power to you

Jersey Competition Regulatory Authority,
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05 February 2010

For the attention of Mr Graeme Marett – Case Officer

Dear Graeme,

JCRA Review of the Telecommunication Market in Jersey – Consultation Paper 2009 – T3

Further to our recent meeting and with reference to the Consultation Paper 2009-T9 published by the JCRA requesting comments on the provisional findings of the dominance/Significant Market Power (SMP) review relating to the telecommunications markets in Jersey, Jersey Airtel Limited (JAL) is pleased to submit its comments as follows.

JAL welcomes the JCRA's review and agrees that a suitable period has elapsed since the previous review and concurs that it is appropriate to review and revise the existing dominance/ SMP provisions applied in the Jersey Telecommunication market.

JAL broadly agrees with the JCRA's provisional findings, with the exception of the proposed removal of SMP from JT for the mobile services sector.

JAL does not object to the principle of removing SMP from JT in the mobile sector, but JAL firmly believes that timing must play a critical part in this decision. However, JAL would support the potential removal of SMP from JT in the mobile sector, but only after :-

1. Ex Ante regulatory action has been taken by the JCRA to remove JT's stranglehold on On Island and Off Island Wholesale driver products etc ; and
2. JT's market share is confirmed to be below the level clearly defined by the JCRA that aligns to EU/ Global best practice, for instance 50%; and
3. Public announcement made by the JCRA that JT SMP status has been removed accompanied by the appropriate explanation/ justification

Relevant Telecommunications Markets

JAL agrees with the JCRA's proposed market definitions which we believe are appropriate and complete for the purposes of the Jersey telecoms market review.

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Significant Market Power (SMP) and Dominance

JAL concurs that the EU's SMP Guidelines are an appropriate framework for assessing the degree of SMP in telecoms market sectors but believes the factors within the guidelines offer clear direction based on best international best practice and should interpreted consistently across all market sectors.

JAL concurs with the view that the terms SMP and dominance are interchangeable, especially in the context of the continuing monopolistic behaviour of Jersey Telecom (JT) in the Jersey telecoms market place, specifically in the mobile sector. Despite the introduction of rigorous competition, JT continues to achieve significant price premiums and hence price profitability through its market share dominance and stranglehold on key wholesale drivers such as On Island and Off Island circuit pricing. On this basis, it is clear that JT continues to meet the key dominance criteria laid out in the EU Guidelines and thus JAL believes JT should continue to be considered to have SMP in all sectors, but specifically mobile sectors; and the corresponding SMP related measures should still apply.

Analysis of Identified Markets

Access to the public telephone network at a fixed location for residential and non residential customers

JAL agrees that JT is dominant in the supply of fixed line access in Jersey for residential and non-residential customers and concurs that JT has SMP in this sector.

Call origination on the telephone network provided at a fixed location

JAL is interested to note that the JCRA argues that JT's dominant market share of 68% in call origination largely demonstrates and justifies retention of SMP in this sector. Whereas, whilst the JCRA's own statistics show that JT currently has 71% market share in the mobile services sector, despite the presence of competition and Mobile Number Portability. However, the JCRA is still recommending that SMP status is removed from JT in the mobile services sector and not the fixed call origination sector. JAL is concerned at this apparent inconsistency in interpreting the EU guidelines, but JAL does agree that JT is dominant in the provision of call origination at fixed locations and concurs that JT has and should still be considered to have SMP in this market. However, JAL must point out that JT's continued dominance in the fixed call origination (and termination) sector constrains competition in other sectors by impacting; the control of essential infrastructure, customer buying power, economies of scale and potentially the vertical integration elements of the EU Guidelines. Specifically, since traffic between JT landlines and OLO mobiles represents a very significant proportion of the traffic within the Jersey market, JT's clear dominance in the fixed line sectors enables it to exert significant power on OLOs and the OLOs' ability to independently set retail and wholesale pricing.

