



Variations to fixed-term telecommunications contracts

Initial 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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*Suites B1 & B2, Hirzel Court,
St Peter Port, Guernsey, GY1 2NH
Tel: +44 (0)1481 711120
Web: www.cicra.gg*

*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. Many consumers opt for fixed-term¹ 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 MB⁴ 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

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.

decisions made by the JCRA (e.g. price controls). However, as a general principle, the 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 Section 3 below), 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 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: 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 (discussed in Section 3 below).
7. The Consultation ended in June 2013 and seven responses were received, but the JCRA Board felt it was appropriate to wait for Ofcom's decision before publishing an Initial Notice. Ofcom's decision was published on 23 October 2013 (see Annex A attached) 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.
8. In Jersey, there are four providers of consumer and small business telecommunication contracts: JT, Sure (Jersey) Limited (**Sure Jersey**), Newtel Limited (**Newtel**) and Jersey Airtel Limited (**JAL**). By this Initial Notice, the JCRA advises of its decision to implement Option 2, outlined in paragraph 6 above, by introducing a new condition into the licences of relevant operators in order to ensure the fairness of certain contract terms.
9. This Initial Notice summarises the issues involved and the responses received to the Consultation and sets out modifications to the licences of JT, Sure Jersey, JAL and

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.

Newtel to be made under Condition 6 of each of those licences and Article 18(1) of the *Telecommunications (Jersey) Law 2002* (**Telecoms Law**).

2. Legal Background & Regulatory Framework

2.1 Legal Background

10. 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.
11. The JCRA's duties in the telecommunications sector are defined in Article 7 of the *Telecoms Law*.
12. 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.
13. 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

14. 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. Ofcom's Consultation and Statement

15. Unlike in the Channel Islands, UK telecoms operators do not hold individual telecoms licences. Instead, Ofcom, the UK communications regulator, provides a general authorisation for parties to supply telecoms services, subject to general conditions of entitlement (that is, conditions which apply to all operators) and specific conditions (that is, conditions which apply to individual operators in particular positions). The general conditions of entitlement include a number of provisions dealing with the manner in which telecoms customers are treated by operators.

16. In January 2012, Ofcom announced a review of operators' compliance with the General Conditions.⁶ The review related to contracts between operators and consumers, and considered the fairness of certain contract terms for fixed-line telephony, mobile and broadband services. At the time that the review was commenced, GC9.6 provided as follows:⁷

"The Communications Provider shall:

- a) give its Subscribers adequate notice not shorter than one month of any modifications likely to be of material detriment to that Subscriber;*
- b) allow its Subscribers to withdraw from their contract without penalty upon such notice; and*
- c) at the same time as giving the notice in condition 9.6 (a) above, shall inform the Subscriber of its ability to terminate the contract without penalty if the proposed modification is not acceptable to the Subscriber."*

17. Ofcom was concerned that the current rules were not achieving their aims of ensuring fairness and protecting consumers, and the terms of reference included giving consideration to price variation clauses within contracts. In January 2013, Ofcom provisionally concluded that it was necessary to modify GC9.6, in particular to remove the "material detriment" threshold, and issued a consultation on various options that it considered would protect consumers from unexpected prices rises within fixed contracts for fixed-line telephony, broadband and mobile services (the **Ofcom Consultation**).⁸

18. Ofcom's view was that the price the consumer has to pay for the services provided by a Communications Provider (**CP**) is one of the most important contractual terms. The current rules in both the Unfair Terms in Consumer Contracts Regulations and GC9.6 seek to reflect this, and Ofcom considered whether the current rules were achieving these aims. The Ofcom Consultation identified, among others, the following key

⁶ Ibid

⁷ Ofcom, *Consolidated version of general conditions as at 13 September 2011*, Section 48(1) of the Communications Act 2003.

