

Modifications to the Terms and Conditions of subscriber contracts

Report on Consultation and feedback received

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1. Introduction

In January 2011, the Malta Communications Authority (MCA) published a Consultation Document on modifications to the terms and conditions of subscriber contracts. The objective of this document was to seek the views of undertakings and interested parties on the proposals developed by the MCA in relation to the procedures adopted by the service providers when modifying the terms and conditions of subscriber contracts.

The proposals were aimed at addressing the interpretation of Article 22 of the Electronic Communications (Regulation) Act (Cap.399) (ECRA), now renumbered as Article 23 following the transposition of the EU framework into Maltese law in May 2011. The changes to the ECRA, adopted in May 2011, do not impact any of MCA's proposed decisions consulted upon in January 2011.

Article 23 of the ECRA relates to the manner in which any changes to the terms and conditions of subscriber contracts are to be affected by undertakings and the legal rights of subscribers throughout such a process.

The Authority identified three areas where it considers that the process of notification to subscribers on modifications to their terms and conditions could be improved.

This report on Consultation and Decision, summarises the responses to the consultation and presents the revisions to the proposed decision of January 2011. **The final text for 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 'Proposed Modifications to the Terms and Conditions of subscriber contracts' ran from the 18th January 2011 to the 18th March 2011.

Responses to this Proposed Decision were received from GO p.l.c, Melita p.l.c, Vodafone Limited, the Consumer Council and the Malta Competition and Consumer Affairs Authority 'MCCAA' formerly the Consumer and Competition Department.

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

3. The Legal Basis

Article 23 of the ECRA states that undertakings providing any electronic communications service, that wish to modify any related contractual terms must notify every subscriber to that service. The notification should include the modifications to the conditions of the contract and inform subscribers of their right to withdraw without penalty from such contract if they do not accept the modifications. Such notification must be given at least thirty days prior to the coming into effect of any modifications.

In November 2008, the MCA had issued a Decision on 'Proposed Modifications to the Terms and Conditions of Subscriber Contracts' to address issues that were being experienced in relation to the correct application of the provisions in question.

During the course of the application of that 2008 Decision, the MCA has identified three areas where it considers that further clarifications with respect to the application of Article 23 are required in order to avoid any impingement on consumer's rights as well as to facilitate the process of informing subscribers about changes to their contract terms and conditions. These instances mainly relate to:

- the content of the notifications sent to subscribers regarding the proposed modifications to the terms and conditions;
- proposed modifications which will clearly positively impact subscribers; and
- termination of a package and termination of services and/or cessation of operation by an undertaking.

The Authority is therefore issuing a decision on 'Modifications to the Terms and Conditions of subscriber contracts' to address these issues.

4. Report on feedback

4.1 Notifications to subscribers regarding modifications to the terms and conditions of subscriber contracts

In its consultation paper, the MCA noted that in some instances, the notification by undertakings regarding modifications to subscriber contracts include additional information which does not specifically relate to the modifications. As a result, such notifications may not always allow subscribers to make a proper assessment of the impact of the suggested change/s and make an informed decision on whether they would like to terminate their subscription to such service/s.

In order to address this issue, the Authority proposed that although such notifications may be delivered to subscribers concurrently with other communications, the notification must be a separate and distinct document.

The Authority further proposed that the notification should be limited to include the following information:

1. the modifications to the conditions of the service/s currently being offered, including, the exact provisions of the revised contract;
2. the subscribers' right to terminate the service/s within 30 days from notification, without incurring any penalties, if he/she does not agree with the change/s; and
3. the manner in which any deposit or advance payment¹ made by the subscriber for the original service (if any and if applicable) will be refunded if the subscriber chooses to unsubscribe to the service/s or switch to a new service/s.

¹ An **advance payment**, refers to sums paid in advance by subscribers for goods or services. In the electronic communications sector this definition also applies to pre-paid services such as mobile and fixed telephony services.

The Authority received feedback on this proposal which suggested that 'other communications' should be allowed in the same notification letter, provided that the notification part is clearly separated by the use of different titles, sections and other means.

The Authority is concerned that this proposal may divert the subscribers' attention from the actual notification being conveyed to them, thus not enabling them to properly assess the modifications being proposed by their undertaking.

