Competition (Jersey) Law 2005

Provisional Findings – Second 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**)(the **Proposed Transaction**). In this second detailed review [provisional] decision, Sure and Airtel are jointly referred to as the **Parties** or the **Merging Parties**.

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 **Competition Law**).

1.3 Following its second detailed review, which included consideration of responses received to the consultation on proposed commitments, the Authority sets out its Provisional Findings below. Based upon its Provisional Findings, the Authority is minded to exercise its power under Article 22(1) of the Competition Law by refusing to approve the Proposed Transaction (the **Provisional Conclusion**).

1.4 In line with its Guideline 8 on Mergers and Acquisitions (the **Merger Guidelines**)[1], the Provisional Findings are now presented to all parties who have registered an interest in the Proposed Transaction who are invited to respond by **5pm** on **19 July 2023**.

2. Background

The Proposed Transaction

2.1 On 8 November 2022, the Authority received a joint application from the Parties in respect of the Proposed Transaction. Pursuant to a share purchase agreement signed on 21 September 2022 (the **SPA**), Sure will acquire Airtel, excluding the 100% owned subsidiary Bharti House Limited, provided that, amongst other things, the JCRA has issued an approval decision under Article 22 of the Competition Law[2]. If approved, the Proposed Transaction, would combine the Sure and Airtel businesses in Jersey.

The Parties

The Purchaser

2.2 Sure is a 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, a communications company incorporated under the laws of Bahrain with direct and indirect investments across the Middle East and North Africa.

2.3 BTC Sure Group Limited is a provider of mobile and fixed telecommunication services in Jersey, the rest of the Channel Islands, Ascension Island, the British Indian Ocean Territory (Diego Garcia), the Falkland Islands, Isle of Man, and St Helena.

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[1] See Guideline 8 - Mergers and Acquisitions | JCRA (the **Merger Guidelines**).

[2] SPA, Clause 2.1.

2.4 In Jersey, Sure is active via Sure (Jersey) Limited (**Jersey Sure**), an entity which operates fixed and mobile telecommunication networks and is active in the provision of data centre, cloud and cybersecurity solutions for businesses. Jersey Sure also supplies fixed and mobile telephony and fixed internet access for retail customers.

The Seller

2.5 Bharti is a company incorporated in Jersey (64230), and its ultimate holding company is Bharti Overseas Private Limited, a private limited company incorporated under the laws of India. Bharti is the immediate parent company of the Target.

The Target

2.6 Airtel is a provider of mobile and fixed telecommunication services, as well as fixed internet access for retail customers in Jersey. Airtel is incorporated in Jersey (92186) and is operating under the trading name Airtel-Vodafone.

Reasons for the Proposed Transaction

2.7 The Parties explain that, in their view, *'the Jersey mobile services market is small, crowded and fully penetrated'*. The Parties submit that the Proposed Transaction, which if approved would combine the Jersey Sure and Airtel business in Jersey, would bring about the consolidation needed in Jersey's mobile network market. The Parties argue this will bring about long-term sustainability and drive future investment. Therefore, the Parties explain, the reasons for the Proposed Transaction are as follows:

- The Proposed Transaction is being driven *[redacted]*. The Parties state that Airtel *[redacted]*; and
- The Proposed Transaction would allow Sure to become a stronger player, able to compete more effectively with JT. The Parties explain that following the Proposed 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*'.

Requirement for Authority Approval

2.8 Under Article 2(1)(b) of the Competition 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 (for ease of reference, we will be referring to 'mergers' as encompassing both mergers and acquisitions in this decision). Under the SPA, Sure will acquire sole control of Airtel within the meaning of Article 2(1)(b).

2.9 According to Article 20(1) of the Competition 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 a merger must be notified to the Authority for approval under Article 20(1) of the Competition 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.

2.10 On the basis of information provided by the Parties, the Proposed Transaction would result in the combined entity having a share of supply of more than 25% in retail mobile telecommunications services (**retail mobile**) supplied to persons in Jersey. The Proposed Transaction, therefore, requires the approval of the Authority prior to its execution.

Merger Application Process

2.11 The Authority has progressed the Parties merger application in line with its Merger Guidelines.

2.12 On 8 November 2022, the Authority received a joint merger application form (**MAF**) from the Parties for Sure's proposed acquisition of Airtel. Later the same day, the Authority published a Notification of Application on its website, which initiated the first detailed review consultation period. This consultation period concluded on 21 November 2022, with nine submissions being received (seven from members of the public and two from industry).

2.13 On 16 December 2022, the Authority published its decision following the first detailed review, which concluded that the Proposed Transaction may give rise to a substantial lessening of competition in Jersey. Since the first detailed review revealed that the Proposed Transaction may give rise to competition concerns which could lead to refusal of approval or approval with conditions, the Authority, in accordance with its Merger Guidelines, decided to refer the Proposed Transaction for a second detailed review.

2.14 On 6 January 2023, the Authority issued requests for information to the Parties to enable it to progress the second detailed review. The responses were received from the Parties on 20 January 2023.

2.15 Following this, the Authority held two individual state of play meetings with Sure (on 1 March 2023) and Airtel (on 2 March 2023). In response to the State of Play meetings, Sure provided a further commitments proposal and Airtel provided further information to support its contention that it would become a weaker competitor in the future, in the absence of the merger. Sure provided a final set of commitments for consultation on 16 June 2023.

2.16 To assist in its decision whether to refuse the Proposed Transaction or to approve it with conditions, the Authority decided to consult on the commitments proposal from Sure (the **Consultation**)[3]. The purpose of the Consultation was to market-test the commitments through consulting competitors, customers, and/or suppliers of the merging parties, in order to assess the practicability of the remedies and whether they adequately address the Authority's concerns.

2.17 The Consultation was issued on 22 May 2023. It concluded on 16 June 2023, with seven third party responses received, as well as responses from the Parties themselves. Sure provided further commitments as part of its submission. The submissions are considered at section 10 below.

3. Market Definition

Approach

3.1 Article 22(4) of the Competition Law requires the Authority to determine if a merger would substantially lessen competition in Jersey or in any part of Jersey. As an initial step, the Authority will identify the market(s) 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.

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[3] JCRA, Proposed Acquisition of Jersey Airtel Limited by Sure (Guernsey) Limited (C-042), Public Consultation on Proposed Conditions, dated 22 May 2023, available at: https://www.jcra.je/media/598736/c-042-sure-airtel-consultation-on-proposed-conditions.pdf.

3.2 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[4].

3.3 Markets are defined to include all those suppliers, and those buyers, between whom there is close competition. The focus is on those goods or services that are close substitutes in the eyes of buyers, and on those suppliers who produce, or could easily switch to produce, those goods or services. The purpose of market definition is to identify in a systematic way the competitive constraints that the business(es) face. A market definition normally will contain two dimensions, a product and a geographic area[5].

Relevant Product Market

Overlaps between the Parties

3.4 The Parties operations in Jersey can be summarised as follows:

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

Views of the Parties

3.5 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 EU precedent[6], the Parties exclude Over-the-Top services from the relevant market but note that mobile operators will face wider competitive constraints from these services. The Parties argue

[4] 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 Competition 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.

[5] See Guideline 7 - Market Definition | JCRA.

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

that, again based on EU precedent, it is not appropriate to segment the market between pre- and post-paid services or between business and residential users.

3.6 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.

Authority Consideration

3.7 The Authority agrees with the Parties that the relevant product market is the provision of retail mobile telecommunication services. If mobile consumers were faced with a small but significant (5-10%) increase in prices for retail mobile services, they would be unlikely to switch to other forms of communication (e.g. to fixed voice telephony and fixed broadband). Therefore, it is appropriate to define the mobile market separately from the markets for fixed telephony and fixed broadband.

3.8 For the avoidance of doubt, this decision will only consider the retail mobile market, as the overlaps in the Parties' activities in relation to retail fixed internet access, retailed fixed telephony, retail multi-play and wholesale roaming (inbound to Jersey) were not found to give rise to any competition concerns during the Authority's first detailed review.

