Business connectivity market review: Jersey

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Initial Notice and Response to Consultation

Document No: CICRA 14/42 ***5 August 2014***

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Executive summary

In April this year, the JCRA (Jersey Competition Regulatory Authority) initiated a consultation on its review of the market for business connectivity services in Jersey. Having considered carefully the responses received from stakeholders, the JCRA now sets out its definitive position on key issues arising from its review and, in particular, the regulatory measures it considers to be appropriate in relation to the provision of wholesale and retail leased lines.

As was explained in its consultation document in April, 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 has now 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. In its initial consultation, the JCRA proposed to define a single retail market comprising both on-island and off-island circuits but it accepts the point made by respondents that it would be desirable to have a market definition in the retail market which reflects the position at the wholesale level. As a result, the JCRA has now concluded that separate markets be defined at both retail and wholesale level for on-island and off-leased lines.

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

At the wholesale level, the JCRA has 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 concluded 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 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 has now concluded 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 has concluded 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 in any way by other relevant factors.

In the retail market for off-island leased lines, the JCRA has concluded 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 that 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 has confirmed 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 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 regulation in Jersey, and to ensure a consistent approach across Jersey and Guernsey.

The JCRA has 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 has 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 has concluded 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 has determined 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. Introduction

1.1 Background

In April 2014, the JCRA[1] consulted on its review of the market for business connectivity in Jersey[2].

The main purpose of a market review is to identify the competitive conditions prevailing in a market by assessing systematically the competitive constraints that are faced by undertakings (licensees) in the market. In the April consultation, the JCRA set out its preliminary views on the definition of the retail and wholesale markets for business connectivity; assessed the level of competition in the defined markets, came to proposed Significant Market Power (SMP) findings; and set out an initial view of remedies which may be put in place should the market review proposals be maintained.

Responses to the consultation were received from JT, Sure, Airtel and Longport[3], and non-confidential versions of these responses are available on the JCRA's website. Follow-up discussions were held with respondents in order to ensure a shared understanding of points made in the written responses. The JCRA would like to thank respondents for their input.

1.2 Structure of this document

This document constitutes an Initial Notice (IN). The document sets out the conclusions which the JCRA has reached, having taken full account of responses to the consultation, and having carried out further research to ensure it has fully addressed respondents' points. The document contains summaries of particular points raised to illustrate the JCRA's reasoning.

This document broadly follows the structure of the April consultation, and is organised around the questions which were asked in that consultation. It is structured as follows:

Section 2: describes the JCRA's approach to the market review;

Section 3: sets out the JCRA's definition of the retail 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] Longport's response relates mainly to Guernsey, but where comments are generally applicable, they have been included in the Jersey review as well.

Section 4: explains the JCRA's assessment of competition and SMP in the retail market;

Section 5: sets out the JCRA's definition of the wholesale market(s);

Section 6: explains the JCRA's assessment of competition and SMP in the wholesale market(s);

Section 7: sets out remedies to be applied where there is an SMP finding.

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

Annex 2 summarises the JCRA's decisions on the markets for retail and wholesale leased lines.

Annex 3 is a glossary.

Responses to this document should be submitted in writing to:

JCRA
2nd Floor Salisbury House
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St Helier
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JE2 3RF

or by email to lisa.white@cicra.je.

The deadline for responses is **5.00pm** on 02 September **2014**.

All comments should be clearly marked: ***"Initial Notice: Review of the market for business connectivity: Jersey"***. The JCRA's normal practice is to publish responses to consultations on its website. It should be clearly marked if any part of a response is held to be commercially confidential.

2. Approach

2.1 Introduction

The GCRA and JCRA are publishing parallel consultations on the market for business connectivity in Jersey and in Guernsey. However, the Authorities propose to develop an approach to market analysis which can be applied consistently in Jersey and Guernsey. While the approach recognises the differences in the regulatory frameworks between the islands, and recognises that the markets for business connectivity are currently regulated differently, the approach proposed by the Authorities for this review will be methodologically consistent across both islands.

This section presents the approach to market definition, competition assessment and remedies which was set out in the consultation, summarises respondents' comments, and outlines the JCRA's analysis and conclusions.

2.2 Approach to market definition

2.2.1 The JCRA's consultation proposals and questions

The JCRA proposed to apply the broad principles of market definition developed by the European Union (EU). The market definition procedures are designed to identify in a systematic way the competitive constraints encountered by providers of electronic communication networks and services. A relevant product market comprises all products or services that are sufficiently interchangeable or substitutable, from the point of view of a user or a supplier of the products or services.

European guidelines also require the geographic coverage of markets to be considered. The JCRA proposed that, once the product market has been defined, the consideration of the geographic market should determine where the geographic boundaries of the market lie.

Q1. *Do you agree with the JCRA's proposed approach to market definition? If not, what alternative do you suggest?*

2.2.2 Responses

JT, Sure and Airtel agreed with the proposed approach.

JT questioned the extent to which the EU approach is appropriate given the size of the jurisdiction.

2.2.3 JCRA analysis

The JCRA has considered points raised by JT regarding the methodology used in the review, and the application of the methodology to the analysis. In the JCRA's view, it is important to consider JT's comments not only as comment on methodology, but in the context of the eventual regulatory outcome. The JCRA notes that in the consultation, it was clear that the proposed approach is not an academic exercise – the review is not an end in itself but rather an assessment of competitive conditions in a defined market, which will determine whether *ex ante* regulation is appropriate, and if so, what form it should take.

The JCRA acknowledges JT's point that the full EU approach to market analysis may not be appropriate for a small jurisdiction. Further, the JCRA is not legally obliged to follow EU recommendations. The JCRA noted in the consultation that it had decided to adapt the methodology recommended by the European Commission (EC) to the particular circumstances of the Channel Islands, and in the JCRA's view, it was clear in the consultation that the JCRA was drawing on the EU approach, but was not bound to follow it in its entirety.

2.2.4 JCRA conclusion

The JCRA has decided to adopt for this market review the broad principles of market definition as set out by the EU, adapted to the particular circumstances of the Channel Islands.

2.3 Approach to competition assessment

2.3.1 The JCRA's consultation proposals and questions

The JCRA noted in the consultation that the purpose of the competition analysis is to consider whether any operator has Significant Market Power (SMP), and the analysis should look forward 2-3 years, taking into account foreseeable technical and economic developments. If there is no SMP, the market is effectively competitive and does not require *ex ante* regulation. If there is no SMP any existing *ex ante* regulation should be removed, and no further *ex ante* regulation should be imposed (regulations such as universal service obligation regulations and other licence conditions will remain). If there is SMP, then the market is not effectively competitive and regulation should be imposed, at either the wholesale or the retail level, or both, to counteract the potential negative effects of the competition problems that can be caused by the SMP operator.

The JCRA proposed to examine a wide range of characteristics of the market before coming to a conclusion as to the existence of significant market power. The EU lists (non-exhaustive) criteria which, in addition to market share, can be used to measure the power of an undertaking to behave to an appreciable extent independently of its competitors, customers and consumers.

The JCRA noted that the conclusion of the competition assessment for each market is a preliminary view as to whether any undertaking has Significant Market Power in the defined market.

Q2.	*Do you agree with the JCRA's proposed approach to competition and SMP assessment? If not, what alternative do you suggest?*

2.3.2 Responses

Sure and Airtel agreed with the JCRA's proposed approach to competition and SMP assessment.

JT questioned the extent to which the EU approach is correctly applied. In particular, JT proposed that, following the market definition, the JCRA should consider whether or not the market is susceptible to *ex ante* regulation before carrying out a competition assessment. In the case of a market which is not included in the EU's recommended markets, this should be by means of a "three criteria test".

JT also proposed that the JCRA should have considered the conditions of competition in the wholesale market before considering retail regulation.

2.3.3 JCRA analysis

The JCRA considers that JT has raised two key points regarding the application of the methodology, and deals with each in turn.

2.3.3.1 Susceptibility to ex ante regulation

JT has argued that, once it had defined a market for retail leased lines, the JCRA should have introduced an interim step, a three criteria test, before carrying out a competition assessment. The three criteria test is designed to examine whether or not a market is susceptible to *ex ante* regulation. In JT's view, the reason why this step is necessary is because the retail market for leased lines is no longer on the EU's list of recommended markets, which is a list of markets in which regulators can assume there is a susceptibility to *ex ante* regulation.

The JCRA acknowledges it did not present an explicit three criteria test in the consultation. However, it did note that although the retail leased lines market was no longer considered by the EU to be susceptible to *ex ante* regulation, several member states (including the UK) disagree with this view, and in some cases have reinstated retail regulation. In the JCRA's view, given this, it seems reasonable that its approach considered that the EU list was not determinative.

In terms of the substance of the three criteria test, the JCRA believes that the competition assessment which it carried out in the consultation in any event considered the significant elements of the test. As the EC[4] has noted:

"The main indicators to be considered when assessing the first and second criteria are similar to those examined as part of a forward-looking market analysis, in particular, indicators of barriers to entry in the absence of regulation, (including the extent of sunk costs), market structure, market performance and market dynamics, including indicators such as market shares and trends, market prices and trends, and the extent and coverage of competing networks or infrastructures. Any market which satisfies the three criteria in the absence of ex ante regulation is susceptible to ex ante regulation".

The consultation examined the nature of barriers to entry, and assessed whether or not the market tended towards effective competition. The JCRA's view is that the substance of the analysis was undertaken, but it was not presented as a "three criteria" test.

In order to determine whether JT's points on the application of the three criteria test have a material impact on the analysis, the JCRA returns to this issue in the competition assessment below.

