



Wholesale Product Services - Bitstream

Call for Information

Channel Islands Competition and Regulatory Authorities

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Guernsey Competition & Regulatory Authority
Suite 4, 1st Floor, Plaiderie Chambers,
La Plaiderie,
St Peter Port, Guernsey, GY1 1WG
Tel: +44 (0)1481 711120
Web: www.cicra.gg

Jersey Competition Regulatory Authority
2nd Floor Salisbury House, 1-9 Union Street,
St Helier, Jersey, JE2 3RF
Tel: +44 (0)1534 514990
Web: www.cicra.je

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1. Introduction

- 1.1 The States of Jersey Telecoms Strategy Action Plan, developed by the Digital Policy Unit within the Chief Minister's Department, set a clear action to the Jersey Competition Regulatory Authority (the 'JCRA')¹ (the 'Authority') *"As appropriate, direct JT to offer fibre wholesale products to allow for differentiated retail services"*.
- 1.2 During 2018 the Authority engaged with operators with regard to the wholesale broadband requirements for the Jersey market, which would allow operators to offer differentiated retail broadband services in the future.
- 1.3 A workshop was undertaken with all operators and the Authority on 26 April 2018 in Guernsey, where the governments of both Islands highlighted their telecoms strategy and operators were able to provide their plans for wholesale broadband services in the future.
- 1.4 Following this meeting, at the request of Sure and JT it was agreed that a market review would be undertaken by the Authority, which commenced in May to establish who had significant market power by the current operators This was completed in Jersey in January 2019 with JT (Jersey) Limited ('JT') being found to be the dominant provider in Jersey .
- 1.5 In Jersey JT provided notice to the Authority and operators that they planned to move consumers to higher speeds due to their fibre to the home ('FTTH') capability in Jersey. This meant that in 2018 JT planned to move retail and wholesale customers from 100Mbps to 250Mbps at no extra charge.
- 1.6 Sure had requested that JT retain the 100Mbps service to allow them to offer a differentiated service, however JT refused to retain this service and the Authority did not have the necessary powers to force JT to retain this service, primarily due to JT not increasing the wholesale price.
- 1.7 As a result of this change by JT, the Authority arranged meetings with Sure and JT to agree a way forward in developing a wholesale solution that would provide Sure with the ability to offer differentiated retail broadband solutions.
- 1.8 It was subsequently agreed that Sure and JT would enter into commercial discussions and the Authority would only intervene if an agreement could not be concluded in the timely manner. The Authority stated that it expected to see a clear road map for the introduction of a new wholesale solution by the end of 2018.
- 1.9 This timescale has not been achieved and despite an in principle agreement between Sure and JT agreeing in January 2019 to introduce a Bitstream solution, there is no clear timescales for the introduction of this service. Accordingly, it is the Authority's view that it should now formalize this process to ensure that any agreed Bitstream solution is introduced in a timely manner and is formally agreed by the CICRA board once the regulatory process has been followed.

¹ The Jersey Competition Regulatory Authority and the Guernsey Competition and Regulatory Authority are collectively known as the Channel Islands Competition and Regulatory Authorities (CICRA)

2. Purpose of this Call for Information

- 2.1 This Call for Information consults on the need for reassessment of the current wholesale offering by JT and whether Bitstream is the correct long term solution and if so, on what basis?
- 2.2 The Authority is therefore issuing this Call for Information to seek the views of stakeholders on the following issues:
- (a) Are the current wholesale broadband products providing the ability for other licensed operators (**OLOs**) to offer effective differentiated retail broadband services?
 - (b) If respondents do not consider that there are sufficient wholesale services available to offer differentiated retail services, do they consider that a Bitstream solution would provide this ability?
 - (c) If a Bitstream service is the correct solution then what is the correct technical definition for such a service?
 - (d) If Bitstream is the correct wholesale service then what pricing methodology should be applied to this service to ensure it allows operators to compete with the dominant broadband supplier?
 - (e) What do respondents believe is a reasonable implementation timescale following the agreement of a technical definition.
- 2.3 Following an assessment of responses to this Call for Information and other relevant evidence, the Authority will publish a draft decision.
- 2.4 **Disclaimer** - *This document does not constitute legal, technical or commercial advice; the Authority is not bound by this document and may amend it from time to time. This document is without prejudice to the legal position or the rights and duties of the Authority to exercise regulatory powers generally.*

