JCRA Review of the Telecommunication Market in Jersey

Consultation Paper 2009 - T3

1. Introduction and Background

In this consultation document the JCRA sets out its preliminary views on whether any telecommunications operators have significant market power ("SMP") in any of the seven markets which have been analysed[1]. The JCRA now invites interested parties to comment on those views.

In 2004 the JCRA issued a Decision and Direction[2] regarding dominance in the telecommunications market in Jersey. That was about a year after the entry into force of the Telecommunications (Jersey) Law 2002 ("the Law") which laid the foundation for the introduction of competition in this sector. The market in Jersey was in the early days of liberalization and at this time the competitive market was at service level on fixed line telecommunications with providers of services relying on limited wholesale access to the Jersey Telecom Limited's ('JT') fixed network.

In the mobile sector, JT had an absolute monopoly on mobile telecommunications through its GSM service until 2006 when, following allocation of spectrum licences for both 900MHz and 2100MHz to Cable & Wireless Jersey ('CWJ') and Jersey Airtel Limited ('JAL') infrastructure competition in the provision of mobile telecommunications opened the mobile market.

The 2004 Decision found JT to be dominant in six telecommunications markets mentioned below. That Decision has never been updated or amended and it is appropriate to do so now. In a draft report prepared by consultants Regulaid[3] at the request of the JCRA, Regulaid recommended that a market analysis exercise be carried out in relation to seven markets, by way of updating the 2004 Decision. That recommendation had support from those operators who commented on the draft Regulaid report.

The JCRA therefore is consulting on its provisional findings of dominance/SMP concerning telecommunications markets in Jersey. The JCRA's intention is to issue a final decision on dominance/SMP concerning telecommunications markets in Jersey after consideration of any comments it receives in response to this consultation.

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[1] Throughout this document the terms SMP and dominance are used interchangeably.
[2] 2004-1 Telecommunications Market Dominance Decision Paper and Direction - available at: http://www.jcra.je/pdf/040429%20Decision%20on%20JT%20Dominance.pdf
[3] Review of the Jersey Telecom Limited Separated Accounts and Wholesale Access Provision – accessible at: http://www.jcra.je/pdf/090817%20Regulaid%20Review%20of%20Jersey%20Telecom%20Ltd%20REDACTED.pdf

2. Relevant Telecommunications Markets

Any consideration of dominance or SMP must begin with the definition of relevant markets. The European Union's regulatory regime is based upon the Framework Directive (EU Directive 2002/21) which provides for market analyses to be carried out, a list of markets recommended for ex ante regulation and uniform Guidelines on market analysis and the assessment of market power. While the Law does not require the JCRA to follow the EU regime, it is generally considered best international practice by many National Regulatory Authorities (NRAs) outside the EC and thus is used as a benchmark.

Against that background, in 2004 the JCRA looked at a number of markets in which JT appeared to be dominant. Those markets were identified as:

1. Fixed-line telecommunications services;
2. Fixed-line telecommunications networks;
3. Leased circuits;
4. Mobile telecommunications services;
5. Mobile telecommunications networks and
6. Fixed-line broadband

In 2004 JT supplied virtually 100% of the products and services identified in the markets listed above, either through its retail division or via its wholesale products.

Since 2004 the broad market dynamics in Jersey have changed. Two new Class II licensed entrants, CWJ and JAL, have entered the mobile market. This also has a spill-over effect into some other markets. However, although there are currently three Class II licensees in the Jersey market, infrastructure competition has been largely restricted to mobile network deployment. On-island fixed networks remain substantially under the control of JT, although there is some competition in the provision of off-island backhaul.

Furthermore changes have come about as a result of both advances in technology and new and innovative types of products.

