

Response to Consultation on the Structure of the Commission

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Oaseirys Çhellinsh
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Contents

| | | |
|----------|--|----------|
| 1 | Executive Summary | 3 |
| 1.1 | Background | 3 |
| 1.2 | About the Commission..... | 4 |
| 2 | Recap of Available Models..... | 6 |
| 2.1 | Current Structure of the Commission Board | 6 |
| 2.2 | Other Statutory Boards | 6 |
| 2.3 | Other Jurisdictions | 6 |
| 3 | Options Considered | 7 |
| 3.1 | Available Options | 7 |
| | Retention of a Political Chairperson | 7 |
| | Having no Political Representation on the Board | 7 |
| | Having a Political Representative as an Ordinary Board Member..... | 8 |
| 3.2 | Conclusion..... | 9 |

1 Executive Summary

1.1 Background

- 1.1. The Communications Commission (the Commission) is the National Regulatory Authority for the Telecommunications sector on the Isle of Man. It also has a role in the licensing and regulation of broadcasting matters.
- 1.2. The Commission operates under the Telecommunications Act 1984 and the Broadcasting Act 1993. These pieces of legislation, together with the licences issued under them, provide the statutory framework within which the Commission operates. The Commission is in the process of updating this legislation by progressing the Communications Bill 2018 (the Bill). This Bill updates the existing legislation and provides the Commission with a greater set of remedies including fines and penalties and provides for standalone competition powers.
- 1.3. As the Communications Bill 2018 has passed through the Legislative Branches there has been a debate as to the structure of the Commission; specifically, regarding the appropriateness of having a political Chairperson.
- 1.4. In addition the National Telecommunications Strategy in 2018 recommended that the Commission “*review its processes, procedures, and structure on enactment of the Communications Bill*”¹. In March 2019, as a result of the debates and the Strategy recommendation, the Commission committed to reviewing its structures during the 2019-20 operating year².

The Commission has been consistent in pointing out that it has never been against changing its structure but that it simply wants any change to be made in a controlled and evidence led manner. The issue of the political Chairperson was covered as part of a previous consultation process, where the Commission stated that it wished to consider the matter after the Bill was enacted. Importantly, the consultation was on the principle of there being a political chair, there was no consideration at that time of what other governance models may be appropriate³.

Consultation on the Structure of the Commission

- 1.5. The Commission issued a consultation on 5th February 2020 on the Structure of the Commission⁴. This consultation was the culmination of the work that the Commission has carried out to examine both the suitability and effectiveness of its structures and consider the impact potential options may have on the telecommunications and broadcasting sectors.
 - 1.6. It is important that the potential impact of any change be considered in all aspects of its remit; removing the status quo is only one consideration, it must also be kept in mind that the Commission is an Economic Regulator with wide-ranging competition powers. Much of the debate to date has been in relation to the potential for the Commission to interfere with broadcast media outlets, but this sector accounts for only a very small proportion of the Commission’s work.
 - 1.7. The consultation considered models from other jurisdictions, examined the models available to the Commission and the available options:
 - Retention of a Political Chairperson
 - Having no Political Representation on the Board
 - Having a Political Representative as an Ordinary Board Member.
- After analysing the models the Commission formed the preliminary view that the most appropriate model for the Isle of Man’s communications regulator going forward is to have a board with an independent chairperson – somebody with no government or industry links or affiliations – but to retain a political representative as an ordinary board member.
- 1.8. The Consultation received 5 responses. Three from telecommunications operators: BlueWave, Manx Telecom, and Sure and two from Tynwald Members, Mrs C Barber MHK and Hon Juan Watterson SHK.
 - 1.9. The operators agreed with the preliminary view of the Commission or were neutral as to whether there should be a political member. Both MT and Sure stated that key issue

¹ <http://www.tynwald.org.im/business/opqp/sittings/20182021/2018-GD-0062.pdf>

² <https://www.iomcc.im/media/1313/information-notice-02-19-structural-review-of-cc.pdf>

³ <https://www.iomcc.im/media/1195/consultation-on-draft-communications-bill.pdf>

⁴ <https://consult.gov.im/communications-commission/2020-future-constitution-of-the-communications-com/>

for them was that the legislation progressed and wasn't further delayed by the matter of the political Chair.

