

Jersey Competition Regulatory Authority



Case C793/11

Breach of Article 8(1) of the *Competition (Jersey) Law 2005* by Jersey Telecom Limited

Final decision

Document No: CICRA 12/20

February 2012

Jersey Competition Regulatory Authority

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A. Introduction

1. On 4 August 2011, the JCRA received a complaint from Mr Bridgen, proprietor of a '99p store' in St Helier. Mr Bridgen had learnt that Jersey Telecom Limited (now known as JT (Jersey) Limited) ("JT"), was supplying 'Pay-as-you-go SIM Packs' ("JT SIM Packs") to Wilkinsons C.I. Ltd ("Wilkinsons"), a local wholesaler¹. He understood that JT had encouraged Wilkinsons to give the JT SIM Packs to retailers [REDACTED], for resale to the public at £2.00. The JT SIM Pack contained a pay-as-you-go SIM with £3.00 of credit for use on the JT mobile telecommunications network.
2. Mr Bridgen was an existing customer of Wilkinsons. In mid-July 2011, he was approached by the wholesaler and asked if he wanted to stock JT SIM Packs. He stated his intention to sell the product for 99 pence, in keeping with his business model. On 4 August 2011, Mr Bridgen was contacted by Ms Helen Hurst, Channel Development Manager of JT, who advised that JT would require Wilkinsons to refrain from supplying the JT SIM Pack to Mr Bridgen if he insisted on selling the product for 99 pence. As a consequence, Wilkinsons has refrained from supplying JT SIM Packs to Mr Bridgen. Mr Bridgen alleges that this practice is unfair and a barrier to effective competition.
3. Upon receipt of Mr Bridgen's complaint, the JCRA decided that, in accordance with Article 26 of the *Competition (Jersey) Law 2005* (the "Law"), there was reasonable cause to suspect that JT had committed a breach of Article 8 of the Law. Article 8(1) of the Law prohibits undertakings from making arrangements which have "the object or effect of hindering to an appreciable extent competition in the supply of goods or services within Jersey".
4. The JCRA began a formal investigation. On 15 September 2011, it sent a notice to JT under Article 27(1) of the Law requiring JT to produce:
 - all documents relating to the arrangements between JT and other undertakings (including, but not limited to, Wilkinsons) regarding the distribution of JT SIM Packs; and
 - the value of revenue generated from the JT SIM Pack, including revenue generated from top-up cards bought by customers using a SIM sourced from such products for the period 1 January 2010 to 15 September 2011.
5. On 24 January 2012, the JCRA sent a written notice of a draft decision to JT, setting out the reasons why it had provisionally concluded that JT had breached Article 8 of the Law. The JCRA also advised that it was minded to give a direction to JT that it must inform Wilkinsons that Wilkinsons is free to supply all retailers, including the

¹ Wilkinsons supplies confectionery, soft drinks, toiletries and mobile phone top-up cards to retail outlets in the Channel Islands.

complainant, Mr Bridgen, with JT SIM Packs, and minded to impose a financial penalty of £2500 in respect of the breach. JT provided a response to the JCRA on 9 February 2012, although it did not contest the facts as stated in the draft decision, the provisional conclusion that it had committed a breach of Article 8 of the Law, or the proposed direction or level of the proposed financial penalty.

6. The JCRA has considered the material received from JT in its responses to the Article 27 notice, JT's response to the draft decision, and certain other information it believes is relevant to its consideration of the matter. As a result, the JCRA has decided that JT has breached Article 8(1) of the Law, by engaging in resale price maintenance ("RPM"). The JCRA has also decided to give a direction to JT in the terms described in paragraph 5 above (described further below), and to make an order imposing a financial penalty of £2500 on JT in respect of the breach.

