Case C1471G

JT and Sure

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Decision (Penalty Statement)

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Guernsey Competition and Regulatory Authority

21 July 2022

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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 **Investigation**), the GCRA 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**)

had 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). The terms and grounds for the GCRA's decision are set out in a notice in writing dated 20 December 2021 (the **Decision**) which was served on the Parties on that date.[1]

1.3 In consequence of the infringements identified in the Decision, and as set out at paragraph 7.4 of the Decision, the GCRA provisionally considered that it would be appropriate to impose financial penalties on JT and on Sure under section 32(4) of the 2012 Ordinance. On 3 May 2022, it therefore served a notice in writing (**Draft Penalty Statement**) on JT and Sure under section 43(2) of the 2012 Ordinance setting out the terms of and grounds for that proposed decision.

1.4 In accordance with Section 43(2)(c) of the 2012 Ordinance, the Parties were each invited to make representations to the GCRA on the matters set out in the Draft Penalty Statement.

[1] Case C1471G, Decision, https://www.gcra.gg/media/598413/c1471g-competition-law-investigation-jt-sure-final-decision.pdf.

1.5 On 14 June 2022, each of the Parties submitted written representations to the GCRA on the matters set out in the Draft Penalty Statement.

1.6 On 15 June 2022, JT made oral representations to the GCRA on the matters set out in the Draft Penalty Statement. By a letter dated 13 May 2022, Sure's advocates had informed the GCRA that Sure did not wish to make oral representations on those matters.

1.7 Having considered the representations of each of the Parties in response to the Draft Penalty Statement, the GCRA now makes this final decision (**Penalty Statement**) pursuant to section 32(4) and section 34 of the 2012 Ordinance.

1.8 This Penalty Statement 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.

1.9 An undertaking aggrieved by this Penalty Statement may exercise the right of appeal conferred by section 46 of the 2012 Ordinance, particulars of which are set out in Annex B of this Penalty Statement.

B. Confidentiality

1.10 A copy of this Penalty Statement will be published on the GCRA's website (www.gcra.gg).

1.11 Before publishing the Penalty Statement, the GCRA will redact confidential information from it.

1.12 To the extent that they have not already made confidentiality representations in respect of that information, the Parties may make written representations to the GCRA identifying any information in this Penalty Statement which they consider the GCRA should treat as confidential and explaining why they consider that the GCRA should treat that information as confidential.

1.13 Written representations made under the previous paragraph should be provided by 9 a.m. on Friday 22 July 2022 and should be emailed to: info@gcra.gg.

1.14 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.

1.15 Pursuant to section 34(2) of the 2012 Ordinance, where a financial penalty is imposed on an undertaking or person, the GCRA may publish their name and the amount of the penalty in such manner and for such period as it considers appropriate. As such, unless there are compelling reasons to do so, the GCRA will not accept a request for confidentiality in respect of the name of the addressee of this Penalty Statement, the amount of the penalty or the basis on which the penalty has been calculated.

2. FACTUAL BACKGROUND AND CONDUCT

2.1 The GCRA refers to the general factual background as set out in section 3 of the Decision and to its findings in relation to the parties' conduct as set out in section 4 of the Decision.

2.2 Particular features of the Parties' conduct relevant to penalty are mentioned as necessary below.

3. LEGAL FRAMEWORK

A. Introduction

3.1 This Part sets out the legal framework within which the GCRA has considered the evidence relevant to penalty.

B. Sources of law

3.2 Pursuant to section 32(4) of the 2012 Ordinance, the GCRA may, in addition to, or in place of, giving a direction make an order imposing a financial penalty on an undertaking which is found to have breached the prohibition contained in section 5(1) of the 2012 Ordinance.

3.3 Section 34(1) of the 2012 Ordinance sets out the factors which the Authority must take into consideration when deciding whether to impose a penalty and, if so, the amount of that penalty.

3.4 In respect of conduct that took place before 23 February 2021, which is the case for the infringing conduct identified by the Decision in this case, 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 arising in relation to anti-competitive practices between undertakings[2] but was not prevented from departing from EU precedents where this was appropriate in light of the particular circumstances of the Bailiwick.[3,4]

3.5 The GCRA will also have regard to its own past decision making practice and to its own published guidelines concerning the application of Guernsey competition law, including in particular GCRA[5] Guideline 12 – Financial Penalties, issued June 2013.

3.6 The GCRA also considers it relevant to have regard to the decision making practice of the UK's competition regulator, the Competition and Markets Authority (the **CMA**) (together with case-

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[2] The GCRA considers that issues arising with respect to the determination of a penalty imposed in relation to an anti-competitive practice between undertakings amount to questions that arise in relation to such an anti-competitive practice (2012 Ordinance, section 54(b)).

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

[4] The GCRA is aware that the amendment made by regulation 1 of the European Union (Competition) (Brexit) (Guernsey) Regulations 2021 to amend the word 'must' to 'may' at s.54 of the 2012 Ordinance could be read as having retrospective effect. The GCRA has in fact taken into account relevant EU jurisprudence and practice and would have done in any event and so the point is academic.

[5] Issued as a Channel Islands Competition and Regulatory Authorities (CICRA) Guideline.

law considering those decisions), and to published guidelines issued by the CMA, including the CMA's Guidance as to the appropriate amount of a penalty (CMA73), issued 18 April 2018 (**CMA Penalty Guidance**).

3.7 The statutory considerations set out in section 34(1) partially overlap with factors taken into account for the purpose of imposing penalties for infringements of EU and UK competition law. The way in which the EU and UK competition authorities have dealt with those factors have been taken into account only insofar as they overlap with section 34(1) of the 2012 Ordinance.

C. The framework for deciding whether to impose a penalty

Background

3.8 By section 34(1) of the 2012 Ordinance:

> "In deciding whether or not to impose a financial penalty under section 31(4), 32(4) or 33(7) and, if so, the amount thereof, the Authority must take into consideration the following factors -
>
> (a) whether the contravention was brought to the attention of the Authority by the undertaking or person concerned,
>
> (b) the seriousness of the contravention,
>
> (c) whether or not the contravention was intentional, negligent or reckless,
>
> (d) what efforts, if any, have been made to rectify the contravention and to prevent a recurrence,
>
> (e) the potential financial consequences to the undertaking or person concerned, and to third parties including customers and creditors of that undertaking or person, of imposing a penalty, and
>
> (f) the penalties imposed by the Authority in other cases."

D. The framework for deciding the amount of the penalty

Background

3.9 The GCRA must take into consideration the factors set out in section 34(1) of the 2012 Ordinance when determining the amount of any penalty. The GCRA must also have regard to section 34(3) of the 2012 Ordinance as to the maximum penalty which may be imposed.

The three stage approach

3.10 GCRA Guideline 12, section 3, sets out the approach that the GCRA will take in calculating a penalty where it has decided that the imposition of a financial penalty is appropriate:

(a) Step 1 – Basic penalty: In this step, the basic penalty is calculated having regard to the value, in sterling, of the sales of goods or services to which the infringement relates in Guernsey for the last full business year of the business's participation in the infringement, which is then multiplied by the number of years or months of the duration of the infringement.[6] As a general rule, the basic penalty will be set at a level of up to 30% of the value of sales, with the percentage being selected depending on how serious the infringement is. In assessing the seriousness of the infringement (section 34(1)(b)), the GCRA will also have regard to whether or not the contravention was intentional, negligent or reckless (section 34(1)(c)) and the penalties imposed by the Authority in other cases (section 34(1)(f)). Given that there is only one previous decision of the Authority imposing a penalty under the 2012 Ordinance, the GCRA has also taken into account the penalties imposed by the European Commission and the CMA in order to guide its decision making on this point.

(b) Step 2 – Adjustments to the basic penalty (section 34(1)(a), (c) and (d)): The basic penalty may be increased having regard to aggravating factors or decreased having regard to mitigating factors, insofar as they fall within the scope of subsections 34(1)(a), (c) and (d) of the 2012 Ordinance.[7]

(c) Step 3 – Legal Maximum: In this step, the penalty is reduced if the maximum penalty of 10% of worldwide turnover up to a maximum period of three years is exceeded.[8]

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6 Under the Competition (Calculation of Turnover) (Guernsey) Regulations, 2012 (**Turnover Regulations**) where a business year does not equal 12 months, the applicable turnover is the amount that bears the same proportion to the applicable turnover during that business year as 12 months does to that period (Regulation 8, Turnover Regulations).

7 Lists of possible factors are set out in GCRA Guideline 12, section 3. For the avoidance of doubt, the GCRA has not taken into account any of the aggravating or mitigating factors listed in its guidelines insofar as these fall outside the scope of section 34(1) of the 2012 Ordinance.

8 By section 34(3) of the 2012 Ordinance: **"**The amount of the penalty must not exceed 10% of the turnover of the undertaking or person during the period of the contravention of the prohibition in question, up to a maximum period of 3 years."

3.11 Finally, the GCRA will consider the potential financial consequences of imposing a penalty (section 34(1)(e)) through an additional step, a "step back", in which the totality of the proposed penalty is assessed for appropriateness and proportionality.

4. LEGAL ASSESSMENT

A. Whether to impose a penalty

Overview

4.1 For the reasons set out below, the GCRA considers that this is an appropriate case for the imposition of a financial penalty on JT and on Sure because:

(a) The contravention was not brought to the attention of the Authority by Sure or by JT.

(b) The contravention was serious.

(c) The contravention was intentional.

(d) The Parties have each taken some steps to prevent a recurrence of the contravention but, for the reasons set out below, this does not suggest that no penalty should be imposed.

(e) Each of the Parties is well resourced and able to pay a financial penalty, and

(f) There is no existing GCRA decisional practice that suggests that it would be inappropriate to impose a financial penalty. Practice in other jurisdictions, such as the EU and the UK, suggests that imposing a financial penalty for a breach of competition by object of this nature would be appropriate.

The contravention was not brought to the attention of the GCRA by the Parties[9]

4.2 In their responses to the Draft Penalty Statement, each of Sure and JT contend that they did bring the contravention to the attention of the Authority.[10] A number of points cited in support of this contention have been addressed in the Decision and are not accepted for the reasons set out in the Decision.[11]

4.3 In respect of the remaining arguments put forward by Sure, the GCRA finds as follows.

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9 2012 Ordinance, section 34(1)(a).

10 In this Penalty Statement, the responses of JT and of Sure to the Draft Penalty Statement are referred to as the **JT DPS Response** and the **Sure DPS Response**, respectively.

11 Sure DPS Response, paragraph 5.1 and 5.2 **[Case file, page 5653]**, (addressed in Decision, paragraphs 3.6 – 3.11).

4.4 First, an opinion stated to have been expressed by [Ms E, Legal and Regulatory Director, Sure] to Mr Byrne at a drinks reception in July 2018 (i.e. prior to the commencement of the infringement) is not evidence that Sure brought the contravention to the attention of the GCRA or that it did not seek to conceal the contravention from the GCRA:[12]

(a) This exchange predates the infringement. It could not have brought to the attention of the GCRA conduct that had not yet occurred.

(b) The nature of this discussion, which at its highest constituted no more than a brief and informal exchange at a drinks reception, particularly in circumstances where there was no attempt made to follow this up with any sort of formal written request, clearly does not constitute evidence of a full and frank disclosure of an infringement (even more so of an infringement that has not yet occurred).

4.5 Second, Sure states that it "kept detailed documentary records of all the discussions" it held with JT and that the GCRA therefore incorrectly infers that Sure sought to conceal the infringing conduct from the GCRA.[13] The assertion that Sure kept such detailed documentary records is contradicted both by Sure's own submissions to the GCRA on 28 February 2020 and by a review of the documents actually submitted by Sure to the GCRA.

