Competition (Jersey) Law 2005

Decision

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

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1. Executive Summary

1.1 Sure (Guernsey) Limited (**Sure**) is proposing to acquire Jersey Airtel Limited (**Airtel**), excluding Airtel's 100% owned subsidiary Bharti House Limited, from Bharti Global Limited (**Bharti**) (the **Proposed Transaction**). In this Decision, Sure and Airtel are jointly referred to as the **Parties**.

1.2 The Proposed Transaction was notified to the Jersey Competition Regulatory Authority (the **Authority**) by the Parties on 8 November 2022 for approval pursuant to Article 21 of the Competition Jersey Law 2005 (the **Competition Law**).

1.3 Both Airtel and Sure, via Sure (Jersey) Limited (**Jersey Sure**), are active in the supply of retail mobile telecommunications services (**retail mobile**) in Jersey.

1.4 In its first detailed review decision, published on 12 December 2022[1], the Authority concluded that the Proposed Transaction, as notified, may give rise to a substantial lessening of competition in Jersey[2]. Since the Proposed Transaction was found to give rise to competition concerns that could lead to refusal of approval of the acquisition or approval with conditions the Authority, in accordance with its Merger Guidelines[3], referred the application for a second detailed review[4].

1.5 Following the conclusion of its second detailed review, on 12 July 2023, the Authority published its Provisional Findings[5], indicating that, absent suitable remedies, it would be minded to exercise its power under Article 22(1) of the Competition Law by refusing to approve the Proposed Transaction.

1.6 Following publication of the Provisional Findings, Sure submitted commitments to address the Authority's identified competition concerns. Following numerous requests for information and discussions with the Authority, 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**).

1.7 On 28 May 2024, the Authority published a consultation to inform its assessment as to whether the Final Commitments Package addressed the competition concerns identified in the Provisional Findings. During the consultation period, the Authority received five responses. Three of the responses received opposed the Proposed Transaction on the basis of concerns that it may lead to reduced competition which may result in higher prices, lower quality of service and limited innovation. One of the responses received was in favour of the Proposed Transaction, indicating that it found Sure's Final Commitments Package sufficient to allay the Authority's competition concerns. One response was neutral on the Proposed Transaction but requested an additional condition be added to the Authority's decision, should it be approved.

1.8 Having considered these responses and for the reasons set out in further detail in this Decision, the Authority is of the view that the Final Commitments Package is capable of effectively

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[1] C-042 Sure, Airtel - First Review Decision | JCRA.
[2] Under Article 22(4) of the Law, the Authority must determine whether the Proposed Transaction would substantially lessen competition in Jersey, or any part of Jersey.
[3] Guideline 8 - Mergers & Acquisitions, issued July 2022.
[4] Guideline 8 - Mergers & Acquisitions, page 12.
[5] C-042 Sure Airtel Provisional Findings, document no: JCRA 23/44, dated 6 July 2023 (the **Provisional Findings**).

addressing the competition concerns identified during its review and assessment. The Authority has therefore decided to approve the Proposed Transaction subject to conditions.

1.9 The conditions are legally binding on Sure and its subsidiaries and its directors and officers under Article 22(3) of the Competition Law. Pursuant to Article 38 of the Competition Law, if the Authority decides that any relevant persons, including Sure or a subsidiary of Sure, are not complying with the conditions the Authority may issue such directions as it considers appropriate to ensure compliance with the conditions. Instead of, or in addition to, the issuance of a direction, the Authority may also impose a financial penalty for a breach of the relevant conditions.

2. Background

The Proposed Transaction

2.1 Pursuant to a share purchase agreement signed on 21 September 2022, Sure will acquire Airtel, excluding the 100% owned subsidiary Bharti House Limited, provided that, amongst other things, the Authority has issued an approval decision under Article 22 of the Competition Law[6].

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.

2.4 In Jersey, Sure is active via Jersey Sure, an entity which operates mobile telecommunication networks and is active in the provision of data centre, cloud and cybersecurity solutions for businesses. Jersey Sure also supplies 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 submit that the Proposed Transaction would bring about the consolidation needed in Jersey's mobile network market. The Parties argue this will bring about long-term sustainability

[6] SPA, Clause 2.1.

and drive future investment. Therefore, the Parties explain the reasons for the Proposed Transaction are as follows:

- The Proposed Transaction is *[REDACTED]*[7]; and
- The Proposed Transaction would allow Sure to become a stronger player, able to compete more effectively with JT (Jersey) Limited (**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'*[8].

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, the Authority will be referring to 'mergers' as encompassing both mergers and acquisitions in this Decision). Under the share purchase agreement, 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 supplied to persons in Jersey. The Proposed Transaction, therefore, requires the approval of the Authority prior to its execution.

3. The Merger Application Process

Pre-notification

3.1 As encouraged by the Authority's Merger Guidelines, the Parties engaged the Authority at an early stage of the process, informing the Authority of the Proposed Transaction on 13 May 2022. Following requests for further information and discussions with the Authority, a final merger application form (the **MAF**) was submitted on 4 November 2022.

First detailed review

3.2 On 8 November 2022, the Authority published a notice 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). All submissions were considered by the Authority when assessing the Proposed Transaction.

[7] See e.g. MAF, para 3, and Airtel's response to the Provisional Findings, dated 8 August 2023, p. 2-4.
[8] MAF, para 5.

