Mobile Call Termination

2017

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Final Decision

Market Definition and Finding of Dominance

Document: CICRA 17 / 27 (NON-CONFIDENTIAL)

September 2017

Guernsey Competition and Regulatory Authority

Suite 4, 1st Floor, La Plaiderie Chambers,
La Plaiderie
St Peter Port
Guernsey, GY1 1WG
+44 (0)1481 711120
www.cicra.gg

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1. Executive Summary

1.1 The provision of wholesale voice call termination services is needed to support the ability of callers to make voice calls to Guernsey mobile users.

1.2 Retail mobile service providers pay a charge (the mobile termination rate or **MTR**) to mobile network operators for the provision of voice call termination services.

1.3 MTRs represent one component of the cost of calls made by consumers. Because the cost of MTRs is passed through by the retail mobile provider to the consumer and given that the charges imposed by mobile network operators in Guernsey are identical, there is little incentive for such operators and/or providers to negotiate with each other for a more favourable MTR, with all operators currently charging the maximum MTR permitted by the Guernsey Competition and Regulatory Authority (the **GCRA**).

1.4 The level of MTRs in Guernsey is currently regulated by the GCRA. However, prior to any consideration as to whether the current regulatory cap on the level of such charges should change, for reasons of due legal process, there is a need to define the relevant market and establish whether there is the existence of significant market power. This is the purpose of this Final Decision.

1.5 This document follows a consultation issued by the GCRA in November 2016 (the **Consultation**[1]), and a Draft Decision issued by the GCRA in March 2017 (the **Draft Decision**)[2], to both of which stakeholders were invited to respond. It sets out the GCRA's considered position as to the relevant market and existence of significant market power in the provision of wholesale voice call termination services in Guernsey, having taken into account the responses received to the Consultation and the Draft Decision.

1.6 In the GCRA's view there are three separate relevant markets specific to three Guernsey licensed operators, each of which hold significant market power in the provision of wholesale voice call termination services for calls to their own network.

1.7 The GCRA envisages that the period for this review will be 3 - 5 years. This is because the GCRA does not anticipate that market conditions will change over a shorter time frame such that the market definition would need to be revisited at an earlier point. The GCRA's view is that the only market development that could potentially affect market conditions would be the introduction of 5G, which is not likely to occur any earlier than the time frame indicated above. However, the GCRA will continue to monitor developments in this market and will consult again should market conditions change materially during the review period.

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1 Case T1236GJ, CICRA 16/49, www.cicra.gg
2 Attached as Annex 1 to this Final Decision.

2. Background

2.1 Telecommunications networks, both fixed and mobile, need to be connected to one another in order that customers of those different networks are able to call each other.

2.2 Call termination means the completion of a call from a customer of another network. Mobile call termination (**MCT**) is a particular type of call termination service provided by a mobile network operator (**MNO**), which is the receiving operator. It enables the originating network operator to connect a call through to a customer of a different MNO.

2.3 Depending on the nature and origin of a call, there are a number of other services that support the conveyance of a call to its ultimate destination including call origination and transit which attract different charges. Those services are not within the scope of this review.

2.4 An MCT service therefore provides the originating operator access to the last leg of a call being made by one of its customers to the customer of the terminating MNO to allow the call to be completed. For this service, an amount known as the mobile termination rate (**MTR**) is paid to the MNO providing the wholesale call termination (**MCT**) service.

2.5 Regulators in many European countries have identified a need to ensure that MTRs are set at a level that reflects the efficient and cost-effective provision of those services.

2.6 In Guernsey, the Office of Utility Regulation ('OUR') carried out two separate reviews of MTRs between 2006 and 2011. The first review determined that an average MTR of 6.75 ppm should be put in place from 1 April 2007 and a further review in 2009 resulted in all Guernsey MNOs being found to hold significant market power ('SMP') and applying MTRs at a flat rate of 4.11 pence per minute ('ppm') (including transit charges).

2.7 In November 2016, the GCRA issued the Consultation. The Consultation provided the input to the Draft Decision[3].

2.8 The GCRA sought the views of the stakeholders on the following issues :

a. Do the MNOs active in Guernsey have SMP on the relevant market?
b. If the MNOs do have SMP, is a price control, ie, setting an MTR, the most appropriate remedy?
c. If setting an MTR is the most appropriate remedy, what is the basis on which the MTR should be calculated?

2.9 After consideration of the responses received to its Consultation, the GCRA issued its Draft Decision, which:

a. Defined the relevant market (the '**market definition**'), and,

[3] Case T1236GJ, CICRA 17/08, www.cicra.gg

b. Determined whether the MNOs active in Guernsey have SMP on the relevant market (the **assessment of dominance**).

2.10 The GCRA received a total of three responses to its Draft Decision. These were from:

- Sure;
- JT, and,
- Airtel-Vodafone (Airtel)

2.11 After reviewing the responses received, the GCRA offered each respondent a meeting. The purpose of those meetings was to address areas where a respondent had indicated that it did not understand points made by the GCRA in the Draft Decision and/or for the GCRA to ask for clarification of points made in the response. Each respondent was offered the opportunity to provide a supplementary response to the GCRA covering these points, and each did so.

2.12 For ease of reference, the GCRA has numbered the paragraphs of Sure's responses. These numbered versions of Sure's responses, together with JT and Airtel's responses are attached to this Final Decision as Annex 2.

2.13 The GCRA has taken all responses and supplementary responses to the Draft Decision and the Consultation into account in reaching this Final Decision. The GCRA would like to thank each of the respondents for their input to this process. The non-confidential sections of the responses are published on the CICRA website, *www.cicra.gg.*

2.14 The GCRA will continue to carry out its assessment as to the appropriate remedy in terms of whether the level of MTRs charged by those operators with SMP is appropriate. This will form part of a subsequent and separate consultation.

Disclaimer :

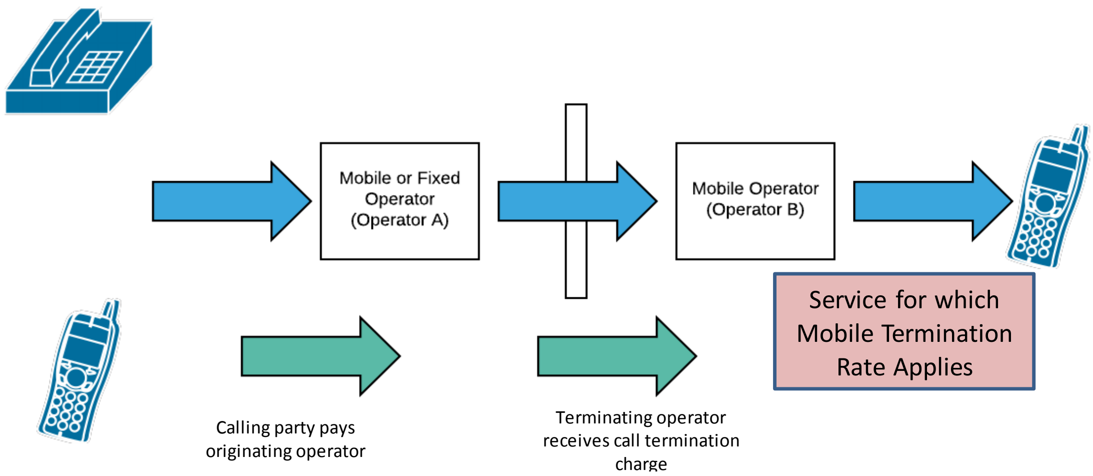
This document does not constitute legal, technical or commercial advice and is without prejudice to the legal position or the rights and duties of the GCRA to exercise regulatory powers generally.

3. Review of the Mobile Call Termination Market

Introduction

3.1 An operator originating a call to a mobile number (the **originating operator**) typically pays an amount known as the **mobile termination rate** (**MTR**) to the **mobile network operator** (**MNO**) providing the wholesale service. This is the current practice in Guernsey (as in many countries in Europe and across the world). The call flow is illustrated in Figure 1, below :

Figure 1 : Mobile termination and calling network provider pays



3.2 In this section, the GCRA introduces its powers relating to price controls and how these are applied specifically to the provision of mobile call termination.

The Place of Price Control Regulation in the Regulatory Framework

3.3 The GCRA has specific powers to determine the maximum level of charges that operators may impose in certain markets. Set out in the following sections are :

a. What these “price control” powers are;
b. The generally accepted rationale for controlling prices in the telecommunications sector; and
c. The approach which is commonly taken to controlling prices.

The powers of the GCRA

3.4 In accordance with section 2 of the Telecommunications (Bailiwick of Guernsey) Law 2001 (the **Telecommunications Law**), the GCRA may grant a licence authorising any person to establish, operate and maintain a telecommunications network or to provide telecommunications services of any class or description specified in the licence.

3.5 Section 5 of the Telecommunications Law allows the GCRA to include such conditions in a telecommunications licence as appear to the GCRA to be appropriate. Without prejudice to the generality of this power, section 5(1)(f) of the Telecommunications Law states that the GCRA may include in any licence "*conditions regulating the prices, premiums and discounts that may be charged or (as the case may be) allowed by a licensee which has a dominant position in a relevant market*".

