



# Bitstream Access – Consultation on Licence Modification

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## Consultation Document

### Channel Islands Competition & Regulatory Authorities

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## 1. Executive Summary / Introduction

1.1 The telecommunications sector in the Channel Islands is regulated by the Channel Islands Competition and Regulatory Authority (**CICRA**), comprising the Jersey Competition Regulatory Authority (**JCRA**) and the Guernsey Competition and Regulatory Authority (**GCRA**)<sup>1</sup>. CICRA has an overarching aim to ensure markets work well, protecting the competitive process, for consumers through its range of legal duties.

1.2 CICRA looks to promote fair competition where this advances consumers interests. The telecoms markets are generally better at meeting consumer demands where competition is effective, and CICRA has specific regulatory powers that place a duty on it to promote competition in this sector where consumers will benefit.

1.3 In response to its duty to promote fair competition, in February 2016, CICRA issued a consultation (the **2016 Consultation**) seeking views on the potential benefit to consumers that the introduction of further fixed line access services might have. CICRA has considered the responses received in deciding on the next steps to be taken for each of the suggested services<sup>2</sup>.

1.4 One of services included in the 2016 Consultation was Bitstream Access (BSA). BSA is where a network provider allows access to high-speed (or interview) access service installed between the network provider and the end customers. This allows an Other Licences Operator (**OLO**) to provide high-speed services to the end user as well as to introduce features that are not dictated by the network provider's own choice of retail product.

1.5 This consultation seeks views on the introduction of BSA; in particular, on an additional condition which CICRA is proposing should be introduced into JT (Jersey) Limited's (**JT**) Licence in respect of the provision of BSA.

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<sup>1</sup> All references in this document to CICRA should be read as references to each of the GCRA and the JCRA, unless the context otherwise requires.

<sup>2</sup> The consultation (CICRA 16/03), responses and a letter from CICRA to respondents (16/42) can be found in the telecoms publications section of the CICRA website.

1.6 This additional licence condition will require JT to provide network access upon reasonable request from an Other Licenced Operator (**OLO**). This network access shall be provided as soon as practicable and on fair and reasonable terms, conditions and charges, and on such terms, conditions and charges as the JCRA may from time to time direct.

1.7 No interest in BSA has been expressed in Guernsey to date, therefore CICRA's provisional view is that this new licence condition is only introduced in Jersey at this point in time, but CICRA is keen to hear the views on this issue as well.

1.8 Respondents are asked to comment on:

- *Do you agree with CICRA's approach i.e. that it should support commercial negotiations between parties by way of the proposed licence condition in Annex B? If not please set out what alternative would you propose and why?*
- *Do you agree that there is no requirement to introduce the same condition for the incumbent operator in Guernsey at this time? If you disagree, please set out the reasoning behind your response. If appropriate this could usefully include an evidence based submission on the potential demand for BSA in Guernsey.*

## **2. Structure and Timetable for Consultation**

2.1 This consultation is structured as follows:

Section 3: Legal Background and Regulatory Framework

Section 4: Bitstream Access

Section 5: Proposed New Licence Condition

Section 6: Next Steps

Annex A: Consideration under Article 7 of the Telecommunications (Jersey) Law 2002

Annex B: Proposed Licence Condition

2.2 Responses to this consultation should be submitted in writing and should be received by CICRA before 5 pm on 07 December 2016. Submissions can be sent by email to [info@cicra.je](mailto:info@cicra.je).

2.3 In accordance with CICRA's policy, non-confidential responses to the consultation will be made available on CICRA's website ([www.cicra.je](http://www.cicra.je)). Any material that is confidential should be put in a separate annex and clearly marked as such.

### 3. Legal Background and Regulatory Framework

3.1 The Telecommunications (Jersey) Law 2002 (the **Jersey Law**) prohibits a person from operating a telecommunications system in Jersey unless that person has a telecommunications licence. The body authorised to grant telecommunications licences in Jersey is the JCRA. Such conditions may be included in a telecommunications licence as the JCRA considers necessary and desirable.