3.3 On 16 December 2022, the Authority published its first detailed review decision finding 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, as notified, may give rise to competition concerns which could lead to refusal of approval or approval with conditions, the Authority in line with its Merger Guidelines decided to refer the Proposed Transaction for a second detailed review.

Second detailed review

3.4 To enable it to progress its second detailed review, on 6 January 2023, the Authority issued requests for information to the Parties. The responses were received from the Parties on 20 January 2023. 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, on 16 June 2023, Sure provided a commitments proposal, which the Authority decided to market-test in order to assess whether the proposed remedies could effectively address the Authority's identified competition concerns (the **May 2023 Consultation**)[9].

3.5 The May 2023 Consultation was issued on 22 May 2023 and concluded on 16 June 2023, seven third-party responses were received, as well as responses from the Parties themselves, including further commitments submitted by Sure. All submissions were considered by the Authority when assessing the Proposed Transaction.

3.6 Following the completion of the second detailed review, on 12 July 2023, the Authority published its Provisional Findings[10]. The Provisional Findings confirmed the Authority's view that the Proposed Transaction, as notified and absent suitable remedies, would be likely to give rise to a substantial lessening of competition in the retail mobile market in Jersey. The Authority therefore noted that it was minded to exercise its power under Article 22(1) of the Competition Law by refusing to approve the Proposed Transaction. The Provisional Findings invited interested parties to comment by 19 July 2023 which, at the request of interested parties, was extended to 9 August 2023.

3.7 In response to the Provisional Findings, Sure further updated its commitment proposals which included a new high-level proposed upfront MVNO commitment. The Authority determined the information provided was insufficient to assess whether the proposed MVNO commitment was capable of addressing the competition concerns arising from the Proposed Transaction. However, the Authority considered it in the best interests of consumers in Jersey to issue a request for information to enable it to duly consider the new proposed upfront MVNO commitment and its effectiveness in addressing the likely substantial lessening of competition.

3.8 To provide Sure with the opportunity to sufficiently develop the proposed MVNO commitment, on 4 October 2023, the Authority decided to 'stop the clock' on the merger application process[11]. On 2 February 2024, Sure submitted the Final Commitments Package. Before and after the submission of this package, Sure's proposed commitments were the subject of further requests for information from the Authority and discussions with Sure and its proposed MVNO partner, the Co-op.

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[9] C-042 - Consultation on Conditions, document no: JCRA 23/19, dated 22 May 2023.
[10] C-042 Sure Airtel Provisional Findings, document no: JCRA 23/44, dated 6 July 2023 (the **Provisional Findings**).
[11] Guideline 8 - Mergers & Acquisitions, page 13.

3.9 On 23 May 2024, the Authority received a satisfactory response to its further information requests and so the merger application process resumed with the initiation of the public consultation on Sure's Final Commitments Package[12]. This consultation was considered necessary to assist the Authority in making its final decision.

3.10 Having taken into account the responses received to the consultation, and for the reasons set out in further detail in this Decision, the Authority considers that the Final Commitments Package is likely to address the competition concerns identified in its Provisional Findings and has, therefore, decided to approve the Proposed Transaction subject to conditions.

4. Market definition

Approach

4.1 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.

4.2 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 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[13].

4.3 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[14].

Relevant Product Market

Overlaps between the Parties

4.4 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)

[12] C-042-sure-airtel-consultation-on-proposed-final-commitments.pdf (jcra.je)
[13] 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.
[14] See Guideline 7 - Market Definition | JCRA.

Activity	Jersey Sure	Target	Overlap
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

4.5 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 precedents[15], 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 that, again based on EU precedents, it is not appropriate to segment the market between pre- and post-paid services or between business and residential users.

4.6 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

4.7 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.

4.8 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

4.9 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:

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

- 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 vast majority of Sure's mobile users in Jersey (over 95%) 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

4.10 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 above. 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

4.11 The Authority has determined that the Parties' proposed market definition, the retail supply of mobile telecommunication services in Jersey, is an appropriate framework within which the competitive effects of the Proposed Transaction should 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.

5. Counterfactual

Approach

5.1 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.

5.2 In its Provisional Findings, the Authority assessed the Proposed Transaction against a counterfactual of the prevailing competitive pre-merger conditions.

5.3 In response to the Provisional Findings, the Parties questioned the counterfactual adopted by the Authority, claiming that the adopted counterfactual *[REDACTED]*,[16] and further suggesting 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*'.[17]

[16] Airtel's response to the Authority's Provisional Findings, dated 8 August 2023, pages 7-8.
[17] Sure's response to the Authority's Provisional Findings, dated 9 August 2023, paragraph 3.1.

5.4 The Authority is mindful that there is inevitably some uncertainty as regards the counterfactual in this case *[REDACTED].*

5.5 In relation to 5G, the Authority notes that Airtel in response to the Provisional Findings claims that a large proportion of its customers own a 5G enabled device and that it would 'reasonably and fully' expect such customers to switch to one of its competitors offering 5G. While customers might consider 5G to be a 'must have' offering in the future, the Authority has not been provided with any evidence to suggest that not providing 5G services would impair a retail provider's ability to effectively compete in the short to medium term during which the effects of the Proposed Transaction have been considered.

