PROPOSED ACQUISITION OF JERSEY AIRTEL LIMITED BY SURE (GUERNSEY) LIMITED (C-042)

PUBLIC CONSULTATION ON PROPOSED CONDITIONS

Competition (Jersey) Law 2005

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Jersey Competition Regulatory Authority
2nd Floor Salisbury House, 1-9 Union Street,
St Helier,
Jersey, JE2 3RF
Tel 01534 514990
Web: www.jcra.je

1. Overview

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 On 12 December 2022, the Authority 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 decided to refer the proposed transaction to a Second Detailed Review - C-042 Sure, Airtel | JCRA.

1.4 During the Second Review, Sure and Airtel have both provided additional information to support their application. Sure provided a Final Commitments Proposal (the **Proposed Commitments**), and Airtel provided further information to support its contention that it would become a weaker competitor in future in the absence of the acquisition.

1.5 As set out below, the Authority has decided to consult on whether the Proposed Conditions may be an effective and proportionate remedy to address the significant lessening of competition and the resulting adverse effects the Authority has found. The proposed conditions are set out in this document and included in full in the Annex attached to this document.

1.6 This consultation will assist the Authority in its decision whether to refuse to approve the transaction, or to approve with conditions. This consultation should not be interpreted as the Authority expressing a final view on the Proposed Transaction. Full details of the Consultation, including the specific questions the Authority is seeking feedback on, are set out in Section 8.

2. Background

The Proposed Transaction

2.1 Sure (Guernsey) Limited is proposing to acquire Jersey Airtel Limited, excluding Airtel's 100% owned subsidiary Bharti House Limited, from Bharti Global Limited. The Proposed Transaction has been notified to the Authority for approval pursuant to Article 21 of the Competition (Jersey) Law 2005 (the **Law**).

2.2 Article 22(1) of the Law provides that the Authority may attach conditions to its approval of a merger. The attachment of conditions is appropriate where the Authority is satisfied that, without the conditions, the merger could not be approved but where the conditions are fulfilled the merger will not substantially lessen competition.

2.3 If the Parties offer conditions, these are then 'market-tested', consulting with competitors, customers and / or suppliers of the merged entity in order to assess the practicality of the remedies and whether they adequately address the Authority's concerns.

2.4 Any conditions imposed can be of a continuing nature, and the Authority may impose financial penalties in respect of any subsequent breach of those conditions. When assessing proposed conditions, the Authority's guidelines[1] state that guidance published by other competition authorities, including the European Commission and UK CMA, may be taken into account.

3 Theories of Harm

3.1 The First Review identified three mechanisms through which the Proposed Transaction may lead to a substantial lessening of competition in the retail mobile market, the 'Theories of Harm'[2]:

(i) By removing competitive constraints offered by Airtel, the Proposed Transaction might allow the merged entity and JT (Jersey) Limited (**JT**) to unilaterally raise prices or reduce quality (non-coordinated effects);

(ii) The transaction may mean that the merged entity and JT might find it easier to coordinate their behaviour to increase prices, reduce investment or reduce quality (coordinated effects);

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

Non-Coordinated Effects

3.2 The transaction would lead the mobile market in Jersey to become concentrated, with only two mobile operators post-merger, each of which having approximately 50% market share. The economic theory predicts that the merged entity would have the ability and greater incentives to raise prices or reduce the quality of its services post-merger. If before the merger one of the merging parties had raised its price it would have lost sales to the other merging party. The merger removes this direct constraint. Therefore the merger may result in a lessening of competition in the mobile market.

3.3 The risk of post-merger price increases (or degradation of quality) depends on the strength of the competitive constraint imposed on each other currently as well as in future (assuming the merger did not go ahead). Analysis indicates that Sure and Airtel are sufficiently close competitors, and that the merger could be expected to lead to significant[3] price increases if no remedies are imposed.

Coordinated Effects

3.4 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

[1] Guideline 8 - Mergers & Acquisitions

[2] The content of this consultation should not be interpreted as the Authority expressing a view on the Theories of Harm that will form part of its Second Detailed Review decision.