3.6 To that end, licence condition 28.2 of Guernsey telecommunications licences provides that the GCRA "*may determine the maximum level of charges the Licensee may apply for Licensed Telecommunications Services within a Relevant Market in which the Licensee has been found to be dominant*".

3.7 In addition, section 10(2)(c) of the Telecommunications Law provides that, where the GCRA has determined that a licensee has a dominant position in a relevant market, the GCRA may direct that that licensee "*provide interconnection or access on terms, conditions and charges that are transparent and cost-orientated having regard to the need to promote efficiency and sustainable competition and maximise consumer benefit*".

3.8 The GCRA therefore has two alternative routes through which it can regulate MTRs; it may do so either through licence condition 28.2 or by issuing a direction under section 10(2) of the Telecommunications Law[4].

3.9 In either case, it is a pre-condition to the imposition of a price control upon a Licensee by the GCRA that the Licensee should first have been found to be "dominant" in the regulated market '(the concepts of 'dominance' and 'significant market power' (**SMP**) are used interchangeably). This reflects the underlying rationale for price regulation, as explained in the following paragraphs.

The rationale for regulating prices

3.10 Dominance/SMP means that a company has a position of economic strength in a market where as a result of that position, the company is not subject to the normal constraints that would be present in a competitive market, but is instead able to act to an appreciable extent independently of its competitors, its customers and, ultimately, consumers.

3.11 In a competitive market, if a non-dominant company were to raise prices above the competitive level, competitors could respond by offering more competitive pricing and customers would be able to switch away to these more competitive offers. In a market where a dominant player raises its prices above the competitive level, the ability of customers to switch away to more competitive suppliers is limited or may even be non-existent and since competition is fragile, the ability of competing suppliers to offer more competitive prices may, in any event, also be limited. A dominant provider can therefore charge prices that are above those that would prevail in a competitive market, to the detriment of consumers.

3.12 In a market subject to economic regulation, such as the telecommunications market in Guernsey, the relevant regulatory body may take steps *ex ante* to prevent this type of harm arising by imposing a price control. In Guernsey, as explained above, the GCRA has the

[4] The GCRA notes that Sure does not agree with the GCRA's assessment of its legal powers. As explained below, the GCRA is not required to consult on the correct interpretation of the law. However, for completeness, Sure's comments in this regard are noted in Appendix 1 to this Final Decision.

power to impose this type of price control on licensees within a relevant market in which that licensee has been found to be dominant.

Approach to MTR price regulation

3.13 The GCRA's approach to MTR price regulation (in respect of which it has taken account of the European Commission's recommended approach and the experience of other regulatory authorities in Europe) is as follows:

(a) First, the relevant wholesale market(s) susceptible to *ex ante* regulation is defined[5];

(b) Second, the GCRA determines whether any operator(s) hold(s) a dominant position on any such market;

(c) Third, if the GCRA determines that such a dominant position exists and identifies a need for remedies, it proposes appropriate regulatory measures

3.14 Having considered the views of the respondents to its Consultation and Draft Decision, the GCRA is in a position to confirm the defined relevant markets and its analysis of the state of competition within these markets.

3.15 Where markets are deemed to be uncompetitive, the GCRA must consider appropriate regulatory obligations on any operator that has been identified to have significant market power. The regulatory obligations that might be appropriate in this case will form part of a separate review and are, consequently, outside the scope of this Final Decision.

[5] The main focus of an analysis of the relevant markets is to identify the competitive conditions prevailing in a market by assessing systematically the competitive constraints which are faced by undertakings in the market. A market review commences by defining a market, which is then analysed to assess the degree of effective competition.

4. Analysis – responses to Draft Decision and Conclusion

4.1 Introduction

4.1.1 Any SMP designation consists of two distinct steps. First, the relevant product and geographic markets must be defined, and second, the question of whether the undertaking in question holds significant market power (**SMP**) on that market must be addressed. Such assessments are typically forward looking and so, for the purposes of this review, the GCRA will consider likely market developments over the next three to five years.

4.1.2 It is important to bear in mind that the relevant market under consideration here is a wholesale market, namely the market on which wholesale termination of voice calls is provided (however that market is defined). However, in carrying out an assessment of the relevant wholesale market/s, it is first appropriate to consider the retail markets since the starting point for the overall assessment of wholesale markets is generally accepted[6] to be the definition of the relevant retail markets from a forward looking perspective[7], taking into account demand-side and supply-side substitutability[8]. This is because demand for wholesale products is derived from the retail market and will be affected by its characteristics[9].

4.1.3 Once it has defined the relevant downstream (retail) market, the GCRA then moves to an analysis of whether consumers' behaviour in the downstream market, ie, the retail level, is capable of acting as a constraint on the prices charges by a mobile network operator (**MNO**) at the wholesale level.

4.1.4 Finally the GCRA defines the wholesale market and assesses whether any operator has SMP on that wholesale market.

A. RETAIL MARKET

4.2 Retail (product) market definition

GCRA process and Draft Decision

4.2.1 In its Consultation, the GCRA considered that the appropriate starting point for its assessment would be a voice call initiated by the calling party to the called party's mobile number for which a termination fee is applicable. This is because callers value calls that successfully reach the called party. In this respect, it is the end-to-end call which is important

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6 See Recital 4 of the 2007 EC Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation.

7 ie, a perspective which evaluates the expected and foreseeable technological and economic developments likely to affect mobile markets for the proposed period of this price control.

8 See Recital 4 of the 2007 EC Recommendation.

9 In particular, competitive constraints at the retail level may impose an indirect constraint on the wholesale market since some proportion of the wholesale price increase is likely to be passed on to the retail level. This may, in turn, result in retail customers switching to goods which do not require the wholesale input. If such retail substitution would be sufficient to limit the ability of a wholesale operator to profitably raise wholesale prices, ie, MTRs, by any significant amount then an indirect constraint exists.

rather than individual parts of that call (such as termination). Customers value mobile services because these allow them to make calls and to be contacted in many different locations in a way that is not possible with fixed services.

4.2.2 The GCRA therefore based its focal product on calls to all Guernsey mobile numbers which were active, or which it expected to be active, over the period of the review. Such a focal product captures the fact that termination of a call initiated by the called party's mobile phone can be over different technologies. This includes 2G, 3G and 4G networks or, potentially, Wi-Fi based solutions. At the retail level, when callers initiate a call to the called party's mobile phone, they (and their originating network) have no control over the technology used to terminate the call. Calling parties will very often be unaware of which technology is used. Moreover, calls to a particular called party's mobile phone may terminate using different technologies during the same call, eg, drop-back from 3G to 2G.

4.2.3 The proposed set of focal products also excluded services that do not use mobile telephone numbers to establish voice calls between two users, for example, Viber and Skype. The GCRA refers to these services as 'pure-OTT' as they do not involve mobile numbers, are purely delivered over data connections and are not routed via the switch of the called parties' network[10]. For the avoidance of doubt, calls which are initiated on OTT applications, such as 'Skype Out', but terminate on mobile numbers were included in the set of focal products.

4.2.4 Having identified this focal product, the GCRA considered that it was then necessary to determine whether callers would switch away to an alternative product if the price of voice calls to mobile numbers were to increase on the basis of the SSNIP[11] test.

4.2.5 For the following reasons, the GCRA considered that callers would be unlikely to do so and that the relevant retail product market was therefore a voice call initiated by the calling party to the called party's mobile number in Guernsey for which a termination fee was applicable :

a. For the reasons set out in the Consultation document, the GCRA's view was that the characteristics of alternative forms of communication meant that consumers would be unlikely to switch to them in response to a small but significant retail price increase of a call to a mobile number[12]. There was therefore a lack of demand-side substitution;

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10 For example, 'pure-OTT' applications such as those operated by Viber and Skype rely on access to a mobile handset via a data connection. As such a call does not need to be routed via the switch of the called parties' network, so it does not attract a termination rate. Moreover, consumers can distinguish these calls from calls to mobile numbers and are likely to expect to pay different rates.

11 SSNIP – Small but significant non-transitory increase in price.

12 This is consistent with the findings of Ofcom which, in its 2011 review, found that these alternative products should not be included in the relevant product market since customers did not consider them to be substitutable for mobile calls. Alternative products considered were: calls to a fixed line as a substitute for calls to a mobile, on-net mobile to mobile (M2M calls as a substitute for off-net calls, call back arrangements, the use of 'pure OTT' services, SMS, email, instant messaging and social networking sites). The GCRA notes that, since publication of its Draft Decision, Ofcom has published (in June 2017) its Mobile Call Termination Review for the period 2018 – 2021. In that document, Ofcom takes the view that, based on the evidence and reasoning it sets out, the use of OTT applications is unlikely to be a sufficiently close substitute for mobile voice calls. Ofcom also cites the 2014 EC Recommendation on Relevant Markets in support of its position.

b. In order for retail supply-side substitution to be a realistic possibility, a firm that was not currently supplying mobile voice calls (to a specific number) would have to be able to begin doing so relatively quickly following an MTR driven increase in the retail price and in a way that avoided payment of MTRs. However, since the payment (or not) of MTRs is controlled by the operator on whose network the call is terminated, a new market entrant could not avoid paying MTRs to such an operator. The retail supply-side substitution argument therefore did not appear to have much force for the period of this market review.