2.3.3.2 Order for reviewing wholesale and retail markets

JT has argued that, while the JCRA was correct in defining the retail markets before defining the wholesale markets, it should have analysed susceptibility to *ex ante* regulation and competition in the wholesale market before the retail market[5]. JT pointed out that the rationale for the switch of focus is to avoid duplication and unnecessary regulation in the retail markets.

The JCRA notes that in the consultation, it recognised the application of the modified greenfield approach as follows:

"The JCRA's assessment takes account of the presence and the potential for SMP regulation in the upstream wholesale market for leased lines.. This means that if wholesale regulation can address existing and potential barriers to entry in the retail market, then this should be taken into account when considering SMP and possible regulatory remedies in the retail markets". [p35]

[4] EC Recommendation on Relevant Markets,

[5] This method of assessment is known as the *Modified Greenfield* approach. This approach assumes that there is no *ex ante* regulation in the market in question, but that upstream *ex ante* regulation is in place.

The structure of the presentation in the consultation was designed to make the arguments as clear as possible, and the JCRA does not agree that it failed to apply a modified greenfield approach. In order to ensure that JT's concerns have been fully taken into account, this issue is addressed again when considering the competition assessment in the retail markets.

2.3.4 JCRA conclusion

The JCRA has decided to proceed with its proposed approach to competition assessment for this review.

2.4 Approach to remedies

2.4.1 The JCRA's consultation proposals and questions

Should an undertaking be found to have SMP, the JCRA would then need to consider how best to address this.

The EU approach to remedies generally considers the deployment of a set of regulatory tools to address structural factors such as enabling wholesale access to an incumbent's network, and behavioural recommendations that establish how the SMP operator is expected to conduct itself in the market. It has been standard practice throughout the EU to impose remedies at a high level on the conclusion of a market review, and to further specify in more detail as required. So, for example, if a national regulator proposes that a price control is required following a market review, it may impose this in principle, then consult with operators and stakeholders to detail how it should be implemented.

The JCRA believes that this general approach to remedies has merit, and proposes that it should be adapted for use in the Channel Islands, if a licensed communications provider is found to have SMP. Such an approach is in accord with the licence conditions which can be applied to dominant operators in Jersey.

Q3. *Do you agree with the JCRA's proposed approach to remedies, should there be a finding of SMP? If not, what alternative do you suggest?*

2.4.2 Responses

Sure and Airtel agreed with the JCRA's proposed approach to remedies. Sure expressed a view that CICRA's approach to remedies has not been consistent between Guernsey and Jersey.

JT expressed a view that the consultation did not sufficiently describe and provide evidence for competition problems in the retail market, and that a robust cost benefit analysis would be required before imposing any remedy.

2.4.3 JCRA analysis

The JCRA agrees that the approach to the market review, and to the eventual imposition and implementation of remedies should be consistent across Guernsey and Jersey.

The JCRA has addressed JT's comments on retail remedies in section 7.

2.4.4 JCRA conclusion

The JCRA has decided to proceed with its proposed approach to the implementation of remedies arising from this review.

3. Retail market definition

3.1 Product market

3.1.1 The JCRA's consultation proposals and questions

The JCRA's proposed conclusions on the definition of the retail product market are as follows:

- the retail leased lines market should not be narrowed to reflect the delivery technology used nor broadened to reflect the increasing purchase by business customers of business connectivity solutions rather than retail leased lines;
- all bandwidths used for delivering leased lines are in the same market.

Q4. *Do you agree with the JCRA's preliminary view that the retail market should not be narrowed to reflect the delivery technology used? If not, why not?*

Q5. *Do you agree that the retail market should not be broadened to include downstream services bought in conjunction with leased lines? If not, why not?*

Q6. *Do you agree that the retail market should not be broadened to include business connectivity services provided over broadband? If not, why not?*

Q7. *Do you agree that all retail leased line bandwidths fall within the same market? If not, why not?*

3.1.2 Responses

JT and Sure agreed with the JCRA's proposals on the definition of the product market. Sure pointed out that, in its view, Ethernet is not new, and that higher bandwidth carrier grade equipment still commands a premium price.

Airtel agreed that the market should not be narrowed to reflect delivery technology, should not include broadband, and that all bandwidths fall within the same market. However, Airtel proposed that IP connectivity should be included due to its perception of high prices compared with mainland UK and other jurisdictions.

3.1.3 JCRA analysis

The process of defining markets to be included in this review entails considering the extent to which products and services are substitutes for each other, and so would fall within the same product market. The JCRA proposed in the consultation that downstream services such as IP feed would not be good substitutes for retail leased lines, and so would not fall within the same product market, and notes that this view is consistent with the conclusions reached by other telecoms regulators.

However, the JCRA recognises concerns expressed by Airtel regarding downstream products and services such as IP connectivity.

3.1.4 JCRA conclusion

The JCRA has decided that (i) the retail market should not be narrowed based on delivery technology used, (ii) it should not be broadened to include downstream services, (iii) it should not be broadened to include services provided over broadband and (iv) all leased line bandwidths fall within the same market.

3.2 Geographic market

3.2.1 The JCRA's consultation proposals and questions

The JCRA's proposals on the definition of the retail geographic market were as follows:

- the retail market encompasses both on-island and off-island leased lines;
- there are separate geographic markets for Jersey and Guernsey, and
- there are no particular areas within Jersey where conditions of competition are appreciably different to the extent that they constitute separate geographic markets.

3.2.2 Geographic markets in Guernsey and Jersey

Q8. *Do you agree that separate geographic markets exist for Guernsey and Jersey? If not, why not?*

3.2.2.1 Responses

Respondents generally supported JCRA's proposal that separate markets exist for Guernsey and Jersey, with both Sure and Airtel commenting that they would expect pricing structures to be similar across both islands. Longport reluctantly agreed, and reiterated its view that the Channel Islands are a single structure in which JT and Sure are an oligopoly.

3.2.2.2 JCRA analysis

The JCRA has addressed Longport's points on oligopoly in the competition assessment.

The JCRA's analysis of responses to the Call for Evidence, and subsequent discussions with operators and other stakeholders indicates a growing trend towards pan-island purchase and supply of retail leased lines. In the JCRA's view, should this trend continue there may be a case to consider Jersey and Guernsey as a single market, but the evidence of a single market is not sufficiently strong at present, and is not likely to become so within the lifetime of this review.

3.2.2.3 JCRA conclusion

The JCRA has decided that separate geographic markets for the supply of retail leased lines exist for Guernsey and Jersey.

3.2.3 On-island and off-island leased lines

Q9. *Do you agree that the retail market encompasses both on-island and off-island leased lines? If not, why not?*

3.2.3.1 Responses

Sure and Airtel agreed with the proposal that the retail market encompasses both on-island and off-island leased lines. However, JT proposed that the retail market definition should reflect the wholesale market separation of on-island and off-island lines, and that the products are priced separately also at a retail level.

3.2.3.2 JCRA analysis

In the consultation, the JCRA's preliminary view was that, based on the evidence which had been provided, it appeared that from a demand point of view, it was immaterial to a retail customer whether the leased line ended on-island or off-island.

The JCRA suggested that, from a supply point of a view, operators can and do offer both on-island and off-island leased lines. This means that a supplier of retail on-island leased lines could switch to supply retail off-island leased lines within a relatively short timeframe and without incurring significant costs.

JT has suggested that the end point of the leased line is critical to the customer, and that on-island and off-island products are priced separately. The JCRA's view is that the evidence on the demand side is not conclusive. The JCRA has reviewed its analysis of the extent to which retail on-island and retail off-island leased lines should be considered to be part of the same market. On balance, the JCRA considers that, given the inconclusive nature of demand side evidence, more weight should be given to the supply side. The JCRA considers that it is not necessarily the case that supply could switch in the short term and at negligible cost from on-island provision to off-island provision and that the markets may therefore be considered to be separate. The JCRA also accepts the point that it may be desirable to have a market definition in the retail market which mirrors the wholesale market. The JCRA will therefore define separate markets for retail on-island and retail off-island leased lines.

3.2.3.3 JCRA conclusion

The JCRA has decided that separate markets exist for the supply of retail on-island and off-island leased lines in Jersey.

3.2.4 Separate geographic markets within Jersey

Q10. *Do you agree that there are no particular areas within Jersey where the conditions of retail competition are such that they may constitute separate geographic markets? If not, why not?*

3.2.4.1 Responses

In considering whether there are particular areas within Jersey which may constitute separate geographic markets, Sure believes it is incorrect to state that operators offer uniform pricing across the island, because JT charges different prices depending on whether the customer is located less than or greater than 300 metres from the exchange. In Sure's view, the greater than 300m pricing falls disproportionately on Other Licensed Operators (OLOs), and is without technical justification.

While agreeing with the JCRA's proposals that there should not be sub-island markets, JT noted that segments of the market, such as high bandwidth products within St. Helier, have greater levels of competition at both the wholesale and retail levels than others.

3.2.4.2 JCRA analysis

The JCRA has reviewed its analysis in light of respondents' comments regarding differences in the conditions of competition within Jersey.

The JCRA recognises that there will be variation in demand and supply conditions amongst different types of customer, and different sizes of organization, but does not consider that these can be evidenced as clear and persistent boundaries which would indicate the existence of separate markets.

The JCRA has also reviewed its analysis of the extent to which separate markets should be defined according to differentiated pricing (ie greater or less than 300m) or to take account of OLO network build.

In the JCRA's view, JT's pricing differential for leased lines greater or less than 300m is a legacy pricing decision taken by the company and is not associated with different competitive conditions. The JCRA understands that there may have been a cost justification in the past for this pricing structure, but is not convinced that the pricing structure reflects cost of provision or any technical requirement. The JCRA notes that JT can restructure its pricing under its current regulatory obligations, and the JCRA is not proposing anything in this review which changes that situation. For this market review, the existence of different prices for leased lines greater than or less than 300m is not evidence of different competitive conditions, but is explained by a combination of different legacy issues.

