

Information to be Included in Subscriber Contracts

Consultation on Proposed Decision

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Contents

1.	Introduction	1
2.	Legal Basis.....	2
3.	Conclusion of a contract	3
4.	When is the contract to be provided?	5
5.	Information to be included in subscriber contracts	7
5.1	Details of the services provided	7
5.1.1	Limitations resulting from content rights	7
5.1.2	Conditions limiting access to and, or use of services and applications..	8
5.2.	Service Quality levels	10
5.3.	Particulars of tariffs, prices and charges	12
5.4.	Billing and payment methods.....	13
5.5.	Email Mobility services	14
5.6.	Duration of the contract, conditions for renewal, suspension and termination	15
5.6.1	Pre-Paid services	16
5.7.	Initiating procedures for settlement of disputes	17
5.8.	Compensation or reimbursement schemes	18
6.	Applicability of Proposed Decision	19
7.	Request for Input.....	20

1. Introduction

The Malta Communications Authority (hereinafter 'the Authority') is the statutory body responsible for the regulation of the electronic communications sector in Malta as stipulated in the Malta Communications Authority Act (Cap. 418) (hereinafter "MCA Act") and the Electronic Communications (Regulation) Act (Cap.399) (hereinafter "ECRA").

Under article 4(1)(c)(ii) of the 'ECRA', one of the objectives of the Authority is to ensure a high level of protection for end-users in their dealings with undertakings providing electronic communications services.

One of the main sources of protection afforded to end-users in this regard is the contract which includes the terms and conditions for the use of the service. In this respect, the MCA had in September 2010, published a set of guidelines for undertakings on the minimum level of information which should be included in subscriber contracts. The aim of that document was to encourage the provision of clear and transparent information in order to enable end-users to make informed decisions with regard to the subscription to electronic communications services (namely fixed telephony, mobile telephony, internet and TV distribution services).

Further to the publication of the above mentioned guidelines, the legal provisions which specify which information must be included in subscriber contracts, have been further strengthened following the transposition into Maltese laws in July 2011 of the revised EU Electronic Communications Framework (as published in the Official Journal of the European Union) of the 19th December 2009.

In this respect the Authority is publishing this proposed decision on the minimum level of information which must be included in subscriber contracts with the aim of creating an environment in which undertakings may ensure that their contracts adhere with the provisions of the law while simultaneously providing consumer protection in electronic communications contracts and improving the quality of available information.

2. Legal Basis

Article 23 of the ECRA states that an undertaking shall provide all subscribers to a public communications network and, or to publicly available electronic communications services, with a contract, and shall provide such services in accordance with such a contract.

Regulation 35 of the Electronic Communications Networks and Services, SL399.28 of the Laws of Malta (hereinafter 'ECNSR') further states that, in accordance with the provisions of the above regulation, an undertaking shall provide its subscribers with a contract that specifies in a clear and comprehensive manner which information is to be included in subscribers contracts.

Further to the above, under regulation 37 of the 'ECNSR' undertakings are required to publish information regarding the services they provide in a transparent, comparable, adequate and up to date manner and to ensure that such information is conveyed clearly and comprehensively at all retail outlets free of charge and on any website operated or controlled by the undertaking.

Within the scope of ensuring consumer protection in line with Article 4(1)(c)(ii) of the ECRA, the Authority by means of this consultative process intends to address the following:

- Provisions that are legally required to be included in contracts related to electronic communications service/s and ensure that these are conveyed in a clear manner;
- The form of such contracts;
- The means by which the contracts should be made available to consumers; and
- Any necessary additional transparency rules related to contracts and terms and conditions, for example their availability on web-sites or from outlets etc.

This proposed decision will not exempt providers of electronic communications services from complying with any other obligations in accordance with other legal provisions and/or decisions published by the MCA or by other competent regulatory bodies.

3. Conclusion of a contract

Within the context of this decision a 'contract' is an agreement between a subscriber and a service provider by which obligations and rights are created and regulated, for the provision and use of any electronic communications service/s. The Authority considers that, a 'written contract' is one that is in a tangible form, where the acceptance of the end-user is denoted, normally by a signature.

In this regard, in all cases where a subscriber is being bound by a definite contract for the provision of any electronic communications services, the Authority considers that a written contract (whereby the subscriber's agreement to that contract is manifest) is necessary for the purposes of Article 23(1) of the 'ECRA'.

