

**The Guernsey Competition and Regulatory Authority's draft  
Business Connectivity Market Review**

1. I have been asked by JT Group to comment on the proposals of the Guernsey Competition and Regulatory Authority (GCRA) in relation to the Business Connectivity Market for the provision of leased lines of various speeds on the island of Guernsey. I have over 25 years' experience in telecommunications regulation across numerous markets and annex a copy of a brief CV to this paper.
  
2. The GCRA has published a draft decision as to its conclusions on the Business Connectivity Market accompanied by a short report ('the report')<sup>1</sup> which has been produced for the GCRA by an external consultant. In my view and for the reasons I explain in this paper, the contents of that report, which the GCRA seem to have accepted uncritically in their draft decision, fall far short of what is required for a market review of this kind. Little, if any, meaningful evidence is presented to support the conclusions that are drawn, and in many cases the authors do not appear to understand the evidential test that has to be met and the analytical approach that has to be adopted. I consider that the conclusions, which differ fundamentally from the conclusions which the GCRA arrived at in its last market review in 2014, are flawed in almost every respect. The GCRA would, in my view, be very unwise to place much, if any, weight on the conclusions in the report and should instead amend its draft decision to bring it in line with its previous findings and with the approach taken by other regulators.
  
3. The paper is structured as follows:
  - a. I first make some general comments about the plausibility of the GCRA's draft decision and the report on which it relies, in light of both the GCRA's previous Business Connectivity Market review and the way in which regulators elsewhere have approached the issues
  
  - b. I then discuss the report produced by the GCRA's consultants, consider the adequacy of the evidence they offer to support their conclusions, and explain what they should have done to meet the relevant legal tests and adhere to good regulatory practice
  
  - c. I offer my own conclusions based on the evidence available to me and my experience

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<sup>1</sup> At <https://www.gcra.gg/media/598293/t1480gj-bcmr-draft-decision-annex-1.pdf>

*General comments on the GCRA's draft decision*

4. The report (and the GCRA's draft decision) defines two geographic markets at both the retail and the wholesale level and two distinct product markets. This produces a total of eight markets in all.

In simple terms, the distinctions are between:

- a. An 'urban' retail market (comprising St Peter Port, St Sampson and St Martin) for lower speed leased lines (below 1 GB/s) in which Sure and JT are said to be jointly dominant
- b. An 'urban' retail market for higher speed leased lines (above 1 GB/s) in which JT is said to be dominant
- c. A 'rural' retail market (comprising the rest of Guernsey) for lower speed leased lines in which Sure is said to be dominant
- d. A 'rural' retail market for higher speed leased lines in which Sure is said to be dominant
- e. An 'urban' wholesale market for lower speed leased lines in which Sure is said to be dominant
- f. An 'urban' wholesale market for higher speed leased lines in which Sure is said to be dominant
- g. A 'rural' wholesale market for lower speed leased lines in which there is no wholesale supply by any firm.
- h. A 'rural' wholesale market for higher speed leased lines in which Sure is said to be dominant.

5. This clearly presents a much more complex picture of competitive dynamics for business services on Guernsey than the GCRA thought was the case in 2014<sup>2</sup>. In that decision, the GCRA concluded that Sure held a dominant position in the provision of wholesale leased lines of all speeds throughout the island but that competitive pressure from JT – which used wholesale services

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<sup>2</sup> 2014 Decision, at <https://www.gcra.gg/cases/2013/t994gj-business-connectivity-market-review/t994gj-final-decision-business-connectivity-market-review/>

provided by Sure - was sufficient to ensure that no operator held a dominant position in the corresponding retail market.

6. Given how much the draft decision departs from the 2014 decision, I would expect the GCRA to be able to explain what had happened in the intervening period to produce such a significant change in the competitive dynamics of the market. Moreover, in this case the draft decision must derive from a conclusion that the retail market for business connectivity services in Guernsey has become significantly less competitive since 2014. That might be the case if, for example, JT had chosen to withdraw from Guernsey in the intervening period or if wholesale regulation of Sure by the GCRA had been withdrawn. Neither of these things has happened. The report itself does not contain any evidence about developments in the business services market which might lead to such a collapse in competition and failure of regulation. This means I am left to speculate as to why or how the authors of the report have arrived at the conclusions they did.
7. Of course, if the report's findings were correct the GCRA would, I think, be the only regulator in Europe to reintroduce regulation in the retail as well as wholesale market for business services and one of only two to do so for any retail telecommunications service<sup>3</sup>. The European Commission initially included a retail market for leased lines in its first list of Relevant Markets back in 2003<sup>4</sup>. But it withdrew it in 2007<sup>5</sup>. This was because regulators throughout Europe – regardless of the size of the market - had found that effective regulation at the wholesale level was generally sufficient to safeguard competition in the downstream retail market. This was the case even when there was no competitive infrastructure provision at the wholesale level and the former incumbent operator retained a monopoly over the provision of the wholesale inputs to itself and its competitors. The GCRA's 2014 decision was entirely consistent with this approach.
8. Before going further, it is worth recalling how regulators in the UK and Europe are expected to approach the task of assessing dominance or Significant Market Power, since this does not appear to have been properly understood by the authors of the report. The European Commission has explained this in numerous decisions, as well as in its SMP Guidelines, which it updated in 2018<sup>6</sup>. The first step is to consider the relevant retail market. The GCRA's consultants appear to do this in paragraphs 4.5 to 4.13 of the report. If the retail market would be effectively competitive without any form of intervention by the regulator, including in wholesale markets, then no further

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<sup>3</sup> Ofcom reintroduced price caps on the level of standalone line rental charges charged by BT in 2017.

