# Case C1471G

# JT and Sure

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# Decision

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## Guernsey Competition and Regulatory Authority

**20 December 2021**

Guernsey Competition and Regulatory Authority
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**TABLE OF CONTENTS**

1. INTRODUCTION 4

**A. Synopsis 4**

**B. Confidentiality 4**

2. EXECUTIVE SUMMARY 6

3. FACTUAL BACKGROUND 8

**A. Mobile connectivity 8**

**B. States of Guernsey – digital policy and 5G networks 8**

The Telecommunications Sector Policy Statement 8
Meetings between the Parties, Airtel and SoG 11
GCRA Statement of Intent 12
Revised CfED approach 13
Subsequent steps by the GCRA 13

**C. The Parties 14**

JT 14
Sure 15
Parties are competitors in Guernsey 16

**D. Airtel 16**

**E. The GCRA's investigation process 16**

4. THE CONDUCT 23

**A. Background 23**

**B. The 5G pre-summit – July 2018 23**

**C. Contacts between the Parties 24**

Summary 24
22 August 2018 meeting 25
7 November 2018 meeting 29
9 January 2019 meeting 29
16 January 2019 meeting 31
Contacts between the Parties – March 2019 – May 2019 31
Approach to [P, a mobile network equipment provider] 35
20 May 2019 – The Principles Document 37
JT internal presentations 38
The MOUs 39
Responses to the GCRA's Draft Statement of Intent 48

5. LEGAL FRAMEWORK 50

**A. Introduction** **50**

**B. Sources of law** **50**

**C. The competition infringement prohibitions** **51**

**D. Undertakings** **51**

**E. Attribution of liability** **52**

**F. Relevant market** **53**

**G. Existence of agreement/concerted practice** **53**
Agreement 53
Concerted practice 55
Single continuous infringement 57
Agreement not required by national legislation 58

**H. Hindering or preventing competition by object** **58**
Infringement by object – general considerations 58
Appreciability 61

6. LEGAL ASSESSMENT 62

**A. Relevant market** **62**

**B. Undertakings** **62**
JT 62
Sure 62

**C. Agreements/concerted practices** **63**
Single continuous infringement 66
Argument of the Parties 67

**D. Infringement by object assessment** **77**

**E. Appreciability** **80**

**F. Duration** **80**

7. DECISION 81

**A. Findings of the GCRA** **81**

**B. Directions** **81**

**C. Financial penalties** **81**

8. SIGNATURE 82

# 1. INTRODUCTION

## A. Synopsis

1.1 The Guernsey Competition and Regulatory Authority (**GCRA**) was established under The Guernsey Competition and Regulatory Authority Ordinance, 2012, and is responsible for administering and enforcing the Competition (Guernsey) Ordinance, 2012 (the **2012 Ordinance**).

1.2 Following an investigation conducted under section 22(1) of the 2012 Ordinance, the GCRA has decided that the following undertakings (each a **Party** and together the **Parties**):

(a) JT Group Limited (the **First Addressee**) and JT (Guernsey) Limited (the **Second Addressee**) (together, **JT**); and

(b) BTC Sure Group Limited (the **Third Addressee**) and Sure (Guernsey) Limited (the **Fourth Addressee**) (together, **Sure**)

have infringed the prohibition imposed by section 5(1) of the 2012 Ordinance (prohibition on agreements between undertakings which have the object or effect of preventing competition within any market in Guernsey for goods or services).

1.3 This document (**Decision**) constitutes the notice in writing specified by section 44(1) of the 2012 Ordinance and what follows sets out the terms of and the grounds for the GCRA's Decision as specified by section 44(2) of the 2012 Ordinance.

1.4 An undertaking aggrieved by this Decision may exercise the right of appeal conferred by section 46 of the 2012 Ordinance, particulars of which are set out in Annex 1 of this Decision.

1.5 In consequence of the infringements identified in this Decision, the GCRA may impose a financial penalty under Section 32(4) of the 2012 Ordinance. The GCRA may issue a separate proposed penalty notice in this regard.

## B. Confidentiality

1.6 A copy of this Decision will be published on the GCRA's website (www.gcra.gg).

1.7 Before publishing the Decision, the GCRA will redact confidential information from it.

1.8 Each Party may make written representations to the GCRA identifying any information in this Decision which it considers the GCRA should treat as confidential and explaining why it considers that the GCRA should treat that information as confidential.

1.9 Written representations made under the previous paragraph should be provided by 4 p.m. on 14 January 2022 and should be emailed to: info@gcra.gg.

1.10 The GCRA will only treat information as confidential where it has been provided with specific reasons to do so and will not accept blanket requests for confidentiality. The GCRA will treat information as confidential where it considers that it falls into one of the following categories:

(a) Commercial information whose disclosure may significantly harm the legitimate interests of the undertaking to which it relates; or

(b) Information relating to the private affairs of an individual whose disclosure may significantly harm the legitimate interests of that individual.

## 2. EXECUTIVE SUMMARY

**This executive summary is provided for reference only. It does not form part of this Decision.**

*Legal Framework*

- The 2012 Ordinance came into force on 1 August 2012.
- It prohibits agreements between undertakings that have the object or effect of preventing competition within any market in Guernsey for goods or services.

*Anti-competitive agreement / concerted practice*

- The concept of an agreement centres around the concurrence of wills between two parties.
- A concerted practice is a form of co-ordination between undertakings which, without having reached the stage where an agreement properly so called has been concluded, knowingly substitutes practical co-operation between them for the risks of competition.
- This requirement of competition strictly precludes any direct or indirect contact between undertakings, the object or effect of which is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting in the market.
- In particular, a concerted practice may arise if there are reciprocal contacts between the parties which have the object or effect of removing or reducing uncertainty as to future conduct on the market. Such contacts are presumed to have an effect on conduct where both parties remain active on the market.
- Where there is a series of contacts between undertakings in pursuit of a single economic aim, the conduct as a whole may be treated as a single agreement and a concerted practice.

*The GCRA's investigation*

- The GCRA's investigation has found that JT and Sure engaged in a single continuous anti-competitive agreement and concerted practice.
  - Through multiple contacts and exchanges of information, JT and Sure disclosed to each other the course of conduct / commercial strategy that one or each of them was contemplating adopting on the market.
  - These contacts and exchanges significantly reduced the uncertainty of each about the way in which the other was contemplating behaving on the market.
  - The Parties remained active on the market throughout, thus it is assumed that the agreement/concerted practice had an effect on their market conduct.
  - The conduct amounts to a single continuous agreement / concerted practice.
- This course of conduct by the Parties constitutes an anti-competitive agreement and a concerted practice by object:
  - An exchange of information between competitors has an anti-competitive object if, as the GCRA has found to be the case here, the exchange is capable of removing

uncertainties concerning the intended conduct of the participating undertakings.
  - An examination of the legal, economic and factual context confirms that the agreement and concerted practice constituted a restriction of competition by object.

- The agreement and concerted practice is conduct capable of having an appreciable effect on competition.

*Penalty*

- The Authority will be minded to impose a financial penalty where it finds a restriction of competition by object. It will therefore now consider whether it would be appropriate to issue a draft penalty statement to JT and/or Sure in respect of the infringements described in this Decision.

## 3. FACTUAL BACKGROUND

### A. Mobile connectivity

3.1 Mobile network technology is commonly referred to in "generations". A new "generation" arrives when there is a significant improvement in network performance or capability. Existing mobile technology is currently at the stage of 4G, with the next generation being 5G.

3.2 For an increasing number of consumers, mobile connectivity is now an everyday necessity[1], with mobile technologies like 4G "increasingly seen as offering a viable alternative to provide high-speed home broadband services".[2]

3.3 As mobile technology continues to evolve from 4G to 5G, significantly faster download speeds and, in consequence, higher capacity networks able to support a greater number of users at any given time will be possible. In January 2020, a white paper published by the World Economic Forum stated that:

> "The positive impact of the Fourth Industrial Revolution and its related emerging technologies will be fully realized through the wide-scale deployment of 5G communication networks in combination with other connectivity solutions. The key functional drivers of 5G will unlock a broad range of opportunities, including the optimization of service delivery, decision-making and end-user experience. Significant economic and social value can be generated by enabling use cases activated by 5G… Fast, intelligent internet connectivity enabled by 5G technology is expected to create approximately $3.6 trillion in economic output and 22.3 million jobs by 2035 in the global 5G value chain alone. This will translate into global economic value across industries of $13.2 trillion, with manufacturing representing over a third of that output; information and communications, wholesale and retail, public services and construction will account for another third combined."[3]

### B. States of Guernsey – digital policy and 5G networks

***The Telecommunications Sector Policy Statement***

3.4 Ensuring that Guernsey businesses and consumers are able to reap the benefits of these advancements in digital and mobile technology has been a key priority for the States of Guernsey. In mid-2018, the Committee *for* Economic Development published a document entitled "The Future of Telecoms" (the **Telecommunications Sector Policy Statement**), which identified three key objectives of the Digital Connectivity Policy:

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1 GCRA publication: "5G Statement of Intent", 20 November 2019, paragraph 3.2 [3084].

2 Committee *for* Economic Development, "The Future of Telecoms", 19 June 2018, p.6 [2962].

3 "The Impact of 5G: Creating New Value across Industries and Society", World Economic Forum White Paper, https://www3.weforum.org/docs/WEF_The_Impact_of_5G_Report.pdf, page 5, 6.

(a) Provision of fibre to business districts within 2 – 3 years;

(b) Provision of high quality super-fast broadband to all residential properties within 2 – 3 years;

(c) Provision of next generation (i.e. 5G) mobile technology in line with, or earlier than, the UK.[4]

3.5 The Telecommunications Sector Policy Statement noted that the technical standards for next generation (5G) mobile technology had not yet been set[5] and that the States of Guernsey, as a key stakeholder, would not seek direct involvement in the technology options for 5G.[6] There were nevertheless a number of high-level considerations to be taken into account when considering the construction and ownership of future 5G infrastructure, including:

(a) Minimising environmental impact;[7]

(b) Cost effective delivery of better quality networks "either independently or through sharing and partnerships".[8]

3.6 In that context, a number of potential network models and/or scenarios, described as "some possible scenarios for innovative new models for the 5G era"[9] were put forward for discussion. Each of the possible scenarios envisaged infrastructure pooling or sharing of existing or newly built networks by all operators[10] – that is to say operators co-operating to achieve a result jointly that they could not achieve individually – to deliver the optimum outcome based on the States of Guernsey's objectives. The Government, as stated above, did not seek direct involvement in the technology options but rather was "[**looking] to the Telecommunications Companies and the Regulator, [the GCRA], to develop the best case network sharing option for Guernsey and the areas where active Government support is required and beneficial**"[11] (emphasis added).

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4 "The Future of Telecoms", page 4 [2960].
5 "The Future of Telecoms", page 4 [2960].
6 "The Future of Telecoms", page 15 [2971].
7 "The Future of Telecoms", page 4 [2960].
8 "The Future of Telecoms", page 15 [2971].
9 "The Future of Telecoms", page 18 [2974].
10 With the exception of the second iteration of scenario (b) as set out below at paragraph 3.7, which would have involved none of the current operators.
11 "The Future of Telecoms", page 18 [2974].

3.7 The three possible scenarios (which would have been alternatives to the award of 5G spectrum through a competitive process) put forward by the Government were as follows:[12]

(a) All network providers (i.e. JT, Sure and Airtel) forming a joint venture or some other special purpose vehicle (**Netco**) to pool their existing infrastructure resources, fixed and mobile. The Netco would then be tasked with rolling out and operating 5G and legacy networks in Guernsey. Given the relative scope and resources of the existing network operators, it was envisaged that Sure would form the basis of the Netco, which would manage the entire pooled infrastructure as described above, in Guernsey. In this Decision, this scenario is referred to as the **Pooled Infrastructure Scenario**.

(b) Tasking a new network company (which could be a consortium of the existing operators) with building a standalone 5G (**SA 5G**) network independently from existing mobile infrastructure. This new 5G network company would be awarded the exclusive licence for 5G and existing operators would not be allowed to build their own 5G networks. Alternatively, an interested third party, such as a telecoms infrastructure vendor or another global telecoms operator, could be invited to construct the new 5G network. In this Decision, this scenario is referred to as the **Single SA 5G Scenario**.

(c) Maintaining competitive networks but putting in place legislative and regulatory measures to require sharing of RAN[13] and transmission backhaul infrastructure to reduce the environmental impact of competing island wide networks. In this Decision, this scenario is referred to as the **Mandated Infrastructure Sharing Scenario**.

3.8 None of these scenarios[14] could have been achieved without collaboration between all operators, since each would have required some kind of joint action by all of them, i.e. either pooling their joint infrastructure resources (in a Netco or through compulsory RAN and transmission backhaul infrastructure sharing) or sharing in the construction and ownership of a new single SA 5G network. None of the scenarios proposed by the Government could have been achieved by any existing operator acting alone.

3.9 By contrast, none of the proposed scenarios would have required, or could reasonably have been interpreted as instructing or requiring, competing operators to agree between them which of their individual existing network infrastructures would be retained to support the

12 Telecommunications Sector Policy Statement, pages 18-20 [2974-2976]

13 Radio Access Network.

14 With the exception of the second iteration of scenario (b) as set out below at paragraph 3.7, which would have involved none of the current operators.

future operation of 5G services and which would be removed. (This outcome is referred to in this Decision as the **Bilateral Home Network Scenario**.) If the outcome intended or desired by the States of Guernsey had been to retain a single operator's existing network infrastructure and for that single legacy infrastructure to be used to enable the provision of 5G services by that operator, this could have been achieved by awarding a single 5G spectrum licence through a normal competitive tender process.[15] Collaboration between the operators to achieve that end would have been unnecessary.

***Meetings between the Parties, Airtel and SoG***

3.10 In late 2018 and early 2019, the States of Guernsey held a number of individual meetings with representatives from each of the Parties and from Airtel to explore these scenarios (i.e. the Pooled Infrastructure Scenario, the Single SA 5G Scenario and the Mandated Infrastructure Sharing Scenario).[16]

3.11 To support the States of Guernsey in developing its policy in this area, the GCRA[17] convened two industry forums to explore the opportunities offered by 5G; a 5G pre-summit in Jersey in July 2018 and a subsequent 5G summit in Guernsey in November 2018.

*Letter from CfED to the Parties – April 2019*

3.12 On 26 April 2019, the President of the Committee *for* Economic Development, Deputy Parkinson, wrote to each of the Parties and to Airtel.[18] That letter notes that the Committee had sought progress on a consolidated view from all of the telecoms companies on the delivery of a single 5G network in Guernsey, but that:

(a) The telecoms operators had not managed to achieve such a common position; and

(b) Unless they were able to align their views, the Committee would award a single 5G licence for Guernsey through a competitive tender process (to be run by the GCRA).

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15 And, as noted above, the three possible scenarios were alternatives to the award of 5G spectrum through a competitive process such as that undertaken when 4G spectrum was granted.

16 JT's response to the first SO [2212-2219].

17 At that time, working in conjunction with the Jersey Competition Regulatory Authority (JCRA) as the Channel Islands Competition and Regulatory Authorities (CICRA).

18 JT_133 [416 - 418].

*GCRA Statement of Intent*

3.13 Subsequently, in May 2019, the GCRA consulted on a draft statement of intent, proposing a framework for the allocation of 5G spectrum in Guernsey[19] (the **Draft SOI**). The Draft SOI noted that although the Government in Guernsey had sought to encourage a consolidated view from the telecoms companies in response to the objectives in Guernsey's telecoms and economic development strategies, that had not been achieved over the past nine months.[20] Given this, views were sought on the award of 5G spectrum to one operator in Guernsey and one operator in Jersey (which might be the same operator in each island and/or a consortium of operators)[21] and the most appropriate means for its allocation (e.g. an auction, a comparative selection process or an alternative method). It noted, however, that:

> "The effective use of the radio spectrum for telecommunications purposes is a matter of public interest for the Islands and, in this context, allocation of spectrum goes beyond the interests of one or more telecommunications operators. It is important that licences to use spectrum are granted in such a way as to make the most efficient use of it and render the maximum benefit to the Islands."[22]

3.14 A number of operators and other interested parties responded to the Draft SOI, including the Parties.[23]

3.15 On the basis of the replies received from operators on 14 June 2019, it became clear that it would not be technically possible to construct a single 5G network (either SA 5G or NSA 5G) as envisaged in the Telecommunications Sector Policy Statement of June 2018 and described in the GCRA's Draft SOI. This was because the responses indicated that:

(a) A non-standalone 5G network (**NSA 5G**) owned by one operator could not interoperate with the required underlying 4G networks of other operators.[24] This meant that the Single Pooled Infrastructure Scenario and the Mandated Infrastructure Sharing Scenario[25] described at paragraph 3.7(a), (c) above were not feasible;

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19 The consultation was carried out with the JCRA, working together as CICRA [3002-3016].

20 Draft SOI, paragraph 3.14 [3008].

21 Draft SOI, page 11 [3012].

22 Draft SOI, paragraph 3.3 [3006].

23 Sure; Guernsey Investment fund; Clear Mobitel; JT; Airtel; Digital Jersey; D Green.

24 A 5G non-standalone network network is a 5G network that "sits on top of" an existing 4G network and must interoperate with that 4G network in order to function.

25 Forming a joint venture (or some other special purpose vehicle (**SPV**)) of network providers to pool their existing infrastructure resources, fixed and mobile, and tasking the new "Netco" with rolling out and operating 5G and legacy networks in Guernsey.

(b) In respect of the Single SA 5G Scenario (b)[26], described at paragraph 3.8(a) above, the current technology did not support the construction of a SA 5G network.[27, 28, 29]

***Revised CfED approach***

3.16 Deputy Parkinson subsequently wrote to each of the Parties,[30] stating (inter alia) that:

"In April the Committee also requested that CICRA launch a draft 'statement of intent' consultation process with telecoms companies and other interested parties to understand their views on the spectrum requirements and the proposed licencing process. This took place during May and June 2019.

The Committee has now had the opportunity to consider the feedback from that consultation, and has drawn the following conclusions:

- 5G will be deployed in two phases, with initial deployments (NSA Release 15) being dependent on using existing 4G infrastructure;
- Due to the need to use existing 4G infrastructure and the practical difficulties of network sharing that this would present, it will not be practical (and likely not possible nor desirable) to seek a single licence for the issuance of suitable spectrum in initial 5G deployments;
- Initial deployments of 5G will be evolutionary rather than revolutionary, and these are best achieved by extending existing 4G networks into '4G+' and then 5G variants rather than create a single new 5G network;
- There are currently no compelling use cases for immediate deployment of a standalone version of 5G, and it will not be until the next release of 5G technology (Standalone "SA" Release 16 from 2022) that these are likely to emerge; and
- It is desirable to follow an evolutionary rather than revolutionary pathway in the implementation of 5G. A single shared network would likely still be the desirable outcome for the full deployment of the standalone version of 5G (SA Release 16 to be rolled out post 2022)."

***Subsequent steps by the GCRA***

3.17 The GCRA[31] also took account of these responses when finalising its Statement of Intent with regard to licensing of 5G spectrum. In its final Statement of Intent (**SOI**)[32], the GCRA noted that:

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26 Building a standalone 5G network independently from existing mobile infrastructure and awarding a new 5G network company (which could be a consortium of the existing operators) the exclusive licence for 5G.

27 A 5G standalone network is a 5G network that operates independently of existing 4G infrastructure but instead "stands alone" from it.

28 See Sure Response to Draft SOI page 2 [3037-3060].

29 [Mr A, Sure] interview timed [30:19] [2883]; timed [40:06] [2887] and timed [40:21] [2888].

30 Letters from Deputy Charles Parkinson of 7 August 2019 to JT and Sure [2681-2683].

"In their responses, stakeholders have identified a number of issues with this proposal, in particular significant inter-operability issues between 5G and 4G networks in the next 2-3 years (until standalone 5G technology becomes available) to allow existing MNOs without a 5G licence to access the proposed single 5G network. CICRA has carefully assessed the arguments presented by the stakeholders and also sought independent technical advice, which has confirmed that until standalone 5G technology becomes available, it may not be possible for non-5G operators to get access to the single 5G network. Therefore, if CICRA were to proceed with its initial plan, it could distort retail competition in the Channel Islands."[33]

3.18 The GCRA's amended plan therefore involved making a minimum amount of 5G spectrum available to all successful applicants, who could then apply for additional spectrum subject to certain conditions.

