



Case T-012

Business connectivity market review:
market definition and significant
market power assessment

Non-statutory Final Decision

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1 Executive summary

- 1.1 This document is the Jersey Competition Regulatory Authority's (**the Authority**) non-statutory Final Decision (**Final Decision**) on market definition and Significant Market Power (**SMP**) in the business connectivity market, following its non-statutory Draft Decision published in October 2020.¹
- 1.2 Business connectivity services comprise leased lines that provide dedicated, symmetric transmission capacity between fixed locations either using a wireless technology (e.g. microwave) or a wireline technology (e.g. fibre). They are used by public and private organisations to support private data networks, network monitoring and to support mobile network backhaul.
- 1.3 In February 2021, the Authority issued an Information Note² which explained that further work on the business connectivity market review (**BCMR**) will be divided into two stages. Stage 1 will address market definition and SMP and Stage 2 will address remedies to be imposed on any undertaking that has a position of SMP. This document is concerned with Stage 1 only.
- 1.4 This executive summary sets out:
- Approach to market definition and SMP (see paragraphs 1.5-1.6);
 - Retail market definition (see paragraphs 1.7-1.16);
 - Wholesale market definition (see paragraphs 1.17-1.23);
 - SMP assessment (see paragraphs 1.24-1.25); and
 - Next steps (see paragraph 1.26).

Approach to market definition and SMP

- 1.5 The Authority set out in the Draft Decision its approach to defining markets and to assessing SMP. It stated that it intended to follow the process adopted by the European Union in its guidelines on SMP. Under this approach market definition would be conducted using the Hypothetical Monopolist Test (**HMT**) and SMP would be assessed starting with the potentially dominant undertaking's market share before assessing other market characteristics that may confer market power.
- 1.6 All respondents agreed with the proposed approach to market definition and SMP.

Retail market definition

- 1.7 In the Draft Decision, the Authority defined the retail market as the provision of leased lines to end customers. The product market comprised leased lines:

¹ Document JCRA 20/20 "Business Connectivity Market Review: Non-Statutory Draft Decision (Consultation)" <https://www.jcra.je/media/598280/t-012-business-connectivity-market-review-draft-decision.pdf>

² Document JCRA 21/07 "Information Note: Business connectivity market review" <https://www.jcra.je/media/598308/t-012-business-connectivity-market-review-information-note.pdf>

- Based on both Traditional Interface (TI) and Alternative Interface (AI) technology; and
 - All bandwidths (speeds) measured in megabits per second.
- 1.8 The market did not include:
- Business or residential broadband access;
 - Downstream services to which a leased line is an input, such as virtual private networks (VPNs); and
 - Off-island or inter-island leased lines.
- 1.9 Stakeholders generally agreed with the Authority's preliminary conclusion within the Draft Decision. However, Airtel-Vodafone argued that the off-island leased lines should be in the relevant market and JT claimed that each bandwidth comprised its own separate market.
- 1.10 The Authority examined both Airtel-Vodafone's and JT's claims, where necessary requesting new data from market participants. The Authority disagrees with both arguments for the following reasons
- 1.11 The 2015 BCMR assessed the market for off-island lines and found it to be effectively competitive with multiple carriers on each route. In the Call for Information that preceded the 2020 Draft Decision the Authority expressly asked if there had been any change in circumstances that would change this finding. All stakeholders who answered this question said they were not aware of any change. Recent analysis also shows the same ownership of off-island cables as in 2015. The Authority concludes that it would be disproportionate to regulate off-island lines when they were not regulated before and when there has been no change in market structure.
- 1.12 In regard to the market being defined by bandwidth, the Authority has responded to JT's proposal by examining its market share at each bandwidth and concluded that it is broadly similar. Thus even were the market to be defined by bandwidth, JT would be likely to be found to have SMP in every market. In the interests of proportionality, therefore, the Authority has concluded that a single market exists comprising all bandwidths.
- 1.13 JT also argued that there was sufficient competition in some parts of Jersey from other operators' own networks that there may be more than one geographic market on Jersey. The Authority has examined the extent of other operators' networks and determined that these networks are still too small to make a material difference to competition and so the geographic market comprises the whole Bailiwick of Jersey.
- 1.14 The Authority has used the three criteria test to determine whether a defined market is susceptible to *ex ante* regulation, in line with the approach in the European Union and United Kingdom. Under this test, the Authority came to the preliminary conclusion in the Draft Decision that the retail market does not have high and enduring barriers to entry and so is not susceptible to *ex ante* regulation.
- 1.15 Airtel-Vodafone and Sure both disagreed with the Authority's preliminary conclusion and argued that the retail minus charge control was an effective barrier to entry. They cited as evidence the fact that other operators' market share has only increased from 30% to 35% in the last five years.

- 1.16 The Authority, however, does not accept this argument as JT is required to provide wholesale access at a price 20% below the retail price, which allows rivals to enter the market. This measure was expressly designed to ensure low barriers to entry. On this basis, the Authority concludes that the market is not susceptible to *ex ante* regulation and there is no need to conduct SMP analysis

Wholesale market definition

- 1.17 In the Draft Decision, the Authority came to the preliminary finding that the wholesale market reflected the retail market but also that the wholesale market:
- should not be broadened to include dark fibre or duct and pole access;
 - should not be narrowed to reflect customer use of wholesale leased lines, in particular for mobile backhaul services; and
 - self-supplied leased lines should be included in the market.
- 1.18 The main concern of respondents was that dark fibre access should be included in the product market definition. Sure's and Airtel-Vodafone's principal argument was that dark fibre is a closer substitute for active leased lines than the Authority considered. As the customer for a wholesale line is another network operator, it would have the necessary skills and resources to light a dark fibre line. They would therefore switch to dark fibre in the event of a SSNIP³ on active wholesale circuits.
- 1.19 Airtel-Vodafone also argued that the market should be extended yet further to include duct and pole (physical infrastructure) access.
- 1.20 The Authority has considered both these points and come to the conclusion that it agrees that the market should be extended to include dark fibre, but should not include physical infrastructure. In addition to agreeing with Airtel-Vodafone and Sure regarding the substitutability of dark fibre for an active service, the Authority has also reviewed recent findings by the European Commission and Ofcom that support their argument. It has therefore decided to extend the product market definition to include dark fibre.
- 1.21 However, the Authority has also concluded that duct and pole access would be unlikely to pass the HMT and is not an economic substitute for leased lines. The market does not, therefore, include physical infrastructure.
- 1.22 JT argued that mobile backhaul should form a separate market due to different competitive conditions: specifically it claimed it would have a lower market share of mobile backhaul due to self-supplied microwave links by Sure and Airtel-Vodafone. The Authority obtained more detailed data on mobile backhaul to establish whether this claim was justified and found that it would not be. JT would still have a large enough market share in mobile backhaul to be presumed to have SMP and other market conditions would be the same. In the interests of proportionality, therefore, the Authority maintains that mobile backhaul should not form a separate market.

³ Small but significant non-transitory increase in price, used in the HMT.

1.23 The Authority found that the wholesale market fulfilled the three criteria test and is therefore susceptible to *ex ante* regulation. All stakeholders agreed with this finding.

