



26<sup>th</sup> November 2015

Michael Byrne  
Chief Executive  
Jersey Competition Regulatory Authority  
2nd Floor Salisbury House  
1 - 9 Union Street  
St Helier  
Jersey  
JE2 3RF

**By post and email**

Dear Michael

**Comments on the Initial Notice - Compensation for enforced router replacement  
Document no: CICRA 15/45 (October 2015)**

We write further to the Initial Notice entitled "*Jersey Telecom Gigabit Isles - Compensation for enforced router replacement*", document no. CICRA 15/45 (the "Notice").

What follows constitutes JT (Jersey) Limited's ("JT") comments on the Notice.

***Prefatory comments***

JT again places on record its deep concern about the manner in which this matter has been handled by the Jersey Competition Regulatory Authority (the "JCRA")/CICRA. Before, during and after the period of consultation following issue of Consultation Document no. CICRA 15/13 in April 2015 (the "Consultation"), JT has maintained an open and transparent dialogue with the JCRA, and has made clear that the issues raised in relation to the arrangements surrounding the updating of routers necessary as a result of the conversion of copper infrastructure to fibre-optics do not warrant or require the scrutiny that the JCRA has brought to bear. JT therefore considers the issue of the Notice to have been unduly hasty and wholly unnecessary.

The Notice is predicated on the erroneous belief that JT requires return of the Tilgin routers it supplies to its customers if those customers choose to switch to another service provider, and that this requirement creates a barrier to competition. Notwithstanding that JT has stated repeatedly that it does not operate a repossession policy, and therefore in practice no routers are required to be returned, the JCRA has proceeded to issue the Notice. The Notice, and the Directions set out within in, are wholly redundant.

Section 2 (and 5) of the Notice states that it sets out Directions (pursuant to Article 16(3)(c) of the Telecommunications (Jersey) Law 2002) that the Jersey Competition Regulatory Authority (the "JCRA") proposes to issue to JT "*in relation to Condition 34(c) of its Class III telecommunications licence*". We assume that this is reference to Condition 34.1(c) of JT's licence.

## **Background**

The background to this matter is uncontroversial; we do not intend to rehearse in this response matters covered elsewhere (in particular, in the Consultation and the Notice). It is, however, useful to refer to the Consultation in considering the fundamental basis for JT Network's agreement to provide support to all retail service providers (including JT Retail) following the Island-wide upgrade from copper infrastructure to fibre-optics.

JT Network agreed to provide support to retail service providers because it was its decision to upgrade the Island's network and, while this upgrade is clearly beneficial to both consumers and providers alike, it was instigated and is being carried out by JT Network and it is therefore appropriate (but, as JT noted in its response to the Consultation dated 8 June 2015, highly unusual) that support is provided to those affected by the change.

This support principally manifests itself as either (1) provision of a Tilgin router; or (2) payment of a sum commensurate to the value of a Tilgin router, to the retail service providers on the Island (including JT Retail) to allow them to connect their customers to the upgraded network at no extra cost (to either the customer or the provider).

As the Consultation sets out, JT Retail opted to utilise JT Network's support in the form of Tilgin routers and has provided these to all of its customers affected by the network upgrade. As part of this offering, JT Retail retains ownership of the routers provided to its customers, as it is contractually required to under its arrangements with Tilgin. The Consultation points out that:-

*"Other retail service providers are free to make use of the compensation as they see fit; in particular, no part of the agreement [for support] dictates what type of router is supplied (thus leaving freedom of service innovation) or whether the service provider retains ownership of whatever router it supplies to the customer."*

JT Retail made its decision (and entered into its agreement with Tilgin) on this basis.

### ***The support in practice***

In practice, the other providers (and particularly Sure, who JT understands is the principal complainant in this matter) have elected to receive financial support and use this to supply their customers with their own choice of router as a means of allowing their customers to access the network.

JT has received no confirmation, from Sure or the JCRA (whose role it is to act as arbiter in this project and ensure that the other providers are not taking advantage of the financial support to make unjust profit by supplying inferior routers) that this financial support has been applied appropriately.

### ***The issue raised in the Consultation and the Notice***

As the Consultation acknowledges, the support provided by JT Network *"can be viewed as putting all retail service providers in the same position; they are [sic] all receive the compensation in a form of their choice whenever a copper to fibre-optic conversion is undertaken and they all have the same options as to whether to retain or gift the broadband router to the customer"*. This is exactly the effect of the support provided by JT Network.

