



# 2018/9 REVIEW OF MOBILE TERMINATION RATES IN JERSEY

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## FINAL NOTICE

**Jersey Competition Regulatory Authority**

**Document No: CICRA 20/11**

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# 1. EXECUTIVE SUMMARY

- 1.1 The Jersey Competition Regulatory Authority (the **Authority**)<sup>1</sup> is issuing this Final Notice which sets out the price control applicable to Jersey MTRs so as to bring MTRs down to a level that, based on the available evidence, is likely to be a much closer approximation of Jersey MNO's LRIC costs and is more closely aligned with the prevailing level of MTRs in the UK and other European countries.
- 1.2 This Final Notice sets out the decision of the Authority, following the process outlined in Article 11 of *Telecommunications (Jersey) Law 2002* (the **Law**).

# 2. STRUCTURE OF THIS DOCUMENT

- 2.1 This document sets out the conclusions which the Authority has reached, having taken full account of the comments provided to CICRA 20/05 "Mobile Termination Rates – Initial Notice – Jersey" issued on 17 February 2020.
- 2.2 The document is structured as follows:

Section 3	Outlines the background and legislative basis for this Decision
Section 4	Sets out the Statutory Notice of a Decision
Section 5	Sets out the next steps

# 3. LEGISLATIVE AND LICENSING BACKGROUND

## Legal Background

- 3.1 In considering the regulation of MTRs, including the level at which it should be capped and whether to apply a glide path to reach a proposed final MTR, reference is made to the JCRA's statutory duties as identified below.
- 3.2 The statutory duties of the JCRA are defined in Article 7 of the Telecoms Law, and include '*a primary duty to perform his, her or its functions under this Law in such manner as each considers is best calculated to ensure that (so far as in his, her or its view is reasonably practicable) such telecommunication services are provided, both within Jersey and between Jersey and the rest of the world, as satisfy all current and prospective demands for them, wherever arising.*'
- 3.3 In addition to the primary duty, relevant duties of the JCRA include the following:
- It must act in such manner as it considers is best calculated to protect and further the short-term and long-term interests of users within Jersey of telecommunication services and perform them, wherever it considers it appropriate, by promoting competition among persons engaged in commercial activities connected with telecommunications in Jersey (Article 7(2)(a) Telecoms Law).

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<sup>1</sup> The Jersey Competition Regulatory Authority (JCRA) and Guernsey Competition and Regulatory Authority (GCRA) co-ordinate their activities in the Channel Islands. However, for the purposes of this document, the Authority refers to the JCRA only as the Decision relates to Jersey only.

- It must perform its functions in such manner as it considers is best calculated to promote efficiency, economy and effectiveness in commercial activities connected with telecommunications in Jersey (Article 7(2)(b) Telecoms Law) so as to further the economic interests of Jersey (Article 7(2)(c) Telecoms Law).
  - These actions should be best calculated to impose a minimum of restriction on persons engaged in commercial activities connected with telecommunications in Jersey (Article 7(2)(d) Telecoms Law).
- 3.4 The Telecoms Law provides for a licensing regime. Article 16 of the Telecoms Law provides that the JCRA may include in licences such conditions necessary to carry out its functions. The Telecoms 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**

#### Finding of SMP

- 3.5 In October 2017, following a review of the mobile market, the JCRA made a decision with respect to the existence of SMP in the markets for mobile call termination. That decision found that each mobile operator has SMP in the market for terminating calls on its own network.
- 3.6 MNOs, in their responses to the Call for Information, confirmed that they considered that the October 2017 decision of JCRA still stands.