3.19 However, on 1 June 2020, Michael Byrne, Chief Executive Officer of the GCRA, wrote to the Parties, stating that because of the current Covid 19 crisis and prevailing public policy concerns regarding the security of 5G infrastructure, the GCRA was putting on hold all work in relation to the allocation of 5G spectrum pending a relook at this area of policy by the Committee *for* Economic Development.[34]

## C. The Parties

***JT***

3.20 JT stands for "Jersey Telecom". It is the former monopoly telecommunications operator in the Bailiwick of Jersey, and the oldest and largest telecommunications operator in the Channel Islands.

3.21 JT was founded in 1888, with the first telephone exchange being opened in Jersey in 1895. The Jersey telephone network was taken over by the British Post Office monopoly in 1912. Legislation transferred the Jersey telecommunications monopoly from the British Post Office to the States of Jersey in 1973, and JT came under the control of the States of Jersey. JT has been operating mobile telephony services in in Jersey since 1987, when it introduced its first analogue mobile network service. It has been operating mobile telephony services in Guernsey since 2002, when it launched a wholly owned subsidiary in Guernsey (the Second Addressee, at the time called "Wave Telecom Ltd").

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31 Working together with the JCRA as CICRA.
32 5G Spectrum Statement of Intent [3081-3097].
33 SOI, paragraphs 1.4 – 1.5 [3069].
34 Letter to Sure, JT and Airtel [3274-3276].

3.22 Jersey's telecommunications market was opened to competition in 2003. JT became a private company in that year but remained (and remains) 100% owned by the States of Jersey.

3.23 JT currently holds licences to operate telecommunications networks in Guernsey. Its mobile telecommunications licence contains conditions relating to the use of 4G spectrum. It also holds WTA spectrum licences issued by Ofcom.

3.24 The Second Addressee, JT (Guernsey) Limited is a wholly owned subsidiary of the First Addressee, JT Group Limited.

***Sure***

3.25 Sure is the former monopoly telecommunications operator in the Bailiwick of Guernsey.

3.26 The States Telephone Department was founded in Guernsey in 1896. It was later renamed the States of Guernsey Telecommunications Board. Guernsey was never part of the British Post Office telecommunications monopoly and so the Guernsey monopoly was held by the States of Guernsey through the States of Guernsey Telecommunications Board.

3.27 Guernsey's telecommunications market was opened to competition in 2003. In preparation for this change, the States of Guernsey Telecommunications Board became a private company in 2001 and was renamed Guernsey Telecoms Ltd. This company was sold to Cable & Wireless in 2002. Following expansion into Jersey and the Isle of Man, its branding was changed to "Sure". Sure was sold to a Bahraini telecommunications company called Bahrain Telecommunications Company (Batelco) B.S.C. in 2013.

3.28 Sure currently holds licences to operate telecommunications networks in Guernsey. Its mobile telecommunications licence contains conditions relating to the use of 4G spectrum. It also holds WTA spectrum licences issued by Ofcom.

3.29 The Fourth Addressee, Sure (Guernsey) Limited is a wholly owned subsidiary of the Third Addressee, BTC Sure Group Limited.

***Parties are competitors in Guernsey***

3.30 JT and Sure are competitors on various mobile and fixed telecommunications markets in Guernsey. Specifically, they operate competing mobile network infrastructures. They also compete in providing mobile services to consumers at the retail level.[35]

**D. Airtel**

3.31 Bharti Airtel (**Airtel**) is an Indian multinational telecommunications company. It is the second largest provider of telecommunication services in the world by number of subscriptions[36] with operations in 18 countries, including India, Sri Lanka and the Channel Islands.[37]

**E. The GCRA's investigation process**

3.32 On 12 June 2019, Mr Byrne received a notification email from [Mr B, Director of Corporate Affairs of JT Global], reporting the Parties' entry into two Memoranda of Understanding (though he referred at that point only to a single document).[38]

3.33 [Mr B, Director of Corporate Affairs of JT Global] summarised the intention and effect of the Memoranda of Understanding as follows:

> "As the debate around the current requirement for 5G networks continues across Jersey and Guernsey, JT and Sure have today signed a Memorandum of Understanding where both parties agree to work together to assess the technical, commercial and practical challenges associated with: a) JT constructing and operating a single standalone 5G network in Jersey that would also be available for use by Sure subscribers; and b) Sure constructing and operating a single standalone 5G network in Guernsey that would also be available for use by JT subscribers.
>
> By working together to assess the technical, commercial and practical challenges associated with a single standalone 5G network in each jurisdiction, the operators expect to capture valuable data that will then inform the ongoing debate on the most appropriate way forward for 5G in both jurisdictions. In addition, the exercise will enable an assessment of the risks and opportunities arising from the use of different suppliers.
>
> While this work is ongoing, each party is free to apply for 5G spectrum licences as and when these become available and will be responding to ongoing consultations in their

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35 The infringing conduct found by the GCRA in its investigation, as set out in this Decision, relates to the Parties' respective mobile networks in Guernsey. The investigation did not relate to competition in the mobile retail segment in Guernsey and the GCRA makes no findings in that respect.

36 `https://www.financialexpress.com/industry/bharti-airtel-overtakes-vodafone-idea-to-become-second-largest-telco-in-terms-of-subscribers/2007984/

37 https://assets.airtel.in/teams/simplycms/web/docs/Quarterl_IR_Pack_Bharti_Airtel_Consolidated-030221.pdf

38 Email from [Mr B, Director of Corporate Affairs of JT Global] McDermott (JT), 12 June 2019 [1352].

own right, pressing for a 5G licence award proceed that would follow the very successful process adopted for awarding 4G licences."

3.34 [Mr B, Director of Corporate Affairs of JT Global] concluded by inviting questions. He sent a follow-up email emphasising the commercial sensitivity of the signing of the Memoranda of Understanding and stating that there was no intention to discuss the matter publicly.[39]

3.35 Mr Byrne replied requesting a copy of the Memorandum of Understanding to which [Mr B, Director of Corporate Affairs of JT Global] had referred.[40]

3.36 In his reply email, [Mr B, Director of Corporate Affairs of JT Global] did not immediately provide the Memoranda of Understanding but asked for clarification as to the basis on which the GCRA's request was made:

> "Can you please provide some background on the request, so that we may understand the reasoning? In doing so, it would be helpful if you could refer to specific clauses in law or licence that you are relying on.
>
> Also, can you please be jurisdiction-specific in your request?"[41]

3.37 Mr Byrne observed that [Mr B, Director of Corporate Affairs of JT Global] had invited questions,[42] in response to which [Mr B, Director of Corporate Affairs of JT Global] stated:

> "The MoUs are confidential, and my sign-off was an offer to answer reasonable questions in relation to the content of the email."[43]

3.38 In order to obtain a copy of the memorandum referred to by [Mr B, Director of Corporate Affairs of JT Global], the then GCRA Chair Michael O'Higgins, approached [Mr C, JT Chair], on 18 June 2019, commenting that:

> "We can see the potentially significant benefits of understanding what might be possible by conducting the assessments proposed in this arrangement. In many ways it is very much in line with the thrust of the discussions we have been having about having a single 5G infrastructure provider in each island to avoid a potentially wasteful duplication of resources. So in that respect, your co-operation on these assessments is probably to be welcomed.
>
> But I am sure you will understand that an MoU between the two main telecom providers must be subject to regulatory review to ensure that nothing in it is anti-

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39 Email from [Mr B, Director of Corporate Affairs of JT Global] McDermott (JT), 12 June 2019 [1381].

40 Email from Michael Byrne (GCRA), 13 June 2019 [1462].

41 Email from [Mr B, Director of Corporate Affairs of JT Global] McDermott (JT), 13 June 2019 [1462].

42 Email from Michael Byrne (GCRA), 13 June 2019 [1489].

43 Email from [Mr B, Director of Corporate Affairs of JT Global] McDermott (JT), 13 June 2019 [1492].

competitive, either as between JT and Sure, or in respect of other companies currently or potentially in this market.

However, [Mr B, Director of Corporate Affairs of JT Global] has refused several requests for us to see the MoU. I would be grateful if you could make a common sense intervention to stop this escalating. We will, of course, treat the MoU as confidential."[44]

3.39 [Mr C, JT Chair] replied on 20 June 2019, apologising for the delay in responding and explaining that he was travelling with limited WiFi access.[45] He said:

> "… received your email this morning and got in touch with [Mr B, Director of Corporate Affairs of JT Global] – couldn't see any reason why your guys shouldn't see the mou with Sure – think [Mr B, Director of Corporate Affairs of JT Global] was a little upset at your escalation but so be it – that's what the channel is for! Copy should be with your team by now.
>
> It's an mou to explore what might be possible – so there shouldn't be any anti-competitive issues in having a discussion – clearly anything that comes out of it will need to be reviewed carefully for all sorts of reasons. I'm very conscious of our responsibility.
>
> I remain deeply concerned about the current 5g situation in the Islands as a whole – it is feeling like a discussion that is getting very much out of hand for the wrong reasons."

3.40 [Mr C, JT Chair] continued by offering some observations on 5G strategy on the Islands and sought to emphasise that he himself would not gain or lose depending on JT's performance.

3.41 Mr O'Higgins thanked [Mr C, JT Chair] for his cooperative response and stated that the GCRA would consider the Memoranda of Understanding "in the same constructive spirit".[46]

3.42 The two Memoranda of Understanding were duly provided to the GCRA by [Mr B, Director of Corporate Affairs of JT Global] on 20 June 2019.[47]

3.43 Based on the content of the emails from Messrs [B, Director of Corporate Affairs of JT Global] and [C, JT Chair], and on having sight of the Memoranda of Understanding themselves, the GCRA took the view that there were reasonable grounds to suspect that the Parties' conduct raised competition concerns under Guernsey competition law. It therefore opened a case in Guernsey. A parallel investigation was opened by the JCRA in Jersey.

3.44 Case opening statements were sent:

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44 Email from Michael O'Higgins (GCRA), 18 June 2019 [2112-2113].

45 Email from [Mr C, JT Chair], 20 June 2019 [2111-2112].

46 Email from Michael O'Higgins (the GCRA), 20 June 2019 [2111].

47 Email from [Mr B, Director of Corporate Affairs of JT Global] McDermott (JT), 20 June 2019 [1635].

(a) From the GCRA (Mr Byrne) to JT [Mr C, JT Chair] on 4 July 2019, stating that the GCRA had reasonable grounds to suspect contraventions of sections 5(1) and 1(1) of the Competition (Guernsey) Ordinance, 2012, on the part of JT Group Limited and/or JT (Guernsey) Limited;[48] and

(b) From the GCRA (Mr Byrne) to Sure [Mr D, Sure Group Chief Executive] on 4 July 2019, stating that the GCRA had reasonable grounds to suspect contraventions of sections 5(1) and 1(1) of the Competition (Guernsey) Ordinance, 2012, on the part of BTC Sure Group Limited and/or Sure (Guernsey) Limited.[49]

3.45 The cover letters sent with the case opening statements observed that Mr O'Higgins, the GCRA's Chair, recused himself from any involvement in the matter. Mr O'Higgins took no further part in the investigation and, as he is no longer the Chair of the GCRA, has had no part in the preparation of this Decision.

3.46 The case opening statements were accompanied by information requests addressed to each of JT and Sure from the GCRA (respectively the **First JT Information Request**[50] and the **First Sure Information Request**),[51] requesting responses by 25 July 2019. Each information request:

(a) Asked for copies of all documents relating to any proposal, plan or arrangement pursuant to which JT and Sure would or might work together in Guernsey to enable the rollout of a 5G standalone mobile network;

(b) Requested an explanation of the basis on which the prices specified in the Memoranda of Understanding had been reached; and

(c) Requested an explanation of whether access to the proposed 5G standalone mobile network would be available to other mobile network operators.

3.47 [Mr B, Director of Corporate Affairs of JT Global] sent a response on behalf of JT on 25 July 2019 (the **First JT Response**), by which JT provided:

(a) Letter setting out JT's responses to the GCRA's questions and offering certain further explanations;[52] and

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48 Letter from Michael Byrne (the GCRA), 4 July 2019, with case opening statement [3114-3115].
49 Letter from Michael Byrne (the GCRA), 4 July 2019, with case opening statement [3117-3118].
50 Letter from GCRA to JT, 4 July 2019 [3146-3166].
51 Letter from GCRA to Sure, 4 July 2019 [3168-3186].
52 Letter from [Mr B, Director of Corporate Affairs of JT Global] McDermott (JT), 24 July 2019 [1929-1932].

(b) A bundle of documents, which the GCRA has marked with document IDs [1929-2116].

3.48 [Mr D, Sure Group Chief Executive] sent responses on behalf of Sure on 25 July 2019 (the **First Sure Response**), by which Sure provided:

(a) Letters setting out Sure's response to the GCRA's questions and offering certain further explanations;[53] and

(b) A bundle of documents.[54]

3.49 On 6 November 2019, [Mr B, Director of Corporate Affairs of JT Global] contacted the GCRA to inform it that JT had decided to terminate the Memoranda of Understanding with immediate effect. He enclosed a letter of that date to [Mr D, Sure Group Chief Executive] purporting to effect such termination. The reason given was that, since the States had indicated that they no longer intended to proceed on the basis of granting a 5G licence to a single provider per Island, the rationale for the existence of the Memoranda of Understanding no longer existed.[55]

3.50 [Ms E, Legal and Regulatory Director, Sure] replied to [Mr B, Director of Corporate Affairs of JT Global] on 7 November 2019, confirming that Sure accepted JT's request to terminate the MOUs with immediate effect[56].

3.51 On 20 January 2020, the GCRA issued a Statement of Objections (the **First SO**) to each of Sure and JT. On the same date, the GCRA sent a second information request to each of JT and Sure (respectively the **Second JT Information Request**[57] and the **Second Sure Information Request**)[58]. The date for response both to the First SO and to each information request was 28 February 2020.

3.52 [Mr D, Sure Group Chief Executive] sent a response to the First SO on behalf of Sure on 28 February 2020.[59]

3.53 On the same date, [Mr D, Sure Group Chief Executive] also sent a response to the Second Sure Information Request (the **Second Sure Response**), by which Sure provided:

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53 Letters from [Mr D, Sure Group Chief Executive] (Sure), 25 July 2019 (GCRA) [2261-2269].
54 Document IDs [2270-2460]
55 JT termination letter,6 November 2019 [2117-2120].
56 Letter from [Ms E, Legal and Regulatory Director, Sure], dated 7 November 2019 [2695].
57 Section 23, 2012 Ordinance, requests for information [3237-3255].
58 Section 23, 2012 Ordinance, requests for information [3256-3273].
59 Letter from Carey Olsen [2461-2470].

(a) A letter setting out Sure's response to the GCRA's questions and offering certain further explanations;[60] and

(b) A bundle of documents, which the GCRA has marked with document IDs [2301 - 2460].

3.54 [Mr F, Chief Financial Officer, JT Global], sent a response on behalf of JT to the First SO on 28 February 2020[61].

3.55 On the same date, [Mr F, Chief Financial Officer, JT Global] sent a response to the Second JT Information Request (the **Second JT Response**), by which JT provided:

(a) A letter setting out JT's responses to the GCRA's questions;[62] and

(b) A bundle of documents, which the GCRA has marked with document IDs [1-1813].

3.56 The disclosure provided by JT in response to the Second JT Information Request was extensive, comprising some additional 1813 pages of documents. Some of these were documents that were responsive to the First JT Information Request but had not been disclosed in response to that request. The remainder were responses to the questions put by the GCRA in the Second JT Information Request.

3.57 On the basis of the documents disclosed by JT in response to the Second JT Information Request, the GCRA took the view that there were reasonable grounds to suspect that the Parties' conduct raised additional competition concerns under Guernsey competition law, namely that the Parties had entered into an agreement or agreements pursuant to which they would consolidate and/or share mobile networks in Guernsey. It therefore decided to expand the scope of its investigation to include those additional matters.

3.58 On 2 October 2020, the GCRA's Legal Director, Sarah Livestro, wrote to the legal representatives of each of JT and Sure, informing them of the expanded scope of the investigation.[63]

3.59 In December 2020, the GCRA carried out interviews of [Mr D, Sure Group Chief Executive], [Mr G, Chief Operating Officer, Sure] and [Mr A, Sure]. Transcripts of these interviews were prepared and placed on the GCRA's file.[64]

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60 Sure Letter [2533-2538].

61 JT Response to SO [2176-2201].

62 JT Letter on disclosure [2222-2231].

63 Letters extending scope of investigation [3277-3280].

3.60 On 12 March 2021, Ms Livestro, wrote to [Mr H, MXC Capital], requesting that he provide the GCRA with certain information in connection with the investigation.[65] [Mr H, MXC Capital] responded on 26 March 2021.[66]

3.61 On 31 March 2021, Ms Livestro wrote to JT's legal representatives explaining that it had not been possible to arrange GCRA interviews with JT personnel for a number of reasons, including restrictions in place in both Jersey and Guernsey due to the Covid-19 pandemic, the technical difficulty of carrying out a formal interview remotely with attendees present at multiple different locations and the fact that JT had not responded to the GCRA's requests to confirm that relevant personnel would be made available on or between certain dates. On the same date, the GCRA therefore requested further information in writing from JT pursuant to a section 23 notice. [67]

3.62 JT responded on 9 April 2021 and that response was added to the GCRA's case file [2256-2260] and the accompanying documents [1841-1928].

3.63 On 21 April 2021, pursuant to section 43(2) of the 2012 Ordinance, the GCRA issued a "notice in writing" (**Statement of Objections**), stating that it proposed to find that the Parties had contravened section 5(1) of the 2012 Ordinance and giving its reasons for that proposed decision.

3.64 Each of the Parties made oral and written representations to the GCRA in respect of the proposed decision as follows:

(a) JT responded in writing on 18 June 2021 (**JT Written Representations**) and orally on 7 October 2021 (**JT Oral Representations**).

(b) Sure responded in writing on 18 June 2021 (**Sure Written Representations**) and orally on 9 September 2021 (**Sure Oral Representations**).

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64 Interviews [2743-2940].

65 Letter to [Mr H, MXC Capital] [3319-3320].

66 Reply from [Mr H, MXC Capital] [3321-3325].

67 Section 23 RFI [3300-3318].

## 4. THE CONDUCT

### A. Background

4.1 On 19 June 2018, the Committee *for* Economic Development in Guernsey published the Telecommunications Sector Policy Statement.[68]

4.2 Following the publication of the Telecommunications Sector Policy Statement, the GCRA and the States of Guernsey carried out formal and informal consultations and meetings with stakeholders, including the Parties, to explore how 5G technology might best be deployed for the benefit of the Guernsey economy and Guernsey consumers. [69]

4.3 One such meeting was the 5G pre-summit meeting organised by the GCRA in Jersey on 5 July 2018.

### B. The 5G pre-summit – July 2018

4.4 The 5G pre-summit was organised by the GCRA in order to facilitate an exchange of views on a number of topics relevant to the roll out of 5G, such as health and safety issues, technical standards, environmental impact and ideal milestones for the innovation and full roll out stages of 5G.

4.5 At the 5G pre-summit, presentations were made by a number of stakeholders and other parties, including Ofcom, the States of Guernsey, GCRA, JT, Sure and Airtel, covering these and other areas. The GCRA had provided each telecommunications operator with an identical brief for the presentation each was to give at that meeting.[70] Each was asked to cover a number of topics, including:

(a) Health and safety issues.

(b) Timescales, availability of technology and standards.

(c) How 5G would fit in with existing 2G, 3G and 4G infrastructure.

(d) How each operator would provide an innovation test environment.

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68 SoG Policy [2957-2996].

69 JT's response to the first SO [2176-2201].

70 5G Pre-Summit slide deck, sent by Tim Ringsdore (CICRA) to the Parties via Outlook Calendar on 1 June 2018 [4218].

