



## **Malta Communications Authority**

# **MCA Guidelines for Inter-Operator Complaints, Disputes & Own Initiative Investigations**

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**Decision 20<sup>th</sup> December 2008 as amended on  
the 7<sup>th</sup> January 2011**

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**Important Information:**

These Guidelines apply to the submission of complaints **by operators**<sup>1</sup> about breaches of regulatory rules **by other operators** to the Malta Communications Authority ('MCA'), to MCA's role in resolving regulatory disputes **between operators**, and to own initiative investigations undertaken by MCA.

These Guidelines **do not** apply to complaints that consumers or other end-users<sup>2</sup> may have in regard to an operator. MCA has separate processes dealing with such complaints against operators whether these operate in the telecommunications, postal or electronic commerce sectors. Details of such processes can be found on MCA's website at:

[www.mca.org.mt/consumercorner/opencomplaint.asp](http://www.mca.org.mt/consumercorner/opencomplaint.asp)

Operators that wish to make a complaint or refer a dispute to MCA, should note that these Guidelines are not a substitute for any law and do not constitute not legal advice.

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<sup>1</sup> The term 'operator' as used in this consultation refers to an undertaking providing or authorised to provide a communications network or an associated facility in terms of the Malta Communications Authority Act (Cap. 418 of the Laws of Malta).

<sup>2</sup> 'Consumer' refers to any natural person who uses or requests a communications service for purposes outside his trade, business or profession.

### **List of Abbreviations:**

- **ECRA:** Electronic Communications (Regulation) Act – Cap. 399 of the Laws of Malta
- **MCA:** Malta Communications Authority
- **MCAA:** Malta Communications Authority Act – Cap. 418 of the Laws of Malta
- **2005 Consultation:** February 2005 consultation paper issued by MCA entitled 'Dispute Resolution Procedures in relation to Disputes between Undertakings'
- **2008 Consultation:** October 2008 consultation paper issued by MCA entitled 'MCA Guidelines for Inter-Operator Complaints, Disputes, and Own Initiative Investigations'.

**! Note: Any reference to days in this paper means RUNNING days, including week-ends and public holidays, unless otherwise stated.**

## **PART I EXECUTIVE SUMMARY**

MCA is hereby outlining its proposals for an effective and clear resolution process in regard to disputes between or complaints by operators against undertakings providing electronic communications services and/or networks, and postal services as well as own initiative investigations into these sectors. This document is divided as follows:

**Part II** introduces the purpose and the 'key themes' of these Guidelines, as well as the application of these Guidelines to the postal sector. It makes reference to the guidelines submitted by MCA for consultations in February 2005 and October 2008 and the responses to the said consultations received by MCA.

**Part III** describes the difference between a **complaint** and a **dispute** and the timeframes applicable to each.

**Part IV** describes the submission and vetting procedures. This part outlines the requirements for a formal complaint or dispute to be taken up by MCA. As explained in the 2008 consultation paper, some changes have been established to the procedure which has been adopted to date, mainly in the **formal requirements** needed for MCA to take cognizance of a complaint or dispute.

**Part V** deals with the investigation procedure and describes the process of investigation and MCA's powers of investigation, together with other relevant information.

**Part VI** discusses the fact that MCA also considers other means of settling disputes, so that a formal dispute resolution procedure under Article 24 ECRA should not necessarily be the only means of resolving disputes. There are instances in which disputes are better resolved through informal intervention or negotiation by MCA, acting as a mediator between the parties.

## **PART II BACKGROUND**

### **2.1 MCA's remit in dealing with complaints & disputes**

MCA's mission is to regulate the sectors of electronic communications, electronic commerce and postal services with a view to achieving sustainable competition, enabling customer choice and value for money, coincident with contributing to the development of an environment that is conducive to investment and continued social and economic growth.

In order to carry out these regulatory functions, MCA is at law provided with the tools to intervene either where there is a disagreement between operators of electronic communications, postal or e-commerce services respectively, or where there is a breach of the law or of a regulatory obligation onerous on such operators. In such cases the aggrieved operator may request MCA to initiate an investigation; alternatively MCA may commence an own initiative investigation if it considers that there are valid grounds to warrant its intervention.

**Article 43 of the MCAA** is the principal article which regulates the resolution process involving disputes between operators established in Malta. These Guidelines accompany the legislation in detailing the procedures to be adopted during the submission and investigation of these matters.

### **2.2 Key Themes**

- The distinction between a **complaint** and a **dispute** and the different procedures applicable to each;
- An introduction of formal requirements in order for MCA to take cognizance of a complaint or a dispute;
- The procedure carried out in the various stages following submission of a complaint or dispute, or of an *ex officio* investigation;
- The time frame within which disputes or complaints must be resolved;
- Transparency of the proceedings, information to the parties, and publication of the final decision;

- The possibility of recourse to alternative dispute resolution mechanisms.

### **2.3 MCA's approach when handling complaints or disputes**

MCA will generally operate on a need only intervention basis, but with a willingness to intervene firmly, promptly and effectively where required. MCA will strive to ensure that its interventions are evidence-based, proportionate, consistent, accountable and transparent in both deliberation and outcome. MCA will seek the least intrusive regulatory mechanisms in dealing with disputes or ensuring compliance with regulatory requirements.