In this respect, the Authority considers that undertakings have two alternatives at law, namely to provide subscribers with:

1. A written physical contract which is signed by the subscriber; or
2. An electronic contract whereby the subscriber's acceptance of that contract is manifest in line with the e-Commerce Act and any other relevant legislation.

In order to ensure that end-users become acquainted with the contractual clauses prior to signing it, the Authority is hereby proposing that end-users are given the choice to indicate in which medium they wish to conclude their contractual agreement, (i.e. either in physical or in electronic form). This does not substitute the requirement to provide the contract in physical form where the end-user does not indicate a preference. For the sake of transparency, the Authority is proposing that the subscriber's signature is included on the physical contractual document and not on a separate document. In either instances (i.e. whether the contract is concluded in a physical or in an electronic format), the subscriber's acceptance must be manifest. In all cases, particularly when these terms and conditions exceed one page, the space reserved for the subscriber's acceptance shall be preceded by an explicit statement which declares that upon accepting, the subscriber agrees to the terms and conditions stipulated in the contract.

With respect to the above, stakeholders are invited to indicate in their responses to the Consultation, what means they consider to be appropriate to demonstrate the subscriber's manifest consent in the case of an electronic conclusion of a contract.

The Authority would like to stress on the importance that subscriber contracts are written in concise, clear and plain language suitable for consumers. In addition to this, the use of a font to ensure that the text is adequately readable is important.

The MCA is aware, that in the electronic communications sector, it is also common practice that subscribers enter into indefinite contracts for pre-paid services without actually signing a written contract. A classical example of this is the subscription to indefinite pre-paid mobile telephony services. The MCA does not interpret this as a breach of Article 23 of ECRA as long as the subscriber's consent to the provision of the service is manifest, and as long as the subscriber is not bound to purchase the service for a definite period, and given that in all circumstances, a copy of the Terms and Conditions is provided to the subscriber upon subscription.

In relation to the above example, the MCA considers that the subscription and subsequent use of the service, is sufficient proof of a subscriber's intention to enter into, and accept the contract terms.

The subscription to add-on services as well as upgrades to a service/s, such as for example the add-on of a movie package for an indefinite period or of a mobile bundle offer, is another instance where subscribers may enter into a contractual agreement without signing a written contract. In such cases undertakings are required to maintain adequate tangible proof of the subscriber's request to subscribe or to unsubscribe to the package as well as the subscriber's acceptance of any new terms and conditions, and provide such evidence to MCA as necessary.

Proposed Decision 1

Undertakings providing any electronic communications service/s shall provide subscribers with either:

1. A written contract which is signed by the subscriber; or
2. An electronic contract whereby the subscriber's acceptance of that contract is manifest in line with the e-Commerce Act and any other relevant legislation.

End-users shall be given the choice to indicate in which medium they wish to conclude their contractual agreement, (i.e. either in physical or in electronic form). Where the end-user does not indicate a preference, the contract shall be provided in physical form.

The subscriber's signature shall be included in the physical contractual document and not on a separate document. In either instances, whether the contract is concluded in a physical or in an electronic format, the subscriber's acceptance must be manifest and the contract shall include all the clauses constituting the terms and conditions. The space reserved for the subscriber's acceptance shall be preceded by an explicit statement which declares that upon accepting, the subscriber agrees to the terms and conditions stipulated in the contract.

The subscription and subsequent use of a pre-paid service, whereby the subscriber may terminate the contract without giving prior notice and without incurring any penalty fees is sufficient proof of a subscriber's intention to enter into, and accept the contract terms and therefore a physical signature is not required. In such circumstances a copy of the Terms and Conditions shall be provided to the subscriber upon subscription.

No signature shall be required for the subscription of add-on services as well as upgrades to the service/s. In such instances the undertaking shall maintain adequate proof of the subscriber's request to subscribe or to unsubscribe to the package / offer as well as the subscriber's acceptance of any new terms and conditions and provide such evidence to MCA as necessary if requested.

4. When is the contract to be provided?

End-users need to be able to compare contractual terms and conditions, in addition to applicable tariffs and other relevant conditions, prior to deciding to subscribe to a specific service.

While the MCA is aware that this information is generally available on service providers' web-sites, in some instances, these are not always easy to locate. The Authority is therefore proposing that any terms and conditions governing a particular service, offer or package, should be accessible from the same web-page where the service, offer or package is being publicised. Furthermore, those terms and conditions governing special offers which are no longer available to take-up, but which are still governing the use of the service/s of a number of subscribers, should be available on the undertaking's website until the termination of all service/s being governed by those terms and conditions.

