



Business connectivity market review: Guernsey

Draft Decision and Response to Consultation

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Executive summary

In April this year, the GCRA (Guernsey Competition and Regulatory Authority) initiated a consultation on its review of the market for business connectivity services in Jersey. Having considered carefully the responses received from stakeholders, the GCRA now sets out its definitive position on key issues arising from its review and, in particular, the regulatory measures it considers to be appropriate in relation to the provision of leased lines.

As was explained in its consultation document in April, the GCRA's market review involves the definition of relevant markets, the assessment of competition within the markets in question and, where competition is found to be deficient in any market, the designation of operators with SMP (Significant Market Power) and the imposition of appropriate remedies. The GCRA has now concluded that its review should follow the broad principles of market definition, competition assessment and the imposition of remedies as set out by the EU, adapted to the particular circumstances of the Channel Islands.

The GCRA has defined separate markets in Guernsey for the provision of leased lines at the wholesale and retail level, with separate markets for on-island and off-island lines. In its initial consultation, the GCRA proposed to define a single retail market comprising both on-island and off-island circuits but it accepts the point made by respondents that it would be desirable to have a market definition in the retail market which reflects the position at the wholesale level. As a result, the GCRA has now concluded that separate markets be defined at both retail and wholesale level for on-island and off-island lines.

The GCRA has undertaken a competition assessment on the provision of leased lines at both wholesale and retail levels for on-island and off-island leased lines. The GCRA has considered whether or not Sure (Sure (Guernsey) Limited) and JT (JT (Jersey) Limited) might be considered to be jointly dominant within the retail market for leased lines in Guernsey. The GCRA has concluded that there is no evidence to support the suggestion of collusive behaviour on the part of Sure and JT and takes the view that any such co-ordinated activity would be unlikely to succeed in practice. The GCRA has, as a result, concluded that joint dominance is not a relevant consideration in relation to the supply of retail leased lines in Guernsey.

At the wholesale level, the GCRA has concluded – based on Sure's very high market share, which is not mitigated by other factors – that Sure is dominant in relation to the provision of wholesale on-island leased lines. Although Sure also continues to hold the largest market share within the wholesale market for off-island leased lines, the existence of multiple competing providers and the amount of capacity available

leads to the conclusion that no operator is dominant in this market. As a result, the GCRA has concluded that Sure should be designated with SMP in the market for wholesale on-island leased lines and that no operator should be designated with SMP in the market wholesale off-island leased lines.

In the Consultation, the GCRA also opened a discussion about how best to ensure that retail and wholesale customers in Guernsey could access high quality off-island leased lines. The GCRA considered relevant options available to it, and has now concluded that its proposals for the regulation of the on-island market can most effectively address the need for access to cost-effective and high quality off-island connectivity. The GCRA will keep this issue under active review, in particular to ensure that there are no artificial barriers at the on-island level to access off-island services and *vice versa*.

At the retail level, the GCRA has concluded that no operator should be designated with SMP in the market for retail on-island leased. This is because of the substantial market share movements that have occurred in the recent past between Sure and JT, with the latter now holding the largest market share, and taking account of likely competitive developments in this market over the medium-term.

In the retail market for off-island leased lines, the GCRA has also concluded that no operator should be designated with SMP. As is the case for on-island retail leased lines, recent entrant JT has supplanted Sure as the leader in terms of market share held in the provision of retail off-island circuits. Combined with the other factors that need to be taken into account when assessing the level of competition, the GCRA has concluded that dominance is not a factor within this market.

The GCRA has considered carefully the issue of appropriate remedies arising from its finding of SMP in relation to provision of wholesale on-island leased lines. In this regard, the GCRA has confirmed its preliminary conclusion that a range of remedies, encompassing obligations on access, transparency, non-discrimination, accounting separation, cost accounting and price control should be imposed on Sure in light of its position as an SMP operator in this market. While the remedies themselves do not constitute new obligations, the GCRA's approach has elaborated in more detail on how these obligations are to be implemented. This has been done both to improve regulation in Guernsey, and to ensure a consistent approach across Guernsey and Jersey.

In summary, the GCRA has concluded that, in relation to the provision of leased lines in Guernsey, the appropriate markets exist at the retail and wholesale levels for on-island and off-island circuits. The GCRA has determined that Sure holds SMP in the wholesale market for on-island leased lines and that in the retail on-island market and the retail and wholesale off-island markets no operator holds a position of SMP.

1. Introduction

1.1 Background

In April 2014, the GCRA¹ consulted on its review of the market for business connectivity in Guernsey².

The main purpose of a market review is to identify the competitive conditions prevailing in a market by assessing systematically the competitive constraints that are faced by undertakings (licensees) in the market. In the April consultation, the GCRA set out its preliminary views on the definition of the retail and wholesale markets for business connectivity; assessed the level of competition in the defined markets, came to proposed Significant Market Power (SMP) findings; and set out an initial view of remedies which may be put in place should the market review proposals be maintained.

Responses to the consultation were received from JT, Sure, Airtel and Longport³, and non-confidential versions of these responses are available on the GCRA's website. Follow-up discussions were held with respondents in order to ensure a shared understanding of points made in the written responses. The GCRA would like to thank respondents for their input.

1.2 Structure of this document

This document constitutes a Draft Decision (DD). The document sets out the conclusions which the GCRA has reached, having taken full account of responses to the consultation, and having carried out further research to ensure it has fully addressed respondents' points. The document contains summaries of particular points raised to illustrate the GCRA's reasoning.

This document broadly follows the structure of the April consultation, and is organised around the questions which were asked in that consultation. It is structured as follows:

Section 2: describes the GCRA's approach to the market review;

Section 3: sets out the GCRA's definition of the retail market;

¹ This market review considers the market for business connectivity in Guernsey. The JCRA is undertaking a parallel review in Jersey.

² Business Connectivity in Guernsey, Document No CICRA 14/16, 8 April 2014

³ Longport's response relates mainly to Guernsey, but where comments are generally applicable, they have been included in the Jersey review as well.

- Section 4: explains the GCRA's assessment of competition and SMP in the retail market;
- Section 5: sets out the GCRA's definition of the wholesale market(s);
- Section 6: explains GCRA's assessment of competition and SMP in the wholesale market(s);
- Section 7: sets out remedies to be applied in markets where there is an SMP finding.

Annex 1 outlines the legal requirements and licensing framework underpinning the market review.

Annex 2 summarises the GCRA's decisions on the markets for retail and wholesale leased lines.

Annex 3 is a glossary.

Responses to this document should be submitted in writing to:

GCRA
Suites B1 & B2
Hirzel Court
St Peter Port
Guernsey
GY1 2NH

or by email to lisa.white@cicra.gg.

The deadline for responses is **5.00pm on 02 September 2014**.

All comments should be clearly marked: ***"Draft Decision: Review of the market for business connectivity, Guernsey"***. The GCRA's normal practice is to publish responses to consultations on its website. It should be clearly marked if any part of a response is held to be commercially confidential.

2. Approach

2.1 Introduction

The GCRA and JCRA are publishing parallel consultations on the market for business connectivity in Jersey and in Guernsey. However, the Authorities proposed to develop an approach to market analysis which can be applied consistently in Jersey and Guernsey. While the approach recognises the differences in the regulatory frameworks between the islands, and recognises that the markets for business connectivity are currently regulated differently, the approach proposed by the Authorities for this review will be methodologically consistent across both islands.

This section presents the approach to market definition, competition assessment and remedies which was set out in the consultation, summarises respondents' comments, and outlines the GCRA's analysis and conclusions.

2.2 Approach to market definition

2.2.1 The GCRA's consultation proposals and questions

The GCRA proposed to apply the broad principles of market definition developed by the European Union (EU). The market definition procedures are designed to identify in a systematic way the competitive constraints encountered by providers of electronic communication networks and services. A relevant product market comprises all products or services that are sufficiently interchangeable or substitutable, from the point of view of a user or a supplier of the products or services.

European guidelines also require the geographic coverage of markets to be considered. The GCRA proposed that, once the product market has been defined, the consideration of the geographic market should determine where the geographic boundaries of the market lie.

Q1. *Do you agree with the GCRA's proposed approach to market definition? If not, what alternative do you suggest?*

2.2.2 Responses

JT, Sure and Airtel agreed with the proposed approach. JT raised some issues regarding methodology and the application of the EU methodology. Where these points are specific to the Jersey consultation, they are discussed in the response to the Jersey consultation.

Longport agreed with the proposed approach, but reluctantly. In Longport's view, it is disappointed with the decision to do separate consultations for Jersey and Guernsey as this is a missed opportunity to explore the perceived collective dominance of JT and Sure.

2.2.3 GCRA analysis

The GCRA notes that all respondents agreed with the proposed approach to market definition, albeit with some reservations. Longport's points on the separate consultations for Jersey and Guernsey are discussed below in the context of the definition of the geographic markets.

2.2.4 GCRA conclusion

The GCRA has decided to adopt for this market review the broad principles of market definition as set out by the EU, adapted to the particular circumstances of the Channel Islands.
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2.3 Approach to competition assessment

2.3.1 The GCRA's consultation proposals and questions

The GCRA noted in the consultation that the purpose of the competition analysis is to consider whether any operator has Significant Market Power (SMP), and the analysis should look forward 2-3 years, taking into account foreseeable technical and economic developments. If there is no SMP, the market is effectively competitive and does not require *ex ante* regulation. If there is no SMP any existing *ex ante* regulation should be removed, and no further *ex ante* regulation should be imposed (regulations such as universal service obligation regulations and other licence conditions will remain). If there is SMP, then the market is not effectively competitive and regulation should be imposed, at either the wholesale or the retail level, or both, to counteract the potential negative effects of the competition problems that can be caused by the SMP operator.

The GCRA proposed to examine a wide range of characteristics of the market before coming to a conclusion as to the existence of significant market power. The EU lists (non-exhaustive) criteria which, in addition to market share, can be used to measure the power of an undertaking to behave to an appreciable extent independently of its competitors, customers and consumers.

The GCRA noted that the conclusion of the competition assessment for each market is a preliminary view as to whether any undertaking has Significant Market Power in the defined market.

Q2. *Do you agree with the GCRA's proposed approach to competition and SMP assessment? If not, what alternative do you suggest?*

2.3.2 Responses

JT, Sure and Airtel agreed with the GCRA's proposed approach to competition and SMP assessment.

Longport agreed with the proposed approach, but reluctantly. In Longport's view, it is disappointed with the decision to do separate consultations for Jersey and Guernsey as this is a missed opportunity to explore the perceived collective dominance of JT and Sure.

2.3.3 GCRA analysis

The GCRA notes that all respondents agreed with the proposed approach to competition assessment, albeit with some reservations. Longport's points on the separate consultations for Jersey and Guernsey are discussed below in the context of the definition of the geographic markets.

2.3.4 GCRA conclusion

The GCRA has decided to proceed with its proposed approach to competition assessment for this review.

2.4 Approach to remedies

2.4.1 The GCRA's consultation proposals and questions

Should an undertaking be found to have SMP, the GCRA would then need to consider how best to address this.