These Guidelines set out MCA's approach in its handling of inter-operator complaints and disputes, of own initiative investigations, and the procedures to be followed. The Guidelines are intended to help operators understand MCA's processes and how best to present a case so that MCA can deal with it in a cost-effective, quick and efficient manner. These Guidelines do not bind MCA. However where MCA departs from them, it will give its reasons for doing so.

MCA will keep these Guidelines under review and amend them as appropriate in the light of gained experience and developing law and practice.

### **2.4 Suggestions to operators before making a complaint or referring a dispute**

- **Speak to MCA first:** MCA is always prepared to discuss matters prior to their formal submission as a complaint or dispute. MCA may not be able to give a view on the merits of complaint or dispute, but it may be able to indicate its approach on a regulatory rule or refer an operator to previous investigations dealing with similar issues. MCA recognises the value of interactions which may prevent complaints or disputes, thereby solving issues without a formal investigation.
- **Seek to resolve matters through commercial discussions:** In so far as disputes are concerned it is invariably always in the interest of the operators concerned to engage in commercial discussions before submitting a dispute. In many instances issues are resolved following such discussions without the need of any regulatory intervention. It is only if it results that such discussions are fruitless that an operator should consider recourse to MCA.

- **Gather all the relevant information:** In some cases, allegations or issues raised cannot be adequately investigated because not enough information is provided to support the claims made, or because some important material detail is not provided. An operator should ensure that it provides MCA with all available relevant information to support its claims.

## 2.5 Responses to the 2005 Consultation – An Overview

In February 2005, MCA issued a consultative paper entitled 'Dispute Resolution Procedures in relation to Disputes between Undertakings'. This consultative paper dealt with the formal requirements pertaining to the submission of a dispute, the process of investigation following such submission, transparency in the proceedings and alternative dispute resolution processes. It also proposed extending this procedure to the postal sector.

Points focused on in the responses to the 2005 Consultation included the following:

- In filing a dispute it is enough if an aggrieved operator demonstrates that it has a juridical interest.
- There were divergent views on whether an aggrieved operator should be required to demonstrate that it tried to have commercial discussions with the other operator, prior to the filing of a dispute with MCA. One respondent commented that there may be circumstances where it may not be practical to expect the operators to the dispute, to engage in discussions to resolve their dispute before going to MCA. Conversely another respondent commented that the dispute resolution process should not be used to replace commercial negotiation between operators.
- On timeframes, most respondents commented that these should be extended, whether at the initial enquiry phase, or when replying to the dispute proper. Moreover most respondents said that MCA should abide with the four months timeframe onerous on it in determining disputes.
- Some respondents commented that the informed determination of disputes between providers of electronic communications requires technical knowledge and experience about the sector, and that MCA as the body best equipped to determine disputes relating to the sector, should deal with such disputes. One respondent further suggested that

the 2005 Consultation should have addressed the scope of jurisdiction that at law MCA and the Office of Fair Competition respectively have. This respondent commented that because of its technical expertise in the sector, MCA should have exclusive jurisdiction in relation to disputes between operators in the electronic communications sector.

- MCA should, at all stages, be mindful of each operator's commercial confidentiality requirements. If MCA considers that particular information marked as confidential, should not be treated as such, it should accordingly inform the operator concerned, affording that operator the opportunity to justify its request for confidentiality.
- Alternative means of dispute resolution, including recourse to arbitration or use of mediation, should not be discarded. Such means are to be resorted to if all the operators to the dispute agree.
- Guidance on the way in which MCA will treat disputes outside the scope of its dispute resolution powers was requested. Submissions relating to complaints where an operator allegedly acts in breach of a statutory requirement were given as an example.
- MCA should be vested with powers to impose interim measures and suspend any disputed action, which can potentially cause irreparable harm to the industry and to competing operators during the continuation of the dispute.<sup>3</sup>

## **2.6 Responses to the 2008 Consultation**

MCA received only two responses to the consultation paper proposing these Guidelines. The responses received were from two postal operators, namely Maltapost plc and Premier Post. The salient points of the replies are summarized hereunder:

- One of the respondents remarked that the Guidelines should apply not only to licensed postal operators but also to: i) operators which are not licensed by MCA but which nevertheless carry out activities that fall within the regulatory ambit of MCA; and ii) operators licensed by MCA which carry out activities that fall outside the scope of their license, but which activities are regulated by the MCA. Consequently, the term 'operator' as used in the consultation

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<sup>3</sup> It is to be noted that Art. 31(4) of the MCAA empowers MCA to take interim measures to remedy a situation in advance of reaching a final decision.



was amended and now refers to *an undertaking **providing** or authorised to provide a communications network or service, or an undertaking **providing** or authorised to provide postal services or e-commerce services, under any law enforced by MCA.*

