



Telecommunications (Jersey) Law 2002

Final Notice: Licence Modifications affecting JT (Jersey) Limited) and Sure (Jersey) Limited

Document No: JCRA 21/19

Date: 6 July 2021

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1. Summary

1.1 On 30 March 2021 the Jersey Competition Regulatory Authority (the **Authority**), issued an [Initial Notice](#) of its intention to exercise a specified regulatory function to modify:

1.1.1 the Class III licence granted to JT (Jersey) Limited (**JT**) on 30 June 2017 (the **JT Licence**); and

1.1.2 the Class II licence granted to Sure (Jersey) Limited (**Sure**) on 1 September 2015 (the **Sure Licence**)

both issued under the Telecommunications (Jersey) Law 2002 (the **Telecoms Law**) and being licences to run telecommunications systems and provide telecommunications services within, to and from the Bailiwick of Jersey.

1.2 The proposed modification took the form of new licence conditions, which were attached to the Initial Notice (**Licence Conditions**). The Licence Conditions place requirements on JT and Sure with regard to network sharing and compliance and anticipate the introduction by the Authority of guidelines relating to the sharing of network elements, which the Authority intends to issue for consultation later in 2021.

1.3 The terms of the thus modified JT Licence and Sure Licence were also attached to the Initial Notice (respectively the **Modified JT Licence** and the **Modified Sure Licence**).

1.4 The Authority has carefully considered certain representations made to it in respect of such proposed modifications and has decided to exercise such specified regulatory function as set out in the Initial Notice and, accordingly, to issue this Final Notice and to issue to JT the Modified JT Licence and to Sure the Modified Sure Licence.

1.5 The Authority has decided to make two minor changes to the text of the Licence Conditions as set out in the Initial Notice:

(a) as the Effective Date of each licence pre-dates the date of issuing the modified licences, the Authority has made it clear that the new licence conditions take effect only from the latter date; and

(b) to clarify that network sharing agreements could be between more than two operators, the Licence Condition relating to such agreements has been changed in each case to (new text in underline):

“If the Licensee intends to enter into any Network Sharing Agreement it shall first so notify the Authority in writing, providing reasonable details of the proposed arrangement and disclosing the identity of the Licensed Operator or Licensed Operators with which it proposes to enter into such agreement...”

1.6 In accordance with Article 11(9) of the Telecoms Law, the Modified JT Licence and Modified Sure Licence shall come into effect on 4 August 2021, being a date later than the 28th day from the date of this Final Notice.

2. Background to the proposed modifications

2.1 The Initial Notice referred to an investigation (**Investigation**) by the Authority under Article 26(1) of the Competition (Jersey) Law 2005 (the **Competition Law**) into the conduct of JT and Sure (and others), as set out in its Case Opening Statement of 4 July 2019 and Statement of

Objections of 20 January 2020. The Investigation related to arrangements made between JT and Sure (and others) for sharing network elements in connection with the roll-out of 5G services on Jersey. The parties have ceased the activity which was the subject of the Investigation.

- 2.2 On 30 March 2021 the Authority announced that the Investigation would be closed without a decision, in the light of certain steps JT and Sure had each made in relation to ensuring that any future sharing of network elements would be in compliance with the Competition Law. Those steps included agreeing the text of the Licence Conditions and to their incorporation into the JT Licence and Sure Licence.
- 2.3 The Licence Conditions provide for clear obligations on JT and Sure to ensure that any use of shared assets or networks is fully compatible with healthy competition, benefiting consumers through lower prices and faster roll-out of new technology.
- 2.4 The mechanism for effecting the incorporation of the Licence Conditions into each of the JT Licence and the Sure Licence is for the Authority to modify such licences pursuant to its powers under Article 18(1) and 18(3) of the Telecoms Act. Article 10(1) of the Telecoms Act designates such action as an exercise of a specified regulatory function for the purposes of Article 11.

3. Representations

- 3.1 Article 11(1) of the Telecoms Law sets out the procedure the Authority must follow in exercising a specified regulatory function, including the form and content of an initial notice of its intention to exercise such function. Such content must include, in accordance with Article 11(1)(e):

“specifying the period within which written representations or objections in respect of the proposed exercise may be made.”

- 3.2 Accordingly the Authority issued the Initial Notice and, in compliance with Article 11(1)(e), the Initial Notice specified in paragraph 5 that:

“5.1 If representations are received before 5pm on 30 April 2021 regarding the proposed exercise of such function, the Authority will consider them and will decide:

5.1.2 not to exercise such function;

5.1.3 to issue a new Initial Notice;

5.1.4 to issue a new Initial Notice; or

5.1.5 to issue a Final Notice confirming the modification of the JT Licence and the Sure Licence.

“If no responses are received before such time, the Final Notice effecting such modification will be made on or about 7 May 2021. At such time as the modification takes effect, it becomes binding on all parties.

“5.2 Written representation or objections to the exercise of this specified regulatory function may be made by e-mail to info@jcra.je on or before 5pm on 30 April 2021.”