The EU approach to remedies generally considers the deployment of a set of regulatory tools to address structural factors such as enabling wholesale access to an incumbent's network, and behavioural recommendations that establish how the SMP operator is expected to conduct itself in the market. It has been standard practice throughout the EU to impose remedies at a high level on the conclusion of a market review, and to further specify in more detail as required. So, for example, if a national regulator proposes that a price control is required following a market review, it may impose this in principle, then consult with operators and stakeholders to detail how it should be implemented.

The GCRA believes that this general approach to remedies has merit, and proposes that it should be adapted for use in the Channel Islands, if a licensed communications provider is found to have SMP. Such an approach is in accord with the licence conditions which can be applied to dominant operators in Guernsey.

Q3. *Do you agree with the GCRA's proposed approach to remedies, should there be a finding of SMP? If not, what alternative do you suggest?*

2.4.2 Responses

Sure and Airtel agreed with the GCRA's proposed approach to remedies. Sure expressed a view that CICRA's approach to remedies has not been consistent between Guernsey and Jersey.

JT expressed a view that the consultation did not sufficiently describe and provide evidence for competition problems particularly in the retail market, and that a robust cost benefit analysis would be required before imposing any remedy.

Longport's views were as noted in response to Q1 and Q2.

2.4.3 GCRA analysis

The GCRA notes broad agreement with its proposed approach to remedies.

While the GCRA and JCRA are publishing parallel consultations on the market for business connectivity in Jersey and in Guernsey, the Authorities propose to develop an approach to market analysis which can be applied consistently in Jersey and Guernsey. This consistent approach applies to the methodology and conduct of the market reviews, and will apply to the implementation of any remedies.

2.4.4 GCRA conclusion

The GCRA has decided to proceed with its proposed approach to the implementation of remedies arising from this review.

3. Retail market definition

3.1 Product market

3.1.1 The GCRA's consultation proposals and questions

The GCRA's proposed conclusions on the definition of the retail product market are as follows:

- the retail leased lines market should not be narrowed to reflect the delivery technology used nor broadened to reflect the increasing purchase by business customers of business connectivity solutions rather than retail leased lines;
- all bandwidths used for delivering leased lines are in the same market.

Q4. *Do you agree with the GCRA's preliminary view that the retail market should not be narrowed to reflect the delivery technology used? If not, why not?*

Q5. *Do you agree that the retail market should not be broadened to include downstream services bought in conjunction with leased lines? If not, why not?*

Q6. *Do you agree that the retail market should not be broadened to include business connectivity services provided over broadband? If not, why not?*

Q7. *Do you agree that all retail leased line bandwidths fall within the same market? If not, why not?*

3.1.2 Responses

JT and Sure agreed with the GCRA's proposals on the definition of the product market. Sure pointed out that, in its view, Ethernet is not new, and that higher bandwidth carrier grade equipment still commands a premium price.

Airtel agreed that the market should not be narrowed to reflect delivery technology, should not include broadband, and that all bandwidths fall within the same market. However, Airtel proposed that IP connectivity should be included due to its perception of high prices compared with mainland UK and other jurisdictions.

Longport agreed that the market should not be narrowed to reflect delivery technology, and agreed that all bandwidths fall within the same market. It agreed to a limited extent that market should not include downstream services, and proposed

that if downstream services were not included, the GCRA should proactively monitor the effect of this. Longport proposed that business connectivity services provided over broadband should be considered as a parallel market segment.

3.1.3 GCRA analysis

The process of defining markets to be included in this review entails considering the extent to which products and services are substitutes for each other, and so would fall within the same product market. The GCRA proposed in the consultation that downstream services such as IP feed would not be good substitutes for retail leased lines, and so would not fall within the same product market, and notes that this view is consistent with the conclusions reached by other telecoms regulators.

However, the GCRA recognises concerns expressed by Longport and Airtel regarding downstream products and services such as IP connectivity and business services provided over broadband.

3.1.4 GCRA conclusion

The GCRA has decided that (i) the retail market should not be narrowed based on delivery technology used, (ii) it should not be broadened to include downstream services, (iii) it should not be broadened to include services provided over broadband and (iv) all leased line bandwidths fall within the same market.

3.2 Geographic market

3.2.1 The GCRA's consultation proposals and questions

The GCRA's proposals on the definition of the retail geographic market were as follows:

- there are separate geographic markets for Jersey and Guernsey;
- the retail market encompasses both on-island and off-island leased lines, and
- there are no particular areas within Guernsey where conditions of competition are appreciably different to the extent that they constitute separate geographic markets.

3.2.2 Geographic markets in Guernsey and Jersey

Q8. *Do you agree that separate geographic markets exist for Guernsey and Jersey? If not, why not?*

3.2.2.1 Responses

JT, Sure and Airtel generally supported the GCRA's proposal that separate markets exist for Guernsey and Jersey, with both Sure and Airtel commenting that they would expect pricing structures to be similar across both islands. Longport reluctantly agreed, and reiterated its view that the Channel Islands are a single structure in which JT and Sure are an oligopoly.

3.2.2.2 GCRA analysis

The GCRA has addressed Longport's points on oligopoly in the competition assessment.

The GCRA's analysis of responses to the Call for Evidence, and subsequent discussions with operators and other stakeholders indicates a growing trend towards pan-island purchase and supply of retail leased lines. In the GCRA's view, should this trend continue there may be a case to consider Jersey and Guernsey as a single market, but the evidence of a single market is not sufficiently strong at present, and is not likely to become so within the lifetime of this review.

3.2.2.3 GCRA conclusion

The GCRA has decided that separate geographic markets for the supply of retail leased lines exist for Guernsey and Jersey.

3.2.3 On-island and off-island leased lines

Q9. Do you agree that the retail market encompasses both on-island and off-island leased lines? If not, why not?

3.2.3.1 Responses

Sure and Airtel agreed with the proposal that the retail market encompasses both on-island and off-island leased lines. However, JT proposed that the retail market definition should reflect the wholesale market separation of on-island and off-island lines, and that the products are priced separately also at a retail level. Longport also proposed that on-island and off-island retail leased lines fall within separate markets, and proposed that off-island leased lines should be further divided into an inter-island market and an international market.

3.2.3.2 GCRA analysis

In the consultation, the GCRA's preliminary view was that, based on the evidence which had been provided, it appeared that from a demand point of view, it was immaterial to a retail customer whether the leased line ended on-island or off-island. The GCRA suggested that, from a supply point of a view, operators can and do offer both on-island and off-island leased lines. This means that a supplier of retail on-island leased lines could switch to supply retail off-island leased lines within a relatively short timeframe and without incurring significant costs.

JT has suggested that the end point of the leased line is critical to the customer, and that on-island and off-island products are priced separately. The GCRA's view is that the evidence on demand conditions is not conclusive. The GCRA has reviewed its analysis of the extent to which retail on-island and retail off-island leased lines should be considered to be part of the same market. On balance, the GCRA considers that, given the inconclusive nature of demand side evidence, more weight should be given to the supply side. The GCRA considers that it is not necessarily the case that supply could switch in the short term and at negligible cost from on-island provision to off-island provision and that the markets may therefore be considered to be separate. The GCRA also accepts the point that it may be desirable to have a market definition in the retail market which mirrors the wholesale market. The GCRA will therefore define separate markets for retail on-island and retail off-island leased lines.

3.2.3.3 GCRA conclusion

The GCRA has decided that separate markets exist for the supply of retail on-island and off-island leased lines in Guernsey.

3.2.4 Separate geographic markets within Guernsey

Q10. *Do you agree that there are no particular areas within Guernsey where the conditions of retail competition are such that they may constitute separate geographic markets? If not, why not?*

3.2.4.1 Responses

In considering whether there are particular areas within Guernsey which may constitute separate geographic markets, Sure believes it is incorrect to state that operators offer uniform pricing across the island, because of Sure's same

exchange/different exchange pricing. Sure indicated a desire to flatten this pricing to achieve uniform pricing across the island, and noted that the achievement of such uniform pricing would be to the detriment of some customers, whilst others would benefit from lower prices. For Sure, the position would be revenue neutral.

Airtel disagreed with the GCRA's pricing assessment, and noted that prices of circuits are dependent on whether the circuits fall within the same exchange or different exchanges. In Airtel's view, prices should be independent of location within Guernsey.

Longport expressed a view that differentiated pricing is increasingly archaic as the transition from TI to AI technology progresses.

Sure proposed that JT's build of network in specific areas of Guernsey also indicates distinct conditions of competition. In Sure's view, JT's build has been concentrated within the central business areas of St Peter Port and St Sampson, but is now extending to other parts of the island.

Longport proposed that a retail on-island market should be further divided into separate government and non-government segments, with potentially stronger *ex ante* regulation in the non-government segment.

3.2.4.2 GCRA analysis

The GCRA has reviewed its analysis in light of respondents' comments regarding differences in the conditions of competition within Guernsey.

In considering the extent to which the States contract should constitute a market in its own right, so that there would be separate markets for retail leased lines supplied to government and non-government customers, the GCRA is not convinced that there are sufficient significant differences between the two proposed markets to warrant this. While the GCRA has recognised the importance of the size of the States contract within the retail leased line market, and has proposed that the State could be considered to be able to exercise countervailing buyer power, a consideration of demand and supply side characteristics does not indicate significant differences which would justify defining a separate market. For example, it is conceivable that a large corporate customer could purchase in a similar way to the State.

The GCRA recognises that there will be variation in demand and supply conditions amongst different types of customer, and different sizes of organization, but does not consider that these can be evidenced as clear and persistent boundaries which would indicate the existence of separate markets.

The GCRA has also reviewed its analysis of the extent to which separate markets should be defined according to differentiated pricing (ie same exchange/different exchange) or to take account of JT's network build.

In the GCRA's view, Sure's pricing differential between same exchange and different exchange is a legacy pricing decision taken by the company and is not associated with different competitive conditions. The GCRA understands that there may have been a cost justification in the past for this pricing structure, but notes that Sure would prefer to flatten its pricing and offer a single price across Guernsey, and that this confirms the GCRA's view that there is a single market in Guernsey. The GCRA notes that Sure can restructure its pricing under its current regulatory obligations, and the GCRA is not proposing anything in this review which changes that situation. For this market review, the existence of different prices for same exchange and different exchange retail leased lines is not evidence of different competitive conditions, but is explained by a combination of different legacy issues.

In considering the extent to which JT's network build should be taken into account, the GCRA notes that, in its response to the consultation, Sure does not believe that the presence of JT infrastructure should alter the SMP conclusions, but does highlight the impact which JT's investment has. The GCRA agrees that infrastructure built by Other Licensed Operators (OLOs) which allows the OLO to offer retail leased lines over that infrastructure both strengthens the competitive position of the OLO, which is then less reliant on the incumbent, and also reduces the OLO's reliance on the wholesale market and reduces the size of the wholesale market.

The GCRA maintains its view that these variations do not result in clear and persistent boundaries which would indicate a separate geographic market within Guernsey, and has received no compelling evidence of, for example, pricing changes in response to change in particular conditions in specific areas. A finding of a smaller geographic market within Guernsey would need to be evidenced by data which showed the clear boundary between different areas in terms of demand and supply.

