



Jersey Competition Regulatory Authority (“JCRA”)

Public Version of

Decision M457/09

Proposed Acquisition

of

Newtel Guernsey Limited and Guernsey.Net Limited

by

Wave Telecom Limited

The Notified Transaction

1. On 27 August 2009, the JCRA received an application (the “**Application**”) for approval under Articles 20 and 21 of the Competition (Jersey) Law 2005 (the ‘**Law**’) concerning the proposed acquisition by Wave Telecom Limited (“**Wave**”) of the entire issued share capital of Newtel (Guernsey) Limited and Guernsey.Net Limited (together also referred to as the “**Target**”) from Newtel Holdings Limited (“**Newtel**”).
2. The JCRA registered a notice of its receipt of the Application in the Jersey Gazette and on its website on 1 September 2009 inviting comments on the proposed acquisition by 16 September 2009. No comments were received. In addition to public consultation, the JCRA conducted its own market enquiries concerning the proposed acquisition.

The Parties

(a) Wave

3. Wave is a company incorporated in Guernsey. Wave is a wholly owned subsidiary of Jersey Group Limited (“**JT**”). Wave provides telecommunications services in Guernsey including fixed and mobile telephony, broadband and private circuits. According to the Wave website, they are the leading private circuit provider in the Channel Islands.¹ Any reference to JT in this Decision includes references to any of its subsidiaries.

(b) Newtel

4. Newtel is a company incorporated in Jersey. Newtel is active in the supply of telecommunications services in Jersey and Guernsey through its subsidiaries. Newtel Limited is a subsidiary active in Jersey. The subsidiaries Newtel (Guernsey) Limited and Guernsey.Net Limited both provide broadband internet, email and leased line services to customers in Guernsey. Newtel (Guernsey)

¹ <http://www.wavetelecom.com/templates/LayoutB.aspx?id=960>

Limited's subsidiary Newtel Data Services Limited provides eGambling hosting services to customers in Guernsey.

The Requirement for JCRA Approval

5. According to Article 20(1) of the Law, a person must not execute certain mergers or acquisitions except with and in accordance with the approval of the JCRA. According to Article 2(1)(b) of the Law, a merger or acquisition occurs for the purpose of the Law if a person who controls an undertaking acquires direct or indirect control of the whole or part of another.
6. Pursuant to the proposed acquisition, Wave would acquire control of the Target as defined under Article 2(1)(b). The parties applied for JCRA approval under Article 1(4) of the Competition (Mergers and Acquisitions) (Jersey) Order 2005 (the "**Order**"), on the basis that JT, Wave's parent company, has a share of more than 40% of the fixed and broadband telecommunications business in Jersey. On the basis of these facts, pursuant to the Order, the JCRA's approval is required under Article 20(1) of the Law before the proposed acquisition is executed.

Process

7. Following the submission and registration of the Application, on 3 September 2009 the JCRA requested additional information from the parties. This information was received on 16 September. On the basis of the information provided by the parties, the JCRA requested additional detail at a meeting with the parties held on 23 September 2009. In addition, the JCRA indicated a potential issue regarding a restrictive covenant containing a non-compete provision (as detailed below in this Decision). On 28 October, the JCRA received the additional information requested. The parties also amended the restrictive covenant in a way that removed a competitive concern that the JCRA identified.

Assessment

8. Under Article 22(4) of the Law, the JCRA must determine if the proposed acquisition would substantially lessen competition in Jersey or any part thereof. This determination usually involves the following steps: (1) defining the affected relevant market(s); (2) assessing concentration levels in the relevant market(s); (3) assessing the ability of the combined undertaking to substantially lessen competition as a result of the proposed acquisition, either unilaterally or in coordination with competitors; (4) assessing whether other market forces, such as the entry of new competitors, eliminate the risk of a substantial lessening of competition; and (5) assessing any pro-competitive effects or efficiencies that may result from the proposed acquisition.² Not all steps may be necessary, however, if the JCRA can determine that the proposed acquisition would not substantially lessen competition in Jersey or any part thereof.

9. As detailed below, upon examining the proposed acquisition as originally proposed by the parties, the JCRA identified a potential competitive concern concerning the provision of private circuits in between Jersey and Guernsey. The JCRA raised this concern with the parties, and in response the parties amended the notified agreement. Accordingly, the JCRA concludes that the notified agreement, as amended, would not substantially lessen competition in Jersey or any part thereof.

Defining the relevant market(s)

10. The first step in the analysis is to define the relevant product and geographic markets. *‘A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products’ characteristics, their prices and their intended use.’*³ The

² See JCRA Guideline, *Mergers and Acquisitions* at 8.

³ *European Commission Notice on the definition of the relevant product market for the purposes of Community competition law*, O.J. C 372 at 2 (9 December 1997).

relevant geographic market is, stated simply, the area in which competition takes place.

11. As an initial matter, the proposed acquisition involves primarily Wave's acquisition of the Target's activities in Guernsey. The JCRA's jurisdiction extends only to a potential substantial lessening of competition in Jersey. Thus, the JCRA's analysis of the proposed acquisition's competitive effects was limited solely to its potential effects to customers located in Jersey.
12. Examining the proposed acquisition from solely a Jersey perspective, the JCRA did identify a potential concern in the supply of inter-island private circuits to Jersey customers. A private circuit is a telecommunication line connecting two locations. It does not have a telephone number, as each of the locations is permanently connected to each other. Private circuits are almost exclusively used by businesses, and for example can be used for communication between different branches of a bank.
13. Private circuits are provided via undersea cables that connect Jersey to France, the UK and Guernsey. In particular, there are two cables suitable for communications services running directly between Jersey and Guernsey. One, the CI4 Cable, is jointly owned by JT and Cable & Wireless ("C&W"). The other cable, operated by the Channel Islands Electricity Grid ("CIEG"), is owned jointly by the Jersey Electricity Company and the Guernsey Electricity Company, but JT, C&W and Newtel all have access to this cable for the provision of private circuits.
14. In defining relevant product markets, the European Commission has distinguished private circuits from other forms of telecommunication services.⁴
15. The JCRA's analysis in this matter focussed on the provision of private circuits to Jersey customers using the undersea cables in between Jersey and Guernsey. This

