



Case T-012

Business Connectivity Market Review: Remedies

Non-statutory Draft Decision

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1 Executive summary

- 1.1 This document is the Jersey Competition Regulatory Authority (**the Authority**)’s non-statutory Draft Decision (**Draft Decision**) for remedies in the business connectivity market review (**BCMR**). It follows the non-statutory Draft Decision Consultation published in October 2020 (**October 2020 Draft Decision**)¹ and subsequent non-statutory Final Decision on market definition and significant market power (**SMP**) issued in July 2021 (**July 2021 Final Decision**).²
- 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 After issuing the October 2020 Draft Decision, in February 2021, the Authority issued an Information Note³ that explained that further work on the BCMR would be divided into two stages. Stage 1 to address market definition and SMP and stage 2 to address remedies to be imposed on any undertaking that has a position of SMP. It was noted that stage 2 would be supported by structured engagement with stakeholders.
- 1.4 Stage 1 of the process was completed with the issue of the July 2021 Final Decision. This set out the market definition and concluded that JT had SMP in the wholesale market for leased lines in the whole Bailiwick of Jersey.
- 1.5 With respect to stage 2 or remedies, in November 2021, the Authority carried out structured engagement with stakeholders on the proposals. In light of the structured engagement and wider considerations, including the Authority’s prioritisation principles, the Authority proposes to adopt a refined approach to remedies as set out in this document for consultation. This approach and the timetable for remedies was set out in an Information Note published in January 2022.⁴
- 1.6 The proposed remedies have been tailored to the identified competition problems and their objective is to support competitive outcomes in the wholesale market for on-island leased lines. The approach proposed is consistent with the approach to remedies adopted in the EU, tailored to Jersey market characteristics. The competition problems that have been identified are:
 - **Refusal to supply:** JT could refuse to allow Other Licensed Operators (**OLOs**) access to its network and so foreclose the downstream retail market to competition;
 - **Price and non-price discrimination:** Even if JT were to allow access, it could set price and non-price terms for OLOs that make it hard for those OLOs to compete effectively with JT’s downstream business; and

¹ See: <https://www.jcra.je/media/598280/business-connectivity-market-review-draft-decision.pdf>

² See: <https://www.jcra.je/media/598342/business-connectivity-market-review-final-decision-market-definition-and-significant-market-power-assessment.pdf>

³ See: <https://www.jcra.je/media/598308/business-connectivity-market-review-information-note.pdf>

⁴ See: <https://www.jcra.je/media/598448/business-connectivity-market-review-information-note.pdf>

- **Excessive pricing:** JT could set a price for wholesale access that is above the competitive level and on which it can earn monopoly rents thereby reducing consumer welfare in the market.

1.7 A summary of the key elements of this Draft Decision and where further detail on them can be found is set out in Figure 1. If adopted, these remedies will replace the existing remedies in the market, which were set as part of the 2014 Business Connectivity Market Review (**2014 Review**).

Figure 1: Overview of proposals in the Draft Decision

Approach to remedies			
Consistent with the approach adopted in the EU and appropriate to the competition problems likely to arise from the exploitation of SMP and proportionate to the possible impact of that problem.			
Competition issue	Remedies	JT Licence Conditions	Further detail
Refusal to supply	<ul style="list-style-type: none"> • An obligation on JT to provide access to wholesale leased lines. • An obligation on JT of transparency, including a requirement for JT to: <ul style="list-style-type: none"> ○ provide appropriate documentation for wholesale on-island leased line products; ○ publish a standard Service Level Agreement (SLA), including Key Performance Indicators (KPIs); ○ publish prices and non-price terms and conditions for wholesale leased lines; ○ publish changes to price and non-price terms and conditions for wholesale on-island leased lines one month before they come into effect; ○ notify OLOs and the Authority 3 months in advance of the launch of a new wholesale product (or removal of an existing product or service); and ○ Implement a refined approach to reference offers for leased lines. • To maintain dark fibre as a potential future regulatory option, if JT is not effectively meeting its obligations consistent with market requirements and the Authority's ongoing objectives. 	Licence Conditions 30, 32, 37, 40	Section 6
Price and non-price discrimination	<ul style="list-style-type: none"> • An obligation on JT of non-discrimination, including a migration service. • An obligation to provide relevant accounting information. 	Licence Conditions 32, 33, 35	Section 7
Excessive pricing	<ul style="list-style-type: none"> • An obligation of cost accounting on JT. • A retail minus price control for JT. This has been refined from the current approach, which was set in the 2014 Review, and it is proposed to set the retail minus between 27% and 32%. 	Licence Conditions 32, 33, 34, 37	Section 8

1.8 This document is subject to Consultation. If the proposals are adopted, it will be followed by a non-statutory Final Decision and statutory Initial Notice. It is envisaged these will be issued in May/June 2022 and the Authority's aim is to implement the remedies in the market in September/October 2022.

2 Introduction

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

- Background (see paragraphs 2.2 to 2.7);
- How to respond (see paragraphs 2.8 to 2.10); and
- Structure of this document (see paragraphs 2.11 to 2.13).

Background

2.2 The main purpose of a market review is to identify whether any undertaking enjoys a position of SMP⁵ 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. If SMP is confirmed the market review will then set out the appropriate set of regulations that should be applied in order to support competitive outcomes.

2.3 In the October 2020 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.

2.4 In February 2021 the Authority issued an Information Note to update stakeholders on the approach to the BCMR. It explained that the Authority would divide further work on this market review into two separate but interrelated stages:

- Stage 1 would deal with matters of market definition and the finding of SMP; and
- Stage 2 would deal with the proposed remedies and will follow after Stage 1.

2.5 Stage 1 of the process was completed with the issue of the July 2021 Final Decision. This set out the market definition and concluded that JT had SMP in the wholesale market for leased lines in the whole Bailiwick of Jersey.

2.6 With respect to stage 2, in November 2021, the Authority carried out a further round of structured engagement with stakeholders on the proposals. In light of the structured engagement and wider considerations, including the Authority's prioritisation principles, the Authority proposes to adopt a refined approach to remedies as set out in this document for consultation. Stakeholders were informed of this by an Information Note published in January 2022.

⁵ 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.

2.7 Note, this document constitutes the Authority’s Draft Decision and is subject to Consultation. If the proposals are adopted, it will be followed by a non-statutory Final Decision and statutory Initial Notice. The statutory process is required as imposing remedies is the exercise of a specified regulatory function pursuant to the Telecommunications (Jersey) Law 2002 (**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.

How to respond

2.8 The Authority invites written views and comments on the issues and questions raised in this document, to be made by 5pm on 1 April 2022. A full list of questions is provided in Annex 2 and the Authority encourages respondents to provide comments that are supported by evidence. Less weight may be given to submissions that cannot be supported by evidence.

2.9 Responses can be submitted by email to info@jcra.je or alternatively in writing to:

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

2.10 All responses should be clearly marked: “Business connectivity market review: remedies”. The Authority’s normal practice is to publish responses to consultations on its website. It should be clearly marked if any part of a response is held to be commercially confidential and a redacted version also supplied for publication.

Structure of this document

2.11 This document is organised as follows:

- Approach to remedies (section 3);
- Proposed remedies in October 2020 Draft Decision (section 4);
- Overview of structured engagement (section 5);
- Proposed remedies to address refusal to supply (section 6);
- Proposed remedies to address price and non-price discrimination (section 7); and
- Proposed remedies to address excessive pricing (section 8).

2.12 This document also includes two annexes:

- Annex 1 provides an overview of the legal, licensing and process framework; and
- Annex 2 provides a summary of the Consultation questions.

