



Sure's response to the GCRA's Business Connectivity Market Review

Sure (Guernsey) Limited ("Sure") is pleased to submit this response to the Guernsey Competition and Regulatory Authority's ("GCRA's") Statutory Draft Decision in relation to its Business Connectivity Market Review (BCMR), issued on 4th March 2021, as document GCRA 21/4. This is a non-confidential response.

Executive Summary

Sure has been asking the GCRA to conduct a review of the business connectivity market in Guernsey for some time as it believes competitive conditions have changed significantly since the 2014 market review¹ such that there should be justification for relaxing some of the existing SMP regulation placed on Sure. Since the review started (originally as a pan-island review led by CICRA) we have provided a significant amount of very detailed data and other evidence to the GCRA to aid its considerations.

We are therefore extremely concerned by the Draft Decision, which is suggesting a significant departure from the current situation and in fact proposing that more rather than less regulation should be applied. The GCRA is proposing to identify 8 different markets and perhaps most significantly, reintroduce retail regulation when none has been in place for nearly seven years. If the Draft Decision had clearly presented the evidence to support this, then whilst we would have been disappointed, we would have had to accept it. However, it is Sure's view that the present consultation cannot form the foundation for any reasonable or robustly defensible decisions to impose SMP remedies on any party in Guernsey.

Having spent considerable time and effort in an attempt to understand the GCRA's proposed conclusions, and its analyses and arguments presented in Annex 1 to the Draft Decision, Sure has concluded that the markets defined, and the proposed designations of significant market power (SMP) are not the products of methodical and transparent analyses, but, on the contrary, are completely unsupported by either analysis or data².

It is Sure's firmly held view that the GCRA has not performed a transparent market analysis process, nor has it presented any form of intelligible or rigorous analysis to support its conclusions. This document comments on the GCRA's Annex 1 document on a paragraph-by-paragraph basis, highlighting that nearly every paragraph demonstrates that the GCRA has not followed the widely-recognised international practice in market definition and SMP analysis and has misunderstood or misinterpreted nearly every single reference made to documents from the European Commission or Ofcom in the UK.

In summary, our conclusions of the GCRA's documentation are:

- If the GCRA has performed any analyses, for example the HHI calculations it refers to, the results of that analysis have not been presented and shared with stakeholders, making it impossible to respond meaningfully.
- The GCRA appears to perform market definitions at retail and wholesale levels simultaneously. This is at odds with accepted best practice where retail markets must be defined first in order that the supporting wholesale markets can be defined. A wholesale market only exists to support one or more retail markets and cannot be defined in isolation;

¹ Business Connectivity market review, Guernsey. Final Decision, CICRA 14/49, 1st October 2014.

² If the GCRA has conducted any relevant analysis then it has not shared it with Sure.

- The GCRA appears to have defined relevant geographic markets prior to defining the corresponding relevant product markets. As geographic markets are subdivisions of product markets (it is essential to know for which product(s) the geographic market is being assessed); the GCRA's geographic market analysis and conclusions are meaningless;
- The GCRA's product market conclusions are not based on any demand and supply-side substitution analysis, nor does the GCRA refer at any point to the application of the chain of substitution principle, which is used in markets where multiple product versions exist with different speeds and price levels – which is clearly the case for the leased lines markets;
- The GCRA appears to apply parameters relevant to geographic market definition to the definition of product markets, which is not meaningful and flies in the face of good international practice. Sure has not been able to identify any data or analysis in the GCRA documentation that supports the GCRA's proposed product markets;
- The GCRA presents no analysis or arguments at all to support its individual SMP findings. They are therefore unsupported and cannot be relied upon for future decisions of regulatory remedies;
- With regards to its proposal that JT and Sure have joint dominance in a retail market, the GCRA appears to rely on erroneous data and on specific parameters that are relevant only to the analysis of wholesale markets. The GCRA also appears to completely ignore the substantial amount of legal precedent for how to establish and justify the existence of joint dominance in electronic communications markets;
- The GCRA refers to documents that are out of date, misinterprets those documents, and even uses as good practice for market definition an Ofcom decision which the GCRA itself later states was successfully challenged - because Ofcom had erred on both product and geographic market definition approaches. Sure has not been able to identify the relevance of any of the GCRA's references as having direct relevance to the sections of the GCRA documentation where they are inserted.

At the start of this consultation process Sure was so concerned by the quality of the GCRA's documents and the GCRA's apparent departure from its previous application of the widely accepted methodological approach to market reviews, that it requested a meeting with the GCRA and its advisor, in order to gain a better understanding of the GCRA's analyses so that we would be able to provide informed and constructive comments in response to this consultation. That request was denied by the GCRA.

Given that we have been asking that the business connectivity market be reviewed for several years now, it is with extreme reluctance that we are urging the GCRA to restart this draft decision stage of the BCMR process and to perform the relevant analyses in accordance with good international practice as summarised in the introductory section of this document. We do not believe that the GCRA can move from its Draft Decision to a statutory Final Decision without having drastically revisited the Draft Decision including providing significantly greater transparency on the evidence it has used to reach its conclusions. We will be as supportive as possible and provide any additional data we have available, should the GCRA require anything beyond what Sure has already provided.

Introduction and background

Sure has reviewed the GCRA Draft Decision documentation in detail and found that the GCRA's approach appears to have departed significantly from international good practice. For ease of reference, we have therefore summarised below the standard and internationally recognised best practice approach to the definition of relevant markets susceptible to ex-ante regulation, and to the analysis of those markets to ascertain whether any one or more parties hold a position of significant market power (SMP). Having set this out we then, in the next section, consider the extent to which the GCRA has demonstrated it has followed this approach.

In accordance with the European regulatory framework for regulation of electronic communications markets, national regulatory authorities (NRAs) conduct regular 'market reviews' consisting of the identification of relevant markets that are susceptible to ex-ante regulation.

The markets identified have both product and geographic dimensions, commencing with the identification of a product market and then subsequently assessing the geographic scope of that product market. In particular, whether that product market is sufficiently homogenous across different geographic areas covered under that NRA's jurisdiction to define a single geographic area, or whether competitive conditions are sufficiently different across different geographic areas to justify the identification of separate geographic markets.

The specific tests used to identify product and geographic markets, together with the relevant up-to-date references to the European Commission's (EC) 2018 Guidelines on market analysis and assessment of significant market power ("the EC SMP Guidelines")³, are outlined briefly below:

Product market definition

Two products are considered as part of the same relevant market if there is sufficient demand or supply substitution between them to make it unprofitable for a hypothetical monopolist to introduce a small but significant non-transitory increase in price on the focal product. This is known as the SSNIP test or the Hypothetical Monopolist Test and the level of price increase is typically considered as being between 5% and 10%.

If consumers are likely to switch from the focal product to the other product in sufficient numbers to make the price increase non-profitable, then there is demand-side substitution. If suppliers will enter the market to produce competing products due to the price increase and this would make the price increase non-profitable, then there is supply-side substitution.

The process of defining a product market starts with the selection of a focal product and other products are then considered one by one to assess demand- and supply-side substitution. If either (or both) types of substitution exist, and would likely make the price increase non-profitable, then the relevant product is added to the relevant market definition and the next product is then tested in the same manner.

In addition to the straight-forward product-by-product assessment, NRAs also commonly apply the 'chain of substitution' assessment principle to electronic communications markets where different versions of a product exist at different capacity and price levels. In particular, the chain of substitution test is nearly always applied to leased lines markets (as there are typically several leased line products with different

³ Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services, 2018/C 159/01.

capacities and price levels) and to broadband product markets where similarly there are typically multiple versions of the product.

The chain of substitution principle assesses whether two products that would not at first glance appear to be substitutes for each other (e.g., a 2Mbps leased line and a 1Gbps leased line), may, in fact, still be in the same market because a customer could switch from a 2Mbps product to a 10Mbps product and from that to a 100Mbps product and so on, until the customer switches to a 1Gbps product). If there are no breaks in the chain between these products such a chain of substitution is found to exist, then the 2Mbps and the 1Gbps products are in the same relevant product market.

Geographic market definition

Once a product market has been defined, NRAs then have to assess whether market conditions in that product market are sufficiently homogenous across the entire geography covered by the market review, or whether some locations have sufficiently different market conditions to justify the definition of one or more separate geographic sub-markets of that relevant product market.

For the geographic market analysis, the demand- and supply-side analysis tools are used again, this time considering whether customers in one location would shop in another location to the extent that the SSNIP would be unprofitable and/or whether a supplier would enter the other geographic market and compete with the hypothetical monopolist to the extent that the SSNIP would be unprofitable.

The geographic market analysis, like the product market analysis, requires that the NRA selects a focal location and then assesses whether a hypothetical monopolist in that market could perform a profitable SSNIP. If it could, then the two locations are considered as part of the same geographic market.

For electronic communications markets, the existence of competing infrastructure is often used to identify separate geographic markets. This is because the existence of one or more competing infrastructures would provide consumer choice and thus there is more likely to be demand-side substitution. On the supply-side, boundaries between two geographic markets are often set based on an assessment of how far from its existing network coverage a competitor to the hypothetical monopolist would extend its network to address new business opportunities.