Relevant Geographic Market

Views of the Parties

3.9 With respect to the geographic market, the Parties view is that the retail mobile telecommunications market should be considered national in scope (i.e. Jersey). In relation to mobile services, they highlight the following:

- contractual barriers to using Guernsey SIM cards in Jersey;
- no mobile number portability between Islands (i.e. Jersey and Guernsey);
- visitor location data demonstrates that *[redacted]* of Sure's mobile users in Jersey *[redacted]* 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 operators than from Guernsey networks.

Authority Consideration

3.10 The Authority agrees that the relevant market should be defined as national in scope. In particular, if mobile consumers in Jersey were faced with a small but significant (5-10%) increase in prices for mobile services, they would not be able to switch to mobile services in other jurisdictions (e.g. in Guernsey or in the UK) for the reasons set out by the Parties. Therefore, it is appropriate to consider a retail mobile telecommunications market in Jersey separately from retail mobile markets in Guernsey or the UK.

Conclusion on relevant product and geographic market

3.11 The Authority has determined the Parties' proposed market definition, the retail supply of mobile telecommunication services in Jersey, to be an appropriate framework within which the competitive effects of the Proposed Transaction can be assessed. The market definition adopted here is also consistent in approach with the market definition used by the European Commission (**Commission**) in recent telecoms mergers[7].

4. Counterfactual

Approach

4.1 When assessing whether a transaction may give rise to a substantial lessening of competition in a relevant market (here, the Jersey retail mobile telecommunications market), the Authority will consider the prospects for competition with the merger against the competitive situation that would occur without the merger. This is known as the counterfactual.

4.2 In framing a suitable counterfactual, the Authority bases its view on a pragmatic and commercial assessment of what is likely to occur in the absence of the proposed merger. The counterfactual is not a statutory test but rather an analytical tool used in answering the question of whether the transaction gives rise to a substantial lessening of competition.

4.3 The counterfactual may consist of the prevailing, or pre-merger conditions of competition, although this cannot necessarily be assumed[8]. Alternatively, the counterfactual may consist of conditions of competition that involve stronger or weaker competition between the merging parties than under the prevailing conditions. For example, it may be that a merger is expected to extinguish the prospect for greater competition through the elimination of a vigorous recent entrant, or the merger may involve a business that would not otherwise continue in the market.

Views of the Parties

4.4 The Parties maintain that Airtel is a weak competitor and that it suffers a significant scale disadvantage as the third and smallest operator in a small, fully penetrated island market. The Parties note that four operators, including three mobile network operators (**MNOs**) hold just under 125,000 subscriptions at a rate of approximately 120 subscriptions per 100 inhabitants. In this regard, Airtel in its response to the Consultation notes that *'[t]he very small size of the Jersey market cannot sustain the viability of three operators'*[9]. According to the Parties, this necessarily has an impact on Airtel's ability to *[redacted]*[10][11].

4.5 The Parties argue that the dynamic nature of the market and the significant changes that will arise as a result of the roll-out of 5G services over the medium term means it is not appropriate to assess the Proposed Transaction against a counterfactual of the prevailing competitive pre-merger conditions[12]. Instead, the Parties submit that, absent the merger, the competitive constraint imposed by Airtel would further weaken. As a result, it is claimed that the Proposed Transaction should be assessed against a counterfactual where *'Airtel has failed to recover its existing investments and would face further struggles to make the substantial additional network*

[7] E.g. Orange/Telekom Romania, decision of 28 July 2021, available at: https://ec.europa.eu/competition/mergers/cases1/202212/M_10153_8224980_614_3.pdf.
[8] The Merger Guideline, paragraph 8.
[9] Airtel response to conditions consultation, paragraph 2.5.
[10] Sure's response to RFI, paragraph 1.15.
[11] Sure's response to the Authority's first detailed review decision, paragraph 2.2.
[12] Sure's response to the Authority's first detailed review decision, paragraph 2.2.

investments required to launch 5G and meet TSR requirements'[13]. Airtel maintains that *[redacted]*[14]. Airtel also notes that: *[redacted]*[15].

4.6 The Parties submit that *[redacted]*. Airtel estimates that the next round of required investment would be approximately *[redacted]*. This covers critical updates to existing core and radio networks reaching 'end of life' status, as well as the investment required to (i) comply with regulatory requirements relating to Technology Security Regulations (**TSRs**) and (ii) roll-out 5G, which Airtel notes is *'required if [it] is to remain a relevant player in the market'*[16] (although previously the Parties had informed the Authority that *[redacted]*[17]).

4.7 Airtel argues that profitability cannot be looked at in isolation without having regard to cashflows and return on shareholder investment metrics. Airtel states that *'in reality, [it] has not been able to grow local revenues year on year to generate enough cash to meet its current / future multi-million pound capex requirements for network modernisation, 5G and TSR obligations'*[18]. It further submits that *[redacted]*[19].

Authority Consideration

4.8 Evidence provided by the Parties does not support the assertion that Airtel is currently a weak competitor. Market share data submitted by the Parties shows that Sure and Airtel hold a similar share of the Jersey retail mobile market[20], and diversion ratios suggest that Airtel exerts a competitive constraint on Sure (see further information on market shares and diversion ratios in section 6 below).

4.9 In addition, the Parties did not provide any compelling evidence prepared outside the context of the Proposed Transaction to demonstrate that the competitive pressure exerted by Airtel would weaken further absent the merger, due to *'increasingly unsustainable investment demands on its network*[21].

4.10 Airtel's financial records indicate that *[redacted]*. In addition, despite the Parties previously confirming that *[redacted]*, Airtel participated in the Authority's recent tender process to acquire 5G spectrum in Jersey. Although Airtel was not awarded any 5G spectrum, this was due to *[redacted]*. The Authority intends to re-run the application process later this year, as it considers it important that there is enough spectrum available to allow three 'Full Service' 5G operators in Jersey (spectrum was awarded to only two operators, Sure and JT, in the 2022 tender process). Airtel noted *[redacted]*[22]. Accordingly, the Authority is not persuaded by the Parties' assertion that, absent the merger, Airtel's competitive constraint would *[redacted]*[23].

4.11 In response to Requests for Information from the Authority, Airtel has provided information on its forward-looking investment required in the next 5 years in order to remain in the market. Airtel's projections suggest that *[redacted]*. Artel has identified *[redacted]*

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[13] MAF, paragraph 4.16.1.

[14] Airtel Response to JCRA's Consultation on Proposed Conditions, paragraph 16. The Authority notes that, when asked about this at its state of play meeting, Bharti stated that *[redacted]*

[15] Ibid, paragraph 12.

[16] Airtel Response to JCRA's Consultation on Proposed Conditions, paragraph 6.

[17] MAF, paragraph 4.5.60.

[18] Airtel Response to JCRA's Consultation on Proposed Conditions, paragraph 4.1.

[19] Ibid, paragraphs 4.3-4.4.

[20] MAF, Annex 2.6.4, page 7.

[21] Sure's response to the Authority's first detailed review decision, paragraph 2.4.

[22] Airtel Response to Defragmentation Consultation, page 1.

[23] Sure's response to the Authority's first detailed review decision, paragraph 2.4.

4.12 While the Authority recognises that some of these investments would certainly be required, it is not fully convinced by the scale and the timing of these investments. More specifically:

(a) *[redacted]*.

(b) The Authority is not convinced that, without *[redacted]*. Indeed, in its state of play meeting with the Authority, Sure questioned whether *[redacted]*. *[redacted]*.

(c) In any event, the Authority is not convinced that *[redacted]*.

4.13 Finally, even if it were the case that Airtel were in a position that *[redacted]* have been considered. Airtel mentioned a failed attempt to negotiate a sale to JT in 2016[24]. However, *[redacted]*.

4.14 For these reasons, the Authority is not persuaded that absent the merger Airtel will likely *[redacted]*. Whilst the Authority does accept that it cannot be excluded that Airtel could become less competitive in the future, *[redacted]*. *[redacted]*. As a result, the Authority considers the most likely counterfactual against which to assess the Proposed Transaction is the prevailing competitive pre-merger conditions.

