

Subscriber Contracts

Report on Decision

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1. Introduction

In February 2012, the Malta Communications Authority (hereafter 'the Authority' / 'MCA') published a Consultation Document on subscriber contracts in the electronic communications sector (hereafter 'ECS'). The objective of this document was to seek the views of undertakings operating in the electronic communications sector and other interested parties on the proposals developed by the MCA in relation to the provision of such contracts.

The proposals were aimed at providing additional clarity on the interpretation of Article 23 of the Electronic Communications (Regulation) Act (Cap.399) (hereafter 'ECRA') which relates to the manner in which an undertaking providing any electronic communications service/s¹ must provide such service/s in accordance with a contract.

The Authority considers that one of the main sources of protection afforded to end-users in the ECS is the contract which includes the Terms and Conditions for the use of the service/s. In this respect, undertakings are required to ensure that such a contract is provided in a clear and transparent manner in order to enable end-users to take informed decisions. The Authority identified four areas where it considered that the provision of subscriber contracts could be more transparent and easily accessible.

This report on Consultation and Decision summarises the responses to the consultation and presents MCA's views and final decision. **The final text of the decision is being published separately and is being annexed to this document.**

2. Responses to the Consultation

The Consultation period for the Proposed Decision entitled 'Information to be Included in Subscriber Contracts' ran from the 3rd of February 2012 to the 30th of March 2012.

Responses to this Proposed Decision were received from GO p.l.c., Melita p.l.c., Vodafone Limited, the Consumer Association and the Local Councils' Association Malta.

MCA wishes to thank these parties for their interest and response.

¹ An electronic communications service includes those services normally provided for remuneration which consist wholly or mainly in the conveyance of signals on electronic communications networks, including Telecommunications services and transmission services in networks used for broadcasting.

3. The Legal Basis

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

Regulation 35 of the Electronic Communications Networks and Services, SL399.28 of the Laws of Malta (hereafter '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 subscriber 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 web-site operated or controlled by the undertaking.

In order to ensure 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:

- agreement and conclusion of a contract;
- form of a contract;
- means by which the contracts should be made available to consumers; and
- 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.

This decision does 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.

4. Conclusion of a contract

4.1. Contracts

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.

In its consultation paper, the MCA noted that for the provision of an electronic communications service, where the subscriber is being bound for a minimum contractual period and/or where

applicable 'early termination fees'² (hereafter 'ETF') apply, it 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'. The Authority considers that, a 'written contract' is one that is in a tangible or durable form, where the acceptance of the end-user is denoted, normally by a signature (whether written or electronic). In this respect, the Authority considers that undertakings have two alternatives at law, namely to provide subscribers with:

- a written physical contract which is signed by the subscriber; or
- an electronic contract.

The Authority further proposed that in either of the above instances, the subscriber's acceptance must be manifest and the contract shall include all the clauses constituting the Terms and Conditions (hereafter 'Ts and Cs'). The Authority received feedback that suggested that the inclusion of all the clauses in subscriber contracts would result in longer contracts which would not necessarily be favorable to end-users. In this respect, the Authority highlights that there is a legal obligation, specifically Article 23 of the 'ECRA', which requires that such contracts include information as specified in Regulation 35 of the ECNSR. In view of this, the Authority, by means of this decision is seeking to ensure, that while the most important clauses governing the service are included in the contract, unnecessary long and extensive contracts are avoided. To this effect, this decision specifies which information could be referenced in subscriber contracts and be provided in a separate location where the end-user could access such information.

4.2. E-contracts

The Authority invited interested stakeholders to indicate possible means and procedures of concluding electronic contracts. The Authority received several submissions from respondents which included the following proposals:

- i. The use of signature pads which capture the subscriber's signature and transfer such signatures to e-files for storage and retrieval as, or if needed;
- ii. An online submission of the subscriber's agreement followed by an exchange of emails;
- iii. A verbal agreement over the phone followed by a copy of the agreement which would be sent to the customer;
- iv. End-users register (by means of a username and a password) to an undertaking's dedicated online portal which contains all packages and offers and the related Ts and Cs. Members select a service and access the related Ts and Cs. Members would be required to tick the box next to the Ts and Cs and submit their details to send a request for subscription.