⁸ Ofcom, *Price rises in fixed term contracts – options to address consumer harm*.
<http://stakeholders.ofcom.org.uk/binaries/consultations/gc9/summary/condoc.pdf>

causes of consumer harm from price rises in fixed-term contracts and the options for addressing them:

- a) *CPs' ability to raise prices in fixed-term contracts without an automatic right to terminate without penalty on the part of consumers* – Ofcom notes that the rules are not operating to meet consumers' legitimate expectations as to the price and that it, like other important obligations the contract places on the consumer (like its length), is and should be fixed;
- b) The rules are not giving consumers sufficient ability to avoid surprises and unfair effects (by ending contracts without penalty);
- c) *Different price elements in a contract* – Ofcom's view is that any regulatory intervention should protect consumers in respect of any increase in the prices for services provided under a contract applicable at the time the contract is entered into by the consumer;
- d) *Allowing CPs to increase prices for reasons outside of their control, e.g. changes in tax* - CPs should be able to rely on a term which specifies that consumers are not allowed to exit the contract without penalty where such increases are passed through to them in the form of price variations;
- e) *How CPs notify consumers of contract variations* - Ofcom has given high level guidance on this issue but does not consider that at this time it needs to take formal regulatory intervention to specify the form of contract variation notification;
- f) *Timescales set by CPs* – Under GC9.6, CPs have to give subscribers a minimum of one month's notice of any modifications likely to be of material detriment. Ofcom's initial view is that CPs should also give consumers the ability to cancel the contract at any time before the price rise takes effect. Ofcom is seeking views on whether the timescale that consumers should be given to cancel without penalty should be set out in the guidance.

19. Ofcom assessed four regulatory options on what intervention, if any, was necessary and appropriate to negate consumer harm.

20. Ofcom's full Statement, issued on 23 October 2013, is available at Annex A to this Initial Notice. In summary, the regulator confirmed that consumers and small businesses should be allowed to exit their landline, broadband or mobile contract without penalty if their provider increases the cost of their monthly deal. It considered that the most appropriate option is to modify GC9.6 so that consumers are able to withdraw from a contract without penalty for any increase in the price for services. Moreover, the 'material detriment' threshold for price modifications would also be removed. Ofcom considered that the ability to avoid the effects of price rises would mean that the risks of cost increases would lie, appropriately, with CPs and would address the inconsistent and uncertain application of the current rules.⁹

⁹ Ibid, para 1.18

21. 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 be regarded as constituting an increase in the unit price paid by the consumer and thus a price rise to which the guidance would apply.

4. Discussion

22. JT considered that it was entitled to make the variations to its mobile product offering detailed in paragraph 2 above under its Mobile Telephone Service Terms and Conditions. Clauses 3.1 and 3.2 of these terms and conditions provide as follows:

3.1 JT may from time to time vary the Conditions and Product Description applicable to the Service and will as soon as practicable and in any event not less than one calendar month before any such variation is to take effect give notice of such variation on-line and / or at JT's office(s) in Jersey and/or Guernsey as applicable.

3.2 Notwithstanding the above, JT may vary all or any of the Service Charges by publishing any such variation in a schedule of tariffs to be displayed and / or available at JT's office(s) in Jersey and/or Guernsey as applicable and / or On-line such variation to have immediate effect unless stipulated otherwise.

23. Clause 14.2 of JT's mobile contract sets out certain rights of customers when JT invokes its rights to vary the contract. In the current version of the mobile terms and conditions, the clause provides as follows:

14.2. The Contract may be terminated by the Customer if:

14.2.1. JT unreasonably exercises its rights of variation or suspension under the Contract, by the Customer giving written notice to JT within 14 days of the notice of variation or suspension;

14.2.2. JT exercises its rights of variation of the technical specification of a Service such that performance of the same is materially degraded, such termination to be on 14 days' written notice without further obligation...

24. Upon questioning by the JCRA, JT was firmly of the view that the decision it took to vary the terms of a mobile offer was entirely standard in the telecoms industry, and cited a response by Ofcom on 22 March 2012 to an announcement by Orange that it was increasing its monthly plan prices that were tied to an existing contract. However, the JCRA considers this example does not support JT's claim, as the reason that Ofcom did not act and/or issue a direction was because the price increase was equal to or less than RPI and Orange's terms and conditions explicitly allowed for this.