<sup>4</sup> At <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32003H0311>

<sup>5</sup> At <https://op.europa.eu/en/publication-detail/-/publication/43ad8f2d-bea6-4e73-801c-5185e86727d3/language-en>

<sup>6</sup> SMP Guidelines, see paras 15-21 at [https://ec.europa.eu/newsroom/dae/document.cfm?doc\\_id=51836](https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=51836)

analysis is required. This has often been the case for mobile retail markets, for example, where there are competing vertically integrated firms without the need for any form of regulation.

9. If, as is the case here, the regulator concludes that without regulation the retail market would not be effectively competitive, the next step is to analyse the corresponding wholesale market or markets. In simple terms, the regulator is required to understand how the relevant wholesale market would function in the absence of regulation. Normally it would fail to function effectively because, without regulation, a vertically integrated firm has no incentive to supply the wholesale services that a potential entrant into the corresponding retail market would require. Often, no such incentive exists when there is no competitive constraint from another firm in the wholesale market. Regulators will therefore find monopolists to be dominant in wholesale markets (and, exceptionally, duopolists to be jointly dominant) and require them to supply wholesale services which will then allow others to enter the retail market and to compete effectively. The result is that a regulator will find dominance in the wholesale market but, after having done so, will conclude that the regulatory interventions it will make in the wholesale market will ensure that the corresponding retail market is competitive and that so no question of dominance will now arise in the retail market. I note that this is exactly the approach the GCRA took in 2014<sup>7</sup>.
10. The order in which the analysis is undertaken is crucial. A finding that a retail market would not be effectively competitive in the absence of wholesale regulation is not the same as a finding about how the retail market will function when wholesale regulation has been put in place. Wholesale regulation should overcome the barriers that would otherwise prevent competition in the retail market.
11. The authors of the report do not appear to have gone through this analytical process or to have otherwise asked themselves whether a finding of dominance and the imposition of regulation in the wholesale market would resolve their competitive concerns about the retail market. The consequence of this error is that the GCRA will, on the basis of the report's conclusions, find itself both regulating prices in the retail market because it has concluded the retail market will not otherwise be effectively competitive and, at the same time, regulating the wholesale market precisely to ensure effective competition in the retail market. This is both contradictory and at odds with the approach which Ofcom and other European regulators have been required to take since the early 2000s. The report does not even seem to recognise the inconsistency.

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<sup>7</sup> 2014 Decision: 'The GCRA notes that the finding of no SMP in the retail market and in the wholesale market for off-island leased lines is contingent on an appropriately regulated market for wholesale on-island leased lines.', p. 8

12. The error is most obviously illustrated by the treatment of barriers to entry in the report. The authors say, at paragraph 4.11, that because infrastructure is required to provide leased lines the market is characterised by high and enduring barriers to entry. The authors are confusing or failing to distinguish between retail and wholesale markets. It may be correct to say that the market for wholesale leased lines, the provision of which requires a network, involves significant barriers to entry. But it cannot be right to say that the corresponding retail market has significant barriers if wholesale services are required by the regulator to be available and can be purchased by anyone. The retail market might be difficult to enter in the absence of a finding of dominance in the wholesale market and wholesale regulation, but not if wholesale products are readily available.

*What has changed since 2014?*

13. What might have changed since 2014 to lead to such a radically different set of conclusions<sup>8</sup>. My understanding is that the most significant development that would be relevant to our consideration of the business services market in Guernsey since 2014 has been that JT has invested in the provision of its own infrastructure at some locations on the island. To the extent that JT is no longer dependent on purchasing regulated inputs from Sure to serve its retail customers, this would make JT a more, not less, effective competitor to Sure than it was in 2014<sup>9</sup>. This would mean that a retail market that was found by the GCRA to be effectively competitive in 2014 would be even more so today. The fact that JT was part of a group that won a fiercely fought tender during this period (in 2019) to provide digital services, including leased lines, to the Government of Guernsey might be further evidence of JT's competitive credentials in Guernsey. In such a case, the obvious conclusion is that an already effectively competitive market has become even more competitive than it was in 2014. Yet the report concludes that, on the contrary, Sure has, since 2014, been able to regain a dominant position which it had previously lost in the 'rural' retail market. This is intuitively implausible, would be unprecedented in Europe, and is unsupported by any evidence in the report.

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<sup>8</sup> One possibility is that the GCRA is no longer applying what it referred to in 2014 as 'the EU methodology'. This is the same approach as adopted by the Competition and Markets Authority in the UK when undertaking market reviews. If there has been a change, it is not apparent from the report or the draft decision and it is not apparent to me what an alternative approach might be.

<sup>9</sup> The GCRA recognised this in its 2014 Draft Decision: 'The GCRA agrees that infrastructure built by Other Licensed Operators (OLOs) which allows the OLO to offer retail leased lines over that infrastructure both strengthens the competitive position of the OLO, which is then less reliant on the incumbent, and also reduces the OLO's reliance on the wholesale market and reduces the size of the wholesale market.', p.14