² In the ECS, an ETF refers to any form of penalty applicable in the event that the subscriber terminates his contract prior to the lapse of his initial contract period. Section 6.5.2 of this document specifies the manner in which such ETFs should be listed in subscriber contracts.

The Authority considers proposal (iv) as referred to above, as the most appropriate option for the conclusion of an e-contract, however, it does not exclude any other model for the conclusion of contracts by electronic means which comply with the requirements of the Electronic Commerce Act (CAP 426) of the Laws of Malta and other applicable legislation.

The MCA deems that when an undertaking concludes an electronic contract, undertakings must, for the remaining period of the contract, maintain evidence of the subscriber's:

- manifest consent to subscribe to the specific package/service/offer; and
- acceptance to subscriber's specific Ts and Cs.

4.3. Physical Contracts

With regard to the conclusion of physical contracts, for transparency reasons, the Authority proposed that the subscriber's signature is included on the physical contractual document containing the applicable Ts and Cs (which includes the date of signature). In all cases, particularly when these Ts and Cs 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 Ts and Cs stipulated in the contract. The Authority received feedback which suggested that as an alternative to the above, subscribers sign a contract form which does not specifically include all the Ts and Cs governing that service as specified by this decision, but instead declares that the subscriber is aware of the existence of the Ts and Cs governing that service and agrees to such Ts and Cs. The Authority disagrees to such a proposal. This suggestion goes contrary to the scope of this decision, which aims to provide further transparency measures to end-users who are subscribing to an electronic communications service.

4.4. Pre-Paid and Add-on Services

The MCA also commented on the fact, that currently in the ECS, it is also common practice that subscribers enter into indefinite contracts for pre-paid services, (for which no ETFs apply) 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:

- 1) not bound to purchase the service for a definite period; and
- 2) no ETFs apply.

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.

Some respondents suggested that the requirement to provide pre-paid subscribers with a copy of their Terms and Conditions (hereafter 'Ts and Cs') is unpractical and presents logistical problems

particularly in cases where pre-paid services are sold by dealers on behalf of the undertaking. Other stakeholders commented that in the case of pre-paid subscriptions there is no contractual agreement. The Authority would like to firstly clarify that a contract is not only defined by the contractual duration of the agreement. The Authority considers other clauses for the use of the service (such as the tariffs, prices, etc) to comprise Ts and Cs which constitute a contract. Furthermore, Directive 2002/22/EC³ specifies that when subscribing to an electronic communications service, end-users 'have a right to a contract with an undertaking or undertakings providing such connection and/or services'. This obligation is therefore also applicable for the provision of a pre-paid service.

The consultation document also referred to the subscription to add-on services including 'premium' services as well as upgrades/downgrades to a service/s. Such instances would include for example the add-on of a movie package or of a mobile bundle offer over and above the service subscription. The Authority would like to clarify that in instances, where the add-on or upgrade is not subject to a minimum subscription period and/or to any early termination fees, the subscriber's signature is not required. Undertakings are required to maintain adequate tangible proof of the subscriber's request to un/subscribe from/to package/offer/service as well as the subscriber's acceptance to any new Ts and Cs, and to provide such evidence to MCA as necessary.

5. Provision of a Contract

End-users need to be able to compare contractual Ts and Cs, 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 therefore proposed that any Ts and Cs governing a particular service, offer or package, must be accessible from the same web-page where the service, offer or package is being publicised. Furthermore, those Ts and Cs governing special offers which are no longer available for take-up, but which are still governing the use of the service/s of a number of subscribers, should continue to be available on the undertaking's web-site until the termination of all service/s being governed by those Ts and Cs. The Authority received positive feedback with regard to this proposed decision.

The Authority also referred to Regulation 37(2) of the ECNSR which 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

³ Directive 2002/22/EC of the European Parliament and of the Council of 7th March 2002 on Universal Services and Users Rights relating Electronic Communications Networks and Services (Universal Service Directive), as amended by Directive 2009/136/EC.

themselves of a service, to understand the service provider's contract terms, and to make an informed decision regarding whether to subscribe or not to the service offered.

The Authority agrees to feedback received which proposed that the undertaking should have the opportunity to first seek to provide the said Ts and Cs electronically or refer the end-user to the location on the web-site where such Ts and Cs could be accessed prior to providing a physical copy, free of charge. The Authority also encourages undertakings to offer their assistance to end-users who request any clarifications with regard to any Ts and Cs governing a package/service/offer.