Call termination on individual public telephone networks provided at a fixed location

JAL agrees that JT remains dominant in the provision of fixed network call termination and concurs that JT has SMP in this market

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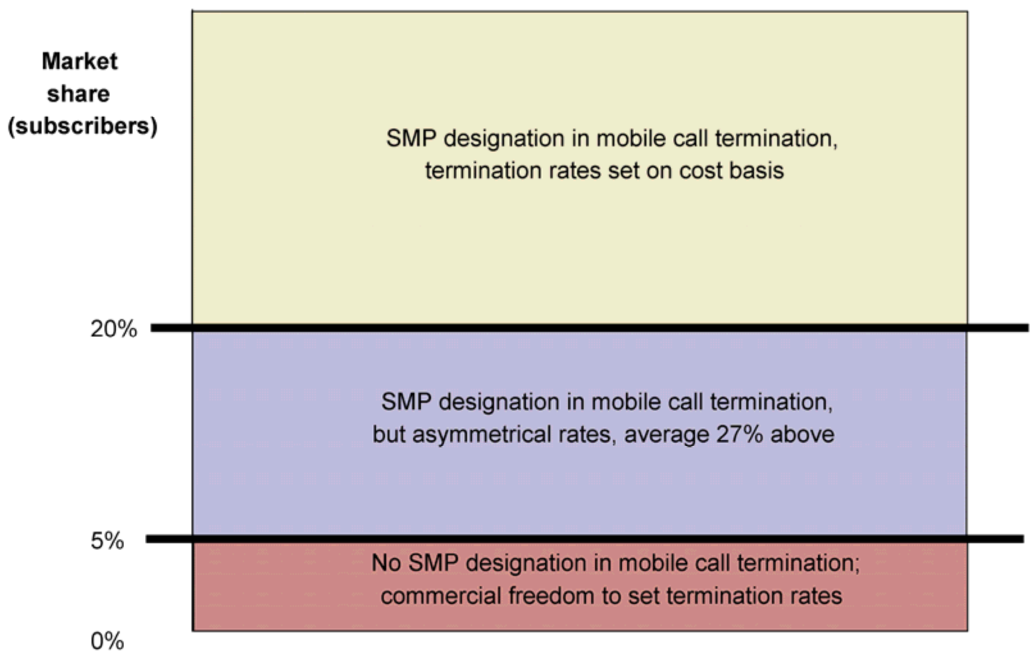
Voice call termination on individual mobile networks

Traditionally regulatory authorities across Europe have taken the view that an individual operator has 100% market share of the use of its own network and by definition must be considered to have SMP for voice call termination on its own network. However, this view has recently been fundamentally challenged by decisions from the Competition Appeal Tribunal in the UK and the Electronic Communications Appeal Panel in Ireland. Both of these authorities have determined that SMP designation is not just a matter of 100% market share; in reality there are countervailing buyer powers that offset market power in an operator's own network. In the case of OLOs with minority overall market share this is considered sufficient to offset even 100% market share within their own networks.

There is a growing view within the regulatory community that a stepped level to determining SMP for mobile termination rates should be applied, as outlined in figure 1 below :-



<u>Figure 1 – Stepped approach to setting mobile call termination rates and SMP – source Ovum</u>

On the basis of the stepped approach proposed, it may be appropriate to set SMP status to JAL but clearly JAL's market share sits below the full SMP designation threshold and thus the SMP measures/ requirements set for JAL should be less onerous and at the least allow setting of asymmetric rates, negate requirements for separated accounts and price notification etc

JAL argues strongly that currently it is seriously constrained in its ability to set its own termination rates independently, due to the current regulatory regime in Jersey and JT's dominance in the mobile and associated market sectors. Thus taking this critical issue into account with JT's corresponding monopoly in key infrastructure/ services supply within and outside Jersey, JAL clearly does not have the requisite level of market power to determine its own mobile termination rates independently and this challenges the JCRA's proposal to apply SMP status and requirements on JAL for mobile

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termination services. Consequently, JAL does not feel it appropriate that as a new player driving competition and building market share, that its legitimate development should be compromised by the application of the same SMP restrictions as the dominant market player JT

JAL also disagrees with the JCRA statement that it is unrealistic to assume that consumers would use multiple simcards to take advantage of lower termination rates. The JCRA's own market statistical data aligns with JAL's market research that significant numbers of mobile customers do use multiple simcards to take advantage of the best termination charges. This is reflected by the significant imbalance between the number of simcards issued in Jersey compared to the consumer population.

On Island Wholesale Leased Lines

JAL remains disappointed that JT's continued dominance in the supply of On Island leased lines has maintained wholesale lease line pricing at unreasonably high levels, especially when compared to similar products offered in Guernsey. The inflated pricing of wholesale lease line products has in turn seriously constrained the development of competition in other areas, such as mobile termination, since OLOs are forced to extensively use JT lease lines in their networks and thus are restricted in their ability to offer further price savings for their retail mobile products. JAL concurs with the JCRA that JT remains dominant in the provision of leased circuits in Jersey and has SMP in this sector. JAL believes the JCRA must take decisive ex ante regulatory action to re-align wholesale lease line pricing to realistic levels and to stimulate further competition across all telecoms sectors.

