



Competition (Jersey) Law 2005

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

PUBLIC CONSULTATION ON PROPOSED FINAL COMMITMENTS

Document No: JCRA 24/20

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1 Purpose of this consultation

- 1.1 This document is the Jersey Competition Regulatory Authority's (the **Authority**) consultation on the final commitments offered by Sure (Guernsey) Limited (**Sure**) in relation to its proposed acquisition of Jersey Airtel Limited (**Airtel**), excluding Airtel's 100% owned subsidiary Bharti House Limited, from Bharti Global Limited (the **Proposed Transaction**).
- 1.2 Pursuant to the Competition (Jersey) Law 2005 (the **Competition Law**), the Authority administers a mandatory clearance regime for certain mergers and acquisitions, and will only give approval if, following a detailed assessment, it is satisfied that the merger is unlikely to have the effect of substantially lessening competition in a market (the legal test).
- 1.3 The Authority has previously decided that the Proposed Transaction is likely to substantially lessen competition in the retail mobile market. As such commitments have been offered by Sure to address this concern. The purpose of this consultation is for the Authority to seek views from interested parties on the following questions:
- (a) **Consultation Question [1]:** Do you have any comments on the Authority's identified theories of harm and its assessment of the benefits of the Proposed Transaction?
 - (b) **Consultation Question [2]:** In relation to the Upfront MVNO Remedy, please provide your views on whether this remedy is likely to be effective in addressing the Authority's identified competition concerns. Please substantiate your response.
 - (c) **Consultation Question [3]:** Do you think the Co-op could be a credible MVNO player in the supply of retail mobile telecommunications services in Jersey?
 - (d) **Consultation Question [4]:** In relation to Conditions 1-5, please provide your views on whether these commitments, in combination with the Upfront MVNO Remedy, are likely to be effective in addressing the Authority's identified competition concerns. Please substantiate your response.
 - (e) **Consultation Question [5]:** Provided that the Proposed Transaction is approved subject to conditions and the Upfront MVNO Remedy, please provide any comments you may have in relation to this application for exemption pursuant to Article 9 of the Competition Law?
- 1.4 The responses to these questions will assist the Authority in its decision whether to refuse to approve the Proposed Transaction, or to approve it with conditions. All interested parties are invited to respond to this consultation by **5pm on 28 June 2024**.

2 Background

- 2.1 Mergers and acquisitions can bring many benefits to an economy, such as introducing new management skills and investment and potential efficiency improvements through economies of scope and scale. This can also result in benefits for consumers. However, concerns may arise when a merger or acquisition has the potential to lessen competition in Jersey. When competition is reduced, consumers can face higher prices, reduced product and/or service quality and less choice and innovation. These risks mean that mergers and acquisitions require assessment to gauge the likelihood of those risks occurring and their effect on market competitiveness.
- 2.2 Sure is proposing to acquire Airtel, 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 Law. Article 22(1) of the Competition Law provides that the Authority may either approve a notified merger or acquisition, with or without attaching conditions, or refuse to approve it.
- 2.3 On 12 July 2023, following completion of its second detailed review, the Authority published its Provisional Findings¹ in relation to the Proposed Transaction. Based on its Provisional Findings, the Authority considered that the Proposed Transaction, as notified, was likely to give rise to a substantial lessening of competition. The Authority therefore indicated that it was minded to exercise its power under Article 22(1) of the Competition Law by refusing to approve the Proposed Transaction.
- 2.4 The attachment of conditions may be appropriate where the Authority is satisfied that, without the conditions, the merger could not be approved but where, if the conditions are fulfilled, the merger will not substantially lessen competition.² Any conditions imposed by the Authority as part of a merger approval decision can be of a continuing nature, and the Authority may impose financial penalties in respect of any subsequent breach of those conditions. When assessing commitment proposals from the parties that might form the basis for conditions, the Authority will take account of guidance published by other competition authorities, including the European Commission and the UK competition authorities.³
- 2.5 In this case, the commitment proposals offered by the Parties have developed during the merger application process. As part of their original application for regulatory approval, the Parties submitted an initial package of time-limited commitments, including a proposal to

¹ [C-042 Sure Airtel Provisional Findings](#), document no: JCRA 23/44, dated 6 July 2023.

