



Mobile Call Termination

2017

Final Notice

Market Definition and Finding of Dominance

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Jersey Competition Regulatory Authority

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1. Executive Summary

- 1.1 The provision of wholesale voice call termination services is needed to support the ability of callers to make voice calls to Jersey mobile users.
- 1.2 Retail mobile service providers pay a charge (the mobile termination rate or **MTR**) to mobile network operators for the provision of voice call termination services.
- 1.3 MTRs represent one component of the cost of calls made by consumers. Because the cost of MTRs is passed through by the retail mobile provider to the consumer and given that the charges imposed by mobile network operators in Jersey are identical, there is little incentive for such operators and/or providers to negotiate with each other for a more favourable MTR, with all operators currently charging the maximum MTR permitted by the Jersey Competition Regulatory Authority (the **JCRA**).
- 1.4 The level of MTRs in Jersey is currently regulated by the JCRA. However, prior to any consideration as to whether the current regulatory cap on the level of such charges should change, for reasons of due legal process, there is a need to define the relevant market and establish whether there is the existence of significant market power. This is the purpose of this Final Notice.
- 1.5 This document follows a consultation issued by the JCRA in November 2016 (the **Consultation**) and an Initial Notice issued by the Authority in March 2017 (the **Initial Notice**)¹ to which stakeholders were invited to respond. It sets out the JCRA's considered position as to the relevant market and existence of significant market power in the provision of wholesale voice call termination services in Jersey, having taken into account the responses received to the Consultation and the Initial Notice.
- 1.6 In the JCRA's view, there are four separate relevant markets specific to four Jersey licensed operators, each of which hold significant market power in the provision of wholesale voice call termination services for calls to their own network.
- 1.7 The JCRA envisages that the period for this review will be 3 - 5 years. This is because the JCRA does not anticipate that market conditions will change over a shorter time frame such that the market definition would need to be revisited at an earlier point. The JCRA's view is that the only market development that could potentially affect market conditions would be the introduction of 5G, which is not likely to occur any earlier than the time frame indicated above. However, the JCRA will continue to monitor developments in this market and will consult again should market conditions change materially during the review period.

¹ Attached as Annex 1 to this Final Notice.

2. Background

- 2.1 Telecommunications networks, both fixed and mobile, need to be connected to one another in order that customers of those different networks are able to call each other.
- 2.2 Call termination means the completion of a call from a customer of another network. Mobile call termination (**MCT**) is a particular type of call termination service provided by a mobile network operator (**MNO**), which is the receiving operator. It enables the originating network operator to connect a call through to a customer of a different MNO.
- 2.3 Depending on the nature and origin of a call, there are a number of other services that support the conveyance of a call to its ultimate destination including call origination and transit which attract different charges. Those services are not within the scope of this review.
- 2.4 An MCT service therefore provides the originating operator access to the last leg of a call being made by one of its customers to the customer of the terminating MNO to allow the call to be completed. For this service, an amount known as the mobile termination rate (**MTR**) is paid to the MNO providing the wholesale call termination (**MCT**) service.
- 2.5 Regulators in many European countries have identified a need to ensure that MTRs are set at a level that reflects the efficient and cost-effective provision of those services.
- 2.6 In 2010, the Jersey Competition Regulatory Authority (the **JCRA**) found that there were distinct markets for the termination of calls on each mobile network in Jersey¹ and that each MNO held significant market power (**SMP**) for the termination of traffic on its own network. This conclusion has formed the basis of subsequent decisions by the JCRA to impose a price control on MTRs in Jersey². In September 2014, the JCRA issued a Final Notice in Jersey (which remains in force) that an MTR of 4.11 pence per minute (**ppm**) should be applied to MNOs in Jersey.
- 2.7 In November 2016, the JCRA issued the Consultation. The Consultation provided the input to the Initial Notice³.
- 2.8 The JCRA sought the views of the stakeholders on the following issues:
 - a. Do the MNOs active in Jersey have SMP on the relevant market?
 - b. If the MNOs do have SMP, is a price control, ie, setting an MTR, the most appropriate remedy?
 - c. If setting an MTR is the most appropriate remedy, what is the basis on which the MTR should be calculated?

² Decision on the Holding of Significant Market Power in Various Telecommunications Markets – <http://cicra.je/files/100420%20market%20review%20decision.pdf>

³ Case T1236GJ, CICRA 17/09, www.cicra.je

- 2.9 After consideration of the responses received to its Consultation, the JCRA issued its Initial Notice (**IN**):
- a. Defining the relevant market (the **market definition**), and,
 - b. Determining whether the MNOs active in Jersey have SMP on the relevant market (the **assessment of dominance**).
- 2.10 The JCRA received a total of three responses to its Initial Notice. These were from:
- Sure;
 - JT, and,
 - Airtel-Vodafone (Airtel)
- 2.11 After reviewing the responses received, the JCRA offered each respondent a meeting. The purpose of those meetings was to address areas where a respondent had indicated that it did not understand points made by the JCRA in the Initial Notice and/or for the JCRA to ask for clarification of points made in the response. Each respondent was offered the opportunity to provide a supplementary response to the JCRA covering these points, and each did so.
- 2.12 For ease of reference, the JCRA has numbered the paragraphs of Sure's responses. These numbered versions of Sure's responses, together with JT and Airtel's responses are attached to this Final Notice as Annex 2.
- 2.13 The JCRA has taken all responses and supplementary responses to the Initial Notice and the Consultation into account in reaching this Final Notice. The JCRA would like to thank each of the respondents for their input to this process. The non-confidential sections of the responses are published on the CICRA website, www.cicra.je.
- 2.14 The JCRA will continue to carry out its assessment as to the appropriate remedy in terms of whether the level of MTRs charged by those operators with SMP is appropriate. This will form part of a subsequent and separate consultation.

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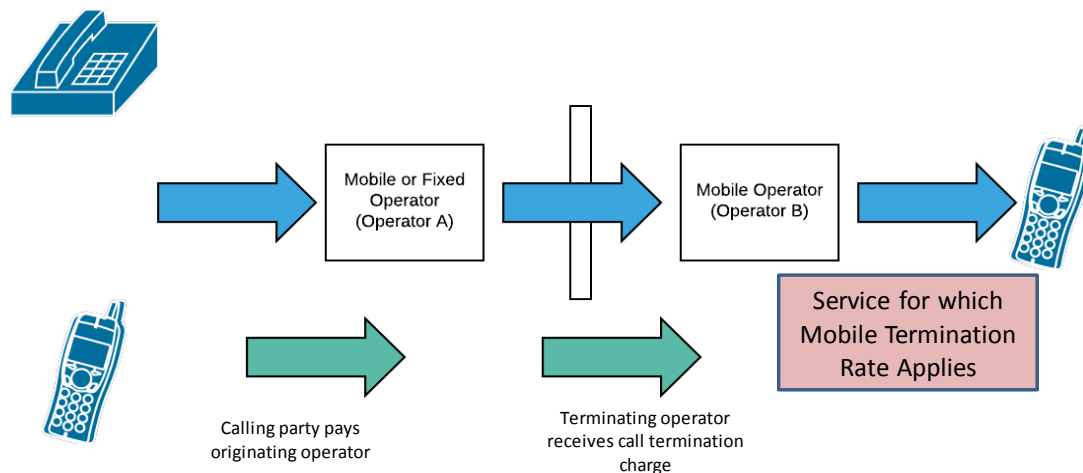
This document does not constitute legal, technical or commercial advice and is without prejudice to the legal position or the rights and duties of the JCRA to exercise regulatory powers generally.

3. Review of the Mobile Call Termination Market

Introduction

3.1 An operator originating a call to a mobile number (the **originating operator**) typically pays an amount known as the **mobile termination rate (MTR)** to the **mobile network operator (MNO)** providing the wholesale service. This is the current practice in Jersey (as in many countries in Europe and across the world). The call flow is illustrated in Figure 1, below :

Figure 1 : Mobile termination and calling network provider pays



3.2 In this section, the JCRA introduces its powers relating to price controls and how these are applied specifically to the provision of mobile call termination.

The Place of Price Control Regulation in the Regulatory Framework

3.3 The JCRA has specific powers to determine the maximum level of charges that operators may impose in certain markets. Set out in the following sections are:

- a. What these “price control” powers are;
- b. The generally accepted rationale for controlling prices in the telecommunications sector; and
- c. The approach which is commonly taken to controlling prices.

The powers of the JCRA

3.4 In accordance with Article 16 of the Telecommunications Law, the JCRA may grant a licence for the running of any telecommunications system specified in the licence. Licensees are subject to conditions set out in their licence, which, in the case of Class II and Class III licences, include a fair competition provision. It is, therefore, a pre-condition to the imposition of a price control upon a licensee by the JCRA that the licensee should first have been found to be ‘dominant’ in the regulated market (the concept of ‘dominance’ and

'significant market power' (**SMP**) are used interchangeably). This reflects the underlying rationale for price regulations, as explained in the following paragraphs.

