Decision – First Detailed Review

Proposed acquisition of Jersey Airtel Limited by Sure (Guernsey) Limited (C-042)

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1. Summary

1.1 Sure (Guernsey) Limited (**Sure** or the **Purchaser**) is proposing to acquire Jersey Airtel Limited (**Airtel** or the **Target**), excluding Airtel's 100% owned subsidiary Bharti House Limited, from Bharti Global Limited (**Bharti** or the **Seller**).

1.2 The proposed transaction has been notified to the Jersey Competition Regulatory Authority (the **Authority**) for approval pursuant to Article 21 of the Competition Jersey Law 2005 (the **2005 Law**).

1.3 The Authority has determined that the notified transaction may give rise to substantial lessening of competition in Jersey. As issues arise from the transaction which may lead to refusal of approval for the acquisition or approval with conditions, in accordance with its Guidelines, the Authority has decided to refer the proposed transaction to a Second Detailed Review.

2. The Notified Transaction

2.1 On 8 November 2022, the Authority received a joint application from the parties for the acquisition of Jersey Airtel Limited. Pursuant to an Agreement signed on 21 September 2022, the Buyer would acquire Jersey Airtel Limited, excluding the 100% owned subsidiary Bharti House Limited. The Agreement also provides that the Buyer will acquire 100% of the shares of Bharti's 100% owned Guernsey subsidiary, Guernsey Airtel Limited (**GAL**).

2.2 In line with the Authority's Guideline on Mergers and Acquisitions[1], the first detailed review period for consultation started on 8 November 2022. A notice of application was placed on the Authority's website. The consultation concluded on 21 November 2022.

2.3 Nine submissions were received (seven from members of the public, and two from industry) and are outlined in Section 9 below.

3. Parties

The Purchaser

3.1 The Purchaser, Sure is company incorporated in Guernsey (38694), and a subsidiary of BTC Sure Group Limited, a company incorporated in the United Kingdom. Its ultimate parent company is Bahrain Telecommunications Company B.S.C (**Batelco**), a company incorporated under the laws of Bahrain.

3.2 BTC Sure Group Limited is a provider of mobile and fixed telecommunication services in Jersey via Sure (Jersey) Limited (**Sure Jersey**) the rest of the Channel Islands, as well as Ascension Island, the British Indian Ocean Territory (Diego Garcia), the Falkland Islands, Isle of Man, and St Helena. It provides a full range of fixed and mobile services for retail customers, and telecom, datacentre, cloud and cybersecurity solutions for businesses.

[1] Guideline 8 - Mergers and Acquisitions | JCRA

The Target

3.3 The Seller is Jersey Airtel Limited (**Airtel** or 'the Target'). Its immediate parent company is Bharti which is a company incorporated in Jersey, Channel Islands, and its ultimate holding company is Bharti Overseas Private Limited, a private limited company incorporated under the laws of India.

3.4 The Target is a provider of mobile and fixed telecommunication services in Jersey operating under the trading name Airtel-Vodafone.

Reasons for the Notified Transaction

3.5 The Parties explain that, in their view, *'the Jersey mobile services market is small, crowded and fully penetrated'*. They explain that the rationale for the transaction is as follows:

- The Parties advise that the transaction (together with the related acquisition of GAL) is being driven by [✂]. They state that Airtel [✂].
- The transaction would allow Sure to become a stronger player, able to compete more effectively with JT (Jersey) Limited (**JT**). They explain that following the transaction Sure *'intends to build a new, next generation mobile network in Jersey, significantly accelerating plans to decommission old equipment and ensure that Jersey consumers and businesses will benefit from enhanced network benefits*'.

4. Requirement for Authority Approval

4.1 Under Article 2(1)(b) of the 2005 Law, a merger or acquisition occurs where a person who controls an undertaking acquires direct or indirect control of the whole or part of another undertaking. As a result of the agreement, the Buyer will acquire sole control of the Target within the meaning of Article 2(1)(b) of the Competition (Jersey) Law 2005 (the **2005 Law**).