² [Guideline 8 - Mergers & Acquisitions](#), page 16.

³ [Guideline 8 - Mergers & Acquisitions](#), page 17.

continue offering Airtel’s existing tariffs and not increasing prices by more than RPI for the first three years post-merger, as well as launching 5G services within a specified time and removing high-risk equipment from the merged entity’s core network. Following its first detailed review, the Authority concluded that these commitments did not appear sufficient to mitigate any potential competition concerns.⁴

- 2.6 During the Authority’s second detailed review, Sure offered further commitments to add to those offered initially. On 22 May 2023, a consultation was launched on whether the updated commitments could be an effective and proportionate remedy to address the competition concerns identified by the Authority at that stage of its assessment (**May 2023 Consultation**).
- 2.7 Following completion of its second detailed review, which included consideration of responses received to the May 2023 Consultation, the Authority’s Provisional Findings indicated that the commitment proposals offered by the Parties did not sufficiently allay the competition concerns arising from the Proposed Transaction.
- 2.8 In response to the Provisional Findings, Sure further updated its commitment proposals. However, the updated proposed commitments submitted contained insufficient information for the Authority to properly assess if they were capable of addressing its competition concerns. To provide Sure the opportunity to develop its updated commitment package, on 4 October 2023, the Authority decided to place the merger application on hold. The commitments offered were the subject of a number of requests for further information from the Authority and were discussed at meetings and on calls with the Parties.
- 2.9 On 2 February 2024, Sure submitted a final commitments package, including an upfront MVNO Remedy (the **Upfront MVNO Remedy**), identifying the Channel Islands Co-operative Society Limited (the **Co-op**) as the Proposed MVNO, a structural spectrum divestment commitment, two merger specific benefits and a number of behavioural remedies (together, the **Final Commitments Package**). A final form MVNO agreement was agreed between Sure and the Co-op on 2 May 2024.
- 2.10 As set out below, the Authority has decided to consult on whether the Final Commitments Package may be an effective and proportionate remedy to address the competition concerns identified in its Provisional Findings. The Final Commitments Package is set out in further detail in this consultation document and is included in the accompanying Appendix 1.
- 2.11 This consultation will assist the Authority in its decision whether to refuse to approve the Proposed Transaction, or to approve it with conditions. Whilst the Authority considers that the

⁴ [Decision – First Detailed Review](#), document no: 22/87, dated 12 December 2022.

Final Commitments Package has the potential to address the competition concerns identified in its Provisional Findings, this consultation should not be interpreted as the Authority expressing a final view on the Proposed Transaction.

3 Summary of competition concerns

- 3.1 As set out in more detail in the Provisional Findings, during its second detailed review, the Authority assessed whether the Proposed Transaction, as notified and including the commitments offered at that stage, was likely to give rise to a substantial lessening of competition in the retail supply of mobile telecommunications services in Jersey.
- 3.2 When assessing whether a transaction may give rise to a substantial lessening of competition, the Authority will consider the prospects for competition with the merger against the competitive situation that would occur without the merger. The Provisional Findings assessed the Proposed Transaction against a counterfactual of the prevailing competitive pre-merger conditions.
- 3.3 In response to the Provisional Findings, the Parties questioned the counterfactual adopted by the Authority, claiming that it is inaccurate⁵, and that *“there is at least some doubt as to whether the prevailing pre-merger conditions can be expected to persist in the medium term in view of major technological developments that require significant investment, including the launch of 5G services and changes required to meet Telecoms Security Requirements”*.⁶
- 3.4 The Authority is mindful that there is inevitably some uncertainty as regards the counterfactual. In particular, in this case, in relation to Airtel's competitiveness in the medium term as a result of the investments and impact of the roll out of 5G in Jersey. The Authority has taken this into account during its assessment of the Proposed Transaction and its evaluation of the commitments proposed by the Parties to remedy its competition concerns. However, the Authority has not found that the evidence provided by the Parties is sufficiently persuasive to demonstrate a counterfactual situation where Airtel is no longer an effective competitor in the market in a likely timeframe that will materially impact on the assessment of the competitive effects of the merger. As a result, the Authority remains of the view that the most appropriate counterfactual against which to assess the Proposed Transaction is the one adopted in its Provisional Findings, i.e. the prevailing competitive pre-merger conditions.

