



Guideline 12A: Guideline on financial penalties
in the regulated sectors including
telecommunications security

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Jersey Competition Regulatory Authority
2nd Floor Salisbury House, 1-9 Union Street, St Helier, Jersey, JE2 3RF
Tel 01534 514990
Web: www.jcra.je

What this guideline is about

The purpose of this guideline is to explain to consumers, business and their advisers the criteria and principles that will inform how the Jersey Competition Regulatory Authority (the **JCRA**) decides whether to issue a financial penalty to a licensed business found to have infringed its licence conditions and/or related laws or to a provider of public electronic telecommunications network or service which is found to have failed to comply with its obligations under the telecoms security framework. It also explains how the amount of that penalty will be determined.

The key laws are:

- Telecommunications (Jersey) Law 2002, with Part 5A relating to telecoms security, (the **Telecoms Law**)
- Air and Sea Ports (Incorporation) (Jersey) Law 2015 (the **Ports Law**)

This guideline should not be relied on as a substitute for the laws themselves. If you have any doubts about your position under the laws, you should seek legal advice.

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1. Introduction

What is the JCRA?

The JCRA is responsible for the administration and enforcement of competition law within Jersey, together with the economic regulation of the telecom, ports and postal sectors, and duties under the telecoms security framework which include investigation and enforcement.

What powers does the JCRA have?

The JCRA has a wide range of powers to investigate regulated sectors for suspected breaches of the law or licence conditions. It can order that offending conduct be stopped and, in certain circumstances, levy financial penalties on businesses for the breach.

Similarly, the JCRA has extensive powers under the telecoms security framework to monitor compliance with security measures set out by the Government in a Code of Practice and to receive reports of the risk or occurrence of security compromises. It can further investigate failures to comply with security duties imposed on providers of public electronic communications networks and providers of public electronic communications services (together referred to as **Providers**). It can require Providers to furnish information and can impose financial penalties for failure to do so. In relation to a failure to comply with a security duty, the JCRA can order the Provider to take various actions and can levy financial penalties.

What sector specific laws does the JCRA have responsibility for?

The JCRA is responsible for administering and enforcing the Postal Services (Jersey) Law 2004 (the **Postal Law**), the Ports Law 2015 and the Telecoms Law and associated Directions issued by the States of Jersey and Orders of the relevant Minister.

2. Powers to impose financial penalties: Telecoms Sector

Under the Telecoms Law, the JCRA may impose a financial penalty on a licensee that breaches a licence condition (Article 19A(2)) except where the contravention is trivial or the licensee is taking reasonable steps to comply with the condition and to remedy the effects of the breach (Article 19A(13)).

The JCRA may impose a further penalty if the breach is not remedied (Article 19A(3)). A financial penalty imposed on a licensee (or the total of those penalties) must not exceed 10% of the turnover of the licensee during the period that the licensee was in contravention of the condition contained in the licence, to a maximum period of 3 years (Article 19A(4)).

Under Part 5A of the Telecoms Law, the JCRA has a duty to seek to ensure that Providers comply with various security duties imposed on them. In doing so, the JCRA will request information from Providers and will investigate failures to comply with their security duties¹.

The JCRA's information gathering powers under the Telecoms Law include a power to impose financial penalties on Providers which do not comply with requests for information. The maximum penalty is 10% of the Provider's business's turnover or, in relation to a continuing failure to comply, £10,000 per day. The same sums apply to financial penalties imposed on a Provider in relation to a breach of a security duty.

3. Powers to impose financial penalties: Ports Sector

Under the Ports Law the JCRA has the power to impose a financial penalty (Article 20(1)) but not where the contravention is trivial or the licensee is taking reasonable steps to comply with the condition or to remedy the damage caused by the breach (Article 20(2)).

The total of any financial penalties imposed on any individual licensee shall not exceed 10% of the turnover of the licensee for any period (up to a maximum of 3 years) during which the licensee was in contravention of the condition (Article 20(3)).

The Ports Law provides that financial penalties will be paid to the Treasurer of the States and paid into the Consolidated Fund.

4. Powers to impose financial penalties: Postal Sector

The JCRA has no power under the Postal Law to impose financial penalties in the postal sector.

5. Deciding to issue a financial penalty

Principles

Penalties will be appropriate and proportionate to the circumstances of each contravention of the licence or the security duty (or failure to provide information by a Provider).

Broadly speaking, the JCRA will seek to impose penalties that are set at a level that achieves deterrence, both to the individual business and the wider industry, whilst also taking into account aggravating and mitigating factors.