2.13 Note, in the interest of brevity and as this is a new Draft Decision, this document does not repeat all the background material set out in previous Draft and Final Decisions or repeat all stakeholder comments. A high level summary is provided where appropriate and cross-references are made where relevant.

3 Approach to remedies

3.1 The proposed approach to remedies set out in this document is consistent with the approach set out in the October 2020 Draft Decision. The approach has been restated below in order to ensure the discussion on remedies set out later in this document is appropriately framed.

Proposed approach to remedies

3.2 The EU's Electronic Communications Code ('EECC')⁶ provides for a set of behavioural obligations or remedies to be imposed by National Regulatory Authorities (NRAs) that establish how the undertaking with SMP is required to conduct itself in the market. It has been standard practice throughout the EU to impose remedies at a high level on the conclusion of a market review, and to further specify in more detail as required. So, for example, if an NRA proposes that a price control is required following a market review, it may impose this in principle, then consult with operators and stakeholders on the detail of how it should be implemented.

3.3 The EECC sets out the obligations that may be imposed by NRAs:

- Obligation of transparency (Article 69 EECC).
- Obligation of non-discrimination (Article 70 EECC).
- Obligation of accounting separation (Article 71 EECC).
- Obligation of access to, and use of, specific network facilities (Article 73 EECC).
- Price control and accounting obligations (Article 74 EECC).
- Functional separation (Article 77 EECC).

3.4 The Authority considers that this general approach to remedies used in the EU should be adapted for use in Jersey. That said, the Authority is not limited in the remedies that it can impose such that it cannot consider other remedies, if those would be effective and proportionate. Such an approach is in accord with the licence conditions which can be applied to dominant operators in Jersey.

3.5 Consistent with the EU framework, the remedies applied by the Authority need to be appropriate to the competition problems likely to arise from the exploitation of SMP and proportionate to the possible impact of that problem. The Authority's preliminary opinion is, absent effective regulation, JT would have the incentive and the ability to use its dominant position in the relevant market to harm customers and limit competition in the market. There are three specific competition issues:

- **Refusal to supply:** JT could refuse to allow OLOs access to its network and so foreclose the downstream retail market to competition;
- **Price and non-price discrimination:** Even if JT were to allow access, it could set price and non-price terms for OLOs that make it hard for those OLOs to compete effectively with JT's downstream business;

⁶ DIRECTIVE (EU) 2018/1972 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 December 2018 establishing the European Electronic Communications Code. This amends and replaces Articles 9-13a of Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, 7 March 2002 (as amended) (Access Directive).

- **Excessive pricing:** JT could set a price for wholesale access that is above the competitive level and on which it can earn monopoly rents thereby reducing consumer welfare in the market.

3.6 The regulations the Authority proposes to impose on JT need to be designed to address these potential competition problems and so promote effective competition in the market.

Question 1: Do you agree with the Authority's proposals for the approach to remedies? If you do not agree you should provide all of your analysis and assessment.

4 Proposed remedies in October 2020 Draft Decision

4.1 In this section an overview of the proposals for remedies that were set out in the October 2020 Draft Decision is presented. This includes an overview of stakeholder views on the proposals. Given the Authority is issuing this document as a new Draft Decision, a detailed response to the comments is not provided, however the comments have been taken into account in the structured engagement process, set out in section 5 and the refined approach to remedies set out in sections 6-9.

Proposed remedies in October 2020 Draft Decision

4.2 The proposed remedies set out in October 2020 were framed against the competition problems they were trying to solve. A key proposed remedy was dark fibre and extensive discussion was included on the costs and benefits of dark fibre. This discussion concluded that after considering the high-level costs and benefits, JT should be under an obligation to supply access to dark fibre on-island leased lines to OLOs upon reasonable request. Implementation was supported by a wide range of elements, such as transitional arrangements.

Figure 2: Overview of proposed remedies in the October 2020 Draft Decision

Element	Further detail on proposals
Competition problem: refusal to supply	
Obligation of access to dark fibre and copper based wholesale leased lines	<ul style="list-style-type: none"> • JT should be under an obligation to supply access to dark fibre on-island leased lines to OLOs upon reasonable request (rather than active leased lines on a wholesale basis). • The Authority to direct the terms upon which access shall be provided. • Noting copper lines are being phased out, where it is still used, JT will be required to continue to provide access to active wholesale leased lines with prices set on a retail minus basis.
Transitional arrangements for existing fibre based wholesale leased lines	<ul style="list-style-type: none"> • The change from a regime of access to an active product with a retail minus charge control to cost oriented access to dark fibre is significant. • Transition arrangements were proposed to ensure no OLO is left without access to a wholesale leased line and unable to serve its end customers until such time as a fit for purpose dark fibre product is available. • These arrangements and their timing would be set out in a separate follow up consultation on dark fibre.
Obligation of transparency	<ul style="list-style-type: none"> • Within the obligation of transparency it was proposed for JT to : <ul style="list-style-type: none"> ○ publish and maintain a Reference Offer for dark fibre access and wholesale leased lines provided on copper, including appropriate technical specifications, and including a mechanism explaining how changes to the Reference Offer will be made and notified; ○ publish prices and non-price terms and conditions for dark fibre and wholesale leased lines; ○ publish a standard Service Level Agreement (SLA) which would govern JT's relationship with the OLOs, including Key Performance Indicators (KPIs); ○ publish changes to price and non-price terms and conditions for wholesale on-island leased lines one month before they come into effect; and ○ provide a notice period of 3 months in advance of the launch of a new wholesale product.

Element	Further detail on proposals
Competition problem: price and non-price discrimination	
Obligation of non-discrimination	<ul style="list-style-type: none"> JT to be obliged not to show undue preference to, or exercise unfair discrimination against, any OLO or its own retail operation regarding the provision of wholesale on-island leased lines provided on either a fibre or a copper cable and irrespective of whether the fibre is dark or lit.
Obligation to maintain accounting records and provide on request	<ul style="list-style-type: none"> While JT is not obliged to provide separated regulatory accounts, it is required to maintain accounting records that enable the Authority to request financial data on request and this should continue.
Competition problem: excessive pricing	
Obligation of cost accounting	<ul style="list-style-type: none"> JT should be obliged to maintain its current cost accounting obligations, with a view to demonstrating its compliance with other obligations.
Separate price controls for dark fibre and copper based wholesale leased lines.	<ul style="list-style-type: none"> A price control should be imposed for the provision of dark fibre in the wholesale market for on-island leased lines. The price of dark fibre should be cost orientated and estimated by reference to a cost model. This would be subject to a separate consultation document. Any residual copper leased lines will still be under a retail minus price control.

October 2020 Draft Decision responses

4.3 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; key points are summarised below.⁷ Newtel submitted a short response that noted full agreement with the proposals outlined in the Draft Decision.

4.4 On the proposed remedies, views from respondents were sought on:

- The case for dark fibre;
- The potential design parameters of any dark fibre remedy; and
- Views on the wider set of remedies.

4.5 With respect to the case for dark fibre:

- Airtel-Vodafone strongly agreed with the case for dark fibre. Airtel-Vodafone noted that a significant benefit of dark fibre would be its use for mobile backhaul, which will enhance capacity and reliability and lead to a better consumer experience.
- Sure agreed on the case for dark fibre, but were concerned the Authority proposed to limit the scope of a dark fibre remedy to certain types of product or service, and were also concerned by the risks associated with - what Sure considered might be - premature removal of current regulation on wholesale leased lines.
- In contrast, JT strong disagreed with the use of dark fibre as a remedy, arguing:
 - There is little demand for dark fibre, noting only one request had been made;

⁷ See: <https://www.jcra.ie/cases/2019/t-012-business-connectivity-market-review/t-012-business-connectivity-market-review-final-decision-market-definition-and-significant-market-power-assessment/>

- The remedy would be expensive to implement and that these costs had not been taken into account by the Authority;
- Practical aspects of implementation had not been considered; and
- The Authority's objectives would be better answered in other ways.