(e) The best options for a 5G network roll-out for the Channel Islands, including the challenges that a joint approach would create.[71]

4.6 A summary of the 5G pre-summit meeting discussions[72] was produced by the GCRA.[73] According to the summary, the questions raised by stakeholders could be grouped under a number of workstreams – spectrum, civil infrastructure access, fibre, network sharing and Government involvement and funding – each of which could be addressed by a working group. It was envisaged that each of JT, Sure and Airtel would participate in each working group, with Newtel joining the "Fibre" group as a fourth participant.[74] The States of Guernsey and Jersey, Ofcom and Newtel were identified as optional participants for certain working groups.

**C. Contacts between the Parties**

4.7 Bilateral contacts between the Parties, which were organised outside of the working group process described above and which did not include Airtel or any other stakeholder, appear to have begun shortly after the 5G pre-summit meeting and continued until at least June 2019.

***Summary***

4.8 The bilateral contacts between the Parties involved the discussion and/or exchange of information in relation to the development of a Bilateral Home Network Scenario for Guernsey, which consisted of:

(a) The proposition that Sure and JT would work together on an "open working" basis to achieve a mobile network infrastructure split along Bailiwick lines within five years. This network split would be achieved through the removal by JT of its mobile network infrastructure from Guernsey.[75]

(b) The commercial strategy that JT was contemplating adopting in respect of the speed of deployment of 5G, which by March 2019 had been incorporated into the proposed implementation timelines for the Bilateral Home Network Scenario.

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71 5G Pre-Summit slide deck, page 16 [4234].
72 Slide presentation entitled "Summary of the workshop (5 July 2018) and next steps" [4239-4254].
73 Working together with the JCRA as CICRA.
74 "Summary of the workshop (5 July 2018) and next steps", slide 6, [4244].
75 And the removal by Sure of its mobile network infrastructure from Jersey.

(c) The development of a common "line to take" with Government and the GCRA in relation to 5G, to support the Bilateral Home Network Scenario.

***22 August 2018 meeting***

4.9 On 22 August 2018, a meeting took place in Jersey between senior representatives of the Parties, [Mr I, JT Chief Executive], [Mr B, Director of Corporate Affairs of JT Global], [Mr J, JT], [Mr D, Sure Group Chief Executive] and [Mr G, Chief Operating Officer, Sure]. An internal JT e-mail from [Mr J, JT] to [Mr K, Chief Information and Technology Officer, JT] of 23 August 2018[76] and a JT "quick notes" document[77] (collectively the **22 August Attendance Notes**) contain notes of the discussion that took place at that meeting.

Disclosure of commercial strategy - speed of implementation of 5G

4.10 The 22 August Attendance Notes record that the JT Chief Executive disclosed to Sure the following matters relating to the commercial strategy that JT was contemplating adopting with regard to the speed of deployment of 5G:

(a) JT was reluctant to be an early adopter of 5G. The reasons given for this were that:

(i) There was a lack of demand for 5G and the technical standards were not yet developed. Real 5G benefits therefore seemed to be some way off.

"no demand – no standard and seems a long way off for real 5G benefits".[78]

(ii) Referring to the move from 3G to 4G, [Mr I, JT Chief Executive] noted that JT had squeezed all value out of 3G before it stepped into 4G. JT had not yet similarly squeezed all value out of 4G, such that a move to 5G was premature at this stage.

"History on 3G – 4G discussed – demand was present in 2004 – squeeze all value out of 3G before we stepped to 4G – 5G not the case."[79]

(b) JT's strategy in respect of the implementation of 5G was to be a follower rather than a leader, but it needed to ensure that it remained "in the story".

"wish to be followers rather than leaders – but need to be in the story"

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76 JT2 [2].
77 JT461 [1812].
78 JT2 [2].
79 JT2 [2].

(c) JT intended to move into 5G in an incremental way.

> "edge into 5G – areas of 5G and move towards the promise of other 5G functions over time."[80]

Bilateral Home Network Scenario

4.11 The 22 August Attendance Notes also indicate that rather than beginning to explore one of the potential scenarios set out in the Telecommunications Sector Policy Statement as described above at paragraph 3.7 (the Pooled Infrastructure Scenario, the Single SA 5G Scenario or the Mandated Infrastructure Sharing Scenario), the Parties instead began to discuss a Bilateral Home Network Scenario – a bilateral arrangement pursuant to which Sure would retain its mobile network infrastructure in Guernsey and the JT mobile network infrastructure in Guernsey would be removed, thus creating "one network" in Guernsey:

> "One network discussions.
> Jersey – JT
> Guernsey – Sure
> [……]
> Repopulate – 3G and 4G network… One in Guernsey and Jersey."[81]

4.12 As explained above at paragraphs 3.7 – 3.9, this type of arrangement (Bilateral Home Network Scenario) was not one of the scenarios put forward by the States of Guernsey in its Telecommunications Sector Policy Statement.

4.13 The Parties appear to have discussed a five-year time frame for a (network) split along Bailiwick lines:

> "Point in 5 years – aim to Jersey / Guernsey split"[82]

4.14 This was consistent with the opening statement made by [Mr D, Sure Group Chief Executive] that the Parties should adopt an open working approach and a common (bilateral) five year objective with respect to 5G.

> "Open working suggestion between JT and Sure
> View over next five years between parties would be an aspiration."[83]

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80 JT2 [2].
81 JT461 [1812].
82 JT461 [1812].
83 JT2 [2].

4.15 Contrary to the assumptions set out in the Telecommunications Sector Policy Statement and the materials produced following the 5G pre-summit, Airtel was not involved in this meeting. Various explanations have been given by the Parties as to why Airtel was excluded, for example:

(a) The Parties had interpreted the three scenarios put forward in the Telecommunications Sector Policy Statement as a requirement or direction that Sure should become the single network operator in Guernsey and thus there was no need to involve Airtel in the discussions, from a technical perspective.[84]

(b) Airtel's network was of a lower quality than that of JT or Sure.[85]

(c) "[Because] this was a discussion between JT and Sure. Full stop."[86]

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[84] JT Written Representations, paragraph 1.15 [3501].

[85] JT Written Representations, paragraph 1.15 [3501].

[86] Transcript of interview with [Mr D, Sure Group Chief Executive], in response to a question about why Airtel was not invited to the 22 August 2018 meeting:
"[35:30] Sarah Livestro: So if Sure had been a single Guernsey network, as you've just suggested, JT would have been accessing that on an MVNO basis, wouldn't they?
[35:39] [Mr D, Sure Group Chief Executive]: Yeah, well that's how it would work, yeah.
[35:41] Sarah Livestro: So what's the difference between JT access, so you said you weren't including Airtel on this because they…
[35:46] [Mr D, Sure Group Chief Executive] (interjects): In this particular meeting.
[35:48] Sarah Livestro: Yes… because they'd indicated that they wanted to, or that they would have been willing to come on as an MVNO, but JT would have been in the same position, wouldn't they?
[35:58] [Mr D, Sure Group Chief Executive]: I don't understand your question. If JT, yeah, I don't understand your question [✂]. So, therefore, if we were in the construct of having a discussion that was about [✂].
[36:25] Sarah Livestro: So when you talk about a single network, do you mean… what do you mean?
[36:30] [Mr D, Sure Group Chief Executive]: From that perspective..
[36:31] Sarah Livestro: A shared network, sorry…you were talking about a shared network.
[36:32] [Mr D, Sure Group Chief Executive] (taps desk): Are we talking about this meeting or are we going to go off into a different direction and talk about something completely different?
[36:38] Sarah Livestro: Sorry, it's a follow-up question to what you said, so you said that Airtel weren't involved [[Mr D, Sure Groups Chief Executive] interjects: "in this meeting"] in this meeting because [✂]. I think that was what you said wasn't it?
[36:52] [Mr D, Sure Group Chief Executive]: **Sorry, this was a discussion between JT and Sure, full stop.**
[36:56] Sarah Livestro: Yep. Okay.
[36:57] [Mr D, Sure Group Chief Executive]: All right? So, follow up question..
[36:59] Sarah Livestro: So I'm asking why Airtel weren't involved?
[37:00] [Mr D, Sure Group Chief Executive]: Because this was a discussion between JT and Sure, much the same as [✂].
[37:18] Sarah Livestro: No, but you're talking about one network discussions. [[Mr D, Sure Group Chief Executive] interjects: "This doesn't, this doesn't"] You've said the idea would be that JT ran the network in Jersey, and Sure ran the network in Guernsey. So I'm just I'm just curious to know why Airtel wasn't included in this?
[37:31] [Mr D, Sure Group Chief Executive]: In this particular meeting? Because it was a meeting between JT and Sure.
[37:35] Sarah Livestro: Yes, but why didn't you invite them?

4.16 Irrespective of the reason for this, the 22 August Attendance Notes make clear that the "one network" discussions that took place between the Parties were, and were intended to remain, bilateral (a "reciprocal agreement"[87]) and that the Parties foresaw that the implementation of the "one network" that they were discussing would have some impact on Airtel.

"Enevatable [sic] move to network sharing approach – what happens to A
Reciprocal agreement… for other MVNO's [sic] – we open the door".[88]

<u>Development of "line to take" with regulator and Government</u>

4.17 Recorded under the heading "Practical moves" in each of the 22 August Attendance Notes, the evidence demonstrates that the Parties also discussed some of the practicalities around joint development and implementation of the "one network" approach (i.e. the Bilateral Home Network Scenario) that they had been discussing and joint messaging that they should adopt.[89] The proposals included joint marketing and PR to ensure a clear message was presented to external stakeholders, the signing of a letter of intent, sharing "crown jewels"[90] and working up a common "public and regulatory"[91] approach.

"Sign a LOI maybe – share crown jewels
Marketing and PR have to work together – get message clear to all external stakeholders".[92]

"Sign an agreement outlining direction and inclusion of NDA – [Mr B, Director of Corporate Affairs of JT Global] to construct
Local Gov and regulatory – common approach
Commercial – considerations to be thought through
Work towards a 5 year Objective between parties – principle agreement".[93]

4.18 The Parties also discussed a strategy of moving the focus of the public discussion away from the implementation of 5G and instead onto the network speeds required by the customer.

"We must provide best use of bandwidth – agnostic delivery
Average bit rate per user – so maybe take conversation away from 5G but all around what customers need on data rate."[94]

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[37:37] [Mr D, Sure Group Chief Executive]: Because it was a meeting between JT and Sure about …about what JT was potentially willing to do. [✂]."
[2826-2828]

[87] JT461 [1812]

[88] JT461 [1812]

[89] JT2 [2-3]; JT461 [1812].

[90] JT461 [1812].

[91] JT461 [1812].

[92] JT461 [1812].

[93] JT2 [2-3]

[94] JT2 [2-3].

*7 November 2018 meeting*

4.19 Two weeks before the GCRA and JCRA second 5G industry forum hosted in Guernsey (see paragraph 3.11 above), a further meeting took place in London on 7 November 2018 between [Mr I, JT Chief Executive], [Mr B, Director of Corporate Affairs of JT Global], [Mr C, JT Chair], [Mr D, Sure Group Chief Executive], and [Mr l, Sure – Batelco Group CEO]. The Sure Response records that there "May have been some limited discussions regarding general network sharing and at the time the general inclination of both parties [was] not to support".[95]

4.20 JT states that it is not aware of any discussions having taken place at that meeting relating to SA 5G mobile networks but has not been able to confirm whether or not any discussions regarding mobile network consolidation took place.[96]

*9 January 2019 meeting*

4.21 On 9 January 2019, a meeting took place between [Mr K, Chief Information and Technology Officer, JT], [Mr M, JT], [Mr N, JT], [Mr O, JT], [Mr J, JT], [Mr G, Chief Operating Officer, Sure] and [Mr A, Sure]. Two communications from [Mr J, JT] (the **9 January Attendance Notes**) reference this meeting; the first being an e-mail apparently sent to himself entitled "Sure – nates and ac"[97] and the second sent a few minutes later to all attendees recording the outcome of the meeting and the actions arising from it[98].

4.22 The 9 January Attendance Notes indicate that matters discussed at the 22 August 2018 meeting were again raised and further developed in this meeting.

<u>Bilateral Home Network Scenario</u>

4.23 First, as was the case for the 22 August 2018 meeting between senior representatives of the Parties, rather than beginning to explore one of the three potential scenarios put forward by the States of Guernsey in the Telecommunications Sector Policy Statement (namely the Pooled Infrastructure Scenario, the Single SA 5G Scenario and/or the Mandated Infrastructure Sharing Scenario) to enable the roll out of 5G services in Guernsey in line with, or earlier than, the UK, the documents demonstrate that the Parties continued to discuss a reciprocal

95 28 February 2020 - JT Appendix 1 [2209].

96 JT letter of 9 April 2021 [2257].

97 JT16 [32-33].

98 JT16 [32-33].

Bilateral Home Network Scenario on a bilateral basis – i.e. each of JT and Sure would cease to operate a mobile network on its non-home island (see paragraphs 4.11 - 4.12).[99]

"Scenario
Sure Gu – JT Jersey".[100]

4.24 As was the case for the 22 August 2018 meeting, the Parties noted that this proposed bilateral arrangement ("Scenario Sure Gu – JT Jersey") might lead to the exit of Airtel from the market, with the 9 January Attendance Notes recording that a discussion point was "Airtel outcome if not in market".[101,102]

<u>Development of "line to take" with regulator and Government</u>

4.25 Second, as first discussed between them on 22 August 2018, the 9 January Attendance Notes record the Parties' agreement on a common approach to take in their individual upcoming discussions with the States of Guernsey and the GCRA, which is presumed to refer to the bilateral meetings that would take place on 16 January 2019. The "line to take" set out in the 9 January Attendance Notes was that the Parties were happy to invest in 5G in the short term, that they were co-operating and that they were discussing infrastructure sharing.

"Message to regulator. Happy to invest in 5G".[103]
"Message for next week's meeting with Local Government
- Invest in 5G in short term
- Discussing infrastructure sharing".[104]

4.26 The GCRA notes that the common position that the Parties agreed to put forward to the States of Guernsey and to the GCRA does not accord with the actual position that they had taken privately, namely:

(a) Contrary to the "line to take" set out in the 9 January Attendance Notes, the Parties did not intend to invest in 5G in the short term (see paragraphs 4.10; 4.18);

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99 i.e. JT would remove its mobile network infrastructure from Guernsey and Sure's existing mobile network infrastructure would therefore become the "single network" in Guernsey.

100 JT16 [32-33].

101 JT16 [32-33].

102 Airtel entered the Guernsey market in 2008 and had steadily gained significant market share from both Sure and JT. However, it relies on JT's mast network to deliver mobile services in Guernsey. In 2013, Airtel's share of the retail mobile market in Guernsey was 14%. By 2019, this had risen to 23% [Table 10, Telecommunications And Market Report 2019, https://www.gcra.gg/media/598279/telecommunications-statistics-2019.pdf]

103 JT16 [32-33].

104 JT17 [34].

(b) Contrary to the “line to take” set out in the 9 January Attendance Notes, the Parties were not discussing any of the infrastructure sharing scenarios suggested by the States of Guernsey in the Telecommunications Sector Policy Statement (i.e. the Pooled Infrastructure Scenario, the Single SA 5G Scenario and/or the Mandated Infrastructure Sharing Scenario) but rather were discussing a Bilateral Home Network Scenario pursuant to which Sure would retain and operate its existing mobile network infrastructure in Guernsey, whilst JT would remove its mobile network infrastructure from Guernsey (see paragraphs 4.12 – 4.13; 4.19 – 4.20).

***16 January 2019 meeting***

Bilateral Home Network Scenario

4.27 On 16 January 2019, the Parties had been invited to meet separately with representatives of certain political committees and their officers, with GCRA officers also attending, to discuss the feasibility of the various scenarios put forward in the Telecommunications Sector Policy Statement. At those meetings, neither JT nor Sure disclosed the Bilateral Home Network Scenario discussions that had taken place and continued to take place between them.

4.28 An internal JT note from 23 January 2019 records a meeting that took place between JT and [Mr D, Sure Group Chief Executive] (likely to have been the meeting between [Mr D, Sure Group Chief Executive] and [Mr I, JT Chief Executive] in Guernsey on 16 January 2019 – the same day as each had had a separate meeting with political representatives as set out above at paragraph 4.27 - referenced by Sure[105]) “discussing Sure’s preference for one mobile network in Guernsey”.[106]

***Contacts between the Parties – March 2019 – May 2019***

4.29 Between March 2019 and May 2019, there was an exchange of internal and external e-mails between various individuals at JT and Sure relating to matters first discussed in the 22 August 2018 meeting, namely:

(a) The Bilateral Home Network Scenario;

105 Sure’s list of meetings from first Sure disclosure [2407].
106 JT459 [1809]

(b) Development of the Parties' commercial strategy regarding the speed of deployment of 5G, to the extent that this was incorporated into the working assumptions on which the Bilateral Home Network Scenario was based.

Bilateral Home Network Scenario

4.30 First, a number of e-mails exchanged between the Parties demonstrate that work was being carried out by them jointly to explore the development and implementation of a Bilateral Home Network Scenario in Guernsey.[107] These discussions were based on the assumption that JT would remove its mobile network infrastructure from Guernsey in return for Sure removing its mobile network infrastructure from Jersey and were consistent with the previous discussions between the Parties on the Bilateral Home Network Scenario (see paragraphs see paragraphs 4.11 – 4.12; 4.19 – 4.20):

(a) On 14 March 2019, [Mr M, JT] e-mailed [Mr A, Sure] and [Mr J, JT], stating that he had "built first model to look at joint Jersey network. This is just a first pass without looking at site specifics but provides safe ballpark figures." He then set out a number of assumptions, including "all Sure RAN to be removed" and identified a CAPEX cost as the move of JT's "Guernsey Core to Jersey".[108]

(b) On 14 March 2019, an internal JT e-mail from [Mr M, JT] to [Mr B, Director of Corporate Affairs of JT Global] (forwarding the e-mail described in (a) above) stated "Fyi – have been looking at savings from JT running Jersey and Sure running Guernsey. I have been doing the model for Jersey and [Mr A, Sure] is doing Guernsey".[109]

(c) On 18 March 2019, [Mr A, Sure] e-mailed [Mr M, JT] and [Mr J, JT] in the following terms:

"**Considerations**

- Sure will retain all RAN equipment on Guernsey, Alderney, Sark and Herm
- Sure will reuse Huawei equipment removed from Jersey to deploy new site and increase capacity on existing site
- JT to remove RAN equipment and antennas [….]
- Sure and JT to combine spectrum." [110]

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107 And in Jersey.
108 JT81 [217-220].
109 JT81 [217].
110 JT84 [233-239].

4.31 In order to support their discussions on the Bilateral Home Network Scenario, the Parties exchanged information on projected costs as well as information related to the number of sites, site types, capacity and spectrum. The nature of these exchanges is recorded in a JT internal e-mail from [Mr K, Chief Information and Technology Officer, JT] to [Mr I, JT Chief Executive], which notes that:

> "We (me, [Mr J, JT] and [Mr M, JT]) have engaged with [Mr G, Chief Operating Officer, Sure] and his team since you asked me to do so earlier this year. We have had a few workshops to explore the scenarios of one radio network in jersey (sic) operated by JT and one radio network in Guernsey operated by Sure. During those workshops, we have exchanged information on number of sites, site types, capacity, spectrum …. both ways."[111]

4.32 An e-mail from [Mr M, JT] to [Mr A, Sure] of 24 April 2019 states:

> "Model attached. First stab at looking at costs involved in moving to single operator per island and then adding 5G. The model provides an estimate of the CAPEX cost of making the change along with the ongoing OPEX savings / run rate. Based on the assumptions we had made. Have not included any Core costs, impact to revenues, impact to roaming etc at this stage […..]
> Savings tab: the first part outlines the CAPEX and OPEX costs of carrying out the change including deploying the extra sites in Jersey and removing sites in Guernsey including labour and materials. Have put in a generic £100K cost for a new 2G/3G/4G site which includes equipment, installation + antennas. Approximate costs used for ongoing rental, electricity and maintenance. Have also put in a nominal £1M for asset write downs. Under Savings have put in some nominal costs we would be saving. Gives the total project CAPEX costs plus expected run rate OPEX savings.
> The 5G tab just gives an illustration for potential capex savings through not having to purchase equipment for the other island, based on the assumption that double bandwidth would be available." [112]

4.33 The excel spreadsheet attached to the e-mail sets out the projected CAPEX and OPEX costs and savings that would be incurred or saved in respect of various items, as well as Sure mast sites in Jersey that JT would acquire from Sure as a consequence of the proposed network swap.

