

REGISTERED MAIL

Our ref. DIS27

29<sup>th</sup> May 2007

**Dr. Geraldine Spiteri**

obo Euroweb Ltd, Keyworld Ltd,  
Nextgen.net Ltd, Waldonet Ltd,  
Telemail Ltd.  
72, 'Darose', Triq ic-Cawwli,  
San Gwann SGN 03

**Mr. David Kay**  
**Chief Executive**

Maltacom plc  
Spencer Hill,  
Marsa HMR 12

**Re: Review of decision entitled "Carrier Selection for VoIP Services –  
Report on Consultation and Decision" August 2005**

**1. Background**

In August 2005 the Malta Communications Authority (the 'Authority') issued a decision entitled "Carrier Selection for VoIP Services – Report on Consultation and Decision" (hereinafter referred to as the "Carrier Selection Decision").

Parts of this decision were contested by various Internet Service Providers<sup>1</sup> (the "ISPs") before the Communications Appeals Board (the "Appeals Board"). The Appeals Board in a decision dated 24<sup>th</sup> February 2006 decided that the Authority had failed in its duty as a regulator to adhere to the principle of *audi alteram partem*. The Appeals Board also stated that the Authority had not directly dealt with the complaint of the ISPs.

The Authority subsequently contested the decision of the Appeals Board before the Court of Appeal (Inferior Jurisdiction), which Court did not uphold the appeal made by the Authority and confirmed the decision of the Appeals Board.<sup>2</sup>

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<sup>1</sup> The ISPs were Euroweb Ltd., Nextgen Ltd, Waldonet Ltd, Keyworld Ltd and Telemail Ltd.

<sup>2</sup> See decision of the Court of Appeal dated 22<sup>nd</sup> November 2006 in the names Euroweb Limited etc vs. Awtorita ta' Malta dwar il-Komunikazzjonijiet.

In line with what was decided by the Appeals Board, on the 29<sup>th</sup> November 2006 the Authority wrote to the ISPs and to Maltacom plc, inviting the ISPs to present those submissions and, or documentation which the ISPs felt were not taken into account by the Authority when it had issued its Carrier Selection Decision in August 2005. The ISPs presented their submissions and documentation as per a communication dated 22<sup>nd</sup> December 2006.<sup>3</sup> The Authority subsequently wrote to Maltacom<sup>4</sup> inviting Maltacom to submit a reply to the submissions made by ISPs. Maltacom presented their reply to these submissions on the 12<sup>th</sup> February 2007. These submissions were copied to the ISPs. In their submissions Maltacom rebutted the various issues raised by the ISPs, strongly contending that there is no predatory behaviour by Maltacom in the provision of the 1021 service. Maltacom also provided commercially sensitive information including accounts under confidential cover to the Authority, requesting that these should not be passed on to the other party.

Since both parties requested the Authority not to pass the accounts and respective computations submitted to the Authority to the other party and none of the parties contested the nature of each other's requests regarding confidentiality of the information, the Authority decided not to pass on the computations of each of the undertakings to the other. There were no contestations in this regard.

## **2. Consideration of the points in issue.**

The appeal by the ISPs in substance revolves around the contention that the pricing of Maltacom's 1021 is predatory in nature.<sup>5</sup>

The Authority considers that in these circumstances the most appropriate measure to test the validity of such a contention is to consider an equally efficient operator imputation test. This is based on a test of the hypothesis on whether an operator as efficient as Maltacom can strike a reasonable margin of profit on a particular contested service.

The equally efficient operator test is based on the assumption that such a hypothetical operator would be as efficient as Maltacom in every aspect. Hence this test requires such a hypothetical operator to be equally efficient in terms of scale and scope. For this reason, the most basic form of the test requires a direct enquiry on the financial performance of the operator allegedly engaging in predatory practices. This is because if the results of the test show that the operator allegedly practising predatory pricing is in reality making a reasonable return, then the hypothesis of predation can be rejected.

