



24 November 2022

Our ref: M1626G

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Dear Deputy Inder

### **Proposed acquisition of Airtel-Vodafone by Sure**

Thank you for your letter of 9 November 2022, stating that Sure intends to acquire Airtel-Vodafone (**Airtel**) in the Channel Islands (the **Transaction**).

This is the first time the Committee for Economic Development (**CfED** or the **Committee**) has invoked section 14 of the 2012 Ordinance and there is therefore no Guernsey precedent that might assist CfED or the Guernsey Competition and Regulatory Authority (the **GCRA**; the **Authority**) in approaching such a consideration. The Transaction would, under normal circumstances, require the approval of the GCRA<sup>1</sup> which is only able to approve a transaction if it is satisfied that that transaction would not substantially lessen competition in Guernsey.<sup>2</sup> It is, however, open to CfED to exempt, by Resolution of the States, a merger if there are exceptional and compelling reasons of public policy making it desirable to do so.<sup>3</sup>

I understand that, in principle, the Committee considers that there are exceptional and compelling reasons of public policy making it desirable to exempt the Transaction from the normal merger notification and clearance requirements in this case. In accordance with section 14 of the 2012 Ordinance, the Committee is seeking any comments or advice that the GCRA may have on the Transaction.

### **Executive summary**

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- <sup>1</sup> Sections 13 and 17 of the Competition (Guernsey) Ordinance, 2012 (the **2012 Ordinance**).
  - <sup>2</sup> Section 13(2)(a), 2012 Ordinance.
  - <sup>3</sup> Section 14(1)(c), (2), 2012 Ordinance.

Whether or not a Transaction achieves exceptional and compelling public policy grounds is a political judgment that falls outside of the competence of the GCRA. However, we would make the following high level comments:

- a. Public interest exemptions from merger control rules are generally permitted only on narrowly defined grounds (e.g., national security; media plurality). On the basis of the information provided to us, it is not clear either why the Transaction is necessary to achieve the benefits identified or why it is considered that those benefits amount to exceptional and compelling public policy grounds.
- b. An unusual and exceptional decision of this nature is likely to come to the attention of an international audience and other institutions in the competition law field.<sup>4</sup> We would therefore suggest that, should the Committee consider that there are exceptional and compelling public policy grounds for clearing this Transaction, that these are clearly and explicitly set out in the clearance documents and that robust evidence is provided to justify why those grounds are met.

Although the information that has been provided to the GCRA is not sufficient to enable it to carry out a full competition analysis, on its face, the Transaction has features that risk generating a substantial lessening of competition, with Sure gaining a market share of 70 – 80% on at least two markets in Guernsey. It is very likely that, were the GCRA to be assessing this Transaction in the usual way, it would proceed to a second detailed review (Phase 2) and that substantial commitments would need to be offered to offset the expected lessening of competition before a potential clearance could be considered.

Sure has offered commitments to address the presumed anti-competitive effects of this Transaction but it appears, on the basis of the information provided, that these would be achieved whether or not the Transaction goes ahead. The commitments therefore do not deliver benefits to consumers that they would not otherwise obtain. Furthermore, because the commitments are behavioural (i.e. things that Sure commits to do in the future) rather than structural (e.g. divestment of an asset or a part of its business), they are likely in any event to be less effective and more difficult to monitor and enforce. We would therefore suggest that the Committee looks again at the commitments offered, if it is still minded to grant the exemption.

## Detailed comments

The GCRA's detailed comments are set out below.

### *Public policy*

The GCRA is mindful that the assessment of whether, or not, an exemption achieves exceptional and compelling public policy goals is a matter that falls within the competence of the Committee and of the States of Guernsey. As such, the GCRA does not consider it appropriate to comment on whether the matters identified in the Oxera Report (the **Report**), as a matter of fact, are exceptional and compelling public policy justifications or not.

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<sup>4</sup> We understand that the Transaction has been notified to the JCRA in normal way and that a full competition law assessment will be carried out by them.

However, as a general point, the GCRA notes that the Oxera Report and the accompanying Sure submission does not in every case make clear why the Transaction is necessary to generate the public policy goals identified or how the benefits claimed will in fact be achieved by the Transaction. It is also not apparent from the material put to the Authority how such claimed benefits would be appropriately monitored, measured and enforced. The table below sets out the benefits claimed and comments on those.