4.34 [Mr A, Sure] populated the sheet with Sure's figures and informed JT that he had done so.[113] (Further information relating to the subscriber numbers and inbound roaming traffic of each of the Parties was exchanged by them in June 2019.) [114]

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[111] JT186 [777-778].

[112] JT129 [401-402].

[113] JT142 [445-446] – email from [Mr A, Sure] to [Mr M, JT] of 14 May 2019. Sure provided that spreadsheet in their third disclosure.

[114] The Parties had also agreed to calculate and share with [P, a mobile network equipment provider] the number of subscribers each had, broken down into 2G/3G/4G, plus inbound roamer traffic (JT-169 [677-682]). This information was shared with Sure and [P, a mobile network equipment provider] by JT by e-mail on 25 June 2019 (Email from [Mr J, JT] to [Mr Q of P] on 25 June 2019 @13.15, [Ms Y, Sure]

4.35 The exchanges between the Parties demonstrate that the Bilateral Home Network Scenario continued to be actively explored by them on a bilateral basis and without involving Airtel (the second largest mobile operator in Guernsey by market share) Thus, on 18 March 2019, [Mr A, Sure] e-mailed [Mr M, JT] and [Mr J, JT] in the following terms:

> **"Risks**
> Airtel currently share a number of JT sites. This will cause issues when trying to decommission the structure. Also if they occupy 2nd place on a structure combining antennas may be harder with larger 5G requirements.
> CICRA may not allow spectrum sharing and it is reallocated between two networks Sure/JT hybrid and Airtel".[115]

4.36 This e-mail shows that the Parties contemplated that, were they to implement the Bilateral Home Network Scenario, Airtel would (at least initially) continue to own and operate a network to which spectrum could be allocated. It is therefore clear that, contrary to the scenarios set out in the Telecommunications Sector Policy Statement, they did not intend Airtel's network to be part of any "one network" solution. They also recognised that if JT were to decommission its network infrastructure in Guernsey, this could affect the quality of Airtel's network.

4.37 This point was picked up in a subsequent JT internal slide presentation, circulated on 26 May 2019:

> "Airtel expected to raise complaint or demand access to National roaming structure." [116]

<u>Development of commercial strategy - speed of implementation of 5G</u>

4.38 The above emails and subsequent documents indicate that, contrary to the agreed "line to take" put forward by the Parties as described above (paragraph 4.25) and contrary to the aspirations set out in the Telecommunications Sector Policy Statement, the Bilateral Home Network Scenario being discussed by the Parties was not intended to facilitate an early adoption of 5G. Rather, the documents demonstrate that the proposed conduct of both Parties (each in their respective home island) was to introduce 5G gradually and only after a period of at least two years. This approach, which by March 2019 had been explicitly

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(who subsequently forwarded it to [Mr G, Chief Operating Officer, Sure] with a covering e-mail stating "I think this was meant for you rather me…. (sic)") – [2542-2543]). On 26 June 2019, [Mr G, Chief Operating Officer, Sure]instructed [Mr Z, Sure] to share similar information with JT (Email from [Mr G, Chief Operating Officer, Sure] to [Mr Z, Sure] of 26 June 2019 @16.32 [2542], which he did by e-mail on the same date (Email from [Mr Z, Sure] to [Mr Q of P] and [Mr J, JT] of 26 June 2019 @16.55 [2541].

115 JT84 [233-239].

116 JT195 [819-830].

incorporated into the Parties' development of the Bilateral Home Network Scenario, is consistent with the commercial strategy shared by JT with Sure at the 22 August 2018 meeting, namely that it did not intend to be an early adopter of 5G but rather wished to squeeze all value out of 4G before edging into 5G (paragraph 4.10):

(a) An e-mail from [Mr A, Sure] to [Mr M, JT] of 28 March 2019 states that:

- Network will commence with 2G/3G/4G
- 5G will be added to the network as required".[117]

(b) An e-mail from [Mr M, JT] to himself of 29 March 2019 states that:

- Network will commence with 2G/3G/4G
- [….]
- Resultant combined network expected to be sufficient to cater for next 2 years growth
- […..]
- After 2 years the additional data growth will be handled by 5G."[118]

(c) An internal JT slide presentation dated May 2019[119] reflects the information exchanged between the Parties (which it describes as "base assumptions"), including:

"1. JT to operate the single mobile network in Jersey and Sure to operate the single mobile network in Guernsey.
2. All existing technologies to be considered with retrieval of all 2G, 3G, and 4G radio access network in non incumbent island. […]
6. A period of two years growth has been considered, past that period 5G would be expected to start to take growth."

(d) A Sure slide presentation, shared with JT, concluded that on the basis of a high level analysis of Capex required and Opex savings, the view of 2G/3G/4G sharing (meaning the Bilateral Home Network Scenario) was positive but that 5G had a number of challenges, including lack of business case, spectrum planning and licence issues and the increase in the number of sites. However, "2/3/4G network sharing with a path of one 5G for each Bailiwick looks attractive".[120]

***Approach to [P, a mobile network equipment provider]***

<u>Bilateral Home Network Scenario</u>

117 JT100 [296].
118 JT103 [303].
119 JT195 [819-830].
120 JT198 [833-835].

4.39 In March 2019, the Parties approached [P, a mobile network equipment provider] to explore a number of new network infrastructure options. The various scenarios were outlined in an e-mail of 25 April 2019 from [Mr G, Chief Operating Officer, Sure] to [Mr Q of P] and [Mr K, Chief Information and Technology Officer, JT], copied to [Mr M, JT] and [Mr A, Sure].[121] Consistently with all the discussions and contacts between the Parties described above, all of the scenarios put forward by the Parties were based on the Bilateral Home Network Scenario, i.e. the premise that JT would remove its mobile network infrastructure from Guernsey and that Sure would retain its mobile network infrastructure in Guernsey.[122]

4.40 On 9 May 2019, by an e-mail sent to [Mr G, Chief Operating Officer, Sure] and [Mr K, Chief Information and Technology Officer, JT], [Mr Q of P] responded to the various 5G options that had been put forward by the Parties. He confirmed that a quotation based on release 16 (required for SA 5G) could not be provided as the standards were not yet complete and that a [P] 5G network could not be made to interoperate with the 4G networks of other equipment vendors without degrading the end-user experience significantly.[123] The subsequent budgetary proposal therefore covered the provision of a single NSA 5G network in Guernsey and a single NSA 5G network in Jersey, with either a 4G swap [P] 4G equipment for Sure's existing Huawei 4G equipment in Guernsey) or a 2G, 3G and 4G swap on the same basis.[124]

4.41 On the basis of the evidence, the GCRA therefore notes that the Parties must have been aware at a senior level, by early Q2 of 2019 at the latest, that the technology required to support a SA 5G network would not be available for some time[125] and that a single NSA 5G network could not interoperate with multiple 4G networks and/or 4G networks of other equipment vendors.[126]

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121 JT 131 [407-410].

122 And that the reverse would happen in Jersey. In particular, the first three options consider only the scenario in which JT retains its mobile network in Jersey and Sure retains its mobile network in Guernsey – the inference being that each would have removed its mobile network in its non-home island (i.e. JT would have removed its mobile infrastructure from Guernsey).

123 JT174 [690].

124 JT258 [1133-1134] – email of 10 June 2019 from [Mr Q of P] to [Mr G, Chief Operating Officer, Sure] and [Mr K, Chief Information and Technology Officer, JT].

125 At interview, [Mr A, Sure] of Sure stated that he knew in early January 2019 that 5G standalone networks could not be constructed [2883-2885].

126 Paragraph 4.40. See also email from [Mr K, Chief Information and Technology Officer, JT]to [Mr J, JT] of 23 August 2018 states: "Also in terms of 5G sharing I am concerned with the inter layer management with existing 2g, 3G and 4g networks. That would need to be tested upfront" [4]; Email from [Mr M, JT] to himself of 13 May 2019 responding to the Draft SOI proposal that there be a single 5G mobile network operator in each island: "Madness! [….] 5G networks only can't be shared (ref. [P, a mobile network equipment provider] and ZTE). For eMBB the deployment has to be NSA as the user camps on 4G therefore the shared network has to support 4G & 5G (2G and 3G are irrelevant). So unless a shared

*20 May 2019* ***– The Principles Document***

4.42 On 20 May 2019, [Mr D, Sure Group Chief Executive] sent to [Mr I, JT Chief Executive] and [Mr B, Director of Corporate Affairs of JT Global] an e-mail entitled "way fwd", attaching a document entitled "Principles" (the **Principles Document**)[127], which set out a number of principles of engagement for the Parties. The approach set out in the Principles Document was consistent with both the Bilateral Home Network Scenario and the Parties' commercial strategy regarding the speed of implementation of 5G, which had first been shared at the 22 August 2018 meeting and had subsequently been developed by the Parties and incorporated into the Bilateral Home Network Scenario.

<u>Bilateral Home Network Scenario</u>

4.43 In line with the Bilateral Home Network Scenario that was being developed by the Parties, the Principles Document provided that Sure would build a single 5G infrastructure in Guernsey and that it would do so alone:

> "1. "Home Network" 5G build commitments by Sure and JT
> a. Sure builds and maintains the required single 5G infrastructure in Bailiwick of Guernsey
> b. JT builds and maintains the required single 5G infrastructure in Bailiwick of Jersey."

4.44 The Principles Document also proposed that each of Sure and JT should retain and continue to own their existing single mobile network in Guernsey and Jersey respectively.

> "4. Additional Mobile Network consolidation
> a. Parties to investigate the consolidation of other domestic mobile networks to realise operating cost, capex and environmental synergies and protect against future reversal of possible single 5G approach
> i. Single mobile networks in each of GSY and JSY owned by Sure and JT respectively
> b. Options for approach and timing."

<u>Development of commercial strategy – speed of implementation of 5G</u>

4.45 The Principles Document refers to the Bilateral Home Network Scenario as being a way of "protect[ing] against reversal of possible single 5G approach".

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network is built (to include 2G/3G/4G/5G) this means a monopoly for one operator. Could build a shared network with Sure – JT Jersey, Sure Guernsey." [437-438].

127 JT171 [684]; and JT172 [685].

4.46 As set out above at paragraph 4.41, by the time that the Principles Document was produced and circulated, the Parties were aware that:

(a) 5G networks could not operate independently of 4G networks; and

(b) A single NSA 5G network could not interoperate with multiple 4G networks.

4.47 If JT had removed its 4G infrastructure from Guernsey, as envisaged under the Bilateral Home Network Scenario, it would have been unable to provide 5G services in Guernsey using its own 4G network. This would have left it (and other operators) in the position of an MVNO[128] and thus dependent on the decisions of the network owner and operator (Sure) as to the timing of the roll out of 5G.

4.48 This outcome was consistent with commercial strategy of JT first shared with Sure on 22 August 2018 which was subsequently incorporated by the Parties into the Bilateral Home Network Scenario (paragraph 4.38 above), namely to allow the Parties to control the speed of implementation of 5G in their "home" island and to introduce it at a pace determined by them.

4.49 [Mr D, Sure Group Chief Executive] also informed [Mr I, JT Chief Executive] and [Mr B, Director of Corporate Affairs of JT Global] that he had "briefed Batelco".

*JT internal presentations*

4.50 On 31 May 2019, [Mr B, Director of Corporate Affairs of JT Global] circulated a slide presentation to JT board members in advance of a meeting of the JT board. The third slide in that pack set out the JT "High Level 5G Strategy" as follows[129]:

- "Defend JT position as mobile network operator in Jersey at all cost
  - Prefer process of licences being issued to operators using a 'beauty contest' approach
  - Though not the preferred option, JT willing to pursue a single 5G network option if necessary
- Be aggressive in Guernsey
  - Again, prefer 'beauty contest' of issuing 5G licences
  - Should single network be only option in Guernsey, the [sic] aggressively pursue
  - Be prepared to consider an alternative approach to Guernsey operation if necessary to secure position in Jersey."

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128 Mobile Virtual Network Operator.
129 JT239 [1020].

4.51 An earlier version of the same slide presentation[130] described the "alternative approach to Guernsey operation if necessary to secure position in Jersey" in the following way:

> "Be prepared to trade Guernsey if it means we can successfully defend Jersey."

4.52 Commenting on that version of the presentation, which was also circulated to the JT Board, [Ms R, JT Board Member] commented as follows:

> "The high level principles of primarily secure a license in Jersey, and secondly try to secure a license in Guernsey but be prepared to trade it to secure Jersey make sense. I wonder whether the simultaneous timing will enable this tiered approach".[131]

4.53 These slides demonstrate that, in the absence of the contacts between the Parties as described above (i.e. under conditions of normal competition), there would have been vigorous competition for any Guernsey 5G spectrum award;[132,133,134] JT's preferred strategic approach in Guernsey was to "be aggressive" (paragraph 4.50). However, while JT continued to prefer a competing network model approach within each Island, as had been the case for the 4G awards, it was prepared to alter this approach and "trade" with Sure, thereby undermining normal competition by removing itself as a mobile infrastructure network operator in Guernsey to defend "at all cost" (paragraph 4.50) its position as the mobile infrastructure network operator in Jersey. As set out in detail in this section, through the development of the Bilateral Home Network Scenario, JT had consistently and over a period of months communicated to Sure that it was contemplating removing its mobile network infrastructure from Guernsey.

*The MOUs*

4.54 In June 2019, the Parties entered into two Memoranda of Understanding (one for each of Guernsey and Jersey) regarding the construction by each of them of a SA 5G network in their "home" island.

4.55 The GCRA considers that although, on their face, the MOUs relate only to the construction of SA 5G networks, the background facts, as evidenced by the documents cited below, demonstrate that the conclusion of the MOUs and the circumstances surrounding that reflect

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130 JT155 [615].

131 JT157, email from [Ms R, JT Board Member] to [Mr B, Director of Corporate Affairs of JT Global] McDermott, [Mr C, JT Chair] and [Mr I, JT Chief Executive], 15 May 2019 @19:03 [653-654].

132 JT155, Slide 36 [641-644].

133 JT230 [980].

134 Ibid.

the Parties' continuing concertation on a number of issues first raised in their meeting of 22 August 2018, namely:

(a) Development of the Bilateral Home Network Scenario;

(b) Exchange of information on intended future speed of implementation of 5G (which by this point had been incorporated into the Bilateral Home Network Scenario);

(c) The development and delivery of a joint "line to take" with the Government and the GCRA.

<u>Emails from MXC</u>

4.56 On 6 June 2019, [Mr S, a telecommunications consultant] e-mailed [Mr I, JT Chief Executive]. [Mr S, a telecommunications consultant], at that time, was assisting the Guernsey Investment Fund (**GIF**) with its strategy around a single network mobile infrastructure for Guernsey. GIF is a States of Guernsey backed fund focused on achieving long term capital growth and a commercial rate of return for shareholders through investments which have a Bailiwick of Guernsey focus, or which may benefit directly or indirectly the development of the Bailiwick. MXC Capital is a Guernsey based permanent capital vehicle that invests in technology companies on behalf of investors and at that time was working with GIF. [Mr H] is the CEO of MXC Capital.

4.57 The e-mail stated as follows:

"Hi [✂]
Hope all well with you.
My Colleague [Mr T] and I are assisting the Guernsey Investment Fund with its strategy around single network mobile infrastructure for Guernsey.
The Fund is investigating part participation in funding a single network on Guernsey and possibly Jersey in order to help Guernsey Government meet its stated single network objectives; this must also help reduce the overhead with maintaining the mobile infrastructure for the local operators. The lead from the Fund is [Mr H].
We would like to meet informally to discuss whether JT would consider selling and leasing back its mobile network infrastructure on Guernsey and perhaps Jersey? I realise this is a complex discussion further down the line, therefore at this stage we would like a high level view on the possibilities from your perspective. There should be significant commercial benefits to JT with a leaseback type model.
[Mr H, MXC Capital] and I are both on Guernsey next week and can be flexible time-wise during office hours or more informally over lunch somewhere private on either island. For this meeting it would just be [Mr H, MXC Capital] and I.
Please let me know when best suits you for a meeting.
With kind regards

[Mr S, a telecommunications consultant]"[135]

4.58 That e-mail was forwarded internally at JT on the same date.[136]

4.59 An e-mail in identical terms was sent by [Mr S, a telecommunications consultant] to [Mr D, Sure Group Chief Executive] on the same date.[137]

Parties' response to MXC approach

4.60 On the same date at 22.47, [Mr D, Sure Group Chief Executive] forwarded the email to [Mr U, Chief Financial Officer – Batelco], [Ms E, Legal and Regulatory Director, Sure] and [Mr G, Chief Operating Officer, Sure], with the following covering e-mail: [138]

"**In confidence – please keep this between the four us (sic) at this stage and the email is not for forwarding!!!**

The plot thickens- see below.

JT received the same email and I suspect so did Airtel.

[Mr G, Chief Operating Officer, Sure] and I have had a series of long conversations with JT ([Mr I, JT Chief Executive] and [Mr K, Chief Information and Technology Officer, JT]) today about network sharing (home, full etc) and on the back these conversations (sic) and now this email JT is more inclined to support the 5g home network approach.

As you know I have diminishing trust in the SoG and the seemingly increasing alignment with progress between MXC, [Mr S, a telecommunications consultant] and SOG. The email below is rather telling and super concerning on a number of levels.

I will give you both a call in the morning but the bottom line is that we want to agree a non binding MOU that covers the 5g home network sharing approach we have been progressing.

They are going to draft something simple and share.

I'll call you both tomorrow to discuss. [Ms E, Legal and Regulatory Director, Sure]-likely to need [Ms V]'s support when it arrives, but let's discuss first.

Regards,

[Mr D, Sure Group Chief Executive]".

4.61 In its Written Representations, Sure explains the above exchange of documentation as follows:

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135 JT Third Disclosure, April 2021 [1814].

136 JT Third Disclosure, April 2021 [1814].

137 Email from [Mr S, a telecommunications consultant] to [Mr D, Sure Group Chief Executive], 6 June 2019 @ 5.10 p.m. [2724-2725].

138 [Mr D, Sure Group Chief Executive] email of 6 June 2019 [2725].

"[o]n 6 June 2019, Sure received an approach on behalf of the Guernsey Investment Fund (with whom MXC, an investor, was working) asking whether Sure would consider a sale and leaseback of its mobile network infrastructure and noting that the Guernsey Investment Fund was considering part participation in funding a single network (the **GIF** approach).

The GIF approach caused concerns on Sure's part. In particular, the combination of (i) the desire on the part of the politicians to make progress with 5G in Guernsey, (ii) their frustration with the telcos' failure to table a cooperative solution for regulatory and political approval, and (iii) the active involvement of the Guernsey Investment Fund (with financial backing from MXC) created a risk for Sure that the politicians and regulators might further lose confidence in the ability of Sure to contribute to delivering the policy objectives of the politicians and regulators.

JT seemingly had concerns that were similar to Sure's. The apparently similar concerns on the part of Sure and JT led to the rapid drafting and agreement of the MOU on 11 June 2019.

As a matter of commercial strategy, the MOU sought to evidence the early stages of cooperative working towards a possible agreement that would deliver 5G for the Channel Islands (as requested by Deputy Parkinson). In short, the aim of the document was to keep Sure and JT "in the game" when the politicians were discussing how to solve the 5G challenge." [139]

4.62 Later in its Written Representations, and although JT denies that this was the case,[140] Sure notes that the MOU "was prepared very quickly for political reasons".[141]

<u>Preparation of MOUs</u>

4.63 On 10 June 2019, [Mr B, Director of Corporate Affairs of JT Global] sent [Mr D, Sure Group Chief Executive] a first draft of an "MoU for Jersey".[142] The email stated that within six months of securing a commercial spectrum licence, JT would have constructed and launched a

[139] Sure Written Representations, paragraph 3.14.5 – 3.15 [3371].