The Authority is also aware that service providers do not always make available hard copies of their contracts to interested end-users to enable prospective subscribers to review the terms and conditions at their convenience. In this respect, Regulation 37(2) of the ECNSR specifies that contracts for the provision of any electronic communications service/s should be provided to any end-user who requests it, for example, either in hard copy from retail outlets or in soft copy following an electronic request by a prospective end-user. This will assist end-users who wish to avail themselves of a service, to understand the service provider's contract terms, and to make an informed choice in deciding whether to subscribe or not to the service offered.

Proposed Decision 2

All terms and conditions shall be available on the undertaking's website. Any terms and conditions governing a particular service, offer or package, shall be accessible from the same web-page where the service, offer or package is being publicised.

Those terms and conditions governing special offers which are no longer available to take-up, but which are still governing the use of the service/s of a number of subscribers, shall be available on the undertaking's website until the termination of all service/s being governed by those terms and conditions.

All terms and conditions for services currently being offered to the public shall be made available in writing at all retail outlets such that upon request the applicable contract is readily available for inspection free of charge by the general public during normal business hours. Copies of these contracts shall be made available in hard copy format free of charge should these be requested by prospective subscribers.

5. Information to be included in subscriber contracts

Regulation 35 of the ECNSR requires undertakings to include the following information in subscriber contracts. This proposed decision provides direction on the implementation of this provision where appropriate.

5.1 Details of the services provided

The MCA considers that service providers generally comply with this obligation by providing a broad description of the service/s and a list of ancillary services. In the telephony sector for example, the primary service would be the ability to receive and make telephone calls while ancillary services, amongst others, could include roaming services.

5.1.1 Limitations resulting from content rights

One area however, where the Authority considers the description of the service to be generally insufficient, relates to the television sector. Regulation 35(1)(b)(ii) of the 'ECNSR' requires undertakings to provide information on any limitations that may result from content rights. In this respect, undertakings are required to describe the nature of the limitations that may apply to the provision of TV distribution services. Content, as included in this document, is referring to both:

- Content which is acquired by the service provider to be broadcast over its network (by way of example, this would include a service provider acquiring the rights to broadcast a sporting event); and / or
- TV Channels that are re/transmitted over a service provider's network and that could therefore be set to form part of the channel line-up. Hereinafter referred to as ('Content').

For example subscriber contracts should specify that the re/transmission of:

1. Content, may be acquired for a definite contractual period, and that given that the re/transmission of such Content is subject to a bidding process, the undertaking cannot guarantee the re/transmission of certain content after the lapse of the defined contractual period; and/or

2. Content (the rights to which are acquired for an indefinite period), may be subject to decisions taken by the Content owners over which the undertaking has no control. Such decision could, for example, require undertakings to stop re/transmitting that Content.

In addition to the above, the Authority feels that when an undertaking is aware *a priori* of any termination dates after which the re/transmission of certain Content cannot be guaranteed (excluding those instances specified in 2nd bullet above), that undertaking must make available information pertaining to these termination dates, on its website and in its retail outlets. The lack of provision of such important information to the subscriber at the time of subscription may be of detriment to the end-user's decision on whether to subscribe or not.

The Authority appreciates that this information may be extensive as well as detailed and therefore believes that the contract should as a minimum make reference to another document which contains this information. Such documents nevertheless should be in the form of appendices to the contract, and should form an integral part of the said contract. This document must be supplied together with the contract for purposes of transparency.

Proposed Decision 3

Subscriber contracts shall describe the nature of any limitations that may apply for the re/transmission of Content.

When an undertaking is aware *a priori* of any expiry dates after which the re/transmission of Content cannot be guaranteed, that undertaking must make available information pertaining to the expiry date to re/transmit that Content. This information shall be made available on the undertaking's website and in all retail outlets. Such documents shall constitute appendices to the contract, of which they shall make an integral part and must be supplied together with the contract.