- One of the operators commented on point 2.4 of the Guidelines to the effect that collection of information may not always be possible for the operator bringing forward a complaint or a dispute, and that MCA is better placed to assist in collecting the required information. On this matter, MCA feels that first and foremost, it is in the interest of all operators that MCA should not investigate unsubstantiated claims; therefore, it shall maintain its position of requiring a level of evidence which provides a 'prima facie' case. This of course does not mean that the operator making a submission is expected to provide evidence which cannot be collected. MCA's position is that it will require that all allegations are properly backed by evidence, which it will then investigate further.
- There was also disagreement with the withholding of information to the complaining operator in the case of a complaint, as opposed to a dispute. MCA feels that this is the essence of the distinction between a complaint and a dispute: a complaint is likened to a report made to an executive authority. Being a report making a complaint, the complainant is not a party to the case and should not be entitled to know the details of each step in the procedure.
- Another comment submitted was that a degree of flexibility should be allowed when processing disputes and complaints, particularly in the early stages of the implementation of the Guidelines. MCA feels that the possibility of a 'degree of flexibility' would undermine the purpose of the Guidelines, i.e. that of requiring a level of formality which in turn seeks to ensure an all-round level of certainty to all operators; therefore, MCA must uphold the requirements created in these Guidelines at all times. Operators should keep in mind that in the event of any doubt, MCA is available to answer questions. Additionally, MCA will keep the Guidelines under continuous review.
- Both operators had differing views to those expressed by MCA in cases of confidentiality, particularly with respect to MCA's requirement of submitting a confidential version with the original submission, if confidentiality is claimed by the operator making such submission. One of the respondents agreed that operators should indicate where confidential information exists, but MCA should automatically treat information as confidential when this information is confidential by nature. The other respondent stated that before divulging

confidential information, even if MCA is of the opinion that it should not be treated as such, MCA should contact the concerned party and ask him if the information can be produced in a non-confidential manner. In this respect, MCA emphasizes that if an operator is claiming confidentiality, he must be responsible for filtering out the confidential parts of his submission, rather than expecting MCA to do this. This will ensure that when making a submission, the operator should be able to make a well substantiated case with enough information for the other party to be able to defend itself. MCA will therefore strictly adhere to the requirement for the production of a non-confidential version of a submission.

- One operator stated that the period to substantiate an operator's claim once it is referred back to it by the Authority, when such claim appears to be serious but not sufficiently substantiated, should be extended to five (5) working days, rather than five (5) running days. This refers to the matter of 'tentative acceptance' described in point 4.4. MCA would like to point out that 'tentative acceptance' is merely an extra chance given to the operator submitting the dispute before the submission is rejected or accepted. Consequently, the preparatory work should have been completed before the submission, and five (5) running days is more than sufficient for this purpose. This is **not** to be confused with MCA's faculty to ask for further information in the investigation period as per point 6.2.
- A respondent suggested that a complaint should be resolved within the same period as a dispute, preferably within a shorter period, especially due to negative repercussions it may have on the business. In this respect, MCA will always seek to resolve disputes or complaints in the shortest time possible; however complaints require more investigation and resources, as they are wider in scope, hence the additional time frame.
- Another comment received was that MCA should deal with dispute tackling and settlement even in case of contractual disagreements, not solely regulatory issues. Whilst MCA may be called upon to arbitrate upon a dispute relating to the communications sectors as regulated under MCAA, it can only act in accordance with its remit at law and therefore cannot intervene in private contractual matters unless requested as described above.
- A final remark by one of the respondents stated that it is important that MCA's decisions are enforceable and binding unless contested before a Court of Law or Tribunal. MCA would like to point out that in effect, a decision of the MCA in a referred complaint or dispute has always been binding and enforceable as detailed in the MCAA.

## **2.7 Applying the Guidelines to all the communications sectors under MCA's remit**

There is no valid reason why the same process adopted with regard to complaints and disputes involving operators in the electronic communications sector should not be adopted in the other communications sectors falling under MCA's remit. Having the same process and timeframes apply has the merit of ensuring uniformity and consistency in the handling of complaints or disputes by MCA. The alternative of having different processes depending on the sector, can lead to confusion. Taking a uniform approach is moreover a logical sequence to the approach taken under the MCAA, where certain uniform measures exist in relation to the sectors falling within the remit of MCA, including the establishment of the Communications Appeals Board with the remit to determine appeals relating to all sectors, and a common compliance regime.

## **PART III DISPUTES AND COMPLAINTS**

### **3.1 Distinguishing between a complaint and a dispute**

It is essential that one is able to distinguish between a complaint and a dispute as there are some differences between the process for investigation of complaints and the process for resolving disputes, both regard to the extent of the output required by the operators concerned when originally making their submissions as well as with regard to how a complaint and a dispute are tackled and determined.

#### **A DISPUTE is:**

- Where operator A has a **specific obligation towards operator B** arising out of a law which MCA is entitled to enforce; AND
- Operator A is alleging that operator B is not complying with such obligation, **even after attempted negotiations.**
- Focus of submission = resolution of **specific issue** between operator A and Operator B.
- A's non-compliance impacts B directly.

#### **A COMPLAINT is:**

- Where operator A has a **generic** obligation which is **NOT specific** to operator B, arising out of a law which MCA is entitled to enforce; AND
- Operator B is making a report that operator A is engaging in **general non-compliant behaviour.**
- Focus of submission = to ensure compliance with A's **generic obligations at law.**
- A's non-compliance has a 'general effect'.