4.6 In relation to Sure's own submissions to the GCRA on 28 February 2020, and in response to a specific request from the GCRA to produce "all documents relating to the meetings referred to in Sure's response to the 4 July Information Request", Sure stated as follows:

> "Sure assumes that the meetings being referred to here are those set out in document Sure 14 (summary note of meetings held between Sure and JT's respective Chief Executives). **There are no documents relevant to these meetings. All discussions were verbal only and no notes were produced**."[14] (emphasis added).

4.7 Sure's assertion is further undermined by the evidence (or lack thereof) provided by Sure to the GCRA. In responding to the three formal information requests served on each of them seeking specific documents, Sure provided approximately 100 documents, many of which were duplicates, whereas JT provided the Authority with a total of approximately 500 documents. The documents provided by JT included both exchanges between the Parties and internal JT correspondence. Sure has not provided copies of a number of those exchanges nor has it

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12 Sure DPS Response, paragraph 5.3 **[Case file, page 5653]**

13 Sure DPS Response, paragraphs 22.3, and 34. **[Case file, pages 5659 & 5665-5666]**

14 **[Case file, page 2536]**

provided further details of the discussions recorded in that correspondence[15] and there is an almost complete absence of internal Sure correspondence between January 2019 and the time at which the MOUs were drafted (10 June 2019). This indicates either that Sure did not keep detailed documentary records of all the discussions it held with JT or, to the extent that it did, it did not disclose these documents to the GCRA pursuant to statutory information requests issued to Sure by the GCRA.

4.8 Third, the GCRA notes that the Parties did draw the existence of the Memoranda of Understanding to the GCRA's attention in June 2019. However:

(a) The GCRA finds that the Parties deliberately excluded from the MOUs the nature and extent of the true contacts between them that preceded it, as set out in section 4 of the Decision. By Sure's own admission, the MOUs were prepared quickly and for political reasons in response, in part, to the perceived threat posed to the Parties by the States of Guernsey's engagement with MXC.[16] The Parties provided further information revealing the wider extent of their coordination only once the GCRA had opened a case investigation and obliged the disclosure.[17]

(b) The Parties did not do so on the basis that they were revealing a breach of competition law. On the contrary, as noted above at (a) the MOUs were misleading, and deliberately so, excluding, as they did, any mention of the contacts between the Parties that had, by that time, been ongoing for some ten months.

(c) The GCRA further finds that Sure did not provide complete and accurate responses to the GCRA's information requests and also actively sought to prevent the contravention from coming to the attention of the GCRA, as set out in the Decision and in this Penalty Statement.[18] JT did provide complete responses but did so only after the GCRA had drawn deficiencies in its initial disclosure to JT's attention.[19]

4.9 Accordingly, the GCRA does not consider that this is a case in which the contravention was brought to the attention of the Authority by the undertaking or person concerned, or that (to

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15 E.g. email from [Mr M, JT] to [Mr B, Director of Corporate Affairs of JT Global] of 14 March 2019 stating that "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" **[Case file, page 217]**

16 Sure Written Representations, paragraph 3.27.1 **[Case file, page 3376].**

17 See description of the steps taken in the GCRA's investigation at Decision, paragraph 3.46 onwards.

18 Decision Paragraph 4.34; Annex A, below, see paragraphs A4 to A32.

19 Decision, paragraph 3.56.

the extent that it was), this is a factor which suggests that no financial penalty should be imposed.

The contravention was serious[20]

4.10 In this case, the GCRA has found that the Parties engaged in behaviour constituting a restriction of competition by object. As explained in the Decision,[21] 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. In the Draft Penalty Statement, the GCRA therefore provisionally concluded that this was a case in which the breach was serious, such that the imposition of a financial penalty was justified.

4.11 Each of JT and Sure deny that the contravention was serious, because:

(a) It was subject to regulatory and political approval,[22] and

(b) The conduct was analogous to an inchoate offence, which should be punished less harshly than a completed offence.[23]

Regulatory and political approval

4.12 The Parties contend that regulatory and political approval would have been required to implement "any […] agreement that the Parties might reach".

4.13 This contention ignores entirely the fact that where confidential commercial information is exchanged between competitors (as was the case here), the harm to competition is caused by the very fact of that exchange. The Parties in this case could not unlearn what they had learned about each other in respect of the confidential information exchanged in their discussions about the Bilateral Home Network Scenario either in respect of the intentions of each regarding the speed of implementation of 5G or in respect of the other confidential information exchanged as described in the Decision. Competition has been harmed, notwithstanding the fact that the Bilateral Home Network Scenario has not been implemented.

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20 2012 Ordinance, section 34(1)(b).

21 Decision, paragraph 5.36.

22 Sure DPS Response, paragraphs 9 – 18 [**Case file, page 5655]**, JT DPS Response, paragraph 10 – 12 **Case file, pages 5616-5617]**.

23 JT DPS Response, paragraph 12 [**Case file, pages 5616-5617]**.

4.14 Certain of the arguments being advanced by the Parties in respect of regulatory and political approval were, to the extent that they were also raised by the Parties in response to the Statement of Objections, dealt with in the Decision.[24]

4.15 The GCRA repeats, in particular, the reasoning set out in paragraph 6.38(c) of the Decision. It is incorrect to characterise the Bilateral Home Network Scenario as being conditional on regulatory and/or political approval. The fact that certain exemptions or permissions might have been sought does not mean that they would have been sought, either on an open and candid basis or at all. Anti-competitive agreements are frequently put into effect without any exemption being sought; indeed, if parties to infringing agreements could raise as a defence the argument that they could potentially have sought an exemption, the 2012 Ordinance would be redundant.

4.16 In its response to the Draft Penalty Statement, Sure argues that it would have required consent under its Jersey telecoms licence to cease operating mobile network infrastructure in Jersey.[25] In that regard, the GCRA finds as follows:

(a) First, this line of argument is based entirely on speculation about whether a competition authority (the JCRA) in another jurisdiction (Jersey) would or would not have given consent for JT to remove mobile network infrastructure, had such consent been sought by JT. For the reasons given at paragraph 6.38(b) of the Decision, the GCRA does not accept that the provisions of Sure's Jersey telecommunications licence mean that the Bilateral Home Network Scenario was incapable of implementation.

(b) Second, Sure ignores the point that (contrary to the argument put forward in the JT DPS Response[26]) JT would have required no such consent from **the GCRA** under the terms of its **Guernsey** licence. A telecommunications operator does not require GCRA permission to remove mobile network infrastructure from Guernsey (the jurisdiction to which the Decision applies). Licence Condition 22.1 of the standard Guernsey mobile telecommunication licence[27] requires a licensee to seek GCRA consent if it intends to cease to provide Licensed Mobile Telecommunications Services (**LMTS**). However, it is possible for Licensed Mobile Telecommunications Services to be provided using the

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24 Decision, paragraph 6.32 – 6.38

25 Sure DPS Response, paragraph 11.6 [**Case file, page 5656]**

26 JT DPS Response, paragraph 11. [**Case file, pages 5655-5656]**

27 This Licence Condition is included in the Guernsey mobile telecommunications licence of each of Sure https://www.gcra.gg/media/2984/sure-nc-mobile-final.pdf and JT https://www.gcra.gg/media/2987/jt-nc-mobile-final.pdf.

network of another operator. This would be done on a Mobile Virtual Network Operator (**MVNO**) basis. An MVNO operates without a mobile radio access network (**RAN**) of its own but still provides mobile communications services by using the RAN of another network operators. Therefore, had JT removed its RAN equipment from Guernsey, it would nevertheless have been able to continue to offer LMTS in Guernsey on an MVNO basis. The GCRA's consent would not have been required and, it follows, could not have been withheld thus making the Bilateral Home Network Scenario incapable of implementation.

4.17 Sure further argues that the imposition of a financial penalty in this case would be inconsistent with the approach that was applied in the EU to agreements notified to the European Commission for review under Regulation 17/62/EEC. In that regard, the GCRA finds as follows:

(a) These rules ceased to apply in the EU almost 20 years ago with the coming into force of Regulation 1/2003/EC. They would not have applied in Guernsey (which was not part of the EU) in any event. The relevant legal framework here is the extant Guernsey law and not obsolete EU rules.

(b) In any event, the position of the Parties here is not analogous to the position of notifying parties under the (now withdrawn) EU regime who would have benefited from immunity from fines under Regulation 17/62/EEC. Immunity under that regime applied only to the extent that arrangements entered into actually fell within the scope of what had been notified to the European Commission. In this case, the conduct which the GCRA has found to infringe the 2012 Ordinance was not brought to the attention of, let alone formally notified to, the GCRA (see paragraphs 4.2 - 4.9 above).

Contravention analogous to an inchoate offence

4.18 JT argues that the conduct found by the Decision to have infringed section 5 of the 2012 Ordinance amounts to an "inchoate and hypothetical" infringement. This is incorrect. The infringement was neither inchoate nor hypothetical; the conduct amounted to a complete infringing agreement and concerted practice for the reasons set out in the Decision at paragraphs 6.7 – 6.22 and in paragraph 4.13 above.

4.19 The GCRA therefore concludes that the contravention was serious.

The contravention was intentional[28]

4.20 The GCRA considers that a contravention will be intentional if the undertaking in question intended to prevent, restrict or distort competition, irrespective of whether that undertaking also intended to contravene the 2012 Ordinance and/or knew that their conduct amounted to a breach of the 2012 Ordinance. [29] In the Draft Penalty Statement, the GCRA provisionally concluded that the Parties by their conduct acted to bring about,[30] and therefore intended, a restriction, distortion or prevention of competition.

4.21 First, the concertation between JT and Sure involved the disclosure by each to the other of the commercial strategy that each of them was contemplating adopting on the market in respect of the retention or removal of mobile network infrastructure in Guernsey,[31] which included the exchange of information regarding the speed at which each intended to roll out 5G and other commercially sensitive information as described in the Decision.[32] As set out in the Decision,[33] it neither achieved nor was intended to achieve any legitimate purpose but can only have been conducted with the intention of limiting competition between the Parties and/or to protect Sure's position in Guernsey in return for JT's position being similarly protected in Jersey.[34] The Parties acted intentionally to bring about an outcome that restricted, distorted or prevented[35] competition. This conclusion holds notwithstanding the fact that regulators and politicians were seeking a means of delivering 5G, as the nature of the commercially sensitive disclosures made by the Parties to each other were not necessary to put together the sort of proposal that was being sought (and indeed took place in the context of discussions designed positively to undermine rather than promote the regulatory and political desire for early 5G deployment).[36]

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28 2012 Ordinance, section 34(1)(b).

29 This interpretation is consistent with that applied under EU and UK competition law: see *Napp Pharmaceutical Holdings v Director General of Fair Trading* [2002] CAT 1, paragraph 456; Case C-280/08 P *Deutsche Telekom v Commission* EU:C:2010:603, paragraph 124.

30 As to the meaning of intention see, inter alia, Halsbury's Laws of England/Criminal Law (Vol. 25 (2020), paras 1-552; Volume 26 (2020), paras 553-1014/1 – Principles of Criminal Liability (2) The Elements of Crime/(iii) Fault Element/16. Intention.

31 And Jersey.

32 Decision, paragraphs 4.8(b), 4.10, 4.29(b), 4.38, 4.38(a) to (d), 4.42, 4.45-4.49, 4.55(b), 4.74(b), 6.9(b), 6.12, 6.16(b), 6.21, 6.28, 6.31(d), and 6.47(b).

33 Decision, paragraph 3.9

34 See, for example, paragraph 6.19 of the Decision.

35 As to the definition of 'prevent' see section 60 of the 2012 Ordinance: "… in relation to competition, means prevent, restrict or distort competition or, in each case, attempt to do so.".

36 An outcome whereby a single operator's existing network infrastructure would be retained and that single legacy infrastructure would be used for the provision of 5G services by that operator could have been achieved by the States of Guernsey simply awarding a single 5G spectrum licence through a normal competitive tender process. Had JT wished to remove its mobile network infrastructure from Guernsey, it could have decided to do so unilaterally – see Decision, paragraph 3.9.

