



Future Economic Regulation of the Broadband Market

Consultation Document

Channel Islands Competition & Regulatory Authorities

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1. Introduction

1.1 Broadband is an essential service for consumers. In a monopoly situation, matters which CICRA as the economic regulator would be expected to address itself to are whether wholesale broadband prices are at efficient and fair levels, regulatory incentives around investment choices are clear and appropriate, and competition is supported where it serves consumers' interests.

1.2 The telecommunications strategy/policy for the States of Guernsey is currently being drafted. The States of Jersey launched its telecoms strategy¹ on 9 January 2018. The Jersey strategy included the policy principle to

'Promote retail competition (not network competition) as the most effective way of delivering the benefits of next generation connectivity to consumers and businesses'.

A key activity allocated to CICRA to support this policy principle is:

'CICRA should ensure that JT supplies other operators with wholesale access to the Gigabit network on a fair, reasonable and non-discriminatory (FRAND) basis, and that wholesale access seekers get access to wholesale products, which allow access seekers to compete based on differentiated retail services'.

1.3 CICRA's *Strategic Objectives and 2018 Draft Work Programme, Consultation Document – Economic Regulation of Telecommunications*², in November 2017. These are consistent with the above. That document introduced three proposed strategic objectives:

(a) *Consumer protection supporting attainment of consumer satisfaction levels comparable to the UK*

(b) *A retail/downstream market where access to upstream inputs ensures new services and innovations can be made available to consumers in timeframes comparable to neighbouring jurisdictions*

(c) *Provision of wholesale network infrastructure services where charges are set at sustainable and equitable levels.*

1.4 In terms of price controls, at present JT Jersey Limited (**JT**) is subject to a price control that takes the form of a margin squeeze test³. This was set as a short term measure following a finding that JT had contravened its licence condition in respect to fair competition. The control has similar features to that of Ofcom's price control⁴ of BT's provision of fibre broadband. It does not however ensure that JT does not earn an excessive return from its wholesale broadband business.

¹ A telecoms strategy for Jersey, prepared for Government of Jersey, December 2017, Oxera

² <https://www.cicra.gg/media/597748/g1347gj-consultation-telecoms-strategic-objectives-and-2018-work-programme.pdf>

³ <http://www.cicra.gg/files/Signed%20Redacted%20Letter%20MS.pdf>

⁴ https://www.ofcom.org.uk/__data/assets/pdf_file/0015/72420/vula_margin_final_statement.pdf

- 1.5 Sure Guernsey Limited (**Sure**) was required to ensure its wholesale broadband prices complied with a cost-plus control decision. Sure has recently argued it is no longer subject to any such wholesale pricing control and in the absence of material price increases or concerns raised by broadband retailers, CICRA decided that its scarce resources are best focussed on future rather than historic controls.
- 1.6 In both islands wholesale provision is essentially ‘white-label’⁵. Competition and differentiation is therefore not possible in the provision of the core product, but tends to be in the supporting retail services (billing, customer contact services etc.) and in undercutting the incumbent’s retail price. In other jurisdictions, with the availability of more extensive network access products the ability of the entrant to control the product template gives greater options to the entrant allowing it to provide a different set of core products to the incumbent given greater control of upstream infrastructure.
- 1.7 Given the existing situation there would appear to be scope for improvement to some aspects of the market that would further advance CICRA’s strategic objective to ensure markets work well for consumers.
- 1.8 To that end, CICRA’s 2018 work programme included the following items:
- (a) *Address any structural or behavioural constraints in wholesale service provision that inhibits innovation by downstream service providers.*
 - (b) *Review of wholesale charging for broadband services by network operators to ensure that charges are set at sustainable and equitable levels.*
- 1.9 This Consultation Document is an initial step to progress the above actions of the CICRA 2018 work programme.
- 1.10 CICRA welcomes your views and evidence on the discussion points raised in this consultation.

⁵ The vertically integrated incumbent decides on a suite of retail products it considers meets consumer needs. Any competitor is then limited to the same suite of retail products for which it pays the incumbent a wholesale price.

2. Economic regulation of broadband – Strategic Objectives

CICRA’s strategic objectives that are specific to this consultation are as follows.

