Response by Sure (Jersey) Limited to JCRA document 17/09: Mobile Call Termination 2017 – Initial Notice Market Definition & Finding of Dominance

1. Sure (Jersey) Limited ('Sure') welcomes the opportunity to respond to the JCRA's Initial Notice on the market definition and finding of dominance with respect to mobile call termination ('MT') services in Jersey ("Initial Notice"). We provide below our responses to the specific positions taken by the JCRA with respect to these issues but would also refer the JCRA to our separate but related response to the GCRA's Draft Decision issued in Guernsey under CICRA Document 17/08 ("Draft Decision"). Where there are methodological or technical issues that are common to both Bailiwicks, our response to the Draft Decision provides greater detail.

2. Where possible, Sure has responded to the Initial Notice using the section and paragraph numbering convention employed within that document. In considering the Initial Notice Sure has focused its efforts on the matters most relevant to the JCRA's proposed findings as set out in Section 5 on page 36 of the Initial Notice, in terms of the relevant market definition and the conclusions on dominance in that market. During the next phase of the JCRA's assessment, Sure intends to comment more widely on the other aspects discussed by the JCRA in its previous consultation on mobile termination rates ('MTRs'), as these are more relevant to any proposed remedies, should Sure be found to be dominant in the provision of MT services on its mobile network.

<u>**Section 3 – Review of the Mobile Call Termination Market**</u>

The powers of the JCRA

3. **3.4:** We note that, in contrast to the Draft Decision in Guernsey, the JCRA provides very little commentary with respect to its legal powers to impose regulation on MTRs in Jersey. It seems from the footnote contained on page 7 that the JCRA is relying on the Fair Competition Condition contained in the licences of the Jersey mobile operators[1].

4. No further analysis of how this Condition is relevant to this issue is provided so we have referred back to the JCRA's 2014 Direction to Mobile Operators[2] ('2014 Direction'). This suggests that the JCRA seems to be specifically relying on Condition 27.1(c) of Sure and Airtel's Licence, and the equivalent Condition 34.1 (c) of JT's Licence.

5. Condition 27.1 (c) of Sure's and Airtel's licence (and 34.1 (c) of JT's Licence) states that:
27.1 The Licensee shall:
…
(c) comply with any direction issued by the JCRA for the purpose of preventing any market abuse or any practice or arrangement that has the object or effect of preventing, restricting

[1] This is indeed condition 27 for Sure and Airtel's Class II Licences but we note that it is Condition 34 of JT's Class III licence.
[2] CICRA 14/53: Mobile Termination Rates in Jersey, Final Notice Direction to Mobile Operators, 29 September 2014

or distorting competition in the establishment, operation and maintenance of Licensed Telecommunications Systems or the provision of Telecommunications Services.

6. Whether this Fair Competition condition can be applied to Sure by the JCRA is subject to Condition 25 of Sure's Licence[3], which says that the JCRA must first determine that the Licensee in question possess SMP in a relevant market. We recognise that this current Initial Notice is attempting to justify the JCRA's findings in that respect.

7. However, we also note that Condition 25 states that the JCRA may apply Condition 27 (and other Conditions in this Part of the Licence) "as appropriate". Sure considers that it would only be appropriate for the JCRA to apply Condition 27.1 (c) of Sure's Licence to the extent that the JCRA can provide the evidence that in doing so, it is preventing a market abuse that has the object or effect of preventing, restricting or distorting competition. We do not believe that as yet the JCRA has provided such evidence with respect to MTRs and can only assume that this will be provided in the next stage of this process, where it will consider what the appropriate regulatory obligations should be for any operator that has been identified as holding a position of SMP.

8. At this stage, however, 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 Competition Condition to MTRs and also what it is trying to achieve in terms of local consumer outcome.

9. The 2014 Direction also states that the other Condition of relevance – but to JT only - is Condition 33.2 of JT's Licence. It seems that it is this Condition that gives the JCRA specific powers to determine the maximum level of charges that JT may impose in certain markets, but there is no equivalent condition to this in either Sure's or Airtel's Jersey Licence. Therefore, regardless of whether the JCRA finds Sure to have a position of SMP in a suitably defined relevant market for MT, we would question its ability to apply specific price control regulation with respect to either Sure or Airtel.