4.2.6 In order to test the validity of this conclusion, the Consultation asked the following question:

Question 1: Does the respondent agree with the GCRA's provisional views relating to the retail market product market? If the respondent does not agree with the GCRA's provisional views, the respondent should provide all of its analysis and assessment of the market.

4.2.7 Having considered the responses to this question, the Draft Decision set out the following analysis[13].

a. In assessing the relevant retail product market, the GCRA initially identifies the likely narrowest market (focal product) and then considers evidence that might suggest expanding that market definition based on a systematic analysis of substitutes whose inclusion might broaden the initial narrow market definition.

b. Here, the GCRA considered that the appropriate focal product was '*a voice call initiated by the calling party to the called party's mobile number in Guernsey for which a termination fee is applicable'.*

c. Regarding the points raised by operators in respect of the extent of the scope of the product market, the GCRA understood that two related points were being made. First, operators (Sure and JT) argued that the product market was wider than the focal product identified, primarily because of the availability of substitutable retail products (eg, OTT calls and/or certain forms of non-voice communications). In respect of the substitutable retail products identified by Sure, Sure highlighted the increasing availability of this technology in Guernsey, eg, the ability to make a WhatsApp call from an iPhone. Second, Sure argued that the way in which consumers make calls might vary depending on whether the number being called was an international or domestic number. It was, therefore, possible that a consumer might consider an OTT service to be a more appropriate functional substitute for a call to a mobile number when making an international call than when making a domestic call and that some further subdivision in the market depending on call destination might be possible.

[13] Draft Decision, paragraphs 4.31 – 4.36

d. The GCRA noted these arguments. It is clear that, at least for some consumers, there may be partial functional substitutability between mobile voice calls and other methods of making calls, such as OTT. However, the GCRA also noted that despite the growth of popularity of OTT applications, these do not offer any interoperability between different platforms, ie, do not ensure sufficient any-to-any communication, and require that end users are simultaneously logged in to the same OTT provider. Moreover, there is still a significant number of end users who do not use data-enabled smartphones, high-quality mobile internet is not universally available, and there are differences in quality of OTT services. These points are noted by Ofcom in its 2015-2018 MCT Review[14], where it stated that the use of OTT applications is not a close substitute for calls to a mobile number for the time being[15].

e. The GCRA considered that, for the purposes of the current review, the precise market definition could be left open insofar as regards the question of whether OTT services and mobile voice calls were in the same product market**.** This is because (as explained later in the Draft Decision), in the context of this review the purpose of defining a retail product market was to assess which products (or subset of products) within that retail market could impose a competitive constraint at the wholesale (MCT) level rather than determining the extent to which particular product subsets within that hypothetical market (however defined) exercised a competitive constraint on each other.

f. As regards non-voice communications, the GCRA considered that there were fundamental differences between the nature of voice communication and non-voice communication. Research carried out by other regulatory authorities tends to confirm that the characteristics of these alternative forms of communication mean that they are not a close enough substitute to voice calls to be included in the same market[16].

Responses to the Draft Decision

4.2.8 In its response and supplementary response, Sure[17] made the following points:

a. The GCRA concluded that calls made over OTT platforms should not be part of the retail market for calls in Guernsey[18]. This conclusion, Sure submitted, was flawed for the following reasons:

i. WhatsApp did not start providing voice calls on iPhones until as recently as April 2015. The use of OTT platforms are (Sure understands) the preferred medium of several customer groups, regardless of the price levels of

14 http://www.ofcom.org.uk/_data/assets/pdf_file/0029/76385/mct_final_statement.pdf
15 MCT Review, paragraphs 3.44 – 3.62.
16 MCT Review, paragraphs 3.63 – 3.65.
17 Neither JT nor Airtel commented specifically on this issue.
18 The GCRA notes that this is an inaccurate representation of its position, which was that the relevant retail market definition could be left open insofar as whether OTT and mobile voice calls were part of the same or distinct product markets.

conventional mobile calls, due to a significant extent to the additional functionality of OTT platforms[19];

ii. In response to a number of specific issues raised by the GCRA which tended to suggest that OTT and mobile voice calls might not form part of the same product market[20], Sure made the following observations:

    1. OTT applications, whilst requiring a user to log in, need such log in to be performed only once. The need to log in is therefore not a barrier to consumers using OTT services[21];
    2. OTT voice calls consume little data. This means that they can easily be received on 3G and 4G networks within the Channel Islands. Sure has in excess of 99% of outdoor 3G and 4G coverage and Guernsey is ranked 7th highest in the OECD for broadband household penetration. The lack of availability of high quality internet coverage is therefore not a barrier to the use of OTT platforms for making voice calls in the Channel Islands[22];
    3. Interoperability is not a major issue when considering availability of OTT applications on different operating systems[23];
    4. Without a mobile telephone number a user will not be able to create a WhatsApp account[24]. (Although not explained further in its response, the GCRA understands the purported significance of this point to be that only mobile telephone users can create WhatsApp accounts, which means that any person making a WhatsApp call could have made a mobile voice call instead but chose not do so, indicating that there is a degree of substitutability between OTT and voice calls.)

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[19] Sure response to Draft Decision, paragraph 16. Sure alludes to this wider product market definition later in its response to the Draft Decision (paragraphs 34 – 35), where it states that: "*A portion of the calls in the relevant retail market are conventional mobile calls which are terminated by the mobile network operator (MNO) on whose network the called party is hosted. For that MT service, the MNO charges a mobile termination rate (MTR). Another large (and growing) portion of the calls are OTT calls, which are terminated over data connections, whether Wi-Fi or the receiving customer's mobile data allowance. In the latter case, there is clearly a charge payable to receive the call, but it is paid by the receiving party, not the originating party*."

[20] Draft Decision, paragraph 4.34

[21] Sure response to Draft Decision, paragraph 18

[22] Sure response to Draft Decision, paragraphs 19 - 20.

[23] Sure response to Draft Decision, paragraph 21: "*Interoperability, for the avoidance of doubt, is not a major issue when considering availability of OTT applications on different operating systems, such as Android or iOS. Given the simplicity of downloading a new application onto a mobile device, Sure does not view the lack of interoperability between OTT platforms as an issue for consumers. Indeed, when looking at OTT applications throughout the World (with the exception of China) two applications dominate, namely WhatsApp and Facebook messenger. Both of these applications are well respected and offer text, voice and video calling. The ability to share files and photos within either platform is a major allure for customers*."

[24] Sure response to Draft Decision, paragraph 22.

5. Sure estimates that Guernsey smartphone penetration is now in excess of 80% of the total devices in use on local operators' networks[25].

iii. The GCRA relied on out of date research to demonstrate that OTT calls and mobile voice calls did not form part of the same product market. Sure stated that it did not accept that these data and conclusions could still be applicable and believed that the GCRA should rely on up-to-date, Channel Islands/Guernsey specific data[26].

b. The GCRA stated that for the purposes of the current review, the precise market definition could be left open insofar as it related to whether mobile voice calls and OTT calls formed part of the same market or were distinct markets[27]. Sure objected to this conclusion for the following reasons:

i. It stated that it did not understand the point that the GCRA was making[28];

ii. Following a meeting between GCRA officers and Sure on 15 June 2017, at which the GCRA officers sought to understand the reasons for Sure's confusion on this point and to provide a comprehensive explanation of the point to Sure, Sure stated in its supplementary response that it still did not understand the GCRA's position because the GCRA had not explained its position sufficiently. Sure required a more comprehensive explanation of: "*why the GCRA considers the retail product market definition to have no importance in respect of the definition of the wholesale product market definition*"[29].

GCRA analysis of responses and conclusion

4.2.9 Regarding the points made under heading 4.2.8.a above, which all address whether or not OTT services and mobile voice calls form part of the same market or are distinct markets, the

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25 Sure response to Draft Decision, paragraph 23.