⁵ Airtel's response to the Authority's Provisional Findings, dated 8 August 2023, pages 7-8.

⁶ Sure's response to the Authority's Provisional Findings, dated 9 August 2023, paragraph 3.1.

3.5 In the Provisional Findings, the Authority identified two mechanisms through which the Proposed Transaction may lead to a substantial lessening of competition in the retail supply of mobile telecommunications services in Jersey (the **Theories of Harm** or **ToH**):

- (a) by removing the competitive constraints offered by Airtel, the Proposed Transaction, should it be unconditionally approved, could allow the merged entity (and JT (Jersey) Limited (**JT**)) to unilaterally raise prices or reduce quality (**non-coordinated effects ToH**); and
- (b) the Proposed Transaction, as notified and absent any suitable remedies, may result in the merged entity and JT finding it easier to coordinate their behaviour to increase prices, reduce investment or reduce quality (**coordinated effects ToH**).

3.6 In relation to the non-coordinated effects ToH, the Authority further noted that the competition concerns identified could be exacerbated by a spectrum asymmetry that could arise as a result of the Proposed Transaction, as Sure and Airtel together control approximately 65% of the spectrum currently available to mobile operators. However, following discussions with Ofcom⁷, it is clear that spectrum trading is currently not possible in Jersey. The relevant provisions of the UK Wireless Telegraphy Act 2006 which allow spectrum trading have not been extended to Jersey through the Wireless Telegraphy (Jersey) Order 2006. Accordingly, Airtel's spectrum cannot be permanently transferred to Sure as a result of the Proposed Transaction. Instead, Airtel's spectrum would, following a period during which potential interim measures may be put in place, revert to the States of Jersey before being available for re-allocation by Ofcom. As a result, the Authority no longer considers that spectrum asymmetry post-merger is a concern that could exacerbate the non-coordinated effects identified in the Provisional Findings.

Non-Coordinated Effects

3.7 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 and which could in turn lead to an increase in prices.⁸

⁷ Ofcom is the UK's communications regulator and also in charge of spectrum allocation in Jersey.

⁸ Horizontal Merger Guidelines produced by the European Commission (**Horizontal Guidelines**), paragraph 24.

- 3.8 As explained in the Provisional Findings, 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.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.
- 3.9 In this case, the Proposed Transaction, as notified and absent any suitable remedies, would lead to further concentration in the retail supply of mobile telecommunications services in Jersey, with only two mobile network operators (**MNOs**) remaining post-merger, each having a market share of approximately 50%. As indicated in the Authority's first detailed review decision and the Provisional Findings, 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. In terms of closeness of competition, the Authority's analysis, as set out in the Provisional Findings, indicates that Sure and Airtel are sufficiently close competitors. The Proposed Transaction therefore removes this direct constraint between the Parties and would, absent suitable remedies, leave consumers with only one alternative supplier in the event that the merged entity raises prices or reduces the quality of its services.
- 3.10 As a result of the factors discussed above (and in greater detail in the Provisional Findings), the Authority provisionally found that the Proposed Transaction, as notified and absent suitable remedies, would be likely to give rise to non-coordinated (unilateral) effects.

Coordinated Effects

- 3.11 A merger may also impede competition if it increases the likelihood that companies are able to coordinate their behaviour and raise prices, even without entering into an anti-competitive arrangement. Such coordination may take various forms, including keeping prices above the competitive level or reducing / delaying investment. A reduction in competition due to coordination amongst firms is more likely in markets where (i) pricing is transparent, (ii) coordination is easy to sustain¹⁰, and (iii) there are no external threats to coordination (i.e. new entrants).

⁹ Horizontal Guidelines, paragraphs 26 ff.

¹⁰ For example, if demand is predictable, operators are symmetric, and deviation from collusion is easy to identify and 'punish'.

3.12 As identified in paragraph 6.46 of the Provisional Findings, the following characteristics of the Jersey mobile market mean that coordination could be possible:

- (a) **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.
- (b) **Symmetric Operators:** after the merger, JT and Sure would have very similar market shares, which makes coordination easier.
- (c) **Pricing Transparency:** all prices are available online and therefore can be easily monitored by all operators.
- (d) **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).