5. Concentration of Spectrum

Current Spectrum Allocations

5.1 There are currently 5 frequency bands used by mobile operators in Jersey: 800 MHz, 900 MHz, 1800 MHz, 2100 MHz, and 2600 MHz.

5.2 The current amount of spectrum held by the three MNOs is as follows:[25]

	800 MHz	**900 MHz**	**1800 MHz**	**2100 MHz**	**2600 MHz**
Sure	2 x 10 MHz	2 x 10 MHz	2 x 20 MHz	2 x 14.8 MHz	2 x 20 MHz
JT	2 x 10 MHz	2 x 15 MHz	2 x 20 MHz	2 x 14.8 MHz	2 x 20 MHz
Airtel	2 x 10 MHz	2 x 10 MHz	2 x 20 MHz	2 x 14.8 MHz	2 x 20 MHz

Source: Ofcom (2019)

Post-merger Spectrum Allocations

5.3 Assuming the Parties were to maintain the same spectrum allocation that they currently hold, the hypothetical spectrum allocations post-merger would be as follows:

	800 MHz	**900 MHz**	**1800 MHz**	**2100 MHz**	**2600 MHz**	**Total**
Merged entity	2 x 20 MHz	2 x 20 MHz	2 x 40 MHz	2 x 29.6 MHz	2 x 40 MHz	2 x 149.6 MHz
JT	2 x 10 MHz	2 x 15 MHz	2 x 20 MHz	2 x 14.8 MHz	2 x 20 MHz	2 x 79.8 MHz

Source: Ofcom (2019)

[24] See e.g. Merger between Airtel-Vodafone and JT Global collapses - BBC News, (dated 1 April 2016).

[25] In April 2023, the Authority carried out an allocation of 5G spectrum and recommended to Ofcom to allocate 2x10 MHz of 700 MHz and 2x40 MHz of 3.4 GHz to Sure and JT. Airtel also participated in the award, but the Authority has not awarded spectrum to Airtel, as *[redacted]*. Nevertheless, the Authority has indicated that it is planning to carry out a second award later in 2023 and Artel would be able to re-apply for 5G spectrum. Given the process is still ongoing, the 700 MHz and 3.4 GHz bands are not taken into account in this Decision.

5.4 Following the Proposed Transaction, Sure and Airtel would hold a combined amount of spectrum which represents 65% of all current spectrum holdings, significantly greater than JT's spectrum allocation.

Effect on Competition

5.5 The Authority has assessed whether the Proposed Transaction could result in the merged entity having an advantage in terms of spectrum holdings. Spectrum is a key input needed to provide mobile services. Spectrum and mobile numbers are assigned to operators by Ofcom in line with recommendations made by the Authority. Currently, most spectrum bands are split roughly equally between the three existing operators.

Views of the Parties

5.6 In the MAF, the Parties indicate that '[t]*he main barriers to entry are access to regulatory licences and, for mobile operators, access to spectrum*'[26].

5.7 Further, in response to the Authority's first detailed review decision, Sure asserted that spectrum is a scarce resource[27]. Sure also noted that, although its base case was that the merged entity would benefit from access to the combined spectrum holdings to ensure sufficient capacity to meet demand across the combined networks, it would be open to discuss with the Authority how the most efficient use of the spectrum could be achieved in Jersey[28].

Authority Consideration

5.8 Following the Proposed Transaction, Sure would control approx. 65% of the mobile spectrum currently in use in Jersey (i.e. 800 MHz, 900 MHz, 1800 MHz , 2100 MHz, 2600 MHz)[29] which would be significantly greater than JT's spectrum allocation. In the first detailed review, the Authority was concerned that, absent suitable conditions, the existing spectrum allocation could lead to a substantial lessening of competition because, all else being equal, the merged entity may be able to offer services of superior quality to JT (e.g. unlimited packages with guaranteed minimum speeds). This may provide the merged entity with a competitive advantage that it would be difficult for JT to overcome. In allocating spectrum, regulators aim to avoid significant spectrum asymmetries for these reasons through the use of spectrum caps. There is also precedent of the Commission imposing spectrum divestment as a condition of merger approvals in the telecoms sector.[30]

5.9 The Authority considers that the spectrum asymmetry post-merger may exacerbate the non-coordinated effects identified below.

6. Impact of the Proposed Transaction on Competition

Approach

6.1 Under Article 22(4) of the Competition Law, the Authority must determine if the Proposed Transaction would substantially lessen competition in Jersey or in any part of Jersey. When considering the effect on competition, the Authority has had regard to its Merger Guidelines and

[26] MAF, paragraph 4.12.1.
[27] Sure's response to the Authority's first detailed review decision, paragraph 5.1.
[28] Sure's response to the Authority's first detailed review decision, paragraph 5.2.
[29] This does not take into account the 5G spectrum allocation that is still ongoing.
[30] See for example Case No COMP/M.5650 - T-MOBILE/ ORANGE, https://ec.europa.eu/competition/mergers/cases/decisions/m5650_1469_2.pdf

the Horizontal Merger Guidelines produced by the European Commission (**Horizontal Guidelines**)[31]. Where relevant, it has also considered the substantive merger guidelines applied by the Competition and Markets Authority (**CMA**) in the UK[32].

6.2 In its assessment of the Proposed Transaction, the Authority has, consistent with Commission (and CMA) precedents, analysed the proposed acquisition in terms of its potential horizontal effects, as the undertakings concerned are competitors in the relevant market.

6.3 The Merger Guidelines specify that the Authority, for horizontal mergers, assesses two potential types of anti-competitive effects:

(a) non-coordinated effects (i.e. the ability of the merged entity to raise prices unilaterally); and

(b) coordinated effects (i.e. the ability of the merged entity to raise prices through either the implicit or explicit cooperation of other competitors)[33].

6.4 For the Proposed Transaction, the Authority has identified the following mechanisms through which the transaction may lead to a substantial lessening of competition in the retail mobile market compared to the counterfactual situation. These are known as 'Theories of Harm' (**ToH**):

(i) by removing the competitive constraints offered by Airtel, the Proposed Transaction, should it be unconditionally approved, could allow the merged entity (and JT) to unilaterally raise prices or reduce quality (<u>non-coordinated effects ToH</u>). This could be further exacerbated by the spectrum asymmetry discussed above.

(ii) the Proposed Transaction, as notified, may result in the merged entity and JT finding it easier to coordinate their behaviour to increase prices, reduce investment or reduce quality (<u>coordinated effects ToH</u>).

6.5 These ToHs will be addressed in further detail in the sections below.

Non-Coordinated (Unilateral) Effects ToH

Approach

6.6 A merger may affect competition in a market by removing important competitive constraints between one or more players who, as a result of the transaction, have increased market power. In such a case, the most direct effect of the merger will typically be the loss of competition between the merging firms, which removes a direct competitive constraint, which could in turn lead to an increase in prices[34].

6.7 A merger may have anticompetitive effects irrespective of whether it leads to the creation or the strengthening of a dominant position of a single firm. This is further explained in the EU Merger Regulation, where it is stated that: '*under certain circumstances, concentrations involving the elimination of important competitive constraints that the merging parties had exerted upon each other, as well as a reduction of competitive pressure on the remaining competitors, may, even in the absence of a likelihood of coordination between the members of the oligopoly, result in a* [substantial lessening of competition]'[35].

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[31] Merger Guidelines, page 16.
[32] Merger Guidelines, page 16.
[33] Merger Guidelines, page 15.
[34] Horizontal Guidelines paragraph 24.
[35] Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (**EU Merger Regulation**), recital 25.

6.8 A number of factors may influence whether or not significant, non-coordinated effects are likely to result from a horizontal merger, such as large market shares of the merging firms, limited possibilities for customers to switch suppliers, closeness of competition or the elimination of an important competitive force[36]:

(a) **Market shares**: the larger the market share, the more likely a firm is to possess market power; and the larger the addition of market share, the more likely it is that a merger will lead to a significant increase in market power. Although market shares and additions of market shares only provide first indications of market power and increases in market power, they are normally important factors in the Authority's competitive assessment[37].

