



JERSEY TELECOM'S RESPONSE TO

**JCRA CONSULTATION ON THE PUBLICATION OF JT
LIMITED'S REGULATORY SEPARATED ACCOUNTS**

CONSULTATION PAPER 2009 – T4

5TH FEBRUARY 2010

1 Introduction

Jersey Telecom ("JT") welcomes the opportunity to respond to the JCRA's consultation on issues in relation to the publication of its separated accounts. JT is in agreement with the JCRA on the basic purpose of accounting separation, as set out in the consultation, namely for a **dominant** incumbent operator to demonstrate that it is not discriminating between its own downstream operations and those of competing providers, i.e. to provide transparency of a **dominant** operator's implicit transfer charges. Accordingly, JT does not object to the preparation of separated accounts in relation to services over which an operator has been deemed to have SMP, and the subsequent provision of those accounts to the JCRA. JT can also accept that there are reasonable grounds and precedent for the publication of those accounts; again, to be clear, in relation to the services/markets in which JT has been found to have SMP. JT does, however, take great exception to the preparation, let alone publication, of separated accounts in relation to services/markets in which JT does not have SMP and which have been found to be supplied competitively. We believe this position to be correct in light of both sound economic/policy reasoning and best practice.

In essence, JT believes it should instead only provide information on services in which it has been found to have SMP and should not provide, as a matter of course, accounting information where no SMP exists. There are two basic reasons for this position:

- Accounting information on non-SMP/competitive services is not necessary for the effective regulation of competition in markets; and
- Further, and specifically in the case of a small jurisdiction such as Jersey, it would not be proportionate to expect accounting information on services where SMP does not exist.

JT is, however, happy to provide information to the JCRA where such information will actually be used by the JCRA in its market assessments, and where it is reasonable and proportionate to request and prepare such information. As compared with the detailed exercise of separated accounts, this would be a more proportionate means by which the JCRA could monitor developments in competitive markets; i.e. on an "as needs" basis. That said, experience so far has shown that the JCRA has tended not to use the separated accounts information provided over the last 4 years. This further underlies our concerns regarding the proportionality of producing separated accounts for non-SMP services.

JT has consistently maintained such a position. When the JCRA initially consulted on separated accounts, JT responded with the view that it should in the first instance provide the JCRA with a manageable set of separated accounts without a large amount of detail, and the information can be expanded if necessary. However, the JCRA requested the current detail provided by JT in its separated accounts. As mentioned, JT is happy to provide this detail if it is going to be used by the JCRA and happy to provide additional information as and when reasonably requested.

This response expands on our reasoning and provides evidence for this position.

2 Summary of position

JT's essential position is as follows: Whilst we accept the broad rationale for the production, as well as the publication, of separate accounts in respect of relevant services/markets, JT contends that preparation and publication of certain elements of the separated accounts – in particular, competitively supplied services/markets – would be inappropriate. The reasons for this are as follows:

- 1 The consultation insufficiently appreciates that accounting separation is not merely an arbitrary regulatory tool at a regulator's disposal, but is specifically a remedy in response to an operator's SMP in a particular defined relevant market;

- 2 In this light, JT can accept that there is both policy rationale and precedent for the publication of regulated accounts in relation to **services/markets in which an operator has SMP**;
- 3 However, in light of policy objectives and in the interests of proportionality, the production of separated accounts should not extend to the inclusion of non-SMP services/markets, and, in any event, the publication of separated accounts of non-SMP services would serve no meaningful regulatory policy objective;
- 4 Indeed, publication of such accounts would be damaging: The accounts for non-SMP services contain commercially sensitive information, hence it would unduly damage JT and the competitive process were they to be publicly disseminated;
- 5 Moreover, publication of accounts for non-SMP services can potentially facilitate un-competitive behaviour through its creating of conditions conducive to tacit collusion between operators;
- 6 Finally, publication of accounts for non-SMP services would be contrary to international best practice, as exemplified by the EU, ERG, Ofcom, ComReg, and the OUR.

The remainder of this paper is structured on the lines of the points raised above.

