



Licence Conditions obliging notification of changes to price regulated services

Consultation Document

Channel Islands Competition & Regulatory Authorities

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Contents

1. Introduction 3

2. Structure of the Consultation 4

3. Relevant obligations..... 5

4. Purpose of obligations 6

5. Issues arising 8

6. Responses and next steps..... 12

1. Introduction

The telecommunications licences granted to JT (Jersey) Ltd (“**JT**”) and to Sure (Guernsey) Ltd (“**Sure**”) contain notification conditions designed to safeguard and promote competition in the Channel Islands telecommunications sectors. One such condition relates to price regulated services¹. Under licence condition 33/31 (“**LC33/31**”), JT and Sure² are required to publish and submit to CICRA³ details of any new prices, prices for new products, discounts or special offers that they intend to introduce prior to these coming into effect⁴.

Based on CICRA’s practical experience of overseeing the LC33/31 licence conditions and views expressed by licensees, CICRA considers that in some cases the conditions may not always achieve their intended purpose.

The consultation therefore seeks views from licensees, stakeholders and interested parties on the nature and extent of any issues of concern with the way these licence conditions operate. Where there are concerns, views are sought on how the obligations might be amended or clarified to better achieve their aims.

¹ Condition 33 in Jersey; Condition 31 (fixed telecommunications services) in Guernsey. In this consultation, these conditions will be referred to collectively as ‘LC33/31’.

² In this consultation, the terms “Licensee” and “Licensees” will be used to refer to JT and/or Sure.

³ In this consultation, references to CICRA mean the JCRA and/or the GCRA.

⁴ In Jersey, the notice period is 21 days for all products. In Guernsey, the notice periods are 21 days for retail products and 30 days for wholesale products.

2. Structure of the Consultation

This paper is structured as follows:

Section 3	The legal basis for the obligations that are the focus of this consultation are set out
Section 4	The underlying rationale for such obligations is provided
Section 5	A discussion of the type of concerns that led to the issue of this consultation and CICRA's proposed response are explained in further detail
Section 6	Next steps

Stakeholders and other interested parties are requested to submit any comments before 5.00pm on Wednesday 19th October to the JCRA or the GCRA at:

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All comments should be clearly marked '*Response to consultation: Licence conditions obliging notification of changes to price regulated services*'.

CICRA intends to make responses to the consultation available for inspection. Any material that is confidential should be put in a separate Annex and clearly marked so that it can be kept confidential.

3. Relevant obligations

The relevant licence conditions are fairly standard regulatory obligations and have been in force since the commencement of commercialisation in the Jersey and Guernsey telecoms sectors.

Legal framework

The Telecommunications (Jersey) Law 2002 (“**Jersey Law**”) and the Telecommunications (Bailiwick of Guernsey) Law, 2001 (“**Guernsey Law**”) prohibit a person from operating a telecommunications system in Jersey or in Guernsey respectively unless that person has a telecommunications licence⁵.

The bodies authorised to grant telecommunications licences are (in Jersey) the JCRA⁶ and (in Guernsey) the GCRA⁷. Such conditions may be included in a telecommunications licence as the GCRA considers appropriate (in Guernsey)⁸ or as the JCRA considers necessary and desirable (in Jersey)⁹.

Price Regulated Services

In Jersey, condition 33 of JT’s telecommunications licence provides as follows:

“33.1 Where the Licensee intends to introduce:

- (a) new prices for any Telecommunication Services, or prices for new Telecommunication Services to be introduced by the Licensee;*
- (b) any discounts to published prices for Telecommunication Services within a relevant market in which the Licensee has been found to be dominant, or for any Subscribers to whom additional services or goods are provided by the Licensee or any of its Subsidiaries or Joint Venture; or*
- (c) special offers to all or any of its customers for particular categories of Telecommunication Services where those Telecommunication Services have been found to be within a relevant market in which the Licensee has been found to be dominant,*

⁵ In Jersey, a person may not “run part of all of a telecommunication system except under a licence in force in respect of the person’s running of the system”, (Jersey Law, Article 2). In Guernsey, a person shall not “establish, operate or maintain a telecommunications network, or [...] provide a telecommunications service in the Bailiwick except under the authority of and in accordance with the conditions of a licence”, (Guernsey Law, s.1).

⁶ Jersey Law, Article 14.

⁷ Guernsey Law, s.2.

⁸ Guernsey Law, s.5.

⁹ Article 16, Jersey Law.

it shall publish the same at least twenty one (21) days prior to their coming into effect or otherwise as required by Telecommunications (Jersey) Law , and provide full details of the same to the JCRA.”