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<sup>3</sup> Identical submissions obo the ISPs were sent electronically which submissions were dated the 23<sup>rd</sup> December 2006.

<sup>4</sup> As per a letter dated 12<sup>th</sup> January 2007.

<sup>5</sup> See submissions by the ISPs as per their letter dated 22<sup>nd</sup> December 2006 and the workings submitted therewith. Reference is also made to paragraph 4 of the aforesaid letter where the ISPs specifically contend that there is a net loss from the provision of the 1021 service.

As can be abstracted from this reasoning, the hypothesis of predation can be validated solely by looking at the performance of the operator allegedly practising this predatory behaviour independently of the need to determine whether another alternative operator can make a reasonable profit. This is because there can be instances where an operator's inability to match a specific market price does not stem from the fact that this price is predatory in nature, but rather because this operator is relatively inefficient in terms of either scale or scope.

The Authority reiterates the importance of these concepts when evaluating the grounds of the dispute lodged by the ISPs.<sup>6</sup>

In line with this stance, the Authority requested Maltacom to submit its separated accounts for its 1021 service for the year 2005. These separated accounts are a regulatory tool by virtue of which the Authority can have a clear view of what costs and revenues are being allocated to this service. Thus, these accounts offer a much clearer perspective upon which the Authority can base its decision.

One important consideration in taking such a route is that these accounts are not based on hypothetical data, but **reflect the actual costs and revenues generated by the 1021 service** over a year's span. It is also pertinent to note that these accounts **are based on audited figures**, thus giving the Authority the required level of comfort on the reliability of the data submitted.

The ISPs in their submissions contend that the Authority failed "to continue to look into the market". This is factually incorrect. The Authority in consonance with its commitment to keep the 1021 service under review, as stated in its Carrier Selection Decision<sup>7</sup>, requested and obtained separated accounts from Maltacom with regard to the 1021 service. The Authority also kept asking for, and obtained regular quarterly updates on the revenues and traffic generated by the service in question.

Furthermore in the exercise of its regulatory duty to keep under review the provision of the 1021 service, the Authority where it considered it necessary, met with Maltacom so as to have a fuller understanding of certain aspects of these accounts. In some instances the Authority also requested further details from Maltacom. On the basis of these investigations the Authority considers that Maltacom is achieving a reasonable level of return on its 1021 service and that there are no solid grounds for the allegation of predatory behaviour levelled against Maltacom by the ISPs.

The Authority also took into account the submissions made by the ISPs, in particular the additional hypothetical business plans incorporating the changes in the market from the time the original submissions were made. However, this evaluation failed to add value to the evidence shown by the separated accounts of the 1021 service. This is because these business plans show a scenario where all the fixed costs are being allocated solely to a hypothetical alternative international call service priced at the 1021 rates. In contrast to the submissions made by the ISPs, the separated accounts apportion the relevant fixed and

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<sup>6</sup> See submissions by ISPs as per their letter dated 22<sup>nd</sup> December 2006, in particular pg.1 thereof and points 4 and 5 of that letter.

<sup>7</sup> See Carrier Selection Decision at pg. 17 para. 2 thereof.

common costs on the various services offered by Maltacom, and hence only a relevant portion of these types of costs are allocated on the 1021 service. Furthermore these accounts are based on a consistent allocation key throughout all the services offered by Maltacom, thus ensuring methodological robustness.

The Authority appreciates that when the ISPs originally submitted these business plans, these reflected a preliminary attempt to analyse the likely impact of this market price on a hypothetical competitor. This notwithstanding, the Authority considers that the submissions made by the ISPs do not demonstrate that Maltacom is engaging in predatory behaviour.

This conclusion is based on the fact that the business plans submitted by the ISPs point to a hypothetical competitor that is solely offering an international call service upon which it is allocating all the fixed costs incurred. This scenario may not be the most efficient in practice, as evidenced by the fact that the ISPs themselves already conduct various other business activities from which they may recover the fixed costs relating to the provision of the 1021 service, in that these costs are common to various business activities being provided by the ISPs. Thus, if a hypothetical operator sets up a business model to offer only calls to international destinations, without achieving the required level of traffic, and hence turnover, to cover all its costs, it could be affected by scale and scope inefficiencies, none of which could be attributed to an alleged anti-competitive behaviour by a third party.