Off Island Wholesale Lease Lines

Whilst JAL agrees there is increased competition in the availability of Off Island Wholesale Lease Lines, JAL firmly believes that JT remains dominant in this sector by controlling interconnection with On Island circuits. JT's dominant market share and high cost of entry effectively limits OLOs (Sure & Newtel) from offering equivalent wholesale products in terms of backhaul capacity, availability/ connectivity, performance, service etc.

In view of the limited scale of the Jersey telecoms market and the very high capital cost of implementing additional submarine connections to Jersey, then it is unlikely that further competing off-island connections will become available in the short-medium term and thus the competition status remains largely unchanged from the time of the previous review. On this basis, JAL believes the competitive situation in the Off Island market remains difficult and since JT is maintaining its dominance, there is no justification to remove the SMP status from JT.

With the ever increasing demand for internet bandwidth from Jersey consumers, JT's dominance in this sector effectively provides a further area in which it can constrain competition in retail/ business sectors by maintaining the artificially high wholesale Off Island circuit and bandwidth pricing. JAL believes that Off Island Lease Lines are a further priority area for the JCRA to take decisive ex ante regulatory action to impose strict price controls to reduce wholesale pricing to reasonable levels.

Wholesale broadband services provided on fixed line network

JAL believes the current pricing and nature of wholesale wireline broadband products seriously constrain competition since the product profit potential for OLOs is marginal. Whilst performance and the value offered by wireless 3G

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broadband products such as those available from JAL are rapidly gaining parity with wireline broadband services in Jersey, JAL believes that ex Ante regulatory action is essential to create a more conducive competitive environment in the short-term for wholesale wireline broadband products to encourage the entry of new and more innovative players. JAL concurs with the JCRA that JT remains dominant in the supply of fixed broadband services in Jersey and has SMP in this sector

Mobile Networks and Services Markets

JAL fundamentally disagrees with the JCRA's preliminary view that JT is no longer dominant in the retail mobile services market and thus JAL objects to the JCRA's proposal to remove the designation of dominance in this sector.

Whilst JAL accepts that market share alone is not a definitive indicator of SMP/ dominance, European judicial case law does presume an operator has SMP where the market share is greater than 50%. Clearly by the JCRA's own statistical data, JT's mobile market share remains strongly dominant at 71%, despite competition from JAL and Sure and the launch of Mobile Number Portability.

JAL believes that JT's dominance in the mobile sector is clearly proven since the majority of the factors stipulated within the EU Guidelines are fulfilled.

Firstly, a dominant firm is defined as one who is able to price above the competitive level profitably, (i.e. without the prospect that it will lose customers to other firms). Whilst the introduction of competition in the mobile sector has forced JT to improve the content of its bundles and the pricing of its services, clear evidence shows that JT continues to enjoy significant price premiums for its mobile pre-pay and post pay products, against similar offerings from JAL and Sure. Additionally, JT tends not to react to even radical changes in competitor mobile offerings or pricing but pursues its own mobile pricing/ product strategies. The ability of JT to consistently price above the competition and its lack of response to mobile market pricing changes clearly demonstrate the behaviour and positioning of a dominant player in the mobile sector.

JAL believes JT's SMP/ dominant status in the mobile sector should be retained and this view is supported by considering each of the criteria in the EU Guidelines, as follows:-

- ***Market Share*** - JT's mobile market share at 71% remains significantly above the minimum EU threshold of 50%, from which EU case law presumes a position of dominance/ SMP - **SMP position strongly evidenced**
- ***Firm size*** - Whilst on a global perspective, JT can be considered a small player, but in terms of turnover and headcount within the local Jersey telecoms market, JT remains by far the largest and most significant operator - **SMP position clearly evidenced**
- ***The role of any essential facility*** – JT is seen as and actively promotes itself as the states owned local brand, with a high profile Universal Service Provision responsibility – **SMP position clearly evidenced**
- ***Any technological advantages, or privileged access to financial resources***, - JT is not seen as having any specific technical advantage when compared to its local mobile competitors, but in view of its significant headcount advantage and the fact that as a public sector owned business it does not operate under normal corporate/ private sector financial regime and demands, then it has a significant operational and commercial advantage over its competitors – **SMP position strongly evidenced**