4.6 Linked to the points above, views on the potential design parameters of any dark fibre remedy were as follows:

- Airtel-Vodafone agreed with the design parameters as set out, the response noted the main requirement would be for end-to-end to backhaul but tail and inter-exchange would be needed in certain cases. To support this, it was also noted that co-location would be required.
- Sure provided a more detailed list of requirements for the effective implementation of a dark fibre remedy. A key issue was transition and Sure proposed a 36 month period for the introduction of the remedy during which JT would continue to have an obligation to provide active leased lines.
- JT noted it disagreed with design parameters as in its view dark fibre would be an inappropriate remedy.

4.7 On the wider set of remedies, views were as follows:

- Airtel-Vodafone agreed with the wider set of proposals and noted the importance of quick and reasonable access to dark fibre.
- Sure provided a detailed response providing further views on the overall package of remedies. Concerns were raised about the extent of cost information received and whether these were appropriate and the possibility of the use of equivalence of inputs in place of the non-discrimination obligation.
- JT response was focused on dark fibre. The response reiterated its disagreement with the remedy and argued that international precedents are very weak and that JT's licence conditions do not allow for imposition of a dark fibre remedy.

5 Overview of structured engagement

- 5.1 Structured engagement took place during the first and second week of November 2021, with the Authority hosting scheduled sessions with key stakeholders active in the Jersey leased line market, namely Airtel-Vodafone, JT, Newtel and Sure. The Authority would like to thank stakeholders for participating in the process and for the open approach taken to it. This includes the supply of additional information and further written comments.
- 5.2 The focus of structured engagement was the Authority's proposed dark fibre remedy. However, the sessions were also used to further understand views on the market development/dynamics and to consider issues specific to responses to the October 2020 Draft Decision. Key market developments covered included:
- Confirmation from JT that copper leased lines had been fully phased out and all leased lines were provided over fibre; and
 - Discussion of the impact of JT's changes to their leased line portfolio in September 2021. This saw the introduction of new leased line products; at lower prices, and the removal from new supply of other older products.
- 5.3 The process illustrated several broad themes (consistent with previous Authority analysis), and general, but not complete support, for the Authority's approach on remedies. Therefore, in order to capture the breadth of material covered as part of the structured engagement this section is split into three subsections, which cover in turn:
- Dark fibre (see paragraphs 5.5 to 5.17);
 - Issues in the business connectivity market (see paragraphs 5.18 to 5.22); and
 - Wider issues (see paragraphs 5.23 to 5.24).
- 5.4 Each of the sections is split between a discussion of stakeholder views and an overview of how the Authority has taken them into account in its refined proposals.

Dark fibre

Stakeholder views

- 5.5 Other than JT, stakeholders remained broadly supportive of a dark fibre remedy. While there is support for a dark fibre remedy, it was less clear as to how general support for the Authority's draft proposal on a dark fibre remedy would manifest itself, if at all, into actual and firm market demand.
- 5.6 Moreover, structured engagement further emphasised that any implementation of a dark fibre remedy would be a non-trivial undertaking, which may also give rise to significant additional - industry wide - cost, and both process and operational complexity. Where some stakeholders indicated a preference for a simplified and rapid approach, others called for a long period of implementation.
- 5.7 Stakeholders had differing views and interpretations of a dark fibre remedy. While some stakeholders considered the potential remedy as a means of more cost-effective network (infrastructure) deployment, other stakeholders considered the remedy in the context of

improving the commercial viability of existing services, and future technologies, for example as a possible component to any future 5G deployment and service.

- 5.8 Recognising the potential risks and implementation issues, some stakeholders advocated a form of ‘parallel running’. That is, a continuation of JT’s existing wholesale obligations in addition to a dark fibre remedy, until such time as the dark fibre remedy was effectively workable and operational. Aside from whether such a regulatory approach would be considered appropriate or proportionate, it could give rise to potential risks of arbitrage and require increased regulatory obligations and Authority oversight.
- 5.9 In general terms, stakeholders acknowledged that a dark fibre remedy would represent a significant policy development, with some suggesting the Authority also assume responsibility for the development – and coordination - of any future remedy. It is understood these comments are largely driven by OLO’s seeking further regulatory and commercial certainty.

Authority analysis

- 5.10 Stakeholder’s views and comments during structured engagement were also considered in the wider context of the Authority’s prioritisation principles. In addition to the potential risks posed by a dark fibre remedy, the likely impact on resource, cost and the Authority’s other programmes of work, would be significant. In a number of respects, this would not effectively align with the Authority’s priorities.
- 5.11 The Authority’s proposed wholesale remedies (set out in sections 6-8), represent a balanced economic and commercial approach and now no longer include dark fibre as the preferred option for implementation. Instead, the proposals build on existing remedies and provide for relative regulatory and market certainty. Building on this, the Authority can leverage the existing legal and licensing framework to give effect to the proposed remedies within a workable and reasonable timeframe.
- 5.12 The potential risks associated with the introduction of a dark fibre remedy, as outlined in the October 2020 Draft Decision, include a number of matters that may be likely to increase regulatory and market uncertainty. For example, the need for considerably longer implementation timescales coupled with the potential complexity of transition and the interaction with, or likely removal of, other wholesale remedies.
- 5.13 Therefore, in tandem with the structured engagement process set out above, the Authority reviewed its earlier assessment of the proposed remedies (as set out in the October 2020 Draft Decision), in the context of proportionality, and considering whether the remedies remained both targeted and appropriate. While consistent with the Authority’s previous approach, the review was not intended to replicate historic or independent analysis, but to further “test” key points and identify issues and areas relevant to the Authority’s approach to BCMR remedies. The Authority’s findings might be summarised into two broad categories:
- Contextual factors: The review indicated that, based on information at the time, the Authority’s earlier analysis was geared toward the potential long-term benefits of specific remedies, as opposed to more detailed consideration of current market ‘failures’ (required to be addressed by wholesale remedies). Further, whether the potential long-term benefits

of specific remedies are realisable when considered relative to uncertain – and diminishing – demand, uncertain costs, and possibly, protracted implementation timescales.

- Policy factors: The review illustrated more immediate scope for enhancing the appropriateness and targeted nature of the current set of wholesale remedies, in particular, refining and updating the current suite of remedies to help give effect to an improved competitive process. For example, leveraging the available remedies to facilitate greater competition on non-price factors, and identifying the extent to which the current retail minus remedy can be recalibrated to enable OLO's to compete more effectively (with JT and one-another).

- 5.14 As part of the review, for completeness, the Authority also considered possible alternative regulatory options for wholesale remedies. These included the framing of a commercial solution, e.g. requiring JT to engage with OLOs and industry to develop a commercial solution (in respect of dark fibre or other wholesale services).
- 5.15 Given JT's SMP, the Authority considers there is limited incentive for JT to negotiate and/or develop a fair and reasonable proposition (consistent with a competitive market outcome). Consequently, there would be additional regulatory and market uncertainty, as well as a high risk of process failure and an unsuccessful outcome.
- 5.16 Similarly, a proposal for different regulatory remedies was also considered e.g. a cost-based price control. This would also pose certain challenges, not least, the risk it might present to any future consideration and adoption of dark fibre. Further, given the likely timescales involved in developing a suitable cost model and design of a price control, this would generate additional market uncertainty and require additional time to implement.
- 5.17 Recognising the above factors, the Authority's analysis and the diversity of stakeholder responses clearly indicated a need for a more considered and potentially different approach to any dark fibre remedy. The Authority has therefore focussed its analysis on developing the current set of remedies toward supporting more competition in the leased lines market in a manner consistent with its prioritisation principles. This process also helped to identify the means of regulatory intervention likely to give more immediate effect (and benefit), while delivering the necessary regulatory and market certainty.

