



Draft Decision

Broadband Market

Market Review and SMP Finding

Channel Islands Competition & Regulatory Authorities

Document No: CICRA 18/41

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1. Introduction

1.1 On 26 April 2018 CICRA¹ launched its broadband consultation² with a stakeholder meeting. At the meeting a number of operators requested that CICRA carry out a market review on the broadband market. Specifically JT (in Jersey) and Sure (in Guernsey) expressed concerns that the Significant Market Power ('SMP') findings existing in the respected broadband markets had been in place for a significant time during which both fixed and mobile technology have changed as well as how consumers use the broadband services provided.

1.2 Following the stakeholder meeting CICRA reviewed the comments of the operators and decided to engage external consultants to carry out a pragmatic and proportionate market review.

1.3 SPC Networks ("SPC") was subsequently engaged to carry out the market review.

1.4 This Draft Decision presents the findings of a *Market Review on the Broadband Market carried out on behalf of CICRA*. The Market Review considered both the Guernsey and Jersey markets.

2. Structure and Timetable

2.1 This Draft Decision is set out as follows:

Section 3: Legal Background

Section 4: Summary of Market Review

Section 5: Proposed Action

Section 6: Next Steps

Section 7: Draft Decision

¹ The JCRA and GCRA co-ordinate their activities with respect to competition law enforcement in the Channel Islands. For the purposes of this document, the JCRA and GCRA are together referred to as CICRA, and all references to CICRA should therefore be read as references to each of the JCRA and GCRA unless the context otherwise requires.

² Future Economic Regulation of the Broadband Market, Consultation Document, CICRA 18/21, 4 May 2018

3. Legal Background

3.1 The SPC Network report is specific on areas of Channel Islands and European laws and regulation that it has considered in carrying out its assessment and reaching its conclusion.

3.2 In addition the specific legal and licencing conditions for Jersey and Guernsey are set out below.

JERSEY

Legal background

3.3 The Telecommunications (Jersey) Law 2002³ (**the Telecoms Law**) provides that the JCRA may include in telecommunications licences such conditions as the JCRA considers necessary or desirable for reasons including but not limited to those set out in article 16 of the Telecoms Law.

3.4 .Part 3 of the Telecoms Law sets out the duties of the Minister and the JCRA, and obliges them to protect and further the interests of telecommunications users within Jersey by, wherever appropriate, promoting competition⁴. Part 3 also sets out general objectives that the JCRA should take into account, including the need to promote efficiency, economy and effectiveness, and to further the economic interests of Jersey.

3.5 The Telecoms Law⁵ specifically provides that the JCRA may include in any licence, conditions that are:

³³ Telecommunications (Jersey) Law 2002, revised edition 06.288, 1 January 2013

⁴ Part 3, Article 7 (2) (a)

⁵ The definition of a position of SMP / dominance and the abuse of a position of SMP / dominance is not explicit in the Telecoms Law. However, the Competition (Jersey) Law 2005 sets out the States’ approach to defining abuse of a dominant position and anti-competitive practice.

- Intended to prevent or reduce anti-competitive behaviour⁶;
- Relate to, or imposing requirements about, competition in relation to telecommunications services, telecommunication systems, apparatus and telecommunication equipment.⁷

Licensing Framework

3.6 Part 2 of the Telecoms Law establishes the requirement for a telecoms operator to hold a licence, and Part 5 sets out the powers which the JCRA has to grant a licence. There are four classes of telecommunications licence in Jersey. A Class III licence is specifically for applicants which have Significant Market Power (SMP). The Class III licence includes a Part which addresses conditions applicable to dominant operators⁸.

3.7 The provisions which are applicable to dominant operators include (but are not limited to) measures addressing the availability and associated terms of Other Licensed Operator (OLO) access to networks and services⁹; the requirement not to show undue preference or to exercise unfair discrimination¹⁰; the requirement not to unfairly cross subsidise¹¹, supported by accounting processes to demonstrate compliance; regulation of prices, and transparency around pricing and wholesale product offerings, including the publication of appropriate Reference Offers¹².

3.8 The Class III licence also includes a Part which directly obliges the licensee not to engage in any practice which has the object or likely effect of preventing, restricting or distorting competition in the establishment, operation and maintenance of telecommunications networks and services.¹³

⁶ Part 5, Article 16 (1) (i)

⁷ Part 5, Article 16 (2) (4) (a)

⁸ Part IV of the Class III licence

⁹ Condition 25, Class III licence

¹⁰ Condition 31, Class III licence

¹¹ Condition 30, Class III licence

¹² Condition 33, Class III licence

¹³ Condition 34, Class III licence

GUERNSEY

Legal background

3.9 Section 5(1) of The Telecommunications (Bailiwick of Guernsey) Law, 2001 (the **Telecoms Law**) provides that the GCRA may include in licences such conditions as they consider appropriate, having regard to objectives set out in Section 2 of the Regulation Law, and the enforcement of the Regulation Law and the Telecoms Law.