It is for these reasons that the Authority believes that notifications regarding proposed change/s to the terms and conditions of subscriber contracts should be communicated to subscribers in separate and distinct documents.

In addition, the Authority has also received submissions, suggesting that the separate notification document includes a defined header. The Authority views this as a positive but optional measure and such decisions should be left to the discretion of the undertaking.

Other interested parties suggested that the inclusion of point 3 above in the notification to subscribers may result in additional unnecessary information which may not allow subscribers to make an informed decision. The Authority regards this requirement as being important because the termination of a service/s and the refund of advance payments are closely interlinked and omitting the third requirement may act as a deterrent to subscribers from making use of their right to terminate.

Suggestions have also been made to consider SMS or email notifications as satisfying these criteria, however the Authority's view in this regard is that these measures are only supplementary and cannot be considered as an adequate substitute of the printed form, with the exceptions which are already allowed in accordance with the Decision of 2008 and which were not subject to consultation.

MCA's decision of 2008, clarifies that in instances where the suggested change in the terms and conditions of service relates to pre-paid mobile telephony, the Authority considers notification via SMS to be sufficient notification. In the event that sufficient information cannot be provided entirely by SMS, the undertaking must make available a free phone service for subscribers wishing to obtain full information on the proposed modification. This free phone number must be communicated to subscribers in the notification SMS.

Further submissions also suggested that the notification letter provides information on the manner in which subscribers are required to notify undertakings about their intention to terminate the contract during the 30 day period as a result of the modification. The

Authority welcomes this suggestion as this further informs the subscriber of his right to terminate the contract and facilitates the whole process.

By way of clarification, the Authority would like to highlight that any customer premises equipment 'CPE' provided to subscribers upon subscription, shall be returned to the undertaking or paid in full or in part, in the event that the subscribers' contract terms and conditions so stipulate, and in line with any other applicable law.

4.2 Modifications to the Terms and Conditions of subscriber contracts

The Authority is of the view that it is important to distinguish between modifications which will positively impact subscribers and modifications which will not necessarily positively impact subscribers. In its consultation document, the MCA proposed two separate procedures to be adhered to when notifying subscribers in such instances.

The aim of this decision is to encourage positive changes and to put undertakings in a better position to implement such changes without incurring undue risks.

4.2.1 Exemption from providing subscribers with the possibility to withdraw from their contract without incurring any penalty fees

The proposed decision relates to instances where an undertaking considers that any suggested changes will positively impact subscribers. Article 23 (5) of the ECRA specifies that in such instances whereby the modifications to the contractual terms and conditions of the service is 'manifestly of benefit to all subscribers' that undertaking may seek the MCA's authorisation to notify subscribers about the suggested changes, whilst not having to provide them with the option to terminate their contract without incurring any penalty fees.

The Authority received feedback which suggested that any proposed modifications which are triggered by the Authority itself should automatically be considered to be beneficial to the subscribers. Other respondents suggested that changes to the terms and conditions which

could have a 'neutral effect', like for example the rewording of the terms and conditions to make them simpler to understand, should also be regarded as positive changes.

The Authority cannot determine, beforehand, that in each of the instances described above, the suggested changes will positively impact all subscribers. By means of the consultative document, the Authority proposed a process to be adhered to in such instances should the MCA consider the suggested changes as beneficial to the subscribers. The Authority therefore remains convinced that it should treat such issues on a case by case basis.

4.2.2 Procedure to seek MCA's decision on proposed modifications

In view of the above, the Authority suggested that any proposed modifications to subscriber contracts should be communicated to the Authority together with all the relevant documentation, including but not limited to:

- the full description of the service/s impacted;
- a brief statement providing considerations on how the undertaking believes that the proposed change/s will positively affect impacted subscribers;
- the related Terms and Conditions of the service/s impacted;
- the copy of the notification letter to be sent to the subscribers; and
- any other relevant information which may be necessary for MCA's ruling.

The Authority further proposed that, within five (5) working days from the undertaking's request, it will confidentially communicate its decision as to whether the proposed change/s may be introduced without subscribers being given the faculty of exiting from the contract without penalty.

Some of the respondents suggested that undertakings should be exempt from notifying subscribers of proposed changes, should such changes be considered by the Authority to be beneficial to subscribers. The Authority reminds respondents that service providers are under a legal obligation to inform subscribers about all changes to their terms and conditions.

