BUSINESS CONNECTIVITY MARKET REVIEW

T1480GJ

Proposed decision:

Market definition & Competitive assessment

12 April 2022

GUERNSEY COMPETITION & REGULATORY AUTHORITY

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1. Executive summary

Introduction

1.1 The Guernsey Competition and Regulatory Authority (**GCRA**) is consulting on its review of the market for business connectivity services in Guernsey – the Business Connectivity Market Review (**BCMR**). The review broadly follows the methodology that is well established across the European Union, adapted to take account of the particular circumstances of Guernsey.

1.2 The focus of the review is on the provision of leased lines. These are the essential building blocks used to put in place secure, dedicated data transmission connectivity between fixed locations. Retail leased lines are bought by businesses and public sector organisations, while wholesale leased lines are bought by telecoms operators, both to provide their retail offerings and to extend their own networks.

1.3 The leased lines market in Guernsey is served by two network operators, Sure (Guernsey) Limited (**Sure**) and JT (Guernsey) Limited, and three service-based operators, Business Telecom Limited (**Business Telecom**), C5 IT Services (**C5**) and Logicalis (Guernsey) Limited (**Logicalis**).

1.4 The purpose of the review is to examine the competitive conditions that prevail regarding the delivery of business connectivity services in on-island retail and wholesale markets.

1.5 This document sets first sets out the response to the GCRA's March 2021 consultation, before presenting its proposed decision on the market definition of the on-island leased lines markets, retail and wholesale, and proposed findings on the level of competition in the defined markets.

1.6 As part of the BCMR process, in those areas where competition is found to be deficient, the GCRA will, in a separate remedies consultation process that will follow this market definition and competitive analysis, put forward proposals for regulatory action.

March 2021 consultation and response

1.7 In March 2021, the GCRA consulted on a BCMR Draft Decision (the **March 2021 consultation**). In that consultation, the GCRA set out its views on the definition of the retail and wholesale markets for business connectivity, assessed the level of competition in the defined markets and came to proposed Significant Market Power (**SMP**) findings. In summary, the findings were:

- Four retail and four wholesale markets comprising two bandwidth markets – below 1 Gbps and 1 Gbps and above (Very High-bandwidth or VHB) – and two geographic markets – Urban (GY1, GY2 and GY4) and Rest of Guernsey.
- In the retail markets:
  - ➢ for connectivity less than 1 Gbps, in the Urban area (GY1, GY2 and GY4), Sure and JT were found to be jointly dominant, while Sure was found to have SMP in the Rest Of Guernsey.
  - ➢ for VHB connectivity in the Urban area, JT was found to have SMP, with Sure dominant in Rest Of Guernsey as the only connectivity provider in this area.
- In the wholesale markets, Sure was found to have SMP in the wholesale provision in the whole of Guernsey for all bandwidth products.

1.8 The GCRA received four responses, from Sure, the JT Group, Newtel (Guernsey) Limited (**Newtel**) and Guernsey Airtel Limited (**Airtel**). Sure and JT's submissions raised concerns about the market identification and competition analysis approach applied by the GCRA. Sure and JT also raised concerns about the level of analysis and explanation provided by the GCRA in reaching its conclusions. Airtel and Newtel raised more specific concerns about matters related to pricing, for example.

1.9 In submissions on the March 2021 consultation, some respondents advocated a market review approach that was more consistent with that undertaken by the European Union. In response, in this paper, the GCRA has more clearly applied the European approach to defining markets and assessing competition, adapted to take account of the particular circumstances of Guernsey.

1.10 Leased lines data submitted by operators to the GCRA in response to the Call for Information in October 2019 was of variable quality, limited in coverage, often inconsistent and in some instances incorrect. In response, the GCRA issued a Direction to Sure and JT requiring the provision of additional information on their leased lines businesses, which was provided between August and October 2021. While there remain significant issues with the quality and breadth of information held and provided by these operators, the Direction did yield useful additional information permitting further analysis. The GCRA has also undertaken further and more detailed leased lines pricing analysis.

1.11 In addition, following the passage of time, new relevant market information has become available, such as Sure's Government contract to fast-track its fibre rollout across the entire Bailiwick.

1.12 As a result of the GCRA's response to submissions received, additional information gathered, and further analysis undertaken since the publication of the March 2021 consultation, the GCRA has arrived at substantially different conclusions in this paper. As such, the GCRA is providing a further opportunity for comment and therefore this paper replaces the March 2021 consultation as a 'proposed decision' for the purposes of Section 5(2) of *The Telecommunications (Bailiwick of Guernsey) Law, 2001* (the **Telecoms Law**).

Demand and pricing

1.13 Since the previous BCMR in 2014, demand for retail leased lines has grown by 30 per cent. The key drivers have been business demand and from mobile network operators for mobile backhaul. Growth in demand for leased lines bandwidth is expected to continue, despite an expected decline in the number of subscriptions, as higher bandwidth products are substituted for lower bandwidth leased lines.

1.14 Retail price benchmarking shows that very-high bandwidth (**VHB**) (1 Gbps1 and above) retail leased line prices in Guernsey are materially higher than comparable jurisdictions. 'Different exchange' prices for a < 1Gbps products are also significantly higher than comparable jurisdictions. Benchmarking of Sure's wholesale prices shows a similar story.

1.15 In response to a January 2022 GCRA consultation on Sure's 2015 wholesale price control, Sure announced a voluntary reduction in the monthly rental charges of the majority its VHB wholesale products and removal of 'Same' and 'Different' exchange pricing. Following an assessment of Sure's price reductions, the GCRA concluded its price control amendment consultation in March 2022, noting that there is room for further price reductions towards cost-reflective prices.

Proposed decision

<u>Market review approach</u>

1.16 In response to concerns raised by some respondents to the March 2021 consultation, the GCRA has adopted the European Union approach to market analysis in this proposed decision. This entails a three-step process:

- First, identify and define the relevant retail and wholesale markets using the Small but Significant Non-transitory Increase in Price (**SSNIP**) test, also known as the Hypothetical Monopolist Test (**HMT**), and consideration of a range of other relevant factors.
- Second, apply the three-criteria test (see paragraph 1.21) to assess whether the defined markets are susceptible to ex-ante regulation.
- Third, assess whether the markets are effectively competitive, which involves assessing whether any operator has SMP or joint SMP in any of the relevant markets.

1.17 There is a fourth and final step, where SMP is found, which is assess the appropriate remedies, based on the nature of the competition problem, or market failure, identified in the relevant markets. The GCRA proposes to undertake the remedies step in a separate process following the conclusion of the market definition and competitive assessment stages.

<u>Retail market definition</u>

1.18 The GCRA's view of the market for retail leased lines is that it should include on-island circuits, leased lines of all bandwidths and all delivery technologies. The GCRA's assessment is that value-added downstream retail products, such as IP connectivity, are not subject to the same demand and supply characteristics as leased lines, and so do not form part of the same market.

1.19 In relation to the geographic scope, the GCRA's view is that, while there are expected to be variations in demand and supply conditions associated with, for instance groups of customers who are geographically concentrated, these variations do not result in clear and persistent boundaries which would indicate a separate geographic retail market within Guernsey.

<u>Wholesale market definition</u>

1.20 The GCRA's view is that the wholesale market matches the retail market in that it includes leased lines of all bandwidths, all delivery technologies and is island-wide. In addition, the GCRA's assessment is that it also includes self-supplied leased lines, dark fibre and duct access.

<u>Competition assessment</u>

1.21 In its competition assessment, the GCRA first applied the European Union's three-criteria test to determine whether the relevant retail and wholesale markets merits *ex ante* regulation. This cumulative test assesses the following market conditions:

- the presence of high and non-transitory structural, legal regulatory barriers to entry;
- a market structure which does not tend towards effective competition within the relevant time horizon, having regard to the state of infrastructure-based and other competition behind the barriers to entry; and

- the insufficiency of competition law alone to adequately address the market failure(s) concerned.

Retail competition

1.22 The GCRA's assessment is that the retail market does not meet the three-criteria test and so is not susceptible to *ex ante* regulation. The GCRA's view is that no operator can behave independently of competitors and customers when setting the relevant retail charges and that therefore no operator enjoys SMP in the retail provision of leased lines services in Guernsey. While the GCRA recognises that issues relating to competition still exist in the retail leased lines market, including excessive prices for certain products, it takes the view that these are best tackled by appropriate regulation at the wholesale level.

Wholesale competition

1.23 The GCRA's assessment is that the wholesale on-island leased lines market on Guernsey fulfils the three criteria test and is, therefore, susceptible to *ex ante* regulation. Following a forward-looking analysis of market characteristics, taking into account market shares, trends in market share and other criteria that may constitute barriers to entry and/or expansion, the GCRA concluded that Sure's:

- stable market share in excess of the European Union's 50 per cent threshold for dominance means it remains the major player in the provision of on-island wholesale leased lines in Guernsey.
- access network confers competitive advantage in the market, along with its ability to take better advantage of economies of scale and scope, and its vertical integration.
- position in the wholesale market for on-island leased lines would confer the ability and incentive to leverage market power into the retail market.

1.24 Taking these factors into consideration, in the absence of wholesale regulation, the GCRA found that Sure can act independently of customers and other network operators in its wholesale pricing structure for the wholesale services under investigation. The GCRA's view, therefore, is that Sure should be designated with SMP in the wholesale market.

Summary of key elements of the proposed decision

1. Market definition

a) Retail market for on-island leased lines:

- the product market should not be:
  - narrowed to reflect the delivery technology i.e. comprises both Alternative Interface and Traditional Interface lines
  - broadened to include business or residential fixed broadband, reflect the purchase by business customers of business connectivity solutions other than retail leased lines nor include off-island leased lines
- all bandwidths used for delivering leased lines are in the same market

- the geographic market is island-wide.

b) Wholesale market for on-island leased lines:

- The GCRA's conclusions in the retail market are mirrored in the wholesale market
- The market should not be narrowed to reflect customer use of leased lines e.g. mobile backhaul
- Self-supply should be included
- The market should be broadened to include duct and dark fibre access
- The geographic market is island-wide.

2. Three-criteria test

a) Retail market:

- Not passed – wholesale access remedies mean that there are no high and enduring barriers to entry and the retail on-island market is therefore not susceptible to *ex ante* regulation.

b) Wholesale market:

- Passed – meets all three elements of the test and the wholesale on-island market is therefore susceptible to *ex ante* regulation.

3. SMP designation

a) Retail market – no operator designated.

b) Wholesale market – Sure designated with SMP:

- stable market share in excess of European Commission dominance threshold
- presence of barriers to entry and expansion
- presence of economies of scale and scope
- evidence of excessive profits
- lack of countervailing buyer power.

Representations or objections

1.25 The GCRA invites interested parties to make representations or objections in respect of the proposed decision by **4pm, Monday 16 May 2022.** If you do not agree with the GCRA's conclusions presented in this Proposed Decision, or the evidence on which the GCRA relied to draw its conclusions, please provide alternative suggestions supported by alternative evidence.

1.26 Responses can be submitted by email to info@gcra.gg or alternatively in writing to:

GCRA
Suite 4, 1st Floor,
La Plaiderie Chambers,
La Plaiderie
St Peter Port, GY1 1WG

1.27 All written comments should be clearly marked *'BCMR Proposed decision: Market Definition & Competitive Assessment'*. The GCRA's normal practice is to publish responses to consultations on its website. If any part of a response is held to be commercially confidential, it should be clearly marked as such.

PART 1: INTRODUCTION

2. Introduction

Leased lines

2.1 Leased lines are high speed, high-quality connections that form the backbone of Guernsey's key digital infrastructure by supporting the provision of business, mobile and residential broadband services on the island. The wholesale products and services used by businesses fall under the European Commission's 'Market 4: Wholesale high quality access provided at a fixed location'. As these products are primarily used for business communications, they are referred to here as the Business Connectivity Market.

2.2 Leased lines use Traditional Interfaces (legacy analogue and digital interfaces) and Alternative Interfaces (such as Ethernet)[1] and fulfil the following quality characteristics:

- dedicated connectivity with no contention;
- scalable and/or symmetric bandwidth; and
- resiliency and security – commercial agreements guaranteeing high level of quality and low resolution times should a fault in the service occur.

2.3 While this type of connectivity can and sometimes is self-provided by end-users (for example, by the use of private radio or microwave links), typically it is put in place via the procurement of leased lines from licensed providers of communications networks and services.

2.4 Leased lines can also be purchased as part of a larger service, that may include value added services such as internet access/IP feed, private voice and data services, Virtual Private Networks (**VPNs**), cloud computing, data storage/disaster recovery and network monitoring and technical support. These are commonly referred to as 'managed services'. These are supplied to business customers either by licensed operators or by systems integrators, the latter by purchasing leased lines from upstream providers and then selling end-to-end business connectivity solutions to end-customers.

2.5 Leased lines are also used by licensed operators to provide mobile network backhaul. While radio links would commonly be used for connecting mobile base stations to the core network, leased lines are required to enable the transmission of mobile voice and data traffic aggregated from the access layer of mobile networks. The advent of 4G mobile services saw an increased demand for fibre access to the base station, with leased lines deployed to fulfil this demand too. The introduction of 5G will see further demand increases for backhaul.

2.6 Fixed broadband providers also use leased line services as an important component of their networks, in order to aggregate and convey data traffic within and across their networks.

2.7 Leased lines are made available by network operators in different ways. Retail leased lines are sold directly to end-user businesses as well as to organisations providing managed business connectivity

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[1] See the Glossary for a description of the two interface types.

services to businesses. Leased lines are also offered to other telecoms operators on a wholesale basis, either to offer as a retail service to their own customers or to support the provision of their fixed and mobile broadband services, including extending their own networks.

2.8 Leased lines are commonly split into two categories. The first is on-island leased lines, which originate and terminate within Guernsey. Off-island leased lines originate in Guernsey but terminate elsewhere, usually Jersey, the United Kingdom (**UK**) or France.[2]

2.9 Annex 1 provides more background information on leased lines, including telecoms operators providing leased line services, current regulatory arrangements, market structure and Government policy.

Background to this document

2.10 In October 2019, the GCRA issued a Call for Information at the start of its BCMR in Guernsey.[3]

2.11 In March 2021, the GCRA consulted on a BCMR Draft Decision.[4] In that consultation, the GCRA set out its views on the definition of the retail and wholesale markets for business connectivity, assessed the level of competition in the defined markets and came to proposed SMP findings.

2.12 Responses to the March 2021 consultation, which are available on the GCRA website, were received from the JT Group, Sure, Newtel and Airtel. A high-level summary of responses is provided in Section 3. Specific comments concerning particular aspects of the March 2021 consultation are referenced in relevant sections of this document.

2.13 In June 2021, the GCRA issued a Direction to Sure and JT requiring the provision of additional information to inform the BCMR market definition and market power assessments. Sure and JT provided further information related to their leased line businesses between August and October 2021, to support further analysis.

2.14 In this document (the **proposed decision**), the GCRA reviews the response to the March 2021 consultation and, applying the broad principles developed by the European Union and published in several European Commission recommendations and guidelines relevant to the regulation of markets within the electronic communications sector, adapted to take account of the particular circumstances of Guernsey, sets out its proposed decision.

Purpose of the review

2.15 The GCRA is consulting on its review of the market for business connectivity services in Guernsey. The review broadly follows the methodology established across the European Union,

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[2] The annual Telecommunications Statistics and Market Report produced by Statistics Jersey in collaboration with the GCRA and Jersey Competition Regulatory Authority, further splits the off-island category into those leased lines that terminate in Jersey (inter-island) and those that terminate elsewhere (off-island).

[3] GCRA (2019). *Business Connectivity Market Review: Call for Information (Non Statutory)*, T1480GJ, October 2019: https://www.gcra.gg/media/598126/business-connectivity-market-review-call-for-information.pdf

[4] GCRA (2021a). *Business Connectivity Market Review, Draft Decision*, T1480GJ, March 2021: https://www.gcra.gg/cases/2019/t1480gj-business-connectivity-market-review/t1480gj-business-connectivity-market-review-market-definition-smp-assessment-draft-decision/

2.16 The main purpose of a market review is to identify the competitive conditions prevailing in a market by assessing systematically the competitive constraints that are faced by licensees in the market. The purpose of this review is to examine the competitive conditions that prevail regarding the delivery of business connectivity services in on-island retail and wholesale markets. In those areas where competition is found to be deficient, in a subsequent process the GCRA will put forward proposals for regulatory action.

2.17 The GCRA's view is that this market review, including any regulatory measures it will consider at the remedies stage, will ensure that the benefits of competition are felt by users of business connectivity services in Guernsey.

Structure of this document

2.18 The remainder of this document is structured as follows:

- Section 3 sets out a summary of the March 2021 consultation.
- Section 4 presents a summary of the responses to the March 2021 consultation.
- Section 5 sets out the GCRA's consideration of the response summary.
- Section 6 considers leased lines demand and pricing.
- Section 8 summarises the market review approach.
- Section 9 presents the proposed retail market definition.
- Section 10 sets out the proposed wholesale market definition.
- Section 11 presents the three-criteria test for the retail and wholesale markets.
- Section 12 contains the competitive assessment of the leased lines markets.
- Section 13 details the consultation process and next steps.
- Annex 1 provides background information on the leased lines market.
- Annex 2 outlines the GCRA's legal requirements and licensing framework underpinning the market review.
- Annex 3 provides further detail on the GCRA's market analysis approach.

PART 2: MARCH 2021 CONSULTATION & RESPONSE

3. Summary of March 2021 consultation

Retail market definition

3.1 The March 2021 consultation identified 4 retail markets:

- Two product markets:
  - ➢ two products based on speed – below 1 Gbps and 1 Gbps and above (i.e. VHB);
  - ➢ no distinction between delivery technology and no separate backhaul product market.
- Two geographic markets:
  - ➢ an Urban area comprising St Peter Port (GY1), St Sampson (GY2) and St Martin (GY4);
  - ➢ all other postcodes falling into the Rest of Guernsey (ROG).

Table 3-1: March 2021 consultation – Retail markets

Product	Geographic	Retail market
< 1 Gbps	Urban	Market 1
	Rest of Guernsey	Market 2
>= 1 Gbps (VHB)	Urban	Market 3
	Rest of Guernsey	Market 4

Wholesale market definition

3.2 The March 2021 consultation identified 4 wholesale markets that match the retail markets:

- Two products based on speed – below and above 1 Gbps.
- Two geographic markets – the Urban area includes St Peter Port (GY1), St Sampson (GY2) and St Martin (GY4) with all other postcodes falling into the Rest of Guernsey (ROG).

Table 3-2: March 2021 consultation – Wholesale markets

Product	Geographic	Wholesale market
< 1 Gbps	Urban	Mkt 5
	Rest of Guernsey	Mkt 6
>= 1 Gbps (VHB)	Urban)	Mkt 7
	Rest of Guernsey	Mkt 8

Competition assessment

3.3 In the competition assessment in the March 2021 consultation, the GCRA reached the following conclusions:

- **Retail market**:
  - For connectivity less than 1 Gbps, in the Urban area (GY1,GY2 and GY4), Sure and JT were found to be jointly dominant, while Sure was found to have SMP in the Rest Of Guernsey.
  - For VHB connectivity in the Urban area, JT was found to have SMP, with Sure dominant in Rest Of Guernsey as the only connectivity provider in this area.
- **Wholesale market** – Sure was found to have SMP in the wholesale provision in the whole of Guernsey for all bandwidth products.

Table 3-3: March 2021 consultation – SMP

Product	Geographic	SMP designation	
		Retail	Wholesale
< 1 Gbps	Urban (GY1, GY2, GY4)	Sure & JT	Sure
	Rest of Guernsey	Sure	
>= 1 Gbps (VHB)	Urban (GY1, GY2, GY4)	JT	
	Rest of Guernsey	Sure	

4. Response to the consultation

Introduction

4.1 As noted in Section 2, responses to the March 2021 consultation were received from JT, Sure, Newtel and Airtel in March 2021. This section provides a high level summary of the responses, with specific comments discussed below.

4.2 JT and Sure's responses were substantively concerned with the market identification and competition analysis approach and or level of analysis/ explanation applied in the consultation. Both JT and Sure took particular exception to the proposed finding of joint dominance. In particular, concern was raised that the GCRA had not applied the standard European Union approach to the regulation of markets within the electronic communications sector. Airtel and Newtel raised more specific concerns about matters related to pricing, for example.

4.3 This section provides a high-level summary of responses, with responses on specific matters considered in relevant sections of the remainder of this document.

JT response

4.4 JT's response raised concerns with the GCRA's analytical approach, the adequacy of the evidence presented and conclusions drawn. JT did not support the GCRA's draft retail market definition, noting that it ‘must derive from a conclusion that the retail market for business connectivity services in Guernsey has become significantly <u>less</u> competitive since 2014.’[5]

4.5 JT submits that the market should be defined as ‘a single product market for leased lines (including for mobile operators) at both the retail and wholesale level, on an all-island geographic basis.

Sure response

4.6 Sure’s March 2021 response dealt almost exclusively with its concerns with the GCRA’s market analysis process and lack of rigorous analysis to support its conclusions. Sure urged the GCRA to ‘restart this draft decision stage of the BCMR process and to perform the relevant analyses in accordance with good international practice as summarised in the introductory section of this document.’[6] While not setting out an alternative complete market definition or competitive assessment conclusion, Sure noted its support for two geographic markets, at the wholesale level.[7]

4.7 Subsequently, in October 2021, in the context of the Direction, Sure presented an alternative market definition and SMP proposal.[8] Sure proposed [✂] retail and [✂] wholesale markets. The key departure from the March 2021 consultation included [……………….. ✂ ……………….].

Airtel response

4.8 Airtel submitted that it agreed with the strategy and reasons for the market segmentation including the outcomes set out in the consultation, but requested that dark fibre and duct access be included in the wholesale product market.[9] Airtel submitted the former ‘is the best suited product for 4G hub sites and in future for 5G sites where high capacity is much needed’. Airtel also submitted that off-island leased line should be a part of this consultation.

4.9 Airtel requested the provision of fractional speed products by all suppliers to assist Airtel to optimally dimension on-island connectivity:

> In <1Gbps product segment, step sizes of 100 Mbps bandwidth should be offered to suit sites with varying capacities.[10]

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[5] JT Group (2021). *Response to the March 2021 consultation*, 18 March 2021: page 3.

[6] Sure (2021a). *Response to March 2021 consultation*, 1 April 2021: page 2.

[7] Sure, 2021a: page 13.

[8] Sure (2021b). *Proposals for GCRA BCMR*, October 2021.

[9] Airtel (2021). *Response to March 2021 consultation*, 25 March 2021.

[10] Airtel, 2021: page 1.

Newtel response

4.10 Newtel raised several pricing matters. First, it submitted that the 'concept of same and different exchange does not make any sense [anymore].' Newtel stated that:

> Fibre is cheaper that old coax type service and allow capacity of up to 1.4 Tbps. Sure and JT to an extent are retaining that model which makes it impossible to compete in a level playing field when a circuit is ordered from and address to a "different exchange." [11]

4.11 Newtel queried the reason for a 1Gbps leased line costing £12,000 per annum in Jersey compared to £24,000 per annum in Guernsey. Newtel also submitted that there is not 'much difference in cost between a 10Mbps and a 10Gbps, however a 10Gbps is 10 times higher in prices that a 10Mbps.'

5. GCRA consideration

5.1 In submissions on the March 2021 consultation, some respondents advocated a market review approach that was more consistent with that undertaken by the European Union. In acknowledgement, in this paper, the GCRA has more clearly applied the European approach to defining markets and assessing competition, adapted to take account of the particular circumstances of Guernsey.

5.2 Leased lines data submitted by operators to the GCRA in response to the Call for Information in October 2019 was of variable quality, limited in coverage, often inconsistent and in some instances incorrect. In response, the GCRA issued a Direction to Sure and JT requiring the provision of additional information on their leased lines businesses, which was provided between August and October 2021. While there remain significant issues with the quality and breadth of information held and provided by these operators, the Direction did yield useful additional information permitting further analysis. The GCRA has also undertaken further and more detailed leased lines pricing analysis.

