes of the provision of publicly available directory enquiry services and directories, the relevant information in an agreed format, in accordance with any decisions the Authority may issue in this regard, on terms which are fair, objective, cost oriented and non-discriminatory.

(3) An undertaking providing a publicly available telephone service shall ensure that all end-users can access directory enquiry services.

³ Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) as amended by Directive 2009/136/EC.

(4) The Authority may impose obligations and conditions on undertakings that control access to end-users for the provision of directory enquiry services in accordance with the provisions of regulation 9:

Provided that such obligations and conditions shall be objective, equitable, non-discriminatory and transparent.

(5) The Authority shall not maintain any regulatory restriction that prevents an end-user in a Member State from accessing directly the directory enquiry service in Malta by voice call or SMS, and shall take measures to ensure such access in accordance with regulation 45.

(6) This regulation applies subject to the requirements of European Union law and national legislation on the protection of personal data and privacy."

- Regulation 24, entitled 'Directory enquiry services and directories', which transposes Article 5 of the Universal Service Directive⁴:

"24. (1) A designated undertaking shall ensure:

(a) that a comprehensive directory of subscribers to publicly available telephony services is made available to all end-users, in a form approved by the Authority, whether printed or electronic or both as the Authority may determine, and is updated on a regular basis at least once a year; and

(b) that a comprehensive and up-to-date telephone directory enquiry service is made available to all end-users, including users of public pay telephones.

(2) A directory or directory enquiry service referred to in subregulation (1) shall comprise, subject to the relevant data protection laws, all subscribers of publicly available telephone services in Malta.

(3) A designated undertaking shall for the purposes of this regulation apply the principle of non-discrimination to the treatment of information that has been provided to it by other undertakings or which it has in its possession or under its control."

2.1 OTHER RELEVANT LEGAL PROVISIONS

While not falling under MCA's remit, one must also make reference to, and take into consideration, regulation 8 of the Data Protection Regulations entitled 'Directory of subscribers', which transposes Article 12 of the Directive on Privacy and Electronic Communications,⁵ whilst also taking into account Recitals 38 and 39 of the said Directive.

⁴ Ibid.

⁵ Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) as amended by Directive 2006/24/EC and Directive 2009/136/EC.

3. ISSUES FOR CONSULTATION

As already indicated in the introduction, this consultation document aims to address three issues:

1. The requisite elements of consent of the personal data release consent clauses (hereinafter referred to as 'consent clauses') that are to be obtained from individual subscribers to ensure the exercising of their right to feature in directory information services;
2. The methodology of sharing personal subscriber data between PATS providers and directory information service providers for the purposes of providing directory enquiry services;
3. The processes that PATS providers should follow, upon receipt of a request from directory information service providers, for the compiling and sharing of subscriber data for the purposes of providing telephone directories.

3.1 REQUISITE ELEMENTS OF THE PERSONAL DATA RELEASE CONSENT CLAUSES⁶

Prior to embarking on this initiative, the MCA evaluated the relevant terms and conditions and consent forms for subscribers of the three largest PATS providers on the market currently providing directory information services. This was done with a view to analyse the current status quo and to identify those areas which could be improved in order to better serve the spirit and letter of ECNS regulations 24 and 42 and the relevant EU Directives, whilst also ensuring compliance by undertakings with the relevant data protection obligations in relation to the directory information services they provide.

The legal obligations incumbent upon PATS providers under the laws administered by the MCA render it necessary for the MCA to ensure that the consent clauses provided by the relevant PATS providers to their subscribers do not, in any way, hinder the development of the directory information services market.

For practical reasons, the MCA considers that such consent clauses should be presented to new customers at the same time as they are provided with their contract of service or, in the case of pre-paid subscribers of mobile telephony services, at the time of purchase. The consent clauses should be presented in all cases and made available either as part of the contract and/or the terms and conditions of such contract, or as a separate form. In the case of subscribers entering a contract, consent clauses would also need to be returned by such customers, duly completed and signed, at the same time as, and together with, the signed contract. In the case of pre-paid subscribers, the consent clauses should be presented as a consent form to be filled out and returned by such subscriber at the time of purchase if he/she wishes to be included in the directory information database. The filling out of a consent form in this case would be at the subscriber's total discretion.