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- ***The strength of the countervailing power of consumers*** – Since JT retains a totally dominant position in both Fixed Line and Broadband market sectors, then directly and indirectly it is able to influence competition in the mobile sector by constraining competitors' ability to set product pricing independently, ie wholesale rates; and ability to influence/ discourage consumers from separating their individual telecoms services between operators – **SMP position strongly evidenced**
- ***Barriers to entry*** - Whilst both JAL and Sure have recently entered the Jersey market, the financials costs were very significant and both operators faced extremely challenging political, environmental and operational conditions in establishing and launching their mobile businesses. Specifically, limited availability of spectrum and difficult planning regimes are likely to discourage further new entrants from entering the Jersey mobile market. Consequently, JT has succeeded to remain dominant despite the entry of 2 competitors and since the possibility of further new entrants is unlikely, then JT's dominant position is likely to remain unchallenged - **SMP position strongly evidenced**
- ***Barrier to expansion*:** - Since the launch of Mobile Number Portability over 12 months ago, only around 10% of the Jersey mobile market has ported their number to alternative operators. Clearly the majority of customers have not felt that the benefits offered by competition outweigh the need to keep their bundle of telecoms services with JT. Additionally, the limited physical size of the Jersey mobile market, the high cost of delivering mobile services in Jersey (mainly driven by JT's high wholesale product prices) and the high levels of saturation make it difficult for competitors to justify investments in new products and technologies to create new market segments or increase market share – **SMP position strongly evidenced**
- ***Product differentiation*** – Whilst JT's core mobile products do not differ significantly from those offered by JAL and Sure, these competitors are constrained in being able to develop and offer new products and services because of the high costs of delivering mobile services in Jersey (caused by JT's dominance and high pricing in On and Off Island Wholesale products), JT's control of key On Island and Off Island infrastructure, JT's reluctance to offer flexible or innovative Wholesale products and the limited Jersey mobile market size. Whilst JAL have been successful in securing positive market share by innovatively differentiating its products and services in some key market segments, this approach has not to date succeeded in challenging JT's overall market dominance – **SMP position strongly evidenced**
- ***Control of essential infrastructure*** – JT's dominant position in On Island and Off Island lease line and Wholesale products sectors clearly provides JT with a very significant advantage to control pricing of key backhaul and IP services which are critical elements for the competitors' mobile service delivery. The current JT RIO Wholesale product portfolio is based around legacy technologies and thus is somewhat limited in terms of flexibility and innovation. These factors constrain the competitors' ability to introduce innovative and differentiated products and services. Finally, in the absence of robust, reliable and transparent separated accounts from JT, there remains the concern that competitor/ wholesale customers could be treated differently/ disadvantageously from JT's own retail operations – **SMP position clearly evidenced**
- ***The type and availability of sales channels*** – Whilst each mobile operator has established effective sales and distribution channels, since the majority of Jersey consumers, both residential and business, are reliant on JT to provide at least some element of their telecoms requirements, then JT's ability to engage with consumers is significantly stronger than the mobile competitors and represents a significant sales and marketing advantage - **SMP position clearly evidenced**
- ***Vertical integration*** – In the absence of robust, reliable and transparent separated accounts from JT , then JT's ability to vertically integrate and cross subsidise mobile products remains a serious concern. Consequently, at the very least , consideration of removing JT's SMP status should not be undertaken until JT's separated

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accounts have been published, proven to be accurate and reliable; and publicly accepted - **SMP position clearly evidenced**

From our analysis, using the EU Guidelines it is clear that JT's current position and capabilities in the mobile sector firmly evidence a dominant/ SMP position when judged against the majority of criteria.

JAL believes that NOW is not a suitable time to remove JT's SMP status in the mobile sector. To reiterate, JAL supports the potential removal of SMP from JT in the mobile sector, but only after :-

1. Ex Ante regulatory action has been taken by the JCRA to remove JT's stranglehold on On Island and Off Island Wholesale driver products etc ; and
2. JT's market share is confirmed to be below the level clearly defined by the JCRA that aligns to EU/ Global best practice, for instance 50%; and
3. Public announcement made by the JCRA that JT SMP status has been removed accompanied by the appropriate explanation/ justification

We trust our comments and response meet with your approval and we look forward to supporting the JCRA in the further stages of this consultation. In the meantime, please do not hesitate to contact me if you have any further questions in this regard.

Yours sincerely

James Wild
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Jersey Airtel Limited

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