

# DECISION NOTICE


## Contracts, Transparency and Termination of Services

**Decision on a set of rules applicable to electronic communications service providers to enhance end-user protection**

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## 1 Executive Summary

In accordance with its regulatory responsibility to ensure a high level of protection for end-users, in February 2022, the Malta Communications Authority (hereafter the 'Authority' and / or the 'MCA') embarked on a consultative process to gather the views of interested stakeholders on a number of proposed measures to be adhered to by electronic communications services (hereafter 'ECS') providers intended to safeguard end-users' interests in relation to the provision of such services.

The MCA's consultative document covered various subject matters and included:

1. Proposed updates to the decisions covered under ['Modifications to the Terms and Conditions of Subscriber Contracts'](#) (hereinafter referred to as the '2011 Decision');
2. Proposed updates to the decisions covered under ['Subscriber Contracts'](#) (hereinafter referred to as the '2012 Decision') which relate to:
  - Information requirements to be included in the 'pre-contractual document' in addition to those mandated in regulation 87 of [S.L. 399.48 titled the 'Electronic Communications Networks and Services \(General\) Regulations'](#), (hereafter 'ECNSR');
  - The conclusion of contracts between service providers and end-users;
  - Transparency measures relating to the publication of information on services offered; and
  - The calculation of maximum early termination fees (hereafter 'ETF').
3. Proposals on the refund of any unutilised advance payment, refundable deposit or any monetary credit to end-users following the termination of a subscription or change of tariff plan;
4. Proposals on the provision of facilities that would ensure continued access of e-mails upon termination of an internet access service; and
5. Proposals on measures to be adhered to by providers in instances where end-users fail to pay their bills.

In response to the public consultation, the MCA received feedback from four (4) stakeholders, namely EPIC Communications Limited; GO plc; Melita Ltd; and Vanilla Telecoms.

Having considered and evaluated the submissions received in response to the public consultation, the MCA is hereby issuing its Decision Notice titled 'Contracts, Transparency and Termination of Services' which mandates a set of rules applicable to ECS providers. The dates on which MCA's decisions shall become applicable are outlined in Section 7 of this document.

## 2 List of Abbreviations

<b>CJEU</b>	Court of Justice of the European Union
<b>CRR</b>	S.L. 378.18 titled the 'Consumer Rights Regulations'
<b>ECNSR</b>	S.L. 399.48 titled the 'Electronic Communications Networks and Services (General) Regulations'
<b>ECRA</b>	Chapter 399 titled the 'Electronic Communications (Regulations) Act'
<b>ECS</b>	Electronic Communications Services
<b>EECC</b>	European Electronic Communications Code
<b>ETF</b>	Early Termination Fees
<b>IAS</b>	Internet Access Service
<b>ICS</b>	Interpersonal Communications Service
<b>M2M</b>	Machine-to-Machine Services
<b>MCA</b>	Malta Communications Authority
<b>NB-ICS</b>	Number-Based Interpersonal Communications Service
<b>NI-ICS</b>	Number-Independent Interpersonal Communications Service
<b>OIR</b>	Open Internet Regulation (EU) 2015/2120
<b>QoS</b>	Quality of Service
<b>SEPA</b>	Single Euro Payments Area
<b>S.L.</b>	Subsidiary Legislation
<b>SMS</b>	Short Message Service

### 3 Types of Electronic Communications Services

The below is a list of 'ECS' types as established in article 2 of [Chapter 399 titled the 'Electronic Communications \(Regulations\) Act \(hereafter 'ECRA'\)](#) and regulation 2 of the ECNSR:

- Internet access service (**'IAS'**)
- Interpersonal communications service (**'ICS'**)
  - o Number-Based Interpersonal Communications Service (**'NB-ICS'**)
  - o Number-Independent Interpersonal Communications Service (**'NI-ICS'**)

Services consisting wholly or mainly in the conveyance of signals such as transmission services used for the provision of machine-to-machine services (**'M2M'**) and for broadcasting.

## 4 Legal Basis

The legal instruments listed in the sections below empower the MCA to implement the measures being mandated in this decision.

### 4.1 Information requirements for contracts

Regulation 87(1) of the ECNSR, requires that providers of publicly available ECS other than transmission services used for the provision of M2M services, provide consumers the information referred to in regulations 4 and 5 of [S.L. 378.18 titled the Consumer Rights Regulations](#) (hereafter the 'CRR') and the information listed in the Eighth Schedule of the ECNSR. This requirement also applies to end-users that are micro-enterprises, small enterprises or not-for-profit organisations, unless such end-users have explicitly agreed to waive all or parts of those provisions.

Regulation 87(8)(c) of the ECNSR empowers the MCA to establish other information requirements to be included in contracts not related to aspects regulated under this regulation, in particular to address newly emerging issues.

The requirements being mandated by the MCA are found in Section 6.1 of this Decision Notice.

### 4.2 Conclusion of contracts

In addition to the requirement to provide consumers the information referred to in regulations 4 and 5 of the CRR and the information listed in the Eighth Schedule of the ECNSR, providers of publicly available ECS other than transmission services used for the provision of M2M services, must also provide consumers a concise and easily readable contract summary, which must contain specific information as stipulated in Regulation 87(3) of the ECNSR and as set out in Part B of the Annex of the European Commission's Implementing Regulation 2019/2243 establishing a template for the contract summary (hereafter the 'Contract Summary Implementing Regulation')<sup>1</sup> before the contract becomes effective. This requirement also applies to end-users that are micro-enterprises, small enterprises or not-for-profit organisations, unless such end-users have explicitly agreed to waive all or parts of those provisions. In accordance regulation 87(4) of the ECNSR, the MCA is empowered to mandate the manner as to how a consumer gives his consent to the contract.

The requirements being mandated by the MCA are found in Section 6.3 of this Decision Notice.

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<sup>1</sup> European Commission [Implementing Regulation \(EU\) 2019/2243](#) of 17 December 2019 establishing a template for the contract summary to be used by providers of publicly available electronic communications services pursuant to Directive (EU) 2018/1972 of the European Parliament and of the Council.

### **4.3 Modifications of contractual conditions by providers**

Regulation 92(1) of the ECNSR provides that end-users shall have the right to terminate their contract without incurring any further costs upon notice of changes in the contractual conditions proposed by the providers of publicly available ECS other than NI-ICS, unless the proposed changes are:

- (a) exclusively to the benefit of the end-user;
- (b) are of a purely administrative nature and have no negative effect on the end-user; or
- (c) are directly imposed by European Union law or national law.

Regulation 92(2) of the ECNSR further states that providers shall notify end-users at least thirty (30) running days in advance of any change in the contractual conditions in a clear and comprehensible manner and on a durable medium, and that where applicable, providers shall simultaneously inform end-users of their right to terminate the contract without incurring any further costs if they do not accept the new conditions, which right is exercisable within thirty (30) running days from notification of the change in contractual conditions by the provider.

In accordance with regulation 92(3) of the ECNSR, providers shall notify the MCA of any proposed modifications to the contractual conditions of their service/s in writing. In accordance with this sub-regulation the MCA may specify the timeframes by when such written notifications are to be sent to the MCA prior to the notification to its end-users.

Regulation 92(4) of the ECNSR provides that the MCA may upon a written request by a provider, in cases where the proposed modifications to the contractual conditions are manifestly of benefit to all end-users to that service, exempt that provider from the requirement to grant its end-users the right to terminate the contract in accordance with this regulation. This sub-regulation empowers the MCA to lay down requirements to be adhered to by providers in such circumstances.

Regulation 92(5) of the ECNSR, empowers the MCA to determine the format, content and the manner of the notifications to be sent to end-users as required under regulation 92 of the ECNSR. This sub-regulation also empowers the MCA to increase the advance notice period to be provided to end-users prior to the implementation of any contractual changes to their services from a minimum period of thirty (30) running days to a minimum period of ninety (90) running days.

The requirements being mandated by the MCA are found in Section 6.4 of this Decision Notice.

#### **4.4 Transparency measures relating to the publication of information on services offered**

Regulation 88(1) of the ECNSR, requires that where providers of IAS or publicly available ICS make the provision of such services subject to terms and conditions, then such providers shall ensure that the information referred to in the Ninth Schedule of the ECNSR is published in a clear, comprehensive, machine-readable manner and in an accessible format for end-users with disabilities in accordance with European Union legislation harmonising accessibility requirements for products and services. Regulation 88(1) of the ECNSR, further states that the MCA may specify additional requirements regarding the form in which such information is to be published.

The requirements being mandated by the MCA are found in Section 6.5 of this Decision Notice.

#### **4.5 Refund of any unutilised advance payment, refundable deposit or any monetary credit to end-users following the termination of a subscription or change of tariff plan**

In accordance with regulation 91 (2) and (3) of the ECNSR, the MCA is empowered to implement measures it considers necessary to ensure that conditions and procedures for contract termination are simple and do not act as a disincentive to changing a service provider. To this effect, the MCA is proposing measures to be adhered to by publicly available ECS providers other than number-independent interpersonal communications services and other than transmission services used for the provision of machine-to-machine services to ensure that following the termination of a subscription or change of tariff plan, end-users receive a refund of any unutilised advance payment and refundable deposit that would have been paid prior to the termination of the subscription or change of tariff plan.

The requirements being mandated by the MCA are found in Section 6.6 of this Decision Notice.

#### **4.6 The calculation of maximum early termination fees ('ETF')**

Regulation 91(2)(b) of the ECNSR provides that any applicable charges due by the end-user for terminating a publicly available ECS (other than NI-ICS and transmission services used for the provision of M2M services) prior to the expiry of the initial contractual period shall be proportionate and reasonable. Regulation 91(2)(b) of the ECNSR empowers the MCA to take the necessary measures to ensure the effective application of this provision.

The requirements being mandated by the MCA are found in Section 6.7 of this Decision Notice.



## **4.7 E-mail forwarding or access to e-mails after termination of the contract with a provider of an internet access service**

Regulation 102(1) of the ECNSR stipulates that the MCA may require providers of IAS or publicly available NB-ICS to make available free of charge all or part of the additional facilities listed in Part B of the Sixth Schedule of the ECNSR, subject to technical feasibility, as well as all or part of the additional facilities listed in Part A of the Sixth Schedule of the ECNSR.

In accordance with regulation 102(1) and Part B of the Sixth Schedule of the ECNSR, the MCA may introduce measures to enable end-users terminating an IAS to either continue accessing the e-mails received on the e-mail addresses based on the commercial name or trade mark of the former provider, or else to have those e-mails sent to those addresses transferred to a new e-mail address specified by the end-user. The MCA may determine a proportionate period of time during which such facilities are to be provided by IAS providers.

The requirements being mandated by the MCA are found in Section 6.8 of this Decision Notice.

## **4.8 Non-payment of bills**

Regulation 102(1) of the ECNSR, empowers the MCA to require providers of IAS and publicly available NB-ICS to make available free of charge all or part of the additional facilities listed in Parts A and B of the Sixth Schedule of the ECNSR. Part A of the Sixth Schedule of the ECNSR empowers the MCA to authorise specified measures to be adhered to by providers when taking actions as a result of non-payment of bills by end-users, provided that such measures are proportionate, non-discriminatory and published. In accordance with the second paragraph of Part A of the Sixth Schedule of the ECNSR the MCA is also empowered to establish the category of end-users to which such measures should apply. In addition to the above, as stipulated in regulation 102(2) the MCA is empowered to go beyond the list of additional facilities in Parts A and B of the Sixth Schedule of the ECNSR in order to ensure a higher level of consumer protection.

The requirements being mandated by the MCA are found in Section 6.9 of this Decision Notice.

## 5 Micro-enterprises, small enterprises or not-for-profit organisations

Some of the decisions mandated in this Decision Notice are also applicable to providers when offering services to end-user who are microenterprises, small enterprises and not-for-profit organisations unless such end-users do not explicitly waive those rights. The details of the applicability of requirements to microenterprises, small enterprises and not-for-profit organisations is further specified in each decision contained throughout this Decision Notice.

Further to a clarification request submitted by a respondent, the MCA clarifies that throughout this Decision Notice the definitions of 'micro-enterprise' and 'small enterprise' as adopted in [Chapter 512 titled the 'Small Business Act'<sup>2</sup>](#) shall apply:

- *'Micro enterprise'*: A *'micro enterprise'* is defined as an enterprise which employs fewer than 10 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 2 million.
- *'Small enterprise'* - A *'small enterprise'* is defined as an enterprise which employs fewer than 50 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 10 million.

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<sup>2</sup> Article 2 of CAP 512 of the Laws of Malta, Small Business Act, states that *"SME" means small and medium enterprises as defined in the Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises*'.

## 6 MCA Decisions

This Section discusses a number of requirements contained in the ECNSR which relate mainly to contracts, transparency and termination of services and establishes a set of decisions to be complied with by ECS providers to enhance end-user protection. A number of these decisions were already established in MCA's '2011 Decision' and '2012 Decision' whereas other new measures are being introduced in addition to the requirements established in these Decisions and in the ECNSR. This Decision Notice shall replace in full the above mentioned two MCA Decisions and shall be applicable in addition to the requirements established in the ECNSR. The dates on which MCA decisions shall become applicable are outlined in section 7 of this Decision Notice. These decisions are without prejudice to any other obligations arising from any other applicable legal requirements or decisions however so described.

### 6.1 Information to be included in the 'Pre-Contractual document' and in the 'Contract Summary'

Regulation 87(1) of the ECNSR, requires that before consumers are bound by a contract or any corresponding offer, providers of publicly available ECS, excluding transmission services used for the provision of M2M services, are to provide such consumers with two sets of information, namely:

1. **the 'pre-contractual information' (which is to be included in the 'pre-contractual document')**: The 'pre-contractual information' refers to the requirement emanating from regulation 87(1) of the ECNSR which requires that consumers are provided with the information contained in regulations 4 and 5 of the CRR and, the information listed in the Eighth Schedule of the ECNSR; and
2. **the 'contract summary'**: The 'Contract Summary' must include the information referred to in regulation 87(3) of the ECNSR and shall be provided in accordance with the 'Contract Summary Implementing Regulation'.

In accordance with regulation 87(9) of the ECNSR, the above provisions also apply to end-users that are micro-enterprises, small enterprises, or not-for-profit organisations unless such end-users have explicitly agreed to waive all or part of those provisions.

In accordance with its powers given under regulation 87(8)(c) of the ECNSR, in its Consultation, the MCA proposed the inclusion of additional information in the 'pre-contractual document' which are not included as part of the minimum set of 'pre-contractual information' requirements mandated in regulation 87(1) of the ECNSR. These related mainly to the following subject matters:

- E-mail forwarding or access to e-mails after termination of the contract with a provider of an IAS;
- Late payment and non-payment of bills – procedures for suspending and terminating the service/s; and

- The nature of any limitations that may apply for the re/transmission of European football content.

The MCA received feedback from a provider which stated that the MCA is only empowered to introduce requirements on the inclusion of additional information in the 'pre-contractual documents' if these relate to emerging issues and argued that MCA's proposed additional information requirements cannot be considered as newly emerging issues.

The MCA contends that regulation 87(8)(c) provides that any 'other information' which the MCA may require providers to include in the 'pre-contractual document' does not necessarily need to relate to 'newly emerging issues'. Regulation 87(8)(c) of the ECNSR simply states that the MCA may from time to time '*establish other information requirements to be included in contracts not related to aspects regulated under this regulation*' adding that such information requirements may '*in particular*' address '*newly emerging issues*'. This does not exclude that the MCA may establish additional information requirements in the 'pre-contractual document' on other aspects not regulated under this regulation which are not necessarily emerging issues.

The MCA received feedback from two providers stating that the addition of such information in the 'pre-contractual document' will increase the volume of information included in the 'pre-contractual document' and that this information does not facilitate the end-users' decision taking prior to subscribing to a service. The feedback received together with MCA's position on each of the additional information requirements proposed is being summarised hereunder:

- E-mail forwarding or access to e-mails after termination of the contract with a provider of an IAS:  
The MCA received feedback from one provider which supported MCA's proposal to require IAS providers who also offer the provision of e-mail services provided with e-mail addresses based on their commercial name or trade mark, to include information in the 'pre-contractual document' about the facilities to be offered to end-users upon termination of service/s as mandated by 'Decision 13' hereunder. The requirements proposed in MCA's consultation are therefore being retained in this Decision Notice.
- Late payment and non-payment of bills – procedures for suspending and terminating the service/s:  
The MCA received feedback from one (1) provider which disagreed with MCA's proposal to also include information in the 'pre-contractual document' about non-payment of bills. The MCA remains of the view that the information pertaining to 'Non-Payment of Bills' as proposed in its consultation is important for end-users to ensure transparency of information and legal certainty and is therefore retaining the requirements proposed in its consultation in this Decision Notice.
- The nature of any limitations that may apply for the re/transmission of European football content:

One (1) provider stated that it disagrees that the 'pre-contractual document' should include the nature of any limitations that may apply for the re/transmission of European football content on the basis that according to this provider, the rights to transmit such content, may be revoked due to unforeseen circumstances and also because the provider may not be the rights holder of all the European football content it transmits.