<u>**Section 4 – Responses to the Consultation**</u>

Market Analysis

10. **4.3:** The JCRA states that its review is a forward-looking one, which the JCRA proposes should cover a period of 3 to 5 years. It is, however, important that the JCRA is specific about the period covered by that forward-looking analysis. Whether the period is 3 or 5 years can make a material difference to the issues that need to be included in the review and the likely future market scenarios that need to be considered. The JCRA states, in paragraph 3.10, that it has taken account of the European Commission's Guidelines in relation to its forward-looking market analysis procedure, but has provided no evidence as to how it has appropriately applied that procedure.

[3] Also Condition 25 in Airtel's Licence, which like Sure holds a Class II Licence in Jersey, but the application of Condition 34.1(c) of JT's Licence is subject to Condition 24 for JT's Class III Licence.

11. As the OTT market in particular is increasing at a fast pace it may prove difficult to accurately forecast its impact on the MTR market as far out as a 5 year period. A 3 year interval for market reviews has been mandated for regulators within the EU and should be considered good practice for other jurisdictions. Anything beyond that is likely to cause market distortions and regulatory uncertainty, which could ultimately be to the detriment of local customers and users. Sure therefore believes that a forecast period of 3 years would present a more relevant data set for this analysis.

12. We would also note that whilst the JCRA states that for the purposes of this review, and in particular its consideration of whether any one or more of the mobile network operators ('MNOs') have SMP in the relevant market within which wholesale mobile call termination services are provided, that it will undertake forward looking analysis, it does not seem to have done this in practice. In its respective consultations leading up to this Initial Notice and the Guernsey Draft Decision the evidence it has referred to on issues such as the impact of OTT on the relevant market definitions seems to entirely backward looking. For example, it has included evidence from an Ofcom Review that was published in 2015 (and related to its UK market review for the period 2015 to 2018)[4] but which uses evidence dating back to 2013. The JCRA seems to be ignoring the evidence that Sure (and JT) has presented on more recent market developments within the Channel Islands with respect to the increasing use of OTT services, let alone how these may be expected to have further impacts on a forward-looking basis.

Market definition

Retail market – product market

13. **4.6 (onwards):** 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.

14. For a more detailed discussion of our views on the JCRA's position on product market definition issues then, we would refer the JCRA to the more detailed discussion contained in our response to the Guernsey Draft Decision, However, in summary:

- In reaching its view that OTT services do not form part of the relevant retail product market, it is not appropriate for CICRA to continue to rely on outdated evidence from the UK. The JCRA - and GCRA - places (rightly) a lot of emphasis on the need for any regulatory measures to be evidence-based and yet it seems to be reluctant to consider the more up to date and relevant evidence on the impact of OTT services in the Channel Islands.
- The reliance on outdated evidence from the UK also completely contradicts the JCRA's statement that it has undertaken a forward-looking analysis of the relevant markets that are the subject of this Initial Notice.
- The reasons cited by the JCRA and GCRA for not considering OTT platforms to form part of the retail market for mobile calls in Jersey and Guernsey - in terms of lack of platform

[4] Mobile call termination market review 2015 - 2018, Final Statement, published by Ofcom March 2015

interoperability, perceived low take-up of data-enable smartphones, lack of high-quality mobile internet, and quality issues of OTT – are all challenged by Sure in terms of the more recent evidence available on all these factors.

15. **4.35:** Sure believes that it is inappropriate for the JCRA to try to dismiss the relevance of the impact of OTT services on the underlying MT service. Sure is not suggesting that retail OTT services are directly competing with the wholesale MT, but they are clearly indirectly causing a constraint on it.

16. It is unclear to Sure what point the JCRA is trying to make in this paragraph and in our view, this aspect needs clarification before the matter can be considered to have been appropriately actioned.

Other points

17. **4.48:** We note that the JCRA now seems to be 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 customers calling Jersey numbers. If it is now saying that it is up to UK operators to reach their own commercial decisions on this – a position that Sure has previously stated is the case, as neither CICRA nor Ofcom has the ability to regulate these particular UK prices – then this again brings into question what this current review is hoping to achieve. In the particular context of the Jersey market, and the legal framework that the JCRA has identified as relevant to MTRs, this reinforces the need for the JCRA to explain what the market abuse, practice or arrangement is that the MNOs are engaging in that is having the object or effect or preventing, restricting or distorting competition, and which would make it appropriate for the JCRA to apply Condition 27 of Sure's licence.

