



MALTA COMMUNICATIONS AUTHORITY

## Decision on the Wholesale Access to Data and the Provision of Publicly Available Directory Information Services

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Final Decision

MCA/D/15-2245

Publication Date:

20 APRIL 2015

## EXECUTIVE SUMMARY

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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) nonetheless 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, on the 21 July 2014, the MCA issued a Consultation Document entitled Wholesale Access to the Provision of Directory Information Services – Consultation and Proposed Decision (hereinafter the 'Consultation Document') in accordance with Article 4A of the Malta Communications Authority Act (Cap. 418 of the Laws of Malta). The document was published on both the MCA website as well as on the socialdialogue.gov.mt site. The consultation period ran over a six week period until 15 September 2014 with two respondents, GO plc (hereinafter 'GO') and Melita plc (hereinafter 'Melita'), giving their non-confidential feedback.

The MCA thanks both respondents for their reactions which have all been noted, analysed and given the required due consideration in the publication of this decision entitled 'Decision on the Wholesale Access to Data and the Provision of Publicly Available Directory Information Services' (hereinafter the 'Decision'). Apart from giving the MCA's final Decision following the consultation process, the MCA will also, throughout this document, describe all the feedback given by the respondents and, as may be required, shall either offer further clarifications or reassurances on any concerns that may have been raised by them or explain the reasoning behind the acceptance or refusal of the MCA to take a particular suggestion on board and include it in this Decision.

This Decision addresses the need for 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. It therefore lists a number of core elements that 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 Decision requires 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.

The Decision also lists 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.

By means of this Decision, the MCA has sought 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 Decision, in fact, also 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 sets out the methodology for the sharing of personal subscriber data by PATS providers for the purpose of the provision of directory services.

In drafting this Decision 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. It has also given due consideration to all the feedback received during the public consultation process on the document published by the MCA on 21 July 2014 and entitled 'Wholesale Access to Data for the Provision of Publicly Available Directory Information Services: Consultation and Proposed Decision', hereinafter referred to as 'the Consultation Document'.

The Decision is also being published following input from the Office of the Information and Data Protection Commissioner (IDPC) which was sought prior to the publication of the Consultation Document as well as this Decision.

### 1.1 TIMEFRAMES

In the Consultation Document, it was initially proposed that any eventual decision issued by the MCA, following the consultation process, would become effective within four months of publication of the final decision. However, GO proposed that the time-frame be extended to a maximum of seven months from publication of this Decision in order to allow operators to cope better with the logistical changes and efforts involved in completing all requirements necessitated by the eventual decision. The MCA has decided to accept this proposal and allow a period of seven (7) months in order to allow a smooth implementation of the changes required by this Decision.

**Decision 1:**

**All the provisions contained in this Decision shall be adhered to and fully implemented by all PATS providers within seven (7) months of the publication date of this Decision.**

## 1.2 DEFINITIONS

In the Consultation Document, a number of definitions were provided for ease of reference as well as to delineate and define a number of concepts that were being referred to in the Consultation Document with the understanding that the eventual decision would also be guided by these definitions.

In its feedback, GO plc expressed its concern with the manner in which two terms had been defined. The first definition giving rise to GO's reservations was that of 'directory information' and its inclusion of 'addresses' with names and telephone numbers. GO's concern stemmed from the fact that, when enquiries were made to it in its capacity as directory information service provider, its obligations were only to make known the telephone numbers of consenting subscribers and not their addresses.

The MCA agrees with GO's submissions and wishes to make clear that the inclusion of addresses as part of the definition of 'directory information' in the Consultation Document was intended to be used only as an identifying field for directory information service providers as well as the general public when seeking numbers to be able to differentiate between consenting customers who may share a name and surname but not necessarily the same address. The availability of subscribers' addresses may also be useful in the case of reverse searches carried out as part of the on-line directory information services that could be offered by directory information service providers as well as in the case of telephone directories as defined below.

Otherwise, the obligation and duty of a directory information service provider is limited to providing telephone numbers of consenting subscribers, a matter which could also be inferred from the definition of "directory information service providers provided in the Consultation Document. For this reason and given the explanation and interpretation given above, the MCA is satisfied that the definition of 'directory information' as contained in the Consultation Document need not be amended.