5.6 Finally, the Authority acknowledges that there is a level of uncertainty as to whether Airtel may be able to attract a sufficient number of new mobile subscriptions to increase or maintain its market share in the long term. However, the Authority has not been provided with sufficiently compelling evidence to give it reason to believe that the status quo would not present a reasonable counterfactual for the purpose of assessing the Proposed Transaction.

5.7 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.

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 the Horizontal Merger Guidelines produced by the Commission (**Horizontal Guidelines**)[18]. Where relevant, it has also considered the substantive merger guidelines applied by the Competition and Markets Authority (**CMA**) in the UK[19].

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)[20].

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**):

[18] Guideline 8 - Mergers & Acquisitions, page 16.
[19] Guideline 8 - Mergers & Acquisitions, page 16.
[20] Guideline 8 - Mergers & Acquisitions, page 15.

(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 (non-coordinated effects ToH); and

(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 (coordinated effects ToH).

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[21].

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]'[22].

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[23]:

(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[24].

(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[25].

(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

[21] Horizontal Guidelines, paragraph 24.
[22] Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (**EU Merger Regulation**), recital 25.
[23] Horizontal Guidelines, paragraphs 26 ff.
[24] Horizontal Guidelines, paragraph 27.
[25] Horizontal Guidelines, paragraph 31.

prices significantly in a post-merger scenario[26]. The degree of substitutability may be evaluated through, for example, diversion ratios[27].

(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[28].

6.9 These are all factors which, although they may not be decisive taken alone, when considered in the round, 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 Parties and their competitors[29].

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*'[30].

6.12 The Jersey Telecommunications Statistics 2023 Report[31] found that, in Jersey, market shares in 2023 remained at similar levels as in the previous two years (and the 2021 edition of the report further indicates that market shares have generally remained stable since at least 2016)[32]. As set out in the table below, in 2023, JT supplied 51% of total mobile subscriptions, with Airtel supplying 26% and Jersey Sure 22%. However, whilst Airtel and Sure have substantially lower market shares than JT on an individual basis, they would have a similar combined market share post-merger of c. 48%.[33]

6.13 It is worth noting that Airtel was able to maintain its market position over the last 5 years: its share was 24% in 2019 and 26% in 2023.

	Jersey Sure	Airtel	Sure and Airtel Combined	JT
2016	24%	21%	45%	55%
2017	25%	21%	46%	54%

[26] Horizontal Guidelines, paragraph 28.
[27] Horizontal Guidelines, paragraph 29.
[28] Horizontal Guidelines, paragraph 37.
[29] Horizontal Guidelines, paragraph 14.
[30] Horizontal Guidelines, paragraph 17.
[31] Statistics Jersey, Telecommunications Statistics and Market Report 2023, https://www.gov.je/SiteCollectionDocuments/Government%20and%20administration/Telecoms%202023%20Final%20report.pdf
[32] 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.
[33] For completeness, 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 considered in further detail in this Decision.

	Jersey Sure	Airtel	Sure and Airtel Combined	JT
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%
2023	22%	26%	48%	51%

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*'[34].

6.15 In terms of market shares, the Parties note that the '*new entity will remain some way behind JT*'[35].

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 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 still raise competition concerns. In particular, this will be the case in concentrated markets where a few players control a large part of the market.

6.17 The Authority notes the Parties submissions in relation to their market shares. However, the Proposed Transaction, as notified and without suitable remedies, would lead to further concentration in the retail mobile market in Jersey, with only two MNOs remaining post-merger, each having approximately half of the market. 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 and/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 would, absent appropriate

[34] MAF, paragraph 4.5.13.
[35] MAF, paragraph 4.5.13.

remedies, leave 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[36]. In the MAF, the Parties note that '*Airtel has been a less active market participant and has not operated as a maverick on any relevant metric of competition (price, quality, service or innovation) and in particular Airtel's competitive interactions with Sure (as opposed to JT) have been limited*'[37].

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[38]. In its response to the Provisional Findings, 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[39]. Further, Airtel has claimed that in 2022 it only acquired 17% of new mobile subscriptions, suggesting that this highlights its inability to maintain its current market share of 25%[40].

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 that *[REDACTED]*[41].

6.21 In terms of the removal of an important competitive constraint, the Parties disagree with the Authority's assessment in the Provisional Findings that the Proposed Transaction may lead to a substantial lessening of competition by removing an important competitive constraint. In particular, the Parties claim that *[REDACTED]*[42], as highlighted by the diversion ratios mentioned above. It is also averred that the exit of Airtel as an independent competitor, consequently, would not materially change the dynamics in the market, while a more robust combined entity would be a stronger challenger to JT for the benefit of consumers.

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 Parties on each other, currently as well as in the future. The Authority's analysis indicates that Sure and Airtel, contrary to the Parties' submissions, are sufficiently close competitors such that the merger could be expected to lead to significant price increases if it were to be cleared and no remedies were imposed.