In Guernsey, condition 31 of Sure’s fixed telecommunications licence provides that:

“31.1 Where the Licensee intends to introduce:

- (a) new prices for any Licensed Telecommunications Services, or prices for new Licensed Telecommunications Services to be introduced by the Licensee;*
- (b) any discounts to published prices for Licensed Telecommunications Services within a Relevant Market in which the Licensee has been found to be dominant or for any Subscribers to whom additional services or goods are provided by the Licensee or any of its Associated Companies; or*
- (c) special offers to all or any of its customers for particular categories of Licensed Telecommunications Services where those Licensed Telecommunications Services have been found to be within a Relevant Market in which the Licensee has been found to be dominant,*

it shall publish the same at least twenty one (21) days for retail products and services and thirty (30) days for wholesale products and services prior to their coming into effect or otherwise as required by law, and provide full details of the same to the [GCRA].”

CICRA has previously consulted on the scope of licensees’ obligations under LC33/31¹⁰. In drafting this consultation, it has taken account of submissions made in previous responses and communications, as well as a number of the observations made by Frontier Economics in their review of JT’s wholesale business¹¹ as well as previous guidance issued by the JCRA to JT¹².

4. Purpose of obligations

CICRA considers that the LC33/31 conditions are intended to achieve several purposes.

- First, it gives CICRA an efficient means of monitoring price and product changes given specific market circumstances;
- Second, where prima facie concerns arise from changes to product pricing, a notification process can reduce the cost of regulatory intervention and disruption to the notifying licensee, customers and competitors by allowing

¹⁰ http://cicra.gg/_files/CICRA%2013-34.pdf

¹¹ http://www.cicra.gg/_files/Review%20of%20JT%20Wholesale%20-%20Final%20Version%20-%20PUBLIC%2018%2009%2012.pdf

¹² http://cicra.gg/_files/070503%20JCRA%20Guideline%20on%20Condition%2033.pdf

opportunity for informal resolution of such concerns before they impact the market;

- Third, where changes are made by the licensee to wholesale inputs on which other licensed telecommunications operators (“**OLOs**”) rely, those OLOs have sufficient notice of the changes as to adapt their retail portfolios in a timely manner;
- Fourth, the licence condition contributes to a level playing field between the retail arm of the Licensee and OLOs. By providing sufficient detail and time for OLOs to deliver a competing product to the market, real or perceived risks that vertical integration gives unfair advantage to the Licensee’s retail arm are reduced. In a context where retail product changes are made by a vertically integrated telecom business with significant market power and where competition is less developed this can be particularly important in order to protect competition.

5. Issues arising

Based on CICRA's practical experience of overseeing LC33/31 and views expressed by licensees, CICRA considers that in some cases the conditions may not always achieve their intended purpose. Particular issues are discussed below.

The views of stakeholders and other interested parties are sought on these and any other concerns relevant to the conditions.

Publication/notification requirement insufficiently specific

If OLOs cannot respond as quickly as the retail arm of the licensee in the event of a wholesale or retail product change by making the necessary commercial decisions in a changed market environment, this weakens their ability to respond to competitive changes from a competitor with significant market power.

LC33/31 do not specify what constitutes "publication" or "notification" of relevant changes. An agreed publication and notification process is essential to ensure the aims of LC33/31 are achieved; a lack of certainty as to where information on relevant changes will be published and/or how notifications are delivered to relevant parties reduces transparency and undermines the purpose of the licence conditions.

While it is not the only way licensees may publish relevant changes, the requirement is fulfilled by publication in the Jersey Gazette/La Gazette Officielle in Guernsey. Respondents to CICRA's previous consultation indicated that this method of publication was costly. Given the availability of the internet, use of the Official Gazette/La Gazette Officielle may not be the most effective method of publication.

CICRA's preliminary view is that as well as being notified to CICRA through its general e-mail address (info@icra.gg or info@icra.je), the information in notifications should be published on a password protected area of a specified Licensee webpage, to which all OLOs and CICRA have access. The notifications should remain on the webpage for a minimum period of three years. In addition, all OLOs and CICRA must be able to subscribe to e-mail notifications, which must be sent to all subscribers when new information is published on the relevant licensee webpage.

Consultation question 1: Do you agree with CICRA's view that the current publication / notification requirement is insufficiently specific?

Respondents are asked to provide examples where they believe lack of specificity has given rise to concerns so that CICRA can assess the materiality and persistency of any alleged concern in this area prior to considering what changes to the regulatory obligations would deliver better outcomes.

Consultation question 2: Do you agree with CICRA's proposed approach to address concerns that the requirement to publish or notify is not sufficiently specific. If not, what alternative approach should CICRA consider and why?

Inadequacy of information contained in publications

LC33/31 obliges publication of certain product and price changes, with full details of the same to CICRA. Where information is published pursuant to LC33/31, it needs to be sufficiently detailed to achieve the transparency and non-discrimination intended by the licence condition. In practical terms, this means that the information should:

- In the case of wholesale changes, be sufficiently detailed to allow OLOs to assess the commercial implications of the changes, including the ability to determine the changes they will be required to make to their own retail products portfolios;
- In the case of retail changes, allow OLOs to assess whether they are able to offer a comparable product and/or the specific underlying wholesale product they need to gain access to;
- In the case of both types of change, allow CICRA to form a prima facie view of the potential impact of the changes should OLOs register concerns with it.