3.2 The Law requires the JCRA to carry out its functions in a certain manner. The duties prescribed are considered in more detail in Annex A.

3.3 The JCRA has granted the incumbent operator in Jersey, JT, a telecommunications licence with specific conditions applicable to licensees deemed to hold a position of significant market power in certain markets. Article 18 of the Jersey Law provides that the JCRA may modify any condition contained in a licence. The power to modify a licence including the power to insert a new condition, as well as amending or deleting an existing condition.

3.4 Article 16(4) provides that Conditions contained in a licence may relate to, or impose requirements about –

- Competition in relation to telecommunications services, telecommunications systems, apparatus and telecommunications equipment (16(4)(a));

- Providing telecommunications services for or on behalf of other providers of telecommunications services, whether the latter run telecommunications services or not (16(4)(e));
- Co-location and sharing of, and access to, facilities, telecommunications systems, apparatus and telecommunications services (16(4)(f)).

## 4. Bitstream Access

4.1 JT currently controls and maintains the fixed network which supports broadband and landline voice provision and, as a result OLOs can only supply services offered wholesale by JT.

4.2 BSA is a form of wholesale network access in that a network provider allows access to high-speed (or internet) access service installed between the network provider and the end customers. This allows an OLO to provide alternative high-speed services to the end user as well as introduce features that are not dictated by the network provider's own choice of retail product.

4.3 A form of BSA could be introduced in a portfolio alongside existing services such as Wholesale Broadband Access and Wholesale Line Rental which would allow OLOs to have a choice of taking a service from a network provider through any of these services.

4.4 The 2016 Consultation asking for the views of respondents on the implementation of BSA in Jersey and, in particular, a) what benefit there would be to consumers, b) estimated take-up, and c) types of services that would be enabled.

4.5 A full copy of the responses is available on the CICRA website, which provides evidence of an existing demand by OLOs. In its response to the 2016 Consultation, JT provided documentation to support its claim that it had not received requests for this product despite having sought requirements from OLOs for wholesale broadband products.

4.6 CICRA is encouraged that these discussions are taking place and CICRA places an emphasis on such commercial negotiations running their course rather than leading with a prescriptive regulatory intervention for this product. There is however an additional level of support that CICRA can provide for such negotiations, in the form of a new Licence Condition, given the imbalance in negotiating power between OLOs and the incumbent.

## 5. Proposed new licence condition

5.1 As discussed above, CICRA will continue to encourage OLOs to enter into technical and commercial arrangements with JT for BSA, as these arrangements should rightly be a matter for agreement between the parties involved, allowing them to set product definitions and agree cost allocation between them.

5.2 In order to support this process, CICRA is considering introducing a new condition into JT's licence. This will allow, if necessary, conditions to be set by CICRA which are non-discriminatory, fair and reasonable for both parties and offer the greatest benefit to all users.

5.3 This Consultation seeks comments on the proposed new condition which CICRA may introduce into Jersey Telecoms' (JT) Licence. The proposed new Licence Condition is attached at Annex B.

*Question 1: Do you agree with CICRA's approach to support commercial negotiations between parties by way of the proposed licence condition? If not, please set out what alternative would you propose and why?*

*Question 2: Do you agree that there is no requirement to introduce the same condition for the incumbent operator in Guernsey at this time? If you disagree, please set out the reasoning behind your response. If appropriate this could usefully include an evidence based submission on the potential demand for BSA in Guernsey.*

## **6. Next Steps**

6.1 Once this consultation has closed, CICRA will review responses and consider whether the proposed licence condition should be introduced into the licence granted to JT.

6.2 In the event that a proposed licence condition is considered appropriate, the final form of the proposed licence condition will be formally published in due course in the form of an Initial Notice in Jersey, and a Draft Decision in Guernsey (if appropriate).

