PUBLIC VERSION

Variations to fixed-term telecommunications contracts

Revised Final Notice

Modification of the licences of JT (Jersey) Limited, Newtel Limited, Sure (Jersey) Limited and Jersey Airtel Limited

Channel Islands Competition
and Regulatory Authorities

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Contents

1. Introduction

1. Many consumers opt for fixed-term[1] telecommunications contracts to provide certainty about the products they will receive and the associated monthly outgoings. During 2012/2013, there appeared to be a growing trend among, in particular, mobile phone operators in the United Kingdom (**UK**) to increase prices for customers during the term of fixed-term contracts. In the provision of mobile services, Orange, T-Mobile, Vodafone and Three all did this, and in the face of customer complaints, adopted the position that it was within their contractual rights to do so because their terms and conditions included the right to raise prices. Reportedly, mobile phone operators stated that "it is only the length of the contract that is ever really fixed."[2] Three's announcement in early 2012 of an increase in prices for fixed-term contracts led to more than 1000 complaints to Which?, the consumer advocacy association, and consequently the latter submitted a formal complaint to Ofcom and launched a campaign 'Fixed means Fixed,'[3] to eliminate this practice.

2. In the Channel Islands, one local operator's decision to vary a product offering during a fixed-term contract in January 2012 also negatively impacted on consumers. The Jersey Competition Regulatory Authority (**JCRA**) received numerous customer complaints regarding JT (Jersey) Limited's (**JT**) decision to remove a 100MB monthly allocation of free data that 9000 existing fixed-term pay monthly mobile customers had been receiving as part of the MyMobile, SIM Only and JT Complete plans. In addition, the data download charge was also increased from 1p per MB (which had applied to data used over the 100MB allowance) to 5p per MB[4] for both new and existing contracts. Importantly, the changes affected customers who had entered into a 12-month or 24-month fixed-term contract with JT and thus fully expected to receive the free data allowance for the duration of their contract. When asked about the rationale for the change, JT stated that it had misjudged the degree to which the data allowance might be used, and that the cost of providing the service had exceeded its initial estimates. JT considered that it was entitled to make these variations under its Mobile Telephone Service Terms and Conditions (see paragraph 24 below).

3. In the face of requests from the JCRA, JT refused to allow customers to revert to their original tariff and did not consider that customers should be allowed to terminate their contract on the grounds that the product had materially changed, despite this right being explicitly provided for in JT's contract. It is noted that in a similar circumstance in January 2014 in Guernsey, Sure (Guernsey) Limited (**Sure Guernsey**) maintained the higher data allowances for existing contract customers and only applied the new limits to new customers.

4. The JCRA has no objection to JT, or any other operator, introducing a price increase, or creating an offer or package with new terms, provided that this is done for new contracts only and the terms comply with the operator's licence and regulatory decisions made by the JCRA (e.g. price controls). However, as a general principle, the

[1] Known in the industry as post paid contracts.
[2] *Which?* Magazine, August 2012, page 6
[3] Ibid
[4] Note that the JCRA understands that a minimum 5p charge is levied in respect of every data connection made by the customer, even if less than 1MB of data is used as part of that connection.

JCRA considers that consumers have a right to expect, and do expect, that the terms of a contract entered into for a fixed term will remain unchanged for that term, whether for fixed-line telephony, mobile or broadband services. It should also be noted that, unlike in the UK, such conduct on the part of operators is not subject to any consumer protection legislation in Jersey or Guernsey.[5]

5. In light of the harm caused to Jersey consumers by the incident detailed above, and having regard to the regulatory action being considered by Ofcom in the UK (detailed in the Initial Notice 14/13), the JCRA believed that it should consider intervening in order to prevent any future consumer harm arising from price rises and product changes in fixed-term contracts, in order to achieve consistency across the telecoms industry and to prevent customers from being adversely affected in the future by similar practices.

6. In Jersey, there are presently four providers of consumer and small business telecommunication contracts: JT, Sure (Jersey) Limited (**Sure Jersey**), Newtel Limited (**Newtel**) and Jersey Airtel Limited (**JAL**).

