



01 September 2010

Colin Gibaut
Director of Strategic Development
Economic Development Department
Jubilee Wharf
24 Esplanade
St Helier JE1 1BB

Dear Colin

Ferry Fare Regulation

The Jersey Competition Regulatory Authority (“**JCRA**”) and the Guernsey Office of Utility Regulation (“**OUR**”) (jointly referred to herein as the “**Regulators**”) submit this joint response to the Green Paper on Competition, Licensing and Regulation in the Car and Passenger Ferry Market published by the Jersey Economic Development Department (“**EDD**”) and the Guernsey Commerce and Employment Department (“**C&E**”) on 10 June 2010 (the “**Consultation**”).

The Regulators welcome the opportunity to contribute their knowledge and experience of regulating monopoly and dominant organisations to the development of ferry regulation. Their objective in making the comments below is that which guides their regulatory activities in other sectors, essentially that of promoting the interest of present and future customers. To do so, they ensure that prices and service quality for services are good value for customers, companies are efficient and invest adequately for the future, and regulation is supplemented where appropriate with market instruments including competition.

The Consultation’s central issue “is whether we need greater fare regulation, whilst maintaining and improving other service standards.”¹ Currently, the Channel Islands have a single provider of car passenger ferry services, Condor Ferries. Under Service Levels Agreements originally concluded with both Islands in 1998, Condor has been, and remains, the sole provider of ferry services in between both Jersey and Guernsey and the UK. Condor is also currently the sole provider of car passenger ferry services on the southern route to France, although there has been intermittent competition on

¹ Consultation at pg. 29 (emphasis in original).

this route in the recent past. A report produced by Oxera for the States of Jersey in 2009, however, questions whether this competition is sustainable in the longer term.²

The Consultation recognizes that, as for other essential services provided by a monopoly or dominant operator, there is a need for some form of economic regulation of ferry services to Jersey and Guernsey Islands. The Consultation raises the question of the forms of regulation that are most likely to achieve its objectives most effectively and efficiently.

The Consultation states, and the Regulators agree, that although Jersey currently has a general Competition Law, and Guernsey is in the process of implementing one, recourse to the abuse of dominance provisions in Competition Law *is not* the best means to regulate a dominant undertaking's pricing. The central concept of abuse of dominance under Competition Law is the prohibition of conduct by a dominant undertaking that "has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."³ Here, by contrast, there currently are no other suppliers of car passenger ferry services in the market or markets in question, and serious questions have been raised as to whether more than one supplier is sustainable in the longer term. Moreover, Competition Law is a tool for ex post enforcement against anti-competitive practices, it is not as well suited for ex ante regulation of price and/or service provision, if such regulation is the goal the States want to achieve. Finally, and as also recognised in the Consultation, placing requirements on a sole operator's efficiency is largely beyond the scope of Competition Law.

Therefore, relying solely on Competition Law is not the answer. Some form of regulation, over and above that which currently exists, would be necessary if consumers' interests are to be properly safeguarded. Any form of such regulation is within the discretion of the States of Jersey and/or Guernsey. However, if the States do consider greater regulation of ferry services, the Regulators advise the following points be incorporated or taken into account:

- *Any form of licensing adopted should be non-exclusive* – If the States decide to move from the current system of ramp permits and SLAs to a more formal licensing system, the Regulators recommend that the licenses granted be expressly non-exclusive. Although the Oxera report questions the long-term viability of competition on either the northern or southern routes, a licensing system should not preclude attempts at new entry, a point on which Oxera itself broadly agrees.⁴ Moreover, the licensing system should not preclude competition in ferry services potentially developing through innovation (such as opening up new routes on the northern and/or southern routes) as opposed to direct intra-route competition. A non-exclusive licensing system also was Oxera's recommended option.

² See Oxera, *The Supply of ferry services: a policy assessment* (15 Apr. 2009).

³ *Hoffman-La Roche v. Commission*, Case 85/76 [1979] ECR 461, [1979] 3 CMLR 211, para 91.

⁴ See Oxera, *The Supply of ferry services: a policy assessment* at p. 41 (15 Apr. 2009) ("In respect of licence exclusivity, the analysis suggests that the States will not be able to rely on sustainable competition to protect the interests of users while meeting the minimum service requirements. Nevertheless, the States may not wish to formally exclude the prospect of future applications for services which may be in the public interest.")

- *Conditions on granting licences should be transparent, and based on qualitative criteria* – The criteria for granting licenses to provide ferry services should be based on whether or not the applicant can show it is a qualified, professional provider of such services, and has the financial means to do so. The criteria should not place quantitative restrictions on the number of licensees, or seek to protect existing licensees from new entry. Licences granted in this way may contain provisions to ensure that certain essential services are provided by licensees or licensees contribute to the cost of these services when they are provided by other licensees if they cannot be recovered from customers directly. Article 7 of the Telecommunications (Jersey) Law 2002, Article 8 of the Postal Services (Jersey) Law 2004 and Sections 2 and 4 of the Regulation of Utilities (Bailiwick of Guernsey) Law 2001 can be useful guides to follow in this regard.
- *The Licence granted to Condor should have robust price monitoring powers, and also monitor Condor's profitability and the quality of its services* – Such regulatory powers constitute a form of light touch regulation, as recommended in the Oxera report; more extensive price regulation should be reserved if light touch regulation proved insufficient (see below). If Condor's profitability is also monitored, with appropriate analyses by route and season, this would give assurance that Condor is not making excessive profits in its provision of ferry services to the Channel Islands. As Oxera notes, effective monitoring of prices and profitability would require enhanced information gathering powers, over and above those currently contained in the laws of Jersey and Guernsey.
- *Possible Efficiency Review* – The Consultation suggests the possibility of an efficiency review of Condor to support future regulation. Before any such study is undertaken, however, the Regulators recommend that EDD and C&F consider carefully its feasibility and scope, and the Regulators would be happy to take part in this consideration.
- *While light touch, a licensing system with price monitoring should reserve the capability to impose more extensive price regulation, should a light touch approach prove insufficient* – This recommendation corresponds to Oxera's own observation that "the ability to introduce a more formal process should be maintained as an option to be considered at a regular review point in the licence, on the basis that if there is evidence or concern that the operator is acting in such a way to abuse the dominant position . . . more direct control of pricing policy would be required."⁵ The existing telecommunication and postal licences in Jersey and Guernsey may be useful templates in this regard, as they reserve the right of the Regulators to impose more direct control on a dominant operator's prices, if necessary.

