

DISPUTE RESOLUTION PROCEDURES IN RELATION TO DISPUTES BETWEEN UNDERTAKINGS

CONSULTATIVE PAPER

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EXECUTIVE SUMMARY	3
1 INTRODUCTION.....	5
1.1 The changes at law	5
1.2 Other means of settling inter-operator disputes.....	5
2 KEY THEMES	6
3 SCOPE OF DISPUTE RESOLUTION	7
3.1 What is a dispute?	7
3.2 Investigating a dispute.....	7
3.3 Implications of the new procedure	8
3.4 Alternative mechanisms.....	9
4 RESOLUTION PROCEDURES	10
4.1 The various steps in the dispute resolution process	10
4.2 Other points on procedure	12
4.3 Cross-border disputes	13
4.4 Ensuring transparency.....	13
FIRST ANNEX.....	14
SECOND ANNEX.....	15

EXECUTIVE SUMMARY

In the wake of the procedures under article 24 of the Electronic Communications (Regulation) Act, Chapter 399 of the Laws of Malta (hereinafter referred to as “ECRA”) the Malta Communications Authority (hereinafter referred to as “MCA”) is outlining its proposals to have in place an effective and clear resolution process on disputes between undertakings providing electronic communications services and, or networks.

In **Part 1**, the MCA is also proposing that the process under article 24 of the ECRA be extended to disputes between undertakings that provide postal services. In this Part of the document, the MCA considers the use of other means of settling disputes. Under the former regime both in the context of telecommunications and postal services, disputes between undertakings were not necessarily concluded with the issue of a final decision by the MCA. In some instances, disputes were resolved through informal MCA intervention or negotiation, with at times the MCA acting as a mediator between the parties to the dispute. Therefore a formal dispute resolution process as provided for in article 24 of the ECRA should not necessarily be the sole means of resolving disputes.

In **Part 2**, the MCA outlines the requirements under article 24 of the ECRA namely:

- The time period of four months for the resolution of disputes. Under the former regime there was no such timeframe,
- Undertakings engaged in the provision of electronic communications services and, or networks can lodge a dispute with the MCA,¹
- MCA must make its decision accessible to the public and communicate to all the parties to the dispute the reasons for its decision.

In **Part 3**, the MCA considers the characteristics making up a dispute to which the dispute resolution procedure would apply, namely that one party claims that another has contravened a legal requirement. The MCA wishes to emphasise the importance that all parties to the dispute should provide all the necessary information to enable the MCA to investigate and determine all the issues in dispute. In this regard in the [First Annex](#) to this Document, the MCA lists the information required in this context. In this Part, the MCA also considers possible alternative mechanisms for resolving disputes between undertakings.

¹ If the proposal to extend the process to postal operators is adopted, then obviously this would also to postal operators.

In **Part 4**, the MCA proposes procedures with the objective of ensuring that disputes are managed and resolved by the MCA in an effective and efficient manner, with each stage of the process described, commencing from the initial submission of a request for dispute resolution to a final decision.

Responses to this paper will be accepted by not later than close of business of **Friday 11 March 2005**.

1 INTRODUCTION

1.1 The changes at law

The coming into force of the amendments to ECRA have substantially changed the procedure regulating the resolution of disputes between undertakings, particularly with the inclusion of a timeframe by when disputes have to be resolved and the faculty of the MCA to impose an administrative fine in the case of non-compliance with a final decision.

Article 24 of the ECRA is the principal article regulating the resolution process of disputes between undertakings established in Malta in connection with their obligations under electronic communications legislation. An undertaking may request the Authority to initiate an investigation of a dispute it has with another undertaking where the dispute relates to an alleged breach of an obligation under the ECRA. Moreover, the MCA may on its own initiative investigate any dispute between undertakings which the MCA may become aware of and which it believes ought to be investigated.

1.2 Other means of settling inter-operator disputes

The dispute resolution procedure dealt with in this Paper is only one way of how the MCA can deal with disputes raised by undertakings. There are other ways of dealing with disputes such as informal meetings or negotiations held under the auspices of the MCA, investigations conducted by the MCA, consultations with industry in general, or through alternative dispute mechanisms.

This paper is without prejudice to the legal position or the rights and duties of the MCA to regulate the various sectors that fall within its remit. Any views expressed are not binding on the MCA and are without prejudice to the final form and content of any decisions the MCA may make.

2 KEY THEMES

The key themes following the amendments of last September to the ECRA are:

- Disputes must be resolved within a maximum of four months, unless there are exceptional circumstances,
- The parties entitled to lodge a dispute with the MCA are those undertakings engaged in the provision of electronic communications services and, or networks or associated facilities,
- On the resolution of a dispute, the MCA is required to publish its decision and to explain the reasons for its decision to the parties concerned,
- The possibility of recourse to alternative dispute resolution mechanisms,
- The faculty of the Minister to extend the dispute resolution process as provided under article 24 of the ECRA to other laws the MCA is empowered by law to enforce².