The rationale for regulating prices

- 3.5 Dominance and SMP mean that a company has a position of economic strength in a market where as a result of that position, the company is not subject to the normal constraints that would be present in a competitive market, but is instead able to act to an appreciable extent independently of its competitors, its customers and, ultimately, consumers.
- 3.6 In a competitive market, if a non-dominant company were to raise prices above the competitive level, competitors could respond by offering more competitive pricing and customers would be able to switch away to these more competitive offers. In a market where a dominant player raises its prices above the competitive level, the ability of customers to switch away to more competitive suppliers is limited or may even be non-existent and since competition is fragile, the ability of competing suppliers to offer more competitive prices may, in any event, also be limited. A dominant provider can therefore charge prices that are above those that would prevail in a competitive market, to the detriment of consumers.
- 3.7 In a market subject to economic regulation, such as the telecommunications market in Jersey, the relevant regulatory body may take steps *ex ante* to prevent this type of harm arising by imposing a price control. In Jersey, as explained above, the JCRA has the power to impose this type of price control on licensees within a relevant market in which that licensee has been found to be dominant⁴.

Approach to MTR price regulation

- 3.8 The JCRA's approach to MTR price regulation (in respect of which it has taken account of the European Commission's recommended approach and the experience of other regulatory authorities in Europe) is as follows:
- a. Firstly, the relevant wholesale market(s) susceptible to *ex ante* regulation is defined⁵;
 - b. Secondly, the JCRA determines whether any operator(s) hold(s) a dominant position on any such market;
 - c. Thirdly, if the JCRA determines that such a dominant position exists and identifies a need for remedies, it proposes appropriate regulatory measures

⁴ In Class II and Class III licences, this power is set out in licence condition 27 (fair competition). The JCRA notes that Sure does not agree with the JCRA's assessment of its legal powers. As explained below, the JCRA is not required to consult on the correct interpretation of the law. However, for completeness, Sure's comments in this regard are noted in Appendix 1 to this Final Notice.

⁵ The main focus of an analysis of the relevant markets is to identify the competitive conditions prevailing in a market by assessing systematically the competitive constraints which are faced by undertakings in the market. A market review commences by defining a market, which is then analysed to assess the degree of effective competition.

- 3.9 Having considered the views of the respondents to its Consultation and Initial Notice, the JCRA is in a position to confirm the defined relevant markets and its analysis of the state of competition within these markets.
- 3.10 Where markets are deemed to be uncompetitive, the JCRA must consider appropriate regulatory obligations on any operator that has been identified to have significant market power. The regulatory obligations that might be appropriate in this case will form part of a separate review and are, consequently, outside the scope of this Final Notice.

4. Analysis – responses to Initial Notice and Conclusion

Introduction

4.1 Introduction

- 4.1.1 Any SMP designation consists of two distinct steps. First, the relevant product and geographic markets must be defined, and second, the question of whether the undertaking in question holds significant market power (**SMP**) on that market must be addressed. Such assessments are typically forward looking and so, for the purposes of this review, the JCRA will consider likely market developments over the next three to five years.
- 4.1.2 It is important to bear in mind that the relevant market under consideration here is a wholesale market, namely the market on which wholesale termination of voice calls is provided (however that market is defined). However, in carrying out an assessment of the relevant wholesale market/s, it is first appropriate to consider the retail markets since the starting point for the overall assessment of wholesale markets is generally accepted⁶ to be the definition of the relevant retail markets from a forward looking perspective⁷, taking into account demand-side and supply-side substitutability⁸. This is because demand for wholesale products is derived from the retail market and will be affected by its characteristics⁹.
- 4.1.3 Once it has defined the relevant downstream (retail) market, the JCRA then moves to an analysis of whether consumers' behaviour in the downstream market, ie, the retail level, is capable of acting as a constraint on the prices charges by a mobile network operator (**MNO**) at the wholesale level.
- 4.1.4 Finally the JCRA defines the wholesale market and assesses whether any operator has SMP on that wholesale market.

A. RETAIL MARKET

4.2 Retail (product) market definition

JCRA process and Initial Notice

- 4.2.1 In its Consultation, the JCRA considered that the appropriate starting point for its assessment would be a voice call initiated by the calling party to the called party's mobile number for which a termination fee is applicable. This is because callers value calls that

⁶ See Recital 4 of the 2007 EC Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation.

⁷ ie, a perspective which evaluates the expected and foreseeable technological and economic developments likely to affect mobile markets for the proposed period of this price control.

⁸ See Recital 4 of the 2007 EC Recommendation.

⁹ In particular, competitive constraints at the retail level may impose an indirect constraint on the wholesale market since some proportion of the wholesale price increase is likely to be passed on to the retail level. This may, in turn, result in retail customers switching to goods which do not require the wholesale input. If such retail substitution would be sufficient to limit the ability of a wholesale operator to profitably raise wholesale prices (ie, MTRs) by any significant amount then an indirect constraint exists.

successfully reach the called party. In this respect, it is the end-to-end call which is important rather than individual parts of that call (such as termination). Customers value mobile services because these allow them to make calls and to be contacted in many different locations in a way that is not possible with fixed services.

- 4.2.2 The JCRA therefore based its focal product on calls to all Jersey mobile numbers which were active, or which it expected to be active, over the period of the review. Such a focal product captures the fact that termination of a call initiated by the called party's mobile phone can be over different technologies. This includes 2G, 3G and 4G networks or, potentially, Wi-Fi based solutions. At the retail level, when callers initiate a call to the called party's mobile phone, they (and their originating network) have no control over the technology used to terminate the call. Calling parties will very often be unaware of which technology is used. Moreover, calls to a particular called party's mobile phone may terminate using different technologies during the same call, eg, drop-back from 3G to 2G.
- 4.2.3 The proposed set of focal products also excluded services that do not use mobile telephone numbers to establish voice calls between two users, for example, Viber and Skype. The JCRA refers to these services as 'pure-OTT' as they do not involve mobile numbers, are purely delivered over data connections and are not routed via the switch of the called parties' network¹⁰. For the avoidance of doubt, calls which are initiated on OTT applications, such as 'Skype Out', but terminate on mobile numbers were included in the set of focal products.
- 4.2.4 Having identified this focal product, the JCRA considered that it was then necessary to determine whether callers would switch away to an alternative product if the price of voice calls to mobile numbers were to increase on the basis of the SSNIP¹¹ test.
- 4.2.5 For the following reasons, the JCRA considered that callers would be unlikely to do so and that the relevant retail product market was therefore a voice call initiated by the calling party to the called party's mobile number in Jersey for which a termination fee was applicable:
- a. For the reasons set out in the Consultation document, the JCRA's view was that the characteristics of alternative forms of communication meant that consumers would be unlikely to switch to them in response to a small but significant retail price increase of a call to a mobile number¹². There was therefore a lack of demand-side substitution;

¹⁰ For example, 'pure-OTT' applications such as those operated by Viber and Skype rely on access to a mobile handset via a data connection. As such a call does not need to be routed via the switch of the called parties' network, so it does not attract a termination rate. Moreover, consumers can distinguish these calls to mobile numbers and are likely to expect to pay different rates.

¹¹ SSNIP – Small but significant non-transitory increase in price.

¹² This is consistent with the findings of Ofcom which, in its 2011 review, found that these alternative products should not be included in the relevant product market since customers did not consider them to be substitutable for mobile calls. Alternative products considered were: calls to a fixed line as a substitute for calls to a mobile, on-net mobile to mobile (M2M calls as a substitute for off-net calls, call back arrangements, the use of 'pure OTT' services, SMS, email, instant messaging and social networking sites). The JCRA notes that, since publication of its Initial Notice, Ofcom has published (in June 2017) its Mobile Call Termination Review for the period 2018 – 2021. In that document, Ofcom takes the view that, based on the evidence and reasoning it sets out, the use of OTT applications is unlikely to be a sufficiently close

- b. In order for retail supply-side substitution to be a realistic possibility, a firm that was not currently supplying mobile voice calls (to a specific number) would have to be able to begin doing so relatively quickly following an MTR driven increase in the retail price and in a way that avoided payment of MTRs. However, since the payment (or not) of MTRs is controlled by the operator on whose network the call is terminated, a new market entrant could not avoid paying MTRs to such an operator. The retail supply-side substitution argument therefore did not appear to have much force for the period of this market review.

4.2.6 In order to test the validity of this conclusion, the Consultation asked the following question:

Question 1: Does the respondent agree with the JCRA's provisional views relating to the retail market product market? If the respondent does not agree with the JCRA's provisional views, the respondent should provide all of its analysis and assessment of the market.