Issues in the business connectivity market

Stakeholder views

- 5.18 The leased lines market dynamic is changing. While responses were mixed on the future of the leased lines market, stakeholders indicated there had been limited growth and a likelihood of reduced overall future demand (for business connectivity services), with potential for greater up-take of business broadband and an increasing focus on solutions as opposed to bandwidth.
- 5.19 That said, subject to pricing and other conditions, there may however be scope for increases in demand in specific segments of the market, for example mobile backhaul. In this market segment, JT's wholesale pricing was referenced as a potential constraint on OLO backhaul options, that is, preventing the use of more leased lines to support mobile backhaul.

- 5.20 More broadly, stakeholders informed the Authority that there may be insufficient margin generally for OLOs to compete more effectively (with JT) within JT's current wholesale pricing. This was even the case for JT's new Ethernet products/pricing, introduced into the market in September 2021. These new products and pricing were seen as having a minimal impact on the market dynamic and no stakeholder had yet taken them up, despite the potential for cost savings.
- 5.21 Stakeholders also informed the Authority that the current wholesale remedies may not be flexible enough to give full effect to service innovation, competitive retail product development and the ability for OLOs to effectively compete or differentiate on non-price factors. For example, OLOs cannot request differentiated wholesale SLAs. There was also some dissatisfaction noted on JT's approach to new wholesale product requests.

Authority analysis

- 5.22 The issues identified in the business connectivity market have been used to support the development and refinement of the current set of remedies toward supporting more competition in the leased lines market. In particular, the Authority is proposing to:
- refine the approach to reference offers (see section 6), to give greater effect to service innovation and allow OLOs to more effectively compete and differentiate on non-price factors;
 - introduce a migration product (see section 7), this will support the development of competition and enable OLOs to migrate easily to more cost-effective and/or preferred services; and
 - recalibrate the retail minus control (see section 8), to allow a greater margin to be available to support competition and a more vibrant retail market. This should also encourage the use of leased lines to support wider applications, such as mobile backhaul.

Wider Issues

Stakeholder views

- 5.23 During the course of structured engagement a variety of other matters were raised by stakeholders, including:
- In the context of the changing market dynamic, one stakeholder commented on the changing nature of demand for ISDN services (and gradual withdrawal), combined with the absence of fixed number portability, as a potential obstacle to OLO's ability to compete with JT on leased lines services. This is particularly important given the increasing purchase of whole solutions by businesses as opposed to individual elements of business connectivity.
 - One stakeholder raised the concept of equivalence of input or outputs, suggesting the Authority consider imposing an obligation on JT in respect of equivalence of outputs. This was described by the stakeholder as helping to *"ensure that JT does not discriminate between wholesale leased line services provided to its own retail arm and those provided to other operators."*

- As a result of recent portfolio changes by JT and ongoing technical developments relating to resilience, stakeholders suggested the Authority require JT to offer more fractional - leased line – services and constrain JT from further network configurations that have the effect of centralising and/or integrating ‘active’ components and technology.
- One stakeholder referenced difficulties in marketing to, and winning, so-called “anchor customers”; these were broadly described by the stakeholder as significant institutional (retail) customers of JT. While price was clearly a consideration for all customers, difficulties in winning such customers also related to other factors, e.g. institutional, supplier familiarity, potential service disruption.

Authority analysis

5.24 With respect to the wider issues set out above the Authority notes:

- Fixed number portability can help facilitate the competitive process. Outside of the BCMR process the Authority has requested that JT consider the potential demand for this service, the high level costs/technical challenges and potential implementation time. The Authority would expect these considerations to be carried out in a manner consistent with JT’s wholesale charter and will closely follow the process.
- The Authority’s view remains that continuation of a non-discrimination obligation on JT, coupled with the other proposed remedies set out in section 7, will be sufficient to ensure a competitive outcome in the retail market. This is consistent with regulatory practice and well understood by market participants.
- On the issue of fractional services, the Authority’s proposed approach to addressing refusal to supply should offer greater scope for these services to be requested. In particular, as set out in section 6, it is proposed to refine the approach to reference offers, so OLOs will be able to request these and other wholesale services. With respect to network configuration, it is not a matter for the Authority to determine how JT configures its network architecture, subject to JT effectively meeting all of its regulatory obligations; in this case, wholesale variants of its entire retail leased lines portfolio.
- The Authority notes the concerns around anchor customers. It would encourage all end-users, irrespective of category or type, to properly consider the potential benefits from switching and help give effect to a more vigorous competitive market for leased lines.

6 Proposed remedies to address refusal to supply

- 6.1 To address the problem of JT refusing to supply OLOs with wholesale access such that those OLOs can compete in the downstream retail market, the Authority proposes:
- An obligation on JT to provide access to wholesale leased lines (see paragraphs 6.3 to 6.6);
 - An obligation on JT of transparency, including a refined approach to reference offers (see paragraphs 6.7 to 6.29); and
 - To maintain dark fibre as a potential future regulatory option (see paragraphs 6.30 to 6.33).
- 6.2 The obligations proposed here are broadly the same as those imposed in the 2014 review, with a new approach to reference offers. The key change from the October 2020 Draft Decision is the removal of access to dark fibre, with instead dark fibre being held as a potential future regulatory option.

Obligation of access

Overview

- 6.3 The access obligation allows an OLO to have certain types of wholesale access to JT's infrastructure.
- 6.4 Condition 32 of JT's licence states that:
- "The Licensee shall offer to lease out circuits or partial circuits for any lawful purpose... "*
- 6.5 Further, Condition 40 of JT's licence states that:
- "The Licensee shall, to the extent requested by another OLO, negotiate with that OLO with a view to concluding an agreement (or an amendment to an existing agreement) for Network Access"*
- 6.6 The Authority's preliminary proposal is that JT shall continue to be obliged to provide access to on-island wholesale leased lines.

Obligation of transparency

Overview

- 6.7 A transparency obligation sets out the manner in which an SMP operator should provide information about its activities in the market in which it has been found dominant. Generally, a transparency obligation supports other obligations. For example, addressing how the SMP operator is expected to behave, and how the SMP operator will demonstrate compliance with its other obligations.
- 6.8 Condition 30 of JT's licence states:
- "The Licensee shall, within ninety (90) days of the Licence Commencement Date make publicly available a template Reference Interconnect Offer (RIO) which shall contain the terms, schedules of Interconnection and pricing of Interconnection between the Licensee's network and any Other Licensed Operator whose licence terms enables them to Interconnect with another Licensed System."*

6.9 Condition 32 of JT's licence states:

"The Licensee shall offer to lease out circuits or partial circuits for any lawful purpose

(a) on publicly advertised conditions and on non-discriminatory terms. This is without prejudice to discounts that are in accordance with Condition 36

... "

6.10 Further, Condition 37.1 states that:

"Where the Licensee intends to introduce:

(a) new prices for any Telecommunication Services, or prices for new Telecommunication Services to be introduced by the Licensee; ...

it shall publish the same at least twenty one (21) days prior to their coming into effect or otherwise as required by Telecommunications (Jersey) Law, and provide full details of the same to the JCRA."