A retail/downstream market where access to upstream inputs ensures new services and innovations can be made available to consumers in timeframes comparable to neighbouring jurisdictions

The way downstream and upstream services are accessed by consumers is changing. Services (described as Over the Top or OTT) are invariably provided by non-jurisdiction specific providers. The increasing range of such services will be further fuelled by the arrival of 5G⁶ around 2021/22. The pace that these new services and innovations can be made available to consumers will rely on a more responsive marketplace than we have at present. It is conceivable that, in the medium term, this could eclipse the need for consumers to use licensed retail services presently governed under a licensing regime from 2002. A more fluid retail licensing environment is likely to be part of the adaptation needed to avoid anomalies where services from competing providers are governed by contrasting regulatory rules—especially if they are accessed from the same device. A market that ensures new services and innovations are made available to consumers in a timely fashion is a priority in achieving this key strategic objective; it will need to be supported by licensing that’s adapted to technology change as well as more ready access by retailers to wholesale inputs they want rather than what incumbents may consider necessary.

Provision of wholesale network infrastructure services where charges are set at sustainable and equitable levels

There is a possibility that, in the medium term, the provision of network infrastructure (mobile and fixed) in the Channel Islands could result in fewer providers. The key reasons are the commercial imperatives that drive investment choices, policy direction and issues of scale for small island economies – all of which look set to be a growing challenge as technology demands change.

In a context where upstream network infrastructure provision by commercial business is expected to be more concentrated, the risks of excessive profits and/or inefficiencies are greater if a regulatory framework does not provide a corresponding counter balance. The implication is that more prescriptive price control regulation will be an important tool in offsetting the risks posed by a commercial monopoly. Regulatory intervention may also be required to ensure that the provision of wholesale network infrastructure services is achieved in sustainable and equitable conditions

⁶ 5G is expected to facilitate multiple new applications, including self-driving vehicles, augmented/virtual reality, smart cities using Internet of Things sensors, and remote health monitoring using wearable devices. Mission critical applications will require high reliability, immersive interaction will require low latency, remote health monitors will require wide geographic coverage. Present expectations are that such diversity would need to be enabled by a single physical network split into multiple virtual networks. Access to it will need to be appropriate to follow a dynamic market.

3. The Channel Islands broadband markets

Key role played by retail broadband services

- 3.1 Retail broadband services play a key role in enabling residential and business consumers to access a full range of commercial and social digital content and services. Consumer welfare is also increased as more services such as government services (eGovernment) and health (eHealth) are delivered 'online'. Broadband is the 'go-to' method to provide an increasing number of these products and services, and the forecast is for increased demand owing to future growth of services, in the main driven by continuing innovation.
- 3.2 The provision of broadband services also has a wide impact on the economics of the Channel Islands. This is, in the main, due to the significant global business position of the Channel Islands with its important international standing and its island location.
- 3.3 Effective retail competition for broadband services plays its role by ensuring that consumers benefit from lower prices, greater choice, better quality of services and benefit from advances made by innovation. The need to ensure that the input prices these retailers pay the monopoly provider for accessing their network are set at sustainable and equitable levels then arises. Informing this in Jersey is the fact that the Jersey government has indicated it is keen to ensure that the island takes a position that can be described as a 'fast adopter'. This does not imply that operators will not be in a position to try cutting edge technologies or develop testbeds. But this policy positioning does inform the ambitions for the economic regulatory framework, in particular how tools such as wholesale price controls might look to lay a framework within which the retail sector is supported.

The role played by wholesale broadband services in delivering a vibrant retail market

- 3.4 Wholesale broadband services, (**upstream services**), are purchased by telecoms service providers (**downstream service providers**) in order to allow them to supply retail broadband services (**downstream services**) to residential and business consumers.
- 3.5 The availability and price of wholesale broadband services that utilise the incumbent operator's network (**upstream service provider**) play a significant role in the promotion and maintenance of an effective level of retail competition in the broadband market. As well as the input prices, these downstream service providers pay the upstream service provider, a further consideration is whether there is a sound regulatory regime that ensures there are suitable products and services to support competition between downstream service providers. A method available to regulators to ensure that there is effective retail (downstream) competition is through the regulation setting out the rules for access to an upstream operators' network.