3. Structure of the Call for Information

3.1 This document is structured as follows:

Section 4:	Why does the Authority consider there is a requirement?
Section 5:	Possible regulatory intervention by the Authority
Section 6:	Options for the introduction of new wholesale broadband services
Section 7:	Summary and Next Steps
Annex 1:	Legal and Regulatory Framework
Annex 2	Summary of Consultation Questions

3.2 Interested parties are invited to submit comments to the Authority in writing or by email on the matters set out in this paper to the following addresses:

CICRA
2nd Floor, Salisbury House
1-9 Union Street
St Helier
Jersey
JE2 3RF

Email: info@cticra.je

3.3 All comments should be clearly marked “2019 Call for Information on the Review of a wholesale Bitstream solution in Jersey” and should arrive by **17.00 p.m.** on **11 March 2019**.

3.4 In line with the Authority’s consultation policy, the Authority intends to make responses to the consultation available on the CICRA website (www.cticra.je), the combined website of the GCRA and JCRA. Any material that is confidential should be put in a separate annex and clearly marked as such so that it may be kept confidential. The Authority regrets that it is not in a position to respond individually to the responses to this consultation.

4 Why does the JCRA consider there is a requirement?

4.1 In considering whether there is a requirement to introduce a wholesale Bitstream service, the Authority has taken into account the following factors:

- The States of Jersey Policy;
- Reintroduction of 50Mbps and 100Mbps wholesale service;
- Sure's request for the provision of a Bitstream service by JT; and
- A finding of dominance on JT.

This section considers each of these factors in turn.

States of Jersey Policy

4.2 A States of Jersey Telecoms Strategy Action Plan, developed by the Digital Policy Unit within the Chief Ministers Department, (the '**Action Plan**'), set a clear action to CICRA: *"As appropriate, direct JT to offer fibre wholesale products to allow for differentiated retail services"*.

4.3 The Action Plan is in line with the recommendations made in the Telecommunications Strategy dated 9 January 2018² (the '**Telecoms Strategy**') and was also developed through discussions with the report's authors (Oxera), the Authority and a number of other Government Departments. This was, for the Authority a significant milestone. This will have been the first time that the Authority has had a clear, published policy on which to base its work plan. The Authority has taken a number of steps to ensure that its strategies and work plan aligns with the Policy.

4.4 The Telecoms Strategy clearly states in Policy Principle 2 that:

"CICRA should ensure that JT supplies other operators with wholesale access ... which allow access seekers to compete based on differentiated retail services". The full text of Policy Principle 2 is provided below for completeness.

Policy principle 2

Promote retail competition (not network competition) as the most effective way of delivering the benefits of next generation connectivity to consumers and businesses (section 4.2)

6. CICRA should ensure that JT supplies other operators with wholesale access to the Gigabit network on a fair, reasonable and non-discriminatory (FRAND) basis, and that wholesale access seekers get access to wholesale products, which allow access seekers to compete based on differentiated retail services.
 - a. This FRAND access should include fibre backhaul for mobile services.
7. CICRA should use this regulatory focus on the Gigabit network to review and publish its prioritisation principles and outline additional resources required, if any, to conduct its duties, including implementing the telecoms strategy. CICRA should ensure that it uses these principles to determine which cases to pursue and to clearly explain its decisions.

Reintroduction of 50Mbps and 100Mbps wholesale service

- 4.5 The Authority's approach to the review of whether a re-introduction of services is required is a medium term priority. There is a separate process being undertaken in respect of the potential reintroduction of 50Mbps and 100Mbps wholesale service as a short term solution ahead of the potential introduction of a Bitstream solution. For the purposes of this Call for Information we do not address that work in this paper but simply note that a separate work stream is underway with a shorter term solution.