B. Background

7. On 15 September 2011, the JCRA sent a notice to JT under Article 27(1) of the Law, the terms of which are set out in paragraph 4 above. JT's first response was received on 30 September 2011. The only document attached to that response was a copy of a Wholesale Distribution Agreement² (the "JT Agreement") between Wilkinsons and JT, dating from 2006. The response did include the requested revenue figures.
8. The letter from JT dated 30 September 2011, which accompanied the revenue figures and the JT Agreement, stated that JT had, until 31 July 2011, provided Wilkinsons with the JT SIM Packs for a wholesale price of [REDACTED]. The JT SIM Packs supplied during this period had credit of £5.00, and the JCRA understands that retailers were expected to sell them for £5.00. As of 1 August 2011, JT SIM Packs had been provided by JT to Wilkinsons [REDACTED]. JT SIM Packs supplied during this period had £3.00 of credit. JT also stated that as all retailers stocking the JT SIM Pack are also required to stock JT top-up cards, [REDACTED].
9. [REDACTED]
10. As noted in paragraph 4 above, the Article 27 notice required JT to produce 'all documents relating to arrangements between Jersey Telecom Limited and other undertakings (including, but not limited to, Wilkinsons C.I. Ltd) regarding distribution of a product known as the 'Pay-as-you-go SIM pack''. The Article 27 notice stipulated that the term 'document' should take the same meaning as in Article 1 of the Law, noting that it included all written and electronic correspondence. As JT had not provided any e-mail correspondence in its first response to the Article 27 notice submitted on 30 September 2011, the JCRA concluded that it was likely that this first response was incomplete.

² Dated 28 July 2006, this agreement covers the distribution of prepaid mobile top up cards, WiFi hotspot cards and prepaid SIM packs. The agreement appears to have expired on 1 July 2007.

11. On 4 October 2011, the JCRA sent an email to JT, querying the absence of any other documents and/or e-correspondence relating to the distribution arrangements for JT SIM Packs, whether within JT or between JT and Wilkinsons. JT was asked to confirm that there were no further responsive documents in the possession, custody or control of JT.
12. On 7 October 2011, JT provided a second response to the Article 27 notice. The fact that further responsive material was provided in the second response has been the subject of separate correspondence between the JCRA and JT.
13. The emails, data and information provided by JT on 7 October 2011 in its second response were reportedly found by JT as a result of searching electronic folders and the email boxes of those employees known to have had contact with Wilkinsons. The information provided by JT included a more recent version of the JT Agreement (albeit one that appeared to have expired)³, as well as e-mails between JT and Wilkinsons, and between JT employees, regarding the supply of JT SIM Packs to Mr Bridgen.
14. An email dated 25 July 2011 sent to Wilkinsons by Ms Hurst responded to Wilkinsons' query about whether Mr Bridgen could sell the JT SIM Pack for 99 pence⁴. Ms Hurst stated that she would have to talk to her manager, and set out her concerns regarding Mr Bridgen's proposal as follows:
 - "Our other retailers may feel put out and feel he has an unfair advantage";
 - "We don't want to undervalue our brand";
 - "It could open a door for fraudulent use and encourage customers to just buy the SIM then dispose of it after using up the free credit (£1 extra is not such a risk) This is not what we want to achieve as we want to encourage new customers and for them to remain on our Network and not use it as a scam"; and
 - "All of our communications say £2, and I would not want to have just one exception, and we are not going to change our comms either for one retailer. It will mean that some other retailers may then want to do the same."
15. In an email dated 29 July 2011, Ms Hurst advised Mr Paul Taylor, Head of Commercial Development at JT, that "we can't dictate a retail price legally" and sought his advice regarding dealings with Mr Bridgen. His e-mail response of the

³ The agreement is dated 12 November 2007, but appears to have expired on 11 November 2008. In an email dated 20 September 2011 (i.e. after JT had received the Article 27 notice) from Ms Hurst to Ms Carol Gunasekara, Regulatory Officer at JT, Ms Hurst appears to have advised Ms Gunasekara that this agreement had expired.

⁴ The e-mail also suggests that it was originally JT that asked Wilkinsons to approach Mr Bridgen to sell the JT SIM Pack.

same date stated: “we cannot allow them to sell for 99p as this is against what we are trying to do and would upset the other agents.” This email exchange suggests that several days before Mr Bridgen was informed that he could not sell the JT SIM Packs at 99 pence, staff at JT knew that insisting on a minimum retail price would be contrary to law.

