



CONTRAVENTION OF LICENCE CONDITION 34 – FINANCIAL PENALTY

T1448J

INITIAL NOTICE OF A PROPOSED DIRECTION TO JT (JERSEY) LIMITED **Jersey Competition Regulatory Authority**

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1. Executive Summary

1.1 The Jersey Competition Regulatory Authority (the **Authority**)¹ is issuing this Initial Notice of its intention to impose a financial penalty on JT (Jersey) Limited (**JT**) for its contravention of Licence Condition 34 (Direction 20 December 2019, CICRA 19/74).

1.1 This Initial Notice sets out the direction of the Authority. In due course, the Authority may issue a Final Notice (as defined in the *Telecommunications (Jersey) Law 2002* (the **Law**)) or a fresh Initial Notice if responses are received, following the process outlined in Article 11 of the Law.

2. Structure of this document

2.1 The document is structured as follows:

Section 3	Outlines the background and legislative basis for this Decision
Section 4	Contains the reasons for the decision to issue a Direction.
Section 5	Sets out the Statutory Notice of a Decision
Section 6	Sets out the next steps

3. Legislative and Licensing Background

3.1 Telecommunication services are regulated in Jersey by way of the Law. The primary duty of the Authority with such regulation is to ensure that telecommunications services are provided both within Jersey and between Jersey and the rest of the world, so as to ensure that all current and prospective demands for such services are satisfied, so far as is reasonably practicable².

3.2 The Law contains a number of duties imposed on the Authority³, including the requirement to perform its functions in such a manner as it considers is best calculated to protect and further the short-term and long-term interests of users within Jersey and perform them by promoting competition among those engaged in commercial activities connected with telecommunications in Jersey.

3.3 Further, the Authority shall have regard to whether services are accessible to and affordable by the maximum number of businesses and domestic users, innovation in services, and the provision of high quality and reliable services⁴.

3.4 Article 19A of the Law provides that the Authority may, in addition to, or in place of, giving a direction under Article 19 of the Law, make an order imposing a financial penalty on a licensee for

¹ The Jersey Competition Regulatory Authority (JCRA) and Guernsey Competition and Regulatory Authority (GCRA) co-ordinate their activities in the Channel Islands. For the purposes of this document, the Authority refers to the JCRA as the Initial Notice refers to Jersey only.

² Telecommunications (Jersey) Law 2002, Article 7 – ‘Duties of the Minister and Authority’

³ Telecommunications (Jersey) Law 2002, Article 7(a) – (f)

⁴ Telecommunications (Jersey) Law 2002, Article 7(3).

the contravention of a licence condition. This function is a ‘specified regulatory function’, and therefore the exercise of such power requires the Authority to follow the procedure set out in Article 11 of the Law.

3.5 JT holds a Class III telecommunications licence in Jersey. The latest version of this licence was issued on 30 June 2017.

4. Licence Contravention and Direction

4.1 Licence Condition 34 provides that JT shall:

- (a) not abuse any position of Significant Market Power and/or established position in any telecommunications market;*
- (b) not engage in any practice or enter into any arrangement that has the object or the likely effect of preventing, restricting or distorting competition in the establishment, operation and maintenance of Licensed Telecommunications Systems or the provision of Telecommunications Services; and*
- (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.*

4.2 On 20 December 2019, the Authority wrote to JT with its Direction (CICRA 19/74) in the terms outlined in its letter of 11 November 2019. JT was directed to adjust and maintain the wholesale and retail prices for its fixed line broadband products such that the combination of those prices does not give rise to a margin squeeze.

4.3 The Authority advised that it would consider separately whether to exercise its powers to impose a financial penalty pursuant to Article 19A of the Law and/or whether to make any further direction in connection with this matter, and would notify JT in due course of any proposed action that it may be minded to take.

5. Financial Penalty

CICRA Guideline⁵

5.1 CICRA Guideline 12A entitled ‘Sector Specific Financial Penalties’ (the **CICRA Guideline**) dated October 2016 was issued to explain to businesses and consumers how the Authority will decide whether to issue a financial penalty and the amount of that penalty. The principle which sits behind the CICRA Guideline is that any financial penalties imposed will be appropriate and proportionate to the circumstances of each infringement when considered in the round. The Authority will seek to impose penalties that are set at a level that achieves deterrence whilst also taking into account any aggravating and mitigating factors.

5.2 In particular, the level of the penalty will be designed to have the appropriate impact on the regulated body and incentivise the board, which is ultimately responsible for the conduct and

⁵ The Channel Islands Competition and Regulatory Authorities (CICRA) is the name given to the joint operation of the Jersey Competition Regulatory Authority (JCRA) and Guernsey Competition and Regulatory Authority (GCRA).

culture of the regulated body, to change conduct and bring the regulated body into compliance. It should be high enough that it is not more profitable for a business to break the law and pay the consequences than it is to comply with the law. This should discourage bad conduct and encourage good practices and a culture of compliance across the organisation.

