

Carrier Selection for VoIP Services

Report on Consultation and Decision

August 2005

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1 Introduction

1.1 Background

In July 2005, the Malta Communications Authority (MCA) published a Statement of Proposed Decision dealing with the provision of Voice over Internet Protocol (VoIP) services using a Carrier Selection facility.

Carrier Selection is a facility that enables subscribers connected to one undertaking to choose to have their calls carried by that same undertaking or by another undertaking on a call-by-call basis. When a subscriber uses Carrier Selection, the call is routed through the selected operator rather than through the operator to which that subscriber is physically connected. The calls made through Carrier Selection are charged by the selected operator rather than the operator providing network access to the subscriber.

In particular, the Proposed Statement of Decision sought the views of interested parties regarding:

- a. The legal basis under which Maltacom plc is providing VoIP services via a carrier selection facility using the brand name 'TEN21'.
- b. Whether Maltacom plc is legally obliged to offer call origination and access services to other authorised service providers on transparent, cost oriented and non-discriminatory terms and conditions.

1.2 Responses to Consultation

The consultation period for the Proposed Statement of Decision ran from the 25th July 2005 to the 1st August 2005.

Responses were received from the following:

- Maltacom plc.
- Melita Cable plc.
- MobIsle Communications Ltd (GO Mobile)
- Euroweb Ltd., Nextgen.net Ltd., Keyworld Ltd, Telemail Ltd., Waldonet Ltd. and Webwaves Ltd. (as a joint submission)

The MCA wishes to thank all these parties for their responses.

The following provides an overview of the key positions taken by respondents and the Authority's position following consultation.

1.3 Consultation Timeframes

One respondent commented that the period for consultation was unreasonably short and that this risked prejudicing the transparency of the decision process.

Another respondent also remarked that the time period granted was extremely short. However, this respondent understood that the reason for this was the necessity to act swiftly in order to curtail behaviour which could potentially be harmful to competition.

The MCA is cognisant of the fact that the consultation period was relatively short but reiterates that urgent regulatory intervention is required to safeguard competition. A potential refusal by Maltacom plc to provide carrier selection for VoIP services provided by third parties as well as a possible lack of clarity as to the regulatory treatment of such services can be detrimental to competition in the market even in the short term. An urgent decision is therefore necessary to protect the interests of users and undertakings in general in accordance with Maltese and Community law.

1.4 Scope of the Decision

One respondent submitted that the proposed decision should not have been restricted to carrier selection for VoIP services. Instead, it should have tackled other VoIP services that do not use carrier selection, such as Voice over Broadband services (VoBB) offered over ADSL and cable internet.

This Decision relates specifically to the regulatory framework for the provision of VoIP services using carrier selection by Maltacom plc. It was precipitated primarily because of the provision of VoIP services via a carrier selection facility by Maltacom plc – an undertaking subject to SMP obligations. VoBB services and other VoIP solutions have been excluded from the scope of this Decision because the regulatory issues involved herein are specific to the provision of VoIP by carrier selection by Maltacom plc.

The MCA reserves the faculty to issue other Decisions relating to the regulatory framework for VoIP services.¹

¹ Refer to the MCA consultation entitled 'Voice over IP: Regulatory principles for Innovative Services', July 2004

2 Impact Assessment of Carrier Selection for VoIP

The use of carrier selection for the provision of VoIP services could potentially result in significant benefits for the consumer. Primarily this service eliminates the need to make a local call apart from the VoIP call with the result that prices for VoIP services could be reduced significantly. This is evidenced by the low prices Maltacom plc is currently offering for its 'TEN21' service. The service should also increase user accessibility to VoIP services since it eliminates the need to buy calling cards as well as the need to familiarise oneself with the associated log-in procedures.

There is a potential risk that if Maltacom plc refuses to supply carrier selection to competing VoIP service providers, such refusal could be extremely detrimental to competition in the market and to the interests of users. Due to the fact that calling cards currently require the completion of a local call prior to the international VoIP service call, by bypassing these costs, the VoIP carrier selection solution offers a service that current VoIP service providers are not able to provide.