6.23 The Authority is of the view that Airtel is an effective competitor. For example, the Authority notes that Airtel has during the merger application process launched new bundled products that combine fixed and mobile services (albeit that its share of fixed subscribers remains low currently). Further, Airtel has expressed an interest in acquiring the required spectrum to launch 5G services

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[36] MAF, paragraph 9.
[37] MAF, paragraph 4.5.62.
[38] MAF, paragraphs 4.5.14-16. See also Sure's response to the Authority's first detailed review decision, paragraph 3.5.
[39] Airtel response to the Provisional Findings, p. 7-8.
[40] JAL's response to the JCRA's "analysis of JAL's response to the Economic Analysis within the Provisional Findings" in Annex A 02.10.2023, page 27.
[41] MAF, para. 4.5.58-59.
[42] Sure's response to the Authority's first detailed review decision, paragraphs. 3.1-3.3.

(although it was unsuccessful in the first spectrum auction). It is also, as set out in the table above, 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 conducted by Frontier Economics, 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**		71.11%	28.89%	*100.00%*
	JT	51.22%		48.78%	*100.00%*
	Airtel	34.98%	65.02%		*100.00%*

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

6.25 In June 2024 Statistics Jersey published the Telecommunications Statistics 2023 report, which provides high level porting data for 2023:

	Sure	JT	Airtel
Port in	645	1,066	500
Port out	774	701	736
Net benefit	-129	365	-236

Source: Jersey Telecommunications Statistics 2023 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 2023 report also indicates that the mobile market in Jersey grew by 5,285 customers between 2021 and 2023[43]. This growth is likely to be due to multi-SIMing[44], given the population in Jersey has remained relatively stable in the last few years[45]. While Airtel shows a net loss of porting customers in 2023 of 236, it also acquired 3,471 'new' customers[46] since 2021.[47] Hence Airtel's overall market share has grown from 24% in 2021 to 26% in 2023, which, contrary to the Parties' assertions, suggests to the Authority that Airtel remains an effective competitor.

6.28 In light of the above information, it is more appropriate to calculate diversion ratios based on market shares[48] rather than porting data, given porting data does not reflect the large number of 'new' customers in Jersey. The 2023 market shares produce diversion ratios similar to those provided by the Parties' 2021 porting analysis, with a slightly higher proportion of customers switching to Airtel:

	To

[43] Jersey Telecommunications Statistics 2023 Report, Figure 39 page 26.
[44] That is one person using multiple phones /SIM cards.
[45] Government of Jersey: https://www.gov.je/StatisticsPerformance/Population/pages/population.aspx
[46] Jersey Telecommunications Statistics 2023 Report, Figure 39 page 26 and Jersey Telecommunications Statistics 2021 Report, Figure 31 page 23. New customers are those who have not ported their mobile numbers.
[47] According to Airtel, some of these 'new' customers are Machine-to-Machine (M2M) connections. However, such customers would still be expected to deliver revenues to Airtel.
[48] This approach to calculating diversion ratios assumes that customers switch proportionately to the operators' market shares.

<table>
<tr><th></th><th></th><th>Sure</th><th>JT</th><th>Airtel</th><th>Homenet</th><th>Ports out</th></tr>
<tr><td rowspan="4">From</td><td>Sure</td><td></td><td>66.4%</td><td>33.3%</td><td>1.3%</td><td>100%</td></tr>
<tr><td>JT</td><td>45.9%</td><td></td><td>53.1%</td><td>2.0%</td><td>100%</td></tr>
<tr><td>Airtel</td><td>29.7%</td><td>68.9%</td><td></td><td>1.4%</td><td>100%</td></tr>
<tr><td>Homenet</td><td>22.2%</td><td>51.5%</td><td>26.3%</td><td></td><td>100%</td></tr>
</table>

Source: Jersey Telecommunications Statistics 2022 Report, Figure 39 page 27

6.29 Finally, the Authority notes that Airtel has historically offered some of the lowest prices in the low and medium price segments of the retail mobile market, e.g. for packages with up to 10GB and up to 20GB mobile data per month, and it remains competitive now.[49] 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[50]. No members of the public commented on the Provisional Findings but further concerns were expressed in response to the latest consultation.

6.30 In its Provisional Findings, the Authority noted that the non-coordinated effects 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 Ofcom, 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 Ofcom, before being available for re-allocation on the recommendation of the Authority. 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 this Decision.

Conclusion on non-coordinated (unilateral) effects ToH

6.31 As a result of the factors discussed above, the Authority has found that the Proposed Transaction, as notified and absent appropriate remedies, is likely to give rise to non-coordinated (unilateral) effects.

6.32 In particular, the Authority has found that the Proposed Transaction, without suitable remedies, 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. 48%) close to the market share of the only other significant player, JT;

[49] For example, Airtel currently offers 10GB of data for £8.80 per month, while JT offers the same amount of data for £12.70.
[50] Authority, first review decision (dated 12 December 2022), Section 9.1 'Third Party Views'.

(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; and

(c) Airtel has historically offered the lowest prices in the low and medium price segments of the retail mobile market, e.g. for packages with up to 10GB and up to 20GB mobile data per month, and it remains competitive now. 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.

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

6.34 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.

6.35 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 2023 diversion ratios based on market shares are used.

Coordinated effects ToH

6.36 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[51].

6.37 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 (easy to reach a common understanding/transparency);

(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 (internally sustainable); 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 (externally sustainable).

[51] 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

6.38 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[52]. Accordingly, the reduction in the number of firms in a market may, in itself, be a factor that facilitates coordination.

6.39 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[53]. 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[54].

Internally sustainable

6.40 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.

6.41 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

6.42 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.

