



Communications Commission

Oaseirys Çhellinsh

Investigation and enforcement procedures guidelines

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1. INTRODUCTION AND PURPOSE OF THIS DOCUMENT

- 1.1 These investigation and enforcement procedures guidelines set out the Communications Commission's approach to handling the enforcement of telecommunications law and regulation, and specifically of operators' licence conditions, on the Isle of Man. As the Island's telecommunications regulator, the Communications Commission has powers to make legally binding orders to secure compliance with licence obligations by operators licensed under Section 5 of the Telecommunications Act, 1984 (of Tynwald) ("the Act"). If telecommunications regulation is not vigorously enforced, the benefits of its provisions will be lost to Manx citizens and the economy. A further advantage of robust enforcement is that it sends a strong signal to market players that breaches of the law and/or licence conditions will not be tolerated. This improves compliance amongst the industry generally, and it is hoped that the need for investigations and enforcement actions will diminish over time. The guidelines are intended to help people understand the Communications Commission's processes but they are not binding on the Commission. These guidelines do not purport to explain all the relevant provisions of the legislation, or give an exhaustive account of the licensing requirements or licence conditions. Interested parties should seek their own legal advice for this purpose. These guidelines cannot be taken as modifying the effect of the statutes or the conditions of a licence.
- 1.2 The Communications Commission may become aware of compliance issues in several different ways. Investigation of complaints from members of the public may reveal breaches of a licence in respect of relations between the operator providing electronic communications services and its consumers. Breaches in respect of dealings between different operators may be revealed through investigations of disputes between operators, although it should be noted that the existence of a complaint or a dispute does not automatically mean that a licence breach has occurred. Where the Commission decides to launch an investigation, it does so on the basis that there is an issue worth investigating, not that there is a proven case of non-compliance.
- 1.3 Finally, the Communications Commission may also investigate any matter on its own initiative, i.e. without the existence of a complaint or a dispute. It may, through its regular contacts with electronic communications providers, business, consumers, government departments or other stakeholders, identify a particular issue which it considers merits further investigation.
- 1.4 The Communications Commission has limited resources and must use those resources in the most effective way. In some circumstances, the interests of citizens and consumers are best served by referring matters to other agencies better placed to deal with those

issues, or for parties to pursue private legal actions, as is envisaged in Section 13(7) of the Act.

1.5 The layout of the remainder of this document is as follows:

- Section 2 sets out the legal background to the enforcement of licence conditions in telecommunications;
- Section 3 explains the Communications Commission's principles for investigation and enforcement;
- Section 4 describes the Communications Commission's process for investigation and enforcement

2. LEGAL BACKGROUND

2.1 These guidelines provide an overview of the licensing requirements and the conditions that licensees are subject to, but do not purport to explain all the relevant provisions of the legislation, nor to give an exhaustive account of the licensing requirements or licence conditions. Interested parties should seek their own legal advice for this purpose.

2.2 Under Section 3 of the Telecommunications Act, 1984, it is an offence to run an unlicensed telecommunication system¹. Section 5 gives the power to grant licences to either the Council of Ministers or the Communications Commission, depending on the class of licence. Sections 11 to 14 contain provisions regarding the enforcement of licence conditions.

2.3 Section 11 sets out the provisions under which the Communications Commission may secure compliance with licence conditions. It provides that, where it appears to the Commission that an operator (i.e. a person authorised by a licence granted under Section 5 to run a telecommunication system) is contravening, or has contravened and is likely to again contravene, any of the conditions of his licence, the Commission may by an Order make such provision as is requisite for the purpose of securing compliance with that condition. An Order under Section 11 will require the operator to do, or refrain from doing, certain things or classes of things as specified in the Order. The Order will take effect at the end of a reasonable period which is specified in the Order itself, and may be revoked at any time by the Commission.