6. Information to be Included in Subscriber Contracts

Regulation 35 of the ECNSR requires undertakings to include the following information in subscriber contracts. The Authority made a number of proposals which aimed to provide direction on the implementation of this provision where appropriate.

6.1. Limitations

6.1.1. 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 proposed that, as a minimum, undertakings provide information on:

- coverage of services; and
- any restrictions imposed by the undertaking, which limit the subscriber's ability to access other services/facilities.

The Authority agrees to feedback received which stated that coverage information related to mobile services can only be provided with respect to outdoor reception levels.

Respondents also commented that terrestrially transmitted services are subject to variations resulting from interference from third parties which are outside of the undertaking's control. Consequently service providers are unable to guarantee reception even in areas which are covered by their network.

The Authority would like to clarify that in the instances relating to both mobile or terrestrial transmitted services, an undertaking is required to **only** provide information regarding known service coverage limitations in terms of geographical areas, where the limitations are attributable to the service provider's infrastructure. This obligation therefore excludes those instances where such limitations are a result of interference from third parties. Indoor coverage is also excluded from this obligation.

6.1.2. Limitations resulting from content rights

Regulation 35 (1) (b) (ii) of the 'ECNSR' requires undertakings to provide a description of the limitations that may result from content⁴ rights for example:

- 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 with the content owner; 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.

Undertakings are required to ensure that subscriber contracts include the information described above and any other limitations arising from content rights.

In addition to the above, the Authority considers that further transparency measures are required in relation to the television transmission sector. The Authority's main concern relates to those instances where a subscriber commits himself/herself to a minimum contractual agreement period without being aware that certain content (including content re/transmitted on the undertaking's premium packages, and irrespective of whether or not the subscriber is subscribed to such premium packages) may not be guaranteed for the duration of that contractual period. In particular the Authority refers to a case dating back in 2010 which related to a change in ownership of the national rights to transmit two major European football competitions, which are very popular amongst the local community. This case was eventually discussed before the Social Affairs Parliamentary Committee.

In this respect, in its Consultation document, the Authority had proposed that when an undertaking is aware *a priori* of any termination dates after which the re/transmission of certain content cannot be guaranteed, that undertaking must make available information pertaining to these termination dates, on its web-site and in its retail outlets.

A number of interested stakeholders raised a number of issues in relation to this proposal.

⁴ The Authority defines Content as included in this document as 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,

hereafter referred to as ('Content').

These included:

- 1) Concerns that the content providers would increase prices during renewal negotiations, in the knowledge that service providers will have to allow their subscribers to rescind their contract without penalty unless they accept to pay higher content transmission rights prices;
- 2) Service providers will be loath to experiment and innovate with new content;
- 3) The expiry of certain content rights (which is not acquired through public and/or semi-public procurement procedures), would not be known to competitors and is sometimes also subject to confidentiality clauses imposed by the content holder. In the respondent's view, the publication of the said information could lead to anti-competitive outcomes;
- 4) The model for the acquisition of certain content rights, such as for example 'movies', renders it practically very difficult to publish meaningful information regarding the expiry of such rights;

The Authority takes note of the complexity of the subject and the difficulties that service providers would encounter in providing the said information as proposed in MCA's consultative document.

After evaluating the feedback received, therefore, the Authority concludes that, at least in the current scenario, it is inappropriate to widen such an obligation across the whole television sector. The Authority also recognises that the issue which gave rise to complaints, related to a lack of transparency regarding the expiry of major European football events.

In view of this, the Authority considers that, the publication of information regarding the expiry dates of European football content rights (acquired through public or semi public bidding processes) should be published.

The Authority has therefore decided that this information is to be made available on undertakings' web-sites and in all retail outlets. Subscriber contracts shall make reference to the availability of such information and such information shall be provided to consumers free of charge upon request.

6.2. Quality of Service

Subscriber contracts must set out the levels of quality which the service provider undertakes to uphold with its subscribers. Regulation 35 (1)(b)(iv) of the 'ECNSR' specifies that amongst other information, the following must be specified in subscriber contracts:

- 1) The minimum access speeds in case of internet services, ensuring that these do not differ significantly from the marketed upper levels;
- 2) Maximum time for initial connection and disconnection;
- 3) Maximum repair time for faults or other service faults, except in the event of catastrophic network breakdown or in cases of force majeure; and
- 4) The types of maintenance services offered.