- 3.3 Representations were received from one party, Airtel Jersey Limited (**Airtel**), on 30 April 2021 and before the 5pm deadline. These representations (**Representations**) are set out in Annex A to this Final Notice.
- 3.4 The Authority notified each of JT and Sure of the receipt of the Representations (but did not disclose to JT and Sure that they had been received from Airtel) and on the 20 May 2021 issued an [Information Note](#) on its website, stating that a decision would be made in due course.
- 3.5 The Authority considered carefully the Representations, and each of the issues raised and weighed the effect, if any, that each should have on the appropriateness of the proposed modifications set out in the Initial Notice. The Authority's detailed response to the Representations is set out in Annex B. The Authority concluded that none of the issues raised affected the proposed modifications.
- 3.6 The Authority decided to make two non-substantive modifications to the Licence Conditions, as set out above. Accordingly, the Authority has decided to issue this Final Notice as set out in Section 4 below.

4. Final Notice

- 4.1 Having considered the Representations made in respect of the Initial Notice, the Authority gives Final Notice of the following Order:

ORDER

The Jersey Competition Regulatory Authority (**Authority**), having considered representations made to it in relation to its Initial Notice of 30 March 2021, hereby confirms modifications to the licences granted under the Telecommunications (Jersey) Law 2002 to:

- JT (Jersey) Limited (**JT**) on 30 June 2017, being a Class III Licence
- Sure (Jersey) Limited (**Sure**) on 1 September 2015, being a Class II Licence

by means of issuing:

- to JT, a Class III licence in the form attached to this Order as served on JT today
- to Sure, a Class II licence in the form attached to this Order as served on Sure today

Each such licence shall come into effect on 4 August 2021.

Each such licence shall be published on the Authority's website, with Schedule C thereto redacted in each case for reasons of confidentiality.

By Order of the Board of the Authority
6 July 2021

Annex A: Representations received from Airtel Jersey Limited

Annex B: Authority's response to the Representations

JERSEY COMPETITION REGULATORY AUTHORITY'S INITIAL NOTICE UNDER THE TELECOMMUNICATIONS (JERSEY) LAW 2002 RELATING TO PROPOSED LICENCE MODIFICATIONS AFFECTING JT (JERSEY) LIMITED AND SURE (JERSEY) LIMITED DATED 30 MARCH 2021 (JCRA 21/09)

RESPONSE BY JERSEY AIRTEL LIMITED

1. INTRODUCTION

- 1.1 This is Jersey Airtel Limited's ("**Airtel-Vodafone**") response to the Jersey Competition Regulatory Authority's ("**JCRA**") initial notice of 30 March 2021 (the "**Initial Notice**") under the Telecommunications (Jersey) Law 2002, relating to proposed licence modifications to telecommunications licences held by JT (Jersey) Limited ("**JT**") and Sure (Jersey) Limited ("**Sure**").
- 1.2 For the reasons set out in more detail in this response, Airtel-Vodafone has significant concerns regarding JCRA's proposal to modify JT's and Sure's Class III and Class II telecommunications licences respectively. Airtel-Vodafone considers that the proposed modifications set out in the JCRA's Initial Notice will not achieve the intended objectives in practice.
- 1.3 The intended purpose of the JCRA's proposal to modify JT and Sure's licences is unclear:
 - 1.3.1 In the Initial Notice the JCRA states that the intended purpose of the amendments is to effectively codify undertakings given by JT and Sure to enable the JCRA to close its investigation into an alleged anticompetitive practice under the Competition (Jersey) Law 2005 (the "**Competition Law 2005**") on administrative priority grounds;¹ and
 - 1.3.2 In its Press release titled *Jersey's 5G Future: promoting competition and enabling new technology* of 30 March 2021, the JCRA states that the proposed licence modifications are intended to "*support a programme of modernising regulation to help set conditions for investment in new mobile technology, including 5G*".²
- 1.4 Given the above two objectives of the JCRA are not both clearly articulated in the Initial Notice, Airtel-Vodafone is unclear as to the JCRA's proposed objectives.
- 1.5 Notwithstanding this lack of clarity as to the purpose(s) of the proposed licence modifications, Airtel-Vodafone considers that they would fail to deliver on either of the two potential objectives that can be discerned from the JCRA's Initial Notice and its wider public communications.
- 1.6 This response is structured as follows:
 - 1.6.1 Section 2 explains why the proposed licence modifications would fail to ensure any greater compliance by JT and Sure with competition law;
 - 1.6.2 Section 3 describes why the proposed modifications would not support a programme of modernising regulation to help set conditions for investment in new mobile technology;
 - 1.6.3 Section 4 explains why all mobile network operators should be involved in any future network sharing arrangements in Jersey, in order to achieve the intended objectives; and
 - 1.6.4 Section 5 contains concluding remarks.

¹ JCRA Initial Notice, paragraphs 2.2-2.3, available at: <https://www.jcra.je/media/598316/licence-modifications-jt-and-sure-initial-notice.pdf>

² JCRA, Jersey's 5G Future: promoting competition and enabling new Technology, p.1, available at: <https://www.jcra.je/media/598314/jerseys-5g-future-promoting-competition-and-enabling-new-technology.pdf>