1.10. All the operators were of the view that the Chair should be independent of Government and Industry.

1.11. Sure stated *"From Sure's perspective, the key is that the proposed and much needed new legislation (the Communications Bill 2018) is not further delayed by any extended debate on the structure of the Commission's board."* Manx Telecom were of the view that *"The most critical aspect is that we need to make a decision, resolve any remaining issues and enact the Communications Bill so that the Commission is empowered to make the changes needed to drive telecommunications forward on the Island. The fact that we are asking the same question more than 4 years later has not been to the Island's benefit."* BlueWave also pointed out that the changes could be made by amending secondary legislation.

1.12. The two political respondents argued that there should be no political representation on the Board, although Mrs Barber did suggest a compromise position if required of a political member with no voting rights.

1.13. It should be noted that some views were expressed by respondents that are outside the scope of this consultation; such views have been noted, but have not been directly addressed here so as to remain focussed on the matter at hand.

1.14. The Commission thanks respondents for their comments, which are further examined in this response. It remains of the view, following this consultation, that the option of a political representative as an Ordinary Board Member is the most appropriate model for the Board going forward.

1.2 About the Commission

1.15. The structure of the Commission's Board is currently set by the Communications Commission Order 1989⁵ (the Order), which makes a provision that the sitting Minister for Home Affairs is the Chairperson of the Commission. While there has been no suggestion of any improper use of this position in the past, it has been questioned whether this is the

appropriate structure for a National Regulatory Authority at present.

1.16. As is the case in almost all other jurisdictions, the Isle of Man has an incumbent telecommunications operator which holds Significant Market Power – that is that, absent regulation, it could abuse its dominant position to prevent competition and protect a monopoly position in the market.

1.17. The Commission is primarily concerned with regulating the telecommunications sector on the Island with a view to fostering sustainable competition. Telecommunications is a vital economic input for almost all of the Island's economy and is a key consideration for commercial interests investing in the Isle of Man. Recent events during the Covid19 pandemic have emphasised the importance of telecommunications to the Island. Without a properly functioning telecommunications market the Island would be less competitive on the global stage. Therefore any change made to the Commission's governance structures has the potential to impact the telecommunications sector which could have far greater ramifications for the Manx economy and consumers.

1.18. To help safeguard competition the Commission regulates the telecommunications sector on an ex-ante basis – simply put it assesses the market for telecommunications services and wherever a party is found to have Significant Market Power, proactive remedies are put in place to prevent it from abusing this position. This has resulted in the Manx consumer having options available to them when buying services and allows for them to switch operators on the basis of cost or quality of service.

1.19. The importance of the telecoms sector to the Island, from both social and economic perspectives has been brought into sharp relief by the recent Covid19 Pandemic. It is more important than ever that healthy competition is maintained in this crucial sector as this will allow investment to continue and provide the Manx people with greater choice and quality. There are currently more telecoms service providers in the Manx market than ever before; this is a clear indication of an open and competitive market and bodes well for the future, however the presence of a

⁵ <https://www.iomcc.im/media/1097/the-communications-commission-order-1989.pdf>

strong, well equipped regulatory authority is required to safeguard this progress.

1.20. Under the Bill the Commission will have the powers to continue its work in areas enshrined in legislation, but it will also acquire new powers to allow it to impose stricter regulation and penalties should the need arise. It is through the measured application of its powers that the Commission fosters the regulatory certainty that creates the environment for investment while protecting competition and ultimately consumers.

1.21. Therefore, given the potential the Commission has to distort the competitive dynamics of what is an important part of the Manx economy it is important that the potential impact of any changes to its structure are fully considered.

