Business connectivity market review:

Jersey

Final Notice

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1. Introduction

1.1 Background

This paper is the Final Notice of the Jersey Competition Regulatory Authority's (JCRA) review of the market for business connectivity in Jersey.

In April 2014, the JCRA[1] consulted on its review of the market for business connectivity in Jersey[2]. The JCRA considered all responses to the consultation, and published its Response to the Consultation and Initial Notice in August 2014.[3]

The JCRA's market review involves the definition of relevant markets, the assessment of competition within the markets in question and, where competition is found to be deficient in any market, the designation of operators with Significant Market Power (SMP) and the imposition of appropriate remedies. The JCRA concluded that its review should follow the broad principles of market definition, competition assessment and the imposition of remedies as set out by the EU, adapted to the particular circumstances of the Channel Islands.

The JCRA has defined separate markets in Jersey for the provision of leased lines at the wholesale and retail level, with separate markets for on-island and off-leased lines.

The JCRA undertook a competition assessment on the provision of leased lines at both wholesale and retail levels for on-island and off-island leased lines. The JCRA's assessment considered if either joint dominance or single firm dominance was a factor within the relevant markets.

In considering joint dominance, the JCRA examined whether or not Sure (Jersey) Limited (Sure) and JT Limited (JT) might be considered to be jointly dominant within the retail market for leased lines in Jersey. The JCRA concluded that there is no evidence to support the suggestion of collusive behaviour on the part of Sure and JT and took the view that any such co-ordinated activity would be unlikely to succeed in practice. The JCRA concluded, as a result, that joint dominance is not a relevant consideration in relation to the supply of retail leased lines in Jersey. The JCRA then went on to examine whether or not any single firm might be considered dominant within the market.

[1] This market review considers the market for business connectivity in Jersey. The GCRA is undertaking a parallel review in Guernsey

[2] Business Connectivity in Jersey, Document No CICRA 14/17, 8 April 2014

[3] Business Connectivity Market review: Jersey, Response to consultation and Initial Notice, Document No CICRA 14/42, 5 August 2014

At the wholesale level, the JCRA concluded – based on JT's very high market share, which is not mitigated by other factors – that JT is dominant in relation to the provision of wholesale on-island leased lines while the existence of multiple competing providers within the wholesale market for off-island leased lines leads to the conclusion that no operator is dominant in this market. As a result, the JCRA has concludes that JT should be designated with SMP in the market for wholesale on-island leased lines in Jersey, and that no operator should be designated with SMP in the market for wholesale off-island leased lines.

In the Consultation, the JCRA also opened a discussion about how best to ensure that retail and wholesale customers in Jersey could access high quality off-island leased lines. The JCRA considered relevant options available to it, and concludes that its proposals for the regulation of the on-island market can most effectively address the need for access to cost-effective and high quality off-island connectivity. The JCRA will keep this issue under active review, in particular to ensure that there are no artificial barriers at the on-island level to access off-island services and *vice versa*.

At the retail level, the JCRA concludes that JT holds a position of dominance within the market for retail on-island leased lines and so should be designated with SMP in this market. This is because JT continues to hold a very high share of this market, with the resultant presumption of dominance not mitigated by other relevant factors.

In the retail market for off-island leased lines, the JCRA concludes that no operator should be designated with SMP. This is because the market shares are more evenly spread between the three providers active in this market (JT, Sure and Newtel) and none of the other factors that need to be taken into account when assessing the level of competition within the market point to the existence of dominance.

The JCRA has considered carefully the issue of appropriate remedies arising from its finding of SMP at the wholesale and retail levels. At the wholesale level, the JCRA confirms its preliminary conclusion that a range of remedies, encompassing obligations on access, transparency, non-discrimination, accounting separation, cost accounting and price control should be imposed or continue to be imposed on JT in light of its position as an SMP operator in the market for wholesale on-island leased lines. While the remedies themselves do not constitute new obligations on operators, the JCRA's approach has elaborated in more detail on how these obligations are to be implemented. This has been done both to improve the clarity of regulation in Jersey, and to ensure an approach consistent with that in Guernsey.