It can be inferred that the parties were aware that their contacts were restrictive of competition because they deliberately sought to hide their full extent from the GCRA. Paragraph 4 of the Principles Document agreed between the parties referred to their investigation of network consolidation options including "Single mobile networks in each of GSY and JSY owned by Sure and JT respectively". However, these exchanges were not recorded in the MOU: Sure's CEO expressly commented that the MOU "certainly [did] not go into wider network sharing options per 4 of the principles!!!".[37] Further steps taken by the parties to keep the full extent of their contacts from the GCRA are detailed at paragraphs A4 to A32 of Annex A.

4.22 Second, the Parties exchanged commercially sensitive information in the context of discussions as to future conduct that they explicitly recognised would damage the competitive position of Airtel, which had steadily increased its market share to become the second largest supplier of mobile services (by number of subscriptions) in Guernsey, behind Sure.[38]

4.23 Third, the Parties deliberately excluded from the MOUs the true nature and extent of the contacts between them.[39] As described in Annex A, Sure also took steps to conceal the contravention from the GCRA, in that it concealed documents, provided contradictory and misleading responses to the GCRA and, in the case of a senior Sure employee, gave answers to questions at interview which were, and which he must have known were, untruthful. The GCRA concludes that a reasonable inference to draw from this conduct is that the Parties intentionally acted to prevent, restrict or distort competition and for that reason sought to conceal the material conduct from the GCRA (and, in the case of the MOUs, the States of Guernsey).

4.24 Fourth, Sure asserts in its response to the Draft Penalty Statement that it understood that network sharing discussions between operators had to be carefully managed in order to avoid contravening the 2012 Ordinance and that it had stated to the GCRA that it would be desirable to put in place a framework or terms of reference to ensure that any such discussions were, and remained, competition law compliant. The GCRA notes, however, that Sure did not attempt to follow-up this "request for assistance" which appears to have been made by way of a passing and informal suggestion by [Ms E, Legal and Regulatory Director, Sure] to Mr Byrne at a drinks reception. Such an informal and brief discussion does not amount on any reasonable basis to "fully and frankly raising with the regulator [Sure's] concerns",[40] particularly since it was not

37 **[Case file, pages 684 to 685]**.
38 Decision, paragraph 4.35.
39 Decision, see paragraph 4.23 above.
40 Sure DPS Response, paragraph 57 **[Case file, page 5671]**.

followed up by Sure in any structured or formal fashion. Sure also states that it had a "detailed competition law and compliance presentation" in place, effective from May 2018, and that it understood that those principles would apply to its conversations with JT.[41] It nevertheless proceeded to engage in the repeated contacts with JT that the GCRA has found constitute a serious breach of the 2012 Ordinance.

4.25 For the reasons set out above at paragraphs 4.12 - 4.16, the GCRA does not accept that "any agreement that might be reached [between Sure and JT was] conditional on prior regulatory approval"[42] or, for the reasons set out at paragraph 4.5 that Sure "carefully and fully documented the discussion with JT".[43]

4.26 The GCRA therefore concludes that Sure failed to follow-up on its informal suggestion that some sort of framework or terms of reference be put in place because it knew that "full and frank" disclosure would show that its behaviour was anti-competitive and thus could not be brought within the terms of any framework for legitimate co-operation. This conclusion is supported by the fact that Sure chose not to bring the contacts between the Parties to the attention of the GCRA, despite having multiple opportunities to do so.[44] These actions demonstrate that, by the Infringing Conduct, Sure intended to prevent, restrict or distort competition.

4.27 In their responses to the Draft Penalty Statement, each of Sure and JT argued that the contravention was not intentional. JT did not develop the point for the reasons set out in its response.[45] The majority of the points cited by Sure in support of this contention have been addressed in the Decision and are not accepted for the reasons set out in the Decision.[46]

4.28 The GCRA does not accept: [47]

(a) For the reasons set out above at paragraph 4.3 that Sure voluntarily approached the GCRA and informed the GCRA about its discussions with JT.

41 Sure DPS Response, paragraph 55 **[Case file, pages 5670-5671]**.
42 Sure DPS Response, paragraph 56 **[Case file, page 5671]**.
43 Sure DPS Response, paragraph 56. The facts and matters cited by Sure in paragraph 59 of the Sure DPS Response do not constitute evidence that the GCRA and/or the States of Guernsey were aware of and/or encouraged the infringing conduct **[Case file, page 5671]**.
44 Annex A, paragraphs A.23 - A.29
45 JT DPS Response, paragraph 13 **[Case file, page 5657]**.
46 Sure DPS Response, paragraphs 19 – 21, 22.1, 22.3(i) **[Case file, pages 5658-5659]**.
47 Sure DPS Response, paragraph 22(3) **[Case file, page 5659]**.

(b) For the reasons set out above at paragraph 4.5 that Sure kept detailed documentary records of all the discussions (or, if it did, that such records have been disclosed to the GCRA).

(c) For the reasons set out above at paragraph 4.12 - 4.16 that any agreement reached by the Parties would have been subject to prior regulatory approval.

4.29 Accordingly, the GCRA finds that the infringement in this case was committed intentionally. Whether or not the Parties realised that their conduct was in breach of competition law is not relevant.[48]

Efforts made to rectify the contravention and prevent a recurrence[49]

4.30 Active co-ordination between the Parties continued until at least 20 August 2019.[50] The Parties terminated the MOUs on 6 November 2019 and the GCRA has seen no evidence to suggest that their active co-ordination continued beyond that date.[51] However, it is also the case that the Parties cannot meaningfully rectify a contravention of this nature because they cannot "unknow" the confidential information that they learned about each other, even when active co-ordination between them ceases.[52]

4.31 The GCRA notes that each of JT and Sure has taken steps to put in place an effective competition compliance programme for employees and, in the case of JT, to strengthen its internal corporate governance mechanisms. Although the GCRA does not find that this justifies the non-imposition of a penalty,[53] it does consider that this conduct constitutes a mitigating factor which will be taken into account when determining the appropriate level of the penalty.

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48 Case C-280/08 P *Deutsche Telekom v Commission* EU:C:2010:603, paragraph 124; *Ping Europe Ltd v CMA* [2020] EWCA Civ 13, para 117.

49 2012 Ordinance, section 34(1)(d).

50 **[Case file, page 2551]**

51 However, there is no indication that their intention in terminating the MOUs was to rectify a breach of competition law **[Case file, pages 2117-2120, and page 2695]** given that the MOUs did not themselves accurately record the contravening course of conduct.

52 Even if it were possible to rectify the contravention, the GCRA notes that neither Party accepts that its conduct contravened the 2012 Ordinance. Under those circumstances, the GCRA assumes that it is unlikely that either Party will have taken any material steps to rectify the contravention.

53 If this were so, undertakings that contravened the competition law would be able to avoid the imposition of a penalty simply by implementing a compliance programme after the fact. The GCRA considers that this would be inappropriate, particularly in a case such as this where the conduct has been found to be intentional and serious and neither Party accepts that it has contravened the law.

Potential financial consequences[54]

4.32 The GCRA considers that the Parties are well resourced and can afford to pay a financial penalty and that imposing a financial penalty is unlikely to have an adverse impact on third parties. The appropriate level of the penalty will be considered below.

Penalties imposed by the Authority in other cases[55]

4.33 There has been one penalty imposed by the Authority in another case involving a contravention by object of section 5(1) of the 2012 Ordinance. In that case, it was considered appropriate to impose a financial penalty in respect of a restriction of competition by object.[56] Therefore to impose a penalty in this case is not inconsistent with any relevant previous decision of the GCRA.

Conclusion

4.34 For the above reasons, the GCRA considers it appropriate to impose a financial penalty on each of JT and Sure. These factors are considered at the first stage of the assessment only for the purpose of determining whether to impose a financial penalty at all. The factors are considered for a second time below in determining the appropriate level of the penalty.

B. The calculation of the penalty

4.35 In calculating the appropriate level of the penalty, the GCRA will take into consideration the factors set out in section 34(1) of the 2012 Ordinance, using the three step approach set out in its Guideline 12, section 3 as a framework for its analysis.

Step 1 – Basic penalty – relevant factors

4.36 In determining the amount of the basic penalty, and within the framework of the 2012 Turnover Regulations, the GCRA will take into account:

(a) The seriousness of the contravention[57], together with whether or not the contravention was intentional, negligent or reckless.[58]

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[54] 2012 Ordinance, section 34(1)(e).

[55] 2012 Ordinance, section 34(1)(f).

[56] On appeal: Case Civil 2345: *The Medical Specialist Group* v. *The Guernsey Competition and Regulatory Authority*

[57] 2012 Ordinance, section 34(1)(b).

[58] 2012 Ordinance, section 34(1)(c).

(b) The penalties imposed by the Authority in other cases.[59]

Step 1 – Basic penalty – framework

4.37 As a general rule, the basic penalty will be set at a level of up to 30% of the value of sales.[60]

4.38 GCRA Guideline 12 - Financial Penalties states that:

> "The assessment of gravity will be taken on a case by case basis and we will consider all relevant factors, including; the nature of the relevant market and/or product, the structure of the market; the market share(s) of the business(es) involved, entry conditions and the effect on competitors, third parties and end consumers."[61]

4.39 As regards penalties imposed in previous cases and given the relative lack of previous decisions in Guernsey, the Authority considers it relevant to have regard not only to its own decision making practice but also to that of the European Commission and the CMA.

4.40 In its decision making practice, the Commission has applied a "gravity percentage" in the region of 15%[62] - 19%[63] for cartel infringements of EU competition law.

4.41 The CMA Penalty Guidance states:

> "The CMA will generally use a starting point between 21 and 30% of relevant turnover for the most serious types of infringement, that is, those which the CMA considers are most likely by their very nature to harm competition most. In relation to infringements of the Chapter I prohibition, this includes cartel activities, such as price-fixing and market sharing and other, non-cartel object infringements which are inherently likely to cause harm to competition. In relation to infringements of the Chapter I prohibition, a starting point between 10 and 20% is more likely to be appropriate for certain, less serious object infringements, and for infringements by effect."[64]

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59 2012 Ordinance, section 34(1)(f).

60 GCRA Guideline 12, section 3 (page 11).

61 GCRA Guideline 12, section 3 (page 11). This approach is consistent with the approach of the European Commission to seriousness. The **Commission's Fining Guidelines** (Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ C210/2, 1.9.2006) state at paragraph 22 that: "In order to decide [on the appropriate starting percentage], the Commission will have regard to a number of factors, such as the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented."

62 See, for example, Case C-590/18 P *Fujikura* v. *Commission* ECLI:EU:C:2019:1135, paragraph 15.

63 See, for example, Case C-607/18 P *NKT Verwaltungs GmbH and NKT* v. *Commission* ECLI:EU:C:2020:385, paragraph 18.

64 CMA Penalty Guidance, Paragraph 2.5.

Step 1 – Basic penalty – assessment

4.42 Regarding **seriousness**, as the GCRA has already observed, the infringing conduct described in the Decision amounts to a restriction of competition by object. The conduct had the potential to damage both "the structure of the market and competition as such".[65] The GCRA therefore considers that this conduct was serious[66] and inherently likely by its very nature to have harmed competition. The GCRA further notes that:[67]

(a) The Parties have a considerable degree of power in relation to the provision of mobile services in Guernsey, with Sure being the provider with the largest share of that segment. This means that the potential market coverage of the infringement is very high.

(b) The infringing conduct had the potential to materially strengthen the already strong position of Sure in that segment both by removing JT's mobile infrastructure in Guernsey and also by potentially degrading the competitive position of the third mobile operator, Airtel and any future market entrant.[68]

(c) The mobile telephony segment is already characterised by high barriers to entry.