<b>Benefit claimed</b>	<b>Benefit achievable / Link to proposed Transaction</b>
<p>Enhanced network capacity and reduced congestion achieved by the combination of Sure's and Airtel's networks.</p>	<p>It is unclear to what extent the networks of Sure and Airtel can be combined, aside from sharing hardware such as masts. This is because the Sure network uses Huawei technology whereas the Airtel network uses Nokia technology. We understand that, following the proposed Transaction, rather than being combined, the two networks would instead run alongside each other for a period, after which one or both networks would be removed and/or replaced. The extent of this claimed exceptional and compelling public interest benefit is therefore unclear.</p>
<p>Delivery of 5G more quickly than Sure would otherwise roll out this technology.</p>	<p>The link between the proposed Transaction and a faster roll out of 5G is not clear. The report does not explain why the Transaction is required to achieve a faster roll out of 5G and is a matter of exceptional and compelling public interest.</p>
<p>Airtel's customers will benefit from the superior speed and quality of Sure's network.</p>	<p>The basis for the claim that Sure's network is superior to that of Airtel appears to be a report commissioned by CICRA in 2017. We note that this report is now somewhat out of date.</p> <p>It is not clear why the Transaction is required to achieve this benefit as an exceptional and compelling public interest. Airtel customers are already able to switch to Sure if they consider that Sure's network offers superior speed and quality. The benefit of competition is that consumers already have that choice.</p>
<p>Airtel's customers will benefit from the enhanced resilience of Sure's network.</p>	<p>The basis for the claim that Airtel's customers will benefit from the enhanced resilience of Sure's network is not apparent. This is because, as set out above, the extent to which Sure's network and Airtel's network can physically be combined is unclear and the exceptional and compelling public policy reason justifying clearance on this ground is not set out in the Report.</p> <p>As noted, Airtel customers are already able to switch to Sure if they consider that Sure's network offers superior resilience. The benefit of competition is that consumers already have that choice.</p>

<p>More efficient, environmentally friendly network</p>	<p>As the Report does not contain any detailed evidence on this point, we are unable to comment on whether, or to what extent, this benefit will be achieved post Transaction.</p> <p>Assuming that this is an exceptional and compelling public interest benefit that can be achieved, the Report does not set out why the Transaction is necessary to achieve this benefit and/or why it could not be achieved through some other means, such as increased network sharing between Sure and Airtel.</p>
<p>Faster removal of High Risk Vendor (HRV) equipment from the mobile network and more cost-effective compliance with the forthcoming Telecoms Security Regulations (the <b>TSRs</b>)</p>	<p>The Report does not explain why the Transaction would allow Sure to implement the TSRs more rapidly. In any event, we understand that compliance with the TSRs will be mandatory (legal requirement) and, as such, it is not immediately obvious how compliance with mandatory legal requirements can be said to be an exceptional and compelling public interest benefit that is achieved by the Transaction or how the deadline could not be achieved in the absence of the Transaction. JT will for example have to comply with the regulations without the benefit of the Transaction.</p>

In order to assist the Committee, the GCRA below provides some high level comments, in particular with reference to other jurisdictions that allow exemptions of mergers for public policy reasons.

First, it is imperative that a decision of such significance as an exemption from the merger review process of a transaction of this nature by the States is based on objective and specific criteria. The materials from the Party that have been made available to the GCRA appear to fall some way short of that standard since they do not clearly and objectively articulate the public policy goals that the Transaction is designed to achieve.

Second, as to the public interest exemptions available in other jurisdictions where the government seeks to intervene in the standard merger regime notification and scrutiny process, the GCRA notes that issues of political salience such as risks to financial stability, media plurality, defence, and foreign investment in strategic industries feature. Furthermore, public interest interventions that are at odds with an economics-based competition assessment are generally limited to a small number of cases characterised by exceptional circumstances. Assurances about services being made available sooner, that they will be of a higher technical standard, that prices would be lower than they might otherwise be or that less expensive offers would remain in the market for longer would not generally be considered to amount to exceptional and compelling reasons of public policy in jurisdictions that apply this, or a similar, test.

