



Sure's response to CICRA's Draft Decision – Broadband Market Review: Market Definition and SMP Assessment

Sure (Guernsey) Limited (“Sure Guernsey”) and Sure (Jersey) Limited (“Sure Jersey”), who are also collectively referred to as “Sure” throughout this response where that is appropriate, are submitting this paper in response to CICRA’s Draft Decision: Broadband Market – Market Review and SMP Finding (“Draft Decision”), which was published on the 19th October 2018, as CICRA document 18/41.

This version of our response is being submitted on a non-confidential basis and we are happy for CICRA to publish it in its entirety on its website.

We note that SPC was only asked to conduct a market review for the wholesale broadband market and that neither SPC nor CICRA have performed a full market review for the relevant retail broadband markets. As CICRA is aware, EU best practice is that retail regulation should not be imposed where it has been found that the associated underlying wholesale markets have been found to be either effectively competitive or subject to appropriate wholesale remedies, which ensure that competition is supported at the retail level.

The SPC analysis does consider the market definition of the fixed broadband retail markets (in fact, all market definition analysis is performed at the retail level), but it does not consider whether there is Significant Market Power (SMP) in those markets. Without an SMP analysis of the retail market, it is not logically feasible to determine whether regulation is necessary at the wholesale level. The retail market SMP analysis should be conducted using the modified greenfield approach, meaning that it should consider the retail market with and without regulation at the wholesale market level.

The EC SMP Guidelines provides the following guidance:

“Having identified the relevant retail market(s) and established whether absent regulatory intervention upstream, a risk of consumer harm due to a lack of competition in the retail market(s) would persist, NRAs should then identify the corresponding wholesale market(s) to assess whether they are susceptible to ex ante regulation”¹

In addition to the need to ascertain whether SMP exists at the retail market level with and without wholesale remedies, as a necessary part of the wholesale market review, it is important that the retail SMP review is performed in Guernsey in particular. This is because Sure Guernsey is presently regulated by an old and outdated market review (that was conducted in 2001 but not to the EC standards) in which it was found to have SMP in the retail broadband market (as part of the designation of dominance in the fixed network and services telecommunications market²). It is Sure Guernsey’s strongly held view that, with appropriate SMP remedies imposed where it holds a position of SMP at the wholesale level, it does not enjoy a position of SMP at the retail level in any part of the retail broadband market in Guernsey and all retail regulation should be discontinued.³

¹ EC SMP Guidelines paragraph 26.

² Decision 1.1 of www.cicra.gg/media/3688/t01g-decision-notice-and-report-decisions-under-the-telecommunications-bailiwick-of-guernsey-law-2001.pdf

³ As CICRA is aware, Sure Guernsey has been deemed to have a position of SMP in the retail broadband market in Guernsey³ whereas JT had its designation of SMP in the Jersey retail broadband market removed in 2010.

Responses to specific questions asked in Draft Decision

Question 1

Does the respondent agree with the market definition provided by SPC Network in its report? If the respondent has alternative views or evidence the respondent is asked to explain those and provide all of its analysis and assessment relating to this matter to inform CICRA's considerations and next steps.

Finding 1 – Guernsey and Jersey are separate geographic markets

Sure notes that SPC has reached its conclusion that Guernsey and Jersey are distinct geographic markets on the basis of first, separate companies owning the respective networks on each Bailiwick (Sure owning the network in Guernsey and JT owning the network in Jersey) and secondly, different legal and regulatory instruments applying to each Bailiwick.

Sure agrees with this conclusion whilst noting that SPC does not rule out the possibility of there being further sub-geographic markets in either or both of the Bailiwicks.

Finding 2 - Product Market definition for Guernsey:

Wholesale access to the internet at a fixed location using an access network based on local loops that are either exclusively or partially based on the copper or fibre access network or using the 4G and ultimately 5G wireless access network via a fixed device in the whole of the Bailiwick of Guernsey.

Finding 4 – Product Market definition for Jersey:

Wholesale access to the internet at a fixed location using an access network based on fibre or cable or using the 4G and ultimately 5G wireless access network via a fixed device in the whole of the Bailiwick of Jersey.