5.3 In addition, following the passage of time, new relevant market information has become available, such as Sure's Government contract to fast-track its ubiquitous fibre rollout across the entire Bailiwick.

5.4 As a result of the GCRA's response to submissions received, additional information gathered, and further analysis undertaken since the publication of the March 2021 consultation, the GCRA has arrived at substantially different conclusions in this paper. As such, the GCRA is providing a further opportunity for comment and therefore this paper replaces the March 2021 consultation as a 'proposed decision' for the purposes of Section 5(2) of the Telecoms Law.

5.5 Part 2 presents updated information on leased lines demand and pricing relevant to the GCRA's proposed decision on BCMR market definition and competition assessment that is set out in Part 3.

[11] Newtel (2021). *Response to March 2021 consultation*, 26 March 2021: page 1.

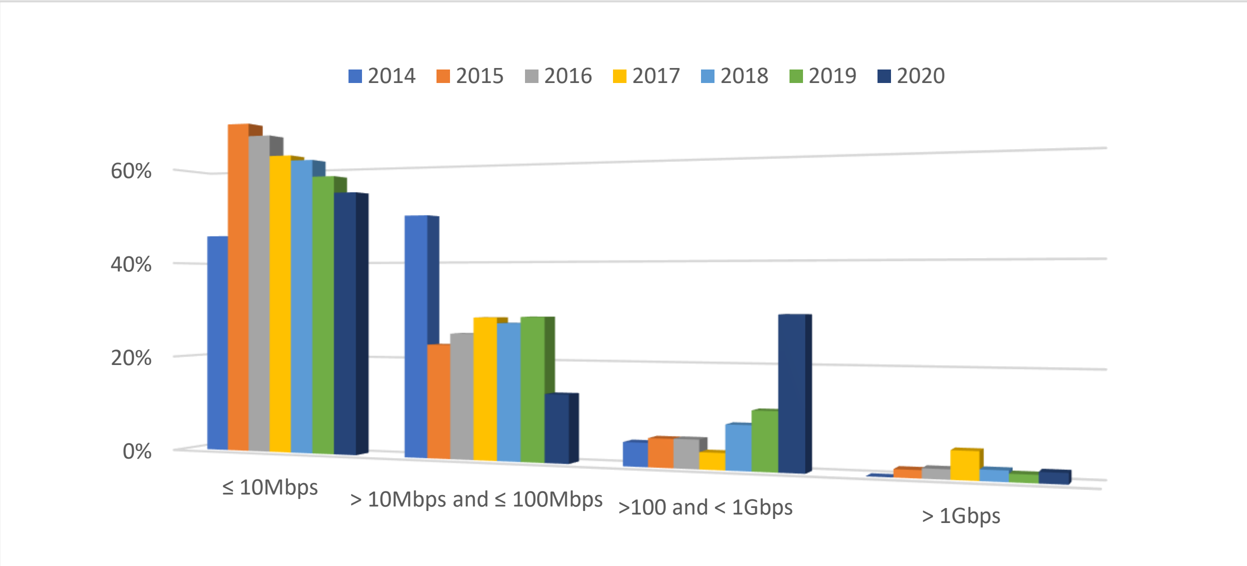
PART 3: LEASED LINES DEMAND AND PRICING

6. Demand

Historical performance

6.1 Since the 2014 BCMR, demand for retail leased lines has grown by 30 per cent, as shown in Figure A1.1 above. The key drivers have been business demand and from other licenced (**OLOs**) for mobile backhaul. Since 2014, demand has been shifting from low to higher bandwidth products (see Figure 6.1).

Figure 6.1: Retail leased lines, by bandwidth

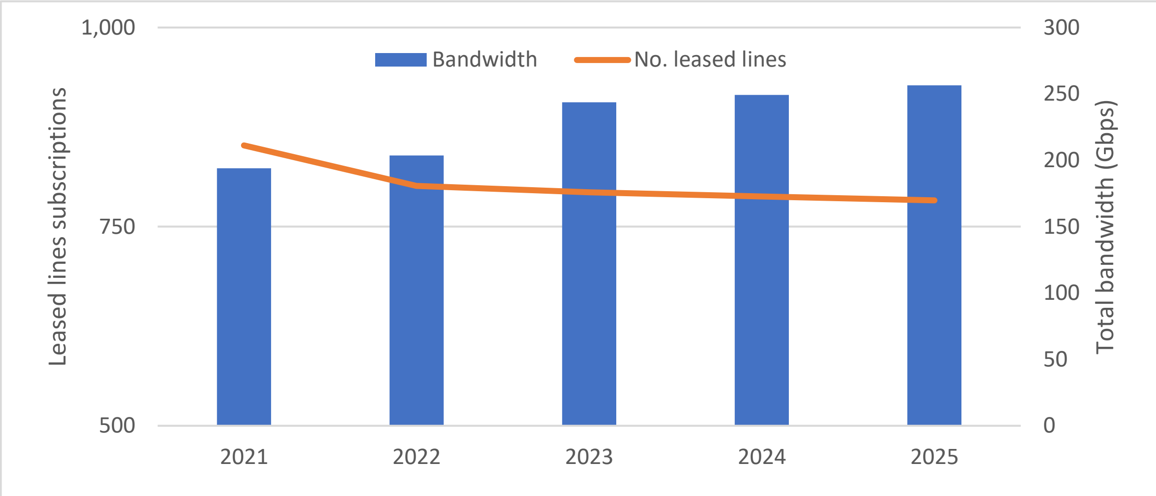


Source: Telecommunications Market Statistics Reports and Statistics Jersey (2021).

Forecast demand

6.2 Looking forward, growth in demand for leased lines bandwidth is expected to continue. The forecast demand for leased lines in Guernsey until 2025, both by number of leased lines subscriptions and bandwidth is shown in Figure 6.2. While, the number of subscriptions is forecast to decline slightly, a significant increase in total bandwidth supplied is expected. These trends are likely to be driven by two things.

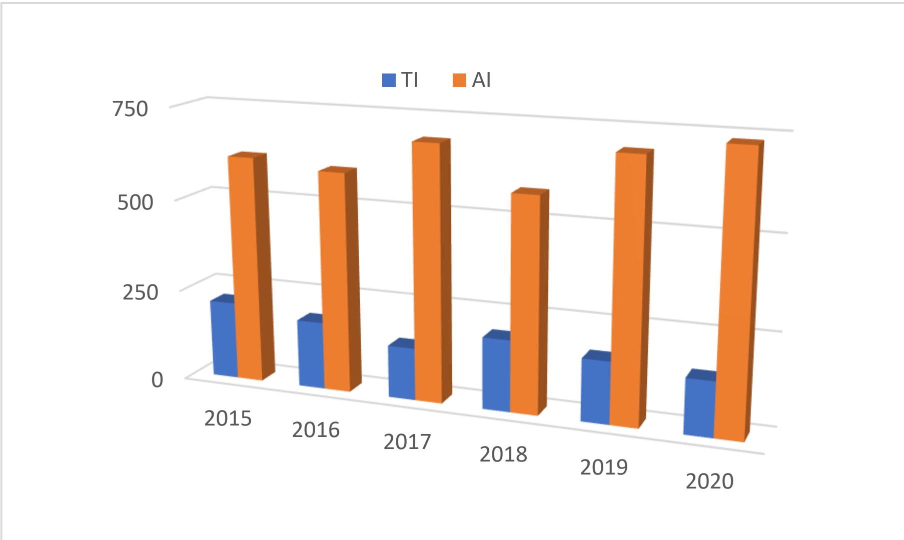
Figure 6.2: Forecast retail and wholesale leased lines, subscriptions



Source: Information from licensed operators; GCRA analysis.

6.3 The first is the gradual phasing out of the old technology (TI) lines. TI lines have shown a declining trend since the last review, as illustrated in Figure 6.3.

Figure 6.3: Retail and wholesale leased lines, by technology



Source: Telecommunications Market Statistics Reports and Statistics Jersey, 2021.

6.4 The second is a continuation of the increasing substitution of lower bandwidth AI leased lines with higher bandwidth lines. Information provided by licensed operators suggests that this increased demand for higher capacity leased lines will be driven, among other things, by greater business use of cloud-based applications that require greater bandwidth. The expected 5G rollout over the review period is also expected to drive demand for higher capacity leased lines for providing backhaul and core connectivity.

7. Pricing

Pricing concerns

7.1 In the 2014 BCMR, responses to the GCRA's Call for Information raised concerns from businesses and public sector organisations that the price of retail connectivity in Guernsey is more expensive than retail connectivity in other jurisdictions. Some respondents suggested this disadvantaged businesses based in Guernsey, and was also a deterrent to businesses considering locating to the island. In response, the GCRA undertook a comparative assessment of retail leased lines pricing, concluding:

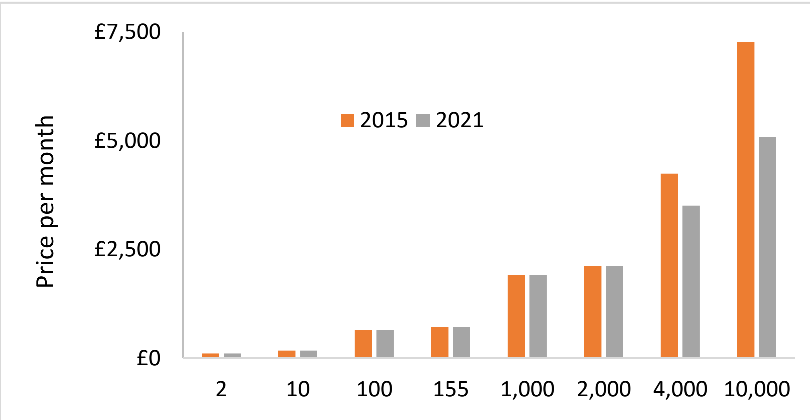
> The GCRA's preliminary assessment of pricing is that some types of leased line (notably the highest bandwidth lines) are relatively expensive when compared with other jurisdictions, but that the pricing of other types of circuits (in particular lower bandwidth circuits) compare more favourably with prices in other jurisdictions.[12]

7.2 The same concerns arose in 2021. The March 2021 consultation identified operator concerns with the high level of retail leased line prices, especially for VHB services:

> Operators have also raised the issue of the high level of pricing, in particular, for Very High-Bandwidth services (VHB), 1Gbps and above. These complaints appear justified given that the blended price of the 1Gbps product is approximately four times what BT charges and recovers on its Fully Allocated Costs basis.[13]

7.3 The March 2021 consultation also noted that prices, at least at certain higher bands, are not evidently cost reflective given that pricing structures have remained unchanged over the period of the review compared to the decline in technology costs.[14]

Figure 7.1: Sure wholesale prices, 2015 and 2021



[12] GCRA, 2014b: page 34.

[13] GCRA (2021b). *Business Connectivity Market Review, Annex 1 Product and Market Definition* T1480GJ, Document No: GCRA 21/5, March 2021, page 14: https://www.gcra.gg/media/598293/bcmr-draft-decision-annex-1.pdf

[14] GCRA, 2021b: page 22.

7.4 Airtel's response to the March 2021 consultation further highlighted these concerns:

> Airtel appreciates that [the [Authority] acknowledges cost of lease lines in Guernsey are exorbitantly high compared to neighbouring markets including the UK. This prohibits Airtel from using leased lines as a preferred medium of transmission in Guernsey, thus pushing Airtel to use Microwave product which has limitations in term of speed and reliability.[15]

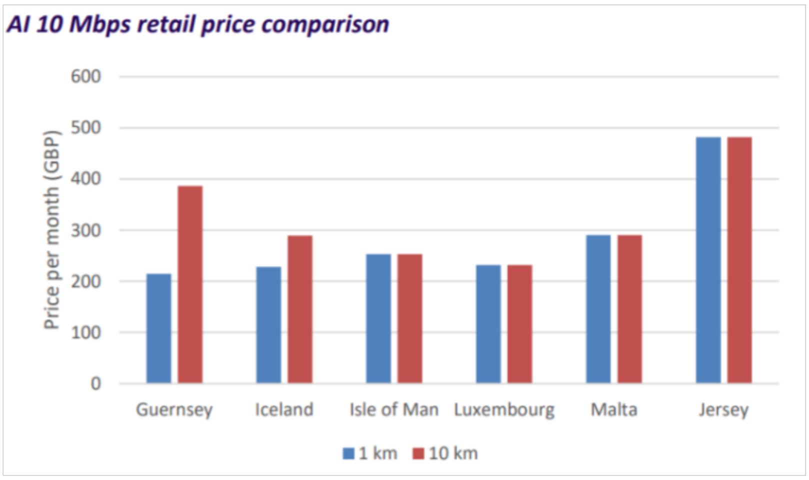
7.5 Newtel also raised pricing concerns:

> For on island circuits higher than 1Gbps, the prices are more than 10 times those of mainland UK.
>
> Also, there is no explanation for the different prices between Jersey and Guernsey. When a 1Gbps cost 12K per annum in Jersey it cost £24k in Guernsey.[16]

Retail price benchmarking

7.6 The high retail prices for Guernsey[17] VHB leased lines was also reflected in the benchmarking published by the Jersey Competition Regulatory Authority (JCRA) in its draft 2021 BCMR.[18] The JCRA benchmarked retail prices of leased lines on Jersey at different bandwidths with comparable jurisdictions, including Guernsey and the Isle of Man (Figure 7.2).

Figure 7.2: Leased line retail price comparison, 2020[19]



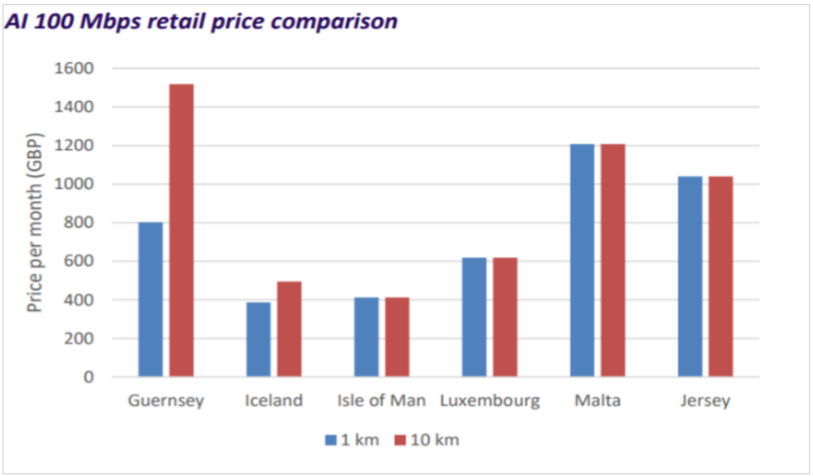
[15] Airtel (2021). *Response to the March 2021 consultation*, 25 March 2021: page 1.

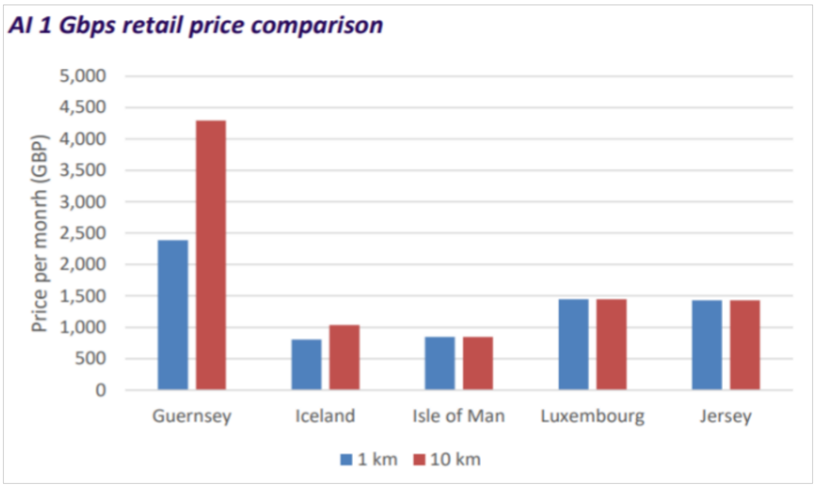
[16] Newtel (2021). *Response to the March 2021 consultation*, 26 March 2021: page 1.

[17] In 2020, retail leased line products in Guernsey were offered by Sure (Guernsey) Limited, JT (Guernsey) Limited, Business Telecom Limited, C5 IT Services (Guernsey) Limited and Logicalis Guernsey Limited.

[18] JCRA (2020). *Business connectivity market review, Non-statutory Draft Decision (Consultation)* Case T-012, 26 October 2020: https://www.jcra.je/media/598280/t-012-business-connectivity-market-review-draft-decision.pdf

[19] JCRA, 2020: Annex 4.





7.7 The retail benchmarking data shows that prices on Guernsey are lower than most comparator countries for 10 Mbps same exchange, but higher than most for 10 Mbps different exchanges. The 100 Mbps product same exchange is in the middle, while the different exchange price is materially higher. The 1 Gbps leased line prices in Guernsey are materially higher than all comparator countries. For example, the price of a 1 Gbps line in Guernsey is more than twice that in the Isle of Man.

Wholesale price benchmarking

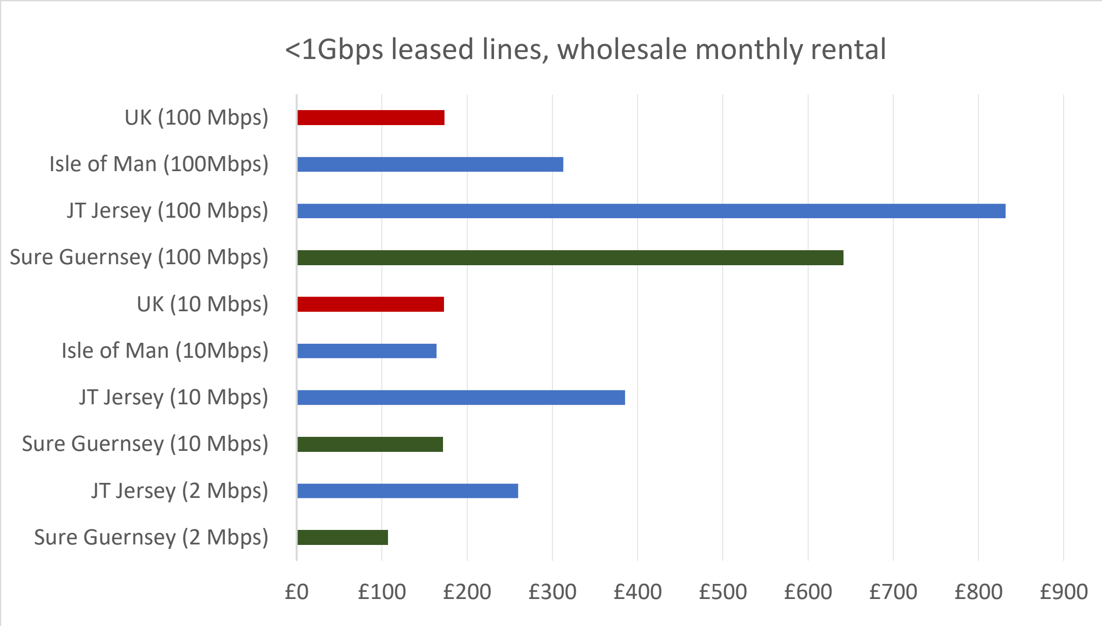
7.8 To further inform this proposed decision, the GCRA benchmarked Sure's wholesale leased line prices at different bandwidths with Jersey (JT (Jersey) Limited),[20] the Isle of Man (Manx Telecom) and the UK (Openreach).[21,22] The data shows that Guernsey same exchange prices for lower speed lines (less than 1 Gbps) are lower than Jersey prices, but higher than UK prices (Figure 7.3). The differential with the UK is particularly marked for the 100 Mbps product.

[20] JT (Jersey) Limited reduced its wholesale prices from September 2021, following the 2020 JCRA BCMR.

[21] For consistency, monthly wholesale rental prices include any associated connection charges amortised over 60 months, and Sure's Same Exchange prices have been utilised.

[22] Openreach wholesale prices sourced from: https://www.openreach.co.uk/cpportal/products/pricing

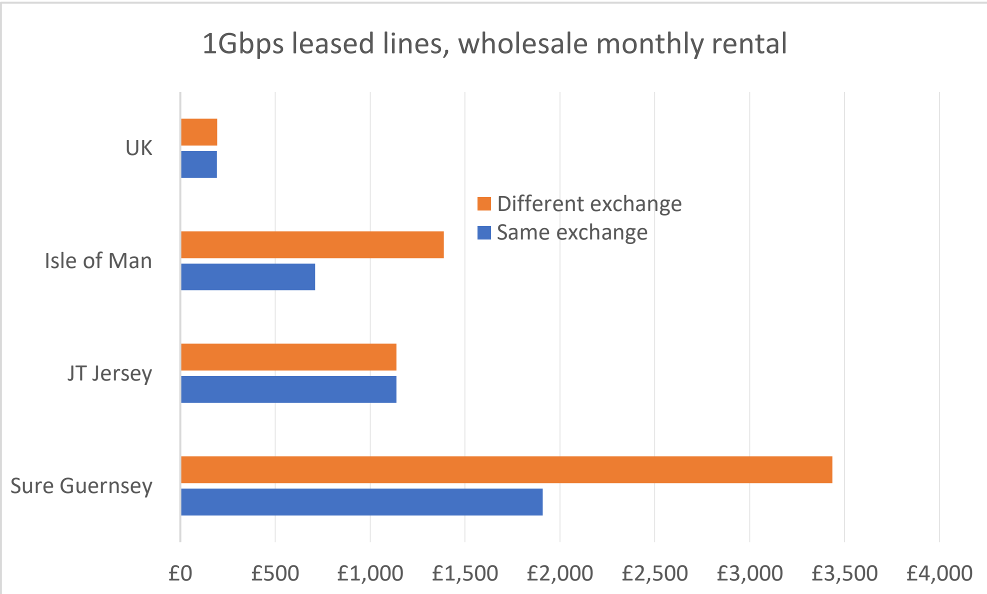
Figure 7.3: Wholesale price comparison, <1Gbps



Source: GCRA, 2022a: page 6.

7.9 The 1 Gbps leased line wholesale prices tell a different story (Figure 7.4). The Guernsey price of £1,909 per month for the same exchange is 1.7 times the Jersey price of £1,139 and nearly 10 times the £193 charged in the UK. The Guernsey same exchange price is also substantially higher than the Isle of Man different exchange (Non-metro) price

Figure 7.4: Wholesale price comparison, 1Gbps



Source: GCRA, 2022a: page 7.

7.10 The price comparison for products with bandwidths greater than 1 Gbps (Figure 7.5), shows that Guernsey prices are higher than in Jersey and Isle of Man, but by a smaller margin than for the

1 Gbps product. The Guernsey price of £5,087 per month for the 10 Gbps product is 1.2 times the Jersey price of £4,133, but still 10 times the £506 charged in the UK.

Figure 7.5: Wholesale price comparison, >1Gbps

Source: GCRA, 2022a: page 7.

Wholesale price control amendment consultation 2022

7.11 In response to concerns from OLOs about the high cost of for Very High-Bandwidth (**VHB**) services of 1 Gbps and above, and a benchmarking exercise (see below), in January 2022 the GCRA consulted on a potential amendment to Sure's 2015 wholesale price control to:[23]

- retain the current retail-minus price control for low-speed leased lines i.e. less than 1 Gbps.
- retain the supporting remedies e.g. non-discrimination, cost accounting/accounting separation and transparency, which are contained in Sure's licence conditions.
- replace the retail-minus control on VHB (i.e. 1Gbps and greater) leased lines with a price cap, benchmarked against JT Jersey's current wholesale prices.