The MCA is of the view that if a provider includes information on any of its adverts or media channels which markets the transmission of any European football event (the rights of which have been acquired through a public bidding processes) than it should be transparent and include information in the 'pre-contractual document' about the expiry date to re/transmit that content. This measure would enable end-users to take more informed decisions when evaluating contract duration options for core services provided by the same provider.

The MCA also notes that providers currently already have an obligation to include this information in the 'pre-contractual document' as required by MCA's 2012 decision. The MCA is therefore retaining the requirements proposed in its consultation in this Decision Notice.

The MCA clarifies that it does not object to the inclusion of clauses in contracts by providers to safeguard their interests in cases where the rights for the re/transmission of European football content are revoked due to circumstances over which the provider has no control.

### **6.1.1 Clarification regarding the inclusion of information on minimum levels of quality of service 'QoS'**

In one of the responses received, one (1) provider stated that the provisions regarding the publication of QoS information in the 'pre-contractual document' emanating from the Eighth Schedule of the ECNSR is '*ambiguous*'. This provider requested that until the MCA issues its final decision titled '[\*Quality of Service Parameters to be measured by Internet Access Providers and Publicly Available Interpersonal Communications Services Providers\*](#)' (further to the public consultation issued by the MCA in 2021), providers should only be required to include in the 'pre-contractual document' the QoS information requirements emanating from MCA's current decision titled 'Quality of Service Framework'.

The MCA wishes to clarify a number of points in relation to this submission namely that:

- i. In MCA's view, Part B (I) of the Eighth Schedule of the ECNSR, provides sufficient clarity with regards to which minimum specific QoS information requirements providers of IAS and publicly available ICS must include in their '*pre-contractual documents*' in addition to the QoS information requirements set out in Part A. These include the following:
  - For IAS: At least information about latency, jitter and packet loss; and
  - For publicly available ICS: at least include the time for the initial connection, failure probability, call signalling delays.

Furthermore, as stated in this regulation, providers are advised to take utmost account of the BEREC guidelines published in March 2020<sup>3</sup>. These guidelines establish the definitions and methodologies which providers should use to determine the performance results of these specific QoS parameters which can then be reflected in the *'pre-contractual document'*.

- ii. Further to the above, Part A (1) and Part B (I) (1) (i) of the Eighth Schedule of the ECNSR state that such minimum quality of service levels are only to be published *'to the extent that those are offered'*. Part A (1) of the Eighth Schedule of the ECNSR further states that *'where no minimum levels of quality of service are offered, a statement to this effect shall be made'*. The MCA interprets this requirement to mean that if providers do not offer any minimum quality of service levels, then providers are not required to include the information requirements specified in point (i) above in contracts. In such instances though, providers are required to include a clear statement clarifying that it does not offer any minimum quality of service levels;
- iii. The MCA is not empowered at law to waive off the applicable provisions contained in the ENCSR including the ones requiring providers of IAS and publicly available ICS to include in the *'pre-contractual document'* the minimum specific QoS information referred to in point (i) above if such minimum quality of service levels are offered by providers;
- iv. MCA's consultation referred to by the respondent in its submission titled *'Quality of Service Parameters to be measured by Internet Access Providers and Publicly Available Interpersonal Communications Services Providers'* did not propose any measures regarding the publication of QoS information in *'pre-contractual documents'* and addresses different purposes to those being addressed in this decision.

In view of the reasons stated above, the MCA is of the view that the Eighth Schedule of the ECNSR provides sufficient clarity and guidance with regards to which, if any, minimum specific QoS information providers must include in their *'pre-contractual documents'* if they offer any minimum quality of service levels. The above is without prejudice to the information requirements mandated in MCA's decision titled ['Quality of Service Framework'](#) and to the information requirements mandated in the [Open Internet Regulation \(EU\) 2015/2120](#) (hereinafter 'OIR').

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<sup>3</sup> BEREC Guidelines detailing Quality of Service Parameters, 2020:  
[https://www.berec.europa.eu/sites/default/files/files/document\\_register\\_store/2020/3/BoR%20%2820%29%2053%20-%20QoS%20Guidelines%20FINAL.pdf](https://www.berec.europa.eu/sites/default/files/files/document_register_store/2020/3/BoR%20%2820%29%2053%20-%20QoS%20Guidelines%20FINAL.pdf)

### 6.1.2 MCA's Decision

In view of the considerations mentioned in Section 6.1, the MCA is retaining the additional information requirements to be included in the 'pre-contractual document' as proposed in its consultation in this Decision Notice as outlined in the Annex attached to this Decision Notice titled '*Additional information requirements to be included in the 'pre-contractual document'*'.

#### Decision 1

Before a consumer is bound by a contract for the provision of publicly available ECS excluding transmission services used for the provision of M2M services, in addition to the 'pre-contractual information' requirements mandated in regulation 87(1) of the ECNSR, providers shall also provide the additional information specified in "*Annex – Additional information requirements to be included in the 'pre-contractual document'*" to the extent that such information relates to the service/s they provide.

The additional information specified in '*Annex – Additional information requirements to be included in the 'pre-contractual document'*', shall also be provided to end-users that are micro-enterprises, small enterprises or not-for-profit organisations, unless such end-users have explicitly agreed to waive all or parts of those provisions.

The additional information specified in "*Annex – Additional information requirements to be included in the 'pre-contractual document'*" shall together with the 'pre-contractual information' mandated in regulation 87(1) of the ECNSR also become an integral part of the contract and shall not be altered unless the contracting parties expressly agree otherwise.

This decision is without prejudice to any other information requirements emanating from any other laws or other relevant decisions published by the MCA which providers are required to adhere to.

Regulation 87(3) of the ECNSR requires that consumers and end-users that are micro-enterprises, small enterprises or not-for-profit organisations are provided a concise and easily readable contract summary, which shall contain specific information as stipulated in this sub-regulation and as set out in Part B of the Annex of the Contract Summary Implementing Regulation. For the time being, the MCA does not consider the need to introduce additional requirements on information to be included in the contract summary beyond those already established in the above-mentioned norms.



## 6.2 The format in which the ‘pre-contractual information’ and the ‘contract summary’ are to be provided before the contract becomes effective

Regulation 87 of the ECNSR requires that publicly available ECS other than transmission services used for the provision of M2M, shall provide consumers with the:

1. ‘pre-contractual information’ in a clear and comprehensible manner on a ‘durable medium’<sup>4</sup> or, where provision on a durable medium is not feasible, in an easily downloadable document made available by the provider (namely regulation 87 (2) of the ECNSR); and
2. ‘pre-contractual information’ ‘before a consumer is bound by a contract or any corresponding offer’ (namely regulation 87 (1) of the ECNSR). In addition to this, regulation 87(4) also provides that *‘the contract shall become effective when the consumer has confirmed his or her agreement after reception of the ‘contract summary’’*. (MCA’s emphasis)

Regulation 87 (9) further specifies that the above requirements shall also apply to end-users that are micro-enterprises, small enterprises or not-for-profit organisations, unless they have explicitly agreed to waive all or parts of those provisions.

The MCA received feedback from two (2) providers on the applicability of these requirements. One of these providers stated that directing end-users to a website where they may find a copy of the ‘pre-contractual information’ and ‘contract summary’ should meet the requirement of providing such information on a ‘durable medium’.

The other provider stated that a stringent interpretation of what constitutes ‘durable medium’ may result in a more burdensome contractual process and consequently in a negative experience for end-users. This respondent drew parallels between two processes it adopts when concluding contracts with end-users which entail the signature by end-users on a ‘tablet’ and the signature by end-users on a ‘printed document’ and stated that in both instances the ‘pre-contractual document’ is ‘made available’ to end-users prior to giving their consent.

This respondent further stated *that ‘when a contract is accepted by the end-user in case of signing on a tablet, a copy of a signed contract is sent to the end-user via email’* whereas when signing on a printed document *‘a printed copy is provided to the end-user automatically’*. According to this respondent, the *‘introduction of an additional obligation’* that would require the ‘pre-contractual information’ to be provided to end-users on a ‘durable medium’ prior to

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<sup>4</sup> A ‘durable medium’ is defined in regulation (2) of the ECNSR as ‘an instrument which enables the consumer or the trader to store information addressed personally to him in a way which is accessible for a period of time for the purposes of such information and which allows the unchanged reproduction of the information stored’.



the conclusion of a contract would complicate and prolong the contracting process and would increase risks associated with the handling of the end-users' personal data. It therefore argued that the process when signing on a tablet should be deemed as the alternative option of providing the 'pre-contractual information' on a 'downloadable document' as opposed to providing it on a 'durable medium'. It also stated that it envisaged possible issues (namely risks associated with the handling of the end-users' personal data) with providing 'the pre-contractual information' on a 'durable medium' prior to the conclusion of a contract in case of distance and off-premises selling.

The MCA has the following feedback to provide in relation to the above:

1. The MCA seeks to clarify that the requirement to provide end-users with 'pre-contractual information' on a 'durable medium' before they are bound by a contract emanates from Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (hereafter the 'EECC') and has been duly transposed into national legislation in October 2021. The MCA is not empowered to remove or modify these specific requirements from the law. In its consultation, the MCA did not propose any amendments to this requirement.
2. The MCA disagrees with the interpretation of a provider which claims that directing end-users to a website where they may find a copy of the 'pre-contractual information' and 'contract summary' should meet the requirement of providing such information on a 'durable medium'. In order to adhere to the definition of 'durable medium' as provided for in regulation (2) of the ECNSR, the 'pre-contractual information' must be:
  - addressed personally to the end-user; and
  - accessible for future reference for a period of time for the purposes of such information and which allows the unchanged reproduction of the information stored.

The process described by this provider does not meet all the above-mentioned requirements and therefore the MCA cannot agree with this respondent's views. To this effect, reference is made to the judgment delivered by the Court of Justice of the European Union (CJEU) following a reference for a preliminary ruling from Austria in case (C49-11) on Content Services, delivered on the 5th of July 2012 in which the CJEU held that in that particular case, sending a consumer an e-mail containing hyperlinks to access the applicable contractual terms and conditions via the company's website was not sufficient to meet the requirements of a durable medium. The judgment is accessible [here](#).

3. With reference to comments submitted by a provider arguing that a stringent interpretation of what constitutes 'durable medium' may result in a more burdensome contractual process, the MCA wishes to clarify that in its consultation it did not propose an exhaustive list of 'durable medium' formats in which the 'pre-contractual information' should be provided to end-users. The MCA agrees that providers should have flexibility, as long as they can ensure that the formats in which the 'pre-contractual information' is provided by them to end-users complies with the definition of 'durable medium' as provided for in the 'ECNSR'. The MCA notes that the definition of 'durable

medium' does not restrict providers to necessarily present a copy of the 'pre-contractual information' in hard copy format, but rather it enables providers to present such information in other formats such as for example a document attached and sent via e-mail amongst others. Having said this, whilst the MCA supports initiatives which reduce the use of paper in line with sustainability objectives, providers must be mindful of the needs of those end-users who have no access to the internet or who do not know how to access this information electronically and can therefore only access this information by means of a hard copy contract. The MCA is aware that currently providers do make the 'pre-contractual document' available in hard copy format and therefore the MCA does not consider that there is the necessity to mandate new measures in this regard.

4. As mentioned above, a respondent stated that in both instances, i.e. when end-users give their explicit consent to a contract by means of a signature on a 'tablet' or on a 'printed document', the 'pre-contractual information' is 'made available' to end-users before they sign the contract. The MCA understands, that when end-users are requested to sign on a 'printed document' which contains all the 'pre-contractual information' required under regulation 87 (1), then end-users have the opportunity if they want, to read the contract prior to signing it, effectively meaning that the 'pre-contractual information' is being provided before the contract becomes effective. On the other hand, in the other instance described by this respondent where contracts are concluded by means of a signature by the end-user on a 'tablet', it is unclear to the MCA how the 'pre-contractual information' is provided to the end-user before signing the contract. The MCA therefore cannot on the basis of the information given by the respondent comment any further on this matter.
5. The MCA appreciates the fact that in order to provide the 'pre-contractual information' on a durable medium, providers may be required to request end-users to provide them with personal data (e.g. an e-mail address). As reiterated previously, the requirement to provide the 'pre-contractual information' on a 'durable medium' prior to the conclusion of a contract is mandated by regulation 87 of the ECNSR and the MCA is not empowered to waive off any such requirements. If, in order to adhere to this requirement, providers need to obtain additional personal data from the end-user, providers are expected to take the necessary measures to gather and process such data in compliance with applicable data protection laws.
6. The only instance where regulation 87(2) of the ECNSR allows that the 'pre-contractual information' to end-users may not be provided on a 'durable medium' is in cases where it is not feasible to provide it in such medium. In such instances only, the 'pre-contractual information' may be provided to end-users in a 'downloadable manner'. Providers must first try to identify possible solutions on how to provide the 'pre-contractual information' on a 'durable medium' and subsequently demonstrate that such solutions are 'not feasible' before being able to provide the 'pre-contractual information' in a 'downloadable manner'. On the basis of the information provided with respect to the processes mentioned above by this respondent, the MCA cannot conclude that in these instances the provision of the 'pre-contractual information' on a durable medium is not feasible. In this regard the MCA notes that it is aware of different solutions adopted by providers within the industry which adhere to the requirement of

providing 'the pre-contractual information' on a 'durable medium' in similar instances as those described by this respondent.

7. The MCA remains available to provide feedback and guidance on the correct application of these regulations.

The MCA received more feedback from a provider which stated that in the case of pre-paid NB-ICS (namely pre-paid NB-ICS sold by third parties and pre-paid NB-ICS bundles), the 'pre-contractual information' and the 'contract summary' can only be sent to end-users in a 'downloadable manner' by means of an SMS containing a link to both sets of information. Furthermore, this respondent also stated that in the case where pre-paid NB-ICS are sold by third parties as well as in the case of a subscription to a NB-ICS bundle the 'pre-contractual information' and the 'contract summary' can only be provided once the service becomes fully activated.

The MCA reiterates that the requirement to provide end-users with the 'pre-contractual information' before they are bound by a contract emanates from regulation 87 (1) and (4) of the ECNSR and that these requirements also apply when end-users subscribe to pre-paid services. The MCA is not empowered to remove or modify these specific requirements and cannot endorse such feedback as it would be going against the requirements it is legally responsible to enforce.

The MCA observes that a common practice undertaken by a number of providers in the industry when pre-paid NB-ICS are sold by third parties, is that end-users are given an information pack which contains the 'pre-contractual information' or which contains a web link from where end-users may access the 'pre-contractual information' in a 'downloadable manner'. The MCA is of the view that if in such circumstances the provision of the 'pre-contractual information' by third parties to end-users in a 'durable medium' is not feasible, then the 'pre-contractual information' may be provided in a 'downloadable manner'. Providers may adopt similar solutions as the ones described above and also apply them to the provision of the 'contract summary' to end-users before the contract becomes effective. The MCA considers that in such scenarios, the end-user can avail of the service/s only after he/she inserts the SIM card into his/her mobile device. When purchasing a new pre-paid NB-ICS therefore the end-user is given the possibility to review the 'pre-contractual information' and the 'contract summary' from the information pack (or by accessing the link provided therein) before starting to make use of the service.

The MCA is aware that when subscribing to a pre-paid bundle NB-ICS an end-user needs to first raise a request to purchase a bundle by sending an SMS to the provider or by submitting a request through the provider's self-care portal. The MCA is also aware that such a bundle is activated within a few minutes from receipt of such a request and not instantly<sup>5</sup>. The MCA

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<sup>5</sup> This information has been gathered from the information included in the terms and conditions of local pre-paid NB-ICS which is published on the website of the respective providers.

cannot endorse practices in which providers do not send the 'pre-contractual information' and the 'contract summary' before the contract becomes effective. Notwithstanding this, if in such instances the provision of both sets of information on a 'durable medium' is not feasible then providers may send this information in a 'downloadable document', for example by means of a link contained in an SMS sent to end-users before the contract becomes effective.

The MCA reiterates that in the above-mentioned examples, if the 'pre-contractual information' and the 'contract summary' are sent in a 'downloadable document', then providers must expressly draw the attention of end-users to the availability of that document and the importance of downloading it for the purposes of documentation, future reference, and unchanged reproduction.

Another provider stated that regulation 87 of the ECNSR is not applicable in instances when end-users subscribe to an add-on service/s. This respondent argued that the 'contract summary' should be made available to end-users only for the core electronic communications service and not for additional services which are to be merely referenced within the template, provided that such do not extend the contract term of the core electronic communications service.

The MCA notes that regulation 87 does not exclude from its scope the subscription to add-on service/s. This regulation stresses the importance of providing the 'pre-contractual information' also when an end-user decides to subscribe to 'a corresponding offer'. The MCA further notes that the subscription to an add-on, like any other subscription, is subject to a number of conditions (such as prices, QoS and other conditions) which both the providers and the end-users need to adhere to even if such add-on services are provided to end-users without the need to commit to a minimum contractual period. The need to therefore provide the 'pre-contractual information' before being bound by such conditions remains of utmost importance even in such instances. The provision of this information may be sent in a 'downloadable document' if the provision of such information in a 'durable medium' is not feasible. The MCA also considers that regulation 87 (4) of the ECNSR which requires providers to provide end-users with a 'contract summary', also applies in the case of a subscription to an add-on. The MCA is of the view that when end-users subscribe to an add-on at the same time that they subscribe to a core service/s, providers may opt either to:

- (1) provide the details of all add-ons which could be added by the end-users in the same 'pre-contractual document' and 'contract summary' for the provision of the core services, provided that in such circumstances any of the add-ons which end-users opt to subscribe to when agreeing to the subscription of the core services are clearly marked in both the 'pre-contractual document' and 'contract summary'; or
- (2) provide a separate 'pre-contractual document' and 'contract summary' of the specific add-on/s which the end-user has specifically chose to subscribe to.

