



Final Decision

Broadband Market

Market Review and SMP Finding

Channel Islands Competition & Regulatory Authorities

Document No: CICRA 19/01

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1. Introduction

- 1.1 On 26 April 2018 CICRA¹ launched its broadband consultation² with a stakeholder meeting. At the meeting a number of operators requested that CICRA carry out a market review on the broadband market. Specifically JT (in Jersey) and Sure (in Guernsey) expressed concerns that the Significant Market Power (**SMP**) findings existing in the respective broadband markets had been in place for a significant time during which both fixed and mobile technology have changed as well as how consumers use the broadband services provided.
- 1.2 Following the stakeholder meeting CICRA reviewed the comments of the operators and decided to engage external consultants to carry out a pragmatic and proportionate market review.
- 1.3 SPC Network was subsequently engaged to carry out the market review.
- 1.4 CICRA published its Draft Decision for stakeholder consultation on 19 October 2018. The Draft Decision presented the findings of a *Market Review on the Broadband Market carried out on behalf of CICRA*. The Market Review considered both the Guernsey and Jersey markets.
- 1.5 This Final Decision considers the responses received to the Draft Decision. Responses were received from Sure (Jersey), Sure (Guernsey), JT (Jersey) and JT (Guernsey).

¹ The JCRA and GCRA co-ordinate their activities with respect to competition law enforcement in the Channel Islands. For the purposes of this document, the JCRA and GCRA are together referred to as CICRA, and all references to CICRA should therefore be read as references to each of the JCRA and GCRA unless the context otherwise requires.

² Future Economic Regulation of the Broadband Market, Consultation Document, CICRA 18/21, 4 May 2018

2. Structure and Timetable

2.1 This Final Decision is set out as follows:

Section 3: Legal Background

Section 4: Summary of Market Review

Section 5: Consultation Questions and Stakeholder Responses

Section 5: Proposed Action

Section 6: Next Steps

Section 7: Final Decision

Annex A: SPC Network Report “Report for CICRA, Wholesale Broadband Access Market Review: Market Definition and SMP Assessment, 25 July 2018”

3. Legal Background

3.1 The SPC Network report is specific on areas of Channel Islands and European laws and regulation that it has considered in carrying out its assessment and reaching its conclusion.

3.2 In addition the specific legal and licencing conditions for Jersey and Guernsey are set out below.

JERSEY

Legal background

3.3 The Telecommunications (Jersey) Law 2002³ (the **Jersey Telecoms Law**) provides that the JCRA may include in telecommunications licences such conditions as the JCRA considers necessary or desirable for reasons including but not limited to those set out in article 16 of the Jersey Telecoms Law.

³ Telecommunications (Jersey) Law 2002, revised edition 06.288, 1 January 2013

- 3.4 Part 3 of the Jersey Telecoms Law sets out the duties of the Minister and the JCRA, and obliges them to protect and further the interests of telecommunications users within Jersey by, wherever appropriate, promoting competition⁴. Part 3 also sets out general objectives that the JCRA should take into account, including the need to promote efficiency, economy and effectiveness, and to further the economic interests of Jersey.
- 3.5 The Jersey Telecoms Law⁵ specifically provides that the JCRA may include in any licence, conditions that are:
- Intended to prevent or reduce anti-competitive behaviour⁶;
 - Relate to, or imposing requirements about, competition in relation to telecommunications services, telecommunication systems, apparatus and telecommunication equipment.⁷

Licensing Framework

- 3.6 Part 2 of the Jersey Telecoms Law establishes the requirement for a telecoms operator to hold a licence, and Part 5 sets out the powers which the JCRA has to grant a licence. There are four classes of telecommunications licence in Jersey. A Class III licence is specifically for applicants which have Significant Market Power (**SMP**). The Class III licence includes a Part which addresses conditions applicable to dominant operators⁸.
- 3.7 The provisions which are applicable to dominant operators include (but are not limited to) measures addressing the availability and associated terms of Other Licensed Operator (**OLO**) access to networks and services⁹; the requirement not to show undue preference or to exercise unfair discrimination¹⁰; the requirement not to unfairly cross

⁴ Part 3, Article 7 (2) (a)

⁵ The definition of a position of SMP / dominance and the abuse of a position of SMP / dominance is not explicit in the Jersey Telecoms Law. However, the Competition (Jersey) Law 2005 sets out the States' approach to defining abuse of a dominant position and anti-competitive practice.