3 Accounting separation is a remedy for SMP

The rationale for accounting separation is satisfactorily set out in the JCRA's consultation at pages 3 and 4, hence it is not repeated here. However, we wish to emphasise that the consultation appears to under-appreciate that accounting separation is a remedy specifically imposed on an operator in a particular defined relevant market in response to finding of SMP in that market. Its status as such is recognised in the EU framework's enshrinement [under the Access Directive] of accounting separation as one of 5 specific wholesale remedies available to NRAs to impose on SMP operators, where appropriate and proportionate. In other words, accounting separation is not justified/needed/relevant where:

- An operator has SMP in a market, but transparency in relation to its treatment of its retail arm is not a concern (e.g. where a Bottom Up cost model is used); or
- The market is effectively competitive.

Accordingly, as discussed further below, we argue that it would neither be appropriate nor proportionate to require JT to prepare separated accounts in relation to services other than those in which JT has been found to have SMP. The concern regarding proportionality is especially germane in the context of a small jurisdiction such as Jersey. As stressed in our response to the Regulaid report on wholesale access, the small size of Jersey should further discipline the JCRA in its consideration of regulatory remedies. The prospect of a detailed and burdensome accounting separation remedy extending to services which have been found to be competitive underscores our concerns that the proportionality principle is as yet insufficiently heeded by the JCRA.

4 Publication of accounts for *SMP services/markets* is reasonable

As discussed, there are policy grounds for the production of separated accounts, as a regulatory remedy in response to SMP. JT also accepts in principle, as discussed in the consultation, that publication of (certain) regulatory accounts may serve to bolster these policy objectives. For example, the EC notes in the directives that:

*“National regulatory authorities may publish [regulatory accounts] information as would contribute to an **open and competitive market**...”¹ [emphasis added]*

The EC also noted in a relevant recommendation that:

“Regulatory accounting information serves national regulatory authorities and other parties that may be affected by regulatory decisions based on that information, such as competitors, investors and consumers. In this context, publication of information may contribute to an open and competitive market and also add credibility to the regulatory accounting system.”²

Similarly, the ERG noted that publication would increase transparency and raise the confidence of competitors that there are no anti-competitive cross-subsidies, as well as noting the various places in the EU framework in which publication of separated accounts is supported:

“A number of provisions of the regulatory framework aim at increasing public access to accounting data and methodologies. In particular:

- under Article 5.4 of the Framework Directive, NRAs are granted the power to publish such information that would contribute to an open and competitive market;*
- Article 9.1 of the Access Directive allows the NRA, in accordance with the provisions of Article 8 of the same Directive, to impose obligations for transparency in relation to interconnection and/or access, requiring operators to make public specific accounting information. In this respect, the NRA may specify the manner in which the information is made public (type of publication, cost, etc);*
- in accordance with Article 11.2 of the Access Directive, accounting records that would contribute to an open and competitive market may be published by the NRA;*
- according to Article 13.4 of the Access Directive where the implementation of a cost accounting system is mandated in order to support price controls, a description of this system is made publicly available, showing at least the main categories under which costs are grouped and the rules used for the allocation of costs.*

*The publication by the notified operator of sufficiently detailed cost statements showing the average cost of network components **will increase transparency and raise the confidence of competitors that there are no anti-competitive cross-subsidies.***³ [emphasis added]

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[Hhttp://ec.europa.eu/information_society/topics/telecoms/regulatory/new_rf/documents/l_10820020_424en00070020.pdf](http://ec.europa.eu/information_society/topics/telecoms/regulatory/new_rf/documents/l_10820020_424en00070020.pdf)H Article 11 of the Access Directive

² [Hhttp://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32005H0698:EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32005H0698:EN:HTML)H - Commission Recommendation of 19 September 2005 on accounting separation and cost accounting

³ ERG Opinion on the proposed Review of the Recommendation on cost accounting and accounting separation

Whilst counter-arguments could be mounted, JT does not wish to raise particular objections to the publication of the separated accounts, per se. As discussed below, however, we will oppose the publication of services where no SMP exists.

5 Production and publication of accounts for non-SMP services serves no policy objective

As discussed, JT believes it should only provide information on services in which it has been found to have SMP and should not provide accounting information where no SMP exists. There are two reasons for this position.