Comments on common themes to both Guernsey and Jersey product markets:

- Are broadband connections of all speeds in the same market?

When defining the product market SPC considers whether the different technologies used to deliver fixed broadband services are in the same market. They do not, however consider whether broadband services of different speeds are all in the same market. There are clear differences in the utility and functionality of broadband connections of different speeds and it is hard to accept that a connection of 20Mbps can be in the same market as a 1Gbps connection. However, in some cases it could be argued that the principle of 'the chain of substitution' applies such that, whilst the extreme low and high-speed products may not be substitutes for each other, they may each be substitutes for other services of speeds in between the extremes – thus creating a single market.

Sure considers it important that the market review is conducted to the level of accuracy and disaggregation that will ensure that, if different markets exist, they are identified as such. This analysis would most likely differ between Guernsey and Jersey as the speeds offered in the two jurisdictions vary substantially, and Sure encourages CICRA to request that SPC supplements the analysis already performed with this additional module and other modules specified in this response.

- Are 4G-based fixed wireless broadband services in the same market as fixed wireline broadband services?

Both product market definitions include "...4G and ultimately 5G wireless access network via a fixed device".

Sure notes, however, that SPC appears somewhat undecided on that point as it states as follows:

“...though the precise applications for which it [4G-based fixed broadband] is used may be different. Our discussions with operators suggest that these services are more likely to be used for browsing, email and voice/messaging services rather than for watching video content and are used by more price sensitive customers as well as seasonal workers or new arrivals on the island living in temporary accommodation whilst they find a permanent home.”⁵

This statement suggests that 4G-based fixed broadband is not substitutable for a wireline broadband connection, as the functionality is different. If the broadband market were to be divided into markets for different speeds of broadband access, then it is possible that 4G-based fixed wireless broadband services would be substitutable for the lower speed wireline broadband services, but SPC has not performed any analysis as to whether all speeds of broadband services are in the same market.

If CICRA were to perform a SSNIP test on 4G-based fixed broadband services and wireline-based fixed broadband services, Sure does not believe that the price increase would be unprofitable due to a sufficient number of customers moving to 4G-based fixed broadband services.

Sure does not believe that the analysis presented by SPC demonstrates clearly that 4G-based fixed access broadband services are direct substitutes for wireline broadband services. Combined with the absence of an analysis of whether all broadband speeds are in the same market we believe that there is no case for concluding that 4G-based fixed broadband services are in the same market as wireline-based fixed broadband services.

Sure notes that the inclusion of 4G only refers to it as a means of fixed wireless access and does not extend to include 4G as a mobile wireless access. Sure agrees that 4G mobile broadband should not be included in the same market as fixed broadband services.

- Will 5G-based fixed wireless broadband services be in the same market as fixed wireline broadband services?

SPC suggests that, by and large, 5G-based fixed wireless broadband services will likely be similar to 4G-based fixed wireless services and 5G-based fixed broadband services should (as SPC has suggested for 4G-based fixed broadband services) be part of the fixed broadband market. This is at odds with the position stated elsewhere in the SPC report⁶, which sets out that ‘it is not possible to determine the extent to which 5G mobile will be a competitive constraint on a hypothetical monopolist of fixed broadband access and therefore [we] are of the view that it should not be included in the relevant product market at this time’.

Sure considers that it is premature to determine at this stage that any 5G-based services are in the same market as wireline-based broadband services. Whilst there are moves to launch 5G services in the Channel Islands relatively quickly, it is unlikely that services will be available to large numbers of customers within the three-year period covered by this review, so it would be inappropriate to stretch the scope of the market definition to include as yet untried technologies and services.

There is considerable uncertainty about how 5G services will be launched, how the network investments will be funded and whether the current three mobile network operators (MNOs) will have separate 5G networks or have shared access to a single 5G infrastructure. The high risk of the investment in 5G infrastructure, and the uncertainty of the types of services that will be offered across that infrastructure and the resulting revenue streams, means that it is inappropriate to make decisions

⁵ Page 16 of SPC Report, last paragraph

⁶ Page 19

of how 5G-based services will fit into the regulatory landscape. In addition, there is currently no guidance available for the Channel Islands markets as to the expected amount of spectrum that will be needed or be made available within the period of this review. Until such time as such information becomes available it would be dangerous to make any assumptions as to the substitutional potential of 5G, versus fixed wireline broadband access.