6.11 Within this framework, the Authority proposes to maintain the following obligations on JT to:

- provide appropriate documentation for wholesale on-island leased line products;
- publish a standard Service Level Agreement (SLA) which would govern JT's relationship with the OLOs, including Key Performance Indicators (KPIs);
- publish prices and non-price terms and conditions for wholesale leased lines;
- publish changes to price and non-price terms and conditions for wholesale on-island leased lines one month before they come into effect; and
- notify OLOs and the Authority 3 months in advance of the launch of a new wholesale product (or removal of an existing product or service).

6.12 These obligations are consistent with best practice and help ensure competition in the retail market is maintained.

6.13 While JT is already under an obligation to provide a reference offer, including appropriate technical specification, and a mechanism explaining how changes to the reference offer will be made and notified, the Authority's view is this requirement should be refined. Further detail on this proposed obligation is set out below

Further detail – refined approach to reference offers

6.14 In this subsection further detail is set out on the reference offer, including:

- Rationale for the reference offer (see paragraph 6.15 to 6.18);
- Precedent (see paragraph 6.19 to 6.21);
- Reference offer scope (see paragraph 6.22 to 6.26); and
- Approach to implementation (see paragraph 6.27 to 6.29).

Rationale for the reference offer

6.15 The Class III licence applicable to JT as an operator with SMP, includes conditions specific to the provision of leased lines and other wholesale products. However, the licence condition on

leased lines does not refer to any specific matters, e.g. product specifications, quality of service, or other important terms and conditions, e.g. timescales for provisioning.

- 6.16 Further, while under the 2014 Review JT was required to provide a reference offer it is not clear if the process properly captures alternative future – and reasonable – requests for access to wholesale leased lines. For example, in order to innovate and differentiate, JT’s wholesale customers may require wholesale product variants, differentiated levels of service, more flexible product dimensioning, or other elements that enable JT’s wholesale customers to efficiently manage their own services and to compete more effectively downstream.
- 6.17 The Authority is therefore proposing to require JT to set out a refined reference offer for wholesale leased lines. This will be a requirement under the overarching - and continuing - obligations and licence conditions on JT in respect of leased lines (and forms part of the proposed BCMR remedies intended to address the competition issues and risks arising from JT’s SMP).
- 6.18 The Authority considers that a refined reference offer will provide for greater clarity and transparency, help give full effect to the range of proposed BCMR remedies, and importantly, establish a framework for ongoing market engagement and development.

Precedent

- 6.19 There is considerable regulatory precedent for the implementation of reference offers, and it is generally considered regulatory best-practice to ensure the SMP operator is subject to a requirement to publish a reference offer to help address at least two main purposes:
- to assist transparency for the monitoring of regulation and potential anti-competitive behaviour; and
 - to give visibility to the terms and conditions on which other providers can purchase wholesale services.
- 6.20 The publication of a reference offer helps to ensure stability in markets as, without it, incentives to invest might be undermined and market entry less likely. Publication of an reference offer allows for potentially quicker negotiations, reduces the likelihood of disputes and gives confidence to those purchasing wholesale services that they are being supplied on non-discriminatory terms. Without this, market entry might be deterred to the detriment of the long-term development of competition and hence consumers. For example, in the UK, Openreach is required to develop and publish reference offers across a suite of wholesale products including wholesale leased lines.⁸
- 6.21 The Authority has engaged with the Office of the Telecommunications Adjudicator (**OTA2**)⁹ in the UK on this, and related matters, to help further understand the issues and current practice in the UK (and to consider the overarching framework applying to new wholesale access

⁸ For example, see the discussion in section 11 of:

https://www.ofcom.org.uk/data/assets/pdf_file/0025/124729/llcc-bcmr-2018-volume-1.pdf

⁹ The OTA2 was established as a follow-on to the original OTA Scheme in the UK. The OTA is independent of the regulator (Ofcom) and industry, and exists to facilitate and coordinate the effective implementation of processes and regulated product developments in a multi-operator context.

requests). The Authority is also considering best-practice in other jurisdictions and consistent with the Authority’s approach to remedies, the wider regulatory framework of the EECC.

Reference offer scope

- 6.22 The obligation relates to a requirement to publish a reference offer, the information to be included in that reference offer (set out in illustrative terms below) and how the reference offer should be published.
- 6.23 As a minimum, the reference offer would contain a description of all the wholesale leased lines products and all the associated terms and conditions, including pricing. The reference offer would also be sufficiently disaggregated to ensure that JT’s customers are not required to incur costs for products, services or facilities not necessary for the service requested. For example, prices per component such that there is transparency on the composition of the product and/or service and the charge for each component.
- 6.24 The reference offer should contain all the elements required to make effective use of the product or service being requested (and be published and/or made available via a website). By way of illustrative summary, the Authority considers that a reference offer should include the following types of elements, see Figure 3.

Figure 3: Illustrative overview of a potential JT reference offer on wholesale leased lines

Aspect	Expected content
Terms and Conditions	Product and/or service descriptions, technical product specifications, charges schedule (including processes and timescales applying to any changes in pricing).
Operational and related matters	Order processes, provisioning timescales, migration arrangements, escalation and dispute resolution measures.
Quality of Service	SLAs (for ordering, provisioning and in-service), maintenance and repair arrangements, SLGs.
Access requests	Procedures and timescales applying to new wholesale leased lines access requests, procedures, processes (and charges) for amendments, ancillary products or services.
General	(Contract) duration, glossary, process for contract commencement and termination.

- 6.25 In terms of new requests for (wholesale leased lines) access, the regulatory framework should help facilitate the competitive process, enabling product development and/or service differentiation, where it is economic and commercially viable to do so (consistent with a competitive process). Moreover, the Authority considers there is scope for innovation and differentiation at and above the “network layer”, and where innovation - at the network, retail or service level - is wholly or partly dependent on regulated wholesale inputs, JT should be subject to a requirement to properly review and meet all reasonable requests for access.
- 6.26 The Authority expects JT to develop the reference offer in accordance with the framework proposed in this Draft Decision. Moreover, JT is encouraged to engage with its wholesale customers on refining – and updating - the reference offer, and the Authority expects JT and OLOs to collaborate constructively with a view to ensuring an effective and transparent framework.

Approach to implementation

- 6.27 On a separate but related matter, the Authority is also taking work forward on the refinement of current arrangements relating to the Statement of Requirements (**SoR**) process. In September 2019 the Authority issued an Information Notice (CICRA 19/39)¹⁰ specifying, at a high-level, the process and requirements applying to JT in respect of new products or product variations. However, it is not clear whether the requirements set out in the above Information Notice have been given full effect.
- 6.28 In order to plan effectively and manage resource and commercial strategies, JT's wholesale customers should have relative certainty as to the process, information requirements, and timescales applicable to any new wholesale product or service request. This will also support the approach to reference offers.
- 6.29 The SoR Information Notice relates to a range of regulated wholesale access products, not simply wholesale leased lines. Therefore, the Authority is progressing work on refining the current SoR process, and the Authority's proposed approach will be given effect by means of an update to the 2019 Information Notice. It is expected this will be issued before the end of 2022.

Dark fibre as a regulatory option

Overview

- 6.30 As set out in the discussion of structured engagement, the Authority's analysis and the diversity of stakeholder responses clearly indicated a need for a more considered and potentially different approach to any dark fibre remedy.
- 6.31 Structured engagement also provided further insight to the leased lines market and helped highlight some of the potential – and specific - constraints to competition and market development. Consideration has therefore been given to potential alternate means of addressing these constraints to competition in a targeted manner, which is consistent with the Authority's prioritisation principles. This process also helped identify the means of intervention likely to give more immediate effect and help bring the necessary regulatory and market certainty.
- 6.32 Nevertheless, structured engagement illustrated the need for stronger incentives on JT to meet its wholesale leased lines obligations. The maintenance of dark fibre as a regulatory 'backstop' re-enforces JT's incentives and provides the Authority additional regulatory scope to intervene to support effective competition in the business connectivity market.
- 6.33 As such, a proposed dark fibre remedy remains as a potential future regulatory option and could be invoked at a later date, if JT failed effectively to meet its obligations consistent with market requirements and the Authority's ongoing objectives.