5.1.2 Conditions limiting access to and, or use of services and applications

Regulation 35(1)(b)(ii) of the ECNSR, requires that any limitations or conditions impacting the service/s being provided, are included in subscriber contracts. In this respect, the Authority considers that, as a minimum, undertakings should provide information on:

- coverage of services, even if only by reference to a location where at the end-user may obtain information on service coverage limitations impacting on the quality of the service. For example, in the case of mobile or terrestrial transmitted services, any service limitations related to network coverage, both in terms of any significant geographical areas where the service provider does not have coverage; and any coverage limitations due to, for example, indoor penetration;
- those instances where tests may be required to assess whether the service can be provided at the subscriber's premises;
- potential restrictions resulting from the service/s in terms of the subscriber's ability to access other services/features.

Proposed Decision 4

Any important limitations or conditions impacting the service/s being provided shall be included in subscriber contracts. As a minimum the following information shall be included:

- Coverage of services (even if only by reference to a location where at the user may obtain information on service coverage limitations impacting on the quality of the service);
- Any instances, where tests are required, to assess whether the service could be provided at the client's premises; and
- Potential restrictions resulting from the service/s in terms of the subscriber's ability to access other services/features.

5.2. Service Quality levels

Subscriber contracts must clearly set the levels of quality which the service provider undertakes to uphold with its subscribers. In this regard, Regulation 35 (1)(b)(iv) of the 'ECNSR' specifies that as a minimum contracts must specify the:

- minimum access speeds in case of internet service, ensuring that these do not differ significantly from the marketed upper levels. A separate Consultation on this subject has been published by the Authority;
- maximum time for initial connection and disconnection. In this regard, contracts should clarify that if the timeframe for initial connection is exceeded and service not installed, a subscriber may exit the contract without incurring penalties. Furthermore, contracts must clearly indicate that the subscriber should not be liable to pay for service/s after the disconnection advance notice lapses (given that the subscriber adhered to the disconnection process established in the contract);
- types of maintenance services offered;
- the maximum repair time required to restore services free of charge following maintenance services to the infrastructure and equipment owned by the service provider, and/or faults resulting from failures to the service provider's equipment and/or infrastructure (excluding cases of force majeure). In this respect, the contract should specify the minimum service availability or up-time, excluding cases of force majeure.

Proposed Decision 5

Subscriber contracts shall clearly set the levels of quality which the service provider undertakes to uphold with his subscribers. As a minimum subscriber contracts shall include:

- the minimum access speeds in case of internet service, ensuring that these do not differ significantly from the marketed upper levels;
- the maximum time for initial connection and disconnection, specifying that if the timeframe for initial connection is exceeded and service not installed, the subscriber may exit the contract without incurring penalties. This clause must also clarify that the subscriber should not be liable to pay for service after the disconnection advance notice lapses (given that the subscriber adhered to the disconnection process established in the contract);
- the types of maintenance services offered;
- the maximum repair time required to restore services free of charge following maintenance services to the infrastructure and equipment owned by the service provider, and/or faults resulting from failures to the service provider's equipment and/or infrastructure (excluding cases of force majeure). In this respect, the contract should specify the minimum service availability or up-time, excluding cases of force majeure.

5.3. Particulars of tariffs, prices and charges

In line with Regulation 35(1)(d) of the ECNSR, subscriber contracts must include information pertaining to the details of prices, tariffs and other applicable charges. Therefore, the following information together with any other information related to the applicable tariffs, prices and charges for the use of service/s must be included in subscriber contracts:

- The types of tariffs, prices and charges, applying to the supply of the designated service/s;
- The cost of installation, connection, reconnection and disconnection of the designated service/s, if any;
- Whether the subscriber is eligible for a discount, credit or rebate, and, if so, the amount of the discount, credit or rebate; and how it is worked out;
- Peak and off-peak hours (where applicable) and related tariffs;
- Any access charges; and
- Any penalties for unreturned/damaged terminal equipment supplied.

All of the above information should be either listed in:

1. subscriber contracts; and / or
2. a separate document which is specifically referenced in the subscriber contracts. Such documents nevertheless should constitute appendices to the contract of which they should make an integral part and must be supplied, together with the contract for purposes of complete transparency.

Proposed Decision 6

All information pertaining to the details of prices, tariffs and other applicable charges for the use of the service/s as specified in Section 5.3 shall either be listed in:

1. subscribers' contracts; and / or
2. a separate document, which is specifically referenced in the subscriber contracts. Such documents nevertheless, should constitute appendices to the contract, of which they should make an integral part and must be supplied, together with the contract for purposes of complete transparency.