Consideration of a Financial Penalty

5.3 When deciding whether or not to impose a financial penalty, the CICRA Guideline sets out a number of factors which the Authority will take into account, including:

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

5.4 Submissions were made to the Authority as part of the investigation and direction process by JT's wholesale broadband customers. These claimed that the margin squeeze had prevented them from offering a wider package of services to retail consumers and those retail consumers suffered detriment as a result. Whilst the Authority cannot be certain that any competitors would pass on the resultant benefits of a reduced wholesale price to consumers, it is clear that they were deprived of the opportunity to do so. As such, in a competitive market, it is reasonable to assume that some detriment was caused to underlying retail consumers.

5.5 If a financial penalty is not imposed, regulated entities may not be deterred from following the same course of action again in future. There is also the risk that it signals to all regulated entities that the Authority is unlikely to impose financial penalties for other similar behaviour. If a regulated entity does not engage in the process, or chooses to be obstructive, then the work for the Authority is significant and the process can be lengthy, possibly negating any subsequent direction or financial penalty. A strong deterrent in this case should help prevent such situations in future.

5.6 In making the Direction in December 2019, the Authority determined that the contravention was not trivial. The breach was initially brought to the attention of JT in January 2019, and was therefore apparent to the licensee. The breach then continued until February 2020.

Conclusion on Financial Penalty

5.7 To summarise:

- a) The degree of harm, whether actual or potential, caused by the contravention, including any increased cost incurred by consumers or other market participants is hard to assess, as the Authority does not have evidence on which it can rely as to (a) the harm alleged to have been caused by JT on its retail competitors; and (b) the harm or increased costs caused for consumers. However, it can be assumed on the balance of probabilities that harm was caused to retail competitors and this harm resulted in a reduction in competitive options and/or increased costs.

- b) imposing a financial penalty is likely to create an incentive for future compliance and deter future breaches;
- c) the Authority has previously stated in December 2019 in its Direction (CICRA 19/74) that the contravention is not trivial;
- d) the breach should have been apparent to a diligent licensee; and
- e) the contravention in question did continue, and timely and effective steps were not taken by JT to end it once JT had been made aware of it.

5.8 Taking all these factors into consideration, there is clear justification, following the principles established in the CICRA Guideline, for the Authority to impose a financial penalty on JT for this licence contravention.

Level of Financial Penalty

5.9 In considering the level of financial penalty to be imposed, the CICRA Guideline states that the Authority will take into account the following criteria:

- The size and turnover of the regulated body
- The seriousness and duration of the contravention
- Any gain (financial or otherwise) made by the regulated body in reach (or any connected body)
- The degree of harm or increased cost incurred by consumers or other market participants

5.10 According to information available to the Authority including the length of the contravention, the level of fine has been based on a base amount of £40,000. Details of this calculation are attached at Confidential Annex A.

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

- Whether the regulated body in breach has a history of contraventions
- The extent to which the contravention occurred deliberately or recklessly, including the extent to which senior management or the Board knew, or ought to have known, that a contravention was occurring or would occur

5.12 This is the second time the Authority has found JT to have acted in contravention of Licence Condition 34. JT was found to have contravened the same licence condition in 2016, however no financial penalty was applied. Following discussions with the Authority, it is also reasonable to assume that JT's senior management and JT's board would have been aware of the breach from as early as January 2019 as the Head of Corporate Affairs played an active part in all discussions. He is also a member of the executive team.

5.13 In accordance with the CICRA Guideline, the following factors may decrease the level of the financial penalty:

- Whether in all the circumstances reasonable steps had been taken by the regulated body to prevent the contravention
- Whether any steps have already been taken to remedy the consequences of the contravention
- The extent to which the regulated body has co-operated with the Authority's investigation

5.14 JT has taken steps to undo the contravention by raising retail prices to a level which removes the margin squeeze. Whilst it took some time to take this action, JT did co-operate with the investigation in a reasonable manner.

5.15 Taking into account the factors which may increase or decrease the level of the penalty as detailed above, the Authority is of the view that the financial penalty to be imposed on JT on this occasion should be £40,000.

5.16 In 2016, JT was found to have contravened Licence Condition 33 where a financial penalty of £3,000 was imposed. This had been reduced from the Authority's initial position of £30,000. Given the repeated nature of this contravention, the penalty will not be reduced in the same way on this occasion.

6. Initial Notice

6.1 The Authority intends to make the following Direction on or about 27 July 2020.

ORDER

The Authority hereby orders a financial penalty on JT (Jersey) Limited for the contravention of Licence Condition 34 of the Class III Licence issued to JT (Jersey) Limited in accordance with Article 19A of the Telecommunications (Jersey) Law 2002.

The level of that penalty is set at £40,000 (forty thousand pounds) and is to be paid in full to the JCRA within 28 days of the date of the Order.

6.2 Written representations in respect of this exercise of regulatory function may be made by 17:00 24 July 2020. If such representations are made, they will be considered by the Authority before giving Final Notice or fresh Initial Notice or decide not to take action by issuing this Order.