⁶ While being referred to as *Personal* Data Release Consent Clauses, the clauses may also be used for corporate entities in order to avoid the need for PATS providers to have separate forms for individual subscribers and corporate subscribers.

However, the obligation to offer the opportunity to have one's data included in a directory information service would subsist with the PATS provider.

In the case of subscribers having a contract, the MCA considers that it is the responsibility of the PATS provider to ensure that the subscriber has indicated his/her choice in a complete and clear manner as described hereunder, and that any failure on the PATS provider's part to secure such subscriber's preference would be tantamount to a breach of the terms and conditions of the contract with all the legal consequences attached thereto.

Thus, the MCA considers that the following elements should be included in all consent clauses, whether such clauses are presented in a printed or electronic format, in order to ensure that PATS and directory information service providers can effectively comply with all the relevant legal obligations under the ECNS Regulations and the Data Protection Regulations.

As previously stated, all relevant PATS providers would have to adopt these consent clauses containing all the elements listed below within four (4) months of the coming into effect of the MCA decision. From such date, the new clauses would have to apply to all new subscribers and to current subscribers wishing to make changes to their consent or their directory/ex-directory status during the term of their existing contract. The new consent clauses would also need to be presented to existing subscribers at the time of their endorsement of the renewal of their contract.

Whenever a contract is automatically renewed, PATS operators should remind relevant subscribers of their right to be included in a directory and to review the information they provided for directory information purposes free of charge. They should therefore also invite them to re-submit their data in line with the new consent clauses.

Elements to be included in consent clauses:

1. A clear statement to the effect that: if and once the subscriber has consented to the inclusion of his/her personal data for the purposes of directory information services, the subscriber would be consenting to the sharing of his/her details with all other authorised directory information service providers and could be included in any form of directory information service, i.e. operator-assisted directory enquiry services, on-line directory enquiry services, printed telephone directories, directories on CD-ROM, USB stick etc. Furthermore, the subscriber's data must be shared by the PATS provider of choice with other directory information service providers established anywhere in the EU, as long as all legal requirements relating thereto are met.
2. A clear statement specifying that the PATS subscriber is, and remains, under no obligation to release his/her personal data for the purposes of being included in a publicly available directory or to be made available for the purposes of directory enquiry services. It should also be explained that should the customer not wish to release such data into the public domain the customer will fall under the category known as 'ex-directory'.
3. A clear choice between two mutually exclusive options, each with its own selection box, where the subscriber must choose between:

- being included in any directory information service that may be provided locally and within the EU; or
 - being ex-directory locally and within the EU.
4. A clear explanation of how a reverse search function⁷ works, including examples of classic as well as other possible searches, with the PATS provider offering a clear, separate and distinct choice to the subscriber to opt in and make his/her personal data available for such searches. Such a separate consent is necessary, even when the PATS provider of choice does not itself provide its subscribers with a reverse search option in its own directory enquiry service.⁸ To this effect, PATS providers could possibly choose to reproduce the definition and examples given of reverse searching in footnote 7 below.
 5. A clear statement that the subscriber may at any time, and at no cost, review and amend the contents of data submitted, the opt-in/opt-out choices made, as well as change his status from ex-directory to directory and vice-versa with, however, the understanding that where a subscriber decides to change his status from directory to ex-directory, any data which would already have been published and/or distributed in written format cannot and will not, in any way, be retracted.
 6. A clear statement that the information being provided by the subscriber by virtue of these consent clauses shall be used by the PATS operator solely for the purposes of directory information services and not for any other purpose such as direct marketing.
 7. A signature or any other identifying field which can authenticate the identity of the subscriber as the account holder and provide evidence that such account holder was of age, aware of and consented to all the ancillary implications of his/her choices as set out in the form at the time the form was submitted to the service provider.