4.2.7 Having considered the responses to this question, the Initial Notice set out the following analysis¹³.

- a. In assessing the relevant retail product market, the JCRA initially identifies the likely narrowest market (focal product) and then considers evidence that might suggest expanding that market definition based on a systematic analysis of substitutes whose inclusion might broaden the initial narrow market definition.
- b. As explained above, the JCRA considered here that the appropriate focal product was '*a voice call initiated by the calling party to the called party's mobile number in Jersey for which a termination fee is applicable*'.
- c. Regarding the points raised by operators in respect of the extent of the scope of the product market, the JCRA understands that two related points are being made. Firstly, operators (Sure and JT) argue that the product market is wider than the focal product identified, primarily because of the availability of substitutable retail products, eg, OTT calls and/or certain forms of non-voice communications. In respect of the substitutable retail products identified by Sure, Sure highlights the increasing availability of this technology in Jersey, eg, the ability to make a WhatsApp call from an iPhone. Secondly, Sure argues that the way in which consumers make calls might vary depending on whether the number being called was an international or domestic number. It is, therefore, possible that a consumer might consider an OTT service to be a more appropriate functional substitute for a call to a mobile number when making an international call than when making a domestic call and that some further subdivision in the market depending on call destination might be possible.

substitute for mobile voice calls. Ofcom also cites the 2014 EC Recommendation on Relevant Markets in support of its position.

¹³ Initial Notice, paragraphs 4.31 – 4.36

- d. The JCRA noted these arguments. It is clear that, at least for some consumers, there may be partial functional substitutability between mobile voice calls and other methods of making calls, such as OTT. However, the JCRA also noted that despite the growth of popularity of OTT applications, these do not offer any interoperability between different platforms, ie, do not ensure sufficient any-to-any communication, and require that end users are simultaneously logged in to the same OTT provider. Moreover, there is still a significant number of end users who do not use data-enabled smartphones, high-quality mobile internet is not universally available, and there are differences in quality of OTT services. These points are noted by Ofcom in its 2015-2018 MCT Review¹⁴, where it stated that the use of OTT applications is not a close substitute for calls to a mobile number for the time being¹⁵.
- e. The JCRA considered that, for the purposes of the current review, the precise market definition could be left open insofar as regards the question of whether OTT services and mobile voice calls are in the same product market. This is because (as explained in the Initial Notice), in the context of this review the purpose of defining a retail product market is to assess which products (or subset of products) within that retail market could impose a competitive constraint at the wholesale (MCT) level rather than determining the extent to which particular product subsets within that hypothetical market (however defined) exercise a competitive constraint on each other.
- f. As regards non-voice communications, the JCRA considers that there are fundamental differences between the nature of voice communication and non-voice communication. Research carried out by other regulatory authorities tends to confirm that the characteristics of these alternative forms of communication mean that they are not a close enough substitute to voice calls to be included in the same market¹⁶.

Responses to the Initial Notice

4.2.8 In its response and supplementary response¹⁷, Sure¹⁸ made the following points:

¹⁴ http://www.ofcom.org.uk/data/assets/pdf_file/0029/76385/mct_final_statement.pdf

¹⁵ MCT Review, paragraphs 3.44 – 3.62

¹⁶ MCT Review, paragraphs 3.63 – 3.65

¹⁷ The JCRA notes that at paragraphs 13 -14 of its response to the Initial Notice, Sure: *“notes that the analysis in this section of the Initial Notice is identical to that contained in the corresponding sections of the Draft Decision in Guernsey, as was the case with the previous November 2016 consultations. This is understandable given that the section is concerned with methodological issues that are common to both jurisdictions and indeed, Sure’s respective responses submitted in January took a common approach to addressing these issues. For a more detailed discussion of our view on the JCRA’s position on product market definition then, we would refer the JCRA to the more detailed discussion contained in our response to the Guernsey Draft Decision.”* Paragraph 14 of Sure’s response to the Initial Notice then goes on to summarise in a series of bullet points its position on product market definition issues as set out in its response to the Draft Decision. The JCRA will, therefore, cross refer in this Final Notice to the relevant paragraphs of Sure’s response to the GCRA’s Draft Decision, substituting “JCRA” for “GCRA” as appropriate.

¹⁸ Neither JT nor Airtel commented specifically on this issue.

- a. The JCRA concluded that calls made over OTT platforms should not be part of the retail market for calls in Jersey¹⁹. This conclusion, Sure submitted, was flawed for the following reasons:
- i. The use of OTT platforms are (Sure understands) the preferred medium of several customer groups, regardless of the price levels of conventional mobile calls, due to a significant extent to the additional functionality of OTT platforms²⁰;
 - ii. In response to a number of specific issues raised by the JCRA which tended to suggest that OTT and mobile voice calls might not form part of the same product market²¹, Sure made the following observations:
 - 1. OTT applications, whilst requiring a user to log in, need such log in to be performed only once. The need to log in is therefore not a barrier to consumers using OTT services²²;
 - 2. OTT voice calls consume little data. This means that they can easily be received on 3G and 4G networks within the Channel Islands. Sure has in excess of 99% of outdoor 3G and 4G coverage. The lack of availability of high quality internet coverage is therefore not a barrier to the use of OTT platforms for making voice calls in the Channel Islands²³;
 - 3. Interoperability is not a major issue when considering availability of OTT applications on different operating systems²⁴;
 - 4. Without a mobile telephone number a user will not be able to create a WhatsApp account²⁵. (Although not explained further in its

¹⁹ The JCRA notes that this is an inaccurate representation of its position, which was that the relevant retail market definition could be left open insofar as whether OTT and mobile voice calls were part of the same or distinct product markets.

²⁰ Sure response to Draft Decision, paragraph 16. Sure alludes to this wider product market definition later in its response to the Draft Decision (paragraphs 34 – 35), where it states that: *“A portion of the calls in the relevant retail market are conventional mobile calls which are terminated by the mobile network operator (MNO) on whose network the called party is hosted. For that MT service, the MNO charges a mobile termination rate (MTR). Another large (and growing) portion of the calls are OTT calls, which are terminated over data connections, whether Wi-Fi or the receiving customer’s mobile data allowance. In the latter case, there is clearly a charge payable to receive the call, but it is paid by the receiving party, not the originating party.”*

²¹ Initial Notice, paragraph 4.34

²² Sure response to Draft Decision, paragraph 18

²³ Sure response to Draft Decision, paragraphs 19 - 20.

²⁴ Sure response to Draft Decision, paragraph 21: *“Interoperability, for the avoidance of doubt, is not a major issue when considering availability of OTT applications on different operating systems, such as Android or iOS. Given the simplicity of downloading a new application onto a mobile device, Sure does not view the lack of interoperability between OTT platforms as an issue for consumers. Indeed, when looking at OTT applications throughout the World (with the exception of China) two applications dominate, namely WhatsApp and Facebook messenger. Both of these applications are well respected and offer text, voice and video calling. The ability to share files and photos within either platform is a major allure for customers.”*

²⁵ Sure response to Draft Decision, paragraph 22.

response, the JCRA understands the purported significance of this point to be that only mobile telephone users can create WhatsApp accounts, which means that any person making a WhatsApp call could have made a mobile voice call instead but chose not to do so, indicating that there is a degree of substitutability between OTT and voice calls.)

- iii. The JCRA relied on out of date research to demonstrate that OTT calls and mobile voice calls did not form part of the same product market. Sure stated that it did not accept that these data and conclusions could still be applicable and believed that the JCRA should rely on up-to-date, Channel Islands specific data²⁶.
- b. The JCRA stated that for the purposes of the current review, the precise market definition could be left open insofar as it related to whether mobile voice calls and OTT calls formed part of the same market or were distinct markets²⁷. Sure objected to this conclusion for the following reasons:
- i. It stated that it did not understand the point that the JCRA was making²⁸;
 - ii. Following a meeting between JCRA officers and Sure on 15 June 2017, at which the JCRA officers sought to understand the reasons for Sure's confusion on this point and to provide a comprehensive explanation of the point to Sure, Sure stated in its supplementary response that it still did not understand the JCRA's position because the JCRA had not explained its position sufficiently. Sure required a more comprehensive explanation of: why the JCRA *"considers the retail product market definition to have no importance in respect of the definition of the wholesale product market definition"*²⁹.

²⁶ Sure response to Draft Decision, paragraph 13 – 14: *"The GCRA relies on research undertaken by other regulators and specifically refers to analysis by Ofcom in its 2015 Mobile Call Termination (MCT) Review to support the GCRA's position that OTT services should not form part of the relevant retail market for mobile calls. Ofcom's supporting evidence, which CICRA has relied on, is some three to four years out of date being sourced from numerous reports dating back as far as June 2013. Sure finds it disappointing that the GCRA considers research and conclusions made this long ago to still be appropriate to support its decisions in this rapidly changing market. Sure does not accept that those data and conclusions can still be applicable and believes the GCRA must rely on up-to-date data, preferable directly relevant to Guernsey, or the Channel Islands more broadly. For a regulatory body that places emphasis on evidence based regulation the lack of the GCRA's (or, more widely, CICRA's) relevant and up-to-date analysis of OTT technologies is concerning, especially considering the materiality of the MTR markets across the Channel Islands. It is also not consistent with the GCRA's statement that it has undertaken a forward-looking approach to this market review."*

²⁷ Initial Notice, paragraph 4.35.

²⁸ Sure response to Draft Decision, paragraph 25.

²⁹ Sure supplementary response to Draft Decision, paragraph 2.