3.13 As set out in the Provisional Findings, the merger between Sure and Airtel could, absent any suitable remedies, make coordination in Jersey easier since 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).

4 Potential Benefits of the Merger

4.1 The Parties have claimed the Proposed Transaction would lead to benefits in the form of improved quality and service, security, and investment and innovation.¹¹

4.2 While the Authority acknowledges that some efficiencies might arise from the Proposed Transaction, the potential benefits identified by the Parties have not been found to be sufficient to offset the Authority's competition concerns, absent suitable remedies. This is in part due to the uncertainty that these benefits would be passed on to consumers in a market where there are only two MNOs, for the reasons described above.

Consultation Question [1]	Do you have any comments on the Authority's identified theories of harm and its assessment of the potential benefits of the Proposed Transaction?
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¹¹ As set out in the June 2023 Commitments Proposal of Sure (Guernsey) Limited, discussed in section 8 of the Provisional Finding; as well as section 6 of Sure's response to the Provisional Findings, dated 9 August 2023, and paragraph 4.5.7 of the MAF which set out 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*".

5 Commitments

- 5.1 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 where conditions imposed on merging parties can mitigate the otherwise negative impact of the merger on competition. Commitments, submitted by parties through the merger application process, can form the basis of any conditions imposed on a merger.
- 5.2 The commitments offered by the Parties to remedy the Authority's competition concerns have developed through the merger application process, as explained above in Section 2 and in Section 9 of the Provisional Findings.
- 5.3 On 2 February 2024, Sure submitted its Final Commitments Package, which is the focus of this consultation, and the MVNO agreement with the Co-op was agreed on 2 May 2024. The Final Commitments Package proposes the Upfront MVNO Remedy and seven other commitments. These are described in more detail below and in Appendix 1.

Upfront MVNO Remedy

- 5.4 In view of the Authority's provisional conclusions set out in the Provisional Findings, Sure has provided a new commitment in the form of the Upfront MVNO Remedy.
- 5.5 In its Final Commitments Package, Sure indicates that it has *"sought to address the Authority's concern, expressed in the Provisional Findings, that only a structural remedy that addressed the reduction in retail operators in Jersey would be sufficient to address its concerns."*¹² The Upfront MVNO Remedy is intended to ensure that three retail mobile providers would remain in the Jersey market following Sure's acquisition of Airtel.
- 5.6 The Proposed MVNO is the Co-op, a well-known food and convenience retailer in the Channel Islands. Sure claims that the Co-op is a *"highly credible MVNO partner"* and suggests that experience from other jurisdictions show that retail chains have a strong track record of launching successful MVNOs, including in the UK where Tesco Mobile is the leading MVNO with over five million subscribers.¹³
- 5.7 In support of the Upfront MVNO Remedy, Sure has provided the Authority with a final form MVNO agreement (the **MVNO Agreement**), signed by both Sure and the Co-op on 2 May 2024. The Upfront MVNO remedy is intended to be a 'fix it first' solution which means that the

¹² Sure, Final Commitments Package, paragraph 1.2.

¹³ Sure, Final Commitments Package, paragraph 2.2.

MVNO Agreement has been signed ahead of the Authority's final decision, with completion conditional only on receiving the required regulatory approvals. Sure's proposal is that, because this remedy would already have been implemented before the Authority's final decision (subject to any changes required as a result of this consultation), it would not need to form part of any post-clearance condition should the Proposed Transaction ultimately be approved with conditions by the Authority. However, the Authority is of the provisional view that, if it decides to clear the Proposed Transaction subject to conditions, the Upfront MVNO Remedy will form one of those conditions because the MVNO Agreement will remain conditional on regulatory approval in Guernsey, which is a matter outside of the Authority's control.