In 2009 the JCRA considered it appropriate to review the telecommunications markets again as recommended by Regulaid[4]. Regulaid recommended that the JCRA should analyse the following markets:

1. Access to the public telephone network at a fixed location for residential and non-residential customers.
2. Call origination on the public telephone network provided at a fixed location.
3. Call termination on individual public telephone networks provided at a fixed location
4. Voice call termination on individual mobile networks

[4] ibid

5. On island wholesale leased lines
6. Off island wholesale leased lines
7. Wholesale broadband services provided on fixed line network

Regulaid proposed these market definitions in its draft report, and no operator that provided comments to the draft Regulaid report objected to these market definitions. Therefore, the JCRA has preliminarily concluded, subject to views expressed in the consultation, that these seven markets should be used as the basis for its SMP/dominance analysis. Moreover, in 2004 the JCRA found JT to be dominant in a market defined as mobile telecommunication networks. Because of substantial changes that have taken place in this market since 2004, the JCRA also has preliminarily concluded that it is appropriate to also reassess dominance in this market.

Consultees are asked to comment on the JCRA's proposed market definitions

3. Significant Market Power and Dominance

The terms SMP and dominance are used interchangeably. This is because in the EU regulatory regime, the concept of SMP has been aligned to the competition law concept of dominance.

The concept of dominance as it has been formulated in EU case law is a position of economic strength enjoyed by an undertaking affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately consumers[5]. Market power is generally defined as the ability to price profitably above the competitive level, and thus SMP or dominance represents a high degree of market power.

The EU Guidelines identify a range of factors to consider in determining whether a firm has SMP:

- Market share. Substantial market share is generally needed for a firm to have market power. Though possible, it would be unusual for a firm with a market share below 25% to have significant market power. By contrast, according to established EU case law, very large market shares of 50% or more are in themselves evidence of the existence of a dominant position.
- The overall size of an undertaking.
- Potential competitors that could enter the market. If barriers to entry are low, the possibility of entry may prevent a firm increasing its price despite having a high market share. If barriers to entry are high, the firm is more likely to have the ability to substantially increase its prices.

[5] *United Brands v Commission* Case 27/79 [1978] ECR 207

- Control of essential infrastructure that cannot be easily duplicated. If a firm controls essential network infrastructure it may be able to impede competition.
- Absence of customer buying power.
- Economies of scale. An established firm may be able to achieve substantially lower per-unit costs than a competitor could, which may act as a barrier to entry.
- Economies of scope. An established firm may be able to offer several products at once, and achieve lower costs than a competitor.
- A highly developed distribution and sales network. A well-established firm may have exclusivity agreements with distributors, making it difficult for competitors to enter the market.
- Vertical integration.
- Barriers to expansion.

4. Analysis of Identified Markets

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

Fixed-line telecommunications is provided over circuits that are connected via underground cable networks either of copper, fibre-optic or a hybrid copper-fibre-optic network. The services provided over such networks can be provisioned either as retail products of the incumbent operator, JT, or via its wholesale division to Other Licensed Operators (OLOs)

JT still provides all fixed lines in Jersey for both business and residential subscribers. At present JT does not offer any wholesale access to its fixed line provision. Since no other operator has developed any fixed line infrastructure in Jersey since the liberalization of the market in 2003, access can only currently be provided using the existing network infrastructure operated by JT. The cost of providing an alternative underground network structure is a major barrier to entry for any OLO considering infrastructure competition. As concluded by many other NRAs, access to the incumbent operator's infrastructure is an important factor in encouraging service competition in the telecommunications market, ensuring that consumers are able to access innovative and competitively priced telecommunications services.

The JCRA takes the preliminary view that JT is dominant in the supply of fixed line access in Jersey for residential and non-residential customers.

Consultees are asked to say whether they agree with this view.

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

Analysis of the market conducted by the JCRA[6] shows that as at the end of 2008 no other operator had deployed or intended to deploy any substantial fixed network infrastructure since the JCRA Decision of 2004. However, the JCRA notes that since the Decision JT has provided Carrier Selection ('CS') as a wholesale product which has been used by some OLOs.