[3] The relevant test frequently used by the European Commission (the 'GUPPI' analysis) indicates that prices may rise by over 5% which would be considered significant (and concerning) by the European Commission. The GUPPI or 'Gross Upward Pricing Pressure Index' provides a quantifiable measure of a firm's post-merger incentive to raise prices.

arrangement. Such coordination may take various forms, including keeping prices above the competitive level or reducing / delaying investment.

3.5 A reduction in competition due to coordination amongst firms is more likely in markets where (i) pricing is transparent, (ii) coordination is easy to sustain[4], and (iii) there are no external threats to coordination (i.e. new entrants).

3.6 The merger between Sure and Airtel could make (tacit) collusion in Jersey easier because a reduction in the number of firms in the market would make it easier for Sure and JT to monitor each other's behaviour and to coordinate a particular outcome (e.g. the extent of 5G coverage). The following characteristics of the Jersey mobile market mean that coordination could be possible:

- **Predictability**: since the market is mature (not growing) and market shares have been largely stable over the last 5 years, demand is likely to be predictable.
- **Symmetric Operators**: after the merger, JT and Sure would have very similar market shares, which makes coordination easier.
- **Pricing Transparency**: all prices are available online and therefore can be easily monitored by all operators.
- **External Stability**: new entry that could disrupt tacit coordination is unlikely as there are significant entry barriers (e.g. due to difficulties in obtaining planning permissions for masts).

Spectrum Asymmetry

3.7 Following the merger, and absent any remedies, the merged entity would control approximately 65% of the spectrum currently available to mobile operators. With more spectrum, all else equal, the merged entity may be able to offer services of superior quality to JT. This may provide the merged entity with an advantage that it would be difficult to overcome for JT, ultimately leading to an increase in the market power of the merged entity.

Consultation Question 1	Do you have any comments on the Authority's identified theories of harm? Are there any other issues with the proposed merger which have not been captured above?

4 Counterfactual

4.1 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.

4.2 The First Review assessed the Proposed Transaction against a counterfactual of the prevailing competitive pre-merger conditions, and is carrying out this consultation on the same basis. This

[4] For example, if demand is predictable, operators are symmetric, and deviation from collusion is easy to identify and 'punish'.

should not be interpreted as the Authority expressing a view on the Counterfactual that will form part of its Second Detailed Review.

5 Potential Benefits of the Merger

5.1 As part of its response to the Second Review, Sure has proposed that the transaction will deliver to Jersey the following three merger specific relevant customer benefits (**RCB**). Sure has told the Authority that these arise from the investment it would be prepared to make as a result of the merger rather than arising as a direct result of the merger:

5.2 **Quality and Service (RCB1)**: If the Proposed Transaction is approved, Sure will build a new network to support customers of the merged entity in both Jersey and Guernsey across 4G and 2G services. This new network will raise both quality and speed advantages to customers of both Airtel and Sure due to greater network capacity, increased site density and resilience, as well as environment benefits from fewer total sites than across both existing networks.

5.3 It is the Proposed Transaction that unlocks the additional investment to enable this to happen and Sure is not making a commitment as to timing. This is constrained by both the completion of the re-farming and spectrum divestment within 36 months of clearance.

5.4 **Security (RCB2)**: Sure maintains that the new mobile network will be built to a higher security specification than any of the existing networks in Jersey. This will not only ensure that no HRV vendors are present on the core and RAN, but will also ensure that the new network is well-placed to meet anticipated telecoms security requirements in Jersey from the outset. Such a focus on increased security will drive investor confidence in Jersey generally, whilst ensuring that Jersey consumers benefit from enhanced security as part of the new network significantly ahead of likely legislative deadlines.

5.5 As with RCB1, it is the Proposed Transaction that unlocks the scale and additional investment to enable this to happen for the new network. Whilst Sure is not making Jersey-specific timing commitments, delivery of this benefit will be enhanced by the binding timing commitment within the proposed commitments.

5.6 **Investment and Innovation, Launch of a 5G Network (RCB3)**: the Proposed Transaction would unlock additional investment to support the significant investment required in a 5G core and RAN as part of its new network.