4.43 For the reasons set out above,[69] the GCRA considers the contravention to have been carried out **intentionally**. As such, the culpability of the Parties is greater than would be the case for a reckless or negligent infringement and this fact should be reflected in the level at which the starting percentage is set.

4.44 Taking into account the decision making practice of the European Commission and the CMA and the decision reached by the GCRA in respect of a financial penalty in Guernsey, the GCRA also takes into account the fact that:

(a) The infringing conduct does not amount to a cartel but rather is a non-cartel object infringement of competition, suggesting that a lower starting percentage should be applied than that which would be appropriate for cartel behaviour (i.e. below 15%).[70]

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65 Case C-8/08 *T-Mobile Netherlands* EU:C:2009:343, paragraph 38.

66 2012 Ordinance, section 34(1)(b).

67 See paragraph 4.17, above, which sets out possible factors that the GCRA may take into account in assessing seriousness.

68 Decision, paragraph 6.52.

69 Decision, paragraph 4.20 - 4.27.

70 As noted above, the European Commission gives an indicative range of 15% - 19% for cartel behaviour; the CMA gives a range of 21% - 30%.

(b) The infringing conduct is of a type that is more serious than a post-term non-compete restriction, in respect of which the GCRA has found that a starting point of 10% of turnover was appropriate.[71]

4.45 In the Draft Penalty Statement, the GCRA stated that it proposed to select as a starting point the figure of 12% which is towards the bottom end of the appropriate range for serious infringements.

4.46 In its response to the Draft Penalty Statement, Sure has argued that the figure of 12% is excessive.[72] It has not provided specific reasons beyond repeating the general points made in its response to the Draft Penalty Statement. The GCRA therefore finds that 12% is an appropriate starting point for the reasons given above.

4.47 As to **<u>duration</u>**, the GCRA has found that the conduct lasted between 22 August 2018 and 6 November 2019.[73]

4.48 Regulation 1 of the 2012 Turnover Regulations provides that:

> "In order to calculate the applicable penalty for the purposes of section 34(3) of the Ordinance, the applicable turnover must be calculated in accordance with regulations 2 to 7 and then multiplied by the period of the contravention, by reference to whole or part years, however, such multiplicand cannot exceed the number 3."

4.49 The duration is therefore 1.21 years (1 year, 76 days).

4.50 **<u>Turnover</u>** is calculated on the basis set out in the **2012 Turnover Regulations**.[74]

4.51 The applicable turnover of an undertaking is the turnover for the business year preceding the date on which the decision of the GCRA is taken.[75] In this case, that business year is 2020.

4.52 The applicable turnover of an undertaking is limited to the amounts derived by it from the sale of products and the provision of services falling within the undertaking's ordinary activities after deduction of sales rebates, value added tax and other taxes directly related to turnover.[76]

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71 See https://www.gcra.gg/cases/2020/c1441g-competition-law-investigation-the-medical-specialist-group/c1441g-competition-law-investigation-the-medical-specialist-group-penalty-statement-final-decision/.

72 Sure DPS Response, paragraph 24 **[Case file, 5660]**.

73 Decision, paragraph 6.57.

74 The Competition (Calculation of Turnover)(Guernsey) Regulations, 2012.

75 Turnover Regulations, regulation 2.

76 2012 Turnover Regulations, regulation 3.

4.53 In this case, the services to which the infringement primarily relates are the provision of mobile services in Guernsey. The relevant turnover of each of the Parties in this segment is:

JT	£3,364,000
Sure	£13,016,780

4.54 The GCRA does not accept the arguments put forward by Sure in paragraph 28 of the Sure DPS Response that its relevant turnover should be reduced to £9,745,508:

(a) As stated above, turnover for the purposes of determining a financial penalty is calculated on the basis set out in the 2012 Turnover Regulations. The 2012 Turnover Regulations specify that the applicable turnover of an undertaking is the turnover it derives from the sale of products and the provision of services falling within the undertaking's ordinary activities.[77] Whether or not certain items are included in Sure's Certified Statement of Regulated Turnover for the purposes of its reporting duties under its telecommunications licence is irrelevant to the calculation of its turnover under the 2012 Turnover Regulations.

(b) As a matter of practice, as set out in Guideline 12, the GCRA will take the value of an undertaking's sales of goods or services to which the infringement relates in Guernsey when setting the basic penalty. The GCRA considers that both the sale of handsets and accessories and revenue generated through the provision by Sure of outbound roaming services relate to the provision of mobile services in Guernsey.[78] As such, turnover generated by Sure through the sales of these goods and services may properly be taken into account in the calculation of the basic penalty.

4.55 The GCRA does not accept Sure's submission that its basic penalty should be reduced to the same absolute level as JT's.[79] The GCRA's approach to setting a financial penalty, which is set out in Guideline 12, is that the basic penalty is based on a percentage of an undertaking's relevant Guernsey turnover. The GCRA has selected the same starting percentage for each of Sure and JT in this case and so has not treated Sure unfairly in that regard. The absolute level of the basic penalty to be imposed on Sure is higher than that to be imposed on JT because the

77 Regulation 3, 2012 Turnover Regulations.
78 GCRA Guideline 12, page 10.
79 Sure DPS Response, paragraph 29 **[Case file, page 5661]**

GCRA only has the power to impose sanctions in respect of conduct that has the object or effect of restricting competition in Guernsey (where Sure's turnover is higher than JT's). To reduce Sure's basic penalty to the same absolute level as JT's would unfairly discriminate against JT as the impact of the penalty on JT (in Guernsey) would be disproportionately higher than the impact on Sure (in Guernsey) in circumstances where the GCRA has not found JT to be more culpable than Sure for the infringing conduct. In respect of the specific points raised by Sure:

(a) The fact that the JCRA has not pursued any case regarding conduct in Jersey is irrelevant. Whether or not a competition authority in another jurisdiction decides to take enforcement action in that jurisdiction in respect of certain conduct is not a matter that the GCRA is permitted to take into account when setting the level of a financial penalty in Guernsey.[80]

(b) The same reasoning as set out in paragraph(a) applies to the relevance of the statement that JT is a significant operator across Jersey and Guernsey as a whole. It is for the JCRA, and not the GCRA, to address (and if appropriate, to sanction) conduct that occurred in Jersey.

(c) The relevance of culpability has been dealt with above.

(d) The argument that setting "significantly different fines" may distort competition is neither relevant nor supported by any evidence. Even if this were a relevant consideration,[81] Sure has neither explained, nor produced evidence to demonstrate, why a financial penalty imposed on two undertakings which is identical in relative terms would distort competition between them.

4.56 The basic penalty is therefore as follows:

JT	£488,452.80
Sure	£1,890,036.46

80 See section 34(1) of the 2012 Ordinance, which sets out the factors that the GCRA may take into account in imposing a financial penalty under section 32 of the 2012 Ordinance. It would, in any event, be inappropriate for the GCRA to take account of the impact that conduct had had in another jurisdiction (e.g. Jersey) in setting a financial penalty in Guernsey because it could expose an undertaking to the risk of a double penalty in the event that the regulator in that other jurisdiction (e.g. the JCRA) decided to take enforcement action itself.

81 Relevant factors are set out in section 34(1) of the 2012 Ordinance.

Step 2 – Adjustments to the basic penalty

4.57 In this step, the basic penalty may be increased or decreased having regard to the factors set out in section 34(1)(a), (c) and (d) of the 2012 Ordinance (which constitute aggravating and mitigating factors).

A. Aggravating factors

4.58 In this case, the GCRA finds that, rather than bringing the contravention to the attention of the GCRA, Sure took active and intentional steps to conceal the contravention and prevent it coming to the attention of the Authority. The GCRA also finds that the actions of Sure after the contravention had occurred demonstrate that it intended by the Infringing Conduct[82] to prevent competition. This behaviour, as summarised below and described in detail in Annex A, justifies an increase in the amount of the penalty as against Sure.[83]

The [Mr D, Sure Group Chief Executive] Email

4.59 First, Sure took active and intentional steps to prevent certain key evidence (the **[Mr D, Sure Group Chief Executive] Email**)[84] regarding the role of MXC from coming to the attention of the GCRA, namely suppression of that evidence and providing contradictory and misleading accounts of the matters contained in it.[85]

4.60 Sure states[86] that it was entitled to withhold the redacted parts of the [Mr D, Sure Group Chief Executive] Email from the GCRA because those redacted parts were not responsive to the GCRA's information requests.

4.61 This claim is incorrect for two reasons:

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82 I.e. the conduct that the GCRA has found to infringe the 2012 Ordinance (**Infringing Conduct**)

83 In its response to the DPS, Sure has argued that the GCRA has engaged in double counting by taking into account section 34(1)(c) both in determining the basic penalty and in finding that certain behaviour justified an uplift to the basic penalty. This is incorrect. The conduct that the GCRA has found to constitute aggravating factors was not taken into account when determining the amount of the basic penalty and so was not "counted" at that stage. Each of the aggravating factors either pre or post-dates the actual infringement and so can only corroborate a finding of intentional infringement rather than of itself being a factor that of itself that constitutes an intentional breach. The amount of the basic penalty would have been the same even in the absence of the aggravating factors.

84 See Decision, paragraphs 4.60 to 4.62 and 4.72 to 4.73.

85 Annex A, paragraphs A.3 - A.13.

86 Sure DPS Response, paragraphs 39 – 48 **[Case file, pages 5667 to 5669].**

(a) First, for the reasons set out below, the redacted information was responsive to the First and Second Information Requests. Sure does not dispute that it was also clearly responsive to the Third Information Request (which specifically required the production of the unredacted [Mr D, Sure Group Chief Executive] Email) but it was nevertheless only produced after considerable resistance by Sure, multiple requests from GCRA officers and, finally, a warning that the matter would be escalated to the Authority to consider formal action should the document continue to be withheld by Sure.[87]

(b) Second, and in any event, each information request was accompanied by instructions that, in terms, required documents to be submitted unredacted and in the form in which they were found in Sure's files. Sure chose not to follow these instructions.

4.62 The First Sure Information Request[88] required production of "all documents relating to any proposal, plan or arrangement pursuant to which Sure and JT will or may work together in Guernsey to enable the rollout of a 5G standalone mobile network". The [Mr D, Sure Group Chief Executive] Email was not produced in any form (redacted or unredacted) in response to the First Information Request. The Second Sure Information Request[89] required production of "internal e-mails concerning the drafting of the June 2019 Memorandum of Understanding". Only the redacted [Mr D, Sure Group Chief Executive] Email (without its attachment) was provided in response to the Second Sure Information Request.

4.63 The [Mr D, Sure Group Chief Executive] Email states that:

> "[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 [sic] these conversations **<u>and now this email [from MXC</u>**] JT is more inclined to support the 5g home network approach […..] 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." (**<u>emphasis added</u>**).

4.64 The [Mr D, Sure Group Chief Executive] Email makes clear that the email that each of Sure and JT had received from MXC, along with [Mr D, Sure Group Chief Executive]'s "series of long conversations" with JT that had taken place that day, together formed the motivation for entering into the MOU, which JT had agreed to draft. As such, the entirety of the [Mr D, Sure Group Chief Executive] Email and its attachment both "related to a proposal, plan or

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87 See GCRA Sure correspondence between 1 March 2021 and 26 March 2021 **[Case file, pages 4298-4565]**

88 Referred to in paragraph 39 of the Sure DPS Response **[Case file, page 5667]**.

89 Referred to in paragraph 43 of the Sure DPS Response **[Case file, page 5668]**.

arrangement pursuant to which" JT and Sure might work together on a standalone 5G network (First Sure Information Request) and constituted an "internal email concerning the drafting of" the MOU (Second Sure Information Request). The [Mr D, Sure Group Chief Executive] Email and its attachment were therefore responsive to each of the First and Second Sure Information Requests in their entirety and should have been disclosed.