The MCA would like to emphasise that the underlying reason behind the third measure is that all PATS providers should ensure that one or the other option has clearly been selected by the subscriber, so that the prerogative to be included or excluded from directory information services remains with the subscriber at all times. As a consequence, PATS providers should no longer implement a default or fallback policy on the matter, nor present subscribers with a form or clauses in which the available options have been pre-selected by the PATS provider itself on the subscriber's behalf. The MCA furthermore considers that, by means of this measure, the adherence of the obligation at law for PATS providers to inform their subscribers of the right to be included in a database for directory information services, or to be ex-directory, would become manifestly self-evident.

⁷ Reverse searching is a facility on electronic versions of directory enquiry services allowing a search for subscriber details by entering data into a specific field other than the subscriber's name contained in the directory entry. Thus, for example, in classic reverse searches, one may carry out a search by entering a telephone number and the name of the person who the number is attributed to would then be given by the directory enquiry service. Other searches could include entering a street name and locality.

⁸ This clause builds upon and amends the directive contained at Section 6.3 of the decision published by the MCA in July 2002 entitled 'Directory Information Services - Report on Consultation and Decision'.

As regards the fifth measure, the MCA understands that, in the case of pre-paid subscribers of mobile telephony, there may be legal expenses incurred by subscribers for an affidavit relating to the verification of identity and confirmation of ownership of a number which has already been assigned, but not registered, when such a subscriber decides to have his/her information included in a database for the provision of directory information services at a time subsequent to the purchase of his/her mobile telephony service. Any such legal fees would not be considered by the MCA as a charge relating to the review and/or amendment of the subscriber's data. Neither would they be considered as a breach of Regulation 42(1)(a) of the ECNS Regulations by the PATS provider.

With respect to the sixth measure, the MCA considers that, should PATS providers wish to seek subscribers consent to share their personal data for any other purpose other than directory information services, this consent would need to be sought on a separate form and not as part of the document seeking the subscriber's consent or dissent for his/her inclusion in a database for the provision of directory information services.

Furthermore, the MCA would like to state that these clauses are in no way intended to alter, in any way, the obligation contained in regulation 35(1)(c) of the ECNS Regulations on contracts⁹. Rather, they seek to build on it and co-exist with such an obligation.

3.2 INTER-OPERATOR SHARING OF PERSONAL SUBSCRIBER DATA

According to regulation 42(2) of the ECNS Regulations, any undertaking which assigns telephone numbers to subscribers must meet all reasonable requests to make available, for the purposes of the provision of publicly available directory enquiry services and directories, the relevant information. The regulation states that such personal data should be transferred and in a format agreed to by the parties.

These provisions do not allow for any exceptions to the rule. They do, however, make two qualifications:

1. the request must be reasonable;
2. the request must be made for the purpose of providing a publicly available directory information service only¹⁰.

In relation to the first qualification, any clarifications from a data protection perspective that may need to be sought by PATS providers in relation to the 'reasonableness' or otherwise of the request for sharing data may be put and addressed to the IDPC for its guidance and advice. Whether or not to seek advice from the IDPC should remain the prerogative of the PATS provider so long as such

⁹ Regulation 35(1) of the ECNS Regulations states:

"In accordance with the provisions of article 23 of the Act, an undertaking providing connection to a publicly communications network and, or publicly available electronic communications services shall provide its subscribers with a contract that shall specify in a clear and comprehensive manner at least:

(...)

(c) the option of the subscriber to include his personal data in a directory and have such data made available to providers of directory enquiry services when requested (...) and how to verify, correct and withdraw such data free of charge in accordance with the applicable data protection laws;"

¹⁰ The information provided for directory information services cannot be used for any other purpose including direct marketing.

undertaking acts in accordance with regulation 42(2) of the ECNS Regulations. The MCA may, nonetheless, be resorted to for advice and/or direction on technical, practical and other industry-related matters as the case may be.