JCRA analysis of responses and conclusion

- 4.2.9 Regarding the points made under heading 4.2.8.a above, which all address whether or not OTT services and mobile voice calls form part of the same market or are distinct markets, the JCRA repeats the conclusion that it set out at paragraphs 4.34 and 4.35 of the Initial Notice, which is reproduced here for ease of reference:

*“It is clear that, at least for some customers, there may be partial functional substitutability between mobile voice calls and other methods of making calls, such as OTT. However [.....] the JCRA considers that, for the purposes of the current review, **the precise market definition can be left open insofar as regards the question of whether OTT services and mobile voice calls are in the same product market.** This is because, as explained below, in the context of this review the purpose of defining a retail product market is to assess which products (or subset of products) within that retail market could impose a competitive constraint at the wholesale (MCT) level rather than determining the extent to which particular product subsets within that hypothetical market (however defined) exercise a competitive constraint on each other.”*

- 4.2.10 A further explanation of this conclusion, as requested by Sure, is set out below. However, the JCRA does not consider that it is necessary to deal with points made at paragraph 4.2.8.a. above in detail, since they address an issue (the precise scope of the product market) which is not determinative for the assessment of the relevant wholesale market and which was therefore intentionally left open by the JCRA (as explained in the extract from its Initial Notice cited at paragraph 4.2.9 above).
- 4.2.12 Regarding the arguments made by Sure summarised at paragraph 4.2.8.b. above, the JCRA makes the following points.
- 4.2.13 It is not correct for Sure to state that the JCRA “*considers the retail product market definition to have no importance in respect of the definition of the wholesale product market definition*”³⁰. The Initial Notice clearly states that:

*“the starting point for the overall assessment of wholesale market is generally accepted to be the definition of the relevant retail markets [.....]. This is because demand for wholesale products is derived from the retail market and will be affected by its characteristics. In particular, competitive constraints at the retail level may impose an indirect constraint on the wholesale market since some proportion of the wholesale price increase is likely to be passed on to the retail level. This may, in turn, result in retail customers switching to goods which do not require the wholesale input. If such retail substitution would be sufficient to limit the ability of a wholesale operator to profitably raise wholesale prices (ie, MTRs) by any significant amount then an indirect constraint exists.”*³¹

In summary, as was clearly set out in the Initial Notice, demand for wholesale products:

- a. Is derived from the retail market;

³⁰ Sure supplementary response to Draft Decision, paragraph 2.

³¹ Initial Notice, paragraph 4.4 and footnote 5.

b. Will be affected by the characteristics of the retail market.

4.2.14 The JCRA demonstrably took account of the first point, namely that demand for wholesale products is derived from demand for the relative retail products; had it not done so it would not have been able to define a wholesale market at all. Wholesale products are not purchased in isolation; if consumers did not purchase the primary product (voice calls), there would be no demand for wholesale products and so without understanding the likely scope of the relevant primary/retail market to which these secondary products relate, a market for wholesale products could not be defined.

4.2.15 However, it does not follow from this, as Sure seems to suggest elsewhere in its response to the Initial Notice³², that if the retail market in this case were defined as including both OTT and mobile voice calls that this would mean that the relevant wholesale market would also comprise termination services for both types of call. This is because even if the market were wide enough to include OTT services **at the retail level**, the services required to terminate the OTT services and mobile voice calls **at the wholesale level** would be entirely different and specific to the type of call (OTT or mobile voice) that had been made³³.

4.2.16 It follows that, whether the retail market is defined widely (OTT services and mobile voice calls) or narrowly (two separate markets, one for OTT service and one for mobile voice calls) there would be a series of distinct wholesale markets for the termination of mobile voice calls. It is therefore not necessary to define the retail market precisely in order to be able to define the wholesale market accurately; that market would be wholesale termination of mobile voice calls in either case.

4.2.17 The second point, which relates to the competitive constraint exercised on pricing at the wholesale level by retail products, is dealt with in detail below³⁴.

4.3 Is consumers' behaviour in that market capable of acting as a constraint on pricing at the wholesale level?

4.3.1 In its Consultation, the JCRA considered whether consumers' behaviour in the retail market provisionally defined in the Consultation was capable of acting as a constraint on pricing at the wholesale level. The JCRA concluded that it was not. This was because for callers to react to an increase in the price of calls to a specific mobile number, they must be sufficiently aware of that increase and deem that it is sufficiently material to act upon it. In particular, consumers need to be aware they are calling a mobile number, the specific network/call provider that controls the number and the price they would face when calling that particular network/mobile number. Research carried out by other national regulatory authorities

³² Sure's response to the Draft Decision states, at paragraph 54: "*In the event that CICRA disagrees with Sure's product market definition and decides to proceed with its decision that there is a separate market for MT services (separate from calls terminated as data services via Wi-fi or data packages) then Sure considers the relevant geographic market should be "calls terminated on mobile devices in Guernsey for which an MTR is payable."*"

³³ It is extremely common for there to exist a wide primary market and a series of narrow secondary markets, for example the wide primary market for the sale of new cars and a series of narrow secondary aftermarket for repair and maintenance of each brand of car.

³⁴ Paragraph 4.3.2 and see also Initial Notice, paragraph 4.35.

suggests consumers are unlikely to be aware of (and therefore unlikely to react to) any impact that an increase in MTRs might have at the retail level, even if retail price rises were significant, ie, of the order of 5% - 10%³⁵.

- 4.3.2 Having taken account of the responses received to the Consultation, in the Initial Notice³⁶, the JCRA explained again that the purpose of defining the retail market is to assess whether consumer choices in that market impose any kind of indirect constraint on the behaviour of operators at the wholesale level.
- 4.3.3 In other words, the relevant question is not of itself whether there is a degree of functional substitutability between different retail products, eg, OTT vs voice calls over mobile, but rather whether, if there was a small but substantial (5%-10%) permanent increase in wholesale prices, consumers would react to this by switching away to those other functionally substitutable retail products.
- 4.3.4 In the Initial Notice, the JCRA set out its clear view that consumers would not do so. This was for a number of reasons.
- 4.3.5 Firstly, even if a 5% - 10% MTR increase were passed through into retail prices and consumers were aware of this, the resulting percentage increase in retail prices would be much less than 5% - 10%. This is because MTRs make up only a portion of the underlying costs of calls. It is, therefore, unlikely that consumers, even if they were aware of the price rise, would switch to an alternative retail product on the basis of a 5% - 10% increase in the (wholesale) MTR.
- 4.3.6 Secondly, for callers to react to an increase in the price of calls they must be sufficiently aware of that increase to act upon it. In particular, consumers need to be aware they are calling a mobile number, the specific network/call provider that controls the number and the price they would face when calling that particular network/mobile number. Research carried out by other national regulatory authorities suggests consumers are unlikely to be aware of (and therefore unlikely to react to) any impact that an increase in MTRs might have at the retail level, even if retail price rises were significant, ie, of the order of 5% - 10%³⁷.
- 4.3.7 The conclusion of the JCRA, as set out in the Initial Notice, was that for the period covered by this review, the availability of functionally substitutable products (such as OTT services) at the retail level (however that market is defined) would not constrain an operator's ability to raise MTRs by 5% - 10% at the wholesale level.

³⁵ As reproduced in the Initial Notice, paragraph 4.11

³⁶ Initial Notice, paragraphs 4.37 – 4.41

³⁷ As noted above, a retail price rise of 5 - 10% based solely on an MTR rise may be unlikely, given that MTRs make up only a small percentage of the overall retail cost of a call.

Responses to the Initial Notice

- 4.3.8 In its response and supplementary response to the Draft Decision/Initial Notice³⁸, Sure³⁹ made the following points:
- a. Many users of OTT platforms⁴⁰ do so due to the significantly lower costs of OTT calls compared to conventional mobile calls and increasing use of OTT may be expected to exert downward pressure on the overall cost of conventional mobile calls⁴¹, of which the MTR forms a part⁴², notwithstanding the fact that the MTR element of the call may not be transparent to the end customer⁴³. OTT services are therefore clearly indirectly causing a constraint on the wholesale mobile termination service⁴⁴. Sure considers that an increase in the MTR would be likely to drive more customers to OTT platforms⁴⁵.
 - b. The JCRA argues that in a SSNIP test, a 5-10% increase in the MTR would not cause a sufficient number of customers to move to OTT to make that increase unprofitable. Sure considers that this is an erroneous attempt at shoehorning a SSNIP test into an assessment between related retail and wholesale markets⁴⁶. It also ignores the fact that a considerable number of customers have already switched to OTT because conventional mobile calls are more expensive than OTT⁴⁷;

JCRA analysis of responses and conclusion

- 4.3.9 As set out above, Ofcom, in its 2015-2018 MCT review, states that:

³⁸ On the basis of paragraph 14 of its response to the Initial Notice, the JCRA assumes that Sure intended that its response and supplementary response to the Draft Decision should also be taken to constitute its response to the Initial Notice.

³⁹ Neither Airtel nor JT responded on this specific point.

⁴⁰ Sure notes that, in the UK, OTT penetration had reach 64% of the UK's mobile subscriber base by 2015. Although Sure does not state this directly, the JCRA assumes that the purpose of including this information in its response is to imply that there is a similar or greater degree of OTT penetration in Jersey.

