

STATES OF JERSEY



DRAFT TELECOMMUNICATIONS (AMENDMENT No. 2) (JERSEY) LAW 201-

**Lodged au Greffe on 26th October 2011
by the Minister for Economic Development**

STATES GREFFE



Jersey

DRAFT TELECOMMUNICATIONS (AMENDMENT No. 2) (JERSEY) LAW 201-

European Convention on Human Rights

In accordance with the provisions of Article 16 of the Human Rights (Jersey) Law 2000 the Minister for Economic Development has made the following statement –

In the view of the Minister for Economic Development the provisions of the Draft Telecommunications (Amendment No. 2) (Jersey) Law 201- are compatible with the Convention Rights.

(Signed) **Senator A.J.H. Maclean**

REPORT

Summary

The purpose of this amendment is –

1. to provide the Jersey Competition Regulatory Authority (the JCRA) with civil powers to fine licensees if they are found to be in breach of one or more of their licensing conditions up to a maximum of 10% of their turnover averaged over 3 years;
2. to clarify the right of the Authority to include conditions in licences which require operators to comply with directions issued by the JCRA; and
3. to simplify the current consultation processes to remove the obligation on the JCRA in Article 11(10) of the Telecommunications (Jersey) Law 2002 (“the Telecommunications Law”) to issue a fresh initial notice in the event of any change to a proposal.

Current regime

Jersey’s current regulatory regime for telecommunications is broadly satisfactory in that it is comparable with a number of other jurisdictions in terms of powers and relative resourcing.

However, several studies into the effectiveness of the JCRA in regulating the telecoms industry have been conducted, and the conclusions of those studies, together with the JCRA’s experience of regulating the telecommunications industry since 2002 have led to the modifications to the Telecommunications Law made by this amending Law.

Studies

In July 2007, Oxera completed a review entitled ‘Possible Sale of Jersey Telecom: Additional Analysis’. A conclusion of this work was that the regulator needed to have appropriate intermediate sanctions for contravention of licence conditions.

The Economic Affairs Scrutiny Panel reported on the proposed privatisation of Jersey Telecom in March 2006, and recommended that a comprehensive review of the current capabilities of the JCRA, including its skill base, resources and legal powers, be carried out.

Consistent with the recommendations of both the Scrutiny Panel and the Oxera report into the sale of Jersey Telecom, a further review was undertaken into the JCRA’s regulation of telecommunications in Jersey.

LECG (a global consulting and expert services firm) in association with law firm Charles Russell LLP were commissioned to conduct the review, with the following main objectives –

- to undertake a review of the JCRA’s regulatory powers, resources and functions as a telecoms regulator within the Jersey market; and
- to produce a report detailing the efficiency of the JCRA in the telecom sector and making any such recommendations for change or improvement that might be considered.

The LECG Report was published in the spring of 2009 and made a series of recommendations, half of which centred on the working practices of the JCRA, generally in respect of the function of telecommunications regulation and its ability to undertake the role.

The recommendations within the Economic Development Department's authority to deliver are primarily amendments to the Telecommunications Law, specifically –

- the streamlining of the Law's consultation procedures,
- providing the JCRA with the ability to fine operators in breach of a licence condition and providing a mechanism to formally clarify licence conditions.

This amendment is therefore primarily based upon the outcome of the review, but also includes provisions to allow the JCRA to include conditions in its licences which could ensure that telecoms operators must follow its directions.

1. Powers to impose penalties

In considering this recommendation of the 2007 Oxera report, the Minister noted the existing powers of the JCRA under the Competition (Jersey) Law 2005 and those of comparable regulators in the United Kingdom and elsewhere.

The only sanction available under the current Telecommunications Law is the power to revoke a telecoms licence if a provider does not comply with its licence conditions. This means that in practice the regulator can only try and persuade its licensees to conform with their licence obligations because the ultimate sanction, revocation, often may not be realistic.

Other telecommunications regulators have the power to enforce fines up to a maximum of 10% of turnover for breaches of licensing conditions, and the Minister considers that this would be a valuable tool for the regulator before being forced into civil litigation or recourse to criminal law.

2. Conditions of licences – requirement to obey directions

The amendment is also intended to resolve an ambiguity in Article 16 of the Law. Currently, while the conditions imposed as part of a licence imply that the JCRA has the authority to direct licensees, this authority is not explicitly stated, unlike in the telecommunications laws in similar jurisdictions like the Isle of Man or Guernsey.