7. In May 2013, the JCRA issued a joint consultation with the Guernsey Competition and Regulatory Authority (**GCRA**) (the **Consultation**) on two options to address their concerns about product and price changes being introduced during fixed-term telecommunications contracts, which would be implemented on a pan-Channel Island, industry-wide basis for fixed-line telephony, mobile and broadband services: In preparing these proposals, the JCRA endeavoured to strike a balance between preserving the commercial freedom of operators on the one hand, and its concerns regarding the scope of operators' power to vary fixed-term contracts and the manner in which customers are contacted to advise them of these variations on the other. The two options consulted on were 1) to amend the terms of all operators' standard terms and conditions or 2) to introduce a new condition into the licence of relevant operators, in terms equivalent to those of General Condition 9.6 (**GC9.6**) enforced by Ofcom, to ensure the fairness of certain contract terms (**Option 2**).

8. The Consultation ended in June 2013 and seven responses were received, but the JCRA felt it was appropriate to wait for Ofcom's decision before publishing an Initial Notice. Ofcom's decision was published on 23 October 2013 and confirmed that UK consumers and small businesses should be allowed to exit their landline, broadband or mobile contract without penalty if their provider increased the cost of their monthly deal. It is noted that Ofcom's guidance does not apply to non-price variations but Ofcom has stated that it is of the view that reducing call allowances (and/or text and/or data allowances) included in a consumer's monthly subscription price would constitute an increase in the unit price paid by the consumer and thus a price rise to which the guidance would apply.

9. Responses to the Consultation were received, on a pan-CI basis, from JT and JT (Guernsey) Limited (together, **JTCI**), JAL and Guernsey Airtel Limited (together

[5] The *Unfair Terms in Consumer Contracts Regulations* 1999 protect UK consumers from terms that reduce their statutory or common law rights or terms that seek to impose unfair burdens on the consumer over and above the obligations of ordinary rules of law. Equivalent legislation does not yet exist in the Channel Islands.

Airtel), Sure Jersey and Sure Guernsey (together, **Sure**), Guernsey Trading Standards Service (**TSS**),[6] ACS Jersey, Longport Group (**Longport**) and Teletech Solutions.

10. The substantive comments of the submissions were detailed in the Initial Notice which the JCRA issued on 3 April 2014, advising of its decision to implement Option 2, outlined in paragraph 7 above, by introducing a new condition into the licences of relevant operators in order to ensure the fairness of certain contract terms.

11. This Final Notice summarises the two responses received to the Initial Notice and sets out modifications, in line with its original proposal, to the licences of JT, Sure Jersey, JAL and Newtel to be made under Condition 6 of each of those licences and Article 18(1) of the *Telecommunications (Jersey) Law 2002* (**Telecoms Law**).

12. This Final Notice also summarises the response of Sure to the notification in La Gazette Officielle in Guernsey of the proposed licence modification and explains why there was a need to i) withdraw the Final Notice in Jersey and issue an amended Final Notice and ii) issue an amended Final Decision and La Gazette Officielle notice in Guernsey.

[6]The submission only related to Guernsey

2. Legal Background & Regulatory Framework

2.1 Legal Background

13. The *Competition Regulatory Authority (Jersey) Law* 2001 sets out the legal framework for regulation. In addition, there is scope for the States of Jersey to give directions to the JCRA.

14. The JCRA's duties in the telecommunications sector are defined in Article 7 of the Telecoms Law.

15. Article 16 of the Telecoms Law provides that the JCRA may include in licences such conditions as they consider necessary for a licensee to carry out its functions. In addition, Article 16(1)(c) of the Telecoms Law specifically provides that the JCRA can include conditions in telecoms licences which regulate terms and conditions, or require that specified terms and conditions be included, in any contract between the licensee and a user within Jersey.

16. Article 18(3) of the Telecoms Law provides that the power to modify a condition contained in a licence (given to the JCRA in Article 18(1)) includes the power to insert a new condition or amend or delete an existing condition, but any new condition, or condition as amended:

"*a) may only be a condition that a licence may contain by virtue of Article 16; and*
b) shall be taken, as from the date when the modification takes effect, to be a condition contained in the licence by virtue of that Article."

