Response by Sure (Guernsey) Limited and Sure (Jersey) Limited to CICRA consultations on amendments to the Guernsey and Jersey Mergers and Acquisitions Regimes

Sure (Jersey) Limited and Sure (Guernsey) Limited, collectively referred to as 'Sure' is submitting this response in relation to CICRA's consultations "Consultation on amendments to the Guernsey Mergers and Acquisitions Regime" (CICRA Document 15/43) and "Consultation on amendments to the Jersey Mergers and Acquisitions Regime" (CICRA Document 15/44), which were both published on 13 November 2015. This is a non-confidential joint response to both consultations, which we are happy for CICRA to publish on its website.

Sure would like to start by saying that it welcomes these reviews of the appropriate mergers and acquisition process in Guernsey and Jersey. We believe that, as far as possible given the different legislative frameworks in each Bailiwick, the processes should be aligned. Many businesses operate on a pan-Channel Islands basis and there have been situations where a merger has been subject to review in one jurisdiction and not the other, or a different type of review in each jurisdiction.

This happened, for example, when the Bahrain Telecommunications Company B.S.C ("Batelco") acquired the Sure businesses from Cable & Wireless Communications PLC ("CWC") in 2013. The acquisition was notifiable under the Competition (Mergers and Acquisitions) (Jersey) Order 2005 ("the Jersey Order") but not under The Competition (Prescribed Mergers and Acquisitions) (Guernsey) Regulations 2012 ("the Regulations").[1]

Issue 1 Local Turnover Test

(a) *Comments on the merits, as well as the practical implications, of a "local" turnover notification test are welcomed.*

(b) *Where respondents have information that might further contribute to informing the appropriate level of the turnover threshold, CICRA would welcome receiving such data.*

Sure believes that the same mandatory notification tests should apply in Jersey as in Guernsey and these tests should be consistent with recognised best international practice, as identified by the International Competition Network (ICN). As such, it would seem that a turnover threshold test would be the appropriate test for both jurisdictions for any mandatory notification regime.

We agree that it would be appropriate to calculate turnover for the purposes of establishing whether a transaction is notifiable, in terms of local turnover only. This is currently the case for non-financial institutions - such as those in the communications sector - where the relevant turnover is identified according to the location of the customer to whom services or products are sold. It would seem logical to extend this to the financial sector too.

[1] Although the transaction did need to be notified in both jurisdictions under the change of control provisions contained in the respective Guernsey and Jersey licences of the relevant CWC's subsidiaries, and was subject to a separate assessment by CICRA under those licence provisions.

Sure notes that CICRA is proposing that the same turnover threshold levels should be applied irrespective of the type of merger involved (that is, whether it is horizontal, vertical or conglomerate). We would question whether this is appropriate, especially when it seems that CICRA's main concern is to concentrate its limited resources on the consideration of those proposed transaction that are most likely to have the potential to significantly affect competition in a Jersey, Guernsey or Channel Islands market. This would seem to suggest that higher turnover thresholds could apply to conglomerate mergers, which have less likelihood to raise competition concerns, and would mirror the currently higher thresholds applied to the share of supply/purchase test in Jersey for conglomerate mergers. In this respect, we would also refer CICRA to our comments in response to Issue 4 below.

We do believe that CICRA should have the ability to subject those proposed transactions that have turnover below the prescribed levels to a "voluntary" notification regime should they have the potential to significantly affect competition. However, the use of the word voluntary may result in parties refusing to co-operate with CICRA's requests for information. It may be better for CICRA to instead describe this a discretionary notification regime. This would be applied at CICRA's discretion and subject to CICRA being able to demonstrate that it has reasonable grounds for believing that there may be substantial competition effects arising from a proposed transaction. CICRA would also need to consider the extent to which it could apply fees for such a discretionary regime. It may be that such fees should only be applicable once CICRA has determined that it did have reasonable grounds for needing to do a more thorough investigation of any substantial competition effects. Any such fees should only be payable by the parties involved in the proposed transaction and not fall on any other parties or the taxpayer.

Issue 2 Definition of "Financial Institution"

> *CICRA would welcome comments on the merits, as well as the practical implications, of applying a definition of "financial institution" which reflects the wording adopted in the EU Regulations.*

Sure has no comments to make on this issue, given that it is only relevant to credit and financial institutions.

Issue 3 Exemptions

> *CICRA would welcome comments on the type of exemptions that might be considered reasonable, without compromising the Ordinance's/Law's goal of prohibiting those mergers and acquisitions which would substantially lessen competition in Guernsey/Jersey or any part thereof.*

Sure agrees that exemptions of the nature identified by CICRA would be appropriate, subject to the need to ensure that any such exemptions would not apply in the event that a merger or acquisition raised legitimate concerns about a substantial lessening of competition in a relevant market within Guernsey and/or Jersey.

