

CONSULTATION DOCUMENT

Contracts which include clauses whereby providers may increase charge/s and/or fee/s however so described according to changes in an objective consumer price index compiled by a public institution

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1 Abbreviations

CJEU	Court of Justice of the European Union
ECNSR	Electronic Communications Networks and Services (General) Regulations (S.L. 399.48 of the Laws of Malta)
ECS	Electronic Communications Services
ETF	Early Termination Fees
IAS	Internet Access Service
ICS	Interpersonal Communications Service
M2M	Machine-to-Machine Services
MCA	Malta Communications Authority
NB-ICS	Number-Based Interpersonal Communications Service
NI-ICS	Number-Independent Interpersonal Communications Service
S.L.	Subsidiary Legislation

2 Background and Purpose

In the past few months some electronic communications service (hereafter 'ECS') providers introduced clauses in some of their end-user contracts enabling them to increase any charge/s and/or fee/s, however so described, of their service/s by an amount which corresponds to an objective consumer price index compiled by a public institution.

This subject matter was at the centre of a 2015 ruling by the Court of Justice of the European Union (hereafter 'CJEU') in response to a question referred by the Supreme Court of Austria which had arisen following a dispute between the Austrian Consumers' Association and A1 Telekom Austria AG. The question referred to the CJEU for a preliminary ruling was the following:

'Is the right, provided for in Article 20(2) of ... Directive [2002/22]¹, for subscribers to withdraw from their contracts without penalty "upon notice of modifications in the contractual conditions" also to be provided for in the case where an adjustment to charges derives from contractual conditions which, from the time when the contract is first concluded, provide that future charges are to be adjusted (upwards or downwards) in accordance with changes in an objective consumer price index reflecting movements in the value of money?'

The CJEU ruled that:

Article 20(2) of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009, must be interpreted as meaning that a change in charges for the provision of electronic communications networks or services, resulting from the operation of a price adjustment clause contained in the standard terms and conditions applied by an undertaking providing such services, the term providing that such a change applies in accordance with changes in an objective consumer price index compiled by a public institution, does not constitute a 'modification to the contractual conditions' within the meaning of that provision, which grants the subscriber the right to withdraw from the contract without penalty.

¹ Article 20(2) of Directive 2002/22/EC has been superseded by Article 105 (4) Directive (EU) 2018/1972 establishing the European Electronic Communications Code (hereafter the 'EECC'). Article 105(4) of the EECC in substance reflects the former EU norm.

In view of the ruling referred to above, when adjusting their charges in accordance with such clauses, providers are not required to provide end-users the option to terminate their contract without incurring any early termination fees (hereafter 'ETFs').

The Malta Communications Authority (hereafter the 'MCA') is concerned that the inclusion of clauses in end-user contracts which enable providers to increase any charge/s and/or fee/s however so described of their service/s plans by an amount which corresponds to an objective consumer price index compiled by a public institution, will have a negative impact on end-users and therefore measures to protect end-users need to be implemented. MCA's concerns include the following:

- End-users may not be aware that the contract they are agreeing to contains such clauses;
- End-users may not understand the impact that such clauses may have when they subscribe to a contract, and may consequently not make an informed choice;
- The inclusion of such clauses in contracts do not give end-users sufficient certainty about what they may be required to pay throughout the duration of the contract of their subscription. Furthermore, the recent increase in rates of inflation has made it even harder for end-users to understand and predict what they are likely to have to pay under such contract terms and to make informed choices;
- Some end-users may struggle with higher unpredictable or unexpected increases in fees and/or charges;
- End-users who are tied to a contractual period cannot avoid incurring these charges as providers may impose ETFs if they terminate their contract;
- Providers can offer contracts with a commitment period of up to 24 months, which means that end-users subscribed to contracts which contain such clauses could face up to two annual price rises while they are in their initial contractual period;
- The increases in fees and charges apply regardless of when end-users signed up to the contract. This means that by way of example, end-users could be subjected to an increase in charge/s and/or fee/s even if the contract was signed only a few weeks before such an increase is implemented by the provider;
- The inclusion of such clauses in contracts make it harder for end-users to search and compare different tariff plans and may distort effective competition.

In order to address these concerns, the MCA is proposing a set of measures to be adhered to by providers of publicly available ECS other than number-independent interpersonal communications services (hereafter 'NI-ICS') and other than transmission services used for the provision of machine-to-machine services (hereafter 'M2M'), in order to provide end-users a higher level of protection when subscribing to contracts which contain such clauses.