In the retail service sector while there has been entry into call provision using CS, it can be seen from Figure 1, the latest available data showing the total number of call minutes, that those originated on JT's network amounted to 68% of that total although these market sectors have been open to competition since the publication of the JT Reference Interconnect Offer ("RIO") in 2005.

29% of total call minutes were originated through the wholesale provision of CS used by CWJ (Sure). and the remaining 3% by Newtel using Voice over Broadband.

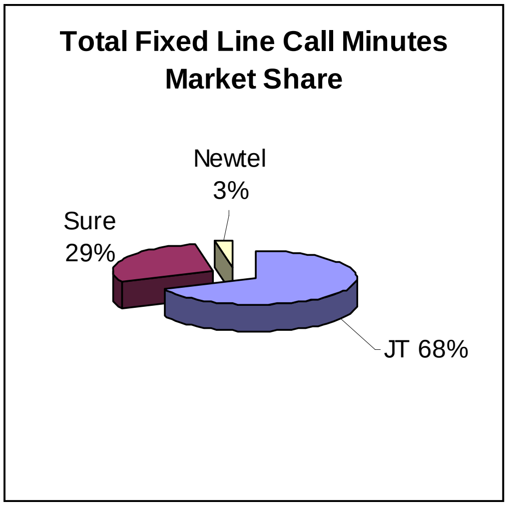

Figure 1. Fixed Line Call Minutes 2008

Therefore, although there has been some entry into the retail service sector, the JCRA still concludes that JT's sole control over the only fixed line network in Jersey acts as a significant barrier to retail entry or expansion in the market for call origination on the public telephone network provided at a fixed location. Moreover, while the JCRA notes that there has been some substitution from fixed to mobile telecommunication services, business customers in particular remain reliant on fixed-line services, and fixed-line services also remain necessary for a broadband connection.

From this the JCRA takes the preliminary view that JT is still dominant in the provision of call origination at fixed locations.

Consultees are asked to say whether they agree.

[6] 2008 Telecommunications Statistical Review - available at: http://www.jcra.je/pdf/090224%202008%20Telecom%20stats%20in%20Jersey.pdf

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

JT provides the only fixed network in Jersey and thus all calls to fixed numbers (in the case of Jersey numbers with the prefix 01534) must be terminated directly on its network.

It therefore has an absolute monopoly in the market for call termination on individual public telephone networks provided at a fixed location.

JT does not currently provide Wholesale Line Rental (‘WLR’), Local Loop Unbundling (‘LLU’) or Fixed Number Portability (‘FNP’) thus it is not possible for OLOs to fully replicate the JT call termination service.

From this the JCRA takes the preliminary view that JT remains dominant in the provision of fixed network call termination.

Consultees are asked to say whether they agree.

4.4 Voice call termination on individual mobile networks

Unlike in the fixed termination market, where if a wholesale product such as LLU were offered and taken up by OLOs, it would be possible for an OLO to terminate a call on what was JT’s network, the same is not true in the mobile termination market.

The originating operator does not have any available substitute to call termination on an individual network. Furthermore, it is unrealistic to envisage that customers would use multiple SIM cards to take advantage of lower termination charges, and even if they did, a call can only be terminated on the mobile network of operator “X” by that very operator.

Finally, the termination rate charged by JT is in practice a reciprocal rate in that it is the same rate charged by the OLOs to JT for terminating traffic on the OLO networks. In practical terms, therefore, JT does not have any countervailing buyer power in respect of the rates charged by OLOs.

For those reasons, and in common with the findings of NRAs in other jurisdictions, the JCRA takes the preliminary view that each mobile operator has SMP in respect of call termination on its own network.

Consultees are asked to say whether they agree.

4.5 On island wholesale leased lines

Wholesale access to on-island leased lines or private circuits ('PCs') has been available to OLOs since 2003 when JT first offered its retail private circuits to OLOs at a discounted rate. The JCRA further notes that this rate and the retail price against which it has been set has remained static over this period.