4.65 In any event, the instructions accompanying each information request provided that:

"Documents provided shall be complete and, unless legally privileged, unredacted, submitted as found in Sure's files (*e.g.*, documents that in their original condition were stapled, clipped or otherwise fastened together shall be produced in such form)."

As such, even if Sure had (wrongly) come to the view that the redacted parts of the [Mr D, Sure Group Chief Executive] Email and its attachment were irrelevant and outwith the scope of the GCRA's information requests, it should nevertheless not have applied redactions to the document or removed the attachment. The entirety of the [Mr D, Sure Group Chief Executive] Email and its attachment were responsive to each of the First and Second Information Requests.

4.66 Sure asserts that its suppression of the [Mr D, Sure Group Chief Executive] Email and its attachment caused no prejudice because "the GCRA obtained the unredacted email within 12 days of making a specific request". This statement is incorrect.

(a) The [Mr D, Sure Group Chief Executive] Email and its attachment were responsive to both the First and the Second Information Requests and should have been provided to the GCRA by Sure in response to those requests (i.e. in July 2019 and in February 2020). Had Sure done so, this would have enabled the GCRA to make more rapid progress with its investigation, not least because the [Mr D, Sure Group Chief Executive] Email and its attachment made clear that rather than the MOU being the "starting point for discussions on [Sure as the single wholesale 5G network operator in Guernsey]"[90] as claimed by Sure in its response to the GCRA's first information request, the MOU had in fact been drafted very quickly and for political reasons (namely to keep Sure and JT "in the game") at a point in time where the discussions between the Parties had been ongoing for some ten months.[91]

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90 Sure First Response letter **[Case file, page 2264].**

91 Decision, paragraphs 4.61 – 4.62.

(b) The GCRA has been given evidence gathering powers by the States of Guernsey in order to enable it to carry out its statutory functions.[92] It is inherently prejudicial to the GCRA's ability to carry out those functions if companies that are under investigation refuse to comply with GCRA information requests and conceal information responsive to such requests from the GCRA.

(c) The case team at the GCRA, which is a publicly funded body, had to dedicate time and resources (which could have been applied elsewhere) to engaging in multiple rounds of correspondence with Sure's advocates, as well as internal time considering potential enforcement action, given Sure's ongoing resistance to providing the [Mr D, Sure Group Chief Executive] Email and its attachment.

Concealment of evidence regarding MXC

4.67 Second, Sure personnel took active and intentional steps to prevent certain key evidence regarding the role of MXC from coming to the attention of the GCRA, namely providing materially untruthful answers regarding MXC to questions put at statutory interview.[93]

4.68 Sure's explanation of the untruthful answer given to the question "Who is MXC?"[94] is that "Who is MXC" is a complex question liable to be misunderstood by a witness whose first language is not English. This explanation is not credible. [Mr G, Chief Operating Officer, Sure] is an experienced, senior professional and is employed in an organisation and in a jurisdiction where the working language is English. He was fully able to answer more complex questions put to him in English throughout the interview. Had he not understood the question "Who is MXC?" (which cannot, on any reasonable basis, be described as "complex"), he could have either asked for clarification or for a break in the interview (at which he was legally represented) to take legal advice. He did neither.

4.69 Sure further argues that [Mr G, Chief Operating Officer, Sure]'s failure to answer truthfully the question "Who is MXC?" was not prejudicial to the GCRA's investigation because:

"Ms Livestro knew the answer. If she needed more information about MXC, she could have typed *"MXC Guernsey*" into the Google search box."[95]

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92 One of the statutory functions of the GCRA is to investigate any anti-competitive practice or suspected anti-competitive practice of an undertaking (The Guernsey Competition and Regulatory Authority Ordinance, 2012, s.4(b)(ii)).

93 Annex A, paragraphs A.15 - A.22.

94 The response given was "I don't know" **[Case file, page 2767]**

95 Paragraph 51 of the Sure DPS Response **[Case file, page 5670]**

4.70 Sure's suggestion that GCRA case officers should have used Google to carry out research into MXC ignores the relevant point that the purpose of asking the question was to establish whether [Mr G, Chief Operating Officer, Sure] knew who MXC was. That information obviously cannot be obtained by typing "MXC Guernsey" (or indeed any other search term) into the Google search box. At the time of [Mr G, Chief Operating Officer, Sure]'s interview, the only information that the GCRA held on its case file in relation to MXC had been provided by JT. The GCRA officer carrying out the interview did not know either that MXC's approach to Sure and to JT was a key factor that had led to the drafting of the MOU or that [Mr G, Chief Operating Officer, Sure] (as a recipient of the [Mr D, Sure Group Chief Executive] Email) was aware of that fact. The reason that the GCRA officer carrying out the interview did not know either of those things was because Sure had concealed that information from the GCRA (see paragraphs 4.59 - 4.66 above). Had [Mr G, Chief Operating Officer, Sure] answered the question truthfully, this would have enabled further questions to be put to him about the knowledge that he had about MXC and its role in the possible provision of 5G services in Guernsey. The prejudice to the GCRA's investigation caused by [Mr G, Chief Operating Officer, Sure]'s untruthful response consists of the perpetuation of Sure's concealment from the GCRA of the relevance of MXC to the GCRA's investigation.

Conclusion

4.71 In consequence, in respect of Sure's conduct in this regard, the GCRA proposes to impose an uplift to the basic penalty as follows:

(a) In respect of the concealment of the full [Mr D, Sure Group Chief Executive] Email and its attachment and the misleading accounts given in respect of the purpose of the MOU (which were accurately described in the redacted portions of the [Mr D, Sure Group Chief Executive] Email) as fully described in paragraphs A.3 - A.13, an uplift of 50%.[96]

(b) In respect of the untruthful and misleading statements given at interview, as fully described in paragraphs A.14 - A.21, an uplift of 15%.[97]

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[96] In Case COMP-F-1/38.121 – Fittings, the European Commission imposed an uplift to the basic penalty of 50% because misleading responses had been given in the undertaking's response to the Statement of Objections and further misleading statements were given by that undertaking when presented with evidence by the European Commission that demonstrated that those initial responses were untrue.

[97] In Case COMP/38.432 – Professional Videotape, the European Commission imposed a combined uplift to the basic penalty of 30% in respect of (a) a refusal to answer questions during a statutory interview, and (b) the shredding of relevant documents to avoid their discovery by Commission officials.

B. Mitigating factors

Compliance programme

4.72 Each of the Parties has stated that it has put in place a competition law compliance programme and that this should be taken into account by the GCRA when determining the level of the financial penalty.

4.73 In both its written and its oral representations, JT has described the measures that it has put in place to reduce the risk of a breach of competition law occurring in the future. These include:

(a) Creation of a Regulatory Board, which meets weekly and comprises both external advisors and senior JT employees. The functions of the Regulatory Board are to provide legal and regulatory advice to JT and to provide a "safe space" for discussion of issues.

(b) Mandatory annual company-wide competition law training, which is run through JT's learning management system. JT's reporting system ensures that 100% of employees complete this training.

(c) Creation of a code of business ethics, including competition law compliance, which forms part of mandatory e-learning on JT's learning management platform.

(d) Attendance by members of the Regulatory and Compliance team at JT team meetings to give advice and ensure compliance with competition law.

(e) Maintaining a log of all interactions with other licensed operators in Guernsey and seeking advice from the Regulatory and Compliance team on whether proposed discussions can take place and any restrictions that apply.

4.74 JT also explains that it has reallocated certain roles and responsibilities to try to establish a less confrontational and more collaborative and open relationship with the GCRA. It cites an example of an exchange with the GCRA relating to the data centre market, in which JT highlighted safeguards put in place to ensure competition law compliance.

4.75 These measures were in place by December 2020 and so were implemented by JT relatively quickly following the GCRA's investigation.

4.76 The GCRA considers that the steps taken by JT constitute efforts to prevent a recurrence of the infringing conduct. Given the comprehensive and wide-ranging nature of the measures

adopted and the speed at which they were adopted, the GCRA considers that it would be appropriate to apply a reduction of 10% to the financial penalty to be imposed on JT.

4.77 In its written representations, Sure describes the measures that it has put in place to reduce the risk of a breach of competition law occurring in the future.[98] These include:

(a) Putting in place an internal competition compliance manual.

(b) Requiring staff to undertake a 45 minute online competition law compliance training and to answer questions correctly at the end of the training. Reminders are sent to staff who fail to complete the training within the prescribed period.

(c) Creation of a Competition Law intranet page.

4.78 These steps were in place by November 2021.

4.79 The GCRA considers that the steps taken by Sure constitute efforts to prevent a recurrence of the infringing conduct. Given that these measures are less comprehensive and wide-ranging than those put in place by JT and were not adopted as quickly, the GCRA considers that it would be appropriate to apply a lesser reduction of 5% to the financial penalty to be imposed on Sure.

Conduct authorised or encouraged by public authorities

4.80 Sure has argued that the Infringing Conduct was authorised or encouraged by public authorities and that this is a mitigating factor.[99] For the reasons set out in the Decision,[100] the GCRA does not accept that the conduct was authorised or encouraged by public authorities. In its response to the Draft Penalty Statement, Sure has not explained how the draft, unsworn affidavit of Deputy Helyar demonstrates that its conduct was authorised or encouraged by public authorities. The GCRA concludes that that evidence does not demonstrate such authorisation or encouragement.

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98 Sure notes that it had had a competition law and compliance presentation in place since May 2018. The GCRA notes that this presentation alone does not seem to have included testing requirements for attendees. Neither do there appear to have been measures in place to ensure continuous learning and compliance. Finally, the GCRA notes that this presentation did not prevent the conduct that the GCRA has identified as an infringement of the 2012 Ordinance. As such, the GCRA will not reduce the financial penalty to be imposed on Sure on the basis of the existence of the competition law and compliance presentation.

99 Sure DPS Response, paragraph 31 **[Case file, page 5665]**

100 Decision, Paragraphs 3.4 – 3.9

4.81 The GCRA therefore finds that no reduction in penalty is applicable on this basis.[101]

Prompt termination

4.82 Sure states that it terminated the infringement as soon as the GCRA intervened. Sure does not state whether "intervened" is intended to refer to the GCRA's request to see the MOUs on 13 June 2019 or to the commencement of the GCRA's formal investigation on 4 July 2019. The GCRA recalls that Sure has previously stated that no further discussions had taken place between the Parties since the MOU was signed.[102]

4.83 In any event, the GCRA notes that the infringement was not terminated either on 13 June 2019 or on 4 July 2019; contacts between the Parties and/or the continuation of work commissioned jointly by the Parties pursuant to the infringing conduct continued until at least 20 August 2019 (from which it can be inferred that no instruction to cease work had been given) and, because the Parties cannot "unknow" the information that they learned about each other, the harm caused by the Infringing Conduct persists even after active co-ordination has ceased:

(a) On 13 June 2019, [Mr K, Chief Information and Technology Officer, JT] emailed [P, a mobile network equipment provider] and Sure, stating that he had had a discussion with [Mr G, Chief Operating Officer, Sure] earlier that day and proposed an all-party conference call to discuss [P, a mobile network equipment provider]'s quotation for 5G network infrastructure (**[P, a mobile network equipment provider Quotation]**).[103] This call was scheduled for 20 June 2019.[104]

(b) Internal JT discussions on 17 June 2019 indicate that the infringement had not been terminated but rather was still being actively considered and discussed.[105]

(c) On 21 June 2019, [Mr Q, of P] of [P, a mobile network equipment provider] e-mailed JT and Sure, thanking them for the "meeting yesterday" to discuss the [P, a mobile network

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101 Sure DPS Response, paragraph 32. **[Case file, page 5665]**

102 "The MOU represented the ***starting*** point for discussions between Sure and JT on this Option – and we would highlight that no further discussions have taken place since the MOU was signed – but it is a very high-level document and completely non-legally binding." Sure Response to First Sure Information Request, 25 July 2019 **[Case file, page 2264]**. On any account, this assertion is wrong since the MOUs followed some ten months of discussions between the Parties and were not the "starting point" for discussions on any plausible basis.