7.12 In response to the consultation, Sure announced a voluntary reduction in the monthly rental charges of the majority its VHB wholesale products and removal of 'Same' and 'Different' exchange pricing, with effect from 28 March 2022. Following an assessment of Sure's price reductions, the GCRA concluded its consultation in March 2022.[24]

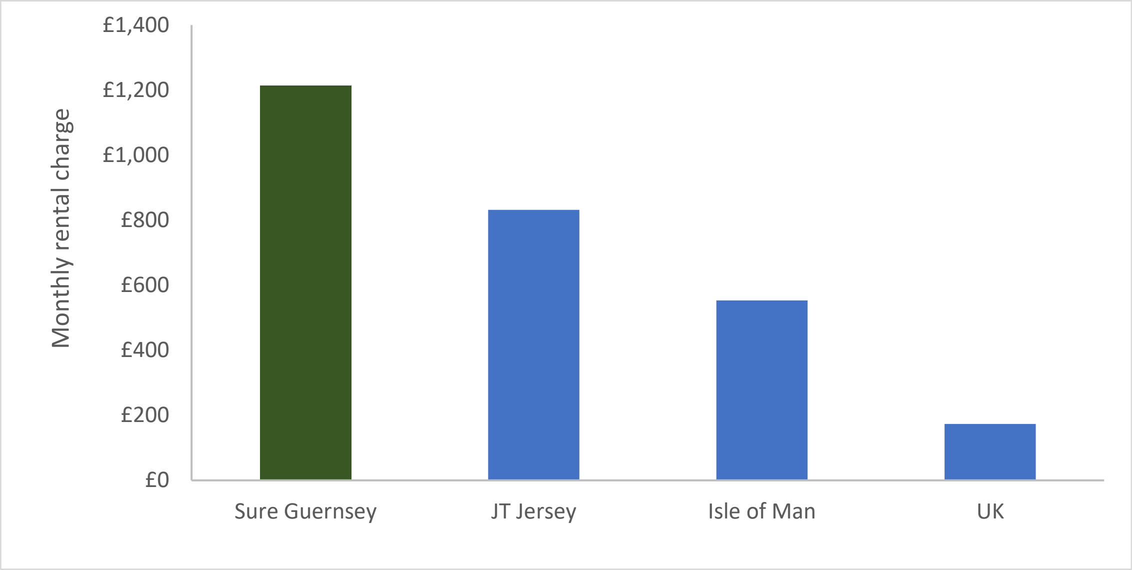
7.13 In reaching this decision, the GCRA noted that the 'decision to close the consultation does not signal that GCRA believes Sure's wholesale prices will be at an efficient level following the announced

[23] GCRA (2022a). *Price control for wholesale on-island leased lines: Consultation*, T1620G, 14 January 2022: https://www.gcra.gg/cases/2021/t1602g-price-control-for-wholesale-on-island-leased-lines/t1602g-price-control-for-wholesale-on-island-leased-lines-consultation-paper/

[24] GCRA (2022b) *Price control wholesale on-island leased lines - Information Paper & Conclusion*, 17 March 2022: https://www.gcra.gg/media/598447/t1602g-price-control-for-wholesale-on-island-leased-lines-information-paper-conclusion.pdf

price reductions, nor will be the retail prices that flow from the wholesale price fall' and suggested that 'there is much room for further price reductions towards cost-reflective prices'.[25] The GCRA also noted Airtel's concerns that Sure had retained differential pricing for its <1 Gbps leased lines.

Figure 7.6: Wholesale price comparison, 'Different Exchange' 100 Mbps



Source: GCRA, 2022b: page 10.

[25] GCRA, 2022b: page 9.

PART 4: PROPOSED DECISION

8. Market review approach

Overarching GCRA considerations

8.1 The GCRA's primary focus is on supporting and maintaining well-functioning markets in Guernsey through the duties placed on the GCRA by law, as set out in Annex 2. Well-functioning markets are a key goal of market economies, and their success benefits all aspects of modern life.

8.2 The role of the GCRA is to:

- promote value and choice for Guernsey consumers to the benefit of the Guernsey economy;
- protect the interests of consumers who have no direct way of making their voices heard;
- support development and delivery of Government policy, in particular, in the sectors subject to economic regulation, to achieve the best outcome for Guernsey consumers; and
- keep the operation of markets and regulated companies under review to identify and address new forms of detriment and issues for potential action, and thereby to promote trust in markets.

8.3 The GCRA considers value and choice is promoted when:

- there is effective and fair competition between businesses;
- market power is not abused;
- mergers do not substantially lessen competition;
- regulatory businesses are incentivised to perform.

European Union approach to market analysis

8.4 In responses to the March 2021 consultation, some respondents advocated an approach that was more consistent with that undertaken by the European Union.

Overarching regulatory approach

8.5 The European Union's regulatory framework for communications, first introduced in 2003, set out an objective to create, through regulation, the conditions for effective competition in telecommunications markets and once effective competition exists, to withdraw all unnecessary sector–specific regulation and apply general competition rules only. The approach entailed the following characteristics:

- Where regulation is necessary, it should be applied at the highest possible level of the value chain (e.g. wholesale) in order to let competition develop in downstream markets (e.g. retail).
- SMP obligations should be based on the nature of the problem identified and proportionate, with the minimum necessary intervention to achieve a particular aim.

8.6 The framework embedded a general rule that most of the problems observed in telecommunications retail markets may be remedied by appropriate remedies imposed at wholesale level.

Market analysis approach

8.7 The market analysis process the GCRA proposes to apply is set out European Commission's guidelines (**2018 EU SMP Guidelines**) on market analysis and assessment of SMP in electronic markets,[26] and the European Commission's recommendation on *ex ante* regulation of electronic markets (**2014 EU Ex Ante Market Recommendation**). The latter sets out those electronic products and service markets that the European Commission has identified as being susceptible to *ex ante* regulation.[27] Some elements of the approach are also reflected in the GCRA guidelines on market definition[28] and abuse of a dominant position.[29]

8.8 Under the European Union regulatory approach to market analysis, the starting point for National Regulatory Authorities (**NRAs**) in the identification of wholesale markets is to identify the corresponding retail market. A determination is then made as to whether the retail market is prospectively competitive in the absence of wholesale regulation. If retail competition is considered unlikely to be sustainable without effective regulation of the wholesale market, then SMP regulations should be adopted accordingly. Market reviews for the purposes of *ex ante* regulation are forward looking and take account of likely developments over the period of the review, which is usually five years. The forward looking review is also usually informed by a review of market changes that have occurred since the previous review, for example changes to market shares over time.

8.9 In terms of process, NRAs commonly apply the following steps:

- First, identify and define the relevant retail and wholesale markets using the Small but Significant Non-transitory Increase in Price (**SSNIP**) test, also known as the Hypothetical Monopolist Test (**HMT**), and consideration of a range of other relevant factors.
- Second, apply the three-criteria test to assess whether the defined markets are susceptible to ex-ante regulation.

[26] European Commission (2018a). Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services, Official Journal of the European Union C 159/1: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018XC0507(01)&rid=7

[27] European Commission (2014b). Commission Recommendation of 9 October 2014 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, 2014/710/EU: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014H0710&from=EN

[28] GCRA (2021c). *Guernsey Competition Law GCRA Guideline 7 – Market Definition*, June 2021: https://www.gcra.gg/media/598337/market-definition.pdf

[29] GCRA (2021d). *Guernsey Competition Law GCRA Guideline 5 – Abuse of a Dominant Position*, June 2021: https://www.gcra.gg/media/598333/abuse-of-a-dominant-position.pdf

- Third, assess whether the markets are effectively competitive, which involves assessing whether any operator has SMP or joint SMP in any of the relevant markets.

- Fourth, where SMP is found, assess the appropriate remedies, based on the nature of the competition problem, or market failure, identified in the relevant markets.

8.10 As noted in Section 2, the GCRA proposes to undertake the remedies step in a separate process following the conclusion of the market definition and competitive assessment stages. The remedies step will conclude the current BCMR process.

8.11 The remainder of this section sets out a summary of the GCRA's approach, with further detail provided in Annex 3.

Market definition

8.12 A relevant market, whether retail or wholesale, is defined to set boundaries for regulatory (or competition) analysis and is the first step in the assessment of SMP or dominance.

8.13 Markets are defined to include all those suppliers, and those consumers, between whom there is close competition. The focus is on those goods or services that are close substitutes in the eyes of consumers, 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 businesses face. The objective of defining a market is to identify those actual competitors of the businesses involved that are capable of constraining those businesses' behaviour and preventing them from behaving independently of effective competitive pressure.

8.14 A market definition contains two dimensions; first to be defined is the product dimension, followed by the geographic dimension.

Three criteria test

8.15 Once a relevant market has been defined, the three-criteria test is used to determine whether the relevant market is susceptible to *ex ante* regulation. The 2014 EU Ex Ante Market Recommendation publishes a list of recommended markets susceptible to *ex ante* regulation. To decide which markets should be included on the list, the Recommendation sets out a cumulative 'three criteria test', which assesses various conditions of the market:

- the presence of high and non-transitory structural, legal regulatory barriers to entry;

- a market structure which does not tend towards effective competition within the relevant time horizon, having regard to the state of infrastructure-based and other competition behind the barriers to entry; and

- the insufficiency of competition law alone to adequately address the market failure(s) concerned.

8.16 This means if a relevant market does not meet even one of the three criteria it is not susceptible to *ex ante* regulation and there is no need for further analysis. A market that is subject to high barriers to entry, not tending towards effective competition and where competition law is insufficient to resolve any problems is deemed to be susceptible to *ex ante* regulation although this does not necessarily mean that any firm has SMP in the market, which must be assessed separately.

8.17 While NRAs are expected to conduct the three-criteria test after the market is defined, it is not strictly necessary for the NRA to carry out the test for markets included in the list of recommended markets, although they may wish to do so given national circumstances.

Competition assessment – determining SMP

8.18 Once the market is defined, the next stage is to determine whether any firm, singly or jointly, holds a position of SMP, which is equivalent to a dominant position, defined in the 2018 EU SMP Guidelines as 'a position of economic strength affording [the firm] the power to behave to an appreciable extent independently of competitors, customers and consumers'.[30]

8.19 The GCRA defines a dominant position in similar manner to that used by the European Commission. A dominant position is one that allows a firm to:

> …. increase prices above the competitive level, or decrease quality, without making that move unprofitable. It can also use its market power to engage in anti-competitive conduct and exclude or deter competitors from the market.[31]

<u>Market shares</u>

8.20 The market share of the leading business is usually the starting point for an assessment of SMP. The GCRA guideline on abuse of a dominant position notes that the European Court of Justice has stated that market dominance can be presumed, in the absence of evidence to the contrary, if a business has a market share persistently above 50 per cent.[32] Such dominance may be overcome in exceptional circumstances if barriers to entry and expansion are low and if there is strong countervailing buyer power, although the presumption is on the business to make such a case. The 2018 EU SMP Guidelines note:

> According to established case-law, very large market share held by an undertaking for some time — in excess of 50 % — is in itself, save in exceptional circumstances, evidence of the existence of a dominant position. Experience suggests that the higher the market share and the longer the period of time over which it is held, the more likely it is that it constitutes an important preliminary indication of SMP.[33]

8.21 The GCRA guideline on dominance considers it unlikely that an individual business will be dominant if its market share is below 40 per cent, although dominance could be established below that figure if other factors (such as the weak position of competitors in the market) provided strong evidence of dominance.[34]

<u>Other relevant factors</u>

8.22 Where the market share is below the 50 per cent threshold, but still high, regulators are expected to examine a number of other factors that may preclude the firm from acting independently of

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[30] 2018 EU SMP Guidelines: paragraph 52.

[31] GCRA Guideline 5 – Abuse of a Dominant Position: page 9.

[32] Case C-62/86 – *AKZO Chemie BV v. Commission* EU:C:1991:286

[33] 2018 EU SMP Guidelines: paragraph 55.

[34] GCRA Guideline 5 – Abuse of a Dominant Position: page 11.

competitors, customers and consumers, for example barriers to entry, as listed in paragraph 58 of the 2018 EU SMP Guidelines.

Joint dominance

8.23 In order to find joint SMP, that is to say a collective dominant position of two or more firms, the General Court held in Airtours,[35] and confirmed by the Court of Justice in Impala II,[36] that three cumulative conditions are necessary for a finding of collective dominance:[37]

- First, each member of the dominant oligopoly must have the ability to know how the other members are behaving in order to monitor whether or not they are adopting a common policy.
- Second , the situation of tacit coordination must be sustainable over time, that is to say, there must be an incentive not to depart from the common policy in the market.
- Third, the foreseeable reaction of current and future competitors, as well as customers, should not jeopardise the results expected from the common policy.

Proportionality and pragmatism

8.24 In undertaking the market analysis set out in this document, the GCRA is also mindful of two things. First, that market definition is not an end in itself; it is concerned with identifying the boundaries of a market so competitive conditions can be assessed, and, if appropriate, *ex ante* regulation can be put in place. Second, is the need to take a proportionate and pragmatic approach bearing in mind the size and structure of the market.

9. Retail market definition

Introduction and summary

9.1 This section sets out the GCRA's proposed market definition at the retail level. This analysis enables the subsequent definition of relevant upstream wholesale markets, which is covered in Section 10. The proposed retail market is defined, commencing with the product and then the geographic dimension.

[35] Case T-342/99 *Airtours* v. *Commission* EU:T:2002:146.

[36] Case T-464/04 Independent Music Publishers and Labels Association (Impala) v. Commission EU:T:2006:216. On appeal, Case C-413/06 P Bertelsmann AG and Sony Corporation of America v. Independent Music Publishers and Labels Association (Impala) EU:C:2008:392.

[37] See Annex 2 for more information.

Table 9-1: Summary – Proposed retail market definition

Dimension	Proposed finding
Product	• The retail leased lines market should comprise all bandwidths used for delivering leased lines • The retail leased lines market <u>should not</u> be: ○ narrowed to reflect the delivery technology i.e. comprises both AI and TI lines ○ broadened to include business or residential fixed broadband ○ broadened to reflect the purchase by business customers of business connectivity solutions other than retail leased lines ○ broadened to include off-island leased lines.
Geographic	• Island-wide – there are no particular areas within Guernsey where conditions of competition are appreciably different to the extent that they constitute separate geographic retail markets

Retail product market

Preamble

9.2 This section commences by introducing some relevant market definition information, before identifying the focal product (or set of products). Then, similar to the 2014 BCMR, it steps through a number of questions to identify demand- and supply-side substitute products and constraints on prices, using the SSNIP test as the conceptual framework.

9.3 As noted below in paragraph 9.21 below, there are significant issues with the quality and breadth of information held by key operators in Guernsey, in particular the level of analysis those respondents advocated in their responses to the March 2021 consultation is incompatible with the quality and breadth of business information they hold. A full analysis of the product market consistent with market definition guidelines and best practice is therefore limited by the available information. The assessment of product definition must therefore out of necessity rely heavily on a conceptual assessment.

Introduction

9.4 The main purpose of the product market definition assessment is to identify the competitive constraints on leased line products which starts with the identification of a focal product or service (or set of focal products and services) and then establishes the boundaries of the market.

9.5 The two main sources of competitive constraint are demand- and supply-side substitution. The former refers to consumers of the focal product switching to an alternative product that can be used for the same purpose in the event of a SSNIP by the hypothetical monopolist. The latter considers potential entry to the market of a rival to produce a substitute for the focal product using its existing assets in the event of a SSNIP.

9.6 When conducting the SSNIP test, the hypothetical monopolist is assumed to produce and sell only the focal product and not any other products. This means that any sales lost by customers switching to other products are a loss to the hypothetical monopolist. This implies that the current prices are set based on existing demand-side constraints. To answer the question of whether a SSNIP would be unprofitable if the hypothetical price rise were implemented requires an assessment of two things. The first is how many purchasers would cease their purchases of the focal product in the face of the price rise (either by switching to substitutes or ceasing purchases altogether). The second is how much money the hypothetical monopolist would save by serving only the reduced pool of purchasers of the focal product (which depends on its gross margin).

9.7 Critical loss analysis, often combined with consumer survey data, is commonly applied in answering the question as to whether a SSNIP would be unprofitable. Any price rise will normally have two effects: a fall in sales, as some consumers are no longer willing to buy at the higher price; and a higher profit margin, made on sales to those consumers who continue to buy at the higher price. These two effects work in opposite directions; the first decreases profits, the second increases profits.

9.8 The critical loss, which is calculated using a simple arithmetic formula,[38] is the minimum percentage loss of sales due to the posited price increase which would be needed to offset the margin gain from the price rise.[39] The standard critical loss test, which presumes break-even rather than profit-maximising behaviour by the hypothetical monopolist, assumes marginal costs are constant for simplicity and holds for any shape of the demand curve. The critical loss percentage of sales for a range of gross margins for a 5 and 10 per cent SSNIP is shown in Table 9-2. The higher the gross margin, the smaller is the percentage of lost sales that would make a SSNIP unprofitable.

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[38] $Critical\ loss = \frac{x}{(m+x)}$ where *m* is the gross margin and *x* is the SSNIP percentage.

[39] See Oxera (2008). *'Could' or 'would'? The difference between two hypothetical monopolists*, Agenda Advancing economics in business, November 2008: https://www.oxera.com/wp-content/uploads/2018/03/Hypothetical-monopolists-1.pdf

Table 9-2: Critical loss values

Gross margin (%)	Break even critical loss (% of sales)	
	5% SSNIP	**10% SSNIP**
100	4.8	9.1
90	5.3	10.0
80	5.9	11.1
70	6.7	12.5
60	7.7	14.3
50	9.1	16.7
40	11.1	20.0
30	14.3	25.0
20	20.0	33.3
10	33.3	50.0

<u>March 2021 consultation response</u>

9.9 In its March 2021 response, JT did not support segmenting the market by bandwidth, and noted that the GCRA:

> 'does not recognise an important feature of these types of markets, which is that a 'chain of substitutability' often applies.'[40]

9.10 JT also submitted that the GCRA did not conduct a sufficiently robust SSNIP test as:

> 'they would have needed to have obtained data about the cross elasticity of demand for leased lines at different speeds, based on observed changes of prices and volumes' and 'would also need to have considered the impact of changes in volumes on the margins earned by the firms.'[41]

9.11 In its March 2021 response, Sure states:

> Sure does not disagree with the GCRA that very high speed leased lines may constitute a separate relevant product market, as it agrees that, in principle, the decision to extend competing network infrastructure would depend on the profitability of doing so. That therefore suggests that there is greater supply-side substitutability for very high speed leased lines than for lower speed leased lines.[42]

9.12 Sure caveats its statement above by submitting that the GCRA has not presented any demand-side or supply-side substitution analysis in reaching its decision to segment the market by bandwidth,

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[40] JT Group (2021). *Response to the March 2021 consultation*, 18 March 2021: page 12.

[41] JT Group, 2021: page 11.

[42] Sure (2021a). *Response to the March 2021 consultation*, 1 April 2021: page 18.

nor has the GCRA considered the effect of the chain of substitution.[43] In its October 2021 submission, Sure proposed [........ ✂ ....].

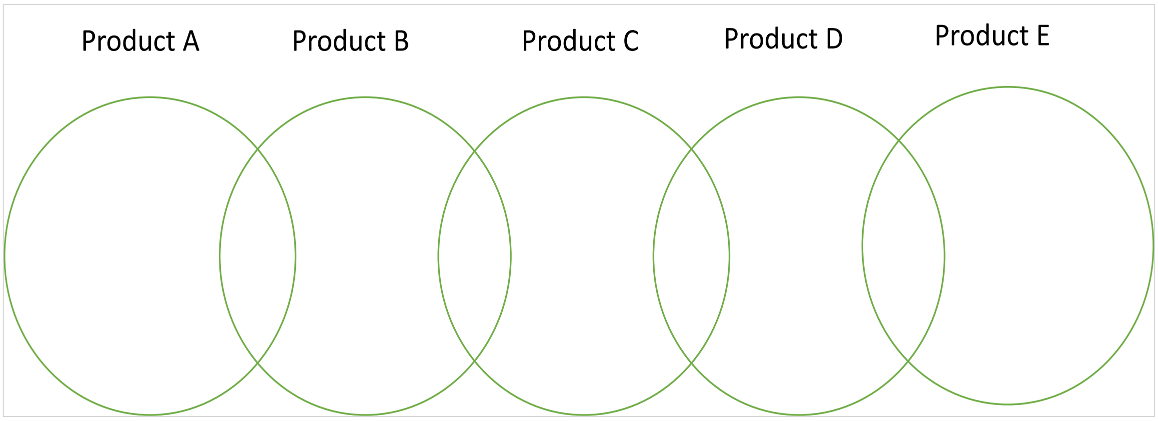
Focal product and bandwidth segmentation

9.13 The GCRA has noted the analyses of the business connectivity markets carried out by regulators in other jurisdictions and reviewed its previous position on bandwidth segmentation in light of responses to the March 2021 consultation and additional data sought from operators.

9.14 In light of the differing needs of end-users for dedicated and uncontended connectivity services in Guernsey, leased lines are sold with a wide range of bandwidth capacities from 2 Mbps to 10 Gbps. In determining the focal product, the GCRA has considered whether the market should be narrower to reflect differences in demand and/or supply of leased lines of different bandwidths. The main consideration is whether different leased line products offered at varying bandwidths would be part of a chain of substitution dynamic.

9.15 A chain of substitution can be characterised graphically as five products, with product A constrained by product B, product B constrained by product C and so on, with the relevant market being ABCDE, as shown in Figure 9.1. In other words, a chain of substitution exists where there is an unbroken series of substitutes and each product in that series is constrained by its neighbouring products.

Figure 9.1: Chain of substitution diagram



Source: Adapted from CAT (2017).[44]

9.16 The fact that there is a chain of substitution between products A to E does not necessarily mean there will be a single relevant market. That is, if the focal product is C, the relevant market might be BCD, with only products B and D exerting a constraint on product C. CAT (2017) notes, however, that it is possible to conceive of a situation in which there is a 'chain substitution transmission effect'. This is where non-substitutes (i.e. A and E in this example) impose a constraining effect on non-neighbouring products indirectly through the restraint they impose on their directly

[43] Sure, 2021a: page 16.

[44] CAT (2017). British Telecommunications PLC v Virgin Media Limited – Judgment (Market Definition), Competition Appeal Tribunal CAT 25, 10 November 2017: https://www.catribunal.org.uk/sites/default/files/1260_BT_Judgment_CAT_25B_101117.pdf

neighbouring products. In this example, applying the transmission effect means the relevant product market is ABCDE.

9.17 In the BCMR context, a chain of substitution means that even if a 10 Mbps leased line does not act as a direct competitive constraint on a hypothetical monopolist of 1 Gbps leased lines, intermediate products (e.g. 100 and 500 Mbps lines) provide a constraint. Thus, in the event of a SSNIP on a 10 Mbps product, consumers may not switch to a 1 Gbps line, but may switch to a 100 Mbps line and so on up to a 1 Gbps product, therefore making the SSNIP unprofitable.

9.18 In its 2021 BCMR in Jersey, the JCRA concluded that the retail (and wholesale) leased lines market included all bandwidth speeds.[45]

9.19 In the 2014 BCMR, the GCRA did not split the market by bandwidth capacity, noting that:

> While it would be unlikely that a purchaser of the highest capacity Ethernet circuits would find it acceptable to switch to multiples of the lowest capacity circuits, there is likely to be substitution along the chain of capacities available, even if not from top to bottom.[46]

9.20 In its March 2021 consultation, the GCRA identified two bandwidth product markets, defined as products and services offering capacities below 1 Gbps and those offering capacities from 1 Gbps and above (VHB).

9.21 In response to comments on the March 2021 consultation, the GCRA requested operators to provide more extensive information to inform a more robust SSNIP test, namely revenue, cost, and profitability data by bandwidth, customer segment and technology. Operators were unable to provide comprehensive data to support the request. Nonetheless, the GCRA sees merit in stepping through a demand-side SSNIP test to assess the evidence for or against a chain of substitution in the retail product market, using the limited information that is available, supported by qualitative judgements.

