



Licence Condition 33 (JT Jersey) and
Licence Conditions 28 and 31 (Sure Guernsey) –
Notification and Review Process

Consultation on licence modification

Document No: CICRA 13/34

17 July 2013

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1. Executive summary

In the Channel Islands, the telecommunications sector is regulated by the Channel Island Competition and Regulatory Authorities (**CICRA**), comprising the Jersey Competition Regulatory Authority (**JCRA**) and the Guernsey Competition and Regulatory Authority (**GCRA**)¹. The two main telecommunications operators in the Channel Islands, i.e. JT (Jersey) Limited (**JT**) as the incumbent operator in Jersey and Sure (Guernsey) Limited (**Sure**) as the incumbent operator in Guernsey, have been granted telecommunications licences with specific licence conditions applicable to licensees deemed to hold a dominant position in certain markets.

This consultation concerns Condition 33 of JT's telecommunications licence in Jersey, and Condition 31 of the fixed telecommunications licence and Condition 28 of the mobile telecommunications licence held by Sure in Guernsey (for the sake of simplicity, these conditions will be referred to as **LC33/31/28**). These conditions require JT/Sure to submit to CICRA a formal notification, and to publish a notice, providing details of any new prices, discounts or additional services that the relevant operator plans to introduce. In some cases, the obligation is triggered where the service relates to a market in which the licensee is dominant, i.e. in which it holds significant market power (**SMP**).

CICRA believes that a common approach to the LC33/31/28 notification and review process will prove beneficial to JT and Sure, and to CICRA, as well as to all other telecommunications licensees in the Channel Islands who rely on the provision of wholesale services by JT and Sure in the markets where those licensees hold SMP.

The current notification and review process does not provide CICRA with flexibility and sufficient time to address any competition concerns in the market resulting from the introduction of a new service/offer by the dominant operators. The only means by which CICRA can prevent anti-competitive effects in the market is to require the licensee to cease, or refrain from implementing the proposed service/offer, by issuing a direction or a determination, a process which is lengthy and resource-intensive.

In addition, there is at present insufficient clarity on the requirements imposed on the operators by LC33/31/28. There are differences of opinion between CICRA and certain operators regarding such matters as when the obligation to notify or publish is triggered, whether there is a time limit for promotions or new products that are notified and what information needs to be included in a notification or publication.

¹ All references in this document to CICRA should be read as references to each of the GCRA and the JCRA, unless the context otherwise requires.

CICRA therefore proposes to amend the LC33/31/28 notification and review process to address these serious shortfalls in regulation of new services/offers introduced by the two incumbent operators in the Channel Islands.

With respect to CICRA's options for scrutinising new services/offers, this consultation presents two options for modifications to the LC33/31/28 notification and review process, for comments from the industry:

- Stop The Clock (**STC**) process – where CICRA is allowed to halt the notification and review process by requesting further information from the licensee where there is insufficient evidence to demonstrate that there is no anti-competitive effect arising from the proposed new service/offer (the clock is reset on receipt of the requested information); and
- Fair Competition (**FC**) process – where CICRA is allowed to suspend the introduction of the proposed service/offer if there are reasonable grounds to suspect the proposed service/offer is likely to have an anti-competitive effect in the market.

CICRA's provisional view is that the FC option is preferable, but it is keen to hear the views of industry participants on this issue.

The consultation also sets out CICRA's provisional views on matters that need to be clarified within the text of LC33/31/28.

2. Introduction

The telecommunications licences granted to JT in Jersey and Sure in Guernsey include conditions prohibiting certain anti-competitive behaviour. In particular, Condition 33 of JT's licence in Jersey and Condition 31 of Sure's fixed and mobile licences in Guernsey require the licensee to submit to CICRA details of any new prices, discounts/promotions or additional services that the licensee plans to introduce in any market in which it is dominant, i.e. in which it holds SMP. This notification must be given 21 days in advance of the change coming into effect. The conditions also oblige the relevant licensee to publish details of the new prices, discounts/promotions or additional services.