⁶ Part 5, Article 16 (1) (i)

⁷ Part 5, Article 16 (2) (4) (a)

⁸ Part IV of the Class III licence

⁹ Condition 25, Class III licence

¹⁰ Condition 31, Class III licence

subsidise¹¹, supported by accounting processes to demonstrate compliance; regulation of prices, and transparency around pricing and wholesale product offerings, including the publication of appropriate Reference Offers¹².

- 3.8 The Class III licence also includes a Part which directly obliges the licensee not to engage in any practice which has the object or likely effect of preventing, restricting or distorting competition in the establishment, operation and maintenance of telecommunications networks and services.¹³

GUERNSEY

Legal background

- 3.9 Section 5(1) of The Telecommunications (Bailiwick of Guernsey) Law, 2001 (the **Guernsey Telecoms Law**) provides that the GCRA may include in licences such conditions as they consider appropriate, having regard to objectives set out in Section 2 of the Regulation of Utilities (Bailiwick of Guernsey) Law 2001 (the **Regulation Law**), and the enforcement of the Regulation Law and the Guernsey Telecoms Law.

- 3.10 The Regulation Law sets out the general duties which the States and the GCRA must take into account in exercising their functions.¹⁴ These include the requirement to protect consumers and other users in respect of the prices charged for, and the quality, services levels, permanence and variety of, utility services; to ensure that utility services are provided in a way which will best contribute to economic and social development and well-being of the Bailiwick; and to introduce, maintain and promote effective and sustainable competition¹⁵.

¹¹ Condition 30, Class III licence

¹² Condition 33, Class III licence

¹³ Condition 34, Class III licence

¹⁴ Section 2 of the Regulation of Utilities Law

¹⁵ These broad objectives were maintained in the transfer of functions and responsibilities to GCRA, as set out in the Guernsey Competition and Regulatory Authority Ordinance, 2012

3.11 The Guernsey Telecoms Law¹⁶ specifically provides that the GCRA may include in any licence conditions that are:

- Intended to prevent and control anti-competitive behaviour¹⁷; and
- Regulate the price premiums and discounts that may be charged or (as the case may be) allowed by a licensee which has a position of SMP in a relevant market¹⁸.

3.12 The GCRA is obliged¹⁹ to publish notice:

- Of a proposed decision as to whether a person has a position of SMP in a relevant market and of the conditions, if any, proposed to be included in the licence granted to that person in relation to the control of that dominant position;
- Of a proposed decision to regulate the prices, premiums and discounts that may be charged or (as the case may be) allowed by a licensee which has a position of SMP in a relevant market; and
- Of a proposed decision to include quality of service conditions in any licence.

Licensing Framework

3.13 Licences are issued to fixed telecommunications providers under Part 1, section 1 of the Guernsey Telecoms Law. All fixed and mobile telecommunications licences include a Part which addresses conditions applicable to operators with SMP²⁰. If the GCRA has found that a licensee has a position of SMP in a relevant market, the provisions of this Part of the licence may apply.

3.14 The provisions which are applicable to operators with SMP include (but are not limited to) measures addressing the availability and associated terms of OLO access to networks and services²¹; the requirement not to show undue preference or to exercise unfair

¹⁶ The definition of a position of SMP / dominance and abuse of a position of SMP / dominance is not explicit in the Guernsey Telecoms Law. However, the Competition (Guernsey) Ordinance 2012 sets out the States' approach to defining abuse of a position of SMP / dominance and anti-competitive practice.