According to the EC SMP Guidelines a relevant geographic market *“comprises an area in which the undertakings concerned are involved in the supply and demand of the relevant products or services, in which the conditions of competition are sufficiently homogeneous, and which can be distinguished from neighbouring areas in which the prevailing conditions of competition are significantly different.”*⁴

The three-criteria test

Once a market is defined (using both product and geographic parameters), the NRAs then have to assess whether that market is susceptible to ex-ante regulation. This is because NRAs should only apply ex-ante regulation to markets that are characterised by significant non-transitory barriers to expansion and competition, and where competition law would not be sufficient to address any abuse of dominance arising from the existence of those barriers.

The EC has developed a test where all three criteria must be satisfied before a market is considered as susceptible to ex-ante regulation. Those criteria are:

⁴ EC SMP Guidelines paragraph 48.

1. high and non-transitory structural, legal or regulatory barriers to entry are present;
2. there is a market structure which does not tend towards effective competition within the relevant time horizon, having regard to the state of infrastructure-based competition and other sources of competition behind the barriers to entry, and
3. competition law alone is insufficient to adequately address the identified market failure(s).

Thus, an NRA needs to demonstrate that a specific market satisfies all of those criteria before it moves on to assess whether any one or more providers within that market enjoy a position of significant market power.

The reason the electronic communications markets are subject to these specific rules and the potential application of ex-ante regulation is that it is a network industry where competitive entry can be extremely difficult, due to three main factors: 1) the significant costs in replicating the network required to offer the relevant products and services, 2) that all existing customers are already connected to the incumbent's network, and 3) that for the services to be of value to users the network of the incumbent needs to be interconnected with the new competing providers in order for the customers of different networks to be able to communicate with each other.

Ex-ante intervention (intervening to prevent abuse of market power rather than only intervening after the abuse has happened) is by its very definition intrusive and can cause market distortions. The hurdles for NRAs to prove SMP are therefore high and significant, in order that interventions are only imposed when absolutely necessary.

Assessment of significant market power

A provider has significant market power (SMP), either individually or jointly with others, when that provider has a position of economic strength that affords it the power to behave to an appreciable extent independently of competitors, customers and consumers⁵.

The way NRAs test whether a provider has SMP is effectively to use the SSNIP test again, but this time it is not applied to a hypothetical monopolist, but to the operator the NRA believes may have SMP.

The criteria used to assess SMP are however wider than those for the market definition. The EC recommends that NRAs apply the following list of criteria:⁶

- market share
- barriers to entry
- barriers to expansion,
- absolute and relative size of the undertaking
- control of infrastructure not easily duplicated
- technological and commercial advantages or superiority
- absence of or low countervailing buying power
- easy or privileged access to capital markets/financial resources

⁵ As defined under Article 14(2) of Directive 2002/21/EC.

⁶ EC SMP Guidelines paragraph 58.

- product/services diversification (for example, bundled products or services)
- economies of scale
- economies of scope
- direct and indirect network effects
- vertical integration
- a highly developed distribution and sales network
- conclusion of long-term and sustainable access agreements
- engagement in contractual relations with other market players that could lead to market foreclosure
- absence of potential competition

Market share is an important criterion for the assessment of SMP but is in virtually no circumstances considered sufficient on its own. Indeed, the EC SMP Guidelines note⁷ that market shares can provide a useful first indication of market structure and the relative importance of the operators active in the market, but they need to be interpreted in light of the relevant market conditions. Importantly, market share should also be considered over time, not at a static point in time. Changes in market shares typically represent competitive activity in the market and, even where the market share of a provider may look high, if the provider's market share has been reduced over time, the market share itself is not sufficient to determine SMP. In virtually all circumstances, NRAs need to assess several criteria before being able to determine that a provider has SMP.

Joint or shared SMP

In most market conditions, NRAs will be considering whether a single provider has SMP but, in some instances, it is possible for two or more providers to have joint or shared SMP. Joint SMP or joint dominance⁸ may arise in oligopolistic market structures (that is, where there are only a few suppliers) if the characteristics of that market are such that each member of the oligopoly becomes aware that they have common interests. This could make it possible, economically rational, and preferable to adopt a common policy for their market conduct, with the aim of selling products above the competitive prices and without them having to make an explicit agreement or resort to a concerted practice and without any actual or potential competitors, customers or consumers being able to react effectively.⁹

The EC SMP Guidelines state that the joint SMP concept (as applied to ex ante regulation) needs to be derived from the same basis as the joint (or collective) dominance concept that is used in competition law, namely the jurisprudence of the Court of Justice of the European Union. The definitive judgment relating to joint dominance is that of the 2002 *Airtours* case¹⁰, which identifies three cumulative criteria for the identification of a position of collective dominance, namely that:

- The undertakings in question must be able to know and monitor each other's behaviour to ensure that each is adopting a common policy on the market in question. This requires a sufficient degree of market transparency for all members of the dominant oligopoly;
- The situation of tacit co-ordination must be sustainable over time, in that there must be an incentive not to depart from the common policy on the market (which inherently requires a

⁷ Para 54, op cit

⁸ The concept is usually referred to as joint or collective dominance when applied for ex post competition law purposes and joint SMP when applied for the purposes of ex ante regulation.

⁹ EC SMP Guidelines paragraph 66.

¹⁰ Case t-342-99/99, *Airtours plc v Commission* EU:T:2002:146. These criteria were subsequently confirmed and clarified in the *Impala* cases: Case T-464/04 *Impala I* EU:T:2006:216 and C-413/06 *Impala II* EU:C:2008:392

deterrent -such as a threat of retaliation - to prevent any member from deviating from the common policy), and

- There must be no effective external constraints through the foreseeable reaction of consumers or competitors, current or future, that would jeopardise the results of the tacitly co-ordinated conduct on the market.

The EC SMP Guidelines further state that when determining whether two or more undertakings have joint SMP in a relevant market, for the purpose of determining whether to impose ex ante regulatory obligations on them, NRAs must also conduct a forward-looking analysis of likely developments during the next review period. This is reinforced within the accompanying explanatory note¹¹, which states:

*NRAs should envisage expected or foreseeable market developments over the course of the next review period to ascertain whether the tacit coordination is the likely market outcome. **The NRAs should discharge the same burden of proof to prove either the existence of joint SMP or the absence thereof.** There cannot be a presumption that either outcome is likely, without a credible analysis of the likely market developments that will occur in the next review period, absent regulatory intervention on the basis of SMP. [emphasis added]*

Further, the EC SMP Guidelines state that, to prove joint SMP, *“The existence of a credible threat of retaliation, deterring deviation, is a necessary requirement to ensure that the coordination mechanism remains credible over time.”*¹²

The tests described above for the establishment of joint SMP are incremental to the standard SMP analysis required to prove single SMP.

There is therefore a high burden of proof for establishing whether there is a position of joint dominance in a particular relevant market and the EC SMP Guidelines emphasise that “...all relevant information on the characteristics of the markets concerned, including both structural features and the past behaviour of market participants, must be taken into account in a prospective analysis”¹³.

Interrelations between retail and wholesale markets

Wholesale markets support retail markets and the ultimate purpose of regulatory interventions is to serve the interests of citizens and consumers (whether private individuals, businesses, other providers, or public authorities).

Market definition therefore starts at the retail level. It is the use of products and services and the supply of those products and services to consumers that is at the core of these analyses, seeking to maximise benefits to consumers. The European Electronic Communications Code (EECC)¹⁴, which was issued by the EC in 2018 and represented an entire revision of the European regulatory framework for the communications sector, confirms this:

¹¹ Commission Staff Working Document accompanying the document “Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications network and services”, C (2018) 2374

¹² EC SMP Guidelines paragraph 85 – 88.

¹³ EC SMP Guidelines paragraph 71

¹⁴ DIRECTIVE (EU) 2018/1972 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 December 2018 establishing the European Electronic Communications Code, L 321/4 Official Journal of the European Union. The EECC came into force on 20 December 2018 with Member States being required to transpose it by 21st December 2020.

“For national regulatory authorities, the starting point for the identification of wholesale markets susceptible to ex ante regulation is the analysis of corresponding retail markets.”¹⁵

The retail market definition and SMP assessment should be conducted under what is known as the ‘modified greenfield’ approach. This means that the retail market analysis should be conducted under the assumption that no wholesale regulation is imposed that is relevant to the specific retail product market. The retail market analysis therefore identifies where, absent regulatory intervention at the wholesale level, SMP exists, and a likely market failure would result from the abuse of that market power.

The EC SMP Guidelines provide as follows:

“NRAs should determine whether the underlying retail market(s) is (are) prospectively competitive in absence of wholesale regulation based on a finding of single or collective significant market power, and thus whether any lack of effective competition is durable (12).

“To this aim, NRAs should take into account existing market conditions as well as expected or foreseeable market developments over the course of the next review period in the absence of regulation based on significant market power; this is known as a Modified Greenfield Approach (13).”¹⁶

The European Commission’s Recommendation on Relevant markets¹⁷ also explains the importance of first defining the retail markets and only moving to wholesale market analysis of retail market failures are identified:

“When carrying out a market analysis under Article 67 of the Code, both the national regulatory authorities and the Commission should start the analysis from the retail markets. The assessment of a market should be done with a forward-looking perspective in the absence of regulation based on a finding of significant market power and starting from existing market conditions. The analysis should assess whether the market is prospectively competitive and whether any lack of competition is durable, by taking into account expected or foreseeable market developments. The analysis should take into account the effects of other types of regulation applicable to the relevant retail and related wholesale market(s) throughout the relevant regulatory period.