Issue 4 Share of Supply/Purchase

(a) *Comments on the merits, as well as the practical implications, of a "share of supply/purchase" test are welcomed*

(b) *Where respondents have information that might further contribute to informing the appropriate level of the share of supply/purchase threshold, CICRA would welcome receiving such data.*

CICRA should be pragmatic in its application of the share of supply/purchase test and especially remember that the purpose of this test is to establish whether a transaction may lead to a substantial lessening of competition within a relevant market. Indeed, we note that CICRA states[2]:

"*Given the level of resources available to CICRA it is important to ensure that resources are focused on those mergers with the greatest likelihood of substantially lessening competition in Jersey and narrowing the turnover to local turnover only will assist in that regard."*

We completely agree with this statement but we would ask whether CICRA also needs to review how compatible this is with how it currently considers acquisitions that qualify under the "conglomeration test" contained in the Jersey Order (and which may also apply in Guernsey should CICRA proceed to introduce a share of supply/purchase test there too). For example, when Batelco acquired Sure in 2013, it did not qualify in terms of any horizontal or vertical relationships, but did qualify under Article 4 of the Jersey Order as Sure had a more than 40% share of the mobile termination market. CICRA also asked for details on certain other markets where it thought that Sure's share may satisfy the 40% threshold. However, it was very clear from the outset that there would be no effects on competition given that Batelco had no operations in the Channel Islands at the time.

Despite this, CICRA still required the parties to provide a detailed Merger Application Form explaining the position of Sure in any and every market in Jersey[3] where its current share of supply/purchase may have exceeded 40%, even though those shares would remain exactly the same post-acquisition. This meant that Batelco and Sure had to incur significant resource costs, including engaging external counsel, to assist in providing detailed submissions to CICRA, which were unnecessary. Likewise, CICRA ended up devoting significant resources itself to consideration of this acquisition, which could have been better employed on other CICRA matters[4]. There were also unnecessary delays to completing the transaction as a result of CICRA's requirements.

We note that CICRA's Decision[5] on the transaction stated:

"*Batelco's operations are currently centred in the Middle East and it has no existing business activities in the Channel Islands. The Buyer and the Target are therefore active in very distinct jurisdictions and there is no existing or potential overlap of their activities in any markets for goods and services traded in Jersey. In the absence of any business activities on the part of the Buyer in the Channel Islands, the JCRA is satisfied that the Acquisition will not lead to a substantial lessening of competition in any markets within Jersey.*"

There was no doubt that this was the case from the very outset – CICRA would have known that Batelco was not licensed in the Channel Islands to provide any communications – so the six weeks that

[2] See paragraphs 42 and 44 respectively of the Guernsey and Jersey consultation documents.
[3] The acquisition was not a "prescribed" acquisition under the Guernsey merger provisions as it did not satisfy the turnover tests, due to Batelco having no turnover in Guernsey.
[4] We do not know whether CICRA also contacted any of the suppliers or customers were identified by Sure, which may have also resulted in third parties having to devote time and resources unnecessarily.
[5] See paragraph 17 of CICRA Decision MAF 954/13, available at http://www.cicra.gg/Batelco decision.pdf

it took CICRA to formally conduct its review of the acquisition were a waste of time and resources for all parties concerned.

In relation to the appropriate thresholds to apply to the turnover tests, we note that CICRA is proposing to apply different thresholds for horizontal and vertical mergers (at 25%) compared to conglomerate mergers (at 40%). We agree that different thresholds should apply although as noted above, if there is no overlap in the local market, even that higher threshold may be inappropriate for considering a conglomerate merger.

The extent to which a higher threshold for horizontal and vertical mergers than 25% would be appropriate is likely to vary depending on the market concerned. If CICRA is trying to align itself more with European practice then it would seem appropriate to keep the threshold at 25%.

As far as the geographic scope of the market is concerned, Sure believes that this should depend on the markets involved in the transaction. There will be some markets where competition really does take place on a pan-Channel Islands basis and therefore the share of supply/purchase test should be applied on that basis. However, there may be some markets where the geographic scope of competition is either Jersey or Guernsey specific and as such should be assessed on that basis.

Issue 5 "Preliminary review" process

CICRA would welcome comments on the retention of, and any amendments to, the "Preliminary Review" process.

Sure has no comments to make on this issue, given that it is only relevant to credit and financial institutions.