- 5.8 Under the MVNO Agreement, Sure would be the Co-op's exclusive MNO supplier of certain mobile telecommunications services for the duration of the MVNO Agreement and has committed to provide it with sufficient capacity to build an effective third player in the supply of retail mobile services in Jersey. The MVNO Agreement contains provisions for regular reviews of wholesale prices, but which limit the ability of Sure to increase wholesale prices *[REDACTED]* and aim to ensure that there is non-discrimination with respect to the quality of service offered to Sure and the Co-op's retail customers. Finally, Sure and the Co-op have also committed to put in place compliance protocols to avoid any coordination of competitive behaviour at the retail level, *[REDACTED]*.
- 5.9 Sure has submitted that the provisions of the MVNO Agreement are aimed at incentivising strong price competition from the Proposed MVNO, and to provide it with sufficient capacity to build an effective third retail mobile player. They are also intended to enable the Proposed MVNO to compete in all areas of the relevant market, to be competitive on both price and non-price aspects, and to ensure that the Proposed MVNO is commercially viable as a long-term competitor.
- 5.10 Further, the MVNO Agreement is said to seek to ensure that the conditions within Sure's licence that are relevant for the protection of retail customers are reflected within the MVNO Agreement, such that the Proposed MVNO's customers will be protected. However, the Co-op has nonetheless applied for its own Class II telecoms licence (a matter which is subject to separate consultation by the Authority).

Additional Commitments

- 5.11 In addition to the Upfront MVNO Remedy, Sure has also offered the following seven commitments:

- (a) **Condition 1 - Spectrum divestment:** Sure will relinquish spectrum within 36 months of the Completion Date.
- (b) **Condition 2 - Legacy Tariffs:** Sure will not withdraw any Sure and Airtel tariffs that are active as at the Completion Date for existing customers for at least 36 months from the Completion Date. These tariffs will remain at no more than current prices (subject to the existing contractual right to increase in line with the Jersey Retail Price Index (**RPI**)). Sure will inform existing Sure and Airtel customers who were on those tariffs at the Completion Date of their right to remain on these tariffs upon expiry of their contracts for 36 months from the Completion Date. This does not prevent Sure from offering enhanced terms on these tariffs should it wish to do so.
- (c) **Condition 3 - Airtel's Basic Plan:** Sure will ensure that Airtel's Basic Plan tariff that was in place at the Completion Date remains available to existing Airtel and new customers for at least 36 months from the Completion Date (subject to the existing contractual right to increase prices in line with RPI). This does not prevent Sure from offering enhanced terms should it choose to do so. Sure will also ensure that this tariff remains marketed online and in-store with the same prominence as all available plans.
- (d) **Condition 4 - Sure 4G Unlimited Plan:** Sure will keep its 4G Unlimited tariff available to its existing and new customers for at least 36 months from the Completion Date (subject to the right to increase the price in line with RPI). Sure will ensure this tariff remains marketed online and in-store with the same prominence as all available plans.
- (e) **Condition 5 - Sure Big Bundle:** Within 12 months from the Completion Date, Sure will notify all eligible existing Airtel customers who also take a Sure fixed line broadband service of their eligibility to access Sure's "Big Bundle" discounts.
- (f) **Condition 6– New Network:** Within [REDACTED] months of the Completion Date, Sure commits to having a new mobile network operational, offering voice and high speed data services that meets its commitments under its existing Licence. Sure also commits to having removed all High Risk Vendors from its Core and RAN within a further [REDACTED] months (i.e. [REDACTED] months from the Completion Date).
- (g) **Condition 7 – 5G Services:** Sure will ensure that 5G services are available at [REDACTED] of its new network's sites within [REDACTED] months from the Completion Date.

6 Assessment of the Proposed Remedies

- 6.1 The Authority has assessed whether the Final Commitments Package provided by Sure is likely to address the competition concerns set out in its Provisional Findings. In making this assessment, the Authority notes that Conditions 1, 6 and 7 do not address its competition concerns and therefore the Authority does not accept these as potential conditions to its decision, in the event it agrees to conditionally approve the Proposed Transaction.
- 6.2 In relation to Condition 1, the Authority does not consider that it is within Sure's power to relinquish Airtel's allocated spectrum. In any event, and as set out in more detail above in paragraph 3.6, the Authority no longer considers that spectrum asymmetry post-merger is a concern that could exacerbate the non-coordinated effects identified in this decision. Conditions 6 and 7 are considered below as 'merger specific benefits'.