9.22 For most leased lines, the main demand-side substitute is another leased line of a different bandwidth. For the purposes of this assessment, given demand for bandwidth is consistently expected to increase due to the march of technology, the primary consideration is on the likelihood of customers switching to a higher bandwidth product in response to a SSNIP. The bandwidth differential between leased lines services can be substantial, however the price differential is not always as significant. The starting point for the analysis, therefore, is an inspection of the retail price differentials between the range of capacities of leased lines, as shown in Figure 9.2.

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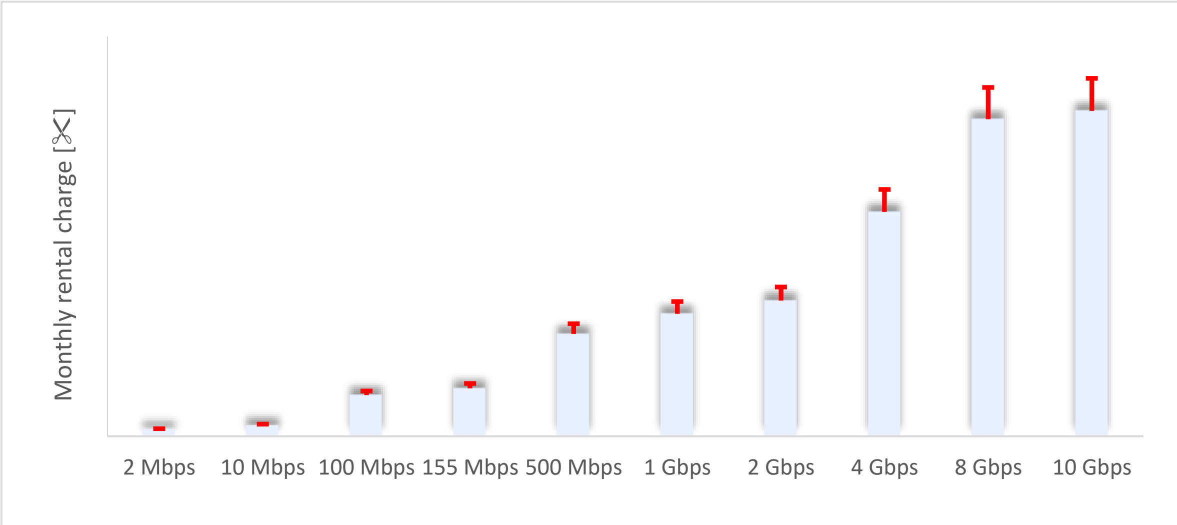
[45] JCRA (2021). *Business connectivity market review, Non-statutory Final Decision Case T-012*, 1 July 2021: https://www.jcra.je/media/598342/business-connectivity-market-review-final-decision-market-definition-and-significant-market-power-assessment.pdf

[46] GCRA, 2014a: page 24.

Figure 9.2: Chain of substitution – retail market



9.23 At first blush, this suggests that a 10 per cent SSNIP by a hypothetical monopolist of any speed of leased lines, apart from 8 Gbps, may be profitable as the price differential is above the SSNIP. On a strict interpretation this would imply a market for almost every bandwidth. The GCRA acknowledges that the conclusions of the SSNIP test in this case may need to be treated with caution due to the 'cellophane fallacy.'[47]

9.24 The next step is to consider critical loss. As noted above, applying critical loss analysis as a tool to assess whether a SSNIP would be unprofitable requires leased line gross margin information from operators, which the GCRA has been unable to obtain for BCMR purposes. Nonetheless, the benchmarking evidence presented in Section 7, which shows that prices are far from cost-reflective, [………… ✂ ……..], indicate that gross margins for Guernsey leased lines operators are likely to be very high. Reference to the critical loss values in Table 9-2 suggests that the amount of switching in response to a SSNIP that would exceed the critical loss that would render a SSNIP unprofitable is likely to be quite small.

9.25 The GCRA also considered the potential impact on SSNIP profitability of customers with bandwidth demand greater than their connected circuit that might fulfil that demand by moving to a higher bandwidth circuit (or multiple smaller bandwidth circuits), but have delayed such an upgrade for cost reasons. This is assessed by comparing costs of such a change before and after a SSNIP on their circuit. Conceptually, the larger the number of such customers the more likely a SSNIP would be unprofitable.

9.26 For example, how likely would a customer on a 500 Mbps product, with demand at say 750 Mbps, switch to a 1 Gbps product in response to a SSNIP on the 500 Mbps line? As shown in Table 9-3, a customer on a 500 Mbps circuit with 'excess demand' would not find it economic to move to a 1 Gbps circuit, either before or after a 10 per cent SSNIP on the 500 Mbps circuit. However, post-SSNIP, that customer would face a smaller price increase of 9 per cent, compared to the 20 per cent pre-SSNIP, making a switch more attractive.

[47] This refers to the situation where the SSNIP test fails in the case of the hypothetical monopolist that already has market power and is charging monopoly rents i.e. the price subject to the SSNIP is not competitive.

Table 9-3: Customer switching, 500 Mbps SSNIP

Bandwidth demand (Mbps)	**500 Mbps**	**1 Gbps**
Cost of 500 Mbps line(s)	[✂]	[✂]
Cost of 500 Mbps lines(s) post 10% SSNIP	[✂]	[✂]
Cost of 1Gbps line	[✂]	[✂]
How much more expensive (or cheaper) is a 1 Gbps connection pre 500 Mbps SSNIP?	20%	-40%
How much more expensive (or cheaper) is a 1 Gbps connection post 500 Mbps SSNIP?	9%	-46%

9.27 Similarly, as shown in Table 9-4, a customer on a 1 Gbps circuit with 'excess demand' would not find it economic to move to a 2 Gbps circuit, either before or after a 10 per cent SSNIP on the 1 Gbps circuit. However, post-SSNIP, that customer would face a price increase of 1 per cent rather than the 11 per cent pre-SSNIP, making a switch more attractive.

Table 9-4: Customer switching, 1 Gbps SSNIP

Bandwidth demand (Mbps)	**1 Gbps**	**2 Gbps**
Cost of 1 Gbps line(s)	[✂]	[✂]
Cost of 1 Gbps line(s) post 10% SSNIP	[✂]	[✂]
Cost of 2 Gbps line	[✂]	[✂]
How much more expensive (or cheaper) is a 2 Gbps connection pre 1 Gbps SSNIP?	11%	-45%
How much more expensive (or cheaper) is a 2 Gbps connection post 1 Gbps SSNIP?	1%	-50%

9.28 Moreover, looking forward across the review period, there are several factors that further suggest that the chain of substitution can be reliably used to inform the boundaries of the product market, and that no segmentation by capacity is necessary in practice.

9.29 [……………. ✂ …………..].[48]

9.30 [……………. ✂…………….].[49]

9.31 [……………. ✂ …………..].

9.32 [……………. ✂ …………..].

9.33 Additional considerations are that a wider range of speeds is now available in the leased lines market than was the case at the time of the 2014 BCMR, while substitution is unlikely between the bottom and top of the range conceptually it does seem likely that there is a chain of substitution

[48] [✂].

[49] [✂].

along the product range, and any product market approach that leads to an outcome where every product is in its own product market would not seem pragmatic or proportionate, especially given other evidence.

9.34 The GCRA's view is, therefore, that the retail on-island leased line market should not be segmented by capacity, which is consistent with the GCRA's approach in the fixed broadband access market.[50] In practical terms, any differences in competitive conditions associated with different capacities of leased lines can in any event be considered at the remedies stage of the BCMR so there is not a material risk that a broader market definition would be inadequate to address competition concerns.

9.35 The GCRA's proposed set of focal products is therefore on-island retail leased lines products across all bandwidths on the island of Guernsey.

9.36 The GCRA does however consider it prudent to test whether the product definition might be expanded or reduced to encompass Alternative and Traditional Interface technology, broadband provision or business solutions, notwithstanding the data limitations in carrying out an orthodox SSNIP assessment for this purpose.

Should the retail market be narrowed to reflect delivery technology?

9.37 AI leased lines are a newer and more cost- effective way of delivering a similar service to customers, and comprise more than 80 per cent of the on-island leased lines market. The standard interfaces for AI products are 10 and 100 Mbps and 1 Gbps.

9.38 TI leased lines are almost exclusively used to provide very low bandwidth services (2 Mbps is the standard interface for TI equipment). Whilst the number of TI leased lines have continued to decline, they still represent a significant portion of the market and are still offered as new connections.

9.39 In the 2014 BCMR, the GCRA took the view that TI and AI leased lines belong in the same market on the basis that the delivery technology is immaterial as it generally makes little difference to a customer how their service is delivered, so long as the costs and quality are not affected. The GCRA's view remains the same today.

9.40 In terms of demand-side substitutability, although the price of the entry-level 10 Mbps AI leased line is more than 5 to 10 per cent above the standard 2 Mbps TI leased line, the market data analysis in Annex 1 shows increasing substitution of TI with AI leased lines, for two reasons. The first is that the wider range of AI leased lines bandwidths gives end-users additional flexibility as they can be configured more easily to business requirements. The second reason is the increasing demand for higher bandwidth products.

9.41 Supply-side substitutability would exist if, in the absence of wholesale regulation, suppliers of AI-based services would be able to provide business connectivity services using TI leased lines, at low cost and within a relatively short timeframe. The GCRA considers that in the event of a SSNIP

[50] GCRA (2019). *Statutory Notice of a Final Decision Broadband Market: Market Review and SMP Finding*, 20 March 2019: https://www.gcra.gg/media/598007/t1358gj-broadband-market-statutory-notice-of-a-final-decision-final-decision.pdf

implemented by a hypothetical monopolist for the provision of connectivity over TI leased lines, no other service provider is likely to invest in rolling out network infrastructure based on TI technology as this would incur significant sunk costs and customers are clearly demonstrating a preference for new technology leased lines. In contrast, in the event of a SSNIP on AI products, existing or new entrants would be more inclined to invest in AI network infrastructure.

9.42 There is no clear evidence of market behaviour where AI-based services are substituted with TI services since the trend appears to be away from lower speed products toward higher speeds especially given the significantly higher prices of the higher speed services but as noted previously, the existence of market power at the wholesale level might better explain such large price differences than justify a potentially separate product markets at different speeds.

9.43 The GCRA's view is, therefore, that AI leased lines are substitutable for TI leased lines and the market should not be narrowed to reflect delivery technology.

<u>Should the market be broadened to include business connectivity services provided via business or residential broadband?</u>

9.44 Business connectivity services tend to be symmetric so that upload and download speeds are the same, unlike broadband services which are asymmetric, with lower upload than download speeds. Moreover, upload speeds tend to be very important for businesses that use leased lines. The GCRA assessed whether retail users would be likely to consider retail broadband services as a good substitute for leased lines, to the extent that business connectivity in the form of retail broadband should form part of the same market as retail leased lines.

9.45 In the 2014 BCMR, the GCRA found that that business connectivity in the form of ADSL broadband may only be considered to be a substitute for leased lines in limited circumstances, and did not include it in the same product market.

9.46 Since 2014, both Sure and JT have expanded their fibre networks. Looking forward, Sure has recently entered into a contract with the States of Guernsey to construct a ubiquitous FttP network by 2026. The network will provide a download speed of up to 1 Gbps (with the capability of access to higher speeds of up to 10 Gbps to fulfil future demand) and an upload speed of up to 212 Mbps to all connected premises. This suggests, for example, that broadband could potentially be a substitute for lower speed leased lines, where the customer does not need upload speeds higher than 212 Mbps.

9.47 A review of Sure's 1 Gbps fibre broadband and 1 Gbps leased line service prices shows a significant premium for the leased line product, reflecting the distinct features of the latter. Leased line services provide end-users with a higher quality service at higher prices that reflect the 1:1 contention ratios, reliability and applicability of strict service level agreements, which are not available with fixed broadband product.

9.48 Moreover, discussions with operators and a review of Sure and JT data reveal little evidence of any significant substitution having taken place. The GCRA, therefore, considers it unlikely that a business would, in response to a five or ten per cent increase in prices of leased lines services switch to a broadband product.

9.49 From a supply-side substitution viewpoint, the network architecture required to support leased lines and broadband access services are different. Broadband services provide the local connectivity to deliver mass-market broadband and other electronic communication services to homes and businesses in contrast to the network architecture of an access network for the supply of leased lines, which does not have this capability.

9.50 In case of a SSNIP implemented by a hypothetical monopolist providing leased line services, an operator providing fixed broadband services would not be able to switch to provide solely leased line solutions in the short term, especially if it lacks a nationwide access network infrastructure. The provision of high-quality access and connectivity services over leased lines requires significant additional investment in the data transport network.

9.51 The GCRA's view is that business connectivity services delivered over broadband connections are not functionally equivalent to connectivity services supplied over leased lines. The GCRA's view, therefore, is that the market should not be broadened to include business connectivity services provided via broadband.

<u>Should the market be broadened to reflect the increasing purchase by customers of a business solution rather than a retail leased line?</u>

9.52 The GCRA has considered the extent to which the retail market should be broadened to include some value added elements of the retail purchase. This could include, for example, VPNs and/or IP connectivity. Many organisations use VPNs to connect offices or sites. The 'Virtual Private' aspect refers to the use of a telecoms operator's public core network, as the business user is actually sharing public infrastructure. Broadly, VPNs can be accessed via the internet or via leased lines.

9.53 For the market to be defined more broadly in this way, it would need to be the case that a consumer of retail leased lines would find a VPN to be a good substitute. The GCRA's view is that a VPN accessed via internet links would not be a good substitute for a leased line because it would not offer comparable features such as security, performance and reliability. For example, VPNs accessed over internet links are generally contended at some point, and therefore do not provide guaranteed bandwidth.

9.54 A VPN which is accessed via leased lines, while being more comparable in terms of functionality, would more correctly defined as a downstream service – the VPN is essentially a leased line with the addition of network management.

9.55 The GCRA's view is that a similar argument applies to whether or not IP connectivity should be included in the same product market as leased lines. IP feed is a downstream service which makes use of leased lines as an input – it is not a substitutable product.

9.56 The GCRA's view, therefore, is that the market for business connectivity does not include downstream services such as VPNs or IP connection.

<u>Should the market be broadened to include off-island leased lines?</u>

9.57 In the 2014 BCMR, the GCRA defined a separate retail market for off-island leased lines on the basis that there are significant differences in relation to barriers to entry, supply and pricing conditions between the two kinds of leased lines.[51] The 2014 BCMR also assessed the market for off-island lines and found it to be effectively competitive with multiple carriers on each route.

9.58 In the Call for Information that preceded the March 2021 consultation the GCRA asked if there had been any change in circumstances that would change this finding. All stakeholders who answered this question said they were not aware of any change.

9.59 The GCRA has again considered whether an off-island leased line is an effective substitute for an on-island leased line. The GCRA is of the view that an on-island leased line between two Guernsey addresses cannot be substituted by a leased line between a Guernsey address and one in another country. An off-island leased line is not, therefore, an effective demand-side substitute for an on-island leased line.

9.60 A supplier of leased lines between Guernsey and elsewhere would not be able to use those assets to provide leased lines between two points on the island, without having to rely on on-island suppliers to provide the connecting leased lines for those circuits. The absence of any supply-side substitution also indicates that off-island leased lines are not in the same market.

9.61 The GCRA's view, therefore, is that off-island leased lines are not an effective demand or supply side substitute for on-island leased lines and therefore the market should not be extended to include off-island leased lines.

Retail geographic market

<u>Are there particular areas within the islands where the conditions of competition are appreciably different to the extent that they may constitute separate geographic retail markets?</u>

9.62 A relevant geographical market comprises the area in which the undertakings concerned are involved in the demand and supply of a product or service in relation to which the conditions of competition are sufficiently similar and which can be distinguished from neighbouring areas in which the prevailing conditions of competition are appreciably different to those areas.

9.63 In the 2014 BCMR, the GCRA noted that where regulators have found sub-national markets, these are primarily wholesale market definitions and have not applied in the retail market.[52] The GCRA stated that definition of a narrower geographic market would involve considering whether an increase in price in one area would attract investment from firms operating in other areas, and whether this would constitute a sufficiently clear and persistent boundary.

9.64 The GCRA found that in Guernsey, operators offer uniform pricing across the island, market their services in a uniform manner, and there is no product differentiation according to geographic area. As a result, the GCRA took the view in 2014 that while there are expected to be variations in demand and supply conditions associated with, for instance groups of customers who are geographically concentrated, these variations do not result in clear and persistent boundaries which would indicate a separate geographic market within Guernsey.

[51] GCRA, 2014a: page 8.

[52] GCRA, 2014a: page 27.

9.65 In its March 2021 consultation, the GCRA proposed two geographic markets (Urban and Rest of Guernsey) for retail (and wholesale) markets.

9.66 In its March 2021 response, Sure submitted:

- that it believes that there are two separate geographic markets in Guernsey for the supply of leased lines in Guernsey and that these geographical differences are particularly pronounced at the wholesale level, as it is linked to the existence of competing infrastructure, stating:

  > In the 2019 BCMR Ofcom's approach to defining geographic markets for the supply of business connectivity services is primarily focused on the existence of competitive infrastructure enabling competitors to supply leased lines services independently of the regulated wholesale product.[53]

- that the GCRA has underestimated the relevant size of the market that it is proposing to provide a geographical boundary to (namely, limiting the relevant competitive areas to the postcodes GY1, GY2 and GY4 throughout this review period).

9.67 In its October 2021 submission, Sure proposed a [………… ✂ ………..], for both retail and wholesale markets.

9.68 JT raised a number of specific concerns with the GCRA's sub-national geographic market definition stating that the draft finding appeared not to have regard to whether the market is retail or wholesale and that the 'GCRA cannot just assume there is a market boundary between locations with a network monopoly and those with a duopoly'.[54]

9.69 JT submitted that JT does not represent a 'significant enough competitive constraint on Sure for the provision of wholesale services (i.e. competitive conditions are not sufficiently different) for this to justify a separate geographic market' and found no evidence in the Draft Decision to 'support the findings of the authors that competitive conditions vary for retail services as between the urban and rural areas which they propose.'[55]

9.70 The GCRA notes that market entrants in Guernsey have built their own infrastructure in certain parts of the island, and considers whether this may reflect differences in competitive conditions in particular areas. The GCRA concurs with respondents that any such differences are more likely to concern the wholesale market. Nonetheless, the GCRA's analysis, which for ease of presentation canvasses the geographic dimension from a retail and wholesale perspective, is provided in this section.

9.71 In its 2021 Wholesale Fixed Telecoms Market Review 2021-26, Ofcom delineated separate sub-national geographic areas for the wholesale market, using postcode sectors as the unit of analysis, where the presence of leased line networks means that BT faces wholesale competition from two

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[53] Sure, 2021a: page 11.

[54] JT Group, 2021: page 9.

[55] JT Group, 2021: page 10.

or more competing networks[56] (i.e. areas of high network reach using Ofcom's network reach model).[57]

9.72 In its 2021 BCMR in Jersey, the JCRA examined the extent of other operators' networks and determined that these networks are still too small to make a material difference to competition and so the geographic retail and wholesale market comprises the whole Bailiwick of Jersey.[58]

9.73 In Guernsey in 2021, operators continue to offer uniform retail pricing across the island, market their services in a uniform manner, and there is no product differentiation according to geographic area. This supports the view that the presence of OLOs do not change competitive conditions.

9.74 BEREC's common position on geographical aspects of market analysis notes that:

> If prices of the incumbent and alternative operators are geographically uniform, that is, do not differ between geographical areas, this may be an indication of insufficient geographical variations in competitive conditions to justify the definition of subnational geographical markets.[59]

9.75 Moreover, as noted by Sure in its March 2021 response,[60] separate geographic markets in retail markets are not warranted because, where there is no competing network presence, competitors can still compete at the retail level because there is regulated access to the incumbent's network and services.

9.76 Leased lines are primarily a product for businesses, and it is not surprising therefore that leased lines use will predominate where there is a concentration of business customers. Supplier's costs are lowest where traffic can be aggregated and in Guernsey this is the urban area around St Peter Port, where the concentration of business customers has proved to be the most attractive area for alternative infrastructure investment (see Figure 9.3).

[56] This contrasts with Guernsey where the incumbent Sure only faces one competing leased lines network.

[57] Ofcom, 2021: page 159.

[58] JCRA, 2021: page 22.

[59] BEREC, 2014: page 15.

[60] Sure, 2021a: page 11.

Figure 9.3: Geographic distribution of retail and wholesale leased lines, 2020

9.77 While recognising that there is geographic variation between areas where there is a concentration of business customers, and areas where there is not, the GCRA's view is that the existence of alternative infrastructure is not enough in itself to demonstrate separate geographic markets.

9.78 The GCRA's view is, therefore, that, while there are expected to be variations in demand and supply conditions associated with, for instance groups of customers who are geographically concentrated, these variations do not result in clear and persistent boundaries which would indicate a separate geographic retail market within Guernsey.

10. Wholesale market definition

Introduction and summary

10.1 This section sets out the GCRA's proposed market definition at the wholesale level. The GCRA's proposed decision is presented first. The proposed wholesale market is then defined, commencing with the product and then the geographic dimension.

Table 10-1: Summary – Proposed wholesale market definition

Dimension	Proposed finding
Product	• The GCRA's conclusions in the retail market are mirrored in the wholesale market viz. all bandwidths are included, the market should not be narrowed to reflect delivery technology or broadened to include fixed broadband, business connectivity solutions other than leased lines or off-island leased lines In addition: • the market should not be narrowed to reflect customer use of leased lines e.g. mobile backhaul • self-supply should be included • the market should be broadened to include duct and dark fibre access.
Geographic	• Island-wide – there are no particular areas within Guernsey where conditions of competition are appreciably different to the extent that they constitute separate geographic markets.

10.2 The wholesale product market for leased lines comprises telecoms operators buying leased lines from each other. This may include the purchase of a wholesale leased line which is then used as an input to the purchaser's retail offering, and could include, for instance, a mobile operator buying leased lines to link its radio base stations and switching centres.

10.3 The definition of the wholesale market is to a large extent derived from the definition of the retail market, but it is necessary to supplement this by considering other factors which are specific to the wholesale market.

10.4 Consistent with the approach taken for the retail market, the remainder of this section assesses a number of factors relevant to potential differences in competitive conditions in the wholesale market and differences in wholesale products.

Wholesale product market

<u>Are the GCRA's conclusions in the retail market mirrored in the wholesale market?</u>

10.5 In defining the retail market for leased lines, the GCRA concluded that:

- All bandwidths used for delivering leased lines are in the same market.
- The retail leased lines market should not be:
  - ➢ narrowed to reflect the delivery technology i.e. comprises both AI and TI lines.
  - ➢ broadened to include business or residential fixed broadband.
  - ➢ broadened to reflect the purchase by business customers of business connectivity solutions other than retail leased lines.
  - ➢ broadened to include off-island leased lines.