One respondent argued that this statement ignores the fact that VoIP operators may currently apply for a free-phone number to be allocated to them, as a result of which a caller does not incur any local call charge.

However, whether a call is made to a free-phone number or not, the underlying costs of the local call still have to be paid (either by the user or, in the case of a call to a free-phone number by the VoIP service provider). In either case, the costs for the local call have to be subsumed within the retail rates of the VoIP service. By avoiding these costs, the 'TEN21' service can be provided at a much lower retail price than a traditional VoIP service provider using calling cards.

Furthermore, even if Maltacom plc were to supply carrier selection to competing VoIP service providers, there is the potential of anti competitive margin squeeze practices. At present, call origination rates for carrier selection are offered as a three minute pulse for the first three minutes and are subsequently charged on a per second basis at a rate which depends upon the time of the day. However, the rates published by Maltacom plc for its 'TEN21' service are based on a per second rate. This leads to a situation where the retail rates for the 'TEN21' service are cheaper than the wholesale rate for carrier selection during certain usage times and for calls of a certain duration.

3 Legal Overview

3.1 Introduction

In September 2004, the Telecommunications (Regulation) Act (Cap 399) was significantly amended to transpose the new EU Framework for Electronic Communications. The Telecommunications (Regulation) Act was renamed as the Electronic Communications (Regulation) Act. Since the revised legislation established new rules for the regulation of electronic communications, it also set out a transitional period whereby the obligations that existed on the 1st May 2004 would continue to apply until the market analysis is carried out in line with Article 9 of the Electronic Communications (Regulation) Act and Regulation 17 of the Electronic Communications Networks and Services (General) Regulations of 2004.²

Under the former regime, operators of public fixed electronic communications systems having a dominant position in the market were required to provide carrier selection to any interconnected operator providing public telephony services.³ Operators with a dominant market position in the provision of the said services were obliged to provide access and interconnection⁴, to ensure that all prices are cost-oriented⁵, not to discriminate⁶, to implement accounting separation⁷ and to ensure transparency in their activities and prices.⁸

These obligations were already applicable to operators enjoying a dominant market position immediately before the coming into force of the amendments. According to the transitional provisions these obligations shall remain applicable until such time as the market analysis is carried out. This Decision is in line with these obligations currently applicable to operators enjoying a dominant position.

In publishing this Decision, the MCA has taken the utmost account of the general principles, policy objectives and remedies enshrined in the new regulatory framework and its compatibility therewith, and will keep the Decisions taken herein under review in light of the outcome of the market analysis procedure.

This Decision is without prejudice to the power of the Authority at law to maintain, amend or withdraw obligations on a case-by-case basis depending on the result of the market analysis.

² Articles 38, 39 and 40 of Electronic Communications (Regulation) Act, establish the norms regulating the transition from one regime to the other.

³ Electronic Communications Services (General) Regulations, LN.151 of 2000, Regulation 24

⁴ *Ibid.*, Regulations 10 and 12

⁵ *Ibid.*, Regulations 10 and 30

⁶ *Ibid.*, Regulations 9, 10, 27 and 30

⁷ *Ibid.*, Regulations 5, 10, 30, 34 and 45

⁸ *Ibid.*, Regulations 10 and 30

3.2 Obligation to Provide Carrier Selection

3.2.1 Introduction

Under the former legal regime, Article 24 of the Telecommunications Services (General) Regulations stated that an operator of a public fixed telecommunications system having a dominant market position providing telephony services was required to allow its subscribers to access switched services of any interconnected operator providing public telephony services on a “call by call” basis and by “pre-selection” with an override facility. The said Regulations also provided that the pricing of carrier selection had to be cost-oriented and that charges to subscribers should not be such as to discourage the use of such service.

In May 2004, the MCA issued a Decision entitled ‘Introducing Carrier Selection and Carrier Pre-Selection in Malta - Report on Consultation and Decision’ (hereafter the MCA Carrier Selection and Pre-Selection Decision) dealing with the introduction of Carrier Selection and Carrier Pre-Selection in Malta.