LC33/31/28 is designed to alert CICRA (and other operators) to any potential anti-competitive effects before a proposed new service/offer is introduced to the market. However, at present, the only means by which CICRA can prevent any anti-competitive effects of a new service/offer is to establish definitively that the new service/offer is anti-competitive, and then to issue a direction to the licensee under the existing fair competition conditions in the licence requiring it to halt the stated anti-competitive conduct.

The wording of these licence conditions was the same at the time telecommunications licences in Guernsey and Jersey were first issued, save minor differences in phrasing. However, because the two jurisdictions functioned independently until recently, the licence conditions were subject to the interpretation of two separate authorities. Coupled with the alterations that have been made to LC31 in Guernsey, JT in Jersey and Sure in Guernsey have been, and continue to be, subject to different reporting obligations.

The processes for issuing either a direction or a determination are defined in legislation and require the publication of draft and final decisions or notices, with a minimum period for public consultation between the two stages, within which time written representations or objections may be presented to CICRA. In Jersey, a period of 29 days must be allowed for public consultation on the Initial Notice, as well as before any final notice can take effect. In Guernsey a minimum of seven days must be allowed for consultation, although in practice twenty-nine days is generally given for directions/determinations.

The duration of this process does not provide sufficient time for CICRA to react formally to any LC33/31/28 notice whose proposal is likely to infringe the telecommunications laws or the relevant operator's licence. Both the public consultation and notification of the final notice must last 29 days in Jersey in addition to the time required to draft the directions or determinations, whereas the operators only have to advise of any new service/offer 21 days in advance of launch. Consequently, under the existing system, CICRA is unable to act to prevent anti-competitive behaviour or situation from occurring, even in the event that the activity

is identified as creating anti-competitive effect on the day the LC33/31/28 notice is issued.

In addition, CICRA's strategic plan for 2012-2014 lists adopting a pan-Channel Island approach to regulation as one of the main areas of focus for telecommunications regulation in the present period. It is noted that the key benefit anticipated from a pan-Channel Island approach to telecommunications regulation is the delivery of a consistent regulatory framework across the Channel Islands.

This consultation therefore outlines proposals for the modification of LC33/31/28 to address the current system, such that CICRA can be confident that the activities of JT and Sure meet the requirements of their licences and the telecommunications laws. The modifications proposed here also meet one of CICRA's strategic objectives of greater unity of telecommunications regulation in the Channel Islands.

A review by Frontier Economics (*the Frontier Report*) of JT's wholesale division² identified issues about the way in which LC33 functions in Jersey and recommended changes to the notification and review process.

In particular, the Frontier Report:

- Observed that the current process falls short of the principle in paragraph 32 of the European Commission's Recommendation of September 2010 on regulated access to Next Generation Access Networks³, which recommends that national regulatory authorities should "*oblige the SMP operator to make new wholesale broadband access products available in principle at least 6 months before the SMP operator or its retail subsidiary markets its own corresponding NGA retail services, unless there are effective safeguards to guarantee non-discrimination*";
- Observed that while JT has attempted to produce clear and concise LC33 documents, at times only limited explanation is provided on the underlying cost data and assumptions, and nor do JT provide a clear statement that its proposed pricing does not lead to margin squeeze;
- Noted that in the case of JT's Gigabit Jersey project, engagement between JT and other licensed operators (**OLOs**) was insufficient for OLOs to launch their own competing retail service at the same time as JT Retail, providing JT Retail with a substantial first mover advantage;
- Noted that reforming LC33/31/28 creates a dilemma for the regulator as:

² http://www.cicra.gg/_files/Review%20of%20JT%20Wholesale%20-%20Final%20Version%20-%20PUBLIC%2018%2009%2012.pdf

³ <http://eur-lex.europa.eu/LexUriServ/%20LexUriServ.do?uri=OJ:L:2010:251:0035:0048:EN:PDF>

- a long notice period may delay services brought to market; while
- a short notice period may result in services being launched that cannot be easily withdrawn if problems are identified with the service.

The Frontier Report recommended that the JCRA revise the current notification and review process for new retail services, such that JT should provide one single document that addresses the wholesale and retail issues, including an analysis of margin squeeze. It recommended that the process should include a 'stop the clock' option for the JCRA in cases where insufficient information has been provided or further investigation is required.

As noted above, CICRA has stated in its strategic plan for 2012-2014 that one of its main areas of focus for telecommunications regulation is to adopt a pan-Channel Island approach to regulation. CICRA has already taken steps to achieving this with the unification of fixed interconnection rates and mobile termination rates. The key benefit expected from pan-Channel Island working is the delivery of a consistent regulatory framework across the Channel Islands. All major telecommunications operators in the Channel Islands have operations in both Jersey and Guernsey and a consistent regulatory framework across the islands will create synergies within CICRA and operators as processes are standardised.

The Frontier Report has given rise to a number of important regulatory actions aimed at improving competition in the provision of telecommunications services at a wholesale level in Jersey. However, it is important from a CICRA perspective to identify whether the issues raised by the Frontier Report are also relevant in Guernsey and, where appropriate, ensure any changes are applied on a pan-Channel Island basis.

A key aim of regulation is to ensure that operators with SMP do not abuse their market dominance, while setting conditions that replicate those that would be expected to occur in a competitive market. Accordingly, regulatory oversight should focus on the activities of a regulated entity in the markets in which it holds SMP, as other markets are deemed to be competitive and subject to normal competitive pressures.

There is one exception to this, at least in terms of oversight, and that is markets in which a licensee operates as a vertically integrated provider, i.e. in both the wholesale and the retail markets, and holds SMP in a relevant wholesale market. In such situations, the licensee may be capable of leveraging its market power in the relevant wholesale market to reduce competition in the related retail market by way of a margin squeeze, but could also affect other retail markets, by way of anti-competitive bundling of the related downstream retail services/products and other retail services/products (e.g. bundling fixed and mobile services).

3. Structure and Timetable for Consultation

3.1 Structure of Consultation

This consultation is structured as follows:

Section 4: sets out the legal and regulatory background to the notification and review process under LC33/31/28;

Section 5: sets out proposals for modification of the LC33/31/28 notification and review process; and

Section 6: sets out next steps in the consultation.

3.2 Timetable for Responses to Consultation

Responses to this consultation should be submitted in writing and should be received by CICRA before 5.00pm on 23 August 2013. Submissions should be sent by email to **info@cicra.je**.

In accordance with the JCRA's policy, non-confidential responses to the consultation will be made available on the JCRA's website (www.cicra.je). Any material that is confidential should be put in a separate annex and clearly marked so that it can be kept confidential.

4. Legal Background and Regulatory Framework

The *Telecommunications (Jersey) Law 2002* (the **Jersey Law**) provides the framework within which the JCRA regulates the telecommunications market in Jersey, while the *Telecommunications (Bailiwick of Guernsey) Law, 2001* (the **Guernsey Law**) provides the framework within which the GCRA regulates the telecommunications market in the Bailiwick of Guernsey.

JT holds a licence granted by the JCRA under Article 14 of the Jersey Law, while Sure holds licences granted by the GCRA under section 2 of the Guernsey Law.

Part IV of JT's licence outlines provisions that apply to services provided in markets in which the JCRA has determined that JT holds SMP. Condition 33.1 of JT's licence provides that:

"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,

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."

Equally, Part IV of Sure's fixed telecommunications licence and Sure's mobile telecommunications licence outline provisions that apply to services provided in markets in which the GCRA has determined that Sure holds SMP.

Condition 31.1 of Sure's fixed telecommunications licence provides that:

"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 prior to their coming into effect or otherwise as required by law, and provide full details of the same to the [Authority].”

Condition 28.1 of Sure’s mobile telecommunications licence is phrased in a similar manner to Condition 31.1 of Sure’s fixed telecommunications licence.

5. Proposed changes to the Notification and Review Process

CICRA is considering changes to the notification and review process in three main areas:

1. Differentiating the requirements in LC33/31/28 for notification and publication for products at a wholesale and retail level;
2. Clarification of the requirements as to when LC33/31/28 notification or publication is required, how notification or publication should be effected and what the notification or publication should contain; and
3. Supplementing CICRA's power to intervene to prevent any anti-competitive effects of new products or prices.

These topics are dealt with in turn below.

5.1. Differentiating notice requirements at a wholesale and retail level

Currently, JT and Sure are required to notify CICRA of an intended commercial activity in a market where it holds SMP, and are also required to publish a LC33/31/28 notice advising of their intention to engage in that activity, excluding any confidential information. The purpose of advanced publication is primarily to mitigate the risk of anti-competitive conduct by JT and Sure as vertically-integrated operators. However, the risks to competition posed by changes to products or prices are different, depending on whether the changes affect wholesale products or retail products.

As JT and Sure hold SMP in a number of wholesale markets and also compete in related retail markets against OLOs who purchase regulated wholesale services from them, both of these operators are subject to licence conditions to ensure that their retail business and wholesale business do not act in concert. Failure to prohibit this conduct would provide an incumbent's retail business with a significant first-mover advantage where it becomes aware of new wholesale services before OLOs.

In reality, discrimination of this nature is difficult to police. In order to mitigate this risk, LC33/31/28 obliges JT and Sure to publish any changes to current wholesale services or the launch of new wholesale services for a mandated period before their introduction (provided that JT and Sure have SMP in the relevant wholesale market). This process therefore provides OLOs with the opportunity to develop their own downstream retail service if desired.

On the other hand, it could be argued that a notification by JT and Sure in relation to retail products or services should not necessitate advising OLOs, in addition to notifying CICRA. Requiring the retail arms of integrated operators to publish their offers in advance of commercial launch places a burden on them that is not placed on their competitors.

However, prior notification, including the corresponding review process, of retail services/offers to CICRA is important because of the risk that an integrated operator may engage in margin squeeze or other anti-competitive conduct resulting directly or indirectly from the market where it holds SMP.

CICRA wishes to hear from stakeholders as to whether the existing requirements applying to JT and Sure when introducing new, discounted or special offers for retail services that use a regulated wholesale service as an input should be modified in order to give the retail arms of JT and Sure more freedom when designing their commercial offers.

If such a modification were to be introduced, the requirement for advance notification of new services/offers for retail products that use a regulated wholesale service as an input would be retained, but notifications would only be provided to CICRA.

Q1. Respondents' views are sought on whether the LC33/31/28 notifications by JT and Sure in respect of retail services that use a regulated wholesale service as an input should be submitted to CICRA only, or whether the existing system of notification to CICRA and publication for users and OLOs should be retained.

5.2. Clarification of notification and publication requirements

Despite the similarity in the phrasing of LC33/31/28 in the licences of JT and Sure in Jersey and Guernsey, the notification and publication practices of the operators are presently quite different. In addition, there are differences of opinion between CICRA and certain operators as to:

- (a) when the notification and publication obligations are triggered;
- (b) how notification or publication should be effected; and
- (c) what information the notifications and published notices must contain.

In CICRA's view, the opportunity should be taken to clarify these requirements, so that there is agreement on all sides as to the obligations of JT and Sure under these conditions.

The existing text in LC33/31/28 refers to an obligation to notify and publish where there are "new prices", "prices for new products", "discounts to published prices" and "special offers". In addition, the treatment is different, depending on whether the service relates to a market in which the operator has been found to be dominant.

CICRA notes that the non-price terms of a service are often as important from a competitive standpoint as the price. Under the current format of LC33/31/28, there is no obligation to notify CICRA of changes to the non-price terms of a service. The range of terms that can currently be changed without notification are vast and could have a considerable effect on competition in the market.

CICRA's provisional view is that the obligation to notify CICRA and to publish notices should arise in respect of products or services in wholesale or retail markets in which the relevant operator has been found to hold SMP or to be dominant, or (subject to views on section 5.1 above) in retail markets that use inputs supplied in wholesale markets in which the relevant operator has been found to hold SMP or to be dominant. No obligation should arise where the relevant operator does not have SMP at the wholesale or retail level.

CICRA's provisional view is that the notification and publication obligation should be triggered when:

- The relevant licensee introduces a new product or service;
- The relevant licensee changes the non-price terms of an existing product or service; or
- The relevant licensee changes the price of an existing product, whether on a temporary basis (e.g. promotions, special offers) or permanently, and whether by reducing the nominal price or by including an ancillary benefit (e.g. concert tickets).

It is accepted that extending the notification/publication obligation to changes to the non-price terms of existing products or services might increase the number of notifications and publications made by the licensees. CICRA's provisional view is that it would be difficult to identify a clear and definitive rule which included only those changes to non-price terms that were material or posed a possible anti-competitive risk, although stakeholders' views on this point would be welcomed.

On point (b), LC33/31/28 presently requires both JT and Sure to satisfy their publication obligation by publishing notices in the Jersey Gazette/La Gazette Officielle respectively. In CICRA's view, this is an expensive and ineffective means of bringing services/offers to the attention of OLOs.

CICRA proposes that the publication obligation should be satisfied by posting an entry on a dedicated page on the relevant operator's website. The page must be accessible to all users, not placed behind a password-protected firewall. In addition, CICRA would expect entries to remain accessible for a long period (at least several years), and for a subscription service to operate, so that OLOs could guarantee that they would receive details of the new entry on the date of publication. In the event that an operator has separate obligations to provide information to its wholesale customers (e.g. under a wholesale services agreement), then this would need to be done in addition to posting an entry on the webpage.

Notification to CICRA could be effected in the usual way, by e-mail to the general CICRA e-mail account.

On point (c), in relation to the content of the documents supplied by the operator, CICRA's provisional view is that:

- both the notification to CICRA and the published notice should provide details of the product/service, the price and, where relevant, the cost to the operator of providing the product/service (including the cost of any promotion/special offer); and
- the information published on the licensee's website should comprise the notification provided to CICRA, with confidential and commercially sensitive information redacted.

Where the obligation to notify is triggered by a promotion or special offer, the period during which the promotion or offer will be available must be specified. If the period were subsequently to be extended, a new notification and publication would be required.

It is essential that the notice submitted by the licensee to CICRA in relation to a retail service/offer must include a detailed margin squeeze assessment, especially if the obligation to publish such offers is to be removed. For the avoidance of doubt, if the obligation to publish notices for retail products is retained, then CICRA's view is that the publication should include details of the product or promotion, as well as the price being charged.

Q2. Do respondents agree that the notification and publication requirements in LC33/31/28 should be amended in the manner proposed by CICRA? Are there any other amendments to the present requirements that respondents would propose?

5.3. *CICRA's power to intervene to prevent anti-competitive effects*

As noted earlier, the current LC33/31/28 notification and review process does not afford CICRA the ability to prevent an anti-competitive effect, should it be identified, occurring in the market before the commercial launch. To enable this, CICRA would have to take an active role in assessing LC33/31/28 notices, moving from its current passive role, where it cannot suspend the commercial launch of a product, to an active role where it is obliged to investigate any anti-competitive concerns raised by the introduction of new service/offer.

However, such a shift would entail a key risk. Changing CICRA's current passive role in the LC33/31/28 notification and review process to an active role might carry the implication that CICRA has reviewed each notification and, therefore, that each notified service which became commercially available in the market carries CICRA's implicit approval. This may compromise CICRA's ability to investigate a service if regulatory or competition concerns were to arise after the notification and review period.

By contrast, approval is not implied during the current process because CICRA does not have the ability to suspend the commercial launch of a notified activity, and without the ability to suspend a service, approval cannot be implied for those services that are not suspended.