SMP assessment

1.24 In the Draft Decision, the Authority came to the preliminary conclusion that JT had SMP in the wholesale market. JT argued that the market should have been defined by bandwidth and that it would not have SMP in some bandwidth markets. This claim had already been rejected in the retail market by the Authority who found JT's market share to be similar across all bandwidths and the same conditions exist in the wholesale market. The Authority therefore upholds its preliminary finding that JT has SMP in the wholesale market for leased lines in the whole Bailiwick of Jersey.

1.25 A summary of the Final Decision regarding market definition and SMP is shown in the table below. The formal Final Decision is set out in section 7.

Figure 1: Summary of Final Decision

Market	Product and geographic market definition	Three criteria test	SMP designation	Proceed to Stage 2
Retail on-island leased lines	<ul style="list-style-type: none"> The retail leased lines market comprises both AI and TI lines. All bandwidths used for delivering leased lines are in the same market. The retail leased lines market does not include business or residential broadband. The retail leased lines market does not include downstream services such as VPNs. The retail market does not include off-island leased lines . The retail market comprises the whole of Jersey. 	Not fulfilled	N/A	N/A
Wholesale on-island leased lines	<ul style="list-style-type: none"> The Authority's conclusions in the retail market are mirrored in the wholesale market <p>In addition:</p> <ul style="list-style-type: none"> The wholesale market includes dark fibre but not physical infrastructure. The wholesale market includes self-supplied leased lines. The wholesale market does not reflect customer use of leased lines, for example mobile backhaul or other retail applications The wholesale market comprises the whole of Jersey. 	Fulfilled	JT	Yes

Next steps

- 1.26 With regards to Stage 2 of the BCMR (remedies) for the wholesale market, the Authority plans a further round of structured engagement with stakeholders on the proposals. As set out in the Information Note, the form of this engagement is still under development and an update will be provided in due course to stakeholders.

2 Introduction

2.1 This section is split into three subsections, which cover in turn:

- Background (see paragraphs 2.2 to 2.6);
- Market review process (see paragraphs 2.7 to 2.9); and
- Structure of this document (see paragraphs 2.10 to 2.13).

Background

2.2 In October 2020, the Authority published a non-statutory Draft Decision (Consultation) as part of its BCMR.

2.3 The main purpose of a market review is to identify whether any undertaking enjoys a position of SMP⁴ in a relevant market and should therefore be subject to *ex ante* regulation. The review assesses the competitive conditions prevailing in a market by systematically analysing the competitive constraints faced by undertakings (licensees) in the market.

2.4 In the Draft Decision, the Authority set out its preliminary views on:

- the product and geographic market definition for the retail and wholesale markets for business connectivity services;
- whether it would be appropriate to apply *ex ante* regulation to the defined retail and wholesale markets;
- the level of competition and SMP findings in the defined wholesale market; and
- the remedies which may be put in place in the wholesale market should the market review proposals be maintained.

2.5 Three substantive responses were received to the Draft Decision from Airtel-Vodafone, JT and Sure and non-confidential versions of these responses are available on the Authority's website. Newtel submitted a short response that noted full agreement with the proposals outlined in the Draft Decision.

2.6 Follow-up discussions were held with all respondents, including Newtel, to ensure a shared understanding of points made in the written responses and to capture additional information which the Authority decided was needed to address matters raised by stakeholders in their responses. A separate discussion was also held with Jersey Electricity Company (JEC) to understand their provision of dark fibre. The Authority would like to thank all stakeholders for their input and for taking the time to discuss their responses with the Authority.

⁴ This represents the ability to behave to an appreciable extent independently of competitors, customers and ultimately consumers. Note SMP is generally held to be equivalent to the concept of dominance under the Competition (Jersey) Law 2005. This document uses the terms interchangeably.

Market review process

- 2.7 In February 2021 the Authority issued an Information Note to update stakeholders on the approach to the BCMR. It explained that the Authority will divide further work on this market review into two separate but interrelated stages:
- Stage 1 will deal with matters of market definition and the finding of SMP; and
 - Stage 2 will deal with the proposed remedies and will follow after Stage 1.
- 2.8 Reflecting the above position, this document is concerned only with Stage 1, market definition and SMP assessment. The Authority has sought to ensure that the market definitions and SMP assessment will be robust in the light of the potential remedies set out in the Draft Decision. Any reference to preliminary remedies made in this document are without prejudice to the Authority's Final Decision on remedies.
- 2.9 This document constitutes the Authority's Final Decision on market definition and SMP and is final and binding. This is because a decision as to whether an undertaking has a dominant position in a relevant market does not require a statutory process to be followed as it is not the exercise of a specified regulatory function pursuant to the Jersey Telecoms Law. This approach is consistent with the Authority's approach to consultations and precedent. Further detail on the process framework is provided in Annex 1.

Structure of this document

- 2.10 This document broadly follows the structure of the Draft Decision and includes the sections covering market definition and SMP is organised as follows:
- Approach to this review (section 3);
 - Retail market definition (section 4);
 - Wholesale market definition (section 5);
 - Wholesale market SMP assessment (section 6); and
 - Final Decision on market definition and SMP (section 7).
- 2.11 Within sections 3 to 6 a consistent approach is adopted to the different sub-sections, where each sub-section refers to an element of the Draft Decision, for example product market definition in the retail market. The structure is as follows:
- Draft Decision proposals;
 - Draft Decision responses;
 - Authority analysis; and
 - Authority conclusion.
- 2.12 The conclusions of sections 4 to 6 are brought together in the Final Decision (section 7). Note, in the interest of brevity, this document does not repeat all the reasoning for proposals set out in the Draft Decision though a high level summary is provided within each section.
- 2.13 This document also includes two Annexes, Annex 1 provides an overview of the legal, licensing and process framework and Annex 2 provides a glossary.

3 Approach to this review

- 3.1 This section refers to section 4 of the Draft Decision where the approach to the BCMR was set out. For market reviews the Authority takes the same broad and well established approach as that used by National Regulatory Authorities (**NRAs**) throughout the European Union (**EU**), by the UK regulator (Ofcom) and as reflected in the CICRA Guidelines on market definition.⁵
- 3.2 This section covers:
- Approach to market definition (see paragraphs 3.3 to 3.9); and
 - Approach to competition assessment (see paragraphs 3.10 to 3.16).⁶

Approach to market definition

Draft Decision proposals

- 3.3 For product and geographic market definition, the Authority explained that it intended to follow the approach set out in the EU's SMP Guidelines.⁷ The Authority therefore adopted the framework of the HMT, which assesses whether a small but significant non-transitory increase in price (**SSNIP**) by a hypothetical monopolist of the focal product would be profitable in the light of demand and/or supply-side substitution.
- 3.4 The Authority also explained that it would be following BEREC's criteria for determining whether there are separate geographic markets within Jersey. These criteria include:
- Differences in barriers to entry and in the number of suppliers in an area;
 - Homogeneity of market shares; and
 - Differences in prices or services.⁸
- 3.5 The Authority also explained that, once a relevant market has been defined, it intended to use the three criteria test to determine whether the relevant market is "susceptible to *ex ante* regulation". The three criteria test assesses whether a market meets all of the following conditions in the order set out below:
- It is characterised by high and non-transitory barriers to entry and expansion;
 - It is not trending towards effective competition; and
 - Competition law alone is not sufficient to resolve any relevant issues in the market.

⁵ JCRA (2017) "CICRA Guideline 7-Market Definition"

⁶ Note section 4 of the Consultation also set out the proposed approach to remedies and comments received on this will be addressed in stage 2 of the work on this market review.