In considering the extent to which OLO network build should be taken into account, the JCRA agrees that infrastructure built by an OLO which allows the OLO to offer retail leased lines over that infrastructure both strengthens the competitive position of the OLO, which is then less reliant on the incumbent, and also reduces the OLO's reliance on the wholesale market and reduces the size of the wholesale market.

The JCRA maintains its view that these variations do not result in clear and persistent boundaries which would indicate a separate geographic market within Jersey, and has received no compelling evidence of, for example, pricing changes in response to change in particular conditions in specific areas. A finding of a smaller geographic market within Jersey would need to be evidenced by data which showed the clear boundary between different areas in terms of demand and supply.

However, the JCRA recognises that conditions of competition vary to the extent that some areas will be more competitive than others, and that both the geographic areas and the extent of competition will change over time. In the JCRA's view, it is important to recognise that JT is not subject to the same competitive pressures at the same time across all of Jersey, and this has been taken into account in the competition assessment rather than the market definition.

3.2.4.3 JCRA conclusion

The JCRA has decided that there are no particular areas within Jersey where the conditions of retail competition are such that they may constitute separate geographic markets.

4. Retail market competition and SMP assessment

4.1 The JCRA's consultation proposals and questions

The JCRA's preliminary view set out in the consultation was that JT should be designated with SMP in the retail leased lines market in Jersey, due to its high and persistent market share of just above 70% (H1 2013). While noting that JT's market share is at a level which can be considered to be presumptive of dominance, the JCRA has also assessed the retail leased lines market in terms of potential barriers to entry and expansion which could potentially mitigate JT's market power, and its preliminary conclusion was that other factors do not sufficiently redress market power.

The JCRA's assessment took account of the presence and the potential for SMP regulation in the upstream wholesale market for leased lines[6]. This means that if wholesale regulation can address existing and potential barriers to entry in the retail market, then this should be taken into account when considering SMP and possible regulatory remedies in the retail markets. The JCRA noted that on-island leased lines are currently regulated at the wholesale level in Jersey, and that JT is currently subject to wholesale regulatory remedies.

Q11. *Do you agree with the JCRA's preliminary conclusion that JT is dominant in the provision of retail leased lines in Jersey? If not, why not?*

Q12. *Do you agree with the JCRA's proposal to designate JT with SMP in the retail market for leased lines in Jersey? If not, why not?*

4.2 Responses

Airtel and Sure agreed with the JCRA's assessment, and with the proposal to designate JT with SMP in the retail market for leased lines.

Longport expressed a view that the symmetrical nature of JT and Sure's businesses is not evidence of competitive network development but rather a potential opportunity for "tacit collusion". Longport proposed that both Sure and JT should be designated as having SMP.

[6] This method of assessment is known as the *Modified Greenfield* approach. This approach assumes that there is no *ex ante* regulation in the market in question, but that upstream *ex ante* regulation is in place.

JT did not agree with the assessment or with the proposed SMP designation. In particular, JT proposed that all operators can access JT's network at a wholesale level, so ubiquity is not an advantage at the retail level, and all OLOs could potentially bundle products in a similar way to JT. JT was critical of the limited nature of information on pricing. Finally, JT proposed that the analysis of potential state countervailing buyer power (CBP) which was put forward in Guernsey also applied in Jersey, because the market is equally contestable.

4.3 JCRA analysis

4.3.1 Joint dominance

The JCRA has considered Longport's view that JT and Sure should be designated with joint dominance in the retail market in Jersey. The JCRA notes that Longport has suggested that the structure of the markets is conducive to coordinated effects – it has not suggested that there are structural links between Sure and JT. According to the EC's SMP Guidelines, when assessing *ex ante* the likely existence or emergence of a market which is or which could become conducive to collective dominance, a regulator should analyse:

- Whether the characteristics of the market makes it conducive to tacit coordination;
- Whether such form is sustainable, that is whether the potential oligopolists have the ability and incentive to deviate; and whether other competitors, buyers or potential entrants have the ability and incentive to challenge any anti-competitive coordinated outcome.

The JCRA has reviewed the criteria set out by the EC to assess potential oligopoly. The finding that a market is highly concentrated is not, in itself, enough to find that its structure is conducive to tacit coordination. The JCRA notes its view of potential countervailing buyer power in the retail leased lines market, and notes that actual and potential entrants have the ability and incentive to challenge any coordinated outcome. The JCRA does not therefore agree that JT and Sure are collectively dominant.

4.3.2 Separate markets for retail on-island and off-island leased lines

The JCRA has accepted points made by respondents and defined separate markets for retail on-island and off-island leased lines. The consultation carried out a competition assessment for a single market, and the JCRA has extended its analysis to consider each market separately. The JCRA addresses JT's points on competition assessment through this process.

4.3.2.1 Market shares

JT's market share of the *retail on-island* leased line market is significantly higher than its share of a combined on-island/off-island market. Whereas JT's market share stands at just over 70% in the combined market, its share within the retail on-island market is significantly higher at 82%. In the latter market, Sure's share stands at 14% (compared to 22% in the combined market) with Newtel holding a 4% share (compared to 7% in the combined market).

JT's market share of the *retail off-island* leased line market is correspondingly lower than that held in the combined market. Indeed, JT is no longer the leader in terms of market share held in the provision of retail off-island circuits. Sure holds the biggest share within this market with a market share of 45%, with JT holding 39% and Newtel accounting for the remaining 16%.

According to the SMP Guidelines[7], dominance concerns normally arise where an undertaking has a relatively stable market share of over 40%, and according to established EU case law, market shares in excess of 50% are in themselves, save in exceptional circumstances, evidence of dominance. The market share figures would indicate a strong presumption of dominance in the retail on-island market, but not in the retail off-island market, but the JCRA has continued to assess existing and potential barriers to entry in both markets.

4.3.2.2 Control of infrastructure not easily replicated

The JCRA noted in the consultation that JT has the benefit of a ubiquitous access network in Jersey, which means it has the necessary infrastructure (active and passive) to reach almost any site on the island within a reasonably short timeframe and without incurring significant costs. JT has expressed a view in its response that ubiquity is not essential in order to compete, and further that all operators can gain access to JT's network at a wholesale level.

Considering first the *retail on-island* market, the JCRA does not agree with this view. While an OLO can build its own infrastructure to connect to an individual customer, or attempt to lease third party duct or fibre capacity to an individual site, the costs of such network extensions are generally high relative to the value of the services provided, and if the OLO attempts to pass on these costs to its customer, it is unlikely to be competitive with an incumbent which may already be connected to the customer site, or have infrastructure close to it. For an OLO, a large proportion of the incremental costs to supply a leased line relate to the construction of physical infrastructure.

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[7] *Ibid.*, Para.76.

The owner of a ubiquitous network has several other advantages over an OLO. It is likely to be able, on average, to serve new customers faster. It does not have to rely on third party services, which reduces the possibility of technical limitations, and offers greater levels of control of network equipment. The amount of network infrastructure offers advantages in building diverse routes.

The JCRA considers that ownership and control of infrastructure which is not easily replicated is less important in the *retail off-island* market. This is because OLOs are less reliant on purchasing wholesale inputs from JT, as there are alternative wholesale off-island options available.

For all of these reasons, in the retail market for *on-island* leased lines, JT derives the benefit of an existing network which takes it into, or close to, most sites in Jersey. The JCRA agrees that, to some extent, anti-competitive elements of this benefit would be addressed by having a well-functioning wholesale market, which would enable OLOs to have access to wholesale products on appropriate terms, and at appropriate prices. However, despite existing wholesale regulation, JT's share of the *retail on-island* leased line market is still well above the level which would be presumptive of dominance, and it is the JCRA's view that JT continues to benefit from control of infrastructure which is not easily replicated.

4.3.2.3 Economies of scale and scope

The JCRA maintains that its assessment of economies of scale and scope for a combined retail market applies also to a retail market for *on-island* leased lines, and for a retail market for *off-island* leased lines. In Jersey, JT is likely to benefit from economies of scale due to ownership of an access network. However, the small size of the market limits the economies of scale which can be achieved by any communications provider. JT offers the broadest range of services, and is likely to be able to achieve economies of scope.

4.3.2.4 Profitability

In the consultation, the JCRA noted its reservations regarding the use of separated accounting information to come to a judgement about profitability. The JCRA also carried out a broad assessment of leased line pricing. It was stated in the consultation that the JCRA's intention was not to undertake a comprehensive survey or to create an international pricing benchmark, but rather to seek information which would help to reach a conclusion as to whether or not the cost of retail leased line pricing is high in the CI compared with similar jurisdictions, and if so, why.

The result of this exercise was not conclusive. In the consultation, the JCRA noted that for on-island retail connections of less than 300 metres, JT is often more expensive than comparative operators in other jurisdictions for lower capacity circuits, but is often cheaper for higher capacity circuits. The JCRA wishes to make clear that because of the inconclusive nature of the pricing and profitability assessments, it has not taken pricing or profitability into account in the SMP assessment.

4.3.2.5 Vertical integration

In the consultation, the JCRA's preliminary view was that the vertical integration of the main suppliers of retail leased lines in Jersey may restrict market entry, and may provide the ability and incentive for a vertically integrated operator to leverage power from the wholesale market to the retail market. The JCRA noted that, in the retail leased line market, a vertically integrated supplier which had SMP in the upstream wholesale market could, for example, bundle its retail leased lines with other non-regulated services such as IP feed, data storage and/or other value-added downstream service in a way which would restrict a market entrant's ability to compete.