5.7 Whilst precise timings and scale of the launch of 5G will be driven by Sure's commitment as contained in the Letters of Recommendations to Ofcom for the award of 5G spectrum, as well as market conditions, there are clear benefits arising from the transaction to incentivise Sure to do so faster and more comprehensively. Sure states that *'the economics of building a new network are such that there are synergies available in choosing to build a 5G ready core at the same time as building Sure's new HRV-compliant network. This provides a further incentive to roll out the 5G network more aggressively than would be the case under the counterfactual'.*

Assessment of the benefits identified by Sure

5.8 For the potential benefits described above to be taken into account, these benefits need to be merger-specific. Sure will have to meet the telecoms security requirements (when these are introduced by Government in Jersey) and to meet its minimum 5G roll-out requirements as these are legal obligations[5]. It is difficult to judge whether Sure's 5G rollout would be faster or more comprehensive than it would have been absent the merger. Note: the Authority has only recommended the allocation of part of the available 5G spectrum at this time.

5.9 Similarly, with regards to the quality and speed advantages of the merged network, it is acknowledged that the merged network may be able to offer greater capacity to its customers than Sure's and Airtel's standalone networks, as it would have more sites and more spectrum. However, if these quality advantages are provided at a higher price, mobile customers in Jersey (especially price-sensitive ones) could be disadvantaged by the merger.

5.10 In any case the Authority would need to assess the benefits, if any, associated with the proposed merger against the theories of harm the Authority will identify at the end of the Second Review. As noted above, Sure will have more customers, which will make it easier for Sure to recoup its overall investment in the new network and in 5G. However, it would face less competition (see the theories of harm discussed above).Overall, the stated benefits are unlikely to be enough to address the competition concerns identified and additional remedies are likely to be required to address these. Sure has therefore proposed additional remedies as set out in section 6.

Consultation Question 2	What are your views on the stated benefits of the merger?

6 Proposed Remedies

6.1 To address the Authority's competition concerns, the merging parties have proposed the following remedies:

Pricing Commitments

6.2 **Legacy Tariffs**: Sure would commit not to withdraw legacy Sure and Airtel tariffs for existing customers for up to 36 months from clearance, with tariffs remaining at no more than current prices, subject to the right to increase in line with RPI. This will be supported by a commitment to ensure that existing Sure and Airtel are informed of their right to remain on those tariffs upon expiry of their contracts for up to 36 months from clearance. The commitment would not prevent Sure from offering enhanced terms on these tariffs (e.g. lower prices, increased bundles, higher speed caps).

6.3 **Airtel's Basic Plan**: Sure will commit to ensure that Airtel's Basic Plan tariff will remain available to existing Airtel and new customers for up to 36 months from clearance (subject to the right to increase in line with RPI). As with Legacy Tariffs (above) Remedy 3, this will not prevent Sure from offering enhanced terms. Sure will also commit to ensuring that this tariff remains marketed online and instore with the same prominence as all available plans.

6.4 **Sure 4G Unlimited Plan**: Sure will commit to ensure that its 4G Unlimited tariff will remain available to existing Sure and new customers for at least 36 months from clearance, subject to the right to increase in line with RPI. Sure will also commit to ensuring that this tariff remains marketed online and instore with the same prominence as all available plans.

[5] T-064 5G Spectrum Award - Information Note (Letters of Recommendation to Ofcom) | JCRA

6.5 **Sure Big Bundle**: Sure commit that within 12 months of clearance to notify all eligible existing Airtel customers who also take a fixed line broadband service from Sure of their eligibility to access Sure's Big Bundle discounts. This commitment will ensure that Sure completes the migration of Airtel's customers onto its network in a timely fashion to enable Sure to identify eligible customers. New Sure and Airtel customers beyond that date who also take Sure fixed line broadband products (and existing Sure and Airtel mobile customers who move their fixed line broadband to Sure) will also be eligible for these discounts.

MVNO Remedy

6.6 Sure commits to ensure that fair access is available to credible MVNO[6] entrants on its new mobile network once deployed. Upon completion of Sure's new mobile network and the re-farming described in the Spectrum Divestment (below) above (i.e. three years from completion), Sure would commit to negotiate in good faith with any credible potential Mobile Virtual Network Operator (MVNO) entrant, with the Authority as final arbiter of any disputes that arise from such negotiations.