3 Legal Basis

The legal instruments listed in the sections below empower the MCA to implement the measures being proposed in this consultation:

Explicit consent to a contract

In accordance Regulation 87(4) of the '[Electronic Communications Networks and Services \(General\) Regulations](#)' as per SL 399.48 of the Laws of Malta (hereafter 'ECNSR'), the MCA is empowered to determine how a consumer gives his consent to a contract for the provision of publicly available ECS other than transmission services used for the provision of M2M services.

Transparency and Publication of Information

Regulation 88(1) of the ECNSR, requires that where providers of internet access services (hereafter 'IAS') or publicly available interpersonal communications services (hereafter '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.

Maximum contractual commitment periods

Regulation 91(3)(b) of the ECNSR provides that contracts concluded between consumers and providers of publicly available ECS other than NI-ICS and other than transmission services used for the provision of M2M services, do not mandate a commitment period longer than twenty-four (24) months, which period may be shortened by the Authority. In doing so the Authority shall ensure that there is always applicable a maximum contractual commitment period:

Provided that any such requirement shall not apply to the duration of an instalment contract where the consumer has agreed in a separate contract to instalment payments exclusively for deployment of a physical connection, in particular to very high capacity networks.

Modification of contractual conditions by providers and rights of end-users

Regulation 92 of the ECNSR empowers the Authority to determine the format, content and the manner of the notification which providers of publicly available ECS other than NI-ICS are required to send to end-users on a durable medium at least thirty (30) days in advance of any change in the contractual conditions.

4 MCA's Proposals

Section 4 of this consultative document discusses a number of proposed measures which the MCA considers that providers should observe in order to mitigate the concerns highlighted in section 2 of this document.

The MCA proposes that the proposed decisions contained in this consultative document apply for the provision of publicly available ECS other than NI-ICS and other than transmission services used for the provision of M2M services.

The MCA clarifies that any proposed decision contained in this consultative document shall be without prejudice to any decision or directive however so described issued by a public authority mandating requirements on the applicability of such clauses including decisions or directives however so described issued by a public authority abolishing or amending such clauses in contracts.

Proposed Decision 1

Providers of publicly available ECS other than NI-ICS and other than transmission services used for the provision of M2M offering a service/s plan which is subject to contractual clauses which enable providers to increase any charge/s and/or fee/s, however so described, of their service/s plans by an amount which corresponds to an objective consumer price index compiled by a public institution, must ensure that the webpages of their website where the details of such service/s plan is publicised, clearly indicates the applicability of such clauses.

The information indicating the applicability of such clauses on such webpages must be:

- of a distinct and noticeable colour, different from the other text;
- underlined; and
- the same size or larger than the prevailing font size used to highlight the main characteristics of the service/s plan.

Proposed Decision 2

Before concluding a contract with a consumer, providers of publicly available ECS other than NI-ICS and other than transmission services used for the provision of M2M services shall obtain an explicit consent from the consumer in the form of a signature on a durable medium indicating that he/she is aware that the contract to which he/she is agreeing to includes clause/s which enable providers to increase any charge/s and/or fee/s however so described of their service/s plans by an amount which corresponds to an objective consumer price index compiled by a public institution and

that when such clauses are applied by the provider, the consumer will have no right to terminate that contract without incurring the applicable ETFs.

Such a signature shall be distinct and separate from any other signature which providers are required to obtain from consumers before they enter into a contract, including but not limited to:

- Signature requirements emanating from 'Decision 2' of MCA's 'Decision Notice' titled ['Contracts, Transparency and Termination'](#);
- Signature requirements emanating from 'Decision 3' of MCA's 'Decision Notice' titled ['Wholesale Access to Data and the Provision of Publicly Available Directory Information Services'](#); and
- Signature requirements emanating from MCA's 'Decision Notice' titled ['Number Portability in Malta'](#) and corresponding [Number Portability Specifications](#).

This 'Decision 2' shall only be applicable when the contracts for the provision of a service/s plan mandate a minimum contractual period or when the termination of the contract is subject to the applicability of an ETF.

Proposed Decision 3

Contracts for the provision of publicly available ECS other than NI-ICS and other than transmission services used for the provision of M2M services which include contractual clauses which enable providers to increase any charge/s and/or fee/s however so described of their service/s plans by an amount which corresponds to an objective consumer price index compiled by a public institution shall not mandate a commitment period longer than six (6) months.

Contractual clauses which enable providers to increase any charge/s and/or fee/s however so described of their service/s plans by an amount which corresponds to an objective consumer price index compiled by a public institution and which are currently included in existing contracts which mandate a commitment period longer than six (6) months shall become null and void and shall not be applied by providers after the initial six (6) month period from when the contract was signed by the consumer has elapsed.