3.10 The Regulation of Utilities (Bailiwick of Guernsey) Law 2001 (the Regulation Law) sets out the general duties which the States and the Guernsey Competition and Regulatory Authority (GCRA) must take into account in exercising their functions.¹⁴ These include the requirement to protect consumers and other users in respect of the prices charged for, and the quality, services levels, permanence and variety of, utility services; to ensure that utility services are provided in a way which will best contribute to economic and social development; and to introduce, maintain and promote effective and sustainable competition¹⁵.

3.11 The Telecoms Law¹⁶ specifically provides that the GCRA may include in any licence conditions that are:

- Intended to prevent and control anti-competitive behaviour¹⁷; and
- Regulate the price premiums and discounts that may be charged or (as the case may be) allowed by a licensee which has a position of SMP in a relevant market¹⁸.

3.12 The GCRA is obliged¹⁹ to publish notice:

¹⁴ Section 2 of the Regulation of Utilities Law

¹⁵ These broad objectives were maintained in the transfer of functions and responsibilities to GCRA, as set out in the Guernsey Competition and Regulatory Authority Ordinance, 2012

¹⁶ The definition of a position of SMP / dominance and abuse of a position of SMP / dominance is not explicit in the Telecoms Law. However, the Competition (Guernsey) Ordinance 2012 sets out the States' approach to defining abuse of a position of SMP / dominance and anti-competitive practice.

¹⁷ Section 5(1)(c) of the Telecoms Law

¹⁸ Section 5(1)(f) of the Telecoms Law

¹⁹ Section 5(2) of the Telecoms Law

- Of a proposed decision as to whether a person has a position of SMP in a relevant market and of the conditions, if any, proposed to be included in the licence granted to that person in relation to the control of that dominant position;
- Of a proposed decision to regulate the prices, premiums and discounts that may be charged or (as the case may be) allowed by a licensee which has a position of SMP in a relevant market; and
- Of a proposed decision to include quality of service conditions in any licence.

Licensing Framework

3.13 Licences are issued to fixed telecommunications providers under Part 1, section 1 of the Telecoms Law. All fixed and mobile telecommunications licences include a Part which addresses conditions applicable to operators with SMP²⁰. If the GCRA has found that a licensee has a position of SMP in a relevant market, the provisions of this Part of the licence may apply.

3.14 The provisions which are applicable to operators with SMP include (but are not limited to) measures addressing the availability and associated terms of Other Licensed Operator (OLO) access to networks and services²¹; the requirement not to show undue preference or to exercise unfair discrimination²²; and the requirement not to unfairly cross subsidise²³, supported by accounting processes to demonstrate compliance; regulation of prices, and transparency around pricing²⁴.

3.15 The fixed telecommunications licences also include a Part which directly obliges the licensee not to engage in any practice which has the object or likely effect of preventing, restricting or distorting competition in the establishment, operation and maintenance of telecommunications networks and services²⁵.

²⁰ Part IV of the fixed telecommunications licences

²¹ Condition 24, Fixed telecommunications licences

²² Condition 29, Fixed telecommunications licences

²³ Condition 28, Fixed telecommunications licences

²⁴ Condition 31, Fixed telecommunications licences

²⁵ Part V: Fair Competition, Fixed telecommunications licences

4. Summary of Market Review

4.1 CICRA gave SPC Network two objectives in its request to conduct an independent assessment of the market:

- i) To define the relevant product and geographic markets, and
- ii) To assess whether any operator holds a position of Significant Market Power (SMP) on the market(s).

4.2 In addition, CICRA specified that SPC should take account of the process of market definition and assessment of SMP used by the European Union, even though neither Guernsey nor Jersey are Member States, but to do so in a way that is both proportionate and pragmatic given the size of the Bailiwicks.

4.3 SPC's report is provided as Annex A to this Draft Decision.

Summary of findings

4.4 **FINDING 1** - *Guernsey and Jersey are separate geographic markets*

4.5 The two Bailiwicks each have separate incumbent fixed network operators (Sure and JT respectively) and are separate legal jurisdictions. On that basis SPC concluded that they consider the Bailiwicks to be two separate geographic markets and have assessed them independently.