Given the scant data available about how 5G networks and services will be positioned relative to existing services and technologies, Sure believes strongly that CICRA should exclude 5G-based services from any regulatory interventions until such time that more clarity exists with regards to the points briefly outlined above.

- Are broadband services for residential and business customers in the same market?

The SPC paper also does not address this important aspect of the market analysis. In both Jersey and Guernsey there are different product offerings for residential and business customers and, although it is possible for customers of one group to purchase products designed for the other group, there are important differences between the product offerings. Without a proper analysis of these different product offerings, it is not possible to determine whether they belong in the same market or should be defined as separate relevant markets.

- Are leased lines and fixed broadband services in the same market?

We note that SPC has not considered whether leased lines are substitutes for broadband services, and vice versa. Within Jersey, JT has rolled out a FTTP network and offers very high speed retail and wholesale broadband services including a symmetrical 250Mbps service and a 1Gbps service. Plans have also been shared that include a symmetrical 1Gbps services and a 'corporate 10Gbps' broadband service to be introduced in the next two years. JT's current broadband portfolio is likely to lead to substantial substitution from leased lines to broadband services, arguably creating conditions where the two markets should be considered as one.

In Sure's experience, it is good industry practice that market reviews should consider whether other product markets could or should form part of the market for the core product, and Sure considers that, in Jersey in particular, there are likely to be strong reasons for why this may be the case. We note that SPC has given no consideration to the extent to which leased lines could be considered as substitutable for this network. In Guernsey, it is Sure's assessment that leased lines are unlikely to form part of the same market as fixed broadband, due to the lower speeds offered in Guernsey on the hybrid copper/fibre fixed broadband market.

Comments on Guernsey specific market definition

- Are there sub-geographic markets within Guernsey?

We are not convinced that a compelling case has been presented to dismiss the possibility of there being sub-geographic markets in Guernsey. We provided evidence to CICRA and SPC about the extent to which JT has built out a fibre network in Guernsey as well as noting that JT does not operate under the same commercial restrictions as Sure. This means that it does not have to justify investments to the sort of payback periods that Sure has to comply with for its shareholders.

Drawing a comparison with Ofcom's findings in the UK that there would need to be two Principal Operators in addition to BT to justify defining sub geographic markets is not appropriate for the Guernsey market. There are three providers of retail fixed broadband services in Guernsey: Sure, JT and Airtel. Airtel offers only fixed wireless broadband services, which it delivers using its own network, it does not use any wholesale broadband products from Sure. This makes JT the only user of Sure's

wholesale broadband products in Guernsey. In locations where JT has deployed its own network, it will naturally use that network in preference to the Sure wholesale broadband products, thus creating a geographic area (or several areas) where there is no demand for the Sure wholesale broadband product at all. As Airtel self-provides all its broadband network connectivity and JT and Sure do the same in locations where JT has a network, Sure believes this **does** justify the creation of one or more separate geographic markets. It seems clear that the market conditions in such locations are substantially different (for example, full infrastructure competition) from locations where there is reliance on wholesale access to Sure's network.

By comparison, in the UK there are many retail providers of broadband services that rely on wholesale access to BT's network (or that of other local network providers). Ofcom was concerned with ensuring that such retail broadband providers had access to a choice of wholesale providers, before it would consider defining a separate geographic market. The explanations above make it clear that the market conditions in the UK and in Guernsey are in no way comparable and Sure does not accept that the arguments presented by SPC for not defining one or more separate geographic markets are valid in Guernsey.

Whilst the current geographic area covered by JT's FTTP network may not be large, it is in a very important part of St. Peter Port and it is very possible that JT may choose to extend that coverage, including to other areas of Guernsey. Sure has already drawn CICRA's attention to the fact that JT is evidently not subject to the constraints faced by commercial entities, such as the need for demonstrating a viable business case before investment decisions are made. JT's initial investment enables it to compete aggressively for connections to important businesses in Guernsey, but Sure is unable to do the same, despite it clearly not holding a position of SMP in that area. Sure considers it critically important that it is at least allowed to compete freely with JT in areas where JT deploys network in Guernsey, and therefore submits that a separate geographic market needs to be defined for locations where JT has or plans to deploy its own fixed access network within the review period.