¹⁷ Section 5(1)(c) of the Guernsey Telecoms Law

¹⁸ Section 5(1)(f) of the Guernsey Telecoms Law

¹⁹ Section 5(2) of the Guernsey Telecoms Law

²⁰ Part IV of the Fixed telecommunications licences

²¹ Condition 24, Fixed telecommunications licences

discrimination²²; and the requirement not to unfairly cross subsidise²³, supported by accounting processes to demonstrate compliance; regulation of prices, and transparency around pricing²⁴.

3.15 The fixed telecommunications licences also include a Part which directly obliges the licensee not to engage in any practice which has the object or likely effect of preventing, restricting or distorting competition in the establishment, operation and maintenance of telecommunications networks and services²⁵.

²² Condition 29, Fixed telecommunications licences

²³ Condition 28, Fixed telecommunications licences

²⁴ Condition 31, Fixed telecommunications licences

²⁵ Part V: Fair Competition, Fixed telecommunications licences

4. Summary of Market Review

- 4.1 CICRA gave SPC Network two objectives in its request to conduct an independent assessment of the market:
- i) To define the relevant product and geographic markets, and
 - ii) To assess whether any operator holds a position of SMP on the market(s).
- 4.2 In addition, CICRA specified that SPC Network should take account of the process of market definition and assessment of SMP used by the European Union, even though neither Guernsey nor Jersey are Member States, but to do so in a way that is both proportionate and pragmatic given the size of the Bailiwicks.
- 4.3 SPC Network's report is provided as Annex A to this Final Decision.

Summary of findings

- 4.4 **FINDING 1** - *Guernsey and Jersey are separate geographic markets*
- 4.5 The two Bailiwicks each have separate incumbent fixed network operators (Sure and JT respectively) and are separate legal jurisdictions. On that basis SPC Network concluded that they consider the Bailiwicks to be two separate geographic markets and have assessed them independently.

Guernsey – Market Definition

- 4.6 **FINDING 2** - *SPC Network concluded that the appropriate market definition in Guernsey is:*

“Wholesale access to the Internet at a fixed location using an access network based on local loops that are either exclusively or partially based on the copper or fibre access network or using the 4G and ultimately 5G wireless access network via a fixed device in the whole Bailiwick of Guernsey”.

Guernsey – Assessment of Market Power

4.7 Based on the market definition above and on the data provided to SPC Network by CICRA, SPC Network found that Sure has a market share of 93% of subscriber lines. This market share is well above the 50% at which a position of SMP is presumed. SPC Network found no evidence of low barriers to entry or expansion and no countervailing buyer power.

4.8 **FINDING 3** - *SPC Network therefore concluded that Sure has SMP on the market.*

Jersey – Market Definition

4.9 **FINDING 4** - *SPC Network concluded that the appropriate market definition in Jersey is:*

“Wholesale access to the Internet at a fixed location using an access network based on fibre or cable or using the 4G and ultimately 5G wireless access network via a fixed device in the whole Bailiwick of Jersey”.

Jersey – Assessment of Market Power

4.10 Based on the market definition above and on the data provided to SPC Network by CICRA, SPC Network found that JT has a market share of 88% of subscriber lines. This market share is well above the 50% at which a position of SMP is presumed. SPC Network found no evidence of low barriers to entry or expansion and no countervailing buyer power.

4.11 **FINDING 5** – *SPC Network therefore concluded that JT has SMP on the market.*

5. Consultation Question and Stakeholder responses

5.1 In the Draft Decision CICRA sought comments on the market definition and SMP statements included in the SPC Network report.

5.2 CICRA received responses from JT and Sure. The responses are published as Annexes to this Final Decision.

Analysis of Responses Received

General comments

Sure response

5.3 Sure in its introduction to its response stated that:

“The SPC Analysis does consider the market definition of the fixed broadband retail markets (in fact, all market definition analysis is performed at the retail level), but it does not consider whether there is Significant Market Power (SMP) in those markets. Without an SMP analysis of the retail market, it is not logically feasible to determine whether regulation is necessary at the wholesale level. The retail market SMP analysis should be conducted using the modified greenfield approach, meaning that it should consider the retail market with and without regulation at the wholesale market level.”