6.43 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

6.44 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*

[52] Horizontal Guidelines, paragraph 45.
[53] Horizontal Guidelines, paragraph 49.
[54] 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'[55].

6.45 In this regard, the Parties claim that[56]:

(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.

6.46 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[57];

(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[58]; 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[59].

Authority consideration

6.47 The Authority considers that the merger between Sure and Airtel could make (tacit) collusion in Jersey easier. Notably, a 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).

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

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

[55] MAF, paragraph 4.5.64.
[56] MAF, paragraphs 4.5.65- 4.5.68.
[57] Sure's response to the Authority's first detailed review decision, paragraph 4.4.
[58] Sure's response to the Authority's first detailed review decision, paragraph 4.6.
[59] 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 exactly '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, absent the provision of a tailored remedy package, there has been any interest from new mobile network operators to enter the relevant market to date.

6.49 The Authority has, therefore, found that the merger, as notified, could be expected to lead to an increased likelihood of the two operators 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, absent suitable remedies, may lead to a substantial lessening of competition by making it easier and more likely for Sure and JT 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[60].

(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) has in negotiations with a seller in commercial negotiations due to their size, commercial significance and/or ability to switch to alternative suppliers[61].

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[62].

[60] Horizontal Guidelines, paragraph 68.
[61] Horizontal Guidelines, paragraph 64.
[62] MAF, paragraph 4.12.1.

7.3 However, the Parties note that nonetheless 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 for its satellite fixed broadband service and can, in their opinion, therefore reasonably be expected to be able to readily expand into Jersey[63].

Authority consideration

7.4 In terms of entry of new mobile network operators, the Authority considers that the expansion of new entrants and/or the competitive fringe is unlikely, absent an upfront MVNO remedy, evidenced by the fact that there have been no new entrants in the last three 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 constraint on the merged entity and JT post-transaction.

8. Efficiencies

8.1 The Authority's assessment of a merger considers any pro-competitive effects or efficiencies that may result from the merger and give rise to consumer benefits. It is possible that efficiencies brought about by a merger could offset or counteract any negative effects on competition.

8.2 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*

[63] MAF, paragraph 4.14.1.

innovation. The combination of Sure and Airtel offers a unique opportunity to create a more effective competitor to JT in Jersey'[64].

8.5 As part of its response to the Provisional Findings, Sure suggested that the Proposed Transaction '*represents a unique opportunity to provide the scale necessary to deliver the investment required to build a next generation, security compliant mobile network infrastructure to the Channel Islands*', further noting that customers will benefit from '*a more resilient network, offering quality and speed improvements through increased network capacity and greater site density*'. Sure has also claimed that a reduction in overall sites will deliver both enhanced network coverage and additional environmental benefits[65].

Authority consideration

8.6 The Authority has during its review not found that the customer benefits cited by the Parties would be sufficient alone to offset a potential substantial lessening of competition. However, as set out in Section 10 below, the Authority acknowledges that the Proposed Transaction in combination with some of the commitments offered by Sure could result in certain customer benefits, which should be considered in the round when assessing the effectiveness of the commitments proposed.

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. As demonstrated below, 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]* months 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 a likely substantial lessening of competition arising from the merger. 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 removal of high-risk vendor equipment was similarly considered to be something that would occur regardless of the merger.

[64] MAF, paragraph 4.5.7.

[65] Sure's response to the Provisional Findings, para 6.1.

Further commitments (March 2023)

9.4 As part of its response to the second detailed review, in addition to the initial commitments, Sure developed its previously submitted pricing commitment and proposed further commitments:

(a) **Pricing commitments:** Sure committed 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 committed to notifying all eligible existing Airtel customers of their eligibility to access Sure's Big Bundle;

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

(c) **Spectrum divestment:** Sure committed to the re-farming and reallocation of some of Sure's existing spectrum within *[REDACTED]* months post-approval.

9.5 To assist in its decision whether to refuse the Proposed Transaction or to approve it with conditions, the Authority initiated the May 2023 Consultation 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 May 2023 Consultation was issued on 22 May 2023 and closed on 16 June 2023.

Developed commitments (June 2023)

9.6 In response to the May 2023 Consultation, on 16 June 2023, Sure submitted a revised 'final' set of commitments:

(a) **Commitment 1:** having been awarded 5G spectrum in the Authority's tender process, Sure considered that there would be certainty that it could deliver, through a binding commitment, a rapid rollout of 5G services to at least *[REDACTED]* of the new network's sites within *[REDACTED]* months of the completion of the Proposed Transaction;

(b) **Commitment 2**: through a binding commitment, Sure committed 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 would arise from the construction of a new, high speed combined network that would offer customers better quality and speed. Sure's binding commitment would ensure that the new network would be operational within *[REDACTED]* months of completion of the Proposed Transaction;

(c) **Commitment 3:** Sure committed to publishing an MVNO Access Offer within six months of completion of the Proposed Transaction. The MVNO Access Offer would facilitate the entry of a new third player into the Jersey market. Sure committed to ensuring that the services under the MVNO Access Offer would be available within 24 months of the Access Offer, and indicated that it would be prepared to make sufficient capacity available such that the new MVNO could reach a market share of 10-15%; and

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

9.7 Having considered these developed commitments, the Authority was not convinced that they would be sufficient to 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[66].