6.2.1. Minimum access speeds

The Authority notes that another Consultation on this subject has been published by the Authority. Interested undertakings submitted their feedback to this consultation. A separate decision will be published on this subject.

6.2.2. Maximum time for initial connection and disconnection

In its consultative document, MCA proposed that contracts should include a clause to the effect that if the service is not installed within the timeframe for initial connection, a subscriber should be able to exit the contract without incurring penalties.

Submissions received agreed that a typical installation period should be established in subscriber contracts. Respondents however noted that such a condition should not apply in circumstances where, for reasons outside its control, the service provider cannot meet the established timeframe. The Authority, therefore, agrees that the installation of a service may exceed the timeframes established in the contract in the event that the installation is dependent on issues which are outside of the service provider's control. This point should however be stipulated in the contract to ensure sufficient transparency with subscribers.

The Authority proposed that contracts clearly indicate that in cases where the subscriber adheres to the disconnection process established in the contract, the subscriber should not be liable to pay for service/s after the disconnection advance notice lapses.

The Authority also stresses that undertakings must ensure that there are no discrepancies between the procedure for connection and disconnection, which unnecessarily render the disconnection process a more cumbersome practice than the connection process.

6.2.3. Types of maintenance services and customer support services offered

The Authority considers that subscriber contract's must make reference to the availability of information on maintenance services and customer support services offered by undertakings and provide such information free of charge together with the contract upon request. No proposals were received in this respect.

6.2.4. Maximum repair time for faults or other service faults

MCA's consultative document proposed that subscriber contracts establish the maximum repair time in instances where maintenance services to the infrastructure and equipment owned by the service provider are required as well as in instances where faults resulting from failures to the undertaking's equipment and/or infrastructure (excluding cases of catastrophic network breakdown or force majeure) occur.

Some respondents commented on the difficulties associated with establishing such timeframes, particularly in instances, where, for example, a submarine cable is damaged. The Authority acknowledges that such faults are in many instances a result of a force majeure and fall outside the undertaking's control. Having said this, neither the Authority nor the undertaking may establish beforehand that a specific fault always and unconditionally occur due to a 'force majeure'. The Authority considers that therefore such timeframes shall be included in subscribers' contracts. For the avoidance of doubt, the Authority would like to clarify that such timeframes shall not be applicable in cases where the faults occur due to a 'force majeure'.

Further to the above, a respondent suggested that the maximum repair time for faults should not apply in instances where damage to the customer premises equipment (hereafter 'CPE') is caused by the subscriber. The Authority notes that the provision of most of the services provided by undertakings, (particularly TV, internet and fixed telephony services) are normally provided by means of CPE (example a TV decoder, an internet modem, etc) provided by the same undertaking. In this regard, the Authority notes that in the event that a subscriber damages his or her CPE, the subscriber is still dependent on the undertaking to have his CPE repaired. Furthermore, it also notes that the subscriber will continue to pay for the service in question during the period when the CPE is being repaired even though the services will be unavailable. Moreover, the subscriber is in many instances charged a fee for the repair of the CPE. For this reason, the Authority considers the timeframes for fault repair established in the contract should still apply in such cases.

6.3. Particulars of Prices, Tariffs 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. In its consultation the Authority proposed that the following information together with any other information related to the applicable tariffs, prices and charges for the use of the 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;
- Any discounts, credit or rebate that the subscriber is eligible to, including 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; and
- Any other service-specific conditions as applicable.

In relation to the above, one respondent, welcomed the possibility of including this information in a separate document from the contract as this would enable contracts to be more concise. On the

other hand, another respondent expressed the importance of including this information in the contract on the grounds that this information is continuously referred to by the subscriber.

In view of the above mentioned submissions, the Authority considers that undertakings should ensure that this information is either provided:

- under one of the clauses in the subscriber's contract; or
- in a separate document which is signed by the subscriber and annexed to the contract.

In the latter situation, the document containing the said information shall constitute an appendix to the contract, of which it shall form an integral part which must be supplied, together with the contract. Furthermore the appendix will be considered to be one of the contract terms and any changes to it would need to be made in line with Article 23 of the ECRA and the MCA's decision on 'Modifications to the Terms and Conditions of subscriber contracts'⁵.