The same concern does not apply in Jersey, as Sure's investments are subject to careful and critical commercial scrutiny before network deployment is approved and Sure then faces competition from JT, which is not under such scrutiny. It is also relevant that JT is not presently subject to retail broadband SMP regulation.

Retail versus wholesale market definitions

Sure acknowledges that SPC has simply assumed that the wholesale market definition will mirror the retail market definition. Sure does not disagree that this approach is acceptable in the context of this particular market review (subject to the several issues set out above regarding how the retail market definition has been arrived at), but cautions against using that approach as a general rule as there may well be differences between retail and wholesale market definitions.

We have commented above on the components lacking from the retail market definition performed by SPC. It is possible that, once those components have been completed, it may no longer be appropriate to simply assume that retail and wholesale markets are the same.

Importance of defining relevant markets correctly

The EC SMP Guidelines⁹ provides the following clarification of when separate geographic markets exist:

⁹ EC SMP Guidelines paragraph 48.

“the relevant geographic market comprises an area in which the undertakings concerned are involved in the supply and demand of the relevant products or services, in which the conditions of competition are sufficiently homogeneous, and which can be distinguished from neighbouring areas in which the prevailing conditions of competition are significantly different. Areas in which the conditions of competition are heterogeneous do not constitute a uniform market.”

As for product markets the EC SMP Guidelines also offers guidance:

“...a relevant product market "comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use”¹⁰

It is important to define individual product or geographic markets where market conditions differ sufficiently from other products or geographies resulting in the wider market not being characterised as homogenous. Defining separate product and geographic markets ensures that the SMP analysis is conducted at the disaggregated homogenous market level, rather than at the level of a single heterogenous market level. SMP analysis at a single heterogenous market level can often disguise differences in competitive conditions within that single market and can result in over- or under-regulation¹¹ and consequent market distortion to the detriment of customers and consumers.

Question 2

Does the respondent agree with the assessment of market power provided by SPC in its report? If the respondent has alternative views or evidence the respondent is asked to explain those and provide all of its analysis and assessment relating to this matter to inform CICRA’s considerations and next steps.

Finding 3 Sure has SMP on the market (as defined in Finding 2) in Guernsey

Finding 5¹² JT has SMP on the market (as defined in Finding 4) in Jersey.

Whilst Sure does not disagree that both Sure and JT are likely to enjoy a position of SMP in their respective home markets (Bailiwicks of Guernsey and Jersey respectively) once the product market definitions have been revisited and properly defined, Sure considers that the very significant issues identified in the market definition section above makes it impossible for it to agree with the SMP findings.

More specifically, we do not agree that Sure holds SMP in the areas where JT has deployed its own FTTP network in Guernsey. We believe that the definitions of the product markets in the two jurisdictions need to be reconsidered to take into account the many points raised above, before we can accept a position of SMP in Guernsey or indeed feel comfortable that JT is subject to the SMP remedies in the right product areas in Jersey to enable Sure and others to compete effectively with JT.

¹⁰ EC SMP Guidelines footnote 17.

¹¹ Often referred to as Type 1 and Type 2 regulatory errors. This issue is recognised by BEREK (‘Common Position on geographic aspects of market analysis’ 5 June 2014) and has been discussed in McChesney, Fred S. "Talking 'Bout My Antitrust Generation Competition for and in the Field of Competition Law". Emory LJ 52 (2003): 1401 and in Bauer, Johannes M., and Erik Bohlin. "From static to dynamic regulation." Intereconomics 43.1 (2008): 38-50.

¹² There seems to be a typographical error in the CICRA document, where this is also noted as Finding 4, when it should be Finding 5.

CONCLUSION

Sure believes that CICRA must revisit the significant issues identified by Sure with respect to the proposed market definitions before it can reach any determinations of SMP. To not do so would undermine CICRA's ability to justify the imposition of any remedies in the relevant markets and increase the risk of making either Type 1 or Type 2 regulatory errors.

Submitted by:

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