Non-Coordinated Effects

- 6.3 With regard to the non-coordinated effects, the Authority notes that, as a result of the Upfront MVNO Remedy, the risk of a substantial lessening of competition post-merger is reduced. With the Co-op entering the mobile market as an MVNO, the market will have three retail competitors: two MNOs (Sure and JT) and one MVNO (the Co-op). With the Co-op's presence, the ability of the merged entity to raise prices post-merger will be limited or at least not significantly greater than in the adopted counterfactual. Indeed, if Sure (or JT) were to increase their prices post-merger, the Proposed MVNO would be able to undercut them and to grow its market share at the expense of the existing operators. This, in turn, would reduce the incumbents' incentives to raise prices post-merger.
- 6.4 The Authority has reviewed the MVNO Agreement between Sure and the Co-op and is assured that the terms of the MVNO Agreement are such that the Co-op should be able to become an effective competitor. In particular:

- (a) Sure is committed to provide sufficient capacity to accommodate the Co-op's growth;
- (b) wholesale prices are set in a way that would allow the Co-op to offer competitive retail prices, while also earning a sufficient margin to remain viable;
- (c) the MVNO Agreement contains provisions for regular reviews of wholesale prices, but which limit Sure's ability to increase wholesale prices over time; and
- (d) the length of the MVNO Agreement is sufficient to provide the Co-op with certainty and to allow it to gain scale to remain an effective competitor in the long-term.

6.5 Furthermore, the MVNO Agreement stipulates that MVNO customers are provided with the same quality of service as Sure's retail customers, i.e. the Co-op will have access to the same technologies and services as those available to Sure's retail customers, including 5G and any future technologies. This ensures that the Proposed MVNO is not disadvantaged in terms of the quality of service and is able to compete for all relevant customer segments¹⁴.

6.6 The Authority observes that commitments involving MVNO entry have been offered and accepted in previous mobile mergers in Europe, e.g. in Ireland, Austria and Germany.¹⁵

6.7 The Authority recognises that it might take the Co-op several months to launch its mobile services. Therefore, if the Proposed Transaction were to receive all required regulatory approvals, there might be a limited period of time when there are only two competitors in the market. However, the risk of lessening of competition during this period is addressed by Sure's Conditions 2, 3 and 4, i.e. Sure will continue to provide legacy tariffs to its existing customers, it will also continue to provide Airtel's basic tariff and Sure's 4G unlimited tariff to new and existing customers. Therefore, prices for customers should not increase in the event of a limited period between Airtel's exit and the Co-op's entry.

Coordinated Effects

6.8 With regard to the coordinated effects, the Authority observes that the entry of the Proposed MVNO would significantly reduce any risks of coordinated effects as it would materially change the conditions that make the market susceptible to coordination:

- (a) **Predictability/external stability:** being a well-regarded strong brand, the Co-op has the potential to disrupt the market and to attract a material share of mobile customers. Therefore, the market will no longer be stable, which would hinder the ability of Sure and JT to co-ordinate and to raise prices above the competitive level; and

¹⁴ Currently, the Co-op has developed 'members-only' plans, however has confirmed its intention to have an offering for non-members too, by the time of its launch.

¹⁵ See for example ["Mergers: Commission clears acquisition of Telefónica Ireland by Hutchison 3G, subject to conditions"](#)

(b) **Symmetric Operators:** as a result of the Co-op's entry, the market shares will no longer be symmetric. Furthermore, Sure and JT's incentives will diverge: while for JT, the Co-op will be a competitor; for Sure, the Co-op will be both a retail competitor, as well as a source of wholesale revenues. Therefore, the incumbents' incentives will no longer be aligned.

6.9 Although the prices in the market are expected to remain transparent, this condition, on its own, is unlikely to be sufficient for the operators to sustain coordination in the market.

Merger specific benefits

6.10 The Proposed Transaction with the proposed remedies is also expected to deliver environmental benefits as there will be fewer mobile masts post-merger than would be the case in the counterfactual absent the merger. This is because some of the sites currently operated by Airtel will be de-commissioned.

6.11 Furthermore, Sure commits to roll out 5G services faster and to remove HRV equipment from its network sooner than it would have done in the counterfactual (Conditions 6 and 7). The Authority remains of the view that the speed of network roll out is primarily driven by competition.