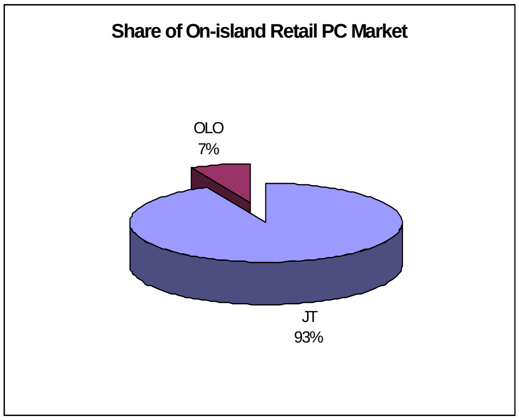

Figure 2. On-island PC Market Share

Leased circuits are important to business as the means of interconnection between operational sites and the internet. For the benefit of economic development of the island businesses should have available innovative and competitive offers in order to sustain long term growth and to embrace technological development. The main feature of leased circuits is the security of the connection offered as directly connected underground cables are robust and interference with the operation is minimized. On the other hand fixed connections are inflexible and have other constraints. Nevertheless in Jersey the finance sector is likely to continue to demand high-quality private circuit capacity for the foreseeable future.

Although OLOs have in some cases deployed wireless connections to support their own network infrastructure, no significant fixed network has been deployed by other operators since 2003. Wireless is also considered less secure and reliable than fixed networks, particularly by consumers within the finance sector on Jersey, which accounts for a significant portion of the PC market.

Although JT supplies OLOs with leased circuits at the wholesale level, this represents only service level competition and thus OLOs are reliant on the technologies offered by JT and thus the opportunities for differentiation are limited. Figure 2 shows the distribution of PC's resold by operator and it can be seen that JT is the largest provider of retail with 93% of the market and at the wholesale level it maintains 100% of the on-island market, which is a requirement regardless of the backhaul provision.

From this data the JCRA takes the preliminary view that JT remains dominant in the provision of leased circuits on Jersey.

Consultees are asked to say whether they agree.

4.6 Off island wholesale leased lines

Some OLOs have access to off-island backhaul that is independent of JT, although remaining reliant on JT for the provision of the on-island segment necessary to connect subscribers to that backhaul. As noted in (5) above, no significant on-island infrastructure development has been deployed by OLOs since liberalization of the telecommunications market in 2003. Many smaller OLOs rely on JT for the provision of Internet Protocol ('IP') access as these have no access to off-island backhaul.

Off-island leased circuits can be provided by OLOs over their own backhaul in some cases. However, the additional buyer power of JT as the largest supplier of leased circuits should enable it to create economies of scale in particular with backhaul to London where it has long standing arrangements for high capacity connections over an existing submarine cable system unavailable to OLOs. Thus, while the JCRA is of the view that to other locations in the UK or elsewhere the market is likely to be fully competitive it does nevertheless recognize the potential for offering wholesale access to certain London destinations.

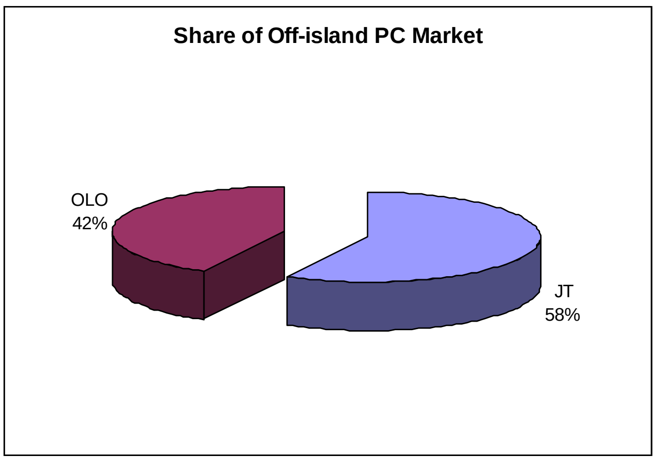

Figure 3 Off-island PC Market Share

The JCRA therefore concludes that the off-island market is competitive among those operators that have access to independent backhaul provision, and no single competitor holds a position of SMP.