14. Other conclusions appear equally implausible. For example, the report finds that Sure holds a dominant position in the urban wholesale market for high speed leased lines but that JT holds a dominant position in the corresponding retail market. The implication of this is that Sure, despite having a capable network and despite having been able to compete with JT in 2014, is no longer able to provide an effective competitive constraint. This is a curious state of affairs, to say the least, and the GCRA would have to have strong evidence to explain why Sure, the former incumbent, is now apparently unable to compete effectively with JT. It would also be very unfortunate if JT, the new investor in telecoms infrastructure in Guernsey, were to be rewarded for its efforts by the GCRA imposing retail price controls on the high speed leased lines it provides over that infrastructure. JT might reasonably think twice about making further investments in Guernsey in such circumstances.
15. I can only speculate as to why the report concludes that JT is dominant and Sure ineffective, since no evidence is provided in the report itself. My assumption is that the authors have drawn incorrect conclusions about the competitive dynamics of a market when looking at market shares. In this case, JT's successful participation in the acquisition of a significant contract with the Government of Guernsey, concluded in 2019, translates into a significant share of the market for JT. But the authors do not seem to appreciate that a bidding market can be highly competitive, even if one firm wins a majority of the contracts that are put out to tender. JT's prices and other aspects of its offer will be effectively constrained so long as Sure is a credible bidder that JT (or the consortium in which JT is participating) takes into account when bidding. This is even if JT wins the contract. Somebody has to win and somebody to lose. It is certainly not necessary for Sure (or the consortium in which Sure is participating) to win contracts in order for it to be an effective competitor or for the market as a whole to be competitive. I have not examined the bidding process that led to the award of the Government contracts in 2012 and again in 2019, but I understand and would expect that JT certainly regarded Sure as a credible competitor and that the tender was a competitive one. All of which is to remind us that market shares reveal very little about competition when viewed in isolation.
16. The correct conclusion on the evidence I have seen would be that whilst Sure may retain a dominant position in the wholesale market because, as the report states, JT has a more limited point to point network and has not actively competed in the provision of wholesale services in the past<sup>10</sup>, JT uses a combination of its own infrastructure and regulated wholesale services purchased from Sure to compete effectively with Sure in the retail market. Newtel may also compete. This is exactly the same competitive dynamic that arises in markets where a vertically integrated

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<sup>10</sup> Report, para 2.11

former incumbent like Sure competes with a cable operator in the retail market for broadband services, whilst the former incumbent remains the only and dominant provider of wholesale services. There are two networks, effective competition in the retail market but dominance in the wholesale market. That was the GCRA's conclusion in 2014 and I see nothing in the report to suggest it would not also be the correct conclusion today.

17. The other striking, but equally implausible, conclusion in the report is that, for low speed leased lines in the urban market, Sure holds a dominant position in the wholesale market but Sure and JT share a jointly dominant position in the retail market.
18. Again, I am not aware of any other regulator in Europe (or elsewhere) that has found a market to function in this way. Findings of joint dominance in any market, including telecommunications markets, are extremely unusual and only arise under certain conditions. This is an issue of particular interest to me since I have been closely involved in most of the joint dominance cases in telecommunications over the past 20 years<sup>11</sup>. I discuss the evidence required to establish joint dominance later in this paper. Before I do so, I should note that the approach of other regulators in joint dominance cases has been to seek to establish joint dominance in the wholesale market by arguing that, in the absence of regulation, two (sometimes three) mobile network operators have tacitly agreed amongst themselves to refuse to provide wholesale access to potential retail competitors (MVNOs). The consequence of this is that the colluding operators face less competition in the retail market and earn higher margins as a result. The Commission considers that it is not necessary to find joint dominance in the corresponding retail market<sup>12</sup> and most regulators have not attempted to assert joint dominance in retail telecommunications markets, for reasons I explain further below. An exception was the Dutch regulator which was the first regulator in Europe to find joint dominance in a fixed telecommunications market and, moreover, to do so for both wholesale and retail broadband services<sup>13</sup>. The Dutch regulator's theory was that KPN, the former incumbent, and Ziggo, a cable operator, would tacitly co-ordinate to deny wholesale broadband services to potential entrants into the retail market and, having done so and facing no competition from others, would then be able to co-ordinate their retail prices as well. However, that decision was found to be 'fundamentally flawed' and annulled in full by the Dutch courts in March 2020<sup>14</sup>.

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<sup>11</sup> My brief CV references expert evidence on this topic in other jurisdictions, such as Canada

<sup>12</sup> See SMP Guidelines, para 21 at [https://ec.europa.eu/newsroom/dae/document.cfm?doc\\_id=51836](https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=51836)

<sup>13</sup> Summary at <https://www.acm.nl/sites/default/files/documents/2019-04/market-analysis-wholesale-fixed-access-2019-04-19.pdf>. The Maltese regulator also proposed to find joint dominance in the fixed broadband market in Malta in 2006, but its proposals were opposed by the European Commission and withdrawn without being adopted, see [https://ec.europa.eu/competition/publications/cpn/2007\\_2\\_31.pdf](https://ec.europa.eu/competition/publications/cpn/2007_2_31.pdf).

<sup>14</sup> <https://digitalregulation.org/joint-dominance/>

19. This means no regulator I am aware of anywhere in the world has yet to find joint dominance in either a retail or wholesale market for fixed (as opposed to mobile) telecommunications services. In the GCRA's case, the theory in the report appears to be that despite Sure being obliged to provide regulated wholesale services, as it has been obliged to do for many years, entry by other firms into the retail market is impossible and that, in consequence, JT and Sure are able to tacitly co-ordinate their retail prices without being disrupted by entrants or the threat of entry. In other words, the GCRA's position relies on the conclusion that the GCRA's regulation of Sure's wholesale activities is, and will be, wholly ineffective. Needless to say, that is a very strange argument for the regulator itself to advance.
20. It also relies on the GCRA showing that conditions which it found in 2014, when there was 'no evidence to support the suggestion of collusive behaviour on the part of Sure and JT and takes the view that any such co-ordinated activity would be unlikely to succeed in practice'<sup>15</sup> have changed so fundamentally in the intervening years that Sure and JT can co-ordinate successfully today and in the future. Again, no such evidence is presented.
21. The far more plausible conclusion, and the one arrived at by most regulators, is that if the wholesale market is regulated effectively then barriers to entry into the retail market will be low. In such circumstances, any attempt by existing firms to charge super-competitive prices or otherwise to tacitly collude in the retail market would be disrupted by entry. Thus, if dominance is established in the wholesale market and appropriate regulation imposed, no question of dominance or joint dominance ought to arise in relation to the corresponding retail market. The report contains no evidence to suggest the market in Guernsey would be any different.
22. I now turn to consider the strength of the evidence and analysis contained in the report in more detail.