2.4 Section 12 contains procedural requirements for securing compliance with licence conditions. Section 12(1) provides that, before making an Order under Section 11, the Commission must cause notice to be given:

- stating that it proposes to make an Order and setting out its effect;

¹ There are certain minor exceptions, such as optical-only systems and closed systems.

- stating the relevant condition of the licence and how it has been, or would be, contravened; and
- specifying the time (not being less than 28 days from date of publication of the notice) within which representations or objections to the proposed Order must be made.

The Commission must consider any representations or objections which are duly made and not withdrawn. Similarly, under Section 12(2), before revoking an Order under Section 11, the Commission must cause notice to be given, stating that it proposes to revoke an Order and setting out its effect, and specifying the time (not being less than 28 days from date of publication of the notice) within which representations or objections to the proposed Order must be made. Again, the Commission must consider any representations or objections which are duly made and not withdrawn.

- 2.5 Section 12(3) provides that notice under Sections 12(1) and 12(2) shall be given by publication in such manner as the Commission considers appropriate, and by sending a copy of the notice to the operator. Under Sections 12(4) and 12(5), an Order can only be modified if either the operator consents to this, or the same procedural requirements as set out in Paragraph 2.3, above, are observed – namely, that notice is given, that there is a minimum of 28 days within which representations or objections to the proposed modifications may be made, and that the Commission must consider any such representations or objections which are duly made and not withdrawn.
- 2.6 Finally, Section 12(6) provides that, as soon as is practicable after an Order under Section 11 is made, the Commission shall cause it to be published in such as manner it considers appropriate for the purpose of bringing the Order to the attention of persons likely to be affected by it; and shall cause a copy of the Order to be served on the operator.
- 2.7 Section 13 concerns the validity and effect of Orders. An operator aggrieved by an Order may question its validity on specified legal grounds by making an application to the High Court within 42 days of the date of service on him of a copy of the Order. The High Court may quash the Order or any provision of it. The validity of an Order may not be questioned by any other form of legal proceedings. Enforcement of Orders is essentially civil in nature, and Section 13(4) specifically provides that no criminal proceedings shall lie against any person on the grounds that they have contravened or procured a contravention of an Order. However, the obligation to comply with an Order is a duty owed to any person who may be affected by a contravention of it, and any such person may take civil action if they sustain loss or damage arising from the contravention. In such cases, it is a defence for the operator to prove that he took all reasonable steps and exercised all due diligence to avoid contravening the Order.

- 2.8 In addition to private enforcement, compliance with an Order is enforceable by civil proceedings by the Attorney General for an injunction or any other appropriate relief.
- 2.9 Under Section 14, the Communications Commission is required to keep a Register of Licences and Orders, and to enter there particulars of every Order made under Section 11, and every revocation thereof (with the exception that the Council of Ministers may direct the Commission not to enter such particulars where to do so would be against the public interest or against the commercial interest of any person). The register is open to public inspection, subject to a fee.
- 2.10 The Act contains provisions allowing the Commission to gather information for the exercise of its functions. Section 37 creates a general power to gather information, i.e. not simply from operators. Subject to certain provisos, the Commission may, for any purpose connected with its functions in relation to the enforcement of licences, by notice in writing require persons to provide it with relevant documents and (where businesses are concerned) with estimates, returns and information within a specified time, manner and form. The level of compulsion is that which would apply in civil proceedings before the High Court. It is an offence not to comply with a notice requiring the production of information or documents, or to intentionally alter, suppress or destroy any document required, or to make a false statement in furnishing information.
- 2.11 In relation to requiring information from operators, there are two possible avenues. Section 5(5)(c) of the Act allows the Commission to include in licences conditions which require the authorised person to furnish to the Commission, in such manner and at such times as it may reasonably require, documents, accounts, estimates, returns or other information required for the exercise of its functions. Where a licence under Section 5 does not contain such conditions, Section 38 empowers the Commission, for the purpose of the exercise of its functions, by notice in writing to require the licensee to provide it with relevant documents, accounts, estimates, returns or other information within a specified timeframe, manner and form.
- 2.12 The Act also contains provisions safeguarding the confidentiality of information supplied to the Commission. Section 39 contains general restrictions prohibiting the disclosure of information which has been obtained under or by virtue of the provisions of the Act and which relates to the private affairs of any individual or to a particular business. The information cannot be disclosed during the lifetime of the business or the individual without consent. There are exceptions, such as where the information is disclosed for the purpose of facilitating the performance of functions of the Governor in Council, the Commission, the Chief Secretary or the Isle of Man Office of Fair Trading, or for the purpose of civil or criminal proceedings.