The JCRA also considered the need for regulatory action at the retail level in light of the finding of SMP on the part of JT in the retail on-island market for leased lines. In doing so, the JCRA has taken into account the range of remedies it has decided to impose at the wholesale level, as well as the relatively recent change to the existing retail-minus wholesale price control and the planned forthcoming review of price control within the market. Bearing all of these factors in mind, the JCRA decided not to impose additional *ex ante* regulatory controls in the retail market at this time. However, the JCRA will closely monitor the impact of changes in the wholesale on-island market on the retail market, and will revisit this conclusion if necessary.

In summary, the JCRA concludes that, in relation to the provision of leased lines in Jersey, the appropriate markets exist at the retail and wholesale levels for on-island and off-island circuits. The JCRA determines that JT holds SMP in the retail and wholesale markets for on-island leased lines and that in the retail and wholesale off-island markets no operator holds a position of SMP.

1.2 Structure of this document

Issues raised by respondents, and the JCRA's consideration of them, are discussed in Section 2 of this paper. Section 3 contains the Final Notice.

Annex 1 outlines the legal requirements and licensing framework underpinning the market review.

Annex 2 is a glossary.

2. Respondents' comments and JCRA analysis

2.1 Comments on the Draft Decision

The JCRA received four sets of comments on its Initial Notice, from:

- Digital Jersey (applies to Jersey only)
- JT (applies to Jersey and Guernsey)
- Longport (applies to Guernsey only)
- Sure (applies to Jersey and Guernsey).

As one of the respondents wished their comments to remain confidential, the issues raised are not attributed to any respondent.

The JCRA has summarised each issue raised, and then set out its analysis and conclusion.

2.2 Market data

Respondents' comment

Two respondents proposed that the JCRA should improve its monitoring of the market, particularly in its collection and publication of market data. One respondent linked this to the need to review developments in the market on a timely basis.

JCRA analysis and conclusion

The JCRA agrees that market intelligence needs to be improved, and that the collection and publication of market data helps to ensure an appropriate regulatory response to changes in the market. The JCRA has initiated a new process for collecting market data, and intends to publish a regular market status report.

2.3 Wholesale/retail definition

Respondents' comment

One respondent commented that there should be consistency in the operators' definitions of wholesale and retail customers.

JCRA analysis and conclusion

The JCRA identified during the consultation process that, for legacy reasons, operators are not always consistent in defining wholesale and retail customers. This raises an issue in terms of non-discrimination, where an operator may unwittingly be in breach of its non-discrimination obligation by treating one customer differently to another customer of the same type. It is also an issue in terms of accurate monitoring of market data, where leased lines sales may not be correctly assigned to wholesale or retail.

The JCRA has decided that the following definitions should be adopted and applied by all operators:

Wholesale: the sale of leased lines to an Other Licensed Operator (OLO). For the avoidance of doubt, an OLO is an operator licensed by CICRA in Jersey/Guernsey to provide services on the island.

Retail: the sale of leased lines to other customers. This could include businesses, government, and telecom operators who are not Jersey/Guernsey OLOs and so do not hold Jersey/Guernsey telecom licences.

2.4 Pricing

Respondents' comment

One respondent expressed a view that, although it recognises that there is no regulatory impediment to the introduction of standardised pricing (i.e. the removal of same exchange/different exchange or less than/greater than 300m differential pricing), it believes that the JCRA should intervene to direct this pricing change.

JCRA analysis and conclusion

The JCRA's regulatory approach has allowed operators to rebalance their tariffs, and operators have chosen not to do this. The JCRA notes that differentiated pricing has not been caused by regulatory action, and that the respondent agrees that there is no regulatory impediment to its removal. There is therefore no rationale for regulatory action.

However, the JCRA does recognise that differentiated pricing may no longer be justified in terms of its reflection of an operator's costs of provision, and that eventually this may have an adverse effect on retail and wholesale customers. The JCRA intends to address this issue in its forthcoming work on implementing a price control.

2.5 Implementation

Respondents' comment

One respondent expressed a view that a process and timetable should be set out for the publication and agreement of a reference offer.