26 Sure response to Draft Decision, paragraph 13 – 14: "*The GCRA relies on research undertaken by other regulators and specifically refers to analysis by Ofcom in its 2015 Mobile Call Termination (MCT) Review to support the GCRA's position that OTT services should not form part of the relevant retail market for mobile calls. Ofcom's supporting evidence, which CICRA has relied on, is some three to four years out of date being sourced from numerous reports dating back as far as June 2013. Sure finds it disappointing that the GCRA considers research and conclusions made this long ago to still be appropriate to support its decisions in this rapidly changing market. Sure does not accept that those data and conclusions can still be applicable and believes the GCRA must rely on up-to-date data, preferable directly relevant to Guernsey, or the Channel islands more broadly. For a regulatory body that places emphasis on evidence based regulation the lack of the GCRA's (or, more widely, CICRA's) relevant and up-to-date analysis of OTT technologies is concerning, especially considering the materiality of the MTR markets across the Channel Islands. It is also not consistent with the GCRA's statement that it has undertaken a forward-looking approach to this market review.*"

27 Draft Decision, paragraph 4.35.

28 Sure response to Draft Decision, paragraph 25.

29 Sure supplementary response to Draft Decision, paragraph 2.

GCRA repeats the conclusion that it set out at paragraphs 4.34 and 4.35 of the Draft Decision, which is reproduced here for ease of reference:

"*It is clear that, at least for some customers, there may be partial functional substitutability between mobile voice calls and other methods of making calls, such as OTT. However [….] the GCRA considers that, for the purposes of the current review,* ***the precise market definition can be left open insofar as regards the question of whether OTT services and mobile voice calls are in the same product market****. This is because, as explained below, in the context of this review the purpose of defining a retail product market is to assess which products (or subset of products) within that retail market could impose a competitive constraint at the wholesale (MCT) level rather than determining the extent to which particular product subsets within that hypothetical market (however defined) exercise a competitive constraint on each other*."

4.2.10 A further explanation of this conclusion, as requested by Sure, is set out below. However, the GCRA does not consider that it is necessary to deal with points made at paragraph 4.2.8.a. above in detail, since they address an issue (the precise scope of the product market) which is not determinative for the assessment of the relevant wholesale market and which was therefore intentionally left open by the GCRA (as explained in the extract from its Draft Decision cited at paragraph 4.2.9 above).

4.2.11 Regarding the arguments made by Sure summarised at paragraph 4.2.8.b. above, the GCRA makes the following points.

4.2.12 It is not correct for Sure to state that the GCRA "*considers the retail product market definition to have no importance in respect of the definition of the wholesale product market definition*"[30]. The Draft Decision clearly states that:

"*the starting point for the overall assessment of wholesale market is generally accepted to be the definition of the relevant retail markets [….]. This is because demand for wholesale products is derived from the retail market and will be affected by its characteristics. In particular, competitive constraints at the retail level may impose an indirect constraint on the wholesale market since some proportion of the wholesale price increase is likely to be passed on to the retail level. This may, in turn, result in retail customers switching to goods which do not require the wholesale input. If such retail substitution would be sufficient to limit the ability of a wholesale operator to profitably raise wholesale prices (ie, MTRs) by any significant amount then an indirect constraint exists*."[31]

In summary, as was clearly set out in the Draft Decision, demand for wholesale products:

a. Is derived from the retail market;
b. Will be affected by the characteristics of the retail market.

4.2.13 The GCRA demonstrably took account of the first point, namely that demand for wholesale products is derived from demand for the relative retail products; had it not done so it would

[30] Sure supplementary response to Draft Decision, paragraph 2.
[31] Draft Decision, paragraph 4.5 and footnote 5.

not have been able to define a wholesale market at all. Wholesale products are not purchased in isolation; if consumers did not purchase the primary product (voice calls), there would be no demand for wholesale products and so without understanding the likely scope of the relevant primary/retail market to which these secondary products relate, a market for wholesale products could not be defined.

4.2.14 However, it does not follow from this, as Sure seems to suggest elsewhere in its response to the Draft Decision[32], that if the retail market in this case were defined as including both OTT and mobile voice calls that this would mean that the relevant wholesale market would also comprise termination services for both types of call. This is because even if the market were wide enough to include OTT services **at the retail level**, the services required to terminate the OTT services and mobile voice calls **at the wholesale level** would be entirely different and specific to the type of call (OTT or mobile voice) that had been made[33].

4.2.15 It follows that, whether the retail market is defined widely (OTT services and mobile voice calls) or narrowly (two separate markets, one for OTT service and one for mobile voice calls) there would be a series of distinct wholesale markets for the termination of mobile voice calls. It is therefore not necessary to define the retail market precisely in order to be able to define the wholesale market accurately; that market would be wholesale termination of mobile voice calls in either case.

4.2.16 The second point, which relates to the competitive constraint exercised on pricing at the wholesale level by retail products, is dealt with in detail below[34].

4.3 Is consumers' behaviour in the retail market capable of acting as a constraint on pricing at the wholesale level?

Consultation and Draft Decision

4.3.1 In its Consultation, the GCRA considered whether consumers' behaviour in the retail market provisionally defined in the Consultation was capable of acting as a constraint on pricing at the wholesale level. The GCRA concluded that it was not. This was because for callers to react to an increase in the price of calls to a specific mobile number, they must be sufficiently aware of that increase and deem that it is sufficiently material to act upon it. In particular, consumers need to be aware they are calling a mobile number, the specific network/call provider that controls the number and the price they would face when calling that particular network/mobile number. Research carried out by other national regulatory authorities suggests consumers are unlikely to be aware of (and therefore unlikely to react

32 Sure's response to the Draft Decision states, at paragraph 54: "*In the event that CICRA disagrees with Sure's product market definition and decides to proceed with its decision that there is a separate market for MT services (separate from calls terminated as data services via Wi-fi or data packages) then Sure considers the relevant geographic market should be "*calls terminated on mobile devices in Guernsey for which an MTR is payable.")"

33 It is extremely common for there to exist a wide primary market and a series of narrow secondary markets, for example the wide primary market for the sale of new cars and a series of narrow secondary aftermarket for repair and maintenance of each brand of car.

34 Paragraph 4.3.2 and see also Draft Decision, paragraph 4.35.

to) any impact that an increase in MTRs might have at the retail level, even if retail price rises were significant, ie, of the order of 5% - 10%[35].

4.3.2 Having taken account of the responses received to the Consultation, in the Draft Decision[36], the GCRA explained again that the purpose of defining the retail market is to assess whether consumer choices in that market impose any kind of indirect constraint on the behaviour of operators at the wholesale level.

4.3.3 In other words, the relevant question is not of itself whether there is a degree of functional substitutability between different retail products, eg, OTT vs voice calls over mobile, but rather whether, if there was a small but substantial (5%-10%) permanent increase in wholesale prices, consumers would react to this by switching away to those other functionally substitutable retail products.

4.3.4 In the Draft Decision, the GCRA set out its clear view that consumers would not do so. This was for a number of reasons.

4.3.5 Firstly, even if a 5% - 10% MTR increase were passed through into retail prices and consumers were aware of this, the resulting percentage increase in retail prices would be much less than 5% - 10%. This is because MTRs make up only a portion of the underlying costs of calls. It is, therefore, unlikely that consumers, even if they were aware of the price rise, would switch to an alternative retail product on the basis of a 5% - 10% increase in the (wholesale) MTR.

4.3.6 Secondly, for callers to react to an increase in the price of calls they must be sufficiently aware of that increase to act upon it. In particular, consumers need to be aware they are calling a mobile number, the specific network/call provider that controls the number and the price they would face when calling that particular network/mobile number. Research carried out by other national regulatory authorities suggests consumers are unlikely to be aware of (and therefore unlikely to react to) any impact that an increase in MTRs might have at the retail level, even if retail price rises were significant, ie, of the order of 5% - 10%[37].

4.3.7 The conclusion of the GCRA, as set out in the Draft Decision, was that for the period covered by this review, the availability of functionally substitutable products (such as OTT services) at the retail level (however that market is defined) would not constrain an operator’s ability to raise MTRs by 5% - 10% at the wholesale level.

Responses to the Draft Decision

4.3.8 In its response and supplementary response to the Draft Decision, Sure[38] made the following points:

[35] As reproduced in the Draft Decision, paragraph 4.11

[36] Draft Decision, paragraphs 4.37 – 4.41

[37] As noted above, a retail price rise of 5 - 10% based solely on an MTR rise may be unlikely, given that MTRs make up only a small percentage of the overall retail cost of a call.

[38] Neither Airtel nor JT responded on this specific point.

a. Many users of OTT platforms[39] do so due to the significantly lower costs of OTT calls compared to conventional mobile calls and increasing use of OTT may be expected to exert downward pressure on the overall cost of conventional mobile calls[40], of which the MTR forms a part[41], notwithstanding the fact that the MTR element of the call may not be transparent to the end customer[42]. OTT services are therefore clearly indirectly causing a constraint on the wholesale mobile termination service[43]. Sure considers that an increase in the MTR would be likely to drive more customers to OTT platforms[44].

b. The GCRA argues that in a SSNIP test, a 5-10% increase in the MTR would not cause a sufficient number of customers to move to OTT to make that increase unprofitable. Sure considers that this is an erroneous attempt at shoehorning a SSNIP test into an assessment between related retail and wholesale markets[45]. It also ignores the fact that a considerable number of customers have already switched to OTT because conventional mobile calls are more expensive than OTT[46];

GCRA analysis of responses and conclusion

4.3.9 As set out above, Ofcom, in its 2015-2018 MCT review, stated that:

"In particular, competitive constraints at the retail level may impose an indirect constraint on the wholesale market since some proportion of the wholesale price increase is likely to be passed on to the retail level. This may, in turn, result in retail customers switching to goods which do not require the wholesale input. If such retail substitution would be sufficient to limit the ability of a wholesale operator to profitably raise wholesale prices (ie, MTRs) by any significant amount then an indirect constraint exists."[47]

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39 Sure notes that, in the UK, OTT penetration had reach 64% of the UK's mobile subscriber base by 2015. Although Sure does not state this directly, the GCRA assumes that the purpose of including this information in its response is to imply that there is a similar or greater degree of OTT penetration in Guernsey.