25. In the JCRA's view, JT's conduct in January 2012 raised two significant concerns:

- Firstly, if JT's interpretation of its terms and conditions was correct, JT could use its right to vary the terms and conditions of the contract under clause 3.1 to introduce very significant modifications to the services that customers have purchased from JT, and clause 14.2 provided customers with little or no effective protection; and

- Secondly, the process outlined in clause 3.2 of the mobile contract for advising customers when variations were being made to the contract did not provide sufficient transparency for consumers.
26. On the first issue, JT disadvantaged a significant number of customers by removing an element of the package provided under existing fixed-term mobile contracts. In the JCRA's view, these customers could reasonably have expected to receive the offer set at the time they entered into a contract with JT, for the duration of that contract.
 27. On the second issue, the JCRA is concerned that the requirement in clause 3.2 to publicise any such contract variation "online and/or at JT's office" does not offer consumers sufficient protection, since consumers are unlikely to check JT's website or to visit JT's office on a regular basis. The JCRA does not consider that customers should be expected to regularly visit an operator's office or its website in order to be kept informed of fundamental changes that will affect the product they receive and/or their final bill. Given that operators have address details or mobile phone numbers for all of their customers, the JCRA would expect, at the very least, direct communication with all customers where contract variations were proposed.
 28. JAL, Sure Jersey and Newtel Limited each have similar clauses in their terms and conditions to clauses 3.1 and 3.2 of JT's mobile contract. JAL and Sure Jersey have informed the JCRA that they do not consider it appropriate to implement price changes or product changes for existing customers on fixed-term contracts until the contract ends. The JCRA is not aware of any evidence of either operator invoking the equivalent of clause 3 to change a material component of the tariff for a fixed-term contract (see paragraph 3 above).

5. Consultation

29. Prior to the Consultation, the JCRA's provisional view was that there would be a benefit to consumers and the industry from ensuring consistency as it relates to the right of operators to seek variations to fixed-term contracts, and in the manner in which variations should be notified to customers.
30. The JCRA consulted on two options to address its concerns about product or price changes being introduced during fixed-term telecommunications contracts and in preparing these proposals, 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 as follows:

Option 1: Changes to Terms & Conditions

31. The JCRA considered that in order to offer consumers a level of protection that is otherwise absent in Jersey, one option would be for it to issue a direction under the existing consumer protection conditions of each operator's licence, requiring the operator to amend the variation clauses (or equivalents) in its terms and conditions, to the extent that the clauses are inconsistent with a proposed direction. The proposed direction would have covered the terms and conditions for fixed-line, mobile and broadband services. However, it was proposed that the direction would only apply to residential and domestic customers, since business customers are in a better position to protect themselves by negotiating on contract terms.
32. The proposed direction was based on the following principles:
- a) Where an operator proposes to vary the terms and conditions of a contract, or to change the price payable by the customer, or to remove or alter a component of the product/package being supplied, affected customers would need to be contacted directly, at least one calendar month in advance, and provided with an explanation of the proposed change. Customers could be contacted by letter, e-mail or SMS, depending on the particular customer contact details held by the operator; and
 - b) if the operator seeks to change the price payable by the customer, or to remove or alter a component of the product/package being supplied (regardless of whether the operator is entitled to do this under the existing terms and conditions), or where a variation to the terms and conditions of the contract is likely to be of material detriment to the customer, then at the same time as giving the notice in a) above, the licensee would be required to inform the customer of his/her right to terminate the contract by giving verbal notice to the operator within one calendar month of receiving the notice of variation or suspension. Termination would be without penalty, although where a pay monthly mobile contract included a handset subsidy, customers would be obliged to make a payment to the operator in respect of the remaining handset subsidy (and the same principle could be applied where subsidised equipment

is supplied under a broadband contract). The details of the calculation of the handset/equipment subsidy during the term would need to be explained to the customer before the contract was entered into.

Option 2: Introduction of a new Licence Condition

36. An alternative option was to introduce a new condition into the licence of relevant operators, in terms equivalent to those of GC9.6 enforced by Ofcom, to ensure the fairness of certain contract terms for fixed-line telephony, mobile and broadband services.
37. It was observed that if the JCRA did consider making changes to the conditions of an operator's licence, GC9.6 might provide a template for any such amendments, noting that Ofcom was, at that time, considering whether the wording of GC9.6 provided adequate protection for consumers. It was highlighted that if the JCRA did decide to introduce a new condition into the licence of relevant operators, in all likelihood, it would take account of what Ofcom recommended as a result of its review.
38. 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 **Airtel**), Sure Jersey and Sure Guernsey (together, **Sure**), Guernsey Trading Standards Service (**TSS**),¹⁰ ACS Jersey, Longport Group (**Longport**) and Teletech Solutions (together **the Respondents**) and the substantive comments have been summarised below.