The obligations arising by virtue of Regulation 24 of the Telecommunications Services (General) Regulations and by virtue of the MCA Carrier Selection and Pre-Selection Decision have been extended to the new framework by the aforementioned transitory provisions.⁹

3.2.2 Undertakings that may Request Carrier Selection

According to the relevant provisions both under the former and under the new legal regime, the obligation incumbent upon a dominant operator is to provide carrier selection to providers of ‘publicly available telephone services’¹⁰.

Decision 2 of the MCA Carrier Selection and Pre-Selection Decision cited above states:

“The MCA directs Maltacom plc to enable its subscribers to access both local and the international services of any interconnected provider holding an appropriate licence/authorisation on a call-by-call basis by dialling a Carrier selection code (10XX) with effect from publication of this Decision.”

Therefore, at law, carrier selection need only be made available to service providers supplying publicly available telephone services. Nonetheless, this does not prohibit the dominant operator from choosing, on the basis of commercial considerations, to offer carrier selection with respect to services that are not publicly available telephone services. Under both Maltese law and EU law the provisions regulating the universal service¹¹ and obligations of dominant

⁹ *Supra* para.3.1; Refer also to Electronic Communications Networks and Services (General) Regulations, LN.412 of 2004, Regulation 39

¹⁰ See Electronic Communications Networks and Services (General) Regulations, LN.412 of 2004, Part A of the Eleventh Schedule. Also refer to the definition of ‘publicly available telephone services’ below at para.3.2.3

¹¹ Under EU law carrier selection and carrier pre-selection are provided for in the Universal Service Directive, Article 19.

operators stipulate the *minimal* obligations to be complied with.¹² If the operator in question chooses to provide additional or enhanced services it may do so, provided that it does not breach any obligations that may be incumbent upon it relating to access, non-discrimination, transparency, cost-orientation and accounting separation.

3.2.3 Definition of Publicly Available Telephone Services

Article 2 of the Electronic Communications (Regulation) Act, Cap.399 reflecting *verbatim* Article 2 of the Universal Service Directive provides that:

"publicly available telephone service" means a service available to the public for originating and receiving national and international calls and access to emergency services through a number or numbers in a national or international telephone numbering plan, and in addition may, where relevant, include one or more of the following services:

- (i) the provision of operator assistance,
- (ii) directory enquiry services,
- (iii) directories,
- (iv) provision of public pay phones,
- (v) provision of service under special terms, and
- (vi) provision of special facilities for persons with disabilities or with special social needs and, or the provision of non-geographic services;

Therefore, the core elements of a publicly available telephone service are:

- a service available to the public,
- for originating and receiving national and international phone calls,
- that gives access to emergency services,
- through a number or numbers in a national or international telephone numbering plan.

If a service satisfies the above conditions then that service constitutes a publicly available telephone service. At law, an undertaking providing such a service must be authorised to do so. Thus, an electronic communications service provider who desires to provide publicly available telephony services must notify the Authority accordingly and pay the relevant fees.¹³

¹² Universal Service Directive, Recital 4 defines the universal service as "the provision of a defined minimum set of services to all end-users at an affordable price".

¹³ Electronic Networks and Services (General) Regulations, LN.412 of 2004, Part A of the Eleventh Schedule.

3.3 Obligation of Non-Discrimination

In general, non-discrimination requires that the undertaking enjoying a dominant position applies equivalent conditions in equivalent circumstances to other undertakings providing equivalent services, and provides services and information to others under the same conditions and of the same quality as it provides for its own services, or those of its subsidiaries or partners.¹⁴

Therefore, the scope of the non-discrimination obligation clearly covers the internal processes of an operator. The general non-discrimination obligation requires that third party access seekers are treated no less favourably than the operator's internal divisions.

3.4 Other Obligations

Other obligations currently incumbent upon the dominant operator according to the transitory provisions are those of ensuring transparency, maintenance of separated accounts and cost-orientation of prices.

The transparency obligation requires operators to make public specified information relating to access and interconnection including carrier selection, such as accounting information, technical specifications, network characteristics, terms and conditions for supply and use, and prices. The dominant operator is required to publish a reference offer for services giving the terms and conditions available at a level of detail established by the MCA.¹⁵

The accounting separation obligation specifically supports the obligations of transparency and non-discrimination. Accounting separation ensures that a dominant operator which is vertically integrated makes transparent its wholesale prices and its internal transfer prices.