However, the GCRA recognises that conditions of competition vary to the extent that some areas will be more competitive than others, and that both the geographic areas and the extent of competition will change over time. In the GCRA's view, it is important to recognise that Sure is not subject to the same competitive pressures at the same time across all of Guernsey, and this has been taken into account in the competition assessment rather than in the market definition.

3.2.4.3 *GCRA conclusion*

The GCRA has decided that there are no particular areas within Guernsey where the conditions of retail competition are such that they may constitute separate geographic markets.

4. Retail market competition and SMP assessment

4.1 The GCRA's consultation proposals and questions

In the consultation, the GCRA proposed that no operator should be designated with SMP in the retail leased line market. However, the GCRA's preliminary view was that actual and potential competition problems may remain in the retail market for leased lines in Guernsey. The GCRA noted concerns expressed by business and public sector customers about the perceived high relative cost of connectivity, and the GCRA's preliminary assessment was that, while this does not apply to all leased lines, it does apply to the highest capacity lines, both on- and off-island in Guernsey. Although there has been market entry and expansion in Guernsey, the continuing concerns expressed by retail customers suggest that the benefits of competition may not be fully passed on to customers in the form of lower prices. However, the GCRA's preliminary view was that competition problems associated with barriers to entry and expansion in the market for retail leased lines could more effectively be remedied in the wholesale market.

In addition, the GCRA expressed a preliminary view that the States of Guernsey may be able to exercise an element of countervailing buyer power in the retail leased lines market, because of the size and nature of the Government contract, and that this could potentially mitigate any market power.

If this finding is confirmed following the consultation process, SMP remedies would be withdrawn from the retail market for leased lines in Guernsey. The GCRA notes that this proposed finding is contingent on the review of the wholesale market, and should there be a confirmed SMP finding, the review of appropriate remedies which would be designed to address problems in the retail market as well as the wholesale market.

Q11. *Do you agree with the GCRA's proposal not to designate any operator with SMP in the retail market for leased lines in Guernsey? If not, why not?*

4.2 Responses

Sure agreed with the GCRA's proposals.

Airtel disagreed with the proposal that no operator should be designated with SMP in the retail market for leased lines, and noted that JT's roll-out is concentrated in selected areas.

Longport disagreed with the proposal and noted that the barriers to building network in Guernsey are high, in particular the cost of dig. Longport expressed a view that the symmetrical nature of JT and Sure's businesses is not evidence of competitive network development but rather a potential opportunity for "tacit collusion". Longport proposed that both Sure and JT should be designated as having SMP.

4.3 GCRA analysis

The GCRA has considered Longport's view that JT and Sure should be designated with joint dominance in the retail market in Guernsey. The GCRA notes that Longport has suggested that the structure of the markets is conducive to coordinated effects – it has not suggested that there are structural links between Sure and JT. According to the EC's SMP Guidelines, when assessing *ex ante* the likely existence or emergence of a market which is or which could become conducive to collective dominance, a regulator should analyse:

- Whether the characteristics of the market makes it conducive to tacit coordination;
- Whether such form is sustainable, that is whether the potential oligopolists have the ability and incentive to deviate; and whether other competitors, buyers or potential entrants have the ability and incentive to challenge any anti-competitive coordinated outcome.

The GCRA has reviewed the criteria set out by the EC to assess potential oligopoly. The finding that a market is highly concentrated is not, in itself, enough to find that its structure is conducive to tacit coordination. The GCRA notes its view of potential countervailing buyer power in the retail leased lines market, and notes that actual and potential entrants have the ability and incentive to challenge any coordinated outcome. The GCRA does not therefore agree that JT and Sure are collectively dominant.

The GCRA notes that Airtel points out that JT's build is confined to particular areas and does not cover the whole territory. However, as discussed below, Sure's share of the market is not at a level where there could be a presumption of dominance, and the GCRA's consideration of other structural factors led it to its preliminary conclusion that Sure could not be considered to be dominant in the retail market.

In light of the GCRA's consideration that retail on-island and retail off-island leased lines may fall within separate markets, the GCRA has reviewed its competition assessment as set out in the consultation for a single retail leased lines market. The consultation carried out a competition assessment for a single market, and the GCRA has extended its analysis to consider each market separately.

Market shares

In the consultation, the GCRA noted that in its proposed retail market for on-island and off-island leased lines in Guernsey, JT had since 2011 supplanted the incumbent Sure as the market leader in terms of the number of leased lines supplied. JT's market share rose from 40% to 60% over this period, with Sure's market share falling on a commensurate basis over this time.

Splitting the provision of retail leased lines into on-island and off-island markets and recalculating market shares on this basis results in a slight increase in market share for JT in the former and a slight decrease for JT in the latter, and vice versa for Sure. In the market for **retail on-island leased lines** JT's market share at end-2012 stood at 61% while that for Sure stood at 39%. In the market for **retail off-island leased lines**, JT's market share at end-2012 stood at 54% with 46% for Sure.

The GCRA maintains its view that market shares in both the markets for retail on-island and retail off-island leased lines are volatile.

Barriers to entry

The GCRA's view is that its competition analysis of existing and potential barriers to entry to a single retail leased lines market remains valid for separate markets for retail on-island leased lines and retail off-island leased lines. For this reason, the GCRA's conclusion remains that no operator is dominant in the retail market for on-island leased lines, and no operator is dominant in the retail market for off-island leased lines.

4.4 GCRA conclusion

The GCRA has decided that no operator is dominant in the retail market for on-island leased lines, and no operator is dominant in the retail market for off-island leased lines.

5. Wholesale market definition

5.1 Product market

5.1.1 The GCRA's consultation proposals and questions

The GCRA's proposed conclusions on the definition of wholesale product markets were as follows:

- the wholesale leased lines market should not be narrowed to reflect the delivery technology used nor broadened to encompass passive infrastructure;
- all bandwidths used for delivering wholesale leased lines are in the same market;
- resellers of wholesale leased lines should not form part of the market and the market should not be defined on a narrower basis to reflect customer use of leased lines;
- self-supply should not be included within the wholesale market;

Q12. *Do you agree that the GCRA's preliminary conclusions outlined in relation to the retail leased lines market are mirrored in the wholesale market? If not, why not?*

Q13. *Do you agree that the wholesale market should not be broadened to include dark fibre and/or duct access? If not, why not?*

Q14. *Do you agree that resellers should not be included within the market? If you do not agree, why not?*

Q15. *Do you agree that the wholesale market should not be defined on a narrower basis to reflect customer use of leased lines? If not, why not?*

Q16. *Do you agree that self-supply should not be included in the wholesale market? If not, why not?*

5.1.2 Responses

Longport agreed that resellers should not be included in the market, and that the market should not be narrowed to reflect customer use.

Sure, JT and Airtel agreed with the GCRA's proposals that resellers should not be included in the market; that the market should not be narrowed to reflect customer use of a leased line (for example, whether the leased line is used for backhaul or for supplying a retail customer); and that self-supply should not be included in the wholesale market. Sure noted that it agreed with the exclusion of self-supply.

A further issue raised in responses was the ability of all operators to offer customers a resilient retail leased lines offering. In the respondent's view JT is uniquely placed in Guernsey to offer retail customers a resilient, diverse leased line service, whereby it can offer customers one leased line based on its self-supplied wholesale leased line and one leased line based on Sure's regulated wholesale leased line. By contrast, other operators could only provide retail leased lines over its own wholesale leased circuits, as JT (or any other non-SMP network operator) is under no obligation to provide wholesale circuits to any third party. This means that they could offer customers the same level of resilience and diversity as can be offered by JT. It was proposed that a separate market should be defined for resilient leased lines, and also that JT should be obliged to offer wholesale leased lines in Guernsey.

Sure, JT and Longport agreed that passive infrastructure such as dark fibre and duct access should not fall within the leased line market. However, Airtel proposed that dark fibre and duct access should be included because the prices of equipment required to 'light' fibre have come down significantly and large bandwidths can be supported by low cost equipment.

5.1.3 GCRA analysis

The GCRA notes respondents' agreement that resellers should not be included in the market; that the market should not be narrowed to reflect customer use of a leased line; and that self-supply should not be included in the wholesale market.

The GCRA understands from discussion of a separate "resilient circuits" market that some respondents viewed this as impacting on the wholesale and retail leased lines markets. This market could be characterised as corporate customers based off-island with an off-island corporate IT policy, who are seeking to contract on-island with a single supplier which is expected to offer not just resilience over its own network, but resilience over an alternative network. While JT could do this on Guernsey by offering their own network plus an alternative based on wholesale purchase from Sure, others could not offer a similar option, largely because they could not purchase a second wholesale input on Guernsey from another network provider.

The GCRA acknowledges that this may be a significant trend in the market, but notes that, at this stage, the evidence of the scale and scope of the trend is largely anecdotal. The GCRA notes that the characterised corporate customer would have the option of contracting separately with two operators should it require operator diversity as well as network diversity, and indeed there are examples of organisations which do just this. The GCRA's view is that evidence to date does not warrant the definition of a separate market for resilient leased lines, but if this is a trend which becomes established, this view may be reviewed in the future.

The process of defining markets to be included in this review entails considering the extent to which products and services are substitutes for each other, and so would fall within the same product market. The GCRA proposed in the consultation that upstream services such as dark fibre and duct access would not be good substitutes for wholesale leased lines, and so would not fall within the same product market, and notes that this view is consistent with the conclusions reached by other telecoms regulators. However, the GCRA recognises concerns expressed by Airtel regarding upstream products and services such as dark fibre and duct access, and will monitor developments in that market.

5.1.4 GCRA conclusion

The GCRA has decided that its conclusions on retail market definition are mirrored in the wholesale market and that the wholesale market (i) should not be broadened to include dark fibre/duct access, (ii) should not encompass resellers, (iii) should not be defined on a narrower basis to reflect customer use of leased lines and (iv) should not include self-supply.

5.2 Geographic market

5.2.1 The GCRA's consultation proposals

In the consultation, the GCRA proposed the following geographic markets:

- there are separate geographic markets for Jersey and Guernsey;
- there are separate markets for the provision of on-island and off-island wholesale leased lines in Guernsey, and
- there are no particular areas within Guernsey where conditions of competition are appreciably different to the extent that they constitute separate geographic markets.

5.2.2 Geographic markets in Jersey and Guernsey

Q17. Do you agree with the GCRA's preliminary conclusion that separate geographic markets exist for Jersey and Guernsey? If not, why not?

5.2.2.1 Responses

Sure and Airtel agreed with the GCRA's proposals that there are separate markets in Jersey and Guernsey.

Airtel commented that it believes that pricing should be the same across both islands. Longport expressed a view that differentiated pricing is increasingly archaic as the transition from TI to AI technology progresses.

Longport reluctantly agreed that Jersey and Guernsey are separate markets, and reiterated its view that the Channel Islands are a single structure in which JT and Sure are an oligopoly.