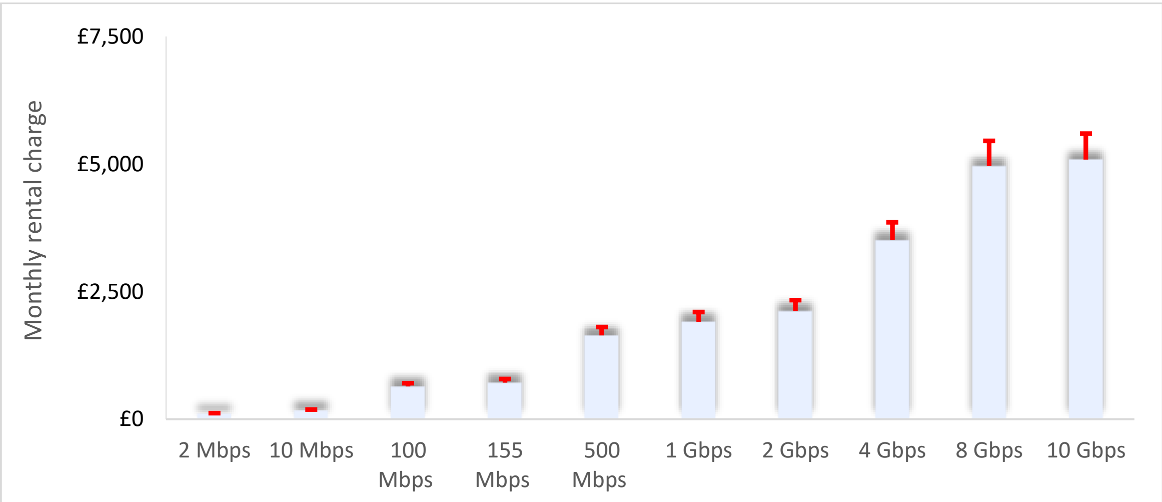
10.6 The GCRA's position is that the substantive analysis underpinning each of the above conclusions is also relevant in defining the wholesale market for leased lines in Guernsey. As is the case at the retail level, wholesale leased lines provided over ethernet outstrip TI-based circuits and at the wholesale level leased lines cannot logically be viewed as a substitute for managed business connectivity services. In addition, there is insufficient evidence to consider that wholesale leased lines and wholesale broadband services reside in the same market.

10.7 On the matter of off-island leased lines, it is necessary to provide clarity regarding the boundary between the on-island and off-island markets. The GCRA's view is that the wholesale on-island leased lines market includes facilities up to, and including, the on-island termination points of international facilities and the local access tails of international circuits. In other words, the on-island market must facilitate access to the off-island market – there must be no gap between the two markets.

Bandwidth segmentation and focal product

10.8 From a demand-side perspective, the GCRA's view is that the chain of substitution that exists between wholesale leased lines of different bandwidths would indicate that all bandwidths lie in the same wholesale market, for similar reasons to those set out in the retail case. The wholesale price differentials between Sure's range of capacities of leased lines, which are similar to those in the retail market, is shown in Figure 10.1.

Figure 10.1: Chain of substitution – wholesale market



Source: GCRA analysis.

10.9 In 2017, the Competition Appeal Tribunal (CAT) found that Ofcom erred in its 2016 decision to define a single product market for leased line services of all bandwidths for BT, and remitted it back to Ofcom for reconsideration.[61] The GCRA notes that Ofcom's decision relied on demand-side analysis, and concerned an unusual market characteristic in that 'products are only offered at

[61] CAT, 2017: paragraph 350.

wholesale in defined bandwidths spaced significantly apart (e.g. 100M, 1G, 10G etc)'.[62] This contrasts with the Guernsey wholesale market where a wider range of capacities are available.

10.10 Following the CAT remittal, in its 2019 BCMR, Ofcom once again defined a single product market for all bandwidths, this time relying on supply- and demand-side analysis.[63] Ofcom's 2021 Wholesale Fixed Telecoms Market Review 2021-26 concluded that all leased line bandwidths are in the same product market, based on a supply-side analysis.[64] While recognising that if some leased lines have higher prices and margins (e.g. VHB services) it may be more profitable for a provider to extend its network to supply those lines than to extend its network to supply lines with lower margins, Ofcom concluded that competitive conditions between bandwidths were similar.

10.11 This was on the basis that BT's rivals rarely dig to connect customers even where these higher margins apply, and the higher prices could be themselves be a reflection of BT's market power and the difference in margins merely reflect the fact that VHB services had not been subject to as stringent price controls as had other leased lines.[65] In other words, the existence of significantly higher price differences between bandwidths was more likely to be due to the existence of market power and less likely to be because different leased line bandwidths are in different product markets.

10.12 The GCRA shares Ofcom's view that the existence of significantly higher price differences between bandwidths is more likely to be due to the existence of market power and less likely to be because different leased line bandwidths are in different product markets.

10.13 The GCRA's set of focal products is therefore on-island wholesale leased lines products across all bandwidths on the island of Guernsey.

10.14 The GCRA does however consider it prudent to test whether the wholesale product definition might be expanded or reduced to encompass customer use of wholesale leased lines, self-supply and access to passive upstream infrastructure, notwithstanding the data limitations in carrying out an orthodox SSNIP assessment for this purpose.

<u>Should the wholesale market be narrowed to reflect customer use of wholesale leased lines, for example mobile backhaul?</u>

10.15 The GCRA has considered whether separate markets should be defined for leased lines which serve different customers. For example, a leased line can be used for mobile backhaul or for

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[62] CAT, 2017: paragraph 118.

[63] Ofcom (2019). *Promoting competition and investment in fibre networks: review of the physical infrastructure and business connectivity markets: Volume 2: market analysis, SMP findings, and remedies for the Business Connectivity Market Review (BCMR) – Statement*, 24 May 2019: https://www.ofcom.org.uk/__data/assets/pdf_file/0029/149339/volume-2-bcmr-draft-statement.pdf: page 30.

[64] Ofcom (2021). *Promoting competition and investment in fibre networks: Wholesale Fixed Telecoms Market Review 2021-26: Volume 2: Market analysis – Statement*, 18 March 2021: https://www.ofcom.org.uk/__data/assets/pdf_file/0023/216086/wftmr-statement-volume-2-market-analysis.pdf

[65] Ofcom, 2021: page 103.

supplying a retail customer, which raises the question as to whether or not the conditions of competition are different according to the use to which the leased line is put.

10.16 Mobile network operators (**MNOs**) are significant buyers of leased lines. MNOs use leased lines to connect their mobile base stations to a point of aggregation in their core networks. This can be done using a mix of access and backhaul connections. In Guernsey, mobile connectivity is provided by Sure, JT and Airtel. Airtel is the only operator who does not own a fixed fibre network on the island. Airtel purchases wholesale leased line circuits from Sure, but the bulk of its backhaul is currently provided over microwave links.

10.17 Currently, some 40 per cent of backhaul around the world is supplied using microwave links as it provides a relatively simple mobile connectivity solution with reasonable bandwidth capacity, all under the control of the mobile operator. Generally, microwave links are used for mobile backhaul where MNOs do not need the higher capacity offered by leased lines and use of leased lines would be costly (for example in rural areas). However, fibre optic backhaul is seen as the preferred, long term solution as it provides flexible growth potential and, importantly, can meet the latency requirements for video and the development of 5G.

10.18 In the 2014 BCMR, the GCRA did not narrow the market to exclude mobile backhaul services in the leased lines market.[66]

10.19 In its March 2021 consultation, the GCRA reached the same conclusion, proposing that mobile backhaul is included within the same product markets as other leased line services.

10.20 In its March 2021 response, JT did not have any fundamental concerns with including backhaul in the market.[67] Airtel noted constraints with using microwave alternatives:

> Airtel appreciates that [the Authority] acknowledges cost of lease lines in Guernsey are exorbitantly high compared to neighbouring markets including the UK. This prohibits Airtel from using leased lines as a preferred medium of transmission in Guernsey, thus pushing Airtel to use Microwave product which has limitations in term of speed and reliability.[68]

10.21 Sure submits that backhaul products have the same characteristics as other leased lines service level agreements, but also indicated that adequate alternative microwave backhaul solutions are available:

> Wireless backhaul providers offer resilient 10Gbps (and faster) solutions to fulfil the needs of 5G mobile operators. Our own wireless backhaul supplier (used for our mobile networks in Jersey and the Isle of Man) provides equipment with up to 5 x 10Gbps interface capabilities, so the GCRA's claim of inadequacy is evidently incorrect.[69]

10.22 On a supply-side assessment wholesale leased lines used for mobile backhaul and other connectivity services are essentially the same product: a lit fibre connection between two locations along a dedicated path. This suggests that, in the event of a SSNIP by a hypothetical monopolist of

[66] GCRA, 2014b: page 40.

[67] JT Group, 2021: page 10.

[68] Airtel, 2021: page 1.

[69] Sure, 2021: page 15.

a separately defined backhaul market or leased line market, a supplier of the other product could enter the market using existing assets making the SSNIP unprofitable. The GCRA also notes the prices charged for wholesale leased lines are the same regardless of the customer's use of the leased line. The inclusion of mobile backhaul is also notably a feature common in market definitions adopted by other NRAs.

10.23 On a forward-looking basis, the GCRA remains unconvinced that microwave technology is an adequate substitute for fibre backhaul. In its Wholesale Fixed Telecoms Market Review 2021-26, Ofcom considered microwave links as a poor substitute for leased lines for mobile backhaul because of their:[70]

- ability to support only lower capacity links compared to fibre-based backhaul, means access seekers are likely to rely on fixed connections in higher traffic areas;
- requirement for line of sight connectivity;
- significantly lower transmission range than fibre-based backhaul links; and
- higher risk of failure because microwave antennas are exposed.

10.24 The GCRA's view, therefore, is that the ultimate use to which a leased line is put does not impact on the market definition, and that the wholesale market for leased lines should include the provision of wholesale leased lines no matter their ultimate use (in particular mobile backhaul), and that this would include provision for backhaul as well as an input to a range of retail applications. In addition, the GCRA's view is that microwave solutions are not adequate substitutes for leased lines in a forward-looking assessment of wholesale leased lines market.

Should the wholesale market include self-supply?

10.25 Self-supply (or self-provision) is the provision of a leased line by a vertically integrated operator's upstream (wholesale) division to its (retail) downstream division, irrespective of how the operator is organised. Whether this self-supply should be taken into account in considering market shares could affect whether the GCRA considers there is SMP (and hence effective competition) in the market.

10.26 In the 2014 BCMR, the GCRA assessed whether an operator would be likely to build its own infrastructure in response to a SSNIP in wholesale leased lines in order to constrain the behaviour of a hypothetical monopolist. If it were a realistic option for a significant proportion of customers (specifically telcos) to replace wholesale leased lines with their own infrastructure in response to a SSNIP, then there would no longer be a requirement for a wholesale product. The GCRA found that such a conclusion was not supportable and excluded self-supply from the relevant market.[71]

10.27 In the March 2021 consultation, in light of additional evidence from subsequent market developments, the GCRA took the view that self-supplied leased lines from all licensed operators should be included in the relevant market, regardless of whether the customer is internal or external.

[70] Ofcom, 2021: page 56.

[71] GCRA, 2014b: page 41.

10.28 Airtel, Newtel and JT made no comments on self-supply (self-provision) of leased lines. Sure sought confirmation that self-supply applies to the wholesale market only:

> In paragraphs 3.50 and 3.51 of the Annex, the GCRA concludes that separate markets exist for products below 1Gbps and at 1Gbps and above, and that both markets include self-provision. The inclusion of self-provision suggests that the markets thus defined may be wholesale markets (as self-provision applies in wholesale markets only), but that is not stated by the GCRA.[72]

10.29 The GCRA is aware that BEREC's review of self-supply found that most NRAs included self-supply.[73] The review also found that, once it has been determined that self-supply should be factored in the market analysis, most NRAs have taken into account self-provisioning by both the incumbent and alternative operators when calculating market shares.

10.30 In Guernsey, from a demand-side substitution perspective, the GCRA considers that a wholesale leased line is essentially the same product whether it is sold to an external customer or provided to the retail division of a vertically integrated firm. Sure, which owns a ubiquitous access network, and JT, which owns a more limited network, both supply their own retail business arms with connectivity services over wholesale leased lines and are already allocating spare capacity to supply third parties with these services.

10.31 In contrast, from a supply-side substitution standpoint, the GCRA's 2014 position remains valid in that the implementation of a SSNIP by hypothetical monopolist on leased lines would be unlikely to provide sufficient incentive for an existing entrant to invest in expanding its network and self-supply services on new routes as this would entail significant sunk costs and time to implement.

10.32 On balance, the GCRA's view is that self-supply should be included in the wholesale market on the basis of demand-side substitutability.

<u>Should access to upstream passive infrastructure form part of the wholesale market?</u>

10.33 In defining the retail leased lines market, the GCRA considered whether or not downstream services that utilise leased lines as an input, such as VPN, should form part of the retail market. In defining the wholesale market, an analogous question occurs in relation to whether or not to include upstream passive infrastructure, such as duct sharing or access to dark fibre.

10.34 Access to physical infrastructure refers to the sharing of an incumbent network operator's physical infrastructure, including ducts and poles, with other licensed operators.[74] This generally allows OLOs to install their own sub-duct and/or cable in the incumbent's ducts and attach and maintain their own equipment on the incumbent's poles.

10.35 Dark fibre is passive in that it is unused or 'unlit' optical fibre i.e. fibre that has been deployed within a communication network but which is not connected to active electronic equipment used

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[72] Sure,2021: page 19.

[73] BEREC (2010). *Report on self-supply, March 2010*: https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/171-berec-report-on-self-supply

[74] Ofcom, for example, defines physical infrastructure as all parts of a network which can be used to host elements of a telecoms network. It can include pipes, masts, ducts, inspection chambers, manholes, cabinets, buildings or entries to buildings, antenna installations, towers and poles. Ofcom, 2021: page 49.

to facilitate data transmission. The access seeker is able to attach their own active equipment directly to the ends of the fibre path and 'light' it at whatever speed they choose and in whatever configuration they choose, within the limitations of what is technically feasible for that particular fibre.

10.36 In the 2014 BCMR, the GCRA noted that an organisation accessing dark fibre would need to install its own equipment to 'light' the fibre, which would involve additional investment in order to do so. Duct access would enable an organisation to install its own optical fibre along a given route, but it would face significant costs both to deploy its own fibre and then to 'light' it. [75] The GCRA concluded that neither dark fibre nor duct access are a close enough substitute to warrant their inclusion within the wholesale market for leased lines.

10.37 Access to passive physical infrastructure was not canvassed in the March 2021 consultation.

10.38 In its March 2021 response, Airtel submitted that access to passive upstream infrastructure should be considered:

> Dark Fibre product should be a part of this consultation as it is best suited product for 4G hub sites and in future for 5G sites where high capacity is much needed. Further, there should also be an option of 'access to duct' in case the existing provider does not have capacity to spare, and the new dark fibre provisioning lead time is high, in which case Airtel can lay their own dark fibre using the duct space.[76]

Dark fibre

10.39 In its 2021 Wholesale Fixed Telecoms Market Review 2021–26, Ofcom concluded that dark fibre used to supply or self-supply leased line services is in the same market as wholesale leased line access services.[77] Ofcom based this finding on a supply-side analysis:

> We concluded that dark fibre, when used to supply or self-supply LL Access services, is in the same product market as LL Access services based on supply-side analysis:
>
> a) When networks are already fibre connected, they would be able to switch between supplying dark fibre and LL Access services sufficiently quickly and at minimal cost in the event of a SSNIP. In fact, the main dark fibre providers (e.g. CityFibre, Zayo, euNetworks and Colt) all supply both dark fibre and LL Access services.
>
> b) Where suppliers are not already connected, dark fibre providers are equally able to supply LL Access services as any other supplier of LL Access services as the incentives to extend their networks will be broadly similar for both services.[78]

[75] GCRA, 2014b: page 39.

[76] Airtel, 2021: page 1.

[77] Ofcom, 2021: page 106.

[78] Ofcom (2020). Promoting competition and investment in fibre networks: Wholesale Fixed Telecoms Market Review 2021-26: Volume 2: Market assessment – Consultation, 8 January 2020: https://www.ofcom.org.uk/__data/assets/pdf_file/0023/216086/wftmr-statement-volume-2-market-analysis.pdf: page 76.

10.40 In the same review, Ofcom identified a national geographic market for wholesale access to telecoms physical infrastructure for deploying a telecoms network, which includes a leased lines network.[79,80]

10.41 Dark fibre is primarily attractive to wholesale customers such as MNOs, which can manage the provision of the electronics. Since the electronic equipment is provided by the customer, rather than the fibre provider, it allows greater choice in how services are provided over the fibre than being limited to just Ethernet or wavelength division multiplex (**WDM**) services.

10.42 In Guernsey, Sure does not offer dark fibre products, nor does it offer access to its other passive physical infrastructure. In its response to the GCRA's mobile backhaul review in 2019, Sure submitted its rationale for not offering dark fibre services, including:[81]

- Providing dark fibre is not an efficient use of fibre infrastructure – in fact, it risks material increases in cost for Sure's business. Sure would normally deliver a number of services across a fibre, but if a wholesale customer were to lease the whole fibre (or fibre pair), Sure would be prevented from using that fibre (or pair) for any other customer service. In many cases we provide multiple types of customer service off each fibre.
- In order to investigate any faults or degradation of service on a dark fibre connection Sure would need to temporarily disconnect the service to install its own electronics to perform diagnostic analyses.

10.43 In its 2021 BCMR, the JCRA concluded, in light of evidence provided by respondents to its BCMR process and approaches adopted by the European Commission and Ofcom, that the Jersey wholesale leased line market should be extended to include dark fibre access.[82] The JCRA noted the European Commission recommendation on relevant markets states:

> The substitutability [of active leased lines by dark fibre] depends on the ability of the access seeker to self-provide the knowledge and active equipment needed as well as the difference in price to active products. If dark fibre is found to exert sufficient competitive constraint over the pricing of leased lines, it could be included in the same relevant market for dedicated capacity.[83]

10.44 The JCRA also considered whether duct access should be included, concluding that it remains outside the relevant market. The JCRA reached this conclusion on the basis that it did not consider

[79] Ofcom, 2021: page 60.

[80] For more information, see Openreach's Physical Infrastructure Access portal, which provides information on sharing of duct and pole infrastructure: https://www.cvf.openreach.co.uk/cpportal/products/passive-products/physical-infrastructure-access(PIA)

[81] Sure response to the Draft Decision: Backhaul Services for Wireless Service Providers, 10 July 2019: https://www.gcra.gg/media/598100/t1407gj-mobile-backhaul-market-sure-response-draft-decision.pdf

[82] JCRA, 2021: page 19.

[83] European Commission (2020b). Explanatory Note accompanying the document Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code, 18 December 2020 https://www.pts.se/globalassets/startpage/dokument/legala-dokument/eu-regler/explanatorynote-201410091.pdf: page 58.

that sufficient demand for leased lines would be substituted by duct access in the event of a SSNIP to make that SSNIP unprofitable. This was because:

> For there to be substitution, wholesale customers would need to access JT's ducts and lay their own cables and other equipment in those ducts to provide leased line services. This would require significant capital investment by customers of wholesale leased and the Authority has seen no evidence that network operators would be willing to make such an investment in the event of a SSNIP.[84]

10.45 In its draft report, in relation to remedies, the JCRA also took the view that 'imposing duct access would be misaligned with the Government's telecoms policy, which has a focus on service competition on a single network as opposed to infrastructure competition through the development of competing independent networks.'[85]

10.46 In line with the JCRA and Ofcom's findings, the GCRA is of the view that access to dark fibre would be an effective supply- and demand-side substitute for active leased lines. In addition, in the wholesale market, the expectation is that the purchaser would always be a licensed telecoms operator, which would have the required technical skills to use dark fibre.

Duct access

10.47 The European Commission has identified the benefits of sharing existing infrastructure to reduce the cost of deploying high-speed electronic communications networks. Its 2014 Broadband Cost Reduction Directive,[86] the European Commission recognised that the roll-out of high-speed fixed and wireless electronic communications networks requires substantial investments, a significant proportion of which is represented by the cost of civil engineering works, and that limiting some of the cost-intensive civil engineering works would make broadband roll-out more effective.

10.48 Article 3 of the 2014 Broadband Cost Reduction Directive states that:

> **Access to existing physical infrastructure**
>
> 1. Member States shall ensure that every network operator has the right to offer to undertakings providing or authorised to provide electronic communications networks access to its physical infrastructure with a view to deploying elements of high-speed electronic communications networks……
>
> 2. Member States shall ensure that, upon written request of an undertaking providing or authorised to provide public communications networks, any network operator has the obligation to meet all reasonable requests for access to its physical infrastructure under fair and reasonable terms and conditions, including price, with a view to deploying elements of high-speed electronic communications networks.

[84] JCRA, 2021: page 20.

[85] JCRA, 2020: page 44.

[86] European Commission (2014a). Directive 2014/61/EU of the European Parliament and of the Council of 15 May 2014 on measures to reduce the cost of deploying high-speed electronic communications networks: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0061&from=EN

10.49 In its 2020 recommendation on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation, the European Commission noted:

> The most upstream market may, depending on national circumstances, consist of or include more generic cross-market wholesale products such as physical infrastructure access (e.g. duct access) or passive access products. In particular, where civil engineering infrastructure exists and is reusable, effective access to such infrastructure may significantly facilitate the roll-out of very high capacity networks and encourage development of infrastructure- based competition to the benefit of end-users.[87]

10.50 In line with Ofcom's findings, the GCRA is also of the view that access to other passive physical infrastructure, and duct access in particular, together with own fibre lay would be an effective alternative to taking active leased lines. As in the case of dark fibre, an even more 'passive' option than dark fibre. Moreover, in contrast to Jersey, the GCRA is not constrained by any telecoms policy that seeks to promote service competition on a single network over infrastructure-based competition. In this regard, the GCRA shares the view of Cave (2011) that 'end users' long term interests are best served by infrastructure competition where it is efficiently attainable.'[88]

Conclusion

10.51 Moreover, while access to passive infrastructure, including dark fibre and duct access, are likely to primarily benefit MNO's that have no fibre network in Guernsey, it may also allow MNO's with existing fibre networks more readily extend their networks.

10.52 The GCRA' view, therefore, is that upstream passive infrastructure, including access to dark fibre and duct sharing, should be included within the wholesale leased line market.

Wholesale geographic market

<u>Are there particular areas within the islands where the conditions of competition are appreciably different to the extent that they may constitute separate geographic markets?</u>

10.53 In its retail market definition, the GCRA noted that market entrants in Guernsey have built their own infrastructure in certain parts of the islands, and considered whether this may reflect differences in competitive conditions in particular areas. The GCRA went on to point out that the definition of a narrower geographic market would involve considering whether an increase in price in one area would attract investment from firms operating in other areas, and whether this would constitute a sufficiently clear and persistent boundary. The GCRA also noted that retail operators

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[87] European Commission (2020a). Commission Recommendation (EU) 2020/2245 of 18 December 2020 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive (EU) 2018/1972 of the European Parliament and of the Council establishing the European Electronic Communications Code: paragraph 26: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32020H2245&from=EN.

[88] Cave, M (2011). The Ladder of Investment and the Exemption Provisions – A Report for Telstra, 28 September 2011: page 1-2: https://www.accc.gov.au/system/files/Telstra%20-%20Attachment%20F%20-%20Cave%20report.pdf

in Guernsey offer uniform pricing across each island, market their services in a uniform manner, and there is no product differentiation according to geographic area.

10.54 The GCRA's view is that similar issues are at play in the wholesale leased lines market. A finding of a smaller geographic market within Guernsey would need to be evidenced by data which showed the clear boundary between different areas in terms of demand and supply. The GCRA notes that where regulators have found sub-national markets, this has been evidenced by detailed data provided by operators on revenue and other supply factors within clearly defined areas, and is an analysis described by BEREC as a 'burdensome process'.

10.55 The GCRA's view, therefore, is that there are no particular areas within Guernsey where the conditions of wholesale competition are such that they constitute separate geographic markets.

Alternative approach to dealing with geographical differences

10.56 BEREC describes two possible ways of dealing with geographical differences in competitive conditions across a national territory.[89]

10.57 The first, which has been considered above, consists of differentiating geographical markets at the market definition stage. Those geographically differentiated markets are then analysed on their own and conclusions on market power are drawn for each of them. The second approach consists of defining one market, analysing it and then differentiating remedies to take into account geographical differences.