Cost orientation ensures that dominant operators do not apply either excessive prices or implement a price squeeze with anti-competitive intent to the detriment of end-users and other operators. For this purpose, prices for access and interconnection including carrier selection must be cost-oriented.¹⁶

3.5 Promotion of Competition

Article 4 of the Electronic Communications (Regulation) Act (Cap.399) provides that one of the main objectives of the MCA is to promote competition by:

- (i) ensuring that users, including disabled users, derive maximum benefit in terms of choice, price and quality; and

¹⁴ Access Directive, Article 10 para (2). See Electronic Communications Services (General) Regulations, LN.151 of 2000, Regulation 10 para (3) which provides that "an operator with a dominant market position... shall provide facilities and services at equivalent quality to those provided for the operator's own internal requirements." Refer also to the Electronic Communications (Regulation) Act, Cap.399, Article 21.

¹⁵ Electronic Communications Services (General) Regulations, LN.151 of 2000, Regulation 12

¹⁶ *Ibid.*, Regulation 24 para. (2)

- (ii) ensuring that there is no distortion or restriction of competition in the electronic communications sector.

3.6 Protection of the Consumer

Article 4 of the Electronic Communications (Regulation) Act (Cap.399) provides that another central objective of the Authority is that of promoting the interests of users within the Community. This is to be achieved, in part, by ensuring a high level of protection for consumers in their dealings with suppliers and by promoting the provision of clear information, in particular requiring transparency of tariffs and conditions for using publicly available electronic communications services.¹⁷

Similarly Article 4 of the Malta Communications Authority Act (Cap.418) provides that the MCA shall promote the interests of consumers and other users in Malta especially in respect of the prices charged for public electronic communication services, and the quality and variety of the said services.¹⁸

¹⁷ Electronic Communications (Regulation) Act, Cap.399, Article 4 para. (c)

¹⁸ Malta Communications Authority Act, Cap.418, Article 4 para. (3) sub-para. (r)

4 Decisions

4.1 The provision of the Carrier Selection VoIP 'TEN21' Service

4.1.1 Summary of Consultation Issues

The Proposed Statement of Decision of July 2005 stated that the 'TEN21' service provided by Maltacom plc does not qualify as a publicly available telephone service because it falls short of satisfying the four criteria that classify a service as such at law.¹⁹ This because the said service does not provide both national and international calls, only provides outgoing calls and not incoming and does not offer access to emergency services. Furthermore, Maltacom plc publicly promotes this service as a VoIP service which differs in price, quality and reliability from normal telephony services.

The Proposed Statement of Decision concluded that although the 'TEN21' service is not a publicly available telephone service, the service may still be provided by Maltacom plc. The legal provisions under both the old and new framework clearly oblige Maltacom plc to offer carrier selection for publicly available telephone services. Nonetheless, the legal framework does not prohibit Maltacom plc from offering carrier selection to its own retail arm or to third parties for VoIP services that are not publicly available telephone services provided that, in doing so, it does not breach its non-discrimination, transparency, cost-orientation and accounting separation obligations.

4.1.2 Views of Respondents

Three respondents to the consultation agreed with the proposed position that the 'TEN21' service is not a publicly available telephone service.

However, one respondent argued that the 'TEN21' service should not be considered in isolation of other services offered through similar network elements. The respondent contended that, should the reasoning in the Proposed Statement of Decision be applied across the board, then it would be necessary to consider each of the individual services constituting Maltacom plc's fixed line telephony service, none of which services would in isolation satisfy the requirements of a publicly available telephone service. Furthermore, this respondent claimed that the 'TEN21' service essentially uses the same network elements as other individual services traditionally used for the provision of fixed telephony services. For these reasons, the 'TEN21' service should be considered as one element of the fixed line service and the fixed line service as a whole is a publicly available telephone service.