If CICRA is to take an active role in assessing the suitability of a notified activity, two potential options have been set out below:

1. Stop The Clock (**STC**) notification – to require operators to provide CICRA with notification of a new wholesale service or offer five days prior to publication of the LC33/31/28. During this five (5) day period, if CICRA has concerns, it may suspend the launch of the service/offer until the conclusion of an investigation. If further information is required to determine whether there is sufficient cause to launch an investigation, the notice will be sent back to the operator with an accompanying information request. If additional information is requested, the five day window is halted and the clock starts again on receipt of the additional requested information; or
2. Fair Competition (**FC**) notification – to extend the notice period for LC33/31/28 to thirty (30) days and insert a clause in LC34/32 (“Fair Competition”) that allows CICRA to suspend the sale of a service/offer, current or proposed, if there are reasonable grounds to suspect the service/offer breaches either of the Laws or an operator’s licence.

Both options provide CICRA with the tools to prevent the launch of a service/offer that will have anti-competitive effects on the market. The ability, in option one, to ‘reset the clock’ if additional information is required, would also add to the quality and detail provided in the notices.

At present, there is little incentive for operators to submit comprehensive notices, as there is no penalty if CICRA requires additional information. In its report, Frontier noted that in *“some of these documents, at times only limited explanation is provided on the underlying cost data and assumptions”*.

Option one has a significantly shorter timeframe for response and, if multiple notices are issued at once, may place significant strain on CICRA’s workload. If this occurs, there is a risk that sufficient time may not be afforded to analysing each notice and services/offers may be commercially launched where perhaps they should not have been, although this risk is likely to be small; historically, most notices have raised few, if any, competitive concerns and in the event that multiple notices are issued simultaneously, CICRA would be able to prioritise analysis on notices that are most likely to have anti-competitive effects. There is a smaller risk of this occurring under option two as the timeframe afforded is materially longer, at 30 days.

Option one might implicitly require that each LC33/31/28 notice that is issued be accompanied by a CICRA ruling as to whether the service creates anti-competitive concerns, either directly (by way of a suspension of the sale of the notified service) or indirectly (by way of not suspending the sale of the notified service).

Option two would provide CICRA with a more general authority to suspend the sale of any service/offer that CICRA has reasonable grounds to suspect is anti-competitive, while removing the requirement for CICRA to pass judgement over

every LC33/31/28 notice. Importantly, the “reasonable grounds” requirement creates a low threshold, similar to section 23 of *The Competition (Guernsey) Ordinance, 2012* or Article 26 of the *Competition (Jersey) Law 2005* – it does not require that CICRA believes that there is sufficient evidence to make a direction under LC33.4/31.4 or LC34/32 of JT’s/Sure’s respective licences. The knowledge that CICRA may suspend the sale of any notified service/offer is also likely to ensure the quality of the notices that are issued by the operators.

The wording of option two and the placement of it in LC34/32 rather than LC33/31/28 would distance the ability of CICRA to suspend the sale of a service/offer considered to be anti-competitive from the notification requirements under LC33/31/28, thereby removing the requirement for CICRA to rule on every notice (explicitly or implicitly). This would alleviate the risk that CICRA was taken to have approved a service/offer that had anti-competitive effects, by implication from the fact that it had not rejected the service/offer when it was notified.

Both options achieve the primary aim of providing CICRA with a robust process preventing the entry of anti-competitive offers to the market and both are likely to ensure the quality and detail of the notices issued.

CICRA’s provisional view is that option two (FC notification) is better suited in the context of the Channel Islands and the specific CICRA working environment, where limited resources are available to CICRA in monitoring and processing simultaneously the price regulation of two incumbent operators.

Q3. Respondents are invited to comment on the proposed options for allowing CICRA to intervene more directly to prevent anti-competitive effects arising from the introduction of new products, prices or special offers.

6. Next Steps

CICRA invites comments on the questions set out above, and any other matters related to the LC33/31/28 notification and review process.

Once this consultation has closed, CICRA will review responses, and will consider whether modifications are required to the Class III Licence granted to JT in Jersey and the Fixed Telecommunications Licence and Mobile Telecommunications Licence granted to Sure in Guernsey.

At present, CICRA expects to issue an Initial Notice and Draft Decision on the LC33/31/28 notification and review process during the course of September/October 2013.