



CONTRAVENTION OF LICENCE CONDITION 34 – FINANCIAL PENALTY

T1448J

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

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Contents

1. Executive Summary	3
2. Structure of this document	3
3. Legislative and Licensing Background	3
4. Matter Contained in Initial Notice	4
5. Representations and Objections	4
6. Final Notice	7

1. Executive Summary

1.1 The Jersey Competition Regulatory Authority (the **Authority**) is issuing this Final Notice imposing a financial penalty on JT (Jersey) Limited (**JT**) for its contravention of Licence Condition 34. The Initial Notice in relation to this matter was dated 22 June 2020 (CICRA 20/16).

2. Structure of this document

2.1 This document sets out the Direction of the Authority, having taken full account of the information gathered and responses received in relation to this matter.

2.2 The document is structured as follows:

Section 3	Outlines the legislative basis for this decision.
Section 4	Contains a summary of the licence contravention, direction and responses.
Section 5	Contains a summary of the representations and objections together with our response to these representations and objections.
Section 6	Contains the Final Notice and Order

3. Legislative and Licensing Background

3.1 Telecommunication services are regulated in Jersey by the Telecommunications (Jersey) Law 2002 (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 practicable¹.

3.2 The Law contains a number of duties imposed on the Authority², 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. 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 services³.

3.3 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 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 (**Article 11**).

¹ Telecommunications (Jersey) Law 2002, Article 7 – 'Duties of the Minister and Authority'

² Telecommunications (Jersey) Law 2002, Article 7(a) – (f)

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

3.4 Article 11 provides that representations or objections to the exercise of the specified regulatory function may be made 28 days from the date of the Initial Notice, and that the Authority shall consider any objections that they receive within that time period before giving Final Notice in relation to the proposed exercise of the function.

3.5 JT holds a Class III telecommunications licence in Jersey. The latest version of this licence was issued on 30 June 2017 (the “**Licence**”).

4. Matters Contained in Initial Notice

4.1 Licence Condition 34 (Fair Competition) 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.

4.4 On 22 June 2020, the Authority issued an Initial Notice in which it ordered JT to pay a financial penalty of £40,000 for contravening Licence Condition 34 (the “**Financial Penalty**”). The Initial Notice states the reasons and the justification for the financial penalty. The Initial Notice also sets out the criteria under which the level of the financial penalty was set.

5. Representations and Objections

5.1 Article 11(4) requires that the Authority consider any representations are made to an Initial Notice within the given period and then gives final notice in relation to the specified regulatory function.

5.2 On 24 July 2020 JT wrote to the Authority in response to the Initial Notice requesting the Authority consider a number of factors before issuing a Final Notice (attached at Annex A).

5.3 On the 24 July 2020, Sure (Jersey) Limited (“**Sure**”) wrote to the Authority asking the Authority to proceed with the Final Penalty without further delay and supporting the Authority’s decision to

impose a fine. Sure noted that the level of the Financial Penalty is inadequate (attached at Annex B).

JT Response

5.4 JT requested that the Authority consider five points before issuing a Final Notice, which are outlined below.

Point 1

5.5 JT claim that the margin squeeze was due to a mistake and was not an intentional squeeze on JT's part, arguing that the Authority recognised this in a letter of 3 July 2019. Also, that whilst senior management was aware of the investigation by the Authority, it did not believe that there was a breach.

5.6 The Authority notes that whether there was intent or not, there was a contravention of a Licence Condition by JT. Lack of intent is not sufficient to avoid a penalty for contravening a licence condition.

5.7 The Authority notes that the licence condition contravention was confirmed to JT by a Direction issued on the 20 December 2019 (**2019 Direction**). As early as October 2018, JT were aware of the possibility that they were engaging in anticompetitive behaviour when Sure wrote to JT, copying the Authority, stating that JT's intended changes to the wholesale and retail broadband prices were anticompetitive and amounted to a margin squeeze. Further, the Authority wrote to JT on 20 December 2018 outlining its concerns.

5.8 The Authority does not consider that this point has any relevance to the issuance or to the level of the financial penalty. The contravention should have been apparent to a diligent licensee. The contravention also continued, and steps were not taken to end it once the licensee became aware of it. The contravention continued until February 2020.

5.9 Both these factors were considered by the Authority when deciding whether or not to issue a financial penalty (see CICRA Guideline 12A).

Point 2

5.10 JT made representations regarding changes to the margin squeeze model (the **Model**) and whether these had been accepted by the Authority.

5.11 Changes to the Model were considered in full by the Authority in the 2019 Direction, and the Authority does not consider that this point should affect the issue or level of the financial penalty.

Point 3

5.12 JT argue that they co-operated with the Authority and its consultants through the process. The Authority acknowledged this in the Initial Notice, noting that whilst it took some time to take to rectify the margin squeeze, JT did cooperate with the investigation in a reasonable manner.

Point 4

5.13 JT state that it notified the Authority of price changes to remedy the breach on 8 November 2019, prior to the Direction issued on 20 December. The Authority notes that whilst the notification of price changes was given in November 2019, these did not take effect until February 2020. This point was also considered when issuing the Initial Notice.

Point 5

5.14 Finally JT request that the Authority prioritise a review of the margin squeeze model to avoid any future errors or misunderstandings regarding the margin squeeze test.

5.15 The Authority maintains that JT's proposal to develop the model is a future consideration and not a relevant factor when considering the issue or level of a financial penalty for this contravention.

Sure Response

5.16 Sure submitted a response in support of the Initial Notice to issue a Financial Penalty, however expressed disappointment on the length of time the case had taken and the amount of the fine.

Time taken for the investigation

5.17 Sure expressed concern that the length of the investigation lengthened JT's opportunity for unjust enrichment, and also questioned whether the margin squeeze was a 'genuine error' on the part of JT.

5.18 The degree of harm, whether actual or potential, caused by the contravention and whether the contravention continued once the regulated body was made aware of it, were both considerations by the Authority when considering whether to issue a financial penalty on this occasion. These factors are outlined in both Guideline 12A and the Initial Notice.

Level of the Financial Penalty

5.19 Sure question whether the level of financial penalty on this occasion is sufficient, given the effect on competitors, including Sure, and the repeated nature of the issue.

5.20 When considering the level of any financial penalty, the Authority takes into account a number of factors which are outlined in both the Guideline and the Initial Notice. The Initial Notice is also clear that the penalty should not be reduced in the same way as it had been previously given the repeated nature of the contravention.

Measures to prevent repeat behaviour

5.21 Sure suggest the Authority should consider the use of 'stop the clock' powers to counter any incentive for JT to introduce anticompetitive prices. Sure further suggest that customers who had taken up the services subject to the margin squeeze should be released from those contracts.

5.22 The Authority notes these suggestions, however does not accept that they would have been an appropriate measure to take on this occasion, however may be considered in relation to any future incidents.

6. Final Notice

6.1 Having considered the representations and objections to the Initial Notice, the Authority gives Final Notice of the following Order to JT:

ORDER

The JCRA hereby maintains the financial penalty issued to JT (Jersey) Limited in the Initial Notice, 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 remains at £40,000 (forty thousand pounds) and is to be paid in full to the JCRA within 28 days of the date of publication of the Order.