6.7 This commitment is designed to ensure that where an MVNO entrant has identified a credible business case to enter, it will be able to obtain access to Sure's mobile network on reasonable terms (to be negotiated between Sure and the MVNO at the time). The MVNO would be able to use Sure's new RAN and associated spectrum, ensuring that there will be no regulatory or spectrum capacity barrier to prevent an MVNO with a commercial case from entering the Jersey market.

Spectrum Divestment

6.8 A structural commitment to work with the Authority to re-farm and reallocate some of Sure's existing spectrum within 26 months of clearance, with the timing being contingent on the rollout of Sure's new network. Further details on the specific spectrum proposals have been provided and Sure suggests these should be made available on request to entities holding an appropriate operating licence in Jersey, subject to appropriate confidentiality proposals.

7 Assessment of the Proposed Remedies

7.1 This section sets out the Authority's current views on the potential benefits and shortcomings of the remedies proposed by Sure, based on economic theory and international experience. The content of this section should not be interpreted as the Authority expressing a final view on the merits of Sure's commitments. Sure is proposing three types of commitments:

- Pricing commitments to be effective in the first 36 months from clearance of the merger.
- An MVNO remedy, to be concluded after 36 months following clearance of the merger, at the earliest.
- A spectrum divestment remedy.

[6] A mobile virtual network operator (**MVNO**) is a wireless communications service provider that does not own the mobile network infrastructure over which it provides services to its customers. An MVNO enters into a business agreement with a mobile network operator (**MNO**) to obtain bulk access to network services at wholesale rates, then sets retail prices independently. There are currently no MVNOs in Jersey.

Pricing Commitments

7.2 The pricing commitments proposed by Sure are relevant for the Authority's theory of harm in relation to non-coordinated effects; that is, likely price increases due to the market becoming more concentrated.

7.3 The pricing commitments offer some protection against the risk of price increases arising from the merger in the short-to-medium term (in the first 3 years). Indeed, Sure commits to maintain the prices of certain packages fixed in real terms (i.e. prices can only increase in line with inflation). These remedies protect consumers from disproportionate price increases.

7.4 However, it might be the case that, absent the merger, customers would have access to lower prices and/or better quality of service. This is because mobile markets are constantly evolving and the packages that are competitive now (i.e. the packages that the pricing commitments relate to) might become less attractive in 2-3 years' time. The pricing commitments offered by Sure would not deliver these benefits, although as noted above, Sure would retain the ability to offer enhanced terms

7.5 The extent of any benefit arising from improved quality may be ambiguous as not all customers may benefit from 5G. On the one hand, Sure will be investing in a 5G network, which is expected to result in higher speeds and better quality of service. However, it is not clear whether these quality improvements would improve consumer choice, or apply to all users or only those who sign up to new packages.

7.6 As noted above in Section 5, Sure will also invest in a new 4G network which will raise both quality and speed advantages to Airtel and Sure customers due to greater network capacity, increased site density and resilience.

7.7 Furthermore, as the proposed commitments are time-limited and would expire after 36 months, this remedy does not address the risk of price increases that the customers' of the merged entity might experience, after this period. It also increases the risk of overall prices in Jersey increasing, as JT itself might decide to increase its prices to take advantage of the overall softening of competition in the island.

Consultation Question 3	In relation to Sure's pricing commitments, please provide your views on whether this remedy is likely to be effective in addressing the Authority's horizontal concerns (non-coordinated effects) in the short-to-medium term (i.e. in the first 3 years while this remedy is in place). Please substantiate your response.

MVNO Remedy

7.8 The MVNO remedy proposed by Sure is relevant for the Authority's theories of harm in relation to non-coordinated and coordinated effects.

7.9 There are currently no MVNOs in Jersey, whilst most mobile markets in Europe have several MVNOs. For example, the most successful MVNOs in the UK are Tesco Mobile, Lycamobile, Lebara, Sky and Virgin Media (prior to its merger with Telefonica).