4.2 According to Article 20(1) of the 2005 Law, a person must not execute certain mergers or acquisitions except and in accordance with the approval of the Authority. In particular, in relation to this transaction, Article 2 of the Competition (Mergers and Acquisitions) (Jersey) Order 2010 (the **Order**) provides that the merger must be notified to the Authority for approval under Article 20(1) of the 2005 Law if its execution would create an undertaking with a share of 25% or more of the supply or purchase of goods or services of any description supplied to or purchased from persons in Jersey, or enhance such a share held by an undertaking.

4.3 On the basis of information provided, the merger will result in the combined entity having a share of the supply of retail mobile telecommunications services supplied to persons in Jersey of more than 25%. The Notified Transaction therefore requires the approval of the Authority prior to its execution.

5. Counterfactual

5.1 When assessing whether the transaction may give rise to a significant lessening of competition, the Authority will consider the prospects for competition with the merger against the competitive situation without the merger.

5.2 [✂]

5.3 The Parties maintain that Airtel follows a cycle of intense capital investment followed by a period of minimal maintenance spend. The Parties state that Sure estimates the required investment would be approximately [✂].

5.4 However, the Parties did not provide any evidence prepared outside the context of the proposed transaction to support their assertion that [✂].

5.5 For these reasons, the Authority has assessed the transaction against a counterfactual of the prevailing competitive pre-merger conditions, and will continue to do so absent further evidence from the Parties.

6. Market Definition

Approach

6.1 Under Article 22(4) of the 2005 Law, the Authority must determine if the merger would substantially lessen competition in Jersey or in any part of Jersey. As an initial step, the Authority will identify the markets which are likely to be affected by the merger as this provides a framework within which the competitive effects of a merger can be assessed.

6.2 When defining a market, the Authority may take note of its own previous decision-making practice and/or market definitions applied by other competition authorities. These previous decisions are not precedents and are not binding, either on the merging parties or on the Authority. Competition conditions may change over time, changing the market definition, and market definition will always depend on the prevailing facts[2].

Views of the Parties

6.3 The Parties propose that the relevant product market is retail mobile telecommunication services. This market covers voice calls, SMS and mobile internet data services, regardless of the type of network technology (2G, 3G, 4G, etc). On a conservative basis and consistent with recent European precedent[3], the Parties exclude Over The Top (**OTT**) services from the relevant market but note that mobile operators will face wider competitive constraints from these services. The Parties argue that, again based on European precedent, it is not appropriate to segment the market between pre- and post-paid services or between business and residential users.

6.4 The Parties also propose relevant markets for (i) retail fixed telephony services, (ii) retail fixed internet access services, (iii) wholesale international roaming services, and (iv) retail multi-play services.

Activity	Jersey Sure	Target	Overlap
Retail Mobile	Yes	Yes	Yes
Retail Fixed Internet Access	Yes	Yes (de minimis)	Yes (de minimis)

[2] This approach is consistent with that taken under EU law – see, for example, Joined Cases T-125/97 and T-127/97 [2000] ECR II-01733, paragraphs 81-82. Article 60 of the 2005 Law requires the Authority to attempt to ensure that so far as possible questions arising in relation to competition are dealt with in a manner that is consistent with the treatment of corresponding questions arising under European Union law in relation to competition within the European Union.

[3] See for example European Case *M10153 - Orange/ Telekom Romania* - M_10153_8224980_614_3.pdf (europa.eu)

Retail Fixed Telephony	Yes	Yes (de minimis)	Yes (de minimis)
Retail Multi-play	Yes	Yes (de minimis)	Yes (de minimis)
Retail Leased Line	Yes	No	No
Mobile Call Termination (Sure)	Yes	No	No
Mobile Call Termination (Airtel)	No	Yes	No
Wholesale Roaming (inbound to Jersey)	Yes	Yes	Yes

6.5 With respect to the geographic market, the Parties view is that the above markets should be national in scope (i.e. Jersey). In relation to mobile services, they explain the following:

- Contractual barriers to using Guernsey SIM cards in Jersey;
- No mobile number portability between Islands;
- Visitor location data demonstrates that [✂] of Sure's mobile users in Jersey [✂] use a Jersey SIM;
- Factoring in Jersey GST means that operators charge different prices for similar products across the two Islands; and
- Data shows that it is more likely that consumers are roaming on Sure's Jersey network from non-Channel Island operator than from Guernsey networks.