If during the course of a subscription, end-users opt to add an add-on/s on top of a core service/s, providers must ensure that if the respective 'pre-contractual document' and 'contract summary' for each specific add-on being subscribed to was not already provided to the end-

user when subscribing to the core service/s, these are duly provided to them before the add-on service/s is activated.

The ECNSR does not establish specific rules regarding the format in which the contract summary is to be provided. The MCA encourages providers to provide such contract summaries using the same methods in which the 'pre-contractual information' is provided to end-users. Notwithstanding the above, providers must ensure that contract summaries are provided using the template specified in Part A of the Annex of the Contract Summary Implementing Regulation and in accordance with the presentation requirements contained in Article 2 of the same Contract Summary Implementing Regulation.

Providers must also ensure that the pre-contractual information is, when requested, provided in an accessible format to end-users with disabilities in accordance with European Union law harmonising accessibility requirements for products and services. In this regard, providers are encouraged to take the necessary measures to ensure that they will be in a position to comply with Directive (EU) 2019/882 'on the accessibility requirements for products and services', once this Directive becomes applicable.

## **6.3 Conclusion of a contract**

In accordance with regulation 87 of the ECNSR, a contract for the provision of publicly available ECS other than transmission services used for the provision of M2M, can only become effective if:

1. The provider has first provided consumers with the 'pre-contractual information' and the 'contract summary' [namely regulation 87 (1) to (4) of the ECNSR]; and
2. After providing the information referred to in point 1 above, the provider has obtained the explicit consent of the consumer to the contract [as per regulation 87(4) of the ECNSR].

The requirements referred to in points (1) and (2) above apply to the conclusion of all types of contracts, including post-paid, pre-paid, hybrid and add-on services alike, and also apply when concluding contracts with end-users that are micro-enterprises, small enterprises, or not-for-profit organisations.

In accordance with its powers given under regulation 87(4) of the ECNSR, in its consultation the MCA proposed the implementation of a set of requirements determining the manner as to how an end-user gives his/her consent to a contract. The responses to MCA's proposals, including MCA's feedback and final position are being summarised hereunder:

### **6.3.1 Part A of Proposed Decision 2 of MCA's Consultation titled 'Contracts, Transparency and Termination'**

In its consultation, the MCA proposed that when concluding a contract for the provision of a publicly available ECS excluding NI-ICS and transmission services used for the provision of

M2M services, after having provided the end-user with the applicable 'pre-contractual information' and 'contract summary', the provider must obtain the end-user's explicit consent by means of a signature on a durable medium indicating his/her agreement to enter into that contract.

One provider wanted to seek MCA's confirmation that the provision of an end-user's consent to enter an agreement may be captured by means of '*a wet/electronic signature*' or by '*ticking a box*'. The MCA clarifies that it considers the following two types of signatures as a confirmation that an end-user gave his / her consent to enter a contract:

1. 'Physical Signatures (or 'wet signatures')' whereby an end-user physically signs on a document which clearly indicates that upon signing, the end-user is giving his/her consent to enter the contract; or
2. Electronic signatures as defined in Regulation (EU) No 910/2014 on electronic identification and trust services for electronic transactions in the internal market, and which clearly indicate to the end-user that upon signing the end-user is giving his/her consent to enter the contract.

With reference to processes which entails ticking of boxes, the MCA is unable to provide any feedback in view of the fact that the respondent did not provide detailed information on what such processes would consist of. Providers are required to adhere to the direction being provided in points (1) or (2) above. The Authority remains available to discuss specific arrangements that providers may wish to propose and to provide its feedback.

Further to the above, in its consultation, the MCA also proposed that upon the conclusion of a contract, providers should give the end-user a copy of his / her consent in which the end-user indicates his / her agreement to enter into that contract. The MCA also proposed that providers maintain evidence of the end-user's consent to enter the contract by storing a copy of the contract signed by the end-user for the entire duration of the contract. The MCA also proposed that providers are required to provide a copy of such consent free of charge to the end-user if he/she so requests during the course of his/her subscription.

The MCA received feedback from one provider contending that the requirement to retain the end-user's consent beyond the fixed contractual period will require providers to store this information for a very long period resulting in an added financial burden. This respondent suggested that the MCA only limits the requirement to store this information until the expiry of the fixed contractual period.<sup>6</sup> The MCA is of the view that in the event of a dispute where an end-user claims that he/she has not given his/her consent to enter a contract, then it is

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<sup>6</sup> The fixed contractual periods of the contracts currently offered by providers vary significantly from one another with some contracts requiring a minimum contractual period of one (1) month whilst others requiring a minimum contractual period of three (3) months, one (1) year or two (2) years.

imperative in order to facilitate the settlement of any such dispute, that the provider is able to furnish evidence demonstrating that the end-user had given his/her consent to enter into that contract. The MCA considers that such a dispute can also arise when the end-user is no longer on a fixed contractual term. In view of this, the MCA considers that the contention referred to above fails to address all disputes that may arise.

In view of the considerations mentioned above, the MCA is retaining the proposals contained in 'Proposed Decision 2 – Part A' of its Consultation in this Decision Notice.

### **6.3.2 Part B and Part C of Proposed Decision 2 of MCA's Consultation titled 'Contracts, Transparency and Termination'**

In 'Part B and Part C of Proposed Decision 2' of its consultation, the MCA proposed two (2) measures, subject to a number of conditions, to be adhered to by providers when:

- Concluding a contract for a new pre-paid NB-ICS or a new pre-paid bundle NB-ICS subscription;
- Adding a service/s on top of an end-user's existing publicly available ECS subscription (excluding NI-ICS and transmission services used for the provision of M2M services); or when
- Upgrading / downgrading an end-user's publicly available ECS other than NI-ICS and transmission services used for the provision of M2M services.

These proposed measures are being summarised hereunder:

1. The requirement to maintain proof of the end-user's subscription request for the duration of that subscription and to provide such proof to the end-user if he/she so requests during the course of that subscription free of charge; and
2. The requirement to inform the end-user on a durable medium that his/her use of the service/s will be deemed to constitute his/her consent to enter into that contract and to provide them with information on how to easily contact their provider free of charge in case they do not wish to proceed and enter into that contract.

The MCA received feedback from a provider who objected to MCA's proposal referred to in point (1). This provider claimed that in the case of requests for add-on services, upgrades and downgrades and pre-paid services, it is not always possible to record the subscription request due to a number of reasons including:

- The end-user's request to subscribe to an unregistered prepaid service cannot be gathered as the identity of the end-user is unknown.

- Retaining a copy of the end-user's subscription request would prove to be difficult due to the variety of channels such requests may be submitted through (e.g. phone, chat, outlets, self-care, SMS etc).
- If an end-user signature is requested for each subscription request made by him/her, it would restrict the current flexible process offered by providers.
- If the subscription request is done by an end-user over a call, it is not technically possible to link the call with the subscription request, and therefore the provider would not be able to delete this call when the subscriber<sup>7</sup> terminates the service. According to this provider if such call is not deleted it would breach the GDPR regulations. This respondent claimed that it already retains call recordings for two years and retaining them for a longer period would cause a financial burden on them and would risk creating a possible conflict with the data minimisation principle found under the same GDPR regulations.

By way of proposal, this respondent suggested that providers include a provision in their contracts stating that if the end-user has made use of the service/s for 30 days, it is deemed that the end-user has explicitly requested and explicitly consented for the service/s, and use of such service/s is explicit proof of such request.

This respondent also objected to MCA's proposal referred to in point (2) above as according to this respondent the implementation of this measure requires complex developments.

The MCA has the following feedback to provide in relation to the above:

***Purchase of a new pre-paid NB-ICS:*** When subscribing to a new pre-paid NB-ICS (whether registered or not) the end-user can only start using the service after he/she inserts the SIM card provided to him/her by the provider into his/her mobile device. Since without this step the service cannot be used, the MCA can consider that this action is sufficient to demonstrate that the end-user did indeed request such a new pre-paid NB-ICS subscription. The MCA will therefore remove from its Decision Notice the proposed measure to require providers to retain proof of the end-user's request to subscribe to a new pre-paid NB-ICS.

With reference to MCA's other proposal included by the MCA in its consultation as referred to in point (2) above, the MCA considers that if for example such information is included in the 'pre-contractual document' or in the starter pack which is provided by a number of providers to the end-user when purchasing a new pre-paid NB-ICS subscription, then this measure would be fulfilled. A provider may also opt for alternative methods other than the one cited

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<sup>7</sup> In line with recital (281) of the EEC, subscriber refers to any person or entity that is a party to a contract or other similar arrangement that is in force with a provider for the supply of voice communications services as defined in article 2 of the Electronic Communications (Regulation) Act (CAP. 399). Pre-paid customers are also regarded as subscribers.



above to provide the information to an end-user in case it deems that the above mentioned method is not feasible.

***Purchase of a pre-paid bundle NB-ICS:*** When subscribing to a pre-paid bundle NB-ICS an end-user needs to first raise a request to subscribe to that bundle by sending an SMS to the provider or by submitting a request through the provider's self-care portal.

With reference to the feedback received from one respondent contending that the requirement on providers to retain a copy of the end-user's request for the duration of the subscription would result in an added financial burden, the MCA considers that as a minimum, in the event of a dispute where an end-user claims that he/she did not give his/her consent to subscribe to that pre-paid bundle NB-ICS, the provider should demonstrate that such pre-paid NB-ICS bundle was requested by the end-user. Without such proof, the MCA considers that it will be extremely difficult to settle any such disputes. The MCA is therefore amending the text of this Decision Notice to clarify that in the event of any disputes the provider shall be responsible to furnish proof of the end-user's request to subscribe to the disputed pre-paid NB-ICS bundle.

With reference to MCA's other proposal included in its consultation as referred to in point (2) above, the MCA takes note of the respondent's submissions that in order to adhere to such requirements, providers would need to develop additional steps to their current processes. Having said this, the MCA considers that providers may implement different solutions to send the information contained in point (2) above to an end-user, such as for example by sending this information to the end-user through an SMS. In all instances, this information shall be sent to the end-user before the pre-paid bundle NB-ICS subscription is activated.

***Purchase of an add-on service/s or of an upgrade / downgrade to a service/s (Applicable to existing publicly available ECS excluding NI-ICS and transmission services used for the provision of M2M services):*** The MCA clarifies that the proposal being referred to in point (1) above replicates a requirement contained in MCA's '2012 Decision'<sup>8</sup> which mandates that providers maintain adequate proof of the subscriber's request to add-on, upgrade or downgrade a service/s.

With reference to the feedback received from one respondent contending that the requirement on providers to retain a copy of the end-user's request for the duration of the subscription would result in an added financial burden, the MCA considers that as a minimum, in the event of a dispute where an end-user claims that he/she had not given his/her consent to subscribe to that add-on service or upgrade or downgrade in service/s, the provider should demonstrate that such add-on service or upgrade or downgrade in service/s was requested by the end-user. Without such proof, the MCA considers that it will be extremely difficult to settle any such disputes. The MCA is therefore amending the text of its Decision Notice to clarify that in

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<sup>8</sup> As stated in Section 7 of this document, this Decision Notice shall replace in full MCA's decision of 2012 and shall be applicable in addition to the requirements established in the ECNSR.

the event of any disputes the provider shall be responsible to furnish proof of the end-user's request to subscribe to the disputed add-on service or upgrade or downgrade in service/s.

With reference to the claims made by the respondent with regards to the implementation of the other measure proposed by the MCA in point (2) above, the MCA takes note of the respondent's submissions that in order to adhere to such requirements, providers would need to develop additional steps to their current processes. Having said this, the MCA considers that there may be different solutions which could be adopted by providers to send the information contained in point (2) above to an end-user, such as for example by sending this information to the end-user through an SMS or an e-mail. In all instances, this information shall be sent to the subscriber before the add-on, upgrade or downgrade is effected.

## Decision 2

### Part A

When concluding a contract for the provision of a publicly available ECS excluding NI-ICS and transmission services used for the provision of M2M services, after having provided the consumer with the applicable 'pre-contractual information' and 'contract summary', the provider must obtain the consumer's explicit consent by means of a signature on a durable medium clearly indicating his/her agreement to enter into that contract.

A copy of the aforesaid consent obtained by the provider shall be provided to the consumer on a durable medium upon conclusion of the contract.

The provider shall store and maintain the consumer's consent for the entire duration of the contract and shall provide a copy of such consent free of charge to the consumer if he/she so requests during the course of his/her subscription.

### Part B (Applicable only to new pre-paid NB-ICS)

When a consumer requests to subscribe to a pre-paid NB-ICS the provider shall inform the consumer on a durable medium that his/her use of the service/s will be deemed to constitute his/her consent to enter into that contract. The consumer shall be provided information on how to easily contact his/her provider free of charge in case he/she does not wish to proceed and enter into that contract:

Provided that the subscription to such pre-paid NB-ICS is not subject to a minimum contractual period exceeding thirty (30) running days or to the payment of any form of termination fee/s.

The above shall be without prejudice to the right of the consumer to receive the applicable 'pre-contractual document' and 'contract summary' prior to the conclusion of the new pre-paid NB-ICS contract.

Part C (Applicable only to pre-paid bundle NB-ICS and to an add-on service/s purchased on top of an existing publicly available ECS subscription (excluding NI-ICS and transmission services used for the provision of M2M services))

When a consumer requests to subscribe to a pre-paid bundle NB-ICS or to an add-on service purchased on top of an existing publicly available ECS subscription (excluding NI-ICS and transmission services used for the provision of M2M services), the provider shall inform the consumer on a durable medium that his/her use of the service/s will be deemed to constitute his/her consent to enter into that contract. The consumer shall be provided information on how to easily contact his/her provider free of charge in case he/she does not wish to proceed and enter into that contract:

Provided that the subscription to such pre-paid bundle NB-ICS or to an add-on service/s purchased on top of an existing publicly available ECS subscription (excluding NI-ICS and transmission services used for the provision of M2M services) is not subject to a minimum contractual period exceeding thirty (30) running days or to the payment of any form of termination fee/s.

In case of a dispute in which an end-user claims that he/she has not given his/her consent to subscribe to that pre-paid bundle NB-ICS or to an add-on service/s, the burden of proof to demonstrate that such service/s was requested by the end-user rests upon the provider.

The above shall be without prejudice to the right of the consumer to receive the applicable 'pre-contractual document' and 'contract summary' prior to the conclusion of the contract for the new pre-paid bundle NB-ICS or add-on service/s purchased on top of an existing publicly available ECS subscription (excluding NI-ICS and transmission services used for the provision of M2M services).

Part D (Applicable only to the upgrade / downgrade of a publicly available ECS service excluding NI-ICS and transmission services used for the provision of M2M services)

The consent procedure set out in 'Part C' of this Decision shall also be applied by a provider of a publicly available ECS other than NI-ICS and transmission services used for the provision of M2M services, when a consumer requests to upgrade / downgrade his / her service/s to a higher / lower tier during the course of his/her subscription. In doing so the provider shall ensure that:

- i. It has received an explicit request by the consumer to upgrade / downgrade the consumer's plan;
- ii. the 'pre-contractual information' and the 'contract summary' applicable to the plan being upgraded / downgraded have been sent to the consumer in accordance with regulation 87 of the ECNSR;
- iii. subsequent to points (i) and (ii) above, the provider informs the consumer on a durable medium that his/her use of the service/s will be deemed to constitute his/her consent to be upgraded / downgraded;
- iv. the contract commitment period is not changed or re-started;
- v. during the course of the subscription, the consumer has the possibility to downgrade / upgrade his/her services back to the services plan he/she was previously subscribed to without incurring any penalty fees however so described, provided the previous services plan the consumer was subscribed to is still being offered at the time of the consumer's request; and
- vi. no additional services are added to the consumer's subscription during the course of the downgrade / upgrade, unless explicitly requested by the consumer in accordance with 'Part A', 'Part B' and 'Part C' of this Decision as may be applicable.

In case of a dispute in which an end-user claims that he/she has not given his/her consent to subscribe to that upgrade/downgrade in service/s, the burden of proof to demonstrate that such upgrade/downgrade in service/s was requested by the end-user rests upon the provider.

If any of the above conditions stipulated in Points (i) to (vi) cannot be met by the provider, the upgrade / downgrade of a plan must be completed in accordance with 'Part A' of this Decision.