Question 1: Does the respondent agree with CICRA's provisional view relating to the Channel Islands' broadband markets set out above? If the respondent has alternative views or relevant evidence the respondent is asked to explain those and provide all of its analysis and assessment relating to this matter to inform CICRA's consideration and next steps.

4. Forward looking regulation for the Channel Islands broadband market

- 4.1 A key CICRA aim for regulating the broadband market is the promotion and protection of retail (downstream) competition whilst supporting efficient and effective investment in the wholesale (upstream) broadband network.
- 4.2 CICRA also considers that retail competition, in terms of the number of competing operators, is limited in the Channel Islands and putting in place additional wholesale broadband access remedies to support entry or expansion in this market its aim is not to manufacture an increase in the number of retail competitors. However, there is a need to ensure that remedies are in place and are operating so as to ensure that existing retail competitors are able to innovate and an operator who is willing to enter into the downstream retail market can do so in an environment where barriers to entry are as low as feasible, for any potential market entrant
- 4.3 In considering what regulation should be considered for the Channel Islands, CICRA has considered the following:

Policies from States of Jersey and States of Guernsey

- 4.4 CICRA is cognisant of the fact that the States of Jersey has in January 2018 published its telecoms policy and that the States of Guernsey is in the latter stages of completing its telecoms policy reviews. CICRA will take into account specific policy recommendations.
- 4.5 All responses to this consultation will be considered in line with relevant States' policies.

Best practice regulatory framework

- 4.6 In Europe, regular market reviews are undertaken on relevant markets to ensure that they are fully functioning and that, where necessary, *ex ante* remedies can be applied. Potential regulatory measures that can be imposed on a wholesale broadband service provider that is identified as having Significant Market Power (**SMP**) on a relevant market could include the following:
- a. A requirement to provide network access on reasonable request and on fair and reasonable terms, conditions and charges. This is often referred to as FRAND⁷ terms;
 - b. A requirement to not discriminate unduly in the supply of services. Some jurisdictions have a requirement to supply services on an Equivalence of Inputs (**EOI**) basis;
 - c. A requirement to publish a Reference Offer (**RO**);
 - d. A requirement to notify changes to terms, conditions or charges;
 - e. A requirement to notify changes to technical information;
 - f. A requirement to publish quality of service information;
 - g. An accounting separation obligation, and
 - h. A cost accounting obligation.

⁷ FRAND – Fair and Reasonable Access on Non-Discriminatory Terms

- 4.7 In order to signal that wholesale broadband services are readily available and designed and supplied in line with a supportive and recognised regulatory framework it would be appropriate for CICRA to consider whether a sub-set or the full list of remedies above should be implemented in the Channel Islands.

Question 2: Does the respondent agree with CICRA’s statement relating to best practice regulatory framework? If the respondent has alternative views or evidence the respondent is asked to explain those and provide all of its analysis and assessment relating to this matter to inform CICRA’s consideration and next steps.

Implementing a mechanism for ensuring an appropriate return on investment for the wholesale broadband providers

- 4.8 Building their own access network would allow downstream service providers greater flexibility in services offered to their consumers. However, this requires a significant level of investment which is unlikely to be forthcoming on a significant scale in jurisdictions of the scale of the Channel Islands markets.
- 4.9 The purchasing of upstream wholesale broadband services therefore allows downstream providers the ability to offer retail services without having to undertake an inhibitive level of investment. Reliance on the upstream service providers could however reduce the level of flexibility of the services that the downstream provider is able to supply to its end users. It is often stated that these operators are limited in how they can ‘differentiate’ the services that they offer. Often downstream providers are limited to offering a ‘white-label’ or a ‘me-too’ version of the service being provided by the incumbent operator. Therefore, product differentiation amongst telecoms providers who take upstream wholesale services is focussed more on the retail level features such as billing, customer service and standards of service than the technical features of the underlying service.
- 4.10 Wholesale broadband products are built using a number of network elements. These include:
- The access network which includes the connection from the customer’s premise to the local exchange either using copper, fibre or a combination of copper and fibre;
 - The broadband equipment at the local exchange;
 - Backhaul connectivity across the upstream provider’s network, and
 - The functionality of the Broadband Remote Access Service (B-RAS) which provides management of the consumer’s internet sessions.
- 4.11 The downstream service providers would have the ability to differentiate their services to a greater extent when they have control over some of the elements listed above, primarily the ability to manage their end-user’s internet session. This raises questions around whether those downstream providers have adequate access to what they require to achieve such ambitions, whether the prices charged by the monopolist are justified and for purposes of this consultation, what is the appropriate form of economic regulatory oversight in the circumstances.