- Accounting information on non-SMP/competitive services is not necessary for the effective regulation of competition in markets;
- Further, and specifically in the case of a small jurisdiction such as Jersey, it would not be proportionate to expect accounting information on services where SMP does not exist.

JT is, however, happy to provide information to the JCRA where such information will actually be used by the JCRA in its market assessments, and where it is reasonable and proportionate to request and produce such information. As compared with the detailed exercise of separated accounts, this would be a more proportionate means by which the JCRA could monitor developments in non-SMP markets; i.e. on an "as needs" basis. That said, experience so far has shown that the JCRA has tended not to use the separated accounts information provided over the last 4 years. This further underlies our concerns regarding the proportionality of producing separated accounts for non-SMP services.

Furthermore, in relation to publication of separated accounts of non-SMP services, we note that we are not aware of any precedent for the *publication* of accounts of non-SMP services, reflecting the fact that such a move would serve no meaningful regulatory policy objective. In this regard, JT notes that the consultation is silent on the question.

In relation to the specific services/markets in the context of Jersey, we note the (preliminary) finding of the JCRA's recent Consultation Paper on the Review of the Telecommunications Market in Jersey that JT no longer has SMP in the mobile networks and services market due to entry and the strengthening of competition:

*"Mobile Networks and Mobile Services – No single operator has SMP on these markets and the JCRA intends to remove the designation of dominance imposed on JT in 2004."*⁴

The consultation made the same finding in relation to off-island leased lines.

In this light, in addition to the Mobile Business and off island leased lines, we therefore also believe that any markets whereby JT is not deemed to have SMP following the finalisation of the JCRA's market review, should also be exempt from preparation and publication. JT would have serious concerns were the JCRA to move to publish accounts of any of these services/markets.

⁴ JCRA Review of the Telecommunications Market in Jersey, Consultation Paper 2009 – T3

6 Publication of accounts for non-SMP services would be unduly commercially damaging

Not only would the preparation and publication of accounts for non-SMP services lack a clear policy purpose, the publication of them, were they to be prepared, would also unduly damage JT and the competitive process, since they contain commercially sensitive information. Such a stance is supported by organisations such as the EC and the ERG:

- The EC framework states that: “*National regulatory authorities may publish such information as would contribute to an open and competitive market, **while respecting national and Community rules on commercial confidentiality.***”⁵ [emphasis added];
- “*In this context, publication of information may contribute to an open and competitive market and also add credibility to the regulatory accounting system. However, **full disclosure may be restricted by national and Community rules regarding business confidentiality.** Therefore, it is recommended that national regulatory authorities, having taken the opinion of operators, define what information can be considered as confidential and should not be made available.*

1. Preparation and publication of information

*The following financial information should be prepared and published (subject to confidentiality and national law obligations) for the **relevant market/service...***⁶ ; [emphasis added]; and,

*“It is recommended that national regulatory authorities make relevant accounting information from notified operators available to interested parties at a sufficient level of detail. The detail of information provided should serve to ensure that there has been no undue discrimination between the provision of services internally and those provided externally and allow identification of the average cost of services and the method by which costs have been calculated. In providing information for these purposes, **national regulatory authorities should have due regard for commercial confidentiality.**”* [emphasis added]

More specifically in the context of Jersey, certain disclosures in the current separated accounts that JT provide to the JCRA contain highly sensitive commercial information, for example service volumes and the costs associated with providing services. Whilst the publication of such information for wholesale services should increase transparency and promote confidence in the interconnection rates⁷, for other services such information would give other operators an unfair competitive advantage. As noted in the JCRA consultation document “*If they are published, such information may also inform other stakeholders with regard to market behaviour*”⁸ but in this case other operators would gain access to commercially sensitive information for markets where JT is not deemed to have SMP without their being required to publish similar information.