#### *Geographic market definition*

23. I have already noted that the report considers geographic market definition (in paragraphs 3.3 to 3.22) without apparent regard to whether the market in question is a wholesale market or a retail market. I find it difficult to see how a geographical market can be properly specified without it first being clear whether wholesale or retail products are being considered. The authors simply assume that the same geographical boundaries must apply to wholesale as to retail markets.

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<sup>15</sup> 2014 Draft Decision, This quote is taken from what is labelled the 'draft decision' in 2014, but is also said by the GCRA to represent its 'definitive position on key issues', at <https://www.gcra.gg/cases/2013/t994gj-business-connectivity-market-review/t994gj-draft-decision-business-connectivity-market-review-guernsey/>, p.1



24. The report states that ‘commercial market conditions’ suggest a separate geographic market for St Peter Port, St Sampson and St Martin and another for the rest of Guernsey<sup>16</sup>. The evidence in the report to support this finding is that:
- a. The density of the former geographic area is almost double that of the latter<sup>17</sup>
  - b. Most businesses are situated in St Peter Port, Government premises in St Sampson and most hotels in St Martin.<sup>18</sup>
  - c. There are ‘at least two competing networks with close access to business and government sectors’ in St Peter, St Sampson and St Martin but Sure has a monopoly in the rest of Guernsey<sup>19</sup>
25. The first point to make is that, to the extent these are relevant factors, they relate to the delineation of the wholesale market rather than the retail market. Competition in the provision of wholesale services is self-evidently not feasible at geographic locations where there is a monopoly infrastructure. The presence of two networks in the urban areas is therefore a relevant consideration (the differences in densities and location of businesses – see (a) and (b) above - are not separate factors in the analysis but rather help to explain why JT has deployed its network at the locations it has).
26. However, the GCRA cannot just assume there is a market boundary between locations with a network monopoly and those with a duopoly. It did not do so in 2014, when it concluded ‘The GCRA maintains its view that these variations [a reference to the fact that JT had deployed infrastructure at some locations but not others on the island] do not result in clear and persistent boundaries which would indicate a separate geographic market within Guernsey, and has received no compelling evidence of, for example, pricing changes in response to change in particular conditions in specific areas. A finding of a smaller geographic market within Guernsey would need to be evidenced by data which showed the clear boundary between different areas in terms of demand and supply.’<sup>20</sup>
27. The GCRA was correct in 2014 in thinking it had to consider the evidence of different competitive conditions in different geographic locations. What evidence there is of this in the

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<sup>16</sup> Report para 3.4

<sup>17</sup> Report, para 3.8

<sup>18</sup> Report, para 3.9

<sup>19</sup> Report, para 3.18

<sup>20</sup> 2014 Draft Decision, p.14

report is contradictory: on the one hand it refers to ‘two competing networks’<sup>21</sup> whilst on the other it states ‘Sure is the main provider of wholesale connectivity in this [urban] area...as the only alternative wholesale connectivity provider, JT, predominantly operates a point-to-point network and its business connectivity services do not rely on a wholesale model.’<sup>22</sup> My understanding is that the latter view is more appropriate and that JT does not at this stage represent a significant enough competitive constraint on Sure for the provision of wholesale services (i.e. competitive conditions are not sufficiently different) for this to justify a separate geographic market. That ought to lead the GCRA adopting a single all-island geographic market definition for the wholesale market. If there is evidence that would support a different conclusion then I have not seen it.

28. The evidence that you would need to consider geographic market definition at the retail level is not addressed at all in the report. My understanding is that JT competes in the provision of leased lines to retail customers at locations throughout Guernsey, some of which it provides using its own infrastructure and some of which it relies upon wholesale services from Sure to provide. The fact that most of the customers are concentrated in a particular location or set of locations does not say anything about the geographic scope of the market. I have seen no evidence to suggest that prices for similar retail products vary significantly by geography. On this basis, competitive dynamics appear similar across the island and I would expect the GCRA to define the geographic retail market that reflects this. There is nothing in the report that I could see to support the findings of the authors that competitive conditions vary for retail services as between the urban and rural areas which they propose.

#### *Product market definition*

29. The report is also unconvincing (and contradictory) when it comes to product market definition.
30. The report first considers whether backhaul products for mobile operators are a different product market from leased lines that are supplied to other businesses. The reasoning is a little confusing and I consider that some of the evidence has no relevance to the conclusion<sup>23</sup>, but I do not have any fundamental concern about the conclusion which the authors reach.