For the avoidance of doubt, two further implicit conditions must also be stated here:

3. the obligation to share directory information subsists only within the EU and with undertakings operating in the EU; and
4. the requesting undertaking must be authorised to provide such a directory information service.

This fourth condition, which applies to all local directory information service providers, requires that such undertaking must have followed the national notification procedures in accordance with regulation 65(2)(f) of the ECNS Regulations and hold a general authorisation to offer directory information services in Malta.

At law, therefore, so long as all four requirements are met, then personal data must be transferred.

Once such data is transferred, the directory information service providers must handle the data received in accordance with all the relevant Data Protection laws and procedures and, in particular, may not transfer such personal data once again, unless in accordance with such laws.

Directory Enquiry Services

Comprehensive directory enquiry services are currently being provided locally by a number of PATS providers. In order for these services to be provided, all PATS providers are providing access to subscriber data upon a specific request made by a directory enquiry service provider (including by an automated system in the case of the on-line comprehensive directory), for access to the telephone number of a particular subscriber. In this manner, the requesting directory enquiry service provider does not have access to the entire client databases belonging to the other respective PATS providers.

This methodology of data sharing, also referred to as 'dipping', has proven to be an effective tool for the sharing of subscriber data. It has also allowed directory services providers and PATS providers to operate in line with the relevant legal provisions related to data protection and end-user rights when providing directory enquiry services.

To this effect, by the authority granted to it under regulation 42(2) of the ECNS Regulations, the MCA intends to establish that the dipping methodology currently in use shall be the standard way that directory information service providers request and gain access to directory information from PATS providers for the purpose of providing directory enquiry services. The MCA will nonetheless continue to monitor inter-operator cooperation in this area to ensure that PATS providers and directory information service providers continue to satisfy their respective obligations and provide prompt and correct directory information.

Regulation 42(2) of the ECNS Regulations states that the sharing of subscriber data for the provision of directory enquiry services should be done on terms which are fair, objective, cost-oriented and non-discriminatory. While refraining from entering into the merits of what such terms should

effectively state, the MCA would address any possible dispute arising and relating to such matters on a case by case basis.

Telephone Directories

Unlike directory enquiry services, by their very nature telephone directories require aggregated directory information.

The PATS provider that has been lawfully requested to provide aggregated subscriber data (also known as a data load), has the obligation to do so on terms which are fair, objective, cost-oriented and non-discriminatory. The MCA is refraining from setting out parameters on such commercial matters. However, the MCA would handle any possible dispute arising and relating to such matters on a case by case basis.

4. SUBMISSION OF RESPONSES

In accordance with its obligations under Article 4A of the Malta Communications Authority Act [Cap. 418 of the Laws of Malta], the Authority welcomes written comments and representations from interested parties and stakeholders during the national consultation period which shall run from the 21/07/2014 to the 15/09/14.

The Authority appreciates that respondents may provide confidential information in their feedback to this consultation document. This information is to be included in a separate annex and should be clearly marked as confidential. Respondents are also requested to state the reasons why the information should be treated as confidential.

For the sake of openness and transparency, the MCA will publish a list of all respondents to this consultation on its website, up to three days following the deadline for responses. The Authority will take the necessary steps to protect the confidentiality of all such material as soon as it is received at the MCA offices in accordance with the MCA's confidentiality guidelines and procedures¹¹. Respondents are however encouraged to avoid confidential markings, wherever possible.

All responses should be submitted to the Authority in writing by no later than 12.00hrs (noon) on 15/09/2013 and addressed to:

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Extensions to the consultation deadline will only be permitted in exceptional circumstances and where the Authority deems fit. The MCA reserves the right to grant, or refuse, any such request at its discretion. Requests for extensions are to be made in writing within the first ten (10) working days of the consultation period.

¹¹ http://www.mca.org.mt/sites/default/files/articles/confidentialityguidelinesFINAL_0.pdf