Guernsey – Market Definition

4.6 **FINDING 2** - *SPC concluded that the appropriate market definition in Guernsey is:*

“Wholesale access to the Internet at a fixed location using an access network based on local loops that are either exclusively or partially based on the copper or fibre access network or using the 4G and ultimately 5G wireless access network via a fixed device in the whole Bailiwick of Guernsey”.

Guernsey – Assessment of Market Power

4.7 Based on the market definition above and on the data provided to SPC by CICRA, SPC found that Sure has a market share of 93% of subscriber lines. This market share is well above the 50% at which a position of SMP is presumed. SPC found no evidence of low barriers to entry or expansion and no countervailing buyer power.

4.8 **FINDING 3** - *SPC therefore concluded that Sure has SMP on the market.*

Jersey – Market Definition

4.9 **FINDING 4** - *SPC concluded that the appropriate market definition in Jersey is:*

“Wholesale access to the Internet at a fixed location using an access network based on fibre or cable or using the 4G and ultimately 5G wireless access network via a fixed device in the whole Bailiwick of Jersey”.

Jersey – Assessment of Market Power

4.10 Based on the market definition above and on the data provided to SPC by CICRA, SPC found that JT has a market share of 88% of subscriber lines. This market share is well above the 50% at which a position of SMP is presumed. SPC found no evidence of low barriers to entry or expansion and no countervailing buyer power.

4.11 **FINDING 4** - *SPC therefore concluded that JT has SMP on the market.*

5. Proposed Action

5.1 CICRA is seeking comments on the market definition and SMP statements included in the SPC Network report.

5.2 CICRA is seeking to understand the following from stakeholders:

Question 1 - Does the respondent agree with the market definition provided by SPC Network in its report? If the respondent has alternative views or evidence the respondent is asked to explain those and provide all of its analysis and assessment relating to this matter to inform CICRA's considerations and next steps.

Question 2 - Does the respondent agree with the assessment of market power provided by SPC in its report? If the respondent has alternative views or evidence the respondent is asked to explain those and provide all of its analysis and assessment relating to this matter to inform CICRA's considerations and next steps.

5.3 The SPC Network report is included in Annex A.

6. Next Steps

6.1 CICRA has recently introduced a revised process for consultations. The Information Notice, CICRA 18/29 "Regulatory Consultation Process" published in July 2018 outlines the new process. Under the new process there is a non-statutory process common to both jurisdictions. The non-statutory process consists of a Call for Information, a Draft Decision and a Final Decision. Responses are sought from stakeholders at the Call for Information and Draft Decision stage. Following the non-statutory process the appropriate Jersey and Guernsey statutory process are followed²⁶.

6.2 The requirement to undertake a market review was an outcome of the Broadband consultation that was carried out earlier this year. That Call for information informed the Draft Decision which represents the second stage of CICRA's new regulatory consultation process.

6.3 Interested parties are invited to submit comments to CICRA in writing or by email on the matters set out in this document to the following addresses:

2nd Floor, Salisbury House

Suite 4, 1st Floor

²⁶ In Jersey the Statutory process is an Initial Notice followed by a Final Notice and in Guernsey a Draft statutory notice followed by a Final statutory notice

1-9 Union Street St Helier Jersey JE2 3RF Email: info@cicra.je	La Plaiderie Chambers La Plaiderie St Peter Port Guernsey GY1 1WG Email: infor@cicra.gg
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6.4 All comments should be clearly marked 'Draft Decision – Broadband Market Review: Market Definition and SMP Assessment' and should arrive by 5pm on 19 November 2018.

6.5 In line with CICRA's consultation policy, it intends to make responses to the consultation available on the CICRA website. Any material that is confidential should be put in a separate annex and clearly marked as such so that it may be kept confidential.

7. Draft Decision

7.1 For the reasons set in full in this document and the relevant analysis set out in the report provided on behalf of CICRA by SPC Network the decision of CICRA is as follows:

GUERNSEY

The appropriate market definition in Guernsey is;

"Wholesale access to the Internet at a fixed location using an access network based on local loops that are either exclusively or partially based on the copper or fibre access network or using the 4G and ultimately 5G wireless access network via a fixed device in the whole Bailiwick of Guernsey."

Assessment of market power: *"Sure has Significant Market Power on the market as defined"*.

JERSEY

The appropriate market definition in Jersey is;

“Wholesale access to the Internet at a fixed location using an access network based on fibre or cable or using the 4G and ultimately 5G wireless access network via a fixed device in the whole Bailiwick of Jersey.”

Assessment of market power: *“JT has Significant Market Power on the market as defined”*.

/END