JT contests this view, and proposes that any service provider could do the same bundling, given the regulated access that is available to JT's wholesale products. In JT's view, the point of wholesale regulation is to give all service providers the same ability to effectively "vertically integrate".

The JCRA agrees that effective wholesale regulation should address an OLO's ability to enter the retail *on-island* and *off-island* leased line markets, and should enable an OLO to combine a wholesale product with its own investment in other products and services. However, as discussed above, there are advantages associated with control of infrastructure and economies of scale and scope which apply also to vertical integration.

4.3.2.6 Countervailing Buyer Power

In the consultation, the JCRA proposed that Countervailing Buyer Power (CBP) was not likely to be a factor which mitigated market power in Jersey. The JCRA noted that the States of Jersey is likely to be the only organisation on the island that may be capable of exercising buyer power because of its purchase of a large volume of retail leased lines (and other services). The GCRA came to a different conclusion in Guernsey, where CBP was proposed to be a significant factor in mitigating any market power.

JT argues that the JCRA has not properly accounted for CBP in its assessment in Jersey, and that the market for retail leased lines is no less contestable than the market in Guernsey.

The JCRA has reviewed its analysis of CBP in both Guernsey and Jersey. The JCRA notes that the market for retail on-island leased lines is significantly bigger in Jersey than it is in Guernsey, so the ability of any purchaser to have an impact on the market is considerably smaller. The States of Jersey contract for leased lines is a smaller proportion of the total market than the States of Guernsey contract in Guernsey. This effect is further heightened because the States of Jersey contract is more fragmented than that of the States of Guernsey. In particular, provision of leased lines for education is included in Guernsey but contracted separately in Jersey. For these reasons, the JCRA does not consider that CBP is as strong a mitigating factor in Jersey as it is in Guernsey.

4.3.2.7 Potential competition

The JCRA noted in the consultation that it is appropriate to consider specifically the extent to which potential competition in the form of potential market entry and/or expansion may act as a constraint on an SMP operator's pricing and behaviour.

The JCRA noted that Sure is investing in its own infrastructure in Jersey, and both Sure and Newtel have increased their shares of the retail market over the last 2 years as JT's share has declined. In the JCRA's view, the presence of two alternative suppliers of retail leased lines suggests that barriers to entry are not insurmountable. However, JT's market share within the *retail on-island market* still remains substantially above the level which would be presumptive of dominance while the significant market share movements in recent years that have been observed in the *retail off-island* market – where Sure has now supplanted JT as market leader and where Newtel has also established an important market presence – would indicate that it is less likely that any operator is dominant in the provision of such circuits.

4.3.2.8 Analysis of barriers to entry

The JCRA has reviewed the competition assessment in light of its decision to define separate markets for retail on-island and retail off-island leased lines.

In considering *retail on-island* leased lines, the JCRA notes JT's high and persistent market share. The JCRA has considered barriers to entry and expansion which may mitigate the market power which is presumed on the basis of the market share. The JCRA notes that this assessment corresponds to an assessment of the first and second criteria of the "three criteria" test. That is, the JCRA has considered whether there are high and non-transitory barriers to entry to the retail on-island leased lines market, and has considered whether or not the market tends towards effective competition.

The JCRA's conclusion is that, while they are not insurmountable, high and non-transitory barriers persist in the *retail on-island* leased lines market, particularly those associated with control of infrastructure not easily replicated, and the cost (particularly sunk cost) of network infrastructure, which enables JT to provide retail leased line services typically faster and at a lower cost than its competitors. In considering whether the market tends towards effective competition, the JCRA notes that both Sure and Newtel have built market share in the retail on-island market over the last two years, but this growth has come from a very low base. In the two-year period (to H1 2013), Sure has increased its market share from 11% to 14%, while Newtel has doubled its share, rising from 2% to 4%. As a result, the total market share accounted by these two operators combined (i.e. the non-JT share) has risen over this period from 14% to 18%. In the JCRA's view, the retail on-island leased line market meets the first two criteria of a three criteria test assessing whether the retail market should be subject to *ex ante* regulation.

The JCRA has extended its analysis to consider the third criterion, that is the extent to which competition law is sufficient. The application of competition law is generally directed to a specific complaint against a particular form of behaviour which has already occurred, while the market review process considers the dynamic of an overall market, and is a prospective analysis which does not depend on proving instances of abuse of a dominant position, but will take into account actual and potential competition problems. Competition law interventions are unlikely to be sufficient where the compliance requirements of an intervention to redress a market failure are extensive, or where frequent and/or timely intervention is indispensable. The JCRA notes that, in the limited examples of competition law cases in telecoms throughout Europe, competition law has generally been used to address specific instances where a market is already competitive, or at least tending towards competition. The JCRA does not consider that competition law is sufficient to address the market failures that result from the first two criteria being met.

In considering the retail *off-island* leased lines market, the JCRA notes that market share movement over the last two years suggests that barriers to entry are being overcome, and that the market cannot be considered to be susceptible to *ex ante* regulation. This finding is supported by the JCRA's review of the competition assessment for the retail off-island market.

For all of these reasons, the JCRA considers that the *retail on-island* market for leased lines in Jersey meets the three criteria which would render it susceptible to *ex ante* regulation. The JCRA's competition assessment of the retail on-island market for leased lines leads it to conclude that JT is dominant in the market for *retail on-island* leased lines and will be designated with SMP. No operator is dominant in the market for *retail off-island* leased lines.

4.4 JCRA conclusion

The JCRA has decided that (i) JT and Sure are not jointly dominant in the retail market for leased lines, (ii) JT is dominant in the retail market for on-island leased lines, and (iii) no operator is dominant in the retail market for off-island leased lines.

5. Wholesale market definition

5.1 Product market

5.1.1 The JCRA's consultation proposals and questions

The JCRA's proposed conclusions on the definition of wholesale product markets were as follows:

- the wholesale leased lines market should not be narrowed to reflect the delivery technology used nor broadened to encompass passive infrastructure;
- all bandwidths used for delivering wholesale leased lines are in the same market;
- resellers of wholesale leased lines should not form part of the market and the market should not be should not be defined on a narrower basis to reflect customer use of leased lines;
- self-supply should not be included within the wholesale market;

Q13. *Do you agree that the JCRA's preliminary conclusions outlined in relation to the retail leased lines market are mirrored in the wholesale market? If not, why not?*

Q14. *Do you agree that the wholesale market should not be broadened to include dark fibre and/or duct access? If not, why not?*

Q15. *Do you agree that resellers should not be included within the market? If you do not agree, why not?*

Q16. *Do you agree that the wholesale market should not be defined on a narrower basis to reflect customer use of leased lines? If not, why not?*

Q17. *Do you agree that self-supply should not be included in the wholesale market? If not, why not?*

5.1.2 Responses

JT, Sure and Airtel agreed with the JCRA's proposals that resellers should not be included in the market; that the market should not be narrowed to reflect customer use of a leased line (for example, whether the leased line is used for backhaul or for supplying a retail customer); and that self-supply should not be included in the wholesale market.

JT and Sure agreed that passive infrastructure such as dark fibre and duct access should not fall within the leased line market. However, Airtel proposed that dark fibre and duct access should be included because the prices of equipment required to 'light' fibre have come down significantly and large bandwidths can be supported by low cost equipment.

5.1.3 JCRA analysis

The JCRA notes respondents' agreement that resellers should not be included in the market; that the market should not be narrowed to reflect customer use of a leased line; and that self-supply should not be included in the wholesale market.

The process of defining markets to be included in this review entails considering the extent to which products and services are substitutes for each other, and so would fall within the same product market. The JCRA proposed in the consultation that upstream services such as dark fibre and duct access would not be good substitutes for wholesale leased lines, and so would not fall within the same product market, and notes that this view is consistent with the conclusions reached by other telecoms regulators. However, the JCRA recognises concerns expressed by Airtel regarding upstream products and services such as dark fibre and duct access, and will monitor developments in that market.

5.1.4 JCRA conclusion

The JCRA has decided that its conclusions on retail market definition are mirrored in the wholesale market and that the wholesale market (i) should not be broadened to include dark fibre/duct access, (ii) should not encompass resellers, (iii) should not be defined on a narrower basis to reflect customer use of leased lines and (iv) should not include self-supply.

5.2 Geographic market

5.2.1 The JCRA's consultation proposals and questions

In the consultation, the JCRA proposed the following geographic markets:

- there are separate geographic markets for Jersey and Guernsey;
- there are separate markets for the provision of on-island and off-island wholesale leased lines in Jersey, and

- there are no particular areas within Jersey where conditions of competition are appreciably different to the extent that they constitute separate geographic markets.

5.2.2 Geographic markets in Jersey and Guernsey

Q18. *Do you agree with the JCRA's preliminary conclusion that separate geographic markets exist for Jersey and Guernsey? If not, why not?*

5.2.2.1 Responses

JT, Sure and Airtel agreed with the JCRA's proposals that there are separate markets in Jersey and Guernsey; that on-island and off-island wholesale leased lines fall in separate markets; and that all off-island wholesale leased lines fall within the same market.

Longport reluctantly agreed that Jersey and Guernsey are separate markets, and reiterated its view that the Channel Islands are a single structure in which JT and Sure are an oligopoly.

Airtel commented that it believes that pricing should be the same across both islands.

5.2.2.2 JCRA analysis

The largest suppliers of wholesale leased lines in Jersey and Guernsey are JT and Sure, and both operators are present in both islands at the retail level. However, in the JCRA's view, there is no uniformity of pricing across the islands[8], and while some functions are centralised or shared, both operators generally treat the islands, as distinct geographic units in terms of marketing and operations, each with their own distinct policies in relation to planning and the deployment of infrastructure generally.