5.4 In its analysis of the response from Sure, CICRA considers that the statement made above is contradicted later by Sure in its response at page 5. SPC Network has been clear in its report to state that it started its analysis at the retail level.

5.5 Sure quotes the EC SMP Guidelines:

“Having identified the relevant market(s) and established whether absent regulatory intervention upstream, a risk of consumer harm due to a lack of competition in the retail market(s) would persist, NTAs should then identify the corresponding wholesale market(s) to assess whether they are susceptible to ex ante regulation”.²⁶

²⁶ EC SMP Guidelines paragraph 26.

5.6 The analysis carried out by SPC Network did identify the relevant retail market(s), did identify the corresponding wholesale market(s) and carried out the three criteria test. The manner in which this analysis was carried out is considered by CICRA to be proportionate for the market conditions in the Channel Islands.

5.7 Sure goes on to state in its response that:

“It is Sure Guernsey’s strongly held view that, with appropriate SMP remedies imposed where it holds a position of SMP at the wholesale level, it does not enjoy a position of SMP at the retail level in any part of the retail broadband market in Guernsey and all retail regulation should be discontinued”.

5.8 CICRA is not at this time considering retail remedies. CICRA is considering wholesale remedies in order to facilitate greater downstream competition. However, at this point in time this consultation only addresses the questions relating to the definition of the wholesale broadband access market and the assessment of SMP on that market. However, in the event that wholesale remedies fail to deliver effective competition in the retail sector then CICRA may have to consider a more detailed review of the retail market for broadband services.

Question 1 - Does the respondent agree with the market definition provided by SPC Network in its report? 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 considerations and next steps.

Sure response

5.9 Sure agrees with the conclusion that Guernsey and Jersey are distinct geographic markets on the basis of first, separate companies owning the respective networks on each Bailiwick and secondly, different legal and regulatory instruments applying to each Bailiwick. However, Sure noted in its response that it considered that SPC Network does not rule out the possibility of there being further sub-geographic markets in either or both of the Bailiwicks.

5.10 In its response Sure raised a number of questions relating to the product market:

a) Are broadband connections of all speeds in the same market?

5.11 It is fair to comment that SPC Network did not carry out a chain of substitution assessment and instead considered all speeds in one market. Again the reasoning behind this was the requirement to be proportionate in the delivery of a market review. The key question that CICRA has considered relating to this is would SPC Network have found any difference if it had carried out the assessment based on speeds. At the wholesale market level, which is the market being assessed in the SPC Network report we do not consider that there will be different competitive conditions by speed.

b) Are 4G-based fixed wireless broadband services in the same market as fixed wireline broadband services??

5.12 Sure suggest that 4G services should not be in the same market. The argument put forward by SPC Network is fully explained in its report. These services are used by consumers for the same purpose as wireline services (i.e. Access to the internet) and so comply with the statements from the CMA²⁷ and Commission²⁸ on page 7 and 8 of the SPC Network report. In the circumstances SPC Network did not see a need to conduct a SSNIP test. High-level analysis of this point is that if this service were removed, Sure's market share would increase marginally resulting in it enjoying an even stronger position in the relevant market.

c) Will 5G based fixed wireless broadband services be in the same market as fixed wireline broadband services?

5.13 CICRA agrees with Sure that it is too early to include 5G in the market and SPC Network make that point in its report.

d) Are broadband services for residential and business customers in the same market?

²⁷ "Where the objective characteristics of products are very similar and their intended uses the same this would be good evidence that the products are close substitutes [but that] products with very different physical characteristics may be close substitutes if, from a customer's point of view, they have a very similar use" – Office of Fair Trading 'Market Definition' December 2004. Para. 3.7

²⁸ "NRA's should thus commence the exercise of defining the relevant product or service market by grouping together products or services that are used by consumers for the same purpose (end use)." – European Commission op cit. footnote 4 Para. 33.