9.8 The Authority's assessment of Sure's 'final' commitments formed the basis of its provisional conclusions, as set out in the Provisional Findings.

The Final Commitments Package (February 2024)

9.9 In view of the Authority's provisional conclusions set out in the Provisional Findings and following further discussions and requests for information from the Authority, on 2 February 2024, Sure submitted its Final Commitments Package. The Final Commitments Package proposed the Upfront MVNO Remedy and seven other commitments. Five of these commitments were the subject of a consultation, published on 28 May 2024, and are described in more detail below.

Upfront MVNO remedy

9.10 As part of the Final Commitments Package, Sure has provided a new commitment in the form of the Upfront MVNO Remedy.

9.11 In its Final Commitments Package, Sure indicated that it had "*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"*[67]. 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.

9.12 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.[68]

9.13 As set out in the Authority's consultation, 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. The Upfront MVNO remedy is intended to be a 'fix it first' solution which means that the MVNO Agreement has been signed ahead of the Authority's final decision, with completion conditional only on receiving the required regulatory approvals. However, the Upfront MVNO Remedy would still need to form one of the conditions of clearance of the Proposed Transaction, as the MVNO Agreement will remain conditional on regulatory approval in Guernsey, which is a matter outside of the Authority's control.

9.14 Under the MVNO Agreement, Sure will 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

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[66] 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.
[67] Sure, Final Commitments Package, paragraph 1.2.
[68] Sure, Final Commitments Package, paragraph 2.2.

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, and *[REDACTED]*.

9.15 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.

9.16 Further, the MVNO Agreement seeks 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 and been granted its own Class II telecoms licence.

Additional commitments

9.17 In addition to the Upfront MVNO Remedy, Sure in its Final Commitments Package also offered the following seven commitments:

Condition 1 - Spectrum divestment: Sure will relinquish spectrum within 36 months of the Completion Date.

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.

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.

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.

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.

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).

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.

10. Assessment of the Final Commitments Package

10.1 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 are not required 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 merger decision. 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 6.30, 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 in the section on 'merger specific benefits'.

Non-coordinated effects

10.2 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.

10.3 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 providing 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 which limit Sure's ability to increase wholesale prices over time; and

(d) the length of the 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.

10.4 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 quality of service and is able to compete for all relevant customer segments.

10.5 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.[69]

10.6 The Authority recognises 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. The risk of lessening of competition during this period is, in theory, 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 there was a limited period between Airtel's exit and the Co-op's entry. However, given that Conditions 2 to 4 of the Final Commitments Package were expressed to commence on completion of the MVNO Agreement, which in turn remains conditional on receipt of regulatory approvals in Guernsey as well as Jersey, these Conditions have been updated to ensure the benchmarking of prices will take place at the date of the Authority's conditional approval of the Proposed Transaction, rather than the completion date of the merger. The Authority considers this will protect consumers from possible price increases before the benchmarking takes place should the time between possible approval and completion of the merger be prolonged as a result of other required regulatory approvals.

Coordinated effects

10.7 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.

(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.

10.8 Although the prices in the market are expected to remain transparent, the Proposed MVNO Remedy, on its own, is unlikely to be sufficient for the operators to sustain coordination in the market.

Merger specific benefits

10.9 In Conditions 6 and 7 of its Final Commitments Package, Sure commits to roll out 5G services faster and to remove HRV equipment from its network sooner than it considers it would have done in the counterfactual (Conditions 6 and 7). However, the Authority does not consider that Conditions 6 and 7 are required to address the competition concerns identified and so these Conditions will not form part of its final decision.

10.10 Moreover, the Authority considers that many of the consumer and environmental benefits that might be considered to arise from the implementation of Conditions 6 and 7 (e.g. fast rollout of 5G services, removal of mast sites by consolidating the existing Sure and Airtel sites) are likely to

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

arise with or without the merger. 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 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.

11. Responses to the Consultation

11.1 During the consultation period of Sure's Final Commitments Package, the Authority received four responses. As set out below, three of the responses received were against the Proposed Transaction on the basis of concerns that it may lead to reduced competition which may result in higher prices, lower quality of service and limited innovation. One of the responses received was in favour of the Proposed Transaction, indicating that it found Sure's Final Commitments Package sufficient to allay the Authority's competition concerns.

11.2 The responses are summarised below:

Date	From	Public / Industry	Response summary
28 May '24	*[REDACTED]*	Public	Against the merger, stating it is "*very concerning*" and "*Sure and JT have a history of collusion and their services are far from competitive when compared to UK or EU.*" Presents the view that Jersey has high prices, low quality and limited service options and that Airtel is "*vital to competition*".
28 May '24	*[REDACTED]*	Public	Against the merger, expressing concern due to reduction in network providers. Banned from using Sure services and can't move to JT. States that Airtel has proactively helped them save money, provided very good customer service and allowed them to have a rolling, rather than fixed contract.
26 June '24	Airtel	Industry	Confirmed that it does not agree with the Authority's interpretation of the data submitted by Airtel nor does it agree with the counterfactual used. Notwithstanding this, Airtel believes Sure's final commitment package will address the Authority's competition concerns and that the Co-op has the potential to be a credible player in Jersey's retail mobile market. Expressed the view that the MVNO agreement meets the threshold for exemption under Article 9 of the Competition Law.
27 June '24	Clear Mobitel	Industry	Against the merger, expressing the view that Sure's commitments are insufficient to address the competition concerns. States the reduction in competition which would stifle innovation, increase

Date	From	Public / Industry	Response summary
			prices and lower service quality, to the detriment of both consumers and businesses. Submits the view that Clear Mobitel is a third viable network operator and would provide more benefits than the proposed MVNO. The Authority is requested to reject the merger application and provide an opportunity for Clear Mobitel to progress negotiations with Airtel.
28 June '24	JT	Industry	Neutral on the proposed transaction. In response to an earlier consultation[70], a condition to require Sure to provide details of the masts to be divested was requested to be attached to the Authority's conditional approval of the Proposed Transaction.