(b) **Limited possibilities of switching supplier**: customers of merging parties may have difficulties switching to other suppliers where there are few alternative suppliers. In such cases, customers are particularly vulnerable to price increases. In this regard, evidence of past customer switching patterns and reactions to price changes may provide important information for the competitive assessment[38].

(c) **Closeness of competition**: products may be differentiated within a relevant market such that some products are closer substitutes than others. The higher the degree of substitutability between the merging firms' products, the more likely it is that the merging firms will raise prices significantly in a post-merger scenario[39]. The degree of substitutability may be evaluated through, for example, diversion ratios[40].

(d) **Elimination of an important competitive force**: some firms may have more of an influence on the competitive process than their market shares or similar measures would suggest, for example where a firm can be considered to be a 'maverick' player. A merger involving such a firm may change the competitive dynamics in a significant, anticompetitive way, in particular when the market is already concentrated[41].

6.9 These are all factors which, although they may not be decisive taken alone, may indicate whether a proposed merger is likely to lead to non-coordinated effects.

Market shares and concentration levels/limited possibility to switch supplier

6.10 As set out above, market shares and concentration levels provide useful indications of the market structure and of the competitive importance of both the Merging Parties and their competitors[42].

6.11 It is well established that market shares of 50% or more may be evidence of the existence of a dominant market position. However, as explained in the Horizontal Guidelines '[a] *merger involving a firm whose market share will remain below 50 % after the merger may also 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*'[43].

[36] Horizontal Guidelines, paragraphs 26 ff.
[37] Horizontal Guidelines, paragraph 27.
[38] Horizontal Guidelines, paragraph 31.
[39] Horizontal Guidelines, paragraph 28.
[40] Horizontal Guidelines, paragraph 29.
[41] Horizontal Guidelines, paragraph 37.
[42] Horizontal Guidelines, paragraph 14.
[43] Horizontal Guidelines, paragraph 17.

6.12 The Authority's Telecommunications Statistics 2022 Report[44] found that, in Jersey, market shares in 2022 remained at similar levels as the year before (and the 2021 edition of the report further indicates that market shares have generally remained stable since at least 2016)[45]. As set out in the table below, in 2022, JT supplied 52% of total mobile subscriptions, with Airtel supplying 25% and Jersey Sure 22%. However, whilst Airtel and Sure have substantially lower market shares of 25% and 22% on an individual basis, they would have a combined market share post-merger of c. 47%.

	Jersey Sure	Airtel	Sure and Airtel Combined	JT
2016	24%	21%	45%	55%
2017	25%	21%	46%	54%
2018	24%	24%	48%	51%
2019	24%	24%	48%	51%
2020	23%	24%	47%	52%
2021	23%	24%	47%	52%
2022	22%	25%	47%	52%

6.13 For completion, Homenet has had a market share in retail mobile of c. 1% since 2018. However, Homenet is not a MNO and was only included in the Authority's Telecommunications Statistics 2022 Report on the basis that it offers some data only plans over 4G. Given its modest market share and different business model, the Authority finds it unlikely that Homenet could have a material impact on competition in retail mobile in Jersey. As a result, Homenet will not be addressed in further detail in this decision.

Views of the Parties

6.14 In the MAF, the Parties acknowledge that the Proposed Transaction would bring together the activities of the second and third largest players in the market (Sure and Airtel), and would reduce the number of providers of retail mobile services in Jersey from four to three (and the number of MNOs from three to two). The Parties also acknowledge that they would have relatively high combined market shares post-transaction. However, they suggest that the Proposed Transaction would create '*a new entity with increased scale, better able to invest in its network and compete aggressively with JT*'[46].

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[44] Statistics Jersey, Telecommunications Statistics and Market Report 2022, published June 2023 https://www.gov.je/SiteCollectionDocuments/Government%20and%20administration/R%20Telecoms%202022%20202306 20%20SJ.pdf, page 27.

[45] Statistics Jersey, Telecommunications Statistics and Market Report 2021, published July 2021, www.jcra.je/cases/2021/t-053-telecommunications-statistics-and-market-report-2021/telecommunications-statistics-and-market-report-2021/, page 23.

[46] MAF, paragraph 4.5.13.

6.15 In terms of market shares, the Parties note that the '*new entity will remain some way behind JT*'[47]. It is also noted that JT's market share has grown since 2018, whereas the market shares of Sure and Airtel have remained stable or fallen[48].

Authority Consideration

6.16 As mentioned above, market shares and concentration levels provide useful first indications of the market structure and of the competitive importance of the Merging Parties and their competitors. They are normally important factors in the Authority's overall competitive assessment. The larger the market share, the more likely a firm is to possess market power; and the larger the addition of market share, the more likely it is that a merger will lead to a significant increase in market power. The Authority notes that mergers involving firms whose market share will remain below 50% after the merger may raise competition concerns. In particular, in concentrated markets where a few players control a large part of the market.

6.17 The Proposed Transaction would lead to further concentration in the retail mobile market in Jersey, with only two MNOs remaining post-merger, each having a market share of approximately 50%. As indicated in the Authority's first detailed review decision, economic theory predicts that a merged entity would have the ability and incentive to raise prices or reduce the quality of its services post-merger, if before the merger it would have lost sales to the other merging party had it sought to raise prices or reduce the quality of its offering. The Proposed Transaction removes this direct constraint between the Parties (as demonstrated by the current diversion ratios – see below) and leaves consumers with only one alternative supplier in the event that the merged entity raises prices or reduces the quality of its services.

Closeness of competition / elimination of an important competitive force

Views of the Parties

6.18 In terms of closeness of competition, the Parties claim that JT is a closer competitor to both Parties than they are to each other[49]. In the MAF, the Parties note that *[redacted]*[50].

6.19 Further, the Parties claim that switching data shows that Sure and Airtel lose and gain customers primarily to/from JT (their closest competitor), rather than each other[51]. In its response to the Authority's Consultation, Airtel specifically notes that the diversion ratios applied by the Authority were overly narrow by focusing only on calendar year 2021 and that they, therefore, were not representative of the state of competition[52].

6.20 The Parties further note that JT, Sure and Airtel all have distinct offerings in the relevant retail mobile market in terms of factors such as price, data allowance and download speeds. It is further suggested *[redacted]*[53].

6.21 In terms of the removal of an important competitive constraint, the Parties disagree with the Authority's preliminary conclusion in its first detailed review decision that the Proposed

[47] MAF, paragraph 4.5.13.
[48] MAF, paragraph 4.5.14.
[49] MAF, paragraph 9.
[50] MAF, paragraph 4.5.62.
[51] MAF, paragraphs 4.5.58-59.
[52] Airtel response to Consultation, paragraph s. 14-15.
[53] MAF, para. 4.5.14. See also Sure's response to the Authority's first detailed review decision, paragraph 3.5.

Transaction may lead to a substantial lessening of competition by removing an important competitive constraint. In particular, the Parties claim *[redacted]*.[54] It is also averred *[redacted]*.

Authority Consideration

6.22 The risk of post-merger price increases (or degradation of quality) depends on the strength of the competitive constraint imposed by the Merging Parties on each other, currently as well as in the future. The Authority's analysis indicates that Sure and Airtel are sufficiently close competitors such that the merger could be expected to lead to significant price increases if were to be cleared and no remedies were imposed.

6.23 Evidence collected by the Authority suggests that Airtel is an effective competitor-. For example, the Authority notes that Airtel has recently launched new bundled products that combine fixed and mobile services (albeit that its share of fixed subscribers remains low currently), Airtel has expressed an interest in acquiring the required spectrum to launch 5G services (although it was unsuccessful in the first spectrum auction, the Authority plans to launch a second auction this year in which Airtel can participate), and *[redacted]*. It is also the only provider that has grown its market share from 2016.