103 **[Case file, page 1542]** – [P, a mobile network equipment provider Quotation] "Channel Island Shared 5G Core and RAN Proposal"

104 [**Case file, pages 1529 & 1627]**

105 Exchange of e-mails between [Mr J, JT] and [Mr M, JT] [**Case file, pages 1603 – 1606]**

equipment provider Quotation] and noting the follow-up actions arising from that meeting.[106]

(d) On 25 June 2019, [Mr J, JT] emailed [P, a mobile network equipment provider] and Sure sharing details on subscriber numbers and capacity.[107]

(e) On 25 June 2019, and in response to the email mentioned at paragraph (d) above, [Mr G, Chief Operating Officer, Sure] e-mailed [Mr A, Sure], asking him to "get similar Sure data as JT provided.[108]

(f) On 26 June 2019, [Mr Z, Sure] e-mailed [P, a mobile network equipment provider] and JT providing some further technical information requested by [P, a mobile network equipment provider] in relation to the [P, a mobile network equipment provider Quotation].[109]

(g) On 12 July 2019, [Mr J, JT] e-mailed [P, a mobile network equipment provider] and Sure confirming technical details and answering a further two questions of the same date put by [P, a mobile network equipment provider] in relation to the [P, a mobile network equipment provider] Quotation.[110]

(h) On 17 July 2019, [Mr G, Chief Operating Officer, Sure] e-mailed JT and [P, a mobile network equipment provider] answering further questions regarding the [P, a mobile network equipment provider Quotation].[111]

(i) On 19 July 2019, there was an exchange of e-mails between [Mr Q, of P] and [Mr G, Chief Operating Officer, Sure], in which [Mr Q, of P] confirmed that [P, a mobile network equipment provider] was working on a revised quotation and would revert within a week or two.[112]

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106 **[Case file, pages 2543 – 2544]**

107 **[Case file, pages 1681 - 1683]**

108 **[Case file, page 2374]**

109 **[Case file, pages 1686-1688],** see also email from [Mr G, Chief Operating Officer, Sure] to [Mr Z, Sure] , instructing [Mr Z, Sure] to share this information [**[Case file, page 2541**].

110 **[Case file, page 1746]**

111 **[Case file, page 1779]**

112 **[Case file, page 2545]**

(j) On 20 August 2019, [Mr Q, of P] emailed [Mr G, Chief Operating Officer, Sure] and [Mr K, Chief Information and Technology Officer, JT], attaching an updated quotation for 5G infrastructure in Guernsey and Jersey.[113]

4.84 The MOUs were not formally terminated until 6 November 2019.

4.85 For the above reasons, the GCRA does not accept that any deduction from Sure's penalty should be made on the grounds that the infringement was terminated promptly.

Negligent rather than intentional infringement

4.86 Sure claims that the infringement was committed negligently rather than intentionally and that its penalty should be reduced on that ground.[114]

4.87 For the reasons set out above at paragraphs 4.20 - 4.29, the GCRA finds that the infringement was committed intentionally. Therefore, the amount of the penalty to be imposed on Sure will not be reduced on the ground that the infringement was committed negligently.

113 **[Case file, page 2551]**

114 Sure DPS Response, paragraph 33 **[Case file, page 5665]**.

Genuine uncertainty about the infringement

4.88 Sure claims that there was genuine uncertainty on its part as to whether the infringing conduct was anti-competitive and that its penalty should be reduced on that ground.[115]

4.89 For the reasons set out above at paragraphs 4.20 - 4.29, the GCRA finds that the infringement was committed intentionally and that there could therefore have been no genuine uncertainty on Sure's part about the anti-competitive nature of its conduct. In respect of the three specific matters raised by Sure under this heading:

(a) Sure's argument that its disclosure of the MOUs is evidence that it was uncertain of whether the infringing conduct was illegal is not accepted. First, the MOUs did not disclose the actual co-ordination that had taken place between the Parties over the preceding ten months but rather put forward a suggested form of future co-operation[116] that the Parties had been told by [P, a mobile network equipment provider] was technically not feasible. Second, the motive for drafting and disclosing the MOUs was political – to keep Sure and JT "in the game".[117] Given this stated motive and the fact that the MOUs did not evidence either the actual co-ordination between the Parties that had already taken place or any co-ordination that they genuinely intended to undertake, the disclosure of the MOUs cannot corroborate the claim that Sure was unsure as to whether the infringing conduct was anti-competitive.

(b) Sure's claim that it documented carefully its discussions with JT is incorrect for the reasons set out above at paragraphs 4.5 - 4.7.

(c) Sure's contention that the GCRA has issued three distinct formulations of its case, thereby supporting Sure's claim that there was genuine uncertainty, is not accepted. The extension of the Authority's case, which led to the withdrawal of the First SO, was not due to the fact that the Authority had come to a different conclusion on the basis of the same evidence (i.e. genuine uncertainty) but rather due to the fact that the Authority, when drafting the Second SO, had access to a substantial additional amount of responsive evidence that the Parties had failed to provide before the First SO was drafted and which revealed that the Parties' co-operation extended beyond SA 5G (the focus of the First SO) to an agreement or agreements pursuant to which the Parties would consolidate and/or

[115] Sure DPS Response, paragraph 34 **[Case file, page 5665]**.
[116] Construction of a SA 5G network
[117] See paragraphs 4.3 - 4.2 above.

share mobile networks in Guernsey. Sure would have been aware of the content of much of the withheld or suppressed evidence throughout the period of the Authority's investigation (including during the period before the First SO was issued). The fact that the Authority was not initially aware of that evidence does not support a finding that Sure was uncertain about whether or not the conduct that that evidence disclosed amounted to an infringement.

4.90 For the above reasons, the GCRA does not accept that any deduction from Sure's penalty should be made on the grounds that there was genuine uncertainty as to whether the conduct infringed the 2012 Ordinance.

Limited involvement

4.91 For the reasons set out above at paragraphs 4.12 - 4.16, the GCRA does not accept that any agreement the Parties reached was subject to regulatory and political approval and that Sure's involvement in the Infringing Conduct was therefore limited.

4.92 For the above reasons, the GCRA does not accept that any deduction from Sure's penalty should be made on the grounds that Sure's involvement in the infringement was limited.

Conclusion

4.93 The penalty at the end of step 2 is therefore:

Sure	£2,962,632.15
JT	£439,607.52

Step 3 – Legal Maximum

4.94 In this step, the penalty is reduced if the maximum penalty of 10% of worldwide turnover up to a maximum period of three years is exceeded.[118]

4.95 The total 2020 turnover for Sure and its connected undertakings was £387,303,000.[119]

118 2012 Ordinance, section 34(3).

119 https://content.batelco.com/wp-content/uploads/2021/03/09063321/Annual-Report-2020-FINAL-English-09032021.pdf.

4.96 The proposed total penalty of £2,962,632.15 does not exceed the statutory maximum.[120]

4.97 JT's total turnover in 2020 (including the connected undertakings of JT) was £169,937,000.[121]

4.98 The proposed total penalty of £439,607.52 does not exceed the statutory maximum.[122]

Step back

4.99 Finally, the GCRA has considered the potential financial consequences of imposing a penalty (section 34(1)(e).

4.100 It is axiomatic that any financial penalty will have some adverse financial consequences on an undertaking on which it is imposed. The GCRA considers it unlikely in this case that the financial penalty would have any adverse consequences for third parties. Likewise, and consistently with the Commission's Fining Guidelines, the GCRA considers that, in order for any reduction under this provision to be justifiable, it would be necessary to demonstrate that the proposed financial penalty would jeopardise the economic viability of the Parties.[123]

4.101 There is no evidence before the GCRA to support the contention that this penalty would jeopardise the economic viability of either of the Parties. Therefore, the GCRA does not consider that it would be appropriate to reduce the proposed penalty on the grounds of its potential financial consequences for the Parties.

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120 10% of £387,303,000 multiplied by the period of the contravention (1.21) - £46,863,663.

121 JT Annual Report 2020.

122 10% of £169,937,000 multiplied by the period of the contravention (1.21) – £30,562,377.

123 Commission's Fining Guidelines, paragraph 35.

5. CONCLUSION

5.1 In consequence of the infringements identified in the Statement of Objections, the GCRA will impose a financial penalty under section 31(4) of the Competition (Guernsey) Ordinance 2012 as follows:

Sure	
Starting percentage	12%
Duration multiplier	1.21
Turnover figure	£13,016,780
Step 1 figure	£1,890,036.46
Aggravating factors	65%
Mitigating factors	5%
Step 2 figure	£2,962,632.15
Legal maximum reduction	N/A
Step 3 figure (legal maximum reduction)	£2,962,632.15
Step 4 figure	£2,962,632.15
Final figure	£2,962,632

JT	
Starting percentage	12%
Duration multiplier	1.21
Turnover figure	£3,364,000
Step 1 figure	£488,452.80
Aggravating factors	0%
Mitigating factors	10%
Step 2 figure	£439,607.52
Legal maximum reduction	N/A
Step 3 figure	£439,607.52
Step 4 figure	£439,607.52
Final figure	£439,608

6. SIGNATURE

Signed:

Michael Byrne, Chief Executive

for and on behalf of the Guernsey Competition and Regulatory Authority

ANNEX A

A. Summary

A.1 The GCRA considers that the acts and omissions of Sure and certain of its senior personnel during the investigation:

(a) Demonstrate that the contravention was not brought to the attention of the GCRA, but instead actively concealed from the GCRA.

(b) Constitute behaviour from which it can be inferred that, by the Infringing Conduct, Sure intended to prevent, restrict or distort competition (see paragraph 4.20 above), in that Sure and/or its senior personnel deliberately and intentionally concealed from the GCRA matters that were material to the GCRA's investigation.

A.2 [✂].[124]

B. Sure's concealment of key evidence

A.3 On 28 February 2020, in response to the GCRA's second statutory request for evidence, Sure provided a redacted version of an e-mail dated 6 June 2018 from its CEO (the **[Mr D, Sure Group Chief Executive] Email**), which he had sent to senior Sure personnel.[125]

A.4 The [Mr D, Sure Group Chief Executive] Email was sent under cover of an email from Sure's Legal and Regulatory Director, who stated that redactions had been applied to [Mr D, Sure Group Chief Executive]'s email '*to protect irrelevant but confidential information*".[126]

A.5 On 1 March 2021, to ensure the completeness of the information held on its file, GCRA officers requested that Sure provide them with an unredacted version of the [Mr D, Sure Group Chief Executive] Email. In response, Sure restated its position that the redactions had been put in place to protect information that was "*commercially sensitive but unrelated to this issue*" and resisted providing the unredacted [Mr D, Sure Group Chief Executive] Email on that basis.[127]

A.6 On 26 March 2021, following multiple requests by GCRA officers for the same to be provided, Sure provided GCRA officers with the unredacted [Mr D, Sure Group Chief Executive] Email. It

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124 [✂].

125 28 February 2020, email from [Ms E, Legal and Regulatory Director, Sure], Sure's Legal and Regulatory Director to Michael Byrne, GCRA CEO [see page 56, below], and [Mr D, Sure Group Chief Executive] e-mail of 6 June 2018 **[Case file, pages 2725 & 2726]**.

126 28 February 2020, [Ms E, Legal and Regulatory Director, Sure], to Michael Byrne, GCRA's CEO [see page 56, below].

127 8 March 2021, Letter from Carey Olsen to GCRA **[Case file, pages 4321 to 4326]**.

was clear that the redacted information was in fact highly relevant to the investigation.[128, i] It also became apparent for the first time that an important e-mail from [Mr S, Telecommunications Consultant] [who had been assisting MXC] (a possible future competitor), in the e-mail chain underneath and all references to it in the [Mr D, Sure Group Chief Executive] Email had been deleted by Sure entirely, thus concealing its existence from the GCRA.