5.2.2.2 GCRA analysis

The largest suppliers of wholesale leased lines in Jersey and Guernsey are JT and Sure, and both operators are present in both islands at the retail level. However, in the GCRA's view, there is no uniformity of pricing across the islands⁴, and while some functions are centralised or shared, both operators generally treat the islands, as distinct geographic units in terms of marketing and operations, each with their own distinct policies in relation to planning and the deployment of infrastructure generally.

In the GCRA's view, the markets may converge at some point to the extent to which they could be considered to be a single geographic unit, but this is unlikely during the timescales relevant to this review.

The GCRA addressed Longport's concerns on oligopoly in the context of the retail market, and its conclusions apply also in the wholesale market.

5.2.2.3 GCRA conclusion

The GCRA has decided that separate geographic markets for the supply of wholesale leased lines exist for Guernsey and Jersey.

⁴ The GCRA notes that wholesale price controls currently apply on both Jersey and Guernsey.

5.2.3 On-island and off-island leased lines

Q18. *Do you agree that there are separate geographic markets for on-island and off-island wholesale leased lines? If not, why not?*

5.2.3.1 Responses

JT, Sure, Airtel and Longport agreed with the GCRA's proposals that on-island and off-island wholesale leased lines fall in separate markets.

5.2.3.2 GCRA analysis

The GCRA notes agreement that separate markets exist for wholesale on-island and wholesale off-island leased lines.

In the consultation, the GCRA emphasised the need to ensure that there is no gap, or "ransom strip" between the wholesale on-island and off-island markets, the GCRA maintains this view. This issue is discussed further in the competition assessment of the wholesale off-island market.

5.2.3.3 GCRA conclusion

The GCRA has decided that separate markets exist for the supply of wholesale on-island and off-island leased lines in Guernsey.

5.2.4 Separate off-island markets within Jersey/Guernsey and elsewhere

Q19. *Do you agree that separate markets do not exist for wholesale off-island leased lines between Jersey and Guernsey, and off-island leased lines elsewhere? If not, why not?*

5.2.4.1 Responses

Sure and Airtel agreed with the GCRA's proposals that all off-island wholesale leased lines fall within the same market.

Longport proposed that there should be separate markets for inter-island and international services because local operators have more infrastructure inter-island than they do internationally. Longport expressed a view that, although contracts for

international services can be taken with a wide range of international telecoms providers, there is a requirement to purchase a half circuit from a local operator. In Longport's view, buying internationally does not circumvent the power of the local incumbents, it simply moves the problem to a different part of the supply chain.

5.2.4.2 *GCRA analysis*

The GCRA has considered whether Longport's points on the differences in supply conditions between the supply of inter-island leased lines and international leased lines warrants the definition of separate markets. The GCRA recognises that local operators are likely to have more control inter-island than they do internationally, but does not believe that there is sufficient evidence of the impact of this variation to justify the definition of separate markets.

5.2.4.3 *GCRA conclusion*

The GCRA has decided that separate markets do not exist for wholesale off-island leased lines between Jersey and Guernsey, and off-island leased lines elsewhere.

5.2.5 **Separate geographic markets within Guernsey**

Q20. *Do you agree that there are no particular areas within Guernsey where the conditions of wholesale competition are such that they may constitute separate geographic markets? If not, why not?*

5.2.5.1 *Responses*

Sure proposed that certain geographic areas should be considered separately to Guernsey as a whole due to JT network build being significantly developed in particular geographic areas (e.g. St Peter Port) which has a high density of Business Connectivity requirements.

Longport proposed that the CIEG should not be included in these markets because passive infrastructure is not included.

5.2.5.2 *GCRA analysis*

The GCRA agrees that the CIEG⁵ telecoms cables should not be included in the wholesale leased lines markets, and in fact the capacity owned by the CIEG was not considered in any part of the analysis of competitive constraints. The CIEG is an

⁵ Channel Islands Electricity Grid, owned by Guernsey Electricity Ltd (GEL) and Jersey Electricity Company Ltd (JEC).

owner of upstream capacity over which leased lines may be provided by telecoms operators, but the CIEG does not itself provide wholesale leased lines.

The GCRA has reviewed its analysis of the extent to which separate geographic markets should be defined to take account of areas which have a high density of business connectivity requirements, and where JT has built its own network. The GCRA notes that most consideration across Europe of sub-national geographic markets has focused on broadband, both in terms of WBA (Market 5) and physical infrastructure access (Market 4).

However, the GCRA notes that two regulators in Europe have found there to be some element of sub-geographic markets for leased lines.⁶ In the UK, Ofcom defined a geographical market in the Western, Eastern and Central London Area (WECLA) for certain specified wholesale leased line products, and a national market in the rest of the UK (excluding Hull). It should be noted that the “national market” includes major cities in the UK with a high concentration of business customers, and the presence of alternative infrastructure, where Ofcom did not find that there was a separate market.

In Belgium, the IBPT has found a national retail market, where no operator has SMP, and a national wholesale market for terminating segments, where the incumbent (Belgacom) has SMP. The IBPT has not found sufficient differentiation to define sub-national geographic markets, but has introduced limited differentiated remedies to reflect its perception of varying conditions. The differentiation is very limited, and excludes from a margin squeeze test retail leased lines provided to specific exchanges where there are at least two other competing operators with their own infrastructure⁷. With this exception, a full suite of remedies is imposed on Belgacom in the wholesale market.

In the GCRA’s view, these examples from other European regulators provide little support for the notion of defining a sub-island wholesale market in Guernsey. In the case of the UK, only in the most concentrated parts of London, which are characterised by the presence of numerous alternative infrastructure providers, is there a view that a differentiated geographic market is warranted. This measure is not thought to be appropriate in any other urban area in the UK. In the case of Belgium, the conclusion is much more limited, and the GCRA notes that even although the market share of the incumbent is around 40% and declining, the margin squeeze test is only excluded for retail leased lines to particular destinations, and

⁶ In most European countries, there are separate markets for trunk and terminating segments of leased lines. The GCRA is considering other NRAs’ assessments of the market for terminating segments as being relevant in the context of on-island leased lines, as the trunk segment market is generally (implicitly) considered to be route based.

⁷ BE/2013/1474.

that a price control and all other remedies still apply in the national wholesale market.

The GCRA considers that this market review is removing *ex ante* regulation from the retail leased lines market in Guernsey and also from the wholesale market for off-island leased lines. The GCRA noted in the consultation that the proposed findings that no operator has SMP in the retail markets were contingent on the review of the wholesale market. This means that the proposals in the retail markets took into account the impact, and potential impact, of regulation in the upstream wholesale markets. If the GCRA were to consider deregulating part of the wholesale on-island market, it would expect to revisit its analysis of the retail markets, as the upstream conditions would then have changed. The GCRA has decided that, on balance, it will retain its conclusion that there is a single geographic market for wholesale on-island leased lines, and that the scope of the market is Guernsey.

5.2.5.3 *GCRA conclusion*

The GCRA has decided that there are no particular areas within Guernsey where the conditions of wholesale competition are such that they may constitute separate geographic markets.

6. Wholesale market SMP assessment

In the consultation, the GCRA proposed two markets for wholesale leased lines:

- the market for *wholesale on-island leased lines*, and
- the market for *wholesale off-island leased lines*.

6.1 Market for Wholesale On-Island Leased Lines

6.1.1 The GCRA's consultation proposals and questions

In the consultation, the GCRA proposed that Sure should be designated with SMP in the wholesale market for on-island leased lines. This was because Sure has a stable market share in excess of 95%, and is still the *de facto* monopolist in the provision of on-island wholesale leased lines in Guernsey. While this is strongly presumptive of dominance, the GCRA also considered other factors which might mitigate Sure's market power.

The GCRA considered that Sure's access network confers competitive advantage in the market, along with its ability to take better advantage of economies of scale and scope, and its vertical integration. The GCRA's preliminary view was that Sure's position in the wholesale market for on-island leased lines would confer the ability and incentive to leverage market power into the retail market, and into the adjacent wholesale market for off-island leased lines.

The GCRA also took into account the nature of competitive conditions in the retail leased lines market in Guernsey, and noted that the retail market is not stable, and that fluctuations in the market are linked to a single contract. The key impact on the wholesale market of conditions in the retail market is that the wholesale merchant market will contract over the lifetime of this review. However, all OLOs remain dependent on wholesale inputs, both for their retail offerings, and for extending their own networks.

Q21. *Do you agree with the GCRA's preliminary conclusion that Sure is dominant in the provision of wholesale on-island leased lines within Guernsey? If not, why not?*

Q22. *Do you agree with the GCRA's proposal that Sure should be designated with SMP in the market for wholesale on-island leased lines in Guernsey? If not, why not?*

6.1.2 Responses

Longport, Airtel and JT agreed with the GCRA's assessment, and agreed that Sure should be designated with SMP in the wholesale market for on-island leased lines in Guernsey.

Sure questioned the preliminary conclusion that it is dominant everywhere in the wholesale on-island market. Sure proposed that there was a need to be more specific about what is meant by "wholesale". It suggested that a more rigorous definition would see the total number of wholesale connections increase, and Sure's market share decrease, particularly in sub-geographical areas where other operators have their own network. Sure proposed that if the GCRA maintains its SMP proposals, it should commit to reviewing this within 12-18 months because of the speed of JT's roll-out.

6.1.3 GCRA analysis

The GCRA acknowledges Sure's point on the need to be clear about the categorisation of "wholesale", and indeed the GCRA notes that the market review process revealed a lack of consistency on the part of all operators. In the GCRA's view, this is generally attributable to historical accident and precedent rather than any anti-competitive intention. However, it is important that a consistent definition is agreed and applied, and the GCRA's intention is that the same definition and application should be in use by all operators in Jersey and Guernsey.

While accepting the desirability of a consistent definition, the GCRA notes that Sure is the main supplier of on-island wholesale leased lines in Guernsey and holds a market share in excess of 95%. It does not seem likely that a sufficient portion of OLO retail leased lines could be re-classified as wholesale, to the extent which would reduce Sure's market share significantly.

The GCRA notes Sure's view that the market should be reviewed again within 12-18 months due to the speed of JT's roll-out. The GCRA would expect to monitor the implementation of all remedies on an on-going basis, and believes this is a more appropriate approach than committing to a fixed time for the next review.

6.1.4 GCRA conclusion

<p>The GCRA has determined that Sure is dominant in the provision of wholesale on-island leased lines in Guernsey and hence that it should be designated with SMP in this market.</p>

6.2 Market for Wholesale Off-Island Leased Lines

6.2.1 The GCRA's consultation proposals and questions

In the consultation, the GCRA noted that market shares held by the three providers of wholesale off-island leased lines are not stable and have shown considerable volatility over the past two years. In addition, the GCRA noted the existence of parallel sub-sea cables in which five different operators hold ownership rights and that there is a significant amount of actual and planned sub-sea off-island capacity in place. In the GCRA's view, these factors point strongly to the conclusion that no one operator holds a position of dominance within the relevant market, nor is any operator likely to do so within the timeframe of this review.

However, the GCRA expressed concern over the pricing of off-island connectivity, particularly of the higher capacity leased lines, and noted that this issue has been raised repeatedly by businesses in Guernsey in the context of the retail market. While the structure of the market for wholesale off-island connectivity indicates that there are three main suppliers, and an additional two owners of capacity who could enter the market, so suggesting that customers have choice, the existence of alternative suppliers does not seem to have as yet impacted significantly on pricing.