2. **PROPOSED MODIFICATIONS FAIL TO ENSURE ANY GREATER COMPLIANCE WITH COMPETITION LAW BY JT AND SURE**
- 2.1 As regards the purpose of ensuring greater compliance by JT and Sure with the Competition Law 2005, the JCRA's proposed licence modifications amount to little more than a requirement to comply with obligations which are already legally binding on JT and Sure. Airtel-Vodafone considers that draft Condition X achieves very little:
 - 2.1.1 Draft Condition X.3(a) merely contains an obligation that any Network Sharing must comply with the Competition Law 2005;
 - 2.1.2 Draft Condition X.3(b) is materially the same as the substantive statutory test for the review of mergers and acquisitions set out in s.22(5) of the Competition Law 2005; and
 - 2.1.3 As regards draft Condition X.3(c), no guidance on network sharing arrangements has been published by the JCRA yet and it is therefore impossible to assess the impact of this condition. The JCRA has made only a vague reference to such guidance being issued for consultation "*later in 2021*".³ In any event, JT and Sure should already have regard to guidance published by the JCRA when assessing their respective compliance with the underlying legislation.
- 2.2 The fact that the modifications would have little if no effect in practice is confirmed by:
 - 2.2.1 Draft Condition X.4 which expressly states that the draft Conditions are "*without prejudice to the Licensee's obligations under any other applicable law, including the [Competition Law 2005]*";
 - 2.2.2 Condition 34.1(b) of JT's Class III licence and Condition 27.1(b) of Sure's Class II licence already contain obligations relating to fair competition, including a requirement that the operators do "*not engage in any practice or enter into any arrangement that has the object or the likely effect of preventing, restricting or distorting competition in the establishment, operation and maintenance of Licensed Telecommunication Systems or the provision of Telecommunication Services*", which is materially the same as the prohibition on anticompetitive agreements contained in s.8(1) of the Competition Law 2005; and
 - 2.2.3 Condition 34.1(c) of JT's Class III licence and Condition 27.1(c) of Sure's Class II licence already require JT and Sure to "*comply with any direction issued by the JCRA for the purpose of preventing any market abuse or any practice or arrangement that has the object or effect of preventing, restricting or distorting competition in the establishment, operation and maintenance of Licensed Telecommunication Systems or the provision of Telecommunication Services*".
- 2.3 To the extent that the draft Conditions include obligations which are not in the Competition Law 2005, Airtel-Vodafone consider that they are unlikely to enhance competition law compliance by JT and Sure. In particular:
 - 2.3.1 Draft Condition X.2 merely requires JT and Sure to provide the JCRA with "reasonable details" of any Network Sharing Agreement, with copies of any such agreement only to be provided on written request. This draft Condition will not provide third parties with any transparency as to what form a Network Sharing Agreement might take. In fact, the JCRA is required under this draft Condition to keep any Network Sharing Agreement, which could impact at least the whole of Jersey, confidential save where disclosure is required by law; and
 - 2.3.2 The proposed compliance obligations in draft Condition Y only require JT and Sure to implement a compliance programme, e.g. to provide their employees with periodic competition law compliance training.
- 2.4 It is therefore unclear how draft Conditions X and Y will change the status quo as regards JT and Sure's respective competition law compliance. Rather, Airtel-Vodafone considers that the draft Conditions could incentivise JT and Sure to enter into a network sharing arrangement which merely benefits themselves and does not benefit the whole of Jersey.

³ JCRA, Initial Notice, paragraph 1.2

- 2.5 Airtel-Vodafone's concern is further justified by the fact that, prior to issuing the Initial Notice and seeking to close its investigation on grounds of administrative priorities, the JCRA was conducting an investigation into whether JT and Sure breached the Competition Law 2005 by entering into a Memorandum of Understanding purporting to relate to network sharing. On 20 January 2020, the JCRA itself issued a Press release alleging that JT and Sure *"have breached Guernsey competition law and Jersey competition law by entering into anticompetitive arrangements/agreements in relation to the construction and operation of 5G networks in Guernsey and in Jersey"*.⁴
- 2.6 Airtel-Vodafone understands that this is the very same conduct for which the Guernsey Competition & Regulatory Authority ("**GCRA**"), issued a Statement of Objections on 21 April 2021, provisionally finding that JT and Sure proposed to enter into a network sharing arrangement which amounts to a breach of Guernsey's competition law. Airtel-Vodafone understands that the GCRA considers that JT and Sure engaged in the unlawful exchange of information and market sharing. The GCRA in its Press release identified Airtel-Vodafone's very concern that the relevant *"agreement to trade mobile network infrastructure would have given each of JT and Sure a far stronger position as mobile network providers in their home Island achieved not by fair and open competition but through a secret anti-competitive arrangement."*⁵
- 2.7 JT has itself already accepted that the proposed network sharing arrangements were *"not the best way of achieving [the] goal"* of ensuring that the *"Jersey telecoms market is fair and open, operates in the interests of consumers and that any shared networks support open competition"*. Sure also conceded that their previous efforts *"were misguided, in that they did not clearly set out how JT and Sure would achieve effective network sharing that was in the interests of consumers on Jersey or which would facilitate open competition"*.⁶
- 2.8 Therefore, as the obligations in the draft Conditions amount to little more than JT and Sure agreeing to comply with legal obligations that they are already subject to, and are set against a background of genuine concerns regarding JT and Sure's conduct, they will not achieve the purpose of achieving a greater degree of compliance by JT and Sure with competition law.
3. **PROPOSED MODIFICATIONS WILL NOT SUPPORT A PROGRAMME OF MODERNISING REGULATION TO HELP SET CONDITIONS FOR INVESTMENT IN NEW MOBILE TECHNOLOGY**
- 3.1 Airtel-Vodafone considers that the proposed licence modifications will not support a programme of modernising regulation to help set conditions for the necessary investment in new mobile technology, including 5G, as stated by the JCRA. However, Airtel-Vodafone is supportive of network sharing arrangements between all operators in Jersey and is similarly supportive of the JCRA seeking to create the regulatory conditions to facilitate this.
- 3.2 Network sharing can deliver significant benefits for competition and thus for consumers. In particular, the efficient deployment of 5G technology at scale could result in significant benefits for people, businesses, and society at large in Jersey. However, it is clear that with the onset of 5G, mobile network operators in Jersey will need to make significant investments in their networks to roll out 5G technology to meet throughput requirements and demand.
- 3.3 Network sharing arrangements between mobile network operators could give rise to significant benefits. For example, network sharing enables inter alia:

⁴ JRCA, C1471GJ - JT, Sure - Draft Decision (Statement of Objections); <https://www.jcra.je/media/598191/c1471gj-jt-sure-draft-decision-statement-of-objections.pdf>

⁵ GCRA, *Competition Authority issues infringement proceedings against two mobile network operators*, Press release dated 21 April 2021, page 3; <https://www.gcra.gg/media/598316/c1471g-competition-authority-issues-infringement-proceedings-against-two-mobile-network-operators.pdf>

⁶ https://www.bailiwickexpress.com/jsy/news/competition-watchdog-drops-investigation-misguided-jt-and-sure/?utm_medium=email&utm_campaign=Bailiwick%20Express%20News%20-%20JERSEY%20EDITION&utm_content=Bailiwick%20Express%20News%20-%20JERSEY%20EDITION+CID_90c352e31c6b3dd28fe8621baedc3d56&utm_source=Email%20marketing%20software&utm_term=Read%20more#.YILoP5BKUn

- 3.3.1 The sharing of capex (e.g. building, rigging, materials and power) and opex (e.g. land rent, power and backhaul) between operators, enabling operators to focus on the competition in the service layer, regardless of the extent of the sharing. Radio access networks already comprise the largest portion of the cost in network deployment and operation. To meet high speed mobile data demand, the number of coverage sites and performance sites will increase significantly. As infrastructure at base station sites usually comprises the largest portion of infrastructure cost, operators can share passive infrastructure and active infrastructure to achieve the optimum performance of sites and 5G capability in a cost-efficient way. As Jersey is a relatively small market with a population of c.100,000, there is a greater need for operators to share such costs to ensure that investments are viable and can be recovered over an acceptable period of time;
- 3.3.2 Lower prices for customers of mobile communications services as a result of the passing on of the abovementioned cost savings. Customers also benefit through the facilitation of operators' migration to next-generation technologies to be able to provide them with the latest technology available;
- 3.3.3 Mobile operators having additional capital, through cost savings, to be able to invest in the deployment of future technologies; and
- 3.3.4 Mobile operators to speed up the roll-out of 5G and improve coverage and capacity in Jersey. Operators are under pressure to extend the capacity of the network due to the significant growth of traffic that is being handled by mobile networks. This means that the cost to handle traffic will increase and operators need to employ methods to ensure that the accommodation of the increased traffic does not require a similar magnitude of growth in infrastructure cost. Traditional infrastructure deployment can only bring limited cost reduction even under intense cost reduction pressure, but infrastructure sharing enables significant cost reduction for mobile network infrastructure deployment.
- 3.4 In addition, Airtel-Vodafone also considers that network sharing could result in significant environmental benefits by reducing duplicative infrastructure between operators. The GCRA has also acknowledged this benefit, recently stating: *"Network sharing of mobile mast infrastructure is positive as it reduces mobile mast density and can be more efficient because it avoids unnecessary duplication of infrastructure. It is encouraged by governments and regulators around the world, including in Guernsey."*⁷ Airtel-Vodafone's and the GCRA's position is in line with relevant regulation in other jurisdictions. For example, in the Netherlands, mobile operators must coordinate site planning to minimise environmental disruption to local communities. In France, a similar requirement requires mobile operators to consult other operators to gauge their interest when deploying new sites (excluding in dense urban areas).
- 3.5 Notwithstanding the above, network sharing arrangements should not operate in such a way so as to harm competition to the detriment of consumers. Concerns regarding improper network sharing arrangements have recently been recognised by the European Commission. On 7 August 2019, the European Commission issued a Statement of Objections to O2 CZ, CETIN and T-Mobile CZ which reached the preliminary view that their network sharing agreement infringes competition law. In the context of that investigation, the Competition Commissioner Margrethe Vestager stated:

*"Operators sharing networks generally benefits consumers in terms of faster roll out, cost savings and coverage in rural areas. However, when there are signs that co-operative agreements may be harmful to consumers, it is our role to investigate these and ensure that markets indeed remain competitive. In the present case, we have concerns that the network sharing agreement between the two major operators in Czechia reduces competition in the more densely populated areas of the country."*⁸

⁷ GCRA, *Competition Authority issues infringement proceedings against two mobile network operators*, Press release dated 21 April 2021, page 2

⁸ Antitrust: Commission sends Statement of Objections to O2 CZ, CETIN and T-Mobile CZ for their network sharing agreement. See: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_5110

- 3.6 It is notable that Czechia, like Jersey, is a market where there are three mobile network operators and the network sharing arrangements related to the two largest operators in that market. The European Commission's press release stated:

"The Commission [...] has reached the preliminary conclusion that the network sharing agreement between the two main mobile operators in Czechia restricts competition and thereby harms innovation in breach of EU antitrust rules.