Authority Consideration

6.6 The relevant product market is defined primarily by reference to the likely response of consumers and competitors[4]. It will comprise products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the product's characteristics, prices and intended use. An undertaking cannot have a significant impact on the prevailing conditions of a market if customers can easily switch to other service providers.

6.7 The Parties proposed market definition is consistent with the market definition used in the EC in recent telecoms mergers and has been used for the purpose of this preliminary review: retail supply of mobile telecommunication services in Jersey.

7. Effect on Competition

Approach

7.1 The analysis of a notifiable transaction will consider whether the merger creates or enhances the ability or incentive to exercise market power, either unilaterally or in co-ordination with competitors, and whether other market forces (such as the entry of new competitors or

[4] See Guideline 7 - Market Definition | JCRA

countervailing power of customers will eliminate this risk. The assessment will also consider any pro-competitive effects or efficiencies that may result from the merger.

7.2 When considering the effect on competition, the Authority has regard to the guidelines produced by the European Commission (**European Guidelines**). It may also consider the substantive merger guidelines applied by the CMA, as well as those of other competition authorities.

7.3 After determining the appropriate frame of reference within which to assess the transaction, the Authority estimates the respective positions of competitors within that frame of reference, both before and after the proposed transaction. This can be used as an indication of the overall level of market concentration, as a result of the merger.

7.4 For horizontal mergers, the Authority can assess two potential types of anti-competitive effects – unilateral effects (i.e. the ability of the merged entity to raise prices unilaterally) and co-ordinated effects (i.e. the ability of the merged entity to raise prices either the implicit or explicit cooperation of other competitors).

Market Shares and Concentration Levels

Retail Supply of Mobile Telecommunications Services

7.5 The Parties maintain that that although the retail supply of mobile telecommunications services is the largest segment in Jersey, representing approximately 36% of the total industry revenue, the retail market is by international standards, small, crowded and fully penetrated. They maintain four operators, including three mobile network operators (**MNO**) represent just under 125,000 subscriptions at a rate of approximately 120 subscriptions per 100 inhabitants.

7.6 JT is the current market leader with a current market share of 40-60% by value, and a similar share since 2016 by volume. The three other operators in the market are Sure, Airtel and Homenet[5] have substantially lower market shares at 20-30%. 10-20% and 0-5% respectively.

7.7 The Authority's Telecommunications Statistics 2021 Report[6] reported that, in Jersey, market shares in 2021 remained the same as in 2020. JT supplied 52% of total mobile subscriptions, with Airtel supplying 24% and Sure Jersey 23%. Homenet had 1% of the mobile subscriptions market in Jersey:

	Sure Jersey	Airtel	JT	*Homenet*
2016	24%	21%	55%	*0*
2017	25%	21%	54%	*0*
2018	24%	24%	51%	*1%*
2019	24%	24%	51%	*1%*
2020	23%	24%	52%	*1%*

[5] Homenet is in the 2021 JCRA Report as it offers some data only plans over 4G. It is not a mobile network operator.

[6] www.jcra.je/cases/2021/t-053-telecommunications-statistics-and-market-report-2021/telecommunications-statistics-and-market-report-2021/

2021	23%	24%	52%	*1%*

Note: Homenet is not a Mobile Network Operator. These services relate to Fixed Wireless Access (broadband) only.

Views of the Parties

7.8 The Parties claim JT is a closer competitor to both Parties than they are to each other. The exit of Airtel as an independent competitor will not therefore materially change the dynamics in the market, while a more robust combined entity will be a stronger challenger to JT. The increased competition that the combined entity will bring to JT will result in substantial concrete benefits for Jersey consumers, both in terms of delivering much needed investment across the Sure/Airtel footprint, and resulting in new and higher quality services to consumers and businesses.

7.9 The Parties do recognise that the Transaction will reduce the number of providers of retail mobile services in Jersey from four to three, and the number of MNOs from three to two, and in order to alleviate any potential concerns, has identified the package of proposed commitments described below.

7.10 The Parties also claim that there is no plausible risk that the Transaction will give rise to horizontal coordination in the retail market for the supply of mobile telecommunications services.