Issue 6 European Competition Law

CICRA would welcome comments on the clarification that could be achieved in a new Regulation or revised M&A Guidelines regarding the treatment of corresponding questions under EU law.

Sure agrees that CICRA should align its approach to EU competition law and clarify in its Guidelines where its approach differs and the reasons why.

Issue 7 Any other suggested amendments to the Regulations

Whilst Sure realises that this consultation deals specifically with the applicable tests to determine the scope of the M&A regulations, it notes that CICRA invites comments on any other suggested amendments to the respective Regulations. In this context, Sure wishes to raise the issue of communication and transparency within the merger review process. We set out below our comments and proposals in this regard.

CICRA has no regulations that specifically relate to communications and transparency within their merger review process and Sure believes that this can lead to both uncertainty in the market and a potentially incomplete review process caused by interested parties not submitting arguments and information on all relevant aspects of the merger.

As far as Sure is aware, CICRA has no guidelines or regulation that govern the release of information throughout the merger review process. This lack of transparency framework means uncertainty as to when announcements will be made, what stage decisions are at, what issues CICRA has identified

relating to the merger, what information is currently being considered by the CICRA, and whether certain arguments have already been considered by CICRA. This uncertainty as to timings and lack of information makes it difficult for businesses to plan ahead with regard to their responses to such reviews. It also means that information or arguments not originally considered by CICRA may be missed in the decision-making process, Sure therefore sees communications and transparency rules and procedures as critical parts of the merger review process. Sure considers CICRA's current lack of these elements in its merger review processes as a significant weakness.

Sure notes that the lack of communications and transparency rules and procedures goes against internationally recognised best practices and recommendations from a number of key, relevant competition authorities, as discussed below.

ICN Guidelines

The International Competition Network, an international body devoted to the enforcement of competition law with membership comprising competition agencies from 92 jurisdictions internationally, produce best practice guidelines for regulators to use in the case of merger notifications.[6] We note that CICRA itself references these guidelines as part of its reasoning in changing from a share of supply testing methodology to a turnover threshold test in Jersey.

The best practice guidelines state that transparency is key to the application of the merger review process.

> *"Transparency is important to achieve consistency, predictability and, ultimately, fairness in applying merger control laws, thereby enhancing the credibility and effectiveness of merger control enforcement … Transparent application of merger control laws entails making all relevant laws, regulations, and other materials relevant to merger control law, policy, and practice readily available to the public in a timely manner"*

It specifically notes that procedures applicable should be publically available to determine:

> *"(v) review periods … (vii) investigative procedures … (viii) any deadlines that the merging parties, third parties, or the competition agencies must obey during the review period; (ix) procedures and deadlines for appealing adverse decisions or for challenging a merger; (x) procedural rights of merging and third parties"*

It also notes that 'Procedural Fairness' should be a basic attribute of all merger review procedures, and comments specifically that this should include providing "third parties with a legitimate interest in the merger … a meaningful opportunity to express their views". It gives a number of examples of how this might be achieved.

Below are examples of guidelines and regulations provided by other bodies responsible for approving mergers in their respective jurisdictions.

[6] http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf

The UK

In the UK, the Competition and Markets Authority (CMA) is responsible for final oversight on whether mergers may proceed. Their guidance on what information must be relayed to relevant parties is clear on the matter:[7]

> "*Transparency is important for a number of reasons. Transparency is a means of achieving due process and ensuring that parties directly involved in a case are treated fairly. It also enables other interested persons to engage effectively with the CMA and to contribute to its work. Ensuring due process for those directly involved in the CMA's work and effectively engaging with other interested persons in turn improves the effectiveness and efficiency of the CMA's work, and the quality and robustness of its decision-making … Providing clear information about its cases also enhances the visibility of the CMA's work, thereby increasing its impact, predictability and accountability."*[8]
>
> "*The CMA aims to achieve transparency in its work by:*
>
> - *ensuring the parties directly involved and other interested persons (if appropriate) are informed during the course of a case of key developments, for example by notifying them of the formal commencement of a case (unless this may prejudice the investigation), sharing developing thinking with relevant parties at appropriate stages of a case, providing indicative timetables, and identifying contacts and decision makers*
> - *engaging with the parties directly involved at an early stage of its cases (unless doing so may prejudice the case)*
> - *ensuring that at appropriate times during the case parties directly involved and other interested persons have an opportunity to raise their concerns and provide their views regarding a particular case*"[9]

Further to outlining its aims and methods for achieving transparency, it specifically states in the guidance to CMA procedure on mergers[10] the various stages of both information dissemination and collection, along with deadlines for when these stages can be expected to occur in the process. For example, in Phase 1, Stage 3 includes "invitation to comment" from third parties, which includes invitation to comment or contact with third parties and then assessment of these responses.[11] Similarly, within Phase 2, Information Gathering is usually the first phase, lasting 1-6 weeks and includes inviting third party submissions, holding third party hearings (with the results of said hearings publically disclosed) and also the "publication of an issues statement, reflecting theories of harm on which the CMA is focusing on"[12] which it then considers any responses to it received.