⁵ Oxera, *The Supply of ferry services: a policy assessment* at pg. 37 (15 Apr. 2009). The Regulators note that the potential for price regulation should not be strictly limited to whether or not the operator is abusing its dominant position, but whether consumer welfare is being adequately protected. Consumer welfare can be harmed by a dominant operators simply being inefficient without necessarily engaging in activity that would be considered to be an abuse of dominance under Competition Law. Such a situation could provide a basis for price caps in a regulated market.

- *Licence(s) for ferry operator(s) should provide for finite terms after which a licence needs to be renewed, for the process whereby such a licence is renewed and for licence revocation in certain circumstances* – These provisions exist in one form or another in other regulated sectors in Jersey and Guernsey. They provide opportunities for regulators and policy makers to review performance and ensure that operators remain incentivised to provide efficient, fairly priced services, while affording the States of Jersey and Guernsey the opportunity to review whether the services provided are meeting their objectives.
- *The Regulatory System should be subject to periodic review* – In addition to, or in conjunction with, the review of licences, the States of Jersey and Guernsey should build in scheduled reviews of the regulatory system. In this way, the States can ensure that the regulatory system adopted is proportionate and achieving its goal of promoting the interests of present and future customers of ferry services in the Channel Islands. For example, if it turns out that, despite the non-exclusivity of licences, the provision of car passenger ferry services to Jersey and Guernsey continues to be provided by a single supplier, the States could consider during a review the potential benefits of introducing a competitive tender process for the provision of these services.
- *Regulation should take a Pan-Channel Island Approach* – It is obvious that, based on its schedule and route network, Condor views Jersey and Guernsey as being part of a single Channel Islands network for the provision of passenger car ferry services. Regulation should therefore reflect this reality. At a minimum, Jersey and Guernsey should adopt a common regulatory approach, with corresponding requirements and reporting obligations. If independent regulation is the preferred option, ideally this should be a common approach for both Islands.
- *Any regulatory scheme implemented should have “teeth” in the ability to fine or otherwise financially penalise operators for infringements of their licence conditions* – The Regulators advise that any regulatory scheme – independent or otherwise – would need to provide for strong enforcement powers, including the power to fine licensed operators based on infringements of licence obligations.

As support for this, the States of Jersey and Guernsey need look no further than the past debate on the possible privatisation of Jersey Telecom (“JT”). One of the key findings to arise out of this debate was the inability of the JCRA to fine operators for licence infringements, with the only remedy being licence revocation, which is draconian and therefore largely illusory, especially for an incumbent operator providing USO-type services. Subsequently, EDD’s own review of telecommunications regulation in Jersey concluded that the inability of the regulator to fine licensed operators was a major shortcoming of the regulatory system, which needed to be corrected.⁶ This shortcoming is currently being addressed through amendments to the

⁶ See LECG and Charles Russell, *Review of the regulatory powers, resources and functions of the JCRA as a telecommunications regulator* at pg. 62 (March 2009).

Telecommunications (Jersey) Law 2002, which when implemented will give the JCRA the power to fine licensed operators, similar to the power the OUR already possesses in Guernsey under Section 27 of the Telecommunications (Bailiwick of Guernsey) Law 2001.

The Regulators see no difference between the recognised need for strong enforcement powers in the regulation of telecommunication services versus the potential need for the same powers with respect to ferry services – and advise the States of Jersey and Guernsey not to create the same mistake as was originally done in Jersey when the telecommunications regulatory system was set up, a mistake which is now being corrected.

Simply having strong enforcement powers available does not otherwise transform a regulatory regime from *light touch* to *heavy handed*. The use of such powers would be governed by applicable law and respect due process and rights of representation of interested parties – protections that can be transferred from existing regulatory laws in Jersey and Guernsey.

Finally, the Regulators would like to make an observation about the potential cost of ferry regulation. Taking a light touch approach as suggested by Oxera, with a primary initial role of licensing and monitoring prices and profitability, could be taken on by the Regulators largely using their existing resources. The additional costs of such an approach would be, at most £100,000 per annum. If more direct control of pricing would become required at a later point, the required regulatory resources would need to be reviewed, although this is a matter that could be reserved for consideration upon a review of the appropriate regulatory framework for ferry services.

The Regulators appreciate the opportunity to respond to this Consultation, and would be happy to provide any further information or assistance the States of Jersey and Guernsey may require on this issue.

Yours sincerely,



Charles Webb
Executive Director
JCRA



John Curran
Director General
OUR