Sure's request for Bitstream

- 4.6 Sure had communicated to the Authority that it had a requirement for JT to provide Bitstream³ as a wholesale product. Bitstream would allow Sure to dimension the retail service it provided based on JT's wholesale product. Bitstream would allow Sure to differentiate its service to its customers based on factors such as speed, contention, quality of service and class of service.
- 4.7 Bitstream as a wholesale service can be made available in a number of forms. Bitstream is readily available in EU jurisdictions and in many other jurisdictions around the world. It is seen as an effective solution for providing wholesale broadband services for a competitive retail market.
- 4.8 In 2017 the Authority introduced a network access licence condition in the licence of JT in Jersey. That licence condition states:

36. Network Access

- 36.1 The Licensee shall, to the extent requested by another OLO, negotiate with that OLO with a view to concluding an agreement (or an amendment to an existing agreement) for Network Access.*
- 36.2 Where an OLO reasonably requests in writing Network Access, the Licensee shall provide that Network Access. The Licensee shall also provide such Network Access as the JCRA may from time to time direct.*
- 36.3 The provision of Network Access shall occur as soon as reasonably practicable and shall be provided on fair and reasonable terms, conditions and charges and on such terms, conditions and charges as the JCRA may from time to time direct.*
- 36.4 Where the Licensee acquires information from another OLO before, during or after the process of negotiating Network Access and where such information is acquired in confidence, in connection with and solely for the purpose of such negotiations or arrangements, the Licensee shall use that information solely for the purpose for which it was supplied and respect at all times the confidentiality of information transmitted or stored. Such information shall not be passed on to any other party for whom such information could provide a competitive advantage. This does not apply*

³ DEFINITION of BITSTREAM - A form of non-physical or virtual access, included in the EU Market 5: Wholesale Broadband Access. 2) A service provided by an incumbent operator whereby a new entrant rents a high speed access link to the customer. SOURCE: The Broadband Glossary, European Commission

to the passing of information to the JCRA where the JCRA requires that information in order to carry out its functions.

36.5 *The Licensee shall comply with any direction the JCRA may make from time to time under this Condition.*

- 4.9 Considering the network access licence condition the Authority proposed that Sure issue a formal request to JT for the provision of Bitstream in Jersey. We understand that during the period May to December 2018, some discussions took place between Sure and JT, which resulted in a final formal request for Bitstream from Sure to JT on December 3rd 2018.
- 4.10 Following a number of conference calls between Sure and JT⁴, on 8 January 2019 JT informed Sure that it was considering the request to be “a reasonable request” and it was carrying out a review to see if the solution was “technically feasible”. In addition, JT informed Sure that it intended to revisit its original fibre cost model (from 2012). That cost model was based on forecasts and assumptions prior to the commencement of JT’s roll out of its fibre access network. The review was to update that model based on actual costs. That cost model would then inform JT’s pricing of a Bitstream service in the event that the service was found by JT to be technically feasible. At the time of the 8 January 2019 call JT was of the view that the cost analysis work could take approximately two months.

JT’s Finding of Dominance

- 4.11 In May 2018, at the request of Sure and JT, the Authority commenced a market review of the Wholesale Broadband Market in Jersey. A review of Guernsey was undertaken simultaneously. The Authority engaged SPC Network to carry out this review and to advise the Authority.
- 4.12 The market review found JT to be dominant in the provision of wholesale broadband in Jersey. The review defined the market as:

“Wholesale access to the Internet at a fixed location using an access network based on fibre or cable or using the 4G and ultimately 5G wireless access network via a fixed device in the whole Bailiwick of Jersey.”

And the finding of dominance as:

“JT has Significant Market Power on the market as defined”.

- 4.13 The Authority completed its process on this matter by issuing a Final Notice on 9 January 2019⁵ and an Information Notice on 30 January 2019⁶

Conclusion

- 4.14 Taking all of these factors into account the Authority has concluded that there might be a requirement to introduce wholesale Bitstream services. The next section of this Call for Information considers options for the introduction of that service. However, for completeness

⁴ CICRA attended these conference calls as an observer

⁵ Final Decision CICRA 19/01. Final Decision, Broadband Market, Market Review and Dominance Finding. 9 January 2019

⁶ Information Notice CICRA 19/03. Notice of Final Decision, 9 January 2019, 30 January

the Authority requests stakeholders to respond to the following question relating to this section.

Question 1: Does the respondent agree that the States of Jersey Policy is clear in its statement requiring “*that wholesale access seekers get access to wholesale products, which allow access seekers to compete based on differentiated retail services*” and that a wholesale Bitstream service could address the States of Jersey policy? If the respondent has alternative views or evidence the respondent is asked to explain those and provide all of its analysis and assessment relating to this matter to inform the Authority’s considerations and next steps.