⁷ European Commission (2018) "Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services"

⁸ BEREC (2018) "Report on the application of the Common Position on geographic aspects of market analysis" p.

- 3.6 The three criteria test is used by the EU and the UK as the basis for determining whether a market should be governed by competition law or by *ex ante* regulation.⁹ Note in the event any one of these criteria is not met, then the market is not susceptible to *ex ante* regulation and no further analysis is needed.

Draft Decision responses

- 3.7 All respondents agreed with the Authority's approach to market definition.

Authority analysis

- 3.8 The Authority notes there was consensus on the proposed approach.

Authority conclusion

- 3.9 In light of the analysis in the Draft Decision and stakeholder responses, the Authority has decided to adopt the principles of market definition and the use of the three criteria test summarised above and set out in full in its Draft Decision.

Approach to competition assessment

Draft Decision proposals

- 3.10 The Authority explained that, once the market has been defined and found to be susceptible to *ex ante* regulation, it would then determine whether any undertaking enjoys a position of SMP, either singly or jointly with others.
- 3.11 It explained that an assessment of SMP usually starts with the potentially dominant undertaking's share of the relevant market and that a very large market share (in excess of 50%) is considered evidence of SMP in its own right.
- 3.12 The Authority also provided a non-exhaustive list of other structural and behavioural criteria that are used by NRAs to determine whether an undertaking has SMP in addition to its market share.
- 3.13 In adopting the approach, the Authority outlined, it would be following the approach adopted by the EU.

Draft Decision responses

- 3.14 All respondents agreed with the Authority's approach to competition assessment.

Authority analysis

- 3.15 The Authority notes there was consensus on the proposed approach.

Authority conclusion

- 3.16 In light of the analysis in the Draft Decision and stakeholder responses the Authority has decided to adopt the broad approach to competition assessment summarised above and set out in full in its Draft Decision.

⁹ For further information on the three criteria test, see European Commission (2020) "EXPLANATORY NOTE Accompanying the document COMMISSION RECOMMENDATION on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation" Dec 2020. P. 11.

4 Retail market definition

- 4.1 This section refers to section 5 of the Draft Decision where the Authority set out its preliminary findings on retail market definition.
- 4.2 The retail market refers to the provision of business connectivity services to end-customers, such as businesses and government entities. The retail market is defined first so that the corresponding wholesale market can be properly identified if there is a risk of consumer harm in the absence of regulation in upstream wholesale markets.¹⁰
- 4.3 This section is split into three subsections, which cover in turn:
- Product market definition (see paragraphs 4.4 to 4.21); and
 - Geographic market definition (see paragraphs 4.22 to 4.26); and
 - Three criteria test (see paragraphs 4.27 to 4.41).

Product market definition

Draft Decision proposals

- 4.4 An issue-by-issue method was adopted to identify substitute products and constraints on prices, consistent with the BCMR conducted by the Authority in 2015¹¹. In particular the Authority assessed the features which purchasers of business connectivity identified as being most important, and the extent to which purchasers perceive alternative products and services as interchangeable in response to a SSNIP.
- 4.5 Following this approach to the retail product market, the Authority's proposed findings were:
- the retail leased lines market comprises both AI and TI lines;
 - all bandwidths used for delivering leased lines are in the same market;
 - the retail leased lines market does not include business or residential broadband;
 - the retail leased lines market should not be broadened to include downstream services such as VPNs; and
 - the retail market should not be broadened to include off-island leased lines.

Draft Decision responses

- 4.6 Sure agreed with the Authority's proposed market definition.
- 4.7 Airtel-Vodafone disagreed with the Authority's preliminary finding that the retail market should not be expanded to include off-island leased lines. It argued many off-island leased lines (between Jersey and Guernsey and between Jersey and the UK) were extensions of on-island circuits and so effectively a part of the same product market. It was also noted the cost of off-island leased lines was very high, indicating there is a market failure in off-island leased lines and that this high cost negatively affects their ability to deliver the level of experience their customers expect.

¹⁰ European Commission (2018) op. cit. footnote 7. Para. 26.

¹¹ See <https://www.jcra.je/cases/2014/t1097gj-business-connectivity-market-review/>

- 4.8 JT disagreed with the Authority's conclusion that all speeds of leased line fell into a single market and argued that the Authority had not conducted a sufficiently robust HMT to conclude that there is a single market for all Ethernet services on Jersey. This was because the price differences between speeds of leased line were such that a SSNIP by a hypothetical monopolist of any speed of leased line would be profitable as the price differential between speeds is substantially greater than 10%, the level assumed as a SSNIP.
- 4.9 JT provided the example of a 268% difference between the retail price of a 1Gbps Fibrelink line and a 10Mbps Ethernet line and the annual price difference between 10Gbps and 10Mbps is a factor of 11.6. The European Commission, according to JT, says that a chain of substitution only exists if the prices at each end of the chain are in the same order of magnitude, which JT says is not the case in Jersey.

Authority analysis

4.10 This section provides the Authority's analysis on:

- Off-island leased lines (see paragraphs 4.11 to 4.16); and
- Bandwidth breaks (see paragraphs 4.17 to 4.20).