Another respondent also argued that, because the 'TEN21' service is not a publicly available telephone service, then the Authority should not allow its provision using the '10xx' prefix. In the opinion of this respondent, this would run counter to the spirit of the legal provisions mandating carrier selection as well as counter to the MCA Carrier Selection and Pre-Selection Decision of May 2004.

¹⁹ *Supra*, para. 3.2.3

4.1.3 MCA's Position

Having considered these submissions, the MCA remains of the opinion that the 'TEN21' service is not a publicly available telephone service. According to its legal definition, a publicly available telephone service is one which satisfies a specific range of core elements. Certainly, as stated above, the service *per se* in this case fails on various counts to satisfy these requisite criteria.

The MCA does not concur with the claim that the 'TEN21' service is one of the core elements which constitute the publicly available telephone service. At the outset, not all services provided by an undertaking authorised to provide publicly available telephone services become, as a consequence, publicly available telephone services. In each case one must examine the service in question so as to analyse whether or not it may be so classified.

In this case, the nature and characteristics of the service and of its supply infer that the 'TEN21' service is not an element of a publicly available telephony service. This stems primarily from the consideration that the service in question is not provided as a replacement for the traditional international voice calls. Despite the significantly reduced prices of the 'TEN21' service, Maltacom plc continues to provide its core service of international calls over the Public Switched Telephony Network (PSTN). Instead, the 'TEN21' service is being offered merely as a secondary service or as an adjunct to the customary telephony service. This is evidenced by its provision over a carrier selection code (and not by direct dialling of the international number) and by the fact that the VoIP service has not been extended to national calls. The product itself is marketed by Maltacom plc as being an inexpensive secondary service of lower quality and less reliable than traditional telephony.

Furthermore, from a technical perspective, the 'TEN21' service is significantly divergent from traditional international calls over the PSTN. Whilst the network elements in the origination of the call are similar, the manner in which the call is transited internationally is entirely different. A traditional international call over the PSTN enjoys a dedicated circuit for a particular voice call from the caller to the recipient. In contrast, for the international transit the 'TEN21' service converts the call into packets of data that travel through the public internet, similarly to email. The packets are then reassembled as sound at the other end of the call. Because in this latter case there is no dedicated circuit for the call and because the calls transverses through an unmanaged network (the internet), it is generally not possible to guarantee service parameters or network security and integrity. This, in effect, means that the obligation incumbent upon providers of publicly available telephone services to provide network integrity and assure quality standards over those services may not be complied with in the case of the 'TEN21' service.

On this basis, whilst traditional international calls over the PSTN constitute a core element of the publicly available telephone service offered by Maltacom plc, the 'TEN21' service, being merely a secondary service, is not to be considered as such. The core elements which may constitute publicly available telephone services are listed exhaustively in the legal definition of a publicly available

telephone service. These include the provision of operator assistance, directory enquiry services, directories, public pay phones and the provision of service under special terms or special facilities for persons with disabilities. Secondary or adjunct services, such as the 'TEN21' service, are excluded from the definition.

This position is consistent with the policy that MCA has adopted in the past relating to the regulation of VoIP services.²⁰ It is also consistent with the current 'light touch' approach to emerging VoIP services advocated by the European Commission.²¹

Finally, with regard to the submissions of the second respondent referred to above, the MCA remains of the opinion that although the 'TEN21' service does not qualify as publicly available telephone service, both the local and the international regulatory framework do not prohibit Maltacom plc from offering such a service of its own accord. As stated above, the provisions regulating the universal service and obligations of dominant operators stipulate the minimal obligations to be complied with. Maltacom plc may provide additional or enhanced services, such as the 'TEN21' service provided that it does not breach obligations that may be incumbent upon it relating to access, non-discrimination, transparency, cost-orientation and accounting separation.²²

Decision 1:

The MCA directs that although the 'TEN21' Service provided by Maltacom plc is not a publicly available telephone service, Maltacom plc may supply the service at law provided that, it does not breach its non-discrimination, transparency, cost-orientation and accounting separation obligations.

4.2 Carrier Selection for Third Party Service Providers

4.2.1 Summary of Consultation Issues

The Proposed Statement of Decision of July 2005 stated that by supplying the 'TEN21' service, Maltacom plc elected, on the basis of commercial considerations, to offer carrier selection with respect to services that are not publicly available telephone services.