Option 1

39. Respondents commented as follows:
40. JTCI expressed its view that its current variation clause in its terms and conditions (**T&Cs**) allows a customer, who feels the variation is 'unreasonable', to provide JT with written notice of termination with 14 days of the variation being notified. JTCI considered that the provisions contained within its T&Cs already provide the customer with an option to terminate if a variation has been made unreasonably and moreover, that JT does and has released customers from contractual obligations in cases when they are unhappy and wish to move operators. JTCI considers that changing terms on a website is common place, not just in the telecommunications industry, and any changes should be applied to other sectors too. The company also criticises the JCRA for not considering in the Consultation the cost implications of the changes it proposes. JTCI also questioned that telecoms operators should be required to contact every customer for any product change and suggested that an unintended consequence would be that the contract term needs to be fixed for a shorter term.
41. Longport was of the view that the JCRA should set strict and explicit licence conditions to provide consumers with protection in the absence of relevant consumer protection. It was of the view that GC9.6 does not provide an adequate framework that is easily understood by Channel Islands' consumers and noted the JCRA's

¹⁰The submission only related to Guernsey and so is not reflected in this Initial Notice

recognition that Ofcom is considering strengthening its wording with the implication that it is currently inadequate. Longport had no particular view as to the means by which the JCRA should introduce a new licence condition, but urged caution that the rules are made explicit and understandable to the general public and considered the following as key issues:

- The changes should apply to domestic/residential subscribers, but clarity is needed as to who is a domestic subscriber as it is common for businesses to take residential broadband services rather than the higher-priced ‘professional’ services;
- Operators must give sufficient notice to subscribers. One month’s notice is too short, given that such changes to fixed term contracts should be rare. A suggestion of at least two months was made;
- Subscribers must be given the option to switch to an alternative provider as well as cancel without penalty and given the time to investigate alternative services and make the transition;
- Operators must make ‘reasonable’ efforts to contact customers (SMS is not considered suitable) and suggested that at least three attempts at contact should be made; and
- As it relates to routers and handset subsidies, Longport were of the view that licence holders should be required to provide clear and transparent information at the point of sale and as the contract progresses e.g. on the monthly bill.

42. Teletech Solutions queried whether the matter was, in fact, a general consumer protection issue rather than something specific to the telecoms industry, but was supportive of both options. It suggested that the JCRA give thought to also including *standard* business mobile phone contracts.¹¹ It noted that the value of a handset is far from transparent to the consumer and may be used as a means to prevent customers exiting their contract. Teletech Solutions suggested that it should be made clear if there is a distinction for price increases driven by cost changes incurred as a result of external factors e.g. regulatory actions; but was of the view that if the operator chooses to pass this cost on, the customer should still have the right to terminate.

43. TSS observed that the term ‘material detriment’ could give rise to challenges from both the consumer and the operator and may need explanation to help reduce such challenges. TSS was also of the view that taxes should ‘probably not give rise to a right to cancel the contract.’ The Service also noted that if an equipment subsidy had to be repaid then it would not be possible to cancel the contract without penalty.

44. Sure had a preference for Option 2, as it provided the greatest amount of certainty for both customers and operators, but believed certain factors needed to be considered under each option:

- Only *significant* changes to non price terms and conditions and any changes to prices should be notified to customers e.g. from time to time, T&Cs will be changed to make them clearer, but Sure does not consider administrative updates e.g. amending spelling errors to be a material change.

¹¹ Small businesses especially were felt to be equally as vulnerable as consumers to enforced contract changes and the financial effect on them may be higher.

- Core elements of fixed term contracts should be distinguished from 'out of bundle' prices.