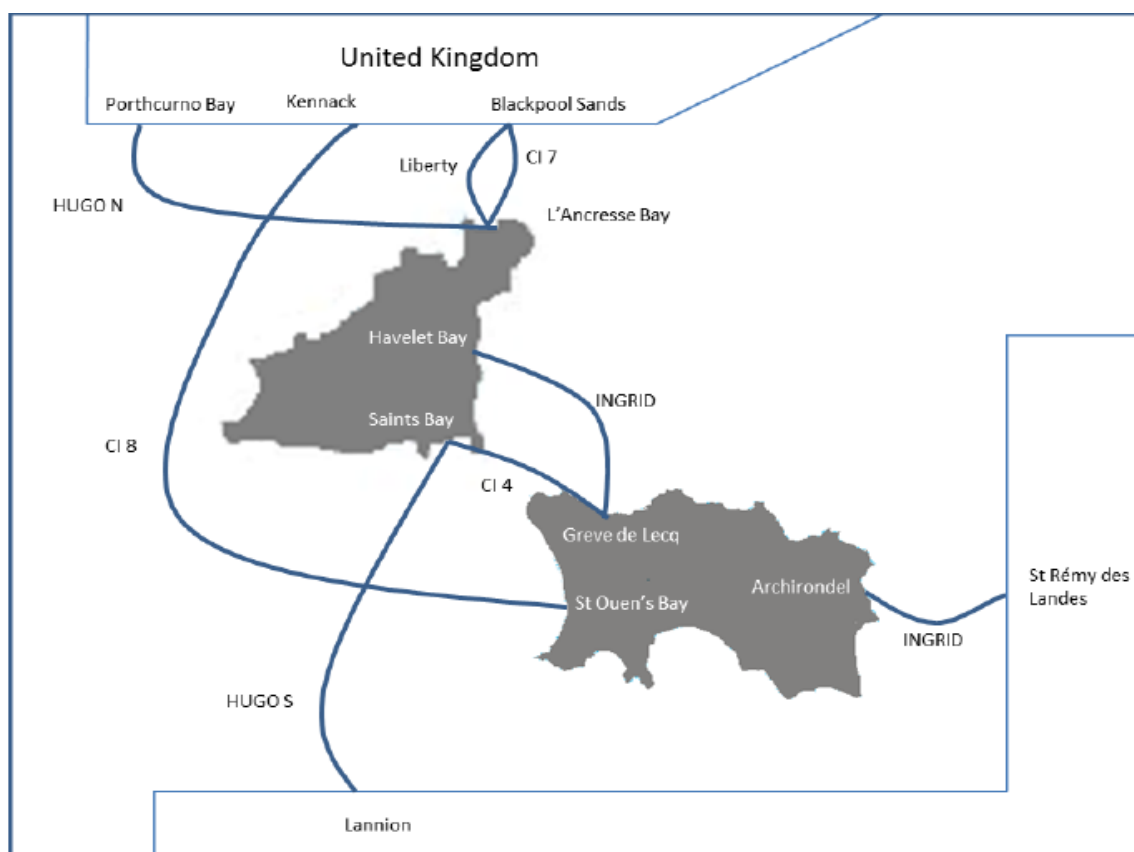
Off-island leased lines

- 4.11 The Authority has concluded it is not appropriate to include off-island leased lines in the market definition as there has been no material change in this market since the last BCMR when the market was found not subject to SMP.
- 4.12 The 2015 BCMR defined a separate market for off-island leased lines and found that the market was effectively competitive. Amongst the reasons for finding no SMP given by the Authority in 2015 were:
- The volatility of market shares;
 - The ownership of off-island circuits by five undertakings indicated that no operator had control over infrastructure not easily duplicated; and
 - The presence of five operators in the market indicated that no single undertaking benefits from economies of scale.¹²
- 4.13 In the Call for Information at the start of this market review, the Authority asked stakeholders if they had any information that could change the 2015 finding. Specifically, stakeholders were asked if there had been any change in ownership of submarine cables that could result in a change of competitive conditions. All respondents who answered this question stated that they were not aware of any such changes.
- 4.14 Figure 2 below shows the cable links between Jersey and Guernsey, the UK and France. A comparison of this map with Figure 5 in the 2014 Consultation document shows no material change in the market structure.

¹² CICRA (2014) 'Business Connectivity Market Review: Jersey. Consultation' 8th April 2014. Section 9.5, p51 onwards.

- 4.15 As can be seen from the map, there are three links between Jersey and Guernsey and one direct route between Jersey and each of the UK and France. However, the multiple links between Guernsey and the UK give purchasers of wholesale lines from Jersey to the UK seven route options for a connection to the UK. Likewise, routing via Guernsey provides three route options to France.
- 4.16 The off-island cables also have different ownership. The INGRID circuits from Jersey to France and Jersey to Guernsey are owned by Jersey Electricity; the CI 4, 7 and 8 circuits are owned by JT, Sure and BT; Hugo N and Hugo S are owned by Vodafone and Sure; and Liberty is owned by JT. Thus there is diversity of ownership as well as diversity of routing.

Figure 2: Schematic representation of cable links



Source: Statistics Jersey¹³

Bandwidth breaks

- 4.17 The Authority has concluded that the market should include all bandwidths as, contrary to the suggestion by JT, the HMT cannot be conducted using current prices, which may be above the competitive level. Further, JT's market share in each bandwidth is comfortably above the level at which dominance is presumed and so it would be likely to be found dominant in all speed based markets.

¹³ Statistics Jersey (2020) "Telecommunications Statistics and Market Report 2019" p. 40

- 4.18 The Authority has considered the argument put forward by JT for separating the market by bandwidth. The Authority notes that market definition is not an end in itself, but rather a means to establish the boundaries of a market where there may be a competition problem¹⁴. The Authority has therefore considered whether the market should be defined at each individual speed in the light of whether such a market definition would assist the authority more in considering competition issues than if the market is defined to cover all speeds. The Authority is also keenly aware of the need for proportionality given its resources and the overall size of the market.
- 4.19 Nevertheless, the Authority has examined the market share held by JT at each bandwidth and found that, in all cases, it is substantially above the 50% threshold at which SMP is presumed¹⁵. Therefore, even if the market were to be disaggregated by bandwidth it is almost certain that JT would be found to have SMP in each bandwidth market. The Authority therefore considers that it would be disproportionate to define separate markets at each line speed.
- 4.20 The Authority accepts that the differences between prices of different bandwidths are substantially greater than the 10% price increase assumed in the HMT. However, the HMT should be conducted using prices that would be found in a competitive market to avoid the “cellophane fallacy” in which products are found to be demand-side substitutes only because a SSNIP above the monopoly price would induce consumers to switch to an alternative product.¹⁶ The international price comparisons shown in Annex 4 of the Draft Decision suggest that leased line prices in Jersey may be above the competitive level, meaning that it may be difficult to undertake an HMT using current prices.

Authority conclusion

- 4.21 In light of the analysis in the Draft Decision and analysis of stakeholder responses the Authority concludes the retail product market definition remains valid. Therefore the retail product market is defined as follows:
- the retail leased lines market comprises both AI and TI lines;
 - all bandwidths used for delivering leased lines are in the same market;
 - the retail leased lines market does not include business or residential broadband;
 - the retail leased lines market should not be broadened to include downstream services such as VPNs; and
 - the retail market should not be broadened to include off-island leased lines.

¹⁴ European Commission (2018) op cit footnote 7. Para. 24, footnote 19.

¹⁵ The Authority examined JT’s market share for circuits of 10Mbps, 100Mbps and 1Gbps. In all cases, JT was found to have a market share in excess of 50%, which is the market share at which dominance is presumed. As all other dominance criteria are the same across bandwidth, the Authority concluded that JT would be found dominant in individual bandwidth markets.

¹⁶ See ‘Commission Staff Working Document accompanying the SMP Guidelines’ p.10. Available at http://ec.europa.eu/newsroom/dae/document.cfm?doc_id=51927

Geographic market definition

Draft Decision proposals

- 4.22 The Authority considered whether there are separate geographic markets within Jersey by considering differences in barriers to entry and in the number of suppliers in an area, homogeneity of market shares and differences in prices or services.
- 4.23 Following this analysis the proposed geographic market was island wide, as there are no particular areas within Jersey where conditions of competition are appreciably different to the extent that they constitute separate geographic markets

Draft Decision responses

- 4.24 JT pointed to the footprint of Other Licensed Operators' (OLOs) networks in St Helier and suggested that the Authority should pay close attention to the competitive landscape on Jersey. However, JT stopped short of claiming any part of Jersey formed a separate geographic market. Neither Sure nor Airtel-Vodafone commented.

Authority analysis

- 4.25 Both Sure and Newtel have provided the Authority with maps showing the extent of their networks on Jersey. In the Authority's opinion, the limited size of these networks means that they are not sufficient to change competitive conditions even where they operate. Further, it is government policy that competition should be at the service, rather than the network, level and this may limit further growth of competitors' networks.¹⁷ However, the Authority will continue to monitor these networks and take account of them in future market reviews.

Authority conclusion

- 4.26 In light of the analysis in the Draft Decision and analysis of stakeholder responses, the Authority concludes the geographic market definition remains valid. Therefore the retail geographic market is defined as the whole Bailiwick of Jersey.