#### Licence Conditions - JT

- 3.7 Condition 33.2 of the licence issued to JT provides that:
- “The JCRA may determine the maximum level of charges the Licensee may apply for Telecommunications Services within a relevant market in which the Licensee has been found to be dominant. A determination may:*
- a) Provide for the overall limit to apply to such Telecommunications Services or categories of Telecommunications Services or any combination of Telecommunications Services;*
  - b) Restrict increases in any such charges or to require reductions in them whether by reference to any formula or otherwise; or*
  - c) Provide for different limits to apply in relation to different periods of time falling within the periods to which the determination applies.”*
- 3.8 This condition therefore allows the JCRA to regulate the prices that JT charges for telecommunications services in a way and for a time that it deems appropriate, provided that JT has a dominant position in the relevant market in which those services are supplied.
- 3.9 Condition 34.1(c) of JT’s licence is designed to protect fair competition in the markets in which JT operates, and provides as follows:
- “The Licensee shall: ...*
- (c) comply with any direction issued by the JCRA for the purpose of preventing any market abuse or any practice or arrangement that has the object or effect of preventing, restricting or distorting competition in the establishment, operation and maintenance of Licensed Telecommunications Systems or the provision of Telecommunications Services.”*
- 3.10 This condition allows the JCRA to give directions to JT, including in relation to the prices that it

charges.

#### Licence Conditions – Other MNOs

- 3.11 As noted above, Airtel Vodafone, Sure and Marathon have also been found in October 2017 to be dominant (i.e. to possess SMP) in the provision of termination services on their networks. Part IV of their licences provide for the JCRA to impose further obligations in the event the JCRA determines the operator has SMP in a specific market. Those obligations include a Fair Competition condition (Condition 27), part of which is in the same terms as Condition 34.1 (c) of JT’s licence, set out immediately above. This condition allows the JCRA to give directions to Airtel Vodafone, Sure and Marathon, including in relation to the prices that it charges.

#### Approach to setting MTRs

- 3.12 The EC Recommendation<sup>2</sup> expects that termination rates are set based on the costs incurred by an efficient operator, and that this is based on bottom-up modelling using LRIC as the most appropriate costing methodology.
- 3.13 Mindful of its statutory duties, the JRCA adopts a proportionate approach to the analysis of MTRs, bearing in mind the comparatively small scale of the regulated markets and the resources it has available.

## 4. FINAL NOTICE OF A DIRECTION

- 4.1 For the reasons set out in the draft decision entitled “2018/19 Review of Mobile Termination Rates in Jersey”, published on 4 July 2019, in the final decision entitled “2018/19 Review of Mobile Termination Rates in Jersey”, published on 17 February 2020, and in the Initial Notice entitled “2018/19 Review of Mobile Termination Rates in Jersey” published on 17 February 2020, the Authority issues a direction (“**the Direction**”) to each of the following licensees, in the form set out below:

- JT (Jersey) Limited (“**JT**”) pursuant to Condition 34.1(c) of its licence; and
- the other operators licensed to provide mobile telecommunications services in Jersey, listed in the schedule hereto, under Condition 27.1(c) of their respective licences.

- 4.2 Before exercising a regulatory function, the Authority is required to give Initial Notice of the proposed Decision. The Authority issued its Initial Notice on 17 February 2020. Two responses were received to that Initial Notice. In the following section the Authority considers the responses.

#### **Responses received to Initial Notice**

- 4.3 Responses were received from:

- Sure (Jersey) Limited (**Sure**), and
- Jersey Airtel Limited and Guernsey Airtel Limited (**Airtel**)

- 4.4 The Authority in reviewing the responses has identified a number of common areas:

- Uncertainty and ambiguity;

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<sup>2</sup> Commission Recommendation of 7 May 2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU

- Definition of MTRs;
- Interconnection;
- Relevant framework for regulation;
- Definitions;
- Withdrawal of previous Initial Notice, and
- Procedural error.

The following section responds to each of the areas.

***Uncertainty and Ambiguity.***

- 4.5 Sure, in its response stated that it found the Authority’s Initial Notice to be ambiguous and inconsistent and that the Authority has created conflicting stances.
- 4.6 Sure refers to the Authority’s “poorly constructed wording” of its proposed Direction, however Sure has expressed these concerns in a wholly general and unparticularised fashion, such the Authority is only able to respond in similarly general terms. The Authority considers that it has taken care to ensure the accuracy and relevance of its proposed Direction. The Authority has consulted widely with stakeholders and has had additional engagement to ensure that the Authority’s approach is clear.
- 4.7 The Authority is of the view that its proposed Direction is clear and constructed in a way that is both appropriate for the situation in the Channel Islands as well as being in line with UK and EU practices.