7.10 If at least one MVNO enters the Jersey market and is successful at attracting subscribers, this may address the horizontal concerns raised by the merger, as the competitive constraint imposed by the new MVNO would reduce the merged entity's incentives to raise prices or reduce the quality of its service. It could also address the coordinated concerns discussed above. This is because with more operators in the market, coordination would be harder to sustain.

7.11 However, MVNOs are often considered less effective competitors than MNOs, meaning that MVNOs may not be able to impose competitive constraints on the merged entity that are as strong as the constraints imposed by Sure and Airtel on each other. This is because MVNOs do not have their own networks and therefore are constrained by the quality of service and by the wholesale prices imposed by the host MNO

7.12 Therefore, the extent to which the MVNO remedy offered by Sure will be successful will be dependent on:

- Whether, should market conditions worsen as a result of the transaction (e.g. price rises or reductions in quality/service) there are any interested parties to enter the mobile market in Jersey as an MVNO;
- Whether an MVNO agreement between this interested party and the merged entity is successfully concluded; and
- Whether the MVNO is able to compete effectively given the wholesale access price (and other non-price conditions) set by the merged entity.

7.13 MNVO remedies were used by the European Commission (**EC**) in several mobile mergers in Europe, with the main differences being the timing of the MNVO entry. Sure proposes to negotiate with potential MNVOs after the completion of the Proposed Transaction and the completion of its new mobile network, while in the European mergers, the EC required the merging parties to conclude MNVO deals before the transaction was approved. Sure has proposed that its enabling remedy is proportionate to the market-specific and regulatory features of the Jersey market, given both its size, the lack of any spectrum capacity constraints and the absence of any requests for MVNO entry to date.

7.14 The Authority may consider whether it should require Sure to find an MVNO entrant prior to the approval of the Proposed Transaction.

7.15 With regard to MVNO access conditions, the EC states that in order for such a remedy to be successful, the MVNO needs to get access to a sizable capacity of the merged entity (up to 30%) at a fixed price. For example, in its assessment of the Telefonica E-Plus merger in Germany, the EC states: *'with the remedy, the MVNOs in Germany… will be able to devise retail tariffs in nearly total independence from the host MNO. In other words, the remedy increases the MVNOs ability to compete. In effect, the remedy 'forces' the MVNO(s) to compete very aggressively on the market, as they have to commit upfront to purchase a significant amount of capacity… in doing so, the remedy creates as strong incentive for the MVNOs to compete aggressively to acquire subscribers to fill this capacity'.* On the other hand, such a requirement might operate as a barrier against enabling MVNO entry in view of the size of the Jersey market.

7.16 The EC has explicitly rejected MVNO access remedies based on a payment per usage model, as this model limits MVNO incentive to compete with MNOs and to gain market share.

7.17 Sure is not committing to specific terms of MVNO access at this stage, but commits to engage constructively with any proposed MVNO on its preferred option and to ensure that the terms of access are 'reasonable'. The final terms of any MVNO deal would be reviewed by the Authority to ensure that the agreed terms and conditions would indeed allow the MNVO to compete effectively. If the negotiations were not successful, the Authority may intervene and impose appropriate wholesale access conditions.

7.18 As the remedy offered by Sure entails that an MVNO agreement will only be concluded 36 months after the merger at the earliest, this remedy does not protect against price increases or quality degradation in the first 36 months after the merger. However, the Pricing Commitments offered by Sure (and discussed above) are aimed at addressing this concern and Sure is proposing that the Pricing Commitments and the MVNO are taken as a package (together with the benefits it has identified) to address both short and medium to longer term concerns.

Consultation Question 4	Please provide your views on the likely effectiveness of the MVNO remedy. Is this remedy likely to be taken up? On what terms? What should the time period over which this remedy should apply? What could be done to promote / facilitate MVNO entry in Jersey?

Spectrum Divestment Remedy

7.19 The spectrum divestment remedy proposed by Sure is relevant for the Authority's theory of harm in relation to spectrum asymmetry, as it would make spectrum holdings more symmetric in the medium and long term. As Sure returns some spectrum to Ofcom, its spectrum holding post-merger would be broadly comparable to that of JT. This would reduce any risk of distortion of competition due to spectrum asymmetries.