Three criteria test

Draft Decision proposals

- 4.27 To establish if the retail market is susceptible to *ex ante* regulation the three criteria test was applied. The first criterion was not passed as current access remedies mean the market is not characterised by high and non-transitory barriers to entry and expansion.
- 4.28 Based on this finding the Authority came to the preliminary conclusion that the retail was not susceptible to *ex ante* regulation and, on this basis, no SMP analysis was undertaken

Draft Decision responses

- 4.29 JT agreed with the Authority's analysis.
- 4.30 Airtel-Vodafone disagreed with the Authority's conclusion that the market is not susceptible to *ex ante* regulation. Its principal concern is that the retail minus pricing basis for wholesale leased

¹⁷ See Draft Decision paras. 3.17 – 3.20 for a discussion on States policy.

lines (at a 20% discount compared to retail prices) is a barrier to competition. It also argued that OLOs have increased their collective market share by just five percentage points in the past five years and this is indicative of a significant barrier to entry.

- 4.31 Sure believes that the retail market is susceptible to *ex ante* regulation. Its primary reason for this is that, it believes, there remain high and enduring barriers to entry. It argues that an increase in OLO market share from 30% - 35% is insufficient evidence to claim that an obligation of access on JT and a retail minus wholesale price removes barriers to entry. Further, Sure argues that OLOs face other barriers to entry and expansion, such as the unwillingness of the States of Jersey to buy from operators other than JT.
- 4.32 Sure further argues that there remain competition issues in the retail market and that the proposed wholesale remedy may not be enough to solve these problems in the short run. Problems in the retail market can only be addressed if there is regulation of that market.

Authority analysis

- 4.33 The Authority has considered the arguments made by both Airtel-Vodafone and Sure that the retail leased lines market does fulfil the three criteria test and is, therefore, susceptible to *ex ante* regulation. However, the Authority remains of the opinion that the presence of regulated terms of access to wholesale leased lines means the market does not fulfil the first of the three criteria (that barriers to entry are high and enduring) and that therefore the market is not susceptible to *ex ante* regulation.¹⁸
- 4.34 Sure and Airtel-Vodafone suggest that the Authority bases its conclusion that the market does not fulfil the three criteria test on the fact that OLOs' market share has increased from 30% to 35% over the past five years. They argue that such an increase is insufficient evidence that the market is not subject to barriers to entry.
- 4.35 The Authority's argument, however, is not based on OLOs increased market share but on the fact that access to wholesale leased lines is available on regulated terms and that such access means that barriers to entry are not high and enduring. The increase in OLOs' market share is used to illustrate the fact that barriers to entry are low in practice as well as principle.
- 4.36 The Authority is aware that there are some limitations concerning market entry related to the use of retail minus pricing in the wholesale market as OLOs only have a narrow margin between the wholesale price and JT's retail price to compete within. The Authority also notes Sure's claim that the States of Jersey "generally appears unwilling to use other suppliers from JT", which closes a large part of the market to competition.
- 4.37 However, on a forward-looking basis, in which alternative remedies are implemented to facilitate entry and expansion still further, OLOs could be expected to have greater freedom over price and/or product specification and therefore the current margin allowed under retail minus would no longer be relevant. It is the intention of the Authority that the remedies imposed as a result of this review will lower barriers to entry and deliver competitive outcomes to consumers.

¹⁸ Under the three criteria test, a market must fulfil all three criteria to be deemed susceptible to *ex ante* regulation. See paragraphs 3.5 & 3.6 above.

- 4.38 In its submission, Sure also makes some claims about JT's behaviour: specifically, that JT provides retail data centre connectivity below current wholesale prices and that it "has a history of pricing retail services in a manner that results in a margin squeeze for its competitors". Such behaviour may result in barriers to entry and expansion, but Sure does not provide evidence to support these claims nor does it point to any occasion in which JT has been found to behave in such a manner.
- 4.39 To the extent that any transition to a new remedy to support further entry and expansion could result in problems at the retail level, the Authority's opinion is that the potential problems foreseen by both Airtel-Vodafone and Sure can be addressed through transition remedies that protect competition whilst any alternative wholesale remedy is implemented. These will be considered during the next phase of the BCMR when the Authority considers remedies.
- 4.40 In February 2021, the Authority set out its prioritisation principles for deploying its limited resource.¹⁹ These principles state that the Authority will "strive to make the best use of the Authority's limited resources to achieve real outcomes for Jersey" (1.6) and will consider the "expected additional economic impact on efficiency, productivity, innovation and the wider economy" (3.3). Bearing these priorities in mind, the Authority would not wish to regulate a market that was not previously been subject to regulation when positive outcomes can be achieved through different means, such as enhanced wholesale regulation.

Authority conclusion

- 4.41 In light of the analysis in the Draft Decision and further analysis in response to stakeholder responses, the Authority concludes that its preliminary decision that the retail market does not fulfil the three criteria test remains valid and so the retail market is not susceptible to *ex ante* regulation. Therefore no SMP analysis is conducted for the retail market.

¹⁹ JCRA (2021) "Prioritisation Principles"

5 Wholesale market definition

- 5.1 This section refers to section 6 of the Draft Decision where the Authority set out its preliminary findings on wholesale market definition. According to the European Commission's SMP Guidelines, regulatory authorities should identify and analyse the wholesale market that is most upstream of the retail market in which competition problems would exist in the absence of regulation upstream. NRA should define market boundaries by taking into account demand-side and, to the extent relevant, supply-side substitutability of products.²⁰
- 5.2 This section is split into three subsections, which cover in turn:
- Product market definition (see paragraphs 5.3 to 5.31); and
 - Geographic market definition (see paragraphs 5.32 to 5.36); and
 - The three criteria test (see paragraphs 5.37 to 5.41).

Product market definition

Draft Decision proposals

- 5.3 The proposed wholesale definition drew on the proposed retail market definition and considered some wholesale specific issues. It was proposed the Authority's preliminary conclusions in the retail market are mirrored in the wholesale market and in addition:
- The wholesale market should not be broadened to include dark fibre or duct access;
 - The wholesale market should not be narrowed to reflect customer use of leased lines, for example mobile backhaul or other retail applications. The implication of this is that the market includes wireless (microwave) technology as well as fibre or other wireline leased lines; and
 - Self-supply should be included within the wholesale market.

Draft Decision responses

- 5.4 Both Sure and Airtel-Vodafone argued that the market should be broadened to include dark fibre. Airtel-Vodafone argued that the market should be extended further to include duct and pole (physical infrastructure) access, as all existing fibre may be in use.
- 5.5 Airtel-Vodafone and Sure's principal argument was that dark fibre is a closer substitute for wholesale active leased lines than the Authority appeared to believe. Customers of dark fibre in the wholesale market would be other telecoms operators and these companies have the skills and resources necessary to light a dark fibre. They would therefore be able to use dark fibre in the event of a SSNIP on an active wholesale leased line.
- 5.6 Sure also argued that including dark fibre in the market would allow the Authority to use existing Licence Conditions to implement a dark fibre access remedy and it would not need to impose new conditions. Finally, Sure noted that Ofcom found dark fibre to be included in the relevant market in its 2018/19 BCMR and it is 2020/2021 Wholesale Fixed Telecoms Market Review.

²⁰ European Commission (2018) op cit footnote 7. Para 26.