Notwithstanding this, the JCRA's view in the consultation, contradicted the commonly understood basis of the support and the commercial freedom afforded to all the retail service providers to make such arrangements as they think allows them to be most competitive:-

*"JT Retail's requirement that, on switching away, the customer must return the supplied router, or pay its value, is likely to be perceived by customers as a disincentive to switching unless the new service provider provides a replacement router. Since the new service provider will not receive a second compensatory payment from JT Networks it will be required to decide whether to provide a router at its own expense (possibly recovering the cost through higher charges over the period of the contract) or risk not being able to persuade the customer to switch as the customer would need to fund a new router...for current purposes it appears that a new service provider charging for the new router risks making its offering less attractive or, if it chooses to absorb the cost, reduce profitability." (page 7 of the Consultation)*

The JCRA is therefore of the opinion that:-

*"...regardless of ownership of the router, unless a new service provider can make practical use of the [Tilgin router supplied by JT Retail to its customers] to deliver service to the customer, and to do so at no additional cost, then:*

- (a) The customer has not received the benefit of the compensation payment (JT has in effect retained it); and*
- (b) As a consequence of JT's decision to convert the customer from a copper to fibre connection and not providing adequate compensation, JT has created a barrier to the customer switching service provider; either through the customer, or the new service provider, needing to provide a replacement router. Such barriers to switching risks market abuse that would have the object or effect of preventing, restricting or distorting competition in the provision of broadband telecom services." (page 7 of the Notice)*

Accordingly, the JCRA has proposed the Directions to remedy this purported risk of "market abuse".

### ***JT's relationship with Tilgin***

On the basis that all the retail service providers are afforded the commercial freedom to put in place such arrangements as they consider allows them to provide the best and most competitive service, and on the express understanding that, as the JCRA itself acknowledges in the Consultation, all the retail service providers *"have the same options as to whether to retain or gift the broadband router to the customer"*, JT Retail entered into an agreement with Tilgin for the supply of routers. JT Retail considers that this managed system, facilitated by the Tilgin routers, allows it to offer a service that separates it from its competitors.

As part of this agreement, Tilgin required JT to retain ownership of the routers it supplies to its customers. This is a contractual requirement and JT cannot derogate from it.

Any direction that the JCRA may purport to make requiring JT to relinquish any ownership of the routers it supplies would seek to overwrite a commercial agreement, and to comply would place JT in clear breach of contract.

The JCRA's attempts to undermine and contradict arrangements that were put in place and set as standard for all the retail service providers are accordingly wholly inappropriate.

***JT's objections to the Notice and the Directions***

Before dealing with each of the Directions in turn, we make the following observations on the rationale for the Notice and the Directions in general terms:-

1. JT Retail's election to (1) receive support from JT Networks in the form of Tilgin routers rather than pure financial assistance; and (2) retain ownership of the supplied routers rather than 'gift' them to its customers, is in line with the options available to all retail service providers.
2. JT Retail entered into an arrangement with Tilgin, and is now contractually bound to commitments made as part of that arrangement, on the basis that it was open to JT Retail (as it was to the other retail service providers) to retain ownership of any supplied routers.
3. Any steps taken by the JCRA that purport to penalise JT Retail for exercising an option available to all retail service providers, but not so exercised by any other retail service provider, would be manifestly inappropriate and contrary to any sense of reasonableness, proportionality or fairness.
4. In any event, the perceived disadvantage to the other retail service providers is misconstrued and flawed for the following reasons:-
  - a. JT Retail connects its customers to the network through Tilgin routers. It does this under an agreement with Tilgin that allows it to apply upgrades and carry out troubleshooting and maintenance on the routers remotely.
  - b. While JT Retail retains legal ownership of the Tilgin routers it supplies to its customers (as it is contractually obliged to do), it operates a policy of allowing those routers to remain in the possession of the customers, regardless of whether those customers remain JT Retail customers or switch to another retail service provider (as the JRCA is well aware).
  - c. Further to a JT Retail customer switching to another retail service provider, his/her Tilgin router will be disconnected from JT Retail's network and no longer receive remote support (either in terms of maintenance or software upgrades). Sure should make it clear to their customer that the router can be used to provide the broadband service however the router will no longer be maintained or managed.
  - d. Notwithstanding the cessation of remote support, all Tilgin routers can continue to be used to access the network through another retail service provider and, given JT Retail's policy of allowing its Tilgin routers to remain in the possession of its (former) customers after termination of their contract with JT Retail, no new router is required to be supplied or purchased by either the new retail service provider or the customer in order to continue to access the network. Accordingly, there is no material disincentive to the customer to switching provider away from JT Retail.