16. Clause 8.1(a) of the JT Agreement states that Wilkinsons acknowledges that retailers are required to offer products for sale at their credit/face value. In an email dated 3 August 2011 from Ms Hurst to Ms Gunasekara, Ms Hurst expressed the view that Clause 8.1(a) of the JT Agreement would be “probably deemed anti-competitive.” The response from Ms Gunasekara later that day makes no mention of Clause 8.1(a) and advises Ms Hurst that “the only clause of the JT agreement that you could use to stop the 99p store retailing the product is Clause 8(1)(d)” (a provision that obliges Wilkinsons to ensure that retailers “maintain the good name of JT and do nothing to bring the name of JT or its products into disrepute...”).

C. Legal Background

17. Article 8(1) of the Law prohibits undertakings from making arrangements which have “the object or effect of hindering to an appreciable extent competition in the supply of goods or services within Jersey”. The JCRA is satisfied that JT, Wilkinsons and Mr Bridgen's store are undertakings for the purposes of the Law.
18. Article 8(2)(a) of the Law elaborates on Article 8(1), and explains that an arrangement will infringe Article 8(1) if, amongst other things, “its object or effect is to directly or indirectly fix purchase or selling prices or any other trading conditions.”
19. Resale price maintenance (“RPM”) is a practice which “has as its direct or indirect object the establishment of a fixed or minimum resale price or a fixed or minimum price level to be observed by the buyer”⁵. An entity engages in RPM if its supplies goods on condition that they are supplied at a fixed or minimum resale price; however, the practice also extends to conduct by which a supplier refuses to supply goods because a re-seller intends to sell for less than a minimum resale price.
20. Article 60 of the Law obliges the JCRA to “attempt to ensure that so far as possible questions arising in relation to competition are dealt with in a manner that is consistent with the treatment of corresponding questions arising under Community law”.
21. In the competition law of the European Communities, RPM provisions are regarded as having the object of “restricting, preventing or distorting competition”⁶. In other

⁵ European Commission (2010), *Guidelines on Vertical Restraints* (2010/C 130/01), paragraphs 47-48.

⁶ *Ibid*; see also *SA Binon & Cie v SA Agence et Messageries de la Presse*, Case 234/83 [1985] ECR 2015, para 44.

words, as with price fixing, no inquiry into the effect of the provision on competition is necessary. For example, under Article 4(a) of the Vertical Block Exemption Regulation, RPM provisions are regarded as a hardcore restriction, so that the agreement is presumed to infringe Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) (i.e. the equivalent of Article 8 of the Law)⁷.

22. Given that Community law regards RPM provisions as object-based infringements of competition law, the JCRA has concluded that Article 8 of the Law should be interpreted in the same manner. As such, the JCRA has concluded that if it identifies an instance of RPM, it is entitled to determine that such an arrangement has the object of preventing, restricting or distorting competition, and therefore breaches Article 8 of the Law, without being required to undertake an enquiry into the effect of the provision on competition.

D. Conclusion on Article 8 breach

23. Based on the material before it (including JT's responses to the Article 27 notice), the JCRA has found that:

- there was arrangement between JT and Wilkinsons for the distribution of the JT SIM Pack;
- as part of that arrangement, JT required Wilkinsons not to supply the JT SIM Pack to Mr Bridgen because he refused to abide by a minimum resale price for the JT SIM Pack of £2.00;
- Wilkinsons complied with JT's requirement, and refused to supply JT SIM Packs to Mr Bridgen; and
- the arrangement between JT and Wilkinsons had as one of its objects the establishment of a fixed or minimum resale price for JT SIM Packs, and was an instance of RPM.