***Definition of MTRs***

- 4.8 Sure stated that its concerns remain with the uncertainty as to the Authority’s intended level of accessibility of the mobile call termination service by non-licensed operators (those not defined and regulated by the JCRA as licensees) and comments on its interpretation of the definition and scope of an MTR.
- 4.9 The Authority deals with the issue of Sure’s uncertainty as to intended level of accessibility under the next heading below.
- 4.10 Sure is correct in its interpretation of the definition and scope of an MTR. In line with international precedent the Authority defines the MCT as the service to terminate on the network of the mobile operator (from the mobile network operator’s switch to the handset of the customer).
- 4.11 As set out in the Authority’s finding of dominance<sup>3</sup> on this matter mobile network operators

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<sup>3</sup> T1235GJ, Final Notice, Mobile Call Termination 2017 – Market Definition and Dominance, CICRA 17/28, October 2017

are, and will remain, dominant in the provision of that service. The finding of dominance leads to a requirement for the appropriate remedies as set out in the Authority's proposed Direction.

- 4.12 The Authority notes Sure's statement that it is "happy to provide that service on a consistent basis, irrespective of the origination of that call".

#### **Interconnection**

- 4.13 Sure stated that "*as the point of physical connectivity (the 'interconnection') occurs at the licensee's switch, the call has to be transported there by using interconnection services that are entirely independent from the mobile termination service. Such interconnections can only be provided between the aforementioned local licensees - being the only entities approved by the JCRA to undertake this function. As a result, the likes of BT and Vodafone are unable to directly access the mobile termination service of Jersey mobile call termination providers, so UK based operators handover their Jersey bound calls to local licensees outside of the regulatory jurisdiction. The 'end-to-end' service provided by Jersey licensees to UK based operators therefore covers the local MTR, charged at the standard regulated rate, in addition to a transit service to bring in the call from no nearer than the mid-point in the English Channel. In respect of our own services, we can confirm that we will not discriminate in the application of the MTR – doing so in all cases, irrespective of the origination of the call*".

- 4.14 Airtel in its response confirmed its understanding that "*the remit of this decision is only for the leg of the Call from Airtel Switch to Airtel's customers device. Any changes incurred by Airtel for bringing the Call to its Switch, Airtel is free to negotiate that with relevant parties and is outside of current or proposed regulation*".

- 4.15 The Authority notes Sure's position that "'end-to-end' service provided by Jersey licensees to UK based operators covers the local MTR, charged at the standard regulated rate, in addition to a transit service to bring in the call from no nearer than the mid-point in the English Channel" and confirm that that is what the Authority intended.

- 4.16 The Authority also notes that Airtel's understanding, as stated in its response, is correct.

#### **Relevant framework for regulation**

- 4.17 Sure is concerned that the Authority has not clarified *why it believes that it is appropriate to try to reclassify and regulate MTRs under any framework other than Interconnection and Access – the industry-wide convention for the regulation of such services.*

- 4.18 For the reasons that it has previously set out, the Authority's view is that its approach has been clear and consistent. It has requested on multiple occasions that Sure clarify any difficulties that Sure has with the proposed definition of MCT and the associated regulation of MCT, but Sure not done so. The Authority has sought to explain the principles of the MCT service in the simple terms.

