



***Assessment of the Impact of the National
Broadband Plan on Telecoms Regulation***

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1. Background

- 1.1. The Communications Commission (the Commission) is the statutory body responsible for economic regulation of the telecoms sector in the Isle of Man. The Commission's main focus is facilitating sustainable competition in telecoms markets on the Island; ultimately competition is assessed on the benefits or otherwise, that it may bring for consumers.
- 1.2. In order to achieve its aims the Commission regulates the telecoms sector on an ex-ante basis – putting in place regulatory obligations and remedies to prevent any parties from abusing a dominant position in the market¹. While it does not rule out regulatory interventions at the retail level if required, most of the obligations and remedies are focussed on the wholesale markets. The Commission is of the view that, given the size and scope of the Manx telecoms market, facilitating access to existing infrastructure on a cost oriented, non-discriminatory basis allows competitors to make more efficient investments in their core networks to allow for greater differentiation from the incumbent.
- 1.3. However, there are some areas of the Island where it is likely that an operator could not make a sufficient return on investment to justify rolling out next generation fibre infrastructure. To overcome this problem the Government has committed to supporting and facilitating investment in these areas through the National Broadband Plan (NBP). The Commission is supportive of this initiative and believes any measures that further the rollout of next generation services are likely to be positive.
- 1.4. It is likely that the NBP will have an impact on competition, at the very least in the intervention areas. Therefore, in line with its regulatory remit and the National Telecommunications Strategy, the Commission believes it is important to outline its views on regulation after the award of the NBP in the interest of providing regulatory certainty for all potential bidders.
- 1.5. The following is based on the Commission's current understanding of the NBP award process and is being treated as a living document; the Commission will update this document as and when there may be developments in relation to the award process and/or its outcomes. The Commission reserves its right to revisit and amend any obligations or remedies in response to competitive developments in the best interests of the Manx consumer and economy.
- 1.6. The Commission believes that the success of the NBP will be the impact it has at the wholesale level, thereby offering greater choice and value for consumers in the retail markets. To ensure this occurs it is essential that all operators can gain access to the infrastructure that the Government is subsidising on a cost oriented, non-discriminatory basis, and that all reasonable access requests are facilitated.

¹ These obligations are contained in the operators' licences issued under the Telecommunications Act 1984. The obligations will be replicated in the Communications Bill 2018 when it is enacted following its passage through the Legislative Branches.

2. Outcomes

- 2.1. While there are many different permutations of bidders and lots that could come out of the NBP award process, for the purposes of regulating the telecoms industry the Commission sees two high-level outcomes to the process:
 - a) the Incumbent, Manx Telecom, is the successful bidder for all lots; or,
 - b) another Operator is the successful bidder in one or more lots.
- 2.2. The reason that the Commission is not considering specific outcomes is that any of the outcomes that could fall under either option would likely have the same net effect on regulation of the sector, the only variables would be who the obligations would apply to.
- 2.3. Each of the outcomes, and the likely implications are considered separately below.

3. Manx Telecom is the Successful Bidder for all Lots

- 3.1. Should Manx Telecom become the successful bidder for all lots there would not be a material change to the telecoms market in terms of Significant Market Power (SMP). There would not be any requirement to put in place any new obligations as Manx Telecom is already subject to the following obligations:
 - a) **Non-Discrimination** – the incumbent is not permitted to discriminate between its own retail operation and other operators, or to discriminate between its retail customers;
 - b) **Access** – all reasonable requests for products or access to its networks must be facilitated and Manx Telecom cannot withdraw access already granted without the approval of the Commission;
 - c) **Price Controls** – Manx Telecom must not create a price squeeze or margin squeeze between markets and products to prevent competition;
 - d) **Accounting Separation** – as the incumbent Manx Telecom must account for its wholesale and retail operations separately, and across regulated markets; and,
 - e) **Cost Orientation** – Manx Telecom is obliged to provide access to its network and products at the wholesale level on a cost oriented basis, only the cost for providing the service and the Weighted Average Cost of Capital (WACC) can be included in wholesale offers.
- 3.2. In addition to publishing formal decisions to give effect to the obligations outlined above², the Commission also provides operators with, and publishes as appropriate, guidance notes on the specific remedies that stem from the obligations. For example the Commission has published guidance notes on Cost Orientation and Accounting Separation³, Margin

²<https://www.iomcc.im/media/1060/notification-of-market-power-determination-wholesale-fixed-markets-decision-notice-2012-02.pdf> and <https://www.iomcc.im/media/1057/notification-of-market-power-determination-retail-fixed-markets-decision-notice-2012-01.pdf> for further information.