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<sup>21</sup> Ibid

<sup>22</sup> Report, para 2.9

<sup>23</sup> For example, the fact that mobile operators have complained about the prices and services that are available to them for backhaul tells us more about the lobbying of the regulator than the competitive dynamics of the market, see the report, para 3.36

31. The report then goes on to consider whether high speed leased lines, which it defines as those supporting speeds above 1 GB/s, are in a different product market to lower speed leased lines<sup>24</sup>. The key question for product market definition is presented at paragraph 3.49, where the authors say ‘Having reviewed and considered the data provided, it is our view that a small but significant increase in price (defined as between 5% and 10%) would not result in switching between products and services below 1Gbps bands and above (VHB products)’. This is the right question to ask, but since the report fails to present any of ‘data’ on which the answer is based, it is impossible for me to determine whether they are correct or not. Regulators are obliged both to base their decisions on evidence and to be as transparent as possible, within the constraints of commercial confidentiality, about what that evidence is. It is unacceptable for a regulator or its consultants to simply assert that something is the case without disclosing anything to show the reader how they arrive at that conclusion. It leads to the suspicion that it may be based on very much at all.
32. If the report’s authors had really undertaken a hypothetical monopolist SSNIP test, as they claim, they would have needed to have obtained data about the cross elasticity of demand for leased lines at different speeds, based on observed changes of prices and volumes. They would also need to have considered the impact of changes in volumes on the margins earned by the firms. Perhaps they have done this but given the lack of other evidence in the report and given that undertaking these kinds of SSNIP tests invariably proves very difficult for anybody to do in practice, I have my doubts. If the report is simply expressly an opinion without any evidential underpinning, the authors ought to have said so and turned their attention to other evidence. I find no other evidence to support the conclusion that sub 1 GB leased lines occupy a separate product market from higher speed lines or to explain why 1GB rather than some other speed should be the appropriate boundary.
33. The report does say that growth and demand is foreseen for higher speed leased lines in future<sup>25</sup>. This would be consistent with what we see everywhere else as business’ demands for connectivity continue to expand. But the authors do not appear to consider the implication of this finding for product market definition, as they should. If businesses are moving from lower speed to higher speed services, this is clear evidence of at least one way substitutability of higher speed services for lower speed ones. It suggests that if an operator sought to raise the price of lower speed services but keep higher speed prices the same, some volume would switch from lower speed to

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<sup>24</sup> I note that it does so after first making a brief diversion at paragraph 3.41 into factors relating to competitive conditions on the supply side. These seem more relevant to geographic market definition for wholesale products and the dominance analysis than to product market definition. I discussed geographic market definition above and consider dominance below.

<sup>25</sup> Report, paras 3.42 and 3.43

higher speed services. In other words, high speed services will constrain lower speed services to some degree and there is no sharp or clear boundary between the two sets of products. The next question to consider is whether an increase in the price of higher speed services might lead some businesses to migrate down to a lower speed service. I have seen no evidence to allow me to answer this, but I would expect it to be a plausible outcome. If so, this would suggest some degree of substitutability between high speed and low speed services in both directions. If so, they would form part of a single product market rather than separate ones.

34. The report also does not recognise an important feature of these types of markets, which is that a ‘chain of substitutability’ often applies<sup>26</sup>. This means, as the term implies, that it is not necessary for a business to be prepared to substitute a 10 GB/s leased line with 10 Mb/s service for these products to be in the same market (this would clearly be very improbable). What is required is for the price of the 10 Mb/s service to constrain the price of the 50 Mb/s, and for that to constrain the price of the 100 Mb/s service and so on all the way up the ‘chain’ to the 10 GB/s service. If that is the case, then the products at either end of the spectrum are in the same product market since they constrain each other via a series of intermediary products. Although the report does contain a section on tariff gradients<sup>27</sup>, the authors do not appear to have considered whether any changes in the gradient offer evidence of product substitutability. I note that BT’s prices in paragraph 5.7 show that if BT changes the price of a leased line at one speed it tends to adjust the prices at other speeds as well. This is evidence of substitutability between the services, since BT is doing this in order to ensure that users of lower speed tariffs do not migrate to higher speed tariffs because it has lowered the price of the latter without adjusting the price of the former. If, on the other hand, each speed of leased line was in a different product market, BT could change the tariff of any product independently of any of the others.
35. None of this has been considered by the GCRA or its consultants. As a result, I do not consider the GCRA or its consultants have presented any credible evidence to support the product market definitions it proposes to adopt, or to explain why these depart from the approach it took in 2014.

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<sup>26</sup> SMP Guidelines, para 43-45

<sup>27</sup> Report, para 5.9. The purpose of this part of the report seems intended to demonstrate that Sure and JT are charging super-competitive retail prices and are earning ‘high levels of profitability’. But the evidence presented shows no such thing. BT’s pricing, presented in paragraph 5.8, tells us nothing about costs or margins or demand conditions in Guernsey and there is no reason to expect the tariff gradient ratios for operators in Guernsey to be similar to those in the UK. What matters when assessing competition is not how costs are recovered from individual products, but how costs relate to prices across the portfolio as a whole. The report offers no evidence on this point.

## *Dominance and joint dominance*

36. I explained earlier in this paper (see paragraphs 8-12) how the authors of the report made a fundamental error in their dominance assessments for the retail markets by failing to take into account the impact of their findings about the wholesale market. I have suggested that, if applied properly, every regulator I know would conclude that the retail market would be competitive in light of effective regulation in the corresponding wholesale market, as the GCRA itself did in 2014. The proposed findings that Sure or JT is dominant in a retail market, or that Sure and JT are jointly dominant, make no sense.
37. In addition, I feel compelled say something about the analysis of joint dominance in paragraphs 4.4 to 4.13. Paragraph 4.3 says there are three criteria that, if met, mean a finding of joint dominance can be made. The report relies on showing these criteria are fulfilled to support the finding of joint dominance. I am afraid this does not stand up to serious scrutiny<sup>28</sup>.
38. The first point is that the courts have consistently rejected what is known as the ‘check list’ approach that has been adopted in the report<sup>29</sup>. It is not sufficient to jump from observing that certain conditions are met to a conclusion that firms are tacitly colluding. The regulator needs first to explain why the firms in question have an incentive to collude (e.g. why a firm might expect to earn higher profits from tacitly agreeing not to compete strongly on price instead of trying to take market share away from its rivals by ‘cheating’ on the agreement or refusing to enter into it in the first place) and, critically, how they are then able to arrive at a tacit agreement and sustain it over time. I note the GCRA understood this when it undertook a similar review in 2014<sup>30</sup>.
39. Some of the conditions considered in the report are relevant to these issues, but they are far from sufficient<sup>31</sup>. For example, it is widely accepted that the number of firms in a market is relevant to

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<sup>28</sup> See SMP Guidelines, paras 65-92 for details. As footnote 29 below shows, the GCRA clearly understood this in 2014. It seems its consultants do not.