7.20 As the remedy entails that some spectrum will be returned to Ofcom, there would be spectrum available for a potential new entrant MNO into the Jersey mobile market. This could be relevant for the Authority's theories of harm in relation to coordinated and non-coordinated effects. However, it is recognised that the prospect of a new MNO entry in the Jersey mobile market is likely to be limited

7.21 It is also noted that the proposed remedy would require some cooperation from JT (in some spectrum bands) to ensure that final spectrum holdings post-merger are continuous[7].

Consultation Question 5	Please provide your view on the effectiveness of the spectrum divestment remedy. Should the spectrum divested by Sure be reallocated to JT or set aside for a new entrant? Please substantiate your response.

Summary

7.22 In relation to non-coordinated effects:

[7] Note: this remedy would require the Authority to follow agreed processes with Ofcom.

- Pricing commitments may address concerns about non-coordinated effects in the first 36 months after the merger, and the MVNO remedy may do so afterwards. However, there are risks in relation to the efficacy of both these remedies in this regard
- New MNO entry using the spectrum made available by the spectrum divestment remedy could in theory address concerns about non-coordinated effects, but in practice it is recognised that the prospect of a new MNO entry in the Jersey mobile market is likely to be limited.

7.23 In relation to coordinated effects:

- The MVNO remedy may address concerns about coordinated effects 36 months after the merger. However, there are risks in relation to the efficacy of this remedy in this regard, especially if there are no interested parties that might be interested in entering the Jersey retail mobile market.
- New MNO entry using the spectrum made available by the spectrum divestment remedy could in theory address concerns about coordinated effects. However, as above, it is recognised that the prospect of a new MNO entry in the Jersey mobile market is likely to be limited.

7.24 In relation spectrum asymmetry:

- The spectrum divestment remedy would make spectrum holdings symmetric in the medium and long term. Therefore, the Authority's concerns with regards to spectrum asymmetries are expected to be addressed.

Consultation Question 6	Do you consider the package of remedies proposed by Sure to be sufficient to address the competition concerns? Please substantiate your response.

8 Consultation

8.1 The Authority is consulting on the draft conditions proposed by Sure set out in this document and in full in the Annex. The Authority welcomes feedback from any interested parties, and hopes to gather views from stakeholders with a diverse range of perspectives. To help respondents the Authority has set out a series of six structured questions throughout the document, to recap these are:

- **Consultation Question 1**: Do you have any comments on the Authority's identified theories of harm? Are there any other issues with the proposed merger which have not been captured above?
- **Consultation Question 2**: What are your views on the stated benefits of the merger?
- **Consultation Question 3**: In relation to Sure's pricing commitments, please provide your views on whether this remedy is likely to be effective in addressing the Authority's horizontal concerns (non-coordinated effects) in the short-to-medium term (i.e. in the first 3 years while this remedy is in place). Please substantiate your response.

- **Consultation Question 4**: Please provide your views on the likely effectiveness of the MVNO remedy. Is this remedy likely to be taken up? On what terms? What should the time period over which this remedy should apply? What could be done to promote / facilitate MVNO entry in Jersey?
- **Consultation Question 5**: Please provide your view on the effectiveness of the spectrum divestment remedy. Should the spectrum divested by Sure be reallocated to JT or set aside for a new entrant? Please substantiate your response.
- **Consultation Question 6**: Do you consider the package of remedies proposed by Sure to be sufficient to address the competition concerns? Please substantiate your response.

8.2 Representations should reach the Authority by 16 June 2023 and should be emailed to info@jcra.je.

8.3 For transparency, the Authority intends to publish all responses received. In providing responses:

- Please provide a brief summary of the interests or organisations being represented, where appropriate;
- Please consider whether the information provided is considered confidential, and explain why this is the case; and
- If the response contains confidential information, please also provide a non-confidential version of your response.

8.4 If you are an individual (i.e. you are not representing an organisation), please indicate whether you wish your response to be attributed to you by name or published anonymously.