Question 3: Do respondents consider there is appropriate access and reasonable control over the wholesale network elements listed above by retail broadband providers? If these descriptions are ambiguous or would benefit from further elaboration in terms of their definitions respondents are asked to set out their views in as much detail as feasible.

Question 4: Are there additional wholesale network elements that have not been identified that have a material bearing on the ability of broadband retailers to provide services? If so respondents are asked to set these out fully?

Question 5: Do respondents consider there is a need for economic regulatory intervention of the wholesale charges by the monopolists who control access to the networks elements above or any additional elements respondents have identified?

What is CICRA's role as the regulator

- 4.12 Absent intervention, markets without effective competition often have a lack of incentives. It is an accepted view that the incentives of a (near) monopoly operator do not inevitably align with the incentives required in a forward view of the market.
- 4.13 CICRA's duty is to ensure that upstream broadband networks are cost-efficient, cost-reflective and support the retail environment in line with policy aims.
- 4.14 It is key that the quality and reliability of upstream services are ensured, so that innovation stays up to date. Historical evidence shows that innovation is largely reliant on competition, and markets designed by operators with dominance on the market do not support that.
- 4.15 CICRA is responsible for ensuring that downstream operators are able to compete in the relevant market. This relies on the services provided by the upstream service provider. A first step for CICRA could be to review the relevant market.

The potential *ex ante* and *ex post* requirements for the wholesale broadband market

- 4.16 A market review process is typically carried out in three stages:
- First, identify and define the relevant markets;
 - Second, assess whether the markets are effectively competitive, which involves assessing whether any operator has SMP in any of the relevant markets, and
 - Finally, where SMP is found, assess the appropriate remedies, based on the nature of the competition problem, or market failure, identified in the relevant markets.
- 4.17 The 2014 EC Recommendation on Relevant Markets sets out those products and service markets, which at a European level, the Commission has identified as being susceptible to *ex ante* regulation. These markets are identified on the basis of the cumulative application of three criteria:
- The presence of high and non-transitory barriers to entry;

- A market structure which does not tend towards effective competition within the relevant time horizon, and
 - The insufficiency of competition law alone to adequately address the market failure(s) concerned.
- 4.18 Absence of appropriate *ex ante* regulation, could leave upstream operators with the incentive and ability to:
- Refuse to provide network access to other downstream service providers (or refuse to provide access on reasonable terms, conditions and charges), which could restrict competition in the provision of retail services to the detriment of consumers;
 - Discriminate in favour of its downstream retail businesses to the detriment of competition in retail broadband services (including by price and/or non-price discrimination), and ultimately to the detriment of consumers, and
 - Fix and maintain some or all of its wholesale prices at an excessively high level or engage in a price squeeze.
- 4.19 Prior to imposing any *ex ante* remedies in a market where a provider is found to have SMP, CICRA first needs to consider whether the competition concerns identified could be sufficiently addressed through competition law. To do so CICRA might consider whether competition law would be effective in responding to the competition concerns identified above.

Initial view

- 4.20 Competition law focuses on preventing the abuse of a dominant position (ie. *ex post*), and may not place sufficient obligations on an SMP operator to facilitate and sustain effective downstream competition (ie. *ex ante*). International experience is that *ex ante* regulation in the wholesale upstream market can better promote effective downstream competition.
- 4.21 *Ex ante* regulation could be better tailored to the particular circumstances in the market and services provided in order to address the competition concerns.
- 4.22 At this stage CICRA considers that providing certainty in the wholesale market is important to the upstream providers and to its competitors in the downstream market as this underpins competition in the retail market which leads to benefits for consumers in the Channel Islands.
- 4.23 CICRA suggests this is best achieved through *ex ante* regulation which, in comparison to reliance on *ex post* competition law remedies alone, would:
- Provide greater clarity on the type of behaviour that is/is not allowed; and
 - Can facilitate more timely enforcement due to the greater certainty and specificity provided by *ex ante* obligations.
- 4.24 In the present circumstances of the market, CICRA considers that competition law remedies alone appear insufficient to address any competition problems.