18. We also note that in this same paragraph the JCRA states: *'As explained elsewhere in this Initial Notice, the service for the termination of a mobile call is the same (and therefore involves the same costs) irrespective of where the call originated. The JCRA* is *not ignoring the fact that there is a variable cost of transit/conveyance in order for a Jersey based mobile operator to be able to terminate the call (by use of the MCT service); it simply notes that the transit/conveyance services are outside of the scope of this review of the Mobile Call Termination market'*.

19. It appears that the JCRA has failed to acknowledge that this is at odds with the principles that it employed in the calculation and application of the current MTR. That is, its latest view that transit requirements should be out of scope of this review, is counter to the current regulatory requirement, as set out in its 2014 Direction, which stated that there should be no additional charge applied for any on-island transit of a call terminated on a mobile network.

20. Sure therefore believes that before proceeding any further, the JCRA needs to clarify its position as stated in this Initial Notice, as it appears to be inconsistent with the 2014 Direction that as the JCRA notes in paragraph 2.7, currently remains in force.

21. **4.50 to 4.51** Given all the above, we cannot agree with the JCRA that it is appropriate to dismiss the arguments presented by Sure and other MNOs that increased usage of alternative forms of communication (OTT) at the retail level is constraining the pricing of wholesale termination charges for calls to mobile. We also do not think it acceptable for the

JCRA to be vague about the retail product market definition and especially whether or not it includes OTT services, when it has clearly noted that the starting point for the definition of the relevant wholesale market/s is the "…definition of the relevant retail markets from **a forward looking perspective…"** [emphasis added]

Retail geographic market

22. The JCRA has not addressed the topic of the geographic scope of the relevant retail geographic market in its Initial Notice.

23. Sure considers it necessary for the JCRA to undertake the complete retail market definition process in order for the upstream wholesale market to be defined appropriately.

Wholesale market – product market

24. **4.52 to 4.91:** Sure notes that the discussion contained in these paragraphs 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, but in summary:

- Sure agrees with the JCRA that the significant wholesale market in respect of the market for calls received in Jersey on a mobile device is the market for call termination (MT).
- Consumers' behaviour in the retail market is capable of acting as a constraint on pricing at the wholesale level. Specifically, the more that consumers use OTT services, the more the MNOs are subject to pressure to reduce the pricing of conventional calls. Whilst consumers may not be aware of the level of the MTR, that is not the same as saying that the MTR is not relevant for retail charges; it is a cost input that the MNO will need to recover in its retail charges.
- OTT substitution is particularly relevant for international calls or other calls outside the bundles included in post-paid packages offered by MNOs, and the use of OTT platforms is easy and near-ubiquitous across many consumer groups.
- The MT service offered by Sure in Jersey is available to be purchased in Jersey only. The service offered to (and purchased by) operators who are not based in Jersey is a different end-to-end commercial service. Whilst it incorporates transport from the point of interconnection with the operator in Jersey, local transit, and termination to the number dialled by the calling party, a non-local operator cannot purchase these different elements separately.
- Sure has provided evidence to show that any OLO in Jersey can choose to offer a commercial service to operators outside Jersey. How each operator chooses to price and specify the commercial service offered to a non-local operator is determined by commercial negotiations. The product offered to non-local operators (which may or may not include a call termination element) should therefore not form part of the relevant market.
- We would refer the JCRA to our Guernsey response with respect to the need to consider the specific issues that arise with respect to ported numbers and especially the need for Sure to be able to recover efficiently incurred costs.

The concepts of interconnection and call termination

25. We note that, as is the case in the Guernsey Draft Decision, the JCRA seems to be suggesting that MT services are not interconnection services and that Sure is mistakenly conflating the concepts of interconnection and call termination. In support of its view that MT services are not interconnection services, the JCRA quotes from the 2015 Ofcom Review but does so selectively. As such it omits the part where Ofcom clearly refers to the MT service as an interconnection service, referring to *'current interconnection practices'* when explaining how the charging for the MT service is structured.[5] Sure therefore considers that the paragraph referenced by the JCRA in fact confirm that the MT services is an interconnection service, rather than the opposite.