The GCRA considered any additional impediments to customers in Guernsey being able to access high quality cost effective off-island connectivity, particularly for high capacity leased lines. The GCRA noted that, at present, owners of off-island capacity who are not licensed in Guernsey cannot offer services to customers in Guernsey. This generally applies even to services which are limited to off-island connectivity. This means that, although there is sufficient off-island capacity, there may be a bottleneck which prevents customers in Guernsey accessing the capacity. The GCRA invited comment on whether, in addition to the measures proposed in the wholesale on-island leased line market, it should introduce a specific off-island licence which would allow companies which own off-island capacity to offer wholesale access to that capacity to locally licensed operators, without necessarily offering services on-island as well.

Q23. *Do you agree with the GCRA's preliminary conclusions on dominance in the provision of wholesale off-island leased lines within Guernsey? If not, why not?*

Q24. *Do you agree that a specific off-island licence would assist in ensuring that there is no impediment to accessing off-island capacity? If not, what alternatives do you suggest?*

Q25. *Do you agree with the GCRA's proposal that no operator is likely to be dominant in the market for wholesale off-island leased lines in Guernsey? If not, why not?*

6.2.2 Responses

JT, Sure and Airtel agreed with the GCRA's competition assessment and proposal that no operator should be designated with SMP.

Longport proposed that Sure is dominant in the supply of off-island leased lines. Longport disagreed with the GCRA's analysis on several grounds. First, Longport proposed Newtel's market share should be excluded from the analysis because it is reliant on Sure-supplied bandwidth on the HUGO cable, and is unable to achieve economies of scale. Second, Longport proposed that CIEG is passive infrastructure and should be excluded, and in any case all fibre is allocated on the CIEG cable. Longport proposed that the BT cable should also be excluded because it is subject to a tripartite agreement between BT, Sure and JT which in Longport's view blocks its use.

JT did not comment specifically on the GCRA's discussion regarding off-island licensing.

Sure expressed a view that, given a finding of no SMP in the off-island market, an off-island licence would be an inappropriate and unjustified regulatory measure. In Sure's view, this could result in existing licensed providers being left with stranded assets and investments, which could also act as a constraint on future investment intentions. Sure does not believe that there is any evidence to support the idea that there is a bottleneck that is preventing customers in Guernsey from accessing off-island capacity.

Airtel supported the notion of issuing specific off-island licences, and proposed that, as an added measure, the GCRA should identify all off-island capacity providers (potential and existing) and find out what they need to become active or more active suppliers in Guernsey for off-island capacity.

Longport proposed that an off-island licence should be introduced which is as simple as possible to encourage new entrants.

6.2.3 GCRA analysis

The GCRA has reviewed its analysis of off-island connectivity. In the consultation, the GCRA noted the existence of parallel sub-sea cables in which five different operators hold ownership rights. The GCRA acknowledges Longport's points regarding the status of owners of capacity, and agrees that this is not the same as offering

wholesale leased lines, and indeed the GCRA notes that no such assumption was made in the GCRA's analysis. However, it is important to note the existence of subsea capacity. The GCRA's assessment is that the existence of subsea capacity is not likely to constrain off-island connectivity, even taking into account potential increase in demand for bandwidth.

In the consultation, the GCRA opened up a discussion of possible impediments or bottlenecks to off-island connectivity, particularly as the existence of multiple operators does not seem to have led to reduced prices. The GCRA has considered all comments, and notes that it does not at present believe that a new form of off-island licence is justified. At present, the GCRA's understanding is that neither BT nor Vodafone (ie owners of subsea cable which are not licensed operators in Guernsey) has a physical or regulatory presence in Guernsey. This means that even if a Guernsey operator wanted to connect directly to, for example, Vodafone or BT, there would be nothing in Guernsey for it to connect to. This cannot be addressed by regulation in Guernsey – for this situation to be different, it would require an external operator to establish a physical presence, and that would be an investment decision on the part of the external operator. The GCRA does not consider that there are regulatory barriers to an external operator deciding to do this, and also considers that regulatory structures are already in place which would enable this to happen. Given the requirement for external investment by an external operator, the GCRA has decided that it will not introduce a new form of licence in advance of demand for such a licence, and should there be demand, it will consider whether existing measures could meet the same objectives.

The GCRA maintains its view as set out in the consultation that the finding of no SMP in the wholesale off-island market is contingent on the *ex ante* regulation of the wholesale on-island market, and that this includes the need to ensure that there are no impediments in the on-island market which obstruct operators' ability to access off-island capacity. Impediments could include technical characteristics of on-island leased line products, and could include anti-competitive on-island pricing structures. The GCRA considers that the implementation of the measures it is putting in place in the wholesale on-island market will effectively address the requirement that on-island operators must be able to access off-island capacity, and should this not be the case, the GCRA will review this situation.

6.2.4 GCRA conclusion

The GCRA has determined that (i) no operator is dominant in the provision of wholesale off-island leased lines in Guernsey and (ii) there is no requirement at this time for a specific off-island licence to deal with impediments to accessing off-island capacity.

7. Proposed remedies in the wholesale market

7.1 Introduction

According to Condition 23 of Sure's fixed telecommunications licence, where the GCRA has decided, in accordance with Section 5 of the Telecommunications Law, that a licensee has a dominant position in a relevant market, it may be determined that the provisions of Part IV of the licence (Conditions Applicable to Dominant Operators) apply.

The GCRA undertook a review of the market for business connectivity in Guernsey, defined on a preliminary basis separate markets for retail leased lines; wholesale on-island leased lines; and wholesale off-island leased lines. Following an assessment of competitive conditions in the markets, the GCRA came to a preliminary view that no operator has SMP in the market for retail leased lines, and no operator has SMP in the wholesale market for off-island leased lines. The GCRA's preliminary view was that Sure has SMP on the market for wholesale on-island leased lines in Guernsey.

The GCRA has now considered all responses to the consultation before coming to its decisions.

In determining questions relating to the abuse of dominance or anti-competitive practices, the GCRA is obliged to take into account the principles laid down by and any relevant decisions of the Court of Justice or General Court of the European Union.⁸ The GCRA has taken into account the implications of designating an operator with SMP, such that the SMP designation has no bearing on whether that undertaking has committed an abuse of a dominant position within the meaning of Article 82 of the EC Treaty or national competition laws. It merely implies that, from a structural perspective, and in the short to medium term, the operator has and will have, on the relevant market identified, sufficient market power to behave to an appreciable extent independently of competitors, customers, and ultimately consumers.⁹ This means that, in proposing *ex ante* remedies should there be a confirmed SMP finding, the GCRA is not obliged to prove that there have been abuses of dominance, but rather notes that the finding of SMP itself indicates that the SMP operator has the ability and incentive to take advantage of a dominant position.

⁸ Section 54, Competition (Guernsey) Ordinance 2012.

⁹ SMP Guidelines, Para 30.

7.2 Market remedies in the market for wholesale on-island leased lines

In the consultation, the GCRA proposed remedies in terms of:

- Access
- Non-discrimination
- Transparency
- Accounting separation
- Cost accounting & price controls

7.2.1 Access

7.2.1.1 *The GCRA's consultation proposals and questions*

In the consultation, the GCRA proposed an overall approach to access that it should be based on a reasonable request. It was noted that an obligation to meet reasonable requests for access means that an SMP operator would be expected to meet *all* reasonable requests for access, unless it can demonstrate that it is not technically or economically feasible to do so.

The GCRA proposed that Sure should be obliged to make equal access available to OLOs in response to a reasonable request for access.

The GCRA proposed to direct the terms upon which equal access shall be provided as follows:

- Sure should be obliged to comply with the access obligation in a manner which is fair, reasonable and timely. The GCRA noted that this applies to the whole process, including the way in which Sure deals with an access request, through to any implementation of an access product;
- Sure should negotiate in good faith with OLOs requesting access;
- Sure should not, without appropriate justification and consultation, withdraw access to facilities already granted.

The GCRA identified three broad options as to how best to ensure access to off-island connectivity:

Option 1: impose a broad and general access obligation, which would enable OLOs to request access. This option relies on the market definition of the on-island wholesale leased lines market as including access to off-island capacity in order to ensure that the goal of being able to access off-island connectivity is met.

Option 2: add a condition to the access obligation which deals specifically with the need to ensure that OLOs can request access to facilities required to meet off-island connectivity.

Option 3: add a condition to the access obligation which directs how access to off-island connectivity is to be provided. This could include, for example, an obligation that the SMP operator should provide neutral locations at submarine termination points where an on-island operator could connect directly with off-island capacity.

Q26. *Do you agree with the GCRA’s proposals on imposing access obligations? If not, why not?*

Q27. *The GCRA has identified 3 options as to how it could address the requirement to ensure access to off-island capacity. Which of these options would you favour? Why?*

7.2.1.2 Responses

Sure commented that, in its view, any access obligation in the leased lines markets should be imposed under Condition 26 of its licence. Sure maintains that it has met all access requirements under this obligation, and intends to continue to do so, and so does not agree that there is a need for any additional obligations to be imposed.

JT responded by commenting that it does not consider that there have been any changes in the wholesale market for leased lines to justify any changes to the remedies which are already in place. In JT’s view, if CICRA wishes to impose new remedies, it needs to present evidence showing the deficiencies with the current situation.

Airtel agreed with the GCRA’s proposals on access obligations, and expressed a preference for Option 3. In Airtel’s view, this option allows for the most comprehensive and detailed process by which the question of access to off-island capacity can be addressed. This is important during initial stages of bringing in competition in the market as it will avoid any room for ambiguity in how connections are to be provided.

Longport proposed that there was a need for a strong access requirement and favoured Option 3. In Longport’s view, this should include the provision of a neutral colocation facility.

7.2.1.3 GCRA analysis

The GCRA confirms that Sure’s access obligations will be imposed under the existing Condition 26 of its licence. Condition 26 states that:

The Licensee shall offer to lease out circuits for any lawful purpose:

- (a) on publicly advertised conditions and on non-discriminatory terms. This is without prejudice to discounts that are in accordance with Condition 31;*
- (b) within a reasonable and published period of time from any request;*
- (c) so as to meet the quality standards required under the Conditions; and*
- (d) at prices that do not exceed levels determined from time to time by the Director General.*

The GCRA proposed that Sure should be obliged to comply with the access obligation and lease out circuits in a manner which is fair, reasonable and timely; should negotiate in good faith with OLOs requesting access; and should not, without appropriate justification and consultation, withdraw access to facilities already granted. These are not new obligations. Rather, the GCRA's proposals clarify how the overall obligation is to be understood and implemented. The GCRA believes that this clarity is important in ensuring that SMP operators have a shared understanding of how the regulator views the implementation of the obligations, and ultimately how the regulator will come to decisions in any future disputes. The GCRA believes that it is also important that the further explanation of remedies is provided in a way which will facilitate consistent implementation in Jersey and Guernsey, given the differences in underlying legislation and in the operators' licences.