[140] In its written representations, JT states that the GCRA "raises the spectre of MXC and suggests that this was the catalyst for "*progressing more rapidly the [….] discussions*". This is inaccurate (and somewhat inconsistent) speculation on the part of the GCRA." JT Written Representations, paragraph 7.6 [3553]. JT further states as follows: "The GCRA now alleges that the MOUs were a smokescreen. If that were right, they would have been handed over with alacrity but they were not. Nor, in any event, is the evidence relied on for the theory that the MOUs were designed for the authorities' benefit persuasive. […] The repetition by the GCRA of this complaint, without either taking JT's response into account or joining issue with it, and/or without disclosing any contemporaneous documents from the GCRA's files in relation thereto once again highlights the GCRA's misreading of events and documents to fit a particular narrative, irrespective of the evidence or the true facts." JT Written Representations, paragraphs 8.3 – 8.5 [3555].

[141] Sure Written Representations, paragraph 3.27.1 [3376].

[142] Email from [Mr B, Director of Corporate Affairs of JT Global] McDermott to [Mr D, Sure Group Chief Executive], 10 June 2019 @16:46 [1126].

SA 5G network in Jersey.[143] An identical proposed Guernsey MOU would contain identical provisions relating to the construction of a 5G standalone mobile network in Guernsey.

4.64 Approximately an hour later, [Mr D, Sure Group Chief Executive] forwarded the e-mail and attachment to [Ms E, Legal and Regulatory Director, Sure], [Mr U], [Mr G, Chief Operating Officer, Sure]and [Mr W, Chief Executive, Sure Guernsey] (all of Sure).[144] He also attached the Principles Document.[145]

4.65 Referring to the Memorandum of Understanding, [Mr D, Sure Group Chief Executive] stated as follows:

> "I have had a very quick look at this and its simplicity is appealing. It basically says that we will work together on mutual home networks. I have also attached the more detailed principles I had provided…at this stage I don't think we need to go into that much detail so the MOU [Mr B, Director of Corporate Affairs of JT Global] has provided simple (sic) kicks things off. Certainly does not go into wider network sharing options per 4 of the principles!!!"

4.66 As set out above, option 4 of the Principles Document reads as follows:

> "Parties to investigate the consolidation of other domestic mobile networks to realise operating cost, capex and environmental synergies and protect against future reversal of possible single 5G approach; Single mobile networks in each of GSY and JSY owned by Sure and JT respectively."

4.67 [Mr D, Sure Group Chief Executive] concluded by asking for comments on the Memorandum of Understanding and stating that he was "keen to get this done tomorrow!".

4.68 [Ms E, Legal and Regulatory Director, Sure] responded to [Mr D, Sure Group Chief Executive]'s e-mail in the following terms:

> "main question we need to ask is what is the purpose of this MoU. If it is so we can show the Governments that yes, we are already engaged in this and talking then we think it would be better to keep this as general as possible at this stage."[146]

4.69 [Mr D, Sure Group Chief Executive] also produced a draft press release to accompany the Memoranda of Understanding, which he shared with [Mr I, JT Chief Executive] by e-mail on 11 June 2019.[147,148] [Mr I, JT Chief Executive] forwarded this draft press release to [Mr B, Director

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143 The GCRA notes, that this however appears inconsistent with the email sent by [P, a mobile network equipment provider] on 9 May 2019 (see paragraph 4.40 above), which clearly stated that 5G standalone mobile networks could not be constructed.

144 Email from [Mr D, Sure Group Chief Executive] of 10 June 2019 @5:45 [2410-2411].

145 Principles Document [2365].

146 Email from [Ms E, Legal and Regulatory Director, Sure] to [Mr D, Sure Group Chief Executive] of 11 June 2019 @ 12:51, [2623].

147 JT288 [1231].

of Corporate Affairs of JT Global] and [Ms X, JT] asking for their views. [Ms X, JT] responded in the following terms:

"Ok thanks for sharing. Imagine it's a well-timed political grenade hence the short time frame to rush it out as it's quite a biggy?"

4.70 [Mr I, JT Chief Executive] replied by e-mail an hour later,[149] stating:

"Thanks [Ms X]. Actually this is aimed at a few Government and trade folks. We want it out but don't want to make a big thing of it."

4.71 On 11 June 2019 the Parties signed the two Memoranda of Understanding.[150]

4.72 On 12 June 2019, [Mr B, Director of Corporate Affairs of JT Global] sent an e-mail to JT board members, stating as follows:

"Following the note from MXC last week re; single network in Guernsey/purchasing JT mobile network and discussion between [Mr I, JT Chief Executive] and [Mr C, JT Chair] on network sharing options, we have this morning signed a non-binding MoU with Sure and the details are set out in the e-mail below."[151]

4.73 [Mr α, JT Board Member], responded in the following terms:

"[Mr B, Director of Corporate Affairs of JT Global]
As I read it this is a "protect our own patch" agreement with the really key wording set out in the last substantive paragraph.
Thank you
[Mr α]."[152]

<u>Assessment</u>

4.74 The evidence described above demonstrates that:

(a) "Long conversations" between senior executives of each of the Parties took place on 6 June 2019 and these discussions had led to JT indicating to Sure its support for progressing more rapidly the <u>Bilateral Home Network Scenario</u> discussions in which the Parties had been engaged since 22 August 2018 (paragraphs 4.60 - 4.62).

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148 JT288 [1231].

149 JT288 [1231].

150 One Memorandum of Understanding was entered into between Sure (Guernsey) Ltd and JT (Guernsey) Ltd (the Second and Fifth Addressees), while the second was entered into between JT (Jersey) Ltd and Sure (Jersey) Ltd (the Third and Sixth Addressees). Each was signed by [Mr D, Sure Group Chief Executive] on behalf of Sure and [Mr I, JT Chief Executive] on behalf of JT.

151 JT344.

152 JT349.

(b) According to Sure the perceived threat posed by the States of Guernsey's engagement with MXC, which the Parties were concerned demonstrated a loss of confidence in their ability to deliver 5G in Guernsey and which the Sure CEO described as "super concerning", led to the signing of the MOU. This demonstrates that the Parties intended to try to remain in control of the speed of implementation of 5G in Guernsey. Their ability to do so would have been undermined if MXC had managed to partner successfully with another telecommunications operator (paragraphs 4.60 - 4.62).

(c) The MOUs represented co-ordination by the Parties on a "line to take" with the States of Guernsey and the GCRA, namely that each was still "in the game"[153] with respect to the implementation of 5G in line with the ambitions of the States of Guernsey. The MOUs, which related to the construction of SA 5G networks, did not, however, represent the actual nature of the contacts between the Parties, which had focussed on the development of a Bilateral Home Network Scenario based on a single 2G – 4G network with the incremental introduction of 5G on a non-standalone basis. As noted by the Sure CEO, the MOU "certainly [did] not go into wider network sharing options per 4 of the principles!!!" (i.e. did not accurately reflect the true nature of the discussions between the Parties to date).[154] This conclusion is supported by:

(i) the exchange of e-mails between the JT CEO and [Ms X, JT], which demonstrate that the MOU was not the "biggie" that it appeared to be (as assumed by [Ms X, JT]) but rather was intended to convey a message to politicians and the regulator that the Parties were still "in the game" (paragraph 4.60 – 4.62; 4.65; 4.69 – 4.70);

(ii) the e-mail from [Ms E, Legal and Regulatory Director, Sure] to [Mr D, Sure Group Chief Executive] which notes that the purpose of the MoU was "so we can show the Governments that yes, we are already engaged in this and talking" (paragraph 4.68).

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[153] Sure Written Representations, cited at paragraph 4.61 above.
[154] See paragraphs 4.65 - 4.66 above.

*Communication of MOU to the GCRA*

4.75 On 12 June 2019, Mr Byrne received a notification email from [Mr B, Director of Corporate Affairs of JT Global] reporting the Parties' entry into two Memoranda of Understanding (though he referred at that point only to a single document).[155]

4.76 On 13 June 2019 @08:56, Mr Byrne replied requesting a copy of the Memorandum of Understanding to which [Mr B, Director of Corporate Affairs of JT Global] had referred.

4.77 On 13 June 2019 @16:04, [Mr K, Chief Information and Technology Officer, JT] sent an e-mail to [Mr Q of P], regarding the budgetary proposal for a 5G Network prepared by [P, a mobile network equipment provider] for JT and Sure (described above at paragraph 4.40). The e-mail stated as follows:

> "Also, Sure and JT have announced to the regulator and the States their intention to explore a network sharing scenario in the form of an MOU signed by both operators. Because of the current political landscape, we have not disclosed the discussions on all techno's but have focused on a Standalone 5G which answers the immediate political concerns/requirements and debates. In order to fuel that scenario, [Mr G, Chief Operating Officer, Sure] and I would be interested to have a budgetary quotation of a shared 5G standalone network. This is something we can discuss on the call next week." [156]

4.78 In the Statement of Objections,[157] the GCRA had provisionally concluded that the above e-mail demonstrated that the MoUs were drafted to support a "line to take" with the regulator and/or the politicians that did not accurately represent the joint activities of the Parties with respect to the implementation of 5G.

4.79 Sure has explicitly denied that the approach to [P, a mobile network equipment provider] was made to support a narrative that the MOU was intended to begin genuine collaboration on the construction of a SA 5G network, when it was not. It states that:

> "The parties had made a proposal to the regulators in the MOU and in order to substantiate that proposal they needed to satisfy themselves and the politicians and regulators that it was deliverable."[158]

It further suggests that [Mr K, Chief Information and Technology Officer, JT]'s choice of words ("fuel that scenario") may be due to the fact that English is not his first language.

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155 Email from [Mr B, Director of Corporate Affairs of JT Global] McDermott (JT), 12 June 2019 JT366 [1463].

156 JT381 [1527].

157 Statement of Objections, paragraph 4.63.

158 Sure Written Representations, paragraph 3.28 [3378]

4.80 The GCRA notes that on 16 May 2019, following correspondence between them and [P, a mobile network equipment provider], [Mr K, Chief Information and Technology Officer, JT] and [Mr G, Chief Operating Officer, Sure] received an e-mail from [Mr P of Q] in which he stated that [P, a mobile network equipment provider] could not provide a quotation based on release 16 (required for SA 5G) as the Parties had requested because the standards were not yet complete (see paragraph 4.40). The GCRA therefore does not consider it plausible that [Mr K, Chief Information and Technology Officer, JT], having been informed on 16 May that no quotation for a SA 5G network could be provided, would have approached [P, a mobile network equipment provider] again on 13 June (less than a month later) in order to substantiate the proposal made in the MOU for a SA 5G network and to satisfy himself that it was deliverable; he knew that it was not. The impossibility of constructing a SA 5G network at that time and the fact that this was known to the Parties before the point at which the MOUs were drafted is evidenced by multiple documents.[159]

4.81 In addition, the context of the comment within [Mr K, Chief Information and Technology Officer, JT]'s e-mail makes clear that the Parties had not disclosed to the GCRA and the States the nature of their actual discussions ("we have not disclosed the discussions on all techno's") but rather had limited themselves to putting forward a SA 5G proposal for political reasons ("answers the immediate political concerns/requirements and debates"). Sure has explained that these "political reasons" were to demonstrate that JT and Sure were still "in the game" in respect of the delivery of the States of Guernsey's 5G objectives.[160]

4.82 The GCRA therefore considers that the evidence, and in particular the timings of the emails sent on 13 June 2019, demonstrates that the Parties approached [P, a mobile network equipment provider] to produce a quotation to demonstrate ("fuel the scenario") that they were genuinely exploring the construction of a SA 5G network, when this was not the case. The GCRA considers that this is further evidence that, as had been the case throughout the period of the conduct in question, the Parties continued to collaborate on a "line to take" with Government and with the GCRA that did not reflect their actual intentions or conduct.

4.83 As described above, JT initially resisted providing copies of the MoUs to the GCRA. However, after an intervention from the GCRA Chair, the MoUs were sent to Mr Byrne by [Mr B, Director of Corporate Affairs of JT Global] by e-mail on 20 June 2019 (referenced at paragraph 3.42 above).

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159 As cited in the footnotes of paragraph 4.41 above.

160 See paragraph 4.61 above.

***Responses to the GCRA's Draft Statement of Intent***

4.84 On or about 14 June 2019, despite having three days earlier signed Memoranda of Understanding committing them to working together to enable the rollout of a SA 5G mobile network by Sure in Guernsey, both JT and Sure responded to the GCRA's Draft Statement of Intention (**Draft SOI**) stating that the construction of a SA 5G network was not currently possible.[161] This directly contradicted the assumptions on which the MoUs were based. In addition, JT pointed out that a single NSA 5G network could not interoperate with more than one 4G network, as interoperability between the equipment of different vendors was technically challenging.[162]

4.85 In its response to question three of the Draft SOI[163], Sure stated as follows:

"Sure is very alarmed by the reference to new operators in this question. As we discuss below, including in response to question 8, the prospect of another operator with a network monopoly entering markets that already have three mobile network operators that have yet to recoup their 4G investment, would:

1. threaten the sustainability of the sector leading to reduced investment from existing operators through any period of uncertainty;
2. result in challenges that would threaten the timescale for the intended rollout of 5G;
3. question respective Government's (sic) actual commitment to the support of inbound investment across all industries; and
4. ultimately lead to, in the medium and longer term, a degradation of the now superior (to the UK) levels of telecoms services in the Channel Islands.

If there is any Government funding available, then it should be offered to the existing operators albeit with strict conditions attached to the use of those funds."

4.86 In its response to question eight of the Draft SOI[164], Sure stated as follows:

"As explained above, Sure does not believe this option [new entity operating a wholesale network across both islands (either as two separate networks of single pan-island network)] should be contemplated by either Government. It could seriously threaten the ongoing viability of the existing networks and further put at risk the sustainability of effective competition. We would therefore anticipate that any serious pursuit of this option would be likely to result in one or more legal challenges by the existing mobile network operators, which apart from the cost implications for all concerned would seriously affect the timescale

161 Sure response to Draft SOI, page 2; JT response to Draft SOI, page 2 [2090].

162 "For a seamless user experience with existing 4G mobile services, the 5G network will need to interface with existing 4G networks. Operators in the Channel Islands use a mix of vendors across their networks – making it technically challenging to deploy a 5G network that is interoperable with existing 4G networks (JT believes this would not be feasible in NSA-5G deployment, since current equipment solutions are vendor-specific)." JT response to Draft SOI, page 2 [2090].

163 "Are there any potential opportunities for existing or new operators to partner with Government(s) to enhance the economic value of the 5G network or to better meet the policy ambitions in either or both jurisdictions?"

164 "Respondents are asked to comment on the issue of spectrum initially only to one operator in Jersey and one operator in Guernsey, which may be the same operator."

for delivery of 5G in the Channel Islands. It could also affect the Channel Islands' ability to attract further investment as it could appear that the Governments are content to undermine the significant investments that have already been undertaken."

## 5. LEGAL FRAMEWORK

### A. Introduction

5.1 This Part sets out the legal framework within which the GCRA has considered the evidence presented in this Statement.

### B. Sources of law

5.2 The 2012 Ordinance contains the competition law which applies in Guernsey. It came into force on 1 August 2012.

5.3 In respect of conduct that took place before 23 February 2021, the GCRA was obliged to take account of the treatment of corresponding questions under European Union (**EU**) competition law when determining questions in relation to Guernsey competition law but was not prevented from departing from EU precedents where this was appropriate in light of the particular circumstances of the Bailiwick.[165] With effect from 23 February 2021 the GCRA may take those principles into account.[166]

5.4 Given that the conduct in question occurred before 23 February 2021, the GCRA will take account of the treatment of corresponding questions under EU competition law when assessing this conduct.

5.5 Relevant sources of EU competition law include judgments of the European Court of Justice (the **ECJ**) or European General Court (the **General Court**), decisions taken and guidance published by the European Commission (the **Commission**), and interpretations of EU competition law by courts and competition authorities in the EU Member States.

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165 GCRA Guideline 2, page 6 (https://www.gcra.gg/legal-frameworks/guidelines/guideline-anti-competitive-agreements/).

166 The 2012 Ordinance, provides in section 54:
"Authority and Court to have regard to EU authorities.
The Authority and the Court [may] in determining questions arising in relation to -
(a) the abuse by one or more undertakings of a dominant position within any market in Guernsey for goods and services,
(b) anti-competitive practices between undertakings, and
(c) the merger and acquisition of undertakings,
take into account the principles laid down by and any relevant decisions of the Court of Justice or General Court of the European Union in respect of corresponding questions arising under Community law in relation to competition within the internal market of the European Union."

The word "may" (in square brackets) was substituted for the word "must" by the European Union (Competition) (Brexit) (Guernsey) Regulations, 2021.

5.6 The GCRA will also have regard to its own past decisional practice and to its own published guidelines concerning the application of Guernsey competition law, including in particular GCRA Guideline 2 – Anti-Competitive Agreements.

5.7 In addition, the GCRA will have regard to relevant decisional practice of the UK's Competition and Markets Authority (**CMA**) and its predecessor the Office of Fair Trading (**OFT**), which apply competition laws that are materially similar to those contained in the 2012 Ordinance,[167] together with any relevant court or tribunal decisions applying competition law in the United Kingdom.

## C. The competition infringement prohibitions

5.8 Section 5(1) of the 2012 Ordinance, prohibits agreements between undertakings which have the object or effect of preventing competition within any market in Guernsey for goods or services[168]. The wording of section 5(1) closely follows that of Article 101(1) of the Treaty on the Functioning of the European Union (**TFEU**) and of s.2 of the Competition Act 1998. The interpretation of these provisions by the EU and UK authorities are therefore relevant when considering the application of section 5(1) of the 2012 Ordinance in Guernsey.

## D. Undertakings

5.9 Section 5(1) of the 2012 Ordinance applies to agreements/arrangements between undertakings.

5.10 The concept of an undertaking is defined in section 60(1) of the 2012 Ordinance:

"a person who is carrying on a business and includes an association, whether or not incorporated, which consists of or includes such persons".

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[167] The Competition Act 1998.

[168] "Prohibition on preventing competition.

5. (1) Subject to the provisions of this Part of this Ordinance, agreements between undertakings which have the object or effect of preventing competition within any market in Guernsey for goods or services are prohibited.

(2) Subsection (1) applies, in particular, to agreements between undertakings which -

(a) directly or indirectly fix purchase or selling prices or any other trading conditions,

(b) limit or control production, markets, technical development or investment,

(c) share markets or sources of supply,

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage,

(e) make the conclusion of contracts subject to the acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.

(3) Subsection (1) applies only if the agreement is, or is intended to be, implemented in Guernsey."

5.11 These definitions accord with the interpretation given to the concept of an undertaking in EU law. The ECJ has held that "the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way it is financed".[169]

5.12 Accordingly, the key consideration is whether the entity is engaged in "economic activity". The EU Court of Justice has also observed that "It has also been consistently held that any activity consisting in offering goods or services on a given market is an economic activity".[170]

5.13 The fact that an entity is owned by the States does not prevent it from forming an "undertaking" for the purposes of competition law. In any event, section 56(1) of the 2012 Ordinance confirms that it applies to States-controlled entities wherever they are "carrying on a business".

**E. Attribution of liability**

5.14 The concept of an undertaking must be understood as relating to an economic unit even if in law that unit consists of more than one natural or legal persons. The undertaking that committed an infringement may therefore be larger than the legal entity whose representatives actually engaged in the infringement. It is necessary, however, for the GCRA to identify one or more legal entities who represent the undertaking concerned and can function as the addressee of the proposed decision.

5.15 By the principle of personal responsibility, liability for a competition infringement can be attributed to any legal entity which was directly involved in the infringing conduct.[171]

5.16 Further and in any event, it is settled in the EU case-law that the conduct of a subsidiary may be imputed to the parent company where that subsidiary does not decide independently on its own conduct on the market, but simply carries out, in all material respects, the instructions

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169 Case C-41/90 *Höfner and Elser v Macrotron* EU:C:1991:161, paragraph 21.

170 Joined Cases C-180/98 to 184/98 *Pavlov* EU:C:2000:428, paragraph 75. This definition is reflected in the GCRA's Guideline on Anti-Competitive Arrangements (Guideline 2), which provides that: "'(u)ndertaking' includes any natural person, or group of persons, capable of carrying on commercial or economic activities relating to goods or services, whatever its legal status. It includes companies, firms, businesses, and partnerships, individuals operating as sole traders, agricultural cooperatives, trade associations and non profit-making organisations. It also includes the States . . . a body created by Act of the States and any States Authority, to the extent that they are carrying on an economic activity. An economic activity includes any activity consisting of offering goods or services in a market. Thus, to the extent that the States, or a body created or controlled by the States, engages in an economic activity, as opposed to solely acting in the public interest, its activities are potentially subject to scrutiny under the Law."