### **6.3.3 Requirements applicable when concluding contracts with end-users that are micro-enterprises, small enterprises or not-for-profit organisations and requirements applicable to bundles**

In its consultation, the MCA proposed that the measures contemplated in 'Decision 2' above also apply to bundles of services or bundle of services and terminal equipment offered to consumers which comprise at least an IAS, NB-ICS or a transmission service used for broadcasting. Furthermore, the MCA also proposed that 'Decision 2' above also applies when concluding contracts with end-users that are micro-enterprises, small enterprises or not-for-profit organisations, unless such end-users have explicitly agreed to waive all or parts of those provisions.

The MCA did not receive submissions on these proposed measures and the MCA is therefore retaining the proposal included in MCA's consultation in this Decision Notice. For the avoidance of any doubt, MCA's Decision Notice is clarifying that the measure requiring that Decision 2 applies to bundles of services or bundle of services and terminal equipment offered

to consumers which comprise at least an IAS, NB-ICS or a transmission service used for broadcasting, shall also apply to bundles of services or bundle of services and terminal equipment offered to end-users that are micro-enterprises, small enterprises or not-for-profit organisations, unless such end-users have explicitly agreed to waive all or parts of those provisions.

### **Decision 3 (Applicable to providers of publicly available ECS excluding NI-ICS and transmission services used for the provision of M2M services)**

'Decision 2' shall also apply when concluding contracts with end-users that are micro-enterprises, small enterprises or not-for-profit organisations, unless such end-users have explicitly agreed to waive all or parts of those provisions.

'Decision 2' shall also apply to bundles of services or bundle of services and terminal equipment offered to consumers and end-users that are micro-enterprises, small enterprises or not-for-profit organisations (unless such end-users have explicitly agreed to waive all or parts of those provisions) which comprise at least an IAS, NB-ICS or a transmission service used for broadcasting.

## **6.4 Modifications of contractual conditions (applicable to publicly available ECS other than NI-ICS)**

In its '2011 Decision', the MCA, amongst other measures, stipulated:

1. The manner and format in which notifications are to be sent to end-users to inform them about modifications to their contractual conditions;
2. The content and information that such notifications shall include;
3. The timeframes by when such written notifications are to be sent to the MCA prior to the notification to end-users;
4. The procedure to be followed by providers to seek a waiver from the MCA from the requirement to grant end-users the right to terminate the contract without incurring any penalties in the event that the contractual modifications are manifestly of benefit to all end-users to that service; and
5. Requirements to be adhered to by providers when terminating a package/s; when terminating a specific service/s; and/or when ceasing operations.

In the consultative paper leading to this decision, the MCA consulted about those measures contained in the '2011 Decision' which it believes should be retained or updated and proposed a set of new measures to be adhered to by providers to give more clarity to stakeholders and to enhance end-user protection. The MCA received extensive feedback about its proposals which are being discussed hereunder. As stated previously, the MCA shall repeal the 2011 Decision referred to above and replace it with the following decisions contained in section 6.4

of this decision notice. These shall be applicable together with the new rules included in regulation 92 of the ECNSR.

#### **6.4.1 The end-users' right to terminate their contract without incurring any further costs upon notice of changes in the contractual conditions**

Regulation 92(1) of the ECNSR states that end-users have the right to terminate their contract without incurring any further costs upon notice of changes in the contractual conditions proposed by the publicly available ECS other than NI-ICS unless the proposed changes are:

- (a) exclusively to the benefit of the end-user;
- (b) are of a purely administrative nature and have no negative effect on the end-user; or
- (c) are directly imposed by European Union or national law.

This provision is intended to ensure that when a provider proposes a contractual change/s to a service/s [with the exception of changes listed in points (a), (b) and (c) above], end-users subscribed to that service/s, are able to rescind their contract with their provider without incurring any financial penalty. In accordance with the spirit of this provision, in its consultation, the MCA proposed that when terminating the service/s as a result of the contractual changes proposed by the provider, end-users should:

- (1) have the right to have the service/s under that contract terminated with immediate effect upon receipt of the notification of termination by the provider, unless the end-user has explicitly agreed to have such service/s terminated at a later date; and
- (2) not be charged any further costs except for charges related to the provision of the service/s up until the date of termination and for any non-loaned equipment bundled with the service which is retained by the end-user in accordance with regulation 91(7) of the ECNSR.

With reference to MCA's proposal referred to in point one (1) above, the MCA received feedback from two (2) providers who stated that they may not be able to immediately terminate the service/s upon receipt of the notification of termination from the end-user. Both providers proposed instead that the obligation onerous on service providers is amended to require that providers ensure that the service/s is terminated at the latest on the day before the change/s in the contractual conditions proposed by the providers comes into effect (unless the end-user explicitly agrees to have his/her service/s terminated at a later date). The objective which MCA's proposal aimed to achieve was to ensure that end-users are able to terminate their service/s before the date on which the changes in the contractual conditions proposed by their providers come into effect. The MCA considers the proposal submitted by these two (2) providers is consistent with the MCA's objective and the MCA is therefore adopting this proposal by the aforesaid providers in this Decision Notice.

Further to a clarification request submitted by a provider, the MCA confirms that the proposed requirement referred to in point two (2) above shall be without prejudice to the providers' right to charge any penalties to end-users should they fail to return any loaned equipment to their provider or should any returned equipment by the end-user be damaged or faulty after terminating the service/s provided that such penalties are clearly included in the end-users contract and are fair and reasonable. Nevertheless, the MCA does not consider it necessary to amend this proposal and urges providers to ensure that the conditions of their contracts clearly list the obligations and procedures end-users need to follow when terminating their service/s.

Furthermore, 'Proposed Decision 12' of MCA's consultation included, amongst others, a proposal which entails that if consumers avail of their right to terminate their service by porting their number to an alternative provider as a result of the changes in the contractual conditions proposed by the provider (including when a provider decides to terminate a service/s plan or to terminates the provision of a service/s or cease operations) in accordance with section 6.4 of this Decision Notice, any requests for refund of accumulated monetary credit made by pre-paid or hybrid consumers in accordance with Decision 15/2022 of the MCA's Decision Notice titled 'Number Portability in Malta' (MCA/D/22-4760), hereafter the 'Number Portability Decision' shall not be subject to the refund fee. The MCA did not receive any objections to this specific aspect of 'Proposed Decision 12' and therefore intends to integrate this measure with 'Decision 4' of this Decision Notice.

## Decision 4

When, in accordance with regulation 92 of the ECNSR, an end-user avails of his/her right to terminate his/her contract as a result of changes in the contractual conditions proposed by providers of publicly available ECS other than NI-ICS, such end-user shall:

- (1) have the right to terminate his/her contract before the changes in the contractual conditions proposed by their providers come into effect, unless the end-user has explicitly agreed to have such service/s terminated at a later date. This requirement shall be without prejudice to the end-user's right to port his/her mobile, fixed, freephone or premium rate numbers to an alternative provider in accordance with [MCA's 'Number Portability Decision'](#); and
- (2) not be charged any further costs except for charges related to the provision of the service/s up until the date of termination and for any non-loaned equipment bundled with the service/s which is retained by the end-user in accordance with regulation 91(7) of the ECNSR.

When a consumer avails of his/her right to terminate their service by porting his/her number to an alternative provider as a result of the changes in the contractual conditions proposed by the provider (including when a provider decides to terminate a service/s plan or to terminates the provision of a service/s or cease operations) in accordance with section 6.4



of this Decision Notice, any requests for refund of accumulated monetary credit made by pre-paid or hybrid consumers in accordance with Decision 15/2022 of the 'Number Portability Decision' shall not be subject to the refund fee contemplated in regulation 94(13) of the ECNSR and in Decision 15/2022 of the 'Number Portability Decision'.

#### 6.4.2 Content of the notifications sent to end-users

Regulation 92(2) of the ECNSR states that providers shall notify end-users at least thirty (30) days in advance of any proposed modifications to the contractual conditions of their services in a clear and comprehensible manner and on a durable medium. This regulation further states that where applicable, providers shall simultaneously inform end-users of their right to terminate the contract without incurring any further costs if they do not accept the new conditions, which right shall be exercisable within thirty (30) days from notification of the change in contractual conditions by the provider.

In its consultation, specifically in 'Proposed Decision 5', the MCA proposed to retain the set of additional information requirements to be included by providers in the notifications to end-users, as stipulated in section 2.2 of MCA's 2011 Decision. The MCA also proposed the inclusion of additional information requirements to be included in the notifications by providers in order to provide more clarity and enhance further protection to end-users. The MCA received feedback with regards to two (2) proposed additional information requirements which are being summarised hereunder for ease of reference:

##### **(1) Information about the end-users' right to port their number/s to any provider of their choice**

In its consultation, the MCA proposed that in the event that the contractual modification/s relate to the provision of a mobile and/or fixed voice communications service, freephone service and/or premium rate service, the notification which providers are to send to end-users should also include information about the option available to end-users to port their number/s to any provider of their choice by lodging a porting request through the recipient provider.

One provider objected to this proposal and claimed that it goes beyond the transparency obligations stipulated in regulation 92(2) of the ECNSR. The MCA notes that it is empowered, in accordance with regulation 92(5) of the ECNSR, to determine the content (and therefore to mandate the inclusion of additional information requirements) of the notifications which providers are to send to end-users before implementing any modifications to the contractual conditions of their service/s. MCA's decision to mandate the inclusion of a set of additional information is being made in accordance with this legal provision.



Two (2) providers stated that the inclusion of this information will increase the volume of information in the notification and may possibly detract end-users from the main purpose of the notification. The MCA considers that such information will serve to enable end-users to take more informed decisions when evaluating their options in instances where a provider proposes changes to their contractual conditions.

One (1) of these providers further argued that the inclusion of this information is unnecessary since according to this respondent, end-users should be aware of the possibility to port their number to a provider of their choice considering that this facility has been in place for a number of years. Whilst the number portability facility has been long established locally, some end-users may still not be aware of the possibility to avail of such a facility or else may not be aware that such an option may also be availed of in such circumstances. Furthermore, as reiterated previously, the inclusion of this additional information will assist end-users in evaluating more accurately the options available to them when notified about a proposed change/s to their contractual conditions.

One (1) of these providers further stated that in the event of a porting request, the 'recipient provider' will not be aware of the changes proposed by the 'donor provider'<sup>9</sup> to the contractual conditions of the end-users' plan and may therefore inadvertently provide incorrect information regarding the applicability or otherwise of any early termination penalties upon termination of the service/s provided by the 'donor provider'. The MCA does not believe that this point should be of concern namely due to the fact that prior to taking a decision, end-users will be informed on a durable medium by their current provider of their option to terminate their service/s (or port their number to an alternative provider) without incurring any such penalty fees. End-users will therefore be fully aware that should they decide to port their number to an alternative provider, they will not be imposed any early termination fees.

In view of the above considerations, the MCA shall retain the proposal included in its consultation in this Decision Notice.

**(2) Information about the contact channels which can be used by an end-user to ask free of charge about the contractual changes being notified to end-users**

In its consultation the MCA proposed that the notification which providers are to send to end-users should also include information about the contact channels which can be used by end-users to ask free of charge about the contractual changes being notified

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<sup>9</sup> Donor provider/operator (also referred to as Transferring provider) refers to the service provider (including any agents or other persons however so described acting on its behalf) that provides service to a subscriber number before porting. The donor provider/operator is referred to as the Transferring provider in the EECC and the new national legislation (S.L. 399.48).

to end-users, including, in the case of changes not impacting an IAS, the inclusion of information on the telephony support customer care number of the service provider.

One (1) respondent argued that the obligation to provide telephony support services free of charge will be financially cumbersome for providers to implement. This respondent stated that it disagreed with MCA's proposal since other free of charge support services are made available together with the provision of telephony support services at a minimal charge or at no cost depending on one's tariff. This respondent also stated that telephony support services will not be the most sought telephony support service option by end-users.

In the first instance the MCA clarifies that what it proposed was that the notification should include information about the telephony support customer care number of the service provider only in instances where changes are not impacting an IAS. The MCA is concerned that in such circumstances, end-users who have any enquiries about the modifications being proposed by the provider, may not have access to the internet and subsequently the telephony support services would be the only easily accessible means to submit their enquiries. The objective of this proposal is therefore to ensure that such end-users have access to at least one easily accessible support service free of charge. The MCA remarks that a recent [study](#) conducted by MISCO commissioned by the MCA reported that 58% of respondents indicated that telephony support service is their most preferred customer contact channel. The MCA is therefore retaining the proposal included in MCA's consultation in this Decision Notice.

In view of the above considerations, the MCA is retaining the proposal included in its consultation in this Decision Notice with the inclusion of some minor amendments.

## Decision 5

Any notifications sent in accordance with regulation 92(2) of the ECNSR, shall be limited to information about the modifications to the contractual conditions of the service/s which the provider of publicly available ECS excluding NI-ICS intends to implement.

The information in the notification shall clearly explain the modifications being introduced by the provider in such a manner that an end-user can easily compare the contractual conditions he/she had agreed to with the new contractual conditions being proposed by the said provider.

Unless exempted by the MCA in line with 'Decision 7' hereunder, any notification to an end-user regarding modifications to the contractual conditions must also include information regarding:

1. the end-user's right to terminate the contract within thirty (30) running days from receipt of the notification, without incurring any penalties, if he/she does not agree with the proposed modification/s;

2. the manner in which an end-user is required to notify the provider about his/her intention to terminate the contract during the thirty (30) running day notification period should he/she disagree with the proposed modification/s;
3. the possibility, in the event that the contractual modification/s relate to the provision of a mobile and/or fixed voice communications service, freephone service and/or premium rate service, of the end-user to port his/her number/s to any provider of his/her choice by lodging a porting request through the recipient provider, in which case the end-user's contract is automatically terminated upon successful porting;
4. if applicable, the manner in which any refundable deposit, unutilised advance payment made by the end-user for the service/s subscribed to, may be refunded if the end-user chooses to unsubscribe from the service/s, switch to a new service/s, or switch or port to a new service provider;
5. if applicable, the manner in which any pre-paid or hybrid monetary credit accumulated in their account may be refunded if an end-user chooses to port their number to a new service provider; and
6. the contact channels which can be used by an end-user to ask free of charge about the contractual changes being notified to end-users, including, in the case of changes not impacting an IAS, the inclusion of information on a free of charge telephony support customer care number of the service provider.

Notifications to end-users can be sent out concurrently with other 'ordinary' communications (e.g. a monthly bill or monthly promotional newsletters), however providers shall ensure that these are given due prominence and are distinguishable from the 'ordinary' aspects of the communication to minimise the risk that such notification is overlooked by end-users.

### 6.4.3 The format in which notifications are to be sent to end-users

Regulation 92(2) of the ECNSR states that any notifications sent by providers to inform end-users about any proposed modifications to any contractual condition shall be sent on a **durable medium** at least thirty (30) days before such changes become applicable.

As previously stated, the MCA considers that in accordance with the definition of 'durable medium' emanating from the ECNSR, providers have different solutions that may be deemed appropriate and which may include amongst others: documents posted to the end-users' residential or business address; a document attached and sent via e-mail; or an SMS notification (provided that the information requirements contained in 'Decision 5' are adhered to within the context of the type of 'durable medium' chosen by the provider).

One respondent stated that an SMS may be the only means of notification possible, particularly when changes need to be notified to unregistered mobile pre-paid end-users and that the use of an SMS as a means to notify end-users about the changes being proposed to the contractual conditions may not always be viable due to the length of the information that would need to be communicated to end-users. This provider suggested that in light of the above, providers should be allowed to notify end-users about the proposed changes to their contractual conditions by sending them an SMS containing a web link to a unique pdf file available in a printable format on the provider's website (which file is retained on the provider's website for a specific time period). This provider proposed that the SMS would inform end-

users about the importance of downloading the file for the purposes of documentation, future reference and unchanged reproduction and the SMS would also include the details of a freephone number where end-users can obtain full information about the proposed modifications by that provider.

The MCA wishes to clarify a number of points in relation to this proposal as follows:

- (i) The format in which notifications about modifications to the contractual conditions are to be sent to end-users is prescribed in Article 105 (4) of the EECC and was duly transposed into national legislation in October 2021. The MCA is not empowered to remove or modify this requirement from the law and therefore in its consultation, the MCA did not propose any amendments to this requirement.
- (ii) As reiterated previously in this Decision Notice, in order to conform with the requirements emanating from the definition of ‘durable medium’ as provided for in regulation (2) of the ECNSR, providers shall ensure that the information contained in ‘Decision 5’ above is personally addressed to end-users in such a format which can be retained by end-users for future reference and can be reproduced in an unchanged manner at a later point in time. The MCA considers that the proposal presented by this respondent does not meet these applicable requirements. To this effect, as reiterated in Section 6.2 above, the MCA refers to the judgment delivered by the Court of Justice of the European Union (CJEU) following a reference for a preliminary ruling from Austria in case (C49-11) on Content Services, delivered on the 5th of July 2012 in which the CJEU held that in that particular case, sending a consumer an e-mail containing hyperlinks to access the applicable contractual terms and conditions via the company’s website was not sufficient to meet the requirements of a durable medium. The judgment is accessible [here](#).