Question 2: Do you agree with the Authority's proposals for the set of regulations to be imposed on JT to address refusal to supply? If you do not agree you should provide all of your analysis and assessment.

¹⁰ See: <https://www.icra.ie/media/598124/t1476gj-wholesale-access-statement-of-requirements-information-notice.pdf>

Question 3: Do you agree with the Authority's proposals for the introduction of a refined approach to reference offers for leased lines? If you do not agree you should provide all of your analysis and assessment.

7 Proposed remedies to address price and non-price discrimination

- 7.1 To address the problem of JT refusing to supply OLOs with wholesale access such that those OLOs can compete in the downstream retail market, the Authority proposes:
- An obligation on JT of non-discrimination, including a migration service (see paragraphs 7.3 to 7.17); and
 - An obligation to provide relevant accounting information (see paragraphs 7.18 to 7.20).
- 7.2 The obligations proposed here are broadly the same as those imposed in the 2014 review and the October 2020 Draft Decision, with the addition of the migration product.

Obligation of non-discrimination

Overview

- 7.3 A non-discrimination obligation generally has two aspects. First, it obliges an SMP operator to treat all OLOs in an equivalent manner – it cannot discriminate between them. Secondly, it obliges the SMP operator to treat OLOs in the same way as it treats its own downstream (or retail) arm. This means, for example, where an OLO is buying a wholesale input so it can offer a retail service, it should not be disadvantaged compared with the SMP operator’s own retail operation. The onus is on the SMP operator to show that its behaviour is not discriminatory.
- 7.4 Condition 32 of JT’s licence states that:
- “The Licensee shall offer to lease out circuits or partial circuits for any lawful purpose*
- (a) on publicly advertised conditions and on non-discriminatory terms. This is without prejudice to discounts that are in accordance with Condition 36;*
- (b) within a reasonable time from any written request and, in any event, within thirty (30) days;*
- (c) so as to meet the quality standards required under the Conditions; and*
-”*
- 7.5 Further, Condition 35 of JT’s licence states that:
- “The Licensee shall not show undue preference to, or exercise unfair discrimination against, any User or Other Licensed Operator regarding the provision of any Telecommunications Services or Access”*
- 7.6 The Authority’s proposal is that JT shall continue to be obliged not to show undue preference to, or exercise unfair discrimination against, any OLO or its own retail operation regarding the provision of wholesale on-island leased lines.
- 7.7 As an extension of this provision and to help ensure effective competition in the retail market the Authority proposes that JT should be required to provide a wholesaled leased line migration service on fair and reasonable terms. Further detail on this proposed obligation is set out below.

Further detail – migration service

- 7.8 In this subsection further detail is set out on the migration service, including:
- Rationale for the service (see paragraphs 7.9 to 7.12);

- Precedent (see paragraphs 7.13 to 7.15); and
- Service scope (see paragraphs 7.16 to 7.17).

Rationale for the service

- 7.9 As determined in the July 2021 Final Decision, JT has SMP in the market for wholesale leased lines. JT may therefore have limited incentive to develop or support an effective migration service for its wholesale customers, such that wholesale customers can efficiently migrate onto a new product or service. For example, as and when alternative and/or cheaper wholesale service are made available for supply by JT.
- 7.10 This would appear to be the case with the launch and revised approach to the pricing of JT's wholesale leased lines portfolio in September 2021. During structured engagement, both JT and OLOs informed the Authority that JT does not offer or supply a migration product onto the new wholesale leased lines pricing structure. Wholesale customers are required to cancel existing contracts and order a new product as if they were a new wholesale customer. In effect, JT's existing wholesale customers are required to undergo a "cease and re-provide" process.
- 7.11 The Authority is also aware that there is interest from OLOs in taking up the new products offered. This re-enforces the Authority's view that wholesale customers are keen to reap the benefits from alternative and/or cheaper options, and that wholesale customers should have the option to efficiently migrate their products and services.
- 7.12 The Authority believes that the ability of JT's wholesale customers to migrate its wholesale services - and ultimately its own end-users - efficiently and economically is important for the development of competition. To the extent JT's wholesale customers utilise JT's wholesale services to compete with JT for end-users in downstream markets, an inability to migrate onto more cost-effective and/or preferred services, would hinder the competitive process and re-enforce JT's SMP in the wholesale market for leased lines.

Precedent

- 7.13 There is regulatory precedent for migration-type remedies on SMP operators, including more technical and scale migrations. For example, in the context of both leased lines and Broadband access, Ofcom have imposed similar obligations on BT (now Openreach) to supply a migration product and service.¹¹
- 7.14 In these particular cases the SMP operator was obliged to develop a migration service; enabling wholesale customers to migrate broadband access services, and OLO customers of private circuits to economically migrate onto (new) wholesale variants of retail private circuits. Further, Ofcom recognised the likely disincentive on the SMP operator to offer and support migrations, and the risk the SMP operator may seek to develop a costly and inefficient migration procedure

¹¹ For example, see:

- Ofcom, Review of the retail leased lines, symmetric broadband origination and wholesale trunk segments markets. Final Statement and Notification, 2004.
- Ofcom, Direction concerning ADSL Broadband Access Migration Services; and, Determination to resolve a dispute between Tiscali, Thus and BT concerning ADSL Broadband Access Migration Services. Final Statement, 2004.

(to deter competition), and therefore, also determined the migration charges and associated conditions.

- 7.15 In a wider regulatory context, it is appropriate for the Authority to ensure JT, as the dominant operator, has a suitable framework and process in place to support and manage wholesale product migrations. The Authority notes that wholesale migration services are now relatively commonplace and might be considered a necessary component of an SMP's "reference offer". In this regard, Openreach in the UK now offers and supports wholesale migration of various fixed-line access services¹², and a "transfer of service" product for Ethernet circuits.¹³

Service scope

- 7.16 Therefore, the Authority is proposing to include within the BCMR remedies a requirement on JT to provide a wholesale leased line migration service on fair and reasonable terms. Where the migration is effectively administrative, e.g., same or similar product and/or service but revised pricing (or other terms), JT should only charge an incremental administrative fee. Further, the migration service should be consistent with the timescales of processing a new order, and administrative migrations should not result in any downtime in service.
- 7.17 Finally, where JT's wholesale customers are considered, by JT, to be "out of contract", i.e., the original term of the contract has expired, but the customer has not terminated the service and has continued to incur JT's charges for the same service (beyond the original term), the migration requirement on JT remains.

Obligation to provide relevant accounting information

Overview

- 7.18 Generally, accounting remedies are imposed in order to ensure the SMP operator is not discriminating against OLOs, for example by cross-subsidising some products at the expense of others, and is not leveraging its power in one market into another. While JT is no longer obliged to provide separate accounts, Condition 33 of its licence requires that:

"... the Licensee shall confirm to the JCRA that it maintains accounting records in a form that enables the activities specified in any direction given by the JCRA to be separately identifiable, and which the JCRA considers to be sufficient to show and explain the transactions of each of those activities."

- 7.19 The Authority's view is the current licence condition continues to be sufficient for the Authority to obtain relevant accounting information and no change is needed.
- 7.20 The Authority notes, that as set out in its 2022 Business Plan, it will carry out an audit of JT's processes and controls with respect to its accounting and cost allocation practices as a follow up to the wholesale broadband price review. This will improve the effectiveness of this obligation on a forward looking basis.