3. PRINCIPLES FOR INVESTIGATION AND ENFORCEMENT

A. PRIORITISATION

- 3.1 The Communications Commission must use its resources as efficiently and effectively as possible. While it will consider all submissions it receives, it does not have the resources to investigate all possible complaints and disputes received. It must prioritise the use of its resources, weighing up the likely benefits (mainly to consumers and to the process of competition, rather than to individual competitors) against the cost of using its resources in this way rather than for other purposes, having regard to the relevant regulatory principles.

B. TRANSPARENCY

- 3.2 The Communications Commission will conduct its investigations in as open and transparent a manner as possible. When it opens an investigation, it will normally inform the relevant parties (i.e. the complainant, if any; the party under investigation; and any other interested parties), unless there are good reasons not to do so. It may also choose to publish a brief statement on its website, stating that it has launched an investigation into a certain subject. If, however, it has reasons to believe that publication would hamper the investigation (for example, if it would lead parties to destroy evidence, or if the statement itself might be used inappropriately by parties to further their own case), it may decide not to publish, or to delay doing so until all the available evidence has been gathered. If it does publish a statement, and if subsequent evidence comes to light which causes it to broaden the scope of the investigation, it may also publish that fact. It will also publish on its website any Notices related to proposed Orders under Section 11, as required under Section 12(1), specifying the time allowed for representations or objections, and how these may be made (see Paragraph 4.15). Once these have been considered, and if and when an Order is finalised, the Order itself will be published on the website as well as served on the relevant operator. Where the Commission considers it appropriate to publish an Order in Isle of Man print media in order to bring it to the attention of persons affected by it, it will do so.

C. RESPECT FOR CONFIDENTIALITY

- 3.3 The Communications Commission is bound by strict provisions regarding the treatment of confidential information under Section 39 of the Act. In order to achieve the proper balance between transparency and respect for confidentiality, the Commission requests that all responses to information requests are supplied with a non-confidential version,

including submissions as to why particular information is confidential. Stakeholders should note that, when responding to statutory information requests, a blanket marking of “confidential” on all information supplied is unhelpful, both for the Communications Commission and for itself. A statement that all information supplied is “confidential” will oblige the Commission to take its own view on what is, and is not, genuinely confidential.

D. RESPECT FOR RIGHTS OF COMPLAINANTS AND OTHER INTERESTED PARTIES

3.4 The Communications Commission recognises the important role that third parties – that is, individuals or firms who are not themselves targets of an investigation – can play in its investigations. While complainants are often important third parties in investigations, others – such as competitors, customers and suppliers – can also be involved. The Communications Commission’s primary mechanism for notifying third parties of current investigations will be the statements published on its website. Any individual or organisation who wishes to be considered as a third party participant in an investigation should contact the Commission as soon as possible.

4. INVESTIGATION AND ENFORCEMENT PROCESS

4.1 There are four possible phases in the Communications Commission’s investigation and enforcement process:

- ***Enquiry phase.*** The purpose of this phase is to enable the Commission to decide if, on the basis of the evidence before it at that point, there is a possible enforcement issue. The Commission does not use its formal information-gathering powers at this stage.
- ***Investigation phase.*** This phase involves looking for evidence to allow the Commission to determine whether or not a contravention of an operator’s licence or a breach of the Act is occurring or has occurred and is likely to occur again. Evidence may be sought from a complainant, from the party against which an allegation is made, and from other industry players.
- ***Enforcement phase.*** This relates to the outcome of an investigation, where the Commission has concluded that the operator has committed or is committing a breach of its licence conditions, and has imposed a remedy. The remedy may be either an informal or a formal one. An informal remedy may take the form of assurances from the operator regarding its future behaviour. A formal remedy would consist of an Order of the Commission under Section 11(1) of the Act .