An SMS notification is just one example of a type of ‘durable medium’ from which providers may choose to notify end-users about modifications to the contractual conditions of their contracts. If the notification to send to end-users is lengthy and does not fit an SMS or in a concatenated SMS, then providers should opt for other practical means of durable media when notifying end-users. In instances such as those described by the respondent where the volume of information to be included in the SMS is lengthy and providers have no means to notify end-users other than via an SMS, providers may consider staggering the notification in more than one (1) SMS, suffixed with a count (e.g. “SMS 1 of 4”), or send a concatenated SMS. The MCA remains available to discuss on a case-by-case basis any alternative approaches which providers may propose should they encounter any difficulties in fulfilling these requirements.

#### **6.4.4 Notifications to the MCA**

In accordance with regulation 92(3) of the ECNSR, providers shall notify the MCA of any proposed modifications to the contractual conditions of their service/s in writing. In accordance with this sub-regulation the MCA may specify the timeframes by when such written notifications are to be sent to the MCA prior to the notification by the provider to its end-users.

In its consultation, the MCA proposed to retain the same timeframes currently laid down in Section 3.2 of MCA's 2011 Decision whereby providers notify the MCA about any proposed changes to the proposed modifications to the contractual condition/s of their service/s. The MCA received submissions from two (2) providers who agreed to MCA's proposal. The MCA will therefore be retaining the proposal included in its consultation in this Decision Notice.

## **Decision 6**

Providers of publicly available ECS other than NI-ICS shall notify the MCA about any modifications to the contract of service/s at least one (1) working day prior to the notification to the relevant end-users and shall:

1. provide the MCA with a draft copy of the notification which will be sent to end-users; and
2. indicate the type of 'durable medium' that will be used to notify end-users.

The notifications to be sent in accordance with the above proposed decision are to be sent to the MCA to enable it to monitor trends and practices in the sector. Whilst the MCA may at its discretion provide its views on the content included in the said notifications, any such feedback by the MCA should not be construed as constituting any form of approval by the MCA of the notification or its contents including any modifications to the contractual conditions being implemented by providers. Such notifications shall be without prejudice to any action that may be taken by any relevant enforcement body, including the MCA, should it result that any modifications introduced by the provider are in breach of any applicable law or decisions. In cases where providers need to seek regulatory guidance regarding aspects related to the modifications they wish to implement, they are encouraged to write to the MCA seeking its feedback, doing so well in advance of any communication of draft notifications regarding modifications to the contractual conditions of services to the MCA. This would ensure that the process to implement the modifications that providers wish to introduce is done smoothly.

### **6.4.5 Exemption from the requirement to grant end-users the right to terminate the contract without incurring further costs**

Regulation 92(1) of the ECNSR mentions three instances in which providers of publicly available ECS other than NI-ICS are exempted from granting end-users the right to terminate the contract without incurring further costs. These are limited to instances where the proposed changes are:

- (a) exclusively to the benefit of the end-user;
- (b) of a purely administrative nature and have no negative effect on the end-user; or
- (c) are directly imposed by European Union or national law.

In its consultative document the MCA stated that should a public authority or a court rule that a provider must amend a condition/s contained in any contract for the provision of publicly available ECS excluding NI-ICS, then such modifications shall be subject to the obligation enabling end-users to terminate the contract without incurring further costs.

The MCA received feedback from one provider who stated that this position should not be applied holistically to all scenarios. This respondent argued that if a European or national court rules against the provision of a service/s that was being provided in accordance with the laws applicable at that moment, then the subscribers of such service/s should not be given the right to terminate without incurring any applicable early termination penalties.

After having considered this feedback, the MCA considers that for the sake of fairness, such instances should be evaluated on a case-by-case basis in order to assess on the basis of objective criteria whether the right of impacted subscribers to exit the contract without penalties should be granted or not. The MCA is therefore retracting the statement included in its consultative document, without prejudice however, to the MCA's faculty, if deemed applicable, to require any provider to provide subscribers the right to exit the contract without penalties should a public authority or a court rule that a provider must modify a condition/s of its contracts because such condition/s are in breach of any applicable law.

As stipulated in regulation 92(4) of the ECNSR, the MCA may, upon a written request by a provider, in cases where the proposed modifications to the contractual conditions are manifestly of benefit to all end-users to that service, exempt that provider from the requirement to grant its end-users the right to terminate the contract in accordance with this regulation. Section 6.4.6 below outlines the procedures to be followed by providers to seek MCA's waiver.

#### **6.4.6 Notifications to the MCA in instances outlined in Section 6.4.5**

Regulation 92(4) of the ECNSR stipulates that providers may send a written request to seek the MCA's waiver from granting end-users the right to terminate the contract without further costs in cases where the proposed modifications to the contractual conditions are manifestly of benefit to all end-users.

For the avoidance of any doubt, the MCA clarifies that in such circumstances, even if an exemption is granted by the MCA in accordance with the above, providers are still required to notify end-users about the modifications to the contractual conditions they intend to introduce. Such notification should be sent on a durable medium.

In accordance with this sub-regulation the MCA is empowered to specify the timeframes by when such written notifications are to be sent to the MCA prior to the notification by the provider to its end-users. In its consultation the MCA proposed a set of procedures to be followed by providers and by the MCA in such instances which proposals are mainly based

on the same procedures currently laid down in Section 3.1 of MCA's 2011 Decision. The MCA received feedback from one provider supporting MCA's proposal. None of the other providers have expressed any concerns relating to this proposal. The MCA is therefore retaining the contents included in its consultation in this Decision Notice.

## Decision 7

A provider of publicly available ECS excluding NI-ICS may seek an exemption from the MCA from the requirement to grant its end-users the right to terminate their contract without incurring any further costs if it is determined by the MCA that the proposed modifications the provider intends to introduce are:

- (a) exclusively to the benefit of the end-user;
- (b) are of a purely administrative nature and have no negative effect on the end-user; or
- (c) are directly imposed by EU or national law.

Any requests by a provider for a waiver from the requirement to grant its end-users the right to terminate their contract without incurring any further costs when implementing changes in any of the above instances, shall be sent in writing to the MCA on e-mail address [termsandconditions@mca.org.mt](mailto:termsandconditions@mca.org.mt). When submitting such requests the provider shall send all of the following documentation listed below:

- the full description of the service/s in question;
- a brief statement providing considerations on the grounds on which the provider is requesting the exemption;
- the related terms and conditions of the service/s in question;
- the copy of the notification to be sent to the end-users; and
- any other relevant information which may be necessary for MCA's ruling.

Requests for exemptions must be communicated to the MCA not less than five (5) working days prior to the intended date of notification by the provider to its end-users. The MCA shall communicate its decision within a maximum of five (5) working days from receipt of the provider's request.

In the following instances contemplated in points (1) and (2) below, when the MCA grants a provider the waiver from the requirement to provide its end-users the right to terminate their contract without incurring any further costs, the provider concerned may implement the said changes with immediate effect as soon as the end-user is notified with the said modifications:

1. the changes are exclusively to the benefit of the end-user; or



2. the changes are of a purely administrative nature and have no negative effect on the end-user.

In all other instances not covered in points (1) and (2) above, notifications are to be sent to end-users thirty (30) running days in advance of any change in the contractual conditions.

In all instances including where the MCA grants a waiver in accordance with this Decision, providers shall notify end-users about the modifications to the contractual conditions they intend to introduce on a durable medium.

#### 6.4.7 Termination of a service/s plan

In recent years, providers have on various occasions decided to terminate the provision of a service/s plan and have consequently, in a number of instances, migrated end-users from such service/s plans to an alternative service/s plan offered by the same provider. In doing so, providers grant end-users the right to terminate their contract without penalties within a thirty (30) running day notice period, unless such a migration is manifestly positive for the end-users. In order to establish a process which would guarantee that the interests of all parties including end-users are safeguarded, the MCA proposed that in such circumstances providers may either:

1. Terminate the service/s plan and inform end-users about the termination of the service/s plan in accordance with regulation 92 (1), (2) and (3) of the ECNSR as well as MCA's 'Decisions 4, 5 and 6' included above (this option does not entail the migration of end-users to an alternative service/s plan, which means that at the end of the notice period, unless end-users do not subscribe to a new service/s plan, their services would be terminated); or
2. Terminate the service/s plan and inform end-users that they will be migrated to another service/s plan. The MCA proposed a number of end-user protection measures to be adhered to by providers in such circumstances (these measures were included in 'Proposed Decision 8 of [MCA's Consultation](#)').

One (1) provider objected to the introduction of three (3) of the measures proposed by the MCA which were contained in 'Proposed Decision 8' of MCA's consultation and which are referred to in point two (2) above. The measures being contested by this respondent are requirements intended to ensure that when terminating a service/s plan and migrating end-users to an alternative service/s plan:

- i. The new service/s plan includes only the same services previously included in the service plan being terminated;
- ii. The new service/s plan contains similar characteristics to the service/s plan end-users were previously subscribed to (e.g. end-users cannot be migrated from a pre-paid plan to a post-paid plan); and
- iii. end-users are as much as is reasonably possible migrated to a service/s plan which applies similar or lower periodic fees, charges and allowances.



This respondent stated that these measures are too stringent and will hinder providers from offering more technologically advanced services. This respondent further stated that when migrating end-users to a new service/s plan, in most instances the new service/s plan would include improved allowances at the same price or at a slight increase than the previous service/s plan end-users would have been subscribed to. This respondent also stated that since end-users are provided with a thirty (30) running day time window to terminate their subscription without penalty, such obligations should be removed.

The MCA is cognisant of the need of providers to terminate, from time to time, their legacy service/s plans, and consequently migrate end-users subscribed to such legacy service/s plans to new service/s plans without disrupting the provision of the service/s to end-users'. Having said this, it is imperative that the migration of end-users from their current service/s plan to another service/s plan is done in accordance with a minimum set of criteria to avoid that end-users are migrated to a plan which is not necessarily in their best interests.

In order to facilitate this process, the MCA proposed that if providers can meet a set of minimum end-user protection measures, then the migration can be completed by informing end-users of the proposed migration in accordance with point two (2) above. The MCA considers that without these proposed protection measures, end-users may find themselves subscribed to plans which may differ extensively from the ones they had agreed to when subscribing to the service plan/s being terminated. The MCA is therefore of the view that all the measures it included in 'Proposed Decision 8' should be retained in this Decision Notice. The MCA clarifies that in instances where such measures cannot be met by the providers, then the migration to another service/s plan can only be completed after obtaining the end-users' explicit consent in accordance with 'Decision 2' above.

The MCA clarifies that this decision shall exclusively apply only in those instances where a provider is terminating the service/s plan to which end-users are currently subscribed to. Providers shall not migrate end-users to a new service/s plan unless their current service/s plan is being terminated or unless explicitly requested by the end-users in accordance with MCA's 'Decision 2' above.

For the avoidance of any doubt, the MCA shall be removing references to regulation 92(1) (2) and (3) of the ECNSR and 'Decisions 4 and 5' included in 'Proposed Decision 8 – Part A' of MCA's consultation. The MCA will instead list the specific conditions stemming from such regulations and decisions to provide more clarity. This is being done following submissions received from a provider in relation to 'Proposed Decision 9' of MCA's consultative document which in MCA's view should also be extended to this 'Decision 8'. The MCA considers that this amendment would provide better guidance to stakeholders regarding the applicable requirements emanating from 'Decision 8' hereunder.

For the sake of completeness and in order to ensure that end-users are fully aware of all of their rights (including new rights which have been transposed from the 'EECC' into Maltese legislation in 2021), the MCA is amending the text regarding the information to be included in

the notification to end-users in the circumstances applicable under 'Decision 8 – Part A' to include the requirement to inform them of their right to port (or reactivate) the number for a period of one (1) month following the date of termination of the service/s in case that the termination of the service/s relates to the provision of a mobile and/or fixed voice communications service, freephone service and/or premium rate service.

## Decision 8

### Part A (Terminating a service/s plan without migrating end-users)

When providers are in the process of terminating a service/s plan for the provision of a publicly available ECS other than NI-ICS, their end-users shall:

1. have the right to port their mobile, fixed, freephone or premium rate numbers to an alternative provider in accordance with MCA's ['Number Portability Decision'](#), provided that in such circumstances any requests for refund of accumulated monetary credit made by pre-paid or hybrid consumers in accordance with Decision 15/2022 of the 'Number Portability Decision' shall not be subject to the refund fee contemplated in Regulation 94(13) of the ECNSR and in Decision 15/2022 of the ['Number Portability Decision'](#).
2. not be charged any further costs except for charges related to the provision of the service/s up until the date of termination of the service/s plan and for any non-loaned equipment bundled with the service/s plan which is retained by the end-user in accordance with regulation 91(7) of the ECNSR.

When terminating a service/s plan for the provision of a publicly available ECS other than NI-ICS, a provider shall inform end-users at least thirty (30) running days in advance of the termination of the service/s plan in a clear and comprehensible manner and on a durable medium:

- i. about the termination of the service/s plan including timeframes by when such service/s plan will be terminated;
- ii. about the end-user's right not to incur any penalties as a result of the termination of the service/s plan by their provider except for charges related to the provision of the service/s up until the date of termination and for any non-loaned equipment bundled with the service which is retained by the end-user in accordance with regulation 91(7) of the ECNSR;
- iii. about the possibility, in the event that the termination relates to the provision of a mobile and/or fixed voice communications service, freephone service and/or premium rate service, of the end-user to port his/her number/s to any provider of his/her choice by lodging a porting request through the recipient provider, in which case the end-user's contract is automatically terminated upon successful porting. In addition, in the notification the end-user shall also be informed of his/her right to request to port (or reactivate) the number for a period of one (1) month following the date of termination of the service/s plan;

- iv. if applicable, about the manner in which any refundable deposit, unutilised advance payment made by the end-user for the service/s plan being terminated, may be refunded when the service/s plan is terminated or when the end-user ports his/her number/s to an alternative provider in accordance with the MCA's 'Number Portability Decision';
- v. if applicable, about the manner in which any pre-paid or hybrid monetary credit accumulated in the account may be refunded if an end-user chooses to port his/her number/s to a new service provider in accordance with MCA's decision titled 'Number Portability Decision';
- vi. about the contact channels which can be used by an end-user to ask - free of charge - about the termination of the service/s plan being notified about, including, where the termination does not include an IAS, the inclusion of information on a free of charge telephony support customer care number of the service provider.

Notifications to end-users can be sent out concurrently with other 'ordinary' communications (e.g. a monthly bill or monthly promotional newsletters), however providers shall ensure that these are given due prominence and are distinguishable from the 'ordinary' aspects of the communication to minimise the risk that such notification is overlooked by end-users.

#### Part B (Migration of end-users upon termination of a service/s plan)

When a publicly available ECS provider other than a NI-ICS provider decides to terminate a service/s plan and migrate end-users to another service/s plan offered by the same provider, such a provider shall:

- i. adhere to all the requirements stipulated in regulations 92(1), (2) and (3) of the ECNSR as well as MCA's Decisions 4 and 5 of this Decision Notice. This is without prejudice to the service provider's right to seek a waiver from MCA from providing end-users the right to terminate their contract without incurring any further costs if a request is submitted and approved by the MCA in accordance with Decision 7 above;
- ii. only migrate end-users to another service/s plan which includes solely the same services previously included in the service/s plan being terminated;
- iii. only migrate end-users to a service/s plan which contains similar characteristics to the service/s plan the end-user is currently subscribed to (e.g. end-users cannot be migrated from a pre-paid plan to a post-paid plan);
- iv. ensure as much as is reasonably possible that end-users are migrated to a plan which applies similar or lower periodic fees, similar charges and similar or increased allowances;

- v. not re-start or increase the remaining contract duration period; and
- vi. send end-users a copy of the 'pre-contractual information' and 'contract summary' applicable to the plan on which they are being migrated to in accordance with regulation 87 of the ECNSR.

This proposed decision shall exclusively apply only in those instances where a provider is terminating a service/s plan to which end-users are currently subscribed to. Any initiatives undertaken by providers to upgrade end-users from their current plan to a higher tier plan (provided that the providers are not terminating the plan the end-users are currently subscribed to) shall adhere to MCA's 'Decision 2' above.

#### **6.4.8 Providers terminating the provision of a service/s or ceasing operations**

Section 4.2 of MCA's 2011 Decision stipulates requirements to be adhered to by providers when terminating the provision of a service/s or when ceasing operations. The MCA had proposed that the current requirements contained in section 4.2 of MCA's '2011 Decision' are retained with some minor amendments.

One (1) provider supported this decision but proposed that this decision should clarify that the information to be included in the notification informing end-users on how to migrate their services to at least one (1) alternative provider should only be included in instances when an alternative provider offers an alternative service comparable to the terminated services. The MCA is factoring this suggestion in its Decision Notice.

This respondent further suggested that where there are more than one (1) alternative providers offering alternative services to the terminated service/s, then notifications are to inform end-users on how to migrate their service/s to all such alternative providers.

Whilst it acknowledges the benefits of this suggestion the MCA considers that the provider terminating the service/s or ceasing operations may not be fully aware of the specific details of all other comparable service plan/s offered by other providers in the market. Having said this, the Authority notes that the text of its proposal stated that providers are to include information in the notification on how to migrate their services to at least one (1) alternative provider, thus allowing providers the possibility to include information in the notification to end-users on how to migrate their services to more than one (1) alternative provider. On the basis of the above, the MCA is therefore retaining the same text as proposed in its consultation in this Decision Notice.