171 Case C-97/08 P *Akzo Nobel v Commission* EU:C:2009:536, paragraph paragraph 56–57.

given to it by its parent company. That is because, in such a situation, the parent company and subsidiary form a single economic unit and so a single undertaking.

5.17 There is a rebuttable presumption to the effect that the parent company exercises a decisive influence over its subsidiary where the parent company owns (directly or indirectly) a 100% shareholding in its subsidiary.[172] Where this is so, therefore, the GCRA will be able to regard the parent company as jointly and severally liable for the conduct and therefore for the payment of any fine imposed on its subsidiary, unless the parent company discharges the burden of proof of showing that its subsidiary acts independently on the market. In considering whether the presumption has been rebutted, the GCRA will consider all relevant factors relating to the economic, organisational and legal links which bind the subsidiary to its parent. However, the GCRA observes that the EU General Court has previously stated that the presumption is not rebutted by showing (on its own) that, for example, the subsidiary acts independently in specific aspects of its policy on the marketing of the affected products.[173]

## F. Relevant market

5.18 For the purposes of applying section 5(1) of the 2012 Ordinance, the GCRA considers that it is only obliged to define the relevant market where it is impossible, without such a definition, to determine whether the agreement has as its object or effect the prevention of competition to an appreciable extent.[174] However, if it considers it appropriate to do so, the GCRA may choose to define the relevant market in order, for example, to analyse the effects of an alleged infringement.

## G. Existence of agreement/concerted practice

***Agreement***

5.19 Section 5(1) of the 2012 Ordinance prohibits anti-competitive “agreements” between undertakings. “Agreements between undertakings” is defined in section 60 of the 2012 Ordinance as meaning “any type of agreement, arrangement or understanding”.

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[172] ibid, paragraph paragraph 60–61.

[173] Case T-190/06*Total and Elf Aquitaine v Commission* EU:T:2011:378, paragraph 64.

[174] Case T-62/98 *Volkswagen v Commission* EU:T:2000:180, paragraph 230.

5.20 This broad definition of the concept of an "agreement" is aligned with the interpretation of that concept in EU competition law. Thus, the EU Court of Justice has noted[175] that an agreement:

> "centres round the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention."

5.21 An agreement can be regarded as having been concluded where there is a concurrence of wills on the very principle of a restriction of competition, even if the specific features of the restriction envisaged are still under negotiation.[176] The concept of agreement applies equally to inchoate undertakings and partial and conditional agreements in the bargaining process which lead up to the definitive agreement. It is therefore not necessary, in order for there to be an infringement of section 5(1) of the 2012 Ordinance, for the participants to have agreed in advance upon a comprehensive common plan or that there is a joint intention to pursue an anti-competitive aim.[177] In order for there to be an agreement within the meaning of section 5(1) of the 2012 Ordinance, it is sufficient that the undertakings have expressed their joint intention to behave on the market in a certain way.[178]

5.22 The issue of whether a particular agreement or arrangement is legally enforceable does not affect its classification as an "agreement" or an "arrangement" for the purposes of the 2012 Ordinance.[179] In addition, the fact that an agreement is neither applied nor enforced does not prevent it from constituting an agreement for the purposes of section 5(1) of the 2012 Ordinance. Thus, in *CISAC*,[180] the Commission stated that the existence of a particular clause in an agreement created a "visual and psychological" background which deterred parties from acting in a way that was inconsistent with it. This principle is reflected in section 3 of Guideline 2, which observes that it also does not matter that a party may not yet have decided whether to carry the agreement out:

> "The fact that a party may have played only a limited part in the setting up of the agreement, or may not be fully committed to its implementation, or participated only under

175 Case T-41/96 *Bayer v Commission* EU:T:2000:242, paragraph 69, upheld in Joined Cases C-2 and 3/01 P, EU:C:2004:2, paragraph 97.

176 Case AT.39824 – *Trucks*, paragraph 198 (provisional, non-confidential version https://ec.europa.eu/competition/antitrust/cases/dec_docs/39824/39824_8754_5.pdf

177 Case T-168/01 *GlaxoSmithKline v Commission* EU:T:2006:265, paragraph 77, upheld in Case C-501/06 P, EU:C:2009:610.

178 *Trucks,* paragraph 200.

179 See the definition of "agreement between undertakings" under section 60 of the 2012 Ordinance.

180 COMP/38698 *CISAC*, decision of 16 July 2008, [2009] 4 CMLR 577, paragraph 130.

pressure from other parties does not mean that it is not party to the agreement (although these facts may be taken into consideration in deciding the level of any financial penalty)."

5.23 An agreement may be made on an undertaking's behalf by employees acting in the ordinary course of their employment. This remains the case even where such employees are acting without the knowledge of senior management and/or where they are acting contrary to express instructions.[181]

***Concerted practice***

5.24 The concept of "agreement" includes the EU competition law concept of "concerted practices".[182]

5.25 The object of the Treaty in creating a separate concept of concerted practice was to prevent undertakings from avoiding the application of Article 101(1) by:

> "colluding in an anti-competitive manner falling short of a definite agreement by, for example, informing each other in advance of the attitude each intends to adopt, so that each could regulate its commercial conduct in the knowledge that its competitors would behave in the same way."[183]

5.26 The concept of a "concerted practice" encompasses:

> "… a form of coordination between undertakings which, without having reached the stage where an agreement properly so called has been concluded, knowingly substitutes practical co-operation between them for the risks of competition."[184]

5.27 The EU case law on concerted practice was summarised by the UK Competition Appeal Tribunal (**CAT**) as follows:[185]

(a) The concepts of agreement and concerted practice are intended to catch forms of collusion having the same nature and are only distinguishable from each other by their intensity and the form in which they manifest themselves;

(b) The term concerted practice refers to a form of coordination between undertakings which knowingly substitutes, for the risks of competition, practical cooperation between them;

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181 *Viho/Parker Pen*, OJ 1992 L233/27, [1993] 5 CMLR 382, paragraph 16.

182 See the definition of "agreement between undertakings" under section 60 of the 2012 Ordinance, which specifically includes "a concerted practice involving undertakings".

183 Case T-7/89 *Hercules* v. *Commission* EU: T:1991:75, paragraph 241.

184 Joined Cases T-25/95 etic *Cimenteries v Commission* EU: T:2000:77, paragraph 1849.

185 Apex Asphalt and Paving Co Limited v. Office of Fair Trading [2005] CAT 4, paragraph 206.

(c) The criteria of coordination and cooperation laid down by the case law of the ECJ, which in no way require the working out of an actual plan, must be understood in the light of the concept inherent in the provisions of the TFEU relating to competition that each economic operator must determine independently the policy which it intends to adopt on the common market;

(d) The requirement of independence strictly precludes any direct or indirect contact between such operators, the object or effect of which is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market;

(e) In particular a concerted practice may arise if there are reciprocal contacts between the parties which have the object or effect of removing or reducing uncertainty as to future conduct on the market;

(f) Reciprocal contacts are established where one competitor discloses its future intention or conduct on the market to another when the latter requests it or, at the very least, accepts it;

(g) It is sufficient that, by its statement of intention, the competitor should have eliminated or, at the very least, substantially reduced uncertainty as to the conduct on the market to be expected on his part;

(h) A concerted practice implies, besides undertakings concerting together, conduct on the market pursuant to those collusive practices, and a relationship of cause and effect between the two;

(i) There is a presumption that the undertakings participating in concerting arrangements and remaining active on the market take account of the information exchanged with their competitors when determining their conduct on that market, particularly when they concert together on a regular basis over a long period;

(j) Although the concept of a concerted practice presupposes conduct of the participating undertakings on the market, it does not necessarily imply that that conduct should produce the concrete effect of restricting, preventing or distorting competition.

(k) It follows from the actual text of [Article 101(1) TFEU] that concerted practices are prohibited, regardless of their effect.

***Single continuous infringement***

5.28 Where there is a series of contacts, which may include a series of bilateral contacts, between undertakings in pursuit of a single economic aim, such conduct as a whole may be treated as a single agreement and a concerted practice rather than a series of separate agreements and/or concerted practices. It follows that where there are multiple contacts between undertakings pursuing a single economic aim, it is not necessary to characterise each one as an agreement or a concerted practice, provided that:

(a) The relevant agreements/concerted practices share an overall plan pursuing a common objective;

(b) Each undertaking intends to contribute, by its own conduct, to the plan;

(c) Each undertaking is aware of the conduct of the other(s) in pursuing the common plan.[186]

The same principle applies in respect of discrete infringements of short duration; it is not necessary for the decision maker to characterise an infringement as either an agreement or a concerted practice: it is sufficient that the conduct in question amounts to one or the other.[187]

5.29 Agreements and/or concerted practices may constitute a single continuous infringement, even where they vary in intensity and effectiveness.[188]

5.30 Parties to an agreement and/or concerted practice may show varying degrees of commitment to the common plan and there may be internal conflict. The fact that a party does not abide fully by a manifestly anti-competitive agreement/concerted practice or even that it "cheats" on the agreement does not preclude a finding that there was a continuing single overall infringement.[189]

186 Case C-49/92 P, *Commission* v. *Anic Partecipazioni SpA* EU:C:1999:356, paragraph 81-83.
187 Decision No. CA98/01/2011, *RBS/Barclays*, 20 January 2011, paragraphs 221 – 222.
188 Ibid, paragraph 261.
189 Ibid, paragraph 262.

*Agreement not required by national legislation*

5.31 The prohibition on anti-competitive agreements applies only to conduct engaged in by undertakings on their own initiative. If national legislation requires anti-competitive conduct or creates a legal framework which eliminates any possibility of competitive activity by undertakings, then the relevant conduct falls outside the scope of the competition law rules. This is because in that case the restriction of competition is not attributable to the autonomous conduct of the undertakings in question but rather is a function of national law or the applicable national legal framework.[190]

5.32 By contrast, conduct that is not required by law may be caught by section 5(1) of the 2012 Ordinance, even if it is done following consultation with government or with governmental encouragement or approval, or where it is subsequently ratified by law.[191]

**H. Hindering or preventing competition by object**

5.33 Anti-competitive agreements or concerted practices are classified as such because they substitute independent action by competitors on a market with co-ordination. Such co-ordination will be illegal where it has either the object or the effect of preventing competition.

***Infringement by object – general considerations***

5.34 Section 5(2) of the 2012 Ordinance explains that the section 5(1) prohibition:

> "applies, in particular, to an arrangement if its object or effect is to –
>
> (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
>
> (b) limit or control production, markets, technical development, or investment;
>
> (c) share markets or sources of supply;
>
> (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

5.35 Guideline 2 explains in section 3:

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190 Case C-359/95 P and C-379/95 P *Commission* v. *Ladbroke* EU:C:1997:531, paragraph 33.

191 Cases T-191/98, etc, *Atlantic Container Line* v. *Commission (TACA)*, EU:T:2003:245, paragraphs 1130-1131.

"Agreements between businesses in which one or more of these types of restriction is apparent can be said to have the 'object' of hindering or preventing competition."

5.36 Object infringements are those forms of collusion between undertakings which can be regarded, by their very nature, as being injurious to the proper functioning of normal competition.[192] In such cases, the restrictive effect on competition is presumed.[193]

5.37 The EU Court of Justice has also stated that it is sufficient that there be merely the possibility of a negative impact on competition:

"… it is sufficient that it has the potential to have a negative impact on competition. In other words, the concerted practice must simply be capable in an individual case, having regard to the specific legal and economic context, of resulting in the prevention, restriction or distortion of competition".[194]

5.38 The EU Court of Justice has more recently summarised the effect of the case-law as follows:

"Consequently, it is established that certain collusive behaviour**,** such as that leading to horizontal price-fixing by cartels, may be considered so likely to have negative effects, in particular on the price, quantity or quality of the goods and services, that it may be considered redundant, for the purposes of applying Article 81(1) EC, to prove that they have actual effects on the market … Experience shows that such behaviour leads to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers."[195]

5.39 The Court of Justice went on to explain that an agreement/concerted practice should be assessed in its economic and legal context, as well as in light of the facts of the market in question, in order to determine whether its object was anti-competitive:

"According to the case-law of the Court, in order to determine whether an agreement between undertakings or a decision by an association of undertakings reveals a sufficient degree of harm to competition that it may be considered a restriction of competition 'by object' within the meaning of Article 81(1) EC, regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part. When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question".[196]

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192 Case C-209/07 *Competition Authority v Beef Industry Development Society (Irish Beef)* EU:C:2008:643, paragraph 17; C-67/13 P *Groupement des Cartes Bancaires v Commission*, EU:C:2014:2204, paragraph 50; C-373/14 P *Toshiba v Commission* EU:C:2016:26, paragraph 26.

193 Case C-8/08 *T-Mobile Netherlands* EU:C:2009:343, paragraph 29; *Cartes Bancaires*, ibid, paragraph 49; *Toshiba*, ibid, paragraph 26.

194 *T-Mobile Netherlands*, ibid, paragraph 31.

195 Case C-67/13 P *Groupement des Cartes Bancaires v Commission* EU:C:2014:2204, paragraph 51.

196 ibid, paragraph 53.

5.40 An agreement/concerted practice may have an anti-competitive object even where there is no direct link between that practice and the prices or terms and conditions offered to end users. The ECJ has explained that:

> "[Article 101(1)], like the other competition rules of the Treaty, is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such."[197]

5.41 The assessment of the objectives of an agreement should be carried out objectively; it does not depend on the parties' subjective intentions, and there may be an infringement by object where the parties acted without any subjective intention of restricting competition.[198]

5.42 In addition, there may be an infringement by object even where the parties have not implemented their agreement,[199] though it may be relevant to consider the way in which an agreement is implemented as part of the assessment of the agreement.[200]

***Infringement by object – information exchange***

5.43 An exchange of information amounts to an anti-competitive restriction of competition by object if that exchange is capable of removing uncertainties concerning the intended market conduct of the participating undertakings.[201]

5.44 Guideline 2 observes in section 11:

> "The disclosure of information, whether one-way disclosure or an exchange, may have an effect on competition where it serves to remove uncertainties in the market and therefore eliminate competition between businesses, such as where information is exchanged on pricing intentions (see below). It does not matter that the information could have been obtained from other sources. Whether the information disclosure has an effect on competition, or is even found to have the object of hindering or preventing competition, will depend on the circumstances of each individual case: the market characteristics, the type of information and the way in which it is disclosed.
>
> As a general principle, the GCRA considers that the smaller the number of businesses operating in the market, the more frequent the disclosure, and the more sensitive and confidential the nature of the information which is disclosed, the more likely there is to be an effect on competition.

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197 *T-Mobile Netherlands*, ibid, paragraph 38.

198 Case C-209/07 *Competition Authority v Beef Industry Development Society (Irish Beef)* EU:C:2008:643, paragraph 21; *Cartes Bancaires*, ibid, paragraph 54.

199 Case C-277/87 *Sandoz Prodotti Farmaceutici v Commission* EU:C:1990:6, paragraph 3.

200 Commission's *Guidance on the Application of Article 101(3)*, [2004] OJ C 101/97, paragraph 22.

201 *T-Mobile* Netherlands, paragraph 43; Case C-286/13 P *Dole Food v Commission* ECLI:EU:C:2015:184, paragraph 121.

An agreement between competing businesses to exchange information, whether directly or indirectly is likely to be regarded as having the object of hindering or preventing competition."

***Appreciability***

5.45 Although the 2012 Ordinance does not explicitly incorporate the "appreciable effect on competition" provision of Article 101(1) TFEU, Guideline 2 explains in section 3 that, notwithstanding this difference in wording, an "appreciability" criterion will usually be applied under the 2012 Ordinance:

> "… in administering the Ordinance, [the GCRA] will typically apply the same requirement [of appreciability] when considering whether an agreement has the effect of preventing competition within any market for goods or services in Guernsey."

5.46 Guideline 2 goes on to explain how the "appreciability" criterion can be satisfied:

> "Generally speaking, we take the view that an agreement will have no appreciable effect on competition if the parties' combined share of the relevant market/s does not exceed 25 per cent, although there may be circumstances in which this is not the case.
>
> We will, in addition, generally regard any agreement between businesses that:
>
> - directly or indirectly fixes prices; or
> - shares markets; or
> - imposes minimum resale prices; or
> - is one of a network of similar agreements which have a cumulative effect on the market in question,
>
> as being capable of having an appreciable effect on competition, even where the parties' market shares are below 25 per cent."

## 6. LEGAL ASSESSMENT

6.1 The GCRA proposes to find as follows.

### A. Relevant market

6.2 It is not necessary for the GCRA to define the market precisely in this case, as explained at paragraph 5.18 above. The GCRA therefore proposes not to conduct a full market definition analysis but will proceed on the basis that the frame of reference for its assessment is the provision of mobile telephony services in Guernsey.

### B. Undertakings

***JT***

6.3 The GCRA considers that the JT entities are clearly engaged in economic activity, namely the supply of mobile telephony services in Guernsey. As set out at paragraph 5.13 above, this conclusion is not affected by the fact that JT is 100% owned by the States of Jersey.

6.4 Further, the two JT entities form a single undertaking. The Second Addressee, JT (Guernsey) Limited, is a wholly owned subsidiary of the First Addressee, JT Group Limited. There is nothing in the material the GCRA has seen to rebut the presumption that the conduct of the Second Addressee can be attributed to the First Addressee, its parent company. Accordingly, for the reasons set out in paragraph 5.17 above, the two JT entities form a single economic unit and so a single undertaking.

***Sure***

6.5 The GCRA considers that both Sure entities are clearly engaged in economic activity, namely the supply of mobile telephony services in Guernsey.

6.6 Further, the two Sure entities form a single undertaking. The Fourth Addressee, Sure (Guernsey) Limited is a wholly owned subsidiary of the Third Addressee, BTC Sure Group Limited. There is nothing in the material the GCRA has seen to rebut the presumption that the conduct of the Fourth Addressee can be attributed to the Third Addressee, its parent company. Accordingly, for the reasons set out in paragraph 5.17 above, the two Sure entities form a single economic unit and so a single undertaking.

## C. Agreements/concerted practices

6.7 The GCRA recalls that:

(a) An agreement/arrangement arises where there is a concurrence of wills between two (or more) parties to act on the market in a specific way in accordance with the terms of the agreement, even if the specific features of the restriction envisaged are still under negotiation. "Agreement" includes inchoate understandings and partial and conditional agreements in the bargaining process which lead up to the definitive agreement. Agreement on a comprehensive common plan is not necessary; it is sufficient that the undertakings involved have expressed their joint intention to behave on the market in a certain way.

(b) A concerted practice is a form of co-ordination falling within the scope of section 5(1) of the 2012 Ordinance and refers to conduct pursuant to which parties knowingly substitute practical co-operation for the risks of competition. This concept must be understood in the light of the principle that each economic operator must determine independently the policy that it intends to adopt on the market.

(c) The requirement of independence strictly precludes any contact between operators, the object or effect of which is to disclose to a competitor the course of conduct which they have decided to adopt or are contemplating adopting on the market.

(d) Where there is a series of contacts between undertakings in pursuit of a single economic aim, such conduct as a whole may be treated as a single agreement and a concerted practice rather than a series of separate agreements and/or concerted practices.

6.8 Applying the principles set out above at paragraphs 5.19 - 5.32 to the evidence set out at paragraphs 4.7 - 4.83, the GCRA finds that the conduct of the Parties amounts to an agreement and a concerted practice under section 5(1) of the 2012 Ordinance.

***Commercial strategy / course of conduct***

6.9 First, the GCRA finds that:

(a) whether an undertaking retains mobile network infrastructure in, or removes mobile network infrastructure from, a territory in which it is active; and

(b) the speed at which and/or the way in which it introduces a new product, such as 5G, into the market; and

(c) the way in which it communicates those decisions to the regulator and the Government

are all matters that clearly form part of that undertaking's commercial strategy and relate to the course of conduct that that undertaking is contemplating adopting on the market.