5.14 It is true that SPC Network did not specifically address the potential for separate business and residential markets. However, SPC Network is not convinced that there would be materially different findings if it did. Sure has not provided evidence to counter the view that it enjoys the same dominant position for business customers as it does with residential. It should however be noted that this review was conducted at the wholesale level where all customers are retailers and not end users.

e) Are leased lines and fixed broadband in the same market?

5.15 In its assessment of the market SPC Network again refers to the statements from the CMA²⁹ and Commission³⁰ on page 7 and 8 of the SPC Network report. In the circumstances SPC Network did not see a need to conduct a SSNIP test.

5.16 In its response Sure raised a number of questions relating to the Guernsey specific market definition:

f) Are there sub-geographic markets within Guernsey?

5.17 In respect of the geographic market definition, SPC Network's analysis shows that JT's current limited planned development means that it is unlikely to create conditions of competition in St Peter Port that are sufficiently different to elsewhere that it would constitute a different geographic market. This finding is based on market conditions in Guernsey and the UK precedent is quoted only for reference to show how other jurisdictions define geographic markets.

JT response

5.18 In its response JT has made a limited attempt to engage on this matter.

²⁹ "Where the objective characteristics of products are very similar and their intended uses the same this would be good evidence that the products are close substitutes [but that] products with very different physical characteristics may be close substitutes if, from a customer's point of view, they have a very similar use" – Office of Fair Trading 'Market Definition' December 2004. Para. 3.7

³⁰ "NRA's should thus commence the exercise of defining the relevant product or service market by grouping together products or services that are used by consumers for the same purpose (end use)." – European Commission op cit. footnote 4 Para. 33.

5.19 CICRA considers that there is no requirement to define markets based on the market definitions in use elsewhere. Markets are defined on the basis of the facts in the market in question.

5.20 Best practice is to start market reviews from scratch and based on the conditions found in the market place. It is not best practice to merely update an existing market review based on a previous market review. Such an approach would be open to criticism.

Question 2 - Does the respondent agree with the assessment of market power provided by SPC in its report? 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 considerations and next steps.

Sure response

5.21 On page 6 of Sure's response it states:

"Whilst Sure does not disagree that both Sure and JT are likely to enjoy a position of SMP in their respective home markets (Bailiwicks of Guernsey and Jersey respectively) once the product market definitions have been revisited and properly defined, Sure considers that the very significant issues identified in the market definition section above makes it impossible for it to agree with the SMP findings".

5.22 Sure seems to accept that it will be found to have SMP even with a product market definition that is different to one found by CICRA on the basis of SPC Network's report.

5.23 It is a well-known fact that market definition is not an end in its own right but a means to the end of placing boundaries around a likely competition problem. This is referred to on page 7 of SPC Network's report. CICRA is pleased to see Sure's acceptance that it will enjoy a position of SMP even with a different product market definition.

CICRA Summary

5.24 The process of a market review was put in place at the request of the operators at the Broadband launch event and CICRA has engaged SPC Network to take a thorough but proportional approach to carrying out a market review in the two Bailiwicks.

- 5.25 The evidence of SMP put forward by SPC Network demonstrated that Sure and JT, in their own respect have SMP in a form that is not marginal.
- 5.26 Whilst questions have been raised by operators regarding certain steps taken to define the market it is the clear view of CICRA and SPC Network that, any alternative approach would not have delivered a different SMP result, that is both Sure and JT would remain dominant on their respective markets.
- 5.27 Key to the consultation process undertaken by the Draft Decision are the **two** questions put by CICRA. The questions relating to the market definition and the assessment of market power.
- 5.28 In both questions, the onus was placed on the stakeholder responding that if it held 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”.
- 5.29 It is clear from the responses of both operators that they have not provided any evidence in any form to dispute the level of SMP found by SPC Network in its report. On the contrary, if some of the arguments put forward were implemented then it is predicted that the result would be a higher degree of SMP than that presented in the report.
- 5.30 It is therefore the opinion of CICRA that, without evidence being proved by stakeholders to disprove the findings of SMP, the findings of SMP and presented in the Draft Decision stand and the Draft Decision will be reflected in the final decision.