According to the non-discrimination obligation incumbent upon Maltacom plc as a dominant operator, Maltacom plc is bound to provide services to third parties under the same terms and conditions and of the same quality as it provides to its

²⁰ MCA Guidelines entitled 'Packet Switched Voice Services Consultation Report & Authorisation Guidelines', December 2002; see also MCA Consultation entitled 'Voice over IP: Regulatory principles for Innovative Services', July 2004

²¹ 'The European Commission's Approach to Voice over IP: Frequently Asked Questions', 11th February 2005; see also European Regulators Group (ERG), 'Common statement for VoIP regulatory approaches', 11th February 2005

²² *Supra*, para. 3.2.2

own retail services arm, or those of its subsidiaries or partners.²³ Therefore, according to this non-discrimination obligation and because Maltacom plc provides carrier selection for services that are not publicly available telephone services to itself, it has to offer carrier selection of the same quality to third party providers of such services.

4.2.2 Views of Respondents

Three respondents agreed that, on the basis of the non-discrimination obligation, carrier selection for VoIP services should be provided also to third party undertakings authorised as 'other public electronic communications service providers'.

One respondent argued that it is incorrect to infer that the Universal Service Directive and Maltese legislation provide for the possibility of offering carrier selection to providers of services which are not authorised as publicly available telephony service providers. In the opinion of this respondent, if this were so, there would be no logic in having the distinction between obligations and rights for publicly available telephony services and other electronic communications services.

4.2.3 MCA's Position on Third Party Providers

Having considered the submissions of this respondent, the MCA, as stated above, agrees that the provisions at law regulating carrier selection at law impose an obligation on the dominant operator to provide carrier selection only with respect to services that are publicly available telephony services.²⁴ Taken in isolation from the other provisions of Maltese law or the EU Directives (apart from the Universal Directive), this provision implies that a third party provider of VoIP services not constituting publicly available telephony services could not request the provision of carrier selection.

However, once Maltacom plc has, of its own accord, provided the service to its retail arm for VoIP services, then the other obligations incumbent on Maltacom plc as a dominant operator, including the non-discrimination obligation, become applicable. According to this non-discrimination obligation, not only is Maltacom obliged to offer to third parties services that are similar to those that it offers to its retail arm, but it should offer such services to them under similar terms and conditions and at the same quality as it provides to its retail arm. This principle of non-discrimination ensures that dominant undertakings do not distort competition, in particular where they are vertically integrated undertakings that supply services to undertakings with whom they compete on downstream markets.

The provisions regulating carrier selection were never intended to give rise to a discriminatory situation where a dominant undertaking may provide wholesale carrier selection for VoIP services to its own retail arm but refuse to supply the

²³ *Supra*, para. 3.3

²⁴ *Supra*, para. 3.2.2

wholesale carrier selection to undertakings providing equivalent services in equivalent circumstances.

The MCA believes that this offering to third parties will prevent distortions in the market and may even increase competition in the provision of VoIP Services, thus ensuring that users derive maximum benefit in terms of choice, price and quality.²⁵

Decision 2:

The MCA directs that in accordance with its non-discrimination obligations, Maltacom plc shall provide wholesale carrier selection services to other authorised providers (for services that are not publicly available telephone services) under the same terms and conditions and quality that it provides to its own retail arm.

4.3 Call Origination Charges

4.3.1 Summary of Consultation Issues

Maltacom plc, as a dominant operator, is required at law to supply access, including indirect access by carrier selection, at cost-oriented prices. Decision 6 of the MCA Carrier Selection and Pre-Selection Decision of May 2004 requires that call origination charges are included in the Reference Interconnection Offer (RIO) of each dominant operator. Furthermore, according to the said Decision such charges must be transparent, cost oriented and non-discriminatory and must be subject to the MCA's prior approval.

As discussed above²⁶, the rates at which Maltacom plc is offering its 'TEN21' service are, at times, not sufficient cover the wholesale call origination rate currently included in its Reference Interconnection Offer. This results from the origination rates, which are based on a three-minute pulse for the first 3 minutes compared to the 'TEN21' service which is calculated on a per-second basis.