### 3.2 Is it a Dispute?

The following questions offer some help in deciding if the submission should be framed as a dispute:

- Identify the **main objective** of your submission – which law/decision/directive is being breached? Where does it arise?
  - Does this law, decision or directive impose an **obligation** on the other party **towards you**?
  - Were there, or should there have been **commercial negotiations** as a result of this obligation?
  - Could this situation have been solved by such commercial negotiations with the other party, if they were amenable to discussion?
  - Are you seeking to **resolve** a particular situation in which you are a party, or are you complaining about a behaviour which has an 'indirect' effect on you by giving the other party a competitive advantage?
  - Are you complaining about **behaviour specific to one situation**, and **specific to you** or is it a more '**general**' type of behaviour that you wish to complain about?
  - Do you have a **contract** with the other party regulating this kind of situation?
  - Is there a **direct relationship** between you and the other party in this particular situation?
- ! **Where any doubts arise as to the kind of submission you wish to make, it is best to contact the MCA in writing BEFORE filing the submission, by sending an email to [disputes@mca.org.mt](mailto:disputes@mca.org.mt).**

### 3.3 Comparison between Disputes and Complaints

| Dispute  | Complaint  |
|--|--|
| Comparable to private dispute where the parties resort to a civil lawsuit in order to resolve issues between them. | Comparable to public proceedings where a person makes a report of illegal behavior to the public authorities asking them to investigate. |
| Is in relation to an <b>obligation</b> which the investigated party has <b>towards the party alleging</b> .        | Is in relation to a <b>general obligation imposed</b> upon the investigated party.   |
| Obligation must arise under an <b>identified law/decision/directive</b> which MCA is entitled to enforce.          | Obligation must arise under an <b>identified law/decision/directive</b> which MCA is entitled to enforce.                                |
| Only open to an operator who has <b>negotiated in good faith</b> but failed to reach agreement.                    | Does not follow negotiation.   |
| Resolved within <b>4 months</b> according to law.  | Resolved within <b>6 months</b> according to internal policy.  |
| Operator submitting the dispute treated as a 'party' to the proceedings.   | Operator submitting the complaint <b>NOT</b> treated as a 'party' to the proceedings.  |
| Examples: provision of network access, breaches of RIO obligations.  | Examples: discounts in breach of cost orientation obligation.  |

### 3.4 Timeframes: commencement & conclusion of the investigation of a complaint or dispute

Whilst **Article 43 of MCAA** states that disputes must be resolved within **four (4)** months, there is no equivalent timescale for the conclusion of an investigation following a complaint. This notwithstanding MCA will try to conclude its investigations of a complaint within a period of **six (6)** months barring circumstances beyond MCA's control which may lead to delays. Such longer timeframe is required in the case of complaints due to the fact that more time and resources are required in such cases in order to reach informed conclusions.

| Type of investigation | Timeframe  |
|-----------------------|--|
| <b>Disputes</b>       | 4 months for a 'Statement of Decision' in accordance with Article 43 of the MCAA.  |
| <b>Complaints</b>     | A timeframe of 6 months is hereby being established by way of guidance for these types of complaints, but shall not act an established time frame binding MCA. |

Such timeframes shall commence from the receipt by MCA of a properly **completed** submission. **This shall include the submission of a non-confidential version of the complaint where so required.** In order to comply with the four (4) months timeframe set for determination of a dispute, it is important that all the operators to the dispute fully co-operate with MCA in achieving resolution of their dispute within this timeframe. Hence MCA shall not consider any late submissions and will base its final determination of the dispute on the basis of the information available to it. Moreover, where appropriate, MCA shall take regulatory measures against any operator which has in any way impeded the timely conclusion of an investigation.

## **PART IV**

### **THE SUBMISSION & VETTING PROCEDURES**

#### **4.1 Formalities of the submission procedure**

Whilst MCA shall take account of all submissions received by it within the prescribed timeframes, it shall, as a general rule, reject a submission both in regard to a dispute and in regard to a complaint, which *prime facie* does not present a **valid case** supported by **enough evidence** to justify to MCA that an investigation is warranted. In particular MCA shall not commence or continue an investigation in response to unsubstantiated allegations, inadequate submissions or on the basis of evidence which is materially incorrect.

MCA shall reject a submission lodging a **dispute** unless it is satisfied that serious attempts by the operator referring the dispute were made to resolve the dispute bilaterally. MCA shall reject **complaints** which are not specific or which *prima facie* appear to be frivolous or unjustified. Hence a generic allegation that a broad set of *ex-ante* conditions has been breached is inadequate.

**Annexes II and III** to this document list the formalities and essential information to be provided when either lodging a complaint or referring a dispute.

Reasons **why submissions are not accepted** include the following:

- The operator making the complaint does not refer to a specific regulatory provision which it believes was breached or fails to provide any evidence or reasoning why that provision has been breached.
- The operator making the complaint makes generic claims alleging breach of regulatory requirements without specifying the conduct in question.
- The dispute raised is the result of contractual disagreement between the operators concerned and is unrelated to regulatory issues falling within the remit of MCA.
- The complaint or dispute falls within the remit of another public authority and that authority is better placed to handle the complaint or dispute (e.g. complaints relating to comparative or misleading advertising).