“If the retail market concerned is not effectively competitive from a forward-looking perspective in the absence of ex ante regulation, the corresponding wholesale market(s) susceptible to ex ante regulation in line with Article 67 of the Code should be defined and analysed. In addition, when analysing the boundaries and market power within (a) corresponding relevant wholesale market(s) to determine whether it is/they are effectively competitive, direct and indirect competitive constraints should be taken into account, irrespective of whether these constraints result from electronic communications networks, electronic communications services or other types of services or applications that are equivalent from the end-users’ perspective.”¹⁸

If a retail market is defined, passes the three-criteria test, and a provider is determined to have SMP in that relevant market, then the NRA should define the relevant wholesale market(s) that support the

¹⁵ EECC recital 169

¹⁶ SMP Guidelines paragraphs 16 and 17.

¹⁷ COMMISSION RECOMMENDATION (EU) 2020/2245 of 18 December 2020 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive (EU) 2018/1972 of the European Parliament and of the Council establishing the European Electronic Communications Code Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32020H2245&from=EN>

¹⁸ Paragraphs 23 and 24, op cit.

provision of those specific retail products and services. In some instances, more than one wholesale market may serve a retail market and in others a wholesale market may serve several retail markets.¹⁹

So, relevant wholesale markets are defined using the same processes, principles, and criteria as for retail markets.

Focus on wholesale regulation

The EC, and good international practice, focuses regulatory attention on upstream (wholesale) markets, on the principle that effective wholesale remedies will enable retail competition.

The EECC states:

“ [...]The objective of ex ante regulatory intervention is to produce benefits for end-users by making retail markets effectively competitive on a sustainable basis. Obligations at wholesale level should be imposed where otherwise one or more retail markets are not likely to become effectively competitive in the absence of those obligations.”²⁰

and

“Ex ante regulation imposed at the wholesale level, which is in principle less intrusive than retail regulation, is considered to be sufficient to tackle potential competition problems on the related downstream retail market or markets.”²¹

Identification of market failure and design of remedies

Although the current GCRA consultation does not address the decision of which (if any) remedies are required to prevent the abuse of market power and any resulting market failures, Sure considers it important to outline the EC’s criteria and approach for that final part of the overall market review process.

To identify that an operator has SMP, a regulator needs to establish what would be the harm or market failure that would result if the party were not regulated. Having thus identified the relevant market failures (which can be forward looking as the remedies are to prevent, rather than punish, abuse), the remedies applied must be directly linked to the prevention of those market failures and should be proportionate to the harm that would result from those market failures.

The EECC specifically provides for this as follows:

“Obligations imposed in accordance with this Article shall be:

- (a) based on the nature of the problem identified by a national regulatory authority in its market analysis, where appropriate taking into account the identification of transnational demand pursuant to Article 66;*

¹⁹ EECC recital 171.

²⁰ EECC recital 29.

²¹ EECC recital 173.

(b) *proportionate, having regard, where possible, to the costs and benefits;*

(c) *justified in light of the objectives laid down in Article 3; and*

(d) *imposed following consultation in accordance with Articles 23 and 32.*²²

Sure's comments on the GCRA's approach to market definition

Sure has reviewed the GCRA's Draft Decision carefully, along with the associated PowerPoint slides²³ and Annex 1²⁴ to the Draft Decision. Sure has also requested a meeting with the GCRA and its advisor to ask for clarification of how the GCRA has reached the conclusions set out in the Draft Decision and to enable Sure to provide as constructive and informed comments on the Draft Decision as possible. This request has been refused. In the absence of such a meeting, therefore, we have a considerable number of queries in relation to the GCRA's proposed conclusions that we have to include in this response.

In the following sections, we use the GCRA's section headings and follow the sequence of Annex 1 ('Product and Market Definition').

Market level

In paragraph 2.2, the GCRA states that, as retail and wholesale markets are separate in their function and operation, it will continue to distinguish between retail and wholesale markets.

Sure does not disagree with this conclusion, but would draw the GCRA's attention to the standard approach of identifying retail and wholesale markets, as outlined in the introduction to this response. A wholesale market is identified and defined once SMP has been established at the retail level²⁵.

Additionally, as the wholesale market(s) support the retail market, we are not certain we understand the GCRA's statement that the retail and wholesale markets are separate in their function and operation. It is Sure's view that the retail and wholesale markets are indeed closely related and interdependent.

Market Definition

Geographic market

The GCRA commences its market definition with an explanation of why it has found that there are two separate geographic markets in Guernsey, namely the postcodes GY1, GY2, and GY4 (we will refer to this market as high demand market (HDM)) in one market and the rest of Guernsey (ROG) in another market.

The GCRA does not specify which product market this geographic segmentation applies to. As geographic markets should be defined within already established product markets, Sure struggles to understand how the GCRA could identify geographic markets prior to the definition of the relevant product markets. The geographic market definition process, as outlined in the Introduction section to this response, should be

²² EECC Article 68.4

²³ www.gcra.gg/media/598294/t1480gj-bcmr-draft-decision-presentation.pdf

²⁴ www.gcra.gg/media/598293/t1480gj-bcmr-draft-decision-annex-1.pdf

²⁵ Please note that, as described in the introduction section above, the market analyses are performed using the 'modified greenfield' approach, meaning that there is an assumption that there is no upstream regulation in place. This therefore results in an SMP finding at the retail level in situations where retail competition relies on regulation at the wholesale level. Retail SMP is, however often removed if wholesale remedies are subsequently considered sufficient to enable competition at retail levels.

applied to a known product market, or it would not be possible to perform the relevant demand and supply-side substitution analyses.

The GCRA offers statistical information about the Guernsey economy but we do not understand the relevance of any of this to this specific market analysis. For example, the density of the population being higher in the HDM than in the ROG market – as the leased lines market is used by businesses, the density of the residential population is unlikely to have any impact on the market for leased lines. The GCRA states that, within the HDM, most businesses are located in GY1 whereas government premises are located in GY2 and GY4 but presents no analysis of the business concentration in the HDM versus the ROG market.

The GCRA refers to an example in which Ofcom defines geographic markets in its 2016²⁶ BCMR²⁷. Whilst Ofcom is often a very good reference of good regulatory practice, Sure is not certain that this particular Ofcom document is an authoritative reference on either geographic or product market definition. This is because Ofcom's 2016 BCMR was successfully challenged in court. The Judgement by the Competition Appeals Tribunal²⁸ (CAT) is itself referenced by the GCRA in the Draft Decision, so we assume that the GCRA is aware that the CAT found that Ofcom had erred on both product and geographic market definition. In any event, the GCRA should explain why any product and geographic market definitions defined using UK market data should – or should not - apply in the same way in Guernsey. The GCRA should consider and explain the extent to which the market conditions in Guernsey are the same as those in the UK.

Ofcom performed a new BCMR which it completed in 2019, which was also challenged but the appeal was not successful. In the 2019 BCMR Ofcom's approach to defining geographic markets for the supply of business connectivity services is primarily focused on the existence of competitive infrastructure enabling competitors to supply leased lines services independently of the regulated wholesale product.²⁹ Ofcom does not find that there are separate geographic markets in the retail markets because, where there is no competing network presence, competitors can still compete at the retail level because there is regulated access to BT's network and services.

It should be noted that, importantly, Ofcom would only undertake geographic market definition analysis once it has defined the relevant product market. That is also supported by the quote referenced by the GCRA from the European Commission's 1997 Notice on Market definition³⁰ which is referenced in the Competition Appeals Tribunal (CAT) Judgement in paragraph 351 of its Judgement in Case No: 1260/3/3/16 for BT's (successful) appeal of Ofcom's market definitions in the 2016 BCMR. The EC definition of a geographic market is:

"8. The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area[s]".

9. The relevant market within which to assess a given competition issue is therefore established by the combination of the product and geographic markets. The Commission interprets the definitions in paragraphs

²⁶ Sure notes that the GCRA document erroneously refers to the BCMR 2017 (which does not exist), but the GCRA has confirmed that this was a simple typographical error.

²⁷ Paragraphs 1.11 – 3.14 of Annex 1.

²⁸ https://www.catribunal.org.uk/sites/default/files/1260_BT_Judgment_CAT_25B_101117.pdf

²⁹ Although Ofcom does start by reviewing the market for retail leased lines.

³⁰ <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A31997Y1209%2801%29> paragraphs 8 and 9 (and 7 on product definition).

7 an 8 (which reflect the case-law of the Court of Justice and the Court of First Instance as well as its own decision-making practice) according to the orientations defined in this notice.”

For completeness, we also include the Commission’s definition of a product market (which precedes its definition of a geographic market):

“7.[...]’A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products’ characteristics, their prices and their intended use’.”

It should, however, be noted that, since the CAT decision referenced by the GCRA, the EC has launched new guidelines on market definition and SMP analysis. The revised SMP Guidelines were issued in 2018³¹. The relevant definitions in the up-to-date EC SMP Guidelines are:

48. According to established case-law, the relevant geographic market comprises an area in which the undertakings concerned are involved in the supply and demand of the relevant products or services, in which the conditions of competition are sufficiently homogeneous, and which can be distinguished from neighbouring areas in which the prevailing conditions of competition are significantly different ⁽⁴⁰⁾. Areas in which the conditions of competition are heterogeneous do not constitute a uniform market ⁽⁴¹⁾. [Emphasis added]

49. With regard to the choice of the geographic unit from which an NRA should start its assessment, the Commission has frequently stated (42) that NRAs should ensure that these units: (a) are of an appropriate size, i.e. small enough to avoid significant variations of competitive conditions within each unit but big enough to avoid a resource-intensive and burdensome micro-analysis that could lead to market fragmentation, (b) are able to reflect the network structure of all relevant operators, and (c) have clear and stable boundaries over time.

