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**Review of the regulatory powers, resources and
functions of the JCRA as a telecommunications
regulator**

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LECG in association with Charles Russell LLP

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Executive Summary

This report, prepared for the Economic Development Department (“EDD”) of the States of Jersey (the “States”), presents the findings of our review of the powers, resources and functions of the Jersey Competition Regulatory Authority (“JCRA”) as a telecommunications regulator.

Context

The Telecommunications (Jersey) Law 2002 (“TL”) established the JCRA as a telecommunications regulator and changed the status of Jersey Telecom Group Ltd (“JT”) to a fully government-owned but separately incorporated entity. The law paved the way for the introduction of competition in the telecommunications sector in Jersey. Since that time a number of players have entered the market: Newtel, a fixed operator; Cable & Wireless (“C&W”); the Guernsey incumbent; a new entrant in Jersey’s fixed and mobile markets trading as Sure; and recently Airtel-Vodafone, a mobile operator. However, JT still has a very strong position in all fixed markets with, for example, 100% market share in the access market, over 90% of the voice call market and over 80% of the fixed broadband market. JT also has a strong market position in mobile with over 70% market share. Although it faces stronger and intensifying competition in this market given the entry of competing operators and the recently introduced Mobile Number Portability (“MNP”) that will reduce barriers to switching for consumers.

Key regulatory remedies introduced by the JCRA include wholesale price regulation of broadband internet access and leased lines, indirect access for voice calls, a safeguard retail price control and MNP. Other activities that the JCRA has recently been involved with include providing advice on structural separation and the establishment of a mobile mast location website. The JCRA also receives complaints from market participants about breaches of licence conditions and competition law by operators. The JCRA investigates the complaints and may take action where licence conditions or competition law have been breached.

Methodology

Our approach to the review is two pronged :

- benchmarking the inputs and resources, outputs and activities and market outcomes against a range of other microstates and the UK and Ireland; and
- interviewing key stakeholders about their views of the JCRA's powers, resources and functions.

Findings

Our benchmarking suggests that the JCRA's budget and resourcing is broadly comparable to, but at the lower end of the range of other microstates in terms of resources and staffing levels of the regulator. There is evidence of resource constraints on the activities and outputs of the JCRA. For example, important strategic activities such as the wholesale access review have been delayed as a result of the resources required to deal with other matters, such as the introduction of MNP and the potential privatisation of JT. The JCRA's telecommunications caseload shows that a significant proportion of cases continue beyond one year, with some unresolved cases over three years old.

The JCRA publishes an annual statement of objectives and an annual report. However, we consider that the transparency and accountability of the JCRA could be improved by publishing and reporting against key performance indicators ("KPIs"). In common with best practice, the JCRA should consider using its website to maintain an up-to-date record of cases opened, processed and closed. We understand that it is the JCRA's intention to consider the potential role of KPIs and the development of a more comprehensive website record of its activity in the near future and we welcome this development.

As noted above, competition in fixed markets appears to be relatively weak, however, our review suggest that market outcomes compare favourably with other jurisdictions. For example, Jersey has high levels of broadband and mobile penetration compared to its peers and prices of many services are lower than in other jurisdictions. Prices for some services, however, such as interconnection, appear higher in Jersey than in comparable jurisdictions, such as Guernsey.

Our review of the legal powers of the JCRA shows that the enforcement process in Jersey is slow and cumbersome. The need for a process involving initial notice, followed by final notice, followed by a determination, in cases where the enforcement functions of the JCRA are being exercised, hampers effective regulatory intervention. The consultation process is also protracted by the need or the perceived need to start with a fresh draft notice when the JCRA intends to

make any changes to its original plans. Finally, the deterrence effect of existing regulatory measures and sanctions is very limited under the TL and the possibility of fining an operator for a breach of its licence is a well recognised regulatory tool which is not available in Jersey.

We do not consider that the privatisation of JT would in itself automatically lead to a requirement for additional resources or powers for the JCRA over and above what is recommended in the present report. There is a risk that privatisation would result in more litigious behaviour by JT and/or may necessitate control over the financial leverage of JT. Such risks, however, can be managed within the current framework.

Recommendations

The main recommendations arising from our review include:

1. Our review provides evidence that additional resources would enhance the JCRA's ability to regulate the sector effectively. This is desirable whether or not JT is privatised, but would have particular relevance in the event of the privatisation of JT.
2. Our review shows that increased transparency and accountability would enhance the effectiveness of the regulatory process. We therefore recommend that, in carrying out its functions, the JCRA publishes a range of additional information regarding the context of the objectives it sets out, selected KPIs, case and market information.
3. We recommend that the procedure in Article 11 of the TL be reconsidered so that a less prescriptive regime is implemented, with no obligation to issue fresh notifications when changes to consultations are made. The JCRA should be able to start a new consultation in cases where it feels that the proposals have changed so significantly that there would be benefit from doing so, but there should be no obligation on the JCRA to do so.
4. We recommend that the duty to consult (in recommendation 3 above) should be restricted to those regulatory decisions that serve a "policy" function. Enforcement / compliance functions should not be subject to consultation. Instead, the JCRA should have a duty to investigate and issue a decision in a transparent manner that preserves the right to be heard for both the operator allegedly in breach and any affected third parties.

5. We recommend that, whilst any necessary legislative changes go through the States, the JCRA consider issuing guidance on the way it intends that Article 11(10) should be interpreted.
6. We recommend that the JRCA be granted the power to fine operators in breach of a licence condition up to 10% of turnover, in line with other jurisdictions.
7. We recommend that the JCRA has due regard to the costs and implications for affected parties prior to exercising regulatory functions under Articles 7 and 11 of the TL.
8. We recommend that JT's separated accounts be published to increase the transparency of JT's activities to the market. JT should be free to make representations to the JCRA as to the confidentiality of such information.
9. There is no provision allowing the JCRA to publish clarification of a licence measure. We therefore recommend that the ability to clarify the position of the JCRA in relation to licence conditions be given.

1 Introduction

Background

This report, prepared for the Economic Development Department of the States of Jersey, presents the findings of our review of the powers, resources and functions of the Jersey Competition Regulatory Authority as a telecommunications regulator.

The review we carried out considered both the regulation of the Jersey telecommunications sector at present as well as the regulation of the telecommunications sector under a number of possible scenarios. For example, we considered in detail the potential impact of the privatisation of the Jersey Telecom Group Ltd on the legal powers, resource level and mix as well as functions of the JCRA.

The successful development of a fully liberalised market with a privatised JT would require that the JCRA has the appropriate capabilities, legal means and resources to regulate the market efficiently and enforce telecommunications legislation.

As a result the Economic Affairs Scrutiny Panel that investigated the proposed privatisation of JT recommended that a comprehensive review of the current capabilities of the JCRA, including its skill base, resources and legal powers, be carried out.

Terms of reference

The EDD commissioned LECG in association with law firm Charles Russell LLP ("Charles Russell") to review the JCRA as a telecommunications regulator and to address the following main points:

- to undertake a review of the JCRA's regulatory powers, resources and functions as a telecoms regulator within the Jersey market; and
- to produce a report detailing the efficiency of the JCRA in the telecommunications sector and making any such recommendations for change or improvement that might be considered.

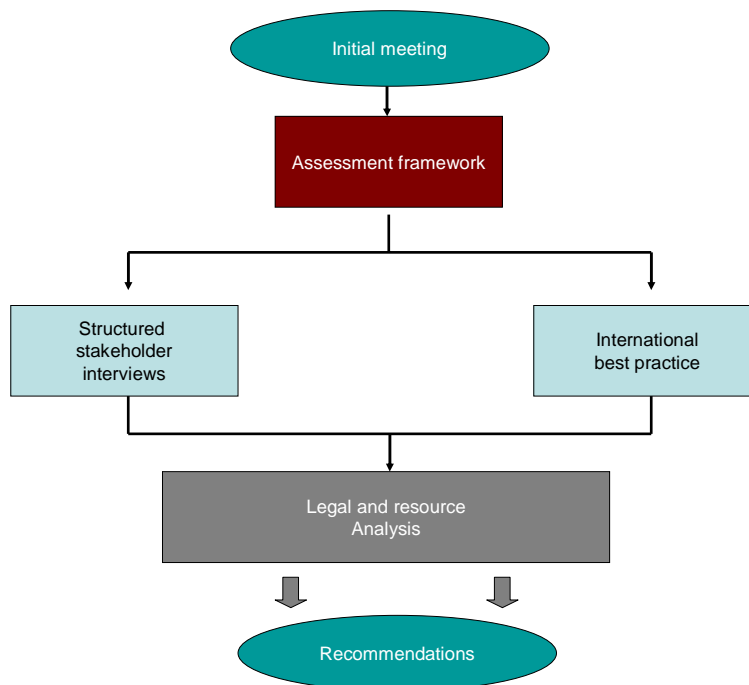
The key questions to be addressed as part of this assignment are:

- Has the JCRA got appropriate legal powers and the associated ability to use them in its current situation and in a scenario where JT is privatised?
- Would the introduction of new powers (such as the ability to fine) be required in order to make the JCRA a more effective regulator?
- Is the statutorily prescribed consultation process appropriate in all instances? Should it be streamlined in certain circumstances?
- Are the capabilities of the JCRA, in terms of skills and resources, adequate to perform its statutory duties now and in the future?
- Based on our findings what should be done to ensure that the JCRA is best able to carry out its duties now and in the future?

Overview of approach

We have reviewed the resources, efficiency and legal powers of the JCRA as set out in Figure 1. Our methodology included:

- undertaking a series of structured interviews with the stakeholders of the JCRA to understand the key issues facing the JCRA and views about its performance; and
- benchmarking the resources, inputs, outputs and outcomes of the JCRA against industry regulators in other countries.

Figure 1: Our approach**Structure of the report**

Our report is structured as follows:

- Section 2 provides an overview of the Jersey Telecommunications market and the activities of the JCRA;
- Section 3 sets out the results of the benchmarking of the JCRA against other selected telecommunication regulators;
- Section 4 summarises the key themes of the stakeholder interviews;
- Section 5 sets out the assessment framework we used and describes our analysis of the resources and efficiency of the JCRA as a telecommunications regulator;
- Section 6 sets out our analysis of the legal powers of the JCRA; and
- Section 7 summarises our conclusions and recommendations.

2 Overview of Jersey Telecommunications Market

Introduction

This chapter provides an overview of the Jersey telecommunications market, the history of JT and the resources and outputs of the JCRA. This section also discusses a number of current and future regulatory issues that are relevant to the review.

History

The first telecommunications cable was laid between Jersey and the other Channel Islands by the Channel Islands Telegraph Company in 1858. Then, in 1888, the first telephone exchange in Jersey was opened by South Western and Wales Telephone Company. The present telephone system originates from the National Telephone Company that took over the redundant assets of the South Western and Wales Telephone Company in 1895. The Jersey exchange network was subsequently taken over in 1912 by the British General Post Office which was then bought by the States of Jersey in 1923 and renamed the States Telephone Committee. However, part of the network remained the responsibility of the United Kingdom Minister for Posts and Telecommunications services until the introduction of the Telecommunications (Jersey) Law of 1972 that vested in the States the exclusive privilege for the provision of all telecommunications on the Island. This model of exclusive privilege was exercised by the States through the Telecommunications Board (made up of members of the States) which was in charge of the management of the then statutory monopoly. This was modelled on British telecommunications law at the time of introduction.

The States of Jersey was the regulator, operator and owner of the only telecommunications provider in Jersey up until 1st January 2003. The TL changed this by splitting the role of the operator, owner and regulator as follows:

- the operator became the incorporated organisation JT governed by an independent board of directors;
- the owner became the Finance & Economics Committee, and subsequently the Minister for Treasury & Resources, acting in the interests of the States as an investor in JT; and

- the regulatory role fell to the JCRA and the Industries Committee (now the Minister for Economic Development).

The TL also ended JT's monopoly in the local market by empowering the JCRA to issue licences to new operators. The law was modelled on the 1984 UK Telecommunications Act, which was subsequently replaced in the UK by the Communications Act of 2003 establishing Ofcom.

Market overview

The present review is neither a review of the state of competition in the Jersey telecommunication markets nor a strategic review of the telecommunications regulatory framework. The evidence and market information describing the level, structure and dynamic of competition included in the present report are therefore provided as contextual elements for our review of the JCRA's powers and resources and as a basis for benchmarking market outcomes with other jurisdictions.

In the six years since the introduction of competition, entry has occurred in a range of mobile and fixed markets. However, JT continues to be a dominant force in all markets.

Fixed access

The JCRA has found that JT has 100% of the market for fixed access¹. The retail price of fixed line services is subject to a price control as part of the Retail Price Control. A sub cap of RPI-1% is applied to line rental and connection. There are around 60,000 fixed lines in Jersey. However, market prices suggest that the price cap has not constrained JT's prices in recent years. Newtel does have a limited cable TV network, which could potentially be upgraded in the future to provide telephony services. We however understand that Newtel has not used its cable plant to offer telephony services.