It is clear that, despite the rates included in the Reference Interconnection Offer, Maltacom plc is charging its retail arm on a per-second basis for call origination applicable to the 'TEN21' service.

Based on the non-discrimination principle, Maltacom plc is obliged to provide services to third parties at the same prices and terms and conditions as it provides to its own retail services, or those of its subsidiaries or partners.²⁷ Furthermore, Maltacom plc as dominant operator is also bound to ensure that these prices are transparent and cost oriented. For this reason, the Reference

²⁵ Refer to the competitive distortions that may arise from not requiring that Maltacom plc provide this service to third parties above at para. 2

²⁶ *Supra*, para. 2

²⁷ *Supra*, para. 3.3

Interconnection Offer should be amended to include call origination charges for VoIP carrier selection services to be charged on a per-second basis.

Finally, accounting separation will specifically support the obligations of transparency and non-discrimination by ensuring that the prices of Maltacom plc for the self-provision of wholesale carrier selection and the retail prices for the 'TEN21' service remain identifiable and thus transparent.

4.3.2 Views of Respondents

One respondent argued that Maltacom plc was unlawfully departing from the cost-oriented rates stipulated in its Reference Interconnection Offer. The respondent argued that the MCA should not legitimise the charges on a per-second basis but instead should require Maltacom to charge the rates currently stipulated in its Reference Interconnection Offer both internally and to third party operators availing themselves of carrier selection for VoIP services.

Another respondent also argued that the excessively low retail rates being offered for the 'TEN21' service constitute predatory pricing resulting in the distortion of competition. According to this respondent, even in the absence of origination charges, selling VoIP at the retail rates proposed does not even cover the costs of the VoIP termination let alone leave a significant commercially viable margin of profit.

4.3.3 MCA's Position on Call Origination Charges

The MCA is aware that, at specific times of the day and for certain call durations, the rates at which Maltacom plc is offering its 'TEN21' service are not sufficient to cover the current wholesale call origination rate included in its Reference Interconnection Offer. This occurs because the said origination rates are based on a three-minute pulse for the first three minutes whereas the 'TEN21' service is calculated on a per-second basis.

Although the quantum of the rates (determined on the basis of a cost-orientation methodology) has remained the same, Maltacom plc has adopted vis-à-vis its retail arm a different billing methodology for origination of the 'TEN21' service based on per-second billing rather than a three minute pulse.

In so far as Maltacom plc offers call origination by carrier selection to third parties at the same prices and on similar terms and conditions as it provides to its own retail services, the MCA does not deem that the adoption of this different billing methodology will negatively affect competition in the market. On the contrary, it will contribute towards ensuring that users derive maximum benefit in terms of choice and price. Furthermore, the adoption of a per-second billing approach is in line with the MCA's interconnection strategy.²⁸

Because the same network elements and relevant costs are involved for call origination irrespective of whether it is provided for VoIP services or for traditional

²⁸ See MCA Decision Notice, 'Maltacom Tariff Rebalancing Proposal', November 2003, pg.8; refer also to the MCA 'Interconnection Strategy', March 2005

PSTN telephony, all call origination services should, as a result, utilise a per-second billing methodology.

With respect to the allegation of predatory pricing in the retail price being charged for the 'TEN21' service, the MCA notes that at present, because the retail price appears to cover the wholesale elements together with a reasonable margin of profit, there is no solid evidence of any alleged anti-competitive behaviour in this regard. Nonetheless, the MCA will be maintaining a close scrutiny of the 'TEN21' service and other similar services particularly to ensure there is no cross-subsidisation between wholesale elements and to ascertain that any respective retail pricing is not prohibitive to competition.

Decision 3:

The MCA directs that, in accordance with its non-discrimination obligation, Maltacom plc must provide carrier selection to third parties at rates similar to that which it charges internally to itself. The rates shall be those currently specified for call origination in Maltacom plc's Reference Interconnect Offer but charged on a per second basis. They shall be as follows:

- Peak – 0.73c per minute charged on a per second basis
- Evening – 0.49c per minute charged on a per second basis
- Weekend – 0.49c per minute charged on a per second basis

Decision 4:

The MCA directs that, Maltacom plc shall change the call origination rates in its Reference Interconnect Offer to the rates specified in Decision 3 so as to ensure sufficient transparency in the prices for carrier selection.