24. The JCRA Board (the "**Board**") provisionally concluded that, on the facts, it was satisfied that JT had breached Article 8(1) of the Law. On 24 January 2012, pursuant to Article 35(1)(a) of the Law, the JCRA sent a written notice of its draft decision to JT, stating that it had provisionally concluded that JT had breached Article 8(1) of the Law, setting out the reasons for that provisional conclusion, and advising that it was minded to impose a financial penalty on JT of £2500. The Board also advised that it proposed to issue a direction, under Article 36(1) of the Law, that with immediate effect, JT must inform Wilkinsons that it can supply all retailers, including the complainant, with JT SIM Packs, and must not stipulate a minimum retail price. The JCRA invited written representation to be submitted by 10 February 2012

⁷ Ibid

25. On 9 February 2012, the JCRA received a response from JT, which did not contest either the draft decision that it had breached the Law, or the proposed direction or financial penalty. However, JT emphasised in its response that this was “an isolated incident of non-compliance,” adding that JT is fully aware of its legal obligations and “in light of the provisional finding, will reinforce the importance of compliance and the requirement of the Law with its staff.”

E. Appropriate Remedy

26. For the reasons set out above, the JCRA has decided that JT has committed a breach of Article 8(1) of the Law.

27. Article 36(1) of the Law provides that if the JCRA decides that an undertaking is in breach of Article 8(1) “it may give the undertaking such direction as it considers appropriate to bring the breach to an end”. In the present case, given that it understands that Wilkinsons continues to refrain from supplying the JT SIM Pack to Mr Bridgen, the JCRA considers that it is appropriate to give a direction in respect of JT’s arrangements with Wilkinsons and JT’s conduct with respect to the JT SIM Pack. The terms of the direction are set out in paragraph 33 below.

28. Article 36(4) of the Law provides that in addition to, or in place of, giving a direction, the JCRA may make an order imposing a financial penalty for an infringement of Article 8. In order to impose a financial penalty, the JCRA must be satisfied that the breach was committed either intentionally, negligently, or recklessly: Article 39(1) of the Law.

29. The JCRA is satisfied that JT knowingly breached the Law in this case. In particular, it notes that in the e-mail of 29 July 2011, Ms Hurst advised Mr Taylor “we can’t dictate a retail price legally”. The JCRA has therefore concluded that it is able to impose a financial penalty on JT in respect of this infringement.

30. Under Article 39(2) of the Law, a financial penalty cannot exceed 10% of the turnover of the undertaking concerned for the period of the breach, up to a maximum period of three years. The JCRA is satisfied that the financial penalty imposed does not exceed this cap.

31. In deciding that it is appropriate to impose a financial penalty, and the size of that penalty, the JCRA has had regard to the following factors:

- the evidence suggests that the breach was intentional and JT staff were aware that the conduct was contrary to law (see the e-mail exchange quoted at paragraph 29 above);

- JT is a large corporation acting in a regulated sector, and so ought to be familiar with its obligations under the Law;
- RPM is a serious and clear-cut breach of the Law (reflected in the fact that it is an object-based infringement);
- there is only evidence of JT imposing RPM in respect of one retailer (and in relation to one product), so the impact on competition and consumers, as well as the complainant, is not likely to have been significant;
- there are no previous instances of JT having been found to have breached the Law; and
- the product (JT SIM Pack) has an unusual pricing structure, being sold to end consumers below cost (but with an expectation that continued use will generate a profit for JT), which appears to have contributed to the decision to proceed with RPM.

32. Considering the factors set out in the paragraph above, the JCRA has determined that the appropriate financial penalty to be imposed on JT in respect of this breach of the Law is £2500. The amount of the financial penalty is specific to this case and is not indicative of penalties or other remedies that the JCRA might impose in the future.

F. Direction and Financial Penalty Order

33. The JCRA hereby gives the following direction to JT under Article 36(1) of the Law:

- JT must, within 2 days of receiving this direction, inform Wilkinsons that Wilkinsons is free to supply all retailers, including the complainant, Mr Bridgen, with JT SIM Packs; and
- JT must not stipulate a minimum retail price with respect to JT SIM Packs.

34. The JCRA hereby makes an order imposing a financial penalty of £2500 on JT under Article 39 of the Law.

35. JT may pay this financial penalty by cheque or bank transfer. Details in respect of making a bank transfer are available from the JCRA. If payment is not made by 30 March 2012, interest will accrue daily thereafter, on any amount unpaid, at four percentage points above the published base rate of the Bank of England.

16 February 2012

By order of the JCRA Board