In the JCRA's view, the markets may converge at some point to the extent to which they could be considered to be a single geographic unit, but this is unlikely during the lifetime of this review.

The JCRA addressed Longport's concerns on oligopoly in the context of the retail market, and its analysis applies also in the wholesale market.

[8] The JCRA notes that wholesale price controls currently apply on both Jersey and Guernsey.

JT reiterated points noted earlier in the context of the retail market regarding its view of the treatment of areas which are more competitive than others, even if this does not lead to differentiated markets.

5.2.2.3 JCRA conclusion

The JCRA has decided that separate geographic markets for the supply of wholesale leased lines exist for Guernsey and Jersey.

5.2.3 On-island and off-island leased lines

Q19. *Do you agree that there are separate geographic markets for on-island and off-island wholesale leased lines? If not, why not?*

5.2.3.1 Responses

JT, Sure, Airtel and Longport agreed with the JCRA's proposals that on-island and off-island wholesale leased lines fall in separate markets.

5.2.3.2 JCRA analysis

The JCRA notes agreement that separate markets exist for wholesale on-island and wholesale off-island leased lines.

In the consultation, the JCRA emphasised the need to ensure that there is no gap, or "ransom strip" between the wholesale on-island and off-island markets, and the JCRA maintains this view. This issue is discussed further in the competition assessment of the wholesale off-island market.

5.2.3.3 JCRA conclusion

The JCRA has decided that separate markets exist for the supply of wholesale on-island and off-island leased lines in Jersey.

5.2.4 Separate off-island markets within Jersey/Guernsey and elsewhere

Q20. *Do you agree that separate markets do not exist for wholesale off-island leased lines between Jersey and Guernsey, and off-island leased lines elsewhere? If not, why not?*

5.2.4.1 Responses

JT, Sure and Airtel agreed with the JCRA's proposals that all off-island wholesale leased lines fall within the same market.

Longport proposed that there should be separate markets for inter-island and international services because local operators have more infrastructure inter-island than they do internationally. Longport expressed a view that, although contracts for international services can be taken with a wide range of international telecoms providers, there is a requirement to purchase a half circuit from a local operator. In Longport's view, buying internationally does not circumvent the power of the local incumbents, it simply moves the problem to a different part of the supply chain.

5.2.4.2 JCRA analysis

The JCRA has considered whether Longport's points on the differences in supply conditions between the supply of inter-island leased lines and international leased lines warrants the definition of separate markets. The JCRA recognises that local operators are likely to have more control inter-island than they do internationally, but does not believe that there is sufficient evidence of the impact of this variation to justify the definition of separate markets.

5.2.4.3 JCRA conclusion

The JCRA has decided that separate markets do not exist for wholesale off-island leased lines between Jersey and Guernsey, and off-island leased lines elsewhere.

5.2.5 Separate geographic markets within Jersey

Q21. *Do you agree that there are no particular areas within Jersey where the conditions of wholesale competition are such that they may constitute separate geographic markets? If not, why not?*

5.2.5.1 Responses

JT expressed a view that segments of the market (e.g. high bandwidth products within St. Helier) have greater levels of competition at both the wholesale and retail levels than others. In JT's view, whilst the differences may not be sufficient to justify separate markets, they should be factored in when considering the imposition of remedies.

Airtel agreed that the whole of Jersey constitutes a single market.

5.2.5.2 JCRA analysis

The JCRA maintains its view that variations in competitive conditions do not result in clear and persistent boundaries which would indicate a separate geographic market within Jersey. The JCRA has received no compelling evidence of response in the market to differing geographic conditions, and notes that a finding of a smaller geographic market within Jersey would need to be evidenced by data which showed the clear boundary between different areas in terms of demand and supply.

However, the JCRA recognises that conditions of competition vary to the extent that some areas will be more competitive than others, and that both the geographic areas and the extent of competition will change over time. In the JCRA's view, it is important to recognise that JT is not subject to the same competitive pressures at the same time across all of Jersey, and this has been taken into account in the competition assessment rather than in the market definition.

5.2.5.3 JCRA conclusion

The JCRA has decided that there are no particular areas within Jersey where the conditions of wholesale competition are such that they may constitute separate geographic markets.

6. Wholesale market SMP assessment

In the consultation, the JCRA proposed two markets for wholesale leased lines:

- the market for ***wholesale on-island leased lines***, and
- the market for ***wholesale off-island leased lines***.

6.1 Market for Wholesale On-Island Leased Lines

6.1.1 The JCRA's consultation proposals and questions

In the consultation, the JCRA proposed that JT should be designated with SMP in the wholesale market for on-island leased lines. This was because JThas a stable market share in excess of 95%, and is still the *de facto* monopolist in the provision of on-island wholesale leased lines in Jersey. While this is strongly presumptive of dominance, the JCRA also considered other factors which might mitigate JT's market power.

The JCRA considered that JT's access network confers competitive advantage in the market, along with its ability to take better advantage of economies of scale and scope, and its vertical integration. The JCRA's preliminary view was that JT's position in the wholesale market for on-island leased lines would confer the ability and incentive to leverage market power into the retail market, and into the adjacent wholesale market for off-island leased lines.

The JCRA also took into account the nature of competitive conditions in the retail leased lines market in Jersey, and noted that JT continues to retain a very large market share at the retail level. Although there is some build-out of alternative infrastructure by competing operators, OLOs are likely to remain dependent on wholesale inputs from JT for the foreseeable future, both for their retail offerings and for extending their own networks.

Q22. *Do you agree with the JCRA's preliminary conclusion that JT is dominant in the provision of wholesale on-island leased lines within Jersey? If not, why not?*

Q23. *Do you agree with the JCRA's proposal that JT should be designated with SMP in the market for wholesale on-island leased lines? If not, why not?*

6.1.2 Responses

Sure, Airtel and JT agreed with the JCRA's assessment, and agreed that JT should be designated with SMP in the wholesale market for on-island leased lines in Jersey.

6.1.3 JCRA analysis

The JCRA maintains its view that JT is designated with SMP in the wholesale market for on-island leased lines in Jersey.

6.1.4 JCRA conclusion

The JCRA has determined that JT is dominant in the provision of wholesale on-island leased lines in Jersey and hence that it should be designated with SMP in this market.

6.2 Market for Wholesale Off-Island Leased Lines

6.2.1 The JCRA's consultation proposals and questions

In the consultation, the JCRA noted that market shares held by the three providers of wholesale off-island leased lines are not stable and have shown considerable volatility over the past two years. In addition, the JCRA noted the existence of parallel sub-sea cables in which five different operators hold ownership rights and that there is a significant amount of actual and planned sub-sea off-island capacity in place. In the JCRA's view, these factors point strongly to the conclusion that no one operator holds a position of dominance within the relevant market, nor is any operator likely to do so within the timeframe of this review.

However, the JCRA expressed concern over the pricing of off-island connectivity, particularly of the higher capacity leased lines, and noted that this issue has been raised repeatedly by businesses in Jersey in the context of the retail market. While the structure of the market for wholesale off-island connectivity indicates that there are three main suppliers, and an additional two owners of capacity who could enter the market, so suggesting that customers have choice, the existence of alternative suppliers does not seem to have as yet impacted significantly on pricing.

The JCRA considered any additional impediments to customers in Jersey being able to access high quality cost effective off-island connectivity, particularly for high capacity leased lines. The JCRA noted that, at present, owners of off-island capacity who are not licensed in Jersey cannot offer services to customers in Jersey. This generally applies even to services which are limited to off-island connectivity. This means that, although there is sufficient off-island capacity, there may be a bottleneck which prevents customers in Jersey accessing the capacity. The JCRA invited comment on whether, in addition to the measures proposed in the wholesale on-island leased line market, it should introduce a specific off-island licence which would allow companies which own off-island capacity to offer wholesale access to that capacity to locally licensed operators, without necessarily offering services on-island as well.

Q24. *Do you agree with the JCRA's preliminary conclusions on dominance in the provision of wholesale off-island leased lines within Jersey? If not, why not?*

Q25. *Do you agree that a specific off-island licence would assist in ensuring that there is no impediment to accessing off-island capacity? If not, what alternatives do you suggest?*

Q26. *Do you agree with the JCRA's proposal that no operator is likely to be dominant in the market for wholesale off-island leased lines in Jersey? If not, why not?*

6.2.2 Responses

JT and Sure agreed with the JCRA's competition assessment and proposal that no operator should be designated with SMP.

Airtel did not agree with the SMP proposals, because, in its view, prices remain high. Airtel stated that the other two operators (Newtel and Sure) have set prices based on JT's whole sale price which remains high. In its view, off-island leased lines should be reviewed and benchmarked against other jurisdictions.

JT did not comment specifically on the JCRA's discussion regarding off-island licensing.

Sure expressed a view that, given a finding of no SMP in the off-island market, an off-island licence would be an inappropriate and unjustified regulatory measure. In Sure's view, this could result in existing licensed providers being left with stranded assets and investments, which could also act as a constraint on future investment intentions.

Airtel supported the notion of issuing specific off-island licences, and proposed that, as an added measure, the JCRA should identify all off-island capacity providers (potential and existing) and find out what they need to become active or more active suppliers in Jersey for off-island capacity.

6.2.3 JCRA analysis

The JCRA has reviewed its analysis of off-island connectivity. In the consultation, the JCRA noted the existence of parallel sub-sea cables in which five different operators hold ownership rights. The JCRA acknowledges Longport's points regarding the status of owners of capacity, and agrees that this is not the same as offering wholesale leased lines, and indeed the JCRA notes that no such assumption was made in the JCRA's analysis. However, it is important to note the existence of subsea capacity. The JCRA's assessment is that the existence of subsea capacity is not likely to constrain off-island connectivity, even taking into account potential increase in demand for bandwidth.