And the up-to-date product market definition (which precedes the geographic market definition) is:

“33 According to settled case-law, the relevant product market comprises all products or services that are sufficiently interchangeable or substitutable, not only in terms of their objective characteristics, their prices or their intended use, but also in terms of the conditions of competition and/or the structure of supply and demand in the market in question (34). Products or services that are only interchangeable to a small or relative degree do not form part of the same market (35). NRAs should thus commence the exercise of defining the relevant product or service market by grouping together products or services that are used by consumers for the same purpose (end use).

34. Although the end use of a product or service is closely related to its physical characteristics, different types of products or services may be used to achieve the same end.

35. Product substitutability between different services may arise through the increasing convergence of various technologies, which often allows operators to offer similar retail product bundles. The use of digital transmission systems, for example, can lead to similarities in the performance and characteristics of network services using distinct technologies.”

Whilst the changes made in the updated EC documentation may not appear material, it is important to note that the new geographic market definition makes it very clear that the geographic market is defined within a specified product market, see text underlined above: “of the relevant products or services”. Sure notes that

³¹ <https://ec.europa.eu/digital-single-market/en/news/communication-smp-guidelines>. See paragraphs 48 and 49 for geographic market definition and paragraphs 33 – 35 for product market definition.

the GCRA appears to have first defined relevant geographic markets and then subsequently defined relevant product markets, which is the opposite to accepted EC practice. As geographic markets need to be defined within the market for supply and demand of the relevant products and services, Sure considers that the GCRA could not have defined appropriate relevant geographic markets without first defining the relevant product markets for which the appreciably different conditions of competition can be observed. The GCRA's documentation does not refer to why the proposed separate geographic markets apply to both the product markets proposed by the GCRA (that is retail and wholesale markets, and low and high speed markets, as proposed by the GCRA).

The CAT Judgment (as referenced above) usefully refers to the (then) EC SMP Guidelines as follows:

"55. Once the relevant product market is identified, the next step to be undertaken is the definition of the geographical dimension of the market. It is only when the geographical dimension of the product or service market has been defined that a NRA may properly assess the conditions of effective competition therein.

56. According to established case-law, the relevant geographic market comprises an area in which the undertakings concerned are involved in the supply and demand of the relevant products or services, in which area the conditions of competition are similar or sufficiently homogeneous and which can be distinguished from neighbouring areas in which the prevailing conditions of competition are appreciably different. The definition of the geographic market does not require the conditions of competition between traders or providers of services to be perfectly homogeneous. It is sufficient that they are similar or sufficiently homogeneous, and accordingly, only those areas in which the conditions of competition are "heterogeneous" may not be considered to constitute a uniform market.

57. The process of defining the limits of the geographic market proceeds along the same lines as those discussed above in relation to the assessment of Section G 144 the demand and supply-side substitution in response to a relative price increase."

The CAT also references a BEREC Common Position that further reinforces this point, but we do not consider it necessary to replicate that here.'

Geographic units

Noting that we have not seen any of the analysis the GCRA has undertaken to define the proposed geographic markets, it is Sure's view that the definition of geographic markets must be forward-looking and therefore must consider the likely expansion of any competitive network.

As per Sure's submissions to the GCRA during the data collection process preceding the production of this Draft Decision, Sure does believe that there are two separate geographic markets in Guernsey for the supply of leased lines in Guernsey. These geographical differences are particularly pronounced at the wholesale level, as it is linked to the existence of competing infrastructure (owned and operated by JT) and JT's willingness to extend its existing network to reach new customers. The GCRA references JT's existing infrastructure but does not seem to have attempted to estimate the distance JT would be willing (during the period of this review) to extend its network to reach new customer sites. As a result, there is a risk that the GCRA has underestimated the relevant size of the market that it is proposing to provide a geographical boundary to (namely, limiting the relevant competitive areas to the postcodes GY1, GY2 and GY4 throughout this review period).

In summary, we find that the GCRA's justification and process for arriving at their draft conclusions are not sufficiently robust or indeed transparent to withstand reasonable expert scrutiny. Our key concerns are that:

- The GCRA appears to have performed geographic market definitions in advance of and independently of defining the relevant product markets to which any geographic markets are appropriate;
- The GCRA has not presented any of its analyses to underpin its geographic market definition proposals. Such analysis must include a provision for likely expansion of JT's network in Guernsey over the period of the market review.

Product Market Definition

As referenced above, the up-to-date EC definition of relevant product markets is as follows:

"33 According to settled case-law, the relevant product market comprises all products or services that are sufficiently interchangeable or substitutable, not only in terms of their objective characteristics, their prices or their intended use, but also in terms of the conditions of competition and/or the structure of supply and demand in the market in question (34). Products or services that are only interchangeable to a small or relative degree do not form part of the same market (35). NRAs should thus commence the exercise of defining the relevant product or service market by grouping together products or services that are used by consumers for the same purpose (end use).

34. Although the end use of a product or service is closely related to its physical characteristics, different types of products or services may be used to achieve the same end.

35. Product substitutability between different services may arise through the increasing convergence of various technologies, which often allows operators to offer similar retail product bundles. The use of digital transmission systems, for example, can lead to similarities in the performance and characteristics of network services using distinct technologies."

The GCRA proposes two separate retail product markets and two separate wholesale markets

In paragraph 3.23 of Annex 1, the GCRA states that it has sought to answer the following questions in the product market definition:

"With respect to the product market, our assessment considered whether:

- 1. It is appropriate to maintain a distinction between different speeds of service and, if so;*
- 2. Whether there is more than one distinct market, and if so, what speed parameters should be applied."*

In paragraph 3.24 of the Annex, the GCRA concludes that it would not be proportionate to define a separate market for leased lines of less than 10Mbps speed. Sure agrees with that conclusion.

In paragraph 3.25 of the Annex, the GCRA suggests that JT's leased lines are provided point-to-point, but that Sure's leased lines are provided *"using the network of a downstream communication provider"*. Sure does not understand this statement. Sure provides point-to-point leased lines using its own network and does not use any *"downstream communications provider"* services in Guernsey. Sure is therefore very concerned that GCRA appears to have fundamentally misunderstood the nature and topology of Sure's network in Guernsey.

In paragraph 3.27 of the Annex, the GCRA further states that the use of leased lines fall into two broad categories:

- “1. Fixed access for business sites (“Business Access”);
2. Use by Mobile Network Operators (MNOs) to connect their mobile base stations to the network (“Mobile backhaul”).”

Sure believes that is an over-simplification as operators use leased lines for many other purposes in their networks than simply for mobile backhaul. Leased lines are, for example, also used for voice services between exchanges, broadband backhaul and for the connection between data centres and other operators’ network locations.

Backhaul – should it be treated as a separate market

In paragraph 3.32, the GCRA states that as backhaul speed requirements increase to perhaps 10Gbps, the use of microwave links “*will be inadequate and arguably is already inadequate to satisfy rapidly rising demand requirements and needs in this market.*” Whilst Sure agrees that fibre backhaul may become more prevalent, we would like to draw the GCRA’s attention to the availability of 10Gbps microwave link technology, as previously highlighted by Sure³². Wireless backhaul providers offer resilient 10Gbps (and faster) solutions to fulfil the needs of 5G mobile operators. Our own wireless backhaul supplier (used for our mobile networks in Jersey and the Isle of Man) provides equipment with up to 5 x 10Gbps interface capabilities, so the GCRA’s claim of inadequacy is evidently incorrect.

In paragraph 3.34, the GCRA states that backhaul products have “*very different characteristics from other leased lines service level agreements*”, but the GCRA presents no data to substantiate that statement. Sure provides leased lines to OLOs in Guernsey for backhaul purposes, but none of these have a need for characteristics or service level agreements that are specific to that usage. [§].

In paragraph 3.35, that GCRA concludes that the limited availability of backhaul options available in Guernsey forces “*new operators*” to “*under or over dimension their networks*”. The GCRA presents no evidence to support this conclusion. Paragraph 3.36 mentions a suggested “*reluctance to provide new services*”, claimed by other respondents to the GCRA’s data collection, but it is Sure’s view that it handles requests for new services in an efficient and unbiased manner, whether they originate from other operators or its own retail businesses. The GCRA may be basing its views on the most recent request by an OLO but we would remind the GCRA that the particular operator withdrew its request, without indicating why. We are a demand-focussed provider and see no point in developing solutions for which there is no commercial interest. Sure therefore does not accept the GCRA’s conclusion and considers it unfounded.

[§].

In paragraph 3.37, the GCRA concludes that the nature of demand for higher speed leased lines is different from that for lower speeds. The GCRA has not performed any demand- and supply substitution analysis – or if it has, it has not shared that in the Draft Decision - nor considered whether a chain of substitution analysis would conclude that all speeds should be in the same market. Further, this section of the Annex is titled “Backhaul – should it be treated as a separate market”. However, it now appears to have not addressed whether backhaul circuits constitute a separate market but instead concluded that higher speed markets do constitute a separate market. It is, at this point also not clear how the GCRA defines ‘high speeds’ and ‘lower speeds’. There is discussion of a need for leased lines at speeds of 10, 20, and 50Mbps (in paragraph 3.35) and it appears that those speeds are considered part of the ‘higher speeds’ market, although later in the document the GCRA concludes that there is a separate market for

³² Page 3 of Sure’s 10/07/19 response to CICRA’s Draft Decision: Backhaul Services for Wireless Service Providers.

high speed leased lines of 1Gbps and above, thus categorising the 10, 20, and 50Mbps lines as low speed. This appears to be at least inconsistent.