¹² See: <https://www.openreach.co.uk/cpportal/services/product-services/product-migrations>

¹³ See:

<https://www.openreach.co.uk/orpg/home/products/pricing/loadProductPriceDetails.do?data=%2BS0IaV4dSjk2exrY%2B7kmpLUhQs2CaL8KKKqt3D%2BYs4dZ6rNZujnCs99NbIKJZPD9hXYmiiixH6wrCQm97GZMyQ%3D%3D>

Question 4: Do you agree with the Authority's proposals for the set of regulations to be imposed on JT to address price and non-price discrimination? If you do not agree you should provide all of your analysis and assessment.

Question 5: Do you agree with the Authority's proposals for the introduction of a migration service? If you do not agree you should provide all of your analysis and assessment.

8 Proposed remedies to address excessive pricing

- 8.1 To address the problem of JT having the incentive and ability to set excessive prices for leased lines, the Authority proposes:
- An obligation of cost accounting on JT (see paragraphs 8.3 to 8.6); and
 - A retail minus price control for JT (see paragraphs 8.7 to 8.31).
- 8.2 The obligations proposed here are a refinement on those imposed in the 2014 review. The October 2020 Draft Decision included a proposed cost orientated control on dark fibre.

Obligation of cost accounting

Overview

- 8.3 Cost accounting obligations are generally put in place to ensure that an SMP operator can demonstrate it is not engaging in practices which would unfairly disadvantage its competitors.
- 8.4 Condition 34.1 of JT's licence states that:
- "The Licensee shall not unfairly cross subsidise or unfairly subsidise the establishment, operation or maintenance of any Telecommunication Network or Telecommunication Services."*
- 8.5 Condition 34.2 establishes how this should be done:
- "To enable the JCRA to evaluate where any unfair cross-subsidisation or unfair subsidisation is taking place, the Licensee shall record at full cost in its accounting records any material transfer of assets, funds, costs, rights or liabilities between a part and any other part of its business, and between it and any Subsidiary or Joint Venture, and shall comply with any directions issued by the JCRA for this purpose."*
- 8.6 The Authority proposes that JT should be obliged to maintain its current cost accounting obligations, with a view to demonstrating its compliance with other obligations.

Retail minus price control

Overview

- 8.7 Price controls can be established in the retail and wholesale markets, and usually limit the price which the SMP operator can charge. Price controls are usually put in place to address the potential for the SMP operator to charge excessive prices.
- 8.8 Condition 32 of JT's licence states that:
- "The Licensee shall offer to lease out circuits or partial circuits for any lawful purpose*
-*
- (d) at prices that do not exceed levels determined from time to time by the JCRA."*
- 8.9 Further, Condition 37.2 of JT's licence states that:
- "The JCRA may determine the maximum level of charges the Licensee may apply for Telecommunication Services within a relevant market in which the Licensee has been found to be dominant."*

8.10 The July 2021 Final Decision confirmed that JT is dominant in the wholesale market for on-island leased lines. The Authority proposes that a price control continues to be necessary in the wholesale market for on-island leased lines and a retail-minus control is appropriate and proportionate. The Authority proposes the control should be set on an ex-ante basis, apply to all wholesale on-island leased lines, and continues to oblige JT to make a wholesale equivalent available of all of its retail offers. The Authority proposes to set the minus component of the retail-minus price control between 27% - 32%; an increase in the margin from the current 20%, and further detail is set out below.

Further detail –retail minus price control

8.11 In this subsection further detail is set out on the retail minus price control, including:

- The current retail minus control (see paragraphs 8.12 to 8.15);
- Rationale for recalibration of the control (see paragraphs 8.16 to 8.20);
- Analysis supporting the recalibration (see paragraphs 8.21 to 8.28); and
- Wider policy issues (see paragraphs 8.29 to 8.31).

The current retail minus control

8.12 Retail minus type price controls have been frequently used by regulatory and competition authorities to facilitate competition and produce prices which replicate, as much as possible, those expected in an effectively competitive market. Implementation of an appropriately designed retail minus price control will encourage and support efficient market entry and investment. A correctly calibrated retail-minus control, combined with other remedies and policy measures, should ensure that the SMP operator is not in a position to sustain excessive pricing in the regulated market (nor in the downstream retail market).

8.13 The current wholesale price control which applies to on-island leased lines is set at retail minus 20%. In the Final Notice containing the current price control obligation on JT, the Authority stated also that the goal of implementing a price control was to produce prices which replicate - as much as possible - those expected in an effectively competitive market. Further, the implementation of a price control was intended to encourage and protect efficient market entry and investment, and should ultimately benefit the end-user.

8.14 With these objectives in mind, the Authority considered a number of options as to how the price control may best be structured and implemented, concluding that the most appropriate and proportionate means of achieving this was to put in place a retail minus price control.

8.15 The Authority also imposed supporting obligations establishing clear rules on how wholesale on-island leased lines are to be supplied by JT, and how JT is to demonstrate that they are supplied in a way which complies with its obligations.

Rationale for recalibration of the control

8.16 The Authority proposes that a retail minus wholesale price control continues to be appropriate and proportionate. However, to help meet the objectives and further develop the competitive environment, the Authority considers that the current wholesale price control requires updating and recalibration.

- 8.17 For context, in the October 2020 Draft Decision the Authority conducted an assessment of JT's prices for retail on-island leased lines; which were found to be generally more expensive than in comparator countries. Further it was noted that JT was likely to be making higher profits than operators in comparator markets.¹⁴ As noted, in September 2021, JT made portfolio changes, introducing new products at a lower price. Nevertheless, even with these reductions, JT's wholesale charges remain high when compared to the UK.¹⁵
- 8.18 The structured engagement process further illustrated a requirement for the Authority to reconsider the current structure of the wholesale price control on JT. For example:
- it was noted the market dynamic appears to be changing, with less overall future demand (for business connectivity type-services), proportionately more take-up of business broadband type-services and an increasing customer focus on solutions (as opposed to just bandwidth);
 - the current wholesale price control structure was referenced by OLOs as a potential obstacle, as there may be insufficient margin for OLOs to compete more effectively with JT in the retail market; and
 - the current wholesale pricing was also referred to as a potential constraint on backhaul options, and this may be one of the reasons for the number of mobile base stations still served by microwave as opposed to fibre.
- 8.19 Further, the Authority adopted a retail minus price control in 2015 in the expectation that it would strengthen the competitive environment. However, retail market shares have remained largely stable, and JT is effectively able to set its retail and wholesale prices without having to take full account of competitors and customers. Also, JT's relatively high prices are likely to be a result of its dominant position and the lack of an effective competitive constraint on prices.
- 8.20 The Authority is therefore minded to recalibrate and strengthen the retail minus price control to give effect to a more vibrant competitive process. The following section outlines the Authority's proposed approach.

Analysis supporting the recalibration

- 8.21 The Authority notes firstly that the overarching objective remains one of "replicating the prices produced in an effectively competitive market" – encouraging efficient entry and further enabling downstream competition.
- 8.22 The Authority recognises that too low a margin may prevent efficient entry, whereas too high a margin risks inefficient entry (and possibly JT's ability to recover efficiently incurred costs). In addition, the Authority is keen to ensure that end-users of leased lines services benefit from enhanced competitiveness and pay charges that more accurately reflect the cost of supply.
- 8.23 As a starting point, the Authority's recalibration builds on the existing construct, and the current regulatory and licensing framework (and broad approach set out in the Final Notice of the 2014 Review). Therefore, while a wide body of evidence and literature exists on the derivation of

¹⁴ See Annex 4 of the October 2020 Draft Decision.