- 5.7 JT repeated its argument concerning disaggregating the market by bandwidths previously put forward in response to the Authority's preliminary conclusions on the retail market.
- 5.8 JT also argued that the leased lines used for mobile backhaul should be in a separate market on the basis that there are significantly different competitive conditions in this market segment, in particular as there is substantial self-supply by mobile operators using microwave links.
- 5.9 Sure also stated that the wholesale leased lines market definition should be broader than the retail market definition "because point-to-point connectivity is used for a wide range of purposes in addition to the provision of retail leased lines, and the wholesale leased lines market should be defined to include all such use cases."²¹.

Authority analysis

5.10 This section provides the Authority's analysis on:

- The inclusion of dark fibre and/or duct access (see paragraphs 5.11 to 5.24);
- Bandwidth breaks (see paragraph 5.25); and
- Mobile backhaul (see paragraphs 5.26 to 5.29).

The inclusion of dark fibre and/or duct access

- 5.11 The Authority has concluded in the light of evidence provided by respondents and the approaches adopted by the European Commission and Ofcom that the market should be extended to include dark fibre access. However, the Authority has also concluded that duct access remains outside the relevant market.
- 5.12 The Authority has carefully considered the arguments made for the inclusion of dark fibre in the wholesale market. In doing so, the Authority has noted that the European Commission's recent recommendation on relevant markets states:
- "The substitutability [of active leased lines by dark fibre] depends on the ability of the access seeker to self-provide the knowledge and active equipment needed as well as the difference in price to active products. If dark fibre is found to exert sufficient competitive constraint over the pricing of leased lines, it could be included in the same relevant market for dedicated capacity."*²²
- 5.13 The Authority has considered whether it would be possible to undertake the HMT to determine whether dark fibre could be a substitute in the event of a SSNIP by a hypothetical monopolist of active wholesale leased lines. Whilst some dark fibre circuits are provided by the Jersey Electricity (JE), the network is very limited and linked to the electricity grid. The Authority is, therefore, of the opinion that there is not enough information to undertake an HMT.
- 5.14 However, were it possible to do so, then the Authority considers that a SSNIP imposed by a hypothetical monopolist of wholesale active leased lines is unlikely to be profitable as purchasers of such circuits could switch demand to dark fibre. Such purchasers would be other

²¹ "Sure's response to the JCRA Business Connectivity Market Review Draft Decision" p. 8

²² European Commission (2020) "EXPLANATORY NOTE Accompanying the document COMMISSION RECOMMENDATION on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation" Dec 2020. P. 58

licensed operators and so would have the knowledge and equipment to light dark fibre circuits, as Airtel-Vodafone and Sure have argued and as suggested by the European Commission.

- 5.15 The Authority is also aware that the UK regulator, Ofcom, has recently published its Statement (equivalent to a Final Decision) on the Wholesale Fixed Telecoms Market in the UK.²³ In this review, Ofcom has found dark fibre to be in the same market as wholesale active leased lines on the basis of supply side substitution. Specifically, Ofcom states two reasons why dark fibre is a supply-side substitute for an active leased line:

a) "When networks are already fibre connected, they would be able to switch between supplying dark fibre and Leased Line Access services sufficiently quickly and at minimal cost.

*b) Where suppliers are not already connected, dark fibre providers are equally able to supply leased line access services as any other supplier of Leased Line Access services as the incentives to extend their networks will be broadly similar for both services."*²⁴

- 5.16 Taking all the above points in paragraphs 5.12 – 5.15 into consideration, the Authority is persuaded that dark fibre would be an effective supply and demand- side substitute for active leased lines and that the market definition should be broadened to include dark fibre.
- 5.17 The Authority also notes the suggestion made by Sure that that it could use Licence Condition 28 to apply the dark fibre remedy, if imposed. The Authority considers Sure's suggestion has merit and that if the Authority's preliminary decision to impose a dark fibre access remedy is imposed it may be done so under LC28 and will give further consideration to this suggestion when it considers remedies.
- 5.18 With respect to remedies, in coming to the conclusion to include dark fibre in the market, the Authority has considered whether it is possible to include a product within a market without requiring regulated access to that product in the event of a finding of SMP in the market. The Authority has considered this to ensure that a market definition that includes dark fibre does not presuppose an obligation on the SMP operator to provide regulated access to dark fibre as it does not wish to prejudice its future Final Decision in remedies.
- 5.19 The Authority's opinion is that the inclusion of dark fibre in the market is a factual decision based on demand and supply side substitutability under the HMT, whereas whether to require regulated access to dark fibre is a regulatory judgment. Such a judgement concerns whether and to what extent regulated access to dark fibre is necessary to solve the competition problems identified by the market analysis.
- 5.20 The Authority has also paid particular attention to Ofcom's recent WFTMR. It has already noted that Ofcom includes dark fibre in the leased lines product market. However, whilst Ofcom has included dark fibre access in the product market, it has only included it as a remedy in geographic market Area 3, the geographic market where Openreach is not expected to face infrastructure competition. Ofcom has not included dark fibre access as a remedy in Area 2 and the High Network Reach (HNR) area, where there is potential for infrastructure competition.

²³ Ofcom (2021) "Promoting competition and investment in fibre networks: Wholesale Fixed Telecoms Market Review 2021-26" (WFTMR) March 2021

²⁴ Ibid. Vol. II, Para. 6.88.

Ofcom has, however, imposed regulated access to wholesale active leased lines in Area 2 and the HNR area.

- 5.21 Therefore, on the basis of this precedent and practice, the Authority's view is it can include dark fibre in the relevant market definition without prejudice to its forthcoming analysis of remedies for the market.
- 5.22 Further, with respect to the question regarding use cases raised by Sure, the Authority does not intend that there should be any limitation on use cases for dark fibre if the preliminary decision to impose a dark fibre access remedy is upheld in the Final Decision on remedies. However, the Authority does recognise that additional regulation may be needed for some uses cases, such as where colocation is required at a JT facility. This will be addressed when the remedies are set out in detail.
- 5.23 Alongside considering dark fibre, the Authority has also considered Airtel-Vodafone's proposal that the wholesale market definition should be further broadened to include duct access. However the Authority has upheld its original decision that duct access is outside the market for the reasons explained below.
- 5.24 The Authority does not consider that sufficient demand for leased lines would be substituted by duct access in the event of a SSNIP to make that SSNIP unprofitable. For there to be substitution, wholesale customers would need to access JT's ducts and lay their own cables and other equipment in those ducts to provide leased line services. This would require significant capital investment by customers of wholesale leased and the Authority has seen no evidence that network operators would be willing to make such an investment in the event of a SSNIP. The Authority, therefore, has no reason to expect a SSNIP to be unprofitable due to substitution by duct access.

Bandwidth breaks

- 5.25 The Authority has considered JT's claim that the wholesale market should be delineated by bandwidths. It has come to the conclusion that the market should include all bandwidths for the same reasons explained earlier in relation to the retail market definition²⁵. These are, first that JT's market share is above the level at which dominance would be presumed for all bandwidths separately and, secondly, that separating the market by bandwidth would be disproportionate.

Mobile backhaul

- 5.26 The Authority has considered JT's proposal that the leased lines provided for mobile backhaul should be in a separate relevant market. The Authority does not agree with JT's opinion and is maintaining the preliminary market definition to include mobile backhaul.
- 5.27 In the Draft Decision, the Authority explained that leased lines used for mobile backhaul and for other applications were the same and thus subject to supply-side substitution in the event of a SSNIP by a hypothetical monopolist. The Authority also explained that competitive conditions do not differ between the supply of mobile backhaul and the supply of leased lines used for other purposes. JT challenged this latter view, arguing that it had a substantially lower market

²⁵ See paragraphs 4.17 - 4.20 above.

share of mobile backhaul due to the significant use of self-supplied microwave links by other mobile network operators (MNOs).