³<https://www.iomcc.im/media/1330/information-notice-on-cost-orientation-assessments-june-2019.pdf>

Squeeze⁴, and publishes the details and findings of any investigations into alleged non-compliance with regulatory obligations.

- 3.3. It is important to note that while the obligations would not change, the specifics with regard to demonstrating compliance with them would be likely to change; for example being the successful bidder in the NBP would clearly have an impact on demonstrating compliance with the Cost Orientation obligation as Manx Telecom would have to demonstrate there was cross subsidisation between the State's subvention and parts of the network that are not in the intervention areas.
- 3.4. The Commission notes that some of the obligations that would be required by Government to ensure that the NBP meets its objectives in the regulatory area could be applied on a contractual basis as part of the award. However there is a risk that if the Government is applying regulatory obligations that are the same as those that already apply to the operators this could lead to scenarios where in future the contractual obligations and regulatory obligations may not be aligned. As such the Commission is of the view that regulation by the Commission alone should be sufficient to ensure the incumbent would not be in a position to leverage the award of the NBP contract to damage competition or restrict access to networks in the intervention zones and creates less risk of misalignment in these specific regulatory areas.

4. Another Operator is the Successful Bidder for one or more Lots

- 4.1. Should another bidder be successful in obtaining one or more Lots in the NBP award the Commission would still be obliged to ensure that there would be no distortion to competition and to ensure that an Operator could not unduly leverage a dominant position, even in limited geographic areas. In order to find an operator with SMP in a particular area the Commission would, amongst other things, expect that there would be high structural barriers to entry, that the boundaries of the area would be stable over time, and that there would be different competitive conditions in the area. The State subvention to build a network in an area in which it would otherwise be uneconomical to do so reflect the high barriers to entry that exist. Additionally the boundaries would be stable over time as the geographic lots subject to the subvention would not change and the fact that an operator other than the incumbent would have a dominant position demonstrates that competitive conditions would be different than the rest of the Island.
- 4.2. Should such a situation arise the Commission would be of the view that in having SMP in that area the same obligations outlined in paragraph 3.1 a) to e) above would apply to the Successful Bidder. There are well established mechanisms in place for determining compliance with these obligations, but it is also an area that the Commission acknowledges can evolve overtime. The regulatory framework under which the Commission operates takes this into account and obligations and remedies are revisited periodically to ensure that they are fit for purpose.

⁴ <https://www.iomcc.im/media/1218/guidelines-on-assessment-of-margin-squeeze.pdf>

- 4.3. Once again it would seem that the Commission's regulatory objectives would be aligned sufficiently with the interests of the NBP and the current regulatory framework would ensure that the risks associated with awarding such a contract would be managed.

5. Alternative Technology Provider

- 5.1. The Commission also notes the provision for selection of an Alternative Technology Provider (ATP) in some or all of the intervention areas, and that this is at the discretion of the Department for Enterprise (DFE).
- 5.2. It is likely that the decision to appoint an operator as an ATP in any given area would mean that they would have SMP in a Wholesale Wireless Access market within intervention areas. The Commission acknowledges that such a market has not yet been designated but that is largely due to the fact that Wireless Access is not offered as a wholesale product anywhere on the Island. However the appointment of an ATP being provided with gap funding to supply such services would clearly change this.
- 5.3. Again, working on the assumption that the subvention is being provided on the basis that it would not be economical to provide the service on a commercial basis, any operator in receipt of State subvention to rollout wholesale services would attract an SMP designation within the relevant geographic markets in much the same way as in the fibre markets.

6. Conclusion

- 6.1. As part of the NBP process the requirement to ensure that no abuse arises as a result of the award of a contract is balanced with the regulatory and contractual obligations, which are not without their cost, on any Successful Bidders. The Commission is of the view that the current regulatory framework is sufficient to do this, which will only be strengthened by the enactment of the Communications Bill.
- 6.2. The Commission is releasing this paper in the interest of ensuring that there is regulatory certainty; it is of the view that operators with an interest in competing in the NBP award process would benefit from having foresight of the likely regulatory environment in which they would operate. As such the Commission considers this to be a living document and will release updated versions if and when developments in the NBP process arise that may cause it to change its thinking. However as it stands the Commission is satisfied that the views set out in this version of the paper are a reflection of its current thinking.
- 6.3. After the completion of the NBP award process the Commission will in any event monitor competition in the telecoms sector on a proactive basis, and will ensure that appropriate interventions are made to ensure no issues arise. This includes consulting on and implementing changes to the regulatory framework as required to ensure it is fit for purpose.
- 6.4. Finally, the Commission would like to reiterate its support for the National Telecommunications Strategy, and the NBP process, which it believes will be a positive investment in the Island's future and of net benefit to consumers.