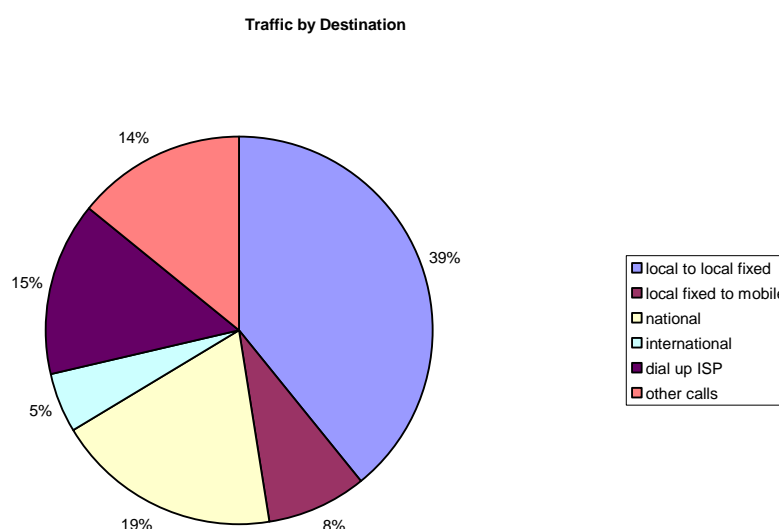
Fixed calls

The main voice telephony services provided over the fixed network are local calls, calls to the UK and international calls. The JCRA estimates that JT has over 90% of the market across all types of call services. There are two new entrants in the market: Newtel and Sure (C&W). Newtel provide a bypass directory service and a

¹ JCRA, *Control of Jersey Telecom Limited's Retail Prices Decision Paper and Determination*, T2008-1, 15 September 2008.

voice over broadband (“VOIP”) service, while Sure provide a carrier selection based service, using a “smartbox”². The JCRA estimate that JT has reduced prices for calls to the UK since liberalisation in 2002, from 6p per minute to 3.5p per minute. Figure 2 shows the composition of call traffic by destination.

Figure 2: Call traffic by destination (call minutes)



Source: JCRA, *Telecommunications Statistical Review, 2007*.

Broadband

There were 26,320 Digital Subscriber Lines (“DSL”) lines in Jersey at the end of 2007. A range of broadband services are available: asymmetric DSL of 2 Mb/s download at 378 kb/s and upload at variety of contention rates; and symmetric DSL service download and upload at up to 2 Mb/s. The JCRA does not publish separate market share for broadband internet access, however, JT has a market share of around 80% of total retail internet access. It is the sole supplier of wholesale fixed broadband services, providing a resale DSL service to Newtel. The wholesale price is determined on a retail minus 40% basis. The wholesale product does not include the DSL backhaul, which Newtel purchases separately from JT. We also understand that Newtel is the only operator to have taken up JT’s wholesale service.

² JCRA, *Telecommunications Statistical Review, 2007*.

Leased lines / business data

The JCRA does not publish leased line / business data information. JT is the sole supplier of wholesale leased lines. Both Sure and Newtel provide retail leased line and data services utilising JT's wholesale service. The wholesale charge is determined on the basis of retail prices minus 9%.

Mobile

There are three mobile network operators in Jersey. Sure and Airtel-Vodafone entered the market in 2006 and 2007 respectively. The JCRA estimates that JT has a market share of around 70%, Sure 22% and Airtel-Vodafone 8%³. All operators offer both GPRS and 3G data services on their networks. The JCRA estimate that the introduction of competition has resulted in significant reductions in mobile call prices, with falls of up to 70% for some services. For example, prices for calls to local mobile and fixed lines have fallen from 15p per minute in March 2006 to 7p per minute in September 2008 and prices for calls to UK landlines have fallen from 30p to 10p per minute⁴. Airtel-Vodafone has introduced a standalone USB mobile broadband 3G data service, at speeds up to 1.8 Mb/s.

Key regulations

We now briefly outline the key telecommunications regulations in Jersey, some of which have already been mentioned above. These are:

- retail price control of fixed access and calls. The retail price control is seen as a safeguard cap rather than a binding price cap as it includes services subject to competition (such as business calls to the UK) and non-competitive services, such as access;
- wholesale price regulation, on a retail minus basis, of broadband internet access and leased lines;
- indirect access for voice calls (not mandated by regulation, but enabled by JCRA compliance action); and
- MNP, newly implemented in December 2008.

³ LECG / CR interview with the JCRA

⁴ JCRA, *Impact of Competition Policy in the Bailiwick of Jersey*, September 2008.

JCRA

Background

The JCRA was established in May 2001, initially to regulate the telecommunications sector and its role later expanded to cover competition law and postal regulation. The JCRA has a board of 5 members, including the Chairman, Lord Kingsland and the Executive Director, Chuck Webb.

Resources

The JCRA has a total budget of around £1.2m per annum and total staff of nine FTEs. Salary and staff costs amounted to £781,000 in 2007 or about 65% of total cost. The JCRA is funded from three main sources: licence fees charged to telecommunications operators, licence fees charged to postal operators and a grant from the EDD to cover competition activities. The telecommunications regulation specific costs of the JCRA were approximately £507,000 in 2007, which was a slight increase on the previous two years – £480,000 in 2006 and £470,000 in 2005.

The telecommunications regulation activities are carried out by a full time case officer with contributions from the JCRA legal advisor, economic advisor and the Executive Director. In the 2008 financial year, the staffing resources dedicated to telecommunications are budgeted to be around the equivalent of two full time staff members. The major cost areas in 2007 were staffing and overhead costs (73%) followed by legal and professional fees (22%).

The JCRA consults annually on its aims and objectives for competition law, telecommunication and postal regulation and it reports on its performance in an annual report including financial statements. The JCRA has freedom to set the level of licence fees and so is able to increase or decrease the level of resources devoted to telecommunications regulation should it wish to do so.

Activities and outputs

The key activities of the JCRA in recent years included the following:

- Mobile Number Portability;
- Retail Price Control;
- mobile mast location website; and

- advice on structural separation in the context of the proposed privatisation of JT.

In the next year, the JCRA is proposing to undertake: a review of access and wholesale services provided by JT; and a review of JT's separated accounts.

Future issues

Our review of the powers, resources and functions of the JCRA as a telecommunications regulator also includes a forward looking opinion as to the likely impact of a number of future market scenarios. We have identified a number of significant events and trends likely to impact the JCRA over the next 3 to 5 years.

Privatisation of Jersey Telecom

The States considered privatising JT in 2006. At the time, it was decided not to proceed with the privatisation and that the issue would not be considered again for a further 3 years. One of the issues raised in the context of the privatisation of JT was the potential need to review the resources and powers available to the JCRA. As explicitly requested in the terms of reference, in this review we consider the impact that privatisation would have on the regulation of telecommunications in Jersey. For clarity, this review is not addressing the question of whether or not JT should be privatised, but focuses instead on the likely implications of privatisation on the resources, powers and functions of the JCRA.

Separation of JT

One of the issues raised in the context of the privatisation of JT was the possibility of mandating separation of JT. JCRA set out a number of options for separation of JT in a paper to the EDD dated 10 January 2007. That paper set out the implications of full structural separation or some variant of functional separation, including the Faroe Islands experience, where the incumbent operator was separated into separate companies with shared government ownership. Structural separation of incumbent operators is a hotly debated issue in international telecommunications regulation. The power for National Regulatory Authorities ("NRAs") to impose functional separation on incumbent operators is likely to be expressly included in the new European framework for telecommunication regulation expected to be passed early in 2009. It is possible that post-privatisation, JT could decide to separate itself on a voluntary basis, as was proposed by the Irish operator, eircom, in 2007 (a proposal later withdrawn

due to the volatility of financial markets). We are not asked to advise whether or how JT should be separated, but our analysis will consider the possible implications of separation of JT for the resources and powers of the JCRA.

Convergence

The convergence of communications platforms (fixed, mobile, terrestrial and satellite broadcasting) and services (access, voice, broadband and media) has been discussed widely in the communications sector since the turn of the century. While convergent products and services have taken longer to materialise than some industry analysts once thought, there is now increasing evidence of the blurring of the boundaries between the various services and platforms in the communication sectors. Voice calls are increasingly migrating from fixed to mobile platforms. The rapid development of mobile broadband raises question as to the extent to which mobile broadband is a substitute or complement to fixed broadband. Increasing amounts of video content are now delivered over the internet. These trends will shape the development of the value chain and have the potential to introduce new forms of competition to the telecommunications sector. They also raise new issues about the leverage of market power from existing markets into new markets. Therefore, convergence must be taken into account in considering the resourcing and power of the telecommunication regulator.

Spectrum

A related issue to convergence is the management of spectrum. Currently, Ofcom is responsible for the management of spectrum in the British Isles and other Crown dependencies, while the JCRA is responsible for licensing telecommunication operators. Ofcom and the JCRA have been working together to ensure that the issuing of new spectrum and telecommunications licences is aligned.

Cross-channel co-ordination

There is already a level of co-operation and co-ordination between the JCRA and the Guernsey telecoms regulatory, the Office of Utility Regulation ("OUR"). For example, representatives of the two regulatory authorities meet on a quarterly basis. We also note that the introduction of MNP was adopted as a cross-channel regulatory solution. The telecommunications markets in Jersey and Guernsey involve a largely overlapping set of key players – for example, JT, Sure, Newtel and Airtel-Vodafone are all operating in both jurisdictions. Also we note that many

operators, and their telecommunications client firms, seem to be operating in an integrated way across both markets, and interact with both regulators.

It is beyond the scope of the current review to consider constitutional, institutional and political implications associated with cross-channel co-ordination. However, we discuss regulatory co-ordination between Jersey and Guernsey in the context of its implications for the resources and powers of the JCRA.

Next Generation Network investment

Like in many other countries, the basic access infrastructure serving Jersey is based on a copper pair access network (also called local loop) that was rolled out many decades ago to provide fixed voice telephony. The electronics in such networks has been upgraded over the past few years to also provide broadband services (DSL currently support 2 Mb/s download speeds in Jersey). Longer term however it appears that new fibre based infrastructures (Next Generation Access) “NGA”) networks) will be required to provide very high speed broadband services.

Our analysis considers the likely impact of the regulatory issues associated with such a transition on the resources and powers of the JCRA.

3 Benchmarking

Introduction

This section benchmarks the JCRA and the Jersey telecommunications market with seven other countries. The benchmark countries include other microstates, both inside and outside the EU, as well as Ireland and the UK. We selected comparable micro and small state jurisdictions according to population size, GDP and geographic location. In particular we chose Guernsey, Malta, Liechtenstein, Cyprus and Barbados. Because of their historically strong ties with Jersey, Ireland and the UK were also included in our analysis. The UK also provides a reference point, as the UK telecommunication market was liberalised early (in the 1984 Telecoms Act followed by the 1991 Duopoly Review).

This chapter is divided into three sections. In the first section we discuss each regulator's inputs and resources. We look at key metrics such as number of staff and the regulator's expenditure as well as background data that let us categorise each country according to its population and GDP size. In the second section, we look at each regulator's responsibilities and their work programmes during previous years. In the third section, we compare market outcomes using price data for products that represent wholesale and retail markets as well as markets for broadband, mobile and fixed telephony.

We collected the most recent data available from sources such as regulatory authorities' annual reports, public consultations, incumbents' reference offers and multinational sources such as ITU and EU publications. A full list of sources and references is available in Appendix I.

Inputs and resources

Among the small countries in our sample, Jersey ranks between Guernsey and Barbados in terms of both size and GDP (see Table 1). Cyprus and Malta, both members of the EU, are microstates with larger populations and GDP. In our sample, Liechtenstein is the smallest country followed by Guernsey, both in terms of population and GDP. The UK and Ireland are considerably larger than other countries in the sample for both metrics. Not surprisingly, population and GDP are also highly correlated with the number of staff that each regulator employs. Both the Malta Communications Authority ("MCA") and Cyprus's Advisory Committee on Electronic Communications and Post ("OCECPR") are considerably larger in

terms of number of staff than Jersey (and the other microstates). This is likely to be related to both their size and the need to comply with the EU's regulatory framework. Perhaps surprisingly, in Barbados, a country which is similar to Jersey in terms of GDP, the Fair Trading Commission ("FTC") has more than three times as many employees as the JCRA. Regulators' total expenditure is strongly correlated with GDP and population size.