The second definition that GO was 'greatly concerned' about was the inclusion of on-line directory information services with the definition of 'directory enquiry services' as opposed to 'telephone directories.' The MCA would like to reassure GO and other PATS providers that the inclusion of 'on-line directory information services' with the definition of 'directory enquiry services' was only made for the practical treatment of the particular subject at hand. To explain further, the provision of directory information in response to telephone enquiries and online enquiries is similar due to the fact that the requesting customer is requesting access to the telephone number of specific subscribers, and therefore limited in number. This is very different to the case when there is a request for data to be provided in bulk, as is the case when a requesting customer or authorised directory information service provider is given access to a database or a printed publication containing all the directory information of all the PATS provider's consenting subscribers.

It is therefore for reasons of expediency and practicality that, for the purposes of this Decision and the preceding Consultation Document, the MCA treated the subject of online directory information services together with operator-assisted enquiry services. In no way is the treatment of these two directory information services together for the purposes of this Decision intended to be construed as a general re-classification of online directory information services as part of telephone directories. The definition in question as contained in this Decision shall thus have no implications on USO definitions.

In its feedback, GO also stated that the treatment of online enquiry services with telephone directories would “limit the definition of Regulation 24(1)(a) of the ECNS Regulations as it reserves the electronic format directory to media listed in point 1 of page 7 of the [Consultation Document]”.

To explain further, Regulation 24(1)(a) states:

*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.*

Point 1 of Page 7 of the consultation document, which GO refers to, was the first element that the MCA suggested had to form a part of the consent clauses. This first element has in fact remained unchanged and is now the first point of Decision 7 below as follows:

*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, it must be stated that the subscriber's data shall 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. (Our emphasis)*

To this effect, the MCA considers that point 1 on page 7 of the Consultation Document is being taken out of context by GO. What point 1 does is make reference to a statement which needs to be included in the consent form in order to highlight the implications to subscribers of consenting to their personal data being included in the database for the purposes of providing directory information services. Furthermore, the media listed in point 1 are not intended to form part of an exhaustive list but, rather, are an indicative list as the word ‘etc.’ should indicate. Thus, the MCA does not share GO’s concerns on this matter and trusts that, following this explanation, GO’s concerns on this matter are allayed.

The definitions, as amended, shall therefore be as follows:

**Decision 2:**

**For the purpose of this Decision, the following definitions are being given for the proper understanding and interpretation of this document<sup>1</sup>:**

**'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);**

**'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;<sup>2</sup> 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 of the Laws of Malta, made under the ECRA;**

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<sup>1</sup> Unless otherwise stated, the definitions provided in Article 2 of the ECRA also apply to this Decision .

<sup>2</sup> 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 Decision, Online Directory Information Services are being included within the concept of Directory Enquiry Services for the purposes of this Decision. 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 this Decision, in view of their distinct features and search functions.

***'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***

***'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

No feedback was received contesting in any way the corresponding 'Legal Basis' section of the Consultation Document. The relevant extracts of the ECRA, as well as the ECNS Regulations, are therefore being 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 Directive<sup>3</sup>:

"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.

(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.

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<sup>3</sup> 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.

(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 Directive<sup>4</sup>:

"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 the MCA's remit, one must also make reference to, and take into consideration, regulation 8 of the Processing of Personal Data (Electronic Communications Sector) Regulations entitled 'Directory of subscribers' (SL 440.41 of the Laws of Malta), which transposes Article 12 of the Directive on Privacy and Electronic Communications,<sup>5</sup> whilst also taking into account Recitals 38 and 39 of the said Directive.

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<sup>4</sup> Ibid.

<sup>5</sup> 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. FEEDBACK ON MAIN ISSUES CONSULTED UPON

The Consultation Document addressed three main 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.

The greater part of the feedback received from both GO and Melita focussed on the first issue in relation to the consent clauses. Both the feedback and the MCA's analysis and reaction to it follow hereunder.

#### 3.1 REQUISITE ELEMENTS OF THE PERSONAL DATA RELEASE CONSENT CLAUSES<sup>6</sup>

As stated in the Consultation Document, 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.

The Consultation Document had stated that, for the sake of practicality, 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.

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<sup>6</sup> 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.

In this regard, GO also suggested that, in the interest of practicality, the consent clauses may also form a part of a document that may also be used for other purposes, typically the contract, and that these clauses be in a clearly defined, separate section, requiring a separate signature if the MCA requires it. The MCA has no objection to this approach and considers it to be in line with its objectives so long as the different sections of the document or contract are clearly defined and delineated and that a separate signature for the consent clauses is sought and obtained from the subscriber.