10.58 The first approach is applied when a NRA believes that in some areas the market structure and the competition situation differ significantly from the parallel areas (e.g. areas are competitive enough to withdraw obligations, a measure which is inevitable if no SMP undertaking can be identified in those areas). The second is employed when any differences in the conditions of competition between geographical areas are not yet sufficiently stable or sustainable to justify the definition of regional or local markets.

10.59 In relation to the second approach, BEREC states:

> In contrast, where the available evidence suggests that the scope of the relevant market is national (any differences in the conditions of competition between geographical areas are not yet sufficiently stable or sustainable to justify the definition of regional or local markets), market power will have to be assessed within this national market. In case of geographical variations in competitive conditions within this national market, it may be appropriate to vary remedies within that national market, despite the fact that an operator is found to have SMP throughout the entire territory.

10.60 The GCRA proposes to consider BEREC's second approach at the subsequent remedies stage of this BCMR process.

[89] BEREC (2014). *BEREC Common Position on geographic aspects of market analysis (definition and remedies)*, 5 June 2014: page 5: https://berec.europa.eu/eng/document_register/subject_matter/berec/download/0/4439-berec-common-position-on-geographic-aspe_0.pdf

11. Three-criteria test

Introduction and summary

11.1 In this section, the GCRA assesses whether or not the proposed retail and wholesale markets meet the European Commission's three-criteria *ex ante* regulation test.

Table 11-1: Summary – Proposed three-criteria test findings

Market	Proposed finding
Retail	• Not passed – wholesale access remedies mean that there are no high and enduring barriers to entry and the market is therefore not susceptible to *ex ante regulation*. On this basis, no formal SMP analysis is undertaken
Wholesale	• Passed – meets all three elements of the test and is therefore susceptible to ex ante regulation. On this basis, SMP analysis is undertaken.

Retail market

11.2 To establish if the retail market is susceptible to *ex ante* regulation, all criteria in the cumulative European Commission three criteria test must be met. Should any one of these criteria not be passed, taking into account existing regulation in upstream (i.e. wholesale) markets, then the retail market is not susceptible to *ex ante* regulation with no further analysis required.

<u>Criteria 1: Is the market subject to high and non-transitory barriers to entry and expansion?</u>

11.3 OLOs operating in the leased lines retail market are able to access wholesale leased lines on regulated terms from Sure (see Section 0). Sure is obliged to set the price of wholesale leased lines at the retail price minus 20 per cent and offer an equivalent wholesale product to OLOs for any retail product it offers. As such the economic barriers to entry at retail level are low as any OLO can expand its business by acquiring more wholesale leased lines if needed.

11.4 Moreover, the wholesale market remedies that will be considered at the remedies stage of this BCMR may be designed to lower such barriers further. In line with the 2014 EU Ex Ante Market Recommendation, 'legal or regulatory barriers that are likely to be removed within the relevant time horizon should not normally be deemed to constitute a barrier to entry such as to fulfil the first criterion.'[90]

11.5 The GCRA's view, therefore, is the retail market does not meet the first of the three-criteria and so is not susceptible to *ex ante* regulation. As such, analysis of the remaining criteria is not warranted.

11.6 The implication of this view is any alleged dominance and anticompetitive practices in this market would be subject to competition law rather than regulation. For avoidance of doubt, this does not

[90] European Commission, 2014: paragraph 13.

imply that the GCRA has no regulatory concerns with the current functioning of the leased lines retail market, as evidenced by the benchmarking results presented in Section 0. Rather, the implication is that the GCRA will address retail market concerns through wholesale market remedies.[91]

Wholesale market

11.7 As noted in Section 2, the Guernsey wholesale leased lines market is equivalent to the European Commission's 'Market 4: Wholesale high quality access provided at a fixed location'. As Market 4 is listed in the 2014 EU Ex Ante Market Recommendation,[92] NRAs are not required to conduct the three-criteria test, but may still consider it appropriate, on the basis of specific national circumstances, to conduct its own three-criteria test.[93]

11.8 For completeness, rather than a need to address any specific national circumstances, the GCRA has chosen to conduct a three-criteria test. As with the retail market, all three criteria in the three-criteria test must be met. In the event any one of these criteria is not met then the market is not susceptible to *ex ante* regulation and no further analysis is needed.

<u>Criteria 1: Is the market subject to high and non-transitory barriers to entry and expansion?</u>

11.9 Currently, there is no regulated access to any business connectivity product upstream of wholesale leased lines, such as dark fibre or duct access. Any new entrant must therefore build its own physical network. This represents a significant structural barrier to entry as entry would require very high levels of investment to install new physical infrastructure and would take considerable time.

11.10 Moreover, the costs associated with such investment are, to a large degree, likely to be sunk. Sunk costs are upfront costs that an undertaking must incur when investing in market entry. Given that sunk costs are not recoverable upon exit, the market entrant must ensure that return on investment at least covers these sunk costs.

11.11 In Guernsey, Sure derives its competitive advantage at the wholesale level as it controls a ubiquitous network infrastructure, which supports the provision of a range of leased line products and services including TI and AI leased lines across the island. Moreover, as noted in Section 0, Sure will be extending its fibre network to enable all of Guernsey to be served by a fibre network by December 2026. It is unlikely to be economically feasible for any new market entrant or existing market player to fully replicate Sure's network infrastructure for the provision of wholesale services over national leased lines in Guernsey.

[91] The 2014 EU Ex Ante Recommendation makes it clear that should a NRA 'demonstrate that wholesale interventions have been unsuccessful, the relevant retail market may be susceptible to ex ante regulation provided that the national regulatory authority has found that the three-criteria test prescribed in this Recommendation is met.' European Commission, 2014: paragraph 18.

[92] European Commission, 2014: Annex.

[93] European Commission, 2014: paragraph 20.

11.12 The GCRA's view, therefore, is that the Guernsey wholesale market exhibits high and non-transitory barriers to entry.

Criteria 2: Is the market trending towards effective competition?

11.13 Sure's wholesale market power is significant and entrenched, despite its extent having reduced since the last review, for two reasons. The first is a decrease in JT's use of Sure's wholesale leased lines in favour of its own network. The second is the proposed inclusion of self-supply in the wholesale product market. Data from operators on the number of leased lines provided in 2020, including self-supply, shows Sure has a wholesale market share of around [✂]. Based on forecast data provided by operators, this share is unlikely to fall significantly over the market review period. A market share of this size and expected stability suggests the wholesale market is not trending towards effective competition and will not do so in the near future.

11.14 The GCRA's view, therefore, is that the wholesale market will not, in the absence of regulation, trend towards effective competition in the near future.

Criteria 3: Is competition law alone likely to be able to resolve any issues in the market?

11.15 In its 2021 Wholesale Fixed Telecoms Market Review 2021–26, Ofcom identified four reasons why competition law alone would be insufficient to address the competition concerns in the market for wholesale access to telecoms physical infrastructure for deploying a telecoms networks:

- First, competition law would focus on tackling the abuse of a dominant position and would not be as effective as ex ante regulation in promoting downstream competition.
- Second, regulation must remain effective for the review period, and ex ante regulation better enables us to do this as it can be tailored to the particular circumstances in the market and services provided.
- Third, competition law does not provide enough regulatory certainty, which itself can undermine downstream competition where there is upstream SMP – and regulatory certainty is important in encouraging long-term investment in competing networks. In contrast, a benefit of ex ante regulation is that all industry stakeholders are clear in advance on the regulation that will apply.
- Fourth, ex ante regulation can facilitate more timely enforcement due to the greater certainty and specificity provided. [94]

11.16 Ofcom's points equally apply to the wholesale leased lines market in Guernsey. Competition law is not a substitute for utility price regulation. Rather, in the context of SMP utility regulation, they are complements. Utility regulation is generally concerned with efficiency and the promotion of competition under particular market conditions, and is characterised by *ex-ante* interventions and remedies.

[94] Ofcom, 2020: page 55.

11.17 In contrast, competition legislation is more concerned with the protection of competition to the extent that it exists, and largely involves *ex-post* interventions in response to dominant firms exploiting consumers or excluding rivals. It is therefore unlikely to be able to resolve issues of access on fair and reasonable terms to facilitate the entry of competition in downstream markets

11.18 The GCRA's view, therefore, is that competition law alone is unlikely to be able to resolve substantive issues in the wholesale market.

Conclusion

11.19 In conclusion, the GCRA is of the view that the wholesale on-island leased lines market on Guernsey fulfils the three criteria test and is, therefore, susceptible to *ex ante* regulation.

12. Competition assessment

Introduction and summary

12.1 In this section, the GCRA presents a summary of its competition findings. This is followed by consideration of whether or not the proposed markets are likely to become effectively competitive during the period of this review (and until overtaken by a subsequent review) which is likely to be between three to five years, or whether any operator has SMP.

Table 12-1: Summary – Proposed SMP findings

Market	SMP indicators	Proposed SMP designation
Retail	• Failed the three criteria test so not subject to formal competition analysis.	• None
Wholesale	• Stable market share in excess of European Commission dominance threshold • Presence of barriers to entry and expansion • Presence of economies of scale and scope • Evidence of excessive profits • Lack of countervailing buyer power.	• Sure

March 2021 consultation response

10.61 In its March 2021 response, JT submits that the GCRA made a 'fundamental error in their dominance assessments for the retail markets by failing to take into account the impact of their findings about the wholesale market.'[95] JT further submits that:

[95] JT Group, 2021: page 13.

The proposed findings that Sure or JT is dominant in a retail market, or that Sure and JT are jointly dominant, make no sense.[96]

10.62 JT submits that it 'would expect to find that Sure holds a dominant position in the wholesale market, so defined, by virtue of its unchallenged geographic reach and the lack of significant wholesale provision by JT or any other provider.'[97] JT further submits that it would 'not expect to find dominance in the corresponding retail market.'[98]

10.63 In its response to the March 2021 consultation, Sure submits that GCRA presents no analysis or arguments to support its individual SMP findings. Sure claims, for example, the GCRA does not attempt to determine the Herfindahl-Hirschman Index (**HHI**)[99] for the Guernsey leased lines markets.[100] Sure also raises concerns about the joint dominance analysis, submitting that the 'GCRA also appears to completely ignore the substantial amount of legal precedent for how to establish and justify the existence of joint dominance in electronic communications markets.'[101] Sure's response does not offer an alternative SMP conclusion.

10.64 In its October 2021 submission, Sure proposed [✂] retail and [✂] wholesale markets [… ✂ ..].[102]

Retail market assessment

12.2 As noted in Section 11, given the availability of wholesale services at regulated prices, the GCRA's view is that the retail market fails the European Commission three-criteria test for *ex-ante* assessment and is not, therefore, subject to a formal competition assessment.

12.3 Nevertheless, for completeness, the estimated market shares and HHI of market concentration for the on-island retail leased lines market are presented in Figure 12.1.

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[96] JT Group, 2021: page 13.

[97] JT Group, 2021: page 17.

[98] JT Group, 2021: page 17.

[99] The United States Department of Justice classifies market concentration as follows:[99]

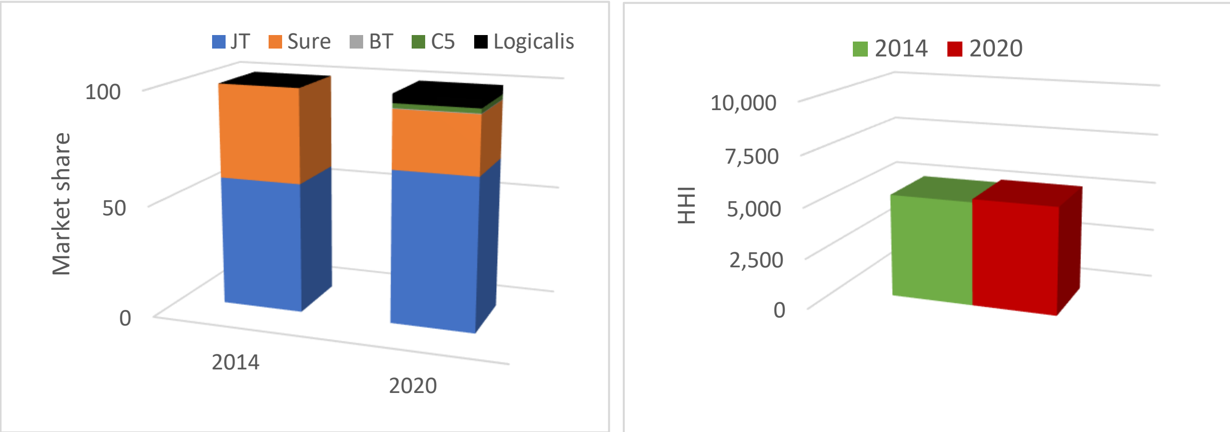
- Unconcentrated markets: HHI below 1,500.
- Moderately concentrated markets: HHI between 1,500 and 2,500.
- Highly concentrated markets: HHI above 2,500.
- Monopoly markets: HHI is 10,000.

[100] Sure, 2021a: page 24.

[101] Sure, 2021a: page 2.

[102] Sure (2021b). *Sure proposals for GCRA BCMR*, October 2021.

Figure 12.1: Market shares and HHI – On-island retail market, 2014 and 2020



Source: Telecommunications Statistics Market Reports, operator returns and GCRA calculations.

12.4 This shows that JT's share of the retail market has increased since the 2014 BCMR, with its States of Guernsey contract continuing to play a significant role. The level of concentration only shows a marginal increase over this period, despite JT's larger market share, thanks to the entry of several smaller licensed operators. The HHI, at about double the 2,500 threshold, signals a highly concentrated market.

12.5 The GCRA's view is that actual and potential competition problems may remain in the retail market for leased lines in Guernsey. The GCRA notes that the market is highly concentrated, as shown in Figure 12.1. The GCRA also notes concerns expressed about the high relative cost of connectivity, as discussed in Section 6. The GCRA's assessment is that, while this may not apply to all leased lines, it does apply to the highest capacity lines. Although there has been market entry and expansion in Guernsey, the continuing concerns expressed by customers suggest that the benefits of competition are not being fully passed on to customers in the form of lower prices.

12.6 However, the GCRA's view is that competition problems associated with barriers to entry and expansion in the market for retail leased lines could more effectively be remedied in the wholesale market.

12.7 The GCRA's view, therefore, is that no operator can behave independently of competitors, customers and consumers when setting the relevant retail charges and that therefore no operator enjoys SMP in the retail provision of leased lines services in Guernsey. This situation is likely to persist within the timeframe of this review.

Wholesale market assessment

Introduction

12.8 As noted Section 11, the GCRA's view is that the wholesale market passes the European Commission three-criteria test for *ex-ante* assessment. The SMP assessment for the wholesale market is presented in this section.

12.9 The GCRA's proposed approach is set out in Section 8. This involves a forward-looking analysis of market characteristics. While market shares and trends in market share provide an important indication of how competitive a market is, they are not determinative on their own, particularly in signalling the level of future competition. The GCRA has therefore taken into account a number of other relevant criteria that may constitute barriers to entry and/or expansion in coming to its proposed finding.

12.10 The assessment seeks to determine whether any firm, singly or jointly, holds a position of SMP, which is equivalent to a dominant position, in the wholesale leased lines market in Guernsey. The GCRA defines a dominant position as one that allows a firm to increase prices above the competitive level, or decrease quality, without making that move unprofitable. A dominant firm can also use its market power to engage in anti-competitive conduct and exclude or deter competitors from the market. Absent appropriate *ex ante* regulation, examples of the types of competition problems that may arise include:

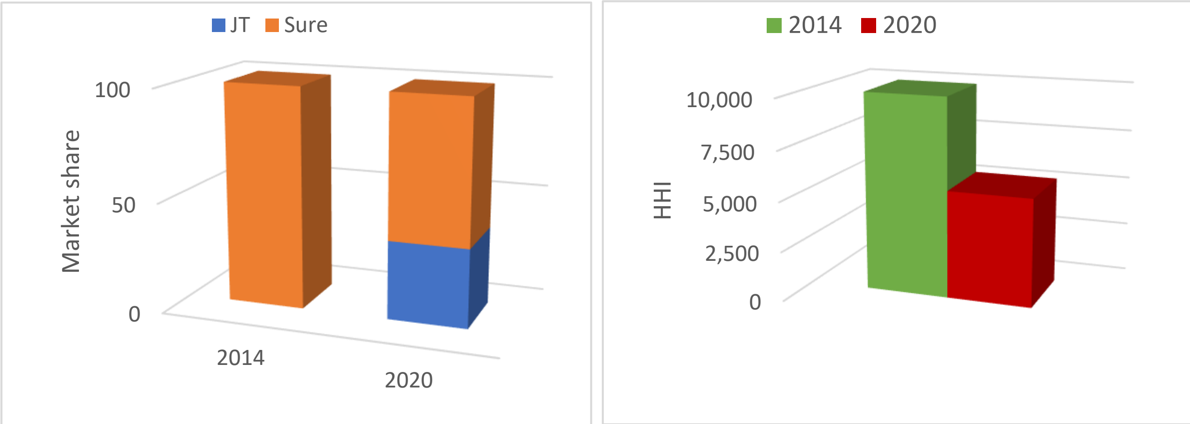
- Refusing to provide network access to other downstream service providers (or refuse to provide access on reasonable terms, conditions, and charges), which could restrict competition in the provision of retail services to the detriment of consumers.
- Discrimination in favour of its downstream retail businesses to the detriment of competition in retail services (including by price and/or non-price discrimination), and ultimately to the detriment of consumers.
- Fixing and maintain some or all of its wholesale prices at an excessively high level or engaging in a price squeeze.

Market share and concentration

12.11 The market share of the leading business is usually the starting point for an assessment of SMP. As discussed in Section 11, and shown in Figure 12.2, Sure is no longer the *de facto* monopoly in the wholesale market it was in 2014 BCMR thanks to JT entering the market. Since then, JT has entered the merchant market in a limited way and has been reducing its reliance on Sure's wholesale leased lines in favour of its own network. The proposed inclusion of self-supply in the wholesale product market has also had a significant impact on its current market share.

12.12 Nonetheless, measured by the number of circuits, and taking into account self-supply, Sure remains the dominant operator in the wholesale market, with a market share in excess of [✂]. This is well above the European Commission's 50 per cent dominance threshold, and is not expected to change significantly over the review period.

Figure 12.2: Market shares and HHI – On-island wholesale market, 2015 and 2020



Source: Telecommunications Statistics Market Reports, operator returns and GCRA calculations.

12.13 The estimates for the concentration in Guernsey wholesale on-island leased lines market, is shown in Figure 12.2, measured by the volume of leased lines. The estimated HHI for the wholesale market has fallen substantially since 2014, largely due to the inclusion of self-supply in the market, but is remains a highly concentrated market at more than two times the 2,500 threshold.

Other relevant factors in assessing dominance

12.14 Although the market share is above the dominance threshold, in this section the GCRA considers a number of other relevant criteria that may impact on the level of competition over the period of the market review. These include:

- barriers to entry and expansion;
- control of infrastructure not easily replicated;
- economies of scale and scope;
- profitability;
- switching;
- vertical integration;
- countervailing buyer power; and
- potential competition.

Barriers to entry and expansion

12.15 Building telecommunications access network infrastructure represents a high cost for a telecoms operator, and confers competitive advantage on an operator that already has an extensive access network.

12.16 Sure has the benefit of a ubiquitous access network in Guernsey, which means it has the necessary infrastructure, active and passive, to reach almost any site on the island within a reasonably short timeframe and without incurring significant costs. While this network currently relies on both

Sure's copper and fibre assets, it is fast-tracking the rollout of a ubiquitous fibre network with the assistance of the States of Guernsey.

12.17 Competing networks supply customers on-net (i.e. using their own network, either with existing duct connections or where digging is required) or off-net (i.e. using access to third-party infrastructure network, usually through a regulated wholesale market). Ofcom uses this concept to inform their view on the presence of competing network infrastructure and the ability of competing network operators to use it to compete for customers.[103] Ofcom's view is that a higher proportion of customers supplied on-net suggests a higher presence of competing network infrastructure. On the other hand, a low proportion of customers supplied on-net suggests reliance on access to BT's infrastructure as BT's is much closer to demand sites compared to competing networks.

12.18 In the leased line markets, OLOs can and do extend their networks on a customer-by-customer basis, either by building their own infrastructure or by leasing passive infrastructure (e.g. ducts) from a third party if that option is available. Generally, only short distances would be cost justified because route length is a prime cost driver. Therefore, typically, network extension would tend to be driven by a customer being close to an existing element of the network where there may be a business case for a payback over, say, 2-3 years. In addition to civil works costs, other constraints can include road closure/ dig restrictions (such as the three-year moratorium on road disturbance following full resurfacing) and property owner restrictions on installing additional ducts into buildings.

12.19 Since the 2014 BCMR, JT has been building its own infrastructure in Guernsey, primarily to service the States of Guernsey contract, but also as a means to build its business customer base. As anticipated, it has been migrating an increasing number of retail leased lines away from Sure's network and onto its own.

12.20 This suggests that as JT becomes less dependent on the purchase of wholesale leased lines, and consequently the wholesale leased line market (excluding self-supply) would contract. The GCRA's evaluation of data provided by operators indicates that this process is underway, although JT is and will remain reliant on the continuing purchase of wholesale leased lines from Sure, largely low bandwidth services of 2 Mb and 10 Mb. The GCRA's assessment is that JT would be unlikely to replicate Sure's ubiquitous network because its focus is on connecting to particular customers, and that JT does not have the incentive (absent regulation) or motivation to offer a comprehensive wholesale product on its own infrastructure.

12.21 While the GCRA believes that JT's dependency on wholesale leased lines may decrease further, this is not the case for other OLOs, which remain dependant on Sure's wholesale leased lines, both to reach retail customers and to purchase wholesale leased lines as inputs to their own networks. The dependency is in large part determined by Sure's control of infrastructure which is not easily replicated.

[103] Ofcom, 2021: page 192.

Control of infrastructure not easily replicated

12.22 As noted above, Sure owns a leased line network across the whole of Guernsey. It has also been noted that the only other network operator, JT, does not have an island-wide network and that the cost of building an alternative ubiquitous network is very high with most of the cost associated with civil works. Information from operators indicated that the cost of civil works, including digging and refilling trenches to an acceptable standard, was an average of about [✂] per metre.

12.23 As discussed in Section 10, the European Union's 2014 Broadband Cost Reduction Directive also recognised that high-speed fixed and wireless electronic communications networks require substantial investments, a significant proportion of which is represented by the cost of civil engineering works, and that limiting some of the cost-intensive civil engineering works would make broadband roll-out more effective. The UK gave effect to this directive through the *Communications (Access to Infrastructure) Regulations 2016*.[104]

12.24 For all these reasons, therefore, it would be difficult for any other licensed operator to duplicate the network that Sure controls.

Economies of scale and scope

12.25 Economies of scale occur when the average cost of additional capacity continuously declines, so the larger the network the lower the cost of serving each customers. Economies of scope arise when the average cost of each additional product declines with each additional product. The more products a network operator is able to sell, the less each costs as there are common costs shared between products.

12.26 Generally, telecoms operators with greater network scale and scope will benefit from lower costs. Scale and scope economies may be achieved by the high proportion of fixed and common costs associated with the ownership of network infrastructure. In the leased lines market, scale economies are more likely to be achieved in the use of the underlying physical infrastructure, and less so in the provision of dedicated access links to each customer, due to the higher proportion of fixed and common costs in the underlying infrastructure.

12.27 In Guernsey, Sure is likely to benefit from economies of scale due to its ownership of a ubiquitous access network. The GCRA notes, however, that the small size of the market limits the extent to which any communications provider in Guernsey can benefit from scale economies.

12.28 Economies of scope may be achieved where the costs of providing leased line connectivity may be shared across the provision of all connectivity – where, for example, the same physical infrastructure and network services are used to provide a range of downstream retail services. Generally, an operator selling a wide range of communications services will be more likely to be able to achieve economies of scope because it will have lower average costs per service.