Table 1: Inputs and resources

	Liechtenstein	Guernsey	Jersey	Barbados	Malta	Cyprus	Ireland	UK
Population ('000)	35	66	92	282	404	793	4,156	60,944
GDP (\$bn / PPP)	1.79	2.70	5.10	5.31	9.40	21.40	191.60	2013.00
Expenditure (£'000)	849	908	1,201	1,054	3,907	4,609	13,717	129,400
Expenditure / £'000 GDP	0.48	0.34	0.24	0.20	0.42	0.22	0.07	0.06
Number of staff	6	5	9	30	50	30	108	776
Staff / '000 pop	0.17	0.08	0.10	0.11	0.12	0.04	0.03	0.01
Expenditure / staff	141,572	181,691	133,466	35,117	78,131	153,630	127,012	166,753

Sources: LECG analysis – data sources see Appendix I

Figure 3 below sets out three resource input ratios: staff per capita of each country's total population; expenditure of the regulator as a proportion of GDP; and expenditure of the regulator per staff member. The data on each regulator's expenditure are the total expenditure on all regulatory activities. Ideally, we would benchmark each regulator's expenditure on telecommunication regulation, however, these data are not available for all regulators. In the next section on outputs, we consider the roles and activities of each regulator. This provides some check on the extent to which the regulator's non-telecommunication functions may affect their level of resources in the context of our benchmarking.

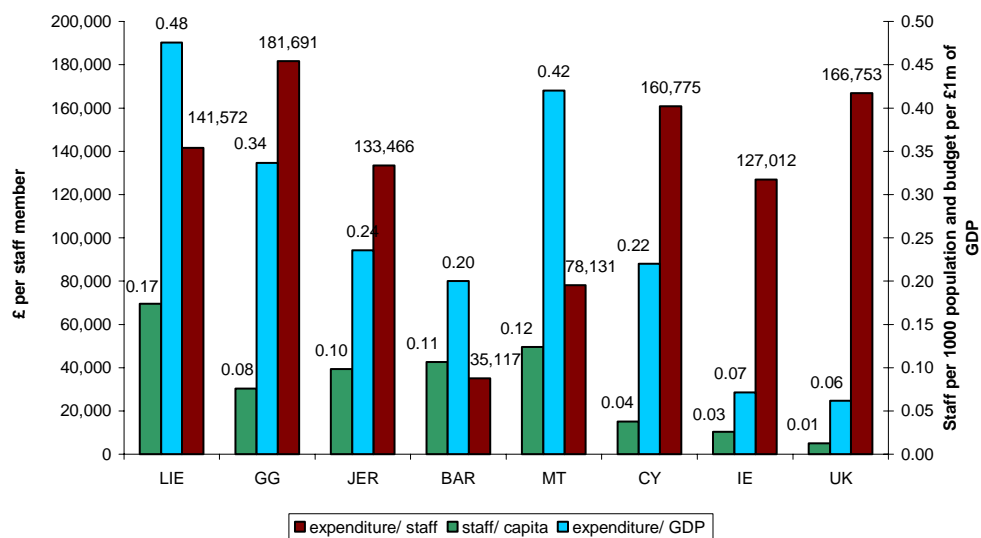
The staff per capita data indicate that regulatory authorities exhibit considerable economies of scale. A large country like the UK has a very low level of staff per capita, while a microstate like Liechtenstein has a very high level of staff per capita. Jersey has a lower staff per capita ratio than Liechtenstein, Barbados and Malta, but higher than Guernsey and Cyprus.

Among the microstates, Guernsey and Liechtenstein have the highest expenditure per employee. The OUR in Guernsey state that they have a small core team which is supplemented with outside experts on a case by case basis. The JCRA is closer to the average on this measure, with Barbados and Malta exhibiting a considerably lower level of expenditure per employee.

The resources as percentage of GDP are consistent with the finding of economies of scale, with larger economies spending less on regulation as percentage of GDP. According to this measure, Jersey spends less as a proportion of GDP than Guernsey, Liechtenstein and Barbados, but more than Malta and Cyprus.

Overall, the results suggest that the JCRA is a small regulator with staffing levels, expressed as a proportion of population, consistent with its immediate peers (Guernsey and Barbados). However the total resources spent on regulation as a proportion of GDP by the JCRA is significantly lower that its peers with the exception of Barbados. We will consider the linkages between resource levels and outputs and activities of the regulator in the next section.

Figure 3: Staff and resource input ratios



Source: LECG analysis – data sources included in Appendix 1.

Outputs and activities

In this section we will discuss the roles and responsibilities of the telecommunications regulators in each of the countries benchmarked. Each regulatory authority in the sample countries is charged with additional tasks besides the regulation of the telecommunications sector. As indicated in Table 2, the JCRA and FTC in Barbados are the only regulatory bodies from the jurisdictions considered that also oversee general competition law. Ofcom in the UK has concurrent jurisdiction to investigate competition law matters when a possible infringement of the competition rules occurs in the communications sector, alongside the national competition authority with enforcing competition law generally, across all sectors. Alongside telecommunications services, postal services have been liberalised in most countries in recent years. Because of the strong similarities between both industries many countries decided to combine the regulatory function associated with both sectors into one authority, a step that has also been taken by the States of Jersey. In addition to postal and telecommunications services, the OUR also oversees the regulation of the energy sector. In addition, many regulators also have responsibility for managing spectrum including issuing radio and broadcasting licences. While the JCRA issues licences, it is not directly responsible for spectrum allocation in Jersey – Ofcom has this responsibility. The JCRA and Ofcom however co-ordinate their actions to ensure a consistent management of spectrum resources.

Table 2: Regulatory responsibilities

	Liechtenstein	Guernsey	Jersey	Barbados	Malta	Cyprus	Ireland	UK
Telecoms	✓	✓	✓	✓	✓	✓	✓	✓
Competition	✗	✗	✓	✓	✗	✗	✗	✗
Postal Services	✗	✓	✓	✗	✓	✓	✓	✗
Electricity	✗	✓	✗	✗	✗	✗	✗	✗
Spectrum	✓	✗	✗	✗	✓	✓	✓	✓

Source: LECG analysis

The responsibilities of the JCRA under competition law appear to be more demanding than the regulation of other sectors. Information provided by the JCRA

suggests that about 40 to 45% its budget is spent on telecommunication regulation, while the Guernsey OUR spends about 60% of its budget on telecommunication regulation. In light of this, the data in Figure 3 and Table 2 suggest that the JCRA would be in the lower quartile of the microstates in terms of relative levels of resources devoted to telecommunication regulation.

In Table 3 we present an overview of recent regulatory activities in the telecommunications sector in each country in the sample. In particular, we checked whether licences were issued, retail or wholesale markets have been regulated or analysed and whether fixed and mobile interconnection charges have been subject to investigation. With the exception of the FTC in Barbados, regulators in all countries were engaged in all the regulatory activities under consideration. In Barbados, licences are issued by the Ministry of Telecommunications rather than the regulator and mobile termination charges have not been considered by the regulator.

In our sample two incumbents have separated operations, namely the UK and Liechtenstein.

In the UK, British Telecom is functionally separated and divided into different branches, including BT Retail, BT Wholesale and Openreach. The latter is responsible for local loop access, BT Wholesale manages BT's backbone network and BT Retail provides telecommunications services to businesses and households (using inputs from both Openreach and BT Wholesale).

In Liechtenstein, there is partial structural separation. In 2006 Liechtensteinische Kraftwerke ("LKW") and Telecom Liechtenstein (formerly Liechtenstein Telenet) signed a consolidation agreement which obliged Telecom Liechtenstein to sell its network infrastructure to LKW, who already owned a cable and electricity network. At the same time, LKW had to transfer its telecommunications services provided via their cable network to Telecom Liechtenstein. This created a unique network provider, LKW, and a separate service provider, Telecom Liechtenstein. This does not amount to complete structural separation as LKW and Telecom Liechtenstein are under the common ownership of the government. However, there is greater access to networks as LKW has to provide wholesale access to its network to all telecommunication service providers.

Structural separation has been proposed (but later withdrawn) by the Irish incumbent, eircom, and recently discussed in Jersey.

Table 3: Regulatory activities

	Liechtenstein	Guernsey	Jersey	Barbados	Malta	Cyprus	Ireland	UK
Licensing	✓	✓	✓	✗	✓	✓	✓	✓
Retail Price Regulation	✓	✓	✓	✓	✓	✓	✓	✓
Wholesale	✓	✓	✓	✓	✓	✓	✓	✓
Mobile Termination Charge	✓	✓	✓	✗	✓	✓	✓	✓
Fixed Line Termination Charge	✓	✓	✓	✓	✓	✓	✓	✓
Structural / Functional Separation	✓	✗	✗	✗	✗	✗	✗	✓

Source: LECG analysis

In terms of scope of responsibilities, the major difference between the JCRA and its peers is that it has responsibility for general competition law. The only other regulatory authority in our sample that oversees competition law is the FTC in Barbados. Although there might be good reasons for this integrated approach it might also draw board and senior management focus and resources away from regulation. However, our analysis supports the overall work programme and outputs of the JCRA in the telecoms sector are similar to other telecommunication regulators.

Outcomes

In this section, we benchmark outcomes in the Jersey telecommunication market against outcomes in the other countries. Table 4 summarizes our findings on penetration rates, markets shares and prices for fixed line termination charges, retail broadband services, leased line products, retail telephone line rental and local calls.

Market share data were readily accessible for EU member states and most other countries but were not available for Barbados.

Table 4: Regulatory outcomes

		LIE	GG	JER	BAR	MT	CY	IE	UK
Penetration Rates (%)	Mobile	80%	67%	161%	80%	86%	113%	121%	119%
	Broadband	29%	n/a	28%	20%	14%	9%	23%	26%
Incumbent's market share (%)	Fixed	47%	90%	92%	n/a	99%	86%	72%	49%
	Mobile	n/a	75%	70%	n/a	53%	89%	45%	24%
	Broadband	70%	90%	80%	n/a	41%	88%	51%	26%
Interconnection charges (pence per minute)	Local	2.01	0.35	0.62	0.42	1.00	0.24	0.44	0.09
	Metropolitan	2.01	0.35	0.62	0.42	1.00	0.43	0.62	0.18
	National	2.01	0.35	0.62	0.42	1.00	0.51	0.81	0.18
Price of 2Mb/s retail broadband (£)		24.63	24.99	17.99	39.88	10.96	23.30	23.71	14.65
Leased line (2 km)	2 Mb/s	n/a	122	283	840	835	461	301	368
	34 Mb/s	n/a	9,267	3,117	n/a	n/a	2,307	2,443	3,181
Price of access line (£)	Monthly charge	12.69	7.99	12.00	11.32	4.74	12.67	20.05	10.50
	Connection fee	45.23	69.99	120.49	32.33	43.46	79.41	39.52	124.99
Local call charges (pence/ 3min)		9.54	4.80	7.00	n/a	9.80	7.95	12.26	11.34

Notes: Mobile penetration rates are based on number of subscribers as percentage of population, except for Guernsey and Malta, where penetration rates are based on contract (post pay) mobile service only.

Broadband penetration rate is based on number of broadband lines as percentage of the total population.

Fixed incumbent market share is based on incumbent's share of total retail access lines.

Mobile incumbent market share is the leading operator's share of mobile subscribers as percentage of the total number of subscribers.

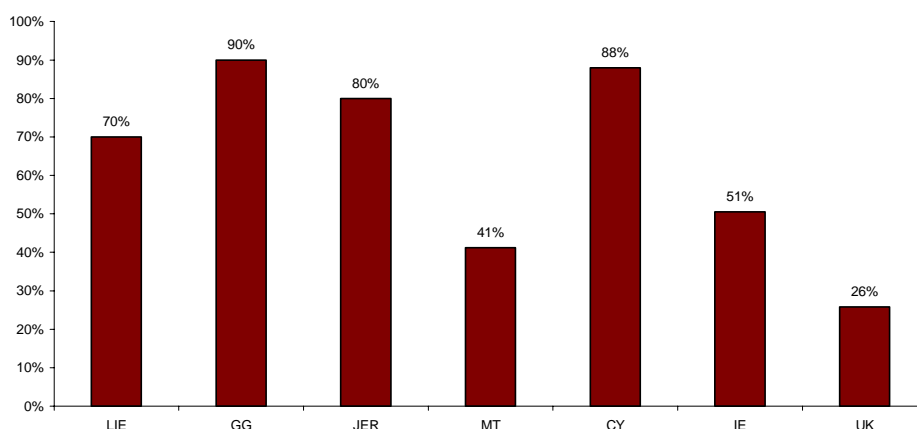
Broadband market share is the incumbent's share of the total number of broadband lines.

Source: LECG analysis – data sources included in Appendix I. Currency conversion at market exchange rates at October 2008. Mobile penetration rates are high (>80%) in almost all countries of our sample. They are exceptionally high in Jersey, although this calculation is based on SIM cards issued rather than active, which is likely to overstate the actual penetration level relative to other countries. For some countries in the sample (Guernsey and Malta), penetration rates are based on contact (post pay) mobile services only and likely to be understated. Jersey has the second highest broadband penetration, slightly behind Liechtenstein.