2.2 Regulatory framework

17. Condition 6.1 of the telecoms licences issued by the JCRA provides:

"*The JCRA may from time to time modify, delete or add to any Condition in this Licence. Any modifications, deletion or addition to the Conditions shall be made in accordance with Article 18 of the Telecommunications (Jersey) Law and any other requirements under any applicable Law.*"

3. Initial Notice and responses

18. The Initial Notice (CICRA 14/13) discussed in detail the conduct on the part of JT that had given rise to the Consultation, the regulatory action taken by Ofcom, and the JCRA's rationale for electing to pursue Option 2. As required, the Initial Notice also set out the text of the proposed licence modification.

19. The JCRA received two responses to the Initial Notice – from Airtel and Sure.

Summary of Airtel's response

20. Airtel agrees that Option 2 remains the best option for consumers, small businesses[7] and operators. However, Airtel sought clarity regarding the mobile 'out of bundle' elements. Airtel was of the view that the JCRA's reference in the Initial Notice to "within an inclusive bundle" meant the bundle in respect of which a customer signs a contract, i.e. x amount of minutes, x amount of free texts and x amount of free data on a per month allowance. Airtel sought clarification that if an operator were to increase its rates for mobile roaming or for 'out of bundle' mobile calls, texts and data that such increases would be deemed not to be an increase in the unit price and thus customers would not have the right to terminate their contract.

Summary of Sure's response

21. Sure made the observation that the Consultation was originally driven by Ofcom's consideration of issues relating to mobile operators in the UK and by JT's changes in Jersey to data charges and allowances on certain pay-monthly mobile contracts; that is, the original focus of CICRA's concern was on the mobile market, whereas the JCRA's proposals would also apply to customer contracts in fixed-line markets.

22. Sure is supportive of the proposal (i.e. Option 2) in relation to the mobile market and would accept the proposed modification with respect to its Guernsey mobile licence. However, Sure has two main concerns as it relates to fixed-line services; in particular, price-controlled services in Guernsey and Sure Jersey's provision of broadband services in Jersey. It therefore feels unable to accept the proposed modification of its Guernsey fixed licence or its Jersey telecommunications licence (as it has one licence in Jersey covering all communication services).

23. Sure is of the view that the JCRA has not considered the implications of regulator-approved price increases for Sure's price-controlled services in Guernsey (and suggests the same issues would also apply to JT's price-controlled services in Jersey). Sure therefore sought confirmation that any price changes (increases) accepted by the GCRA in Guernsey for fixed services under a price control determination would be exempt from the proposed licence condition (i.e. that such price increases could be passed on by Sure to its customers without triggering a right on the part of the customer to cancel the contract, and without the need for 2 months prior notice). For example, if line rental charges were increased, but only by making other changes to call charges so that overall Sure complied with the price cap constraint, Sure considers that

[7] Using CICRA's proposed definition, already adopted by Ofcom, of ten or less employees across the Channel Islands

customers should not have the right to cancel their contracts, even if an individual customer makes no calls over the fixed line and so cannot benefit from the reduced call charges. Moreover, Sure observes that providing two months notice to customers would be impossible as discussions with the GCRA in Guernsey usually occur just before the beginning of the price cap year.

24. Sure also has concerns about Option 2 as it applies to broadband, because it considers that it cannot control the price of its inputs at the wholesale level in Jersey; in particular, wholesale broadband charges levied by JT. In Sure's view, the price it charges for its retail broadband service in Jersey depends heavily upon the underlying charge that Sure Jersey has to pay for the wholesale broadband product supplied by JT. As such, Sure considers that it would be unworkable and unfair for Sure Jersey's licence to limit it from passing on to customers with fixed-term contracts any cost increases that result from decisions of JT to increase wholesale broadband prices.