40 Sure's response to the Draft Decision, paragraph 37.

41 Sure's response to the Draft Decision, paragraph 38. In that paragraph, Sure notes that the GCRA stated in the Draft Decision that Sure agrees that the MTR is not relevant to retail charges. Sure states that that is a misunderstanding and that this is not its position. For that reason, the GCRA does not include that statement as part of its reasoning supporting this Final Decision.

42 Sure's response to the Draft Decision, paragraph 41

43 Sure's response to the Draft Decision, paragraph 24. Sure considers that OTT substitution is particularly relevant for international calls or other calls outside of the bundles included in post-paid packages offered by MNOs. End customers can actively choose whether to make a call where an MTR is incurred or one that is not (Sure's response to the Draft Decision, paragraph 39).

44 Sure supplementary response to Draft Decision, paragraph 3. It goes on to state, in that paragraph that: "*Sure therefore considers that the GCRA's statement at paragraph 4.35 of the Draft Decision is not sufficiently justified and that is why Sure's response asked that it be explained further.*"

45 Sure's response to the Draft Decision, paragraph 40. In that paragraph, Sure goes on to state that: "*Ofcom does not use this approach, for good reason*." The GCRA does not consider this comment to be one to which it can properly respond, since Sure does not specify what is meant by "*with good reason*". In addition, the GCRA does not agree, for the reasons set out in this Final Decision, that its approach is inconsistent with that of Ofcom. The GCRA will therefore not address this point any further.

46 Sure's response to the Draft Decision, paragraph 41

47 MCT Review, paragraph 3.12.

In other words, if a wholesale operator could not profitably raise wholesale prices without triggering consumer switching at the retail level, then an indirect constraint on the wholesale market exists.

4.3.10 The GCRA does not therefore understand the point that is being made by Sure at paragraph 40 of its response to the Draft Decision, set out in paragraph 4.3.8.b. above. The test described by the GCRA (ie, whether a 5-10% increase in the MTR would cause consumer switching at the retail level) is materially the same as that described by Ofcom in its MCT Review. The GCRA therefore considers its approach to be in line with that of other telecoms regulators.

4.3.11 Further, on the basis of that test (as set out by Ofcom and taken into account by the GCRA in its Draft Decision), it follows that an indirect constraint on wholesale MTR charges cannot be established by arguing (as Sure does) that the overall cost of mobile voice calls, **in a general sense**, is constrained by consumers' ability to switch to cheaper OTT products. The constraint imposed by OTT as a whole on mobile voice calls is not the point at issue. Rather, the relevant point is whether a consumer of mobile voice calls would, **specifically in response to an increase in the MTR**, switch to a competing retail product. For the reasons set out in its Consultation and Draft Decision, and in line with the consistent practice of other telecommunications regulators, the conclusion of the GCRA is that such switching would not take place and that the existence of functionally substitutable products (such as OTT) at the retail level does not constrain the wholesale MTR.

4.3.12 In this regard, it is relevant to note that all MNOs in Guernsey charge the maximum permitted MTR. This is so notwithstanding the fact that there is some degree of functional substitutability between OTT services and mobile voice calls. The fact that MNOs continue to charge the maximum MTR, despite the fact that OTT services are (Sure argues) widely available, is strong evidence that MNOs do not consider that such consumer switching at the retail level can be influenced by the level at which MTRs are set (ie, that the possibility of retail switching does not, in fact, impose any kind of indirect competitive constraint on MTRs).

4.3.13 For completeness, the GCRA notes that, in its response to the JCRA on this point in the context of the parallel process being carried out in Jersey, Sure stated that:

"*we would note that Sure has provided evidence to the JCRA that* ***the level of MTRs has little discernible impact on any retail prices customers pay for mobile services (whether those customers are located in Jersey or elsewhere)****. As such it is difficult to see how the JCRA could demonstrate that any of the MNOs is engaging in any market abuse, practice or arrangement that is having either the object or effect of preventing, restricting or distorting competition. We therefore question the appropriateness of the JCRA applying the Fair Competition Condition to MTRs and also what it is trying to achieve in terms of local consumer outcome*."[48]

[48] Sure response to the Draft Decision, paragraph 8.

4.4 Other points

4.4.1 The GCRA notes that respondents to the Draft Decision have put forward a number of points that do not address the issues of market definition and SMP.

4.4.2 Sure makes the following points:

a. The current regulatory requirement is that a free on-island transit service is provided[49]. It is therefore inconsistent for the GCRA now to state that transit is outside the scope of this review[50]. Sure outlines a number of concerns that it has in relation to the fact that mobile transit services have not, to date, been considered by the GCRA in the context of this review[51];

b. Sure will not offer any interconnection services outside of Guernsey[52];

c. Sure noted that the GCRA had not addressed the retail geographic market in either its Consultation or its Draft Decision and that Sure considered it necessary for the GCRA to undertake the compete retail market definition process in order that the upstream wholesale market could be defined appropriately[53].

4.4.3 In relation to point a. above, the GCRA reiterates that the purpose of this Final Decision is to define the market on which wholesale mobile voice call termination charges are provided. Transit services are distinct from termination services and therefore fall outside the scope of this market definition exercise. The GCRA notes that this approach is entirely in line with that of other regulators. Furthermore, as has been made clear, the purpose of this Final Decision is not to regulate prices either of mobile termination services or of transit services; it is limited to market definition. Remedies (which could include price regulation) will be dealt with through a separate process.

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49 For completeness, the GCRA notes that in its supplementary response to the Draft Decision, Sure sets out what it states to be comments made by GCRA officers in a meeting held with Sure on 15 June 2017: "*Sure was encouraged that CICRA confirmed during the meeting on June 15th, that CICRA's current opposition to Sure Fixed charging for the transit service is because of the lack of direct interconnection to Sure Mobile and that, therefore, once direct interconnection with Sure Mobile is available to OLOs, OLOs would need to pay for the transit service if they chose to continue interconnecting with Sure Fixed only*." As was made clear to Sure before the 15th June meeting, that meeting was to discuss specific issues in relation to Sure's response to the Draft Decision/Initial Notice only. Sure's summary above is not one that is recognised or accepted by GCRA officers as being an accurate representation either of the conversation that took place or of the CICRA/GCRA position on transit charges (which was in any event wholly outside of the scope of the agenda for that meeting) and it is therefore not accepted by the GCRA.

50 Sure's response to the Draft Decision, paragraph 27, Sure supplementary response to Draft Decision, paragraphs 16 – 18. Sure goes on state (response to Draft Decision, paragraphs 28 – 29) that it would not be willing to continue to provide a free fixed network transit service and that it is planning to offer a direct interconnection from Sure Mobile to OLOs, which will negate the need for a fixed transit facility/charge.

51 Sure response to Draft Decision, paragraphs 44 – 47.

52 Sure response to Draft Decision, paragraph 67.

53 Sure response to Draft Decision, paragraphs 30 – 31.b

4.4.4 Given that the question of transit services and charges for those services fall outside the scope of the matters being addressed in this Final Decision, the GCRA does not consider them further here.

4.4.5 The GCRA notes point b. above but does not consider it to be relevant to the question of market definition.

4.4.6 Sure confirmed in its supplementary response to the Draft Decision[54] that it was withdrawing its points on retail geographic market definition, and these are therefore not considered further here.

4.5 GCRA conclusion

4.5.1 For the reasons explained above, the argument being forwarded by operators that the increased usage of alternative forms of communications at the retail level would constrain the pricing of wholesale termination charges for calls to mobiles is not one that has been evidenced by respondents and is not accepted.

4.5.2 The GCRA's conclusion is, therefore, that the appropriate retail product market for this *ex ante* assessment includes a voice call initiated by the calling party to the called party's mobile number in Guernsey for which a termination fee is applicable. The precise product market definition may be wide enough to encompass OTT services but can be left open in this case, since the availability of alternative forms of voice communication (such as OTT services) at the retail level would not impose a competitive constraint on the pricing of wholesale termination charges.

B. WHOLESALE MARKET

4.6 Wholesale market – product market

GCRA process and Draft Decision

4.6.1 The GCRA consulted on a provisional view that the relevant wholesale product market definition was :

'termination of all calls made to all mobile numbers allocated to each MNO for which the MNO charges the MTR'

4.6.2 The following factors appeared relevant to its provisional conclusion :

a. An MNO is likely to face **homogenous competitive conditions** in providing mobile call termination services to the different numbers it hosts, which implies that its conduct in supplying the service in relation to different mobile numbers is likely to be similar; and/or,

[54] Sure's supplementary response to the Draft Decision, paragraph 4.

b. An MNO faces a **common constraint**, for example, through billing systems which would make it difficult and/or costly to charge different MTRs to different mobile numbers, even it if wanted to.