⁴¹ Sure's response to the Draft Decision, paragraph 37.

⁴² Sure's response to the Draft Decision, paragraph 38. In that paragraph, Sure notes that the GCRA stated in the Draft Decision that Sure agrees that the MTR is not relevant to retail charges. Sure states that that is a misunderstanding and that this is not its position. For that reason, the JCRA does not include that statement as part of its reasoning supporting this Final Notice.

⁴³ Sure's response to the Draft Decision, paragraph 41

⁴⁴ Sure's response to the Draft Decision, paragraph 24. Sure considers that OTT substitution is particularly relevant for international calls or other calls outside of the bundles included in post-paid packages offered by MNOs. End customers can actively choose whether to make a call where an MTR is incurred or one that is not (Sure's response to the Draft Decision, paragraph 39).

⁴⁵ Sure supplementary response to Draft Decision, paragraph 3. It goes on to state, in that paragraph that: .
"Sure therefore considers that the GCRA's statement at paragraph 4.35 of the Draft Decision is not sufficiently justified and that is why Sure's response asked that it be explained further."

⁴⁶ Sure's response to the Draft Decision, paragraph 40. In that paragraph, Sure goes on to state that: "Ofcom does not use this approach, for good reason." The JCRA does not consider this comment to be one to which it can properly respond, since Sure does not specify what is meant by "with good reason". In addition, the JCRA does not agree, for the reasons set out in this Final Notice, that its approach is inconsistent with that of Ofcom. The JCRA will therefore not address this point any further.

⁴⁷ Sure's response to the Draft Decision, paragraph 41

“In particular, competitive constraints at the retail level may impose an indirect constraint on the wholesale market since some proportion of the wholesale price increase is likely to be passed on to the retail level. This may, in turn, result in retail customers switching to goods which do not require the wholesale input. If such retail substitution would be sufficient to limit the ability of a wholesale operator to profitably raise wholesale prices (ie, MTRs) by any significant amount then an indirect constraint exists.”⁴⁸

In other words, if a wholesale operator could not profitably raise wholesale prices without triggering consumer switching at the retail level, then an indirect constraint on the wholesale market exists.

- 4.3.10 The JCRA does not therefore understand the point that is being made by Sure as set out in paragraph 4.3.8.b. above. The test described by the JCRA (ie, whether a 5-10% increase in the MTR would cause consumer switching at the retail level) is materially the same as that described by Ofcom in its MCT Review. The JCRA therefore considers its approach to be in line with that of other telecoms regulators.
- 4.3.11 Further, on the basis of that test (as set out by Ofcom and taken into account by the JCRA in its Initial Notice), it follows that an indirect constraint on wholesale MTR charges cannot be established by arguing (as Sure does) that the overall cost of mobile voice calls, **in a general sense**, is constrained by consumers’ ability to switch to cheaper OTT products. The constraint imposed by OTT as a whole on mobile voice calls is not the point at issue. Rather, the relevant point is whether a consumer of mobile voice calls would, **specifically in response to an increase in the MTR**, switch to a competing retail product. For the reasons set out in its Consultation and Initial Notice, and in line with the consistent practice of other telecommunications regulators, the conclusion of the JCRA is that such switching would not take place and that the existence of functionally substitutable products (such as OTT) at the retail level does not constrain the wholesale MTR.
- 4.3.12 In this regard, it is relevant to note that all MNOs in Jersey charge the maximum permitted MTR. This is so, notwithstanding the fact that there is some degree of functional substitutability between OTT services and mobile voice calls. The fact that MNOs continue to charge the maximum MTR, despite the fact that OTT services are (Sure argues) widely available, is strong evidence that MNOs do not consider that such consumer switching at the retail level can be influenced by the level at which MTRs are set, ie, that the possibility of retail switching does not, in fact, impose any kind of indirect competitive constraint on MTRs.
- 4.3.13 For completeness, the JCRA notes that in its response to the Initial Notice, Sure stated that:

*“we would note that Sure has provided evidence to the JCRA that **the level of MTRs has little discernible impact on any retail prices customers pay for mobile services (whether those customers are located in Jersey or elsewhere)**. As such it is difficult to see how the JCRA could demonstrate that any of the MNOs is engaging in any market abuse, practice or arrangement that is having either the object or effect of preventing, restricting or distorting competition. We therefore question the appropriateness of the JCRA applying the Fair*

⁴⁸ MCT Review, paragraph 3.12.

Competition Condition to MTRs and also what it is trying to achieve in terms of local consumer outcome.”⁴⁹

4.4 Other points

4.4.1 The JCRA notes that respondents to the Initial Notice have put forward a number of points that do not address the issues of market definition and SMP.

4.4.2 Sure makes the following points:

- a. The JCRA is distancing itself from what seemed to be one of the initial drivers behind its review of MTRs, namely the (mistaken) view that a reduction in MTRs in Jersey would result in lower prices for UK consumers calling Jersey numbers. If this is the case, this raises the question of what the JCRA hope that this review will achieve⁵⁰;
- b. In the context of the Jersey market, and the legal framework that the JCRA has identified as being relevant to MTRs, the JCRA should explain what the market abuse, practice or arrangement is that the MNOs are engaging in that is having the object or effect of preventing, restricting or distorting competition and which would make it appropriate for the JCRA to apply Condition 27 of Sure’s licence⁵¹.
- c. The current regulatory requirement is that a free on-island transit service is provided⁵². It is therefore inconsistent for the JCRA now to state that transit is outside the scope of this review⁵³. Sure outlines a number of concerns that it has in relation to the fact that mobile transit services have not, to date, been considered by the JCRA in the context of this review⁵⁴;
- d. Sure noted that the JCRA had not addressed the retail geographic market in its Initial Notice and that Sure considered it necessary for the JCRA to undertake the compete

⁴⁹ Sure response to the Initial Notice, paragraph 8.

⁵⁰ Sure response to the Initial Notice, paragraph 17

⁵¹ Sure response to the Initial Notice, paragraph 17

⁵² For completeness, the JCRA notes that in its supplementary response to the Draft Decision, Sure sets out what it states to be comments made by JCRA officers in a meeting held with Sure on 15 June 2017: “*Sure was encouraged that CICRA confirmed during the meeting on June 15th, that CICRA’s current opposition to Sure Fixed charging for the transit service is because of the lack of direct interconnection to Sure Mobile and that, therefore, once direct interconnection with Sure Mobile is available to OLOs, OLOs would need to pay for the transit service if they chose to continue interconnecting with Sure Fixed only.*” As was made clear to Sure before the 15th June meeting, that meeting was to discuss specific issues in relation to Sure’s response to the Draft Decision/Initial Notice only. Sure’s summary above is not one that is recognised or accepted by JCRA officers as being an accurate representation either of the conversation that took place or of the CICRA/JCRA position on transit charges (which was in any event wholly outside of the scope of the agenda for that meeting) and it is therefore not accepted by the JCRA.

⁵³ Sure response to the Initial Notice, paragraph 19, Sure response to the Draft Decision, paragraph 27, Sure supplementary response to Draft Decision, paragraphs 16 – 18. Sure goes on state (response to Draft Decision, paragraphs 28 – 29) that it would not be willing to continue to provide a free fixed network transit service and that it is planning to offer a direct interconnection from Sure Mobile to OLOs, which will negate the need for a fixed transit facility/charge.

⁵⁴ Sure response to Initial Notice, paragraphs 19 – 20, Sure response to Draft Decision, paragraphs 44 – 47.

retail market definition process in order that the upstream wholesale market could be defined appropriately⁵⁵.

- 4.4.3 In relation to point a. above, the JCRA does not understand either the basis on which Sure has drawn these conclusions regarding the JCRA's motivation, or their relevance to market definition and SMP analysis, which has been the purpose of the Consultation, Initial Notice and this Final Notice. These points are therefore not considered further in this Final Notice.
- 4.4.4 In relation to point b. above, for the reasons explained in this Final Notice, the JCRA is not required to consult on the scope of its legal powers. Furthermore, the JCRA notes that the purpose of the current exercise is a market definition and SMP analysis and not the imposition of a remedy. This point will therefore not be considered further here.
- 4.4.5 In relation to point c. above, the JCRA reiterates that the purpose of this Final Notice is to define the market on which wholesale mobile voice call termination charges are provided. Transit services are distinct from termination services and therefore fall outside the scope of this market definition exercise. The JCRA notes that this approach is entirely in line with that of other regulators. Furthermore, as has been made clear, the purpose of this Final Notice is not to regulate prices either of mobile termination services or of transit services; it is limited to market definition. Remedies (which could include price regulation) will be dealt with through a separate process.
- 4.4.6 Sure confirmed in its supplementary response to the Draft Decision⁵⁶ that it was withdrawing its points on retail geographic market definition and these are therefore not considered further here.