² See article 26 of the ECRA.

3 SCOPE OF DISPUTE RESOLUTION

3.1 What is a dispute?

The MCA proposes to introduce a clear definition of the characteristics making up a dispute following the amendments to the ECRA and in accordance with the norms established under the European Union's Framework Directive³. The same can also apply to disputes between operators in the postal services market.

The MCA is of the view that for an issue to be accepted as a dispute, and for it to be resolved through the application of the dispute resolution procedures, the issue must include at least the following characteristics:

- The dispute must arise between undertakings in connection with obligations under the ECRA as the case may be, so that the party initiating the dispute has a specific grievance based on the failure of the other party to comply with its obligations at law,
- The dispute must be between undertakings engaged in the provision of electronic communications services and, or networks or associated facilities.

3.2 Investigating a dispute

In order to comply with the targeted timeframes in resolving a dispute, the MCA proposes that there should be clear boundaries on the subject matter and procedures for disputes. This means that both the MCA and undertakings must ensure an adequate and comprehensive preparation of cases where there is dispute.

MCA proposes that, for a dispute to be accepted, a number of conditions must first be met, namely that:

- In the first instance the MCA must be satisfied that the matter notified is best resolved under the dispute resolution procedures,
- The scope of the dispute is clear and specific,
- There is a statement by the aggrieved undertaking indicating clearly the legal obligation to which the dispute relates and the legal basis for the MCA to intervene,

³ Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services. Article 20 of this Directive specifically deals with dispute resolution between undertakings.

- The undertaking raising the dispute should within the parameters established at law, indicate the remedy or remedies it is seeking from the MCA,
- The impact of a failure to resolve the dispute on the affected party should be described.

By the time a dispute is brought to the MCA, there should have been serious attempts by the party concerned to resolve the issue bilaterally. The dispute resolution process should not be used as a replacement of commercial negotiations between parties.

The submission of the dispute must include complete documentary evidence (including evidence of attempts by the parties to resolve the issue bilaterally) to enable the MCA to initiate and conclude the process⁴.

Q.1: Do you agree with the MCA's proposed criteria for accepting a dispute submission? Give a detailed explanation for your views. Suggest any other criteria you think should be included. In doing so state why any such other criteria should be considered.

3.3 Implications of the new procedure

Once a dispute is accepted by the MCA, the scope of the dispute shall not subsequently be modified unless all the parties to the dispute agree.

From the date of notification of a dispute in accordance with the requirements in the First Annex to this Paper, MCA shall endeavour to resolve the dispute within the four month timeframe established under article 24 of the ECRA.

The MCA would like to highlight the implications of the established timeframe of four months for dispute resolution. In order to meet this objective, it is important that all the parties to a dispute fully co-operate with the MCA in achieving resolution of disputes within this timeframe. Therefore, where a party to a dispute fails to provide information or a response within the requested timeframe, the MCA will not grant an extension to that party's submission. The MCA will base its final determination of the dispute on the basis of the information available to the MCA and will not accept or consider late submissions. It is therefore essential that all submissions are detailed, submitted in good time and address all aspects of the issue under consideration.

Undertakings should note that all decisions made by the MCA under the dispute resolution procedures are binding, and failure to comply with any such decisions may

⁴ Please see the Annex to this Paper containing a summary of the required information necessary to submit a dispute for MCA's resolution.

lead to the appropriate regulatory measures including the imposition of sanctions where appropriate. This is without prejudice to the right of the parties to appeal any such decisions before the Communications Appeals Board⁵.

3.4 Alternative mechanisms

The MCA recognises that in some instances a flexible and informal approach may be a more appropriate method to resolve a dispute. Regrettably in Malta, effective recourse to alternative means of dispute resolution have not proved to be as successful as one would wish. Having said this, the MCA firmly believes that if the right attitude to such processes is taken, there will be scope for the MCA to consider alternative means of dispute resolution such as mediation. Recourse to this and other means of dispute resolution will be conditional to all the parties agreeing *a priori* to such alternative processes. In such instances the MCA will adopt the procedure it considers to be most suitable in the particular circumstances of the case and which is best conducive to resolution of the issues in the dispute.

In addition, the MCA shall also continue to deal with issues referred to it by complainants in other ways including resolution through informal contacts or negotiation, discussion and negotiation at industry fora, the MCA's own investigations and public consultation.

The MCA will continue to choose the most appropriate method for resolving a dispute on a case-by-case basis.

Q.2 Do you agree with the proposal of the MCA for alternative dispute resolution? In particular do you think that mediation may be another means of effectively resolving disputes? Are there any specific circumstances where you consider that the use of mediation would be effective?