Other NRAs take this into consideration in the publication requirements for separated accounts; in Guernsey, for example, Sure do not publish a Network Statement of Costs for the Mobile Network nor do they disclose the usage factors and costs for all services and the network components included in the Core and Access Network Statement of Costs are less disaggregated than those that JT currently provides to the JCRA. In New Zealand, there is also an exemption for commercially

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[Hhttp://ec.europa.eu/information_society/topics/telecoms/regulatory/new_rf/documents/l_10820020_424en00070020.pdf](http://ec.europa.eu/information_society/topics/telecoms/regulatory/new_rf/documents/l_10820020_424en00070020.pdf)H Article 11 of the Access Directive

⁶ Op Cit, Commission Recommendation

⁷ Commission Recommendation of 19th September 2005 on accounting separation and cost accounting systems under the regulatory framework for electronic communications (2005/698/EC)

⁸ Pg3, JCRA Consultation on the Publication of JT Limited's Regulatory Separated Accounts, consultation document 2009-T4, 15th December 2009

sensitive information: *"The Commission may exempt confidential information from Publication where the disclosure of that information would not be reasonable."*⁹

JT submits that the JCRA has not adequately addressed this extremely important concern which arises from undue or unreasonable publication of financial information.

7 Unnecessary publication of non-SMP accounts can undermine competition

In addition to the undue revelation of commercially sensitive information, publication of accounts for non-SMP services can jeopardise competition by potentially facilitating tacit collusion between operators. This argument is articulated by the ERG in its Remedies guidance paper:

*"Another problem with non-discrimination is that together with the transparency obligation it can also **facilitate and indeed encourage tacit collusion** among operators. In markets which meet many or all of the criteria which would indicate the presence of possible joint dominance, consideration should be given to the extent that such obligations may have adverse consequences, possibly to the extent that alternative or modified obligations might be considered... Problems similar to that identified in relation to transparency and non-discrimination also apply in this area regarding **co-ordinating effects and the possible promotion or facilitation of tacit collusion**. The **revelation of business processes, efficiencies and indeed strategies to competitors can be mitigated by appropriate control of the information**. Therefore the publication of information by NRAs is conditioned in the sense that it has to contribute to an open and competitive market, while national and Community rules on commercial confidentiality are respected."*¹⁰ [emphasis added]

In addition to the points already made, the JCRA should give careful consideration to the less obvious but equally deleterious downsides to competition arising from the public disclosure of key information on competitive markets.

8 Publication of accounts for non-SMP services would be contrary to international best practice

The above has already demonstrated that publication of non-SMP accounts would be at odds with best practice. We provide further evidence of this below. In particular, we note that leading NRAs such as Ofcom and ComReg have rejected publication of non-SMP accounts.

Ofcom stated that:

*"We do not believe that BT should publish or we should publish a statement in relation to the information, as the confidential respondent is proposing. This AFI [Additional Financial Information] contains information on BT's unregulated downstream (retail) activities and we consider it would be disproportionate for this AFI to be published."*¹¹

BT's regulatory accounts state that publication of the accounts relates to SMP products, and that they are continually updated in light of Ofcom's market review findings, e.g. Ofcom's de-regulation of wholesale broadband access and retail call origination:

⁹ Pg 12, Draft of Telecom Accounting Separation Information Disclosure Requirements for Financial Years ending 2009 and 2010, Commerce Commission New Zealand, 6th March 2009

¹⁰ ERG Remedies Guidance 2006

¹¹ [Hhttp://www.ofcom.org.uk/consult/condocs/btkcom09/statement/btkcom_statement.pdf](http://www.ofcom.org.uk/consult/condocs/btkcom09/statement/btkcom_statement.pdf)H

Changes to BT's and KCOM's regulatory financial reporting – 2008/09 update Explanatory Statement and Notification.

“Publication - The annual Current Cost Financial Statements satisfy the obligation relating to publication of financial information in relation to SMP markets. The publication of information relating to SMP markets is intended to provide public assurance that BT has complied with its cost accounting and accounting separation obligations.”¹²

ComReg notes in its recent consultation:

“With regard to the inclusion of non regulated services in the published separated accounts, Ofcom for example although identifying the importance of monitoring BT Plc’s compliance with its no undue discrimination obligation was of the opinion that the: “AFI contains information on BT’s unregulated downstream (retail) activities” and it considered that “...it would be disproportionate for this AFI to be published.