4.5 JCRA conclusion

- 4.5.1 For the reasons explained above, the argument being forwarded by operators that the increased usage of alternative forms of communications at the retail level would constrain the pricing of wholesale termination charges for calls to mobiles is not one that has been evidenced by respondents and is not accepted.
- 4.5.2 The JCRA's conclusion is, therefore, that the appropriate retail product market for this *ex ante* assessment includes a voice call initiated by the calling party to the called party's mobile number in Jersey for which a termination fee is applicable. The precise product market definition may be wide enough to encompass OTT services but can be left open in this case, since the availability of alternative forms of voice communication (such as OTT services) at the retail level would not impose a competitive constraint on the pricing of wholesale termination charges.

⁵⁵ Sure response to Initial Notice, paragraph 22 – 23.

⁵⁶ Sure's supplementary response to the Draft Decision, paragraph 4.

WHOLESALE MARKET

4.6 Wholesale market – product market

JCRA process and Initial Notice

4.6.1 The JCRA consulted on a provisional view that the relevant wholesale product market definition was:

‘termination of all calls made to all mobile numbers allocated to each MNO for which the MNO charges the MTR’

4.6.2 The following factors appeared relevant to its provisional conclusion:

- a. An MNO is likely to face **homogenous competitive conditions** in providing mobile call termination services to the different numbers it hosts, which implies that its conduct in supplying the service in relation to different mobile numbers is likely to be similar; and/or,
- b. An MNO faces a **common constraint**, for example, through billing systems which would make it difficult and/or costly to charge different MTRs to different mobile numbers, even if it wanted to.

4.6.3 The JCRA therefore concluded that, absent regulation, competitive conditions in the wholesale market for different mobile numbers were likely to be homogenous if the same MNO set a termination rate. However, competitive conditions may differ between those numbers for which different MNOs set the termination rate. Therefore, the JCRA’s provisional consideration was that, on the basis of homogenous competitive conditions, termination of all calls made to all mobile numbers allocated to each MNO for which the MNO charges the MTR should be defined as a distinct product market.

4.6.4 The JCRA considered whether the market should be widened to include mobile numbers hosted by more than one MNO. However, it noted that each of these MNOs will be able to set the MTR independently of all other MNOs, absent SMP price regulation. There is, therefore, no common pricing constraint linking the MTR set by each of the MNOs and so it was not considered appropriate to widen the relevant market beyond each MNO.

4.6.5 The JCRA in its Consultation asked the following question:

Question 2: Does the respondent agree with the JCRA’s provisional view that there is no common pricing constraint linking the MTR set by each of the MNOs and therefore the relevant market is each MNO? If the respondent does not agree with the JCRA’s provisional view, the respondent should provide all of its analysis and assessment of the market.

4.6.6 On the basis of comments received in response to its Initial Notice, the JCRA updated its definition as follows:

'... termination of all calls made to all mobile numbers currently allocated or assigned to each MNO for use on its network for which the MNO charges the MTR.'

4.6.7 The JCRA also considered that it was necessary to determine which calls fell within the scope of the above definition. In its Consultation, it stated that it considered that the market for mobile call termination would include:

- Any call conveyance technology used to deliver voice call termination services to mobile numbers, whether delivered by 2G, 3G, 4G, VoIP or VoLTE based technologies, and,
- All mobile numbers currently allocated or assigned to each MNO for use on its network for which the MNO charges the MTR

4.6.8 The Consultation listed the following call types that the JCRA proposed should be included within the Mobile Call Termination market:

Call Type	JCRA Position
Voice Calls	Terminated on a mobile number
Off-net	YES
On-net	NO
Ported in	NO
Ported Out	YES
Calls to voicemail	YES
Voice calls to mobile numbers terminating on IP	YES
Call forwarding (including international)	YES
Calls to Jersey number roaming abroad	YES
Calls to non-Jersey numbers roaming in Jersey	NO

4.6.9 The JCRA in its Consultation asked the following question:

Question 3: Does the respondent agree with the JCRA's provisional views relating to the call types included within the proposed product definition? If the respondent does not agree with the JCRA's provisional view the respondent should provide all of its analysis and assessment of this market.

4.6.10 Taking into account the responses received to the Consultation, the JCRA modified the above table. It stated that the following calls were included in the relevant wholesale product market encompassing the range of services listed below :

Call Type	JCRA Position
Voice calls	Terminated on a mobile number
Off-net	YES
On-net	NO
Ported In	YES
Ported Out	NO
Calls to voicemail	YES
Voice calls to mobile numbers terminating on IP	YES
Call forwarding (including international)	YES
Calls to Jersey number roaming abroad	YES
Calls to non-Jersey numbers roaming in Jersey	NO

Responses to the Initial Notice⁵⁷

4.6.11 Sure argues that the voice call termination service that it offers is not a single, undifferentiated service. A mobile termination service is offered as a stand alone product only to Jersey licensed operators. The service offered to and purchased by operators is a different end to end commercial service. In Sure’s view, this bundling means that the service offered to non-Jersey operators is not a mobile termination service⁵⁸.

⁵⁷ In paragraph 24 of its response to the Initial Notice, Sure “notes that the discussion contained in these paragraphs [4.52 to 4.91 of the Initial Notice is identical to that contained in the corresponding sections of the GCRA Draft Decision, which as stated above in relation to the analysis of the retail market, we can understand due to it being concerned with common methodological issues. We would again refer the JCRA to our response to the Guernsey Draft Decision for our detailed comments on this section.” The JCRA will therefore adopt Sure’s response to the Draft Decision as a response to the Initial Notice in respect of this section and cross refer to that response accordingly.

⁵⁸ Sure response to Draft Decision, paragraph 69: “the point of disagreement appears to be that the GCRA currently consider that the service provided outside Guernsey, to telecoms operators not licensed in Guernsey, is an MT service; it is not.”.

JCRA analysis of responses and conclusion

- 4.6.12 In both the Consultation and the Initial Notice, the JCRA proposed a consistent definition of the wholesale product market, which, as set out above, was:

“termination of all calls made to all mobile numbers allocated to each MNO for which the MNO charges the MTR”

- 4.6.13 **Termination** means the act of passing the call from the mobile switch to the customer’s handset (ie, the final “leg”) of the call. As the above definition makes absolutely clear, this is a service that is provided by the relevant **mobile** network operator.

- 4.6.14 The basis for Sure’s suggestion that the JCRA is seeking to regulate the terms on which (in its example) BT contracts with Sure Fixed is therefore not understood⁵⁹. As has been made absolutely clear in both the Consultation and the Initial Notice, the relevant wholesale market proposed covered the actual **provision of the termination service** by the **mobile network operator**. In the example provided by Sure, Sure Fixed clearly is neither a mobile network operator nor terminates the call (call termination being carried out by Sure Mobile). In the context of that example, it is (and has always been) the position of the JCRA that Sure Mobile provides the termination service to Sure Fixed.

- 4.6.15 The example provided by Sure does not, therefore, demonstrate that the wholesale product market definition set out in the Initial Notice was incorrect.

4.7 Wholesale market – geographic market

JCRA process and Initial Notice

- 4.7.1 In the Consultation, the JCRA set out its view that, at the wholesale level, mobile termination services need to be accessed in order to terminate a call. The competitive conditions for the service of wholesale termination of the call did not appear to differ irrespective of the various handover points on route. This suggested that it was appropriate to consider the geographic market as the area for which the MNO could determine the MTR in relation to a Jersey number, and the JCRA’s provisional view was that this area lay within Jersey.

- 4.7.2 The JCRA in its Consultation asked the following question:

Question 4 : Does the respondent agree with the JCRA’s provisional views relating to the geographic market for the wholesale market ? If the respondent does not agree with the JCRA’s provisional view the respondent should provide all of its analysis and assessment of this market.

- 4.7.3 A number of the points made by Sure in response to the Consultation related to whether the JCRA had jurisdiction to regulate MTRs in respect of calls that originated outside of Jersey, and not to the scope of the geographic market as such. In its Initial Notice, the JCRA addressed these points and Sure has raised similar issues in its response to the Initial

⁵⁹ Sure’s supplementary response to the Draft Decision, paragraphs 8 – 15.

Notice⁶⁰. As set out in section 3 of this Final Notice, the issues relating to the jurisdiction of the JCRA raised by Sure are considered in Appendix 1 to this Final Notice⁶¹.

- 4.7.4 Aside from addressing the jurisdictional points raised by Sure, the JCRA in its Initial Notice, having taken into account the responses to the Consultation, confirmed its conclusion set out at paragraph 4.7.1 above.

Responses to the Initial Notice

- 4.7.5 In its response to the Initial Notice, Sure states that it agrees with the JCRA that the geographic wholesale market is Guernsey⁶². However, in Sure's view, since the mobile termination service can only be purchased in Guernsey, it can only be purchased by OLOs⁶³. On the basis of Sure's statement in paragraph 24 of its response to the Initial Notice, the JCRA assumes that Sure statements in relation to Guernsey also apply in respect of Jersey.
- 4.7.6 Sure also highlighted what it considered to be a matter relevant to the scope of the geographic market, which it had first brought to the JCRA's attention in its response to the Consultation⁶⁴. The details of this point are recorded in a footnote to this paragraph and will be redacted from the public version of the Final Notice⁶⁵.