6.24 The Authority notes that, contrary to the Parties' assertions, diversion ratios for Jersey also suggest that Airtel is an effective and sufficiently close competitor to Sure. Analysis prepared by Oxera, based on porting data provided by the Parties, shows that, in 2021, Airtel won a significant proportion of switching customers from both Sure and JT:

		To			
		Sure	**JT**	**Airtel**	*Ports out*
From	**Sure**	*[redacted]*	*[redacted]*	*[redacted]*	*[redacted]*
	JT	*[redacted]*	*[redacted]*	*[redacted]*	*[redacted]*
	Airtel	*[redacted*	*[redacted]*	*[redacted]*	*[redacted]*

Source: MAF Annex 4.4.2 prepared by Oxera, data from 2021

6.25 Statistics Jersey have also recently published the Telecommunications Statistics 2022 report, which provides high level porting data for 2022:

	Sure	**JT**	**Airtel**
Port in	840	1,155	578
Port out	907	809	857
Net benefit	-67	346	-279

Source: Jersey Telecommunications Statistics 2022 Report, Table 7 page 28.

6.26 The Jersey Telecommunications Statistics report is not detailed enough to carry out a direct comparison to the 2021 porting data submitted by the Parties because it only provides the aggregated porting statistics.

6.27 Although the net porting figure for Airtel is negative, i.e. more customers ported their numbers away from Airtel than ported to Airtel, the porting figures do not provide the full picture. The Telecommunications Statistics 2022 report also indicates that the mobile market in Jersey grew by 5,114 customers between 2021 and 2022[55]. This growth is likely to be due to multi-SIMing[56],

[54] Sure's response to the Authority's first detailed review decision, paragraphs. 3.1-3.3.
[55] Jersey Telecommunications Statistics 2022 Report, Figure 36 page 26
[56] That is one person using multiple phones /SIM cards.

given the population in Jersey has remained relatively stable in the last few years[57]. While Airtel shows a net loss of porting customers in 2022 of 279, it also acquired 2,252 'new' customers[58] (which equals almost 45% of all 'new' mobile subscriptions in Jersey in 2022). Hence Airtel's overall market share has grown from 24% in 2021 to 25.2% in 2022, which, contrary to the Parties' assertions, suggests to the Authority that Airtel remains an effective competitor. In light of the above information, it is more appropriate to calculate diversion ratios based on market shares[59] rather than porting data, given porting data does not reflect the large number of 'new' customers in Jersey. In any case, the 2022 market shares produce diversion ratios *[redacted]*:

		To				
		Sure	**JT**	**Airtel**	**Homenet**	*Ports out*
From	**Sure**		66.84%	32.27%	0.90%	*100.00%*
	JT	45.93%		52.61%	1.46%	*100.00%*
	Airtel	29.37%	69.69%		0.93%	*100.00%*
	Homenet	22.13%	52.52%	25.35%		*100.00%*

Source: Frontier Economics analysis based on Jersey Telecommunications Statistics 2022 Report, Figure 39 page 27

6.28 Finally, the Authority notes that Airtel currently offers the lowest prices in the low and medium price segments of the retail mobile market for packages with up to 10GB and up to 20GB mobile data per month. If the Proposed Transaction is approved unconditionally, there is a risk that customers in these segments (who are more likely to be price-sensitive) would be negatively affected. In this regard, the Authority notes that the seven members of the public who commented on the MAF during the first detailed review consultation period all expressed concerns regarding the merger, indicating that the Proposed Transaction would result in higher prices and reduced service for customers[60]. Similar responses were received from the public in response to the Consultation, noting, amongst other things, that Airtel offers the cheapest pricing in the market.

Conclusion on non-coordinated (unilateral) effects ToH

6.29 As a result of the factors discussed above, and the fact that any effects could be exacerbated by the spectrum asymmetry, the Authority has found that the Proposed Transaction is likely to give rise to non-coordinated (unilateral) effects.

6.30 In particular, the Authority has found that the Proposed Transaction may lead to a substantial lessening of competition through the creation of non-coordinated effects for the following reasons:

(a) Airtel has a substantial market share. It is the second largest operator by number of subscribers in a market with only three players and the only operator to grow its share since 2016. Post-merger, the combined entity will hold a share (c. 47%) close to the market share of the only other significant player, JT;

(b) Airtel will be removed as an effective competitive force from the market. Evidence provided by the Parties and switching data suggests that Airtel is a sufficiently close competitor to Sure

[57] Government of Jersey: https://www.gov.je/StatisticsPerformance/Population/pages/population.aspx
[58] Jersey Telecommunications Statistics 2022 Report, Figure 37 page 26 and Jersey Telecommunications Statistics 2021 Report, Figure 31 page 23. New customers are those who have not ported their mobile numbers.
[59] This approach to calculating diversion ratios assumes that customers switch proportionately to the operators' market shares.
[60] Authority, first review decision (dated 12 December 2022), Section 9.1 'Third Party Views'.

and that it was the destination for a significant proportion of customers who switched away from Sure and JT in recent years; and

(c) Airtel currently offers the lowest prices in the low and medium price segments of the retail mobile market for packages with up to 10GB and up to 20GB mobile data per month. If the Proposed Transaction is approved unconditionally, there is a risk that customers in these segments (who are more likely to be price-sensitive) would be negatively affected.

6.31 Overall, the Authority considers that the merged entity would have a greater incentive to increase prices (or reduce quality) due to the higher concentration in the retail mobile market post-merger.

6.32 The Authority has commissioned Frontier Economics to consider the possible range of price increases that could be expected to result from the Proposed Transaction, based on a standard 'GUPPI analysis' using information provided by the Parties in the MAF. The GUPPI or 'Gross Upward Pricing Pressure Index' provides a quantifiable measure of a firm's post-merger incentive to raise prices. This test is frequently used by the Commission to identify potential concerns arising from a merger. In general, if prices might be expected to increase by more than 5%, this would be considered concerning.

6.33 The analysis undertaken by Frontier Economics estimates that the merged entity would have incentive to raise prices by more than 5% to 10% in Jersey. This result holds irrespective of whether the 2021 diversion ratios (based on the porting data provided by the Parties) or the 2022 diversion ratios based on the market shares are used.

Coordinated Effects ToH

6.34 In a concentrated market a merger may substantially lessen competition, through the creation or the strengthening of a collective dominant position, as it increases the likelihood that firms are able to coordinate their behaviour and raise prices, even without entering into an agreement or resorting to a concerted practice[61].

6.35 Such coordination may take various forms. However, typically, the following three conditions are necessary for coordination to be sustainable:

(a) the coordinating firms must be able to reach a common understanding of the terms of coordination and monitor to a sufficient degree whether the terms of coordination are being adhered to (<u>easy to reach a common understanding/transparency</u>);

(b) there is some form of credible deterrent mechanism that can be activated if deviation is detected, i.e. coordination is internally sustainable among the coordinating group as the firms find it in their individual interests to adhere to the coordinated outcome (<u>internally sustainable</u>); and

(c) the reactions of outsiders, such as current and future competitors not participating in the coordination, as well as customers, should not be able to undermine the results expected from the coordination (<u>externally sustainable</u>).

[61] Horizontal Guidelines, paragraph 39. See also Judgment of the Court of First Instance of 6 June 2002 in Case T-342/99, Airtours v. Commission.

Easy to reach a common understanding/transparency

6.36 In relation to reaching terms of coordination, the less complex and the more stable the economic environment, the easier it is typically for firms to reach a common understanding on the terms of coordination. For example, it may be easier to reach a common understanding on the terms of coordination where there are fewer players in the market[62]. Accordingly, the reduction in the number of firms in a market may, in itself, be a factor that facilitates coordination.

6.37 For firms to be able to monitor deviations, the relevant markets need to be sufficiently transparent to allow the coordinating firms to monitor to a sufficient degree whether other firms are deviating[63]. Transparency in the market is often higher, the lower the number of active participants in the market. Further, where there is publicly available information on firms' pricing, product portfolio or investment decisions this may enable the detection of deviation[64].