Consultees are asked to state whether they agree.

4.7 Wholesale broadband services provided on fixed line network

JT has provided broadband services both as retail and as a retail-minus wholesale product since the market was liberalized in 2003. Newtel has been a wholesale customer since 2003 by virtue of its takeover of Interactive Online Ltd and recently CWJ has entered the market. Fixed line broadband relies on the existing JT network infrastructure for its delivery and as no OLO has deployed fixed networks since 2003 JT remains the sole provider of fixed broadband services.

The latest available statistical data for fixed line broadband (fig 4) shows that JT retains 79% share of the total broadband retail market for all types of broadband offer and 100% share of the wholesale market. While prices for broadband services have dropped since

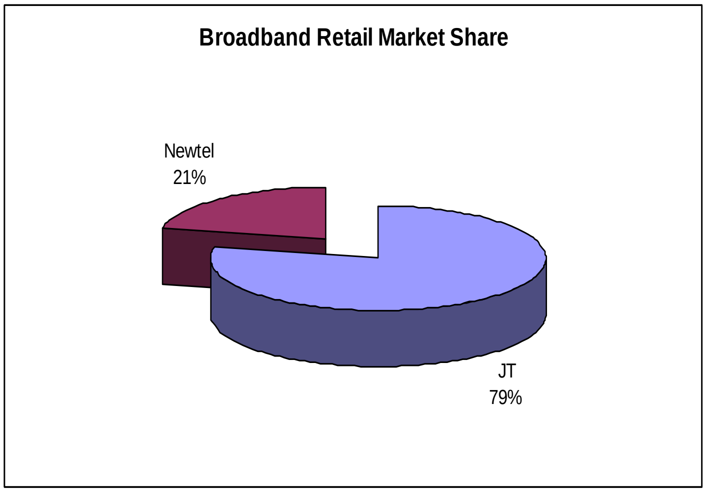

Figure 4 Broadband Retail Market Share (all types)

2003 by virtue of both price reduction and enhancement of delivery speed, the wholesale product has remained as 60% of the retail price. Competition in this sector has been based on price only as there is currently no wholesale offer from JT that enables differentiation on quality of service or other technical factors. Moreover, despite generally being more expensive than competitive retail offerings, JT has retained almost 80% of the retail market share. This provides evidence that factors other than price are discouraging retail customers from switching away from JT.

OLO share of the residential market has increased since 2003 as shown in Figure 5. Although broadband services are now also available over 3G mobile networks, the comparative reliability and speed does not make this an effective alternative to fixed line broadband in the majority of cases. JT now offers 8Mb/s ADSL services at contention rates of 50:1 (or 20:1 premium priced rate) while the mobile operators only advertise a theoretical maximum speed of 3.6Mb/s this is highly dependent on a number of indeterminate factors including location, time of day network congestion and signal quality. At the end of 2008 3G broadband accounted for only 7% of the total internet access market (Fig 6). However, the statistical data does not distinguish between wireless only users and users that also use mobile broadband, therefore it is likely that the percentage of wireless broadband is overstated.