In the consultation, the JCRA opened up a discussion of possible impediments or bottlenecks to off-island connectivity, particularly as the existence of multiple operators does not seem to have led to reduced prices. The JCRA has considered all comments, and notes that it does not at present believe that a new form of off-island licence is justified. At present, the JCRA's understanding is that neither BT nor Vodafone (ie owners of subsea cable which are not licensed operators in Jersey) has a physical or regulatory presence in Jersey. This means that even if a Jersey operator wanted to connect directly to, for example, Vodafone or BT, there would be nothing in Jersey for it to connect to. This cannot be addressed by regulation in Jersey – for this situation to be different, it would require an external operator to establish a physical presence, and that would be an investment decision on the part of the external operator. The JCRA does not consider that there are regulatory barriers to an external operator deciding to do this, and also considers that regulatory structures are already in place which would enable this to happen. Given the requirement for external investment by an external operator, the JCRA has decided that it will not introduce a new form of licence in advance of demand for such a licence, and should there be demand, it will consider whether existing measures could meet the same objectives.

The JCRA maintains its view as set out 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.

6.2.4 JCRA conclusion

The JCRA has determined that (i) no operator is dominant in the provision of wholesale off-island leased lines in Jersey and (ii) there is no requirement at this time for a specific off-island licence to deal with impediments to accessing off-island capacity.

7. Proposed remedies in the retail and wholesale markets

7.1 Introduction

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.

The JCRA undertook a review of the market for business connectivity, defined markets for retail leased lines; wholesale on-island leased lines; and wholesale off-island leased lines. Following an assessment of competitive conditions in the markets, the JCRA came to a preliminary view that while no operator has SMP in the wholesale market for off-island leased lines, JT has SMP on the markets for retail leased lines and wholesale on-island leased lines.

The JCRA has now considered all responses to the consultation before coming to its decisions.

In determining questions relating to competition, the JCRA is obliged to ensure that so far as possible, questions are dealt with in a manner which is consistent with the treatment of corresponding questions arising under Community law in relation to competition within the European community.[9]

The JCRA has taken into account the implications of designating an operator with SMP, such that the SMP designation has no bearing on whether that undertaking has committed an abuse of a dominant position within the meaning of Article 82 of the EC Treaty or national competition laws. It merely implies that, from a structural perspective, and in the short to medium term, the operator has and will have, on the relevant market identified, sufficient market power to behave to an appreciable extent independently of competitors, customers, and ultimately consumers.[10] This means that, in proposing *ex ante* remedies should there be a confirmed SMP finding, The JCRA is not obliged to prove that there have been abuses of dominance, but rather notes that the finding of SMP itself indicates that the SMP operator has the ability and incentive to take advantage of a dominant position.

In its response to the consultation, JT proposed that the overall analysis should consider the definition of the retail then the wholesale markets, and that the competition assessment should consider first the wholesale then the retail markets. Any SMP finding or remedies in the retail markets would only follow if, after the imposition of wholesale remedies, there were considered to be any residual competition problems in the retail market.

[9] Part 10, Article 60, *Ibid.*
[10] SMP Guidelines, Para 30.

The JCRA notes that its analysis considered the retail market in the presence of wholesale regulation in the upstream market, and followed the modified greenfield approach.

7.2 Market remedies in the market for wholesale on-island leased lines

In the consultation, the JCRA proposed remedies in terms of:

- Access
- Non-discrimination
- Transparency
- Accounting separation
- Cost accounting & price controls

7.2.1 Access

7.2.1.1 The JCRA's consultation proposals and questions

In the consultation, the JCRA proposed an overall approach to access that it should be based on a reasonable request. It was noted that an obligation to meet reasonable requests for access means that an SMP operator would be expected to meet *all* reasonable requests for access, unless it can demonstrate that it is not technically or economically feasible to do so.

Condition 25.1 of JT's licence states that:

"The Licensee shall at the request of an Other Licensed Operator or if directed by the JCRA, make Equal Access available to that Other Licensed Operator. The JCRA may direct the terms upon which such Equal Access shall be provided and the JCRA may make subsequent directions modifying or supplementing the regulation of Equal Access".

The JCRA proposed that JT should be obliged to make equal access available to OLOs in response to a reasonable request for access.

The JCRA proposed to direct the terms upon which equal access shall be provided as follows:

- JT should be obliged to comply with the access obligation in a manner which is fair, reasonable and timely. 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.

The JCRA identified three broad options as to how best to ensure access to off-island connectivity:

Option 1: impose a broad and general access obligation, which would enable OLOs to request access. This option relies on the market definition of the on-island wholesale leased lines market as including access to off-island capacity in order to ensure that the goal of being able to access off-island connectivity is met.

Option 2: add a condition to the access obligation which deals specifically with the need to ensure that OLOs can request access to facilities required to meet off-island connectivity.

Option 3: add a condition to the access obligation which directs how access to off-island connectivity is to be provided. This could include, for example, an obligation that the SMP operator should provide neutral locations at submarine termination points where an on-island operator could connect directly with off-island capacity.

Q28. *Do you agree with the JCRA's proposals on imposing access obligations? If not, why not?*

Q 29. *The JCRA has identified 3 options as to how it could address the requirement to ensure access to off-island capacity. Which of these options would you favour? Why?*

7.2.1.2 Responses

JT stated that it did not consider that there have been any changes in the wholesale market for leased lines to justify any changes to the remedies that are already in place. In JT's view, If CICRA wishes to impose new remedies, it needs to present evidence showing the deficiencies with the current situation.

Sure proposed that an access obligation for leased lines should be made with reference to Condition 28 of JT's licence. With reference to ensuring access to off-island capacity, Sure stated a preference for either Option 1 or Option 2, and noted that it has no evidence that JT is not already complying with these obligations.

Airtel agreed with the JCRA's proposals on access obligations, and expressed a preference for Option 3. In Airtel's view, this option allows for the most comprehensive and detailed process by which the question of access to off-island capacity can be addressed. This is important during initial stages of bringing in competition in the market as it will avoid any room for ambiguity in how connections are to be provided.

7.2.1.3 JCRA analysis

The JCRA confirms that JT's access obligations will be imposed under the existing Condition 28 of its licence.

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 proposed that JT should be obliged to comply with the access obligation and lease out circuits in a manner which is fair, reasonable and timely; should negotiate in good faith with OLOs requesting access; and should not, without appropriate justification and consultation, withdraw access to facilities already granted. These are not new obligations. Rather, the JCRA's proposals clarify how the overall obligation is to be understood and implemented. The JCRA believes that this clarity is important in ensuring that SMP operators have a shared understanding of how the regulator views the implementation of the obligations, and ultimately how the regulator will come to decisions in any future disputes. The JCRA believes that it is also important that the further explanation of remedies is provided in a way which will facilitate consistent implementation in Jersey and Guernsey, given the differences in underlying legislation and in the operators' licences.

The JCRA understands that JT has expressed a view that there is no justification for any additional remedies in the leased lines market, because there have been no changes in the market and the current remedies work well. However, the market review is an objective process which considers whether any operator has SMP. This finding does not imply that an SMP operator has committed an abuse of a dominant position. It merely implies that, from a structural perspective, and in the short to medium term, the operator has and will have, on the relevant market identified, sufficient market power to behave to an appreciable extent independently of competitors, customers, and ultimately consumers.[11] This means that, in proposing *ex ante* remedies should there be a confirmed SMP finding, the JCRA is not obliged to prove that there have been abuses of dominance, but rather notes that the finding of SMP itself indicates that the SMP operator has the ability and incentive to take advantage of a dominant position.

The JCRA has considered respondents' points on how the access obligation may best ensure that there is no impediment to on-island operators' ability to access off-island capacity. The JCRA noted earlier that it has decided not to introduce an off-island licence at this stage, particularly because there has not been demand from off-island operators up until now, and the JCRA considers that there are no regulatory barriers to dealing with any such demand should it arise.

The JCRA noted in the competition assessment that its finding that no operator has SMP in the wholesale off-island market is contingent on the appropriate *ex ante* regulation of the wholesale on-island market, in that it assumes that the way in which the on-island market is defined, and the remedies which are being put in place, will ensure that there are no barriers preventing an on-island operator accessing off-island capacity. The approach which the JCRA has taken to identifying remedies sets out the requirement for JT to offer access to wholesale on-island leased lines, and also sets out the ways in which JT is expected to behave in the market.

The JCRA expects that the remedies which are being put in place in the wholesale on-island market will ensure that there is no "ransom strip" for OLOs seeking off-island connectivity, and this applies to their ability to secure access, and to the conditions under which access is granted. Should the JCRA find that this approach is not sufficient to prevent barriers to accessing off-island capacity, the JCRA will revisit its conclusion.

7.2.1.4 JCRA conclusion

The JCRA has decided to impose an obligation on JT requiring it to meet all reasonable requests for access to wholesale on-island leased lines, with this obligation specifying that JT should comply in a manner which is fair, reasonable and timely; should negotiate in good faith with OLOs requesting access and that JT should not, without appropriate justification and consultation, withdraw access to facilities already granted.

[11] SMP Guidelines, Para 30.

7.2.2 Non-discrimination

7.2.2.1 The JCRA's consultation proposals and questions

In the consultation, the JCRA proposed that a non-discrimination obligation is a necessary obligation to ensure that an SMP operator's behaviour in the market does not disadvantage its actual and potential competitors.

According to 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".

The obligation not to show undue preference or to unfairly discriminate is emphasised again in Condition 31.1, which states that:

"The Licensee shall not show undue preference to, or exercise unfair discrimination against, any User or Other Licensed Operator regarding the provision of any 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 Subsidiary or Joint Venture 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".