25. Sure also considers that any price changes that result from factors that fall outside an operator's control should be exempt from the proposed licence condition (e.g. the introduction or increase of a sales tax that results in a customer's post-tax contract price increasing). Sure considers that the JCRA needs to make it clear that price changes stemming from legislative changes that a licensee could not reasonably have anticipated will not be captured by the JCRA's proposals.

26. Sure also considers that the JCRA's proposed definition of a 'Relevant Subscriber' may be difficult to apply in practice and considers that it will need flexibility about the assumptions it may have to make; in particular, if it or another operator sought to increase prices during the contract term and then needed to ascertain if a customer's employee numbers had dipped below or increased above ten so as to decide if the proposed direction would apply to that particular customer. Sure is concerned that while the JCRA advised in the Initial Notice that it will take a pragmatic approach, if called on to arbitrate frequently on such matters, it could result in an unwelcome distraction for the JCRA.

4. JCRA Decision and rationale

27. The JCRA's view remains that there is a benefit to consumers and the industry in providing clear rules relating to the right of operators to seek variations to fixed-term contracts and the manner in which variations should be notified to customers. It has therefore decided to confirm the modification of the licences of JT, Sure Jersey, Newtel and JAL as set out in the Initial Notice, subject to the amendments outlined below.

28. In the course of discussions with Airtel and Sure regarding their submissions, it became apparent that there was some confusion regarding the scope of the Licence Condition and what should be regarded as a fixed-term contract. The JCRA's intention, in keeping with the rationale for the licence condition, is that the condition should apply to contracts into which customers are 'locked' by a fixed term and from which they cannot switch to avoid the unanticipated increase in unit price. It is not intended that the condition should apply to month-to-month contracts or short duration contracts, since in those instances customers are able to opt for alternatives with relatively short notice. For that reason, the JCRA has included an explanatory sub-condition 18.14(f), which provides a definition of the term "Fixed-Term Contract".

29. In response to Airtel's submission, it is noted that the intention of sub-condition 18.14(g) is to explain that changes in call, text or data allowances within a bundle should be regarded as a change in the unit price of the bundle (and therefore caught by the licence condition).

30. The JCRA notes Sure's views relating to price-controlled services and observes that one reason that Ofcom may not have taken a position on this issue in its Consultation or Final Statement is because it has removed price controls for virtually all retail telecoms services in the UK. The JCRA accepts that any increase/change in unit price as part of a price control determination will have been subject to separate scrutiny by the GCRA (in the case of Sure Guernsey) and the JCRA (in the case of JT). It notes however that the JCRA applies a cap to a basket that includes a mix of calls and line rental, and does not apply caps to separate products within the basket. It therefore does not believe operators face unfair limitations on their ability to recover allowable revenues since they have the ability to apply different charges between those on fixed contacts and those who are not, provided of course they do not engage in undue preference or unfair discrimination. It is therefore the JCRA's view that it is not necessary to carve out price controlled services from the new licence condition.

31. The JCRA considers that material charges outside the control or anticipation of the operator, such as changes in taxation and other government-imposed surcharges, are likely to be rare. However, it is acknowledged that it is common for fixed-term and fixed-price contracts in many markets to contain clauses allowing the seller to adjust the price to take account of new government levies or taxes, as an exception to the general rule that the price is fixed. In light of this, Condition 18.14 includes a new sub-condition (d), which dis-applies the Condition where: the unit price increase is directly referable to the introduction of a new tax, duty or levy, or an increase in its rate; and the provision allowing the operator to make the increase is displayed prominently in the contract (so that the customer is made aware of it).

32. In respect of Sure’s concern regarding its lack of control over the price it pays JT for wholesale fixed services in Jersey, and the alleged unfairness of Sure being limited from passing such increased costs on to customers, the JCRA notes that the need to protect customers from unexpected price increases is a particularly important principle. There are many industries where suppliers must make predictions about wholesale costs when entering into retail contracts, and the JCRA is not convinced that Sure’s lack of control over input costs should justify diluting the important consumer protection benefits that the licence condition could bring. To the extent that Sure’s concerns [REDACTED], the JCRA also observes that there is detailed regulation in place for the incumbent operator's supply of wholesale services and that concerns about the functioning of wholesale markets for fixed-line services should be addressed by effective enforcement action, not by discarding or diluting measures such as the new licence condition. It should also be noted that it would be open to an operator to mitigate the risk posed by lack of control over wholesale costs by clearly stipulating in a retail contract certain defined increases in price at particular times, provided that the clause is displayed prominently in the contract (such price increases will not be “unanticipated”, and can be taken into account by customers before they enter into the contract). In order to make it clear that such provisions are permissible, the JCRA has included new explanatory text in sub-condition 18.14(d).