<sup>29</sup> Ibid, para 68: ‘In *Impala II* case [sic] the Court of Justice confirmed these criteria as identifying the conditions in the presence of which tacit coordination is more likely to emerge. .... At the same time, it indicated the necessity to avoid a mechanical approach involving the separate verification of each of those criteria taken in isolation, while taking no account of the overall economic mechanism of a hypothetical tacit coordination’

<sup>30</sup> 2014 Draft Decision: ‘According to the EC’s SMP Guidelines, when assessing ex ante the likely existence or emergence of a market which is or which could become conducive to collective dominance, a regulator should analyse: • Whether the characteristics of the market makes it conducive to tacit coordination; • Whether such form is sustainable, that is whether the potential oligopolists have the ability and incentive to deviate; and whether other competitors, buyers or potential entrants have the ability and incentive to challenge any anti-competitive coordinated outcome. ‘, p.19

<sup>31</sup> Ibid para 78 ‘As stated by the Court of Justice in *Impala II*, besides market transparency, a market structure conducive to tacit collusion may also be characterised by market concentration and product homogeneity. Other characteristics that may lead to the same conclusion can be extrapolated from case-law or prior regulatory decisions. A non-exhaustive list of market characteristics that the NRAs may consider in their case by case assessment are, by a way of an example, market shares, elasticity of demand, vertical integration, cost and

tacit co-ordination. A market that is concentrated will have fewer firms and the fewer parties there are to an agreement, the easier it is to align everyone's interests (or rather the more likely it is they will align) and the easier it is for each firm to monitor the conduct of the other firms (in order to detect deviation from the agreement). The report also says that 'high market shares' are relevant<sup>32</sup>. This is another way of saying that the market is likely to be concentrated. Thus far I agree with the report.

40. However, the report fails to consider other factors that are much more important in the assessment. These include whether market shares are symmetric or whether there are significant differences between the shares of different firms. The report redacts the market shares of Sure and JT in paragraph 4.8, but they would normally need to be highly symmetric (i.e. close to 50/50) in order for both firms to have incentives to tacitly collude<sup>33</sup>. This is because if one firm has a much lower share than another, it will be more profitable for it to cut prices and pursue market share than to agree to tacitly collude with the larger firm<sup>34</sup>. In addition, tacit collusion in growing markets or markets where there is significant technological disruption is more difficult to achieve than in mature, commodity markets. In my view, the market for business leased lines has both characteristics, with significant growth in the higher speed end of the market but mature products at lower speeds. The report does not consider any of this.
41. Nor does the report consider whether the market is sufficiently transparent for firms to be able to agree on what dimension of competition they co-ordinate (known as the 'focal point') and to monitor each other's compliance with that agreement. The report's position appears to be that JT and Sure can tacitly co-ordinate separately on the price of each and every leased line service at lower speeds but cannot co-ordinate on prices for higher speed services. No reason is given as to why co-ordination is possible in one case and not the other. In any event, my understanding is that neither JT nor Sure are obliged to publish their retail prices for leased lines in Guernsey and that neither in fact do. The market is not transparent. How is Sure presumed to be able to monitor JT's conduct to ensure it adheres to the tacit agreement (or vice versa) when no prices can be observed?

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output compatibilities, comprehensive network coverage, profitability and Average Revenue per User (ARPU) levels, relative symmetry of operator and related similarity of retail operations.'

<sup>32</sup> Report, para 4.8

<sup>33</sup> Importantly, when measuring market share it would probably be necessary to exclude the Government contract which is subject to a different competitive dynamic in the form of a tender. It is very difficult to firms to tacitly collude in bidding markets (which is why we more often see examples of explicit collusion or cartels to fix prices in these circumstances).

<sup>34</sup> The 2014 Draft Decision did disclose market shares which, for the on-island market, were 60/40 in favour of JT. The GCRA did not find joint dominance on these numbers (ignoring other considerations). If, as the report suggests, market shares are little changed since then, a 60/40 split is far from being symmetric. Moreover, the 2104 Draft Decision suggests shares are highly unstable, with JT increasing from 40% to 60% in just 3 years, see p.18

