



CABLE & WIRELESS

**JCRA Review of the Telecommunication
Market in Jersey**

Comments by C&WJ on JCRA Consultation
Document 2009-T3
issued on 27 November 2009

5 February 2010



1 Introduction

Cable & Wireless Jersey Limited (C&WJ) welcomes the opportunity to respond to the Jersey Competition Regulatory Authority's (JCRA's) Consultation Paper 2009-T3, JCRA Review of the Telecommunication Market in Jersey ("Consultation Paper") issued on 27 November 2009. At the JCRA's suggestion, C&WJ also attended a meeting with the JCRA, held jointly with Jersey Airtel Limited ("JAL") on the 21st January 2010, where the JCRA's proposal to remove the dominance status of JT in the mobile market was discussed in more detail. Where appropriate, our comments on the mobile market reflect discussions at that meeting but for the avoidance of doubt, C&WJ would like to emphasise that any comments made with respect to the mobile market are C&WJ's views only and in no way represent a joint response between C&WJ and JAL.

Where possible and relevant, the comments in this response follow the order and numbering of the JCRA's Consultation Paper.

2 Relevant Telecommunications Markets

C&WJ agrees it is appropriate for the JCRA to adopt the same general approach to assessing dominance as is used by the European Union (EU), although the approach needs to be used in a way that is proportionate to Jersey. C&WJ notes that the JCRA has proposed adopting the market definitions suggested in the recent Regulaid¹ report, with the addition of a market for mobile telecommunications networks.

C&WJ broadly agrees with the proposed market definitions although it notes page 4 on the Consultation Paper only makes reference to a market for "mobile telecommunications networks", whereas the subsequent discussion on mobile on page 11 and 12 also refers to mobile telecommunications services. In the comments below, C&WJ assumes that the JCRA is in fact referring to a market that is defined in a way that is consistent with the definition adopted by the EU². That is, a mobile market consisting of a single "cluster" retail market that includes access, national, international and roaming calls and SMS.

3 Significant Market Power and Dominance

Whilst the JCRA has not asked for any specific comments on this section of the paper, C&WJ agrees that the EU-style approach to assessing Significant Market Power (SMP)/dominance is the appropriate approach to take. This approach is being adopted by an increasing number of regulators throughout the world, including in smaller jurisdictions.

C&WJ notes the discussion on the various factors used to determine whether a firm has SMP and in particular the statement from EU case law that "...very large market shares of 50% or more are in themselves evidence of the existence of a dominant position."

¹ Review of Jersey Telecom Ltd's regulatory accounts and access provisions, Final Report to the Jersey Competition Regulatory Authority, Regulaid BV, 27 November 2009.

² See European Commission Staff Working Document Explanatory Note, Accompanying document to the Commission Recommendation on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, C(2007)5406, 13 11 2007.

Whilst C&WJ does not believe that SMP should be assessed on the basis of market shares alone – and does not believe that is what this statement is saying – it accepts that very high market shares can be prima facie evidence of SMP. It firmly believes, however, that other factors need to be assessed before reaching any final conclusions in relation to SMP, including those that are listed on pages 4 and 5 of the Consultation Paper. C&WJ believes an additional factor that the JCRA should bear in mind is the extent to which the current regulatory and legal framework in Jersey is already under review³ and will be revised and reformed. Some of the existing regulations, whilst possibly being inadequate in some respects as discussed further below, may nonetheless be serving to prevent an operator holding a position of SMP from abusing its position. It is important for the JCRA to ensure that would not change should any part of the current regulations be lifted. In such circumstances, again as referred to below, C&WJ does not believe it is appropriate to lift any SMP finding at this moment

4 Analysis of Identified Markets

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

C&WJ agrees with the JCRA's analysis and conclusion that JT remains dominant in the supply of fixed line access in Jersey for residential and non-residential customers.

4.2 Call origination on the public telephone network provided at a fixed location

C&WJ agrees with the JCRA's analysis and conclusion that JT remains dominant in the provision of call origination at fixed locations.

C&WJ is, however, somewhat surprised by the market share figures shown in Figure 1 for fixed line call minutes in 2008. It assumes that these figures are based on the quarterly statistical returns submitted to the JCRA by each operator. The market share figure quoted for Sure seems very high (and that for JT seems under-estimated) and does not accord with C&WJ's perception of how well it has managed to penetrate this market.

C&WJ is also unclear as to how Newtel can provide an estimate of its share of minutes given that these will have been provided over a broadband router, transiting the web and so are difficult to measure. This leads to the wider question of the impact of the use of VoIP services such as Skype, which are not included within the market share statistics. Such questions should form part of any future considerations of this market, particularly in terms of how the market share figures should be interpreted.

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

C&WJ agrees with the JCRA that JT, as the only fixed network in Jersey, maintains a dominant position in the provision of fixed network call termination.

4.4 Voice call termination on individual mobile networks

³ See "Review of the regulatory powers, resources and functions of the JCRA as a telecommunications regulator", LECG in association with Charles Russell LLP, March 2009 and Regulaid review, op cit.

C&WJ agrees that, with respect to mobile termination, each individual mobile operator has SMP with respect to calls terminating on their individual networks.

4.5 On Island wholesale leased lines

C&WJ agrees with the JCRA's conclusion that JT remains dominant in the provision of on-island wholesale leased lines in Jersey. As the JCRA points out, the wholesale price that JT charges to Other Licensed Operators (OLOs) such as C&WJ has not changed since 2003, when JT first started offering private circuits to OLOs on a retail minus basis. C&WJ believes that that level of discount of 9% offered to OLOs is wholly inadequate and does not allow C&WJ or any OLO to compete effectively with JT, which explains why JT has managed to maintain an extremely high market share. C&WJ agrees with the analysis contained within the Regulaid report⁴ with respect to on island leased lines and notes the recommendation that the discount offered to OLOs should be 25%. C&WJ believes that there could be scope for the discount to be higher than 25%, although it is difficult to confirm this due to the current lack of published regulated accounts.