Third, such a decision by the States is likely to come to the attention of an international audience and institutions in the competition law field; decisions such as these can invoke considerable interest not least because they are unusual and exceptional. It would therefore benefit the reputation of Guernsey if the application of the public interest test to a proposed market concentration is based on objective and specific criteria that rigorously seeks and secures the benefits that meet the exceptional and compelling reasons of public policy.

### *Competition assessment*

The Report states that it has not performed a detailed competitive assessment of the impact of the Transaction. The GCRA's comments are therefore, necessarily, at a high level.

The Report states that the proposed Transaction will result in a reduction in the number of competitors from three to two in two markets – the “retail mobile” market and the “wholesale roaming” market. The merged entity would have a market share of 77% by value (80% by volume) in the retail mobile market and 73% by value in the wholesale roaming market, based on 2021 figures. In the identified markets, the Transaction amounts to a significant increase in market concentration. There is also a question as to whether these are in fact the only markets relevant to this transaction. The market for the provision of wholesale mobile networks that for example Mobile Virtual Network Operators might in future rely on, appears to be another market relevant to this Transaction not covered in the material provided.

In general terms, the larger a merged entity's market share, the more likely it is to be able to act independently of both its customers and its competitors in those markets. It is this lack of competitive and customer constraint that would otherwise be present in a competitive market which allows a company that enjoys a position of market power to act in ways that are harmful to competition and to consumers. Where a merged entity holds a share in excess of 50% on a market, it is presumed to hold a dominant position, meaning that these risks are likely - which is more the case when market shares are approaching 80% as in this Transaction. If the GCRA were to review this Transaction in the usual way, these concerns would be significant and would need to be assessed in detail.

The GCRA notes that Sure has offered commitments to deal with the above concern, insofar as they apply to the retail mobile market. These are:

- Allowing existing customers of Sure and Airtel to maintain their existing terms and prices for 36 months following clearance of the Transaction.
- Continuing to offer Airtel's “Basic” plan (in the value area of the market)
- Continuing to offer Sure's “Unlimited” plan.

In respect of these commitments, the GCRA has the following high level comments.

First, it is unusual for behavioural, rather than structural commitments to be accepted to address potential competition concerns of the type likely to be generated by the Transaction. It would be more usual to expect the merging parties to offer a structural remedy (such as divestment). There are for example no commitments to divest spectrum or number ranges which might be minimum requirements in these circumstances. Structural remedies are more likely to counterbalance the anti-competitive effects created by a merger that would otherwise create such a degree of market concentration and market power. As well as generally less effective, behavioural remedies also require ongoing monitoring to ensure that they are complied with which can be problematic as circumstances and technologies in markets change.

Second, the GCRA notes that the Report does not explain why these commitments deliver benefits beyond those that could be expected if the Transaction did not proceed. These are usually examined by reference to the counterfactual and below we examine two.

- If the Transaction did not proceed and Airtel left the market (**Counterfactual One**), the remaining competitors (JT and Sure) would need to compete to win Airtel's customers by offering products and prices that were attractive to those consumers. We also assume that

Sure would continue to offer its Unlimited plan in a Counterfactual One scenario. In other words, it is reasonable to assume that, in a Counterfactual One scenario, consumers would enjoy the benefits to which the commitments relate. The Report does not explain, by reference to Counterfactual One, why the commitments offered protect competition and consumers to an extent that would outweigh the negative effects (market concentration and creation of a dominant position) of the Transaction.