42. Even if prices were published, co-ordination would be very difficult. Imagine, for example, that JT lowered the price of a 100 Mb/s leased line but raised the price of at 1 GB/s. Sure could observe this, but would this represent a deviation from the tacit agreement or would JT be complying with an agreement about prices for the portfolio of business services as a whole? How would they know? Tacit co-ordination across multiple products, as is being proposed in the report, is extraordinarily difficult to sustain precisely because there are so many variables. It is feasible to co-ordinate on the price of a commodity like cement, but price co-ordination in telecommunications markets involving multiple products has generally been regarded as being impossible to sustain. This will be even more difficult if the leased line services are sold and priced as one part of a much larger bundle of 'managed services', as I understand is sometimes the case.
43. The report is correct to say that barriers to entry are relevant but, as I explained earlier in paragraph 12, they have come to the wrong conclusions. They are required to assess the barriers to entry in the market in which the tacit co-ordination is being posited, not in the corresponding wholesale market (where I agree barriers may exist). So far as the retail market is concerned, the barriers to entry have been dismantled through the requirement that Sure provides a regulated wholesale product which any firm can purchase and use to compete in the retail market. The question is therefore not whether barriers to entry exist, but whether actual or potential entrants could place a sufficient competitive constraint upon Sure and JT to disrupt any tacit agreement between them. It is possible they might not, but the report does not recognise the need to even engage with this question.
44. The report also fails to consider barriers to expansion, which are equally important. Even if entry is difficult, firms will find it more difficult to tacitly co-ordinate if either of them can easily and cheaply expand their output and steal market share from the other. Conversely, tacit co-ordination is more plausible in circumstances where all the firms are subject to capacity constraints. Again, there is no evidence in the report to guide me, but my expectation would be that there are relatively low barriers to expansion in the market for the provision of retail leased lines. It is true that JT faces some barriers if it wishes to serve new customers at locations where it currently lacks infrastructure, but I would expect it to have excess capacity where it does. In any event, JT could purchase wholesale services from Sure to serve customers at locations where it faces barriers to expansion. Sure already has infrastructure to most if not all locations, and so its barriers to expansion (and therefore JT's as well) are certainly low.
45. The report is also unclear about whether the tacit co-ordination it postulates is already to be observed in the market for low speed leased lines in urban areas or whether there is risk of the

firms arriving at an agreement at some point in the future. This is unsurprising when the nature of agreement has itself been left so vague. Assuming, however, that it is claimed a tacit agreement is already in place in the market, the GCRA will need to explain how JT and Sure ensure that is sustained. This involves explaining how and why the ‘retaliation’ or ‘punishment’ mechanism will work. No attempt is made to do this in the report. A common approach is to claim that, in the event one firm breaks the agreement, the other would lower its prices to punish the deviator. In this case, if JT lowered its leased line prices to steal customers, Sure would retaliate by lowering its prices to regain them, leaving JT no better off than before. However, the problem with this theory is that, having both lowered their prices, the operators now need to find a way to return to the higher prices that were previously enabled by the tacit agreement. This is difficult to do, particularly in markets, like that for business services, where contracts tend to lock prices in for an extensive period. Any difficulty in raising prices after having lowered them to punish another firm can render the retaliation mechanism ineffective. And if this is indeed the case, then a reduction in the retail prices of one firm followed by a reduction by the other is much more likely to be evidence of effective competition between them than any form of tacit collusion. Notwithstanding this, a regulator would normally look at previous pricing interactions between firms to assess whether there is any evidence of retaliation having been a feature of the market in the past. No such evidence is presented in the report.

46. The report also fails to consider whether customers can exercise countervailing buyer power that would disrupt any attempt at tacit co-ordination. This is clearly the case when the buyer can organise a bidding contest where it will be impossible for the firms involved to monitor each other’s bids and very tempting for either of them to ‘cheat’. The Government contract involved such a tender, but other business purchasers of leased lines are also comparatively sophisticated buyers. The GCRA considered this issue in 2014, so it is difficult to understand why the report again fails to do so<sup>35</sup>.
47. Finally, evidence of tacit co-ordination might be inferred from the margins which the firms have earned over a sustained period. This would provide confirmation both that they have an incentive to co-ordinate and that they have been able to do so. I deal briefly with the report’s consideration of tariff gradients in footnote 15 of this paper but suffice to say that the report offers no evidence to show that JT’s margins for low speed leased lines in urban areas, where it is alleged to enjoy joint dominance, vary significantly from the margins it earns from other products or in rural areas, which is what the report’s theory would suggest.

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<sup>35</sup> 2014 Draft Decision:



48. It will be clear, for the reasons above, that I consider the discussion of joint dominance in the report to fall far short of what would be required for the GCRA to adopt such a finding in this review.

*My assessment*

49. JT have not asked me to undertake my own review of the market for leased lines for businesses in Guernsey and I lack both the time and access to the data necessary to do so. However, I offer an assessment based on what evidence and data I do find in the report and in the GCRA's (much better) 2014 Draft Decision, my wider experience of how competition works in markets for leased lines in both large and small geographies around the world, and the conclusions which regulators have reached in those cases:

- a. I would define a single product market for leased lines (including for mobile operators) at both the retail and wholesale level, on an all-island geographic basis.
- b. Having done so, I would expect to find that Sure holds a dominant position in the wholesale market, so defined, by virtue of its unchallenged geographic reach and the lack of significant wholesale provision by JT or any other provider.
- c. Given this finding and the consequent requirement for the GCRA to intervene effectively in the wholesale market, I would not expect to find dominance in the corresponding retail market.

Richard Feasey

18 March 2021

## **Annex: Brief CV**

### *Employment*

#### *September 2013 - present*

Panel Member at the Competition and Markets Authority, appointed in October 2017. Panel Members are the designated decisionmakers on mergers which may result in a substantial lessening of competition, market investigations of particular sectors of the UK economy and certain regulatory appeals. Merger experience to date includes Member on EMR/MWR (metal recycling), Chairman of Nielsen/Ebiquity (ad intel), Vice Chair on Sainsbury/Asda (groceries), Vice Chair Sabre/Farelogix (airline booking) and Member of Viagogo/Stubhub (ticket resale). Vice Chair of market investigation into the Funerals industry.