5.4. Billing and payment methods

Post-paid contracts must provide information on the right of subscribers to request, at any time, a basic level of itemised bill, free of charge through their preferred medium in line with regulation 38 of the 'ECNSR'. In addition, the Authority is hereby proposing that the following information is also provided in subscriber contracts:

- Methods of issuing bills (paper or electronic billing) and billing frequency (including any available subscriber options);
- Different methods of payment available and any charges/discounts available on each of these methods, if any;
- Any timeframes for the payment of bills;
- Applicable charges for late payment of bills and any other action that may be taken by the service provider in this regard in line with Proposed Decision 9 below.

Proposed Decision 7

Post-paid contracts shall provide information on the right of subscribers to request at any time a basic level of itemised bill, free of charge, through their preferred medium in line with regulation 38 of the 'ECNSR'.

In addition, subscriber contracts shall also provide information on:

- the methods of issuing bills (paper or electronic billing) and billing frequency (including any available customer options);
- the different methods of payment available and any charges/discounts available on each of these methods, if any;
- any timeframes for the payment of bills; and
- applicable charges for late payment of bills and any other action that may be taken by the service provider in this regard in line with **Proposed Decision 9** below.

5.5. Email Mobility services

Regulation 35(1)(f) of the ECNSR requires that subscriber contracts contain information on the subscriber's right to be provided with email forwarding services, if so requested, upon termination of an internet service in line with regulation 48 of the ECNSR. In this respect subscriber contracts are required to include information on the subscriber's right to request, upon termination of his internet service:

1. the forwarding of any e-mail received on the original e-mail address to the new e-mail address free of charge, for a minimum period of twelve (12) months; and
2. an automated reply to any electronic mail received on the original e-mail address informing the sender of the forwarding service referred to above.

Undertakings should take the necessary measures to ensure that this process is integrated into the disconnection procedure of the respective undertaking in line with Proposed Decision 9 hereunder.

Proposed Decision 8

Subscriber contracts shall include information on the subscriber's right to request upon termination of his internet service:

1. the forwarding of any e-mail received on the original e-mail address to the new e-mail address free of charge, for a minimum period of twelve (12) months; and
2. an automated reply to any electronic mail received on the original e-mail address informing the sender of the forwarding service referred to above.

Undertakings shall take the necessary measures to ensure that this process is integrated into the disconnection procedure of the respective undertaking in line with **Proposed Decision 9** hereunder.

5.6. Duration of the contract, conditions for renewal, suspension and termination

Contracts of service/s may include a specific term for the supply of the designated services.

The clause on the duration of the contract is one of the most important clauses in the contract and should be separate from any other clause in the contract and prominently displayed.

In particular this clause shall specify:

1. the duration of the contract;
2. the minimum advance period of notice to be given by either party to terminate the contract, if any;
3. the means by which such advance notice is to be communicated to the service provider;
4. the means by which the subscriber is required to terminate the service/s, including any information on relevant procedures that need to be adhered to by the subscriber;

5. the events that would give either party a right to suspend and/or terminate the contract. Contracts must specify the method by which a subscriber may rescind the contract without incurring any penalties if it is proved that the contracted services cannot be provided;
6. any penalties, (ensuring that these are reasonable and proportionate) as well as the calculation method applied for such penalties, in the event that the subscriber terminates his contract prior to the lapse of the contracted period; and
7. terms and conditions for renewal of a contract.

In order to ensure that subscribers are aware of the duration of the contract, as well as the charge applicable for terminating the contract before the end of its term, the Authority is further proposing that undertakings will be required to ensure that this information is written in **bold** and in a font size which is at least **20% larger** than the other clauses in the contract of service.

With regard to suspension and/or termination of service due to non-payment, the contract should clarify that subscribers will be adequately informed in advance about the actions that will be undertaken by the service provider in this regard, specifying the courses of action available to subscribers to avoid suspension and/or termination of service/s. The appropriate method used to make this advance notification should also be indicated in the contract and undertakings should take the necessary measures to ensure that they possess sufficient proof that such notifications have in fact reached the subscriber.

5.6.1 Pre-Paid services

By way of clarification, the above referred advance notification requirement to subscribers does not apply to prepaid telephone services. The Authority notes that in general, the current measures adopted by service providers for pre-paid telephony services, provide subscribers with sufficient advance notification about their imminent credit consumption.

Proposed Decision 9

Any clauses specifying any contractual periods, shall also include information as highlighted in points (1) to (7), in section 5.6 above.