1.22. In relation to the broadcasting sector the Commission's remit is quite limited. It is restricted to issuing broadcasting licences to organisations that meet certain criteria which aim to maximise the use of the available radio spectrum and plurality of media control on the island, the issuance of Codes or Practice which lay out good practice for e.g. the broadcasting of content to minors and advertising standards⁶. It also has a role to play through the Public Service Broadcaster's in considering station formats in light of that Broadcaster's obligations.

1.23. The Commission has no operational control or editorial input to the content produced by the broadcasters.

⁶ <https://www.iomcc.im/broadcasting/>

2 Recap of Available Models

2.1 Current Structure of the Commission Board

2.1. In the consultation it was outlined that the legislation prescribing the structure of the Commission is the Communications Commission Order 1989. The Board of the Commission is currently made up of 6 members, one of whom is the Minister for Home Affairs and serves as the Chairperson. It was further confirmed that Regulatory Decisions are put to the Board and decided by majority vote with each member having one vote; the legislation does not provide for a casting vote or veto by the Chairperson or any other member. Should the Board be deadlocked on an issue the status quo would be maintained.

2.2 Other Statutory Boards

- 2.2. The Commission also conducted analysis of other statutory boards on the Island to determine the common structures, if any, in use. All of the Boards included in the analysis were established to deal with their remit in the manner that has been determined to be most appropriate given that remit.
- 2.3. It was pointed out that none of the Statutory Boards are Economic Regulators in the same sense as the Commission; again, this was simply an observation and not intended to compare or rank the work of different Statutory Boards. In short this means that the Commission has a greater scope than others, through the application of ex-ante remedies, to shape or distort the competitive conditions in markets within its remit.
- 2.4. The Commission's analysis focused only on Statutory Boards that have a remit that includes the oversight or regulation of an industry, industry sector, or market; as such bodies such as the Isle of Man Post Office and the Manx Utilities Authority were excluded from further consideration.

2.5. It was found that among the organisations that remain in consideration there is a variety of governance structures, and that each tended to be a reflection of the respective industries being regulated and the role and remit of the authority. As such it was deemed that while there were some useful precedents, there is no universally accepted model for regulatory authorities in the Isle of Man.

2.3 Other Jurisdictions

- 2.6. In the course of determining an appropriate structure the Commission also examined how similar National Regulatory Authorities are constituted in other jurisdictions. During the course of its research it became clear that there is no single accepted universal model, each jurisdiction tends toward a model that best suits the local circumstances.
- 2.7. The Commission has narrowed its benchmark to similar jurisdictions, such as the Channel Islands and Malta, and other EU jurisdictions as the ex-ante regulatory frameworks used are similar to that used in the Isle of Man. This resulted in a benchmark from 19 other jurisdictions.
- 2.8. It was found that while there are almost as many models as there are jurisdictions, it was possible to group National Regulatory Authorities under three broad headings:
- a) Executive Management – includes organisations that do not have an independent board and are solely governed by executive personnel;
 - b) Political Oversight – includes organisations which have a board which is chaired by a member of parliament or a senior government executive officer; or,
 - c) Independent Oversight – includes organisations that have a board which is chaired by an independent figure, i.e. no industry or political affiliations.
- 2.9. The benchmarking exercise showed that the predominant governance model is Executive Management with c. 53% of other jurisdictions opting for this structure. This approach was disregarded as it was not in keeping with the Manx context.
- 2.10. Independent Oversight is the second most common option with c. 31% of the jurisdictions opting for this model, only c. 15% of the jurisdictions examined opted for Political Oversight. Consideration was then given to both of these models and the Commission made its proposals.

3 Options Considered

3.1 Available Options

3.1. Three broad models that the Commission could consider when looking at potential future governance of the organisation were identified, they were:

- a) Retention of a political Chairperson;
- b) Having no political representation on the Board; or,
- c) Having a political representative as an ordinary Board Member.