The GCRA understands that Sure believes it has been compliant with its obligations up till now, and therefore should not be subject to any additional remedies. JT has also expressed a view that there is no justification for any additional remedies in the leased lines market, because there have been no changes in the market and the current remedies work well. However, the market review is an objective process which considers whether any operator has SMP. This finding does not imply that an SMP operator has committed an abuse of a dominant position. It merely implies that, from a structural perspective, and in the short to medium term, the operator has and will have, on the relevant market identified, sufficient market power to behave to an appreciable extent independently of competitors, customers, and ultimately consumers.¹⁰ This means that, in proposing *ex ante* remedies should there be a confirmed SMP finding, the GCRA is not obliged to prove that there have been abuses of dominance, but rather notes that the finding of SMP itself indicates that the SMP operator has the ability and incentive to take advantage of a dominant position.

¹⁰ SMP Guidelines, Para 30.

The GCRA has considered respondents' points on how the access obligation may best ensure that there is no impediment to on-island operators' ability to access off-island capacity. The GCRA noted earlier that it has decided not to introduce an off-island licence at this stage, particularly because there has not been demand from off-island operators up until now, and the GCRA considers that there are no barriers to dealing with any such demand should it arise. The GCRA noted in the competition assessment that its finding that no operator has SMP in the wholesale off-island market is contingent on the appropriate *ex ante* regulation of the wholesale on-island market, in that it assumes that the way in which the on-island market is defined, and the remedies which are being put in place, will ensure that there are no barriers preventing an on-island operator accessing off-island capacity. The approach which the GCRA has taken to identifying remedies sets out the requirement for Sure to offer access to wholesale on-island leased lines, and also sets out the ways in which Sure is expected to behave in the market. Should the GCRA find that this approach is not sufficient to prevent barriers to accessing off-island capacity, the GCRA will revisit its conclusion.

7.2.1.4 GCRA conclusion

The GCRA has decided to impose an obligation on Sure requiring it to meet all reasonable requests for access to wholesale on-island leased lines, with this obligation specifying that Sure should comply in a manner which is fair, reasonable and timely; should negotiate in good faith with OLOs requesting access and that Sure should not, without appropriate justification and consultation, withdraw access to facilities already granted.

7.2.2 Non-discrimination

7.2.2.1 The GCRA's consultation proposals and questions

In the consultation, the GCRA proposed that a non-discrimination obligation is a necessary obligation to ensure that an SMP operator's behaviour in the market does not disadvantage its actual and potential competitors.

According to Condition 26.2 of Sure's licence:

"The Licensee shall offer to lease out circuits to other licensed operators on terms that are no less favourable than those on which the Licensee makes equivalent leased circuits available to its Associated Companies or its own business divisions."

The obligation not to show undue preference or to unfairly discriminate is emphasised again in Condition 29, which states that:

“The Licensee shall not show undue preference to, or exercise unfair discrimination against, any User or Other Licensed Operator regarding the provision of any Licensed Telecommunications Services or Access. The Licensee will be deemed to be in breach of this Condition if it favours any business carried on by the Licensee or an Associated Company or Other Licensed Operator so as to place Other Licensed Operators competing with that business at an unfair disadvantage in relation to any licensed activity.”

Q28. *Do you agree with the GCRA’s proposals on imposing non-discrimination obligations? If not, why not?*

7.2.2.2 Responses

JT reiterated its view that it did not consider that there have been any changes in the wholesale market for leased lines to justify any changes to the remedies that are already in place.

Airtel and Longport agreed with the GCRA’s proposals.

Longport proposed that without colocation facilities, OLOs risk being at a considerable disadvantage. In Longport’s view, while Sure has opportunities to use low-cost, unregulated, on-premises, local-area-network type connections to connect its downstream equipment located nearby, OLOs would be required to use Sure’s managed, on-island, wide-area-networking, wholesale products to connect to their premises located elsewhere.

Sure stated that, to the best of its knowledge, it was compliant with its current non-discrimination obligations and so the proposals would have no impact.

7.2.2.3 GCRA analysis

The GCRA acknowledges Longport’s points, and agrees that an operator which has built infrastructure is likely to have technical and commercial advantages over one which has not. In the context of this review of the leased lines markets, it is important to be clear about what is included in the market and what is not. The GCRA is putting measures in place to ensure that OLOs can have access to wholesale on-island leased lines, and is including a series of measures addressing how access is to be delivered. Sure’s non-discrimination obligation means that it is obliged to offer wholesale on-island leased lines on terms which do not discriminate between OLOs, and which do not discriminate between OLOs and Sure’s own operation. This means that, on the basis of a reasonable request, an OLO should have access to wholesale on-island leased lines which are of a similar technical specification, quality of service, price and so on as wholesale leased lines which Sure supplies to itself. This market

review is not concerned with the underlying physical infrastructure. In the GCRA's view, this underlying infrastructure would fall within a different telecoms market.

The GCRA has addressed points regarding colocation facilities above, and notes that the establishment of colocation facilities would require specific demand and investment from an off-island operator.

The GCRA will maintain its consultation proposal that Sure will continue to be subject to an obligation not to discriminate between OLOs, and between OLOs and Sure's own retail operation.

7.2.2.4 GCRA conclusion

The GCRA has decided to impose an obligation on Sure requiring it to offer wholesale on-island leased lines on terms which do not discriminate between OLOs, and which do not discriminate between OLOs and Sure's own operation.

7.2.3 Transparency

7.2.3.1 The GCRA's consultation proposals and questions

In the consultation, the GCRA noted that a transparency obligation sets out the manner in which an SMP operator should provide information about its activities in the market in which it has been found dominant. Generally, a transparency obligation supports other obligations addressing how the SMP operator is expected to behave, in that the transparency obligation sets out how the SMP operator will demonstrate compliance with its other obligations.

It is the GCRA's view that where an SMP operator offers products on a wholesale market where it has been found to have SMP, these products should be appropriately documented. An OLO should be able to easily access technical information about wholesale products; information about prices and other terms and conditions; and process information including a change mechanism.

Part IV of Sure's licence does not include specific transparency conditions. However, Condition 26.1 of Sure's licence states that:

"The Licensee shall offer to lease out circuits for any lawful purpose:

(a) on publicly advertised conditions and on non-discriminatory terms. This is without prejudice to discounts that are in accordance with Condition 31;

(b) within a reasonable and published period of time from any request;

(c) so as to meet the quality standards required under the Conditions; and

(d) at prices that do not exceed levels determined from time to time by the Director General.”

The GCRA considers that the imposition of transparency obligations is essential, both for OLOs seeking to purchase wholesale leased lines, and in facilitating Sure’s ability to demonstrate its compliance with its other obligations. The GCRA believes it is appropriate and proportionate that Sure should be obliged to provide information about its supply of wholesale on-island leased lines, and proposes the following:

The GCRA proposed that Sure should be obliged to publish and maintain a Reference Offer for wholesale on-island leased lines, including appropriate technical specifications, and including a mechanism explaining how changes to the Reference Offer will be made and notified.

The GCRA proposed that Sure should be required to publish a standard SLA which would govern Sure’s relationship with the OLO. It is increasingly seen as good practice to publish Key Performance Indicators (KPIs), and this could be done as part of the SLA.

The GCRA proposed that Sure should be required to publish prices and non-price terms and conditions for wholesale leased lines. Condition 31.1 of Sure’s licence provides that publication of any changes should be made, and the GCRA informed, at least 21 days before changes come into effect. Operators have informed the GCRA that in practice, one month’s notice is provided, and the GCRA believes that there is merit in standardising the requirement to publish changes to price and non-price terms and conditions for wholesale on-island leased lines one month before they come into effect.

The GCRA proposed that OLOs and the Regulator should be notified in advance of the launch of a new wholesale product. This is necessary to ensure that OLOs have the same opportunity as the SMP operator’s downstream arm to react to changes in the wholesale offer and reflect them in the OLO retail offer. The GCRA suggested that the notice period should be 3 months.

<p>Q29. <i>Do you agree with the GCRA’s proposals on imposing transparency obligations? If not, why not?</i></p>

7.2.3.2 Responses

JT reiterated its view that it did not consider that there have been any changes in the wholesale market for leased lines to justify any changes to the remedies that are already in place.

Airtel and Longport agreed with the GCRA's proposals. Longport explicitly supported the requirement that Sure should produce a Reference Offer.

Sure stated that it already complies with transparency obligations in Guernsey. Sure noted that its licence was modified in January 2012¹¹ to make the notification requirement for changes to wholesale prices 30 days in advance, and not 21 days as noted in the consultation document

Sure proposed that there should be standardisation of the notification periods between Jersey and Guernsey. Sure proposed that there should be provision in the notice period for new wholesale products for the situation where all parties agree that a shorter notice period would be beneficial. Sure proposed that the GCRA should consider the appropriate notice period for the withdrawal of existing products, because many withdrawals can have major planning considerations for OLOs.

Sure stated that there is no requirement in its licence for it to publish and maintain a Reference Offer for wholesale on-island leased lines. Sure does, however, support the provision of technical specifications and a framework for the notification of price and other changes in relation to wholesale on-island leased lines. Sure stated an intention to continue to comply with Condition 26.1 of its licence, which sets out the parameters on which such leased lines should be made available.

7.2.3.3 GCRA analysis

The GCRA recognises that Sure does not have an explicit licence requirement to produce a Reference Offer, and welcomes Sure's support for the provision of technical specifications and a framework for change notifications. In the GCRA's view, the production and maintenance of appropriate technical specifications and a mechanism for change is an integral part of the product offering. The GCRA also intends that there should be a common approach in Jersey and Guernsey to the technical information which is made available, and to the processes associated with change, and its elaboration of transparency requirements is intended to address this objective.

The GCRA agrees that there should be standardised notification periods for Jersey and Guernsey, and notes Sure's licence modification. The GCRA agrees that Sure's proposal that notification periods for new wholesale products may be reduced if all parties agree has merit. The GCRA also considers that a pragmatic approach is required to the definition of "new products" which recognises that minor changes to existing products do not require the same notification process as the introduction of

¹¹ CICRA 12/03, Amendment to Cable & Wireless Guernsey's Fixed Telecommunications Licence, Statutory Modification.

new products. The GCRA has considered whether to introduce specific notice periods for the withdrawal of existing products, but has decided against this as a case by case approach would be more suitable.

The GCRA notes that transparency obligations are essential in order that Sure can demonstrate compliance with its other obligations, and the GCRA concludes that for this reason, and in order to ensure consistency between Jersey and Guernsey, Sure should continue to be subject to transparency requirements.

7.2.3.4 GCRA conclusion

The GCRA has decided to impose a transparency obligation on Sure requiring it to (i) publish and maintain a Reference Offer for wholesale on-island leased lines, (ii) publish a standard SLA which would govern Sure's relationship with the OLOs who access wholesale leased line services, (iii) publish and notify prices and non-price terms and conditions for wholesale leased lines, and publish and notify changes at least 30 days in advance of their coming into effect, and (iv) provide appropriate advance notification to the GCRA and OLOs when launching new wholesale leased line products and services.