The JCRA proposed that JT shall be obliged not to show undue preference to, or exercise unfair discrimination against, any OLO regarding the provision of wholesale on-island leased lines.

Q30. *Do you agree with the JCRA's proposals on imposing non-discrimination obligations? If not, why not?*

7.2.2.2 Responses

JT reiterated its view that it did not consider that there have been any changes in the wholesale market for leased lines to justify any changes to the remedies that are already in place.

Airtel and Sure agreed with the JCRA's proposals.

Sure expressed a view that it is important for the JCRA not only to re-confirm the need for JT to comply with Condition 28.2 and Condition 31.1 of its licence, but also to scrutinise more closely its internal practices to ensure that JT does not favour its own retail arm with regards to the pricing and availability of leased lines. Sure continues to have concerns over the alleged provision of non-standard leased lines by JT's wholesale arm for exclusive use of its retail arm for connectivity of States of Jersey services. This includes the siting of Core Network equipment within a States building (Cyril Le Marquand House) to facilitate this practice.

7.2.2.3 JCRA analysis

The JCRA notes Sure's points and considers that JT's non-discrimination obligations are clear.

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

7.2.2.4 JCRA conclusion

The JCRA has decided to impose an obligation on JT requiring it to offer wholesale on-island leased lines on terms which do not discriminate between OLOs, and which do not discriminate between OLOs and JT's own operation.

7.2.3 Transparency

7.2.3.1 The JCRA's consultation proposals and questions

In the consultation, the JCRA noted that a transparency obligation sets out the manner in which an SMP operator should provide information about its activities in the market in which it has been found dominant. Generally, a transparency obligation supports other obligations addressing how the SMP operator is expected to behave, in that the transparency obligation sets out how the SMP operator will demonstrate compliance with its other obligations.

It is the JCRA's view that where an SMP operator offers products on a wholesale market where it has been found to have SMP, these products should be appropriately documented. An OLO should be able to easily access technical information about wholesale products; information about prices and other terms and conditions; and process information including a change mechanism.

Condition 26.1 of JT's licence states that:

"The Licensee shall, within ninety (90) days of the commencement of this licence make publicly available a template Reference Interconnect Offer ("RIO") which shall contain the terms, schedules of Interconnection and pricing of Interconnection

between the Licensees network and any Other Licensed Operator whose Licence terms enables them to Interconnect with another Licensed System".

The JCRA proposed that JT should be obliged to publish and maintain a Reference Offer for wholesale leased lines, including appropriate technical specifications, and including a mechanism explaining how changes to the reference Offer will be made and notified.

The JCRA proposed that JT should be required to publish a standard SLA which would govern JT's relationship with the OLO. It is increasingly seen as good practice to publish Key Performance Indicators (KPIs), and this could be done as part of the SLA.

The JCRA proposed that JT should be required to publish prices and non-price terms and conditions for wholesale leased lines. Condition 33.1 of JT's licence, provides that publication of any changes should be made, and the JCRA informed, at least 21 days before changes come into effect. Operators have informed JCRA that in practice, one month's notice is provided, and the JCRA believes that there is merit in standardising the requirement to publish changes to price and non-price terms and conditions for wholesale on-island leased lines one month before they come into effect.

The JCRA proposed that OLOs and the Regulator should be notified in advance of the launch of a new wholesale product. This is necessary to ensure that OLOs have the same opportunity as the SMP operator's downstream arm to react to changes in the wholesale offer and reflect them in the OLO retail offer. The JCRA suggested that the notice period should be 3 months.

Q31. *Do you agree with the JCRA's proposals on imposing transparency obligations? If not, why not?*

7.2.3.2 Responses

JT reiterated its view that it did not consider that there have been any changes in the wholesale market for leased lines to justify any changes to the remedies that are already in place.

Airtel and Sure agreed with the JCRA's proposals.

Sure proposed that there should be standardisation of the notification periods between Jersey and Guernsey. Sure proposed that there should be provision in the notice period for new wholesale products for the situation where all parties agree that a shorter notice period would be beneficial. Sure proposed that the JCRA should consider the appropriate notice period for the withdrawal of existing products, because many withdrawals can have major planning considerations for OLOs.

Sure expressed a view that JT should be obliged to include wholesale on-island leased lines within its Reference Offer. In Sure's view, it is vitally important that JT is not allowed to positively discriminate in the provision of wholesale leased lines for use by its own retail arm, and the market would have greater assurance of the likelihood of non-discrimination through the publication and maintenance of a properly defined RIO structure. Sure also believes that the existing failings in relation to documentation and process would be also addressed as part of those RIO requirements.

7.2.3.3 JCRA analysis

In the JCRA's view, the production and maintenance of appropriate technical specifications and a mechanism for change is an integral part of the product offering. The JCRA does not intend at this stage to mandate particular products (as is often done in other jurisdictions) and is relying on SMP operators to produce appropriate information. The JCRA also intends that there should be a common approach in Jersey and Guernsey to the technical information which is made available, and to the processes associated with change, and its elaboration of transparency requirements is intended to address this objective.

The JCRA agrees that there should be standardised notification periods for Jersey and Guernsey, and this is detailed in Annex 2. The JCRA agrees that Sure's proposal that notification periods for new wholesale products may be reduced if all parties agree has merit. The JCRA also considers that a pragmatic approach is required to the definition of "new products" which recognises that minor changes to existing products do not require the same notification process as the introduction of new products. The JCRA has considered whether to introduce specific notice periods for the withdrawal of existing products, but has decided against this as a case by case approach would be more suitable.

The JCRA notes that transparency obligations are essential in order that JT can demonstrate compliance with its other obligations, and the JCRA concludes that for this reason, and in order to ensure consistency between Jersey and Guernsey, JT should continue to be subject to transparency requirements.

7.2.3.4 JCRA conclusion

The JCRA has decided to impose a transparency obligation on JT requiring it to (i) publish and maintain a Reference Offer for wholesale on-island leased lines, (ii) publish a standard SLA which would govern JT's relationship with the OLOs who access wholesale leased line services, (iii) publish and notify prices and non-price terms and conditions for wholesale leased lines, and publish and notify changes at least 30 days in advance of their coming into effect, and (iv) provide appropriate advance notification to the JCRA and OLOs when launching new wholesale leased line products and services.

7.2.4 Accounting separation

7.2.4.1 The JCRA's consultation proposals and questions

In the consultation, the JCRA noted that, generally, accounting remedies are imposed in order to ensure that the SMP operator is not discriminating against OLOs, for example by cross-subsidising some products at the expense of others, and is not leveraging its power in one market into another.

Condition 29 of JT's licence requires that:

"…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 noted that the production of separated accounts is not an end in itself, but should be designed to demonstrate compliance with other obligations, particularly those relating to transparency, non-discrimination and price controls.

Generally, in the JCRA's view, there must be visibility in how costs are allocated to particular products and services, that the information must be discrete and detailed enough to demonstrate that there is no discrimination, that there is no cross subsidy across JT's retail products and services, and that the difference between wholesale and retail prices is such that an equally efficient competitor could compete in the market.

The JCRA noted that JT is currently obliged to provide separated accounting information, and proposes that this obligation should be maintained. The JCRA reserves the right to provide further guidance and direction to JT in order to ensure that the production of separated accounts meets JCRA's objectives.

Q32.	*Do you agree with the JCRA's proposals on imposing accounting separation obligations? If not, why not?*

7.2.4.2 Responses

JT reiterated its view that it did not consider that there have been any changes in the wholesale market for leased lines to justify any changes to the remedies that are already in place.

Airtel agreed with the JCRA's proposals.

Sure noted the benefits of separated accounts, for CICRA, for the telecommunications market, and for Sure's own commercial costing purposes. As no defined changes were proposed in the consultation document, Sure did not comment further.

7.2.4.3 JCRA analysis

The JCRA notes respondents' comments, and maintains the obligation that JT will be expected to produce separated accounting information.

7.2.4.4 JCRA conclusion

The JCRA has decided to retain the existing obligation requiring JT to provide separated accounting information.

7.2.5 Cost accounting and price controls

7.2.5.1 The JCRA's consultation proposals

In the consultation, the JCRA noted that cost accounting obligations are generally put in place to ensure that an SMP operator can demonstrate that it is not engaging in practices which would unfairly disadvantage its competitors.

Condition 30.1 of JT's licence states that:

"The Licensee shall not unfairly cross subsidise or unfairly subsidise the establishment, operation or maintenance of any Telecommunication Network or Telecommunication Services".

Condition 30.2 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 proposed that JT should be obliged to maintain its current cost accounting obligations, with a view to demonstrating its compliance with other obligations.

In the consultation, the JCRA noted that price controls can be established in the retail and wholesale markets, and usually limit the price which the SMP operator can charge. Price controls are usually put in place to address the potential for the SMP operator to impose margin squeeze[12], or to cross-subsidise.

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 proposed that a price control continues to be necessary in the wholesale market for on-island leased lines, and proposed that this review should make provision in principle for a price control as a necessary and proportionate remedy. The JCRA proposed to review the structure and level of the price control immediately following the final decision. This further specification of the price control remedy would be subject to consultation.

Q33. *Do you agree with the JCRA's proposals for imposing cost accounting and price control remedies?*

7.2.5.2 Responses

JT reiterated its view that it did not consider that there have been any changes in the wholesale market for leased lines to justify any changes to the remedies that are already in place.

Airtel agreed with the JCRA's proposals.

Sure agreed in principle with the JCRA's proposals on cost accounting and price controls, but questioned whether JT does, in fact, currently provide its separated accounts on a current cost basis. In Sure's view, no CCA adjustments have been applied within any of the annual results published to date by JT.