Another important reason why the Authority considers that further intervention with regard to the 1021 service is uncalled for, stems from the fact that a number of other undertakings providing international call services are matching the applicable 1021 prices for the major foreign destinations. The Authority notes that, incidentally, one of these undertakings – Sky Telecom Limited - is a subsidiary of one of the complainants in this dispute, namely Telemail Limited. This market reality hence contradicts the ISPs claim<sup>8</sup> that the price of the 1021 service cannot be matched.

In their submissions<sup>9</sup> the ISPs contend that the market reviews carried by the Authority show a heavy imbalance in favour of Maltacom, indicating (according to the ISPs) that competitors have been driven out of business.<sup>10</sup> The Authority feels that the fact that 1021 minutes constitute the major share of international minutes does not necessarily mean that such an imbalance resulted from a predatory behaviour. The Authority considers in this regard that the ISPs failed to support their arguments with tangible evidence, but simply based their contentions on suppositions.

Furthermore, the ISPs contend<sup>11</sup> that Maltacom is integrating the billing of the 1021 service with Maltacom's telephone bill to end-users. The ISPs contend that such a billing service is not offered at all to third parties, namely the ISPs. According to the ISPs this is a major setback to a true level playing field because, in their opinion, it is more inconvenient for a customer to use a pre-paid card

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<sup>8</sup> Ibid. Point 4 at pg.2 thereof.

<sup>9</sup> Ibid. Point 1 at pg.1 thereof.

<sup>10</sup> Ibid. Point 1 at pg.1 thereof.

<sup>11</sup> Ibid. Point 6 pg.2 et seq. thereof.

service as opposed to a post-paid alternative. The ISPs further claim that proof of how this billing issue is affecting the market is the fact that Telemail Limited is still not in a position to market a Carrier Selection and Pre-Select service in a viable manner.

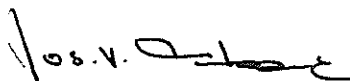
In this regard the Authority notes that the obligation imposed on Maltacom<sup>12</sup> is to provide a solution whereby carrier pre-select operators are able to provide a single bill to their customers for access and calls, irrespective of whether such access may be provided to the customers by Maltacom.<sup>13</sup> This decision has not been appealed by the ISPs.

Furthermore, the Authority considers that the 1021 service can be effectively replicated by alternative operators by making use of the wholesale inputs of carrier selection/pre-selection and wholesale line rental, all of which are provided by Maltacom as required under the aforementioned decision. Proof of the effectiveness of this solution is the fact that Sky Telecom Limited a subsidiary of one of the complainants to this dispute - Telemail Limited - is already availing itself of these wholesale inputs and providing a cluster of telephony services to its subscribers and issuing a single integrated bill to the same subscribers.

### **3. Decision**

The Authority re-evaluated all the submissions made by both parties including the additional submissions and information that both parties forwarded to the Authority.

For the reasons outlined above, the Authority determines that there is no tangible evidence to demonstrate that Maltacom have or are engaging in predatory pricing or other infringements of its regulatory obligations with respect to its 1021 services, and therefore the ISPs are not justified in the allegations levelled at Maltacom. Hence, the Authority confirms its decision entitled Carrier Selection for VoIP Services - Report on Consultation and Decision of August 2005 and considers that there is no justification for it to take any of the regulatory measures requested by the ISPs in their submissions.



**Joseph V. Tabone**  
**Chairman**

cc Mr. Stefan Briffa – Head Regulatory and Research Office, Maltacom plc,  
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<sup>12</sup> “Access to the public telephone network at a fixed - Report on Consultation and Decision” - <http://www.mca.org.mt/infocentre/openarticle.asp?id=881&pref=1>

<sup>13</sup> *ibid.* par. 4.4.3, p. 36