5. Possible regulatory intervention by the Authority?

Introduction

- 5.1 The ability for broadband operators to supply differentiated retail services can be supplied in a number of ways, either by the incumbent operator (in this case JT Jersey) providing wholesale products at differing speeds, quality of service (**QoS**) and price or by some other method such as Bitstream.
- 5.2 The Authority has confirmed with the States of Jersey that the telecoms strategy for Jersey clarifies that differentiated retail services in defined by speed, QoS and price.
- 5.3 JT currently considers there to be sufficient wholesale services in the market to support this strategy, however Sure has challenged this and requires other differentiated solutions.
- 5.4 A Bitstream solution could provide retail broadband suppliers with the opportunity to provide differentiated services, by speed, QoS and price in the medium term.

Question 2: Does the respondent agree that a Bitstream solution would provide retail broadband suppliers with a cost effective way of providing differentiated retail services. If the respondent has alternative views or evidence the respondent is asked to explain those and provide all of its analysis and assessment relating to this matter to inform the Authority's considerations and next steps.

Question 3: If a Bitstream service is the correct solution then what is the correct technical definition for such a service?

Question 4: If Bitstream is the correct wholesale service then what pricing methodology should be applied to this service to ensure it allows operators to compete with the dominant broadband supplier?

Time to implement products

- 5.5 If a Bitstream service was to be introduced a reasonable time should be provided to JT to develop and test such as service.

Question 5: What do respondents believe is a reasonable implementation timescale following the agreement of a technical definition. Respondents should provide evidence based justification for their proposed timescales.

6. Options for the introduction of new wholesale broadband services

- 6.1 In considering the approach to providing broadband operators the ability to offer differentiated retail broadband solutions there are a number of options to consider:
- (a) do nothing
 - (b) allow the operators to continue negotiations and potentially agree commercial arrangements for a new Bitstream solution
 - (c) The Authority to intervene and formalise the process to ensure Bitstream is the correct solution and a final solution is implemented in a timely manner and a final decision is made by the JCRA board.
- 6.2 It is necessary that the Authority has considered which of these options is the most appropriate for the particular circumstances of Jersey and the relevant market context. Given the amount of time that has elapsed since initial discussions took place in April of 2018, and the time it has taken operators to come to an initial position as highlighted in Section 1, specifically 1.9 of this document, the Authority believes that option (c) is the appropriate approach.

Question 6: Do respondents believe that it is appropriate for the Authority to intervene at this stage to ensure that a service, such as, Bitstream is introduced in a timely manner and the final solution is binding under JT's license conditions. If the respondent has alternative views or evidence the respondent is asked to explain those and provide all of its analysis and assessment relating to this matter to inform the Authority's considerations and next steps.

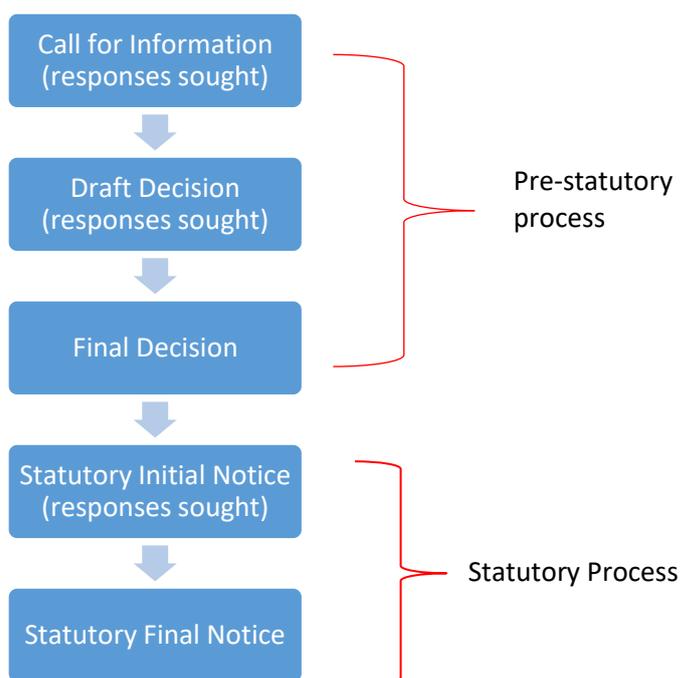
7. Summary and Next Steps

Summary

- 7.1 Stakeholders are invited to address the specific questions set out in Annex 2 below. In addition, respondents **are invited to raise any other matters they consider relevant in the present context when responding to this Call for Information.**
- 7.2 The Authority will consider all of the responses received, which will inform its considerations on the matters set out in this Call for Information.