The amendment would amend Article 16 to expressly permit the JCRA to include conditions in licences requiring operators to follow its directions.

3. Requirement for repeated consultation

The amendment revises the manner in which the JCRA is required to consult upon regulatory decisions.

The JCRA is obliged to undertake public consultations in response to a wide range of proposals and initiatives. Currently, if it consults upon a regulatory decision, and then changes its proposed decision in any way in response to feedback that it has received as a result of the consultation, it is then required to begin the consultation again more or less from scratch. The burden that this imposes may have a number of negative consequences –

- Repeated consultation on the same issue may create ‘voter apathy’ and reduce the overall effectiveness of consultation.
- It will divert JCRA resources from other, potentially more significant, matters.
- The need to repeat a consultation if changes are made in response to it could create a perverse incentive not to adopt the findings of a consultation. This is particularly likely to be the case where resources are constrained.

The LECG review recommended that this procedure should be reconsidered so that there was no absolute obligation to issue fresh notifications when changes to consultations are made, but that the JCRA should be able to start a new notification in cases where it feels that the proposals have changed so significantly that there would be benefit from starting a new consultation.

For these reasons, the amendment provides discretion in such circumstances.

Financial and manpower implications

There are no additional financial or manpower implications for the States arising from the adoption of this draft Law.

European Convention on Human Rights

Article 16 of the Human Rights (Jersey) Law 2000 requires the Minister in charge of a Projet de Loi to make a statement about the compatibility of the provisions of the Projet with the Convention rights (as defined by Article 1 of the Law). On 25th October 2011, the Minister for Economic Development made the following statement before Second Reading of this Projet in the States Assembly –

In the view of the Minister for Economic Development the provisions of the Draft Telecommunications (Amendment No. 2) (Jersey) Law 201- are compatible with the Convention Rights.

Explanatory Note

This Law amends the Telecommunications (Jersey) Law 2002 to allow the Jersey Competition Regulatory Authority (“the Authority”) more flexibility in the way it carries out its functions under the Law.

Article 1 defines the principal Law as the Telecommunications (Jersey) Law 2002.

Article 2 amends the definition “specified regulatory functions” in Article 10 of the principal Law to take into account the additional functions that the Authority will be given by this Law.

Article 3 amends Article 11 of the principal Law to remove the requirement for the Authority to comply with the notification and consultation process required by that Article in respect of its regulatory functions of giving directions to comply with licence conditions or of imposing a financial penalty. (The notification requirements for these regulatory functions are now set out in Articles 19 and 19A.). The amendment also removes the requirement for the Authority, in every case, to repeat the notification and consultation process of the Article if, as a result of complying with that process it subsequently decides to take regulatory action that is different from that which it originally proposed to take. However, the Authority may repeat the notification and consultation process if it considers that it is necessary to do so.

Article 4 amends Article 12 of the principal Law to enable an appeal to be made against a decision of the Authority to impose a financial penalty (including the amount of any such penalty).

Article 5 omits an otiose paragraph in Article 13 of the principal Law.

Article 6 amends Article 16 of the principal Law to make it clear that the Authority can include in a licence it grants a condition requiring the licensee to comply with any direction given by the Authority in respect of anything to which the licence relates.

Article 7 amends Article 19 of the principal Law to require the Authority to give notice in writing to a licensee where it proposes to give a direction to the licensee under Article 19 of the principal Law. The licensee will have the opportunity to make representations to the Authority during the notice period.

Article 8 inserts Article 19A into the principal Law which allows the Authority to impose a financial penalty for the contravention of a condition of a licence and for a failure by the licensee to comply with any direction given by the Authority in respect of such a contravention. The Article requires the Authority to give notice in writing to the licensee where it proposes to impose a financial penalty. The licensee will have the opportunity to make representations to the Authority during the notice period.

The financial penalty must not exceed 10% of the turnover of the licensee during the period of the contravention, to a maximum period of 3 years.

Article 9 amends Article 24 of the principal Law to require the Authority to enter details on the register of any financial penalties it imposes under Article 19A.

Articles 10 and 11 are citation and commencement provisions.