7.2.4 Accounting separation

7.2.4.1 The GCRA's consultation proposals and questions

In the consultation, the GCRA noted that, generally, accounting remedies are imposed in order to ensure that the SMP operator is not discriminating against OLOs, for example by cross-subsidising some products at the expense of others, and is not leveraging its power in one market into another.

Condition 27 of Sure's licence requires that:

"Within six months of the Licence Commencement Date, the Licensee shall prepare and maintain accounting records in a form that enables the activities specified in any direction given by the Director General [GCRA] to be separately identifiable, and which the Director General [GCRA] considers to be sufficient to show and explain the transactions of each of those activities. The Director General [GCRA] may direct the Licensee as to the basis and timing of such reports as the Director General [GCRA] may require."

The GCRA noted that the production of separated accounts is not an end in itself, but should be designed to demonstrate compliance with other obligations, particularly those relating to transparency, non-discrimination and price controls.

Generally, in the GCRA's view, there must be visibility in how costs are allocated to particular products and services, that the information must be discrete and detailed enough to demonstrate that there is no discrimination, that there is no cross subsidy across Sure's retail products and services, and that the difference between wholesale and retail prices is such that an equally efficient competitor could compete in the market.

The GCRA noted that Sure is currently obliged to provide separated accounting information, and proposes that this obligation should be maintained. The GCRA reserves the right to provide further guidance and direction to Sure in order to ensure that the production of separated accounts meets the GCRA's objectives.

Q30. *Do you agree with the GCRA's proposals on imposing accounting separation obligations? If not, why not?*

7.2.4.2 Responses

JT reiterated its view that it did not consider that there have been any changes in the wholesale market for leased lines to justify any changes to the remedies that are already in place.

Airtel and Longport agreed with the GCRA's proposals.

Sure noted the benefits of separated accounts, for CICRA, for the telecommunications market, and for Sure's own commercial costing purposes. As no defined changes were proposed in the consultation document, Sure did not comment further.

7.2.4.3 GCRA analysis

The GCRA notes respondents' comments, and maintains the obligation that Sure will be expected to produce separated accounting information.

7.2.4.4 GCRA conclusion

The GCRA has decided to retain the existing obligation requiring Sure to provide separated accounting information.

7.2.5 Cost accounting and price controls

7.2.5.1 *The GCRA's consultation proposals and questions*

In the consultation, the GCRA noted that cost accounting obligations are generally put in place to ensure that an SMP operator can demonstrate that it is not engaging in practices which would unfairly disadvantage its competitors.

Condition 28.1 of Sure's licence states that:

"The Licensee shall not unfairly cross subsidise or unfairly subsidise the establishment, operation or maintenance of any Telecommunications Network or Telecommunications Services."

Condition 28.2 establishes how this should be done:

"To enable the Director General [GCRA] to evaluate where any unfair cross-subsidisation or unfair subsidisation is taking place, the Licensee shall record at full cost in its accounting records any material transfer of assets, funds, rights or liabilities between a part and any other part of its business, and between it and any Associated Company, and shall comply with any directions issued by the Director General [GCRA] for this purpose."

The GCRA proposed that Sure should be obliged to maintain its current cost accounting obligations, with a view to demonstrating its compliance with other obligations.

In the consultation, the GCRA noted that price controls can be established in the retail and/or wholesale markets, and usually limit the price which the SMP operator can charge. Price controls are usually put in place to address the potential for the SMP operator to impose margin squeeze¹², or to cross-subsidise.

Condition 31.2 of Sure's licence states that:

"The Director General [GCRA] may determine the maximum level of charges the Licensee may apply for Licensed Telecommunications Services within a Relevant Market in which the Licensee has been found to be dominant."

The GCRA proposed that a price control continues to be necessary in the wholesale market for on-island leased lines, and proposed that this review should make provision in principle for a price control as a necessary and proportionate remedy. The GCRA proposed to review the structure and level of the price control

¹² A margin (price) squeeze arises when a dominant operator, which provides a wholesale input on which other operators rely in order to compete at the retail level, prices its upstream (wholesale) services and downstream (retail) services in such a way as to prevent others from competing with it at the downstream level.

immediately following the final decision. This further specification of the price control remedy would be subject to consultation.

Q31. *Do you agree with the GCRA's proposals for imposing cost accounting and price control remedies?*

7.2.5.2 Responses

JT reiterated its view that it did not consider that there have been any changes in the wholesale market for leased lines to justify any changes to the remedies that are already in place.

Airtel and Longport agreed with the GCRA's proposals.

Sure stated that it currently provides its separated accounts on a current cost basis and has no objection to continuing to use this methodology (for as long as this requirement exists).

Sure does not agree that it should be subject to a price control in the wholesale market for on-island leased lines. In Sure's view, the addition of a separately reported business within Sure's separated accounts would provide the visibility that CICRA is seeking in relation to the avoidance of margin squeeze and cross-subsidisation.

7.2.5.3 GCRA analysis

The GCRA notes broad agreement with its proposals on cost accounting obligations, and will maintain Sure's current cost accounting obligations. The GCRA notes ongoing work on separated accounts as per its 2014 work programme.

The GCRA has considered Sure's view that it should not be subject to a price control in the wholesale market for on-island leased lines, because the inclusion of wholesale on-island leased lines in the separated accounts would provide sufficient evidence that Sure was not engaging in anti-competitive practices such as margin squeeze and cross subsidisation.

The GCRA proposed in the consultation that a price control obligation should be imposed at a high level, and reviewed immediately following the publication of the decision. The review would consider both the structure and the form of the price control, and the GCRA's intention is to examine alternatives to the current retail minus control. The GCRA maintains its view that a price control is justified in the wholesale market for on-island leased lines.

The GCRA does not agree with Sure's view that inclusion in the separated accounts would provide sufficient transparency. In the GCRA's view, it is not appropriate to use separated accounting information in isolation to set prices for services or

products for three main reasons. First of all, the costs disclosed may not reflect efficient costs. That is, the costs in Sure's separated accounts reflect Sure's actual costs, and cannot reflect the extent to which Sure's costs are those of an efficient operator. Secondly, Sure's actual costs as presented in the separated accounts may include legacy network costs which would not be incurred by a market entrant. Thirdly, separated accounts are by their nature historic, while price setting generally includes a forward –looking approach.

For all of these reasons, it is the GCRA's view that separated accounting information provides a first order test of the extent to which prices reflect costs, but there is not sufficient granularity to rely on this alone.

7.2.5.4 GCRA conclusion

The GCRA has decided that Sure should be obliged to maintain its current cost accounting obligations, with a view to demonstrating its compliance with other obligations. Issues raised in relation to CCA will be addressed under the review of separated accounts in the 2014 work programme. The GCRA maintains that a price control is a necessary and proportionate remedy. The GCRA intends to review the structure and level of the price control immediately following the final decision.

7.3 Other issues and priorities

In the consultation, the GCRA provided an opportunity for stakeholders to identify other issues and priorities in relation to the supply of business connectivity services which were not specifically dealt with in its consultation document.

Q32. *Are there topics or priorities not covered in this consultation which you would like to raise?*

7.3.1 Responses

Sure expressed a view that pricing structure, specifically the same exchange/different exchange convention in Guernsey, should be included in the consultation.

Sure also proposed that CICRA needs to ensure that it collates and analyses market information on a timely basis as, in Sure's view, failure to do so would limit its ability to conduct regular and timely reviews that will be necessary given the speed at which the business connectivity markets are changing.

Sure proposed that CICRA needs to standardise the classification of leased lines into wholesale and retail by clearly defining the criteria for each and making sure all operators report on same consistent basis.

JT noted that it had highlighted its views on the most important issues to be addressed in its response to the consultation.

Longport proposed that the regulatory complaints and appeals processes should be simplified so that they are as cost effective and rapid as possible. Longport emphasised its view that the opening of the telecoms markets to international operators is essential for economic growth and diversification, and that the GCRA should look at its powers under Guernsey law, and the latest legal thinking on the regulation of oligopolies.

7.3.1 GCRA analysis

The GCRA has addressed points raised by Sure regarding pricing structure earlier in this document. The GCRA notes that Sure's current pricing structure which differentiates between in-exchange and between-exchange leased lines is not a regulatory requirement, but is the result of a commercial decision made by the operator. The GCRA expects that approaches to pricing can be justified, and that particularly in a market where there has been a finding of SMP, the choice of pricing structure does not abuse the dominant position in the market.

The GCRA notes Sure's comments on market information. The GCRA has noted throughout this response to consultation that the SMP findings on off-island markets are contingent on well-functioning and appropriately regulated on-island markets. The GCRA has signalled its intention to monitor developments in the leased lines markets in order to ensure that the remedies which are being put in place are implemented in a timely manner.

The GCRA noted earlier in this document that operators must be consistent in the categorisation and treatment of wholesale and retail customers, and that legacy issues revealing inconsistencies on the part of all operators had become evident during the market review process. Consistency will be particularly important for SMP operators to ensure they are compliant with their non-discrimination obligations.

The GCRA notes Longport's points on the regulatory complaints and appeals process. The GCRA has addressed Longport's points on off-island operators and on the regulation of oligopolies earlier in this document.

7.3.2 GCRA conclusion

The GCRA notes all comments, and has taken the view that the additional issues raised by respondents to the consultation do not require further regulatory action at this time.

ANNEX 1: Legal background and licensing framework

Legal background

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

The Regulation of Utilities (Bailiwick of Guernsey) Law 2001 (the Regulation Law) sets out the general duties which the States and the Guernsey Competition and Regulatory Authority (GCRA) must take into account in exercising their functions.¹³ These include the requirement to protect consumers and other users in respect of the prices charged for, and the quality, service levels, permanence and variety of, utility services; to ensure that utility services are provided in a way which will best contribute to economic and social development; and to introduce, maintain and promote effective and sustainable competition¹⁴.

The Telecoms Law¹⁵ specifically provides that the GCRA may include in any licence conditions that are:

- intended to prevent and control anti-competitive behaviour¹⁶; and
- regulate the price premiums and discounts that may be charged or (as the case may be) allowed by a licensee which has a dominant position in a relevant market¹⁷.

The GCRA is obliged¹⁸ to publish notice:

- of a proposed decision as to whether a person has a dominant position in a relevant market and of the conditions, if any, proposed to be included in the licence granted or to be granted to that person in relation to the control of that dominant position;

¹³ Section 2 of the RoU Law.

¹⁴ These broad objectives were maintained in the transfer of functions and responsibilities to GCRA, as set out in the Guernsey Competition and Regulatory Authority Ordinance, 2012.

¹⁵ The definition of dominance and abuse of dominance is not explicit in the Telecoms Law. However, the Competition (Guernsey) Ordinance 2012 sets out the States' approach to defining abuse of dominance and anti-competitive practice

¹⁶ Section 5(1)(c) of the Telecoms Law.

¹⁷ Section 5(1)(f) of the Telecoms Law.

¹⁸ Section 5 (2) of the Telecoms Law.

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

Licensing Framework

Licences are issued to fixed telecommunications providers under Part I, section 1 of the Telecoms Law. All fixed and mobile telecommunications licences include a Part which addresses conditions applicable to dominant operators¹⁹. If the GCRA has found that a licensee has a dominant position in a relevant market, the provisions of this Part of the licence may apply.