6.4. Billing and Payment Methods

In its consultation document, the MCA referred to Regulation 38 of the ECNSR which establishes that subscribers have a right to request, at any time, a basic level of itemised bill, free of charge, through their preferred medium. For the avoidance of doubt, an itemised bill as referred to above, is a distinctive document from the invoice/bill sent periodically (in many instances on a monthly basis) to subscribers.

In addition to the above, the MCA considers that subscriber contracts must also include information regarding:

- 1) Methods of issuing bills/invoices (giving the subscriber the possibility to decide which medium he/she wishes to receive such bills/invoices free of charge) and the billing frequency (including any available subscriber options);
- 2) Different methods of payment available and any charges/discounts available on each of these methods, if any;
- 3) Any timeframes for the payment of bills; and
- 4) Applicable charges for late payment of bills and any other actions that may be taken by the service provider in this regard.

The Authority received feedback which suggested that information regarding payment methods should not be included in subscriber contracts as this could negatively impact service providers' commercial negotiations with third parties offering bill payment facilities.

⁵ Decision notice and report on Modifications to the Terms and Conditions of Subscriber Contracts of October 2011 - <http://www.mca.org.mt/article/decision-notice-and-report-modifications-terms-and-conditions-subscriber-contracts>.

The Authority firstly considers that billing and bill payment procedures are important to consumers and that changes to such practices could negatively impact consumers. Consequently there should be sufficient transparency for consumers about these procedures at the time of subscription and the service provider should not be able to unilaterally change these procedures without having to apply Article 23 of the ECRA.

Furthermore, the Authority is of the opinion that undertakings should be able to address any commercial issues with third parties providing billing services facilities, arising from the proposed level of transparency on the subject, through the terms of the contract with the third parties providing billing services facilities.

Other submissions received expressed the view that undertakings should not be constrained to, accept, implement or refuse a particular method of payment. The Authority stresses that undertakings are free to apply any billing method of their choice as long as this is clearly specified in the contract and as long as any changes to billing methods are introduced in compliance with Article 23 of ECRA and relevant MCA decision.

6.5. Email Forwarding Services

Regulation 35 (1) (f) of the ECNSR requires that subscriber contracts contain information on the subscriber's right to be provided with the following services, if the subscriber so requests, upon termination of an internet service in line with regulation 48 of the ECNSR:

- 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.

One respondent suggested that this information should not be included in subscriber contracts arguing that currently information on fixed and mobile telephony number portability is not included in subscriber contracts.

The Authority stresses that the requirement for service providers to include information on the subscriber's right to be provided with email forwarding services in the subscriber contract is a legal obligation and not subject to the discretion of the Authority.

In addition to the above, undertakings must take the necessary measures to ensure that the process to request email forwarding services, is specified in the disconnection procedure outlined in the Ts and Cs of the respective undertaking.

6.6. Duration of the Contract, Conditions for Renewal, Suspension and Termination

Service providers may, and often do, offer contracts of service/s which have a definite duration. The Authority proposed that such contracts should include a clause which specifies:

- 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 subscriber decision to terminate the contract is to be communicated to the service provider;
- 4) the steps that the subscriber is required to take in order to terminate the contract;
- 5) the conditions under which either party would have a right to suspend and/or terminate the contract. Furthermore, 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 are not being provided in line with the contract terms;
- 6) any penalties applicable in the event that the subscriber terminates his contract prior to the lapse of the contracted period, (ensuring that these are reasonable and proportionate)
- 7) the manner in which the contract may be renewed.

6.6.1. Duration of 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 proposed that subscriber contracts should specify this information in **bold** and in a font size which is at least **20% larger** than the other clauses in the contract of service.

The Authority received feedback which suggested that this requirement would represent an unnecessary step and does not necessarily ensure that additional transparency for consumers.

Other respondents agreed with this proposal. One respondent suggested that this requirement should specify that such a clause is written in **bold** and **inserted as the final clause before the subscriber's signature**.

The Authority considers that the clause on the duration of the contract is one of the most important clauses and that the measure proposed in the Authority's consultation document, while not constituting a significant burden on the market players, would be beneficial to subscribers.

Furthermore, the Authority considers the proposal to include this information in **bold** and as **a final clause before the subscriber's signature** to be a valid proposal.