11.3 The concerns raised by respondents largely align with the Authority's identified competition concerns (set out within this Decision and summarised at paragraph 12.1 below). However, the responses received have not been substantiated such to give reason for the Authority to change its position, set out at Section 10 above, that Sure's Final Commitments Package is capable of addressing its competition concerns.

11.4 The Authority notes that Airtel disagrees with its interpretation of the data submitted and the counterfactual reached. However, as set out in at Section 5 above, the Authority has considered Airtel's previous representations in this regard and has concluded that the counterfactual of the prevailing competitive pre-merger conditions remains the most appropriate.

11.5 Lastly, with regard to Clear Mobitel's request to reject the merger in order that it can pursue negotiations with Airtel, the Authority considers this a commercial matter and so falls outside of the Authority's remit. Moreover, given the Authority's conclusion regarding the relevant counterfactual against which to assess the competitive effects of the merger (i.e. that Airtel continues as a competitive force in the market), an alternative potential purchaser for Airtel does not alter that counterfactual assessment and, therefore, the Authority's conclusion that this merger gives rise to competition concerns, its view that remedies are required to address the competition concerns identified and its view that Sure's Final Commitments Package is capable of addressing those concerns.

11.6 Similarly, the Authority considers JT's request for a condition regarding the divestment of masts is a commercial matter to pursue with Sure.

12. Conclusion

12.1 Following the conclusion of its second detailed review, and taking into account the submissions made in response to its Provisional Findings, the Authority concluded that:

[70] C-042 - Consultation on Conditions (jcra.je)

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

(b) The Proposed Transaction, as notified, would lead to further concentration in the market, removing direct competitive constraints between the Parties (as demonstrated by 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 mobile network operators is unlikely, evidenced by the fact that there have been no new entrants in the last three 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; and

(d) The customer benefits cited by the Parties, if the Proposed Transaction were implemented without commitments, would not be sufficient to offset the likely substantial lessening of competition.

12.2 However, for the reasons set out at section 11 above, and taking into account the responses received to the May 2024 Consultation, the Authority considers that the pro-competitive effect of the Upfront MVNO Remedy, in combination with Conditions 2 to 5 within the Final Commitments Package submitted by Sure, is sufficient to outweigh the likely competition concerns identified. Further, since the launch of the Authority's consultation on Sure's Final Commitments Package, Conditions 2 to 4 have been updated to ensure that the benchmarking of prices will take place at the time of a possible conditional merger clearance by the Authority rather than the completion date of the merger. The Authority considers that this will protect consumers from possible price increases before the benchmarking takes place should the time between possible approval and completion be prolonged as a result of other required regulatory approvals. A further condition, Condition 6, has been added to ensure that Sure acquires control of no part of Airtel prior to satisfying the Condition 1. Therefore, the Authority considers it appropriate to approve the Proposed Transaction subject to conditions, those conditions being the implementation of the Upfront MVNO Remedy and (updated) Conditions 2 to 5 of the Final Commitments Package.

13. Vertical exemption for MVNO Agreement

Introduction

13.1 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*'.

13.2 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. An exemption would mean the Authority cannot take any action regarding the arrangement during the period of the exemption. However, the exemption will cease to have effect if a condition or obligation is breached.

Application for exemption

13.3 To be considered for exemption under Article 9 of the Competition Law, an arrangement must first be determined to be subject to Article 8 of the Competition Law. Article 8 of the Law states 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. Article 8(2)(a) states that this prohibition applies, in particular, to an arrangement that directly or indirectly fixes purchasing or selling prices or any other trading conditions. Article 60 of the Law requires that, so far as possible, the Authority interprets these provisions consistently with the treatment of corresponding questions arising under competition law in the European Union.

13.4 Next, to qualify for an exemption under Article 9, the Authority must be satisfied that an arrangement meets all four of the criteria listed in Article 9(3) in that it:

(a) is likely to improve the production or distribution of goods or service, or to promote technical or economic progress in the production or distribution of goods or services;

(b) will allow consumers of those goods or services a fair share of any resulting benefit;

(c) does not impose on the undertakings concerned terms that are not indispensable to the attainment of the objectives mentioned in sub-paragraphs (a) and (b); and

(d) does not afford the undertakings concerned the ability to eliminate competition in respect of a substantial part of the goods or services in question.

Views of the Parties

13.5 In May 2024, the Authority received an application from the Parties to exempt the MVNO Agreement under Article 9 of the Competition Law.