26. As additional evidence, in 2012, the JCRA referred to its review of the charges applied by JT for all *interconnection* services and that 'this Initial Notice sets out the JCRA's proposals with regard to MTRs only. The JCRA will separately consult on its proposals for the level of charges for fixed interconnection services provided by JT'.[6]

27. Elsewhere in that <u>MTR specific document</u> (paragraph 3.1) the JCRA stated that 'a Class III licence also includes conditions relating to the requirement to provide *interconnection* services and the production of a reference offer for *interconnection* services ("RIO")'.

28. As is the case in Guernsey, interconnection in Jersey is only available to other licensed operators. The means by which interconnection occurs with an OLO is through a Reference Interconnect Offer. The JCRA is correct when it says that we have noted that we do not currently have an obligation to provide a Reference Interconnection Offer in Jersey, therefore we maintain that the JCRA cannot currently use this Licence Condition against Sure (or indeed Airtel) when it does not exist.

29. The JCRA seems to sweep over this fact by instead then referring to the Fair Competition condition as a means to regulate Sure's (or any of the other MNOs' MTR). In this respect, we refer the JCRA back to our opening comments above where we note that to apply this Condition it seems that the JCRA would first need to 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.

<u>Section 5 – Initial Notice</u>

30. It is evident from the JCRA's Initial Notice on MTRs and the relevant earlier consultation that it has proposed numerous definitions for the market for mobile termination. Sure is concerned that even within this Initial Notice section of its document the JCRA has, as

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[5] The full quote from Ofcom is: *One of the services that network operators offering voice services provide to each other is call termination – that is, the completion of a call from a customer of another network. MCT is the service provided by an MCP necessary for an originating CP to connect a caller with the intended mobile call recipient on that MCP's network.* ***<u>Under current interconnection practices</u>*** *<u>used by CPs in Europe and many other countries around the world, as shown in Figure 1, the originating CP pays an amount (known as the mobile termination rate or MTR) to the MCP providing the voice call termination service</u>."[5] [underlined text shows what was excluded by the JCRA].*

[6] Page 2 of www.cicra.gg/_files/CICRA%201201%20%20Mobile%20Termination%20Rates%20in%20Jersey%20Initial%20Notice%20of%20Proposed%20directions%20to%20mobile%20network%20operators.pdf

currently worded, created two distinct and somewhat conflicting definitions of a market. This is not only unhelpful to respondents, it is also unlikely to stand up to robust scrutiny, should that be required at any time in the future. Sure does not consider that due regard has been given to this important wording and has therefore considered it helpful to propose two amendments.

Current wording:

31. *'The JCRA proposes 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 this 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% market share of wholesale call termination on its own network and each is acting as a monopoly in the provision of that service.'*

32. The market referred to in the second bullet point is materially different to that defined in the first bullet point and as such, Sure believes that these items need to be conflated (or at least directly associated) to create a meaningful and robust definition. Should the JCRA wish to keep the bullet points separate then Sure believes that the first needs to be amended to identify it as *'MCT on its own network'*.

33. In addition, based on Sure's arguments, particularly in the latter part of this response, we believe that a further amendment to the first bullet point is required, to recognise that the only operators that can directly access the Jersey interconnection service for mobile termination are those that are licensed by the JCRA within that jurisdiction. Whilst other operators (such as BT and Vodafone in the UK) can make use of a Jersey MNO's MT service they can do so only via a local operator and not directly. As the JCRA is adamant that any transit/conveyance facilities (including those provided to off-island operators) must sit outside the scope of an MT service the definition of *'another communications provider'* should also be replaced.

Sure's proposed wording:

34. *The JCRA proposes to find that:*

- ***The** relevant market ~~exists~~ for **mobile** termination services **is** that ~~are~~ 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.'*

Conclusion

35. In light of the significant areas of this Initial Notice where Sure has identified the need for either further explanation or clarification - and especially with respect to the JCRA's legal powers in relation to mobile termination rates - we strongly believe that the JCRA has no alternative but to reissue a new Initial Notice that addresses these issues.

Sure (Jersey) Limited

18th May 2017