The provisions which are applicable to dominant operators include (but are not limited to) measures addressing the availability and associated terms of Other Licensed Operator (OLO) access to networks and services²⁰; the requirement not to show undue preference or to exercise unfair discrimination²¹; the requirement not to unfairly cross subsidise²², supported by accounting processes to demonstrate compliance; regulation of prices, and transparency around pricing²³.

In addition, the fixed telecommunications licences include conditions specific to the provision of leased circuits²⁴, which apply where a licensee has been found to be in a dominant position. The conditions applicable to the supply of leased circuits refer to the retail and wholesale markets, and require that a dominant provider offers circuits on publicly advertised and non-discriminatory terms, and in compliance with quality standards and at prices determined by the GCRA.

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

¹⁹ Part IV of the fixed telecommunications licences.

²⁰ Condition 24, Fixed telecommunications licences.

²¹ Condition 29, Fixed telecommunications licences.

²² Condition 28, Fixed telecommunications licences.

²³ Condition 31, Fixed telecommunications licences.

²⁴ Condition 26, Fixed telecommunications licences.

²⁵ Part V: Fair competition, Fixed telecommunications licences.

ANNEX 2: Draft Decision

Statutory powers

The GCRA's statutory powers are set out in Annex 1 of this response to consultation and draft decision.

The provisions of the consultation document and this Response to Consultation shall, where appropriate, be construed with this Decision. The analysis set out through the consultation process explains the reasoning behind the proposals, and indicates the effects the proposals are expected to have and gives reasons for making the proposal.

Market definition

The markets which have been defined are:

- Retail market for on-island leased lines
- Retail market for off-island leased lines
- Wholesale market for on-island leased lines
- Wholesale market for off-island leased lines.

SMP designation

The GCRA carried out a competition assessment on the markets, and concluded that no operator is dominant in the retail markets for on-island leased lines and off-island leased lines, and no operator is dominant in the wholesale market for off-island leased lines.

The GCRA concluded that Sure has SMP in the wholesale market for on-island leased lines.

SMP obligations in relation to the wholesale market for on-island leased lines

According to Condition 23 of Sure's fixed telecommunications licence, where the GCRA has decided, in accordance with Section 5 of the Telecommunications Law, that a licensee has a dominant position in a relevant market, it may be determined that the provisions of Part IV of the licence (Conditions Applicable to Dominant Operators) apply.

Access

Condition 26 of Sure's licence states that:

"The Licensee shall offer to lease out circuits for any lawful purpose:

- (a) on publicly advertised conditions and on non-discriminatory terms. This is without prejudice to discounts that are in accordance with Condition 31;*
- (b) within a reasonable and published period of time from any request;*
- (c) so as to meet the quality standards required under the Conditions; and*
- (d) at prices that do not exceed levels determined from time to time by the Director General".*

The GCRA determines that Sure shall continue to be obliged to make access to wholesale on-island leased lines available to OLOs in response to a reasonable request for access.

Access shall be provided on the following terms:

- Sure is obliged to comply with the access obligation in a manner which is fair, reasonable and timely. The GCRA notes that this applies to the whole process, including the way in which Sure deals with an access request, through to any implementation of an access product;
- Sure should negotiate in good faith with OLOs requesting access;
- Sure should not, without appropriate justification and consultation, withdraw access to facilities already granted.

Non-discrimination

The GCRA determines that Sure will continue to be subject to an obligation not to discriminate between OLOs, and between OLOs and Sure's own retail operation.

The obligation not to discriminate between OLOs is imposed under Condition 29 of Sure's licence, which applies to all telecommunications services:

"The Licensee shall not show undue preference to, or exercise unfair discrimination against, any User or Other Licensed Operator regarding the provision of any Licensed Telecommunications Services or Access. The Licensee will be deemed to be in breach of this Condition if it favours any business carried on by the Licensee or an Associated

Company or Other Licensed Operator so as to place Other Licensed Operators competing with that business at an unfair disadvantage in relation to any licensed activity”.

This obligation not to discriminate between OLOs and Sure’s own retail operation is imposed under Condition 26.2 of Sure’s licence:

“The Licensee shall offer to lease out circuits to other licensed operators on terms that are no less favourable than those on which the Licensee makes equivalent leased circuits available to its Associated Companies or its own business divisions.”

Transparency

The GCRA determines that Sure shall continue to be subject to transparency obligations. The GCRA notes that transparency obligations are generally necessary to demonstrate compliance with other obligations, and has elaborated on the obligations with this objective in mind.

The GCRA determines specific obligations should be imposed as follows:

- Sure shall be obliged to publish and maintain a Reference Offer for wholesale on-island leased lines, including appropriate technical specifications, and including a mechanism explaining how changes to the Reference Offer will be made and notified.
- Sure shall be required to publish a standard SLA which will govern Sure’s relationship with the OLO. It is increasingly seen as good practice to publish Key Performance Indicators (KPIs), and this could be done as part of the SLA.
- Sure shall be required to publish prices and non-price terms and conditions for wholesale on-island leased lines. Publication of any changes should be made, and the GCRA informed, at least 30 days before changes come into effect.
- OLOs and the Regulator should be notified 3 months in advance of the launch of a new wholesale product. This period may be reduced if all parties agree.

Accounting separation

The GCRA determines that Sure will continue to be obliged to prepare and maintain separated accounting information.

Condition 27 of Sure’s licence states that:

“Within six months of the Licence Commencement Date, the Licensee shall prepare and maintain accounting records in a form that enables the activities specified in any direction given by the Director General [GCRA] to be separately identifiable, and which the Director General [GCRA] considers to be sufficient to show and explain the transactions of each of those activities. The Director General [GCRA] may direct the Licensee as to the basis and timing of such reports as the Director General [GCRA] may require.”

Cost accounting and price controls

The GCRA determines that Sure shall continue to be obliged to maintain its current cost accounting obligations, with a view to demonstrating its compliance with other obligations.

Condition 28.2 establishes how this should be done:

“To enable the Director General [GCRA] to evaluate where any unfair cross-subsidisation or unfair subsidisation is taking place, the Licensee shall record at full cost in its accounting records any material transfer of assets, funds, rights or liabilities between a part and any other part of its business, and between it and any Associated Company, and shall comply with any directions issued by the Director General [GCRA] for this purpose.”

The GCRA has determined that a price control continues to be necessary in the wholesale market for on-island leased lines.

Condition 31.2 of Sure’s licence states that:

“The Director General [GCRA] may determine the maximum level of charges the Licensee may apply for Licensed Telecommunications Services within a Relevant Market in which the Licensee has been found to be dominant.”

The GCRA intends to review the structure and level of the price control immediately following the final decision.

ANNEX 3: Glossary

4G: Fourth-generation mobile telecommunications technology, which enables the delivery of high-speed broadband services over mobile networks. The '4G' standard encompasses the Long Term Evolution (LTE) technology, which is the main 4G technology being deployed worldwide.

Alternative Interface (AI): new types of technologies used for delivering leased lines services, for example *Ethernet* (see below), which contrast with legacy *T1* technologies (see below).

Asymmetric Digital Subscriber Line (ADSL): a broadband technology that enables high-speed data transmission over legacy copper local access telephony networks, using a high data rate in one direction and a lower data rate in the other.

Bandwidth: The physical characteristic of a telecoms system that indicates the speed at which information can be transferred, which in digital systems is measured in bits per second (bps).

Cloud computing: the use of a network of remote servers connected via the internet that store, manage and process data that would otherwise be handled on a local server or computer.

Dark fibre: unused or 'unlit' optical fibre, i.e. fibre which has been deployed within a communication network but which is not connected to active electronic equipment used to facilitate data transmission.

Direct internet access (DIA): a dedicated connection to the internet provided directly from the customer's site over a permanent link (also known as *IP feed* – see below).

Ethernet: a technology used for data transmission. Originally deployed for use in a *LAN* (see below) environment, the technology has also increasingly been used to support *WAN* (see below) connectivity, with Ethernet being used in this instance as a leased line technology.

Ex ante: the application of regulation before an abuse of power has necessarily occurred. The reasoning behind its application is that finding that an operator has SMP means that the operator is likely to have the incentive and motivation to behave in a way which exploits its market power to the detriment of competitors and ultimately to consumers. *Ex ante* regulation can be contrasted with *ex post* regulation, which investigates an incident which has already happened.

Ex post: the use of regulation following a complaint or abuse of market position by an operator. In contrast to *ex ante* regulation (see above).

Half circuit: portion of an international circuit where the provision between origination and termination is shared by two or more operators. The half circuit point is a notional pricing point.

Internet Protocol: the communications protocol used for transmitting a data packet between a source and a destination on data networks, including the internet (also known as *Direct internet access* – see above).

Internet Protocol (IP) feed: a dedicated connection to the internet provided directly from the customer's site over a permanent link.

Leased line: A permanently connected communications link between two premises dedicated to a customer's exclusive use (see also *Private circuit* below).

Local Area Network (LAN): a network that connects a number of devices that are relatively close together, for example within the same office or building, which enables intercommunication amongst users and access to private voice, email, internet and intranet services and applications.

Modified Greenfield approach: a regulatory approach that works on the assumption that there is no *ex ante* (see above) regulation in the market in question, but takes account of the fact that upstream *ex ante* regulation is in place.

Multi-protocol label switching (MPLS): a mechanism for directing data within and across networks from one network node to the next, with data packets being given a specific forwarding label at the point at which they enter the network, thus enabling more efficient routing.

Plesiochronous Digital Hierarchy (PDH): a technical data transmission standard that enables transmission of data that generally runs at a similar rate to have a slight variation in actual data speed compared to the nominal rate. In recent years, PDH transmission has largely been replaced within telecoms networks by *SDH*, (see below).

Private circuit: an alternative term for a *Leased line* (see above).

Retail Price Index (RPI): a measure of inflation, published monthly by the Office for National Statistics in the UK.

Small but Significant Non-transitory Increase in Price (SSNIP): a theoretical price increase that forms part of the 'hypothetical monopolist' test used in market definition analysis. The price increase in question is usually considered to be in the range of 5 to 10 per cent.

Synchronous Digital Hierarchy (SDH): a technical data transmission standard for the transmission, which has largely replaced traditional PDH (see above) transmission. SDH is an international standard that enables high-bandwidth synchronous data transmission.

Time Division Multiplex (TDM): a method of putting multiple data streams in a single signal by separating the signal into many segments, each having a very short duration. Each individual data stream is then reassembled at the receiving end based on the timing.

Traditional Interface (TI): legacy technologies used for delivering leased lines services, of which the main one would be *TDM* (see above).

Virtual Private Network (VPN): a private network where connectivity is extended by making use of the internet over which a virtual point-to-point connection is established, with various protocols being used to ensure data security over the public element of the network.

Wave Division Multiplex (WDM): a transmission technology that enables multiple wavelengths of light to share the same fibre optic pair.

Wide Area Network (WAN): a network connecting devices located in geographically dispersed locations, either in the same national area or across national boundaries.