Authority Consideration

7.11 Market shares and concentration levels provide useful indications of the market structure and of the competitive importance of the merging parties and their competitors. Mergers involving firms whose market share will remain below 50% after the merger may raise competition concerns in view of other factors such as the strength and number of competitors, the presence of capacity constraints or the extent to which the products of the merging parties are close substitutes.

7.12 The Authority has identified three mechanisms through which the Transaction may lead to a substantial lessening of competition in the retail mobile market. These are known as 'Theories of Harm' (**ToH**):

(i) By removing the competitive constraints offered by Airtel, the Transaction will allow the merged entity and JT to unilaterally raise prices or reduce quality (<u>non-coordinated effects</u>).

(ii) The Transaction may mean that the merged entity and JT will find it easier to coordinate their behaviour to increase prices, reduce investment or reduce quality (<u>coordinated effects</u>).

(iii) The merged entity will have a significant advantage in spectrum holdings (a key input to mobile services) which could lead to increases in retail prices (<u>advantage in spectrum holding</u>).

(i) Non-Coordinated Effects

7.13 The most direct effect of any horizontal merger is the loss of competition between the merging firms. For example, prior to the merger, if an operator had raised its price, it would have lost sales to the operator being acquired. The merger removes this direct constraint.

7.14 The proposed Transaction may lead to a substantial lessening of competition by removing an important competitive constraint for the following reasons:

(a) Prior to the merger, Airtel has a substantial market share (it is the second largest operator by number of subscribers in the market).

(b) Switching data suggests Airtel was the destination for a significant proportion of customers from Sure and JT who switched away in recent years.

(c) Airtel currently offers the lowest prices in the low and medium price segments of the retail mobile market.

7.15 The Parties maintain that Airtel should be seen as a weak competitor going forward, however the Parties have provided limited evidence to support this. Other evidence collected by the Authority suggests that Airtel will remain an effective competitor. For example: Airtel has recently launched new bundled products that combine fixed and mobile services, [✂].

7.16 The Authority will test this evidence further as part of the Second Stage Review.

(ii) Coordinated Effects

7.17 A merger may also impede competition if it increases the likelihood that companies are able to coordinate their behaviour and raise prices, even without entering into an anti-competitive arrangement. Such coordination may take various forms, including keeping prices above the competitive level or reducing / delaying investment.

7.18 The Transaction may lead to a substantial lessening of competition by making it easier and more likely the remaining firms may coordinate their behaviour for the following reasons:

(a) Post-merger, the merged entity and JT will each account for approximately 50% of the market in terms of numbers of subscribers. Economic literature suggests that tacit coordination is more likely where operators have symmetric market shares.

(b) The size of the market is stable and there will only be two operators, meaning that the remaining operators will be easily able to predict demand for their rivals' products.

(c) Prior to the merger, it could be argued that Airtel is a disruptive force (offering the lowest prices in the market), which could disrupt any coordination. This disruptive force would be lost following the merger.

(d) Given prices are published online, operators would be able to easily monitor each other's prices and could use this knowledge to tacitly coordinate around a focal point.

(e) The Guernsey Competition & Regulatory Authority (**GCRA**) has previously investigated Sure and JT in Guernsey for explicitly colluding to delay investment in mobile services[7].

7.19 The Authority will test this evidence further as part of the Second Stage Review.

[7] Note: case subject of an ongoing appeal to the Royal Court in Guernsey

(iii) Advantage in Spectrum Holdings

7.20 Spectrum is a key input needed to provide mobile services. Spectrum and numbers are assigned to operators by Ofcom in line with recommendations made by the Authority. Spectrum is currently split roughly in thirds between the three existing operators[8].

7.21 Following the merger, and absent any remedies, the merged entity will control approx. 65% of the spectrum currently available to mobile operators. The Authority is concerned that this could lead to a substantial lessening of competition by giving the merged entity a significant advantage in network quality, thereby increasing its market power and allowing it to increase prices in the high quality segment of the market. In addition, there would be no spectrum available for any new entry into the market.

7.22 The Authority will also explore this theory of harm further in its Second Stage Review.

8. Commitments

8.1 Under Article 22(1) of the 2005 Law, the Authority may attach conditions to its approval of a merger. The attachment of conditions will be considered where the merger would not be approved as it stands, but with conditions imposed the impact on competition can be mitigated.

