



**GUIDELINE ON PROCEDURES UNDER THE
TELECOMMUNICATIONS (JERSEY) LAW 2002**

20 April 2009

Introduction

1. This Guideline describes the Jersey Competition Regulatory Authority's ("JCRA") procedures with respect to the exercise of its regulatory functions as set out in Articles 7 and 11 of the Telecommunications (Jersey) Law 2002 ("the Law"). The Guideline is the product of a two-phase consultation exercise carried out in 2008 and is published in the interests of transparency, to assist those the JCRA regulates in the telecommunications sector. It is also published in the light of some of the findings and recommendations in the March 2009 review of the JCRA's powers carried out by LECG and Charles Russell LLP (hereinafter, the "LECG Report").
2. Whilst the JCRA will normally follow the procedures described in this document, it should be stressed that it is a *Guideline*. If appropriate circumstances merit it, the JCRA may depart from the Guideline. Where it does so it will give reasons why it has done so. Furthermore, the Guideline remains subject to amendment or revocation by the JCRA.

The JCRA's duties under Article 7 of the Law

3. The JCRA has a *primary duty* under Article 7(1) of the Law. That primary duty is to perform its functions in such manner as it considers is best calculated to ensure that (so far as in its view is reasonably practicable) such telecommunications services are provided, both within Jersey and between Jersey and the rest of the world, as satisfy all current and prospective demands for them, wherever arising.
4. Thus, the primary duty is all about ensuring that demands for telecommunications services are satisfied.
5. Article 7(3) of the Law is relevant to the primary duty. That provision states that in considering whether telecommunications services satisfy current and prospective demands, the JCRA must have regard to a number of factors. Those factors include accessibility, affordability, innovation, quality and reliability and certain other matters.

6. Apart from the primary duty, there are a number of *secondary considerations* relevant to the functions of the JCRA. These are set out in Article 7(2). They apply only to the extent that they are consistent with the primary duty described in Article 7(1). These secondary considerations require the JCRA to perform its functions in such manner as it considers is best calculated to:
 - protect and further the short and long term interests of users by, whenever appropriate, promoting competition;
 - promote efficiency, economy and effectiveness in commercial activities connected with telecommunications in Jersey;
 - further Jersey's economic interests;
 - impose the minimum of restrictions on telecommunications providers;
 - ensure that telecommunications providers have sufficient financial and other resources to conduct their activities; and
 - have regard to any special needs of persons who are disabled, have limited financial resources, or have particular needs.
7. In the light of that statutory background, the JCRA's procedures under Article 7 start with determining whether the proposed exercise of a function would be best calculated to ensure that demands for current and prospective telecommunications services in Jersey (and between Jersey and the rest of the world) are satisfied, as required by Article 7(1). This determination is informed by the considerations listed in Article 7(3), to the extent that these considerations are relevant to the exercise of the function as proposed.
8. Having considered the primary duty, the JCRA then considers whether the proposed exercise of the function is consistent with each of the factors listed in Article 7(2). In this regard:
 - It is possible that one or more of the Article 7(2) considerations may not be relevant to the exercise of the function. In such a case the JCRA takes the view that the proposed exercise of the function would not be inconsistent with that consideration.

- It may be the case that the exercise of a particular function would be consistent with Article 7(1) (as informed by Article 7(3)), but inconsistent with one or more of the secondary considerations listed in Article 7(2). If this is the case, the Law requires the JCRA to proceed with the exercise of the function.
9. The level of detail of the JCRA's procedures under Article 7, as described above, will depend upon, and is proportionate to, the function which the JCRA proposes to exercise.
 10. The matters set out in Article 7 form the basis for the exercise of any function which the JCRA has under the Law. The JCRA cannot undertake a function in its capacity as telecommunications regulator which would be inconsistent with the Article 7(1) primary duty and the Article 7(2) secondary considerations.

The consultation process described in Article 11 of the Law

11. Article 11 of the Law lays down the procedure which the JCRA must follow when it proposes to exercise a "specified regulatory function". The term "specified regulatory function" is defined in the Law. It covers a number of functions, including: granting or refusing a licence; giving, revoking or refusing a consent or making a determination under licence conditions; modifying or refusing to modify a licence; the giving or refusing to give a direction to comply with a licence condition; revoking a licence; and giving, revoking or refusing various approvals and determinations.
12. Article 11 is quite prescriptive in laying down the procedure to be followed with very little left to the discretion of the JCRA (except on certain aspects of timing). Article 11 essentially establishes a consultation process.
13. Article 11(1) of the Law requires the JCRA to publish an Initial Notice. This must contain certain information including:
 - specifying the regulatory function which the JCRA proposes to exercise;
 - the reason for this;