4.6.3 The GCRA therefore concluded that, absent regulation, competitive conditions in the wholesale market for different mobile numbers were likely to be homogenous if the same MNO set a termination rate. However, competitive conditions may differ between those numbers for which different MNOs set the termination rate. Therefore, the GCRA's provisional consideration was that, on the basis of homogenous competitive conditions, termination of all calls made to all mobile numbers allocated to each MNO for which the MNO charges the MTR should be defined as a series of distinct product markets.

4.6.4 The GCRA considered whether the market should be widened to include mobile numbers hosted by more than one MNO. However, it noted that each of these MNOs will be able to set the MTR independently of all other MNOs, absent SMP price regulation. There is, therefore, no common pricing constraint linking the MTR set by each of the MNOs and so it was not considered appropriate to widen the relevant market beyond each MNO.

4.6.5 The GCRA in its Consultation asked the following question :

Question 2 : Does the respondent agree with the GCRA's provisional view that there is no common pricing constraint linking the MTR set by each of the MNOs and therefore the relevant market is each MNO ? If the respondent does not agree with the GCRA's provisional view, the respondent should provide all of its analysis and assessment of the market.

4.6.6 On the basis of comments received in response to its Draft Decision, the GCRA updated its definition as follows:

'… termination of all calls made to all mobile numbers currently allocated or assigned to each MNO for use on its network for which the MNO charges the MTR.'

4.6.7 The GCRA also considered that it was necessary to determine which calls fell within the scope of the above definition. In its Consultation, it stated that it considered that the market for mobile call termination would include :

- Any call conveyance technology used to deliver voice call termination services to mobile numbers, whether delivered by 2G, 3G, 4G, VoIP or VoLTE based technologies, and,
- All mobile numbers currently allocated or assigned to each MNO for use on its network for which the MNO charges the MTR

4.6.8 The Consultation listed the following call types that the GCRA proposed should be included within the Mobile Call Termination market:

Call Type	GCRA Position
Voice Calls	Terminated on a mobile number

Off-net	YES
On-net	NO
Ported in	NO
Ported Out	YES
Calls to voicemail	YES
Voice calls to mobile numbers terminating on IP	YES
Call forwarding (including international)	YES
Calls to Guernsey number roaming abroad	YES
Calls to non-Guernsey numbers roaming in Guernsey	NO

4.6.9 The GCRA in its Consultation asked the following question :

Question 3 : Does the respondent agree with the GCRA's provisional views relating to the call types included within the proposed product definition ? If the respondent does not agree with the GCRA's provisional view the respondent should provide all of its analysis and assessment of this market.

4.6.10 Taking into account the responses received to the Consultation, the GCRA modified the above table. It stated that the following calls were included in the relevant wholesale product market encompassing the range of services listed below :

Call Type	GCRA Position
Voice calls	Terminated on a mobile number
Off-net	YES
On-net	NO
Ported In	YES
Ported Out	NO
Calls to voicemail	YES
Voice calls to mobile numbers	YES

terminating on IP	
Call forwarding (including international)	YES
Calls to Guernsey number roaming abroad	YES
Calls to non-Guernsey numbers roaming in Guernsey	NO

Responses to the Draft Decision

4.6.11 Sure argues that the voice call termination service that it offers is not a single, undifferentiated service. A mobile termination service is offered as a stand alone product only to Guernsey licensed operators. By contrast, where an operator is not Guernsey licensed but wishes to terminate a call to a number allocated or assigned to Sure Mobile for use on its network, it purchases a bundled service from Sure Fixed which incorporates interconnection, transit and call termination[55]. In Sure's view, this bundling means that the service offered to non-Guernsey operators is not a mobile termination service[56].

4.6.12 In its supplementary response to the Draft Decision, Sure repeats this point and provides an example which, it argues, demonstrates that operators who hand over a call outside Guernsey to Sure Fixed for termination by Sure Mobile in Guernsey do not purchase mobile call termination services. Rather, according to Sure, mobile termination services are provided by Sure Mobile to Sure Fixed in Guernsey; the non-Guernsey operator by contrast purchases an "end to end" service from Sure Fixed for interconnection, transit and termination of the call[57].

GCRA analysis of responses and conclusion

4.6.13 In both the Consultation and the Draft Decision, the GCRA proposed a consistent definition of the wholesale product market, which, as set out above, was:

*"**termination** of all calls made to all mobile numbers allocated to each MNO for which **the MNO** charges the MTR"*

4.6.14 **Termination** means the act of passing the call from the mobile switch to the customer's handset (ie, the final "leg") of the call. As the above definition makes absolutely clear, this is a service that is provided by the relevant **mobile** network operator.

55 In this scenario, the GCRA assumes that Sure Fixed transfers the call to Sure Mobile for termination, rather than terminating the call itself. Sure argues that the means by which the call reaches the handover point is relevant for the purposes of market definition (Sure response to the Draft Decision, paragraph 68).

56 Sure response to Draft Decision, paragraph 69: "*the point of disagreement appears to be that the GCRA currently consider that the service provided outside Guernsey, to telecoms operators not licensed in Guernsey, is an MT service; it is not*.".

57 Sure's supplementary response to the Draft Decision, paragraphs 8 – 15.

4.6.15 The basis for Sure's suggestion that the GCRA is seeking to regulate the terms on which (in its example) BT contracts with Sure Fixed is therefore not understood[58]. As has been made absolutely clear in both the Consultation and the Draft Decision, the relevant wholesale market proposed covered the actual **provision of the termination service** by the **mobile network operator**. In the example provided by Sure, Sure Fixed clearly is neither a mobile network operator nor terminates the call (call termination being carried out by Sure Mobile). In the context of that example, it is (and has always been) the position of the GCRA that Sure Mobile provides the termination service to Sure Fixed.

4.6.16 The example provided by Sure does not, therefore, demonstrate that the wholesale product market definition set out in the Draft Decision was incorrect.

4.7 Wholesale market – geographic market

GCRA process and Draft Decision

4.7.1 In the Consultation, the GCRA set out its view that, at the wholesale level, mobile termination services need to be accessed in order to terminate a call. The competitive conditions for the service of wholesale termination of the call did not appear to differ irrespective of the various handover points on route. This suggested that it was appropriate to consider the geographic market as the area for which the MNO could determine the MTR in relation to a Guernsey number, and the GCRA's provisional view was that this area lay within Guernsey.

4.7.2 The GCRA in its Consultation asked the following question:

Question 4 : Does the respondent agree with the GCRA's provisional views relating to the geographic market for the wholesale market ? If the respondent does not agree with the GCRA's provisional view the respondent should provide all of its analysis and assessment of this market.

4.7.3 A number of the points made by Sure in response to the Consultation related to whether the GCRA had jurisdiction to regulate MTRs in respect of calls that originated outside of the Bailiwick of Guernsey, and not to the scope of the geographic market as such. In its Draft Decision, the GCRA addressed these points and Sure has raised similar issues in its response to the Draft Decision. As set out in section 3 of this Final Decision, the issues relating to the jurisdiction of the GCRA raised by Sure are considered in Appendix 1 to this Final Decision[59].

4.7.4 Aside from addressing the jurisdictional points raised by Sure, the GCRA in its Draft Decision, having taken into account the responses to the Consultation, confirmed its conclusion set out at paragraph 4.7.1 above.

[58] Sure's supplementary response to the Draft Decision, paragraphs 8 – 15.

[59] The GCRA notes that the purpose of a consultation is to obtain evidence from stakeholders on the matters being consulted on (in this case, market definition and SMP) and not to seek the views of stakeholders on the legal powers of the GCRA. Since jurisdictional points are therefore not within the scope of the Final Decision, they will be addressed by way of an Appendix.

Responses to the Draft Decision

4.7.5 In its response to the Draft Decision, Sure states that it agrees with the GCRA that the geographic wholesale market is Guernsey[60]. However, in Sure's view, since the mobile termination service can only be purchased in Guernsey, it can only be purchased by OLOs[61].

4.7.6 Sure also highlighted what it considered to be a matter relevant to the scope of the geographic market, which it had first brought to the GCRA's attention in its response to the Consultation. It requested that the GCRA consider this point and respond to it in a way that respected its confidential nature[62]. The details of this point are recorded in a footnote to this paragraph and will be redacted from the public version of the Final Decision[63].

GCRA analysis and conclusion

4.7.7 Regarding the confidential point raised by Sure regarding [✂], the view of the GCRA is that this does not affect either the scope of the wholesale geographic market or demonstrate that demand side substitution exists within [✂] and could easily be replicated in Guernsey. The information provided by Sure merely illustrated a scenario where a [✂]. As already stated [✂].

4.7.8 Based on its assessment and of the views provided in the course of the Consultation and the Draft Decision, the GCRA's position is that the relevant geographic market for call termination services for the termination of voice calls to Guernsey mobile numbers is the Bailiwick of Guernsey. This entirely consistent with the previous decision making practice of the GCRA.