4.6 Off island wholesale leased lines

The JCRA has concluded that no operator has SMP in the supply of off-island leased circuits as OLOs can provide these over their own backhaul. C&WJ agrees with this conclusion.

4.7 Wholesale broadband services provided on fixed line network

C&WJ agrees that JT maintains a dominant position in the supply of wholesale broadband services provided on a fixed line network. C&WJ has recently launched its retail broadband service but is entirely dependent on JT for the wholesale elements of that service. C&WJ has not been satisfied with the wholesale provisioning offered by JT, including the lack of appropriate service levels and credits, and will be raising this as a separate issue with both JT and the JCRA.

4.8 The Mobile Networks and Services Market

As noted in the introduction to this response, C&WJ assumes that the JCRA has defined this market in a way that is consistent with the definition used by the EU, namely as a retail cluster market consisting of mobile access, national, international and roaming calls and SMS.

C&WJ does not agree with the JCRA's preliminary conclusion that JT is no longer dominant in the supply of retail mobile services and does not believe it is appropriate at this time to remove JT's designation of dominance in that market. The JCRA has acknowledged in this Consultation Paper that very large market shares of 50% or more are evidence of the existence of a dominant position. Figure 7 on page 11 of the Paper shows that JT still holds a market share of 71% of the retail mobile market. C&WJ does not believe that a high market share in itself is sufficient to prove the existence of SMP; rather, it is whether the firm in question has the ability to act independently of others in the market. C&WJ believes, however, that JT has advantages over other mobile operators in Jersey that gives it this ability. Such advantages are not available in similar jurisdictions such as Guernsey as the regulatory regime there is different and, in C&WJ's view, more effective, helping to support a far more competitive environment than in Jersey.

⁴ Op cit.

First, JT is the only mobile operator in Jersey to also own an extensive fixed network. That in itself is not an issue but when it is combined with a regulatory framework that is currently not effective - as has been recognised in the recent Regulaid⁵ report – it gives JT a major advantage over its competitors. For example, JT currently has no obligation to publish its separated accounts, making it impossible for competitors to assess whether it has allocated its costs correctly between different services. Further, it makes it easier for JT to cross-subsidise potentially competitive services such as mobile, from the profits of services where it faces less competition, such as fixed services, without detection. Whilst C&WJ accepts that the JCRA has access to JT's accounts it is unsure whether the JCRA has the resources to ensure that every new tariff offering introduced by JT is free from cross-subsidy.

JT is also in a much stronger position than its competitors to offer bundled service offerings that include fixed, broadband and mobile services. C&WJ should emphasise that it has no difficulty as such with firms providing mixed bundles of services, provided that they do not have exclusionary effects on competition. The regulator needs to have the appropriate tools at its disposal to be able to assess whether any bundles would have such effects.

However, JT is currently under no requirement to obtain prior approval from the JCRA for any pricing proposals, beyond a notification requirement. Instead, the JCRA relies on a predominantly ex post competition law approach to regulation, which primarily depends on competitors or customers bringing complaints to its attention. The JCRA seems to demand a high level of proof from complainants before any investigative action is initiated but without being able to offer proof of potential misallocation of costs or cross-subsidy, it is difficult for competitors to bring complaints to the JCRA about potentially anti-competitive pricing or other behaviour.

In this context, C&WJ thinks it is important to recognise that the ability to act independently of others does not just mean being able to increase prices, as is suggested by the discussion on page 12 of the consultation paper, which states that JT no longer has sufficient market power to enable it to substantially increase its retail prices. JT could also exercise market power and exclude competitors by decreasing prices to a level that equally efficient competitors could not match, if it is able to cross-subsidise from other services with little chance of detection. We note that the Regulaid review has raised concerns about the accuracy and appropriateness of the "non regulated business" data; it therefore seems premature to be contemplating removing JT's SMP status in the mobile market whilst these concerns are unresolved.

C&WJ notes that the JCRA has not gone so far as to describe the retail mobile market as effectively competitive; rather it has said that "...there are signs that competition is leading to more consumer choice and lower prices..". C&WJ does not deny that competition has increased in this market but believes that the further development of that competition could be jeopardised by the premature lifting of JT's dominance status.

Indeed, as noted in the EU guidelines on the assessment of SMP, "the fact that an undertaking with a significant position on the market is gradually losing market

⁵ Op cit

share may well indicate that the market is becoming more competitive, but it does not preclude a finding of significant market power.”⁶

Given that it would be difficult for the JCRA to reinstate regulation once lifted, surely a better approach would be for the JCRA to maintain JT’s dominance designation for the time being and then revisit the market in say, 12 months’ time? During this time, C&WJ would hope that many of the recommendations contained in the Regulaid report, and the related LECG⁷ report on the regulatory powers, etc., of the JCRA would have been implemented, including the recommendation to publish JT’s separated accounts.

Preliminary Conclusions

C&WJ agrees with the JCRA’s preliminary conclusions as listed in section 5 of the Consultation Paper, with the exception of the mobile market. C&WJ believes it would be premature of the JCRA to remove JT’s designation of dominance as it would risk the further development of competition in this market. This is particularly so given the current regulatory framework in Jersey and its recognised weaknesses.

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⁶ Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, Official Journal of the European communities, 2002/C 165/03, 11th July 2002.

⁷ Op cit.