33. Nevertheless, taking into consideration the level of concern expressed by Sure and in recognition that there may be unforeseen exceptional circumstances when the operators need to pass on increased wholesale costs to customers imposed by Sure (as it relates to Guernsey) and JT (as it relates to Jersey), we have created an exemption provision under the new licence condition. Where costs incurred by the licensee increase significantly, and such an increase was not reasonably foreseeable, then the licensee may apply to the JCRA for a waiver of the requirements of the new licence condition which is captured in sub-condition 18.14 (h).

34. The JCRA has noted Sure’s representation regarding the definition of “Relevant Subscriber”, and the potential difficulty for operators of knowing whether their business customers have fewer than 10 employees in the Channel Islands. The JCRA is of the view that unit price changes during fixed-term contracts should be rare, so that the need to ascertain whether a customer is a “Relevant Subscriber” should be infrequent and therefore the need for the JCRA to arbitrate even more infrequent. The JCRA does accept that operators may not always know the number of employees and so in these instances, the JCRA will take a pragmatic approach and use its discretion on a case by case basis. However, the JCRA makes the observation that Sure and other operators may want to add a relevant section to a contract that identifies if a customer is a “Relevant Subscriber”.

35. In June 2014, a Final Notice and a Final Decision were issued in Jersey and Guernsey respectively. However, in seeking to clarify that certain aspects of a mobile contract that were not part of the exclusive bundle, but nevertheless could inform a customer’s decision to enter a contract with a Licensee e.g. free incoming roaming charges, were not going to be captured by the new licence condition, certain wording from the modified licence condition that appeared in the Initial Notice and the Draft Decision was removed. The specific wording that was removed was “*However, for mobile telephone contracts only, increases in charges for calls, texts and data not provided within an inclusive bundle shall be deemed not to be an increase in the unit price*.”

36. This meant that inadvertently rather than seeking to provide clarity on the issue, there was a material change from the Initial Notice (and Draft Decision in Guernsey) that the Licensees (and the JCRA/GCRA Board) had not been consulted on. Moreover, in removing the text italicised above, the recommendation in the Final Notice (and Final Decision) was not consistent with the guidance published by Ofcom in October 2013. On 25 June 2014, Sure submitted a response to the Gazette Officielle notice[8] advising of its refusal to accept the proposed licence modification in Guernsey primarily because of the material change, as it related to whether out of bundle calls/data and texts were captured by the licence modification or not, and the inconsistency with the approach taken by Ofcom. Sure noted that it would have raised similar objections in relation to the proposed licence modification in Jersey, but there was no process by which to do so.

37. Sure's submission noted that the proposed licence modification went further than Ofcom's Decision, that expressly stated that the decision only applied to core subscription prices i.e. the recurring monthly price paid for a core package of inclusive services. Sure was of the view that the GCRA (and the JCRA) should not deviate from Ofcom's position.

38. It can be argued that the inclusion of protection for customers of out-of-subscription services within the scope of the variation to fixed term contracts licence modification, has validity. However, an approach that is inconsistent with Ofcom in this area is considered to move beyond the specific precedent the consultation process has relied on. It therefore seems prudent to only extend the protection to consumers, in a manner that is consistent with Ofcom's approach and the Initial Notice (and Draft Decision). The JCRA considers that additional regulation can be provided where there is actual evidence of concern, as Ofcom itself has suggested in its decision.