The MCA would also like to clarify that the obligation on PATS providers to provide such consent clauses would only arise in the case of the provision of telephony services provided by means of a contract as well as in the case of pre-paid mobile telephony services where the subscriber has opted to have his/her personal details registered with the PATS provider of choice. In the case of a pre-paid subscriber who does not wish to have his/her personal details registered in any manner whatsoever with the PATS provider, then the obligation on the PATS provider to present such consent clauses would not subsist.

**Decision 3:**

***Consent clauses should be presented by PATS providers 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 who wish to register their personal details, at the time of purchase. The consent clauses should be presented in all such cases and made available either as part of the contract and/or the terms and conditions of such contract, or as a separate form. Consent clauses presented as part of the contract or any other document shall require a separate signature.***

The Consultation Document had proposed that 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 who opt to have their personal details registered with their PATS provider of choice, the consent clauses would be presented as a consent form to be filled out and returned by such subscriber at the time of purchase if such subscriber also wishes to be included in the directory information database. The filling out of a consent form in this latter case would be at the subscriber's total discretion and in no way mandatory. However, the obligation to offer the opportunity to have one's data included in a directory information service would subsist at all times with the PATS provider.

Melita objected to this proposal on the grounds that it already has in place an online system whereby a subscriber to any telephony service may voluntarily submit personal data to be included in the directory information services provided. Melita thus stated that it did "not see the necessity of *imposing* this on the customer at the time of the conclusion of the contract or at the time of purchase of pre-paid services." (our italics)

The MCA acknowledges that Melita does, in fact, have such a system and that its subscribers do, in fact, enjoy the right to *submit* their personal data online. However, the MCA would also like to point out that the consent clauses go beyond offering such an option by actually *informing* subscribers of such right as well as their continuing right to *change* and also *withdraw* their personal data from being used for the provision of directory information services at any point in time throughout the duration of their contract and at no charge. To

this effect, the MCA does not see this proposal as an imposition in any way upon subscribers, as described by Melita, but, rather, as an opportunity to make such subscribers more aware of their rights at law and of the consequences of their choices.

**Decision 4:**

***PATS providers shall ensure that the consent clauses are returned by their subscribers, duly completed and signed, at the same time as, and together with, the signed contract. In the case of registered pre-paid subscribers wishing to be included in the directory information services, the consent clauses shall be returned by such subscriber at the time of purchase if he/she wishes to be included in the directory information database.***

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 by the PATS provider of the terms and conditions of the contract with all the legal consequences attached thereto. To clarify further, this means that, should the PATS provider fail, at the time of signature of the contract, to secure the explicit choices of its subscriber, endorsed by the subscriber's signature in relation thereto, such contract will be considered as null, with the subscriber having no obligations towards the PATS provider and vice versa, until the situation is remedied and the consent clauses are duly completed and signed by such subscriber and returned to the PATS provider. The contract, and all the respective obligations contained therein, may thus be validated and brought into effect on the date that the PATS provider receives the respective consent clauses duly completed and signed by the subscriber.

**Decision 5:**

***Failure on the PATS provider's part to obtain the consent clauses duly completed and signed by the subscriber shall be tantamount to a breach of the terms and conditions of the contract with the consequence that such contract shall have no effect until the consent clauses are returned to the PATS provider duly completed and signed by the subscriber.***

As previously stated, all relevant PATS providers would have to adopt these consent clauses containing all the elements listed below within seven (7) months of the coming into effect of this 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. As stated in the Consultation Document, the new consent clauses would also need to be presented to existing subscribers at the time of any renewal of their contract, whether such renewal is explicit – i.e. written and signed off by the subscriber- or even tacit, i.e. it continues to operate beyond the stated period under the same terms and conditions (and in accordance with the proviso of Regulation 36(2) of the ECNS Regulations<sup>7</sup>) without the subscriber's signature to explicitly signify consent to such an extension.

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<sup>7</sup> The Proviso of Regulation 36(2) of the ECNS Regulation states: "Provided that no termination charges shall apply with respect to contracts that have been renewed after the initial contract period has expired."

In the case of tacit renewals, this means that whenever a contract is automatically renewed, PATS providers should remind the relevant existing subscribers of their right to be included in a directory and of their right to review the information they provided for directory information purposes free of charge. PATS providers should therefore also invite such subscribers to re-submit their personal data in line with the new consent clauses.

In its feedback during the public consultation process, Melita objected to this point, again on the grounds of the continuing online service it offers its subscribers to include their personal data in a directory information database.

