

Please Quote Our Ref. MCA-LEG/tc/12-0854 (LEG 367)

10th May 2012

Mr. Andrei Torriani
Chief Executive Officer
Melita Plc
Mriehel By-Pass
Mriehel BKR 3000

Dear Mr. Torriani ,

Re: Final Decision subsequent to a communication by Melita plc of a circular to its subscribers entitled "Switch off printed bills! Less paper with mymelita".

Reference is made to Melita plc's [hereafter "Melita"] circular with the heading "Switch off printed bills! Less paper with Mymelita" sent by Melita to its subscribers, and to the various communications between the Malta Communications Authority [hereafter "MCA"] and Melita, including MCA's letter of warning dated 10th April 2012, Melita's response thereto dated 23rd May 2012, and to the e-mail communications dated 26th April 2012, 30th April 2012 and 3rd May 2012. Reference is also made to various other communications prior to the issue of the aforesaid letter of warning.

1. The Facts

The issue under consideration arose following Melita's communication to its subscribers of a circular entitled "Switch off printed bills! Less paper with Mymelita". In this circular Melita informed its subscribers that as from April 2012 it would no longer send 'traditional' paper bills to those subscribers who are registered to Mymelita. Instead such subscribers would receive Melita's e-mail notifications [of the bills] at their registered e-mail address. These subscribers were informed that if they wished to continue to receive traditional paper bills they could choose to reactivate the paper bills by filling an online form.

2. Initiatives in Favour of the Environment

At this juncture, MCA would like to state that it encourages initiatives in favour of the environment. However in the present case, the MCA considers that the taking forward of the implementation of this initiative by Melita is in breach of the applicable regulatory norms enforced by the MCA as referred to below in this Decision, hence MCA's intervention and consequential issue of the letter of warning dated 10th April 2012.

3. Letter of Warning

In its letter of warning to Melita, the MCA said that Melita in issuing the aforesaid circular and informing its subscribers that they would no longer receive paper bills, effectively changed the applicable Terms and Conditions and acted in breach of the regulatory decision entitled "Modifications to the Terms and Conditions of subscriber contracts" of the 11th October 2011 (hereafter "11th October 2011 Decision"), notably decision 3.2 thereof which requires that any modifications to the terms and conditions must be notified to the MCA at least 31 days prior to their coming into force.

MCA notes that it did not receive any notification from Melita within the stipulated timeframe informing MCA of the modifications being made. Furthermore Melita in communicating the modification to its subscribers failed to give the said subscribers the right to withdraw from the contract with Melita without incurring any penalty within a period of 30 days prior to the implementation of the proposed modification to the terms and conditions [see article 23 of the Electronic Communications (Regulation) Act and also of Decision number 1 of the 11th October 2011 Decision].

4. Melita's Contentions

Melita argues that the Standard Terms and Conditions cited by MCA in the letter of warning have to be read in conjunction with the specific Terms and Conditions which according to Melita apply to Mymelita registered users.

Melita contends that that there is no breach as alleged by MCA since Melita "has not made any changes in Terms and Conditions". According to Melita the Mymelita subscribers still retain the service outlined in the specific Terms and Conditions and therefore there is no obligation of prior notification to the MCA. In addition Melita without prejudice to its other arguments notes that even if there was a change this was of benefit to the subscribers.

5. Decision

The first point to consider is whether there has been a change to the applicable Terms and Conditions. Reference in the context of the various communications between the MCA and Melita, has been to two separate sets of Terms and Conditions, namely the (Melita) Standard Terms and Conditions and the Mymelita Terms and Conditions. Factually there is no contention that clause 6.4 of the Standard Terms and Conditions has been modified as a result of the issue of the aforesaid circular by Melita. Clause 6.4 reads as follows:

“6.4 Invoices will be sent to your last known address and **we assume that you received invoices sent to you by post three days after posting.** You are liable to pay all amounts listed on the invoice notwithstanding who made use of the Service/s. Any amount that is not settled by the due date as indicated on the invoice shall be subject to: (i) interest at the then maximum rate allowed by law, until the date that they are paid by you; (ii) a Late Payment charge as stipulated in the **Schedule of Charges.**” (Emphasis in bold is of the MCA).

From the above it is clear that invoices – any invoices – will be sent by Melita via post. Melita argues however that the wording of clause 6.4 of its Standard Terms and Conditions must be read in conjunction with the terms and conditions specific to the particular service –in this case Mymelita.