Decision 5:

The MCA directs that Maltacom plc shall make transparent its wholesale prices and its internal transfer prices by implementing accounting separation in relation to the wholesale and retail activities involved in the provision of carrier selection for services that are not publicly available telephone services.

4.4 Consumer Implications

4.4.1 Summary of Consultation Issues

The Proposed Statement of Decision of July 2005 stated that, because carrier selection for services that are not publicly available telephone services are based

on VoIP technology, in the short term the quality of these services may not be equivalent to the quality users are accustomed to in relation to publicly available telephone services offered by existing network operators.

In the interest of consumers in general, carrier selection for services that are not publicly available telephone services (including the 'TEN21' service) should make clear any quality and service limitations applicable to the service in question.²⁹ Primarily, this should be achieved by promoting or marketing the service as VoIP and not as telephony.

4.4.2 Views of Respondents

One respondent argued that Maltacom plc should not be obliged to market the 'TEN21' service as a VoIP service but as an element or feature enhancing the fixed line service.

Another respondent claimed that it is in the consumers' interest that operators be obliged to inform customers fully of the nature of any service being purchased. However, the consumer's interest is not served by operators being enjoined to refrain from marketing VoIP service as telephony. The MCA 'Consumer Perceptions Survey – Fixed Line Telephony and VoIP Services' of the 17th May 2005 demonstrates that from a consumer's perspective VoIP and traditional telephony services are interchangeable and serve precisely the same purpose.

4.4.3 MCA's Position on Consumer Implications

Having taken these submissions into consideration, the MCA remains of the opinion that the interest of the consumer is best served if quality and service limitations are clearly specified. Although consumers may perceive traditional telephony as interchangeable with VoIP services for the purposes of making international calls, there could be significant differences in terms of price, quality or other aspects of the service. It is essential that consumers are fully informed and can make their own choices depending on the nature of the service they require. At present, the most effective manner of making such distinction is by clearly promoting and marketing VoIP services as such rather than as telephony services.

Decision 6:

The MCA directs that services which are not publicly available telephone services provided using carrier selection should clearly specify any quality and service limitations applicable to the service in question. In particular, such services should be promoted and marketed as VoIP services and not as telephony services.

²⁹ *Supra*, para. 3.6

4.5 Application of Carrier Select Decision

4.5.1 Summary of Consultation Issues

The Proposed Statement of Decision of July 2005 stated that, without prejudice to the other decisions therein included, the provisions of the MCA's Carrier Selection and Carrier Pre-Selection Decision Notice (published in May 2004) shall apply also to the provision of carrier selection for services that are not publicly available telephone services. This will ensure conformity in the provision of carrier selection irrespective of the applicant and will guarantee that the consumer is adequately protected.

4.5.2 Views of Respondents

One respondent argued that the proposed decision deals only with the availability of carrier select access, without mentioning post-paid billing. The respondent argued that Maltacom plc should make post-paid billing available to all players. Otherwise competitors will be deprived of an equal opportunity to compete.

4.5.3 MCA's Position on Post-Paid Billing

Decision 5 of the MCA's Carrier Selection and Carrier Pre-Selection Decision Notice published in May 2004 dealt specifically with consumer billing. Because this latter Decision Notice shall apply also to the provision of carrier selection for services that are not publicly available telephone services, the said Decision 5 will be equally applicable to carrier selection for VoIP services.

The MCA reserves the right to intervene particularly on post-paid billing, if failure to negotiate a billing solution results in a distortion of competition such that alternative suppliers of VoIP services are inhibited from providing those services via carrier selection.

Decision 7:

The MCA directs that, without prejudice to the other Decisions herein included, the MCA's Carrier Selection and Carrier Pre-Selection Decision will apply also to the provision of carrier selection for services that are not publicly available telephone services.

Joseph V Tabone
Director General

11th August 2005