JCRA analysis and conclusion

The JCRA acknowledges that the imposition of remedies following the market review is the start of a process which will implement the obligations designed to address competition problems in the leased lines market. The JCRA agrees that it is essential that the remedies are implemented in a timely manner, and signals its intention to ensure that this happens.

2.6 Off-island licensing

Respondents' comment

A respondent expressed its view that new operators need to be encouraged to enter the Jersey market by the easing of licensing requirements.

JCRA analysis

The JCRA notes that the context in which this issue has been raised is that of an operator which has off-island capacity extending its offer to supply services on-island. There are two points to be considered here.

First, in the consultation process, the JCRA considered whether regulation acts to prevent market entry into the Jersey market. The JCRA does not consider that there are regulatory barriers to an external operator deciding to enter the market, and considers that regulatory structures are in place which would facilitate new market entry, should an external operator decide to invest.

Second, the JCRA considered in the consultation whether the regulatory status of off-island owners of capacity needed to be reviewed. The JCRA believes that there is good reason to maintain licensing in this area.

The removal of licensing would seriously restrict the JCRA's ability to gather information or to regulate the area should the need arise in future. Introducing specific class licences also introduces risks and at this stage there is no evidence that licensing is acting as a barrier to entry into the market. The JCRA would consider carefully any concrete evidence from prospective entrants that they were prevented from entering the market by licensing requirements, and that this constituted a significant barrier to market entry.

The JCRA reiterates its view as expressed in the consultation that the finding of no SMP in the wholesale off-island market is contingent on the *ex ante* regulation of the wholesale on-island market, and that this includes the need to ensure that there are no impediments in the on-island market which obstruct operators' ability to access off-island capacity. Impediments could include technical characteristics of on-island leased line products, and could include anti-competitive on-island pricing structures. The JCRA considers that the implementation of the measures it is putting in place in the wholesale on-island market will effectively address the requirement that on-island operators must be able to access off-island capacity, and should this not be the case, the JCRA will review this situation.

2.7 Wider issues

Respondents' comment

One respondent raised two broad issues. The first concerns the respondent's view of the lack of JCRA resources. The second concerns the respondent's view that the consultation process has not been adequately publicised.

JCRA analysis

The JCRA considers that both issues are broader than the market review, and that it is more appropriate to deal with them bilaterally outside the market review process.

2.8 Next steps

Following the publication of the Final Decision, the JCRA will work with SMP operators to agree an implementation plan, which is a set of actions and a timetable which will ensure that they are compliant with their obligations. The JCRA will also inform SMP operators at this time how it intends to monitor implementation.

The JCRA has discussed through the consultation process its intention to review the price control remedy. The JCRA will initiate its review following the publication of this Decision.

3. Final Notice

3.1 Statutory powers

The JCRA's statutory powers are set out in Annex 1 of this Final Notice.

The provisions of the consultation document and the Response to Consultation shall, where appropriate, be construed with this Notice. The analysis set out through the consultation process explains the reasoning behind the proposals, and indicates the effects the proposals are expected to have and gives reasons for making the proposal.

3.2 Market definition

The markets which have been defined are:

- Retail market for on-island leased lines
- Retail market for off-island leased lines
- Wholesale market for on-island leased lines
- Wholesale market for off-island leased lines.

3.3 Decisions on SMP designation

The JCRA carried out a competition assessment on the markets, and concluded that no operator is dominant in the retail market for off-island leased lines, and no operator is dominant in the wholesale market for off-island leased lines.

The JCRA concluded that JT has SMP in the retail market for on-island leased lines, and the wholesale market for on-island leased lines. The JCRA notes that the finding of no SMP in the wholesale market for off-island leased lines is contingent on an appropriately regulated market for wholesale on-island leased lines.

Arising from its decisions on SMP designation outlined above, existing regulatory obligations based on SMP, including price controls, in the markets where no operator has been found to be dominant are hereby rescinded. Regulatory obligations will instead be focused solely on the markets where JT has been designated with SMP, i.e. the retail market for on-island leased lines and the wholesale market for on-island leased lines. These obligations are set out below.