In terms of market share of the incumbent, which is a proxy for the extent of competition in a market, the picture is somewhat different. JT has the highest market share in the fixed voice market of any incumbent in the sample, except Malta. JT's mobile market share is in the middle of the range, while its broadband market share is higher than in all countries except Cyprus and Guernsey. In broadband markets, the incumbents' market shares vary significantly. A reason for this could be the lack of network based competition in some countries due to the absence of cable operators that provide broadband services, as is the case in Jersey.

Competition in mobile is developing rapidly in both Jersey and Guernsey. With the entry of new operators into the market, outcomes could look quite different in 12 to 24 months time.

Figure 4: Incumbent's broadband market share (as % number of broadband lines)



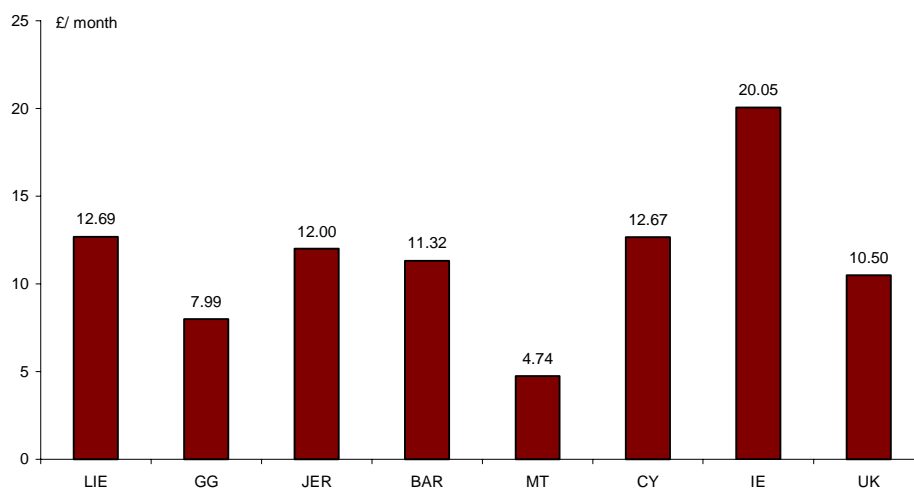
Source: LECG analysis – data sources included in Appendix.

In Jersey the price for basic telecommunications services, including access line rental and local call charges, is at the middle to lower end of the sample. The access charge is higher than the charges in Malta, UK and Guernsey, but is

below the prices charged in Ireland, Cyprus and Liechtenstein. Figure 5 below shows the price of an access line rental in Jersey compared to other jurisdictions.

It is not relevant to compare the cost of calls to the UK for the entire sample, but we have compared the cost for calls from Guernsey and Jersey to the UK, as these calls are particularly important for both Jersey and Guernsey. The call charge for a 3 minute call to London is 10.5p from Jersey and 12p from Guernsey.

Figure 5: Monthly line rental



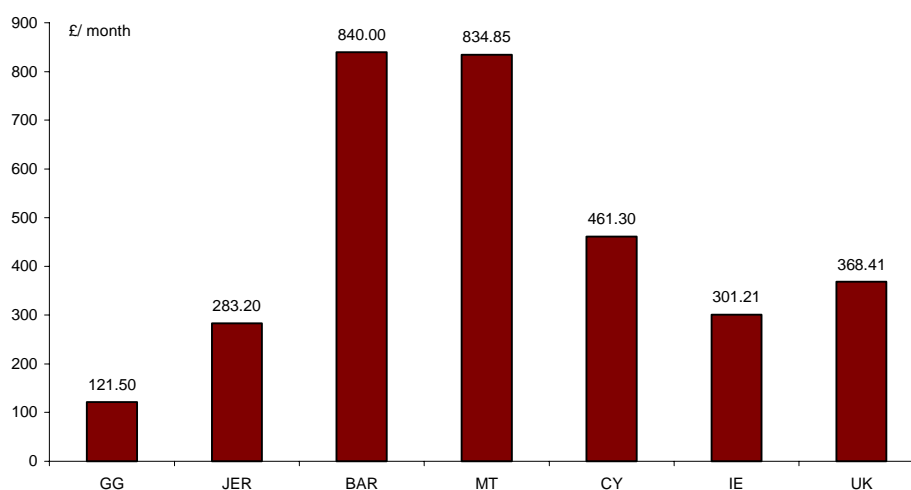
Source: LECG analysis – data sources included in Appendix. Currency conversion at market exchange rates at October 2008.

The price of broadband access in Jersey is significantly higher than in Malta and the UK, but lower than in the rest of the sample countries. However, it should be noted that the market for broadband services is heterogeneous across different countries with a large spread in speeds available. BT and eircom offer broadband services up to 8 Mb/s with unlimited download capacity, whereas the maximum speed available to JT customers is 2 Mb/s with restricted download capacities. The price shown above is for a 20 Gb download cap. The price in Jersey for a 60Gb data download cap is £34.99 – this is higher than all other countries except Barbados.

The price of business data services and in particular on-island leased lines is at the lower end of the range in Jersey, although considerably higher than Guernsey. Figure 6 shows prices for leased lines with a speed of 2 Mb/s. Unlike other larger

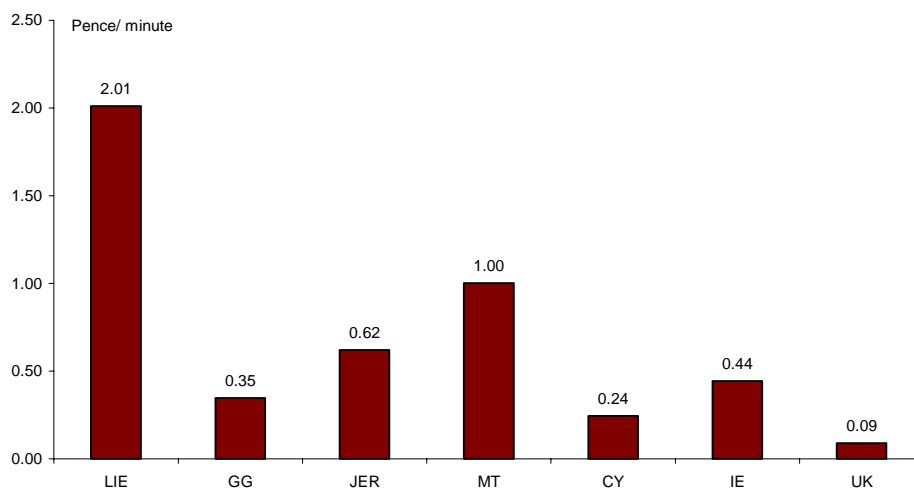
jurisdictions, JT's leased lines have a uniform rate regardless of distance. Leased line services, particularly off-island leased lines, are important to Jersey, given their wide use in the banking and finance sector and the importance of this sector to the economy. The cost of 2 Mb/s leased line half circuit from Jersey to London is £6,552 with a connection fee of £1,250, while the equivalent half circuit from Guernsey is £5,152 with no connection fee. This suggests that both on- and off-island leased line prices are higher in Jersey than Guernsey.

Figure 6: Prices of a 2 Mb/s leased lines



Source: LECG analysis – data sources included in Appendix I. Currency conversion at market exchange rates at October 2008.

Figure 7 sets out the local fixed interconnection (termination) charges for each country. A full list of interconnection charges for fixed line operators are set out in Table 4. Jersey Telecom's prices are at the upper end of the sample with only Malta and Liechtenstein charging higher prices.

Figure 7: Local interconnection charges


Source: LECG analysis – data sources included in Appendix I. Currency conversion at market exchange rates at October 2008.

To sum up, outcomes in terms of market penetration rates are very good for Jersey, while the extent of competition in most markets appears to be far from effective. Prices for domestic fixed services in Jersey compare reasonably well with prices in other countries in the sample, although broadband prices appear to have the potential to be significantly lower and the service offerings lag more developed markets. Prices for interconnection appear to be high relative to other countries, whereas prices for leased lines are low compared to the rest of the sample, but higher than in Guernsey for both on-island and circuits to London.

Conclusions

This section compared the performance of selected countries and regulatory authorities with Jersey and the JCRA using indicators to assess available resources, functions and outcomes.

In terms of resources, while the JCRA lies within the broad range of the sample, it appears to lag its microstate peers in terms of the resources as a proportion of GDP and staffing as a proportion of population. The lower cost and smaller scale of the JCRA does not appear to be explained by lighter responsibilities in areas other than telecommunications, if anything, the JCRA appears to have a greater workload outside telecommunications regulation than other regulators.

In terms of outcomes, the market penetration for broadband and mobile suggest that any issues with pricing and regulation have not impeded consumer take up of services. This does not necessarily imply that consumers are getting a good deal and may reflect other market features of Jersey such as relatively high average incomes. The benchmarking of the pricing of services in Jersey suggests that the on-island leased line prices are lower than in other markets, while fixed line services including broadband are not out of line with other countries. Market share data suggest that competition has not developed in the fixed market despite the efforts of the JCRA, although competition is now emerging in the mobile market.

4 Summary of Stakeholder Interviews

In addition to the international benchmarking of the JCRA, the review team has carried out an interview programme with a number of key stakeholder of the Jersey telecommunications sector. The purpose of this interview programme was to gauge the views in the industry on the resourcing, performance and legal powers of the JCRA.

We interviewed relevant personnel at the JCRA on the market, regulation, legal powers and resource management. The other stakeholders we interviewed were:

- Jersey Telecom
- Sure (C&W)
- Newtel
- Airtel-Vodafone
- Jersey Finance
- Treasury and Resource Department.

We also interviewed the Director General of the Guernsey OUR and Ofcom spectrum management staff. We interviewed the Director General of the OUR in relation to the operation of the OUR and the Guernsey market and the Ofcom staff in relation to Ofcom's spectrum role. These interviews did not cover the Jersey market or regulation and are not therefore summarised below but referred to in the relevant sections of this report.

This chapter sets out an overview of the key themes emerging from the interviews.

Resources of the JCRA

There were mixed views among stakeholders about the resourcing of the JCRA. A number of stakeholders made comparison with the Guernsey OUR. One stakeholder claimed that the recent increase in resources at the OUR on telecommunication issues meant that the OUR had considerably more resources devoted to telecommunications regulation than the JCRA. Other stakeholders commented that given the different roles of the JCRA and the OUR, it was difficult to compare the level of resourcing. Overall, there was little consensus about the

adequacy of the JCRA's resources, although there is greater support for the view that the JCRA would require more resources to deal with a privatised JT. In terms of the mix of resources available to the JCRA the consensus was that additional regulatory capabilities, rather than competition law resources were required.

Competition

One stakeholder argued that fixed line prices compared well with the UK and Ireland and that mobile prices were lower in Jersey than in these countries. This stakeholder considered that competition in the business market was intense for voice traffic. JT noted that it was in fact a very small firm in relation to the telecoms groups behind some of its competitors (such as C&W or Airtel-Vodafone).

From the consumer perspective, Jersey Finance noted that there was little evidence of competition for business services and that the focus of competitors' efforts appeared to be the mobile market for domestic customers. However, pricing and quality of services was not generally seen as a significant issue by large business customers. The availability of high quality video conferencing services ("telepresence") was the only point raised by large corporate business customers.

The impact of competition has varied between services. For example, off-island leased lines prices have decreased dramatically since the liberalisation of the market, but on-island leased line prices have not changed. A number of stakeholders believed that the retail minus 9% basis of pricing wholesale leased line was inappropriate and resulted in prices that were too high for consumers and limited competition. One stakeholder noted that on-island leased lines prices in Jersey were 33% higher than in Guernsey.

A number of stakeholders were concerned about margin squeezes between retail and wholesale leased lines and retail and wholesale broadband services. Newtel believed that there was insufficient margin between the JT retail broadband and wholesale broadband prices for an efficient operator to compete in the retail market. They did not believe that JT was fully recovering retail costs from its retail service – JT retail costs were not allocated to retail services. They also considered that the JT practice of offering free connection, half price line rentals for half of the 12 month contract period and inducements such as Jersey Live tickets exacerbated the margin squeeze. They had first complained about margin

squeezes to the JCRA four years ago and have made a number of complaints since, but did not believe that the JCRA can take action due to the deficiencies in the separated accounts.

One stakeholder commented that although JT tended to meet Service Level Agreement requirements (“SLAs”) this did not mean that discrimination did not occur. For example, JT has an incentive to wait until the deadline in the SLA - say the tenth day - to repair a fault reported by a competitor while the same fault on its own network could be fixed more quickly. A number of respondents considered that the retail arm of JT received a better wholesale service than other operators (and therefore discriminated against competitors), and that there was no transparency about the service provided by JT wholesale to JT retail compared to other providers.