“In the case of New Zealand Telecom, the Telecommunications Act of 2001 sets out the mandatory regulatory reporting disclosure for Accounting Separation, requiring that the: “The Commission must require Telecom to prepare and disclose information about the operation and behaviour of all or any of its network, wholesale, or retail business activities as if those activities were operated as independent or unrelated companies.” These information disclosure powers are not limited to regulated services but extend to unregulated network, wholesale and retail services i.e. “The Commission may require Telecom to prepare and disclose separate information about all or part of separate prescribed business activities or separate prescribed services, within the network, wholesale, or retail categories.”

“Based on the UK and New Zealand precedent, it is reasonable that accounting information relating to non regulated (competitive) services should be provided to the NRA. However given the commercial sensitivity of such information there should be no requirement for such information to be published. Instead it should be provided as part of the Additional Financial Information (determined annually by the NRA).”¹³
[emphasis added]

We would further note that in Guernsey, Sure (Cable & Wireless Guernsey Ltd) are not required to publish disaggregated Mobile Sub-Businesses and in New Zealand, whilst the Commerce Commission has the right to require Telecom to publish disaggregated Retail Sub-Business it has chosen not to do so.

9 Proposed proforma of the statements

Whilst we broadly agree with the proforma templates included in Appendix A of the consultation document we would note that the proposed Statement of Costs of Network Services does not reflect the current disclosure JT provides as part of its separated accounts. We would emphasise that whilst we support the continuing production of the Statement of Costs of Network Services for the JCRA’s information, we object to its publication containing as it does commercially sensitive information. The current templates for these are included on a confidential basis in Appendix 1 of this document.

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[Hhttp://www.btplc.com/Thegroup/RegulatoryandPublicaffairs/Financialstatements/2009/CurrentCostFinancialStatements.pdf](http://www.btplc.com/Thegroup/RegulatoryandPublicaffairs/Financialstatements/2009/CurrentCostFinancialStatements.pdf)H

¹³ [Hhttp://www.comreg.ie/fileupload/publications/ComReg0975.pdf](http://www.comreg.ie/fileupload/publications/ComReg0975.pdf)H

10 Conclusion

JT considers that the amount of detail in the separated accounts should be reduced, and should only cover information for SMP markets. In view of the cost and time involved in their preparation, and the small size of Jersey, it would be contrary to the regulatory principle of proportionality for the JCRA to require JT to extend such an SMP remedy to non-SMP services.

We believe this basic logic should also extend to the level of disaggregation in the current separated accounts. It is not clear why JT should be required to prepare accounts *below* the level of the relevant market. At the very least, from the perspective of proportionality, the JCRA should set out a clear justification for such a requirement. For example, the separated accounts currently split fixed origination into several services by type of call. We consider that such detail is not appropriate or proportionate, given that the relevant market is defined as the market for call origination, and is not defined by type of call. Hence, JT has been found to have SMP in the call origination market, not in the local call origination market, calls to mobile market, etc. On a related note, the added value of requiring dial-up internet calls to be separated out is questionable in light of the mass migration to broadband services.

JT is however, happy to provide additional information to the JCRA where reasonably requested.

The purpose of separated accounts is a remedy for SMP in a defined market where a lack of transparency is also a concern. We accept that the publication of (certain) regulatory accounts may serve to encourage the development of an open and competitive market. However, our position is to limit the preparation and publication of separated accounts to markets where JT has been deemed to have SMP as argued above. Our position can be summarised as:

- only publication of accounts for SMP services/markets serves a policy objective and we support publication for these;
- publication of non-SMP services/markets serves no policy objective and is unduly commercially damaging for JT either by disclosing commercially sensitive information or by undermining competition; and
- publication of non-SMP services/markets is contrary to international best practice.

JT considers therefore that the following services should not be subject to publication:

- the Mobile Business;
- off-island leased lines;
- any other markets whereby JT is not deemed to have SMP following the finalisation of the JCRA's market review; and
- any commercially sensitive costs and volumes.

We would reiterate that were the JCRA to move to publish accounts of any of these services/markets we would object.

Finally, we also note that should the JCRA have legitimate concerns regarding any of these markets/services, it is always open for the JCRA to request the relevant information be provided.