Senior Adviser to the Payment Systems Regulator, appointed April 2020. The PSR is an independent subsidiary of the Financial Conduct Authority, responsible for overseeing the UK's main payments systems, including ATMs, Visa and Mastercard debit and credit cards, BACs and other bank payments. Senior advisers advise the CEO and leadership on strategy, organisational issues and case management.

Member of the National Infrastructure Commission for Wales, appointed October 2017. The NICW advises the Welsh Government on long term strategic planning of transport, energy, water and communications infrastructure.

Senior Adviser to the Centre on Regulation in Europe (CERRE) in Brussels since 2017 and co-author with other academics of various reports on competition and telecommunications policy, including State Aid for broadband, the Google Shopping case and Digital Markets Act.

Director of Fronfraith Ltd. Consulting advice, including on the merger of Vodafone Hutchison Australia and TPG; an expert report for the Irish High Court on the application of Financial Penalty Provisions; expert reports for the US Bankruptcy Court, Southern District New York and the UK High Court on assumptions adopted in business models employed by the owners of a Greek wireless operator; and advice to the Canadian Radio-communication and Telecommunications Commission on regulation in the Canadian wireless industry.

Lecturer at University College, Kings College, Judge Business School and Nyenrode University, Amsterdam since 2014, giving annual lectures to MSc/MBA students on aspects of business strategy, digital platforms and competition policy.

Associate at Frontier Economics Ltd, a London based economic consulting firm, until October 2017 and a Senior Adviser to Wiley Rein LLP, a Washington DC law firm, until December 2017.

Member of the Advisory Board of Gigaclear plc, a fibre telecommunications business sold to Infracapital, until October 2017

Special Adviser to the House of Lords EU Internal Market Sub-Committee between 2015 and 2016, assisting their enquiry into the impact and regulation of Online Digital Platforms

#### *Prior to 2013*

Director of Public Policy at Vodafone Group plc responsible for all aspects of regulatory and competition policy relating to the company's operations in Europe, the US and Asia, 2001-2013

Vice President and Member of the Executive Committee of MCI Worldcom International 1998-2001, an investor in national and trans-national fibre infrastructure, operating the largest ‘internet backbone’ in the world.

Senior roles at Ionica plc 1995-98, a UK fixed wireless start up based in Cambridge, and TeleWest Communications plc (now Virgin Media) 1991- 1995.

#### *Recent publications*

‘Digital Markets Act: Making Economic Regulation of Platforms Fit for the Digital Age’, December 2020, (with Profs de Streel, Kramer, Monti and Fletcher) at [CERRE DMA Making-economic-regulation-of-platforms-fit-for-the-digital-age\\_Full-report\\_December2020.pdf](https://cerre.eu/wp-content/uploads/2020/09/CERRE_DMA_Making-economic-regulation-of-platforms-fit-for-the-digital-age_Full-report_December2020.pdf)

‘Data sharing for digital markets contestability’, September 2020 (with Prof de Streel) at [https://cerre.eu/wp-content/uploads/2020/09/CERRE\\_Data-sharing-for-digital-markets-contestability-towards-a-governance-framework\\_September2020.pdf](https://cerre.eu/wp-content/uploads/2020/09/CERRE_Data-sharing-for-digital-markets-contestability-towards-a-governance-framework_September2020.pdf)

‘The use of costing methodologies by regulators around the world: submission to the CRTC’, August 2020, at <https://services.crtc.gc.ca/pub/DocWebBroker/OpenDocument.aspx?DMID=3904973>

‘Implementing effective remedies for anti-competitive intermediation bias on vertically integrated platforms’, October 2019 (with Prof Kramer) at [https://cerre.eu/wp-content/uploads/2020/05/cerre\\_report\\_intermediation\\_bias\\_remedies.pdf](https://cerre.eu/wp-content/uploads/2020/05/cerre_report_intermediation_bias_remedies.pdf)

‘Report on recent developments in the regulation of wholesale services for MVNOs in the rest of the world’, May 2019 at <https://services.crtc.gc.ca/pub/DocWebBroker/OpenDocument.aspx?DMID=3647494>

‘State Aid for Broadband Infrastructure in Europe’, November 2018 (with Prof Borreau) at [https://cerre.eu/wp-content/uploads/2020/06/CERRE\\_StateAidBroadband\\_FinalReport\\_0.pdf](https://cerre.eu/wp-content/uploads/2020/06/CERRE_StateAidBroadband_FinalReport_0.pdf)

‘Policy Towards Competition in High Speed Broadband in Europe’, February 2017 (with Prof Cave) at [https://cerre.eu/wp-content/uploads/2020/06/170220\\_CERRE\\_BroadbandReport\\_Final.pdf](https://cerre.eu/wp-content/uploads/2020/06/170220_CERRE_BroadbandReport_Final.pdf)

Response to Professor George Yarrow’s submissions to the ACCC in the Domestic Mobile Roaming Enquiry 2016 at <https://www.accc.gov.au/system/files/VHA%20submission%20%20Annex%20%20of%206.pdf>

Comments on aspects of the ACCC’s Domestic Roaming Declaration Enquiry Draft Decision, June 2017 at <https://www.accc.gov.au/system/files/MACE%20-%20MR%20Declaration%20Inquiry%20-%20Submissions%20to%20draft%20decision%20-%20Vodafone%20Hutchison%20Australia%20attachment%20F.pdf>

The regulation of mobile wholesale markets in the rest of the world (and its relevance to the CRTC’s enquiry into wholesale wireless markets in Canada), May 2014 at <https://services.crtc.gc.ca/pub/DocWebBroker/OpenDocument.aspx?DMID=2131643>