- 4.25 Whilst, at this point in time, CICRA has not carried out a market review of the relevant markets it considers appropriate for it to engage in an early discussion with stakeholders with regards to its aims for this important market as well as high-level approaches to how this will be achieved.

5. Stakeholder consultation

- 5.1 CICRA has a number of high-level aims for this market and wishes to seek views from stakeholders as to whether these aims are appropriate and how best to ensure these aims are achieved.

Aim 1

To ensure that the regulatory framework and the functioning of the wholesale upstream markets provides the right signals to potential market entrants.

CICRA does not consider its role is to speculate how many or what type of market entrant might wish to enter the retail markets. CICRA's role is to ensure that operators face a low barrier to entering the broadband retail market as is feasible given the market circumstances. This appears to be achieved by ensuring that there is a wholesale broadband product set, supplied by the upstream operator, that will allow rapid entry into the market and the ability to innovate and differentiate as the downstream operator requires to meet its business objectives. To put it another way, CICRA should ensure that the risks to entering the market that relate to the upstream market are minimised for the downstream service provider by removing unnecessary barriers to that.

Aim 2 To ensure that there is a fair and appropriate return on investment allowed for upstream operators who have invested in next generation networks and associated equipment and capacity.

The incentive to invest needs to be focussed on ensuring that sufficient capacity and connections are available to support a successful downstream market.

- 5.2 Where there is SMP, a potential (but not only solution) that CICRA is interested in seeking views on from all stakeholders is the provision of a single, wholesale product (in terms of capacity) upon which the downstream retail service provider can configure its services. This might be a way forward to ensure that the downstream service provider is able to offer a range of speeds and data usage whilst the upstream provider focusses on a single wholesale 'capacity pipe' solution. This could result in the upstream operator providing a service that, as an example, could support a 1Gbps, symmetric service that the downstream operator takes to support a much lower speed, lower data utilisation (i.e. the usage is potentially capped at a monthly allowance) and asymmetric service. In this scenario CICRA would want to ensure that the upstream operator is able to recover a sufficient return on its investment but also that the downstream operator is able to make a margin to support its business. This would

be consistent with the aim of ensuring that consumers have a fit for purpose service, a service that is sufficient for their needs (i.e. one they are not paying for services that they do not actually need such as very high speed or symmetric service). A choice of retail product offerings could demonstrate that the market is functioning well and is providing for the welfare of consumers.

- 5.3 Whilst an aspiration could be that the Channel Islands are seen to be a high-speed, high-usage economy, in terms of its broadband market, it is envisaged that a sector of society will still only need a proportion of the speed and usage of the network and it is important that CICRA allows a market to function that enables retail service providers to be able to function across all sectors of the market and not forced to adopt the commercial path which the incumbent chooses for its retail business in terms of products it makes available and scope for innovation.

Question 6: What do respondents consider are the appropriate investment incentives that an economic regulatory framework should provide to both support investment upstream in the wholesale network as well as support innovation and choice by competing retailers? The respondent is asked to set out the alternatives it considers feasible and its evidence and reasoning for those its supports and those it does not.

6. Next Steps

- 6.1 CICRA is open to considering different approaches to how the wholesale and retail market should be structured and regulated going forward.
- 6.2 Interested parties are invited to submit comments to CICRA in writing or by email on the matters set out in the papers that accompany this document to the following addresses:

2nd Floor, Salisbury House 1-9 Union Street St Helier Jersey JE2 3RF Email: info@cicra.je	Suite 4, 1st Floor La Plaiderie Chambers La Plaiderie St Peter Port Guernsey GY1 1WG Email: info@cicra.gg
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- 6.3 All comments should be clearly marked 'Future Economic Regulation of the Broadband Market' and should arrive by 5pm on 15 June 2018.
- 6.4 In line with CICRA's consultation policy, it intends to make responses to the consultation available on the CICRA website. Any material that is confidential should be put in a separate annex and clearly marked as such so that it may be kept confidential.

END.