MCA does not agree with Melita’s argument in this regard. MCA considers that subscribers to any electronic communications services provided by Melita are subject to the Standard Terms and Conditions of the service subscribed to, which amongst other requirements must be in accordance with the laws administered by MCA. Furthermore, these Terms and Conditions stipulate the method of invoicing that Melita committed to follow with regard to subscribers of its electronic communications services (as per Clause 6.4 above). The Mymelita service is subscribed to in a completely different manner to the electronic communications service/s offered by Melita. Factually a customer subscribing to any of their electronic communication service/s does not automatically subscribe to the Mymelita service. Therefore the Terms and Conditions of the electronic communications service are completely distinct from the Terms and Conditions that govern the Mymelita service and the former should at no point be read in conjunction with the latter as they refer to two completely distinct services.

Without prejudice to the above even if one had to accept Melita’s argument that the Standard Terms and Conditions must be read in conjunction with the Mymelita Terms and Conditions, the point remains that Melita by its own admission did factually amend the Mymelita Terms and Conditions . In fact on being asked by the MCA whether there were any changes to the Mymelita Terms and Conditions, Melita replied that clause 3.1 of the Mymelita Terms and Conditions were in February 2012 amended. The previous clause 3.1 read as follows:

“3.1 The Customer acknowledges that Self Care is provided for information purposes only and is not intended to replace receipt of bills via normal mail.”

The amended clause 3.1 now reads as follows:

"3.1 The Customer acknowledges that by subscribing to Self Care as of 1st March 2012 he/she is subscribing to E-Billing and therefore will NOT be in receipt of bills via normal mail, a one-time administrative charge may be applicable. Should the Customer decide that he/she would like to continue receiving paper bills he/she may do so by assessing www.melita.com/paperbills."

As a result, such a change to the Mymelita Terms and Conditions would automatically imply a change to the Standard Terms and Conditions of the electronic communications service/s as it directly impacts/amends Clause 6.4 of the Standard Terms and Conditions. Therefore even if one had to accept Melita's above reasoning, article 23 of the Electronic Communications (Regulation) Act and also decision number 1 of the 11th October 2011 Decision would apply.

Melita argues that there was no obligation on its part to notify the MCA with any changes to the Terms and Conditions as its Mymelita subscribers "would still be retaining the service scheduled for as outlined in the specific terms and conditions." Whilst one may agree that the service has remained the same, it is evident that an important condition relating to the mode of notification of bills was changed coupled with the possible levy of a one-time administrative charge.

Melita argues that the change in question is of benefit to its subscribers. Reference in this instance is made to article 23(4) and (5) of Cap.399, which collectively provide that:

- (1) Any proposed modifications to the contractual Terms and Conditions must be notified to the MCA, and
- (2) That the undertaking in question – in this case Melita – can make a written request to the MCA if the proposed modification is manifestly of benefit to the subscribers concerned.

It is clear from both a reading of the law and of the 11th October 2011 Decision that Melita in all instances where there is a modification to the Terms and Conditions, must first notify the MCA. From the above it is clear that Melita did not do so.

Moreover Melita appear to contend that it had no obligation to act in accordance with the requirements of article 23 and of the 11th October 2011 Decision and thereby enable impacted subscribers to withdraw from the contract following the modification in Terms and Conditions, this since according to Melita the change was of benefit to the said subscribers.

Regrettably Melita in changing the Terms and Conditions arbitrarily decided that the changes were of benefit to its subscribers and consequently chose to ignore the procedure laid down in article 23(5) whereby Melita could have requested MCA for an exemption from the application of article 23 on the basis that the changes are - according to Melita - of benefit to its subscribers.

Furthermore without prejudice to the above, as a consequence of the opt-out procedure adopted by Melita, it is being assumed that subscribers are agreeing not to continue to receive traditional paper bills unless they communicate otherwise to Melita. MCA considers the application of an opt-out in such circumstances as establishing a precedent which should be avoided. MCA is concerned that similar opt-out procedures may be applied to other cases such as for example the provision of new products at a fee not requested by the consumer.

On the basis of the above, MCA considers that Melita acted in breach of the aforesaid regulatory requirements. Accordingly an administrative fine of two thousand euro [€ 2000] is being imposed on Melita with regard to the above mentioned instances of alleged non-compliance.

Yours,



Paul Edgar Micallef
Chief Legal Advisor
Malta Communications Authority

Cc:

Dr. Getrude Borg Micallef – Legal Counsel – Melita Plc.