MCA shall normally accept **a complaint** only if the operator making the complaint:

- Clearly identifies the relevant *ex ante* condition, regulatory obligation or provision of the law which is being breached;
- Submits sufficient evidence to back its allegations including evidence of harm suffered or which it may reasonably expect to suffer, and where available, evidence of actual or potential effect on consumers; and
- Submits a statement signed by an authorised representative, ideally being the chief executive, that due care has been taken to ensure that the submission and any supporting evidence is correct and complete.

MCA shall normally accept **a dispute** only where the operator raising the dispute submits clear information on the dispute including:

- A clear and comprehensive explanation of the commercial context to the dispute;
- Clear reference to the relevant regulatory conditions which form the basis for the dispute;
- A clear motivated statement as to why the dispute is being raised stating the prejudice being suffered or that may be suffered, and the intervention being sought from MCA;
- Tangible evidence of commercial negotiations on all issues covered by the scope of the dispute; and
- A statement by an authorised officer, preferably the chief executive, of the operator referring the dispute, that it has used its best endeavours to resolve the dispute through commercial negotiation with the other operator and that due care has been taken to ensure that the submission and any supporting evidence is correct and complete.

Notwithstanding any of the above requisite formalities, MCA shall have the discretion to waive any of the said formalities where the complaint or the dispute raises serious issues which MCA considers merits investigation, whether as a complaint or a dispute, or through the initiation of an own investigation.

The conduct of an investigation of a complaint or dispute shall not in any manner be construed as limiting MCA's responsibility at law to consider taking action if MCA becomes aware of any infringements that are not part of the original ambit of the investigation.

## **4.2 Confidentiality Claims in Submissions**

MCA shall at all times take all the steps necessary to ensure compliance with confidentiality and data protection obligations. **It must be noted however that all submissions containing confidential information must be accompanied by a 'non-confidential version'**. The submission must also contain the reason why such information is considered confidential as the operator concerned shall not be given the opportunity to request information not marked as confidential to become confidential at a later stage.

**! Submissions claiming to be confidential but not accompanied by a confidential version will be rejected.**

MCA may refuse to take cognizance of a submission if it considers that it cannot sufficiently investigate the matter due to very stringent confidentiality claims.

## **4.3 Vetting of the Submission**

Upon receipt of a submission, MCA will commence an internal vetting process of such submission. If at this stage MCA considers that *prima facie* a submission does not comply with any of the essential formalities referred to under Parts 4.1 and 4.2 of these Guidelines, it will then inform the operator concerned that its submission is not being accepted, stating its reasons.

If MCA considers that the submission does comply with all the essential formalities, then MCA will send a Notice of Investigation to the operator against which allegations are being made as detailed in Part 5.1 of these Guidelines.

Once a submission has been accepted, it cannot be modified unless there are valid reasons for such modification and a request for modification is requested and acceded to by MCA. Modification will mean that the timeframe in dealing with a dispute or complaint has to be extended.

Acceptance or rejection of a submission will be notified within **fifteen (15)** days from receipt of such submission.

If MCA is satisfied that other means of resolving the issue in a timely manner are available to the parties, or if other proceedings in relation to the issue have been initiated by either party, MCA may decide not to investigate the matter informing the parties concerned accordingly.

**! In particular, it must be noted that whilst evidence of attempted negotiation is not a mandatory condition for the acceptance of a complaint, where MCA feels that the matter could have been better solved through commercial discussions, and no such attempts were made, MCA may decide not to open investigation and take appropriate measures which may include:**

- **treating the matter under facilitation/mediation procedures instead; OR**
- **stating that the submission was frivolous and vexatious.**

#### **4.4 'Tentative Acceptance'**

In cases where the claims made in the submission appear to be serious, notwithstanding the fact that the claim is not sufficiently substantiated, MCA has the discretion to make a decision of 'tentative acceptance', whereby more information will be demanded from the operator submitting the claim. The submission will be automatically rejected if the required information is not submitted within **five (5) days** from the date of a notification of a 'tentative acceptance'. In the case of a 'tentative acceptance' the submission shall be deemed to have been received **only** on the date when MCA has received the additional information requested.

## **PART V THE INVESTIGATION PHASE**

### **6.1 The investigation: differences between disputes and complaints**

The posting of a Notice of Investigation marks the commencement of the investigation phase. Such notice shall contain a copy of the original submission, (or a non-confidential copy of in cases of confidential submissions). MCA reserves the right to publish the salient points of the Notice of Investigation on its website.

It must be noted that the procedure will differ in the case of disputes and complaints. As mentioned earlier, a comparison is being drawn between 'civil' private lawsuit and public prosecution cases when dealing with these two kinds of submission. Thus a **dispute** will be likened to a 'civil' case whereby the parties are entitled to all the information being provided by the other party, in order for him to be able to make a sufficient case to rebut allegations against him.

A **complaint**, on the other hand, is similar to a public prosecution case, where the complainant files a report with the public authorities, and may be called to give evidence. The complainant is NOT however entitled to the details of the investigation of the complaint, and does NOT have the right to make further submissions during the investigation, unless in the form of further evidence requested by MCA.