¹⁵ The pricing changes moved JT closer to the benchmark presented for the Isle of Man. Pricing in the UK remains substantially cheaper as noted in the October 2020 Draft Decision.

retail minus price controls, we apply the same broad principles as previously, and propose to update the current structure using the latest data and cost information.

- 8.24 This information was secured by an information request submitted to JT for it to provide the Authority with cost data and other information relating to leased lines (and JT's wider business activities). The cost data and associated information supplied by JT to the Authority contained the following elements:
- time series of retail revenues (2017 – 2020) – showing bandwidth and circuit type;
 - a time series of total retail avoidable costs; and
 - a time series of total common costs.
- 8.25 Absent more detailed information from JT on cost allocation keys and related items, with the support of Winchester Economics, the Authority has further analysed this data to construct a view on the appropriate minus component of the retail minus price control. In line with this top-down approach, the approach does not rely on detailed assumptions about how the JT leased line network is constructed, instead the appropriate costs are allocated using cost drivers, which reflect assumptions about how costs should be recovered. The key cost driver used is revenue attributed to leased lines, as this is:
- Consistent with regulatory practice;
 - Practicable and workable;
 - Based on evidence and accurate information; and
 - Broadly consistent with an economic view of avoidable costs.
- 8.26 The Authority employed and tested different sources of revenue data to inform the cost driver, as well as employing different cost allocation methodologies. This analysis indicated that retail avoidable costs are estimated to fall within a relatively narrow range of 27% to 32%. Clearly, the level of avoidable cost increases as more cost is allocated to the avoidable cost-stack. Therefore, in each case, the Authority has adopted reasonable and proportionate assumptions for cost allocation using regulatory judgement.
- 8.27 In light of this analysis, The Authority considers the current retail minus margin of 20% does not wholly reflect the likely level of avoidable costs. Therefore, the Authority is proposing to increase the minus component of the retail minus price control from 20% to between 27% and 32%. The Authority is minded to adopt a point in the range, as representative of a balanced outcome given the uncertainties.¹⁶
- 8.28 The Authority has also considered the timescales relating to implementation of a recalibrated retail minus price control. Given the administrative requirements arising from the Authority's proposals are non-material, it is the Authority's view that the new retail minus price control should have effect as soon as possible after the Final Notice has been issued. That is, save for a

¹⁶ Consideration was also given to alternate approaches for the retail minus price control, for example, calibrating the minus component relative to circuit bandwidth. However, these alternate approaches were rejected for reasons of policy consistency, transparency and market certainty (and to avoid the potential for any perverse outcomes).

necessary administrative period following the Final Notice, the recalibrated retail minus price control will be effective.

Wider policy issues.

- 8.29 It is recognised that a – recalibrated - retail minus price control does not directly constrain JT’s retail prices for leased lines. The retail minus price control is not intended to directly regulate JT’s retail charges; JT will, and should, have the ability to determine its own retail prices. However, the Authority’s approach is designed to promote more competition at the retail level, and the recalibrated retail minus price control will provide greater scope for OLOs to effectively compete with JT (and one another). Further, a more competitive process will constrain JT’s ability to independently determine its own retail prices for leased lines.
- 8.30 More rigorous competition should also bring about greater innovation. While it is not a matter for the Authority to seek to specify the nature and/or types of innovation; this should be driven by the market, the Authority is of course keen to ensure the regulatory framework provides the necessary scope for innovation. In this regard, the Authority believes there is more scope for innovation at and above the ‘network layer’, particularly with the proposed recalibration of the price control. Moreover, the refined approach to JT’s licence obligations, including for example a refined reference offer, will provide JT’s wholesale customers with greater clarity, and confidence, to commercially innovate.
- 8.31 The recalibrated retail minus price control will apply to all JT’s leased lines services, including those currently used to support broadband - and mobile - backhaul. In respect of broadband backhaul, the pricing is linked to the pricing of Fibre Link, which forms part of the leased lines portfolio. Noting this link, the Authority plans to remove the safeguard cap¹⁷ set as part of the Wholesale Broadband Access Services: Price Review, to allow the price reductions through the updated retail minus to flow through. To the extent future regulated backhaul products are developed, these will also be subject to the Authority’s proposed BCMR remedies.¹⁸

Question 6: Do you agree with the Authority’s proposals for the set of regulations to be imposed on JT to address excessive pricing? If you do not agree you should provide all of your analysis and assessment.

Question 7: Do you agree with the Authority’s proposals for the recalibration of the retail minus control? If you do not agree you should provide all of your analysis and assessment.

¹⁷ Under this prices were fixed at the current level of prices (the prices as of September 2021, when the Final Notice for the price review was issued).

¹⁸ The Authority has been informed of JT’s intention to develop a wholesale mobile backhaul product. It welcomes this and encourages JT to progress work with a view to implementation as soon as possible.

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.¹⁹

A1.3 The Law contains a number of duties imposed on the Authority²⁰, 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.²¹

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.²²

¹⁹ Telecommunications (Jersey) Law 2002, Article 7(1) – ‘Duties of the Minister and Authority’.

²⁰ Telecommunications (Jersey) Law 2002, Article 7(2)(a) – (f).

²¹ Telecommunications (Jersey) Law 2002, Article 7(3).

²² 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 services²³; the requirement not to show undue preference or to exercise unfair discrimination²⁴; the requirement not to unfairly cross subsidise²⁵, 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.²⁶
- A1.8 In addition, the Class III licence includes conditions specific to the provision of leased lines²⁷, 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.²⁸

Process framework

- A1.10 The Authority's approach to consultations was set out in an Information Note in July 2018.²⁹ The Information Note outlines the process to be undertaken before carrying out certain regulatory functions in accordance with the statutory process under the Telecoms Law.
- A1.11 Initially, 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..
- A1.12 The Telecoms Law sets out various functions of the Authority which are 'specified regulatory functions' and which must therefore be undertaken in accordance with the statutory process set out in Article 11 of the Telecoms Law. The imposition of the remedies set out in this document on JT would constitute a specified regulatory function. Accordingly, once the non-statutory process is completed and if the proposals in this document are adopted and set out in the Final Decision, the Authority would issue an Initial Notice under the Telecoms Law, and follow the statutory process.

²³ Condition 29, Class III licence.

²⁴ Condition 35, Class III licence.

²⁵ Condition 34, Class III licence.

²⁶ Condition 37, Class III licence.

²⁷ Condition 32, Class III licence.

²⁸ Condition 38, Class III licence.

²⁹ Document CICRA 18/29 "Regulatory Consultation Process"

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

Annex 2: Consultation questions

Question 1: Do you agree with the Authority's proposals for the approach to remedies? If you do not agree you should provide all of your analysis and assessment.

Question 2: Do you agree with the Authority's proposals for the set of regulations to be imposed on JT to address refusal to supply? If you do not agree you should provide all of your analysis and assessment.

Question 3: Do you agree with the Authority's proposals for the introduction of a refined approach to reference offers for leased lines? If you do not agree you should provide all of your analysis and assessment.

Question 4: Do you agree with the Authority's proposals for the set of regulations to be imposed on JT to address price and non-price discrimination? If you do not agree you should provide all of your analysis and assessment.

Question 5: Do you agree with the Authority's proposals for the introduction of a migration service? If you do not agree you should provide all of your analysis and assessment.

Question 6: Do you agree with the Authority's proposals for the set of regulations to be imposed on JT to address excessive pricing? If you do not agree you should provide all of your analysis and assessment.

Question 7: Do you agree with the Authority's proposals for the recalibration of the retail minus control? If you do not agree you should provide all of your analysis and assessment.