- ***Compliance phase.*** This deals with follow-up action by the Commission to ensure that assurances are honoured and that Orders are implemented as directed. Where the Commission considers that an existing Order has been breached, it may refer the matter to the Attorney General with a recommendation that he bring civil proceedings for an injunction or other appropriate relief.

A. ENQUIRY PHASE: COMPLAINTS, DISPUTES AND OWN-INITIATIVE ACTIONS

- 4.2 The Commission may receive information which might lead it to open an investigation, and eventually to enforcement action, in a number of different ways. It may receive complaints from members of the public, and will pay particular attention to repeated complaints about the same operator, which may indicate that it is not complying with its obligations. It may receive complaints by one operator about another which relate to alleged breaches of licence conditions. And it may decide, on its own initiative and on the basis of information gleaned from its daily interaction with consumers and industry, rather than on any specific complaint, to instigate an investigation.
- 4.3 When a complaint or dispute is referred to it for possible action, the Commission must first decide whether to accept it as a case. It must verify that the issue falls within its legal powers to remedy. Once a complaint or dispute is accepted, the Commission will open a file and the case will enter the enquiry phase. During this phase, the Commission will ensure that it fully understands the nature of the complaint or dispute, in order to decide whether to launch a full investigation. Information on the issue will be gathered in an informal way – for example, through telephone calls and voluntary disclosure of information, such as e-mail correspondence, by the parties involved. A decision to launch an investigation does not mean that there has been a breach of the licence conditions – merely that there is an issue worth investigation. Ideally the enquiry phase should last no more than 21 working days, but this may need to be extended according to other demands on the Commission.. Own-initiative investigations may take longer than complaints or disputes during the enquiry phase, but the Commission will still aim to complete them within a set time, which may be more than 21 days. During an enquiry the Commission will not comment on a dispute or complaint.
- 4.4 Submissions, particularly from operators, must contain a certain level of evidence before the Commission will open an enquiry. However, in cases of serious complaints from individual consumers, it will be less stringent in its information requirements. Where inter-operator complaints and disputes are concerned, submissions will be expected to specify what regulatory provision or article of law has been breached, with specific, relevant evidence. Issues which are purely commercial or contractual (and which do not involve access or interconnection) are unsuitable for complaint to, or resolution by, the

regulator, as are issues which fall within the jurisdiction of another body, such as the Isle of Man Office of Fair Trading.

4.5 In summary, the Commission will only accept an inter-operator complaint where complainants:

- clearly identify the relevant condition or law which they believe is being breached;
- submit sufficient factual evidence to back up their allegations including evidence of harm suffered or expected to be suffered by the operator and, where available, evidence of actual or potential effect on consumers; and
- submit a statement by an officer, preferably the CEO, of the operator that due care has been taken to ensure that the evidence submitted is correct and complete.

4.6 The outcome of the enquiry phase is a decision whether or not to launch an investigation. The Commission may engage outside expertise in order to help it reach this decision. If it does so, it will ensure that the consultants are bound by the same level of restrictions on disclosure of confidential information as is imposed on the Commission under Section 39 of the Act.

Given the comments about resources in the “Introduction”, above, it is worth reiterating that a decision by the Commission not to open an investigation does not necessarily imply any view by the Commission about the merits of a complaint.

B. INVESTIGATION PHASE

4.7 The Commission relies on accurate information, provided in a timely manner, to carry out efficient investigations. Delays in the provision of information can have a significant impact on overall timescales and can significantly disadvantage consumers, as well as the parties involved. Operators are therefore reminded of their obligation under Sections 37 and 38 of the Act, as well as under their licence conditions.