Demand and supply side substitutability test

The GCRA refers to the EC's Notice of 1997, but, as set out above in the section discussing geographic market definition, that Notice was replaced in 2018 with the current SMP Guidelines. That said, the GCRA refers to a specific section (page 7, paragraph 43) and infers from it that conditions for price discrimination exist in the (UK?) leased lines market but draws no conclusion in this regard for the Guernsey leased lines markets.

It should also be noted that the quote refers to the narrowing of a product market once that product market has been defined. A product market is not defined by looking at the demands of different customer groups, but by looking at the characteristics and pricing of the focal product and then applying demand- and supply-side analysis to gradually add products into the market for which demand- or supply-side substitution has been ascertained. After that it may be appropriate to examine whether the market needs to be narrowed (or subdivided) to reflect specific demands of customer groups.

It is also not clear whether the GCRA is considering the retail or wholesale leased lines market when conducting this analysis. It is necessary to commence with analysis of the retail market and then, if SMP is established using the modified greenfield approach, identify any relevant supporting wholesale market(s) for which a separate analysis is then performed. There is no precedent that is Sure is aware of for conducting the two analyses in parallel or without differentiating between the two markets.

In paragraph 3.40 of the Annex, the GCRA proceeds to state that even if products are not demand-side or supply-side substitutes, they may still be in the same market if the competitive conditions for those services are sufficiently homogenous. Sure does not understand this point and the GCRA has provided no references to substantiate its statement. Three issues are immediately apparent as arising from this statement:

1. The GCRA has presented no demand-side or supply-side substitution analysis at all in this document. In paragraph 3.49 of the Annex, the CGRA states that it does not believe that a small but significant increase in price would lead to substitution between products at below 1Gbps and 1Gbps and above, but does not explain why it makes this conclusion,
2. The GCRA also does not say whether this conclusion is reached for the retail market or the wholesale market.
3. Finally, the GCRA also does not consider the effect of the chain of substitution or even identify the starting 'focal product' for the substitution analysis.

Paragraph 3.41 of the Annex sets out a number of statements relating to competitive conditions and the GCRA's conclusions on those statements. We consider each of these in turn:

"Therefore, a key question for the product market assessment is whether there are groups of customers for which the competitive conditions are similar so they can be considered as a separate market. To answer that question, the following competitive conditions were considered, and our conclusions are provided below"

Sure fundamentally disagrees with this assertion. The GCRA has performed no demand-side or supply-side substitution for either the retail or wholesale product market. The GCRA has not demonstrated

anywhere that there are customer groups for which the competitive conditions are similar so they can be considered as a separate market. The statement itself is non-sensical. In performing the product market definition analysis, the focus should be on products and the demand and supply of those products. If there was a customer group for which demand or supply was sufficiently different from the demand and supply conditions for other customers, then this could be considered as part of the product market definition analysis.

It is possible that a specific group of customers is found to have a different set of demands and therefore could be considered as constituting a separate market. This was previously the case in voice and broadband markets where business and residential customers were considered separate markets because they had clearly identifiable different needs and the providers in the market were able to charge significant premia for business services over residential services. The GCRA has made no such analysis or arguments in its Draft Decision documents.

1. Presence of rival infrastructure. We analysed whether and to what extent the ability of nearby network operators to compete is different for a given enterprise site based on product characteristics and geographic location. Our analysis of network diagrams suggests different network characteristics in different areas of Guernsey;

This particular parameter appears pertinent to the definition of geographic markets, not product markets. In addition, the GCRA does not explain what it believes the “different network characteristics” are and how they impact on its considerations.

2. Customer group and density of competing networks. If there are more dense networks close to one customer group, e.g., financial services in GY1, this would suggest these customers have different supply conditions. This is the case in Guernsey (see above statistical data on industry sectors, population and business densities);

Again, this parameter is relevant to the definition of geographic markets, not product markets.

3. Ubiquity of the operator’s network. This results in greater advantage when competing for customers (e.g. Sure incumbent infrastructure across the whole island vs JT’s high speed capability for leased line services in specific areas of the island);

As above, this parameter is relevant to the definition of geographic markets, not product markets.

4. Differences in demand-side characteristics when purchasing business lines. When differences mean that one particular group of customers is likely to face a significantly different level of competition (e.g. financial services or businesses based in certain areas) with different market outcomes, this is an indication of a separate product group;

This parameter also seems to be geographic in focus – that is, it is focused on where different competitive conditions exist. However, Sure does not understand how this applies to different customer groups. Once competing infrastructure is in place, the operator of that infrastructure is likely to want to address all demand within its coverage area as it helps amortise the investment in the infrastructure. It may be that the competing network was originally built to serve customers needing very high speed connections (for

example, the States of Guernsey, in the case of JT's network), but once the network is there it can serve all commercial demand in that area, including any wholesale opportunities that may arise.

5. Demand side substitution for microwave links. Microwave radio is not widely available to business customers. If MNOs consider microwave links to be an alternative to other leased line products, this would mean that Sure and JT would face stronger competition from Airtel. This does not appear to be the case."

Sure is not sure what the GCRA means to say with this statement. Does the GCRA conclude that microwave links are not part of the relevant leased lines (retail/wholesale) product market?

The demand and supply side substitutability test section does not appear to have any specific conclusions, nor does it appear to have performed any demand-side or supply-side substitution analysis.

Access to bandwidth of up to 1Gbps and Very High Bandwidth service

In paragraph 3.44, the GCRA refers to BT's successful appeal against Ofcom's product and geographic market definitions as the most relevant precedent for considering the definition of different product markets for leased lines at different speeds. The GCRA, however, states that the relevant Ofcom BCMR decision was in 2017 and the CAT Judgement was in 2019 whereas, in fact the relevant Ofcom BCMR decision was in 2016 and the CAT Judgement was in 2017.^{33 34}

In paragraph 3.46, the GCRA references a statement from the Ofcom 2016 BCMR decision, in which Ofcom discusses the possible difference in supply-substitutability (that is whether a supplier would enter the market to supply the relevant product in the case of a small for significant non transitory increase in price by the hypothetical monopolist) for products up to 1Gbps speed and products of 1Gbps speed and above. Ofcom claims in that quote that there is no difference in the willingness by competitors to extend their networks for either group of leased lines products and therefore finds that all speeds are in the same product market.

In paragraph 3.47, the GCRA then proceeds to state that the same conditions do not appear to apply in Guernsey, due to JT having stressed that its decisions to extend its network depend on the profitability of doing so and as higher speed products attract a higher price, it is more likely to extend its network to provide higher speed products. Sure draws the GCRA's attention to the fact that the Ofcom decision that all speeds of leased lines were in the same relevant product market was in fact overturned by the CAT, so the Ofcom statement referenced cannot be considered a reference to good international practice.

Sure does not disagree with the GCRA that very high speed leased lines may constitute a separate relevant product market, as it agrees that, in principle, the decision to extend competing network infrastructure would depend on the profitability of doing so. That therefore suggests that there is greater supply-side substitutability for very high speed leased lines than for lower speed leased lines. Sure is, however, concerned that the GCRA has presented no analysis to support this being the case, beyond the qualitative statement from JT as referenced in paragraph 3.47 of the Annex.

In paragraph 3.49, the GCRA concludes that leased lines customers would not switch between products below and above 1Gbps, but presents no analysis for this. Further, the analysis presented above to justify

³³ https://www.catribunal.org.uk/sites/default/files/1260_BT_Judgment_CAT_25B_101117.pdf

³⁴ Sure also notes that this is the same Ofcom BCMR decision that the GCRA has relied upon earlier in the Annex to justify its geographic market definition (despite that decision being overturned by the CAT on appeal.

the existence of the two separate products markets refer to supply-side substitutability (that is, a supplier extending its network to serve a new customer site), so the GCRA's rationale in paragraph 3.49, that there is no demand-side substitution between products below or above 1Gbps, cannot be based on that data.

To undertake the demand-side substitution analysis, the GCRA would need to consider the characteristics, functionality, and pricing of the relevant products. No such analysis is presented or referred to as having been done by the GCRA.

As mentioned above, earlier in the Annex, around paragraph 3.35, the GCRA discusses different demand conditions for what it refers to as "*High speed leased lines*" as being leased lines of 10/20/50Mbps, but then does not refer to that analysis again, instead moving on to considering whether there are separate markets for leased lines products above or below 1Gbps. Sure would welcome the GCRA's clarification as to its conclusions relative to the 10/20/50Mbps speed products and how this interrelates to the GCRA's conclusion that separate product markets exist for products below 1Gbps and at 1Gbps and above.

Sure is further very concerned that the GCRA has not considered the question of whether separate product markets for very high speed and lower speed products exist in both retail and wholesale markets. Sure considers that this is critical and must be performed in line with the EC SMP Guidelines as quoted elsewhere in this response and in line with general international market analysis practice for electronic communications markets.

In paragraphs 3.50 and 3.51 of the Annex, the GCRA concludes that separate markets exist for products below 1Gbps and at 1Gbps and above, and that both markets include self-provision. The inclusion of self-provision suggests that the markets thus defined may be wholesale markets (as self-provision applies in wholesale markets only), but that is not stated by the GCRA.