- the date when the proposed specified regulatory function will take effect;
 - specifying where the document giving effect to the proposed exercise can be inspected;
 - and specifying the time period within which written representations or objections may be made. Article 11(3) mandates a minimum period of 28 days within which representations or objections may be made.
14. Although Article 11(1) only requires the JCRA to specify a “reason” for the proposed exercise of the specified regulatory function, the JCRA will normally set out its reasons for the proposed exercise of the specified regulatory function under Article 7 of the Law, as set out above. As noted in Paragraph 8 above, the level of detail in the JCRA’s explanation of reasons shall correspond to the nature of the specified regulatory function under consideration.
15. If the JCRA does receive representations or objections then Article 11(4) requires it to consider those representations or objections and then give a Final Notice in relation to the proposed exercise of the specified regulatory function. The Final Notice must contain certain information including a summary of the representations and objections and details of the JCRA’s response to them as well as a statement of whether or not the JCRA intends to exercise the specified regulatory function.
16. As indicated, when representations or objections are received by the JCRA, Article 11 requires the JCRA to issue a Final Notice, regardless of whether or not, in light of the comments received, the JCRA still intends to proceed with the specified regulatory function as proposed in the Initial Notice. If the JCRA wishes to change its proposal as to the exercise of the function (other than the date when it is to take effect) it must issue a new Initial Notice. In this case, the JCRA shall issue both a Final Notice (closing the first consultation process) and a fresh Initial Notice (starting a new consultation process on the revised procedure).
17. As a general aid to interested parties, and in the interests of transparency, within a week of the close of the consultation period set out in an Initial Notice, the JCRA will publish a statement on its website stating: (1) the

number of responses received, (2) the identity of the respondents, and (3) an estimated time-table of when the JCRA intends to publish a Final Notice concerning the matter. In addition to publishing this information on its website, the JCRA shall endeavour to email it individually to each respondent to the consultation.

18. If the subsequent time-frame for the JCRA to publish its Final Notice exceeds the initial estimate, the JCRA shall state, on its website, a revised time-frame, and inform each respondent to the consultation.
19. As part of its Final Notice, the JCRA will publish the full non-confidential texts of any representations or objections which it receives during the Article 11 consultation process. To facilitate this, respondents will be asked to provide a non-confidential version of their representations or objections and to signify their consent to the publication of that version. If no non-confidential version is supplied, the JCRA will review the confidential version, and propose to the respondent excision of any material which is, in the JCRA's view, confidential and may publish the excised version.
20. Furthermore, when the JCRA receives a request to exercise a specified regulatory function, it will publish notice of that fact on the JCRA website (subject only to issues of confidentiality). If it is subsequently decided to exercise the function in question, an Initial Notice will be published in the ordinary way. If it is decided not to exercise the specified regulatory function, notice of closure of the file will be published on the JCRA website.
21. The LECG Report recognised that the Article 11 consultation process is cumbersome, particularly where representations and objections are received following publication of an Initial Notice. In an attempt to identify issues and minimise differences of opinion, the JCRA will endeavour to engage with industry and other relevant stakeholders *prior to* issuing an Initial Notice. This process may also involve a public consultation. The level of detail of such a process shall correspond to the nature of the specified regulatory function under consideration.
22. The LECG Report also recognised the difficulties caused by Article 11(10). This Article states that if, after considering any representations or objections

to the proposed exercise of a specified regulatory function set out in an Initial Notice, the JCRA wishes to change its proposal as to the exercise (other than the date when it is to take effect), the JCRA shall issue a fresh Initial Notice about the exercise. The LECG Report recommended that, while necessary legislative changes to this provision are considered, the JCRA consider issuing guidance on the way it intends that Article 11(10) should be interpreted.

23. In light of this recommendation, the JCRA interprets Article 11(10) by focussing on the words “as to the exercise” used therein. The JCRA will focus on whether the proposed changes to the function set out in the Initial Notice would be a change “as to the exercise” of that function, that is, would the change materially affect the JCRA’s exercise of the proposed function? If so, a fresh Initial Notice is required; if not, the JCRA may proceed with the exercise as set in the original Initial Notice. What is considered to be “material” will be determined on a case-by-case basis. If changes are made to a specified regulatory function that do not materially change its exercise, the JCRA shall issue a public statement to that effect, similar to what it has done previously when it has changed the effective date of a specified regulatory function. If an affected party disagrees with the JCRA’s determination of what changes would materially affect its exercise of a specified regulatory function, the Law’s appeal procedures remain potentially applicable.
24. Finally, the JCRA has considered whether, in addition to publishing notices and other documents in the Jersey Gazette and on the website, it would be appropriate to establish an “e-mail alert” service under which interested parties could sign up to receive an e-mail alert immediately something is published on the JCRA website. Based on the estimated costs of setting up such a system, we have decided to not do so now, although this will be kept under review. We will continue to follow our current practice of notifying persons we believe to be interested parties when publishing documents on the JCRA web-site.