6. Next Steps

- 6.1 CICRA has recently introduced a revised process for consultations. The Information Notice, CICRA 18/29 “Regulatory Consultation Process” published in July 2018 outlines the new process to be undertaken before carrying out certain regulatory functions in accordance with the relevant statutory process.
- 6.2 Under the new process there is a non-statutory process common to both jurisdictions. The non-statutory process consists of a Call for Information, a Draft Decision and a Final Decision. Responses are sought from stakeholders at the Call for Information and Draft Decision stage, following which a Final Decision is issued. This paper is thus the final stage of the non-statutory process.
- 6.3 Before carrying out certain regulatory functions, following the non-statutory process the appropriate Jersey and Guernsey statutory process is followed³¹. In Guernsey a decision as to whether a person has a dominant position in a relevant market requires the statutory process to be followed³². The same decision however does not require a statutory process to be undertaken in Jersey as it is not the exercise of a specified regulatory function pursuant to the Jersey Telecoms Law.
- 6.4 Accordingly, in Guernsey the GCRA will proceed to the statutory process on the market review. While the GCRA considers any Decision made as part of the pre-statutory process to be the starting point for later parts in the process and as a statement of its current expectations, this Decision is not binding until such time as it has been included in the Final Statutory Notice.
- 6.5 In Jersey, as there is no requirement to follow the statutory process this Decision is final and binding. Notwithstanding the binding nature of this Decision from Jersey’s perspective, the JCRA is mindful that it had previously indicated that a statutory process would need to be undertaken for this particular market review. Interested parties may

³¹ See Information Notice CICRA 18/29 “Regulatory Consultation Process”, July 2018

³² Section 5(2) of The Telecommunications (Bailiwick of Guernsey) Law 2001

therefore submit comments to the JCRA in writing or by email as to why the statutory process should be pursued in this particular case to the following address:

2nd Floor, Salisbury House
1-9 Union Street
St Helier
Jersey
JE2 3RF

Email: info@icra.je

- 6.6 All comments should be clearly marked 'Final Decision – Broadband Market Review: Market Definition and SMP Assessment' and should arrive by 5pm on **Wednesday 23 January 2019**.
- 6.7 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.

7. Final Decision

- 7.1 The Authority has considered in full the responses received to its Draft Decision.
- 7.2 The questions included in the consultation for the Draft Decision placed the onus on the respondents to provide evidence as to why the SPC Network finding of SMP was not correct, if that was indeed the case. Neither JT nor Sure in their responses provided any evidence as to why the finding of SMP was incorrect. Therefore the Authority considers that the findings made by SPC Network are correct.
- 7.3 For the reasons set in full in the Draft Decision document and the relevant analysis set out in the report provided on behalf of CICRA by SPC Network, the Final Decision of CICRA is as follows:

GUERNSEY

The appropriate market definition in Guernsey is;

“Wholesale access to the Internet at a fixed location using an access network based on local loops that are either exclusively or partially based on the copper or fibre access network or using the 4G and ultimately 5G wireless access network via a fixed device in the whole Bailiwick of Guernsey.”

Assessment of market power: *“Sure has Significant Market Power on the market as defined”*.

JERSEY

The appropriate market definition in Jersey is;

“Wholesale access to the Internet at a fixed location using an access network based on fibre or cable or using the 4G and ultimately 5G wireless access network via a fixed device in the whole Bailiwick of Jersey.”

Assessment of market power: *“JT has Significant Market Power on the market as defined”*.

/END