Overall comments on the GCRA's market definition analysis and conclusions

The GCRA concludes that there are 8 separate relevant markets for the supply of leased lines in Guernsey. Having reviewed Annex 1 to the Draft Decision carefully, Sure has severe concerns with the process the GCRA has gone through to reach those conclusions and with the lack of evidence to support the conclusions.

As set out at the front of this response, there are well-established and well documented processes and tests to apply for the definition of relevant markets in electronic communications, that are susceptible to ex-ante regulation. They are summarised below:

Definition of relevant product markets

Starting at the retail level (using the modified greenfield approach):

For each product market:

- a. Identify focal product
- b. Gradually expand market to include other products if a SSNIP for a hypothetical monopolist is not profitable (testing demand – and supply-side substitution)
- c. Test whether the chain of substitution applies to products that may not seem to be direct substitutes to the focal products but are in fact indirect substitutes through a chain of substitution

- d. Apply three-criteria test to the resulting market to determine whether it is susceptible to ex-ante regulation
- e. SMP analysis

If SMP is found at retail level then the product definition process is repeated at the wholesale level. This is because retail SMP can only exist if there is also wholesale SMP, as the market failures that need to be demonstrated to justify retail SMP almost always arise from barriers to competition at the wholesale level. One wholesale market may support more than one retail market, so it cannot be assumed that market definitions at retail and wholesale levels will be aligned. For example, whilst there may be a break in the chain of substitution at the wholesale level but not at the retail level and, often, the competition conditions differ geographically at the wholesale level, but not at the retail level (where wholesale access makes it possible for many providers to participate in the provision of retail services).

Definition of relevant geographic markets

For each relevant product markets that has been considered susceptible to ex-ante regulation, regulators may find it appropriate to consider whether the competitive conditions in those markets are sufficiently homogenous in different geographic locations covered by the market, to constitute a single market or whether the product market should be sub-divided into two or more geographic markets.

To determine whether separate geographic markets exist, the hypothetical monopolist test can again be performed. This helps understand whether customers would move from one location to another in order to access different products or pricing in response to a SSNIP, or, whether a supplier in one location would start supplying products and services in another location, in response to a SSNIP test.

The geographic market definition analysis should also be informed using the modified greenfield approach.

Summary of Sure's comments on the GCRA's approach to market definition

Above, we have commented on the contents of Annex 1 to the Draft Decision on a nearly paragraph by paragraph basis, where we have pointed out problems, queries and inconsistencies in what the GCRA has presented. However, in order to provide an overview of our queries and concerns we present them below at a summary level.

As far as we can tell, the GCRA started by considering competition conditions for the supply of leased lines services in different parts of Guernsey – that is geographic market definition. The GCRA's analysis at this stage does not define which product markets that geographic analysis is applicable to. It is essential to first define a product market before undertaking geographic market analysis as otherwise it is not possible to know for which products the geographic market analysis is being performed.

The GCRA's geographic market analysis is therefore all but meaningless:

- Despite subsequently concluding that the supply of leased lines falls into two separate product markets, according to the speed of the lines, the GCRA does not consider geographic conditions for leased lines of different speeds. The GCRA subsequently applies the geographic markets to both low and high speed leased lines market without justifying why this is appropriate.
- Likewise, despite subsequently concluding that there are separate retail and wholesale markets for leased lines in Guernsey, the GCRA does not identify whether the geographic market analysis is for the retail or the wholesale markets. The GCRA subsequently applies the geographic markets to both retail and wholesale leased lines market without justifying why this is appropriate.

To illustrate why the same geographic market conclusions may not apply to relevant markets for leased lines of low and high speeds, consider where a supplier would be willing to go to meet demand for very high speed (and correspondingly high value) leased lines compared to where an operator would go in order to meet demand for very low speed (and correspondingly low value) leased lines.

With regards to determining geographic markets for retail and wholesale markets, there are also potentially significant differences. Addressing first retail market conditions, the analysis would need to consider supply to retail customers using either a supplier's own network, a combination of its own network and access to wholesale components or using only wholesale services. Given these different possibilities to support retail supply, it is, for example, not at all clear that the presence of competing network infrastructure in different geographic areas is relevant to the competitive conditions in the retail market. For the wholesale market, the presence of competitive infrastructure is, however of significant relevance as it determines the level of competition in the supply of wholesale leased lines.

With regards to definition of relevant product markets, which should have been undertaken before the geographic market definition, the GCRA presents various hypotheses relating to demand and supply conditions for leased lines products at different speeds, but the GCRA presents no actual demand- or supply substitution analysis. It identifies no focal product and tests no products (different speed leased lines) against a focal product.

As discussed earlier, in paragraph 3.35 the GCRA seems to be describing leased lines of 10/20/50Mbps as high speed leased lines, but in subsequent analysis and in its conclusion the GCRA considers that different markets exist for leased lines of less than 1Gbps and for leased lines of 1Gbps and above. Sure has found no analysis to justify why the Guernsey market conditions justify the definition of those product markets. Nor have we seen any analysis to suggest that there is only a single product market. The complete lack of transparent and consistent analysis and no mention of the chain of substitution analysis, which is the standard approach to defining product markets for products that have a range of speed/price variants, makes it impossible for Sure to agree or disagree with the GCRA's conclusions in this regard.

With regards to the GCRA's conclusion that separate retail and wholesale markets exist in Guernsey, Sure agrees that this is the case. Sure, however, challenges that the GCRA appears to have analysed retail and wholesale markets together with no effort at all to identify the different characteristics of the retail and wholesale markets. Sure is virtually certain that, if the GCRA undertook proper and separate market analyses at retail and wholesale levels, it would find that the characteristics differ sufficiently to not justify the GCRA's current conclusions.

The GCRA's use of reference documentation

Throughout Annex 1, the GCRA refers to a number of documents to support its approach and conclusions. Sure has tried to locate the references presented, but this has been hindered by the GCRA providing neither the full document names from which the references were taken, nor links to or URLs for the documents themselves.

Sure notes that the GCRA appears to reference the Ofcom 2016 BCMR Statement on several occasions, but refers to it variously as the 2017 BCMR and the 2019 BCMR. Sure further notes that Ofcom's 2016 BCMR was successfully challenged in the Competition Appeals tribunal (CAT), in particular Ofcom's approaches to product and geographic markets were found to be erroneous by the CAT. Sure therefore finds it curious and inappropriate that the GCRA should use that specific Ofcom market review as its reference.

The GCRA also references the CAT's judgement³⁵ on Ofcom's 2016 BCMR but appears to have misunderstood what the CAT was saying and specifically not recognised that the CAT's decision was based on the specific conditions in the UK wholesale leased lines market (which differs substantially from the Guernsey leased lines (retail and wholesale) markets. The reference therefore appears to Sure to be erroneous.

We have indicated in the above paragraph-by-paragraph analysis where we believe specific references to be erroneous or misleading, so will not go into further detail here.

Dominance and Joint Dominance

Section 4 of Annex 1 states that it presents the GCRA's dominance analysis. As such, it should present an analysis of each market defined in the previous section but does not do so. In fact, Sure has not been able to identify any dominance analysis for any one of the relevant product and geographic markets supposedly defined by the GCRA.

We present at the front of this response the standard and internationally recognised process for determining whether a provider has significant market power (SMP) in a relevant market. There is no indication that the GCRA has even attempted to apply that process, nor consider the criteria identified for the process. Below we review the detailed contents of Section 4 of Annex 1.

In paragraph 4.1, the GCRA describes the 'Guernsey market' as having only two principal competitors and states that under certain conditions this market structure is often referred to as one where there is joint dominance. Markets with two principal players are typically referred to as duopolies, (and more generally where there are few competitors as oligopolies) but this is not sufficient to say that there is joint dominance. The existence of joint dominance can only be established after conducting a very complex set of tests and analyses, (as outlined on page 7 above) none of which are referred to or presented in the GCRA's documentation.

In paragraph 4.2, the GCRA further explains that 'joint SMP' does not require illegal collusion but suggests that tacit coordination is sufficient. Sure notes that the GCRA does not here consider what analysis is required to prove the existence of tacit collusion, nor does the GCRA present any analysis to suggest that tacit collusion is in fact present in any of the 8 relevant markets defined by the GCRA.

³⁵ We believe the reference to be to the judgement but are not certain as no specific paragraph numbers or other indications are provided by the GCRA.

In paragraph 4.3 the GCRA lists a further three criteria it considers relevant to the finding of joint SMP, namely market concentration, high and stable market shares, and enduring barrier to market entry. Sure notes that the GCRA does not mention any of the other criteria that need to be satisfied before joint SMP can be proven. In particular, there is no mention of the three cumulative conditions as identified in the *Airtours* case and recognised by the EC as necessary for a finding of joint SMP, let alone any attempt to conduct a forward-looking analysis of whether these conditions apply to any of the markets under consideration here.

The importance of the *Airtours* criteria for assessing joint dominance is now widely recognised. For example, a recent paper³⁶ commenting on the application of joint dominance in the EECC stated:

Our extensive review of legal precedents shows an overwhelming consensus about the fact that the Airtours criteria are the only sound legal basis for finding joint dominance and can only be applied in instances where the risk of coordination is confirmed by hard evidence. This conclusion applies to all types of joint dominance cases rendered by competition authorities and national regulatory authorities. We therefore conclude that any regulatory codification of the conditions for a finding of joint dominance must, at a minimum, integrate the Airtours criteria and provide for safeguards in applying these to situations where actual market data demonstrate the need for regulatory intervention.