4.8 Where necessary, the Commission will use its statutory powers under Sections 37 and 38 to enable it to collect the information it needs to pursue investigations. It may take enforcement action against companies which fail to respond to statutory requests for information, or which block or delay the provision of information. However, it may also use informal requests for information in certain circumstances, such as where background information is required, or the information is required before a formal request can be issued.

- 4.9 When a formal information request has been issued, the Commission will not normally agree to an extension of the deadline and will be robust in enforcing the requirement to respond, unless compelling reasons are provided to support a requested extension. Stakeholders are requested to submit non-confidential summaries of information, with particularly confidential matters either indicated by square brackets with a gap between (for instance "Our agreement with company XXX requires us to submit information on []), or with ranges of numbers rather than precise figures (for instance "Our turnover in 2007 was [£5m -£10m]).
- 4.10 The Commission will approach each investigation and the role of a given third party on a case-by-case basis, assessing the need for third party complainants' comments, including whether they should be given access to documents during an investigation, subject to the usual confidentiality considerations. In this phase also, the Commission may engage outside expertise. If it does so, it will ensure that the consultants are bound by the same level of restrictions on disclosure of confidential information as is imposed on the Commission under Section 39 of the Act.
- 4.11 The Commission estimates that investigations will normally take 4 to 6 months.

C. ENFORCEMENT PHASE

- 4.12 The outcome of an investigation will be either:
- A statement of closure, i.e. a public statement that the investigation has been closed. This may be on the grounds that the investigation has concluded that no breach of the legislation has been committed, or it may be on the grounds that the Commission has concluded that it would be wasteful to commit more resources to the problem. It may also occur because the issue has been resolved between the parties and the complaint has therefore been withdrawn;
 - A Notice under Section 12(1) of the Act to the operator involved that the Commission intends to issue an Order requiring compliance with the licence conditions, giving reasons and evidence. A non-confidential version of this notification will also be published on the Commission's website.

There will thus be, in every case, a public statement of the basis on which the matter has been closed.

- 4.13 If the conclusion of the Commission is that a violation of the law or a licence condition has occurred, it must consider what action to take. Its options, in order of increasing seriousness, are:

I. ACCEPT INFORMAL ASSURANCES FROM THE PARTIES AS TO THEIR FUTURE BEHAVIOUR

4.14 The Commission may consider, and accept, informal assurances in some cases in respect of conduct which has breached a licence condition, and may decide to close a case on the basis of those assurances. However, informal assurances would not be appropriate if a case raised issues that affected a wide group of stakeholders. In each relevant case, the Commission will form a judgement based on the facts of the case, the terms of the proposed assurance and its duties in relation to competition, consumers and parties likely to be affected by the decision. Assurances will not be accepted after stronger enforcement action (e.g. the issuance of a draft Order) has been taken. The Commission will generally only accept informal assurances on the following basis:

- It furthers the interests of citizens and consumers for the Commission to do so (for example, because it addresses a specific problem in a cost-effective way);
- The assurances address the concerns raised by the Commission in its investigation;
- The assurances are provided in writing in the form of a (non-statutory) undertaking, signed by a senior officer of the company;
- The party giving the assurances consents to a non-confidential version of the assurances being published on the Commission's website;
- The assurances include a measurable commitment to some form of compliance monitoring in the future.

II. ISSUE ORDER UNDER SECTION 11(1) OF THE ACT

4.15 Where the Commission has concluded, on foot of an investigation, that an operator is contravening, or has contravened, its licence conditions, it may issue an Order under Section 11(1) of the Act. If so, it will, in line with its procedural obligations under Section 12(1), first issue a Notice setting out:

- (a) the determination made by the Commission, with reasons;
- (b) the relevant condition of the licence and how it has been, or could be, contravened;
- (c) the fact that it proposes to make an Order and the effect of the Order;
- (d) the actions which the operator must take to remedy the contravention;
- (e) the time period which will be allowed to the operator to effect the requirements of the Order;
- (f) the time period (not less than 28 days) within which representations and objections may be made to the proposed Order.