The MCA, after considering Melita's feedback as well as the administrative implications involved in the fulfilment of this obligation to notify all tacitly renewing subscribers, has decided to proceed with the decision as originally proposed in the Consultation Document. The MCA has decided to do so as it considers that only in this manner can this Decision, and the new consent clauses it is putting in place have the desired widespread effect and be brought to the attention of *all* subscribers, and not just subscribers who are either new to public telephony services or subscribers who are changing their PATS provider of choice or tariff plan or explicitly renewing the terms of a current plan.

**Decision 6:**

***Within seven (7) months of coming into effect of this Decision, the consent clauses shall 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 shall also be presented by the PATS providers to their existing subscribers at the time of any written endorsement or tacit renewal of any such subscriber's contract.***

At this juncture, the MCA considers it appropriate to also remind PATS providers that failure to grant the opportunity to a subscriber who, at any given point in time throughout the duration of his/her contract, wishes to correct or amend the substance of his/her consent clauses would constitute a breach of Regulation 42(1)(a) of the ECNS Regulations.<sup>8</sup>

### 3.1.1 ELEMENTS TO BE INCLUDED IN CONSENT CLAUSES:

Feedback from both GO and Melita was provided in relation to the elements originally proposed in the Consultation Document.

With reference to the first element or requirement and the inclusion of a statement to the effect that, once given, a subscriber's personal data could also be shared, under particular circumstances, with other directory information service providers established anywhere in the EU, Melita stated the following: "At present Melita's consent clauses state that data can be made available to a 'third party undertaking offering a directory service'. Given that the

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<sup>8</sup> Refer to p. 9 of this Decision.

wording is not limited to local undertakings, we understand that this already covers all the subscribers who have indicated their consent to be included in a directory information service, and hence there would be no need to re-obtain their consent for having their details accessed by a European directory services provider.”

The MCA shares Melita’s view that consent would not have to be re-sought from Melita’s subscribers. This is also in line with the reasoning of the Court of Justice of the European Union (formerly the ‘European Court of Justice’) in the Deutsche Telekom AG (Case C-543-09) case quoted by Melita further on in its response to the Consultation Document. However, the MCA wishes to point out that, while consent would not have to be re-sought, the wording of Melita’s consent clauses would nonetheless have to be amended by Melita within 7 months from the publication of this Decision in order to reflect the wording contained in the first element listed below in Decision 7. In this manner, within 7 months from the publication of this Decision, the consent clauses presented by Melita as well as all other PATS Providers to their subscribers will be in line with this Decision.

In its feedback, Melita objected to the third element of the consent clauses as proposed in the Consultation Document on the following grounds which the MCA has broadly summarised as follows:

- (i) Regulation 42 of the ECNS Regulations does not specify the obligation for operators to provide an “ex-directory” option;
- (ii) the opt-in procedure Melita currently adopts is in line with and satisfies the definitions of consent and the obligations contained in local and European legislation and was also approved by the IDPC;
- (iii) the proposal of having two mutually exclusive options without the default option will delay the subscription or installation of services, possibly stalling processes altogether.

Following an assessment of Melita’s grounds of objection, the MCA submits that, while it is true that Regulation 42 does not require an “ex-directory” option, neither does it prohibit it. Furthermore, the “ex-directory” option is likewise in conformity with all the definitions of consent and the obligations contained in local and European legislation. As a matter of fact, the MCA considers that the two mutually-exclusive options, presenting subscribers with the option of selecting either to be included or excluded from directory information services, give subscribers the ultimate in terms of opportunity to make a considered and informed choice. To this effect, the MCA would also like to point out that all the proposals put forward by the MCA in the Consultation Document were also seen by the IDPC prior to publication and were not objected to in any manner whatsoever. Finally, as regards the possible delays that Melita envisages, the MCA considers that these can be overcome by undertakings once their respective customer-care staff is informed of the new Consent Clauses.

For the reasons stated above, as well as the real need felt by the MCA to have one consistent procedure being used by all PATS providers in order to acquire subscribers’ consent or otherwise for the inclusion of their personal data for the provision of directory information services, with no room for doubt or fall-backs, the MCA considers Melita’s arguments on the third element as being debatable and is not sufficiently convinced by them to warrant a change of stance in view of the importance of the subscribers’ rights it is seeking to protect in this instance.