⁴ EC Case M.3914 Tele2/Versatel of 7 September 2005. Private circuits are referred to in this document as Leased line or dedicated access. Article 60 of the Law requires that, so far as possible, matters arising under competition law in Jersey are treated in a manner that is consistent with the treatment of corresponding questions arising under competition law in the European Union.

was therefore the relevant product market the JCRA used for the purpose of this Decision. If there are no competition concerns using the narrowly defined relevant market, generally there will be no competition concerns if the market definition is widened to include competing services, for example private circuits that go via either France or the UK and that bypass the direct connection offered by the existing cables in between Jersey and Guernsey.

16. As noted above, because the JCRA's analysis was limited to the potential competitive effects of the proposed acquisition to customers located in Jersey, the relevant geographic market was limited to Jersey.
17. In conclusion, for the purpose of this Decision, the relevant market is defined as the supply to Jersey customers of private circuits between Jersey and Guernsey using one of the cables between Jersey and Guernsey.

Effect on Competition

18. The infrastructure, based on the two cables mentioned above, currently provides direct access to three telecommunications providers: Newtel Limited, JT (Wave's parent entity) and C&W. These three telecommunications providers in turn may offer capacity on the cables to other suppliers of telecommunications services.
19. The JCRA's first potential concern was therefore whether the proposed acquisition would reduce the number of supplier of inter-island private circuits from three to two. The increase in concentration from three competitors to two as a result of an acquisition can be a strong indication of a substantial lessening of competition under the Law.⁵
20. The parties informed the JCRA that the right of access to the CIEG cable is owned by the Jersey-registered company Newtel Limited and that this right of access is not part of the proposed acquisition. The JCRA therefore concluded that

⁵ See, for example, Paragraph 64 of the JCRA Decision M005/05 Ferryspeed (C.I.) Limited/Channel Express (C.I.) Limited of 3 July 2006.

- the proposed acquisition would not directly lead to a three to two market consolidation in the number of suppliers of inter-island private circuits.
21. Even if Newtel's right of access to the CIEG cable is not part of the proposed acquisition, however, a second potential competitive concern was that Newtel would no longer have the *ability* and *incentive* to provide private circuits between Jersey and Guernsey, as the result of the divestment of its Guernsey business. If this were the case, competition would be affected in a similar manner, as Jersey customers would be able to obtain inter-island private circuits from only two instead of three suppliers.
 22. In this respect, the JCRA noted the notified agreement's non-compete clause, which was for a period of [4-10] years, could be interpreted as affecting Newtel's ability to offer inter-island private circuits following the proposed acquisition.
 23. Under European Union competition law, so-called 'ancillary restraints' – agreements that do not form an integral part of the asset or share transfer but are considered to be 'directly related and necessary to the implementation of the concentration' – are subject to analysis in the merger review.⁶ Applicable EC guidance states that non-competition clauses for periods of up to two years are justified when the proposed acquisition includes the transfer of goodwill, and for periods of up to three years when the proposed acquisition includes the transfer of both goodwill and know-how.⁷ Longer periods may be justified in exceptional cases.⁸ The JCRA has taken this precedent into account in its previous Decisions.⁹
 24. In response to the JCRA's concern, both parties recognised the JCRA's competition concern with regard to inter-island private circuits, and upon further consideration Newtel wanted to safeguard its ability to provide private circuits to Jersey based customers. Therefore, both Newtel and Wave amended the non-

⁶ See *Commission Notice on restrictions directly related and necessary to concentrations*, O.J. C 56/03 Paragraphs 1 and 10 (5 March 2005).

⁷ See *ibid.* Paragraph 20.

⁸ *Ibid.* Paragraph 20, note 5.

⁹ See for example JCRA Decision M407/09 of 21 May 2009 *Mourant & Co. Limited et all/Como Acquisitions Limited*, Paragraphs 15-18.

compete clause described above, and provided this amendment to the JCRA. The amendment expressly states that nothing shall prevent Newtel Limited, a subsidiary of Newtel, offering to lease or leasing any private circuit between Guernsey and Jersey. The JCRA therefore concludes that Newtel, through its subsidiary Newtel Limited, will retain the ability to compete in the relevant market following the proposed acquisition.

25. Regarding the *incentive* to compete, Newtel provided information concerning the volume of its business and ongoing financial commitments to current customers concerning the provision of services within the relevant market. Based on this evidence, the JCRA concludes that Newtel will, post-acquisition, continue to have the incentive to provide private circuits between Jersey and Guernsey.
26. On the basis of the amended agreement, as detailed in Paragraph 24 above, and Newtel's continued incentives to compete in the relevant market, the JCRA concludes that the proposed acquisition will not result in a substantial lessening of competition in the supply to Jersey customers of private circuits between Jersey and Guernsey using one of the cables between Jersey and Guernsey. As the other activities that will be potentially affected by the proposed acquisition do not concern competition in Jersey, the analysis of such effects falls outside of the remit of the Law.
27. Therefore, the JCRA concludes that the proposed acquisition will not result in a substantial lessening of competition in Jersey or any part of Jersey.

Conclusion

28. Based on the preceding analysis, the JCRA hereby approves the proposed acquisition under Article 20(1) of the Law.

16 November 2009

By Order of the JCRA Board