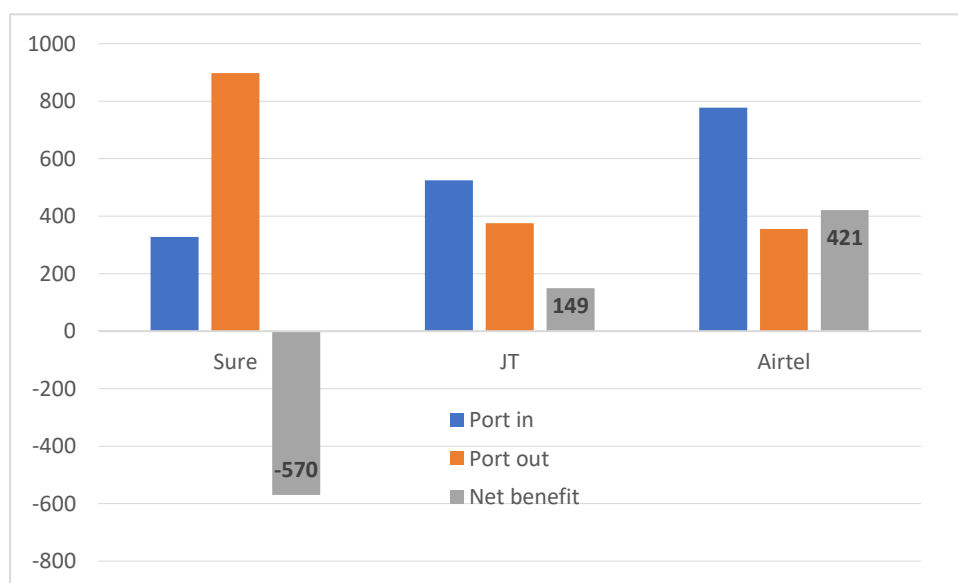
- If the Transaction did not proceed and Airtel remained in the market (**Counterfactual Two**), it is reasonable to assume that both Airtel’s “Basic” plan and Sure’s “Unlimited” plan would continue to be available to customers. In other words, it is reasonable to assume that, in a Counterfactual Two scenario, consumers would enjoy the benefits to which the commitments relate. The Report does not explain, by reference to Counterfactual Two, why the commitments offered protect competition and consumers to an extent that would outweigh the negative effects (market concentration and creation of a dominant position) of the Transaction.

In respect of the concern identified in the wholesale roaming market, the Report states that countervailing buyer power would ensure that the Transaction did not give rise to anti-competitive effects on that market. It does not, however, provide the empirical evidence on which that conclusion is based and the GCRA is therefore unable to comment further on the assertion.

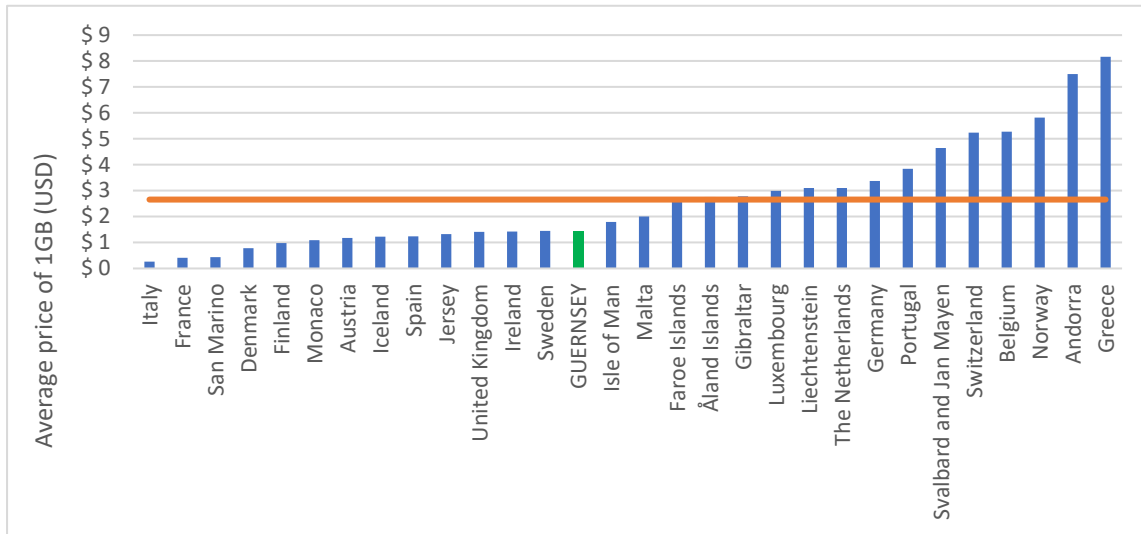
#### *Regulatory impact*

The retail mobile market in Guernsey is currently characterised by competition on the merits between the three mobile operators (Sure, JT and Airtel) with incumbency advantage a factor of less importance than in other telecom markets because mobile technology awards were made on a competitive basis in contrast to much of the fixed network infrastructure where legacy advantages continue to prevail. This has undoubtedly delivered benefits to Guernsey mobile consumers in the form of increased choice and lower prices. It has also substantially reduced the extent of regulatory oversight required. The Authority has not been in a position to update the analysis that informed its priorities over 2022 in the time available so draws on its previous analysis below.