For the sake of completeness and in order to ensure that end-users are fully aware of all of their rights (including new rights which have been transposed from the 'EECC' into Maltese legislation in 2021), the MCA is amending the text regarding the information to be included in the notification to end-users in the circumstances applicable under 'Decision 9' to include the requirement to inform them of their right to port the number for a period of one (1) month following the date of termination of the service/s where the termination of the service/s relates to the provision of a mobile and/or fixed voice communications service, freephone service and/or premium rate service.

Another respondent suggested that the notification period to inform the Authority at least ten (10) working days prior to the notification to the relevant end-users should be streamlined to the notification period of five (5) working days factored in Decision 7.

The MCA considers that such decisions by providers are planned in advance, thus giving providers ample time to be in a position to adhere to MCA's proposed requirement. The MCA also considers that such decisions are likely to have an impact on a larger number of end-users as opposed to a decision to amend or terminate a service/s plan. Based on past experiences and considering the major implications that such decisions could have on the industry at large, the MCA considers that the proposal to require providers to inform the MCA ten (10) working days prior to the notification to the relevant end-users to be justified and reasonable and therefore the MCA intends to retain the proposal included in MCA's consultation in this Decision Notice.

As mentioned in section 6.4.7 of this Decision Notice, this same respondent also suggested that the references to regulation 92(1) of the ECNSR and 'Decisions 4 and 5' included in 'Proposed Decision 9' of MCA's consultation are removed and instead the specific conditions stemming from such regulations and decisions are specifically highlighted within this 'Decision 9'. The MCA does not object to this proposal and is factoring this suggestion in the text of this Decision Notice.

## Decision 9

When providers of publicly available ECS other than NI-ICS decide to terminate the provision of a service/s or cease operations, their end-users shall:

1. have the right to port their mobile, fixed, freephone or premium rate numbers to an alternative provider in accordance with MCA's ['Number Portability Decision'](#), provided that in such circumstances any requests for refund of accumulated monetary credit made by pre-paid or hybrid consumers in accordance with Decision 15/2022 of the 'Number Portability Decision' shall not be subject to the refund fee contemplated in regulation 94(13) of the ECNSR and in Decision 15/2022 of the ['Number Portability Decision'](#).
2. not be charged any further costs except for charges related to the provision of the service/s up until the date of termination of the service/s plan and for any non-loaned

equipment bundled with the service/s plan which is retained by the end-user in accordance with regulation 91(7) of the ECNSR;

When terminating the provision of a service/s or ceasing operations, providers of publicly available ECS other than NI-ICS shall inform end-users at least thirty (30) running days in advance of the termination or cessation of the service/s in a clear and comprehensible manner and on a durable medium:

- i. about the termination of the service/s including timeframes by when such service/s will be terminated;
- ii. about the end-user's right not to incur any penalties as a result of the termination of the service/s by their provider except for charges related to the provision of the service/s up until the date of termination and for any non-loaned equipment bundled with the service which is retained by the end-user in accordance with regulation 91(7) of the ECNSR;
- iii. the manner on how to migrate their services to at least one (1) alternative provider (provided that there is an alternative provider which offers an alternative service/s comparable to the terminated service/s) and make available technical support services to assist impacted end-users so as to minimise any disruptions;
- iv. about the possibility, in the event that the termination relates to the provision of a mobile and/or fixed voice communications service, freephone service and/or premium rate service, of the end-user to port his/her number/s to any provider of his/her choice by lodging a porting request through the recipient provider, in which case the end-user's contract is automatically terminated upon successful porting. In addition, in the notification the end-user shall also be informed of his/her right to request to port the number for a period of one (1) month following the date of termination of the service/s;
- v. if applicable, about the manner in which any refundable deposit, unutilised advance payment made by the end-user for the service/s plan being terminated, may be refunded when the service is terminated or when the end-user ports his/her number to an alternative provider in accordance with MCA's decision titled 'Number Portability Decision';
- vi. if applicable, about the manner in which any pre-paid or hybrid monetary credit accumulated in the account may be refunded if an end-user chooses to port his/her number/s to a new service provider in accordance with MCA's decision titled 'Number Portability Decision';
- vii. about the contact channels which can be used by an end-user to ask free of charge about the termination of the service/s being notified, including, in the case the

termination does not include an IAS, the inclusion of information on a free of charge telephony support customer care number of the service provider.

Notifications to end-users can be sent out concurrently with other 'ordinary' communications (e.g. a monthly bill or monthly promotional newsletters), however providers shall ensure that these are given due prominence and are distinguishable from the 'ordinary' aspects of the communication to minimise the risk that such notification is overlooked by end-users.

Any migration of service shall be without prejudice to the obligations set out in regulation 94 of the ECNSR, in particular sub-regulation (10) thereof which mandates the end-user's explicit consent for number portability, and to the provisions established in other relevant decisions published by the MCA such as the MCA's 'Number Portability Decision'.

Providers shall take all the necessary measures, particularly when making agreements with third parties in relation to the publicly available ECS they provide, in order to ensure that such agreements do not act as an obstacle when implementing the above-mentioned norms in this Decision. In doing so, providers must ensure that wholesale agreements take into account the notice periods stipulated in the ECNSR and in this Decision.

Providers of publicly available ECS other than NI-ICS shall notify the MCA about their decision to terminate the provision of a service/s or ceasing operations at least ten (10) working days prior to the notification to the relevant end-users and shall:

1. Provide the MCA with a draft copy of the notification which will be sent to end-users; and
2. Indicate the type of 'durable medium' on which the notification will be sent to end-users.

## **6.5 Transparency measures relating to the publication of information on services offered**

Regulation 88 (1) of the ECNSR, requires that where providers of IAS or publicly available ICS make the provision of services subject to terms and conditions, they shall ensure that the information contained in the Ninth Schedule of the ECNSR is published in a clear, comprehensive, machine-readable manner and in an accessible format for end-users with disabilities in accordance with EU legislation harmonising accessibility requirements for products and services. In accordance with regulation 96(1) of the ECNSR, this requirement also applies in those cases where a bundle of services, or a bundle of services and terminal equipment comprises at least an IAS or a publicly available NB-ICS.



Regulation 88(1) of the ECNSR empowers the MCA to specify requirements regarding the form in which the information in the Ninth Schedule of the ECNSR is to be published. In its consultation, the MCA proposed that as a minimum, such information should be published on the service provider's website and should be accessible on or from the same webpage where the service/s, offer or package is being publicised. Such a requirement, together with the right enabling end-users to obtain a copy of the 'pre-contractual information' and 'contract summary' as mentioned in Sections 6.1 and 6.2 above, provides the necessary level of transparency to enable end-users to take more informed decisions about the service/s they wish to subscribe to.

The MCA did not receive any feedback to this proposal and is therefore retaining the proposal included in its consultation in Decision Notice.

### **Decision 10**

Where a provider of IAS or publicly available ICS makes the provision of services subject to terms and conditions, then such a provider shall ensure that the information referred to in the Ninth Schedule of the ECNSR, is published in a clear, comprehensive, machine-readable manner as a minimum on the provider's website and shall be accessible on or from the same webpage where the service/s, offer or package is being publicised.

The above shall be applicable also to a bundle of services, or a bundle of services and terminal equipment comprising at least an IAS or a publicly available NB-ICS service.

The requirements contained in Decision 10 shall also apply to services designed or marketed for micro-enterprises, small enterprises, or not-for-profit organisations.



## **6.6 Refund of any unutilised advance payment, refundable deposit or any monetary credit to end-users following the termination of a subscription or change of tariff plan**

### **6.6.1 Refund of any unutilised advance payment and/or of any refundable deposit paid by the end-user**

#### **6.6.1.1 MCA's proposal**

'Proposed Decision 11', of MCA's consultation proposed that following the termination of a subscription or change of tariff plan, providers automatically refund end-users any unutilised advance payment and/or refundable deposit they may have paid to the provider prior to the termination of their subscription or change of tariff plan. In section 4.4.1 of its consultation, the MCA cited a number of (non-exhaustive) examples on how such refunds could be reimbursed automatically to end-users including:

- bank transfers<sup>10</sup>;
- transfers to another active account the same end-user has with the provider; or
- the deduction of any unutilised advance payment and/or refundable deposit owed to the end-users from the total of outstanding payments due by the said end-users.

The proposal also envisaged that providers inform end-users on a durable medium about the specific method to be used by the provider to automatically reimburse such refunds or, in case that such refunds cannot be reimbursed automatically, to inform end-users on a durable medium of their right to collect such refund from any of the service provider's outlets. MCA's proposal included a requirement which mandated that refunds that are to be issued by service providers' and collected from their outlets should as a minimum be made available either in cash or by cheque.

A summary of all the feedback received from three (3) providers, together with the MCA's response, is presented hereunder.

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<sup>10</sup> To undertake this option, providers would need to be already in possession of the end-users' bank details (such as in the case where an end-user would have had a direct debit mandate with the provider) in order to be able to reimburse refunds automatically to end-users without the need for end-users to take any action from their end.

### 6.6.1.2 Automatic Refunds

Two (2) providers supported the principle as carried in the proposed decision that end-users are entitled to receive a refund of any unutilised advance payment and/or refundable deposit following the termination of a subscription or change of tariff plan. Notwithstanding, they expressed difficulties in adhering to MCA's proposal to process such refunds in an automatic manner. One (1) of these two (2) providers claimed that it currently has no option to process such refunds in an automatic manner whereas the other provider claimed that it would be required to invest in new technological solutions to implement the measures proposed by the MCA. One (1) of these providers also noted that before processing such refunds to end-users, providers would need to first verify any additional charges (such as telephony usage) incurred by the end-users and await that end-users return any loaned equipment by the provider. Both providers suggested that in view of the above, the reimbursement of such refunds to end-users should only be provided if end-users raise a request with their provider.

The Authority does not support the suggestion presented by these two (2) providers, namely that the refund of any unutilised advance payment and/or refundable deposit following the termination of a subscription or change of tariff plan, should only be provided if end-users raise a request with their provider. The MCA recognises that providers might need to change their current practices and develop new processes, taking into account technical feasibility to adhere to this requirement. The Authority remains of the view that it is incumbent on providers to proactively initiate the reimbursement process for moneys that providers would have already collected and for which the end-users would have a right of reimbursement as a result of their decision to terminating their subscription or when changing their tariff plan, without the need for end-users to take further action from their end. As stated in section 7 below the MCA will nevertheless extend the timeframe mandating the applicability of this decision to allow providers to implement the necessary changes to their procedures and systems to adhere to this requirement.

The MCA agrees that providers should have discretion on the refund mechanisms they deploy to reimburse end-users. The MCA has previously in this document cited a number of automatic refund options which providers may undertake. In addition to these examples, providers may wish to implement other solutions which would guarantee the automatic reimbursement of any applicable refunds to end-users. The MCA is however of the view that if it is not technically possible to process such refunds automatically to the end-user, then providers shall offer the possibility to end-users to receive such refunds using any of the minimum mechanisms outlined in section 6.6.1.3 below.

### 6.6.1.3 Refunds which cannot be reimbursed automatically

Three (3) providers raised objections to MCA's proposal that if the refund of any unutilised advance payment and /or refundable deposit cannot be processed automatically, then as a minimum, providers are to offer end-users the possibility to collect refunds from the provider's outlets either in cash or by cheque. One provider cited risks of cash misappropriation and difficulties to implement control mechanisms. Another provider raised similar concerns and also remarked about the potential of cash misappropriation and that cash refunds posed a risk to providers. This provider also stated that at a time where electronic communications providers are making significant efforts to push end-users to safer and more efficient electronic

means of payments, it considers that there should not be new obligations that direct end-users to cash transactions. A third provider also expressed a negative position vis-à-vis cash refunds, noting that such cash refunds are rarely resorted to in this day and age, and these may cause reconciliation issues or lead to abuse, particularly by unregistered SIM holders.

The three (3) providers pointed out that cheques for amounts under €20 are no longer possible, as a result of the directives issued by the Central Bank of Malta which came into force as from January 2022. It was noted that for the vast majority of claims for refunds, the amount due would not exceed such amount, rendering the facility unsuitable in most cases.

Two (2) providers suggested that the manner in which such refunds are to be processed should be at the discretion of providers. One (1) of these two (2) providers, together with a third provider further indicated the preference to process such refunds primarily via bank transfers, with one of these providers suggesting that bank details could be provided by end-users in a dedicated form whereas the other provider suggested that such bank details would only need to be provided by end-users if the provider does not have such details already stored in its records. One (1) provider also made reference to the feedback it provided to a separate consultation issued by the MCA titled 'Consultation and Proposed Decision on Number Portability in Malta' (MCA/C/21-4466, hereafter the '*Number Portability Consultation Paper*'), whereby the MCA notes that this respondent stated that certain bank transfers, in particular those to overseas banks could be subject to excessive bank charges and therefore suggested that bank transfers are to be limited to SEPA accounts.

One (1) of the providers mentioned that in case where the remaining credit exceeds €20, it could issue a cheque which would then be mailed to the end-users' address. However, this provider stressed that cheques cannot be issued from retail outlets. Another provider suggested that in instances where the options normally offered by providers to reimburse such fees are not feasible to the provider, then the provider may reimburse such refunds via cash or cheque against a charge.

The MCA acknowledges that cash and cheque refunds may bring about some difficulties for providers if adopted as the *de facto* mechanism when a refund cannot be processed automatically, and wishes to clarify that this was not the intended approach. The MCA would have no objection if, in the event that refunds cannot be processed automatically, providers were to first request end-users to provide their bank details to process their refund via SEPA bank transfer. The offering, as a minimum, of either cash or cheque facilities was intended to be a safeguard for individuals who are unable to avail of bank transfers, such as unbanked individuals or individuals who do not have a SEPA account. For the majority of requests, bank transfers to SEPA accounts would adequately address the requirements of this end-user right. To this effect, the offering of the refund via a SEPA bank transfer was included in 'Decision 11' below, and the text "*As a minimum, end-users shall be offered the facility to receive such refunds either in cash or cheque*" included in 'Proposed Decision 11' of MCA's Consultation was removed.

However, for end-users who cannot receive such refunds automatically and who also cannot provide their SEPA bank details because they have no access to SEPA banking facilities or who do not have access to any other refund mechanism offered by their provider, then

providers should endeavour to process the request using either cash or cheque, depending on the amount due to the end-users. The MCA is therefore introducing the following text in 'Decision11': *"If the refunds cannot be reimbursed to end-users automatically, end-users are to be offered at the earliest possible, as a minimum, the facility to submit to their provider their SEPA bank details so that they can avail of the refund via a SEPA bank transfer. If end-users are justifiably unable to obtain the refund via a SEPA bank transfer or any other refund mechanism adopted by the provider, the provider must arrange for the refund to be issued via cash or cheque, depending on the amount of monetary credit due to the end-users"*.

In view of the feedback submitted the MCA shall be amending its decision to require that any applicable refunds are reimbursed to end-users 'following' and not 'upon' the termination of a subscription or change of a tariff plan. This amendment is being implemented to enable providers some time to determine if and what refunds are payable to end-users. The MCA expects providers to undertake efficient procedures to refund such fees at the earliest possible and whilst it is not, for the time being, implementing timeframes by when such refunds are to be reimbursed to end-users, it reserves the right to introduce any such requirements should the need arise in the future.

#### 6.6.1.4 Notification to end-users on a 'durable medium':

One (1) provider stated that MCA's proposal to require providers to notify end-users on a durable medium to inform them about the refund of any unutilised advance payment and/or refundable deposit when terminating a service/s or when changing a tariff plan, is too onerous. This provider instead suggested that this information is made available by providers on their respective websites (such as in Frequently Asked Questions (FAQs) sections) and at contact points. Another provider requested guidance from MCA on how it anticipates that such information can be provided to end-users. This respondent requested the MCA to clarify whether the provision of such information in the termination forms to be completed by end-users would suffice to adhere to this requirement. This respondent also requested clarification on how this obligation could be adhered to by providers in instances where end-users raise a request to port their telephony number to an alternative provider, in light of the fact that donor operators are obliged not to initiate any contact with such end-users during the porting process.

As reiterated previously, MCA's proposal requires that providers send either of the following notifications to end-users, on a durable medium, depending on the particular circumstances as follows:

1. in case that any unutilised advance payment and/or of any refundable deposit paid by the end-user is refunded automatically, providers are to notify end-users about the specific method to be used to automatically reimburse such refunds; or
2. in case that any unutilised advance payment and/or of any refundable deposit paid by the end-user cannot be refunded automatically, providers are to notify end-users of the process to follow to avail of the refunds they are entitled to receive.

In the instance being referred to in point one (1) above, the measure would ascertain that end-users are reassured that they will be receiving the refund they are entitled to whilst informing

them that no action is required from their end to receive such refunds. On the other hand, in the instance being referred to in point two (2) above, the measure would minimise the possibility that end-users lose the opportunity to avail of any refunds due to them especially since in such circumstances end-users are required to take action to collect or receive such refunds. The MCA remains therefore of the view that these measures should be retained as it provides a higher level of clarity and transparency to end-users.