The Commission holds the view that in this instance, instead of leading to greater efficiencies and higher service quality, the network sharing agreement is likely to remove the incentives for the two mobile operators to improve their networks and services to the benefit of users."

- 3.7 Therefore, while network sharing can be positive it does not follow that it is always pro-competitive in all its guises. In this case, Airtel-Vodafone has serious concerns that these proposed licence modifications will in fact encourage exclusive network sharing arrangements between JT and Sure which are likely to operate to the detriment of consumers in Jersey and Airtel-Vodafone. In particular, these proposed licence modifications do not include any obligation on JT or Sure to ensure that any network sharing arrangement benefits all consumers in Jersey, including those customers on Airtel-Vodafone's network (see further Section 4 below).
- 3.8 As noted above, the requirement that JT and Sure notify any proposed network sharing arrangement to the JCRA expressly includes an obligation on the JCRA to keep it confidential. This precludes any real consultation or transparency to third parties on any proposed network sharing arrangements. Of more benefit would be a requirement on those operators to notify the regulatory authority who would publish the opportunity to share the infrastructure, coupled with requirements to grant access on fair, reasonable and non-discriminatory terms.
- 3.9 In this regard, the JCRA's lack of transparency is stark in contrast to how other telecommunications regulators have approached this issue. For example, operators are obliged to publish information on passive infrastructure sharing opportunities in advance, in a public forum, in many European countries (e.g. Belgium, Bulgaria, Croatia, Greece, Italy, Latvia, Liechtenstein, Montenegro and Serbia). In Norway, a similar obligation applies to the operator with significant market power.
- 3.10 Further, the draft Conditions do not preclude the very real possibility that Airtel-Vodafone is placed at a competitive disadvantage by the actions of JT or Sure. In particular, Airtel-Vodafone considers that the exclusion of Airtel-Vodafone from any network sharing arrangements would cause substantial and irreparable harm to its business.
- 3.11 JT and Sure would be permitted to share the costs of these significant network investments. However, Airtel-Vodafone would be placed at a significant cost and time to market disadvantage as it would have to bear the significant capex and opex associated with rolling out 5G on its own, assuming it is possible at all for Airtel-Vodafone to single-handedly roll out a 5G network.
- 3.12 This competitive harm to Airtel-Vodafone would ultimately prejudice consumers in Jersey. Airtel-Vodafone's relatively higher cost base would mean that it would not be able to continue to operate as a competitive constraint on JT and Sure. This would effectively reduce the number of mobile network operators offering competitive services in Jersey from three to two (with each of JT and Sure having a stronger position in Jersey and Guernsey respectively). As a consequence, there would be less choice for consumers in Jersey. It would inevitably lead to higher prices and poorer quality mobile services.
- 3.13 Therefore, Airtel-Vodafone's view is that the proposed licence conditions would manifestly fail to deliver a programme of modernising regulation to help set conditions for the necessary investment in new mobile technology.

4. **ALL MOBILE NETWORK OPERATORS MUST BE INVOLVED IN ANY NETWORK SHARING ARRANGEMENTS IN JERSEY**

- 4.1 Airtel-Vodafone considers that the onset of 5G provides the opportunity for the JCRA and Jersey's mobile network operators to work together to ensure that this new technology is

rolled out quickly and in as efficient a manner as possible, given the substantial benefits 5G will bring to people, businesses, and society at large in Jersey.

- 4.2 The JCRA's proposed licence modifications will not facilitate the efficient roll-out and offering of 5G services in Jersey, with all the benefits that the new technology brings for consumers. Instead, Airtel-Vodafone considers that the JCRA should propose modifications to the licences of JT and Sure, requiring that they notify the JCRA who would publish the opportunity to share the infrastructure. JT and Sure should also be under an obligation to grant access to any network sharing arrangement between them with third parties on fair, reasonable and non-discriminatory terms. Any such obligation would need to be supported by a strong, efficient and transparent information provision and dispute resolution mechanism as well as a set of material remedies.
- 4.3 This would ensure that any 5G network sharing arrangements in Jersey can operate to the benefit of all the island's mobile network customers, rather than just the customers of JT and Sure. Network sharing between all operators would also be appropriate in light of the unique features of the Jersey market, including the significantly smaller population size when compared with other European nations. As noted above, suitable network sharing arrangements in Jersey would give rise to significant costs savings, lower prices, operators having more capital available for new technologies, operators being able to provide higher quality services (e.g. 5G and greater coverage and capacity) and environmental benefits.
- 4.4 This proposal would also be entirely consistent with how mobile network operators are regulated in other jurisdictions. By way of example:
 - 4.4.1 In Norway, infrastructure sharing obligations have been imposed on the operator with significant market power following a market review. The dominant mobile operator is under infrastructure sharing obligations including national roaming.
 - 4.4.2 In Austria, the national regulator can grant a new entrant national roaming access to the mobile networks of existing operators for a limited term.
 - 4.4.3 In Belgium, the national regulator can impose shared use with due regard for the principle of proportionality. In the event of disputes between operators, the national regulator can impose cost sharing fees as well as terms regarding shared use of antenna sites. It can also impose national roaming obligations on operators controlling access to end users.
 - 4.4.4 In Portugal, a national decree law goes further than just allowing passive infrastructure sharing and actively obliges operators (where technically possible) to make sharing agreements regarding passive assets.
 - 4.4.5 In Liechtenstein, operators are obliged to grant access to passive infrastructure assets and mobile operators are obliged to share sites subject to capacity being available.
- 4.5 A similar goal could be achieved by having Ofcom, in consultation with the JCRA, include stipulations in the award of spectrum for 5G in Jersey to oblige operators to negotiate and agree infrastructure sharing agreements. Similar approaches have been adopted in other European jurisdictions. For example:
 - 4.5.1 Belgium, Czechia, France and Romania imposed obligations on license holders to provide national roaming services for new entrants or to share spectrum with operators that have relatively less spectrum holdings.
 - 4.5.2 The Portuguese regulator referred to national legislative stipulations in its 2011 auction (of 450 MHz, 800 MHz, 900 MHz, 1800 MHz, 2.1 GHz and 2.6 GHz frequency bands) to oblige operators to negotiate passive infrastructure sharing agreements.
 - 4.5.3 In Liechtenstein, the national regulator included ancillary conditions in its spectrum awards that obliged operators to share passive assets.
- 4.6 Airtel-Vodafone therefore considers that these options would create the regulatory conditions needed to support pro-competitive network sharing which would benefit all people, businesses, and society at large in Jersey.