Legal powers

There is general agreement that the current regulatory powers of the JCRA are too limited and that this adversely impacts on the ability of the JCRA to be an effective regulator. The only exception to this view was JT that did not believe that more powers were required. JT however did not consider that additional powers, such as the power to fine for licence breaches, would have a significant impact on them as they always complied with the regulation. Other stakeholders felt that the power to fine was vital to the effectiveness of the JCRA. For example, one stakeholder observed that without it “the JCRA is a watchdog without teeth.”

There is general agreement that the current requirement for “re-consultation”, where the JCRA has made any changes to a decision is cumbersome and inefficient. Again, the only exception to this view is JT, they considered that both material and immaterial changes to an interim decision required re-consultation. Some stakeholders questioned whether the TL actually required re-consultation, when changes were immaterial.

One stakeholder criticised the JCRA for inconsistent application of the law, as it stated that in 2006 the JCRA had intervened to prevent 18 month contracts for post paid mobile contracts but recently allowed the use of 18 month contracts for handheld devices.

A number of stakeholders suggested that the JCRA is too focused on competition law and gives insufficient weight to enforcement of telecommunication regulation.

Effectiveness of the JCRA

A number of stakeholders were concerned about the lack of transparency in the activities of the JCRA. Most stakeholders acknowledged the quality of the relationship they had forged with the JCRA and the generally open communications channels available to them for dialogue. However, it was generally felt that there was too little visibility about the JCRA's actions in response to complaints and insufficient use of public findings as part of a sanction process. There was also criticism of the lack of transparency in the JCRA's handling of complaints. For example, it was suggested that the opening and closing of cases could be published in a similar manner to other regulators' practice. A stakeholder also suggested that letters of complaints should be disclosed by the JCRA to the relevant party, when a matter is under investigation.

A range of stakeholders criticised the non-publication of JT's regulatory accounts, although JT indicated that they would oppose the publication of the accounts in their current form as they were concerned that the public may misunderstand the results such as measures of the returns on assets for some services.

A number of stakeholders considered that in conducting the MNP process a number of the JCRA's shortcomings were highlighted. For example, one stakeholder criticised the lack of a robust analytical framework (such as problem definition, identification and evaluation of options leading to an impact assessment) in the JCRA's initial MNP evaluation.

Some stakeholders considered that the response of the JCRA to complaints was ineffective, with long periods of investigation and no action taken against the operator which was the subject of the complaint.

A number of stakeholders commented on improved relationship with the JCRA under the current Executive Director, but some stakeholders were concerned about the lack of focus on key regulatory issues and whether the JCRA had sufficient support from Ministers to take action.

Impact of privatisation

There were mixed views about the impact of privatisation on the resources and powers of the JCRA. Some stakeholders considered that JT operated in a commercial fashion and that therefore the operator's behaviour towards the regulator was unlikely to change significantly. Other stakeholders suggested that

JT would be likely to take more aggressive positions post-privatisation and may, in particular, be more litigious. Some stakeholders suggested that state ownership of JT moderates the tendency of JT and the JCRA to resolve issues in the Courts, as mediation was likely to be preferable to having two government funded entities locked in expensive litigation.

One stakeholder was opposed to privatisation – at least in the short term – on the grounds that the JT was still effectively a monopoly, that the market was not effectively competitive and that therefore it was critical for the powers and resources of the JCRA to be addressed prior to any privatisation.

One stakeholder considered that in the event of privatisation, the JCRA may need to take steps to limit the leverage of JT, but that it is able to do so under the current TL, given the objectives of protecting the interest of future users of telecommunications services. This stakeholder also considered that failure to invest by JT could be addressed by the JCRA directing JT to make investments, provided this is the best means of meeting the JCRA's objectives.

One stakeholder considered that customers in Jersey were more loyal to JT than customers in Guernsey were to Sure and that this was due to the perception that JT "belongs to the people". Privatisation may remove this perception and therefore reduce barriers to switching.

Impact of structural or functional separation

There is general agreement among stakeholders that UK style functional separation (as stated in section 3, access, backbone and retail have been separated in the UK) is not realistic in a small jurisdiction like Jersey, however, there is considerable divergence of opinion about other forms of structural separation or "half-way house" types of functional separation.

Some stakeholders believed that full structural separation, by removing JT's incentives to foreclose downstream markets, would reduce the need for on-going regulation and therefore reduce the resources required by the JCRA over time.

Some stakeholders considered that KPIs on JT's performance in providing itself and wholesale customers with services would provide increased transparency and be more effective in promoting equivalence between JT retail and other wholesale customers than functional separation. Such an approach was also

seen as more realistic given the scale of Jersey's telecommunications market and the likely costs, timeframe and legal issues associated with a full separation process.

5 Resources and Efficiency

Introduction

This chapter discusses our assessment of the resources and efficiency of the JCRA. This chapter is structured as follows:

- in the first section we set out our framework for assessing efficiency and adequacy of resources;
- in the second section we discuss the economic literature on performance assessment of telecom regulators; and
- in the third section we analyse the resources, outputs, outcomes against current demands before considering the implications of future issues.

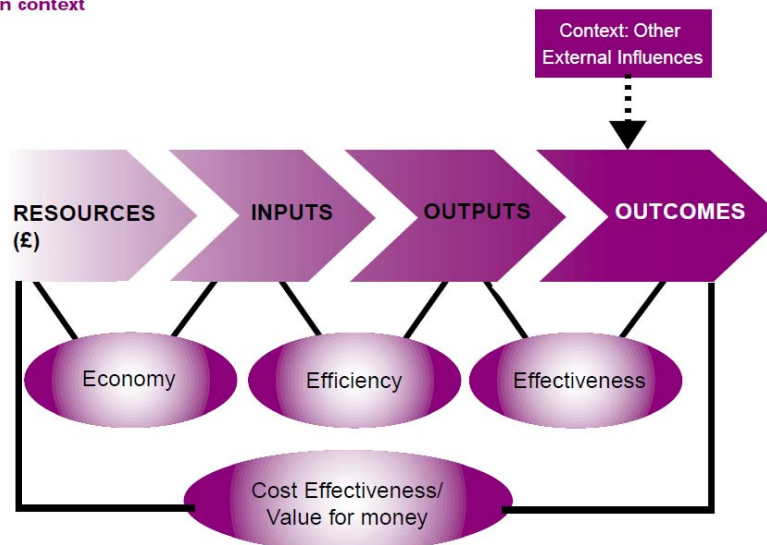
Assessment framework

The assessment of the performance and resourcing of public organisations such as telecoms regulators, is a complex and difficult task. Many factors influence developments in the telecoms markets and regulatory interventions may take a number of years to have full effect. We begin our analysis by setting out a framework for assessing performance of telecommunication regulators.

Figure 8 below sets out the performance management framework developed by the UK government for the public sector. Similar approaches are used in many other countries.

Figure 8: Assessment Framework

Performance in context



Source: HM Treasury, Cabinet Office, National Audit Office, Audit Commission and Office for National Statistics, *Choosing the right fabric – a framework for performance information*, March 2001.

The terms are defined as follows:

- resources refer to the amount of funding an organisation receives;
- inputs are the resources that contribute to production and delivery of the activities of the organisation;
- outputs are the final products or services produced by an organisation;
- outcomes refer to the impacts or consequences for the community of the organisation's activities. Some performance measurement frameworks distinguish between the impacts of a government body and the outcome sought for society. Clearly there are external influences on outcomes, other than the activities of the regulator such as changes in technology and strategic decisions by operators or potential entrants;
- economy measures the cost of acquiring inputs for the organisation or programme. In the case of the JCRA, this will be mainly staff and premises costs;
- efficiency measures whether the maximum outputs are obtained for the level of inputs that go into the process. In this case, it will be licences awarded or licence infringements investigated; and

- effectiveness measures whether the outputs of the programme lead to the desired outcome.

The assessment of performance of a public body is usually a mix of assessing the economy, efficiency and effectiveness. Our understanding of the terms of reference is that efficiency not only refers to cost effectiveness but to all three performance measures identified above.

The assessment of the adequacy of resources is not usually included in the assessment of performance efficiency. However, we consider that adequacy of resource can be addressed within the same framework with the addition of benchmarking information. Benchmarking provides a comparison of the size of the JCRA's inputs and resources compared to other regulators. This enables us to distinguish between over- or under-performance due to the level of resourcing or due to better or more efficient use of resources.

Performance measures for telecommunication regulators

There are two publicly available indices measuring the effectiveness of telecommunication regulation in the European Union. The European Competitive Telecommunications Association ("ECTA") scorecard and European Union Regulatory Institutions ("EURI") Database developed by the London Business School.

The ECTA scorecard is a measure of the relative effectiveness of the regulatory frameworks for the communications sector in EU countries. The scorecard is based on responses to detailed questionnaire submitted to the NRAs and ECTA members based on questions covering the institutional framework, general market access conditions and the competitive and regulatory conditions for fixed and mobile telephony and high speed business connections. The outcome is a ranking of all countries included in the survey.

The survey does not attempt to measure efficient use of inputs or resources by the regulator and it does not consider the outputs of a regulator.

The limitations of the ECTA scorecard are well known⁵. In this instance however, the fact that it was designed to assess the development of specific policies (such

⁵ Melvyn Weeks and Brian Williamson, *A sound basis for evidence based policy? A critique of the ECTA regulatory scorecard and SPC Network papers on investment and broadband*, Indepen report for ETNO, June 2006.

as unbundling) makes it almost unusable in the context of microstates such as Jersey. Indeed, the assessment of regulatory effectiveness using the ECTA scorecard would not only be subjective but also misleading as many of the assessment criteria would be zero rated given that unbundling had not been introduced in Jersey.

A second potential measure of telecom regulator's performance is the EURI Database. This provides a measure of regulatory quality based on index measures which assess regulators on their enforcements powers, effective appeals and licensing and a measure of regulatory independence based on a separate range of criteria. However, this data has not been updated recently.

Economic literature on efficiency of telecommunication regulators

While there is a significant economic literature on the effect of regulation on the efficiency of regulated firms including telecommunications operators, there is little literature on the efficiency of telecommunication regulators themselves.

Afonso and Scaglioni⁶ use the both the ECTA and EURI scorecards to develop a composite measure of regulator performance and use Data Envelopment Analysis ("DEA") to assess the performance of the regulators. They measure inputs on the basis of financial resources per capita of each country and the number of employees. The two scorecards produce different results, the UK and France rank highly and Portugal poorly on the ECTA measures, while on the EURI measures France and Portugal are ranked highly and the UK has a mid ranking.

Lupi et al⁷ also use DEA analysis to assess the efficiency of European regulators. They use staff numbers and total cost of the regulator as a measure of the inputs and use the following market outcomes as a measure of regulatory outputs:

- price of 3 and 10 minute fixed telephony calls;
- price of three baskets of mobile services;
- alternative operators share of access (fully unbundled loops plus alternative infrastructure as a share of total lines);

⁶ Antonio Afonso and Carla Scaglioni, *An Assessment of the Telecommunications Regulation Performance in the European Union*, ISEG-UTL Working Paper, May 2006

⁷ Paolo Lupi, Fabio M Manenti, Antonio Sciala and Cristiano Varin, *On the Efficiency of Telecommunications Regulators*, February 2008.

- market share of alternative operators in the broadband access market;
- change in broadband penetration between 2005 and 2004; and
- ratio of the total investment in fixed telecommunications between 2004 and 2006 and total investment in the economy.

They find that the regulators in Slovenia, Austria and Slovakia rank highly on a range of measures and the Czech Republic, Hungary and Poland rank poorly.

There are also a range of issues with their approach. The distinction between shared loops (ignored) and fully unbundled loops (included) as measures of competition does not appear to be justified and assuming a direct link between regulatory decisions and the level of broadband penetration in any one year does not appear to provide a sound basis for assessing regulatory efficiency. Such an approach also shares the same issues as the ECTA scorecard as it uses performance measures that reflect the *extent* rather than *quality* of regulation.

It is unclear how both studies adjust the level of input for the different functions undertaken by regulators, for example, some telecommunications regulators also regulate postal services or broadcasting.

The literature suggests that even for jurisdictions with a common regulatory framework, the development of robust efficiency measures based on input / output DEA analysis are still at an early stage. Even if the results were robust, it would still not be possible to compare Jersey with these jurisdictions as some of the key metrics, such as the level of unbundled loops, are not relevant to Jersey.

Our framework

Our framework for considering the resources and efficiency of the JCRA is the following:

- resource, inputs and outputs – this includes both staff level and mix and the funding of the JCRA and the outputs of the JCRA;
- resource management and reporting – this is focused on the processes employed by the JCRA to plan resource use and their activities and to demonstrate accountability to stakeholder; and
- outcomes – this will compare the outcomes of the Jersey market against other markets as discussed in the benchmarking study.