Retention of a Political Chairperson

3.2. Based on recent debates, and the submissions received on this issue during the initial consultation on the Communications Bill in 2015/16⁷ the Commission was of the preliminary view that retaining the Minister for Home Affairs as its Chairperson was no longer the most suitable model.

3.3. Some potential benefits that come with having a member of the Council of Ministers as Chairperson of the organization were identified; for example, the ability to move legislation on behalf of the Commission and bringing issues directly to the attention of the Council of Ministers.

3.4. It was also acknowledged that there has been considerable opposition from within the broadcasting sector citing that the potential for political interference with broadcasters and/or broadcast content exists. While there is no evidence or suggestion that there has ever been any such interference, the Commission acknowledged that there is an issue with a perception of an organisation having a political Chairperson and that this could be an undermining factor in the long run.

3.5. Within the telecommunications sector there has been a less vocal lobby for change, however stakeholders within the sector have also expressed a preference for the removal of the political Chair.

3.6. It was concluded benefits of retaining the political Chairperson are outweighed by the disadvantages and as such this was not a preferred option.

Consultation Responses

3.7. There were no responses in favour of retention of the political Chair.

Having no Political Representation on the Board

3.8. The second option considered was to have a Board on which there is no political representation. It was noted that from some perspectives this option presented some notable advantages, while removing the disadvantages associated with retention of a political chair.

3.9. However, some potential drawbacks and risks were identified. It was pointed out that while the Commission is obliged take account of both consumers and the public interest, as well as industry.

3.10. The interests of all of these stakeholder groups seldom align and it is that tension that allows for Decisions to be made having been fully scrutinised from all perspectives. A risk that having a model that actively prohibits the representation of one of these stakeholder groups would result in regulatory decisions being made to the detriment of one or more of the stakeholder groups was identified. Specifically there is a risk that public interest could be diluted dependent on the make-up of the Board.

3.11. The Commission was of the view that ensuring all three stakeholder groups represented on the Board would negate any of the potential influence that any one stakeholder group may gain over time. The establishment of a board with no public representatives was therefore not considered a viable option.

Consultation Responses

3.12. BlueWave was neutral as to whether or not there should be a political member of the Board. Both political respondents were of the view that there should be no political representation on the Board. Although Mrs Barber stated that a compromise position of a non-voting, non-executive role for a political member would be acceptable.

3.13. Both Mrs Barber and Mr Speaker were of the view that that the political chairmanship was part of a wider debate on

⁷ <https://www.iomcc.im/legislation/closed-legislation-consultations/2015-2016-communications-bill-consultation/>

regulatory reform and of what was felt to be a need for a clear separation of regulation from the executive.

3.14. Some other issues about the wider strategy for regulation on the Isle of Man were raised but were deemed outside the scope of this consultation.

Commission Response

3.15. The Commission accepts the views of the respondents and notes Mrs Barber's proposed compromise view; while it was not the Commission's preferred option it is in keeping with the view the Commission express that having a political representative would help represent all the stakeholder groups and provide a balance on the Board.

3.16. On balance the Commission remains of the view that all stakeholder groups; industry; consumers; and, public interest, all should be represented on the Board. The compromise suggested is one that would be acceptable to the Commission as a public interest member would still have speaking rights and would be free to express views during debates on Regulatory Decisions.

Having a Political Representative as an Ordinary Board Member

3.17. The third option considered was to have a political representative as an ordinary Board Member. It was made clear that the Chairperson of the organization cannot be a member of Tynwald or a Government Department.

3.18. It was noted that the benefits associated with having a fully independent board would continue to apply by having a political representative as an ordinary Board Member rather than as Chair. Most pertinent would be the ability for the Commission to be held accountable to Tynwald.

3.19. In addition to this many of the disadvantages associated with having a political Chairperson would be dissipated. The perception that there is an overarching political control of the organization is removed as the safeguards outlined above ensure that the political member's influence is limited. They would be in a position to represent the public interest in the Commission's decision-making process; as such having a duly elected public representative that is open to scrutiny was proposed as the most logical advocate for the public interest.