Option 2

45. Respondents commented as follows:

46. JTCI sought clarification around the use of 'without penalty' and wanted the cost of the subsidised handset/equipment to be paid in full before a customer could terminate. JTCI proposed that a further option available to the JCRA was to require a change to the Consumer Code of each operator referencing a customer's ability to terminate a contract and detailing the steps a customer needed to take and the method used to calculate any repayment.
47. Airtel favoured Option 2 but sought more clarity with regards to contracts where a handset subsidy is included. However, it believed that it was the responsibility of customers to take the necessary time to read the operator's T&Cs. In its view, clause 17 of JAL's General T&Cs clearly states that JAL may *amend, vary or supplement any terms and conditions* by giving notice, and the said amended, variation or supplement shall be effective 15¹² days after the date of publication or posting of the notice unless otherwise stated. JAL considered it satisfactory for it to post its new and/or amended T&Cs on the website and send a SMS notification alerting contracted customers to the changes, or referring them to the website or the call centre for more details.
48. TSS felt that this option would provide more certainty and protection for consumers than option 1, as the JCRA would have the powers to act if operators breached their licence conditions, whereas option 1 would entail the consumer arguing breach of contract perhaps leading to more complaints being brought forward under the formal complaints process.
49. Sure was keen to point out that its current practice is already closely aligned to the proposals consulted on and that it already applies a 'material detriment' test, to ensure that the reasonableness or otherwise of any variation is judged in terms of its impact on the consumer. It was supportive of the need for consumer protection, but was concerned operators may be unfairly burdened, a cost which would ultimately be borne by the customer. Sure felt that Option 2 needed to be explicit that a customer should be liable for any unrecovered handset/equipment subsidies but noted it was unclear how it could provide customers with detailed information of the calculation of the handset/equipment subsidy without revealing potentially commercial sensitive information on costs. It conceded that it was a level of detail best explored with the JCRA once it had chosen how it wished to proceed. It also noted that it did not currently have an express commitment to tell customers of their right to terminate if terms are changed to material detriment.
50. Sure also wanted to ensure that out of bundle charges within the minimum fixed term were not captured e.g. call charges outside the inclusive allowance and per MB

¹² Previously 30 days. The change took effect on 7 May 2013 for new customers and for existing customers they became effective 10 June 2013.

charges that are not within an inclusive allowance etc. For example, in the JT example, (see Section 1) Sure considers that a change to the per MB price would have fallen within the out of bundle category if – and only if - JT had not also removed the inclusive MB allowance at the same time; that is, if JT had kept the 100MB inclusive allowance and only increased the per MB price for any usage in excess of that. Sure sought clarity about what the JCRA’s proposals would mean with respect to any price-capped fixed services. It also felt there was a need for some clarification on certain non-price terms that would not be considered to be of *material detriment*. Sure wanted clarity on technical changes to products or services that may remove certain functions or restrict services in the future.

51. ACS Jersey felt that charges outside the control of the operator were few, but that changes in taxation and other government-imposed surcharges and charges such as off-island connection and IP charges were uncontrollable (although it noted historically that these charges have been falling). However, ACS Jersey made the observation that there seemed to be little reason for ever needing to increase charges during a fixed contract and that, as a general rule, heavier users tend to subsidise average users in any event. It felt that any licence condition change should be implemented across the industry. To avoid possible dispute, ACS Jersey recommended that the new condition be amended to read “28 days” rather than "one month" and further recommended that any price increase within existing contracts that exceeds the prevailing RPI be first authorised by the JCRA.

JCRA’s assessment

52. We have considered the representations made, and have concluded that Option 2 provides the greatest level of certainty for both customers and operators alike, noting that both Option 1 and 2 offer more protection to customers than clauses 14 and 17 of JAL’s T&Cs. The need for customers to be able to terminate their contracts and be afforded legal redress is paramount and for this reason, we do not think that it is appropriate that the ability to terminate should be included in a Consumer Code, which is an administrative document.
53. It is also proposed that the new licence condition will only apply to residential and domestic customers, since the majority of business customers are in a better position to protect themselves by negotiating on contract terms. However, in response to some respondents’ comments about the need for clarity around this issue, we have given consideration to the definition used by Ofcom¹³ and the *Communications Act 2003* and it seems appropriate for the JCRA to adopt the same definition. Therefore, we propose defining a small business as a business with ten or less employees across the Channel Islands, to which the new licence condition will apply. It is acknowledged that operators may not 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.
54. The JCRA considers that such variations in fixed-term contracts should be so rare and the harm to consumers can be such that written notice (eg a letter to a customer’s

¹³ The General Conditions define a small business as one which has 10 or less individuals working for it, as adopted September 2011

residential address) is a proportionate means of notifying them. For this reason, we refute JTCI's assertion that it is burdensome to contact every customer for any product change and an unintended consequence would be that the contract term needs to be fixed for a shorter term, as the need to notify should not be a frequent occurrence. Moreover, because such variations should be rare, the JCRA does not accept that Option 2 will place a burden on operators that will increase costs to the detriment of customers. The JCRA also considers that providing notice two calendar months in advance of such a change is necessary to provide adequate opportunity for consumers to respond if they wish to change provider, or even just to compare other services/packages with the same operator. Similarly, it is not considered that a customer should have to provide one month's notice; customers should be able to terminate their contract at any point before the implementation date of the change proposed by the operator, although the JCRA feels it is proportionate that this notice is provided in writing.