A.7 The redacted sections of the [Mr D, Sure Group Chief Executive] Email, (and the deleted e-mail from MXC) evidenced Sure's concern regarding MXC's involvement in the States of Guernsey's "*stated aim*" of delivering a single 5G mobile network in Guernsey and with MXC's offer to purchase Sure's telecommunications infrastructure in Guernsey. The redacted sections and deleted email evidence unambiguously demonstrate that MXC's approach to Sure was a key factor leading to the drafting of the MOU.[129] Therefore, the contents of the entire [Mr D, Sure Group Chief Executive] Email were responsive to the First, Second and Third Sure information requests.[130] As such, the [Mr D, Sure Group Chief Executive] Email and attachment were properly disclosable in their entirety, and obviously so.

A.8 Sure's failure to provide a complete, unredacted version of the [Mr D, Sure Group Chief Executive] Email and its attachment concealed the important evidence contained within the redacted sections and obstructed the GCRA's conduct of its statutory investigation. It is inconceivable that Sure was not aware of the significance of the unredacted sections and attachment, nor are the explanations given for the redactions and omission credible.

A.9 That information also significantly undermined the accuracy and truthfulness of Sure's first explanation of the MOU and its conduct – namely that the MOU was the **start** of contacts between the Parties on the option of Sure as the single wholesale provider of 5G in Guernsey[131]

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[128] Copies of the redacted [Mr D, Sure Group Chief Executive] Email and the unredacted version of that document are reproduced at endnote i.

[129] The background and circumstances in which the MOU was agreed are fully referenced in the Decision at paragraphs 4.54 to 4.86.

[130] The First Sure Information Request stated: "Please provide copies of all documents relating to any proposal, plan or arrangement pursuant to which Sure and JT will or may work together in Guernsey to enable the rollout of a 5G standalone mobile network." **[Case file, pages 3168-3182]**. The Second Sure Information Request stated: "Please also provide, and to the extent that such documents were responsive to the 4 July Information Request, explain why Sure has not already provided: [.....] e. All internal e-mails concerning the drafting of the June 2019 Memoranda of Understanding." **[Case file, pages 3256-3272]**. The Third Sure Information Request specifically required the provision of the unredacted [Mr D, Sure Group Chief Executive] Email **[Case file, pages 3281-3299]**.

[131] In the First Sure Response Letter, Sure stated "What the MoU is designed to do is therefore to explore what Sure has described in its response to CICRA's SoI as Option 4 [Sure as the single wholesale 5G network operator in Guernsey and JT as the single wholesale 5G network operator in Jersey], and which we note includes the requirement for "further analysis ... on detailed bilateral technical and commercial discussions." The MoU does not contain any such detail because we had not reached that stage of

– that Sure provided in correspondence and in formal written submissions to the GCRA in July 2019.

A.10 Further, when compelled to provide the unredacted [Mr D, Sure Group Chief Executive] Email, Sure, through its accompanying covering letter, provided the GCRA with a second and different explanation for agreeing the MOU with JT to that which had been provided in July 2019. That second justification has subsequently been repeated in its written representations and is addressed in the Decision paragraphs 4.61 and 4.62. Providing different accounts for its conduct at different stages of the investigation to account for evidence as it is disclosed significantly undermines the credibility and truthfulness of Sure's representations to the GCRA.

A.11 The suppression by Sure of evidence that was highly material to the GCRA's investigation and the provision of conflicting accounts by Sure in relation to the role of MXC undermine Sure's credibility and the veracity of the accounts provided by it.

A.12 The GCRA considers that:

(a) This behaviour demonstrates an obvious failure to bring the contravention to the attention of the GCRA. Indeed, such conduct was considerably far removed from bringing a contravention to the attention of the GCRA.

(b) It may properly be inferred from Sure's deliberate suppression of evidence that it was fully aware that that evidence demonstrated anti-competitive behaviour and so took steps to conceal it from the GCRA. This conduct corroborates the above finding that by the Infringing Conduct, Sure intended to prevent, distort or restriction competition (see paragraph 4.20 above).

A.13 [✂].

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discussions yet. The MoU represented the *starting* point for discussions between Sure and JT on this Option – and we would highlight that no further discussions have taken place since the MoU was signed – but it is a very high-level document and completely non-legally binding." **[Case file, page 2264]**.

C. Providing misleading and false information about MXC in interviews

A.14 On 2 December 2020, GCRA Officers interviewed [Mr G, Chief Operating Officer, Sure], and put questions to him about MXC. In response, [Mr G, Chief Operating Officer, Sure] denied any knowledge of MXC. As described above and in the Decision, the discussions between MXC and the States of Guernsey led to the creation of the MOU. As such, the role of MXC was (as a recipient of the [Mr D, Sure Group Chief Executive] Email) both known to [Mr G, Chief Operating Officer, Sure] and known by him to be highly material to the GCRA's investigation.

A.15 [Mr G, Chief Operating Officer, Sure]'s denials that he knew who MXC was are contradicted by the documents disclosed to the GCRA and by information provided by [Mr π, Sure Acting CEO].

A.16 During the interview, Officers referred [Mr G, Chief Operating Officer, Sure] to the only two documents from the case evidence file which referenced MXC, both of which had been provided to the GCRA by JT and not by Sure. At the time of that interview, Officers were not aware that the redacted [Mr D, Sure Group Chief Executive] Email also referenced MXC (as outlined above).

A.17 The following, is an extract from [Mr G, Chief Operating Officer, Sure]'s interview, which deals with his response to questions put to him regarding MXC:

> "[55:57] Sarah Livestro: So on the next paragraph down here, there's a comment here that says:
> "MXC - [Mr H, MXC Capital] muddy the water"
> and then if you turn over, at the bottom, under the bullet point called "Dahlia", it says:
> "MXC- [Mr H, MXC Capital] - has approached Sure - [Mr D, Sure Group Chief Executive] not keen on face value"
> So who is MXC?
> [56:29] [Mr G, Chief Operating Officer, Sure]: I don't know.
> [56:30] Sarah Livestro: Okay. And you don't know what he discussed with…
> [56:31] [Mr G, Chief Operating Officer, Sure]: I don't know.
> [56:32] Sarah Livestro (continuing): … you discussed with [Mr D, Sure Group Chief Executive]?
> [56:35] [Mr G, Chief Operating Officer, Sure]: I don't know.[132]

A.18 As stated above, [Mr G, Chief Operating Officer, Sure]'s denial of any knowledge of MXC is contradicted by the fact that he was copied to the [Mr D, Sure Group Chief Executive] Email on 6 June 2018, which identified him as being party to "*a series of long conversations with JT*" regarding MXC, as set out in paragraph 4.50 of the Decision.

[132] 2 December 2020, [Mr G, Chief Operating Officer, Sure] interview transcripts **[Case file, page 2767]**.

A.19 On 6 April 2021, in a letter to the GCRA, [Mr π, Sure Acting CEO], wrote the following account on behalf of [Mr G, Chief Operating Officer, Sure]:

"It is also appropriate to note that there is an obvious issue with the assertion you make. I have not spoken to [Mr G, Chief Operating Officer, Sure] about your letter but my understanding is that [Mr G, Chief Operating Officer, Sure] and [Mr H, MXC Capital] of MXC are known to each other on a personal level, and [Mr G, Chief Operating Officer, Sure] originally introduced MXC to [Mr D, Sure Group Chief Executive]. As such, the idea that [Mr G, Chief Operating Officer, Sure] would deny any knowledge of MXC I would consider highly unlikely. Further, without knowing the precise context I am speculating, but in my view it could very likely to be explained as a simple misunderstanding, especially given the pressure of answering questions within a formal investigation, having had little prior notice, plus the fact that [Mr G, Chief Operating Officer, Sure]'s first language is French, not English. All these factors could quite easily explain why he did not immediately recollect the particulars of the matter."[133]

A.20 Sure was given access to the transcript of [Mr G, Chief Operating Officer, Sure]'s interview on 23 April 2021, as part of the GCRA's access to the file procedure in this case. Sure has, to date, not sought to correct the assertion made by [Mr G, Chief Operating Officer, Sure] that he did not know who MXC was.

A.21 The GCRA finds that this behaviour on the part of Sure constitutes:

(a) A failure to bring the contravention to the attention of the GCRA, and

(b) Intentional concealment of incriminating evidence by Sure which corroborates the above finding that the Infringing Conduct was intended to prevent, restrict or distort competition (see paragraph 4.20 above).[134]

A.22 [✂].

D. Appreciation by Sure that contacts between the Parties might breach the 2012 Ordinance

A.23 As detailed in sections 3 and 4 of the Decision, Sure and JT's senior management, senior personnel, engineers, and technical specialists engaged in extensive negotiations, information exchanges, high level meetings and detailed interactions which commenced as early as August 2018.

A.24 On 11 July 2018 in an e-mail (previously referred to by Sure but only fully disclosed by Sure for the first time in the context of its appeal against the Decision) Sure's Legal and Regulatory Director outlines a conversation that she asserts took place between her and the GCRA's CEO,

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133 12 April 2021, Sure letter GCRA **[Case file, page 4646]**

134 On the basis that there is no innocent explanation of [Mr G, Chief Operating Officer, Sure]'s denial of any knowledge about MXC.

Mr Byrne. According to [Ms E, Legal and Regulatory Director, Sure], at a drinks reception she told Mr Byrne that terms of reference or some sort of formalised approach should be created to enable operators to discuss and address sharing so that they *"cannot be accused of collusion later in the process"*.[135]

A.25 It was therefore appreciated by Sure's Legal and Regulatory Director that:

(a) Discussions between competitors on network sharing risked breach of the 2012 Ordinance if not managed properly, and

(b) It was important for operators to set in advance parameters for such discussions to minimise the competition law risk.

A.26 Sure has not disclosed any documentation that evidences specific consideration of the application of Guernsey competition law to its discussions with JT,[136] despite awareness on its part at a senior level that such discussions could raise competition law issues.

A.27 The absence of any such documentation significantly undermines Sure's assertions that it was transparent about its dealings, or that it was unaware of the implications of entering into contacts with JT without agreed terms of reference and parameters. The fact that Sure appreciated the potential risk but nonetheless embarked on the course of conduct described in section 4 of the Decision strongly suggests that Sure did not attempt to put in place any safeguards around its discussions with JT because it knew that those discussions were anti-competitive. As such, the GCRA concludes that this behaviour by Sure constitutes further material from which it can be inferred that by the Infringing Conduct Sure intended to prevent, restrict or distort competition (see paragraph 4.20 above).

E. Failure by the Parties to disclose contacts between them voluntarily

A.28 The GCRA notes that, contrary to what would have been expected if the co-operation between the Parties had been encouraged or compelled by the States of Guernsey, neither JT nor Sure voluntarily informed the States of Guernsey or the GCRA of the extent of the contacts between them at any relevant point, including:

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135 See page 280, of exhibit IK1 to [Mr D, Sure Group Chief Executive]'s Affidavit, dated 16 January 2022 **[Sealed Court File]**.

136 Sure has attached to its response to the Draft Penalty Statement a copy of a competition compliance presentation that it states was in use from May 2018. This general and high level presentation does not constitute evidence that Sure thoroughly and responsibly considered the application of Guernsey competition law to its discussions with JT.

(a) During their meetings with the States of Guernsey on 16 January 2019.[137]

(b) In response to Deputy Parkinson's letter of 26 April 2019[138] reiterating the States of Guernsey's preferred option for working between all operators to explore the scenarios set out in the Telecommunications Sector Policy Statement.