3.4 SMP obligations in the retail markets for on-island leased lines

There are no existing regulatory obligations on JT in relation to its provision of retail on-island leased lines. The JCRA has decided not to impose additional regulatory obligations on JT in this market at this time, but will instead closely monitor the impact on the retail market of regulation in the wholesale on-island market. The JCRA envisages that regulatory action targeted at the wholesale level will result in a better outcome for retail end-users, arising from increased retail competition, than would the imposition of direct regulatory controls at the retail level.

3.5 SMP obligations in the wholesale market for on-island leased lines

According to Part IV of JT's licence, "Additional conditions applicable to Class III licensees", where the JCRA has determined that a Licensee possesses SMP in a relevant market, it may determine that provisions of Part IV of the licence apply.

<u>Access</u>

Condition 28 of JT's licence states that:

"The Licensee shall offer to lease out circuits for any lawful purpose:

(a) on publicly advertised conditions and on non-discriminatory terms. This is without prejudice to discounts that are in accordance with Condition 32;

(b) within a reasonable period of time from any written request and, in any event, within thirty (30) days;

(c) so as to meet the quality standards required under the Conditions; and

(d) at prices that do not exceed levels determined from time to time by the JCRA".

The JCRA determines that JT shall continue to be obliged to make access to wholesale on-island leased lines available to OLOs in response to a reasonable request for access.

Access shall be provided on the following terms:

- JT is obliged to comply with the access obligation in a manner which is fair, reasonable and timely. The JCRA notes that this applies to the whole process, including the way in which JT deals with an access request, through to any implementation of an access product;
- JT should negotiate in good faith with OLOs requesting access;
- JT should not, without appropriate justification and consultation, withdraw access to facilities already granted.

Non-discrimination

The JCRA determines that JT will continue to be subject to an obligation not to discriminate between OLOs, and between OLOs and JT's own retail operation.

The obligation not to discriminate between OLOs is imposed under Condition 31 of JT's licence, which applies to all telecommunications services:

"The Licensee shall not show undue preference to, or exercise unfair discrimination against, any User or Other Licensed Operator regarding the provision of any Licensed Telecommunications Services or Access. The Licensee will be deemed to be in breach of this Condition if it favours any business carried on by the Licensee or an Associated Company or Other Licensed Operator so as to place Other Licensed Operators competing with that business at an unfair disadvantage in relation to any licensed activity".

This obligation not to discriminate between OLOs and JT's own retail operation is imposed under Condition 28.2 of JT's licence:

"The Licensee shall offer to lease out circuits to other licensed operators on terms that are no less favourable than those on which the Licensee makes equivalent leased circuits available to its Associated Companies, subsidiaries or joint venture companies or its own business divisions."

Transparency

The JCRA determines that JT shall continue to be subject to transparency obligations. The JCRA notes that transparency obligations are generally necessary to demonstrate compliance with other obligations, and has elaborated on the obligations with this objective in mind.

The JCRA determines specific obligations should be imposed as follows:

- JT shall be obliged to publish and maintain a Reference Offer for wholesale on-island leased lines, including appropriate technical specifications, and including a mechanism explaining how changes to the Reference Offer will be made and notified.

- JT shall be required to publish a standard SLA which will govern JT's relationship with the OLO. It is increasingly seen as good practice to publish Key Performance Indicators (KPIs), and this should be included as part of the SLA.
- JT shall be required to publish prices and non-price terms and conditions for wholesale on-island leased lines. Publication of any changes should be made, and the JCRA informed, at least 30 days before changes come into effect.
- OLOs and the Regulator should be notified 3 months in advance of the launch of a new wholesale product. This period may be reduced if all parties agree.

Accounting separation

The JCRA determines that JT will continue to be obliged to prepare and maintain separated accounting information.

Condition 29 of JT's licence states that:

"Within six (6) months of the Licence Commencement Date, the Licensee shall confirm to the JCRA that it maintains accounting records in a form that enables the activities specified in any direction given by the JCRA to be separately identifiable, and which the JCRA considers to be sufficient to show and explain the transactions of each of those activities.

The JCRA may require reports on the accounting records and/or activities from time to time. The JCRA may direct the Licensee as to the basis and timing of such reports as the JCRA may require".