55. The JCRA has considered the views of respondents as they relate to out of bundle charges within the fixed term and accepts that it is appropriate that they are not captured e.g. call charges. It is also accepted that more clarity is required as it relates to handset/equipment subsidies. It has concluded that any remaining handset /equipment subsidies should be paid in full by the customer at the point they withdraw from their fixed term contract. The JCRA is of the view that if the licensee wishes to require customers to pay the remainder of the handset/ equipment subsidy, it needs to be very clear with customers at the point the contract is signed and identify for the customer how much of the subsidy will be paid each month during the fixed term contract. In the event that the licensee clearly sets out that during the contract it will increase charges either by an explicit amount or by reference to a price index, at the point the contract is entered into then the JCRA is of the view that the new licence condition will not apply. However, if the terms and conditions of the licensee merely state that an increase is permitted during a fixed-term contract, then the consumer will be entitled to protection under the new licence condition. The JCRA notes Sure's concern that providing customers with detailed information of the calculation of the handset/equipment subsidy will be difficult without revealing potentially commercially sensitive information, but it is noted that no other operator raised this as a concern and in fact JTCI proposed that the method of calculation of the subsidy appear in the operator's Consumer Code.
56. The JCRA is of the view that a threshold of 'material detriment', or reliance on such terms as 'unreasonable', are too subjective to offer customers any protection. Noting that Ofcom has removed the term 'material detriment' from GC9.6, it is felt appropriate to adopt the same position; there should be no threshold that has to be met if a customer wishes to exit their fixed-term contract as a result of a price increase mid-contract. We are also of the view that the licence condition should apply to all contracts that exist before the implementation date.
57. Noting the differing views expressed on the matter, the JCRA has decided that if the licensee chooses to pass on any costs arising from regulatory or legislative changes, the customer should still be protected under the new licence condition. It is considered that operators have built a margin into each product and thus need to consider whether they can absorb these costs; if they choose to pass the cost on, the new licence condition can be invoked by the customer.

6. Licence Modification

58. The JCRA considers that there is a benefit to consumers, small businesses (as the JCRA is defining that term) and the industry from ensuring consistency as it relates to the right of operators to seek variations to fixed-term contracts, and in the manner in which variations should be notified to customers. The JCRA proposes to adopt Option 2 outlined in the Consultation, and to modify the licences of JT, Sure Jersey, JAL and Newtel under Condition 6.1 of their respective licences in the manner outlined below.
59. Under Licence Condition 18, which relates to consumer protection, a new condition will be added to the licences of JT, Sure Jersey, JAL and Newtel, 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 contract for a fixed term.
 - b) If the Licensee wishes to increase the unit price of a telecommunication service supplied under a contract for a fixed term, 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) 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.
 - e) For the avoidance of doubt, any reduction in call and/or text and/or data allowances provided to a Subscriber under a 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.

7. Next steps

60. The licence modification will take effect on 1 June 2014 unless representations or objections are received, in which case, the relevant date will be set out in a Final Notice published under Article 11(5) of the Telecoms Law. The JCRA considers that two calendar months is sufficient for licensees to make any adjustments they identify as necessary in light of the direction.
61. Representations or objections in relation to the licence modifications can be made in accordance with the arrangements set out below.
62. Responses to this Initial Notice should be received by the JCRA before **midnight on Thursday 1 May 2014**. All submissions should be sent in writing or by email, clearly marked “Variations to fixed-term telecommunications contracts – Initial Notice” and sent to the address below. If you wish, you can submit one submission for both the Initial Notice and the Draft Decision in Guernsey, drawing out any island specificities.

2nd Floor, Salisbury House
1-9 Union Street
St Helier
Jersey
JE2 3RF
Email: info@icra.je

63. In line with the JCRA’s policy, responses to the Initial Notice will be made available on the website (www.icra.je). Any material that is confidential should be put in a separate annex and clearly marked as such.