5.28 The Authority has, therefore, gathered more detailed data from OLOs on the supply of leased lines for mobile backhaul, including the use of self-supplied microwave links.²⁶ Using this data, the Authority has calculated JT's market share of mobile backhaul alone. This calculation shows that JT's share is sufficiently greater than 50% that it can be presumed to have SMP in this section of the market. Its market share has remained at this level for the past two years and is projected to remain persistently above this threshold.

5.29 Therefore, even were the Authority to define a separate mobile backhaul market, the competition problems would be the same as for leased lines used for other purposes and there would be no benefit in defining a separate market.

Authority conclusion

5.30 In light of the analysis in the Draft Decision and analysis of stakeholder responses the Authority concludes the wholesale product market definition is defined as follows:

- The Authority's conclusions in the retail product market are mirrored in the wholesale market

In addition:

- The wholesale market should be broadened to include dark fibre but not broadened to include physical infrastructure;
- The wholesale market should not be narrowed to reflect customer use of leased lines, for example mobile backhaul or other retail applications; and
- Self-supply should be included within the wholesale market.

5.31 In comparison to the Draft Decision the key change is that the wholesale market has been broadened to include dark fibre, whereas previously it was excluded from the market definition.

Geographic market definition

Draft Decision proposals

5.32 The Authority considered whether there are separate geographic markets within Jersey by considering differences in barriers to entry and in the number of suppliers in an area, homogeneity of market shares and differences in prices or services.

5.33 Following this analysis the proposed geographic market was the whole Bailiwick of Jersey, as there are no particular areas within Jersey where conditions of competition are appreciably different to the extent that they constitute separate geographic markets.

²⁶ Specifically, the Authority requested Sure and Airtel-Vodafone to provide data on the number of leased lines they purchase for use as mobile backhaul from other operators (including JEC) and that they provide to themselves, including via microwave. They were asked to provide historic data from 2019 and forecast out to 2023, consistent with the main data request for all types of leased lines. Newtel was asked to provide data on leased lines sold to other operators that are used for mobile backhaul. The data allowed the Authority to calculate the market shares of the mobile backhaul segment of the leased lines market.

Draft Decision responses

- 5.34 Airtel-Vodafone and Sure both agreed with the Authority's preliminary conclusion that there are no geographic markets on Jersey. JT, however, expressed the same view as it did in relation to the retail market, i.e. that OLO investment in networks means the market may be heading towards distinct geographic areas.

Authority analysis

- 5.35 The Authority has noted JT's comments and, whilst it will continue to monitor developments it does not see any reason to define separate geographic markets smaller than Jersey as whole at this stage.

Authority conclusion

- 5.36 In light of the analysis in the Draft Decision and support from stakeholders the Authority concludes that the geographic market definition remains valid. Therefore the wholesale geographic market is defined as the whole Bailiwick of Jersey.

Three criteria test

Draft Decision proposals

- 5.37 To establish if the wholesale market is susceptible to *ex ante* regulation the three criteria test was applied. All three criteria were passed.
- 5.38 Based on this finding the Authority proposed the wholesale market was susceptible to *ex ante* regulation and, on this basis, an SMP analysis was undertaken

Draft Decision responses

- 5.39 All respondents agreed with the Authority that that wholesales leased lines markets fulfils the three criteria test and so is susceptible to *ex ante* regulation.²⁷

Authority analysis

- 5.40 The Authority notes there was consensus on the proposed approach.

Authority conclusion

- 5.41 In light of the analysis in the Draft Decision and stakeholder responses the Authority concludes the wholesale market passes the three criteria test. Therefore the wholesale market is susceptible to *ex ante* regulation.

²⁷ In their response, Airtel-Vodafone wanted the Authority to include connectivity speeds of 10/100/500 and 1000 Mbps leased lines as well as dark fibre. This comment will be considered at the remedies stage.

6 Wholesale market SMP assessment

- 6.1 This section refers to section 7 of the Draft Decision where the Authority set out its preliminary findings on SMP in the wholesale market. SMP is considered to be a position of economic strength allowing the undertaking(s) with SMP to behave independently of competitors, customers and consumers.²⁸ If an undertaking with SMP is not identified and subject to remedies that restrict its behaviour, then it can cause harm in the market by exploiting its customers (for example by setting prices above the competitive level) or excluding its competitors (for example by using anticompetitive practices such as margin squeeze).

Draft Decision proposals

- 6.2 In coming to its proposed SMP findings, the Authority carried out a forward-looking analysis of market characteristics, considering both market shares and trends in market share alongside of other relevant criteria that may constitute barriers to entry and/or expansion.
- 6.3 This analysis led to a proposed finding that JT had SMP in the wholesale market, based on:
- Stable market share in excess of 90%;
 - Presence of barriers to entry and expansion;
 - Presence of economies of scale and scope;
 - Evidence of excessive profits; and
 - Lack of countervailing buyer power.

Draft Decision responses

- 6.4 Airtel-Vodafone and Sure agreed unequivocally with the Authority's preliminary view that JT has SMP in the relevant market.
- 6.5 JT made the point that it disagreed with the Authority's preliminary decision on the wholesale market definition and therefore claimed that it did not have SMP. This was because it would not have SMP in some of the markets it argued should have been defined, such as higher speed leased lines or mobile backhaul.

Authority analysis

- 6.6 The Authority upholds its preliminary decision that JT has SMP in the market for wholesale leased lines in the whole of Jersey.
- 6.7 The Authority has already rejected the arguments put forward by JT regarding market definition. It has explained that, even if a separate mobile backhaul market and separate markets for each bandwidth were defined, JT would still be dominant in those markets. Since market definition is not an end itself but a means to identify where competition problems may exist, it would be neither appropriate nor proportionate to define the separate markets proposed by JT.

Authority conclusion

- 6.8 The Authority's preliminary conclusion set out in the Draft Decision and summarised above that JT enjoys a position of SMP in the wholesale leased lines market as defined is therefore upheld.

²⁸ European Commission (2018) op cit footnote 7. Paragraph 52.

7 Final Decision on market definition and SMP

- 7.1 This section sets out the Authority's Final Decision on Stage 1, the market definition and SMP analysis, for the retail and wholesale business connectivity markets.

Retail market

- 7.2 The appropriate retail market definition in Jersey is:

"High capacity and quality dedicated private circuits based on fibre or copper cables and used by end customers for connection between two fixed locations within the whole Bailiwick of Jersey. The retail leased lines market includes:

- *Both Advanced Interface (AI) and Traditional Interface (TI) protocols; and*
- *All speeds measured in megabits per second (Mbps) or gigabits per second (Gbps).*

- 7.3 The retail market does not fulfil the three criteria test and so is not susceptible to *ex ante* regulation.