Consequently, whilst the operator against whom allegations are being made shall always receive a copy of the submissions made against him, the party making the submission will only receive the other party's replies in the case of **disputes**, but not in the case of **complaints**.

### **6.2 Investigation Procedure**

In conducting the investigation, MCA shall avail itself of all the powers bestowed upon it by virtue of Part VII of the Malta Communications Authority Act (Chapter 418 of the Laws of Malta). The steps in the procedure shall be as follows:

- i. The respondent is allowed **fifteen (15) days** from receipt of the Notice of Investigation within which to make his counter submissions as to the substance of the allegations. **It is to be noted that all submissions containing confidential information must be accompanied by a 'non-confidential version'**. In this respect, reasons for which such information is to be kept confidential shall be given at this stage, as it shall not be given the

opportunity to request confidentiality at a later stage. MCA shall have sole discretion as to whether such confidentiality request is justified or otherwise.

- ii. Following a detailed analysis of all submissions, MCA may:
- **Request more information from the parties**, to be given within the timeframes stipulated.
  - **Meet the parties together or separately**, as MCA considers appropriate, possibly also hearing the evidence as may be required;
  - **In the case of disputes, request a further round of submissions.** This shall at all times be at the sole discretion of the MCA.
- iii. MCA shall issue a Final Decision which is notified to the parties.

### **6.3 Statement of Decision**

When the investigation has come to an end and MCA has reached its decision, it will publish a 'Statement of Decision' declaring the investigation closed and detailing the results of such investigation, together with a reasoned decision on the matter. In the event of confidential information contained in the decision, a non-confidential version of the 'Statement of Decision' will be given.

A non-confidential version of the Statement of Decision will be published on the MCA website. MCA reserves the right to publish a non-confidential version of the 'Statement of Decision' in additional ways, including the publication in local newspapers and other media.

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

### **6.4 Own Initiative Investigations**

MCA shall have the discretion to initiate an investigation on its own initiative in those cases where it deems that this may be required, irrespective of the manner in which MCA has become aware of the behaviour requiring investigation. Such investigations will normally not be published on the MCA website, nor made public unless MCA considers publication to be necessary.

MCA will generally inform the operator being investigated that the investigation is taking place, but shall refrain from doing so if it considers that doing so will be detrimental to the investigation. When the operator is informed, the same rules for the Investigation Phase shall apply, where pertinent. In conducting such investigation, MCA will also avail itself of all the powers bestowed upon it by virtue of Part VII of the Malta Communications Authority Act (Chapter 418 of the Laws of Malta).

## **PART VII: Alternative Mechanisms of Dispute Resolution**

MCA recognises that in some instances a flexible and informal approach may be a more appropriate method to resolve a dispute. An example of such alternative methods of resolution is **mediation**.

At this stage, MCA does engage in facilitation of discussion between operators, with the aim of achieving a workable solution to any incident without recourse to more forceful procedures. This is not however a formal kind of mediation procedure.

Recourse to formal mediation procedures and other means of dispute resolution will be conditional to all the parties agreeing *a priori* to such alternative processes. In such instances 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 this respect, MCA shall not be bound by the timeframe listed by law above.

In addition, MCA will 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, MCA's own investigations and public consultation.

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

## **Part VIII**

### **Failure to make submissions in good time.**

A party to a dispute or a complaint, or an operator which is being investigated by MCA as a result of an own initiative investigation by MCA, should:

- provide full disclosure of information and facts relevant to the matter under investigation; and
- ensure that exhaustive submissions are made, within the timeframes established by MCA regarding the subject of the investigation, dispute or complaint.

Where a party to a dispute or a complaint, or where an operator being investigated by MCA as a result of an own initiative investigation, fails to submit within such timeframes given by MCA in accordance with the applicable processes, such documentation however so described and, or make such submissions as may have a substantive bearing on any final decision of MCA and subsequently such operator without giving any valid reason acceptable to MCA, decides post the applicable deadline to forward such documentation and/or make such submissions, then MCA may impose an one off administrative fine ranging from a minimum of €200 up to a maximum of €2,000.

Before imposing such a fine MCA will act in accordance with the applicable procedures under the Malta Communications Authority Act (Cap. 418 of the Laws of Malta).

In determining the amount to be imposed in such cases, MCA may factor any or all of the following:

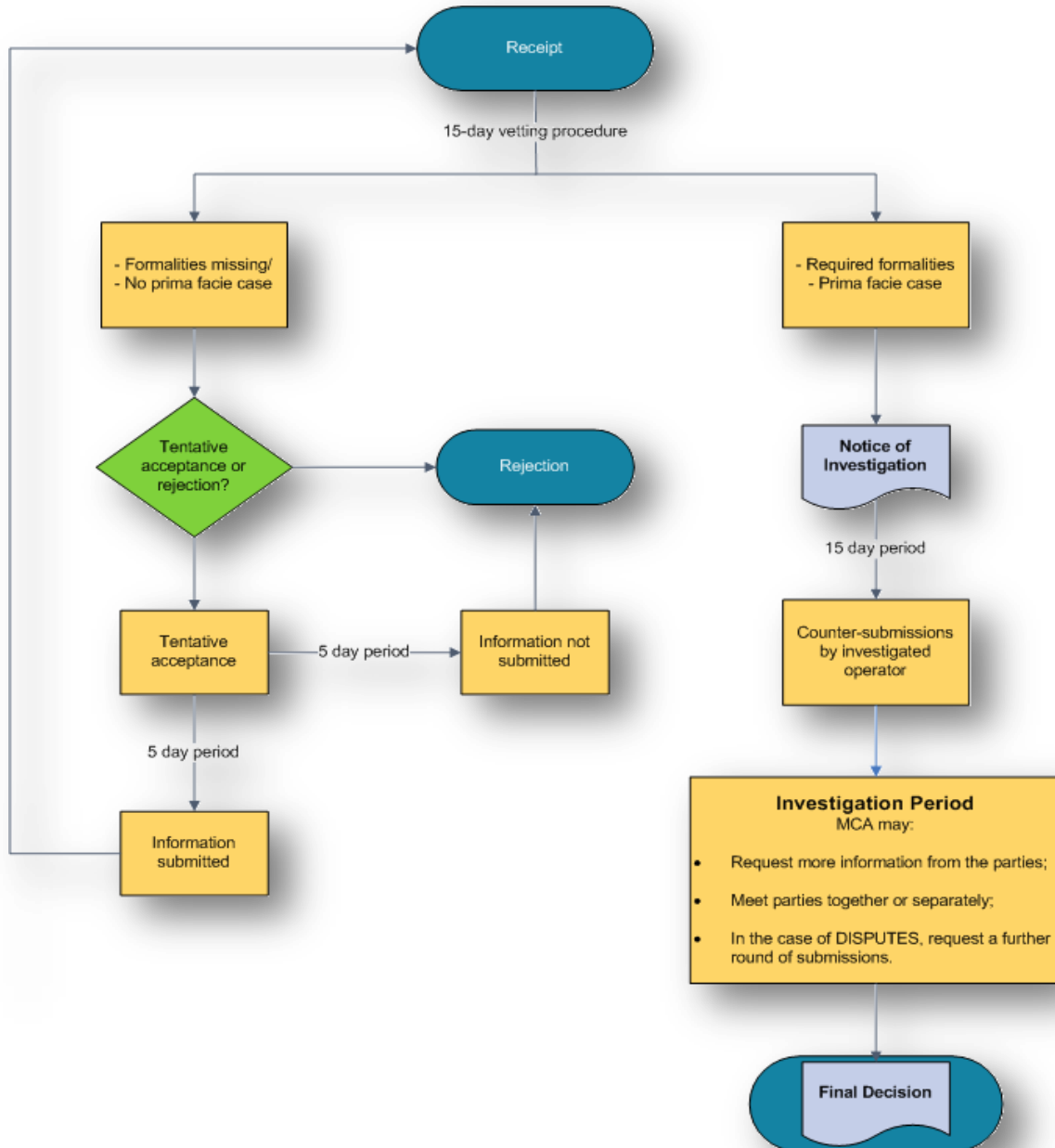
- The gravity of the failure;
- The reasons if any given by the party concerned;
- The nature of the complaint/dispute/investigation;
- The time span involved post the date when the documentation/submissions had to be made.

The above is without prejudice to MCA reserving the right to establish whether it should be taking cognisance at all of any facts, information or explanations, however so described, submitted following the expiry of the prescribed timeframes. The MCA will do so only in exceptional circumstance.





## Annex II Procedure Overview



## **Annex II**

### **Format for submitting COMPLAINT to MCA**

#### 1. ADDRESSING A COMPLAINT

A request for resolution of a complaint should be submitted in writing and sent by e-mail and by post to the following:

**Inter-operator Complaints  
Legal Affairs Group  
Malta Communications Authority  
Valletta Waterfront  
Pinto Wharf  
Floriana  
FRN 1913  
Malta**

**e-mail: [disputes@mca.org.mt](mailto:disputes@mca.org.mt)**

**Tel: 21336840**

#### 2. COMPLAINTS

Please note that a **complaint** arises when an operator alleges that another operator is acting in breach of a statutory requirement, irrespective of whether the alleged breach impacts the operator making the complaint.

#### 3. FURTHER GUIDANCE

If you need any further guidance on how to submit a request for complaint resolution to MCA please contact the Legal Affairs Group either through the email above or through the same contact number during business hours. In any case a complaint should only be raised in relation to an infringement of any law which MCA is empowered to enforce, or of any decision or directive issued by MCA.

#### 4. INFORMATION TO OTHER PARTIES AND CONFIDENTIALITY

On receipt, MCA will send a non confidential version of your submission to the parties named in your complaint submission. **If your submission contains confidential information, you should therefore provide a separate non confidential version which can be copied to the other parties.**

In the event that MCA accepts your submission, MCA may publish details, including the business names of the parties to the complaint on MCA's website.

## 5. CONTENTS OF THE COMPLAINT SUBMISSION DOCUMENT

### **Section A - Preliminary information**

- Summary of complaint (background, undertakings concerned, products/services, key dates, alleged infringement, harm done, relief sought);
- Business name, address, telephone/fax number, and/or e-mail address and, if relevant, the contact details of a person who can discuss the detail of a complaint;
- Details of the other operators being complained against; details of the relationship between the complainant and the operator complained of.