- 4.19 The Authority does not accept that it has sought to reclassify MTRs or to regulate them inappropriately. The Authority's clear approach throughout has been to define the relevant market on which MCT is provided, assess whether any undertaking has SMP on that market and then to impose an appropriate price control on the provision of that service. This power is expressly contemplated in the law and provided for in the licence. There is nothing novel about this approach. The Authority considers that it has not sought to redefine the MCT merely is has sought to set out a definition of MCT, and the associated MTR, as well as a clear set of remedies that align with other similar jurisdictions to remedy the dominance situation on the relevant market.
- 4.20 Sure stated that it has set out in previous regulatory submissions concerns relating to the waterbed effect (where local retail prices would likely need to rise to offset the reduced charges applied to UK operators), should the Authority seek to make the local MTR directly available to UK operators, which Sure firmly believes would be counter to the Authority's current licensing powers.
- 4.21 For the reasons set out above, the Authority considers that this remedy is wholly within the scope of its legal powers. As Sure has not provided any specifics here, it is not possible to comment further.
- 4.22 Sure raised its concerns relating to local operators' investments in 4G which it states have been predicated on business cases where MTRs are maintained at the level appropriate to the required return on investment and the minimisation of local retail mobile charge increases.
- 4.23 The Authority considers that it has been clear on this matter. Whilst MTRs remain above the cost of termination of the mobile call MNOs are directly benefiting from a monopoly position. In fact, from the submission of Sure to the Initial Notice Sure appears to have built its investments in 4G on the excess profit from MTRs. Consumers are able to shop around to seek the most competitive offering for call origination. However, consumers have no choice when it comes to call termination rates.

#### **Definitions**

- 4.24 Sure expressed its concerns on the way in which the Authority had chosen to use wording within the proposed Direction, which Sure stated that *"...it appears to have been taken out of context from their use in other jurisdictions"*.
- 4.25 For the purpose of the Proposed Direction and in order to avoid any uncertainty the Authority has defined specific and relevant terms for the Direction within the framework. The Authority does not consider that the wording of the proposed direction to be unclear. The Authority considers that, as long as the terms are a) clear or, if there is any possible doubt, b) defined, then there is no possible ambiguity and the objection is therefore not understood.
- 4.26 The Authority does not consider that there are ambiguities, vagueness or uncertainty in the

definition of MTRs. Indeed, the fact that Sure has accurately described the Authority's position in its response supports the JCRA's view that the definition is clear. The Authority has, on numerous occasions, invited Sure to provide practical examples of situations in which it would have difficulty in applying the definition; Sure has not done so.

#### ***Withdrawal of previous Initial Notice***

- 4.27 Sure stated that it was concerned that the Authority has provided no explanation as to why, on 13th December 2019, it withdrew the Non-Statutory Final Notice and Statutory Initial Notice that had previously been issued. Sure stated that *"instead it has been left to the operators to try to figure out what those reasons may be. This lack of transparency by a regulator is very concerning"*. Sure went on to state that it considered it not to be unreasonable for operators to expect a full explanation of what underlying changes have been made to the JCRA's previously much-consulted on position, and why, and to be given a proper opportunity to comment.
- 4.28 Airtel in its response also stated that it considered that the Authority had not given any reason for withdrawing the previous Initial Notice & Final Decision and that the Authority had not elaborated on the changes that it had made. Airtel also questioned how the current Initial Notice would work in relation to MNP as it considered that this had not been captured in the revised Initial Notice and Final Decision and why Jersey was being reviewed when all other discussions and consultations had been pan Channel Islands.
- 4.29 The Authority still intends to implement the changes to MTRs at the same time across both jurisdictions.
- 4.30 With regards to MNP, the Authority set this out in its Final Notice on Market Definition and Dominance and this has not changed.
- 4.31 With regards to the reason why the Authority withdrew the previous Initial Notice. On further consideration of the responses to the Final Decision the Authority was concerned that the proposed decision would not capture all of the MCT traffic. The reliance on a definition that incorporated interconnection risked creating a too narrow definition of MTRs. Therefore the Authority amended the proposed direction in the revised Initial Notice.
- 4.32 The Authority, in making this change, went back to the step in the process where the relevant change should be made. Stakeholders have had adequate opportunity to comment on the changes made to the Initial Notice. By taking the step back in the process no stakeholders have been disadvantaged. In addition, the Authority notes that Sure has explained cogently and correctly the position of the Authority with regards to MCT.

#### ***Procedural Error***

- 4.33 Sure considers that the Authority made a procedural error in publishing the Initial Notice, one that Sure considers could render the Initial notice null and void.