5. **CONCLUSION**

- 5.1 For the reasons set out above, Airtel-Vodafone considers that the proposed licence modifications set out in the JCRA's Initial Notice are likely to manifestly fail to ensure either greater compliance by JT and Sure with competition law, or support a programme of modernising regulation to help set conditions for investment in new mobile technology, including 5G.
- 5.2 Airtel-Vodafone therefore urges the JCRA to reconsider the proposed modifications. Airtel-Vodafone has set out in this response two alternative proposed modifications which we think would achieve the stated objectives of the JCRA.
- 5.3 Airtel-Vodafone would be very happy to discuss this response further with the JCRA if that would be helpful.

Jersey Airtel Limited

30 April 2021



**Case T-038: Proposed Modifications of the Licences of JT (Jersey) Limited and Sure (Jersey) Limited
Response By The Jersey Competition Regulatory Authority To Responses Received From Airtel Jersey Limited**

Introduction

- 1.1 On 30 March 2021, the Jersey Competition Regulatory Authority (the **Authority**), issued an Initial Notice setting out its intention to exercise a specified regulatory function to modify:
- (a) the Class III licence granted to JT (Jersey) Limited (**JT**) on 30 June 2017 (the **JT Licence**); and
 - (b) the Class II licence granted to Sure (Jersey) Limited (**Sure**) on 1 September 2015 (the **Sure Licence**),
- both issued under the Telecommunications (Jersey) Law 2002 (the **Telecoms Law**) and being licences to run telecommunications systems and provide telecommunications services within, to and from the Bailiwick of Jersey (together, the **JT and Sure Licences**).
- 1.2 The proposed modifications to the JT and Sure Licences took the form of new licence conditions, as attached to the Initial Notice (the **Licence Conditions**). The proposed Licence Conditions place requirements on JT and Sure with regard to network sharing and compliance and anticipate the introduction by the Authority of guidelines relating to the sharing of network elements, which the Authority intends to issue for consultation later in 2021.
- 1.3 The means of incorporating licence conditions into the existing JT and Sure Licences is by modification pursuant to Condition 6.1 of both JT's Licence and Sure's Licence and Article 18 of the Telecommunications (Jersey) Law 2002 (the **Telecoms Law**). Article 11(1) of the Telecoms Law prescribes the procedure that must be followed to make licence modifications, including allowing a period of 28 days for representations to be made to the Authority in respect of the proposed exercise of the function.
- 1.4 Accordingly, the Authority issued an Initial Notice setting out the proposed Licence Conditions, which specified a period for representations to be made to the Authority, ending at 5pm on 30 April 2021. In accordance with Article 11(4) of the Telecoms Law any representations or objections made are considered by the Authority before a final decision is given in relation to the proposed exercise of the specified regulatory function.
- 1.5 The Authority received one response to its Initial Notice, from Jersey Airtel Limited (**Airtel-Vodafone**). We set out our views, having considered the representations made by Airtel-Vodafone below.

Purpose of the proposed Licence Conditions

- 1.6 Firstly, we reiterate the purpose of the proposed Licence Conditions. On 30 March 2021, the Authority announced that the investigation under Article 26(1) of the Competition (Jersey) Law 2005 (the **Competition Law**) into the conduct of JT and Sure (and others) (the **Investigation**), as set out in its Case Opening Statement of 4 July 2019 and Statement of Objections of 20 January 2020, would be closed without a decision. In taking this decision, the Authority took into account certain steps JT and Sure had each made in relation to ensuring that any future sharing of network elements would be compliant with the Competition Law. Those steps included agreeing the text of the Licence Conditions and to their incorporation into the JT and Sure Licences. The proposed decision by the Authority in relation to the licences, as set out in the Initial Notice, gives effect to those changes.