6.10 As such, each economic operator must determine independently the policy that it intends to adopt in respect of those matters. The requirement of independence strictly precludes any contact between operators, the object or effect of which is to disclose to a competitor the course of conduct they are contemplating adopting on the market regarding those commercially strategic issues.

***Disclosure of contemplated market conduct through reciprocal contacts***

6.11 Second, as summarised at paragraph 4.8 above and described fully in the subsequent paragraphs, and contrary to the requirement that each economic operator must determine its contemplated market conduct independently, the GCRA has found that the Parties engaged in repeated reciprocal contacts through meetings and exchanges of opinion and information, pursuant to which one or both disclosed to the other, and the other accepted the disclosure of, the course of conduct that they were contemplating adopting on the market in relation to the matters set out in paragraph 6.9 above.

6.12 These contacts began at least as early as the meeting between the Parties of 22 August 2018 at which the Bilateral Home Network Scenario was proposed and discussed between the Parties, along with the disclosure by JT to Sure of the commercial strategy it was contemplating regarding the speed of introduction of 5G and a discussion of a "line to take" to support these. The proposals were repeated and discussed at the meeting between the Parties on 9 January 2019 (paragraphs 4.21 - 4.26) and at the meeting between the CEOs of the Parties on 16 January 2019 (paragraph 4.28).

6.13 From at least as early as March 2019, the Parties further developed the Bilateral Home Network Scenario through the exchange of information between them. That information (referred to by the Parties as the "model") related to projected costs, sites, site types, capacity and spectrum (paragraphs 4.30 - 4.37).

6.14 By March 2019, an extended timeline for the implementation of 5G,[202] which was consistent with the strategy first disclosed by JT in August 2018 with regard to the timing of implementation of 5G, had been incorporated into the Bilateral Home Network Scenario (paragraph 4.38).

6.15 The Parties also jointly approached [P, a mobile network equipment provider] for several quotations for mobile infrastructure equipment. Each quotation requested jointly by them was based on the premise that JT would remove its existing mobile network infrastructure from Guernsey and thus evidences the co-ordinated course of conduct in which the Parties were engaged (i.e. the development of the Bilateral Home Network Scenario) (paragraphs 4.39 - 4.41).

6.16 The Principles Document, which was disclosed by Sure to JT on 20 May 2019 (paragraph 4.42 - 4.49), reaffirmed the commercial strategy that had been discussed between the Parties, namely:

(a) The implementation of the Bilateral Home Network Scenario, including

(b) The speed at which they contemplated 5G would be implemented in Guernsey, taking into account the fact that removal of an operator's 4G network would prevent it from offering 5G mobile network services and would therefore protect against a future reversal of a single 5G approach.

6.17 Long conversations took place between senior executives of the Parties on 6 June 2019, during which JT disclosed to Sure its support for progressing more rapidly the Bilateral Home Network Scenario that the Parties had been discussing (paragraph 4.60).

6.18 The conclusion of the MOUs, and the approach by the Parties to [P, a mobile network equipment provider] to produce a quotation for SA 5G network equipment represented co-ordination on a "line to take" by the Parties to support their work on the Bilateral Home Network Scenario (paragraphs 4.55 - 4.83).

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[202] I.e. a gradual, evolutionary implementation, which would not begin for at least two years (see paragraph 4.38 above).

***Contact significantly reduced uncertainty***

6.19 Third, these repeated contacts and exchanges of information significantly reduced the uncertainty of each Party about the way in which the other Party was contemplating operating on the market. This is demonstrated in particular by the internal JT slide presentation of 31 May 2019, which noted that its preferred approach would be to "be aggressive in Guernsey" but that it needed to "defend JT position as mobile network operator in Jersey at all cost" with the earlier version of that presentation noting that JT would "be prepared to trade Guernsey if it means we can successfully defend Jersey" (see paragraphs 4.41- 4.51 above). The only "pro" of allowing Sure to secure the single 5G licence in Guernsey, in JT's view, was that this would "potentially secure JT's network position in Jersey". In other words, in the absence of the concerted practice, JT would have been "aggressive" in Guernsey and would have had to have accepted the risk of not being able successfully to defend Jersey. As a result of the concerted practice, however, JT contemplated altering its behaviour in Guernsey (i.e. not being aggressive but rather "trading" Guernsey) in order to protect its own position in Jersey. It would have been able to protect this position by agreeing with Sure on the approach that Sure would take in Jersey in return for JT altering its approach in Guernsey.

***Parties remained active on the market – effect on conduct presumed***

6.20 Fourth, the fact that both JT and Sure remained active on the market gives rise to a presumption that each took into account the information disclosed when determining their market conduct. The Parties could not "unknow" the information that they exchanged in respect of the Bilateral Home Network Scenario and the commercial strategy that each was contemplating adopting in relation to mobile network infrastructure and the introduction of 5G in Guernsey.

***Single continuous infringement***

6.21 Fifth, the GCRA finds that the conduct described above constitutes a series of contacts and exchanges of information between the Parties. This conduct was characterised by an overall plan pursuing a common objective (namely the exploration and development of the Bilateral Home Network Scenario which the Parties contemplated would allow them to control the speed of implementation of 5G in Guernsey, supported by an agreed "line to take" with the regulator and the Government). Each of JT and Sure intended to contribute, by its own conduct, to the overall plan. Each of JT and Sure were aware of the conduct of the other in pursuing the common plan.

6.22 The GCRA therefore finds that this conduct amounts to a single agreement and a concerted practice rather than a series of separate agreements and/or concerted practices; it is not necessary to characterise each one as an agreement and/or a concerted practice.[203]

***Argument of the Parties***

Burden of proof and presumption of innocence

6.23 In its Written Representations, JT argues that the GCRA has not demonstrated to the required level of proof that JT was a party to an anti-competitive agreement. It states as follows:

> "The SO critically relies on its artificial and strained interpretation of a few terse, bullet-point notes of what it says are critical meetings on 24 August 2018 and 9 January. As explained below that interpretation is unwarranted by the brief material relied on, and ignores both the far more likely innocent explanation and the inherent implausibility of the alleged agreement (as well as entirely ignoring the presumption of innocence and the burden of proof on the GCRA – neither of which critical legal concepts are mentioned in the SO)."[204]

6.24 Section 5 of JT's Written Representations then examines a number of discrete pieces of evidence on a document-by-document basis and put forward reasons as to why an alternative explanation of each piece of evidence would be more appropriate.

6.25 The GCRA does not accept that either this argument or this approach is correct.

6.26 When establishing an infringement of section 5(1) of the 2012 Ordinance, the GCRA must prove the infringements which it has found and adduce evidence capable of demonstrating to the requisite legal standard the existence of the facts constituting the infringement. It must show precise and consistent evidence in order to establish the existence of the infringement and to support the conclusion that the alleged infringements constitute appreciable restrictions of competition within the meaning of section 5(1) of the 2012 Ordinance. That requirement is not satisfied, in particular, where a plausible explanation can be given for those alleged infringements which rules out an infringement of the 2012 Ordinance.[205]

6.27 However:

> "in most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules. The explicit evidence of conduct is often only fragmentary and sparse. It is not

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203 See paragraph 5.28 above.

204 JT Written Representations, paragraph 2.1 [3509]; further elaborated upon in paragraph 4.11 of the Written Representations [3533]

205 *Trucks*, paragraph 223 (and case law cited).

necessary, however, that every piece of evidence relied on by the Commission must meet the requirement of being precise and consistent in relation to every aspect of the infringement but, rather, that "*the body of evidence relied on by the institution, viewed as a whole, meets that requirement*".[206]

6.28 The contemporaneous evidence gathered during the course of this investigation and the submissions of the Parties, when considered as a whole, precisely and consistently show that the Parties engaged in a single agreement and a concerted practice which consisted of the discussion and development of the Bilateral Home Network Scenario, disclosure of commercial strategy on speed of implementation of 5G and development of a line to take with Government and the GCRA. This is set out in detail in section 4 above. JT seeks to argue that because individual pieces of evidence might support a different interpretation, the presumption of innocence and the burden of proof dictate that that alternative interpretation is the one that must be accepted. This is incorrect. The correct test is whether the body of evidence as a whole meets the legal standards described above. The analysis set out in section 4 of this Decision demonstrates that this is the case.

6.29 The GCRA also notes that, as set out above, it is common in cases such as this for evidence to be sparse and fragmentary. As such, the competition authority will be required to draw inferences from it. In this case, for reasons set out in detail in section 4 above, the GCRA is satisfied that on the balance of probabilities that the inferences drawn are consistent with the whole body of the evidence.

<u>Conduct did not constitute an agreement and/or was non-binding</u>

6.30 Both Parties have sought to place weight on the fact that the agreement or concerted practice between the Parties was non-binding and/or exploratory and/or that they had not unequivocally committed to it:

(a) Email from [Mr C, JT Chair] dated 20 June 2019 **[3102]**, set out at paragraph 3.39 above, in which he states that "it's an mou [sic] to explore what might be possible – so there shouldn't be any anti-competitive issues in having a discussion";

(b) First Sure Response dated 24 June 2019, which emphasises that the Memorandum is "a very high-level document and completely non-legally binding" **[2261]**.

[206] *Trucks,* paragraph 224 (and case law cited).

(c) Sure's Written Representations state that the internal approvals necessary to enter an agreement were neither sought nor obtained within Sure.[207]

(d) In response to questions put to him at interview about the Principles Document, and in particular option 4 of that document referring to consolidation of existing mobile networks (paragraph 4.44 above), [Mr D, Sure Group Chief Executive] described that proposition as "an idea"[208]; "fanciful"[209] and a "ridiculous scenario".[210] In the same vein, JT's Written Representations state that it did not want a single 5G network.[211]

(e) JT's Written Representations state that the discussions between the Parties proceeded in a "desultory fashion, with extended period of inactivity and limited exchange of information".[212]

(f) JT's Written Representations state that "parties may discuss whether they should enter into an (allegedly) anti-competitive agreement without actually entering into that agreement, and there is no *"inchoate offence"* of intending to, inciting other to, or attempting to enter into an agreement if no agreement was actually entered into."[213] Sure's Written Representations make a similar point.[214]

6.31 For the following reasons, the GCRA does not accept these arguments. Taking each in turn:

(a) Conduct may constitute an anti-competitive agreement / concerted practice, irrespective of whether it is legally enforceable and/or whether a party to it has decided irrevocably to implement it (paragraphs 5.21 – 5.23). The claimed exploratory or non-binding nature of the conduct does not prevent it from amounting to an agreement/concerted practice.

(b) The fact that Sure had not sought or obtained the internal approvals necessary to enter an agreement is not relevant to the characterisation of the conduct as an agreement and/or a concerted practice (see paragraphs 5.21 - 5.23).

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207 Sure Written Representations, paragraphs 3.35 - 3.38 [3379-3380]

208 Transcript of interview with [Mr D, Sure Group Chief Executive], second part [09:46] [2814].

209 Transcript of interview with [Mr D, Sure Group Chief Executive], second part [11:07] [2815].

210 Transcript of interview with [Mr D, Sure Group Chief Executive], second part [11:37] [2815].

211 JT Written Representations, paragraph 1.4 [3499]. It also states in the same paragraph that Sure repeatedly stated that it did not want a single 5G network. However, this statement is not consistent with other documents, which indicate that Sure did want such a network [JT459] [1809].

212 JT Written Representations, paragraph 3.9 [3512-3513].

213 Paragraph 2.1(c) [3509]

214 Sure Written Representations, paragraphs 3.39 – 3.42 [3380-3381].

(c) Parties to an agreement and/or concerted practice may show varying degrees of commitment to the common plan and there may be "internal conflict" about its implementation. Accordingly, the views expressed by the Sure CEO about the "fanciful" or "ridiculous" nature of the contacts between the Parties and JT's statement that it did not want a single 5G network do not prevent the conduct from being properly characterised as an agreement and a concerted practice (see paragraph 5.30).

(d) The GCRA has found that the contacts between the Parties constituted a single continuous infringement; the conduct pursued a single economic aim, namely the exploration and development of the Bilateral Home Network Scenario in order to enable Sure to control the speed of implementation of 5G in Guernsey, supported by an agreed "line to take" with the Government and the GCRA. The fact that there may have been some periods of inactivity between contacts does not prevent them from constituting a single agreement and a concerted practice (see paragraph 5.29 above).

(e) The GCRA has found that the Parties' conduct amounted to an agreement and a concerted practice by reference to the relevant legal test. As such, the points raised by JT and Sure regarding "agreements to agree" are not relevant as the GCRA is not relying upon any such argument.

Agreement would have required GCRA or political approval

6.32 The Parties argue that the agreement/concerted practice would have been impossible to implement because it would have been or could have been subject to regulatory and/or political approval and/or exemption, namely:

(a) GCRA approval under Licence Condition 22 of JT's mobile telecommunications licence and/or Licence Condition 2 of Sure's mobile telecommunications licence.

(b) Legal exemption from the prohibition on anti-competitive agreements, by way of an individual exemption, a block exemption or an exemption on the grounds of public policy.

(c) Approval from Ofcom for transfer of spectrum.

6.33 Licence Condition 22 of JT's mobile telecommunications licence (**JT Mobile Licence**) issued by the GCRA,[215] provides as follows:

"If the Licensee proposes to cease to provide all or a material part of the Licensed Mobile Telecommunications Services, it shall give not less than three years notice in writing to the GCRA of the proposal and its plans in relation to the cessation of such services. Such cessation shall be effected only with the consent of the GCRA and in accordance with any direction given in relation thereto by the GCRA and the Licensee shall comply with any such directions."

6.34 JT argues that pursuant to that Licence Condition, JT would have required the GCRA's consent to enter into an agreement with Sure to withdraw its mobile network infrastructure from Guernsey. Thus, at paragraph 1.26(c) of its Written Representations, JT states that:

"(i) JT could not, without the consent of the GCRA, enter into any agreement to withdraw from the provision of any Mobile Telecommunications Networks in Guernsey (i.e. JT was not capable of entering into any such agreement); and

(ii) to the extent that the said agreement had any anti-competitive effect, it could not occur without the consent of the GCRA (which would not be given) so that any perceived anti-competitive effect would not, and could not, eventuate and was therefore impossible."

6.35 Sure makes a similar argument in respect of Condition 2.2 of its Mobile Telecommunications License (the **Sure Mobile Licence**)[216], which provides that:

"The Licence is personal to the Licensee and the Licensee shall not:

(a) sub-licence, assign or grant any right, interest of entitlement in the Licence nor transfer the Licence to any other person; or

(b) sell or pledge any of its assets which are necessary to provide any Licensed Mobile Telecommunications Services or establish, operate and maintain any Licensed Mobile Telecommunications Network which the Licensee is obliged to provide under this License, unless such assets are immediately replaced with equivalent assets,

without the prior written consent of the GCRA. The GCRA shall not unreasonably withhold consent",

stating that this Licence Condition may have required Sure to obtain consent for any agreement the Parties may have reached regarding the removal by JT of its mobile network infrastructure from Guernsey.[217]

6.36 Sure further argues that any agreement that it had reached with JT might have been subject to regulatory and political approval. It mentions, in particular:[218]

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[215] https://www.gcra.gg/media/2987/jt-nc-mobile-final.pdf
[216] https://www.gcra.gg/media/2984/sure-nc-mobile-final.pdf
[217] Sure Written Representations, paragraph 3.10 [3370].

(a) Potential approval by the Committee *for* Economic Development on the grounds of public policy (2012 Ordinance, section 9(1)) or as a block exemption (2012 Ordinance, section 7);

(b) Potential individual exemption by the GCRA under section 6 of the 2012 Ordinance;

(c) Potential approval pursuant to the merger control rules set out in section 13 of the 2012 Ordinance.

6.37 Finally, it notes that Ofcom's consent is required to transfer spectrum.[219]

6.38 In respect of these arguments, the GCRA finds as follows.

(a) As stated above (paragraphs 6.9 - 6.21) the GCRA has concluded that the Parties engaged in a single continuous infringement that amounted to an agreement and a concerted practice. They disclosed their contemplated market conduct to each other through reciprocal contacts. Those contacts significantly reduced the uncertainty of each Party about the way in which the other was contemplating operating on the market. The fact that each of JT and Sure remained active on the market gives rise to a presumption that each took account of the information disclosed when determining their own market conduct. The fact that the arrangements may not have been put (fully) into effect does not affect this conclusion (see paragraph 5.22 above). It follows that the question of whether or not the Bilateral Home Network Scenario was capable of implementation is irrelevant; the conduct described above amounted to an agreement and a concerted practice.

(b) Further and in any event, even if it is accepted[220] that JT, had it wished to remove its mobile network infrastructure from Guernsey, would have been required to inform the GCRA of its intention to do so pursuant to Licence Condition 22 of its Mobile Telecoms Licence, the GCRA does not accept that such consent would necessarily not have been obtained and that the Bilateral Home Network Scenario would therefore have been incapable of implementation. This is because all that Licence Condition 22 requires is that a Licensee informs the GCRA of its intention to cease to offer the Licensed Mobile Telecommunications Services. Licence Condition 22 does not require a Licensee to disclose to the GCRA the reason for its decision to cease to offer those services. As

[218] Sure Written Representations, paragraphs 3.7 – 3.9 [3369].

[219] Sure Written Representations, paragraph 3.11 [3370].

[220] The GCRA makes no finding in this regard.

such, it would not necessarily have been obvious, on the face of any such request for consent (unless JT had decided to disclose it to the GCRA) that JT's decision to cease to offer the Licensed Mobile Telecommunications Services was not purely unilateral (and would therefore not raise any issues under the law prohibiting anti-competitive agreements) rather than being the result of the conduct that the GCRA has concluded amounts to an agreement and a concerted practice. There is therefore no evidence to support the view that the GCRA would have become aware of the Bilateral Home Network Scenario through the operation of Licence Condition 22 and logic dictates that it could not have withheld its consent on the basis of an agreement/concerted practice of which it was not aware. It is therefore incorrect to state that Licence Condition 22 would have prevented the implementation of the Bilateral Home Network Scenario on the basis that that Licence Condition would have required JT to disclose its existence to the GCRA, which would then have refused to consent to it. For completeness, the GCRA notes that the 5 year timeframe being considered by the Parties for the implementation of the Bilateral Home Network Scenario would have been achievable, even if JT had been required to give three years notice of its intention to cease to provide Licensed Mobile Telecommunications Services in accordance with the provisions of Licence Condition 22. The same conclusions apply to the arguments put forward by Sure in respect of condition 2 of its Mobile Telecoms Licence.

(c) Further, and in any event, conduct that breaches section 5(1) of the 2012 Ordinance remains prohibited until the point at which any exemption is granted. The arguments of the Parties are, in part, based on the premise that they might have applied for certain exemptions or that certain exemptions might have been applied to their conduct. However, this is speculative; no such applications were made and no such exemptions were applied for and, as such, the conduct remains prohibited if it falls within the scope of section 5(1) of the 2012 Ordinance. The GCRA also observes that conduct that amounts to a restriction of competition by object is, in any event, unlikely to qualify for exemption from the prohibition on anti-competitive agreements.[221]

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221 "Article 81(3) does not exclude a priori certain types of agreements from its scope. As a matter of principle all restrictive agreements that fulfil the four conditions of Article 81(3) are covered by the exception rule. However, severe restrictions of competition are unlikely to fulfil the conditions of Article 81(3). Such restrictions are usually black-listed in block exemption regulations or identified as hardcore restrictions in Commission guidelines and notices. Agreements of this nature generally fail (at least) the two first conditions of Article 81(3). They neither create objective economic benefits nor do they benefit consumers. For example, a horizontal agreement to fix prices limits output leading to misallocation of resources. It also transfers value from consumers to producers, since it leads to higher

(d) The argument that the conduct amounted to a merger is entirely speculative and unsupported.

(e) The arguments relating to the possible refusal of consent by Ofcom to allow the transfer of spectrum are similarly speculative. In any event, the Parties have not produced evidence to demonstrate that the Bilateral Home Network Scenario could not have operated without the transfer of JT's Guernsey spectrum to Sure. As such, these arguments do not demonstrate that the conduct described above does not amount to an agreement and a concerted practice.