6.12 The Authority notes that, with Airtel failing to secure 5G spectrum in the 5G spectrum award, the pressure to roll out 5G networks sooner is unlikely to be strong, both in the counterfactual (absent the merger) or post-merger. The Authority considers that there are benefits arising from Sure's commitments to roll out 5G services to [REDACTED] of its network's sites within [REDACTED] months from the Completion Date and to remove all HRV equipment within [REDACTED] months from the Completion Date. Notwithstanding the consumer benefits, the Authority does not accept Conditions 6 and 7 are merger specific. In relation to Condition 6, the Authority notes the removal of HRV equipment is likely to be a legal requirement in Jersey, which Sure would be required to would be required to comply with absent the merger. In relation to Condition 7, the Authority considers [REDACTED] months from the Completion Date would not be materially faster than Sure's rollout of 5G absent the merger and therefore the benefits are not deemed significant.

Consultation Question [2]	In relation to the Upfront MVNO Remedy, please provide your views on whether this remedy is likely to be effective in addressing the Authority's identified competition concerns. Please substantiate your response.
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Consultation Question [3]	Do you think the Co-op could be a credible MVNO player in the supply of retail mobile telecommunications services in Jersey?
Consultation Question [4]	In relation to Conditions 2-5, please provide your views on whether these commitments, in combination with the Upfront MVNO remedy, are likely to be effective in addressing the Authority's identified competition concerns. Please substantiate your response.

7 Vertical exemption

- 7.1 Article 8(1) of the Competition Law sets out that "*an undertaking must not make an arrangement with one or more other undertakings that has the object or effect of hindering to an appreciable extent competition in the supply of goods or services within Jersey or any part of Jersey*". However, under Article 9(1) of the Competition Law, the Authority may exempt from Article 8(1) an arrangement to which that Article would otherwise apply.
- 7.2 In light of the duration of the MVNO Agreement and the exclusivity provisions contained therein, Sure and the Co-op have requested an individual exemption of the MVNO Agreement under Article 9 of the Competition Law.
- 7.3 Sure and the Co-op note that exclusivity is inherently part of all MVNO arrangements, as it would not be possible for an MVNO to 'multi-home' across different networks. Further, they submit that the exclusivity is essential to support the investment made by an MNO in working with an MVNO to access its network. This exclusivity in favour of the MNO (i.e. the MNO is the exclusive supplier of MVNO services under the agreement) is also claimed to be a well-accepted principle of both EU and UK law.¹⁶
- 7.4 Sure and the Co-op also note that the MVNO Agreement is designed to deliver a pro-competitive effect - the maintenance in the long-term of three suppliers of retail mobile services in Jersey. The only possible anti-competitive effect arising from the exclusivity arrangements is claimed to be a potential foreclosure effect on JT. However, the Co-op is not the only potential MVNO partner and the arrangements do not preclude JT from entering into its own arrangements with other MVNOs. In this regard, Sure and the Co-op note that there

¹⁶ Sure's response to the Authority's RFI dated 06.11.23, section 10.

are other strong retail brands already active in Jersey, some of whom already have MVNO operations in the UK, whilst JT has sufficient network capacity to be able to enter into any such arrangement.

7.5 Finally, Sure and the Co-op consider the duration of the MVNO Agreement is important to ensuring a long-term structural remedy to address the Authority’s competition concerns, as identified in the Provisional Findings.

7.6 As a result, Sure and the Co-op submit that the MVNO Agreement meets the threshold for exemption under Article 9 of the Competition Law, including all the specific requirements of Article 9(3). Namely:

- (a) the exclusivity is essential to 'improving the distribution of services' under Article 9(3)(a) as an accepted pre-requisite for the delivery of MVNO services;
- (b) consumers in Jersey will have a fair share in the benefits in view of the pro-competitive nature of the arrangements (Article 9(3)(b));
- (c) the longer term duration of the agreement is indispensable to delivering the benefits the Authority has identified, meeting Article 9(3)(c); and
- (d) the arrangements do not afford the possibility of eliminating competition under Article 9(4) as this would require there to be a credible foreclosure concern in relation to JT. For the reasons above, Sure submits that this is not a realistic concern.