Furthermore, a rigorous analysis of whether the conditions apply to the market under consideration is needed to prevent the risk of legal challenge. In that respect, we note that only last year the Netherlands Authority for Consumers and Markets (ACM) finding of joint dominance in the Dutch wholesale fixed access market was overruled on appeal.³⁷ There were a number of successful grounds for the appeal including that, in applying the *Airtours* criteria, the ACM had not met the required standard of proof to establish joint dominance. The ACM's finding of joint SMP was therefore annulled.

The GCRA has not referred to the *Airtours* cumulative conditions and whilst we do not believe it is appropriate for us to attempt that analysis here, only a cursory consideration is required to establish that the first of the three cumulative conditions – namely transparency of pricing – is not satisfied in any of the retail leased line “markets” that the GCRA has defined in Guernsey and where it has proposed in its Draft Decision that JT and Sure have joint SMP. Sure's retail prices can be readily established by any OLO through the tying of these prices to the underlying regulated wholesale prices. But Sure has absolutely no visibility of JT's retail prices in these markets as they have no publication requirement and we understand that JT offers prices that are tailored to individual customers' requirements. As the *Airtours* conditions are cumulative, if the first condition is not satisfied then the test for establishing joint SMP has not been met. This is even before the requirement under EU jurisprudence to consider the forward-looking aspect of the *Airtours* test is taken into account.

In Paragraphs 4.5 to 4.7, the GCRA focuses on the principle of market concentration and proceeds to state (in paragraph 4.6) that when performing market concentration analyses it is also typical to consider whether the market definition is relevant (which, according to the GCRA means whether the market is defined too narrowly or too widely). Paragraph 4.7 then proceeds to name the scale often used to define market concentration as the Herfindahl-Hirschman Index (HHI).

³⁶ Joint Dominance in the new European Electronic Communications Code An opportunity to ensure consistency and legal certainty, a report prepared on behalf of Vodafone, Jones Day and Compass Lexecon, September 2017.

³⁷ <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:CBB:2020:177>

Nowhere does the GCRA attempt to determine the HHI for the Guernsey leased lines markets (we do not know which of the 8 markets defined by the GCRA, these specific paragraphs refer to). In paragraph 4.7, the GCRA claims to have performed calculations using the Lerner Index,³⁸ but presents none of the data used, nor the conclusions of those calculations. Sure further notes that a highly concentrated market does not, in and of itself, suggest the existence of joint SMP. In particular, the GCRA appears to have neglected to take into account the size of Guernsey as a reason for why there are not multiple competing infrastructures in Guernsey.

We also note that the GCRA's reference to the definition of 'relevant' markets appears to have no relevance to any other points or conclusions presented by the GCRA, and that market definition issues were addressed in previous sections of Annex 1.

In paragraphs 4.8 to 4.10, the GCRA addresses the parameter of high and stable market shares. It mentions that a high proportion of Sure's retail leased lines customers in St Peter Port are in the financial services sector but does not explain why that is in any way relevant to the level of market shares observed. Additionally, the GCRA mentions that 58% of all retail leased lines in Guernsey are in the St Peter Port area and, again, does not explain why that is relevant to the overall market share distribution between providers of retail leased lines in Guernsey. Finally, the GCRA redacts the market share information, so Sure cannot fully comment on those findings. Based on internal Sure data, however, as set out in Sure's data submission to the GCRA³⁹, there has clearly been a significant change in market shares during the period since the last leased lines market review.

It is interesting that, for this section, the GCRA appears to have focused on the retail leased lines markets (of which the GCRA has identified 4), but it does not indicate which of the relevant retail markets its discussion is applicable to. There is mention of 58% of retail customers are located in St Peter Port, but as St Peter Port is not a separately identified market, and the GCRA has not presented separate market share data for any of the individual retail leased lines markets, that does not help indicate which particular market the GCRA might be considering in these paragraphs.

Paragraphs 4.11 to 4.13 then address enduring barriers to entry. For that we interpret that the GCRA is referring to market entry. The GCRA refers to the European Commission's (EC's) list of recommended markets as a justification for there being enduring barriers to market entry in all Guernsey leased lines markets. It would appear that the GCRA considers this conclusion to apply to both retail and wholesale markets, but it is important to understand that the EC's recommended markets are only at the wholesale level. The EC includes no retail markets on its list of recommended markets.

In fact, when considering the barrier to market entry at wholesale and retail levels, it is evident that they display fundamentally different characteristics. For example, any OLO could enter the retail market by purchasing wholesale circuits from Sure or JT, but to enter the wholesale market would require building physical network infrastructure, for which it could be reasonably argued that there are enduring barriers. Absent any actual analysis of each relevant market Sure rejects the GCRA's conclusions.

In paragraph 4.12, the GCRA specifically refers to parameters used by operators on whether to extend their existing network. Sure cannot understand the relevance of such parameters to the SMP analysis, as it would appear more appropriately relevant to the determination of boundaries between potentially different geographic markets.

³⁸ Which the GCRA does not otherwise describe.

³⁹ Submitted as "FILE 12 – Sure's market share calculations..." on 20th October 2020.

These paragraphs conclude the 'Dominance and joint dominance' section of Annex 1 but the GCRA does not conclude whether it has found individual or joint dominance in any of the 8 markets it claims to have defined in section 3 of Annex 1.

The GCRA jumps immediately into a discussion of joint SMP, and Sure can find no discussion of the criteria relevant to finding single SMP (and which are also necessary for joint SMP). We have presented the standard SMP assessment criteria in the Introduction to this response, from which it is clear that determining SMP is a complex process and that, under virtually no circumstances, SMP cannot be determined through analysis of market shares alone.

It is Sure's view that the GCRA has not demonstrated that SMP exists for any provider in any of the 8 separate markets the GCRA claims to have identified. Sure therefore concludes that the GCRA must revisit its SMP conclusions and present any analysis it has done to arrive at those conclusions. If such analysis has not been performed, the GCRA should recall the current Draft Decision and reissue it once the conclusions can be substantiated with actual data and analysis which is compliant with international good practice.

Pricing and bandwidth gradient

In section 5 of Annex 1, the GCRA proceeds to consider pricing of leased lines in Guernsey and also BT's leased lines pricing. The GCRA claims that the data submitted by operators did not include pricing information. Sure is surprised to hear that as we believe we have provided all pricing information requested by the GCRA.

In paragraph 5.1, the GCRA also states that operators have had difficulty in providing pricing and costing data for leased lines, stating that data provided was "*inconsistent, often irrelevant or found to be simply wrong when reviewed and queried*". Each operator's pricing data should be readily available. Sure reminds the GCRA that the production of costing information is a very complex exercise that was previously facilitated by Sure through the production of regulated accounts. The GCRA, however, withdrew the obligation to produce regulatory accounts in 2015 and Sure consequently does not have costing information at the product level.

In paragraph 5.2, the GCRA proceeds to state that, in the absence of Guernsey operator data, BT's published costs for the provision of leased lines are a good starting point. The GCRA justifies this position by stating that equipment costs are likely to be similar in Guernsey and the UK, that the two jurisdictions use the same currency, and that average earning in the UK was 10% lower than in Guernsey. Sure finds the GCRA's conclusion and the parameters relied on for that conclusion, to be not credible and we challenge the GCRA strongly on this.

For example, the GCRA claims that equipment costs are likely to be similar for Sure and BT but has not provided any evidence to support this claim. When considering the difference in size of the two organisations, and the resulting difference in purchasing power, it is clear that the GCRA's assumption simply is not credible. [X].

In paragraphs 5.3 and 5.4 the GCRA discusses its conclusions on how demand for high speed leased lines in Guernsey and the costs of equipment are likely to evolve over the period of the coming market review period. The GCRA's statements are vague and Sure is uncertain as to their relevance in respect of the overall pricing and costing of leased lines. Additionally, in paragraph 5.4 the GCRA states that equipment costs are declining 'over the product life cycle' (a period not defined) from 4.9% and 7.3%. Sure cannot

understand this statement – there is no indication of what those percentages refer to and it would seem that the numbers suggest an increase, rather than a decrease.

The GCRA then moves on to considering the bandwidth gradients for Sure and BT. The GCRA compares the bandwidth gradients in Guernsey and the UK. In paragraph 5.8, the GCRA states that BT's prices and tariff gradient are regulated and are thus likely to *"reflect relatively closely the cost of service provision by BT to reflect the relative cost of service provision between different bandwidths"*.

Firstly, it is important to note, that only BT's wholesale leased lines pricing is regulated. Ofcom has not found that BT (or any other provider) has SMP in any retail leased lines market. Additionally, Sure believes that the GCRA may not completely understand how Ofcom regulates BT's wholesale leased lines prices. we explain this briefly below:

When applying wholesale price regulation in the wholesale leased lines market, Ofcom designs 'baskets' of products to which a CPI +/- X charge control is applied. Within those baskets, BT is free to set its prices, as long that, in total, the products in each basket comply with the charge control. This means that, in reality, BT sets its own tariff gradient based on its commercial objectives and the commercial activities in the market(s).

Over recent years BT has, for example, set the pricing for 10Mbt and 100Mbt leased lines at the same level, because BT wants to phase out its 10Mbt product. This has nothing to do with the difference in underlying costs. Sure believes that the GCRA has fundamentally misunderstood how BT's wholesale leased lines products are regulated and priced and, as a consequence, the GCRA cannot conclude that the BT tariff gradient is more cost-oriented than that of Sure.