Cost accounting and price controls

The JCRA determines that JT shall continue to be obliged to maintain its current cost accounting obligations, with a view to demonstrating its compliance with other obligations.

Condition 30 establishes how this should be done:

"To enable the JCRA to evaluate where any unfair cross-subsidisation or unfair subsidisation is taking place, the Licensee shall record at full cost in its accounting records any material transfer of assets, funds, costs, rights or liabilities between a

part and any other part of its business, and between it and any Subsidiary or Joint Venture, and shall comply with any directions issued by the JCRA for this purpose".

The JCRA has determined that a price control continues to be necessary in the wholesale market for on-island leased lines.

Condition 33.2 of JT's licence states that:

"The JCRA may determine the maximum level of charges the Licensee may apply for Telecommunication Services within a relevant market in which the Licensee has been found to be dominant".

The JCRA intends to review the structure and level of the price control immediately following the final decision.

Annex 1: Legal background and licensing framework

Legal background

The Telecommunications (Jersey) Law 2002[4] (***the Telecoms Law***) provides that the JCRA may include in telecommunications licences such conditions as the JCRA considers necessary or desirable.

Part 3 of the Telecoms Law sets out the duties of the Minister and the JCRA, and obliges them to protect and further the interests of telecommunications users within Jersey by, wherever appropriate, promoting competition[5]. Part 3 also sets out general objectives that the JCRA should take into account, including the need to promote efficiency, economy and effectiveness, and to further the economic interests of Jersey.

The Telecoms Law[6] specifically provides that the JCRA may include in any licence conditions that are:

- intended to prevent or reduce anti-competitive behaviour[7];
- relate to, or imposing requirements about, competition in relation to telecommunication services, telecommunication systems, apparatus and telecommunication equipment.[8]

Licensing Framework

Part 2 of the Telecoms Law establishes the requirement for a telecoms operator to hold a licence, and Part 5 sets out the powers which the JCRA has to grant a licence. There are four classes of telecommunications licence in Jersey. A Class III licence is specifically for applicants which have Significant Market Power (SMP). The Class III licence includes a Part which addresses conditions applicable to dominant operators[9].

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[4] Telecommunications (Jersey) Law 2002, revised edition 06.288, 1 January 2013.
[5] Part 3, Article 7 (2) (a).
[6] The definition of dominance and abuse of dominance is not explicit in the Telecoms Law. However, the Competition (Jersey) Law 2005 sets out the States' approach to defining abuse of a dominant position and anti-competitive practice
[7] Part 5, Article 16 (1) (i).
[8] Part 5, Article 16 (2) (4) (a).
[9] Part IV of the Class III licence.

The provisions which are applicable to dominant operators include (but are not limited to) measures addressing the availability and associated terms of Other Licensed Operator (OLO) access to networks and services[10]; the requirement not to show undue preference or to exercise unfair discrimination[11]; the requirement not to unfairly cross subsidise[12], supported by accounting processes to demonstrate compliance; regulation of prices, and transparency around pricing and wholesale product offerings, including the publication of appropriate Reference Offers[13].

In addition, the Class III licence includes conditions specific to the provision of leased circuits[14], which apply where a licensee has been found to be in a dominant position. The conditions applicable to the supply of leased circuits refer to the retail and wholesale markets, and require that a dominant provider offers circuits on publicly advertised and non-discriminatory terms, and in compliance with quality standards and at prices determined by the JCRA.

The Class III licence also includes a Part which directly obliges the licensee not to engage in any practice which has the object or likely effect of preventing, restricting or distorting competition in the establishment, operation and maintenance of telecommunications networks and services[15].

[10] Condition 25, Class III licence.
[11] Condition 31, Class III licence.
[12] Condition 30, Class III licence.
[13] Condition 33, Class III licence.
[14] Condition 28, Class III licence.
[15] Condition 34, Class III licence.

ANNEX 2: Glossary

4G: Fourth-generation mobile telecommunications technology, which enables the delivery of high-speed broadband services over mobile networks. The '4G' standard encompasses the Long Term Evolution (LTE) technology, which is the main 4G technology being deployed worldwide.

Alternative Interface (AI): new types of technologies used for delivering leased lines services, for example *Ethernet* (see below), which contrast with legacy *TI* technologies (see below).