These measures were instrumental in allowing the study team to form a coherent view on market outcomes, regulatory outputs and inputs / resourcing. The analysis is necessarily indicative rather than precise, reflecting both the limitations of any international comparison and the fact that the purpose of the review is to form a view about the level of resources and efficiency rather than to undertake a strategic review of the Jersey telecommunications market.

Analysis

Firstly, we propose to analyse resourcing and efficiency by considering the current and historical information from the benchmarking and interview process. Secondly, we will examine the potential impact of future issues such as privatisation, convergence, structural separation and cross-channel co-ordination.

Resources and inputs

As discussed in section 2, the JCRA has a budget of about £500,000 devoted to telecommunication regulation for 2007 and the main staff resources are a full time case officer and significant input from specialist legal and economic advisors. The total staff resources are equivalent to approximately 2 FTEs. The JCRA uses consultants and external legal advice for telecommunication regulation, as required, spending around £100,000 to £150,000 per annum. The level of resources has been fairly static over the last 3 years, with a 5% increase in funding from 2006 to 2007.

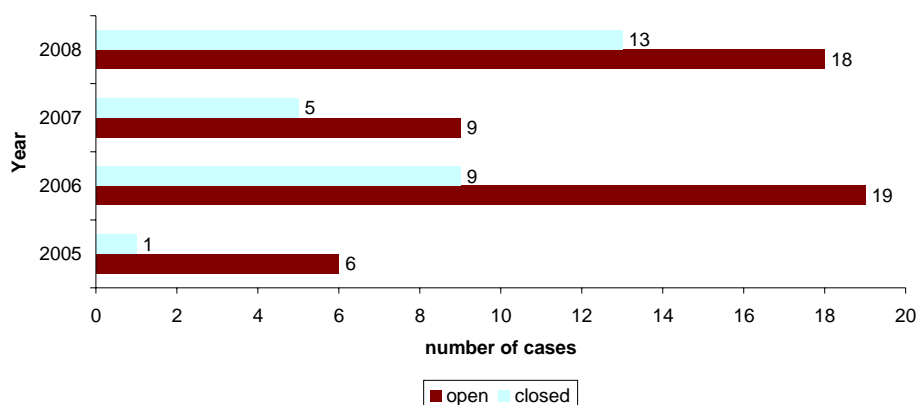
The benchmarking suggests that the budget and staffing as proportion of GDP and population of the JCRA are slightly smaller than other regulators. The JCRA also has responsibilities for postal regulation and competition, but all other regulators also have some responsibilities other than telecommunication regulation.

The Guernsey OUR has about 60% of its resources devoted to telecommunication regulation, out of a budget of £900,000 with 4 professional staff and one office manager. This equates to about a £540,000 budget for telecommunications and 2.4 FTEs. OUR has not increased the level of resources devoted to telecommunication regulation in recent years, although it has recently filled a vacancy. This suggests that similar and perhaps slightly greater level of resources for a smaller market.

Our interviews with the JCRA suggest that resource constraints do limit the ability of the JCRA to address some specific issues in a timely manner. In particular, one large scale litigation, such as the MNP case, combined with work on the sale and separation of JT, was sufficient to defer substantive work such as the review of wholesale and access by a year. Similarly, the consideration of privatisation and functional separation of JT imposed significant demands on the JCRA outside of its standard regulatory activity. It seems there could be a significant risk that major litigation or a one-off event could result in delays to more strategic activities by the JCRA. This may have significant adverse impact on the development of competition in Jersey.

The case file of the JCRA suggests a significant number of long standing open cases, the records show that the following cases remain open. We understand that the JCRA has moved from an approach where a general case file was maintained for series of complaints about an operator to an approach where case files are opened for each investigation. This is likely to result in an increase in the number of cases recorded and shorten the time required to investigate each case.

Figure 9: JCRA cases open and closed by year

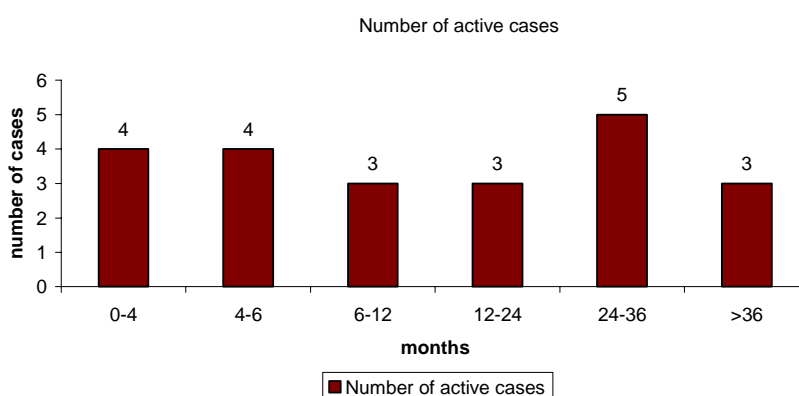


Source: JCRA data and LECG analysis

The number of cases opened in each year varies considerably. This could be due to the caseload of the JCRA may be growing and / or due to the change in approach to recording cases. However, the decline in cases in 2007 from 2006 and increase in 2008 does not appear to be due to the change in approach to recording cases. As the change in approach would result in a one-off increase in

cases. This failure to resolve cases in the year that they are opened may be due to deficiencies in legal powers as well as resourcing issues. The results suggest that the JCRA has become more effective in addressing cases as more cases were closed in recent years or the change to opening a case for each investigation has improved recorded outcomes.

Figure 10: Age profile of JCRA cases (in months)



Source: JCRA data and LECG analysis

Figure 10 describes the age profile of open cases. It is consistent with the previous graph and suggests that many cases take many months or even years to resolve. This outcome occurs despite the move to individual cases for each investigation.

In contrast, Ofcom has a target of resolving all disputes within four months and own initiative investigations within six months. In 2007, Ofcom resolved 100% of disputes within four months and 90% of own initiative investigations within six months⁸.

However, we acknowledge that some cases such as a margin-squeeze cases may raise complex legal and economic issues which regulators in many jurisdictions have struggled to deal with in a timely fashion.

Overall, in light of the evidence of delays in the work programme of the JCRA due to one-off events and litigation and the desirability that some of the measures in the next section be implemented, we consider that there is a need for the JCRA to increase its level of resources. The additional resources could be used to

progress strategic matters and to progress the investigation and resolution of complaints, while at the same time having the capacity to respond to major events or litigation.

Resource management and reporting

The key public planning and reporting documents are the annual Statement of Aims and Objectives (“SAO”, produced in draft and final form in advance of each year) and the annual report. The SAO sets out the broad aims for work areas (competition, telecommunications and postal regulation) and more detailed objectives with associated actions and their timeframe. The annual report discusses the performance of the JCRA against the objectives, although not necessarily all of the objectives set out in the SAO. For example, the 2007 SAO sets out seven objectives and the 2007 annual report records performance against three of the objectives initially stated. In particular, the SAO identifies an objective of promoting innovation and competition in broadband services and states that the JCRA will review wholesale access issues and consider whether regulatory intervention is appropriate in the period from January to June 2007. The annual report does not report anything against this objective and we understand the review has to yet to be undertaken.

The JCRA determines telecommunications licence fees in advance of each year. The EDD is not involved in approving the level of the levy due to the JCRA’s independence from the EDD. This makes the transparency of the JCRA regulatory work programme and outcomes of regulation particularly important. For the competitive activities of the JCRA, the EDD is involved in the budgetary process and therefore implicitly involved in considering the value for money provided by the JCRA.

The publication of a work programme and an annual report on performance against the workplan is consistent with best practices of many regulatory authorities. A microstate regulator is necessarily constrained in the resources it can devote to planning processes and publications. However, when considered against best practice, we note the following:

⁸ Ofcom, *Annual Report 2007/08*.

- the objectives are focused on one year ahead, with no discussion of the strategic context or an appreciation of how the objectives will contribute to the goals of the JCRA over the medium term (i.e. 3 or 4 year period);
- the objectives and proposed actions tend to be set out in vague terms that make them difficult to track and assess. We would recommend that objectives setting best practices (such as SMART guidelines) be considered instead. SMART stands for:
 - S - specific and stretching
 - M - measurable and meaningful
 - A - achievable and action-oriented
 - R - realistic and results-oriented
 - T - time-based and traceable
- while SMART objectives may not be appropriate in every context, they would assist stakeholders in understanding what action the JCRA proposes to undertake and to assess the JCRA's success. For example, the proposed action on compliance with the direction on accounting separation is to monitor and take action where appropriate and the associated timescale is the calendar year. This could be expressed in terms of a review of compliance within 4 to 6 weeks of the date that the accounts are due. A second example is the review of "other access issues" with the action of public consultation by February to June⁹. It is unclear what this review entails;
- the annual report could be used to report achievement against all objectives, whether or not progress was achieved, and the JCRA should explain any non-performance;
- KPIs and case management targets. In addition to the SMART objectives and reporting, the JCRA should develop a limited set of KPIs for its investigation of complaints that contravene telecommunications licence conditions or competition law. The JCRA should develop and publish annual KPIs based on their objectives and targets for case management of investigations. The JCRA should publish timelines for the investigation of cases and compliance with these timelines as part of the annual report

⁹ JCRA, *Aims and Objectives – January to December 2008*, January 2008.

process. This provides greater certainty to stakeholders and enhances the accountability of the JCRA to the sector;

- the JCRA does not publish a list of cases under investigation. The internet can be used to provide up-to-date information to stakeholders on cases that have been opened and when cases have been closed. This would provide increased transparency about the activities of the JCRA; and
- the JCRA publishes market statistics on a range of market outcomes. We consider that this is appropriate and desirable as it enables stakeholders to consider the JCRA's progress towards facilitating positive outcomes. However, we consider that it would be appropriate to extend publication of market share data from broadband internet access to retail voice calls, leased lines and mobile services. This will provide a more comprehensive picture of the market developments.

Outcomes

The benchmarking discussed in the previous chapter sets out how outcomes in the Jersey market compare with a range of other jurisdictions. The benchmarking suggests that prices in Jersey for fixed narrowband voice and access compare favourably with other countries, broadband pricing and leased line pricing are also reasonably close to relevant comparables.

The take up or penetration levels for broadband and mobile services is consistent with the pricing evidence and suggests that Jersey consumers are taking advantage of available telecommunication services.

Non-pricing information tends to suggest that the Jersey broadband offering lags behind other countries, with download speeds limited to 2 Mb/s and little variety in product offering. This suggests that there is little competitive pressure on JT to innovate. This may be of increasing importance as many countries move to NGA networks. It is not clear as to when this will take place in Jersey and whether Jersey will lag behind developments in other countries. NGA roll outs have been announced in many countries. For example, BT has announced the roll out of a Super-Fast broadband network to 40% of UK households over the period to 2012¹⁰.

¹⁰ David Black and Benoit Reillier, *Next Generation Regulation?*, LECG Insights, September 2008.

The market share outcomes indicate that JT is very dominant in fixed line services and dominant in broadband and mobile services, although the mobile market has the most potential for becoming more competitive given the recent arrival of a third operator and the imminent introduction of MNP. Overall, the level of dominance enjoyed by JT is consistent with other microstate jurisdictions without competing access infrastructure. However, it is much higher than advanced liberalised markets in larger states. Competition is also highly dependent on one player in the residential fixed market and two players in the business market.

Overall, our market outcome assessment is mixed – customers are currently receiving a reasonable deal compared to other markets. However, JT has a very strong market position in all markets and for the fixed market there appears to be little prospect of this outcome changing. Current wholesale regulation of voice service and broadband does not appear to be effective in promoting competition. Alternative call providers have made little inroad to the market. Only one player has entered the broadband market, they have complained repeatedly of a margin squeeze and do not appear to be continuing to effectively compete for new customers. The JCRA is to undertake a review of wholesale markets, offering an opportunity to address these issues. However, this review has been delayed due to the MNP process.

The mobile market has the strongest possibility to evolve into a competitive market. However, this may require additional regulatory intervention such as further regulation of mobile termination. We note that the JCRA is to consider mobile termination as part of the proposed review of wholesale markets.

The implications for the resourcing of the JCRA from market outcomes are mixed. The relatively favourable market outcomes associated with other microstates suggest they may not suffer significantly from the lack of regulatory resources. However, the problems associated with the lack of effective wholesale regulation of broadband and leased lines suggest that resource constraints may be impeding effective regulation. This may have significant longer term effect if the lack of competitive pressure on JT results in delays to new investment and the associated introduction of innovative services.

Future issues

Our study is forward looking and therefore it cannot solely focus on the past resourcing and performance of the JCRA. In this section we consider the impact of future issues on the resource requirements of the JCRA.