CICRA's view is that the information currently being published by licensees may not in all cases have been sufficiently detailed to achieve these objectives.

It is not possible to define on an *ex ante* basis exactly which information must be notified/published. This is because wholesale prices/products will be different in each case and adopting a prescriptive approach to the precise information to be notified/published risks engaging licensees and CICRA in a narrow debate about whether particular information falls inside or outside the scope of a given definition. Instead, CICRA's view is that the extent of information provided in a publication or notification must meet the needs of the three

aims set out below and be interpreted flexibly and purposively. Where licensees are uncertain CICRA should be consulted.

CICRA therefore proposes that licensees should be required to publish/notify all information necessary to enable OLOs and CICRA to assess:

- (a) The essence and nature of the product which is being offered, including any significant differences between a new product and any existing product which it is replacing;
- (b) If a new price is being introduced, what the price will be. "Price" should , be interpreted as including both the "headline" price and the actual price payable by the retail customer or OLO, taking into account any discounts or additional charges; and
- (c) The length of time for which the price will be available, or is likely to be, applied;
- (d) The ordering process for a proposed wholesale product, including the delivery timescales on receipt of an order and any constraints applicable.

Consultation question 3: Do you agree with CICRA's view that the information currently being published by licensees may not be sufficient to meet the transparency and non-discrimination intended by the licence condition?

Respondents are asked to provide examples where they believe this has occurred so that CICRA can assess the materiality and persistency of any alleged concern in this area prior to coming to a decision to make changes to the regulatory obligations.

Consultation question 4: Do you agree with CICRA's proposed approach to address concerns that the information provided in publications can in some cases be inadequate? If not, what alternative approach should CICRA consider and why?

Failure to respect the applicable notice period

An aim of the notice period is to enable OLOs, at the end of that period, to be in a position where they are able to effectively compete with the licensee in respect of the new products/prices/offers made available to retail customers by that licensee. Real or perceived risks that vertical integration gives unfair advantage to the licensee's retail arm are reduced by the requirement for a notice period. In a context where retail product changes are made by a vertically integrated telecom business with significant market power and where competition is less developed this can be particularly important in order to protect competition.

LC33/31 does not define when a measure "comes into effect" and so, as a result, there appears to be concerns around the time from when the notice period begins or what the Licensee can or cannot do during the notice period. The interpretation of 'days' may also need to be clarified since 'days' could mean either working days or calendar days.

Licensees might argue that a change to a product only comes into effect when that product is available for purchase but it can market its new product to customers and/or that customers can be "signed up" during the notice period.

CICRA considers that this interpretation of LC33/31 is not in accordance with the intention of the licence condition. OLOs are only able to compete with licensees for customers if customers are in a position to choose between their respective products. OLOs will rarely be in a position to market and/or sign-up customers from the date of publication by the licensee. If the licensee is engaged in marketing or signing-up customers before the end of the notice period there is therefore a concern that the licensee's retail arm is placed in an advantageous position relative to OLOs and such behaviour amounts to discrimination or unfair advantage.

CICRA considers the marketing and signing-up of customers during the notice period is not consistent with the licence condition. However, to ensure the position is clear and understood, CICRA's proposes to issue guidance stating that:

- (a) "Days" in LC33/31 should be interpreted to mean "working days";
- (b) The notice period provided for in LC33/31 is a 'standstill' period during which the licensee may not market, compile any waiting list nor enter into any agreement with a customer in respect of the notified product until after the notice period has expired;

- (c) The notice period will only commence the day after notification has been made to CICRA and publication to the OLOs has been effected.

Consultation question 5: Do you agree with CICRA's proposal to issue guidance confirming that

- a) Days should be interpreted as working days***
- b) The notice period is a standstill period***
- c) The notice period will only commence the day after notification to CICRA and publication to OLOs.***

Respondents are asked to provide examples where they believe their have been disadvantaged by a lack of clarity in these areas. This will support CICRA's assessment of materiality and persistency of any alleged concern in this area prior to coming to a decision to make changes to the regulatory obligations.

Other issues

Finally, CICRA would welcome views on whether the operation of LC33/31 gives rise to any problems or difficulties not identified above and, if so, how these could best be dealt with.

Consultation question 6: Are there other area related to the operation of LC33/31 that give rise to any problems / difficulties not considered above? If yes please explain what these problems / difficulties are and what approach you suggest CICRA should consider to address the matter(s).

Respondents are asked to provide examples where they believe any issue has occurred so that CICRA can assess the materiality and persistency of any alleged concern in this area prior to coming to a decision to make changes to the regulatory obligations.

6. Responses and next steps

Consultation

CICRA would welcome views from stakeholders and interested parties on the approach outlined above. It will consider all responses to this consultation before determining what next steps should be taken. Depending on the outcome of this consultation, the GCRA/JCRA will consider whether it would be appropriate to issue guidance on the scope of licensees' obligations under LC33/31.