## **Annex A – Consideration under Article 7 of the Telecommunications (Jersey) Law 2002**

- 1.1 The Law requires the JCRA to perform its functions in a manner consistent with the considerations set forth in Articles 7(1), 7(2) and 7(3). The JCRA's consideration of these factors is detailed below.
- 1.2 The JCRA has a primary duty under Article 7(1) to perform its functions in such manner 'best calculated to ensure that (so far as reasonably practicable) such telecommunications services are provided... as to satisfy all current and prospective demands for them, wherever arising'.
- 1.3 Having consulted with OLOs in February 2016, there is a clear demand conveyed that OLOs would respond and develop products for customers as an alternative choice to the incumbent in Jersey. This demand is also reflected in the policy adopted by the States of Jersey to liberalise Jersey's telecommunications markets and thereby 'to abolish the exclusive privilege of the States in telecommunications'<sup>3</sup>.
- 1.4 It is apparent from other jurisdictions that BSA is likely to bring benefits to consumers in terms of increased choice, innovation and lower prices. Consumers will also have the opportunity to choose alternative suppliers who provide combined access and call services. The benefits arising are likely to be enjoyed by all consumers in Jersey since the benefits of choice and more competitive offers will be available to all consumers in Jersey regardless of whether they individually switch away from the incumbent since the incumbent will need to respond to competition elsewhere.
- 1.5 Under Article 7(2)(a), the JCRA has a duty to perform its functions in such manner as it considers 'best calculated to protect and further the short term and long term interests of [telecommunications] users within Jersey...' and to perform them, wherever it considers appropriate, by promoting competition between telecommunications operators in Jersey. Telecommunications users in Jersey will benefit in terms of price,

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<sup>3</sup> Telecommunications (Jersey) Law 2002

quantity, quality, variety and innovation arising from the competition between telecommunications operators. Operators will be able to have access to components of the telecommunications infrastructure that they can offer their customers, whether residential or business.

1.6 Article 7(2)(b) places a duty on the JCRA to perform its functions in such a manner as it considers 'best calculated to promote efficiency, economy and effectiveness in commercial activities connected with telecommunications in Jersey'. This decision fulfils this duty in that it is generally recognised that competition serves to increase productivity, dynamic and allocative efficiencies. The JCRA has adopted a cautious approach to imposing obligations on JT. The JCRA is of the view that its regulatory intervention is proportionate and the least intrusive given the clear benefits from the introduction of access products and the demand from other operators.

1.7 Article 7(2)(c) places a duty on the JCRA to perform its function in such a manner as it considers best calculated to further Jersey's economic interests. The absence of bitstream access has in the view of the JCRA placed OLOs at a disadvantage, and consequently consumers have not benefitted from competition to the extent possible.

1.8 Article 7(2)(d) places a duty of proportionality on the JCRA, namely to ensure that the minimum of restriction is imposed on telecommunications operators in achieving its legitimate policy objectives. The proposed licence condition satisfies this duty since further access would not be achievable without the JCRA taking this decision. Proportionality issues have been considered previously, and the JCRA takes the view that it has adopted the minimum level of regulatory intervention in this area of telecommunications market at this stage.

1.9 Article 7(2)(e) requires the JCRA to have regard to the need to ensure that telecommunications operators have sufficient financial and other resources to conduct those activities. The JCRA has placed emphasis on commercial negotiations running their course rather than lead with a prescriptive regulatory intervention with this product. In the first instance, the arrangements should be a matter for agreement

between the parties involved, allowing them to set product definitions and agree cost allocation between them.

1.10 Article 7(3) requires the Authority to have regard to a number of matters. Some specific issues are particularly relevant to this consideration. The introduction of BSA is expected to result in keener competition which is expected to improve affordability, either through driving down prices and/or improving quality of service.

## Annex B – Licence Condition

The proposed addition to JT's licence will be Licence Condition 36 as follows:

### **Condition 36: Network Access**

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