12.29 In Guernsey, Sure offers the broadest range of services, and is likely to be able to achieve economies of scope.

[104] UK Government (2016). *2016 No. 700 Electronic Communications, The Communications (Access to Infrastructure) Regulations 2016*: http://www.legislation.gov.uk/uksi/2016/700/made

12.30 Sure is therefore uniquely able to enjoy economies of scale and scope that its competitors cannot meet without considerable expansion. However, as the barriers to such expansion are sufficiently high this is unlikely to occur. Sure's dominant position is therefore reinforced by its economies of scale and scope compared to its competitors.

Profitability

12.31 The GCRA does not have access to separated accounting information to allow it to comment directly on the profitability of Sure's wholesale on-island leased line business and Sure advised it was unable to provide specific information on margins or costs related to its leased lines business.

12.32 Bearing in mind that the objective is to understand the underlying economic profit associated with an operator's activities in a relevant market, and given the information asymmetry between Sure and the regulator, the GCRA turned to an examination of comparative pricing of wholesale on-island leased lines, as detailed in Section 7.

12.33 Sure's current wholesale on-island leased lines are subject to a retail-minus price control. The GCRA took the view at the time of this decision in 2015 that one of the major advantages of a retail-minus approach is that it would strengthen the competitive environment by allowing market entrants to compete more effectively. The GCRA however noted a disadvantage of the retail-minus approach is that it relies on competitors actively seeking to compete and grow market share. The GCRA noted that in percentage terms market entrants, notably JT, had made considerable inroads into the retail leased lines market in Guernsey, that entrants were being given an ability to price more competitively given this improved margin and that business end-users could take advantage of this choice through appropriately structured competitive procurement processes.

12.34 The wholesale benchmark price analysis shows that Sure's VHB leased line prices are significantly higher than comparable jurisdictions, in particular Jersey and the Isle of Man, and substantially greater than UK wholesale products. This contrasts with the lower bandwidth product prices, where, for the same exchange, Sure's prices compare favourably with comparable jurisdictions, albeit still higher than UK prices. The absence of management information by Sure about the profitability performance of these services further suggest the cost pressures and need to price competitively are absent or at best extremely weak.

12.35 This supports a view that the retail-minus price control has been less effective in restraining excessive pricing for the VHB leased line products than for lower speed products. While a retail-minus approach would lead to cost-oriented 'efficient' wholesale prices if retail prices are themselves cost-oriented and the retail costs subtracted from the retail prices are accurately estimated, there are a number of reasons why retail-minus may not to have worked effectively in this case. The GCRA previously identified two. The first is that it critically relies on aggressive competitors actively seeking to compete and grow market share.[105] The second is that it does not

[105] GCRA, 2015b: page 5.

directly address prices in the retail market, which could be an issue if the SMP operator is charging a retail price which is above marginal cost.[106]

12.36 The GCRA acknowledges Sure may face higher costs due to lower economies of scale in Guernsey than in larger jurisdictions, such as the UK, which may reduce its negotiating power with suppliers of equipment and limit the extent to which prices in Guernsey compare directly with those in the UK. It also recognises the cost of living and salaries may be somewhat higher. However, the GCRA has no evidence to indicate that these additional costs account for the difference in prices. It is the GCRA's view, therefore, that Sure is likely to be making higher profits on leased lines than operators in comparator markets considered in Section 7.

12.37 The market has not, therefore, developed as anticipated by the GCRA when setting the retail-minus control. Given Sure's dominant position and the lack of an effective competitive constraint on prices, the conclusion is that Sure is able to set its retail and wholesale prices without having to take account of competitors and customers, resulting in high prices especially for its VHB leased lines products.

Switching

12.38 The main considerations related to barriers to switching concern the contract terms of agreement between the customer and the service provider. The first is the term of the contract, which is for a minimum of one year, but higher bandwidth leased lines may attract a contract period up to three or five years, often along with a discount. The second is the actual costs involved in switching supplier during the contract period or after the expiry of the contract term, as physical changes, and a significant connection fee, may be required for the connectivity. In addition, customer loyalty, developed as a result of the long-term market presence of the incumbent, may also pose a barrier to switching to alternative operators.

12.39 The GCRA's view, therefore, is that the impact of contract periods in the leased lines market means that change in competitive conditions can only come about relatively slowly.

Vertical integration

12.40 A vertically integrated supplier of wholesale and retail leased lines could achieve efficiencies due to its presence in the upstream and downstream markets. These efficiencies could be passed on to customers in the form of cheaper prices, saving on transaction or interconnection costs, or enhanced product quality, and such efficiencies could be achieved in both the retail and the wholesale markets.

12.41 However, vertical integration can also constitute an entry barrier where the presence of a communications provider at multiple levels of the production or distribution chain raises the cost of new entry (for example, where new entrants perceive the need to enter multiple markets simultaneously) or where the vertically integrated communications provider is able to foreclose competition at one or more levels of the market. This means that, if a vertically integrated supplier

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[106] GCRA (2015a). *Review of the price control for wholesale on island leased lines: Guernsey, Consultation and Draft Decision*, CICRA 15/07, 19 March 2015: page 7: https://www.gcra.gg/media/2056/t1097gj-wholesale-on-island-leased-lines-guernsey-draft-decision.pdf

has SMP in the upstream wholesale market, it would have the opportunity to leverage its market power into the retail market.

12.42 In the Guernsey wholesale on-island leased lines market, Sure is a vertically integrated operator, in that it is active at both the wholesale and the retail level on an island-wide basis. JT is also present in the wholesale self-supply and retail provision of leased lines. However, JT is not in a position to equally leverage market power at the wholesale level as Sure as its network coverage is not island-wide.

12.43 The GCRA has considered whether the vertical integration of an SMP operator would constitute a barrier to entry and/or expansion in the wholesale on-island leased lines market, and its view is that vertical integration would confer an advantage, and that an SMP operator would have the incentive and motivation to leverage its market power downstream into the retail market.

Countervailing buyer power

12.44 Countervailing buyer power is the situation where a purchaser, which is normally purchasing a significant proportion of industry output, buys enough of an operator's services that it can influence the pricing and market behaviour of the operator. The extent of countervailing buyer power depends on whether customers could, at the outset, choose to discontinue the service being provided by a particular supplier and switch to alternative providers, within a short period of time and at reasonable cost.

12.45 The GCRA has considered whether any OLO has the power to credibly threaten the provider it will either switch suppliers or backwardly integrate to self-supply the product. If it can credibly threaten that it will take either of these actions, this can constrain the provider's ability to exploit its market power.

12.46 The existence of high barriers to entry and expansion, as discussed above, and the lack of an alternative provider that could meet any OLO's demand for leased lines means that no customer in the relevant market has countervailing buyer power. Moreover, the wholesale price benchmarking discussed in Section 0 suggests that even JT's potential to self-supply within its network area is not constraining Sure's market power with respect to VHB leased lines.

12.47 The GCRA's view is that, in the wholesale on-island leased lines market, countervailing buyer power is not likely to be an effective constraint.

Potential competition

12.48 Potential competition refers to the prospect of new operators entering the market within a short period of time. The threat of market entry could in certain circumstances constrain the incumbent from raising prices above competitive levels, leading to a situation in which no market power can be profitably exercised.

12.49 The approach to market definition and SMP assessment is forward-looking and considers the extent to which conditions of competition are likely to change in the relevant market during the lifetime of the review. In addition to this overall approach, it is appropriate to consider specifically the extent to which potential competition in the form of potential market entry and/or expansion may act as a constraint on an SMP operator's pricing and behaviour.

12.50 The GCRA has noted that JT is investing in its own infrastructure in Guernsey, and expects that over the course this review period, JT's dependence on purchasing wholesale inputs from Sure may continue to decrease. It is likely that JT will use this infrastructure for its own mobile backhaul, and for commercial clients, as well as to service the States of Guernsey contract.

12.51 In the GCRA's view, it is unlikely that an operator would be able and willing to offer wholesale on-island leased lines on a comprehensive basis without a regulatory obligation to do so. While JT currently makes wholesale capacity available on its own infrastructure to a few customers, the GCRA's view is that this is more likely to be an opportunistic response, and would in all likelihood remain limited in scale.

12.52 Moreover, Sure has the only ubiquitous network in Guernsey over which to offer wholesale services, and JT would have to absorb significant sunk costs in order to fully replicate Sure's network configuration.

12.53 The GCRA's view, therefore, is that existing alternative operators and potential new entrants are unlikely to pose a sufficiently strong competitive constraint on Sure in the wholesale market for on-island leased lines.

Conclusions on dominance in the wholesale on-island leased lines market

12.54 Sure, with a stable market share in excess of the European Commission's 50 per cent threshold for dominance, remains the major player in the provision of on-island wholesale leased lines in Guernsey. While a market share of this size gives rise to a presumption of dominance, the GCRA has also considered other factors which might mitigate Sure's market power in this area.

12.55 The GCRA considers that Sure's access network confers competitive advantage in the market, along with its ability to take better advantage of economies of scale and scope, and its vertical integration. The GCRA's view is that Sure's position in the wholesale market for on-island leased lines would confer the ability and incentive to leverage market power into the retail market.

12.56 The GCRA has also considered the nature of competitive conditions in the retail leased lines market in Guernsey, and notes that fluctuations in that market are linked to a single contract. The key impact on the wholesale market of conditions in the retail market is that the wholesale market is likely to contract further over the lifetime of this review. However, all OLOs remain dependent on wholesale inputs from Sure, both for their retail offerings, and for extending their own networks.

12.57 Taking these factors into consideration, in the absence of wholesale regulation, the GCRA's view is that Sure can act independently of customers and other network operators in its wholesale pricing structure for the wholesale services under investigation. The GCRA's conclusion, therefore, is that Sure is dominant in the provision of wholesale on-island leased lines within Guernsey and should be designated with SMP in this market.

PART 5: CONSULTATION

13. Consultation and next steps

Representations and objections

13.1 The GCRA invites interested parties to make representations or objections in respect of the proposed decision by **4pm Monday, 16 May 2022**. If you do not agree with the GCRA's conclusions presented in this proposed decision, or the evidence on which the GCRA relied to draw its conclusions, please provide alternative suggestions supported by alternative evidence.

13.2 All written responses should be clearly marked *'BCMR Proposed decision: Market Definition & Competitive Assessment'* and should be delivered by hand or by e-mail to the following address:

GCRA
Suite 4, 1st Floor
La Plaiderie Chambers
La Plaiderie
St Peter Port
Guernsey
GY1 1WG

E-mail: info@gcra.gg

13.3 In line with the GCRA's consultation policy, it intends to make responses to the proposed decision available on its website. Any material that is confidential should be put in a separate annex and clearly marked as such, in order that it may be kept confidential.

13.4 Pursuant to Section 5(4) of *The Telecommunications (Bailiwick of Guernsey) Law, 2001*, the GCRA has published notice in La Gazette Officielle of the availability of this document on the GCRA's website (www.gcra.gg).

Next steps

13.5 The GCRA will consider responses received to this proposed decision and any further evidence provided to inform its final decision on the BCMR market definition and competitive assessment.

Acronyms & glossary

Term	Description
4G	Fourth-generation mobile telecommunications technology, which enables the delivery of high-speed broadband services over mobile networks. The '4G' standard encompasses the Long-Term Evolution (LTE) technology, which is the main 4G technology being deployed worldwide.
5G	5G is next generation wireless network technology that will deliver faster and better mobile broadband, with lower latency and greater bandwidth capable of handling more connected devices, than 4G networks
Alternative Interface (AI)	Alternative Interface (AI) leased lines are digital leased lines geared mainly towards the transmission of IP data and are more suitable for the delivery of high bandwidth services than TI leased lines.
Backhaul	A fibre line that connects an access point, such as a mobile base station with the core network of the operator
Bandwidth	The physical characteristic of a telecoms system that indicates the speed at which information can be transferred, which in digital systems is measured in bits per second (bps).
BEREC	Body of European Regulators for Electronic Communications
Business Connectivity Market Review (BCMR)	Regulatory review of the business connectivity (leased line) market
Cost orientation	A form of price control whereby prices are set by reference to associated costs.
Dark fibre	Unused or 'unlit' optical fibre, i.e. fibre which has been deployed within a communication network, but which is not connected to active electronic equipment used to facilitate data transmission.
Duct access	See **Physical infrastructure access**
Ethernet	A technology used for data transmission. Originally deployed for use in a LAN environment, the technology has also increasingly been used to support WAN (see below) connectivity, with Ethernet being used in this instance as a leased line technology.
Ex ante	The application of regulation before an abuse of power has necessarily occurred. The reasoning behind its application is that finding that an operator has SMP means that the operator is likely to have the incentive and motivation to behave in a way which exploits its market power to the detriment of competitors and ultimately to consumers. Ex ante regulation can be contrasted with ex post regulation, which investigates an incident which has already happened.

Term	Description
Bandwidth	In digital telecommunications systems, the rate measured in bits per second at which information can be transferred
Ex post	The use of regulation following a complaint or abuse of market position by an operator. In contrast to ex ante regulation.
Gbps	Gigabits per second (1,000 Mbps) – speed of multiples of consumer information capacity
HMT	Hypothetical Monopolist Test – see **SSNIP**
Mbps	Megabits per second (1 Megabit = 1 million bits) – measure of bandwidth in a digital system
Leased line	A permanently connected communications link between two premises dedicated to a customer's exclusive use (also known as a private circuit)
MNO	mobile network operator
NGA	Next Generation Access refers to the introduction of new products including super-fast broadband
NRA	National Regulatory Authority
Other Licensed Operator (OLO)	A licensed operator other than the incumbent operator
Passive remedies	Passive remedies refer to access remedies which are provided without electronics and may include obligations to provide duct or pole access, or dark fibre
Physical infrastructure access	The sharing of an incumbent network operator's physical infrastructure, including ducts and poles, with other licensed operators. This generally allows OLOs to install their own sub-duct and/or cable in the incumbent's ducts and attach and maintain their own equipment on the incumbent's poles.
Private circuit	An alternative term for a leased line
Retail minus	This is a form of price control whereby the SMP's wholesale price is set by reference to its retail price minus an appropriate margin to enable OLOs to cover their retail costs and compete with the SMP
Significant Market Power (SMP)	The ability to behave independently of competitors, suppliers, and ultimately businesses and consumers in the market
Small but Significant Non-transitory Increase in Price (SSNIP)	A theoretical price increase that forms part of the 'hypothetical monopolist' test used in market definition analysis. The price increase in question is usually considered to be in the range of 5 to 10 per cent.
Tbps	Terabits per second (1,000 Gbps)

Term	Description
Traditional Interface (TI)	Traditional Interface (TI) leased lines are provided using legacy analogue and digital interfaces
UK	United Kingdom
VHB	Very-high bandwidth
VPN	Virtual Private Network – a technology allowing users to make inter-site connections over a public telecommunications network that is software partitioned to emulate the service offered by a physically distinct private network.
Wave Division Multiplex (WDM)	A transmission technology that enables multiple wavelengths of light to share the same fibre optic pair
Wide Area Network (WAN)	A network connecting devices located in geographically dispersed locations, either in the same national area or across national boundaries
WDM	Wavelength division multiplex – a fibre-based technology with features suited for high capacity routes (e.g. between core nodes and to data centres) and for higher capacity backhaul connections WDM is a technology that uses different wavelengths (colours) of light to create separate virtual circuits over the same fibre, or pairs of fibre. WDM circuits generally require electronics and optical lasers built to a higher specification than lower speed circuits.

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Annex 1: Leased lines market background

Leased lines operators

The leased lines market in Guernsey is served by two network operators, Sure and JT, and three service-based operators, Business Telecom Limited (**Business Telecom**), C5 IT Services (**C5**) and Logicalis (Guernsey) Limited (**Logicalis**).

Sure provides Traditional Interface (**TI**) and Alternative Interface (**AI**) wholesale and retail leased lines services using a combination of its island-wide, ubiquitous fibre and copper network. Sure currently offers retail and wholesale leased lines at speeds between 2 Megabits per second (**Mbps**) and 10 Gigabits per second (**Gbps**).

JT (Guernsey) provides AI retail leased line services from 10 Mbps to 10 Gbps over its less extensive fibre network and TI services using Sure's wholesale products. It also provides a limited wholesale service to a few customers. Both network operators serve the urban area comprising St Peter Port (GY1), St Sampson (GY2) and St Martin (GY4). Within the individual areas, most businesses are situated in St Peter Port. The other two areas are where the majority of the Government premises are located in St Sampson, as well as hotels and restaurants in St Martin (GY4).

Findings of the 2014 review and current SMP regulation

In the GCRA's most recent completed BCMR in 2014 (the **2014 BCMR**),[107] one retail and one wholesale on-island leased lines market was defined for one product (leased lines of all bandwidth speeds) one and geographic area (whole of Guernsey). Sure was designated as having SMP in the wholesale market.

Table A1-1: 2014 BCMR – Market definition and SMP designation

Product	Geographic	SMP designation	
		Retail	Wholesale
All bandwidths	Whole of Guernsey	None	Sure

The GCRA's final decision placed the following SMP obligations on Sure in the wholesale market, the majority taking effect through existing licence conditions:[108]

- Access – obligation to make access to wholesale on-island leased lines available to Other Licensed Operators (**OLOs**) in response to a reasonable request for access (Condition 26).
- Non-discrimination – obligation not to discriminate between OLOs (Condition 29).
- Transparency – obligation to publish and maintain a Reference Offer and Service Level Agreement that governs Sure's relationship with the OLO, including Key Performance Indicators and publish prices and non-price terms and conditions.

[107] GCRA (2014a). *Business connectivity market review: Guernsey Final Decision*, Document No: CICRA 14/49, 1 October 2014: https://www.gcra.gg/media/3746/t994gj-business-connectivity-market-review-final-notice.pdf

[108] Sure (Guernsey) Limited Fixed Licence: https://www.gcra.gg/media/597684/sure-fixed-final.pdf

- Accounting separation – obligation to prepare and maintain separated accounting information (Condition 27).
- Cost accounting – obligation to maintain its current cost accounting obligations (Condition 28.2).
- Price controls – provision for the GCRA to impose a price control on any licensed services within a relevant market in which Sure has been found to be dominant (Condition 31.2).

Following the 2014 BCMR, the GCRA put in place a retail minus price control (the **2015 wholesale price control**) on Sure's wholesale on-island leased lines, applicable from 1 July 2015, as follows:[109]

- the control is set on an ex ante basis, applies to all wholesale on-island leased lines and is applied on a product-by-product basis;
- for each retail leased line product offering, a wholesale equivalent product must be offered at a price that complies with the proposed control;
- the control shall be set at retail minus 20 per cent;
- the term of the price control will be aligned with the market review cycle;
- Sure to provide a regular compliance statement, to facilitate increased transparency around pricing and costs of wholesale and retail leased lines, including details of prices, number of lines sold, revenues earned and promotional offers made for all retail and wholesale leased lines, by bandwidth.

Market structure

As noted above, in Guernsey there are 5 providers of retail leased lines: Sure, JT, Business Telecom, C5 and Logicalis. The total number of retail leased lines has shown an inclining trend over the last 5 years, from 571 in 2015 to 744 in 2020 (Figure A1.1). The majority are on-island leased lines. In 2020 there were 629 on-island leased lines, with 78 off-island and 37 inter-island.[110]

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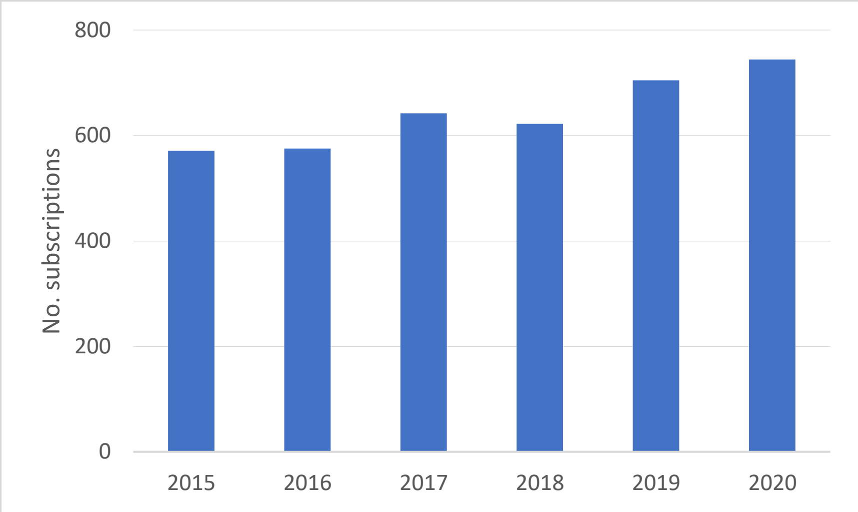
[109] GCRA (2015). Review of the price control for wholesale on island leased lines: Guernsey, Final Decision and Response to Consultation and Draft Decision, CICRA 15/16, 19 May 2015: https://www.gcra.gg/media/2088/t1097gj-price-control-for-wholesale-on-island-leased-lines-guernsey-final-decision.pdf

[110] On-island lines are those where both ends are in Guernsey. Inter-island lines are those where one end is in Guernsey and the other is in Jersey. Off-island lines are those where one end is in Guernsey and the other end is outside of the Channel Islands.

Figure A1.1: Number of retail leased lines, 2015 to 2020



Note: On, off and inter-island.

Source: Statistics Jersey (2021).[111]

At the time of the 2014 BCMR, JT had approximately [✂] of the retail market share, having supplanted the incumbent operator Sure as the market leader for retail leased lines in 2012. The GCRA noted that:

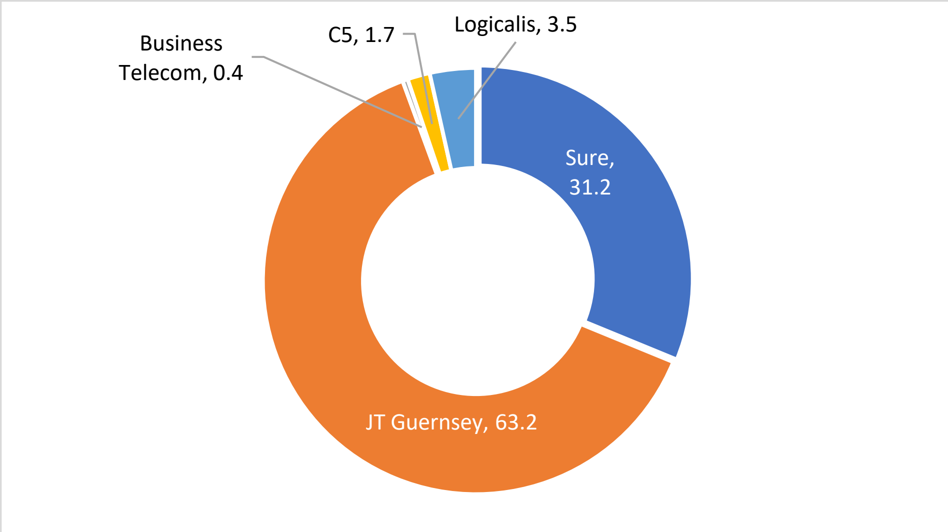
> This market share development appears to have been primarily been driven by JT winning the tender to supply the government with a managed data service comprising a Wide Area Network (WAN) and IP connectivity. Previously, the Guernsey government had bought leased lines directly, and managed its own network. The new contract is a shift to the government contracting for a managed network, in which leased lines are an input. This single contract makes up a significant proportion of the retail leased line market on the island, to the extent that it is possible that whoever holds the contract is likely to be the major supplier of retail leased lines in Guernsey.[112]

In 2020, JT continued as the majority retail service provider across all leased lines, with about 63 per cent of the market (Figure A1.2), continuing to provide services using a combination of its own network and reselling wholesale services from Sure. Sure has about 31 per cent of the market and the other smaller providers together account for the remaining 6 per cent. In 2020, following a competitive tender, JT once again secured the long-term (10-year) States of Guernsey contract with a significant proportion of its retail circuits being provided to States of Guernsey premises.