8.2 The Parties have offered a series of time-limited commitments as part of their application for regulatory approval. These commitments include, [✂], continuing to offer Airtel's existing tariffs and [✂]. They also commit to launching 5G services [✂] and removing high-risk equipment from the merged entity's core network.

8.3 The Authority is not convinced that these commitments will be sufficient to mitigate any lessening of competition for the following reasons:

(a) The proposals do not address the risk of increases in prices [✂], or loss of investment, innovation or quality.

(b) Even within the initial [✂], technological developments would be expected to drive real prices down (at least, prices per unit of data) [✂].

(c) Launching 5G services within the time period specified does not appear to be particularly onerous.

(d) Removing high-risk vendor equipment from its core and RAN will be a government requirement and is not dependent on the merger.

8.4 Should the Second Stage Review find that the transaction is more likely than not to lead to a substantial lessening of competition, the Authority will also consider whether any remedy could mitigate harm to consumers. These could be behavioural commitments (such as the ones offered by the Parties), incentivising retail competition by encouraging entry of a new operator (MNO or MNVO), and/or divestment of assets such as spectrum.

[8] Full details of current spectrum allocation in Jersey can be found here: [Jersey licences - Ofcom]

8.5 Such considerations will take account of the approach taken in the Commission notice on remedies acceptable under European guidelines[9] and assess whether any proposed remedies, once implemented, would eliminate the competition concerns identified.

9. Third Party Views

9.1 During the consultation period, the Authority received nine responses to the Notice of Application. Seven from members of the public, who were all against the transaction being allowed to proceed. Two were from industry raising comments about the allocation of spectrum.

Date	From	Public / Industry	Response summary
04/10/2022	*[Redacted]*	Public	Email and telephone calls (some abusive): against the merger.
04/10/2022	*[Redacted]*	Public	Telephone call - against the merger, and does not believe there are enough options in Jersey
12/10/2022	*[Redacted]*	Public	Letter - against the merger. individual commented on the lack of telecoms providers in Jersey, should the merger go ahead, confirms their view that Sure's customer service is poor, whilst they consider Airtel's customer service to be very good.
08/11/2022	*[Redacted]*	Public	Email - concern that will leave Islanders with less choice of phone and internet providers. Leaving poor choice and less likely to get good prices and service. Already less choice than UK.
08/11/2022	*[Redacted]*	Public	Email - firmly against as originally Airtel welcomed to Jersey because it would be good for competition but allowing this takeover would reduce the Island down to 2 providers thus little to no competition. Apart from this Sure and JT are already in court apparently for colluding to the general public's detriment so the future doesn't appear encouraging.
09/11/2022	*[Redacted]*	Public	Email - How can a reduction in competition be good for the consumer? In short, it can't. Please ensure that this merger is not allowed to go ahead and at the same time ensure that we start to get some competitive contracts from our mobile phone suppliers. The off island charges are too expensive.
21/11/2022	*[Redacted]*	Public	Email - from Guernsey customer objecting to any takeover or merger of Airtel-Vodafone with any other CI based type organisation.
12/10/2022	Clear Mobitel	Industry	Letter - transaction will have a significant impact on the local telecommunications market. Urge the regulator to pause the 5G tender process until the outcome of the merger proposal is better understood
18/11/2022	JT	Industry	*[Redacted]*

[9] See Council Regulation (EC) No139/2004 and under Commission Regulation (EC) No 802/2004

10. Countervailing Factors

10.1 In some instances, there may be countervailing factors that prevent or mitigate any lessening of competition arising from a merger. There are two main ways in which this could happen: through merger efficiencies or through the entry and/or expansion of third parties in reaction to the effects of the merger.

10.2 Merger efficiencies fall into two categories: efficiencies that allow the merged firms to act as stronger competitors to their rivals (for example, by reducing their marginal costs giving them the incentive to provide lower prices or better quality products), or benefits to customers (for example, greater levels of innovation resulting from the combination of assets of the merger firms). Merger efficiencies can, to some extent, offset or counteract any lessening of competition resulting from the merger.