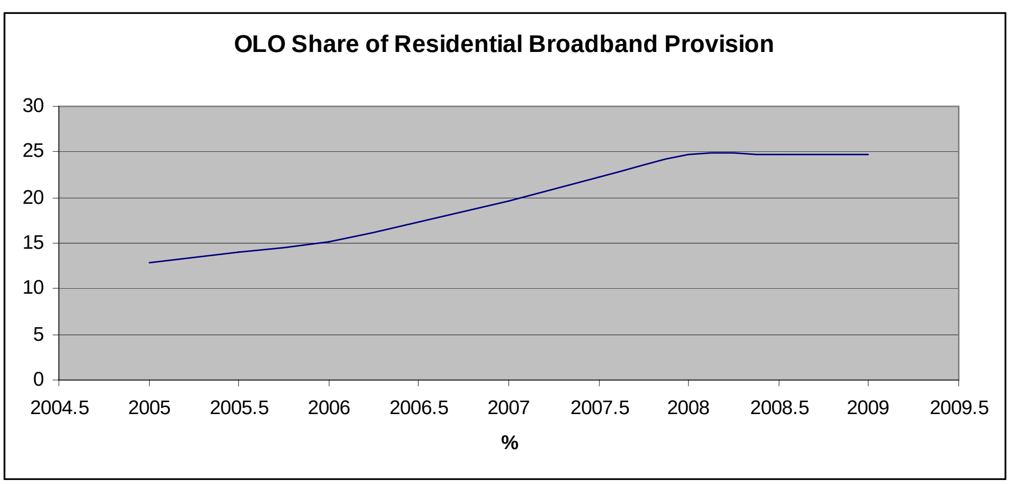

Figure 5 Market Share of OLO Residential Broadband Provision

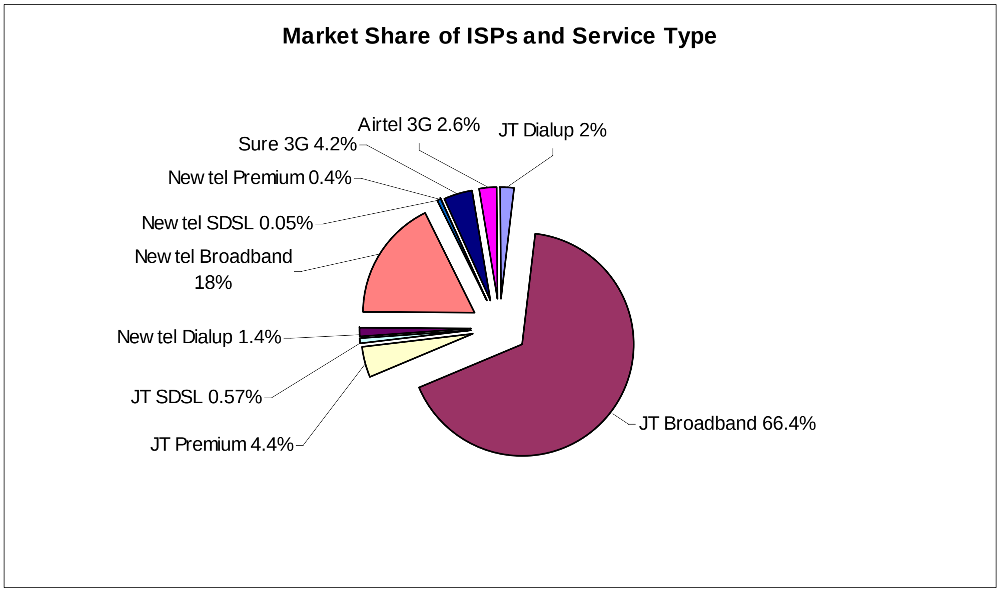

Figure 6 Market share of ISPs by Type

The JCRA therefore takes the preliminary view that JT remains the dominant supplier of fixed broadband services in Jersey.

Consultees are asked to state whether they agree.

4.8 The Mobile Networks and Services Markets

The 2004 Decision designated JT as being dominant in the markets for mobile networks and for mobile services.

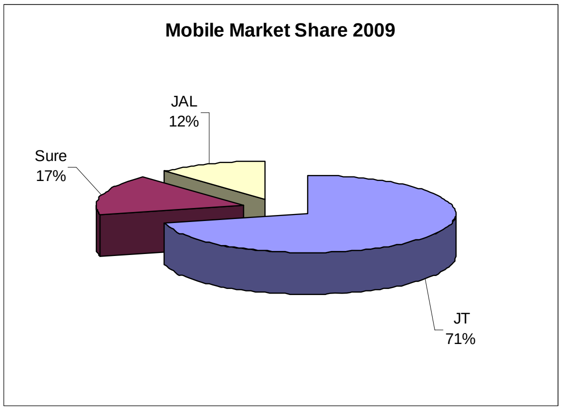

Figure 7. Mobile Market Share

At that time only JT operated a mobile telephone network in Jersey and thus was the only operator offering mobile services. As the only operator it was clearly dominant in the retail mobile telecommunications services market but as it did not offer any wholesale network products, such as Mobile Virtual Network Operator access facilities, it was also dominant in the mobile telecommunications network market.