13.6 In submitting the application for exemption, Sure and the Co-op note that the exclusivity of the MVNO Agreement is inherently part of all MVNO arrangements, as it would not be possible for an MVNO to 'multi-home' across different networks and in any event the exclusivity is said to be 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 domestic UK law.[71]

13.7 Sure and the Co-op also notes that the MVNO Agreement is designed to deliver a pro-competitive effect – namely the maintenance in the long-term of three suppliers of retail mobile services in Jersey, claiming the only possible anti-competitive effect to be the potential foreclosure effect on JT. However, Sure and the Co-op notes the MVNO Agreement does not preclude JT from entering into its own arrangements with other MVNOs. In this regard, Sure and the Co-op note there are other strong retail brands already active in Jersey, some of whom already have MVNO operations in the UK and JT has sufficient network capacity to be able to enter into any such arrangement.

13.8 Finally, Sure and the Co-op consider the duration of the MVNO Agreement is important to the Authority in ensuring that the remedy provides a long-term structural remedy to address the competition concerns identified in this Decision.

13.9 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:

[71] Sure's response to the Authority's RFI dated 06.11.23, section 10.

(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 arising from the agreement 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.

Authority analysis under Article 8 of the Competition Law

13.10 When considering whether the MVNO agreement is subject to Article 8 of the Competition Law, the Authority has taken into account:

(a) that both Sure and the Co-op are entities engaged in economic activity and therefore meet the definition of 'undertaking'[72]; and

(b) that the MVNO Agreement between Sure and the Co-op, who operate at different levels of the supply chain, constitutes a vertical agreement and therefore meets the definition of 'arrangement'[73].

13.11 On this basis, the Authority concludes that the MVNO Agreement is subject to Article 8(1) of the Law.

Authority analysis under Article 9 of the Competition Law

13.12 The Authority's analysis under each of the four exemption criteria listed under Article 9(3)(a) of the Competition Law is presented below.

(a) **Improvement in the distribution of goods or services:** the MVNO Agreement is fundamental to the Authority's decision to conditionally approve the Proposed Transaction as it is expected to maintain competition in the retail mobile market, through the provision of retail mobile services.

(b) **Allow consumers a fair share of the benefits:** the purpose of the MVNO Agreement is to maintain competition in the retail mobile market, to ensure that consumers do not experience an increase in prices and/or a reduction in quality of service, choice or innovation.

(c) **Contains no restrictions that are not indispensable:** the terms of the MVNO Agreement are limited to those that should enable the Co-op to become an effective competitor in the retail mobile market.

(d) **No elimination of competition in the relevant market:** the purpose of the MVNO Agreement is to maintain competition in the retail mobile market and is therefore considered a pro-competitive agreement.

13.13 On this basis, the Authority concludes that the MVNO Agreement satisfies the criteria for exemption under Article 9.

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[72] As defined at Article 1 of the Competition Law.
[73] As defined at Article 1 of the Competition Law.

14. Decision

14.1 Under Article 22 of the Competition Law, the Authority conditionally approves the Proposed Transaction. Specifically, pursuant to Article 22(2) and Article 22(3) of the Law, the Authority's approval of the Proposed Transaction is subject to compliance with each of the following conditions:

Condition 1: The entry into force of the MVNO Agreement entered into by Sure and the Co-op on 2 February 2024. The completion of the MVNO Agreement is conditional only on receiving the required regulatory/Government approvals in Jersey and Guernsey respectively for Sure's acquisition of Airtel, and any necessary licence pre-conditions.

Condition 2 - Legacy Tariffs: Sure will not withdraw any Sure and Airtel tariffs that are active as at the date of clearance of the merger by the Jersey Competition Regulatory Authority 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 - Airtel's Basic Plan: Sure will ensure that Airtel's Basic Plan tariff that was in place at the date of clearance of the merger by the Jersey Competition Regulatory Authority 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 other available plans.

Condition 4 - Sure 4G Unlimited Plan: Sure will keep its 4G Unlimited tariff (as at the date of clearance of the merger by the Jersey Competition Regulatory Authority) 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 other available plans.

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.

Condition 6 – Compliance with Conditions 1-5: Completion of the Proposed Transaction which, in this case includes Sure acquiring any form or element of control over Airtel, is only permissible once Condition 1 has been satisfied. Thereafter, Sure will ensure ongoing compliance with Conditions 2-5 for the minimum period specified in each of these conditions. To assist the Authority in assessing compliance with the Conditions, Sure will provide the Authority with compliance statements in a form and at intervals to be agreed with Authority.

14.2 The Authority may, where appropriate and in response to a written request from Sure showing good cause, modify or substitute one of more of the above conditions set out at paragraph 14.1 of this Decision. The determination of any such application is a matter within the Authority's sole discretion.

14.3 The Conditions, as set out at paragraph 14.1, are legally binding on Sure and its subsidiaries and its directors and officers under Article 22(3) of the Competition Law. Pursuant to Article 38 of the Competition Law, if the Authority decides that either Sure, a subsidiary of Sure, or a director or officer of Sure is not complying with the Conditions, at any time, the Authority may issue directions as it considers appropriate to ensure compliance with the Conditions. Instead of, or in addition to, the issuance of a direction, the Authority may impose a financial penalty on Sure, or any subsidiary of Sure, for any breach of the Conditions.

18 July 2024 **By Order of the Jersey Competition Regulatory Authority**