Q.3 Are there other dispute resolution mechanisms that would be useful as a means of resolving disputes?

⁵ This Appeals Board is set up under Part VIII of the Malta Communications Authority Act (Cap. 418).

4 RESOLUTION PROCEDURES

4.1 The various steps in the dispute resolution process

When the MCA has been notified of a dispute in accordance with the requirements in the First Annex to this Paper, the dispute should be resolved within a maximum of four months, except in exceptional circumstances.

The proposed steps in the dispute resolution procedure and associated timeframes are as follows:

Step 1

The MCA receives a written notice of a dispute containing the required information outlined in First Annex to this Paper. The MCA determines whether the notice conforms to the definition of a dispute, assesses the adequacy of the information provided, and the legal basis for the dispute.

The four months timeframe will commence from the date of notification of the dispute provided this is in accordance with the requirements stated in the First Annex. If the notice does not provide any information the MCA considers essential for the initiation of the dispute resolution process, the MCA will inform the party concerned. The timeframe of four months will commence only when the MCA is satisfied that the required information has been provided.

Step 2

The MCA formally notifies the respondents of the complaint lodged against it and a copy of the dispute submission is sent to the respondent. The MCA informs the respondent when the four month timeframe commences. The respondent is allowed to make his counter submissions **within five calendar days** on whether an investigation under the dispute procedures should be undertaken by the MCA.

If considered to be necessary, the MCA will meet with the complainant and, or the respondent to discuss the dispute submissions and, or any reply thereto made in accordance with this step.

Having regard to information from the parties to the dispute, the MCA may opt for one of the following options:

- (i) – if the MCA is satisfied that other means of resolving the dispute in a timely manner are available to the parties, or if legal proceedings in relation to

the dispute have been initiated by either party to the dispute, the MCA will inform the parties of its decision not to investigate the dispute as soon as possible, giving its reasons for doing so.

If, four months from the date of a decision not to investigate, the dispute is not resolved and legal proceedings by any of the parties in relation to the dispute are not in progress, the MCA shall at the request of a party to the dispute initiate an investigation and make a determination within a further four months; or

(ii) – if the MCA decides to use the dispute resolution procedures, it will inform the parties of such a decision as soon as possible. The scope of the dispute will not be subsequently modified unless all parties agree. The MCA will also publish in brief the scope of the dispute on its website.

Q.4 Do you agree that the respondent should have the opportunity to object and, or make submissions as to whether the MCA should in the first initiative investigate the dispute? Give your reasons.

Step 3

From the date when the MCA communicates its decision to the parties availing themselves of the dispute resolution procedures as stated in Step 2(ii) above, the respondent will normally be required to respond to the dispute submissions within **fourteen calendar days**.

Step 4

Following a detailed analysis of all submissions, the MCA may do all or any of the following:

- (i) Request more information in writing from the parties,
- (ii) Meet the parties together or separately, as MCA considers appropriate,
- (iii) Decide that the issue, in part or in its entirety, may be withdrawn from the dispute procedures and that it would be more effectively dealt with using other dispute resolution mechanisms.

Step 5

MCA presents a draft determination of the dispute. Depending on the subject of the dispute and its impact on the wider market, the MCA may decide to publish the determination on its website, or may send it to the parties to the dispute only. In deciding how to proceed, the MCA will consider whether any part of the determination is commercially confidential and the relevance of the dispute to the industry in general.

In general, parties to the dispute will have **fourteen calendar days** to submit their comments to the draft determination.

Step 6

Following further analysis of all submissions, the MCA will communicate its final determination, a copy of which will be sent to all the parties to the dispute. The determination will be published on the MCA's website, having regard to any requests for commercial confidentiality which the MCA considers to be justified. The determination will include a clear statement of the reasons for the MCA's decision.

The determination will not preclude any of the parties to the dispute from making an appeal in accordance with the relevant legislation.

4.2 Other points on procedure

Where the MCA becomes aware that the information provided by the party lodging the dispute in accordance with the First Annex to this Paper is incomplete, the four months clock **will be reset** and the procedure will recommence once the MCA has been provided with the required information.

To assist the party lodging a dispute under this process, the MCA will consider the feasibility of preparing a specific form, the purpose of which will be to assist such a party in complying with the requisites under this process as detailed in the First Annex to this paper.

During the dispute resolution process, all the MCA requests for information will have a timeline for response by the parties to the dispute. The timeline will depend on the nature of the dispute and the information requested. This is necessary to ensure that the four months timeframe to resolve the dispute is met.

At any stage of the process only the parties to the dispute can make submissions and, or submit documentation provided this is strictly pertinent to the dispute. The MCA may at

any stage of the process, of its own initiative require or obtain any relevant documentation whether from the parties to the dispute or from other sources.