The MCA considers that providers have different solutions on how to send the information referred to above on a 'durable medium' including amongst others via SMS, e-mail or by a letter mailed to the end-users' address. The MCA has no objection to the inclusion of information in 'termination forms' however this measure on its own would not suffice to achieve the objective of MCA's proposal. The MCA is of the view that the notifications can only be sent after that the provider has determined that end-users are entitled to receive such refund and after determining whether such refunds would be processed automatically or otherwise. At the time of the submission of the termination form by end-users, providers may not yet know whether the end-users terminating the service are eligible to receive any applicable refunds or whether any applicable refunds could be processed automatically or not. Furthermore, end-users who submit a porting form (to a recipient operator) are not required to also submit a termination form (to the donor operator) and therefore this information may not be conveyed to the end-users in such instances. The MCA considers that the best approach would be to provide this information to end-users on a durable medium, only after the provider has determined that end-users are entitled to receive a refund and after determining the manner in which such refunds can be processed.

The MCA clarifies that when a subscription is terminated following a request for porting raised by an end-user, the recipient operator is also required to send a notification to end-users on a durable medium only after successful porting, wherein subscribers are to be directed to the donor operator for further details on credit refunds, as specified in Decision 15/2022 of the 'Number Portability Decision'. Furthermore, the MCA would also like to point out that Decision 16/2022 of the 'Number Portability Decision' addresses in detail aspects related to winback prevention in relation to porting.

#### 6.6.1.5 Other Feedback

One (1) provider stated that this proposed decision should only apply to 'post-paid' services and should not apply to 'pre-paid' services. This respondent remarked that the only refund 'pre-paid' end-users may claim is for any remaining 'monetary credit' they may have in their account at the time of termination of the service/s, for which a proposed refund mechanism is covered under 'Proposed Decision 12' of MCA's consultation.

The MCA clarifies that 'Decision 11' applies to the refund of any unutilised advance payments and/or refundable deposits made by end-users subscribed to post-paid and hybrid plans. 'Decision 11' excludes the refund of any monetary credit that end-users subscribed to hybrid plans may have accumulated.

The MCA is aligning the scope of the applicability of this decision to those providers falling within the scope of regulation 91 (2) and 91 (3) of the ECNSR.

## Decision 11

Providers of publicly available ECS other than number-independent interpersonal communications services and other than transmission services used for the provision of machine-to-machine services, shall when technically possible, following the termination of a subscription or change of a tariff plan, automatically refund end-users any unutilised advance payment and/or refundable deposit they may have paid prior to the termination of their subscription or change of tariff plan. End-users shall be informed on a durable medium about the specific method to be used by the provider to automatically refund any unutilised advance payment and/or refundable deposit to end-users following the termination of their subscription or change of tariff plan.

If the above refunds cannot be reimbursed to end-users automatically, end-users are to be offered at the earliest possible, as a minimum, the facility to submit to their provider their SEPA bank details so that they can avail of the refund via a SEPA bank transfer. If end-users are justifiably unable to obtain the refund via a SEPA bank transfer or any other refund mechanism adopted by the provider, the provider must arrange for the refund to be issued via cash or cheque, depending on the amount of monetary credit due to the end-users. When refunds cannot be transferred automatically to end-users, providers are to inform end-users, through a durable medium, of the process to follow to avail of the refunds they are entitled to receive.

The MCA hereby clarifies that this 'Decision 11' also applies when the termination of a subscription of an end-user occurs following the successful porting of a number.

'Decision 11' only applies to the refund of any unutilised advance payments and/or refundable deposits made by end-users subscribed to post-paid and hybrid plans. 'Decision 11' excludes the refund of any monetary credit that end-users subscribed to hybrid plans may have accumulated.

### 6.6.2 Refund of any monetary credit accumulated by consumers subscribed to pre-paid or hybrid tariff plans

'Proposed Decision 12' of MCA's consultation provided that consumers subscribed to a pre-paid or hybrid tariff plan shall be entitled to request a refund of any monetary credit accumulated in their pre-paid or hybrid tariff plan accounts (hereafter 'monetary credit') upon termination of a subscription or change of tariff plan. The MCA proposed that since in such instances it may not be possible for providers to reimburse such monetary credit automatically, consumers shall be required to raise a request with their provider in order to receive a refund (as minimum either in the form of cash or cheque) of any monetary credit accumulated in their pre-paid or hybrid account. The processes on how such refunds should be provided to end-users as proposed by the MCA can be viewed in section 4.4.2 of [MCA's Consultation](#).

The MCA received feedback from three (3) providers, all of which raised a number of objections and difficulties in implementing MCA's proposal. Most notably, the points raised included the following:

- One (1) provider objected that 'Proposed Decision 12' of MCA's consultation also applies in instances where pre-paid or hybrid services are terminated as a result of automatic disconnection carried out by the service provider (such as for example when services are terminated by the provider following a period of service inactivity) and stated that the provisions established under the 'ECNSR' and the 'EECC' that regulate monetary credit refund are applicable only to end-users porting their number to another service provider;
- One (1) provider stated that it is difficult to ascertain the identity of consumers following the termination of an unregistered subscription. Another provider similarly noted that given the anonymity of unregistered pre-paid consumers, refunding them could lead to an increase in fraud or money laundering practices;
- One (1) provider referred to its hybrid tariff plans which separate the credit into two components, one which includes credit topped up by consumers and another which includes a portion or all of the monthly fee paid by consumers. This provider stated that it would be pertinent to clarify that while a portion or all of the monthly fee the consumer pays may be allocated as a credit component, this should not be deemed as top-up credit, irrespective if this is communicated to consumers in the credit check as hybrid/bonus credit.
- All providers raised objections to the minimum refund facilities proposed, namely the provision of either a cash or a cheque refund. One (1) provider expressed its position against, citing risks of cash misappropriation and difficulties to implement control mechanisms. Another respondent raised similar concerns, mentioning the potential for misappropriation and that cash refunds posed a risk to providers. This provider also mentioned that at a time where electronic communications providers are making significant efforts to push consumers to safer and more efficient electronic means of payments, it considers that there should not be new obligations that direct consumers to cash transactions. A third provider also expressed a negative position vis-à-vis cash refunds, noting that such cash refunds are rarely resorted to in this day and age and these may cause reconciliation issues or lead to abuse, particularly by unregistered SIM holders.
- With reference to cheque refunds to consumers, the three (3) providers pointed out that cheques for amounts under €20 are no longer possible, given directives by the Central Bank of Malta which came into force as from January 2022. It was noted that, for the vast majority of claims for refunds, the amount due would not exceed such amount, rendering the facility unsuitable to work with in most cases. One (1) provider stated that cheques cannot be issued from retail outlets due to the same arguments raised for cash refunds.



- One (1) provider argued that it would be too onerous to put an additional obligation to require providers to inform each consumer on a durable medium of their right to request a refund for any remaining monetary credit, the manner in which the refund may be requested and the time period from the date of termination of the subscription or change of tariff plan within which a refund may be requested.

Having considered the feedback received, the MCA is not retaining the proposal as included in its Consultation in this Decision Notice with the exception of one measure which was included in 'Proposed Decision 12' of MCA's consultation and which was integrated to 'Decision 4' of this Decision Notice and which mandates the following:

*'When a consumer avails of his/her right to terminate their service by porting his/her number to an alternative provider as a result of the changes in the contractual conditions proposed by the provider (including when a provider decides to terminate a service/s plan or to terminates the provision of a service/s or cease operations) in accordance with section 6.4 of this Decision Notice, any requests for refund of accumulated monetary credit made by pre-paid or hybrid consumers in accordance with Decision 15/2022 of the 'Number Portability Decision' shall not be subject to the refund fee contemplated in Regulation 94(13) of the ECNSR and in Decision 15/2022 of the 'Number Portability Decision'.*

MCA's decision not to retain the other measures contemplated in 'Proposed Decision 12' of MCA's consultation shall be without prejudice to:

- i. The right of pre-paid and hybrid consumers to request a refund of any accumulated monetary credit in their account when porting their number to an alternative provider in accordance with the ['Number Portability Decision'](#); and
- ii. Decision 11 contained in section 6.6.1 above which entitles end-users subscribed to post-paid and hybrid tariff plans, to receive a refund of any unutilised advance payment and/or refundable deposit which such end-users may have paid prior to the termination of their subscription or change of tariff plan.

## **6.7 The calculation of maximum early termination fees ('ETFs')**

In accordance with regulation 91(2) of the ECNSR, providers of publicly available ECS other than NI-ICS and transmission services used for the provision of M2M services are required to ensure that any ETFs payable by end-users terminating their contract prior to the expiry of their minimum commitment period are proportionate and reasonable. This requirement is intended to ensure that the faculty of end-users to switch provider is not unduly hindered. The correct application of this requirement is also important so as not to undermine competition and to avoid practices which could be of detriment to end-users. In accordance with regulation 91(2) of the ECNSR, the MCA is empowered to establish a methodology to calculate maximum early termination fees to ensure the effective application of this sub-regulation.

MCA's 2012 Decision mandates that any ETFs applied to end-users terminating their service/s prior to the expiry of their minimum commitment period *'shall not exceed the sum of the remaining periodic fees that the end-users would be liable to pay, should he/she complete his/her initial term'*. In its consultation the MCA proposed an alternative ETF methodology to be followed by providers which would replace the requirement referred to above and which



*provided that 'any early termination fees payable by end-users terminating a publicly available ECS other than NI-ICS and transmission services used for the provision of M2M services prior to the expiry of the initial contractual period shall be justified and reasonable, and shall not exceed the total sum of any discounts received by the end-user until the date of the termination of the service/s (if applicable) or 30% of the total sum of the remaining periodic fees that the end-user would be liable to pay should he/she complete his/her initial term, whichever sum is lesser'.*

The MCA received feedback from two (2) providers objecting to this proposal on the basis that any such early termination fees to be recovered by providers as proposed by the MCA would be too low to justify the providers' technical effort to set up the necessary systems to collect such fees as well as other costs incurred by providers to on-board end-users. These two providers further claimed that this provision dilutes the strength of the contract, with one of the providers further stating that such lower termination fees will be seen by end-users as an incentive to terminate the service/s before its minimum commitment expiry.

One of these two (2) providers stated that this proposal puts providers operating in this sector at a disadvantage when compared to providers operating in other sectors, whilst the other respondent stated that providers would need to deploy complex measures to be able to calculate the new proposed applicable fees and suggested instead that the MCA should retain the decision currently included in 'Decision 9' of MCA's 2012 Decision referred to earlier in this section.

A third provider claimed that the consultation did not explain the methodology used to arrive to the proposed maximum caps. This provider disagreed with MCA's proposal and contested that such early termination fees should not be exclusively associated to the discounts received. This provider stated that providers incur costs to retain and attract new subscribers and argued that the feasibility of the services provided is calculated over the whole term of an agreement. This provider further stated that in addition to discounts, such costs also include installation charges and the associated commercial costs to develop and sell the service/s. This provider therefore considers that early termination fees should not be limited to a capping of the total sum of discounts and proposed that over and above the discount received by the end-user for entering into an agreement with a minimum commitment period, the maximum termination fee should, as a minimum, also consider installation charges if such installation was provided for free.

A fourth provider did not object to this proposal but stated that this methodology would be unfeasible and disproportionate if it is also applied to the service/s provided by VULA seeker providers, given that these providers are charged by the access network provider for each connection it provides to the VULA seeker provider.

After having carefully reviewed the feedback received, the MCA has concluded that before establishing new rules which go beyond the ones currently contained in MCA's 2012 decision, the MCA needs to engage in further consultations with stakeholders on this subject. The MCA will therefore retain the requirements currently contained in Decision 9 of its 2012 Decision and plans to hold further consultations with stakeholders to discuss what additional measures could be adopted to ensure that ETFs do not hinder end-users from changing providers whilst

enabling providers to recover some of the costs borne by them when users terminate their contract prematurely.

## Decision 12

Any early termination fees payable by end-users terminating a publicly available ECS other than NI-ICS and transmission services used for the provision of M2M services prior to the expiry of the initial contractual period shall be justified and reasonable, and shall not exceed the remaining periodic fees that the end-user would be liable to pay should he/she complete his/her initial term.

This decision shall be without prejudice to the sub-regulations 91(5) and (7) of the ECSNR.

The MCA clarifies that no early termination fees can be applied in the instances referred to in sub-regulations 91(5) and (7), which norms respectively provide that:

- i. Where a contract or national legislation provides for automatic prolongation of a fixed duration contract for publicly available ECS other than NI-ICS, then after such prolongation, end-users may terminate the contract without incurring any costs except the charges for receiving the service during the notice period and any applicable reasonable and justified charges in connection with unreturned loaned equipment; and
- ii. Where an end-user has the right to terminate a contract for a publicly available ECS, other than NI-ICS, pursuant to the ECNSR or to other provisions of EU or national law, no compensation shall be due by the end-user other than for retained non-loaned subsidised terminal equipment.

## 6.8 E-mail forwarding or access to e-mails after termination of the contract with a provider of an internet access service

MCA's consultation proposed that upon termination of an IAS, providers who also offer the provision of e-mail services provided with e-mail addresses based on their commercial name or trade mark, offer at least one of the following facilities:

1. E-mail forwarding services: This facility shall allow end-users to request that e-mails sent to e-mail addresses based on the commercial name or trade mark of the former IAS provider are transferred to a new e-mail address specified by the end-users for a minimum period of one (1) year free of charge. When providing this facility, the IAS provider shall send an automated reply to any e-mail received on the e-mail address operated by that IAS provider with a message informing the sender of the forwarding

service. The message shall also provide the new e-mail address provided by the end-users; or

2. Continued access to e-mails: This facility shall allow end-users to opt to continue accessing and receive the e-mails sent to the e-mail addresses based on the commercial name or trademark of the former IAS provider, for a minimum period of one (1) year free of charge.

The MCA received a submission from one (1) provider which supported MCA's proposal. The MCA is therefore retaining the proposal included in MCA's consultation in this Decision Notice.

### Decision 13

When an end-user terminates his/her IAS, providers who also offer the provision of e-mail services provided with e-mail addresses based on their commercial name or trademark, shall offer at least one of the following facilities:

1. E-mail forwarding services: This facility shall allow an end-user to request that e-mails sent to e-mail addresses based on the commercial name or trademark of the former IAS provider are transferred to a new e-mail address specified by the end-user for a minimum period of one (1) year free of charge. When providing this facility, the IAS provider shall send an automated reply to any e-mail received on the e-mail address operated by that IAS provider with a message informing the sender of the forwarding service. The message shall also provide the new e-mail address provided by the end-user; or
2. Continued access to e-mails: This facility shall allow an end-user to opt to continue accessing and receive the e-mails sent to the e-mail addresses based on the commercial name or trademark of the former IAS provider, for a minimum period of one (1) year free of charge.

In addition to the above, MCA's consultation also proposed that, IAS providers terminating the provision of e-mail services provided with e-mail addresses based on their commercial name or trademark are to send a notification to end-users on a durable medium thirty (30) running days prior to the termination of the services informing them about the possibility to avail of one or both facilities referred to in Decision 13 above. The MCA further proposed that a copy of the notification to end-users is to be sent to the MCA ten (10) working days before being sent to impacted end-users.

One (1) respondent supported MCA's proposal to notify end-users thirty (30) running days prior to the termination of the e-mail services, but stated that it would not be possible to offer the e-mail service for a further period of one (1) year, claiming that if this obligation is adopted in MCA's final decision it would hinder the operations of IAS providers. The MCA considers

that although end-users may take personal measures to inform their contacts about the imminent termination of their e-mail account, there still could be instances in which important e-mail communication is sent to impacted end-users on the e-mail address being terminated following the termination date. Allowing end-users, including businesses, the possibility to avail of at least one of the facilities contemplated in Decision 13 above for at least (1) year, would safeguard them from missing out on potential important e-mail communications and enable them to keep track of any e-mails they may receive following the termination of their e-mail services. In view of this, this Decision Notice is retaining the proposal included in MCA's consultation. The MCA encourages providers to factor in these measures in case they decide to terminate the provision of e-mail services to minimise disruptions to their operations.

## Decision 14

IAS providers terminating the provision of e-mail services provided with e-mail addresses based on their commercial name or trade mark shall notify end-users on a durable medium thirty (30) running days prior to the termination of the services in accordance with any applicable decisions emanating from Section 6.4 of this Decision Notice. Such notification shall inform end-users of the possibility to avail of one or both facilities referred to in Decision 13 of this Decision Notice. A copy of the notification to end-users is to be sent to the MCA ten (10) working days before being sent to impacted end-users.

## 6.9 Non-Payment of Bills

MCA's consultation proposed a set of rules to be adhered to by providers of IAS and publicly available NB-ICS services when taking any action against end-users if they fail to pay their bills. The rules which were proposed by the MCA are being summarised hereunder:

Applicability of late payment fees: Providers shall allow a time period of at least thirty (30) running days starting from the date when a new bill has been issued before applying any late payment charges to end-users. Any late payment charges which may be applied to end-users shall be reasonable and justified.