In 2005 the JCRA consulted on the introduction of 3G spectrum licences and awards were made early in 2006. Since then new entrants CWJ and JAL have entered the mobile market offering both GSM and 3G UMTS services each having deployed suitable network equipment.

The mobile market now has active competition from three operators which ensures that consumers can now select an operator based on a number of factors including cost, service or innovative offers. The current market shares are as shown in Figure 2 and as can be seen JT still has the largest share of the market. However, although JT still holds this largest share it is now no longer able to be a price leader and consequently price competition now exists in the market. The market competiveness was further augmented in 2008 with the introduction of Mobile Number Portability. This enables consumers not only to change provider but to do so seamlessly.

Furthermore, the availability of competing mobile networks to Jersey Telecom lowers barriers to entry and expansion, compared to fixed-line markets where currently entry and expansion remains reliant on access to JT's fixed-line network.

Because there are signs that competition is leading to more consumer choice and lower costs, the JCRA is of the preliminary view that JT no longer has sufficient market power to enable it to substantially increase its retail prices. This is evidenced by the enhancement of mobile bundles since the introduction of competition. In July 2006, prior to the entry of CWJ, JT introduced its first entry level bundle which included 25 minutes to local numbers and 25 texts to any destination per month. The equivalent JT entry level offer now contains 75 minutes to any local fixed or mobile number and 75 texts to any destination per month. This represents a significant increase of consumer welfare. Prior to the introduction of competition JT provided no bundled minutes or texts in its entry level product. In addition consumers are now also able to choose bundles of calls and texts in various combinations from OLOs.

Therefore the JCRA is of the preliminary view that JT no longer holds SMP in the mobile services market and it is now competitive and potentially moving towards a fully competitive state where network operator shares will tend toward equilibrium. Consequently the JCRA is now of the preliminary view that JT is no longer dominant the retail sector.

The JCRA therefore intends, subject to this consultation, to remove the designation of dominance made in respect of JT in the mobile services market in 2004.

Consultees are asked to state whether they agree with this analysis and proposed course of action.

5. Preliminary Conclusions

The JCRA, having analysed the markets described in this document, has reached preliminary conclusions as follows:

1. **The appropriate relevant market definitions are the ones proposed by Regulaid, plus mobile telecommunication services.**

2. **Access to the public telephone network at a fixed location for residential and non-residential customers:** JT has SMP in this market.

3. **Call origination on the public telephone network provided at a fixed location:** JT has SMP in this market.

4. **Call termination on individual public telephone networks provided at a fixed location:** JT has SMP in this market.

5. **Voice call termination on individual mobile networks:** Each mobile operator, that is, JT, CWJ and JAL has SMP in the market for terminating calls on its own network.

6. **On-Island Wholesale Leased Lines:** JT has SMP in this market.

7. **Off-Island Wholesale Leased Lines:** No operator has SMP in this market.

8. **Wholesale Broadband Services Provided on a Fixed Line Network:** JT has SMP in this market.

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

Consultees are asked to comment on these preliminary conclusions.

6. Consultation Procedure:

Written comments on this Consultation Paper are invited, to be received no later than **5PM on 29 January 2010.** Submissions should be clearly marked "Comments on JCRA Consultation Document 2009-T3" and may be supplied either in hard copy or electronically, addressed (as appropriate) to:

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N.B. ***The JCRA intends to publish full non-confidential texts of any submissions received in response to this consultation. Thus, respondents to this consultation should provide a non-confidential version in their responses.***

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