As regards the same third element GO, on the other hand, suggested that another option be included for subscribers to select, that is, that subscribers would be able to choose whether or

not they would want their PATS provider of choice to share their personal data with other authorised directory information service providers. In other words, subscribers could have the option of choosing that their telephone number is given by the directory information services offered by the PATS provider providing their telephony service but is not shared by that PATS provider with other directory information service providers. Whatever GO's justifications, the MCA must refuse this suggestion outright as it is in breach of Regulation 42(2) of the ECNS Regulations and of Article 25(2) of the Universal Service Directive which clearly impose the obligation on PATS providers to share directory information so long as particular conditions are met. Such conditions are elaborated upon in Section 3.2 and Decision 8 below.

GO also gave feedback on the fifth element, suggesting that the "MCA specify that the word 'written' be further defined to mean published in paper format or on media (CDs, memory sticks) that the authorised provider cannot change." The MCA has accepted this suggestion and has amended the fifth element in order to reflect this suggestion.

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 applicable data protection regulations.

**Decision 7:**

**All consent clauses shall contain the following elements:**

- ***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, it must be stated that the subscriber's data shall 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.***
- ***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'.***
- ***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.***



- ***A clear explanation of how a reverse search function<sup>9</sup> works, including examples of standard or traditional searches 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.<sup>10</sup> To this effect, PATS providers could possibly choose to reproduce the definition and examples given of reverse searching in footnote 7 below.***
  
- ***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 or her status from ex-directory to directory and vice-versa with, however, the understanding that where a subscriber decides to change his or her status from directory to ex-directory, or amend his/her data, any data which would already have been published and/or distributed in written format, whether in paper format or any other electronic media, cannot and will not, in any way, be retracted.***
  
- ***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.***
  
- ***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 once again like to emphasise at this juncture that the underlying reason behind the third element 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 to 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.

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

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<sup>9</sup> 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.

<sup>10</sup> 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'.

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 contracts<sup>11</sup>. 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 that such transfer should take place 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 only<sup>12</sup>.

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 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.

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<sup>11</sup> 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;"

<sup>12</sup> The information provided for directory information services cannot be used for any other purpose including direct marketing.

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.

From feedback provided solely from Melita in relation to these four requirements, the response to these four requirements as listed and explained in the Consultation Document was all positive.

**Decision 8:**

***A PATS Provider must share the personal data of those subscribers that who have consented to its inclusion for the provision of directory information services with another undertaking so long as the following conditions are met:***

- 1. the request must be reasonable;***
- 2. the request must be made for the purpose of providing a publicly available directory information service only;***
- 3. the directory information will be used for the purpose of providing directory information services within EU territory only; and***
- 4. the requesting undertaking must be authorised in Malta to provide such a directory information service.***

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.

### 3.2.1 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 is establishing the following:

**Decision 9:**

***The dipping methodology currently in use shall be the standard way that authorised 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, thus allowing both parties to negotiate freely, the MCA would like to clarify and emphasise that, according to Regulation 42(2), it is only the cost of sharing subscriber data that can be charged as a price for the data transfer. This means that any prior cost that may have been incurred by the PATS provider in order to collect, store, process or to enable access to this subscriber data cannot, in any manner whatsoever, be recovered from or transferred to the requesting authorised directory information service provider. To clarify further, this means that any set-up costs to enable dipping cannot be transferred onto a requesting authorised directory information service provider. It also means that it is only the cost of transferring the subscriber data, with no element of profit whatsoever, which can be claimed by the PATS provider.

The MCA will address any possible dispute arising and relating to such cost-related matters and any other matters relating to the transfer of data by the dipping methodology on a case-by-case basis.

### 3.2.2 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 which it considers should be negotiated by the respective parties but would handle any possible dispute arising and relating to such matters on a case-by-case basis.

Nonetheless, as in the case of the dipping methodology described above, the MCA considers it necessary at this juncture to once again refer to Regulation 42(2) of the ECNS Regulations and to state that it is only the actual and immediate cost of sharing the data in bulk that can be claimed by the PATS provider from the requesting authorised directory information service provider. As with the dipping methodology, the price of such transfer cannot include any cost relating to the collection, storage, processing or having such information on hand so as to enable the PATS provider to fulfil a potential request for sharing. Neither can it include any profit whatsoever. Regulation 42(2), however, allows a price to be charged for the cost of the medium used for sharing and the cost of those resources used to share such data (e.g. paper, CD-ROM, USB stick, postage costs etc.) as well as the cost of the time taken to transfer such data onto such medium.

***Decision 10:***

***A 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 so long as the four criteria listed in Decision 8 above are met.***