Consultation Process

- 7.3 The Authority has recently introduced a revised process for consultations. The Information Notice, CICRA 18/29 “Regulatory Consultation Process” published in July 2018 outlines the new process to be undertaken before carrying out certain regulatory functions in accordance with the relevant statutory process. This process is set out below in diagrammatical form:



- 7.4 The new process includes a pre-statutory phase (stages 1 to 3). The pre-statutory process consists of a Call for Information, a Draft Decision and a Final Decision. Responses are sought from stakeholders at the Call for Information and Draft Decision stage, following which a Final Decision is issued. This Call for Information is thus the first stage of the pre-statutory process.
- 7.5 Whilst the Authority considers any decision made as part of the pre-statutory process to be the starting point for the statutory process and as a statement of its expectations, the Pre-

Statutory Final Decision (i.e. stage 3 of the above diagram) is not binding where there is a requirement to undertake a statutory process.

- 7.6 After the pre-statutory process has been completed, the statutory process will commence. Responses are sought at the Statutory Initial Notice stage, following which the Statutory Final Notice is issued, such decision being final and binding.

Annex 1 – Legal and Regulatory Framework

Legal Background

Article 16 of the Telecoms Law provides that the JCRA may include in licences such conditions necessary to carry out its functions. The Telecom Law specifically provides that licences can include:

- Conditions for the prevention or reduction of anti-competitive behaviour; and
- Conditions allowing the JCRA to make determinations.

Regulatory Framework

In January 2019 following a review of the markets for Broadband services in Jersey the JCRA made the decision with respect to JT holding significant market power ('SMP') in that market.

Condition 36 of JT's licence states as follows:

- 36.1 *The Licensee shall, to the extent requested by another OLO, negotiate with that OLO with a view to concluding an agreement (or an amendment to an existing agreement) for Network Access.*
- 36.2 *Where an OLO reasonably requests in writing Network Access, the Licensee shall provide that Network Access. The Licensee shall also provide such Network Access as the JCRA may from time to time direct.*
- 36.3 *The provision of Network Access shall occur as soon as reasonably practicable and shall be provided on fair and reasonable terms, conditions and charges and on such terms, conditions and charges as the JCRA may from time to time direct.*
- 36.4 *Where the Licensee acquires information from another OLO before, during or after the process of negotiating Network Access and where such information is acquired in confidence, in connection with and solely for the purpose of such negotiations or arrangements, the Licensee shall use that information solely for the purpose for which it was supplied and respect at all times the confidentiality of information transmitted or stored. Such information shall not be passed on to any other party for whom such information could provide a competitive advantage. This does not apply to the passing of information to the JCRA where the JCRA requires that information in order to carry out its functions.*
- 36.5 *The Licensee shall comply with any direction the JCRA may make from time to time under this Condition.*

This condition therefore allows the JCRA to direct JT to provide such Network Access as the JCRA may determine from time to time.

Annex 2 – Summary of Consultation Questions

Question 1: Does the respondent agree that the States of Jersey Policy is clear in its statement requiring *“that wholesale access seekers get access to wholesale products, which allow access seekers to compete based on differentiated retail services”* and that a wholesale Bitstream service could address the States of Jersey policy? If the respondent has alternative views or evidence the respondent is asked to explain those and provide all of its analysis and assessment relating to this matter to inform the Authority’s considerations and next steps.

Question 2: Does the respondent agree that a Bitstream solution would provide retail broadband suppliers with a cost effective way of providing differentiated retail services. If the respondent has alternative views or evidence the respondent is asked to explain those and provide all of its analysis and assessment relating to this matter to inform the Authority’s considerations and next steps.

Question 3: If a Bitstream service is the correct solution then what is the correct technical definition for such a service?

Question 4: If Bitstream is the correct wholesale service then what pricing methodology should be applied to this service to ensure it allows operators to compete with the dominant broadband supplier?

Question 5: What do respondents believe is a reasonable implementation timescale following the agreement of a technical definition. Respondents should provide evidence based justification for their proposed timescales.

Question 6: Do respondents believe that it is appropriate for the JCRA to intervene at this stage to ensure that a service, such as, Bitstream is introduced in a timely manner and the final solution is binding under JT’s license conditions. If the respondent has alternative views or evidence the respondent is asked to explain those and provide all of its analysis and assessment relating to this matter to inform the Authority’s considerations and next steps.