It has therefore decided to consider acceptable either of the following options:

- 1) **bold** and in a font size which is at least **20% larger** than the other clauses in the contract of service; or
- 2) **bold** and inserted as **the final clause before the subscriber's signature** (given that the font size is the same used for the other clauses in the contract).

6.6.2. Early termination fees (ETF)

Regulation 36 (2) of the ECNSR, requires that any direct charges to subscribers requesting termination of contracts should be justified and reasonable. Regulation 35 (1) (d) requires that such charges are listed in subscriber contracts.

In relation to the above, the Authority distinguishes between two types of ETF:

- 1) Proportionate repayments of any subsidy or other benefit that the undertaking granted to the subscriber at the time of subscription or during the course of the contract. By way of example, in the mobile telephony sector, undertakings often provide subsidised or free mobile handsets to subscribers entering into a contract having a definite duration. In the event that subscribers exit their contract prior to the lapse of their initial contractual period, they would be charged for the recovery of a portion of subsidy or benefit or the cost of the handset provided to them for free calculated in proportion to the remaining contractual period; and
- 2) Charges established as penalties to be imposed on subscribers that choose to exit a definite contract prior to its lapse.

In its consultation document, MCA proposed that the calculation method applied for such ETF, should be explained in the contract. The Authority received feedback which disagreed with this proposal.

The Authority notes that, in many instances, the ETF as referred to in point two (2) above is higher than the sum of the remaining periodic fees that the subscriber would be liable to pay, should he complete his initial term. The Authority considers the application of such fees to be unjustified and therefore in breach of Regulation 36 (2). The Authority strongly believes that in no case can an ETF exceed the amount of the contractual retail payments, remaining due at the date of termination in the case where a fixed periodic rate is established,. Furthermore, the Authority is of the view that depending on the quantum of the early termination charge, it may be disproportionate and unjustified to apply the same charge to subscribers, without taking into account the point at which they choose to terminate their contract.

In addition to the above, the Authority would like to take the opportunity to clarify that undertakings are required to ensure that no ETF are applied after the initial period expires, in line with Regulation 36 (2) of the ECNSR. For the avoidance of any doubt, the Authority interprets this Regulation as prohibiting the application of an ETF after the date of the expiry of the initial contract period both in the case of a renewal and also in the event that a contract's initial term is being extended beyond the initial contract period by means of a notification to subscribers informing them of changes to their Ts and Cs in line with Article 23 of the 'ECRA' and MCA's decision titled 'Modifications to the Ts and Cs of subscriber contracts'.

6.6.3. Suspension and/or termination of service due to non-payment

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.

The aforementioned 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. No proposals were received in this regard.

6.7. 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.

Some respondents highlighted that the inclusion of the said information would unnecessarily lengthen subscriber contracts. The Authority agrees with such views and therefore considers that subscriber contracts need only make reference to a location where the end-user may access information regarding the undertaking's complaint and enquiry handling process. This information shall as a minimum specify:

- 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.

This information shall be made available on the undertaking's website as well as in all of the undertaking's retail outlets, such that it is readily available for inspection, free of charge, if requested by end-users.

6.8. 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 agrees with feedback received which suggested that this information could be extensive as well as detailed. In this respect, the Authority considers that subscriber contracts need only make reference to a location where the end-user may access information. This information should be made available on the undertaking's website as well as in all of the undertaking's retail outlets, such that it is readily available for inspection, free of charge, if requested by end-users.

Notwithstanding the above, an 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 must be taken to ensure that the Authority may verify this.

7. Applicability of Proposed Decision

The Authority requested that all **new subscriptions** for the provision of any electronic communication service/s will be provided a contract as specified by MCA's decision, (annexed to this document) and other obligations in accordance with other legal provisions and/or decisions published by the MCA or by other competent regulatory bodies any.

The Authority proposed that undertakings are provided two (2) calendar months from the publication of its final decision to ensure that contracts for new subscriptions are updated accordingly to this decision. While one interested stakeholder agreed to the timeframe proposed in MCA's decision the Authority received two requests from two undertakings to extend the said timeframe to six (6) calendar months and nine (9) calendar months respectively. Further to this request the Authority, has reviewed its position and will be extending the timeframe for the implementation of the requirements emanating from this decision to **four (4) calendar months** from the publication of the said decision.