The GCRA then considers the level of price competition between Sure and JT, suggesting that JT's pricing maintains a relatively stable differential to Sure's prices. From this, the GCRA concludes that, as prices have been relatively stable (here we assume that the GCRA refers to retail prices) since the last market review, the operators are not exerting significant competitive pressure on each other.

Sure believes that these observations and conclusions need to be unpacked, [3<]. In fact, the observation of a relatively stable price differential between Sure and JT process is a direct product of the existing price regulations. [3<].

Further, Sure has no way of knowing what JT charges for its retail and wholesale leased lines, as these are commercially confidential and therefore not visible in the market. From this consultation, Sure has learnt that JT prices at a certain % below Sure's (indirectly regulated) retail price. That is new information for Sure, as JT has never shared its leased lines portfolio pricing with us. The GCRA should note from the EC SMP Guidelines that one parameter is critical to the existence of joint SMP, namely that *"each member of the dominant oligopoly must have the ability to know how the other members are behaving in order to monitor whether or not they are adopting a common policy. It is not enough for each member of the dominant oligopoly to be aware that interdependent market conduct is profitable for all of them but each member must also have the means of knowing whether the other operators are adopting the same strategy and whether they are maintaining it. There must there be sufficient market transparency for all members of the dominant oligopoly to be aware, sufficiently precisely and quickly, of the way in which the other members' market conduct is evolving."*⁴⁰

⁴⁰ EC SMP Guidelines paragraph 67.

Sure strongly challenges that the GCRA can in any way rely on the entirely one-sided pricing policy of JT to prove any form of tacit collusion or joint SMP.

The GCRA appears to conclude (in paragraph 5.9 (1)) that leased lines prices at different speeds are set to reflect the value placed on the increased speeds by customers. That observation is absolutely correct. That is how leased lines prices are set across most of the world. Even when regulated the price distribution between different speeds is typically set to reflect value, rather than strictly based on cost increments. Not doing so would run counter to good commercial practice. This can mean, in some instances, that lower speed products do not cover all their costs, whereas higher speed products over-recover, making the portfolio overall viable. Sure does not understand why the GCRA would seek to change this widespread and generally accepted practice.

Whilst the GCRA may think that it can somehow conclude dominance from its review of leased lines pricing in Guernsey and the UK, our explanation above of how Ofcom regulates BT's wholesale leased lines pricing clearly shows that the GCRA cannot assume that the BT tariff gradient is cost-oriented. On the contrary, it is known as not being cost-oriented.

Sure can see nothing in the GCRA's discussion of pricing and bandwidth gradient that proves either single or joint SMP in the Guernsey leased lines markets (whether retail or wholesale, as the GCRA again does not indicate which market(s) the analysis is applicable to and appears to be mixing up retail and wholesale market characteristics).

The GCRA's summary findings (paragraph 5.10)

Under this heading, the GCRA sets out 6 points regarding the "type of evidence that would indicate or be indicative of the operator's [sic] dominance on the market". Although Sure does not entirely understand what those words mean, we set out below a review of each of those 6 points.

1. *"Evidence of substitution in the recent past – there is no evidence of substitution in Guernsey over the review period;"*

The GCRA does not explain what type of substitution it may refer to here, nor which of the 8 separate markets this may apply to. Sure, however, draws the GCRA's attention to the significant changes in retail market shares over the period since the last review, which clearly demonstrates that substitution has taken place. As the GCRA has presented no data for the 4 retail markets it claims to have defined, Sure cannot comment on whether this applies in all of those markets.

2. *"Quantitative test (e.g., evidence of price correlation) – operators' rates vary by a fixed % which demonstrates price correlation;"*

As set out above, the stable difference in pricing between Sure's and JT's retail prices (of which Sure was not aware until reading this document), is a direct consequence of how the GCRA is currently regulating Sure in the leased lines market. Sure has no way of knowing how JT prices its retail services as JT does not publish that information.

3. *Views of customers and competitors – operators are not forecasting increased growth in the business sector, but customers have raised the prospect of unmet demand and difficulties obtaining suitable access from the two infrastructure providers"*

Sure is uncertain as to the relevance of forecasts for the Guernsey business sector. It should, however, be noted that the Guernsey business market is relatively stable and Sure is not aware of a significant change expected in the number of businesses located in Guernsey.

Sure has presented clear information to the GCRA that it has not refused to supply any leased lines product for which any customer (retail or wholesale) has demonstrated there is a reasonable demand.

4. *Consumer preferences – within the context of business connectivity, operators are critical of the current pricing structures. They also claim that they are unable to tailor product and services to their business requirements, and their preference would be for greater diversity of bandwidth provision;*

Sure is uncertain what the GCRA wishes to demonstrate by this point. We have already presented to the GCRA (in the data collection process and earlier in this document) that Sure operates an objective new product request process and has, to the best of our knowledge, not refused any reasonable demand for new leased lines products.

The existence of a preference from customers (and here we believe the GCRA may be referring to wholesale customers) for a greater diversity of bandwidth and perhaps different pricing structures does not mean that there is a market failure, only that not every individual preference of every single customer is catered for. That is standard for all markets, whether regulated or not.

5. *Evidence concerning barriers and cost associated with switching demand to potential substitutes – there is no data available to assess the scale of switching costs in Guernsey, however, the tariff data by bandwidth shows that product switching to a potential substitute would be unlikely;*

Sure cannot decipher this statement.

Firstly, we do not know what is meant by 'switching demand to potential substitutes'. Secondly, the reference to tariff data showing switching to potential substitutes being unlikely, is equally confounding. If the GCRA means to say that the difference in pricing between different bandwidth products is too high for customers to want to increase their leased lines products, then we do not understand why this is in anyway relevant to the determination of whether one or more operators have SMP.

6. *Evidence concerning different categories of customers and price discrimination – the main concern from the regulatory perspective is that the two network providers' businesses are dependent on two key sectors. the high dependence on these two sectors is further entrenched by the fact that one of the operators was granted a 10-year contract, effectively excluding anyone else from competing for that customer for an extensive period of time in a technology market where change can be rapid."*

Sure is not aware of any price discrimination between different classes of customers. Sure's prices are regulated, with wholesale prices being subject to publication and transparency criteria and retail prices being regulated indirectly due to the retail-minus wholesale regulation. This means that Sure could not readily discriminate between different types of customers, whether retail or wholesale.

If the GCRA is referring to different prices for different bandwidth, then that is a practice used worldwide and tariff gradients vary substantially across the world. There is no single right or wrong way to set the tariff gradient, but it does not constitute price discrimination between different customer groups.

Finally, the GCRA refers to the 10-year contract for leased lines services to the States of Guernsey, awarded to JT. Whilst Sure agrees with the GCRA that the 10-year contract is too long, we cannot understand why this in any way relates to whether one or more operators in Guernsey have SMP. The existence of very large customer contracts means that those customers have very strong countervailing buyer power (which is an important criterion in the assessment of SMP).

The existence of strong countervailing buyer power advocates strongly against the existence of SMP in the relevant market (again, Sure is not sure which market(s) the GCRA refers to for this particular point, but would assume it to be the retail market as the 10-year contract is a retail contract).

Having reviewed the 6 points listed by the GCRA under the heading of summary findings, Sure has found no evidence, analysis or arguments that prove the existence of SMP in any of the markets the GCRA claims to have defined.

Competition Appeal Tribunal (CAT) BT VS Ofcom 2017: Summary findings

In paragraph 6.1, the GCRA states that the CAT found that Ofcom had erred when finding that a SSNIP test from 1G to 10G leased lines would be unprofitable.

Sure is aware of this CAT finding and has already commented earlier in this response that we find it puzzling that the GCRA relied on Ofcom's approach to product and market definition, given that Ofcom was found by the CAT to have erred in both.

Sure does not understand the purpose of this reference at this point in the consultation and would be grateful if the GCRA could explain its relevance to the GCRA's conclusions.

Conclusions

In paragraphs 7.1 and 7.2, under its heading 'Conclusions', the GCRA offers no conclusions. Nowhere in the document does the GCRA present its set of relevant markets identified and the SMP findings for each market.

The closest the GCRA comes to a conclusion, is in paragraph 2.1, where it states:

"Our review identified eight regulated markets where operators, either singularly or jointly, hold significant market power (SMP). The findings are a direct result of the joint dominance position on the island that is occupied by Sure and JT (in GY1, GY2 & GY4)."

Nowhere in the Annex does the GCRA set out the definition of its relevant markets and nowhere does the GCRA set out its SMP findings. Those are presented in the accompanying PowerPoint slides, but neither the Annex nor the slides provide a specific rationale for each market defined, nor for the finding of single and/or joint SMP for each of those markets.

The GCRA's statement in paragraph 2.1 is also interesting as it states that the findings are a direct result of the joint dominance position on the island that is occupied by Sure and JT (in GY1, GY2 & GY4). In the accompanying slides, however, the GCRA does not find that the two operators have joint SMP in all the product markets in those geographies. In the slides the GCRA appears to be proposing that Sure has single SMP in both wholesale markets and one of the retail markets in those geographies, with joint SMP being found only for the remaining retail market. It would seem that there is at least some level of inconsistency there.

Paragraphs 7.1 and 7.2 claim that the Annex has presented a 'precise and methodical analysis' of the business connectivity market. It should, however, be clear from our careful and detailed critique in this response that this is not the case.

The GCRA has presented no transparent analyses or evidence, it has not applied international good practice and has arrived at conclusions that are not borne out by any evidence presented within the Draft Decision.

Sure (Guernsey) Limited