This decision shall be without prejudice to the duration of instalment contracts where the consumer has agreed in a separate contract to instalment payments exclusively for deployment of a physical connection, in particular to very high capacity networks as provided for in regulation 91(3) of the ECNSR.

Proposed Decision 4

Providers of publicly available ECS other than NI-ICS and other than transmission services used for the provision of M2M services introducing (or amending) clauses to existing contracts which enable them in future to increase any charge/s and/or fee/s however so described of their service/s plans by an amount which corresponds to an objective consumer price index compiled by a public institution shall ensure that any notifications to consumers informing them of such changes:

1. do not exceed the equivalent of a one single-sided A4 page when printed with an easily readable font;
2. only contain information regarding the clauses referred to in the first paragraph of this decision being introduced (or amended) to the existing contract. For the avoidance of any doubt, if together with the modifications being referred to in the first paragraph of this decision, the provider intends to implement additional unrelated contractual modifications, any such additional unrelated modifications need to be notified to consumers in a separate notification on a durable medium; and
3. shall be sent in accordance with regulation 92(2) of the ECNSR and MCA's decision titled 'Contracts, Transparency and Termination'.

Proposed Decision 5

When implementing increases in any charge/s and/or fee/s however so described in accordance with existing contractual clauses which enable providers to increase any charge/s and/or fee/s however so described of their service/s plans by an amount which corresponds to an objective consumer price index compiled by a public institution, providers shall notify the MCA at least ten (10) working days in advance of such increase. The notification to the MCA shall:

- specify which service/s plans which will be impacted;
- specify all the charge/s and/or fee/s however so described which will be increased;
- the amounts by which such charge/s and/or fee/s however so described will be increased; and
- the computation used to work out the increases being implemented.
- The objective official consumer price index issued by the competent public entity used to determine the increases being implemented

Proposed Decision 6

When implementing increases in any charge/s and/or fee/s however so described in accordance with clauses which enable providers to increase any charge/s and/or fee/s however so described of their service/s plans by an amount which corresponds to an objective consumer price index compiled by a public institution, providers shall notify impacted end-users about such increases on a durable medium at least thirty (30) calendar days in advance of such increases.

Proposed Decision 7

The decisions listed in this 'Decision Notice' shall also apply to the provision of service/s to end-users that are microenterprises, small enterprises or not-for-profit organisations, unless such end-users have explicitly agreed to waive all or parts of those provisions.

The decisions listed in this 'Decision Notice' shall also apply to bundles of services or bundle of services and terminal equipment which comprise at least an IAS, NB-ICS or a transmission service used for broadcasting.

5 Applicability of MCA's Final Decision Notice

The MCA shall take into consideration all the feedback it will receive before issuing its final decision on the subject matter covered in this consultative paper. The MCA is of the view that the proposed decisions contained in this consultative document shall become applicable with immediate effect upon publication of MCA's final decision with the exception of proposed decisions 1 and 2 which shall become applicable within thirty (30) calendar days from publication of the Decision Notice.

6 Submission of Responses

In accordance with the requirements of Article 4A of the Malta Communications Authority Act [Cap 418 of the Laws of Malta], the MCA invites written comments from interested stakeholders on MCA's Consultation and Proposed Decision on 'Contracts which include clauses whereby providers may increase charge/s and/or fee/s however so described according to changes in an objective consumer price index compiled by a public institution'.

The MCA appreciates that respondents may provide confidential information in their feedback to this consultation paper. Such information is to be included in a separate annex and should be clearly marked as confidential. Respondents are requested to state the reasons why the information should be treated as confidential. The MCA will take the necessary steps to protect the confidentiality of such material as soon as it is received at the MCA offices in accordance with the MCA's confidentiality guidelines and procedures². Respondents are however encouraged to avoid confidential submission wherever possible.

The MCA will, after taking into consideration all the responses received to this consultation, publish a Decision Notice on '*Contracts Which Enable Inflation Linked Increases of Charge/s and Fee/s*'. For the sake of openness and transparency, the MCA will publish a list of all respondents to this Consultation Paper in the ensuing Decision Notice.

All responses should be addressed to the Chief Executive Officer and submitted to the MCA electronically on consultations@mca.org.mt or by mail at the following address: Malta Communications Authority, Pinto Wharf, Valletta Waterfront, Floriana, FRN1913. **The consultation period will run until 12.00hrs CET of 29/09/2023.** Extensions to the consultation deadline will only be permitted in exceptional circumstances and where the MCA deems fit. The MCA reserves the right to grant or refuse any such request at its discretion. Requests for extensions are to be made in writing within the first ten (10) working days of the consultation period.

² http://www.mca.org.mt/sites/default/files/articles/confidentialityguidelinesFINAL_0.pdf



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