- 4.34 The Authority considers that the document giving effect to the specified regulatory function is the Initial Notice itself, which has the decision (the operative part of the Initial Notice – the document giving effect to the proposed specified regulatory function) attached to the back. The requirement in the law is to identify to any person how they can obtain that document (the Initial Notice). The Authority published the document in two places.
- 4.35 First, the document was published on the Authority’s website [www.cicra.je](http://www.cicra.je). This was following the Authority’s standard process of notifying all interested stakeholders ahead of the publication on the website. Second, the publication was notified in the Jersey Gazette ([www.gov.je](http://www.gov.je)) by reference to a link to the specific Initial Notice on the Authority’s website.
- 4.36 The Authority therefore considers that it has taken every opportunity to ensure that the document giving effect to the proposed exercise of the specified regulatory function is accessible to any interested party

## SUMMARY

- 4.37 The Authority has considered all the issues raised by respondents to the Initial Notice.
- 4.38 The Authority does not consider that any of the issues raised create a requirement or justification to amend the way forward with regards to the proposed decision. The Authority has sought to respond to those points fully in this document.
- 4.39 Therefore, the Authority intends to make the following Direction on 12 May 2020.

## DIRECTION

1. This Direction shall, except where specified otherwise, apply from 1 June 2020; and shall remain in force until a further decision of the Authority.
2. For the purposes of these Directions:
  - a. **“call”** means a voice call which originates on a public electronic communications network (whether fixed or mobile) and which is terminated to a mobile number within a number range allocated to the Licensee, for which the Licensee is able to set the call termination charge;
  - b. **“call termination charge”** means either a fixed-to-mobile call termination charge or a mobile-to-mobile call termination charge;
  - c. **“fixed-to-mobile call”** means a Call originating on a fixed public electronic communications network;
  - d. **“fixed-to-mobile call termination charge”** means the charge made by the Licensee to terminate a fixed-to-mobile call;
  - e. **“the Authority”** means the Jersey Competition Regulatory Authority;

- f. **“Licensee”** means each of the licensees listed in the schedule hereto;
  - g. **“mobile number”** means a telephone number that is designated under the UK’s National Telephone Numbering Plan (NTNP) for use in connection with Mobile Services (as that term is defined in the NTNP);
  - h. **“mobile-to-mobile call”** means a Call originating on a mobile public electronic communications network of another mobile communications provider;
  - i. **“mobile-to-mobile call termination charge”** means the charge made by the Licensee to termination a mobile-to-mobile call;
  - j. **“pence per minute”** means the sum in pence charged for a minute of a Call.
3. The Licensee shall not unduly discriminate against particular persons or against a particular description of persons, in relation to matters connected with network the mobile call termination service.
  4. The Licensee shall ensure that for each Call received on any day after 31 May 2020 the call termination charge (which shall be expressed in pence per minute) does not exceed the following charge ceilings:
    - a. For the period from **1 June 2020 to 31 May 2021: 3.11 pence per minute;**
    - b. For the period from **1 June 2021 to 31 May 2022: 1.11 pence per minute;**
    - c. For the period commencing on **1 June 2022: 0.7 pence per minute.**
  5. Without prejudice to the Authority’s statutory information gathering powers, the Licensee shall provide to the Authority in writing any information reasonably required by the Authority for the Licensee to demonstrate compliance with this Direction at any time upon reasonable notice.
  6. Unless the Authority otherwise consents in writing, the Licensee shall publish its call termination charge.
  7. The Licensee shall publish each proposed amendment to the call termination charges not less than twenty eight days before the date that any such amendment comes into effect.
  8. Publication for the purposes of paragraphs 6 and 7 above shall be effected by –
    - a. Sending a copy of such information or any appropriate parts of it to any person who may reasonably request such a copy; and
    - b. Placing a readily accessible copy of such information on a relevant and publicly accessible website operated or controlled by the Licensee or on behalf of the Licensee.

#### **SCHEDULE**

The Direction is issued to the following licensees:

1. JT (Jersey) Limited
2. Sure (Jersey) Limited
3. Airtel Vodafone (Jersey) Limited
4. Marathon Telecom Limited