Agreement encouraged by the States of Guernsey

6.39 The Parties have consistently put forward an argument that their conduct cannot amount to an anti-competitive agreement and/or concerted practice because it was required and/or encouraged by the States of Guernsey and/or the GCRA.[222]

6.40 In its Written Representations, JT references the following wording in the Telecommunications Sector Policy Statement:

"Given the relative scope and resources of the existing network operators, it is envisaged that Sure would form the basis of the Netco in Guernsey and JT in Jersey"

which it explicitly interprets as implying that the Parties were being directed to implement the Bilateral Home Network Scenario. Thus, JT states that "the implications for operators were clear"; JT would have to forego its network in Guernsey and be an MVNO on Sure's network in Guernsey (as would Airtel). [223]

6.41 In respect of the above argument, the GCRA finds that:

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prices without producing any countervailing value to consumers within the relevant market. Moreover, these types of agreements generally also fail the indispensability test under the third condition." – Commission Guidelines on the application of Article 81(3) of the Treaty, OJ C 101/97, 27.4.2004, p.97, paragraph 46.

222 E.g. JT Written Representations: "[the GCRA] encouraged and/or cajoled and/or requested and/or facilitated and/or coordinated (whether formally or informally) the Parties to engage with one another and to cooperate to deliver the then policy objective of producing a pre-agreed monopoly 5G network operator on each island." (paragraph 1.33) [3505]; "the motivation for engaging in discussions was not to restrict competition or to benefit either Party, but to respond to pressure from Governments and regulators." (paragraph 3.9(b)) [3512].
E.g. Transcript of interview with [Mr D, Sure Group Chief Executive], Sure CEO, timed at [52:29]: "We were doing this because Government was asking us to have the discussion. So I will fall back to that again and again." [2810].

223 JT Written Representations, paragraph 1.3(f) [3498].

(a) It is based on a mischaracterisation of the Telecommunications Sector Policy Statement; and

(b) Even if the Parties had been encouraged or requested by the States of Guernsey and/or the GCRA to implement the Bilateral Home Network Scenario (which they were not), such encouragement or requests would not absolve the Parties of liability for entering into the agreement/concerted practice described above.

MISCHARACTERISATION OF THE TELECOMMUNICATIONS SECTOR POLICY STATEMENT

6.42 As explained above, the three scenarios set out in the Telecommunications Sector Policy Statement would have required collaboration between all operators to achieve an outcome that none of them could have achieved alone. [224] Each would have required some joint action by all of them to produce the solution envisaged i.e. either pooling their joint infrastructure resources (the Pooled Infrastructure Scenario or the Mandated Infrastructure Sharing Scenario) or sharing in the construction and ownership of a new single SA 5G network (the Single SA 5G Scenario). The conduct engaged in by the Parties sought to explore none of the above legitimately collaborative scenarios. On the contrary, if JT had wished to remove its mobile network infrastructure from Guernsey, it could have done so on a unilateral basis. And if the outcome intended or desired by the States of Guernsey had been to retain a single operator's existing network infrastructure and for that single legacy infrastructure to be used to enable the provision of 5G services, this would have been achieved by awarding a single 5G spectrum licence through a normal competitive tender process.[225] The concertation between JT and Sure therefore achieved no legitimate purpose; its purpose was for the Parties to disclose to each other the market conduct that they intended to pursue and to adjust their commercial behaviour accordingly.

6.43 By early Q2 2019 at the latest (and possibly as early as the beginning of Q1 2019) the Parties knew that the scenarios put forward by the States of Guernsey in the Telecommunications Sector Policy Statements were not technically feasible. This was clearly explained by [Mr A, Sure] at interview (see footnote 237). At that time, [Mr A, Sure] reported directly to [Mr G, Chief Operating Officer, Sure] (who was leading the Bilateral Home Network Scenario discussions with JT) and [Mr G, Chief Operating Officer, Sure] reported to [Mr D, Sure Group

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224 With the exception of the second iteration of scenario (b) as set out below at paragraph 3.7, which would have involved none of the current operators.

225 The letter of 26 April sent by Deputy Parkinson to the Parties confirmed that in the absence of a joint solution between all operators, the States of Guernsey would proceed to a competitive award of 5G spectrum.

Chief Executive].[226] It is therefore unlikely that [Mr G, Chief Operating Officer, Sure] and [Mr D, Sure Group Chief Executive] were not aware of the technical difficulties presented by the scenarios set out in the Telecommunications Sector Policy Statement. The point was confirmed to both parties by [P, a mobile network equipment provider] (paragraph 4.40) and referenced in subsequent internal documents (see footnote 126). The evidence demonstrates that the Parties nevertheless continued to engage in the conduct described in section 4 above well beyond the point at which they were aware that the proposals set out in the Telecommunications Sector Policy Statement were not feasible. This demonstrates that the aim of the conduct could not have been to fulfil the ambitions of the States of Guernsey as set out the Telecommunications Sector Policy Statement.

CONDUCT WAS NOT REQUIRED BY NATIONAL LEGISLATION

6.44 As set out above at paragraphs 5.31 - 5.32, if national legislation <u>requires</u> anti-competitive conduct or creates a legal framework which <u>eliminates any possibility</u> of competitive activity by undertakings, then the relevant conduct falls outside the scope of the competition law rules. By contrast, conduct that is not required by law may be caught by section 5(1) of the 2012 Ordinance, even if it is done following consultation with Government or with their encouragement or approval, or where it is subsequently ratified by law.[227,228]

6.45 In the present case, the agreement and concerted practice in which the Parties engaged was not required by national legislation. Nor did the applicable national legal framework in Guernsey eliminate any possibility of competitive activity between the Parties in respect of the implementation of 5G. On the contrary, the letter of 19 April 2019 from Deputy Parkinson (referenced in paragraph 3.12 above) specifically stated that a competitive tender process for the award of 5G spectrum was one of the options being considered by the States of Guernsey and that such a process would be adopted if the Parties, together with Airtel, did not pursue one of the scenarios set out in the Telecommunications Sector Policy Statement. A competitive process was therefore an option that had been specifically left open by the States of Guernsey. There is therefore no legal basis on which the Parties can claim that their conduct was required by national law or by the applicable legal framework in Guernsey.

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226 Transcript of interview with [Mr A, Sure], [15:51] – [16:15] [2877].

227 Case C-359/95 P and C-379/95 P *Commission* v. *Ladbroke* EU:C:1997:531, paragraph 33.

228 Cases T-191/98, etc, *Atlantic Container Line* v. *Commission (TACA)*, EU:T:2003:245, paragraphs 1130-1131.

## D. Infringement by object assessment

***Conduct amounts to an anti-competitive agreement/concerted practice by object***

6.46 Applying the principles set out at paragraphs 5.33 – 5.44 above, the GCRA finds that the conduct described above (paragraphs 4.7 - 4.83) amounted to an anti-competitive agreement and a concerted practice by object.

6.47 As set out above, pursuant to the agreement and concerted practice, the Parties disclosed to each other the commercial strategy/course of conduct that one or both intended to adopt in the market in relation to:

(a) The contemplated removal by JT of its mobile network infrastructure from Guernsey, pursuant to the Bilateral Home Network Scenario;

(b) The speed at which and/or the way in which the Parties intended to introduce a new product (5G) into the market;

(c) The way in which the Parties communicated those decisions to the GCRA and the Government.

6.48 The GCRA has found that this information relates to the commercial strategy and/or contemplated market conduct of the Parties (paragraphs 6.9 - 6.10 above) and that it removed uncertainty with regard to the intended conduct of the Parties (paragraph 6.19).

6.49 The GCRA recalls that "**an exchange of information between competitors is tainted with an anti-competitive object if the exchange is capable of removing uncertainties concerning the intended conduct of the participating undertakings**" (emphasis added).[229]

6.50 Prima facie, therefore, this conduct amounts to a restriction of competition by object. This is confirmed by a consideration of the legal, factual and economic context[230] in which the conduct occurred.

6.51 The following facts and matters are relevant in that regard.

6.52 First, the Parties make up two out of the current three mobile network operators in Guernsey. They also together have a high combined share of total mobile subscriptions in Guernsey. The

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229 *T-Mobile Netherlands*, paragraph 43.
230 Paragraphs 5.39 - 5.42.

sector is therefore already highly concentrated with the Parties possessing a degree of power in relation to the provision of mobile services in Guernsey.

| | Sure | JT | Combined |
|---|---|---|---|
| Guernsey | 56% | 20% | 76% |

Source: [GCRA] – Telecommunications Statistics 2019[231]

Given that context, the agreement/concerted practice would be likely to have the potential to materially strengthen the already strong position of Sure, both by removing JT's competing mobile network infrastructure from Guernsey and also by potentially degrading the competitive position of Airtel. It therefore has the potential to damage both "the structure of the market and competition as such".[232] This conclusion is supported by the following evidence:

(a) The note of the meeting held on 9 January 2019 contemplates that the agreement / concerted practice between the Parties might lead to the exit of Airtel from the market ("Airtel outcome if not in market" – paragraph 4.24);

(b) An email of 18 March 2019 from [Mr A, Sure] to JT notes that Airtel currently shared a number of JT sites in Guernsey. This would cause issues when trying to decommission JT's Guernsey network and combining antennas (Sure and JT) would be more difficult '*where Airtel occupied second place on a structure*,[233] *"Airtel"* is noted as a problem created by the agreement / concerted practice[234], while a subsequent JT internal slide presentation notes that

> "Airtel expected to raise complaint or demand access to National roaming structure; CNI [Critical National Infrastructure] – total reliance on one mobile network operator in each island, dependant on Airtel outcomes".[235]

It was therefore clearly in the contemplation of the parties:

(i) That Airtel would not be included in the Bilateral Home Network Scenario; and

(ii) The arrangements might cause Airtel to leave the market, leaving each of JT

231 https://www.gcra.gg/media/598279/telecommunications-statistics-2019.pdf
232 *T-Mobile Netherlands*, paragraph 38.
233 JT195 [819-830].
234 JT107 [313].
235 JT195 [819-830].

and Sure as the sole mobile network operator in their “home” island.

6.53 Second, the States of Guernsey had informed the Parties that it intended to award a single licence for 5G spectrum through a competitive process.[236] Because 5G could not, at that time, be provided independently of an existing 4G network, it would not have been possible for JT to operate a 5G network in Guernsey had it removed its 4G network.[237] In this context, the fact that JT had communicated to Sure that it was contemplating removing its 2G – 4G mobile network infrastructure from Guernsey meant that, at the least, uncertainty as to how JT might have behaved in any competitive 5G spectrum award process would have been reduced.

6.54 Third, the Guernsey Investment Fund / MXC were actively exploring the possibility of becoming a mobile network infrastructure owner in Guernsey in order to further the ambitions of the States of Guernsey to see an early adoption of 5G in Guernsey. They had approached Sure,[238] JT and Airtel (paragraph 4.60) to express an interest in purchasing their mobile network infrastructure in Guernsey. The evidence above demonstrates that the Parties acted together to draft the MOU in an attempt to prevent or discourage the States of

236 For the last time on 26 April 2019 (see paragraph 3.12 above).

237 At interview, [Mr A, Sure] stated as follows: “So 5G is not, or certainly wasn't at the time [of the 9 January 2019 meeting], wouldn't have been a good idea to be an independent network. 5G has to work in conjunction with an existing network and it's very much the way 5G was designed and will be for the foreseeable future. We may be at a point in 10 years’ time when 5G can be called standalone. So 5G is very much an addition, it is adding more capacity to the existing networks. 4G is a very capable network, and there is a long-term evolution, which we mustn't forget […] So in order to do a single 5G network, you would have to have a single 2G, 3G, 4G network as well [….] And I suppose as a sort of an initial point of exploration, it made sense to consider well, you’ve got a network in Guernsey and Jersey, we've got a network in Guernsey and Jersey, what happened if we were to say we'd run the network in Guernsey, you’d run the network in Jersey, then we would then have to work out a way of how we would then share the network. We would use your network in Jersey, you would use our network in Guernsey, vice versa. But we then had to look at all the considerations around that, which are some of these points here [in the e-mails relating to 9 January 2019 meeting]. So coverage and capacity model, so we needed to make sure that if we were [combining networks] the network coverage would not be any worse, ideally be better [….] So they would own the network in Jersey, we would own the network in Guernsey.” [2883-2885]. Paragraph 4.40. See also email from [Mr K, Chief Information and Technology Officer, JT]to [Mr J, JT] of 23 August 2018 states: “Also in terms of 5G sharing I am concerned with the inter layer management with existing 2g, 3G and 4g networks. That would need to be tested upfront”; Email from [Mr M, JT] to himself of 13 May 2019 responding to the Draft SOI proposal that there be a single 5G mobile network operator in each island: “Madness! [….] 5G networks only can’t be shared (ref. [P, a mobile network equipment provider] and ZTE). For eMBB the deployment has to be NSA as the user camps on 4G therefore the shared network has to support 4G & 5G (2G and 3G are irrelevant). So unless a shared network is built (to include 2G/3G/4G/5G) this means a monopoly for one operator. Could build a shared network with Sure – JT Jersey, Sure Guernsey.” [437-438].

238 The issue of MXC was raised with [Mr D, Sure Group Chief Executive] at interview (second part) [40:41] - [43:52] [2831].

Guernsey from pursuing this option. The conduct of the Parties was therefore capable, in this case, of damaging the structure of the market and competition as such. [239]

**E. Appreciability**

6.55 The GCRA finds that the coordination between the parties constituted a restriction of competition by object, which for the reasons set out in paragraphs 6.52 - 6.54 and as explained in GCRA Guideline 2 (paragraph 5.44) is conduct capable of having an appreciable effect on competition.

**F. Duration**

6.56 As set out in Part 3 above, the earliest contact appears to have taken place on 22 August 2018. The Memorandum of Understanding, which formed an integral part of the agreement and the concerted practice, was terminated on 6 November 2019.

6.57 The GCRA therefore finds that the Parties' anti-competitive conduct lasted between 22 August 2018 and 6 November 2019.

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[239] In particular, Sure's Written Representations note that the GIF approach caused concerns on JT and Sure's part that politicians and regulators might further lose confidence in the ability of Sure to contribute to delivering the 5G policy objectives of the politicians and regulators. For that reason, the Parties drafted the MOU to keep Sure and JT "in the game" when the politicians were discussing how to solve the 5G challenge. Sure Written Representations, paragraph 3.14.5 – 3.15 [3317].

## 7. DECISION

### A. Findings of the GCRA

7.1. Accordingly, the GCRA finds that the Parties have infringed the prohibition imposed by section 5(1) of the 2012 Ordinance (prohibition on agreements between undertakings which have the object of preventing competition within any market in Guernsey for goods or services).

### B. Directions

7.2. Because the Parties have apparently ceased their coordination, the GCRA considers that there is no need for the GCRA to issue directions requiring them to do so.

### C. Financial penalties

7.3. The GCRA may make an order imposing a financial penalty on an undertaking which is found to have breached the prohibition contained 5(1) of the Competition (Guernsey) Ordinance, pursuant to section 32(4) of the Ordinance.

7.4. The Authority will be minded to impose a financial penalty where it finds a restriction of competition by object. It will therefore now consider whether it would be appropriate to issue a draft penalty statement to the Parties in respect of the by object infringement described in this Decision. In carrying out this assessment, the GCRA will follow the approach set out in its Guideline on Financial Penalties.[240]

7.5. In the event that the GCRA proposes to require the Parties to pay a financial penalty, the GCRA will issue a draft penalty statement and provide the Parties with an opportunity to make representations before any decision in relation to the penalty is taken.

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[240] Guideline 12 – Financial Penalties: https://www.gcra.gg/legal-frameworks/guidelines/financial-penalties/

## 8. SIGNATURE

Signed:

Michael Byrne, Chief Executive

for and on behalf of the Guernsey Competition and Regulatory Authority

## Annex 1 – Particulars of the right of appeal conferred by section 46 of the 2012 Ordinance

**Section 46 - Appeals against decisions of Authority or Department.**

(1) An undertaking aggrieved by a decision of the relevant authority -

(a) to refuse an application by the undertaking for -

(i) an exemption under section 3, 4, 6, 9, 10, 14 or 15, or

(ii) an approval of a merger or acquisition under section 13(1),

(b) to revoke the undertaking's exemption or approval,

(c) to impose, vary or rescind any condition in respect of the undertaking's exemption or approval,

(d) to refuse to extend the period of validity of the undertaking's exemption or approval under section 18(2),

(e) following an investigation conducted under section 22, that the undertaking -

(i) has contravened section 1(1), 5(1) or 13(1),

(ii) has contravened any condition of an exemption or approval,

(iii) has contravened a direction of the Authority under section 21, 31, 32, 33 or 35, or

(iv) intends to contravene section 13(1),

(f) to refuse the undertaking consent for the provision of copies of documents under section 26 instead of originals or to impose, vary or rescind any term or condition in respect of any such consent,

(g) to give the undertaking a direction under section 27(1),

(h) to refuse the undertaking access to documents or to allow the undertaking to copy documents under section 28(2) or to impose, vary or rescind any term or condition in respect of any such access or copying,

(i) to exercise any relevant power in relation to the undertaking at the request of an overseas competition authority under section 30(1),

(j) to impose a financial penalty on the undertaking under section 31(4), 32(4) or 33(7),

(k) under section 34(8), to vary -

(i) the amount of a financial penalty, or

(ii) the number, amounts and times of the instalments by which the financial penalty is to be paid,

(l) to give the undertaking a direction under section 21, 31, 32, 33 or 35,

(m) to vary or rescind any direction so given,

(n) to omit, pursuant to the provisions of section 45(2), any matter from a statement of reasons given to the undertaking,

(o) to serve a notice on the undertaking under section 23(1), (2) or (3),

(p) which is a decision of such description as the Department may by regulation prescribe for the purposes of this section,

may appeal to the Royal Court against the decision.

(2) The grounds of an appeal under this section are that -

(a) the decision was ultra vires or there was some other error of law,

(b) the decision was unreasonable,

(c) the decision was made in bad faith,

(d) there was a lack of proportionality, or

(e) there was a material error as to the facts or as to the procedure.

(3) An appeal under this section shall be instituted -

(a) within a period of 28 days immediately following the date of the notice of the relevant authority's decision, and

(b) by summons served on the Minister of the Department or, as the case may be, the Authority stating the grounds and material facts on which the appellant relies.

(4) The relevant authority may, where an appeal under this section has been instituted, apply to the Royal Court, by summons served on the appellant, for an order that the appeal shall be dismissed for want of prosecution; and on hearing the application the Royal Court may -

(a) dismiss the appeal or dismiss the application (in either case on such terms and conditions as the Royal Court may direct), or

(b) make such other order as the Royal Court considers just.

The provisions of this subsection are without prejudice to the inherent powers of the Royal Court or to the provisions of rule 52 of the Royal Court Civil Rules, 2007[f].

(5) On an appeal under this section the Royal Court may -

(a) set the decision of the relevant authority aside and, if the Royal Court considers it appropriate to do so, remit the matter to the relevant authority with such directions as the Royal Court thinks fit, or

(b) confirm the decision, in whole or in part.

(6) On an appeal under this section against a decision described in subsection (1)(c), (l) or (m) the Royal Court may, on the application of the appellant, and on such terms and conditions as the Royal

Court thinks just, suspend or modify the operation of the condition or direction in question, or the variation or rescission thereof, pending the determination of the appeal.

(7) For the purposes of determining an appeal under this section against a decision described in subsection (1)(n) to omit, pursuant to the provisions of section 45(2), any matter from a statement of reasons, the Royal Court may examine the information the disclosure of which the relevant authority considers would be prejudicial, and unless the Royal Court orders otherwise the information shall not, pending the determination of the appeal, be disclosed to the appellant or any person representing him.

(8) An appeal from a decision of the Royal Court made on an appeal under this section lies, with leave of the Royal Court or Court of Appeal, to the Court of Appeal on a question of law.

(9) Section 21 of the Court of Appeal (Guernsey) Law, 1961[g] ("powers of a single judge") applies to the powers of the Court of Appeal to give leave to appeal under subsection (8) as it applies to the powers of the Court of Appeal to give leave to appeal under Part II of that Law.

(10) This section does not confer a right of appeal on a question which has been determined by the Royal Court on an application by the Authority for directions, or for a determination of a question of fact, law or procedure, under section 8 of the Guernsey Competition and Regulatory Authority Ordinance, 2012.