60 Sure's response to the Draft Decision, paragraph 50.
61 Sure's response to the Draft Decision, paragraph 52.
62 Sure's response to the Draft Decision, paragraph 49.
63 [***<u>CONFIDENTIAL FOOTNOTE</u>***] ✂

C. CONCLUSION ON THE SCOPE OF THE RELEVANT MARKET

4.8 Market definition – conclusion

GCRA analysis and Draft Decision

4.8.1 In its Consultation, the GCRA consulted on the appropriateness of the following market definition[64]:

'Termination services that are provided by [named mobile communications provider] (MNO) to another communications provider, for the termination of voice calls to Guernsey mobile numbers allocated to that MNO by Ofcom in the area served by that MNO and for which that MNO is able to set the termination rate.'

4.8.2 The GCRA in its Consultation asked the following question :

Question 5 : Does the respondent agree with the GCRA's provisional views relating to the proposed market definition ? If the respondent does not agree with the GCRA's provisional view the respondent should provide all of its analysis and assessment of this market.

4.8.3 Having taken into account the views expressed in response to the Consultation, the GCRA concluded in its Draft Decision that the appropriate definition was essentially as proposed by the GCRA in its Consultation. However, for the reasons explained in the Draft Decision, the removal of text referring to the allocation of numbers by Ofcom gives rise to a more precise definition. The market definition was therefore amended on that basis.

4.8.4 The GCRA agreed with the view of Sure that the definition should be supported by a table of call types that were included as part of the definition.

4.8.5 By removing the reference to numbers allocated by Ofcom, the revised definition to be applied for the Mobile Call Termination services as set out in the Draft Decision was:

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64 The 2007 EC Recommendation identifies the mobile call termination market is a market which is susceptible to *ex ante* regulation in the following terms: 'Voice call termination on individual mobile networks'. We consider that our proposed definition is consistent with that of the EC. This is because, by definition, the mobile numbers allocated to an MNO identify those calls that are switched to, and routed by, the recipient's network. Therefore, a reference to a mobile number range necessarily refers to the activity of the relevant individual mobile network (as the MNO provided termination must have some form of switching and routing). However, given that there is scope for confusion in the use of the word 'network' (which in some contexts might be interpreted as a reference only to radio access network) we have not used the word 'network' in the proposed market definition. Market evidence in the UK suggests that the ownership or operation of what has been traditionally understood in a mobile network (eg, a 2G, 3G or 4G radio access network) is not essential to whether an MTR can be set to interconnecting operator (origination or terminating traffic to the operator in question).
In addition, we note that the revised EC Recommendation on relevant markets also recommends a technology neutral approach to market definition in the wholesale mobile call termination markets. It suggests that the market for mobile termination is composed of the markets for termination offered by each MNO. It notes that, in line with the technology neutral approach, this comprises termination on all network technologies. It also includes call termination irrespective of where the call originates. It states that the geographic scope of each market coincides with the geographic coverage of the network concerned and is usually national.

‘Termination services that are provided by [named mobile communications provider] (MNO) to another communications provider, for the termination of voice calls to Guernsey mobile numbers in the area served by that MNO and for which that MNO is able to set the termination rate.’

4.8.6 The following table describes the call types that are and are not included in this definition:

Call Type	**GCRA Position**
Voice Calls	Terminated on a mobile number
Off-net	YES
On-net	NO
Ported IN	YES
Ported OUT	NO
Calls to voicemail	YES
Voice calls to mobile numbers terminating on IP	YES
Call forwarding (including international)	YES
Calls to Guernsey number roaming abroad	YES
Calls to non-Guernsey numbers roaming in Guernsey	NO

Responses to the Draft Decision

4.8.7 Airtel-Vodafone in its response to the Draft Decision stated that it “*has fundamental disagreement with the position adopted by CICRA in relation to market definition, subsequent determination of SMP and the basis proposed for remedy*”.

4.8.8 It considers that the “*very narrow description which only considers calls being terminated irrespective of, a) its origin, b) the costs that go into terminating the call and c) impact on the end user (who is the final entity in the chain) will result in a skewed definition and consequently a wrong remedy being applied*”.

4.8.9 In addition Airtel-Vodafone describes how it has to pay variable MTRs for all international outgoing calls and that the international carriers and destinations are under no obligation to reciprocate any changes imposed by CICRA on the Channel Islands operators. Airtel-Vodafone, therefore reaches a conclusion that off-net calls cannot be part of any remedy as the principle of reciprocity cannot be applied.

4.8.10 JT's response included a diagram depicting its interpretation of the Draft Decision and described the key elements of the Draft Decision as follows:

FINDING 1 *– A relevant market exists for termination services that are provided by [JT] (MNO) to another communications provider, for the termination of voice calls to Guernsey mobile numbers in this area served by that MNO and for which that MNO is able to set the termination rate, and*

FINDING 2 *– Each MNO is dominant on the market for the provision of MCT on its own network. Each has 100% share of wholesale call termination on its network and each is acting as a monopoly in the provision of that service.*

4.8.11 Following a meeting between the GCRA and JT on 5 May 2017 JT confirmed that its understanding that Finding 1 only related to calls once they reach the Guernsey mobile switch of JT and not to the conveyance of mobile calls before they reach the mobile network of JT. That view aligns with the market as defined by the GCRA. JT has confirmed that it does not object to Finding 1[65].

4.8.12 JT had raised no objection to Finding 2.

GCRA analysis and conclusion

4.8.13 In response to the issues raised by Airtel-Vodafone, the GCRA makes the following points.

4.8.14 Firstly, the approach taken by the GCRA to define the market for mobile call termination is one that is recognised and consistently applied in Europe. Airtel-Vodafone, in its response, did not provide any evidence to demonstrate that the GCRA was wrong in its market definition or the methodology that the GCRA employed but is significantly concerned with any requirement to lower MTRs, which was not a matter covered by the Draft Decision.

4.8.15 Secondly, with respect to Airtel-Vodafone's point on reciprocity, the principle of reciprocity as described is not relevant in the context of a market definition and SMP assessment and so will not be considered further here.

4.8.16 JT's response to the Draft Decision does not raise any issues that would require the GCRA to reconsider its market definition as set out above.

4.8.17 For the purposes of this Final Decision, the GCRA therefore concludes that the relevant market definition is:

'Termination services that are provided by [named mobile communications provider] (MNO) to another communications provider, for the termination of voice calls to Guernsey mobile numbers in the area served by that MNO and for which that MNO is able to set the termination rate.'

4.8.18 The following table describes the call types that are and are not included in this definition:

[65] In its supplementary response JT included a diagram which the GCRA has noted but does not necessarily accept accurately describes the Draft Decision. JT was informed of such by the GCRA's Officers at the meetings described. The diagram therefore does not form part of this Final Decision.

Call Type	GCRA Position
Voice Calls	Terminated on a mobile number
Off-net	YES
On-net	NO
Ported IN	YES
Ported OUT	NO
Calls to voicemail	YES
Voice calls to mobile numbers terminating on IP	YES
Call forwarding (including international)	YES
Calls to Guernsey number roaming abroad	YES
Calls to non-Guernsey numbers roaming in Guernsey	NO

D. SMP ANALYSIS

4.9 SMP definition

GCRA analysis and Draft Decision

4.9.1 Under the European Framework Directive an undertaking is considered to have SMP if:

'either individually or jointly with others, it enjoys a position equivalent to dominance, that is to say, a position of economic strength of affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers.'[66]

4.9.2 Based on the GCRA's assessment of the market and in line with standard principles, the GCRA in its Consultation concluded that each MNO has 100% of the relevant market. The GCRA therefore considered whether there was compelling evidence to suggest that, despite these very high (monopoly) market shares, the MNOs should be considered not to have SMP on those markets. It did so by examining whether:

a. Barriers to entry are low; and,
b. Countervailing Buyer Power (CBP) is likely to exist.

4.9.3 In respect of barriers to entry, in the Consultation the GCRA stated that if MNOs could quickly and easily invest in further infrastructure that enabled provision of mobile call

[66] Article 14(2) of the Framework Directive.

termination on another MNOs network, this would indicate that barriers to market entry were low[67]. This was considered unlikely to be a realistic possibility within the short to medium term for two reasons. Firstly, MNOs, which each have 100% of their own relevant market, would not have strong incentives to co-operate to forego the monopoly profit that can be earned from mobile call termination. Secondly, no infrastructure mechanisms were expected to be available to allow market entry and no evidence to suggest that this was feasible was provided.

4.9.4 In respect of countervailing buyer power (CBP), the GCRA stated in its Consultation that it did not consider that there was any evidence of countervailing buyer power in this market. The GCRA was therefore of the view that each of the three MNOs had SMP in the relevant market.

4.9.5 The GCRA in its Consultation asked the following question:

Question 7: Does the respondent agree with the GCRA's provisional views relating to the barriers to entry and countervailing buyer power? If the respondent does not agree with the GCRA's provisional view the respondent should provide all of its analysis and assessment of this market.

4.9.6 Having taken into account the responses to the Consultation, the GCRA in its Draft Decision stated that there was no evidence to indicate that each MNO was not dominant on the market for the provision of MCT on its own network. Each had 100% share of wholesale call termination on their networks and each was acting as a monopoly in the provision of that service.