(c) When reacting to the potential collaboration between the States of Guernsey and MXC. In that regard, the GCRA notes that although the Parties have consistently sought to characterise the contacts between them over the preceding 10 months as being intended to carry out the wishes of the States of Guernsey, their response to the "threat" posed by MXC was not to disclose those contacts to the States of Guernsey as evidence that they were already engaged in exploring legitimate co-operation but rather to enter into the MOUs, which both failed to mention those contacts at all and put forward a proposal for joint working that the Parties knew to be technically not feasible. The MOUs were, at best, misleading and deliberately so.

A.29 As such, the GCRA concludes that this conduct demonstrates on the part of Sure and of JT:

(a) Further material from which it can be inferred that by the Infringing Conduct Sure intended to prevent, restrict or distort competition (see paragraph 4.20 above).

(b) A failure to bring the contravention to the attention of the GCRA.

F. Failure to disclose relevant documents

A.30 Despite the fact that both Parties now state that their conduct was encouraged or required by the States of Guernsey and/or by the GCRA, neither has disclosed any internal documentation that explains how the contacts between them were designed to deliver on the objectives they now claim were imposed upon them. Neither party has disclosed any documentation whatsoever that evidences their claims that they received instructions and encouragement from the States of Guernsey and/or the GCRA to enter into the Bilateral Home Network Scenario (as defined in the Decision).

A.31 Nor has either party disclosed any board minutes, internal notes or instructions of any kind which were provided by senior management to junior staff or personnel which explain the scope of instructions or any explanation of the purpose for the contacts between them, which

137 Decision, paragraph 4.25.
138 Decision, paragraph 3.12.

involved senior personnel from both organisations including the CEOs of each of JT and Sure. In summary, there is no contemporaneous documentation evidencing the explanation now advanced for the Parties' conduct. The explanation is ex post facto.

A.32 The GCRA also notes the contrast between the failure by Sure to disclose any contemporaneous notes of its meetings with JT with the detailed notes it has chosen to disclose of casual and/or informal interactions with GCRA Authority Members.[139] By way of example, on 22 August 2018, a key meeting between Sure and JT took place in Jersey between senior representatives of the Parties, including the CEOs of both JT and Sure. JT has provided two contemporaneous notes of this key meeting. Sure has provided none. By contrast, Sure has recently provided in evidence as part of its reply to the Decision an attendance note of 26 January 2019 from what it asserts is a key meeting with the GCRA board, notes from informal conversations during a drinks reception between the GCRA CEO and the Sure Legal and Regulatory Director and an "attendance note" of an informal conversation that allegedly took place between the same Sure representative and the former GCRA Chairman at Guernsey airport.[140] The contrast between the absence of notes from Sure and JT meetings and detailed notes of casual or informal meetings with the GCRA is stark and not explained.

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[139] See paragraph 71(c) of Sure's Summons, dated 14 January 2022, [Mr D, Sure Group Chief Executive]'s Affidavit paragraph 59, and pages 269-271 of Exhibit IK1, dated 16 January 2022 **[Sealed Court File]**.

[140] See footnote 12 in Sure's Summons, dated 14 January 2022, and, page 280, Exhibit IK1 to [Mr D, Sure Group Chief Executive]'s Affidavit, dated 16 January 2022 **[Sealed Court File]**.

ANNEX A

KEY TIMELINE EVENTS

i. 11 July 2018, [Ms E, Legal and Regulatory Director, Sure], sent an internal e-mail to senior Sure personnel stating that it would be desirable to have in place formal terms of reference before engaging in discussions with other operators about a shared or new 5G network. She highlighted the competition law risk of proceeding without such a document.

ii. 22 August 2018, a meeting between Sure and JT 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], the Sure CEO [Mr D, Sure Group Chief Executive] and [Mr G, Chief Operating Officer, Sure].

iii. 23 August 2018, an internal JT e-mail from [Mr J, JT] to [Mr K, Chief Information and Technology Officer, JT] and JT "quick notes" document[141] (collectively the **22 August Attendance Notes in the Decision**) contain notes of the discussion that took place at that meeting. No internal Sure note has been produced from that meeting.

iv. On 12 June 2019, [Mr B, Director of Corporate Affairs of JT Global] of JT claimed, "*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*.." and "*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*" [142]

v. On 20 June 2019, [Mr C, JT Chair], stated "*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*."

vi. 25 July 2019, [Mr D, Sure Group Chief Executive] stated "*The MoU represented the starting point for discussions between Sure and JT on this Option – and we would highlight that no further discussions have taken place since the MoU was signed – but it is a very high-level document and completely non-legally binding*.

vii. On 28 February 2020, Sure stated the MOU was entered into and notified to the GCRA "as soon as they had agreed to start exploratory talks" with JT discussions regarding what Sure has termed as network sharing.[143]

viii. On 28 February 2020, at the point at which the [Mr D, Sure Group Chief Executive] Email was first provided by Sure (following a formal section 23 request), Sure claimed the redactions were applied to the document in order to protect "*irrelevant but confidential material*".[144]

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[141] **[Case file, page 1812].**

[142] Decision paragraph 3.33.

[143] **[Case file, page 2474].**

[144] See page 56, below.

ix. On 2 December 2020, Sure's Chief Operating Officer, [Mr G, Chief Operating Officer, Sure] and [Mr D, Sure Group Chief Executive] were interviewed following service of statutory section 23 requests for information.

x. On 1 March 2021, as part of the GCRA's investigation, Sure was served with a statutory section 23 information request, which required the provision of six documents. A deadline for the provision of those documents was given as 1700 on 8 March 2021. That section 23 request for information and all previous and subsequent section 23 requests served on Sure, clearly stated that legal professional privilege was the only acceptable justification for withholding responsive documentary evidence or information from the GCRA.

xi. On 8 March 2021, Sure responded, through its Advocates, and provided five of the six requested documents. The document not provided at this time was the [Mr D, Sure Group Chief Executive] Email. The request had explicitly requested that all documents be provided without any redactions.

xii. On 8 March 2021, Sure provided the following reasoning for not providing an unredacted version of the e-mail:

> *"The reason for this is because, as explained when the further materials were provided to you last year, this e-mail contained reference to a matter that was commercially sensitive but unrelated to this issue and one which is not encompassed within the subject matter of this investigation. Having reviewed the e-mail again that position remains the case."*

xiii. On 10 March 2021, the GCRA wrote to Sure confirming that commercial sensitivity was not a legal basis for withholding information and it was required to provide the e-mail in its original, unredacted form.[145]

xiv. On 26 March 2021, after multiple rounds of correspondence between the GCRA officers and Sure's legal representatives, Sure provided the unredacted [Mr D, Sure Group Chief Executive] Email (albeit not an original electronic version as required by the 1 March 2021 section 23 request).

xv. In the covering letter that accompanied the [Mr D, Sure Group Chief Executive] Email (also of 26 March 2021), Sure's Advocates stated that MXC's alignment with the States of Guernsey and its approach to buy Sure's infrastructure reinforced its concerns that a single network was being forced on it by the States of Guernsey and the GCRA, and that was the "additional impetus" for it agreeing the MOU with JT.

xvi. On 29 March 2021, following requests by the GCRA to clarify Sure's legal justifications for providing a redacted version of [Mr D, Sure Group Chief Executive] e-mail, Sure's Advocates confirmed:

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[145] 10 March 2021, GCRA email to Carey Olsen **[Case file, page 4327]**

> *"You have no entitlement to information regarding the drafting process underpinning the correspondence sent to you. Our discussion with our clients leading up to the correspondence sent to you, and the terms thereof, are protected by legal privilege."*

xvii. On 6 April 2021, the GCRA sent a letter to Sure's interim CEO to provide him with the opportunity to respond to the GCRA concerns regarding the conduct of Sure's senior personnel, the perceived obstruction of the investigation and the concealment of evidence.[146]

xviii. On 12 April 2021, Sure provided its response letter.[147]

xix. [✂].

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[146] 6 April 2021, GCRA letter to Sure **[Case file, pages 4577 to 4631]**

[147] 12 April 2021, Sure letter to GCRA **[Case file, pages 4632 to 4649]**

ANNEX B

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,

ANNEX B

(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.

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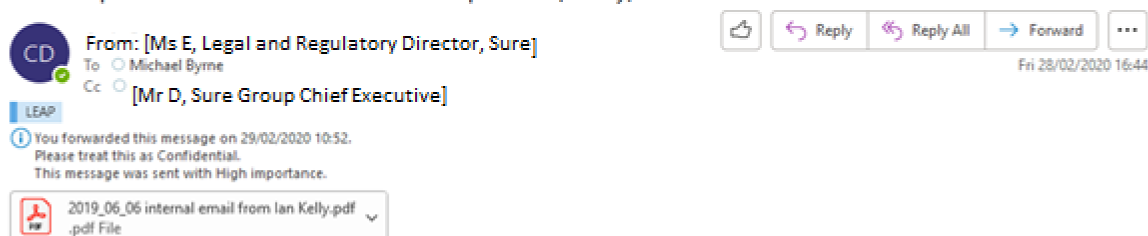
i

1. The redacted version of the **[Mr D, Sure Group Chief Executive] Email**, provided by [Ms E, Legal and Regulatory Director, Sure] by e-mail on 28 February 2020, is reproduced below.


Sure Response to Formal Notice under Competition (Jersey) Law 2005

CD

From: [Ms E, Legal and Regulatory Director, Sure]

To Michael Byrne

Cc [Mr D, Sure Group Chief Executive]

LEAP

Reply Reply All Forward

Fri 28/02/2020 16:44

You forwarded this message on 29/02/2020 10:52.
Please treat this as Confidential.
This message was sent with High importance.

2019_06_06 internal email from Ian Kelly.pdf
.pdf File

Dear Michael

Apologies but there was one further e-mail that should have been included as part of the response to question 3e (All internal emails concerning the drafting of the June 2019 Memoranda of Understanding). This is now attached. Please note that redactions have been applied to this e-mail to protect irrelevant but confidential material.

Best regards

[Ms E, Legal and Regulatory Director, Sure]

Legal and Regulatory Director

ANNEX B

From: [Mr D, Sure Group Chief Executive]
Sent: Thursday, June 6, 2019 10:47:17 PM
To: . [Mr U, Chief Financial Officer, Batelco], [Ms E, Legal and Regulatory Director, Sure]
Cc: [Mr G, Chief Operating Officer, Sure]
Subject: Fwd: 5G Single Network - Gsy

[Mr G] and I have had a series of long conversations with JT ([Mr I] and [Mr K]) today about network sharing (home, full etc) and on the back these conversations JT is more inclined to support the 5g home network approach.

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] -likely to need [Ms V]'s support when it arrives, but let's discuss first.

Regards,

[Mr D, Sure Group Chief Executive]

2. The unredacted [Mr D, Sure Group Chief Executive] Email, with the previously redacted text highlighted in yellow, as provided by Sure on 26 March 2021, reads as follows:

"**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 e-mail 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 [sic] these conversations 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, 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]"

3. The [Mr D, Sure Group Chief Executive Email] forwarded another e-mail that [Mr D, Sure Group Chief Executive] had received from [Mr S, Telecommunications Consultant]. That e-mail had been completely removed from the [Mr D, Sure Group Chief Executive Email] as provided to the GCRA (as had been any references to it that would have alerted GCRA officers to its existence). It read as follows:

"Hi [Mr D, Sure Group Chief Executive]

Hope all well with you..

My Colleague [Mr T] and I am [sic] doing some work for the Guernsey Investment Fund around single network mobile infrastructure. The Fund is investigating part participation in funding a single network on Guernsey in order to help the island meet its stated single network objectives and help reduce the overhead of maintaining the mobile infrastructure for the local operators. The lead from the Fund is [Mr H, MXC Capital].

We would like to meet informally to discuss whether Sure would consider selling and leasing back its mobile network infrastructure? I realise this is a complex discussion further down the line, so this is just a high level view on the possibilities at this stage. There should be significant commercial benefits to Sure 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. 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, Telecommunications Consultant]".