Jersey

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Arrangement

Article

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Jersey

DRAFT TELECOMMUNICATIONS (AMENDMENT No. 2) (JERSEY) LAW 201-

A LAW to amend the Telecommunications (Jersey) Law 2002.

Adopted by the States [date to be inserted]

Sanctioned by Order of Her Majesty in Council [date to be inserted]

Registered by the Royal Court [date to be inserted]

THE STATES, subject to the sanction of Her Most Excellent Majesty in Council, have adopted the following Law –

1 Interpretation

In this Law “the principal Law” means the Telecommunications (Jersey) Law 2002¹.

2 Article 10 amended

In Article 10(1) of the principal Law, for the definition “specified regulatory function”, there is substituted the following definition –

“ ‘specified regulatory function’ means any of the following functions of the Authority –

- (a) granting or refusing a licence under Article 14;
- (b) giving, refusing or revoking consent under Article 16(3)(a);
- (c) making or revoking a determination under Article 16(3)(b);
- (d) giving or revoking a direction under Article 16(3)(c);
- (e) modifying, or refusing to modify, a condition under Article 18;
- (f) giving, or deciding not to give, a direction under Article 19;
- (g) imposing a financial penalty under Article 19A;
- (h) revoking a licence under Article 20;

- (i) granting, refusing or revoking an approval under Article 21;
- (j) giving, refusing or revoking consent or a direction, or making or revoking a determination, under Article 21;
- (k) any other function of the Authority under this Law that the States prescribe by Regulations.”.

3 Article 11 amended

In Article 11 of the principal Law –

- (a) before paragraph (1) there shall be inserted the following paragraph –
 - “(A1) This Article applies to a specified regulatory function other than a specified regulatory function under Article 19 or 19A.”;
- (b) for paragraph (5)(e) there shall be substituted the following sub-paragraph –
 - “(e) state –
 - (i) that the Authority intends to exercise the specified regulatory function, either by taking the action proposed or by taking some other specified action, and the date when the proposed exercise of the function will have effect (expressed by specification or by formula), or
 - (ii) that the Authority does not intend to exercise the specified regulatory function.”;
- (c) for paragraphs (10) and (11) there are substituted the following paragraphs –
 - “(10) Paragraph (11) applies where –
 - (a) after considering any representations or objections, the Authority decides not to take the action proposed in the exercise of the specified regulatory function but to take some other action; and
 - (b) the Authority is satisfied that a person or the public in general should be permitted to make representations or objections in respect of the taking of that action.
 - (11) The Authority may give fresh initial notice under paragraph (1).”.

4 Article 12 amended

For Article 12(1)(e) of the principal Law there is substituted the following sub-paragraph –

- “(e) if the exercise concerns a licence, excluding an exercise that concerns an approval, but including –
 - (i) the giving, or failure to give, a direction under Article 19, or
 - (ii) the imposition of a financial penalty under Article 19A, or the amount of any such penalty imposed,

any person may appeal against the exercise.”.

5 Article 13 amended

Article 13 of the principal Law is amended by omitting paragraph (7).

6 Article 16 amended

For Article 16(2) and (3) of the principal Law there shall be substituted the following paragraphs –

- “(2) Conditions contained in a licence may require the licensee –
 - (a) not to do, not to continue to do or not to cease to do anything under the licence without the prior consent of the Authority;
 - (b) to refer for determination by the Authority any specified question, or any specified class of questions, and to act on such a determination; or
 - (c) to comply with any direction given by the Authority in respect of anything to which the licence relates.
- (3) The Authority has power to –
 - (a) give, refuse or revoke its consent as referred to in paragraph (2)(a);
 - (b) to make or revoke a determination referred to in paragraph (2)(b); and
 - (c) to give or revoke a direction referred to in paragraph (2)(c).”.

7 Article 19 amended

In Article 19, for paragraph (2) there shall be substituted the following paragraphs –

- “(2) Before giving a direction under paragraph (1) the Authority shall give notification to the licensee which –
 - (a) sets out the direction which the Authority proposes to give to the licensee under paragraph (3);
 - (b) specifies the period during which the licensee has an opportunity to –
 - (i) make representations about the matters notified,
 - (ii) comply with any conditions referred to in the notification in respect of which the licensee remains in contravention, or
 - (iii) remedy the consequences of any contraventions referred to in the notification.
- (2A) Subject to paragraphs (2B) and (2C), the period specified in the notification under paragraph (2A)(b) shall be the period of 28 days

beginning with the day after the one on which notification was given.