In particular, the level of the penalty must have the appropriate impact on the regulated body or Provider at an organisational level. It should incentivise the board (which is ultimately responsible

¹ These information gathering powers are considered in more detail in the JCRA Guideline on Information Gathering and Enforcement

for the conduct and culture of the regulated body or Provider) to change the conduct of the body as a whole and bring it into compliance, achieving this, where necessary, by changing the conduct at different levels within the organisation. The level of the penalty should be high enough that the management realises that it is not more profitable for a business to break the law and pay the consequences, than it is to comply with the law in the first instance. This should discourage bad conduct and encourage good practices and a culture of compliance across the organisation.

If, in making the assessment in any particular case, the JCRA considers that the level of penalties set in previous cases has not been sufficiently effective in achieving deterrence, and deter future breaches, it may set higher penalties.

Will a penalty be imposed?

When deciding whether or not to impose a financial penalty, the JCRA will take account of a number of factors, which will include the following:

- the degree of harm, whether actual or potential, caused by the contravention, including any increased cost incurred by consumers or other market participants;
- whether imposing a financial penalty is likely to create an incentive for future compliance and deter future breaches;
- whether the contravention is material or trivial;
- whether the breach should have been apparent to a diligent licensee or Provider; and
- whether the contravention in question continued, or timely and effective steps were taken to end it, once the regulated body or Provider became aware of it.

6. Calculating the level of a financial penalty

Criteria relevant to the level of financial penalty

In considering the **level** of financial penalty to be imposed, the JCRA will take account of the following criteria:

- the size and turnover of the regulated body or Provider;
- the seriousness and duration of the contravention;
- any gain (financial or otherwise) made by the body in breach (or any connected body); and
- the degree of harm or increased cost incurred by customers or other market participants or

Providers.

The following factors may **increase** the level of the financial penalty:

- whether the body in breach has a history of contraventions; and
- the extent to which the contravention occurred negligently, recklessly or intentionally, including the extent to which senior management and or the board knew, or ought to have known, that a contravention was occurring or would occur.

The following factors may **decrease** the level of the financial penalty:

- whether in all the circumstances reasonable steps had been taken by the body to prevent the contravention;
- whether any actions have already been taken to remedy the consequences of the contravention; and
- the extent to which the body in breach has cooperated with the JCRA investigation

When considering the degree of harm caused by the contravention and/or any gain made by the body as a result of the contravention, the JCRA may seek to quantify those amounts, in which case it will have regard to:

- any relevant precedents set by previous cases, but may depart from them depending on the facts and context of each case.
- the need for transparency in applying these guidelines, particularly as regards the weighting of the factors considered.

Discounts for settlement of financial penalties

The JCRA does not as a matter of course offer a discount for settlement (that is the agreement of the licensee or Provider to the financial penalty proposed to be imposed): it is a matter of judgement in relation to a particular set of circumstances. The discount recognises the savings in time and resources which arise from a settlement.

Consumer Redress Payments

In relation to licensees, in certain circumstances, it may be of greater benefit to consumers for the organisation in question to make consumer redress payments rather than a financial penalty. These may be made in the form of direct compensation payments to customers where they have been affected by the case in question, or made to an appropriate cause approved by the JCRA.

It will be for the organisation in question to propose such an alternative remedy to us. It is entirely within the JCRA's discretion to accept or reject any alternative remedy proposed.

It should be noted that an acceptance by the JCRA of a proposed alternative remedy will not remove any financial penalty in its entirety.

Payment and issuing infringement decisions

The infringement decision will specify the date by which the financial penalty and any consumer redress payments must be made, which will usually be one calendar month after the financial penalty has been imposed. If payments have not been paid by that date, interest will accrue daily thereafter on any unpaid amount at a rate 4% above the base rate of the Bank of England. The Royal Court of Jersey can also be asked for an Order to enforce payment of a financial penalty.

A public version of the contravention decision, including the amount of the financial penalty, will be published on the JCRA's website. In relation to contraventions of security duties, only such information as may be permitted under the Telecoms Law will be published.

Any financial penalties received by the JCRA are paid to the Treasury of Jersey.

7. How can I find out more?

Please contact the JCRA if you have a question about its regulatory role, or if you suspect that a business is breaching the law or its licence or its security duties and wish to make a complaint or discuss your concerns:

Jersey Competition Regulatory Authority
2nd Floor, Salisbury House
1-9 Union Street
St Helier
Jersey JE2 3RF
01534 514990
info@jcra.je

Publications

All publications, including the detailed guidelines the JCRA publishes covering specific areas of the laws, can be downloaded from its website www.jcra.je. You can also request a copy of any publications by telephone from the number above.