Wholesale market

- 7.4 The appropriate wholesale market definition in Jersey is:

"High capacity and quality dedicated private circuits based on wireless technology, fibre or copper cables and used by Other Licensed Operators, including mobile network operators, for connection between two fixed locations within the whole Bailiwick of Jersey. The wholesale leased lines market includes:

- *Both Advanced Interface (AI) and Traditional Interface (TI) protocols;*
- *All speeds or bandwidths measured in megabits per second (Mbps) or gigabits per second (Gbps);*
- *Circuits used for the purpose of mobile backhaul, i.e. where one end of the circuit is at a mobile base station;*
- *Circuits supplied by a licensed operator to itself for onward supply to the retail market; and*
- *"Dark fibre circuits", i.e. fibre optic circuits that are not "lit" to provide a specific access speed or bandwidth and which are then lit by the customer of that circuit for any purpose.*

- 7.5 The wholesale market fulfils the three criteria test and is susceptible to *ex ante* regulation.

- 7.6 JT has been found to have SMP in this market as defined. Therefore the Authority will progress with Stage 2 of the BCMR to address remedies to be imposed on JT.

Annex 1: Legal, licensing and process framework

A1.1 This annex sets out the legal background, the licensing framework and process framework that relates to business connectivity market review.

Legal background

A1.2 Telecommunication services are regulated in Jersey under the Telecommunications (Jersey) Law 2002 (the **Telecoms Law**). The primary duty of the Authority is to perform its functions in such a manner as it considers appropriate to ensure that (so far as in its view is reasonably practicable) telecommunications services are provided both within Jersey and between Jersey and the rest of the world, so as to ensure that all current and prospective demands for such services are satisfied.²⁹

A1.3 The Telecoms Law contains a number of duties imposed on the Authority³⁰, including the requirement to perform its functions in such a manner as:

- to protect and further the short-term and long-term interests of users within Jersey and perform them by promoting competition among those engaged in commercial activities connected with telecommunications in Jersey;
- to promote efficiency, economy and effectiveness in commercial activities connected with telecommunications in Jersey; and
- it considers is best calculated to further the economic interests of Jersey.

A1.4 Further, the Authority shall have regard to:

- whether services are accessible to and affordable by the maximum number of business and domestic users;
- whether there is innovation in services and their provision; and
- the provision of high quality and reliable services.³¹

A1.5 Article 9 provides that the Authority shall keep under review and gather information about the provision of telecommunications services in Jersey and elsewhere.

Licensing framework

A1.6 Part 2 of the Telecoms Law establishes the requirement for a telecoms operator to hold a licence, and Part 5 sets out the powers the Authority has to grant a licence. There are four classes of telecommunications licence in Jersey. A Class III Licence is specifically for applicants which have SMP. The Class III Licence includes a Part which addresses conditions applicable to dominant operators.³²

²⁹ Telecommunications (Jersey) Law 2002, Article 7(1) – ‘Duties of the Minister and Authority’.

³⁰ Telecommunications (Jersey) Law 2002, Article 7(2)(a) – (f).

³¹ Telecommunications (Jersey) Law 2002, Article 7(3).

³² Part IV of the Class III licence.

- A1.7 The provisions which are applicable to dominant operators include (but are not limited to) measures addressing the availability and associated terms of OLO access to networks and services³³; the requirement not to show undue preference or to exercise unfair discrimination³⁴; the requirement not to unfairly cross subsidise³⁵, supported by accounting processes to demonstrate compliance; regulation of prices, and transparency around pricing and wholesale product offerings, including the publication of appropriate Reference Offers.³⁶
- A1.8 In addition, the Class III licence includes conditions specific to the provision of leased lines³⁷, which apply where a licensee has been found to be in a dominant position. The conditions applicable to the supply of leased lines refer to the retail and wholesale markets and require a dominant provider offers leased lines on publicly advertised and non-discriminatory terms, and in compliance with quality standards and at prices determined by the Authority.
- A1.9 The Class III licence also includes a Part which directly obliges the licensee not to engage in any practice that has the object or likely effect of preventing, restricting or distorting competition in the establishment, operation and maintenance of telecommunications networks and services.³⁸

Process framework

- A1.10 The Authority's approach to consultations was set out in an Information Note in July 2018.³⁹ The Information Note outlines the process to be undertaken before carrying out certain regulatory functions in accordance with the relevant statutory process.
- A1.11 Under the process there is a non-statutory process. 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.
- A1.12 Before carrying out certain regulatory functions, following the non-statutory process the appropriate Jersey statutory process is followed. For Jersey a decision as to whether a person has a dominant position in a relevant market does not require the statutory process to be followed as it is not the exercise of a specified regulatory function pursuant to the Jersey Telecoms Law.
- A1.13 This means for this Final Decision on market definition and SMP there is no requirement to follow the statutory process and this Decision is final and binding.

³³ Condition 25, Class III licence.

³⁴ Condition 31, Class III licence.

³⁵ Condition 30, Class III licence.

³⁶ Condition 33, Class III licence.

³⁷ Condition 28, Class III licence.

³⁸ Condition 34, Class III licence.

³⁹ Document CICRA 18/29 "Regulatory Consultation Process"

<https://www.jcra.je/media/597858/g1369gj-regulatory-consultation-process-information-note.pdf>

Annex 2: Glossary

Alternative Interface (AI): new types of technologies used for delivering leased lines services, for example *Ethernet* (see below), which contrast with legacy *TI* technologies (see below).

Bandwidth: the physical characteristic of a telecoms system that indicates the speed at which information can be transferred, which in digital systems is measured in bits per second (bps).

Dark fibre: unused or 'unlit' optical fibre, i.e. fibre which has been deployed within a communication network but which is not connected to active electronic equipment used to facilitate data transmission.

Ethernet: a technology used for data transmission. Originally deployed for use in a *LAN* (see below) environment, the technology has also increasingly been used to support *WAN* (see below) connectivity, with Ethernet being used in this instance as a leased line technology.

Ex ante: the application of regulation before an abuse of power has necessarily occurred. The reasoning behind its application is that finding that an operator has SMP means that the operator is likely to have the incentive and motivation to behave in a way which exploits its market power to the detriment of competitors and ultimately to consumers. *Ex ante* regulation can be contrasted with *ex post* regulation, which investigates an incident which has already happened.

Ex post: the use of regulation following a complaint or abuse of market position by an operator. In contrast to *ex ante* regulation (see above).

Gbps: Gigabits per second (1 Gigabit = 1,000,000,000 bits) A measure of bandwidth in a digital system.

Hypothetical monopolist test (HMT): This assesses whether a hypothetical monopolist of the narrowest possible focal product is able to impose a small but significant non-transitory increase in price (SSNIP – see below) for a product or service without reducing its profits.

Leased line: A permanently connected communications link between two premises dedicated to a customer's exclusive use.

Mbps: Megabits per second (1 Megabit = 1 million bits). A measure of bandwidth in a digital system.

Small but Significant Non-transitory Increase in Price (SSNIP): a theoretical price increase that forms part of the 'hypothetical monopolist' test used in market definition analysis. The price increase in question is usually considered to be in the range of 5 to 10%.

Time Division Multiplex (TDM): a method of putting multiple data streams in a single signal by separating the signal into many segments, each having a very short duration. Each individual data stream is then reassembled at the receiving end based on the timing.

Traditional Interface (TI): legacy technologies used for delivering leased lines services, of which the main one would be *TDM* (see above).

Virtual Private Network (VPN): a private network where connectivity is extended by making use of the internet over which a virtual point-to-point connection is established, with various protocols being used to ensure data security over the public element of the network.