JCRA analysis and conclusion

- 4.7.7 Regarding the point raised by Sure regarding [X], the view of the JCRA is that this does not affect either the scope of the wholesale geographic market or demonstrate that demand side substitution exists within [X] and could easily be replicated in Jersey. The information provided by Sure merely illustrated a scenario where a [X]. As already stated [X].
- 4.7.8 Based on its assessment and of the views provided in the course of the Consultation and the Initial Notice, the JCRA's position is that the relevant geographic market for call termination services for the termination of voice calls to Jersey mobile numbers is Jersey. This is entirely consistent with the previous decision making practice of the JCRA.

C. CONCLUSION ON THE SCOPE OF THE RELEVANT MARKET

4.8 Market definition – conclusion

JCRA analysis and Initial Notice

- 4.8.1 In its Consultation, the JCRA consulted on the appropriateness of the following market definition⁶⁶:

⁶⁰ Sure's response to the Initial Notice, paragraphs 25 - 29

⁶¹ The JCRA notes that the purpose of a consultation is to obtain evidence from stakeholders on the matters being consulted on (in this case, market definition and SMP) and not to seek the views of stakeholders on the legal powers of the JCRA. Since jurisdictional points are therefore not within the scope of the Final Notice, they will be addressed by way of an Appendix.

⁶² Sure's response to the Draft Decision, paragraph 50.

⁶³ Sure's response to the Draft Decision, paragraph 52.

⁶⁴ Sure's response to the Initial Notice, paragraph 24, fifth bullet point.

⁶⁵ **[CONFIDENTIAL FOOTNOTE]** X

⁶⁶ The 2007 EC Recommendation identifies the mobile call termination market is a market which is susceptible to *ex ante* regulation in the following terms : 'Voice call termination on individual mobile

‘Termination services that are provided by [named mobile communications provider] (MNO) to another communications provider, for the termination of voice calls to Jersey mobile numbers allocated to that MNO by Ofcom in the area served by that MNO and for which that MNO is able to set the termination rate.’

4.8.2 The JCRA in its Consultation asked the following question:

Question 5: Does the respondent agree with the JCRA’s provisional views relating to the proposed market definition ? If the respondent does not agree with the JCRA’s provisional view the respondent should provide all of its analysis and assessment of this market.

4.8.3 Having taken into account the views expressed in response to the Consultation, the JCRA concluded in its Initial Notice that the appropriate definition was essentially as proposed by the JCRA in its Consultation. However, for the reasons explained in the Initial Notice, the removal of text referring to the allocation of numbers by Ofcom gives rise to a more precise definition. The market definition was therefore amended on that basis.

4.8.4 The JCRA agreed with the view of Sure that the definition should be supported by a table of call types that were included as part of the definition.

4.8.5 By removing the reference to numbers allocated by Ofcom, the revised definition to be applied for the Mobile Call Termination services as set out in the Initial Notice was:

‘Termination services that are provided by [named mobile communications provider] (MNO) to another communications provider, for the termination of voice calls to Jersey mobile numbers in the area served by that MNO and for which that MNO is able to set the termination rate.’

4.8.6 The following table describes the call types that are and are not included in this definition:

networks’. We consider that our proposed definition is consistent with that of the EC. This is because, by definition, the mobile numbers allocated to an MNO identify those calls that are switched to, and routed by, the recipient’s network. Therefore, a reference to a mobile number range necessarily refers to the activity of the relevant individual mobile network (as the MNO provided termination must have some form of switching and routing). However, given that there is scope for confusion in the use of the word ‘network’ (which in some contexts might be interpreted as a reference only to radio access network) we have not used the word ‘network’ in the proposed market definition. Market evidence in the UK suggests that the ownership or operation of what has been traditionally understood in a mobile network (eg, a 2G, 3G or 4G radio access network) is not essential to whether an MTR can be set to interconnecting operator (origination or terminating traffic to the operator in question).

In addition, we note that the revised EC Recommendation on relevant markets also recommends a technology neutral approach to market definition in the wholesale mobile call termination markets. It suggests that the market for mobile termination is composed of the markets for termination offered by each MNO. It notes that, in line with the technology neutral approach, this comprises termination on all network technologies. It also includes call termination irrespective of where the call originates. It states that the geographic scope of each market coincides with the geographic coverage of the network concerned and is usually national.

Call Type	JCRA Position
Voice Calls	Terminated on a mobile number
Off-net	YES
On-net	NO
Ported IN	YES
Ported OUT	NO
Calls to voicemail	YES
Voice calls to mobile numbers terminating on IP	YES
Call forwarding (including international)	YES
Calls to Jersey number roaming abroad	YES
Calls to non-Jersey numbers roaming in Jersey	NO

Responses to the Initial Notice

- 4.8.7 Airtel-Vodafone in its response to the Initial Notice stated that it *“has fundamental disagreement with the position adopted by CICRA in relation to market definition, subsequent determination of SMP and the basis proposed for remedy”*.
- 4.8.8 It considers that the *“very narrow description which only considers calls being terminated irrespective of, a) its origin, b) the costs that go into terminating the call and c) impact on the end user (who is the final entity in the chain) will result in a skewed definition and consequently a wrong remedy being applied”*.
- 4.8.9 In addition Airtel-Vodafone describes how it has to pay variable MTRs for all international outgoing calls and that the international carriers and destinations are under no obligation to reciprocate any changes imposed by CICRA on the Channel Islands operators. Airtel-Vodafone, therefore reaches a conclusion that off-net calls cannot be part of any remedy as the principle of reciprocity cannot be applied.
- 4.8.10 JT’s response included a diagram depicting its interpretation of the Initial Notice and described the key elements of the Initial Notice as follows:

FINDING 1 – *A relevant market exists for termination services that are provided by [JT] (MNO) to another communications provider, for the termination of voice calls to Jersey mobile numbers in this area served by that MNO and for which that MNO is able to set the termination rate, and*

FINDING 2 – Each MNO is dominant on the market for the provision of MCT on its own network. Each has 100% share of wholesale call termination on its network and each is acting as a monopoly in the provision of that service.

4.8.11 Following a meeting between the JCRA and JT on 5 May 2017 JT confirmed that its understanding that Finding 1 only related to calls once they reach the Jersey mobile switch of JT and not to the conveyance of mobile calls before they reach the mobile network of JT. That view aligns with the market as defined by the JCRA. JT has confirmed that it does not object to Finding 1⁶⁷.

4.8.12 JT had raised no objection to Finding 2.

JCRA analysis and conclusion

4.8.13 In response to the issues raised by Airtel-Vodafone, the JCRA makes the following points.

4.8.14 Firstly, the approach taken by the JCRA to define the market for mobile call termination is one that is recognised and consistently applied in Europe. Airtel-Vodafone, in its response, did not provide any evidence to demonstrate that the JCRA was wrong in its market definition or the methodology that the JCRA employed but is significantly concerned with any requirement to lower MTRs, which was not a matter covered by the Initial Notice.

4.8.15 Secondly, with respect to Airtel-Vodafone’s point on reciprocity. the principle of reciprocity as described is not relevant in the context of a market definition and SMP assessment and so will not be considered further here.

4.8.16 JT’s response to the Initial Notice does not raise any issues that would require the JCRA to reconsider its market definition as set out above.

4.8.17 For the purposes of this Final Notice, the JCRA therefore concludes that the relevant market definition is:

‘Termination services that are provided by [named mobile communications provider] (MNO) to another communications provider, for the termination of voice calls to Jersey mobile numbers in the area served by that MNO and for which that MNO is able to set the termination rate.’

4.8.18 The following table describes the call types that are and are not included in this definition:

⁶⁷ In its supplementary response JT included a diagram which the JCRA has noted but does not necessarily accept accurately describes the Initial Notice. JT was informed of such by the JCRA’s Officers at the meetings described. The diagram therefore does not form part of this Final Notice.

Call Type	JCRA Position
Voice Calls	Terminated on a mobile number
Off-net	YES
On-net	NO
Ported IN	YES
Ported OUT	NO
Calls to voicemail	YES
Voice calls to mobile numbers terminating on IP	YES
Call forwarding (including international)	YES
Calls to Jersey number roaming abroad	YES
Calls to non-Jersey numbers roaming in Jersey	NO

D. SMP ANALYSIS

4.9 SMP definition

JCRA analysis and Initial Notice

4.9.1 Under the European Framework Directive an undertaking is considered to have SMP if:

*'either individually or jointly with others, it enjoys a position equivalent to dominance, that is to say, a position of economic strength of affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers.'*⁶⁸

4.9.2 Based on the JCRA's assessment of the market and in line with standard principles, the JCRA in its Consultation concluded that each MNO has 100% of the relevant market. The JCRA therefore considered whether there was compelling evidence to suggest that, despite these very high (monopoly) market shares, the MNOs should be considered not to have SMP on those markets. It did so by examining whether:

- a. Barriers to entry are low; and,
- b. Countervailing Buyer Power (CBP) is likely to exist.