Privatisation

The interview of key stakeholders suggests diverging views on the impact of privatisation on the behaviour of JT and hence on the potential resource implications for the JCRA. JT has a reputation for acting in a commercial fashion and the well established nature of the regulatory regime suggests that privatisation may have little practical impact on the JCRA. The privatisation of incumbent telecommunications operators in other jurisdictions does not suggest that privatisation, in itself, automatically and significantly alters the behaviour of regulated firms. The relationship between the States of Jersey and JT is governed by a memorandum of understanding, covering the responsibilities of JT to inform and consult the Minister of Finance¹¹. This will no longer apply following privatisation. The regulatory strategies of the incumbent operators post-privatisation will in fact depend on a range of factors.

Privatisation could be expected to result in the following outcomes with implications for resources.

Access to regulatory expertise

Access to regulatory expertise within the other parts of the acquiring group, if JT was acquired by an another telecommunication operator. This may enhance the incumbent operator's ability to deal with and influence the regulator. For example, economic or regulatory analysis commissioned by a large telecoms group could be used to shape the regulatory debate in a way that would not be cost effective for a standalone JT. However, we note that regulation has been established in Jersey for some time and that JT appears to have been very effective in representing its interests to the regulator. In practice, therefore, this may not have a very significant impact.

Leverage

The question of whether the leverage or gearing of JT should be controlled by the JCRA has been raised by some of the stakeholders. In some cases, privatised

operators (such as BT in 2002 and eircom at present) have incurred considerable levels of debt. This may raise issues about the continued solvency of the business and the implications for consumers in the event of business failure. It may potentially result in the passing of risk from shareholders to consumers (or taxpayers), in the event of unforeseen events occur or costs not being effectively managed. Also, the risk of bankruptcy associated with high gearing levels can be used by incumbents in the context of regulatory negotiations to seek a better bargaining position. As insolvency is often deemed politically unacceptable very high gearing levels can provide regulated entities with undue negotiating power. However, the absence of cost based price cap regulation (with the exception of the retail price control, which is a safeguard cap) suggests that the risk of pass-through may be low. There may be other reasons for avoiding concerns about solvency, so this may be a new issue for the regulator to consider. A change of ownership would however trigger a review of JT's licence condition (section 2.6 c) and appropriate debt levels can be set on this occasion. The JCRA may want to consult on such possible changes prior to any privatisation in order to give regulatory visibility to interested parties.

Litigation

There is some suggestion that public ownership of JT may have resulted in more restraint during potentially litigious disputes than private ownership would have. While it is not possible to assess with precision the extent of this effect within the scope of this investigation, we note that it is not uncommon for governments to internalise conflicts by exerting pressure on the various government entities involved to solve the divergence of opinions. We note that restraint of litigation is not in itself a desirable outcome – an appeals process is an important component of a well designed regulatory arrangement. However, clearly, an increase in litigation would have resource implications for the JCRA.

Overall, we consider that privatisation would not impact the resources required for the JCRA's day to day business, although, it may increase the risk of costly litigation. The JCRA has the budgetary flexibility to address litigation, if required. This resource issue is therefore capable of being addressed within current arrangements. However, it is consistent with the findings that the existing workload of the JCRA may require additional resources and it would be important

¹¹ Memorandum of understanding between the Minister for Treasury and Resources and Jersey Telecom.

for the JCRA to ensure that litigation does not divert it from its regulatory work programme.

Convergence

Convergence raises the possibility of increasing competition between different platforms and services, it may also raise additional issues for regulation. The most obvious convergence issue emerging in Jersey is fixed / mobile convergence. Both voice calls and broadband can be provided over mobile platforms and two additional operators make mobile a potentially exciting source of competition in the Jersey telecommunication markets. However, as JT has both mobile and fixed platforms, there remains the risk that fixed mobile bundling could be used to constrain competition in the fixed or mobile markets. In the absence of an effective suite of wholesale products to offer fixed services, competing mobile operators will be ill placed to respond.

Looking further into the future, it is likely that increasing bandwidth demands for mobile data will require greater access to the fixed network – either in the current form of leased lines or possibly use of the fixed access networks if fixed and mobile telephony becomes integrated (for example, though devices that are fixed at home and mobile elsewhere). This will increase the pressure on the JCRA to ensure effective wholesale access to JT's network.

Spectrum

Convergence is also linked to the allocation of spectrum. Currently Ofcom is responsible for the allocation of spectrum within Jersey, with the JCRA responsible for granting licences to telecommunications operators. A range of alternative arrangements could be envisaged, including the transfer of Ofcom's responsibility to the JCRA.

This option could provide benefits if Jersey's spectrum management needs were to diverge sharply from the UK and required closer co-ordination with the other activities of the JCRA. While it is beyond the scope of this review to assess the merits of this option, we note the following:

- transfer of responsibility of spectrum management and licensing would require changes to both UK and Jersey legislation;
- such a change would also require significant additional resources for the JCRA, likely to be in the order of one to two additional FTEs for

telecommunications spectrum licensing (excluding broadcasting). This would need to include specialist technical expertise as well regulatory policy input and access to external expert advice on an ad hoc basis;

- there would be a loss of economies of scale with Ofcom spectrum management across the UK, Channel Islands and other Crown dependencies;
- the management of third parties' spectrum interest (such as France, the international community through the ITU and other standardisation bodies, etc.) would also need to be managed by the JCRA; and
- spectrum is not a barrier to the development of competition in the telecommunications market as there does not appear to be a shortage of spectrum in Jersey.

We note that there may be issues with the potential under-utilisation of spectrum currently allocated on a first come first served basis. We are aware that 3.5Ghz spectrum has been allocated to an operator but has not been used. In the absence of spectrum trading, transfer to parties able to use the spectrum is difficult. "Use it or lose it" clauses can be employed but raise practical difficulties, as a regulator has to second guess the appropriate speed of market development.

We do not consider that the transfer of spectrum management from Ofcom to the JCRA would improve the efficiency and effectiveness of the JCRA. While the additional resources would increase the size of the JCRA, there would be little economy of scope with the current work of the JCRA. Furthermore, taking on spectrum management may require valuable management and board attention and distract the JCRA from other core telecommunication issues.

Separation

Functional and structural separation were both raised in the JT sale process. Advice on whether any type of separation should be adopted is outside the scope of this review, however, we need to consider the potential implications of separation for resources. There a number of potential variants of separation with different implications for resources.

Functional separation

An UK style functional separation would require considerable resources to impose and maintain. The functional separation undertakings amount to over 700 pages and have required considerable efforts to update over time. Given the fixed costs associated with the separation process, such an approach does not appear to be practical in a jurisdiction the size of Jersey. In the UK and New Zealand, incumbents have spent around £70m on the one-off costs of implementing functional separation¹². There were additional ongoing costs and further costs are reflected in systems upgrades, rather than attributed to separation.

A modified form of functional separation (such as the Faroe Islands approach of separating companies while providing new entrant board representation in the network company) would require less resources to impose and maintain. This approach may be practicable in Jersey. If effective, it may require less resources for the regulator to investigate cases of discrimination. However, it is likely to shift the consideration of these issues to the board of the network operator rather than eliminate the issue entirely. There may also be issues of corporate governance to consider, in the sense that directors have a duty to act in the best interest of the company, not of its competitors.

It is likely that many legacy issues would still need to be addressed. For example, the systems of the incumbent are designed to integrate the operation of their network and retail divisions. This means that the incumbent's retail arm will have differential access to the network for legacy and potentially new services. Secondly, the culture of the network operator will take time to change and it still may show instinctive preference for its own downstream operation. Issues of discrimination and potential discrimination by the network operator will continue to need to be addressed under any system of limited functional separation along the Faroe Islands model, at least immediately following separation.

Structural separation

Structural separation of the network and retail operation would undoubtedly have considerable resource implications for JT. However, the focus of our investigation is the JCRA. The process of structural separation will raise many questions for the regulator to consider and so the separation process will require additional resources for the JCRA. For example, whether there should be any requirements

¹² BT, *Annual Report 2005* and New Zealand Telecom, *Annual Report 2007*.

on the separated network to offer equivalent access to entrants as to its former retail operation. ComReg's (the Irish regulator) initial impact assessment of the proposed separation of eircom required significant internal resources as well as external advice in excess of €700,000¹³.

On an on-going basis, structural separation may diminish issues of discrimination by the network operator. However, the legacy and culture issues discussed above will also apply to structural separation and this suggests that wholesale regulation would still be required immediately following separation.

Cross-channel regulation and co-ordination

The fact that all major operators have operations in both Jersey and Guernsey markets as well as the similarity of the challenges of introducing competition in microstates with a dominant fixed operator suggest that co-ordination of regulatory efforts between Jersey and Guernsey is important. There are a range of potential models to adopt ranging from the establishment of a common regulator to ad hoc co-operation on a case by case basis.

We are not proposing to examine the pros and cons of pan-channel regulation, except to note there would be some benefits from a regulatory efficiency perspective. These benefits include the following:

- increased economies of scale for the regulator. This is likely to reduce cost of regulation as well as to enable better quality of regulation by greater specialisation;
- reduced compliance cost for operators in only having to deal with one set of regulations across the market; and
- preventing regulatory arbitrage – where firms avoid the impact of regulation by the use of subsidiaries in other market.

The JCRA and OUR worked together to impose MNP in both markets. There is likely to be further opportunity to co-operate between the two regulators. They currently meet together on a quarterly basis. Co-operation between the regulators is unlikely to reduce the cost of operation for the JCRA, although there may be scope to learn from each other and share good practice. It has the potential to impose additional costs from meetings and joint work, but on-balance this cost

¹³ The Irish Independent, *Comreg takes on three consultants for eircom split plan*, 30 January 2008.

looks unlikely to be substantial. It has also has the potential to improve market outcomes and reduce the regulatory burden of operators and so improve the overall value for money of regulation.

We believe that even in the absence of a move to pan-channel regulation, that strategic consideration of cross-channel co-ordination is warranted. The regulators should initiate a consultation with stakeholders on the desirability and potential scope for a work programme to harmonise practices between the islands. This would seek to identify where harmonisation could benefit the markets in the short, medium and long term and the changes that could realise these benefits. Both regulators could then work to implement a harmonisation programme if it was deemed beneficial. In the short to medium term it may be possible to reduce compliance costs to firms while improving the quality of regulation.

Conclusion

The JCRA has operated with a fairly stable level of resources over the last three years. There is some evidence of outputs been curtailed by resource constraints, with one-off issues forcing the ongoing work programme of the JCRA to be delayed. Market outcomes in terms of price and penetration suggest that the JCRA has delivered a regulatory framework which has performed well against other microstates but less well compared to advanced liberalised telecommunication markets. However, the fixed market is far from competitive and a number of difficult issues need to be addressed by the JCRA in order to promote effective competition.

Future issues such as privatisation and convergence are likely to increase pressure on resources. Both structural separation and pan-channel regulation may offer potential for resource savings. However, the benefits from any structural separation are likely to be less than anticipated by some commentators due to legacy infrastructure and culture which means that discrimination issues would be likely to persist for some time in a separated environment.

Overall, our review suggests that increased resources are required by the JCRA both now and in the event of privatisation. Privatisation in itself need not result in an increase in resources required for effective regulation, although there may be some potential for increased costs associated with litigation. The focus of increased resources should be on enhancing the JCRA's ability to maintain focus

on strategic regulatory issues and to address the case load of complaints in a timely fashion.

As part of any increase in resources, the JCRA should enhance its transparency and accountability for the use of its resources by maintaining a public record of complaints received and processed and providing more detail in its annual plan on its strategy and objectives. While the detailed KPIs used by many regulators may not all be relevant and cost effectively deployed in the context of Jersey, a number of basic but important metrics should be provided to ensure a more transparent regulatory process.

6 Legal Powers

Introduction

In this section we examine the legal powers available to the JCRA. We then consider some issues arising from the way in which the JCRA in practice operates. We identify areas which could be improved by the adoption of new legislation. We also suggest possible ways in which the current legislation could be interpreted that should lead to better outcomes, whilst new legislation is debated.

Existing powers in the law

By virtue of the Competition Regulatory Authority (Jersey) Law 2001 (“CRAL”), the JCRA has the functions conferred on it by any law or other enactment. The JCRA currently acts as the postal regulator, the telecommunications regulator and the competition authority in Jersey. It is conceivable that, should another sector be liberalised, the JCRA would be responsible for its regulation.

In this report, we examine the JCRA as a telecommunications regulator, as required by our terms of reference. Although the competition law powers of the JCRA are outside the terms of reference of our review, we consider them to the extent that they have an impact on certain aspects of the powers and functions of JCRA as a telecommunication regulator.

Similarly to other telecommunications laws around the world, the TL grants powers to the JCRA to exercise certain functions, in accordance with its duties and taking into account specific factors. Logically, the duties of the JCRA are the starting point of our analysis.