Asymmetric Digital Subscriber Line (ADSL): a broadband technology that enables high-speed data transmission over legacy copper local access telephony networks, using a high data rate in one direction and a lower data rate in the other.

Bandwidth: The physical characteristic of a telecoms system that indicates the speed at which information can be transferred, which in digital systems is measured in bits per second (bps).

Cloud computing: the use of a network of remote servers connected via the internet that store, manage and process data that would otherwise be handled on a local server or computer.

Dark fibre: unused or 'unlit' optical fibre, i.e. fibre which has been deployed within a communication network but which is not connected to active electronic equipment used to facilitate data transmission.

Direct internet access (DIA): a dedicated connection to the internet provided directly from the customer's site over a permanent link (also known as *IP feed* – see below).

Ethernet: a technology used for data transmission. Originally deployed for use in a *LAN* (see below) environment, the technology has also increasingly been used to support *WAN* (see below) connectivity, with Ethernet being used in this instance as a leased line technology.

Ex ante: the application of regulation before an abuse of power has necessarily occurred. The reasoning behind its application is that finding that an operator has SMP means that the operator is likely to have the incentive and motivation to behave in a way which exploits its market power to the detriment of competitors and ultimately to consumers. *Ex ante* regulation can be contrasted with *ex post* regulation, which investigates an incident which has already happened.

Ex post: the use of regulation following a complaint or abuse of market position by an operator. In contrast to *ex ante* regulation (see above).

Half circuit: portion of an international circuit where the provision between origination and termination is shared by two or more operators. The half circuit point is a notional pricing point.

Internet Protocol: the communications protocol used for transmitting a data packet between a source and a destination on data networks, including the internet (also known as *Direct internet access* – see above).

Internet Protocol (IP) feed: a dedicated connection to the internet provided directly from the customer's site over a permanent link.

Leased line: A permanently connected communications link between two premises dedicated to a customer's exclusive use (see also *Private circuit* below).

Local Area Network (LAN): a network that connects a number of devices that are relatively close together, for example within the same office or building, which enables intercommunication amongst users and access to private voice, email, internet and intranet services and applications.

Modified Greenfield approach: a regulatory approach that works on the assumption that there is no *ex ante* (see above) regulation in the market in question, but takes account of the fact that upstream *ex ante* regulation is in place.

Multi-protocol label switching (MPLS): a mechanism for directing data within and across networks from one network node to the next, with data packets being given a specific forwarding label at the point at which they enter the network, thus enabling more efficient routing.

Plesiochronous Digital Hierarchy (PDH): a technical data transmission standard that enables transmission of data that generally runs at a similar rate to have a slight variation in actual data speed compared to the nominal rate. In recent years, PDH transmission has largely been replaced within telecoms networks by *SDH*, (see below).

Private circuit: an alternative term for a *Leased line* (see above).

Retail Price Index (RPI): a measure of inflation, published monthly by the Office for National Statistics in the UK.

Small but Significant Non-transitory Increase in Price (SSNIP): a theoretical price increase that forms part of the 'hypothetical monopolist' test used in market definition analysis. The price increase in question is usually considered to be in the range of 5 to 10 per cent.

Synchronous Digital Hierarchy (SDH): a technical data transmission standard for the transmission, which has largely replaced traditional PDH (see above) transmission. SDH is an international standard that enables high-bandwidth synchronous data transmission.

Time Division Multiplex (TDM): a method of putting multiple data streams in a single signal by separating the signal into many segments, each having a very short duration. Each individual data stream is then reassembled at the receiving end based on the timing.

Traditional Interface (TI): legacy technologies used for delivering leased lines services, of which the main one would be *TDM* (see above).

Virtual Private Network (VPN): a private network where connectivity is extended by making use of the internet over which a virtual point-to-point connection is established, with various protocols being used to ensure data security over the public element of the network.

Wave Division Multiplex (WDM): a transmission technology that enables multiple wavelengths of light to share the same fibre optic pair.

Wide Area Network (WAN): a network connecting devices located in geographically dispersed locations, either in the same national area or across national boundaries.