39. Sure also raised a second objection to the Gazette Officielle notice, requiring the GCRA to [REDACTED]. This matter was covered in the original Initial Notice and Final Decision and is identically addressed in paragraph 30 above. The view of the JCRA and GCRA remains that fixed term contract customers can justifiably be charged different prices to non-fixed term customers and that this is common practice in a range of markets and does not require additional regulatory comfort [REDACTED]. Moreover, the assurance sought by Sure is too broad and there can be no question of obviating the obligation on Sure (and JT as it relates to Jersey) to justify prices as it relates to price controlled products.

40. The Licensees were all consulted and gave their agreement that the JCRA could withdraw the Final Notice in Jersey and issue a revised Final Notice, subject to the amended text (detailed in paragraph 35 above) being included and ii) in Guernsey, the GCRA could issue a revised Final Decision and Gazette Officielle notice to include

[8] There are slightly different processes in both islands regarding how licences are modified. Unlike in Jersey, where the issuance of a Final Notice is the last stage in the legal process, in Guernsey, the formal publication of the proposed modification must be through a notice in La Gazette Officielle.

the amended text. Moreover, the date for implementation has been altered from 1 September to 1 October 2014.

5. Licence Modification

41. For the reasons set out above, the JCRA gives Final Notice of its decision to modify the licences of JT, Sure Jersey, JAL and Newtel under Condition 6.1 of their respective licences in the manner outlined below. The decision will take effect on 1st October 2014. The JCRA considers that two calendar months is sufficient for licensees to make any adjustments they identify as necessary in light of the licence modification.

42. Within Licence Condition 18 of the licences of JT, Sure Jersey, JAL and Newtel (dealing with consumer protection), a new condition will be added; namely, Condition 18.14 as follows:

    a) The Licensee shall give a Relevant Subscriber not less than two calendar months' notice in writing of any increase to the unit price of a telecommunication service supplied under a Fixed-Term Contract.

    b) If the Licensee wishes to increase the unit price of a telecommunication service supplied under a Fixed-Term Contract, it shall allow a Relevant Subscriber to terminate its contract for that telecommunication service without penalty, provided that: (i) notice is given in writing by the Relevant Subscriber to the Licensee at any time during the notice period referred to in sub-condition a); and (ii) the Relevant Subscriber pays to the Licensee any outstanding subsidy in respect of telecommunications equipment supplied at no charge or at a discount by the Licensee under the contract.

    c) As part of any notice referred to in sub-condition a), the Licensee shall inform the Relevant Subscriber of (i) its ability to terminate its contract for that telecommunication service without penalty; and (ii) the amount of the outstanding telecommunications equipment subsidy referred to in sub-condition b).

    d) This condition shall not apply to an increase in the unit price of a telecommunication service supplied under a Fixed-Term Contract, provided that:

        a. the increase is directly referable to the introduction of, or increase in, direct taxes or other government duties or levies, and the relevant contract clearly permits the Licensee to make that increase; or
        b. the quantum of the increase in unit price and the timing of the increase are set out clearly in the relevant contract (whether as an actual amount, or by reference to a price index),

       and, in each case, the provision allowing the operator to make the increase is prominently displayed in the contract.

    e) For the purposes of this Condition, a "Relevant Subscriber" shall be a residential or domestic subscriber, or a business with fewer than 10 employees located in the Channel Islands.

f) For the purposes of this Condition, a "Fixed-Term Contract" shall be defined as a contract involving the supply of telecommunication services by the Licensee with a term of more than 2 months.

g) For the avoidance of doubt, any reduction in call and/or text and/or data allowances provided to a Subscriber under a Fixed-Term Contract for a telecommunication service will constitute an increase in the unit price charged to the Subscriber and thus a circumstance to which sub-conditions a), b) and c) would apply. However, for mobile telephone contracts only, increases in charges for calls, texts and data not provided within an inclusive bundle shall be deemed not to be an increase in the unit price.

h) Where costs incurred by the Licensee in the provision of a telecommunication service increase significantly, and such increase was not reasonably foreseeable, then the Licensee may apply to the JCRA for, and the JCRA may grant, a waiver of the requirements of this Condition in respect of Fixed-Term Contracts for that telecommunication service.