Points (b) to (e), above, will effectively constitute the draft text of the proposed Order. The Notice will be published on the Commission's website, and a copy will be sent to the operator which is the subject of the Order by registered post. If necessary for the protection of confidential information, the version of the Notice which appears on the website may have some information redacted.

- 4.16 An Order will be considered where the Commission considers that informal assurances are insufficient to ensure that the contravention will be remedied. Where, having investigated, the Commission considers that a contravention has occurred, it will generally issue an Order unless there are good reasons not to do so. Note that simply bringing the contravention to an end will not, in itself, provide a strong enough case for the Commission not to issue an Order.
- 4.17 Once the period for making representations and objections has concluded, the Commission will consider them and decide whether or not to proceed with the Order. If it does, it will finalise the text of the Order and publish it on its website. Where the Commission considers it appropriate to publish an Order in Isle of Man print media in order to bring it to the attention of persons affected by it, it will do so. If necessary for the protection of confidential information, the version of the Notice which appears on the website may have some information redacted. At the same time it will send a full version to the operator which is the subject of the Order by registered post. It will also enter the Order into the Register of Licences and Orders maintained by it in its offices, unless it has received a direction from the Council of Ministers not to enter any particulars in the Register on the grounds that this would be against the public interest or against the commercial interest of any person. In this case, these particulars would not be published on the website or in the print media either.
- 4.18 If, based on representations and objections made to the issuance of a Notice under Section 12(1) of the Act, the Commission decides that it is not appropriate to issue an Order, it will publish this decision also on its website.
- 4.19 If, based on representations and objections made to the issuance of a Notice under Section 12(1) of the Act, or otherwise in its discretion, the Commission decides that an Order should be issued with modifications, it will seek the consent of the operator which is the subject of the Order to the modification under Section 12(4) of the Act. If this consent is forthcoming, the Order will be issued forthwith. If this consent is not forthcoming, the Commission will issue a new Notice under Section 12(1) setting out the text of the modified Order, and the operator again has a minimum of 28 days to make representations or objections.

D. COMPLIANCE PHASE

- 4.20 Once a case is resolved, either by an undertaking from a company to do something or take some action, or because the issue has been resolved between the parties, or because the Commission has issued an Order, the case enters the compliance phase. This may be because:
- the Commission accepts informal assurances from the operator as to its future behaviour;
 - the Commission issues an Order requiring the operator which has been found to have committed, or to be likely to commit, a contravention to take certain actions within a certain time period.
- 4.21 There is no specific time limit for the compliance phase, since each case will depend on its facts. During this phase, the Commission will monitor the behaviour of the operator which has been the subject of investigation. If the operator which has given assurances does not comply with them, the Commission will re-initiate the enforcement phase with a view to imposing more severe penalties for non-compliance.
- 4.22 Any Orders issued by the Commission will follow the principles of natural justice and due process. Operators which are the subject of an adverse decision by the Commission also have the right of appeal, under Section 13(1) of the Act, to the High Court. If the court is satisfied that the Order is not within the Commission's powers under Section 11, or that any of the requirements of Section 12 have not been complied with in relation to it, or that the interests of the operator have been substantially prejudiced by a failure to comply with those requirements, it may quash the Order or any provision of the Order.
- 4.23 The Communications Commission therefore considers that the rights of operators are well safeguarded, and expects that, subject to any possible appeal, once an Order has issued it will be complied with within the time limit given. However, it will monitor compliance by operators with the conditions of all Orders. If it finds that an operator does not comply within the specified time, it will, in the absence of substantial mitigating factors, refer the matter to the Attorney General for possible civil enforcement.