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[7] CMA Transparency Statement: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/270249/CMA6_Transparency_Statement.pdf

[8] Ibid, p3

[9] Ibid, p4

[10] Mergers: Guidance on the CMA's jurisdiction and procedure: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/384055/CMA2__Mergers__Guidance.pdf

[11] ibid, p39

[12] Ibid, p96

Importantly, when the CMA issues invitations to comments, it issues its own analysis of the information it has received, identifying 'theories of harm' where the merger could lead to a substantial lessening of competition (SLC). This provides the respondents with a framework for their submissions and also assists the CMA in that it will receive responses that are structured according to its own analyses. Were the CMA to not include its theories of harm, then it is possible that interested parties without access to specialised competition expertise could miss potentially important consequences of the merger.

The European Commission

The EC has best practice guidance on communication with third parties, stating:

> "*One of the aims of these Best Practices is to enhance transparency in the day to day handling of merger cases and in particular, to ensure good communication between DG Competition, the merging parties and third parties. In this regard, DG Competition endeavours to give all parties involved in the proceeding ample opportunity for open and frank discussions and to make their points of view known throughout the procedure*."[13]

It then subsequently recommends 'State-of-Play' meetings, whereby all parties in the process are informed of various stages of the decisions:

"*Notifying parties will normally be offered the opportunity of attending a State of Play meeting at the following five different points in the Phase I and Phase II procedure …*

- *before the expiry of 3 weeks into phase 2 …*
- *within 2 weeks following the adoption of the Article 6(1)(c) decision [Phase 1] …*
- *before the issuing of a Statement of Objections …*
- *following the reply to the SO and the Oral Hearing …*
- *before the Advisory Committee meets"*[14]

Whilst the EC notes that such meetings are voluntary in nature, given the frequency of such meetings, it is clear that the EC sees transparency as a critical part of the decision-making process.

Suggested Courses of Action

It is clear from the above evidence that the EC, the UK and the ICN all recognise the importance of communications and transparency and see them as a key part in the analysis and decision-making process for merger reviews. Sure is not aware that CICRA has any communication and transparency rules regarding Merger investigations. Our experience of CICRA's communications in past merger cases and in the current investigation into the proposed merger between JT and Airtel indicate that CICRA does not follow best practice in communications and transparency. For example, whilst CICRA stated on its website that its consideration of that proposed transaction would go to a second stage, as it had identified possible competition issues, it did not give any information on what those potential issues were. Transparency of CICRA's "theories of harm" will, as noted above, give third parties

[13] EU Competition Law, Merger Legislation: Situation as at 1st July 2013: http://ec.europa.eu/competition/mergers/legislation/merger_law_2013_web.pdf
[14] Ibid, p306/307

information that will allow them to frame any representations they may wish to make under the more detailed second stage investigation.

Sure acknowledges that it may not be appropriate for CICRA to simply copy the rules and procedures from much larger competition authorities, but this does not mean that communications and transparency is not equally important in a small jurisdiction as in a much larger one. It is arguably more important in small jurisdictions where many interested parties are likely to be small companies without access to specialist competition expertise.

To remedy this situation, Sure suggests that CICRA initiates a consultation process on its communications and transparency rules and procedures for merger enquiries and other competition investigations. It may in fact be useful if CICRA were to consult on all its communications and transparency rules and procedures across competition and regulatory activities, as these vary between Guernsey and Jersey and in some cases do not exist.

As an immediate step, Sure also requests that CICRA starts complying with the international best practice examples we have presented above in order that current and future merger investigations are conducted in such a way as to ensure that CICRA receives comments and information on all critical aspects of the merger, even if the respondents do not all have access to specialised competition resources.

CICRA next steps

Finally, and related to the above, Sure notes that CICRA will be considering responses to the Consultations and then providing specific advice to the Department for Commerce and Employment in Guernsey, and to the Minister for Economic Development in Jersey. CICRA states that it will publish its formal proposals to these departments. In the interests of transparency Sure believes that these proposals should also be published and made available to all other stakeholders by placing them on CICRA's website.

Sure (Guernsey) Limited and Sure (Jersey) Limited
15th January 2016