The information pertaining to the duration of the contract, as well as the charge applicable for terminating the contract before the end of its term, shall be written in **bold** and in a font size which is at least **20% larger** than the other clauses in the contract of service.

Any circumstances that may give rise to suspension and/or termination of service due to non-payment shall be clearly listed in the contract. The contract shall clarify that subscribers will be adequately informed in advance about the actions that will be undertaken in this regard, specifying the courses of action available to subscribers to avoid suspension and/or termination of service/s.

5.7. Initiating procedures for settlement of disputes

Under Article 8 of the ECRA, undertakings are required to establish efficient mechanisms for receiving complaints and enquiries. The provision of such a service, enables undertakings to enhance customer satisfaction by providing an efficient, fair and accessible mechanism for handling complaints and enquiries. In order for subscribers to use this service, they require information on the complaint and enquiry handling processes adopted by the undertaking concerned.

The Authority considers that in relation to the complaint and enquiry handling process, the following information should be specified in subscriber contracts, taking into account the obligations onerous on service providers under Article 8 of ECRA:

1. Available channels for submitting claims;
2. Any reasonable time limit for submitting claims;
3. Maximum time limit for undertakings to acknowledge receipt of claims;
4. Maximum time limit for responding to claims;
5. Claims resolution procedure;
6. Information about the subscribers right to lodge a complaint with the MCA if not satisfied with the response and/or remedy offered by the service provider; and

7. MCA's contact details.

Proposed Decision 10

The undertaking's complaint and enquiry handling process along with the information specified in points (1) to (7) in Section 5.7 above, shall be listed in subscriber contracts.

5.8. Compensation or reimbursement schemes

Regulation 40 of the ECNSR, provides that any undertaking providing any electronic communication service/s, establishes and operates, appropriate and reasonable compensation and, or refund schemes to allow for reimbursement of payments, and compensation for losses incurred where contracted service quality levels are not met by the undertaking for reasons not attributable to the subscriber, excluding cases of force majeure. In this respect, regulation 35(1)(j) of the ECNSR provides that such compensation and refund schemes are to be included in subscriber contracts.

The Authority appreciates that this information may be extensive as well as detailed. The Authority therefore believes that subscriber contracts may alternatively make reference to another document which contains this information. Such documents nevertheless, should constitute appendices to the contract, forming an integral part thereof and must be supplied together with the contract for purposes of transparency.

In the event that an undertaking opts not to include the compensation scheme as an annex to the contract, the undertaking must take the necessary steps to ensure that changes to compensation schemes are version controlled so that any subscriber claiming under the scheme is able to refer to the scheme as applicable at the time of subscription. Measures should be taken to ensure that the Authority may verify this.

Proposed Decision 11

The compensation and refund schemes provided by undertakings to allow for reimbursement of payments, and compensation for losses incurred where contracted service quality levels are not met by the undertaking for reasons not attributable to the subscriber, excluding cases of force majeure, shall be made available on the undertaking's website and in all retail outlets.

In addition this information shall also be, either listed in:

1. the subscribers' contracts; and / or
2. a separate document, which is specifically referenced in the subscriber contracts. Such documents shall constitute appendices to the contract, of which they shall make an integral part and must be supplied, in hard copy, together with the contract for purposes of complete transparency.

In the event that an undertaking opts not to include the compensation scheme as an annex to the contract, the undertaking must take the necessary steps to ensure that changes to compensation schemes are version controlled so that any subscriber claiming under the scheme is able to refer to the scheme as applicable at the time of subscription. Measures shall be taken to ensure that the Authority may verify this.

6. Applicability of Proposed Decision

The Authority is of the view that undertakings should be in a position to ensure that all new contracts for the provision of any electronic communication service/s are compliant with the said decision within 2 calendar months from the publication of its final decision.

7. Request for Input

The Authority, in accordance with its obligations under article 4A of the Malta Communications Authority Act [Cap. 418] is seeking the views of all interested parties and stakeholders who have an interest in the subject being dealt with before issuing the proposed decision referred to above.

Any person who wishes to make submissions relevant to the consultation must ensure that submissions are received by the Authority in both hard copy as well as electronic format by not later than **Friday, 30th March 2012.**

Any such submissions are to be addressed to:

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All submissions shall be made publicly available by the Authority on its website unless the person making any such submission gives valid reasons acceptable to the Authority as to why such submissions should not be made public.