Responses to the Draft Decision

4.9.7 Sure considers that it submitted to the GCRA, as part of its response to the Consultation, clear evidence that any OLO in Guernsey can choose to offer a commercial service to operators outside Guernsey that incorporates the final termination of both fixed and mobile calls[68]. Sure states that an "*individual MNO does not control a bottleneck in the manner that led the European Commission to conclude that there are separate call termination markets for each mobile and fixed network. By definition, any commercial service offered to a non-local operator would need to incorporate the cost to the provider of the service any payments to other OLOs to complete any call termination required, so all calls for which an MTR is chargeable will automatically be subject to non-discriminatory terms and condition at the point of termination in Guernsey. How each operator chooses to price and specify the commercial service offered to non-local operator, is however, an entirely different matter, and one which is determined by commercial negotiations. The product offered to non-local*

[67] This appears to be no more than a theoretical possibility. It involves rival operators acquiring SIM registrations and proprietary technology that would allow a calling operator to choose that provider to terminate a call to a customer held by another operator.

[68] See footnote 62 above.

operators (which may or may not include a call termination element) should therefore not [be] part of the relevant market."[69]

GCRA analysis and conclusion

4.9.8 Sure argues that any operator can provide a service that transits a mobile call and then hands it over for termination on the network of the MNO on which the customer resides. In doing so the operator will take into account any cost incurred for the termination of the call and which it needs to pay to the MNO who is physically terminating the call.

4.9.9 As set out at paragraph 4.7.7 above, the scenario described by Sure does not demonstrate that demand side substitution exists within [✂] and could easily be replicated in Guernsey. The information provided by Sure merely illustrated a scenario where a [✂]. As already stated [✂].

4.9.10 There is no alternative method of terminating the call and currently there is no foreseeable technology, or even the demand, for an alternative method for the termination of a mobile call. Therefore, the GCRA considers that the barriers to entry in this market remain high and there is no potential for the exercise of countervailing buyer power.

GCRA analysis and conclusion

4.9.11 For the reasons set out above and in its Draft Decision, the GCRA concludes that each MNO is dominant on the market for the provision of MCT on its own network. Each has 100% share of wholesale call termination on its network and each is acting as a monopoly in the provision of that service.

E. FINAL DECISION

4.10 Draft Decision

4.10.1 In the Draft Decision, the GCRA stated that it proposed to find that:

- A relevant market exists for termination services that are provided by [named mobile communications provider] (MNO) to another communications provider, for the termination of voice calls to Guernsey mobile numbers in the area served by that MNO and for which that MNO is able to set the termination rate.

- Each MNO is dominant on the market for the provision of MCT on its own network. Each has 100% share of wholesale call termination on its own network and each is acting as a monopoly in the provision of that service

Responses to the Draft Decision

4.10.2 Sure considers that the GCRA has proposed numerous definitions for the market for mobile termination and that the Draft Decision creates two distinct (and somewhat conflicting)

[69] Sure response to Draft Decision, paragraph 43.

definitions of a market. Sure does not consider that due regard has been given to the wording and has therefore considered it helpful to produce two amendments.

4.10.3 Sure believes that the two parts of the market definition set out in the Draft Decision[70] (paragraph 4.10.1 above) need to be conflated (or at least directly associated) to create a meaningful and robust definition. In any event, Sure believes that the first part of the proposed wording needs to be amended as below.

4.10.4 The proposed wording from Sure is:

'*The GCRA proposes to find that:*

- *The relevant market for mobile termination services is that provided by [named mobile communications provider] (MNO) to any Other Licensed Operator, for the termination of voice calls to Guernsey mobile numbers in this area served by that MNO and for which that MNO is able to set the termination rate (referred to, in summary as 'MCT on its own network').*

- *Each MNO is dominant on the market for the provision of MCT on its own network. Each has 100% market share of wholesale call termination on its own network and each is acting as a monopoly in the provision of that service.*

GCRA analysis and conclusion

4.10.5 The purpose of consulting with stakeholders in the market was to test the proposed market definition and explain how it was arrived at. The GCRA commenced the process with a focal product and then looked to see whether expanding it was relevant. In that process, various definitions are tested. A portrayal of this process as one proposing "*numerous definitions for the market for mobile termination*" appears to misunderstand a process that is standard in such assessments. .

4.10.6 The GCRA does not consider the proposed amendment to the first bullet point to be necessary.

4.10.7 The GCRA has considered the merits of the amendment to the second part of this definition and considers that the proposal put forward is reasonable and clearer. In order to minimise the changing to the wording provided in the Draft Decision the GCRA has decided to replace "*for the provision of MCT on its own network*" with "*on the market as defined above*" (ie, the definition in the second bullet refers to first bullet).

[70] As set out in paragraph 4.10.1 of this Final Decision

5. Final Decision

The GCRA finds:

- **A relevant market for termination services that are provided by JT (Guernsey) Limited (MNO) to another communications provider, for the termination of voice calls to Guernsey mobile numbers in the area served by that MNO and for which that MNO is able to set the termination rate.**

- **A relevant market exists for termination services that are provided by Sure (Guernsey) Limited (MNO) to another communications provider, for the termination of voice calls to Guernsey mobile numbers in the area served by that MNO and for which that MNO is able to set the termination rate.**

- **A relevant market exists for termination services that are provided by Airtel-Vodafone Guernsey Limited (MNO) to another communications provider, for the termination of voice calls to Guernsey mobile numbers in the area served by that MNO and for which that MNO is able to set the termination rate.**

- **Each MNO is dominant on the relevant market as defined. Each has 100% share of wholesale call termination on its network and each is acting as a monopoly in the provision of that service.**

For clarity the following calls are subject to a Mobile Termination Rate:

Call Type
Voice Calls
Off-net
Ported In
Calls to Voicemail
Voice calls to mobile numbers terminating on IP
Call forwarding (including international)
Calls to Guernsey numbers roaming abroad

Appendix 1

1. As set out in the Final Decision, Sure has made a number of points in its responses to the Consultation and to the Draft Decision that relate to the legal powers pursuant to which the GCRA may (or may not) regulate MTRs in Guernsey.

2. The GCRA notes that the purpose of a consultation process is to gather evidence from stakeholders regarding whether the propositions the GCRA has put forward are correct. In this case, the purpose of the consultation process was to seek evidence regarding the correctness (or otherwise) of a market definition and SMP finding put forward by the GCRA.

3. The scope of its legal powers is not a matter on which the GCRA is required to consult. The issues relating to the legal powers of the GCRA that Sure has raised therefore do not form part of the Final Decision.

4. Furthermore, the GCRA notes that this Final Decision does not impose any form of price control on Sure. It merely defines relevant markets and makes a finding of SMP. It is therefore unclear to the GCRA why Sure is, at this point, raising issues relating to the legal powers of the GCRA to do something that the GCRA is not seeking to do in this Final Decision.

5. Nevertheless, these points are listed in this Appendix 1 for completeness.

6. In its response to the Draft Decision, Sure makes a series of points:

    a. Licence condition 28.2 only applies to price control applied to "baskets" of products and so cannot be the basis of a control on MTRs[71];

    b. A consultation carried out by the GCRA in 2013 demonstrates that licence condition 28.2 was not intended to relate to interconnection services[72];

    c. CICRA is placing emphasis on licence condition 28.2 because it no longer suits its aims to directly associate MTRs under s.10(2) of the Telecoms Law[73];

    d. The fact that no equivalent to licence condition 28.2 exists in Jersey leads to weakness and disparity between operators within Jersey and between operators in the different regulated jurisdictions of Jersey and Guernsey[74];

    e. Sure has undertaken research to determine how the term "interconnection" is defined in other jurisdictions and considers that this should inform the interpretation of that term in Guernsey[75];

71 Sure response to the Draft Decision, paragraph 5.
72 Sure response to the Draft Decision, paragraph 6
73 Sure response to the Draft Decision, paragraph 7
74 Sure response to the Draft Decision, paragraph 8
75 Sure response to the Draft Decision, paragraphs 59 – 60

f. The GCRA and the JCRA have in the past used the term "interconnection" in relation to mobile termination services[76];

g. The concept of interconnection commonly encompasses services provided across the interconnection and not just the physical link itself[77];

h. According to Sure, the GCRA has previously applied all the subsections of s.10 of the Telecoms Law to operators. This means that these conditions are cumulative[78].

i. The interpretation of s.10(2) of the Telecoms Law contended for by the GCRA would undermine the purpose of that section[79].

j. The wording of s.10(5), (6) of the Telecoms law provides for a dispute resolution procedure between licensees. This suggests that s.10 only applies to operators licensed in Guernsey[80].

[76] Sure response to the Draft Decision, paragraph 61
[77] Sure response to the Draft Decision, paragraph 62.
[78] Sure response to the Draft Decision, paragraph 70.
[79] Sure response to the Draft Decision, paragraphs 71 – 73.
[80] Sure response to the Draft Decision, paragraph 74.