### **Section B - Legal basis for the complaint**

- Specify the applicable *ex ante* condition(s) which you consider is/are being breached by the operator complained of and a clear explanation of why you believe the condition(s) is/are being breached.
- Include a view on the relevant economic market and whether any communications provider in that market has been designated as having SMP.

### **Section C – Details of the complaint**

- An explanation of the reasons for the complaint;
- The products and/or services concerned by the complaint;
- Relevant dates and incidents;
- Details of any relevant contact with the operator complained of;
- A chronology of events;
- If the complainant is alleging that his business, the market or consumers have been affected by the alleged activity, evidence to back up such allegations;
- Relief/remedy sought including details of the timing/urgency of the complaint and reasons;
- Names of other industry members or other persons who can support the complaint.

**Section D - Factual evidence supporting the allegation and verification by an officer of the company**

This section must contain well detailed factual evidence available to support the allegation made. See paragraph 4.1 of the Guidelines for further guidance.

**Section E - Other relevant information**

Any supporting information should be provided with the complaint, including, for example:

- copies of any relevant industry reports/consumer surveys;
- details of any similar complaints/investigations/proceedings concerning the same or similar products/services.

**Declaration by an officer of the company:**

Before making this submission to MCA, to the best of my knowledge and belief, [company name] has used its best endeavours to resolve this complaint through commercial negotiation.

Signed:

Position in the Company:

Date:

## **Annex III**

### **Format for submitting a request to MCA to resolve a DISPUTE**

#### 1. ADDRESSING A DISPUTE

A request for resolution of a dispute should be submitted in writing and sent by email and by post to the following:

**Inter-operator Disputes  
Legal Affairs Group  
Malta Communications Authority  
Valletta Waterfront  
Pinto Wharf  
Floriana  
FRN 1913  
Malta**

**e-mail: [disputes@mca.org.mt](mailto:disputes@mca.org.mt)  
Tel: 21336840**

#### 2. DISPUTES

Please note that a **dispute** is the result of a failure of commercial negotiation between two operators about a matter that falls within MCA's remit, such as the provision of network access or other regulatory conditions imposed by MCA, which directly link to the commercial relationship between one operator and another.

#### 3. FURTHER GUIDANCE

If you need any further guidance on how to submit a request for dispute resolution to MCA please contact the Legal Affairs Group either through the email above or through the same contact number during business hours. In any case a dispute should only be raised in relation to an infringement of any law which the MCA is empowered to enforce or of any decision or directive issued by the MCA.

#### 4. INFORMATION TO OTHER PARTIES AND CONFIDENTIALITY

On receipt, MCA will send a non confidential version of your submission to the parties named in your dispute submission. **If your submission contains confidential information, you should therefore provide a separate non confidential version which can be copied to the other parties.**

In the event that MCA accepts your submission, MCA may publish details, including the business names of the parties to the dispute on MCA's website.

## 5. CONTENTS OF THE DISPUTE SUBMISSION DOCUMENT

### **Section A - Preliminary information**

- A clear and concise description of your dispute stating that the dispute is being lodged on the basis of article 43 of Malta Communications Authority Act (Cap. 418 of the Laws of Malta).
- Business name, address, telephone/fax number, and/or e-mail address and, if relevant, the contact details of a person who can discuss the detail of the dispute.
- Details of the other parties involved in the dispute.
- Details of the relationship between the parties to the dispute.

### **Section B - The issues in dispute**

- A full statement of the scope of the dispute, including:
  - ✓ A list of all the issues which are in dispute;
  - ✓ Full details of the relevant products or services.
  - ✓ If the dispute relates to a request for a new access product:
    - business plans of relevant product or service including forecasts, demonstrating how and when you intend to make use of the products or services requested.
  - ✓ In the case of disputes involving contracts:
    - a copy of the relevant version of the contract, clearly identifying the clauses that are subject to the dispute.
- A description of the *ex ante* conditions to which the dispute relates, including a view on the relevant economic market and whether any communications provider in that market has been designated as having SMP.
- You should explain why you consider that the relevant obligation is not being met, for example, if you make an allegation that a charge is not cost oriented you must set out your reasoning.
- Details of the way in which you wish to see the dispute resolved, including an explanation as to why MCA should reach this outcome.

**Section C - History of commercial negotiations**

- A description of any negotiations which have taken place between the parties; or, in the event that a party has refused to enter into negotiations, evidence to suggest that you have taken reasonable steps to engage the party in meaningful negotiations;
- Details of the steps taken to resolve all of the issues which are in dispute;
- An explanation of why commercial agreement could not be reached;
- Relevant documentary evidence of commercial negotiations, covering the whole period of negotiation, including correspondence, notes of meetings and telephone calls, and a chronological summary of the events;
- Details of any options or proposed solutions put forward by any party during negotiations, including what, if anything, was accepted, what was rejected and why.

**Declaration by an officer of the company:**

Before making this submission to MCA, to the best of my knowledge and belief, [company name] has used its best endeavours to resolve this dispute through commercial negotiation, and the information provided in this submission is correct and complete.

Signed:

Position in the Company:

Date: