



Office of Utility Regulation

**Decisions under
The Telecommunications (Bailiwick of
Guernsey) Law, 2001**

Decision Notice and Report on the Consultation

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1. Introduction

In August 2001, the Director General of Utility Regulation (“the Director General”) published notice of her intention to take certain steps in accordance with the Telecommunications (Bailiwick of Guernsey) Law, 2001 (“the Telecoms Law”). The proposed decisions were set out in Document OUR01/04 and addressed the following issues;

- (a) A proposed decision as to whether a person has a dominant position in a relevant market ;
- (b) A proposed decision to include conditions in the licence to be granted to that person in relation to the control of that dominant position, and what those conditions are;
- (c) A proposed decision to regulate the prices, premiums, discounts that may be charged or allowed by a licensee which has a dominant position in a relevant market;
- (d) A proposed decision to include quality of service conditions in any licence, and
- (e) A proposed decision to apply the Code, as set out in Schedule 1 of the Telecoms Law, to a Licensee.

The Director General invited comments from interested parties on the proposed decisions and this report sets out the response to that invitation, the Director General’s consideration of the comments received and her determination on those matters.

This report is structured along the lines of the consultation document and each section will summaries the matter consulted upon, the responses received and the Director General’s consideration of the matter.

Four organisations responded to the consultation, as listed below:

- ActNow
- CIBC World Markets
- Guernsey Telecom
- Newtel

Deputy Roy Bisson also provided comments of a general nature on this and related consultation papers.

The Director General wishes to thank those who have responded to this consultation document for their contributions in helping to shape the regulatory regime. With the exception of the responses marked as confidential, written comments are available for inspection at the OUR’s office.

The following sections shall address the issue of substance consulted upon.

2. Overview

As was stated in Document OUR 01/04, there is a considerable amount of international literature and experience in the matter of defining relevant markets in telecommunications and determining whether there is dominance or market power in those markets, but there is little precedent in Guernsey.

The Director General proposed a number of decisions based on a practical interpretation of the current status of development of the market and the position of Guernsey Telecoms (“GT”) within that market. She noted that the decisions were likely to be unchanged no matter what methodology was used to determine the markets or to make findings of dominance on those markets and informed interested parties that she would develop a more detailed structure and methodology in the future.

One respondent, while not querying the proposed decisions of the Director General, did spend considerable effort commenting on the underlying methodology used to arrive at the decisions, including quoting European law precedent to illustrate their point that the methodology was not detailed enough and had not followed certain specific precedents. Another requested more information on the methodology and how it would be developed as this issue will be of significance in the market going forward.

The Director General has noted these points, but refers respondents to the comments already made and repeats the fact that she will be developing a body of analysis and an appropriate methodology for this task over time. In the meantime the following comments are designed to provide clarification and assist interested parties:

2.1. *International Precedent and Case Law*

International precedent is always useful in considering decisions in the Guernsey context, but given the huge amount of previous cases in this area, it is important not to adopt any one precedent unilaterally without considering a wide range of relevant factors. For example, one respondent commented that there is no precedent for defining geographic markets in telecommunications with reference to the area in which an entity is licensed to operate and quoted other precedents for ways of defining geographic markets. However, the Director General can provide full references for such precedent¹. Clearly this type of confusion is bound to arise if particular precedents are adopted too rigidly.

¹ “ In the telecommunications sector, the geographical scope of the relevant market has traditionally been determined by reference to two main criteria ²³:

- (a) the area covered by a network ²⁴ , and
- (b) the existence of legal and other regulatory instruments ²⁵ .

²⁴ In practice, this area will correspond to the limits of the area in which an operator is authorised to operate. In Case No COMP/M.1650 – *ACEA/Telefonica*, the Commission pointed out that since the notified joint venture would have a licence limited to the area of Rome, the geographical market could be defined as local; at par.16.” – Extract from Commission Working Document Com(2001)175

2.2. Use of Dominance in a Regulatory Context

Notwithstanding this long history of interpretation of dominance in the context of competition law, the use of the term dominance in the context of setting ex-ante regulatory rules is quite new. Competition law is concerned with identifying abuses of dominance after the fact and applying remedies or penalties ex-post and therefore concentrates on defining markets and dominance with reference to a specific point in time (the point when the alleged abuse of dominance took place). Regulation on the other hand defines markets and determines the position of players in those markets with a view to setting regulatory rules that will apply over a period of time in the future. In Europe there is a significant debate ongoing at present about this new application of the term “dominance” and how it should be applied in a regulatory regime. The Director General considers that this debate and experience and the differences between ex-ante and ex-post use of the term should be taken into account when developing the regime in Guernsey.