- 1.7 Airtel-Vodafone suggested that the intended purpose of the Authority's proposal to modify the JT and Sure licences was unclear, as different purposes were set out in the Initial Notice and the Media Release of 30 March 2021.¹ Whilst not being part of the formal reasoning behind the proposed Licence Conditions, the Media Release was nevertheless consistent with the Initial Notice, when it stated: *"Following the operators' commitments noted above, and in light of their public commitment to ensuring that any future network sharing will take competition law requirements fully into account, the Authority has decided to close its investigation into an earlier Memorandum of Understanding (MOU) that was entered into, and then terminated, by JT and Sure."* The Authority considers that the purpose of the proposed Licence Conditions is clear.

Ensuring greater compliance with competition law

- 1.8 In light of the conduct highlighted to the Authority in the course of the Investigation, the aim of the Licence Conditions was to ensure that JT and Sure raised their internal awareness of, and hence compliance with, competition law. As stated in the Initial Notice, it is consistent with the Authority's dual roles as a competition authority and telecommunications regulator, to use all reasonable means to ensure knowledge of and compliance with competition law, for the benefit of all licensees and consumers. The guidelines that will be consulted on in due course are also intended as an important mechanism for heightening competition law compliance and awareness.
- 1.9 Airtel-Vodafone's response to the Initial Notice stated that the proposed compliance obligations in Licence Condition Y only required JT and Sure to implement a compliance programme and that it was therefore unclear as to how the proposed Licence Conditions would change the status quo as regards JT and Sure's respective competition law compliance. The Authority considers that incorporating the proposed Licence Conditions into the JT and Sure Licences will achieve its aim of heightening awareness of, and increasing compliance with, competition law. It is widely accepted that setting up policies, procedures and training can help reduce the risk of breaches of competition law from occurring.² This is what the proposed Licence Conditions regarding compliance aim to achieve.
- 1.10 In addition, Airtel-Vodafone considered that the proposed Licence Conditions could incentivise JT and Sure to enter into a network sharing arrangement that merely benefitted themselves and which would not benefit the whole of Jersey – i.e. it could have the opposite effect of ensuring greater compliance with competition law by Sure and JT.
- 1.11 The Authority believes that Airtel-Vodafone's concern is misplaced in two important respects. First, there is no basis in law for believing that an additional restriction on network sharing that applies to JT and Sure would make it more likely that JT and/or Sure would enter into a network sharing agreement that had anti-competitive effects. Second, there is no dichotomy between a network sharing arrangement which benefits JT and Sure and one that benefits the whole of Jersey. The key is to ensure that the effect of any network sharing is to generate benefits

¹ <https://www.jcra.je/media/598314/jerseys-5g-future-promoting-competition-and-enabling-new-technology.pdf>

² See, for example, the UK's Competition and Markets Authority's 'Quick Guide to Complying with Competition Law' at page 8, which recommends that organisations should *"Set up policies, procedures and training to reduce the risks [of breaching competition law] you have identified occurring"*: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/306899/CMA19.pdf

without harming competition. If that goal is achieved, it will benefit the sharing operators and Jersey consumers.

- 1.12 The appears to be an underlying concern that the Authority will be ineffective in challenging any anti-competitive network sharing arrangements. There is no basis for that concern on the face of the proposed Licence Conditions. The Authority has stated publicly that it shares Airtel-Vodafone's (and others') views on the possible benefits of network sharing, provided it is undertaken in a way that does not harm competition. The Authority intends to be vigilant in relation to any future network sharing arrangements – indeed, the outcome of the Licence Condition X is to equip the Authority to perform that role more effectively.

Transparency of future network sharing arrangements

- 1.13 In its response to the Initial Notice, Airtel-Vodafone stated that proposed Licence Condition X.2 *'merely requires JT and Sure to provide the JCRA with "reasonable details" of any Network Sharing Agreement, with copies of any such agreement only to be provided on written request. This draft Condition will not provide third parties with any transparency as to what form a Network Sharing Agreement might take. In fact, the JCRA is required under this draft Condition to keep any Network Sharing Agreement, which could impact at least the whole of Jersey, confidential save where disclosure is required by law'*.
- 1.14 The Authority considers that Airtel-Vodafone has set up an expectation – namely, the transparency of contract details – to then note that that expectation may not be met. However, the licence conditions were not intended to achieve that outcome.
- 1.15 After careful consideration, the Authority decided that the obligation on JT and Sure to notify the Authority in advance of any network sharing arrangements, and to provide information on request, was a proportionate means to enable the Authority to be aware of potential network sharing and to heighten JT and Sure's sensitivity to the need to comply with competition law. Such agreements would, by their nature, be confidential, and the Authority has no right to, and would not, make them public other than in the context of the exercise of its competition law or telecommunications law powers.
- 1.16 That said, the Authority anticipates that any network sharing arrangement that raises concerns about competition would merit appropriate scrutiny. The precise mechanism for achieving the right balance between transparency and protection of legitimate commercial interests would need to be struck at the time. For example, if a network sharing agreement raised concerns and had impacts on the wider market, it might be appropriate for the Authority to consult publicly before taking a final view about that arrangement. This could involve, for example, publishing a non-confidential version, or summary, of the terms of the contract, so that respondents had appropriate transparency.
- 1.17 To the extent that Airtel-Vodafone anticipates a lack of transparency in relation to some future consideration of a network sharing agreement at some point in the future, that is a matter to be determined at the time. The level of transparency in the Licence Condition mirrors that in the Competition Law and the Authority is satisfied it achieves its aims.