4.9.3 In respect of barriers to entry, in the Consultation the JCRA stated that if MNOs could quickly and easily invest in further infrastructure that enabled provision of mobile call termination

⁶⁸ Article 14(2) of the Framework Directive.

on another MNOs network, this would indicate that barriers to market entry were low⁶⁹. This was considered unlikely to be a realistic possibility within the short to medium term for two reasons. First, MNOs, which each have 100% of their own relevant market, would not have strong incentives to co-operate to forego the monopoly profit that can be earned from mobile call termination. Second, no infrastructure mechanisms were expected to be available to allow market entry and no evidence to suggest that this was feasible was provided.

4.9.4 In respect of countervailing buyer power (CBP), the JCRA stated in its Consultation that it did not consider that there was any evidence of countervailing buyer power in this market. The JCRA was therefore of the view that each of the three MNOs had SMP in the relevant market.

4.9.5 The JCRA in its Consultation asked the following question:

Question 7: Does the respondent agree with the JCRA's provisional views relating to the barriers to entry and countervailing buyer power? If the respondent does not agree with the JCRA's provisional view the respondent should provide all of its analysis and assessment of this market.

4.9.6 Having taken into account the responses to the Consultation, the JCRA in its Initial Notice stated that there was no evidence to indicate that each MNO was not dominant on the market for the provision of MCT on its own network. Each had 100% share of wholesale call termination on their networks and each was acting as a monopoly in the provision of that service.

Responses to the Initial Notice

4.9.7 Sure considers that it submitted to the JCRA⁷⁰, as part of its response to the Consultation, clear evidence that any OLO in Jersey can choose to offer a commercial service to operators outside Jersey that incorporates the final termination of both fixed and mobile calls⁷¹. Sure states that an *“individual MNO does not control a bottleneck in the manner that led the European Commission to conclude that there are separate call termination markets for each mobile and fixed network. By definition, any commercial service offered to a non-local operator would need to incorporate the cost to the provider of the service any payments to other OLOs to complete any call termination required, so all calls for which an MTR is chargeable will automatically be subject to non-discriminatory terms and condition at the point of termination in Jersey. How each operator chooses to price and specify the commercial service offered to non-local operator, is however, an entirely different matter, and one which is determined by commercial negotiations. The product offered to non-local*

⁶⁹ This appears to be no more than a theoretical possibility. It involves rival operators acquiring SIM registrations and proprietary technology that would allow a calling operator to choose that provider to terminate a call to a customer held by another operator.

⁷⁰ This point was made in its Guernsey response to the GCRA, but the JCRA assumes that Sure intended this point to be taken account of by the JCRA, on the basis of the statement made by Sure at paragraph 24 of its response to the Initial Notice.

⁷¹ See footnote 65 above.

operators (which may or may not include a call termination element) should therefore not [be] part of the relevant market.”⁷²

JCRA analysis and conclusion

- 4.9.8 Sure argues that any operator can provide a service that transits a mobile call and then hands it over for termination on the network of the MNO on which the customer resides. In doing so the operator will take into account any cost incurred for the termination of the call and which it needs to pay to the MNO who is physically terminating the call.
- 4.9.9 As set out at paragraph 4.7.7 above, the scenario described by Sure does not demonstrate that demand side substitution exists within [X] and could easily be replicated in Jersey. The information provided by Sure merely illustrated a scenario where a [X]. As already stated [X].
- 4.9.10 There is no alternative method of terminating the call and currently there is no foreseeable technology, or even the demand, for an alternative method for the termination of a mobile call. Therefore, the JCRA considers that the barriers to entry in this market remain high and there is no potential for the exercise of countervailing buyer power.

JCRA analysis and conclusion

- 4.9.11 For the reasons set out above and in its Initial Notice, the JCRA concludes that each MNO is dominant on the market for the provision of MCT on its own network. Each has 100% share of wholesale call termination on its network and each is acting as a monopoly in the provision of that service.

E. FINAL NOTICE

4.10 Initial Notice

4.10.1 In the Initial Notice, the JCRA stated that it proposed to find that:

- A relevant market exists for termination services that are provided by [named mobile communications provider] (MNO) to another communications provider, for the termination of voice calls to Jersey mobile numbers in the area served by that MNO and for which that MNO is able to set the termination rate.
- Each MNO is dominant on the market for the provision of MCT on its own network. Each has 100% share of wholesale call termination on its own network and each is acting as a monopoly in the provision of that service

Responses to the Initial Notice

- 4.10.2 Sure considers that the JCRA has proposed numerous definitions for the market for mobile termination and that the Initial Notice creates two distinct (and somewhat conflicting)

⁷² Sure response to Draft Decision, paragraph 43.

definitions of a market. Sure does not consider that due regard has been given to the wording and has therefore considered it helpful to produce two amendments.

4.10.3 Sure believes that the two parts of the market definition set out in the Initial Notice⁷³ need to be conflated (or at least directly associated) to create a meaningful and robust definition. In any event, Sure believes that the first part of the proposed wording needs to be amended as below.

4.10.4 The proposed wording from Sure is:

'The JCRA proposes to find that:

- *The relevant market for mobile termination services is that provided by [named mobile communications provider] (MNO) to any Other Licensed Operator, for the termination of voice calls to Jersey mobile numbers in this area served by that MNO and for which that MNO is able to set the termination rate (referred to, in summary as 'MCT on its own network').*
- *Each MNO is dominant on the market for the provision of MCT on its own network. Each has 100% market share of wholesale call termination on its own network and each is acting as a monopoly in the provision of that service.*

JCRA analysis and conclusion

4.10.5 The purpose of consulting with stakeholders in the market was to test the proposed market definition and explain how it was arrived at. The JCRA commenced the process with a focal product and then looked to see whether expanding it was relevant and in that process various definitions are tested. A portrayal of this process as one proposing "*numerous definitions for the market for mobile termination*" appears to misunderstand a process that is standard in such assessments.

4.10.6 The JCRA does not consider the amendment to the first bullet point to be necessary.

4.10.7 The JCRA has considered the merits of the amendment to the second part of this definition and considers that the proposal put forward is reasonable and clearer. In order to minimise the changing to the wording provided in the Initial Notice the JCRA has decided to replace "*for the provision of MCT on its own network*" with "*on the market as defined above*", ie, the definition in the second bullet refers to first bullet,.

⁷³ As set out in paragraph 4.10.1 of this Final Notice

5. Final Notice

The JCRA finds:

- A relevant market for termination services that are provided by JT (Jersey) Limited (MNO) to another communications provider, for the termination of voice calls to Jersey mobile numbers in the area served by that MNO and for which that MNO is able to set the termination rate.
- A relevant market exists for termination services that are provided by Sure (Jersey) Limited (MNO) to another communications provider, for the termination of voice calls to Jersey mobile numbers in the area served by that MNO and for which that MNO is able to set the termination rate.
- A relevant market exists for termination services that are provided by Airtel-Vodafone Jersey Limited (MNO) to another communications provider, for the termination of voice calls to Jersey mobile numbers in the area served by that MNO and for which that MNO is able to set the termination rate.
- A relevant market exists for termination services that are provided by Marathon Telecoms Limited (MNO) to another communications provided, for the termination of voice calls to Jersey mobile numbers in the area served by that MNO and for which that MNO is able to set the termination rate.
- Each MNO is dominant on the relevant market as defined. Each has 100% share of wholesale call termination on its network and each is acting as a monopoly in the provision of that service.

For clarity the following calls are subject to a Mobile Termination Rate:

Call Type
Voice Calls
Off-net
Ported In
Calls to Voicemail
Voice calls to mobile numbers terminating on IP
Call forwarding (including international)
Calls to Jersey numbers roaming abroad

Appendix 1 - Final Notice

1. As set out in the Final Notice, Sure has made a number of points in its responses to the Consultation and to the Initial Notice that relate to the legal powers pursuant to which the JCRA may (or may not) regulate MTRs in Jersey.
2. The JCRA notes that the purpose of a consultation process is to gather evidence from stakeholders regarding whether the propositions the JCRA has put forward are correct. In this case, the purpose of the consultation process was to seek evidence regarding the correctness (or otherwise) of a market definition and SMP finding put forward by the JCRA.
3. The scope of its legal powers is not a matter on which the JCRA is required to consult. The issues relating to the legal powers of the JCRA that Sure has raised therefore do not form part of the Final Notice.
4. Furthermore, the JCRA notes that this Final Notice does not impose any form of price control on Sure. It merely defines relevant markets and makes a finding of SMP. It is therefore unclear to the JCRA why Sure is, at this point, raising issues relating to the legal powers of the JCRA to do something that the JCRA is not seeking to do in this Final Notice.
5. Nevertheless, these points are listed in this Appendix 1 for completeness.
6. In its response to the Initial Notice, Sure makes a series of points:
 - a. Sure's view is that mobile termination services are interconnection services⁷⁴;
 - b. In order for the Fair Competition clause to be engaged, the JCRA would have to demonstrate that Sure had entered into an anti-competitive arrangement or engaged in market abuse.

⁷⁴ Sure's response to Initial Notice, paragraphs 25 -28