The Figure below illustrates the number of consumers switching mobile service provider in 2020. It is evident that Airtel’s offering led to the majority of switching customers doing so to take its services.

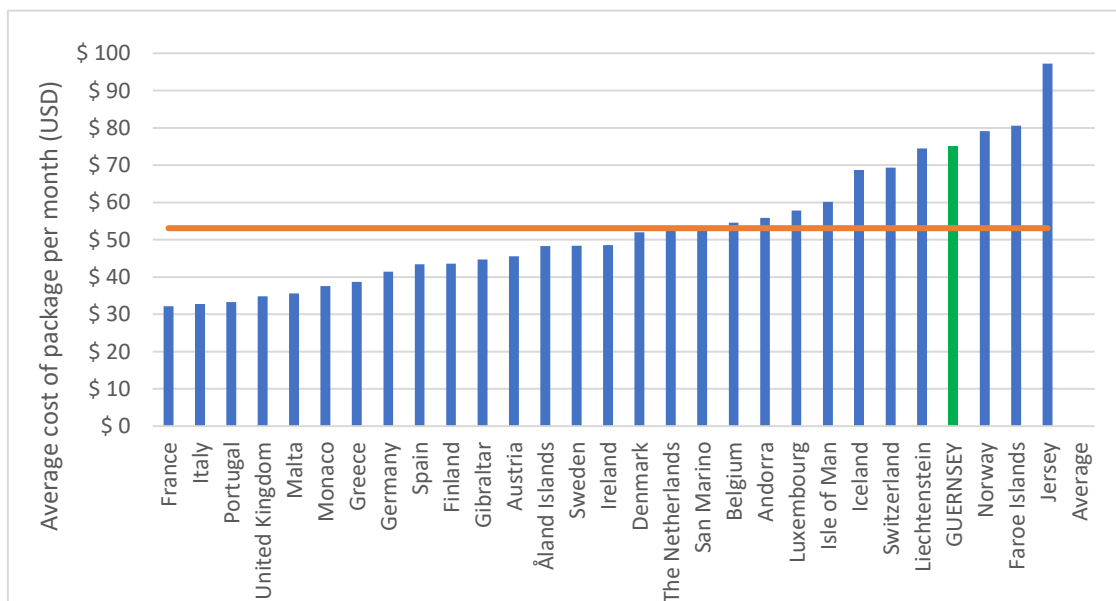


The Figure below illustrates the rank order by average cost per GB for mobile broadband in Western European countries in 2020. Guernsey is well placed in terms of international competitiveness in respect of mobile service. This position is almost certainly the consequence of a more competitive market where competition is on its merits.



The GCRA 2022-2024 work programme considered the cost contributors to Guernsey’s fixed broadband market and business circuit lines market. Both markets are significantly more concentrated than the current mobile market in Guernsey. The Authority has not been in a position to update the analysis in the time available but draws on its previous analysis below.

The Figure below illustrates Western Europe countries’ fixed broadband average plan costs for 2020. In contrast to mobile, Guernsey is at the upper end of the price range compared to other jurisdictions where unlike mobile, in Guernsey a dominant firm, Sure, is present.



While it is more nuanced between lower and higher speeds, a similar comparison is apparent from the leased line international price comparison which informed the GCRA’s 2022-2024 work

programme. Again, in contrast to mobile, Guernsey is at the upper end of the price range compared to other jurisdictions in a market where unlike mobile, a dominant firm, Sure, is present.



In conclusion, the benefits of competition have been a major contributor to Guernsey’s high ranking alongside other countries in the mobile market in contrast to markets where concentration is high and Guernsey’s international ranking is significantly less favourable. The GCRA notes that, from a purely regulatory perspective, it is unusual consciously to substitute a situation in which there is effective competition, for one in which a lack of effective competition will require intensive regulatory oversight to protect consumers and we assume that the Committee will wish to take appropriate steps to ensure that Guernsey consumers and businesses are not adversely affected by this Transaction.

Should you wish to discuss any of the contents of this letter, please do not hesitate to contact me.

Yours sincerely

**Michael Byrne**  
Chief Executive