Best practice for network sharing

- 1.18 In its representations, Airtel-Vodafone highlighted the pro-competitive benefits of network sharing but added that it had *'serious concerns'* that the proposed Licence Conditions could encourage anticompetitive behaviour between JT and Sure in the form of exclusive network sharing to the detriment of Jersey consumers and Airtel-Vodafone. It highlighted in particular that the proposed Licence Conditions did not *'include any obligation on JT or Sure to ensure that*

any network sharing arrangement benefits all consumers in Jersey, including those customers on Airtel-Vodafone's network'.

- 1.19 The Authority has not asserted that network sharing is always pro-competitive: it has stressed that any network sharing must comply with competition law and not result in harm to competition. Accordingly, the Authority sees no basis for Airtel-Vodafone's assertion that the licence modifications will encourage (or permit) exclusionary network sharing arrangements. Without pre-empting the outcome of any future review, the Authority does not anticipate that it would permit such an arrangement to stand, and as a result of the proposed Licence Conditions, the Authority has additional tools at its disposal to resolve those issues, that give greater flexibility and speed of action than relying on competition law alone.
- 1.20 Airtel suggested that *'[o]f more benefit would be a requirement on those operators to notify the regulatory authority who would publish the opportunity to share the infrastructure, coupled with requirements to grant access on fair, reasonable and non-discriminatory terms'*. This would be a substantive change to the current telecommunication's regulatory regime, which is not within the scope of, or the intention of, the Licence Conditions. Airtel's views are noted, but not relevant to the Authority's decision to propose Licence Conditions on the JT and Sure Licences to raise awareness of, and hence compliance with, competition law.
- 1.21 Airtel-Vodafone also submitted that *'the draft Conditions do not preclude the very real possibility that Airtel-Vodafone is placed at a competitive disadvantage by the actions of JT or Sure. In particular, Airtel-Vodafone considers that the exclusion of Airtel-Vodafone from any network sharing arrangements would cause substantial and irreparable harm to its business'*. For the avoidance of doubt, the Authority's intention in setting the proposed Licence Conditions is to reduce the possibility that Airtel-Vodafone (or any operator) might be excluded from the market as a result of a network sharing arrangement, if such an arrangement was contrary to those operators' regulatory obligations or competition law. Should Airtel-Vodafone have any concerns in relation to 5G and its deployment, Airtel-Vodafone will be able to make submissions in relation to any future consultation on the roll-out of 5G and other new technologies at the appropriate juncture.
- 1.22 Another suggestion from Airtel-Vodafone was that the Authority should propose modifications to the JT and Sure Licences which would require them to notify the Authority of any network sharing arrangements, which the Authority would then publish so that other operators had the opportunity to share the infrastructure. Airtel-Vodafone submitted that JT and Sure should also be under an obligation to grant access to any network sharing arrangement between them with third parties on fair, reasonable and non-discriminatory terms.
- 1.23 Whilst these suggestions from Airtel-Vodafone are noted, they represent a more intrusive regime than that which is currently in place, and one which would impose significantly more costs on stakeholders. Those steps may be necessary in the future but the case for them at this present time has not been made out.
- 1.24 Airtel-Vodafone also gave examples of how network sharing has been managed in particular jurisdictions, with particular reference made to the 2018 BEREC report.³ Whilst these are helpful suggestions as to future 5G and other technology roll-outs, the Authority does not consider that they are relevant to the decision it takes in relation to the proposed Licence Conditions for JT and Sure's Licences, for the reasons already outlined above.

³ https://berec.europa.eu/eng/document_register/subject_matter/berec/download/0/8164-berec-report-on-infrastructure-sharing_0.pdf



The parallel investigation in the Bailiwick of Guernsey

- 1.25 Airtel-Vodafone referred to the investigation of JT and Sure by the Guernsey Competition and Regulatory Authority (the **GCRA**) in Guernsey. The Authority does not expand here on the points made by Airtel-Vodafone. The GCRA's investigation is a separate proceeding, and each regulator must take its own independent view of how best to proceed in light of its statutory and public law duties. The Authority has done so in relation to the Investigation. That said, it is clear from the outcome of the Investigation that the Authority did not, and would not, accept a network sharing arrangement that forced a third operator to exit the market, with the resultant loss of competition and consequential risk of harm to consumers.

Concluding remarks

- 1.26 Having carefully considered the representations made by Airtel-Vodafone, the Authority has decided to proceed with the proposed Licence Conditions largely in the form set out in the Initial Notice and to issue and publish on its website a Final Notice to that effect.
- 1.27 The Authority has decided to make two non-substantive changes to the text of the Licence Conditions published in the Initial Notice:
- (a) as the Effective Date of each licence pre-dates the date of issuing the modified licences, the Authority has made it clear that the new licence conditions take effect only from the latter date; and
 - (b) to clarify that network sharing agreements could be between more than two operators, the substantive Licence Condition relating to such agreements has been changed in each case to:

"If the Licensee intends to enter into any Network Sharing Agreement it shall first so notify the Authority in writing, providing reasonable details of the proposed arrangement and disclosing the identity of the Licensed Operator or Licensed Operators with which it proposes to enter into such agreement..."

By Order of the Board of the Jersey Competition Regulatory Authority

6 July 2021