Internally sustainable

6.38 Coordinating firms may be tempted to increase their market share by, for example, offering lower prices or secret discounts. For any coordination to be internally sustainable, it must therefore be sufficiently easy to monitor the behaviour of other coordinating firms, and the consequences of deviation must also be sufficiently severe to convince coordinating firms that it is in their best interest to adhere to the terms of coordination.

6.39 In assessing whether any consequences of deviation are sufficiently disincentivising, relevant aspects to consider include:

(a) **swiftness of response**: where firms are able to monitor their competitors' actions due to market transparency, their response can generally be implemented in a more timely manner; and

(b) **effectiveness of response**: that is whether the response of other firms, such as a corresponding price decrease, is a credible response and sufficient to discourage deviation.

Externally sustainable

6.40 Finally, for coordination to be successful (or externally sustainable), the actions of non-coordinating firms and potential competitors, including customers, should not be able to jeopardise the outcome expected from coordination.

6.41 Coordination will typically be less sustainable where:

(a) existing competitors outside the coordinating group make up a significant proportion of the market, or can otherwise impose a strong competitive constraint; or

(b) in cases of 'dynamic' competition where entry of new competitors is likely, or the group of non-coordinating competitors is likely to be able to expand.

Views of the Parties

6.42 In the MAF, the Parties note that '*the Transaction will reduce the number of providers of retail mobile services in Jersey from 4 to 3 (and the number of MNOs from 3 to 2). Nonetheless, there is*

[62] Horizontal Guidelines, paragraph 45.
[63] Horizontal Guidelines, paragraph 49.
[64] Horizontal Guidelines, paragraph 50.

no plausible risk that the Transaction will give rise to horizontal coordination in the retail market for the supply of mobile telecommunications services'[65].

6.43 In this regard, the Parties claim that[66]:

(a) the highly complex nature of the market in terms of tariffs and offerings makes it makes it more difficult for suppliers to compare product offers and price points;

(b) substantial asymmetries between suppliers will remain post-merger;

(c) JT will retain a substantial lead over the merged entity in terms of market shares and total revenues;

(d) there are various fringe players/potential entrants with the capacity to disrupt any potential coordination; and

(e) the history of other, similar, two player island markets shows that two-party island markets can remain highly competitive, exhibiting low prices and high levels of innovation, e.g. Isle of Man.

6.44 In its response to the Authority's first detailed review decision, Sure expressed its disagreement with the Authority's preliminary conclusion that the Proposed Transaction may lead to a substantial lessening of competition by making it easier for the remaining firms (i.e. JT and Sure/Airtel) to coordinate their behaviour post-merger. In particular, Sure claims that:

(a) the fact that, post-merger, Sure and JT would initially have similar market shares in retail mobile in Jersey alone does not provide clear evidence that the market will be more susceptible to coordination[67];

(b) the retail mobile market in Jersey is, and would continue to be post-merger, dynamic as the two main market players continue to innovate in order to win customers and increase demand[68]; and

(c) although prices are published online, this does not mean that operators could or would coordinate their pricing post-merger given e.g. the different market positions of Sure and JT, the complexity of retail mobile pricing and the lack of like-for-like comparable products offered by Sure and JT[69].

Authority Consideration

6.45 The Authority considers that the merger between Sure and Airtel could make (tacit) collusion in Jersey easier. Notably, the reduction in the number of firms (from three to two MNOs) 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. in terms of pricing, product offering, and the extent of 5G coverage).

6.46 In particular, the Authority finds that the following characteristics of the Jersey retail mobile market mean that coordination could be possible:

- **Predictability**: the size of the market is stable, with market shares not having fluctuated significantly over the last 5 years. Post-merger, there would be only two MNOs, meaning

[65] MAF, paragraph 4.5.64.
[66] MAF, paragraphs 4.5.65- 4.5.68.
[67] Sure's response to the Authority's first detailed review decision, paragraph 4.4.
[68] Sure's response to the Authority's first detailed review decision, paragraph 4.6.
[69] Sure's response to the Authority's first detailed review decision, paragraph 4.9.

that it could be expected to be relatively easy for the remaining operators (JT and Sure) to predict demand for their rivals' products;

- **Symmetric Operators**: the merged entity and JT would, post-merger, 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.
- **Pricing Transparency**: all prices are available online and can therefore be easily monitored by all operators, irrespective of whether the offerings are exact 'like-for-like'. This implies that it is possible to detect any deviations from the focal point.
- **External Stability**: new entry that could disrupt tacit coordination appears unlikely as there are significant entry barriers (e.g. due to difficulties in obtaining planning permissions for masts). Further, the Parties have not provided any evidence that there has been any interest from new players to enter the relevant market to date.

6.47 The Authority has, therefore, found that the merger could be expected to lead to an increased likelihood of the two operators to reaching a common understanding and that such an understanding would be internally and externally sustainable. As a result, the Authority considers that the Proposed Transaction may also lead to a substantial lessening of competition by making it easier and more likely for the remaining firms to coordinate their behaviour.

7. Countervailing Factors

7.1 Where a notified transaction risks a substantial lessening of competition, the Authority will analyse whether other market forces (such as the entry of new competitors or countervailing power of customers) could eliminate or substantially diminish the possible anticompetitive effects arising from the transaction:

(a) **entry of new competitors**: where it is sufficiently easy for a new player to enter the market, it is less likely that a merger would pose any significant anticompetitive risk. However, for entry to be considered a sufficient competitive constraint on the merging parties, it must be shown to be likely, timely and sufficient to deter or defeat any potential anticompetitive effects of the merger[70].

(b) **countervailing buyer power**: the competitive pressure on a supplier is not only exercised by competitors but can also come from its customers through so-called countervailing buyer power. Countervailing buyer power in this context is typically understood as the bargaining strength that the buyer (in this case customers of retail mobile) have in negotiations with a seller in commercial negotiations due to their size, commercial significance and/or ability to switch to alternative suppliers[71].

Views of the Parties

7.2 In the MAF, the Parties note that the main barriers to entry are access to regulatory licences and, for mobile operators, access to spectrum[72].

7.3 However, they nonetheless note that Clear Mobitel have announced plans to build a 5G network in Jersey. In addition, they indicate that Starlink has recently been granted a licence in Guernsey

[70] Horizontal Guidelines, paragraph 68.
[71] Horizontal Guidelines, paragraph 64.
[72] MAF, paragraph 4.12.1.

for its satellite fixed broadband service and can, in their opinion, therefore reasonably be expected to be able to readily expand into Jersey[73].

Authority Consideration

7.4 In terms of entry of new competitors, the Authority considers that the expansion of new entrants and/or the competitive fringe is unlikely, evidenced by the fact that there have been no new entrants in the last 3 years. Limited available spectrum and access to sites are key barriers to new entry.

7.5 Despite having held spectrum in the 5G band for several years, the Authority notes that Clear Mobitel has not indicated any substantiated plans to launch 5G services in Jersey. The Authority, therefore, does not find it likely that Clear Mobitel would enter the market in a sufficiently timely manner or to act as a sufficient potential competitive constraint on the Merging Parties and JT, post-transaction, to counteract any anticompetitive effects arising from the Proposed Transaction. The Authority also does not consider that a provider of satellite fixed broadband services in Guernsey is a likely new entrant to the retail mobile market in Jersey.

7.6 Further, there is generally no significant buyer power amongst consumers, which would be sufficient to impose a meaningful competitive pressure on the merged entity and JT post-transaction.

8. Efficiencies

8.1 The Authority's assessment will also consider any pro-competitive effects or efficiencies that may result from the merger and give rise to consumer benefits.

8.2 It is possible that efficiencies brought about by a merger could offset or counteract any negative effects on competition. Merger efficiencies largely fall into two categories:

(a) pro-competitive efficiencies that allow the merged firms to act as stronger competitors to their rivals (for example, by reducing their marginal costs, and giving them the incentive to provide lower prices or the scale to invest to offer better-quality products); or

(b) benefits to customers (for example, greater levels of innovation resulting from the combination of assets of the merger firms).