2.3. Local Conditions

Finally, it is necessary to consider the particular circumstances of Guernsey when applying any international precedent and it is acknowledged that there is currently no local case law or precedent in this area. Therefore, the Director General will take care to consider local conditions when developing the methodology for defining markets, and making findings of dominance on those markets.

3. Decision as to whether a person has a dominant position in a relevant market.

For this present decision the Director General has taken a practical approach having regard to the current stage of development of the Guernsey telecommunications market. She has considered the relevant market having regard to the geographic area of the market and the product and services market and then considered the position of the sole player in those markets – GT.

The Director General set out her position with regard to the scope of the geographic market and the product and services market in OUR 01/04. As was stated in that document, there are various ways of identifying markets in telecommunications using tests such as demand and supply side substitutability for products and services. However, in the current climate in the Bailiwick of Guernsey these tests are redundant because there is a legal impediment to any other operator other than GT operating in the relevant markets.

With the introduction of new legislation in the form of the Telecommunications Law, this legal monopoly will be removed. The States of Guernsey has directed the Director General that the licensing regime shall include further exclusive rights for GT to operate in these markets for a limited period only and these exclusive rights shall be removed as quickly as possible and in any case before the end of three years².

² Billet d’Etat No VI, 2001: The States Board of Industry – States Directions on the Regulation of the Telecommunications Sector, p. 341 (www.gov.gg/billets/2001/Billet_VI_2001.pdf)

Where there is an exclusive right in the licence, the situation described above is unchanged, i.e. GT has a legal monopoly in these product and services markets. This document and the related document OUR 01/03 provide for the inclusion of limited exclusive rights to operate in the following markets in the Bailiwick of Guernsey:

- Fixed telecommunications services
- Fixed telecommunications networks
- Leased Circuits
- Mobile telecommunications services
- Mobile telecommunications networks.

Therefore, the Director General proposed to consider dominance in these markets at this time. In the light of the comments received the Director General confirms that these markets remain unchanged.

3.1. *Dominant position*

The Director General set out her thinking with regard to the position of GT in the relevant markets in question and sought comments of interested parties on the proposed decision.

Comments Received

In general respondents agreed with the Director General's proposed decision on this matter. A number of respondents expressed interest in how the Director General will develop this area of the regulatory regime. One respondent expressed concern that as the analysis of market dominance develops that it may impact on the licence terms and conditions. Another respondent sought clarification on the exclusivity period to be granted to GT.

One respondent, while acknowledging that GT is likely to hold a dominant position in the relevant markets regardless of the approach adopted, queried the approach adopted by the Director General in determining that GT has a dominant position in the relevant markets. The respondent cited other approaches adopted, particularly by the European Commission in determining this matter. A number of respondents also raised the issue of the review of the designation and noted that the licence condition makes no provision for the removal of any such designation. In addition, clarification was sought on the applicability of the conditions to products and services in the relevant markets only.

Director General's Position

The Director General is grateful for the contributions to the debate on this particular issue. In relation to the methodology used she refers respondents to the comments in section 2 above.

With regard to licence conditions, the conditions that shall be applied to operators found to be dominant have been set out in document OUR01/03 for consultation. The development of analyses and methodologies in this area is not intended to impact on the licence terms and conditions themselves. However, the designation of a licensee as being dominant will 'activate' the specific terms and conditions in the licence and those conditions will apply to that dominant operator.

Similarly the removal of the designation of dominance following the review of the market strength of licensees in the market shall 'de-activate' those conditions. In this way the conditions will be disapplied if appropriate.

Decision 1.1

The Director General finds that Guernsey Telecom is dominant in the fixed network and services telecommunications market and in the mobile network and services market.

4. Decision to include in the licence conditions in relation to the control of that dominant position.

In light of the finding that GT is dominant, the Director General set out in the Consultation Document her proposal to include a number of specific conditions in the licence that it is proposed to grant to GT in order to control that dominant position.

These conditions were set out in section IV of the Draft telecommunications Licence at Appendix 2 to document OUR01/03 – Telecommunications Licence Conditions – Consultation Paper.

Comments Received

All respondents agreed with the Director's General's proposals to include the conditions referenced above in the licence to issue to GT. Certain respondents expressed opinions about the need for there to be reviews of a licensee's designation of dominance as competition develops and that the conditions associated with being dominated should cease to be applicable in time.

One respondent also expressed the view that the conditions should only apply to products and services in the relevant market in which the licensee is designated as having a dominant position.