3.20. This was proposed as the preferred option as it maintains many of the benefits but does not incorporate the potential disadvantages or risks associated with the second option.

Consultation Responses

3.21. Sure and Manx Telecom were both in favour of this model. Sure stated that this would provide an appropriate balance, Manx Telecom highlighted a concern that the Manx Government has an interest in telecommunications regulation due to its ownership of the MUA which it declared to be a '*clear conflict of interest*'. BlueWave also stated "*in the event of whichever legislation should be debated and there is to be a change within the structure of the Commission; BlueWave would agree with the Commission's conclusion, within this consultation, for the chair of the board to be a neutral and non-governmental role.*"

3.22. Manx Telecom argued that a Chair should have recent industry knowledge and experience.

3.23. Mr Speaker argued that there is a danger with a politician that they would be "*the only person with a perceived political mandate, as opposed to technical expertise.*" Mr Speaker argued that this could give undue weight on this basis.

3.24. Both Manx Telecom and Sure emphasised the key issue at hand is moving the legislation forward. Sure stated "*From Sure's perspective, the key is that the proposed and much needed new legislation (the Communications Bill 2018) is not further delayed by any extended debate on the structure of the Commission's board.*" Manx Telecom was of the view that "*The most critical aspect is that we need to make a decision, resolve any remaining issues and enact the Communications Bill so that the Commission is empowered to make the changes needed to drive telecommunications forward on the Island. The fact that we are asking the same question more than 4 years later has not been to the Island's benefit.*" BlueWave also pointed out that the changes could be made by amending secondary legislation.

Commission Response

3.25. The Commission notes that all industry respondents were in favour of the proposal, and furthermore that the driving factor behind these responses was to move the legislation

closer to being enacted as the provisions within it are much needed.

3.26. In relation to Manx Telecom's assertions regarding the alleged compromised position that Government has in relation to e-llan and the telecom's sector, the Commission does not agree that such an interest is a conflict. There is no evidence to suggest that there has been any negative impact on competition in markets that e-llan currently operates; it is arguably the opposite that applies in markets such as off-Island connectivity. Furthermore, in the on-Island markets in which it operates e-llan enjoys a very small market share and is geographically limited in its scope, especially when compared to Manx Telecom. In any event, should e-llan ever attain a dominant position in any regulated market it would be subject to the same ex-ante measures that would apply to any operator in such a position.

3.27. The Commission recognises both Sure and MT's clear statements that any new Chair must be independent and should have no industry or Government affiliations, however does not entirely agree with the assertion that a Chair should have recent industry knowledge and experience.

3.28. The Commission holds that experience the role of the Chairperson is a non-executive one and skills such as governance, challenge, and board management are of utmost importance; technical expertise should mostly be provided by the executive and its advisers. The Commission is of the view that Board members should not have very recent links to industry, or any associated lobby groups, in light of the scope of the Commission's powers.

3.29. The Commission is of the view that there should be a period of at least 5 years from when a person from industry, or a connected entity, could take up a position on the Board of the Commission. The intention is to ensure that there are no conflicts of interest likely to arise and the opportunity for lobbying members is greatly diminished. To be clear, this would not apply to persons with industry experience from other jurisdictions.

3.2 Conclusion

3.30. Having considered the responses and the evidence gathered during this process, the Commission can conclude that the most appropriate model is to have a Chair who is independent of industry and Government.

3.31. The model of a political member as a representative on the Board provides the necessary balance to allow for the interests of all stakeholders to be represented including the public interest. The proposal of a political member that has no voting rights is also in keeping with the findings of this consultation process and would also be an acceptable structure in the Manx context.

3.32. The Commission hopes that the Bill can continue its progress through the legislative Branches to Royal Assent with any necessary amendment in respect of the removal of the Political Chair.