8.3 Efficiencies can only be taken into account for the competitive assessment where it can be verified that they are reasonably certain to materialise and substantial enough to counteract a merger's potential harm to consumers. Further, efficiencies will only be relevant to the competitive assessment when they are merger specific, i.e. they would not take place absent the merger. It is for the merging parties to provide the relevant information necessary to demonstrate that there are no less anticompetitive, realistic and attainable alternatives of a non-concentrative nature that would generate the same efficiencies.

Views of the Parties

8.4 In the MAF, the Parties indicated that '*the Transaction will deliver key benefits to Jersey consumers and business across the key metrics of competition, which include all of price, service, quality and innovation. The combination of Sure and Airtel offers a unique opportunity to create a more effective competitor to JT in Jersey*'[74].

[73] MAF, paragraph 4.14.1.
[74] MAF, paragraph 4.5.7.

8.5 As part of its response to the Authority's second detailed review, Sure has proposed that the transaction will deliver to Jersey the following three merger specific relevant customer benefits (**RCB**):

8.6 **Quality and Service (RCB1)**: If the Proposed Transaction is approved, Sure has indicated that it will build a new network to support customers of the merged entity in Jersey (and Guernsey) across 4G and 2G services. This new network will provide 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 having fewer total sites combined than currently exist across both individual networks.

8.7 Sure claims that it is the Proposed Transaction that '*unlocks the additional investment to enable this to happen*'[75].

8.8 **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 high-risk vendors (**HRV**) are present on the core and RAN parts of the network, but will also ensure that the new network is well-placed to meet anticipated telecoms security requirements in Jersey from the outset. Sure submits that 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.

8.9 As with RCB1, Sure asserts that it is the Proposed Transaction that '*unlocks the scale and additional investment to enable this to happen for the new network*'[76].

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

8.11 Sure claims that there are clear benefits arising from the Proposed Transaction to incentivise Sure to roll out a 5G network faster and more comprehensively than in the counterfactual situation. 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'*[77].

8.12 The Parties have not provided quantitative evidence of any pro-competitive efficiencies that would reduce their variable / marginal costs and which would therefore lead to a reduction in prices.

Authority Consideration

8.13 The Authority's first detailed review found that the customer benefits cited by the Parties would not be sufficient to offset a potential substantial lessening of competition. During its second detailed review, the Authority has not received any additional information that would lead it to alter its findings. In particular:

(a) The additional investment in 5G resulting from the Proposed Transaction is only marginally greater (*[redacted]*) than the amount Sure stated it would invest absent the Proposed Transaction. In the MAF, Sure stated that Sure's parent company would invest £48M across

[75] Final Commitments Proposal of Sure (Guernsey) Limited, paragraph 2.1(i).
[76] Final Commitments Proposal of Sure (Guernsey) Limited, paragraph 2.1(ii).
[77] Final Commitments Proposal of Sure (Guernsey) Limited, paragraph 2.1(iii).

both Channel Islands in the merger scenario – this was an increase of £*[redacted]* on their prior investment plans, which suggests that Sure planned to invest £*[redacted]* in the counterfactual scenario.[78] 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 Proposed Transaction did not take place. It is therefore unlikely to be great enough to offset the consumer harm resulting from a potential lessening of competition. In conclusion, the Authority considers that the benefits of implementing 5G faster are not significant and do not result in material consumer benefit, such that the anticompetitive effects of the merger might be outweighed.

(b) Analysis by Oxera indicates that the removal of the HRV equipment by June 2025 will result in estimated benefits over the next 10 years of £*[redacted]*. The Authority considers that these benefits are likely to be overstated as the 'delay' is *[redacted]* only (the 10-year estimate is not relevant) and the situation is different (HRV in 4G networks is not as risky as HRV in 5G networks).

(c) Finally, the impact of greater network capacity and higher site density (referred to in RCB1) has not been quantified, which means the Authority is unable to assess the extent to which these benefits might counterbalance the substantial lessening of competition arising from the Proposed Transaction.

9. Commitments

9.1 Under Article 22(1) of the Competition 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. Commitments, submitted by parties through the merger application process, can form the basis of any conditions imposed on a merger. The commitments offered by the Parties have developed through the merger application process.

Initial commitments

9.2 As part of their application for regulatory approval, the Parties submitted a series of time-limited commitments. These commitments included, for three years post-merger, continuing to offer Airtel's existing tariffs and increasing prices by not more than RPI. They also committed to launching 5G services within *[redacted]* and removing high-risk equipment from the merged entity's core network.

9.3 Following its first detailed review, the Authority concluded that these commitments did not appear sufficient to mitigate any substantial lessening of competition. For example, the proposed commitments did not address the risk of increases in prices beyond three years, or the likely impact of the lessening of competition on non-price dimensions of competition. Launching 5G services within the period specified did not appear to be particularly onerous or give rise to material benefits that would not otherwise be expected to arise in the counterfactual. The

[78] Furthermore, Airtel would also be likely to undertake some 5G investment in the counterfactual even if this was limited. So if Airtel's investment was more than £*[redacted]* absent the merger over the next 5 years, then the merger would not deliver any merger specific incremental investment.

removal of high-risk vendor equipment was similarly considered to be something that would occur regardless of the merger.

Further commitments

9.4 As part of its response to the second detailed review, in addition to the initial commitments, Sure proposed further commitments:

(a) **Pricing commitments:** Sure will commit to not withdrawing legacy Sure and Airtel tariffs, and ensuring Airtel's Basic Plan and Sure's 4G Unlimited Plan remain available for new and existing customers up to 36 months post-approval. Further, within 12 months of approval, Sure will commit to notifying all eligible existing Airtel customers of their eligibility to access Sure's Big Bundle;

(b) **MVNO remedy:** Sure will commit to ensure that fair access is available to a credible MVNO entrant on its new mobile network once deployed; and

(c) **Spectrum divestment:** Sure will commit to the re-farming and reallocation of some of Sure's existing spectrum within 36 months post-approval.

9.5 Upon receiving these commitments, the Authority's initial views were:

a) In relation to <u>non-coordinated effects</u>:

- 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. For example, both remedies are time-restrained[79] and would require monitoring by the Authority and/or an appointed third party (such as a Monitoring Trustee) to ensure compliance during the applicable period.
- 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.
- If an MVNO were to enter the mobile market and compete with Sure and JT, it would address the Authority's concerns. However, the appetite for MVNOs to enter the Jersey market remains untested. Indeed, the Parties are not committing to find an MVNO, but only to provide access if there is interest (which they themselves consider unlikely).

b) In relation to <u>coordinated effects</u>:

- 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 as explained above, especially if there are no interested parties that might be interested in entering the Jersey retail mobile market. Further, in the event there are no forthcoming MVNO candidates, Sure has not committed to find an MVNO. Instead, the remedy is limited to Sure making capacity available, should a credible MVNO entrant wish to enter.

[79] I.e. the pricing commitment would only be in force for the first 36 months after the merger, and the MVNO remedy would only be concluded *after* 36 months following clearance (at the earliest).

- 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.

c) In relation to spectrum asymmetry:

- The spectrum divestment remedy would reduce the amount of spectrum held by the merged entity and therefore would reduce spectrum asymmetry in the medium and long term. Therefore, any concerns with regards to the merged entity having a disproportionate amount of spectrum could, in theory, be expected to be addressed**.** However, the proposed divestment of spectrum, **on its own**, would not address the non-coordinated effects concerns identified above.

9.6 To assist in its decision whether to refuse the Proposed Transaction or to approve it with conditions, the Authority decided to consult on the proposed commitments. The purpose of the Consultation was to ascertain views on whether the proposed commitments may be an effective and proportionate way to remedy the likely substantial lessening of competition arising from the merger. The Consultation was issued on 22 May 2023 and closed on 16 June 2023. The submissions received are considered at section 10 below.