[12] A margin (price) squeeze arises when a dominant operator, which provides a wholesale input on which other operators rely in order to compete at the retail level, prices its upstream (wholesale) services and downstream (retail) services in such a way as to prevent others from competing with it at the downstream level.

7.2.5.3 JCRA analysis

The JCRA notes broad agreement with its proposals on cost accounting obligations, and will maintain JT's current cost accounting obligations. The JCRA notes ongoing work on separated accounts as per its 2014 work programme.

The JCRA proposed in the consultation that a price control obligation should be imposed at a high level, and reviewed immediately following the publication of the decision. The review would consider both the structure and the form of the price control, and the JCRA's intention is to examine alternatives to the current retail minus control. The JCRA maintains its view that a price control is justified in the wholesale market for on-island leased lines.

7.2.5.4 JCRA conclusion

The JCRA has decided that JT should be obliged to maintain its current cost accounting obligations, with a view to demonstrating its compliance with other obligations. Issues raised in relation to CCA will be addressed under the review of separated accounts in the 2014 work programme. The JCRA maintains that a price control is a necessary and proportionate remedy. The JCRA intends to review the structure and level of the price control immediately following the final decision.

7.3 Market remedies in the market for retail on-island leased lines

7.3.1 The JCRA's consultation proposals and questions

In the consultation, the JCRA proposed to find that JT has SMP in the retail market for leased lines. The JCRA noted that it expected to monitor closely the impact in the retail market of wholesale regulation, should an SMP finding and consequent remedies in the wholesale market be confirmed.

The JCRA identified three options, should its preliminary SMP finding in the retail leased lines market be confirmed.

Option 1: rely on remedies in the wholesale market to address actual and potential competition problems in the retail market.

Option 2: impose a specific remedy designed to address particular competition problems.

It may be that wholesale regulation on its own may not be sufficient to address competition problems in the retail market, and that specific retail remedies may be required. Option 2 would put in place the lightest possible remedy which would achieve objectives in the retail market.

Option 2 would put in place an obligation on the SMP operator not to unreasonably bundle retail leased line services with other products and services.

Option 3: put in place a full suite of remedies in the retail market.

Q27. *The JCRA has identified 3 options as to how it could address JT's proposed SMP in the retail leased line market. Which of these options would you favour? Why?*

7.3.2 Responses

Sure proposed that Option 2 would seem to offer the most appropriate and proportionate remedy to address JT's SMP in the retail leased lines market. If JT complies with the obligation not to unreasonably bundle retail leased line services with other products and services then option 3 would not be necessary. However, Sure requested that should Option 2 fail, then CICRA would consider the implementation of Option 3 within a very short space of time.

Airtel proposed that Option 3 would be most suitable. In Airtel's view, Option 1 will not give the desired result as retail minus 20% is a very low margin. Airtel believes that the minimum discount for any such measure should be 40-50%. In Airtel's opinion, Option 2 would be difficult to implement and enforce.

JT proposed that, should an SMP finding in the retail market be confirmed, it would be appropriate to rely on remedies imposed in the wholesale market [ie Option 1]. JT expressed a view that further analysis was required of competition problems in the retail market before any remedies were considered. In addition, JT put forward a view that where regulators have sought to regulate bundles, the focus was on whether the bundle could be replicated, and not on how an operator priced its non-regulated product. In JT's view, wholesale remedies already mean that there is sufficient competition for the regulated services within the bundle. JT believes that the services in the bundle which are not regulated can presumably be replicated by all competitors, and that the JCRA should not consider price regulation of competitive products.

7.3.3 JCRA analysis

The JCRA has reviewed its definition and competition assessment of the retail market in Jersey, and has concluded that there are separate markets for retail on-island and retail off-island leased lines. The JCRA's decision is that JT is designated with SMP in the market for retail on-island leased lines, and that no operator has SMP in the retail market for off-island leased lines.

The JCRA has reviewed its approach to retail remedies in the light of its extended analysis. The JCRA was clear in the consultation that regulatory controls on retail services would only be imposed where the JCRA considered that wholesale measures would fail to achieve the objective of ensuring effective competition and addressing customer benefit. The JCRA notes that wholesale regulation has been in place in the leased line market in Jersey for some years, and while the JCRA has found JT with SMP in the wholesale on-island and retail on-island markets, there has been some level of market entry and expansion. The JCRA seeks to build on this by developing its regulatory approach in the wholesale on-island market. In this Initial Notice, the JCRA, while not imposing new remedies, has elaborated and explained how it intends to implement wholesale remedies, and has noted that there will be a consistent approach across Jersey and Guernsey.

The JCRA noted in the consultation that change to the retail minus control (where the margin was increased from 9% to 20% in 2012) may not yet have fully worked through into the market. The JCRA considers that this change, taken together with the forthcoming review of the price control, and the implementation of the elaborated measures as set out in Annex 2, may be sufficient to address JT's SMP in the retail on-island market. The JCRA has therefore decided not to impose additional regulatory controls in the retail market at this time. However, as the JCRA has found JT to have SMP in the retail on-island market, it will closely monitor the impact of changes in the wholesale on-island market on the retail market, and will revisit this conclusion if necessary.

7.3.4 JCRA conclusion

The JCRA has decided not to impose additional regulatory obligations on JT in the market for retail on-island leased lines at this time but will instead closely monitor the impact on the retail market of changes in the wholesale on-island market, and will revisit this conclusion if necessary.

7.4 Other issues and priorities

In the consultation, the JCRA provided an opportunity for stakeholders to identify other issues and priorities in relation to the supply of business connectivity services which were not specifically dealt with in its consultation document.

Q34. *Are there topics or priorities not covered in this consultation which you would like to raise?*

7.4.1 Responses

Sure expressed a view that pricing structure should be included at this stage of the consultation. In particular, Sure proposed that there should be discussion of its view that JT charges a premium for >300m leased lines in Jersey, and that this discriminates against OLOs.

Sure also proposed that CICRA needs to ensure that it collates and analyses market information on a timely basis as, in Sure's view, failure to do so would limit its ability to conduct regular and timely reviews that will be necessary given the speed at which the business connectivity markets are changing.

Sure proposed that CICRA needs to standardise the classification of leased lines into wholesale and retail by clearly defining the criteria for each and making sure all operators report on same consistent basis.

JT noted that it had highlighted its views on the most important issues to be addressed in its response to the consultation.

Longport proposed that the regulatory complaints and appeals processes should be simplified so that they are as cost effective and rapid as possible. Longport emphasised its view that the opening of the telecoms markets to international operators is essential for economic growth and diversification, and that the regulator should look at its legal powers, and the latest legal thinking on the regulation of oligopolies.

7.4.1 JCRA analysis

The JCRA has addressed points raised by Sure regarding pricing structure earlier in this document. The JCRA notes that JT's current pricing structure which differentiates between leased lines less than or more than 300m is not a regulatory requirement, but is the result of a commercial decision made by the operator. The JCRA expects that approaches to pricing can be justified, and that particularly in a market where there has been a finding of SMP, the choice of pricing structure does not abuse the dominant positon in the market.

The JCRA notes Sure's comments on market information. The JCRA has noted throughout this response to consultation that the SMP findings on off-island markets are contingent on well-functioning and appropriately regulated on-island markets. The JCRA has signalled its intention to monitor developments in the leased lines markets in order to ensure that the remedies which are being put in place are implemented in a timely manner.

The JCRA noted earlier in this document that operators must be consistent in the categorisation and treatment of wholesale and retail customers, and that legacy issues revealing inconsistencies on the part of all operators had become evident during the market review process. Consistency will be particularly important for SMP operators to ensure they are compliant with their non-discrimination obligations.

The JCRA notes Longport's points on the regulatory complaints and appeals process. The JCRA has addressed Longport's points on off-island operators and on the regulation of oligopolies earlier in this document.

7.4.2 JCRA conclusion

The JCRA notes all comments, and has taken the view that the additional issues raised by respondents to the consultation do not require further regulatory action at this time.

Annex 1: Legal background and licensing framework

Legal background

The Telecommunications (Jersey) Law 2002[13] (***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[14]. 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[15] specifically provides that the JCRA may include in any licence conditions that are:

- intended to prevent or reduce anti-competitive behaviour[16];
- relate to, or imposing requirements about, competition in relation to telecommunication services, telecommunication systems, apparatus and telecommunication equipment.[17]

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[18].

The provisions which are applicable to dominant operators include (but are not limited to) measures addressing the availability and associated terms of Other

[13] Telecommunications (Jersey) Law 2002, revised edition 06.288, 1 January 2013.
[14] Part 3, Article 7 (2) (a).
[15] 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
[16] Part 5, Article 16 (1) (i).
[17] Part 5, Article 16 (2) (4) (a).
[18] Part IV of the Class III licence.

Licensed Operator (OLO) access to networks and services[19]; the requirement not to show undue preference or to exercise unfair discrimination[20]; the requirement not to unfairly cross subsidise[21], 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[22].

In addition, the Class III licence includes conditions specific to the provision of leased circuits[23], 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[24].

[19] Condition 25, Class III licence.
[20] Condition 31, Class III licence.
[21] Condition 30, Class III licence.
[22] Condition 33, Class III licence.
[23] Condition 28, Class III licence.
[24] Condition 34, Class III licence.

ANNEX 2: Initial Notice

Statutory powers

The JCRA's statutory powers are set out in Annex 1 of this response to consultation and Initial Notice.

The provisions of the consultation document and this Response to Consultation shall, where appropriate, be construed with this Decision. 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.

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.

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.

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

The JCRA has decided not to impose additional regulatory obligations on JT at this time, but will closely monitor the impact on the retail market of regulation in the wholesale on-island market.

SMP obligations in relation to 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.

Access

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 could be done 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".

<u>Cost accounting and price controls</u>

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 3: 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.