- e. JT Retail operates using Tilgin routers as they offer significant benefits to JT Retail's customers and efficiencies to JT Retail's business. As a consequence, any customer switching from another retail service provider to JT Retail will require a new Tilgin router (at cost to JT) in order to enjoy the full benefits of JT Retail's service product. Accordingly, *"the customer cannot take advantage of available choices without facing additional costs, either directly or indirectly, for the replacement router."*
- f. Conversely, a customer switching from JT Retail to another retail service provider will be able to continue to utilise the Tilgin router to access the network through the new provider without any deficiencies in service. The *"material disincentives"* facing an incoming JT Retail customer are not therefore aligned with the comparative ease with which an outgoing JT Retail customer may transfer to another provider.

We now turn to the Directions set out in the Notice. Taking each Direction in turn:-

*Direction 1:* JT Network already supports the retail service providers by way of *"compensation payment"* (by way of either financial assistance or provision of a suitable router). Accordingly, Direction 1 is invalid.

*Direction 2:* JT Retail already operates a policy that allows an outgoing JT Retail customer to retain possession of his/her Tilgin router even after switching to another retail service provider. As JT's response to the Consultation (provided on 8 June 2015) made clear: *"Based on what actually happens in practice, JT Retail has now amended its policy document so that in a scenario where the customer moves its broadband service from JT to another provider the router remains with the property/customer."* Accordingly, Direction 2 is invalid.

*Direction 3:* As JT has made clear to the JCRA in correspondence, the process by which a different retail service provider *"can take control"* of the Tilgin routers in order to provide a service to a switching customer is straightforward and does not warrant *"detailed and clear instructions"*. In the event that JT Retail supplies a customer with access to the network through a Tilgin router, JT's responsibility to that customer extends to and includes the router itself. In circumstances where the customer switches to another retail service provider, JT's responsibility terminates at the optical network termination point; the customer (and their new provider) accordingly control the router.

As JT explained to the JCRA in its email dated 11 September 2015: *"The Tilgin router disconnects from the JT management platform when the JT retail fibre broadband service is disconnected. If there is no JT IP address associated with the Tilgin router then it is unable to communicate with the JT management platform. When a customer moves from JT retail to Sure the JT IP address is removed and they are configured with a Sure IP address. The router will be able to be used with the new service provider fibre broadband service but it will no longer be in contact with the JT management platform."*

Accordingly, Direction 3 is invalid.

*Direction 4:* JT Retail already operates the policy described. Accordingly, Direction 4 is invalid.

*Direction 5:* JT Retail already operates the policy described. Accordingly, Direction 5 is invalid.

*Direction 6:* JT Retail does not impose additional charges in the process of transferring control of routers to other service providers. JT Retail already operates the policy described. Accordingly, Direction 6 is invalid.

### **Conclusion**

The JCRA has issued the Notice on the misconstrued pretext that customers are being materially disincentivised to switch service providers away from JT Retail because to do so would involve additional cost to them either through the upfront cost of a new router or higher service charges from alternative service providers as a means of covering the cost of a complimentary new router. Neither of these concerns is borne out by the realities of how the network operates, and neither is reflected in the number of customers migrating from JT Retail to other retail service providers.

Rather than enter into a constructive dialogue with JT to better understand the position and allow a proper analysis to be carried out and explored, the JCRA has unnecessarily and ill-advisedly issued the Notice. This has put JT (and potentially other service providers wishing to offer comment thereon) to cost that is unjustified and unwarranted.

More worryingly, the Notice fails entirely to reflect upon (1) the disadvantages to JT of the current arrangement (which are, at the very least, on par with all the other retail service providers); and (2) the fact that JT is contractually bound to fulfil commitments to Tilgin that are in direct conflict with the requirements of the Directions (which, with no grace period for implementation, are assumed to be actionable forthwith). Any steps taken by JT Retail to try to secure a competitive edge (such as its relationship with Tilgin) are merely a product of a healthy and competitive market and offer no abusive barrier to competition.

We trust the JCRA will reconsider its position and withdraw the Notice being, as it is, entirely unnecessary.

Yours sincerely



**DARAGH MCDERMOTT**  
**DIRECTOR CORPORATE AFFAIRS**