Consultation Question [5]	Provided that the Proposed Transaction is approved subject to conditions and the Upfront MVNO Remedy, please provide any comments you may have in relation to this application for exemption pursuant to Article 9 of the Competition Law?
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8 Consultation

8.1 The Authority is consulting on conditions proposed by Sure set out in this document and in Appendix 1 below. 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 five structured questions throughout the document. To recap these are:

- (a) **Consultation Question [1]:** Do you have any comments on the Authority’s identified theories of harm and its assessment of the benefits of the Proposed Merger?

- (b) **Consultation Question [2]:** In relation to the Upfront MVNO Remedy, please provide your views on whether this remedy is likely to be effective in addressing the Authority's identified competition concerns. Please substantiate your response.
- (c) **Consultation Question [3]:** Do you think the Co-op could be a credible MVNO player in the supply of retail mobile telecommunications services in Jersey?
- (d) **Consultation Question [4]:** In relation to Conditions 1-5, please provide your views on whether these commitments, in combination with the Upfront MVNO Remedy, are likely to be effective in addressing the Authority's identified competition concerns. Please substantiate your response.
- (e) **Consultation Question [5]:** Provided that the Proposed Transaction is approved subject to conditions and the Upfront MVNO Remedy, please provide any comments you may have in relation to this application for exemption pursuant to Article 9 of the Competition Law?

8.2 Representations should reach the Authority by **5pm on 28 June 2024** and should be emailed to **info@jcra.je**.

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

- (a) please provide a brief summary of the interests or organisations being represented, where appropriate;
- (b) please consider whether the information provided is considered confidential, and explain why this is the case; and
- (c) 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.

Appendix 1: Sure’s Final Commitments Package

The Upfront MVNO Remedy means that Sure and the Co-op will enter into a binding MVNO Agreement conditional only on regulatory approvals in Jersey and Guernsey and any necessary licence pre-conditions, prior to any potential conditional clearance being granted by the Authority.

As a result, Sure proposes that there will be a pre-condition and then seven separate binding conditions which will be attached to the merger approval under Article 22 of the Competition Law. However, as explained within the consultation document, the Authority does not accept Conditions 1, 6 and 7 to address its competition concerns and so, in the event the Authority decides to conditionally approve the Proposed Transaction, these are not potential conditions to its decision.

For the reasons set out in the consultation document, the Authority is of the view that, if it decides to clear the Proposed Transaction subject to conditions, the Upfront MVNO Remedy will form one of those conditions because the MVNO Agreement will remain conditional on other matters that the Authority cannot control (in particular, regulatory approval in Guernsey). However, for the purposes of describing Sure’s proposed commitments here, the Upfront MVNO Remedy is described as a “Pre-condition” in line with the terminology used in Sure’s Final Commitments Package.

Pre-Condition

Pre-Condition Execution of a binding MVNO Agreement in a form agreed with the Authority between Sure and the Co-op conditional only on regulatory approvals and any necessary licence pre-conditions.

Proposed Merger Conditions Attached to Merger Approval

Condition 2 Sure will not withdraw any Sure and Airtel tariffs that are active as at the Completion Date for existing customers for at least 36 months from the Completion Date. These tariffs will remain at no more than current prices (subject to the existing contractual right to increase in line with the Jersey Retail Price Index (RPI)). Sure will inform existing Sure and Airtel customers who were on those tariffs at the Completion Date of their right to remain on these tariffs upon expiry of their contracts for 36 months from the Completion Date. This does not prevent Sure from offering enhanced terms on these tariffs should it wish to do so.

Condition 3 Sure will ensure that Airtel’s Basic Plan tariff that was in place at the Completion Date remains available to existing Airtel and new customers for at least 36 months

from the Completion Date (subject to the existing contractual right to increase prices in line with RPI). This does not prevent Sure from offering enhanced terms should it choose to do so. Sure will also ensure that this tariff remains marketed online and in-store with the same prominence as all available plans.

Condition 4 Sure will keep its 4G Unlimited tariff available to its existing and new customers for at least 36 months from the Completion Date (subject to the right to increase the price in line with RPI). Sure will ensure this tariff remains marketed online and in-store with the same prominence as all available plans.

Condition 5 Within 12 months from the Completion Date, Sure will notify all eligible existing Airtel customers who also take a Sure fixed line broadband service of their eligibility to access Sure's "Big Bundle" discounts