Suspension and Termination of Services: Providers shall allow end-users a minimum period of at least two (2) calendar months to settle any outstanding dues before suspending a service/s. The two (2) month period shall commence from the expiry date indicated by the provider for the payment of the outstanding bill. During the period of suspension, publicly available NB-ICS providers, shall ensure, that end-users have continued access to calls that do not incur a charge including receipt of incoming calls, calls to "112" and other national emergency numbers and calls to the customer service of the provider in question. As far as is technically feasible, any suspension of the service should be confined to the part of the service/s to which the action or omission leading to the suspension or termination relates.

Providers shall **only** terminate a service after the expiration of a minimum period of suspension of service of not less than one (1) calendar month.

Notifications on a 'durable medium': Providers shall send an advance notice on a durable medium not less than fifteen (15) running days before any service suspension action is taken and not less than five (5) running days before any service termination action is taken unless any outstanding bills are settled beforehand. The notifications shall specify as a minimum:

- the reasons for suspension and / or termination;
- the period during which the service/s will be suspended and the stipulated termination date of the service if the suspension is not lifted;
- any available course of action which can be taken by the end-users to avoid termination and to have the service restored;
- any charges due for reconnection of service/s, subject that such charges are reasonable and justified;
- any charges, such as 'early termination fees', that may be applicable if the service is terminated;
- the end-user's right to lodge a complaint with their provider in the event that the aforesaid end-user is disputing any charges contained in his/her bill; and
- the end-user's right to lodge a complaint with the MCA in the event that the dispute with the provider is not addressed to his/her satisfaction, including MCA's contact details (telephone number and customer care e-mail address).

In its consultation, the MCA clarified that the above proposals shall apply without prejudice to other MCA decisions including MCA's Decision titled ["A Framework for Premium Rate Services in the '5' Numbering Range"](#).

Various feedback was received from providers on this Proposed Decision and the respective rationale identified above. A summary of all the feedback received from four (4) providers, together with the MCA's response, is presented hereunder:

### **6.9.1 Feedback on 'Applicability of late payment fees'**

One (1) provider stated that MCA's proposal is burdensome and interpreted it to mean that the time window will automatically increase to sixty (60) running days. Another provider stated that allowing a thirty (30) running day time window for the payment of bills before any late payment charges may be applied, is already reasonable and justified and should not be further extended. Another provider stated that if implemented, these measures would result in an extension of current processes and would consequently increase the risk of not detecting possible fraudulent end-users. This provider also stated that such measures would result in additional costs to be incurred by providers until the amounts due are actually collected. This respondent stated that MCA's proposal would delay the provider's debt collection process and would impact negatively the working capital of the provider, and consequently its investments rendering its operations very challenging. In conclusion this provider stated that in order to shorten the cash collection process it may have to start charging in advance as opposed to its current practice in which rental fees are invoiced following the lapse of the rental period.

The MCA recognises that the text included in its proposed decision which stated that *‘providers shall allow a time period of at least thirty (30) calendar days starting on the date when a new bill has been issued before applying any late payment charges to end-users’ (emphasis added by the MCA)*, may be interpreted to mean that such time window shall commence after a new successive bill has been issued by the provider following the unpaid bill previously issued by the same provider. This is not the MCA’s intended approach and in view of the feedback received as well to provide more clarity to stakeholders, the MCA in its Decision Notice clarifies that the time window for the payment of bills before any late payment charges may be applied if such bill is not paid, shall commence as from the same date when such bill is issued.

Another provider disagreed with MCA’s proposal for a thirty (30) running day time window for the payment of bills before any late payment charges may be applied, stating that contending that such a measure creates substantial difficulties for providers and end-users alike. This respondent stated that in its case, bills are issued during the first few days of each month and cover the rental fees for that entire month and the usage fees for the preceding month. If end-users are given a thirty (30) running day time period to settle their bills, the payment could be made in the first few days of the next month (if end-users pay at the end of that thirty (30) running day period) and such payment would not be captured in the following month’s bill. According to this respondent, this situation would create confusion and lead to complaints, given that end-users may have paid the bill within the allowed time period but would still be charged for late payment in the following month’s bill. This respondent suggested instead that a time period of twenty (20) running days should be considered and drew parallels to the payment period conditions applied in other sectors such as the local water and electricity sector claiming that the above proposed time window of twenty (20) running days would still be longer than that applied in the water and electricity sector. This respondent further stated that its proposal would minimise end-user complaints and confusion with respect to the charging of late payment fees while minimising the back office effort it would take to reimburse incorrectly charged late payment fees for the previous months in future bills.

The MCA disagrees with this respondent’s view that the proposed minimum thirty (30) running day time window before any late payment charges could be applied to end-users by providers should be revised to a minimum of twenty (20) running days. The MCA considers that the minimum time window of thirty (30) running days is a proportionate timeframe that provides sufficient time to end-users to pay their bills thus avoiding the possibility of incurring any applicable late payment charges, whilst enabling providers to take measures to recover the costs that could arise as a result of the failure of the end-users to pay their bills. The MCA notes that currently some local providers in the sector provide end-users with a thirty (30) running day time window to pay their bills. The MCA also notes that the 30 running day time window is also the minimum standard for payment terms in commercial transactions across the EU as established under the relevant EU law. To this effect, the MCA wishes to clarify that Decision 15 of this Decision Notice shall be without prejudice to any other applicable national or international law, including decisions, regulations or orders issued by any other public authority. In view of the above, the MCA is retaining this measure in this Decision Notice.

The MCA strongly recommends providers to take voluntarily measures to lift any such late payment fees in instances where end-users do not pay their bill before the conclusion of a dispute lodged formally with their provider in relation to part or all of the unpaid bill.

### 6.9.2 Feedback on ‘Suspension and Termination of Services’

One (1) provider stated that providing a blanket allowance of two (2) calendar months prior to suspending a service and a further one (1) calendar month prior to terminating a service/s, will expose the provider to further financial risks by allowing end-users the ability to continue using the service/s and incur further costs which would be difficult for the provider to recoup. This respondent therefore disagreed with MCA’s proposal and stated that providers should have discretion as to when to suspend or terminate a service.

Another provider raised similar concerns to the feedback provided under the section titled *‘Feedback on applicability of late payment fees’* above whereby this provider argued that if MCA’s measures were to be implemented, the said provider would have to extend current processes, consequently increasing the risk of not detecting possible fraudulent end-users. This provider also stated that such measures would result in additional costs to be incurred by it until the amounts due are actually collected. This respondent stated that MCA’s proposal would delay the provider’s debt collection process and would impact negatively the working capital of the provider and consequently its investments rendering its operations very challenging. In conclusion this provider stated that in order to shorten the cash collection process it may have to consider charging in advance as opposed to its current practice whereby rental fees are invoiced in arrears.

The MCA recognises that providers are entitled to take action in instances where end-users do not pay their bills within the timeframes indicated to them, which actions may include the imposition of late payment fees and the suspension or termination of their service/s. However, the MCA needs to ensure that any such actions by providers are proportionate and non-discriminatory. The MCA considers that its proposal achieves an equitable balance between the rights and obligations of end-users and of providers. The MCA is therefore retaining in this Decision Notice the proposal included in its consultation which provided that end-users are allowed a minimum period of at least two (2) calendar months (which shall commence as from the expiry date indicated by the provider for the payment of the outstanding bill) to settle any outstanding dues before suspending a service and a further one (1) calendar month from the suspension of service/s to terminate such service/s.

One (1) provider stated that during the suspension period, its subscribers are able to make calls to emergency services and receive incoming calls (bar when end-users are roaming in view that additional charges may be incurred). However, this provider stated that it is not technically possible to allow end-users whose service/s has been suspended to make calls which are otherwise free of charge in accordance with their plan. This provider also stated that it would not be technically possible to give access to end-users to make calls to its customer service during the period of suspension. This notwithstanding this provider stated that end-users would be able to contact the provider’s customer service through various methods which include live chat, Facebook messenger, e-mail or visiting one of its retail outlets. In view of these claims, this provider suggested that the MCA’s decision should only require providers to allow end-users the facility to make calls to emergency services and to receive incoming calls (except whilst roaming) whilst the service is suspended.



The MCA wishes to clarify that it is not its intention to require that during the suspension period publicly available NB-ICS providers continue to provide access to make calls which have been provided to end-users for free (i.e. as allowances) as part of their plan. The MCA's proposal was intended to require that during such suspension period, end-users also have continued access to calls that do not incur a charge such as calls to emergency services and other similar services. In order to provide more clarity, the MCA is amending this requirement as follows:

*'During the period of suspension, publicly available NB-ICS providers, shall ensure, that end-users have continued access to incoming calls (excluding incoming calls whilst roaming) and to "112" and other national emergency numbers'.*

The MCA believes that in line with good practice vis-à-vis one's end-users, NB-ICS providers should also enable end-users to make calls to their customer care during the suspension period. Notwithstanding this, in view of the technical difficulties flagged by one (1) provider, the MCA is at this juncture not including this requirement in its Decision Notice. The MCA however reserves the faculty to introduce any such requirement should the need arise in the future.

One (1) provider further claimed that it is not technically possible to implement MCA's proposal to limit the suspension or termination of the service only to the part of the service to which the action or omission leading to the suspension or termination relates to. The MCA clarifies that the measure it proposed should be implemented only when technically possible. By way of example, if an end-user is subscribed to a bundle of fixed services and is also subscribed to a separate mobile subscription provided by the same provider but the said end-user only omits to pay bills issued for such bundled fixed services, then the provision of his/her mobile services should not be impacted by any action of suspension or termination implemented by the provider.

### **6.9.3 Feedback on 'Notifications on a 'durable medium''**

One (1) provider stated that it supports MCA's proposal to notify end-users prior to suspending or terminating a service due to non-payment, but proposed that the notification period should be decreased to three (3) days. After having considered the feedback received the MCA considers that a minimum notification period of three (3) working days to inform end-users about the impending suspension or termination of service measures due to non-payment of bills would suffice.

This provider also suggested that repeat offenders, end-users with bad credit rating, high abnormal usage and fraudulent cases should be excluded from such notification obligation. The MCA is of the view, that even in such cases, such end-users should be informed before providers take any suspension and termination action. The MCA is aware that such cases may vary from one another and that it should not introduce formal requirements to be adhered to by providers at this stage. The MCA is of the view that cases relating to fraud, wilful damage to the network, illegal use of a service or persistent late payment or persistent non-payment should be treated on a case-by-case basis. The MCA will be closely monitoring the actions taken by providers in such instances if they occur and will consider introducing additional



measures in this respect in the future only if the Authority considers that circumstances so necessitate.

#### 6.9.4 Other Observations

The MCA wishes to clarify that amongst other information requirements, providers are legally required to include information in the pre-contractual document about:

1. the timeframes they impose for the payment of bills<sup>11</sup>; and
2. any measures they may take, including suspension and termination of service/s measures in case end-users fail to pay their bills<sup>12</sup> within the stipulated timeframe.

The MCA clarifies that should providers amend any of the contractual conditions related to points (1) and (2) above, providers are required to adhere to MCA's 2011 Decision which shall remain applicable until 31st of August 2023 or to Section 6.4 of this Decision Notice which shall become applicable as from the 1<sup>st</sup> of September 2023.

In conclusion, the MCA wishes to clarify that 'Decision 15' hereunder shall be without prejudice to any other applicable law, including decisions, regulations or orders issued by any recognised formal entity.

#### Decision 15

Without prejudice to other MCA decisions, providers of IAS and publicly available NB-ICS shall ensure that they adhere to the following measures when taking action against end-users who fail to pay their bills within the deadline indicated by providers:

- i. Providers shall allow a period of at least thirty (30) calendar days starting as from the same date on which such outstanding bill is issued before applying any late payment charges to end-users;
- ii. Any late payment charges which may be applied to end-users shall be reasonable and justified;
- iii. Providers shall allow end-users a minimum period of at least two (2) months to settle any outstanding dues before suspending a service. The two (2) month

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<sup>11</sup> 'Decision 7' of MCA's Decision Notice titled 'Subscriber Contracts' issued in 2012, states that contracts shall include information on the timeframes for the payment of bills.

<sup>12</sup> 'Decision 9' of MCA's Decision Notice titled 'Subscriber Contracts' issued in 2012, states that contracts shall include information on any measures that may be taken by providers, including suspension and termination of service/s measures, in case end-users fail to pay their bills within the stipulated timeframe.

- period shall commence as from the expiry date indicated by the provider for the payment of the outstanding bill;
- iv. Providers shall send an advance notice on a durable medium not less than three (3) working days before any service suspension action is taken;
  - v. During the period of suspension, publicly available NB-ICS providers, shall ensure, that end-users have continued access to incoming calls (excluding incoming calls whilst roaming) and to "112" and other national emergency numbers;
  - vi. Providers shall only terminate a service after the expiration of a minimum period of suspension of service of not less than one (1) month;
  - vii. During the suspension period, providers shall inform end-users in writing on a durable medium of the imminent termination of a service at least three (3) working days prior to the stipulated termination date, unless any outstanding bills are settled beforehand;
  - viii. As far as is technically feasible, any suspension or termination of the service should be confined to the part of the service to which the action or omission leading to the suspension or termination relates;
  - ix. The notice referred to in points (iv) and (vii) shall specify as a minimum:
    - the reasons for suspension and / or termination;
    - the period during which the service/s will be suspended and the stipulated termination date if the suspension is not lifted;
    - any available course of action which can be taken by the end-users to avoid termination and to have the service/s restored;
    - any charges due for reconnection of service/s, subject that such charges are reasonable and justified;
    - any charges due on termination;
    - the end-user's right to lodge a complaint with their provider in the event that the aforesaid end-user is disputing any charges contained in his/her bill;
    - the end-user's right to lodge a complaint with the MCA in the event that the dispute with the provider is not addressed to their satisfaction, including MCA's contact details (telephone number and customer care e-mail address).

## 7 Applicability of MCA's Decision Notice

MCA's consultation proposed that the decisions contained in MCA's Decision Notice become applicable within three (3) months from publication. Two (2) providers stated that this timeframe is not sufficient to allow them to implement the required technical and operational changes proposed in MCA's consultative document. One (1) of these providers recommended that this timeframe is extended to six (months) starting from the date of publication of the Decision Notice.

The MCA recognises that some of the decisions contained in this Decision Notice require providers to implement a number of internal administrative, technical and/or operational updates. In view of these considerations, the MCA agrees to extend the timeframe of implementation of its Decision Notice to six (6) months from the date of publication, with the exception of 'Decision 13' and 'Decision 14' of this Decision Notice which shall become applicable with immediate effect. The other Decisions contained in this Decision Notice shall become applicable on the 1<sup>st</sup> September 2023, at which point all the decisions contained in this Decision Notice will be applicable.

In the meantime, until the 31<sup>st</sup> August 2023, the MCA's 2011 Decision titled 'Modifications to the Terms and Conditions of Subscriber Contracts' and MCA's 2012 Decision titled 'Subscriber Contracts' shall remain applicable and enforceable along with any other requirements arising from any other applicable legislation and decisions however so described. Both MCA's 2011 Decision as well as MCA's 2012 Decision shall cease to apply on the 1<sup>st</sup> of September 2023.

## **8 Annex – Additional information requirements to be included in the ‘pre-contractual document’**

Pursuant to ‘*Decision 1*’ contained in section 6.1 of this Decision Notice, this Annex contains the information which publicly available ECS, excluding transmission services used for the provision of M2M services, are to include in the ‘pre-contractual document’ in addition to the information requirements provided for in regulation 87 of the ECNSR.

### **E-mail forwarding or access to e-mails after termination of the contract with a provider of an internet access service**

IAS providers that also offer the provision of e-mail services provided with e-mail addresses based on their commercial name or trade mark, shall include in the ‘pre-contractual document’, information on the end-user’s right to request upon termination of the IAS one or both of the following facilities, whichever the IAS provider offers:

1. The forwarding of any e-mail received on the commercial name or trade mark of the former provider to a new e-mail address specified by the end-user for a minimum period of one (1) year free of charge. The ‘pre-contractual document’ shall also specify that an automated reply to any e-mail received on the e-mail address operated by that internet access service provider will be sent to the sender informing him/her of the forwarding service; and/or
2. The facility allowing end-users to continue accessing and receiving e-mails sent to the e-mail addresses based on the commercial name or trade mark of the former IAS provider, for a minimum period of one (1) year free of charge.

### **Non-payment of bills**

IAS and publicly available NB-ICS providers shall include information in the ‘pre-contractual document’ about:

- i. The time period allowed to end-users to pay their bills before any late payment charges become applicable, if any;
- ii. Details about the cost of any applicable late payment charges; and
- iii. Information about any suspension or termination measures, including applicable timeframes within which such measures could be triggered by the provider in the event that outstanding bills are not settled by the end-user.

**The nature of any limitations that may apply for the re/transmission of European football content (Applicable to Transmission services used for broadcasting)**

The 'pre-contractual document' shall include information about the nature of any limitations that may apply for the re/transmission of European football content. When a provider of transmission services used for broadcasting is aware *a priori* of any expiry dates after which the re/transmission of any European football events (the rights of which have been acquired through a public bidding processes) cannot be guaranteed, that service provider must make available information pertaining to the expiry date to re/transmit that content in the 'pre-contractual document'.



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