The Authority takes on board suggestions by other respondents which proposed that, any changes which are deemed to be positive by the Authority, may be introduced with immediate effect.



Feedback was also received on the subject of the information being requested by the Authority from undertakings when they submit their request, with some respondents arguing that this information is excessive. The Authority emphasises that the information being requested is necessary to enable the Authority to evaluate every aspect of the modifications being made by the undertaking. Moreover, the MCA reserves the right to request further information as necessary for it to ensure that the modifications will impact all subscribers positively during the five (5) working day decision period. Failure to provide such information may lead to an automatic dismissal of the request as the Authority will be unable to reach a sufficiently informed decision on the matter.

Submissions were also received with regard to the timeframe proposed by the Authority to communicate its decision. Some feedback suggested that the Authority reduces the timeframe involved in taking its decision. The Authority notes that these decisions may be rather complex in nature and therefore the appropriate timeframes need to be respected. The Authority is aware of the importance of communicating its decision in the minimum timeframe possible, and all efforts will be done to ensure that the minimal time is taken in this respect.

The MCA welcomes a proposal put forward by a respondent, whereby it was suggested that the request for exemption is communicated to the Authority, at the undertaking's sole discretion, ten (10) working days prior to the intended date of notification to subscribers. This will enable undertakings to have more time to execute the process after the MCA has communicated its decision within five (5) working days.

One respondent proposed that contact points within the Authority whereby undertakings may submit their requests, should be identified. The Authority agrees that this suggestion will further facilitate the whole process and is providing the following contact point for such purposes.

Email Address: termsandconditions@mca.org.mt

The Authority will formally acknowledge receipt of communication of requests on the same day that such requests have been submitted to the Authority, given that such requests are submitted during MCA's working hours. Only after receiving MCA's acknowledgement receipt, shall an undertaking consider that his request to the Authority has been delivered.

4.2.3 Modifications to the terms and conditions of subscriber contracts which will not necessarily positively impact subscribers

For the sake of clarification, the Authority would like to stress that in such instances whereby:

- the Authority decides that the proposed modifications will not necessarily positively impact some or all of the concerned subscribers;
- undertakings have already determined that the proposed modifications to the subscribers' contract are not positively affecting impacted subscribers; or
- where for any other reason, the undertaking decides not to seek the Authority's ruling,

undertakings would be required to make any proposed changes in line with the annexed decision.

4.3 Undertakings terminating a package/s and undertakings terminating a specific service/s and/or ceasing operations

Termination of a package; termination of a service and/or cessation of operations is regarded by the Authority as a change to the terms and conditions of subscriber contracts. In such circumstances, therefore, the obligation to inform subscribers of the change in the terms and conditions applies.

In such instances, undertakings would be required to notify subscribers in writing about:

1. The intended termination no later than 30 days prior to its taking effect;
2. The manner in which any deposit or advance payment made by the subscriber for the original service will be refunded.

In its consultation document, the Authority proposed that the notification to the Authority regarding termination should be made three (3) working days prior to the start of the notice period. Feedback received in this regard suggested that the notification period to the

Authority should be increased to five (5) working days as opposed to three (3) working days. The Authority has decided to adopt this suggestion.

It is necessary to distinguish between:

- termination of a package/s; and
- termination of a service/s or cessation of operations by an undertaking.

In the latter situation, in addition to the above requirements, the Authority believes that undertakings must ensure that they make every effort to facilitate the manner by which a subscriber may migrate to other undertakings. Furthermore, the Authority considers, that notifications should also include information that will enable the impacted subscribers to migrate services to alternative providers where necessary. Undertakings should also make available, technical support services to assist subscribers so as to minimise any disruptions.

The Authority accepts the proposal whereby it was suggested that in such circumstances, this obligation would be considered as satisfied if the undertaking, (when notifying subscribers about the termination of services) provides a brief reference to a similar service offered by at least **1 alternative undertaking**.

The Authority stresses that retail service providers entering into any agreement with wholesale service providers must ensure that these agreements do not hinder adherence to the requirements as outlined above.



5. Conclusion

In conclusion the Authority would like to make all parties concerned aware that the content of this decision will apply with immediate effect. The Authority is pleased with the outcome of the consultative approach and would like to thank all respondents for the interest shown throughout the process.