Final commitments

9.7 In response to the Consultation, on 16 June 2023, Sure further developed some of its initial commitments:

(a) **Commitment 1:** having been awarded 5G spectrum in the Authority's recent tender process, Sure considers that there is now certainty that it will deliver, through a binding commitment, a rapid rollout of 5G services to at least *[redacted]* of the new network's sites within *[redacted]* of the completion of the merger;

(b) **Commitment 2**: through a binding commitment, Sure will commit to the timing of the rollout of and operation of a new high speed mobile network on a fully high-risk vendor compliant network. These benefits arise from the construction of a new, high speed combined network that will offer customers better quality and speed. Sure's binding commitment will be to ensure that the new network is operational within *[redacted]* of completion of the merger;

(c) **Commitment 3:** Sure will commit to publishing an MVNO Access Offer within six months of completion of the Proposed Transaction. The MVNO Access Offer will facilitate the entry of a new third player into the Jersey market. Sure will commit to ensuring the services under the MVNO Access Offer will be available within 24 months of the Access Offer, and it has indicated that it would be prepared to make sufficient capacity available such that the new MVNO could reach a market share of *[redacted]* %; and

(d) **Commitment 4:** Sure has provided greater clarity on its spectrum divestment proposal which aims to ensure the final spectrum plan for Jersey offers all operators the most efficient, contiguous blocks of spectrum. Sure propose this commitment will also be the subject of a further binding commitment.

9.8 Having considered these enhanced commitments, the Authority is not convinced that they sufficiently allay the competition concerns arising from the Proposed Transaction, or create or enhance any customer benefits arising from the Proposed Transaction to outweigh the expected loss of competition [80]:

(a) **Commitments 1 and 2**: to the extent any benefit for consumers arises from the construction of a new, high speed combined network, such benefits have not been sufficiently quantified. Accordingly, the information provided does not enable the Authority to duly consider the extent to which any consumer benefit arising from these commitments could counter-balance the likely increase in prices that are expected to arise as a result of the Proposed Transaction;

(b) **Commitment 3**: the Authority acknowledges that Sure has strengthened its final MVNO commitment (compared to its initial proposal), by proposing to publish a reference offer 6 months after the Proposed Transaction proceeds, and by offering to provide sufficient capacity for an MVNO entrant to be able to reach a market share of *[redacted]* %. However, the Authority remains concerned that this commitment does not go far enough in trying to counterbalance the expected anticompetitive effects that are likely to arise as a result of the merger. For example, given its experience regulating the Jersey telecommunications sector, the Authority would expect that a reference offer could be published sooner than 6 months after any clearance of the Proposed Transaction, and in any event waiting another 30 months before the MVNO could actually enter the market appears to undermine the efficacy of the proposal. Further, as mentioned above, fundamentally, this remedy will only be effective if there is an MVNO willing to enter the market. In this regard, the Authority notes that interest has been limited in the past years (although recognising that this was in the context of a 3-operator market), that no interest was received in response to the Consultation and that Sure has not committed to find an MVNO if one does not emerge of its own accord; and

(c) **Commitment 4**: as stated above, any concerns with regards to the merged entity having a disproportionate amount of spectrum could be expected to be addressed. However, this commitment does not, on its own, address the non-coordinated effects concerns identified above.

9.9 The Authority's decision, set out at section 12 below, is based upon Sure's further commitments and final commitments, as detailed within this section.

10. Responses to the Consultation

10.1 During the consultation period, the Authority received nine responses to the Notice of Application. Five were from members of the public, who were all against the Proposed Transaction being allowed to proceed. Two were from industry and each of the Parties submitted a further response.

10.2 One industry respondent confirmed their view that, subject to the allocation of spectrum being agreed as a pre-condition of the merger, it would be able to compete with the merged entity.

[80] Given the nature of the commitments offered, the Authority has given consideration to the CMA's practice in this area (to take account of the impact on relevant customer benefits of any remedies proposed) – see, in particular, CMA, Merger Assessment Guidelines (CMA129), published 18 March 2021, paragraphs 8.5 and 8.26.

Date	From	Public / Industry	Response summary
22/05/2023	*[Redacted]*	Public	Against the merger. Individual commented on quality of Airtel's services and confirmed the views that Sure's services are poor whilst JT is too expensive.
22/05/2023	*[Redacted]*	Public	Against the merger. Individual commented on quality of Airtel's services and confirmed the views that Sure's services are poor whilst JT is too expensive.
23/05/2023	*[Redacted]*	Public	Against the merger. Noting that Airtel was the cheapest provider, the Individual confirmed the view that Sure offered poor quality services whilst JT's customer service '*was so poor I won't go in the shop'*. Individual also expressed concern that, should the merger go ahead, prices will go up with no improvement in services.
23/05/2023	*[Redacted]*	Public	Against the merger. Individual commented that with '*…already excessive prices compared with the UK*' any reduction in competition would be a backwards step for the Island.
23/05/2023	*[Redacted]*	Public	Against the merger. Individual commented on the price of Jersey services compared with the UK. The Individual is concerned that reduction in competition would mean higher prices and no incentive to improve services.
16/06/2023	JT	Industry	Has *'…no objection to the retail pricing commitment but it is a time-limited measure and the JCRA will wish to ensure that there remains sufficient competition following the expiry to safeguard the interests of mobile users in Jersey.'* Expresses the view that it is not aware of a demand for an MVNO in Jersey's retail mobile market and considers that if the divested spectrum were to be acquired by JT, JT would be able to compete with the merged entity. In addition, if mast sites are being reduced JT would like to be made aware in order that it could consider the extent to which the sites may improve its network.
16/06/2023	Clear Mobitel	Industry	Noted the concentration of spectrum that would arise for the merged entity and expressed the view that the proposed benefits do not appear sufficient to support the merger. In addition, Clear Mobitel was not convinced Sure's commitments were likely to be effective in addressing the horizontal concerns. Lastly, Clear Mobitel confirmed '*the appetite for an MVNO in Jersey has thus far proved to be extremely limited'*
16/06/2023	Airtel	Party	Expressing the view that the merger should be assessed against the counterfactual that Airtel will *[redacted]* and that the merger presents *"As previously explained, the market for mobile services in Jersey is small, crowded and fully penetrated. Indeed, the JCRA itself recognises in its Phase One Decision that this market is "mature (not growing)".The Proposed Transaction represents the most effective solution to creating a strong competitor against JT that will be to the benefit of Jersey's*

Date	From	Public / Industry	Response summary
			consumers and businesses. It is incumbent on the JCRA to give due weight to these points as it reaches its provisional decision, and to consider the 'future viability of the telecoms industry', 'consumer benefits', and 'quality of services' together in a balanced way."
16/06/2023	Sure	Party	Final commitments submitted (i) binding commitments regarding the rollout and operation of a new high speed mobile network which provide certainty and as to the timing and delivery of RCB 1-3 (ii) a significantly enhanced MVNO commitment and (iii) greater clarity on the spectrum divestment.

11. Provisional Findings

11.1 The Authority's provisional findings indicate:

(a) Airtel has a substantial share of Jersey's retail mobile market and remains an effective competitor;

(b) The Proposed Transaction would lead to further concentration in the market, removing direct constraint between the Parties (as demonstrated by the current diversion ratios) and leaving consumers with only one alternative supplier in the event that the merged entity raises prices or reduces the quality of its services;

(c) The expansion of new entrants and/or the competitive fringe is unlikely, evidenced by the fact that there have been no new entrants in the last 3 years. Limited available spectrum and access to sites are key barriers to new entry. Further, there is generally no significant buyer power among consumers which would be sufficient to impose a meaningful competitive pressure on the merged entity and JT post-transaction;

(d) The customer benefits cited by the Parties would not be sufficient to offset a potential substantial lessening of competition; and

(e) For the reasons set out above, Sure's commitments do not sufficiently allay the competition concerns arising from the Proposed Transaction, or create or enhance any customer benefits arising from the Proposed Transaction to outweigh the expected loss of competition.

12. Provisional Conclusion

12.1 Following its second detailed review, which included consideration of responses received to the consultation on proposed commitments, the Authority sets out its Provisional Findings above. Based upon its Provisional Findings, the Authority is minded to exercise its power under Article 22(1) of the Competition Law by refusing to approve the Proposed Transaction (the **Provisional Conclusion**).

07 July 2023 **By Order of the Jersey Competition Regulatory Authority**