Views of the Parties

10.3 The Parties claim that the merger, and their proposed commitments, will benefit consumers for the following reasons:

(a) The Transaction will provide greater access to fixed mobile bundles and discounts, essentially unlocking additional discounts for Airtel customers.

(b) The Transaction will lead to the delivery of 5G to Jersey ([✂]) earlier than would have been the case absent the Transaction. In addition, the faster rollout of a 5G network will allow the merged entity to decommission all High Risk Vendor (**HRV**) equipment from its network faster than it otherwise would have.

(c) Following the Transaction, Sure anticipates extending the combined network to a greater number of sites than currently operated by each of Sure and Airtel respectively, providing an increase in site density network with increased capacity and coverage for all users whilst reducing the combined number of sites. This would allow customers to benefit from a superior network, while resulting in environmental and societal benefits from the reduced number of sites such as reduced visual impact and carbon emissions.

10.4 The Parties have not identified any efficiencies that would reduce their variable / marginal costs and would therefore lead to a reduction in prices. All efficiencies put forward by the Parties relate to benefits to consumers resulting from the Transaction.

Authority Consideration

10.5 The Authority's initial assessment has found that the efficiencies cited by the Parties would not be sufficient to offset a potential lessening of competition.

(a) As noted by the Parties, Airtel is already in the process of launching a bundled product.[10] It is therefore uncertain whether the bundled product offered by the merged entity will be superior to the one which would have been offered by Airtel absent the Transaction.

(b) The additional investment in 5G resulting from the Transaction is [✂] than the amount Sure stated it would invest absent the Transaction. In addition, the removal of HRV equipment is likely to be a legal requirement in Jersey, which the Parties would be required to comply with absent the merger. As a result, any consumer benefit would only accrue due to the slightly faster rollout of 5G and removal of HRV equipment relative to a counterfactual in which the

[10] See: https://airtel-vodafone.com/discover/products-and-services/airtel-vodafone-together-jersey

Transaction did not take place and is therefore unlikely to be great enough to offset the consumer harm resulting from a potential lessening of competition.

(c) The limited network quality improvements and environmental benefits resulting from the Transaction are unlikely to be significant enough to outweigh a potential substantial lessening of competition.

11. Consideration

11.1 The Authority's initial assessment has found the following:

(a) The Parties have not provided sufficient evidence to support their position that Airtel [✂] would not be an effective competitor in future, which would may lead to increased prices or decreased quality, investment or innovation.

(b) The additional investment highlighted by the Parties as resulting from the transaction is [✂] than the amount Sure stated it intended to invest absent the Transaction. Although the Parties argue that consumers will benefit from faster 5G rollout and the removal of high-risk equipment as a result of the increased investment, it is unlikely that the benefits would be great enough to offset the consumer harm resulting from a potential substantial lessening of competition.

11.2 The Authority will explore the evidence around the Transaction rationale during the Second Stage Review and will provide the Parties an opportunity to further substantiate their claims.

12. Decision

12.1 Following its first detailed review, the Authority has concerns about the impact of the transaction on the potential market for the supply of retail mobile services. In particular, its initial investigation has raised the following main concerns:

a) First, that the transaction would remove an important competitor from the market and as a result, the remaining operators would have reduced incentives to compete. This would lead to higher prices and less investment in mobile networks.

b) Second, the reduction in the number of competitors following the merger risks leading to a weakening of competitive pressure and increased likelihood that mobile operators will tacitly coordinate their competitive behaviour and increase prices on a sustainable basis.

c) Third, the merged entity will have a significant lead on spectrum holdings. This could increase the merged entities market power and lead to increases in consumer prices.

12.2 As set out in its guidelines, if the Authority concludes that issues have arisen that may lead to the refusal of approval or an approval with conditions, the Authority will submit the application to a second detailed review. The Authority considers that such issues have arisen and, accordingly, the Authority has decided to refer the proposed transaction to a Second Detailed Review.

12.3 The Authority will now investigate the transaction in-depth in order to determine whether its competition concerns are confirmed. The Authority will in particular examine questions such as the extent of the future competitive constraint that would be lost as a result of the transaction, and the potential reaction of competitors to the transaction.

12 December 2022 **By Order of the Jersey Competition Regulatory Authority**