Director General's Position

The Director General has noted the comments of respondents on this matter. As a general rule, the conditions designed to regulate a dominant operator will apply to the relevant markets covered by the licence issued to the licensee. However, the Director General is aware of the fact that a licensee with a dominant position in a relevant market can influence related markets and she will take this into account when considering this point. Therefore, for those parts of the telecommunications market not subject to licensing or those that have been exempted, or where the licensee is found not to be dominant, then these conditions shall not be applied.

Similarly, as competitors gain market share, if a review shows that the licensee no longer holds a dominant position in a particular relevant market then these conditions shall no longer apply in that market.

Decision 2.1

The Director General shall include specific conditions to regulate the activities of licensees found to have a dominant position in a relevant market. Those conditions are set out in Part IV of the pro-forma Fixed Telecommunications Licence set out in Document OUR 01/18 and Part IV of the pro-forma Mobile Telecommunications Licence set out in Document OUR 01/19.

5. Decision to regulate the prices, premiums and discounts of a dominant operator.

Document OUR 01/04 set out the Director General's intention to include conditions relating to the prices, premiums and discounts that dominant operators charge or allow. The relevant conditions were Conditions 26 and 31 set out in Appendix 2 and Condition 27 set out in Appendix 3 to Document OUR 01/03.

Comments Received

The general thrust of responses was favourably disposed towards the Director General's position. However one respondent was of the opinion that care should be taken in the application of this condition as there maybe a risk that it might cause the incumbent to under-invest in the network, thereby having an indirect impact on the level of competition. In addition, rigorous control of prices may impact on new entrants' willingness to invest. Another respondent was of the view that this condition should only be applicable to products or services in the relevant market in which the licensee was found to be dominant.

Director General's Position

The Director General is mindful of the need to balance various interests with regard to prices; incumbents need to be able to generate a return on capital in order to progressively develop their network and services while consumers want and are entitled to low cost, high quality services. In addition, new entrants may need incentives to enter new markets and can only do so when there is an opportunity to make a return on any investment they make. They also need to know that they are competing on a level playing field. She also recognises that there is much work to be done by GT in order to ensure its compliance with these conditions and this Office shall be working closely with GT over the coming period in this respect.

The Director General will take all of these factors and such other relevant information that she considers necessary, into account when applying this condition.

Decision 3.1

The Director General shall include in the licence to be awarded to Guernsey Telecom conditions relating to the prices, premiums and discounts that dominant operators charge or allow. Those conditions are Conditions 31 of the pro-forma Fixed Telecommunications Licence set out in Document OUR 01/18 and Condition 27 of the pro-forma Mobile Telecommunications Licence set out in Document OUR 01/19.

6. Decision to include quality of service conditions in any licence.

The Director General set out her intention to include specific conditions relating to quality of service in the licence that it is proposed to grant to GT. She also signalled her intent to include this provision in licences of all other licensees.

Comments Received

All respondents agreed with the Director General's proposed decision. In addition one respondent asked that the distinction between the service level condition (Condition 16) and the quality of service condition (Condition 17) be defined; it also suggested some textual changes to the drafting of the condition. All respondents also agreed with the Director General's proposals to extend this requirement to all licensees.

Director General's Position

The Director General has noted the comments of the respondents and is pleased that there is such support for proposals aimed at ensuring a higher quality of service with more open and transparent information for users on these important issues. She is also pleased that there is support for the wider application of these conditions to the market generally. She will consult again on this issue prior to finalising the licence text for new entrants to the market.

Decision 4.1

<p>The Director General shall include in the licence to issue to Guernsey Telecom conditions covering service levels available and quality of service indicators. Those conditions are Conditions 16 and 17 of the pro-forma Fixed Telecommunications Licence set out in Document OUR 01/18 and Conditions 15 and 16 of the pro-forma Mobile Telecommunications Licence set out in Document OUR 01/19.</p>
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7. Decision to Apply the Code in Schedule 1 of the Telecoms Law

Section 9 of the Telecommunications Law requires the Director General to publish notice of her intention to apply the Code, as set out in Schedule 1 of the Telecommunications Law. The code sets out certain rights, powers duties and obligations that are applicable to the licensee in relation to access to land. In OUR01/04 the Director General published notice of her intention to apply the code to Guernsey Telecom

Comments Received

All respondents that commented on this matter supported the Director General's position.

Director General's Position

The Director General believes that for the reasons set out in her proposed decision (OUR01/04) that it is necessary to apply the code to GT to enable it to provide the level of service required of it under the law.

Decision 5.1

The Director General shall, under Section 9 of the Telecommunications Law, apply the Code to Guernsey Telecom with effect from 1 st October 2001

ENDS/