- (2B) The period specified in the notification may be shorter if –
- (a) the Authority has reasonable grounds for believing that the contravention in respect of which it is proposing to make a determination is a repeated contravention; and
 - (b) the Authority has determined that, in those circumstances, a shorter period would be appropriate.
- (2C) The Authority may specify a longer period than 28 days, or extend the period specified in the notification if it thinks it appropriate to do so.
- (2D) A notification under this Article –
- (a) must be in writing;
 - (b) may be given in respect of more than one contravention; and
 - (c) if it is in respect of a continuing contravention, may be given in respect of any period during which the contravention has continued.
- (2E) For the purposes of paragraph (2B)(a), a repeated contravention is a contravention of the same condition in respect of which the Authority has given a notification or direction under this Article less than 12 months earlier than the notification now being given.
- (2F) The Authority shall not give a direction or a notification under this Article if it is satisfied that its duties under Article 7 preclude the giving of a direction.
- (2G) The Authority shall not give a direction under this Article if it is satisfied that –
- (a) the contravention of the condition is trivial; or
 - (b) the licensee is taking reasonable steps to comply with the condition and to remedy the effects of the contravention.”.

8 Article 19A inserted

After Article 19 of the principal Law there is inserted the following Article –

“19A Authority may impose financial penalty

- (1) This Article applies where on a date after the commencement of this Article a licensee has contravened or is contravening a condition contained in a licence.
- (2) The Authority may, in addition to, or in place of –
 - (a) giving a direction under Article 19(1); or
 - (b) bringing civil proceedings under Article 19(8) for an injunction or other appropriate relief to compel compliance with such a direction,

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- make an order imposing a financial penalty on the licensee for the contravention.
- (3) If, after the imposition of a financial penalty on a licensee, the licensee continues to fail to comply with the condition the Authority may impose a further financial penalty on the licensee.
 - (4) A financial penalty imposed on a licensee or, if more than one financial penalty is imposed, the total of those penalties, must not exceed 10% of the turnover of the licensee during the period that the licensee was in contravention of the condition contained in the licence, to a maximum period of 3 years.
 - (5) The Minister may by Order prescribe the manner in which the turnover of a licensee is to be calculated for the purposes of paragraph (4).
 - (6) A financial penalty imposed under this Article is recoverable as a civil debt due to the Authority.
 - (7) Before making an order under paragraph (2) the Authority shall give notification to the licensee which –
 - (a) sets out the order which the Authority proposes to make; and
 - (b) specifies the period during which the licensee has an opportunity to make representations about the proposed order.
 - (8) Subject to paragraphs (9) and (10), the period specified in the notification under paragraph (7) must be the period of 28 days beginning with the day after the one on which notification was given.
 - (9) The period specified in the notification may be shorter if –
 - (a) the Authority has reasonable grounds for believing that the contravention in respect of which it is proposing to make the order is a repeated contravention; and
 - (b) the Authority has determined that, in those circumstances, a shorter period would be appropriate.
 - (10) The Authority may specify a longer period than 28 days, or extend the period specified in the notification if it thinks it appropriate to do so.
 - (11) A notification under this Article –
 - (a) must be in writing;
 - (b) may be given in respect of more than one contravention; and
 - (c) if it is in respect of a continuing contravention, may be given in respect of any period during which the contravention has continued.
 - (12) For the purposes of paragraph (9)(a), a repeated contravention is a contravention of the same condition in respect of which the Authority has given a notification or direction under Article 19, or imposed a financial penalty under this Article, less than 12 months earlier than the notification now being given.
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- (13) The Authority shall not make an order under this Article if it is satisfied that –
- (a) the contravention of the condition is trivial; or
 - (b) the licensee is taking reasonable steps to comply with the condition and to remedy the effects of the contravention.”.

9 Article 24 amended

In Article 24(1) for sub-paragraph (d) there shall be substituted the following sub-paragraphs –

- “(d) every financial penalty imposed under Article 19A;
- (e) every approval.”.

10 Citation

This Law may be cited as the Telecommunications (Amendment No. 2) (Jersey) Law 201-.

11 Commencement

This Law shall come into force on the seventh day following its registration.

¹ *chapter 06.288*