Where the MCA considers that it will assist to accelerate and, or ensure the smooth and equitable processing of the resolution of the dispute, the submissions of each party to the dispute may be sent by the MCA to the other party for comment.

Q.5 Do you agree with the procedures proposed? If you do not, please give your reasons.

4.3 Cross-border disputes

In the case of a cross-border dispute, the MCA shall co-ordinate its response with other NRAs involved. The EU Framework Directive does not propose a timescale for cross-border disputes. The MCA however would expect to follow the process described above, and generally communicate with the party making the dispute within fourteen days of receiving the formal notice of dispute. If the dispute has been accepted, this communication will include a proposed timetable for resolving the dispute, taking into account co-ordination with other NRAs. The MCA will monitor any relevant IRG and ERG developments in this regard.

4.4 Ensuring transparency

In order to abide with the requirements at law relating to transparency, the MCA proposes to:

- Publish the scope of any dispute on its website,
- Publish the outcome of the resolution of the dispute. The MCA's final decision will be published on its website,
- Outline the reasons for its decision.

The MCA believes that the publication of disputes, their resolution and the reasons for its decision on its website will lead to a more transparent process which will enable any party to the dispute to comment on the scope of the dispute at Step 2 (ii).

Q.6 Do you agree with the MCA's proposals regarding transparency? If not please give your reasons.

FIRST ANNEX

Type of information	Information required
Contact details	All parties
Scope of dispute	Detailed and comprehensive description of the dispute including where relevant, product or service descriptions
Legal basis for the dispute	Specific legislative background to the dispute, with reference to the relevant legal and, or contractual provisions where appropriate.
Attempts to resolve the dispute	Evidence should be provided of attempts to resolve the dispute. This should include notice of whether the dispute is or has been before any other body whether judicial or otherwise
Impact of the dispute	This should cover the impact that the issue in dispute has on the complaining party's business. Where possible this should include quantification and the relevant documentary evidence provided.
Proposed remedy	The outcome desired by the complaining party

Information should be provided in the knowledge that unless it is marked confidential and reasons acceptable to the MCA given to justify why such information should be so treated, the information shall be passed to the other party in the dispute.

All requests for dispute resolution should be sent to the following focal point within the MCA:

The Chief of Operations
Malta Communications Authority
Suite 43/44 Il-Piazzetta
Tower Road,
Sliema SLM 16
MALTA

or by e-mail to disputes@mca.org.mt

SECOND ANNEX

Article 24 of ECRA

“24. (1) In the event of a dispute arising between undertakings established in Malta in connection with obligations under the Act, the Authority shall, subject to sub-article (2), at the request of any party to the dispute, initiate an investigation of the dispute and, as soon as possible and in any case, other than in circumstances which the Authority considers exceptional, within four months from the date on which the dispute was notified to it by a party to the dispute, make a determination to resolve the dispute and ensure compliance with this Act:

Provided that nothing in this article shall be construed as restricting or prohibiting the Authority from undertaking of its own initiative any investigation of any disputes it may become aware of and which the Authority believes ought to be investigated.

(2) The Authority may decide not to initiate an investigation referred to in sub-article (1) where it is satisfied that other means of resolving the dispute in a timely manner are available to the parties or if legal proceedings in relation to the dispute have been initiated by any party to the dispute.

(3) Where the Authority decides not to initiate an investigation under sub article (2), it shall inform the parties of such decision as soon as possible thereafter.

(4) If four months from the date of a decision referred to in sub-article (3) the dispute is not resolved and the party seeking redress has not initiated legal proceedings before the ordinary courts or any other competent adjudicative fora however so described, the Authority shall, at the request of any of the parties to the dispute, initiate an investigation and give a decision in accordance with the provisions of this article.

(5) In giving a decision under this article the Authority shall have regard to the objectives under article 4.

Cap. 418.

(6) An undertaking to which a decision under this article applies shall, saving the provisions of article 42 of the Malta Communications Authority Act, forthwith comply with that decision. If the undertaking fails to do so, it shall be deemed to have committed an infringement of this article and the Authority may impose an administrative fine of not more than two thousand liri for each day of non-compliance in accordance with

the provisions of this Act. The period of non-compliance shall be deemed to have commenced from the date of notification of the decision of the Authority or from any such other date as may be communicated in the decision which date shall in any case be on or subsequent to the date of notification.

(7) In issuing a decision under this article the Authority shall state the reasons on which it is based, and shall, subject to such requirements of commercial confidentiality as it may deem appropriate, notify the parties to the dispute with a copy of the decision.

(8) The Authority shall publish notice of a decision given under this article and shall indicate where copies of or information regarding the decision may be obtained.

(9) The procedure referred to in this article shall not preclude any party to the dispute from bringing an action before the courts or any other competent adjudicative fora.

(10) The Minister may by regulation vary the periods stated in sub-articles (1) and (4).”