[111] Statistics Jersey (2021). *Telecommunications Statistics and Market Report 2020*, July 2021: https://www.gcra.gg/media/598349/telecommunications-statistics-2020.pdf

[112] GCRA (2014b). *Business connectivity market review: Guernsey – Consultation*, CICRA 14/16, 8 April 2014: https://www.gcra.gg/media/3644/t994gj-review-to-improve-business-connectivity-in-guernsey-call-for-information.pdf: page 30.

Figure A1.2: Market share percentage by number of leased line subscriptions

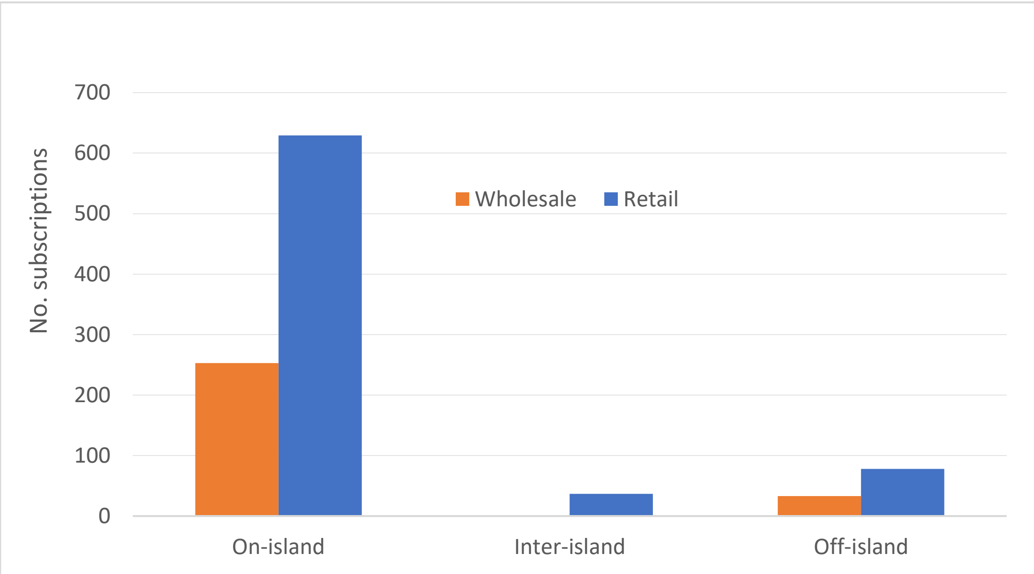


Note: On, off and inter-island.

Source: Statistics Jersey (2021).

In 2020, there were 744 and 287 retail and wholesale leased line subscriptions, respectively (Figure A1.3), with the majority on-island. Sure provides the vast majority of the wholesale leased lines.

Figure A1.3: Number of retail and wholesale leased lines, 2020

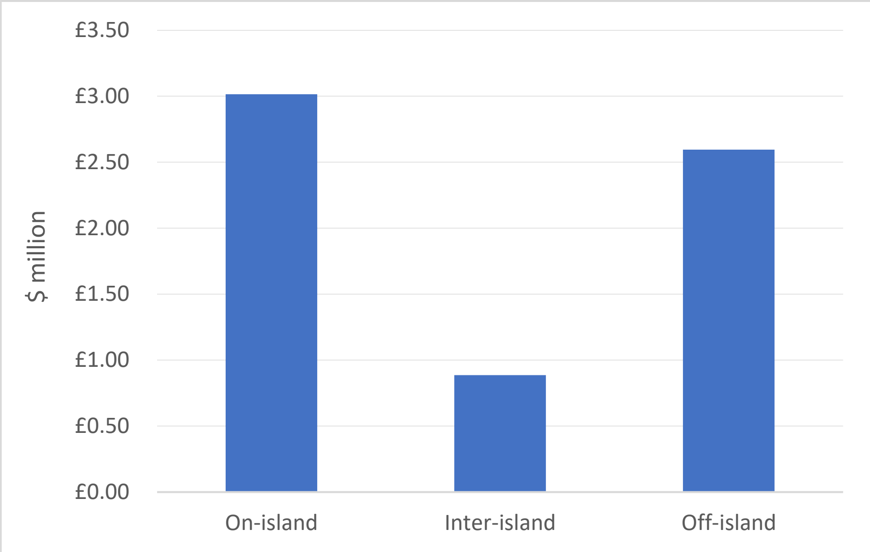


Note: On, off and inter-island.

Source: Statistics Jersey (2021).

Total revenue from retail leased line subscriptions in Guernsey in 2020 was £6.5 million, equivalent to that in 2019. About 46 per cent of the 2020 revenue was earned from on-island leased lines, with inter- and off-island lines accounting for 54 per cent.

Figure A1.4: Retail leased lines revenue, 2020



Source: Statistics Jersey (2021).

Government telecoms policy

The States of Guernsey published a telecoms strategy, The Future of Telecoms, in June 2018.[113] The strategy sets out three key objectives in relation to broadband services, namely provision of:

- fibre to business districts within 2-3 years;
- high quality super-fast broadband up to 100 Mbps to all residential properties within 2-3 years; and
- next generation mobile technology in line, or earlier than the UK (**5G**).

This was followed by a policy letter: *Delivering Next Generation Digital Infrastructure*, published in September 2021, which sets out a proposal to speed up the island-wide rollout of fibre and reaffirms support for next generation mobile as a medium-term objective.[114] Subsequently, a contract was signed between the States of Guernsey and Sure, which provides Sure with a grant capped at £12.5 million to accelerate its planned rollout of fibre to the premises (**FTTP**) and ensure connection of 30 per cent of Guernsey premises that are in uneconomic locations. The purpose is to enable all of Guernsey to be served by a fibre network by December 2026.

The policy letter endorsed 'Wholesale products and prices should be similar to those available in similar sized jurisdictions in which Sure operates, to ensure Guernsey remains competitive' as a broad principle to be followed in coordinating the Sure fibre broadband roll-out solution.[115]

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[113] States of Guernsey (2018). *The Future of Telecoms*, Committee for Economic Development, June 2018: https://www.gov.gg/article/165840/Guernseys-first-ever-Telecoms-strategy-published

[114] States of Guernsey (2021). *Delivering Next Generation Digital Infrastructure*, Committee for Economic Development, September 2021: https://www.gov.gg/article/185510/Delivering-Next-Generation-Digital-Infrastructure

[115] States of Guernsey, 2021: page 17.

The policy letter also provided an update on the States' plans for 5G, stating that its current intention is to license 5G (or its successor technology) from 2023, but only after a licensing framework is presented to the States Assembly. The policy letter made specific reference to 5G backhaul:

> 5G Backhaul - GCRA to ensure the regulation of the interconnect cost of fibre backhaul to 5G transmitter sites. In this way no existing fibre operator can extract a commercial advantage when it comes to rolling out 5G to areas where fibre is scarce.[116]

[116] States of Guernsey, 2021: page 29.

Annex 2: Legal background and licensing framework

Legal background

The Regulation of Utilities (Bailiwick of Guernsey) Law 2001 (**the Regulation Law**) sets out the general duties which the States and the GCRA must take into account in exercising their functions.[117] These include the requirement to protect consumers and other users in respect of the prices charged for, and the quality, service levels, permanence and variety of, utility services; to ensure that utility services are provided in a way which will best contribute to economic and social development; and to introduce, maintain and promote effective and sustainable competition.[118]

The Regulation of Utilities (States' Directions) (Bailiwick of Guernsey) Ordinance, 2012 sets out six principles of economic regulation, summarised below: [119]

- Accountability – regulate within the framework of duties and policies set by the States.
- Focus – focus on protecting consumer interests through competition where possible, or a system replicating competitive outcomes if not, with a focus on outcomes.
- Predictability – provide a stable and objective regulatory environment.
- Coherence – develop frameworks that are a logical part of States broader policy context and priorities.
- Adaptability – evolve as circumstances change.
- Efficiency – make proportionate, cost-effective, timely and robust interventions and decisions.

Section 5(1) of *The Telecommunications (Bailiwick of Guernsey) Law, 2001* (***the Telecoms Law***) provides that the GCRA may include in licences such conditions as they consider appropriate, having regard to objectives set out in Section 2 of the Regulation Law, and the enforcement of the Regulation Law and the Telecoms Law.

The Telecoms Law[120] specifically provides that the GCRA may include in any licence conditions that are:

- intended to prevent and control anti-competitive behaviour;[121] and
- regulate the price premiums and discounts that may be charged or (as the case may be) allowed by a licensee which has a dominant position in a relevant market.[122]

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[117] Section 2 of the Regulation Law.

[118] These broad objectives were maintained in the transfer of functions and responsibilities to GCRA, as set out in the *Guernsey Competition and Regulatory Authority Ordinance, 2012*.

[119] *The Regulation of Utilities (States' Directions) (Bailiwick of Guernsey) Ordinance, 2012:* https://www.guernseylegalresources.gg/CHttpHandler.ashx?id=75588&p=0

[120] The definition of dominance and abuse of dominance is not explicit in the Telecoms Law. However, the *Competition (Guernsey) Ordinance, 2012* sets out the States' approach to defining abuse of dominance and anti-competitive practice.

[121] Section 5(1)(c) of the Telecoms Law.

[122] Section 5(1)(f) of the Telecoms Law.

The GCRA is obliged[123] to publish notice:

- of a proposed decision as to whether a person has a dominant position in a relevant market and of the conditions, if any, proposed to be included in the licence granted or to be granted to that person in relation to the control of that dominant position;
- of a proposed decision to regulate the prices, premiums and discounts that may be charged or (as the case may be) allowed by a licensee which has a dominant position in a relevant market; and
- of a proposed decision to include quality of service conditions in any licence.

Licensing framework

Licences are issued to fixed telecommunications providers under Part I, Section 1 of the Telecoms Law. All fixed and mobile telecommunications licences include a Part which addresses conditions applicable to dominant operators.[124] If the GCRA has found that a licensee has a dominant position in a relevant market, the provisions of this Part of the licence may apply.

The provisions which are applicable to dominant operators include (but are not limited to) measures addressing the availability and associated terms of Other Licensed Operator (OLO) access to networks and services;[125] the requirement not to show undue preference or to exercise unfair discrimination;[126] the requirement not to unfairly cross subsidise,[127] supported by accounting processes to demonstrate compliance; regulation of prices, and transparency around pricing.[128]

In addition, the fixed telecommunications licences include conditions specific to the provision of leased circuits,[129] which apply where a licensee has been found to be in a dominant position. The conditions applicable to the supply of leased circuits refer to the retail and wholesale markets, and require that a dominant provider offers circuits on publicly advertised and non-discriminatory terms, and in compliance with quality standards and at prices determined by the GCRA.

The fixed telecommunications licences also include a Part which directly obliges the licensee not to engage in any practice which has the object or likely effect of preventing, restricting or distorting competition in the establishment, operation and maintenance of telecommunications networks and services.[130]

The form and implementation of the price control are addressed in Condition 31 of Sure’s licence, as follows:

> “ 31.1 Where the Licensee intends to introduce:

[123] Section 5(2) of the Telecoms Law.

[124] Part IV, Fixed telecommunications licences.

[125] Condition 24, Fixed telecommunications licences.

[126] Condition 29, Fixed telecommunications licences.

[127] Condition 28, Fixed telecommunications licences.

[128] Condition 31, Fixed telecommunications licences.

[129] Condition 26, Fixed telecommunications licences.

[130] Part V, Fair competition, Fixed telecommunications licences.

(a) new prices for any Licensed Telecommunications Services, or prices for new Licensed Telecommunications Services to be introduced by the Licensee;

(b) any discounts to published prices for Licensed Telecommunications Services within a Relevant Market in which the Licensee has been found to be dominant or for any Subscribers to whom additional services or goods are provided by the Licensee or any of its Associated Companies; or

(c) special offers to all or any of its customers for particular categories of Licensed Telecommunications Services where those Licensed Telecommunications Services have been found to be within a Relevant Market in which the Licensee has been found to be dominant, it shall publish the same at least twenty one (21) days prior to their coming into effect or otherwise as required by law, and provide full details of the same to the Director General.

31.2 The Director General may determine the maximum level of charges the Licensee may apply for Licensed Telecommunications Services within a Relevant Market in which the Licensee has been found to be dominant. A determination may;

(a) provide for the overall limit to apply to such Licensed Telecommunications Services or categories of Licensed Telecommunications Services or any combination of Licensed Telecommunications Services;

(b) restrict increases in any such charges or to require reductions in them whether by reference to any formula or otherwise; or

(c) provide for different limits to apply in relation to different periods of time falling within the periods to which any determination applies.

31.3 All published prices, discount schemes and special offers of or introduced by the Licensee for Licensed Telecommunications Services shall be transparent and non-discriminatory; all discount schemes shall be cost-justified and all special offers shall be objectively justifiable.

31.4 If the Director General, after consulting the Licensee and such other persons as she may determine, is satisfied that any published price, discount scheme or special offer is in breach the Regulation Law, Telecommunications Law or this Licence, the Director General may, by issuing a direction, require the Licensee to bring the relevant prices, discount schemes or special offers into conformity with the Laws and/or the requirements of this Licence.”

Annex 3: Detailed market review approach

Market definition

Product market dimension

Products can be regarded as belonging to the same product market if they have similar characteristics and/or are used for the same purpose by consumers, even if their physical characteristics are very different. The relevant product market is defined primarily by reference to the likely response of consumers and competitors. An examination of both the likely reaction of purchasers, i.e. demand-side, and other suppliers i.e. supply-side, is typically undertaken.

Demand substitution constitutes the most immediate and effective disciplinary force on the suppliers of a given product. A firm cannot have a significant impact on the prevailing conditions of sale, such as prices, if its customers are in a position to switch easily to available substitute products. On the demand side, the Hypothetical Monopolist Test (**HMT**) is often used to determine whether products belong in the same market. The HMT assesses whether a small but significant non-transitory increase in price (**SSNIP**) would be profitable in the light of potential demand or supply side substitution.

If significant numbers of customers are realistically likely to switch to other products so that the hypothetical monopolist would not find it profitable to impose such a price increase, the market definition should be widened to include those substitutes. This process will continue until a group of products over which a hypothetical monopolist could impose a material and permanent rise in prices without a substantive response from consumers or competitors is identified.

Two products do not have to be direct substitutes to be included in the same market; there may be a chain of substitution between them. This requires careful analysis to ensure that there are no breaks in the chain that would indicate that separate markets exist.

An alternative method of considering the relevant product market is one where the price elasticity of demand is elastic within the market and inelastic between the market and any other.

Supply side substitution analysis is often carried out to identify additional constraints placed on the hypothetical monopolist through potential entrants into the market for the focal product. Close substitute products are those between which suppliers can shift production easily and in the short term, using largely unchanged production facilities and with little or no additional investment, when given the incentive to do so.

In this analysis, it is important that the providers of the alternative product considered are not already materially present in the supply of the focal product. Providers of both the focal and the alternative products are not relevant to supply side substitution where they supply services already identified as demand side substitutes. As such their entry has already been taken into account, so supply side substitution from these suppliers cannot provide an additional competitive constraint.

In electronic communications markets, it is often the case that there is not a product supplied on the market (that is by a wholesale provider to an independent retailer). A vertically integrated firm that operates at both the wholesale and retail levels supplies the product either exclusively or, more frequently, predominantly to its own retail business, which then competes with wholesale customers. In this case, the 2018 EU SMP Guidelines state:

> NRAs should consider self-supply on the network for the delineation of markets and construct a notional market encompassing the self-supply, where there is consumer harm at the retail level and potential demand for such a product exists.[131]

The product market, therefore, consists of all effective substitute products and includes self-supplied inputs.

<u>Geographic market definition</u>

In line with the 2018 EU SMP Guidelines, once the product market has been defined, the consideration of the geographic market determines where the geographic boundaries of the product market lie. The Guidelines define a geographic market as comprising:

> … 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.[132]

The 2018 EU SMP Guidelines state that in an electronic communications market the geographic scope of the market has traditionally been defined by the area covered by a network and the existence of legal and other regulatory instruments.[133]

Typically, the analysis of the geographic scope of the market would consider whether there are specific geographic areas within the jurisdiction which are sufficiently different to warrant definition as a separate market.

BEREC[134] (Body of European Regulators for Electronic Communications) has set out three main criteria for determining whether there is a case for finding there are separate geographic markets:

- differences in the barriers to entry and in the number of suppliers;
- homogeneity of the market shares of these suppliers; and
- potential differences in prices or services.

Three-criteria test

Once a relevant market has been defined, the three-criteria test is used to determine whether the relevant market is susceptible to *ex ante* regulation. The 2014 EU Ex Ante Market Recommendation publishes a list of recommended list of markets susceptible to *ex ante* regulation. To decide which markets should be included on the list, the Recommendation sets out a cumulative 'three-criteria test', which assesses various conditions of the market:

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[131] 2018 EU SMP Guidelines: paragraph 34.

[132] 2018 EU SMP Guidelines: paragraph 48.

[133] 2018 EU SMP Guidelines: paragraph 51.

[134] BEREC (2014). *BEREC Common Position on geographic aspects of market analysis (definition and remedies)*, 5 June 2014: https://berec.europa.eu/eng/document_register/subject_matter/berec/download/0/4439-berec-common-position-on-geographic-aspe_0.pdf

- the presence of high and non-transitory structural, legal regulatory barriers to entry;
- a market structure which does not tend towards effective competition within the relevant time horizon, having regard to the state of infrastructure-based and other competition behind the barriers to entry; and
- the insufficiency of competition law alone to adequately address the market failure(s) concerned.

This means if a relevant market does not meet even one of the three-criteria it is not susceptible to ex ante regulation and there is no need for further analysis. A market that is subject to high barriers to entry, not tending towards effective competition and where competition law is insufficient to resolve any problems is deemed to be susceptible to *ex ante* regulation although this does not necessarily mean that any firm has Significant Market Power (**SMP**) in the market, which must be assessed separately.

While National Regulatory Authorities (**NRAs**) are expected to conduct the three-criteria test after the market is defined, it is not strictly necessary for the NRA to carry out the test for markets included in the list of recommended markets, although they may wish to do so given national circumstances.

Competition assessment – determining SMP

Once the market is defined, the next stage is to determine whether any firm, singly or jointly, holds a position of SMP, which is equivalent to a dominant position, defined in the 2018 EU SMP Guidelines as 'a position of economic strength affording [the firm] the power to behave to an appreciable extent independently of competitors, customers and consumers'.[135]

The GCRA defines a dominant position in similar manner to that used by the European Commission. A dominant position is one that allows a firm to:

> …. increase prices above the competitive level, or decrease quality, without making that move unprofitable. It can also use its market power to engage in anti-competitive conduct and exclude or deter competitors from the market.[136]

<u>Market shares</u>

The market share of the leading business is usually the starting point for an assessment of SMP. The GCRA guideline on abuse of a dominant position notes that the European Court of Justice has stated that market dominance can be presumed, in the absence of entry to the contrary, if a business has a market share persistently above 50 per cent, although such dominance may be overcome if barriers to entry and expansion are low and if there is strong countervailing buyer power.[137] Such dominance may be overcome in exceptional circumstances if barriers to entry and expansion are low and if there is strong countervailing buyer power, although the presumption is on the business to make such a case. The 2018 EU SMP Guidelines note:

> According to established case-law, very large market share held by an undertaking for some time — in excess of 50 % — is in itself, save in exceptional circumstances, evidence of the existence of a dominant position. Experience suggests that the higher the market share and the longer the period

[135] 2018 EU SMP Guidelines: paragraph 52.

[136] GCRA Guideline 5 – Abuse of a Dominant Position: page 9.

[137] Case C-62/86 – *AKZO Chemie BV v. Commission* EU:C:1991:286

> of time over which it is held, the more likely it is that it constitutes an important preliminary indication of SMP.[138]

The GCRA Guideline 5 considers it unlikely that an individual business will be dominant if its market share is below 40 per cent, although dominance could be established below that figure if other factors (such as the weak position of competitors in the market) provided strong evidence of dominance.[139]

Other relevant factors

Where the market share is below the 50 per cent threshold, but still high, regulators are expected to examine a number of other factors that may preclude the firm from acting independently of competitors, customers and consumers, as listed in paragraph 58 of the 2018 EU SMP Guidelines:

- barriers to entry;
- barriers to expansion;
- absolute and relative size of the undertaking;
- control of infrastructure not easily duplicated;
- technological and commercial advantages or superiority;
- absence of or low countervailing buying power;
- easy or privileged access to capital markets/financial resources;
- product/services diversification (for example, bundled products or services);
- economies of scale or scope;
- direct and indirect network effects;
- vertical integration;
- a highly developed distribution and sales network;
- conclusion of long-term and sustainable access agreements;
- engagement in contractual relations with other market players that could lead to market foreclosure; and/or
- absence of potential competition.

The approach to competition assessment in the 2018 EU SMP Guidelines involves a high level analysis of barriers to entry and expansion. In telecommunications markets, barriers to entry can be significant and are often associated with large-scale investment in infrastructure over a long time, with consequent sunk costs, and could also entail an operator's need to achieve economies of scale, scope and density.

Another barrier to entry could arise where an SMP operator is vertically integrated. That is where the operator offers a wholesale and a retail service. In this case, an entrant to the market may find it difficult

[138] 2018 EU SMP Guidelines: paragraph 55.

[139] GCRA Guideline 5 – Abuse of a Dominant Position: page 11.

to compete if the SMP operator’s retail arm benefits from preferential treatment from its parent company, particularly if the market entrant is dependent on purchasing a wholesale input from the SMP operator or if the business/offering is structured in such a way that the wholesale part of the business is able to support or cross-subsidise the retail part of the business.

The competition assessment considers other factors that could dilute market power, such as countervailing buyer power, where a purchaser buys enough of the operator’s services to be able to influence the pricing and market behaviour of the operator.

It is also important to consider any changes to market shares over time, as this will indicate trends in the market and will contribute to an assessment of whether or not the market may become effectively competitive over the period of the review.

Joint dominance

In order to find joint SMP, that is a collective dominant position of two or more firms, the General Court held in Airtours, and confirmed by the Court of Justice in Impala II, that three cumulative conditions are necessary for a finding of collective dominance:

- First, each member of the dominant oligopoly must have the ability to know how the other members are behaving in order to monitor whether or not they are adopting a common policy.
- Second , the situation of tacit coordination must be sustainable over time, that is to say, there must be an incentive not to depart from the common policy in the market.
- Third, the foreseeable reaction of current and future competitors, as well as customers, should not jeopardise the results expected from the common policy.

For completeness, the Airtours criteria are set out below:

> First, each member of the dominant oligopoly must have the ability to know how the other members are behaving in order to monitor whether or not they are adopting a common policy. It is not enough for each member of the dominant oligopoly to be aware that interdependent market conduct is profitable for all of them but each member must also have a means of knowing whether the other operators are adopting the same strategy and whether they are maintaining it. There must, therefore, be sufficient market transparency for all members of the dominant oligopoly to be aware, sufficiently precisely and quickly, of the way in which the other members' market conduct is evolving.
>
> Second, the situation of tacit coordination must be sustainable over time, that is to say, there must be an incentive not to depart from the common policy in the market. It is only if all the members of the dominant oligopoly maintain the parallel conduct that all can benefit. The notion of retaliation in respect of conduct deviating from the common policy is thus inherent in this condition. For a situation of collective dominance to be viable, there must be adequate deterrents to ensure that there is a long-term incentive in not departing from the common policy, which means that each member of the dominant oligopoly must be aware that highly competitive action on its part designed to increase its market share would provoke identical actions from others, so it would derive no benefits from its initiative.

Third, to prove the existence of a dominant position to the requisite legal standard, it must also be established that the foreseeable reaction of current and future competitors, as well as customers, would not jeopardise the results expected from the common policy. [140]

[140] 2018 EU SMP Guidelines: paragraph 67 and 68.