The JCRA’s duties are expressed in general terms and in a hierarchy. The JCRA has a “primary duty” to perform its functions in the manner that it considers is best calculated to ensure that telecommunications services are provided to satisfy current and prospective demand (Art 7(1)).

In considering this primary duty, JCRA must take into account the factors listed in Art 7(3), broadly designed to ensure accessibility and quality of services. This primary duty is then supplemented by other duties, which oblige the JCRA, so far

as is consistent with its primary duty, to perform its functions in a manner best calculated to: (i) protect the interests of users including, when it considers it appropriate, by promoting competition amongst operators (Art 7(2)(a)); (ii) promote efficiency, economy and effectiveness in commercial activities connected with telecommunications in Jersey (Art 7(2)(b)); (iii) further the economic interest of Jersey (Art 7(2)(c)); (iv) impose a minimum of restrictions (akin to a duty to impose proportionate regulation) (Art 7(2)(d)); (v) ensure that operators have sufficient resources to conduct activities (Art 7(2)(e)); and (vi) have regard to the need of special groups of consumers (Art 7(2)(f)).

The JCRA's functions are discussed below. These can be grouped under four main headings: substantive; procedural; investigative and enforcement functions.

Substantive

Under the TL, the JCRA has the powers to:

- grant licences (Art 14) containing conditions largely to be determined by the JCRA for the purposes listed in Art 16;
- modify licences (Art 18). Contrary to a number of other regulatory regimes, the procedure for a licence modification does not differ from the general Art 11 procedure to be followed by the JCRA for the exercise of the majority of its regulatory functions (see under 'procedure' below). The JCRA also has the power to revoke licences. This power is further considered under "enforcement" below; and
- grant, refuse or revoke the approval of apparatus and contractors (Art 21).

The JCRA has the duty to survey the industry (Art 9) and to follow the "directions" given by the Minister for Economic Development (the "Minister") on the implementation of "social or environmental policies" about telecommunications. Further, it needs to consider (but not necessarily comply with) written guidance in relation to any matter relating to the performance by the Authority of its functions under the TL (Art 8(3)). Most recently, in October 2007, the Minister issued a direction under Art 8(1) in relation to the testing of mobile telephone telecommunication masts.

Under the CRAL (Art 6(4)) the JCRA "may", at the request of the Minister for Economic Development, provide the Minister with reports, advice, assistance and

information in relation to the matters of its competence. The formulation of Art 6(4), with its suggestion that the JCRA “may” provide the information, is slightly peculiar. Our interviews with stakeholders in Jersey have confirmed that it is generally understood (including by the JCRA itself) that it has to provide the advice requested by the Minister. For example, the JCRA’s January 2007 report on the “*Structure of Jersey Telecom which best promotes competition in telecommunications and thereby economic growth as a whole*” was published further to a request under Art 6(4) of the CRAL.

Although not the focus of this report, it is important to appreciate that under the terms of an entirely separate legislative instrument, namely the Competition (Jersey) Law 2005 (the “Competition Law”), the JCRA has wide ranging substantive competition law powers in the three main areas of focus of competition law. The JCRA is: an enforcer of the prohibition against anti-competitive arrangements; the authority for merger control (charged with the duty to scrutinise those mergers and / or acquisitions that meet the thresholds prescribed in the Competition (Mergers and Acquisitions) Order 2005); and an enforcer against the prohibition of abuses of a dominant position.

Article 43(1) of the Competition Law provides that enterprises (“undertakings”) can seek guidance from the JCRA on whether a proposed course of action would be a breach of the prohibition against anticompetitive agreements under Art 8(1) or amount to an abuse of a dominant position under Art 16(1). In addition, Art 9 provides that the JCRA may exempt an arrangement from the prohibition in Art 8(1). This provision obliges the JCRA to undertake quite a complex and time consuming function. The JCRA’s website lists four requests for exemption received since 2006 (the latest, in 2008, appears now to have been withdrawn).

It is noticeable that competition authorities in other jurisdictions across Europe, which originally had a similar obligation, have now been released from it. The system is now one where the companies themselves are required to self-assess to determine whether their agreements comply with the competition rules. They run the risk of being fined at a later date if the authority finds that they erred in this self-assessment.

This change was implemented largely due to the pressure on the resources of the relevant competition authorities, which detracted from other priorities such as enforcement against cartel activity. Whilst this is clearly outside the terms of

reference of this study, it is worth noting that to release the JCRA from the obligation to exempt arrangements under Art 9 of the Competition Law, and, to a lesser extent, from the duty to provide guidance under Art 43, could free resources at the JCRA.

Procedural

Under the terms of the TL, the JCRA must issue notices and consultations (Art 11) for the exercise of the vast majority of its regulatory functions. The procedure detailed in Art 11 broadly obliges the JCRA to: (i) issue a so-called initial notice of the functions that the JCRA proposes to carry out and the reasons why it thinks it appropriate to do so; (ii) give the public a chance to take part in the consultation; and (iii) state a period within which written representations may be made.

The consultation needs to last for at least 28 days and, if any third party makes any representations, the JCRA has the duty to consider all representations made and to issue a final notice. The final notice includes the details of the representations made and the JCRA's response.

We have identified three main issues with Art 11:

- the failure to distinguish between compliance and policy;
- the requirement to re-consult in the event of any change to the proposal; and
- the requirement to follow the Art 11 process for matters of clarification.

Compliance and policy

The same process is prescribed for the vast majority of the JCRA's function in the telecommunications sector, without a distinction between those functions that are of a compliance and those that are of a policy nature. Art 11 states that the JCRA must follow the prescribed procedure for the exercise of specified regulatory functions described in Art 10(1). Apart from the power to require information under Art 23 and the power to fix and recover licence fees under Art 17, it appears that the procedure in Art 11 has to be followed by the authority in the exercise of the vast majority of its regulatory functions under the TL.

In particular, there is no differentiation between those regulatory functions where the authority is exercising a policy function, where the need for input by third parties would appear to be greatest, and those functions which are of an

enforcement / compliance nature, namely issuing a direction under Art 19 (see under enforcement below). It is difficult to imagine a valid reason why the compliance / enforcement functions should be subject to such a wide-ranging duty to consult with third parties. If the goal of compliance / enforcement is to bring an operator into line with its obligations, then the relevant authority has the obligation to investigate the alleged breach properly, following transparent procedures and to require the input of other operators that may be affected during the investigation stage.

The licensee who is allegedly in breach of a licence condition should of course be given an opportunity to explain its behaviour and make representations during the investigation. If this is considered helpful, there could be a mechanism, like in other regimes, where the JCRA issues a draft decision, allows the operator allegedly in breach (and third parties) to make representations and then issues a final decision. However, it would seem odd to ask that the authority should require input from third parties or indeed the defaulting licensee on the text of the decision itself.

By way of comparison, no such requirement is prescribed under the terms of the competition law. If there was a rationale to require third party to comment on a decision, one would expect a similar requirement to apply to a decision by the JCRA about an undertaking being engaged in a cartel, say, or a decision to block a merger.

Requirement to re-consult

Art 11(10) requires that if, after considering representations or objections, the JCRA intends to change the proposal in the draft notice as to exercise, then the JCRA should start a new investigation. This requirement makes the process very iterative and unnecessarily so. This is one of the aspects highlighted in the terms of reference as a specific issue to consider and it would appear that if interpreted literally the requirements would arguably be too onerous.

At the same time, Art 11(10) itself indicates that a change “as to exercise” that would mean a change of the date when a proposal is to take effect, would not require a fresh notification. It is possible to argue that the need for a fresh notification under Art 11(10) should only apply to changes that would be somehow material, it being difficult to see how anyone could credibly object to the JCRA proceeding to a final notification where the change to the proposals in the initial

notification are not material. This is an area where guidance from the JCRA would help alleviate a perceived issue in the short term, whilst waiting for the introduction of new legislation.

Requirement to follow Art 11 for matters of clarification

The third issue concerns whether the JCRA would be obliged to follow the Art 11 procedure even for the clarification of an existing measure (such as a licence condition). For example, Art 6(5) of the CRAL gives to the Authority the power to do anything that is calculated to facilitate, or is incidental or conducive to, the performance of its functions. It appears that there should be no need to follow the Art 11 procedure when exercising this power, as the JCRA would not be exercising a specified regulatory function under the TL.

However, it could be argued that the JCRA should follow the same procedure when it is exercising a specified regulatory function or whether it is facilitating the performance of that same function. In some cases, it can be difficult to come to a conclusion as to whether the JCRA is exercising a specific regulatory function or simply clarifying an existing measure.

For example, under Condition 18.6 of their licence, licensees are required to implement a Consumer Code addressing the issues listed in Condition 18.6(a) to (e). The licensee can amend the Consumer Code (Condition 18.7) and the JCRA may issue directions to the licensee as to the changes, or directions to amend the changes or their date of implementation. If the exercise of this power is considered to be a licence modification, then the Art 11 procedure needs to be followed. If not, then arguably the Art 11 procedure does not need to be followed.

There is no clear statement in Art 16 of the TL that licence conditions may include an obligation for licensees to comply with a direction issued by JCRA under that licence condition. This differs from telecommunications laws in a number of other jurisdictions, such as Guernsey where Art 5(1)(a) of the Telecommunications Law expressly provides for licence conditions which oblige the licensee to comply with any directions issued by the regulator. If this were clarified in Art 16, then the issuing of directions could expressly be excluded from Art 11 as a “specified regulatory function”, to make it clear that the Art 11 procedure is not to be followed.

Other issues

Other than the Art 11 procedure, the TL does not require that the JCRA follow any special procedure, stick to any timetable or publish any information. It appears that the JCRA does not have informal targets or guidelines that it has to follow in the exercise of its regulatory functions, although it is understood that this is being addressed in JCRA's draft Art 7 guidelines. In addition, some stakeholders have expressed disquiet that there is no obligation on the JCRA to carry out a Cost Benefit Analysis ("CBA") when imposing an obligation on an operator. JCRA considers that the analysis required by the TL is set out in Art 7, which it follows. We recommend that the JCRA provide increased clarity of its process and the factors it takes under consideration in its assessment of proposed regulatory functions under Art 7 and Art 11 of the TL.

Investigation Powers

As regards powers of investigation under the TL, the JCRA has the power to:

- require the production of existing documents (Art 23). According to the TL, this power is limited to documents that a party could be compelled to disclose in a court of law (Art 23(3)). The JCRA has confirmed that this does not seem to present a difficulty, although, by way of comparison, this limitation is not considered necessary under the comparable powers under the terms of the Competition Law. The licensee has in any event an obligation to provide information under Condition 4 of its licence; and
- require the production of estimates, returns or other information (Art 23(1)(b)).

The JCRA does not have powers to compel an answer to questions (the JCRA has this power under Art 27(3)(b) of the Competition Law), although Condition 4.3 in the licence would seem to be wide enough to allow the JCRA to request that the licensee provides "any assistance requested by the JCRA" in relation to any examination, investigation or audit. The power to compel an answer could be included as part of a new regulatory package. In addition, the JCRA does not have, under the TL, the power to request search warrants, enter premises under a warrant, and obtain information stored in a computer. These are all powers available to the JCRA under the competition law.

Enforcement Powers

The JCRA has limited enforcement powers under the terms of the TL. Should the JCRA believe that a licensee is in breach of a licence condition, and wish to remedy this situation, it can undertake the following:

- issue a direction;
- initiate civil proceedings; and
- revoke the licence.

Direction

The JCRA can issue a direction under Art 19, specifying the conditions that the licensee is contravening and the steps required of the licensee to remedy the effects of the contravention. This provision is reminiscent of laws passed in countries which are the beginning of a liberalisation process. It was a feature of the Telecommunications Act 1984 in the UK, for example, that the regulator needed to issue a “provisional order”, to be then confirmed by a “final order”.

Issuing a direction in Jersey is an even longer process, however, requiring compliance with the onerous requirements for notices described above and contained in Art 11. In practical terms, due to the interplay between Art 11 and Art 19, the JCRA is obliged to undertake a time-consuming process in order to enforce licence obligations, involving at least the following steps: (i) investigating a potential licence breach and being satisfied that a breach is occurring; (ii) issuing an “initial notice” giving operators and third parties an opportunity to comment on the proposal to issue a direction under Art 19; (iii) considering all comments received and proceeding to issuing a “final notice”, if necessary by re-starting the process should the JCRA wish to modify the terms of the proposed action; (iv) issue a direction under Art 19 obliging the licensee to take remedial action.

Although Art 19(4)(c) specifies that the direction can be modified, such modification can only take place “by giving a new direction” (and presumably issuing an entirely new consultation). In addition, the TL specifies (Art 19(2)) that the JCRA “shall not give such a direction”, amongst others, if “the contravention of the condition is trivial” or if “the licensee is taking steps to comply with the condition and to remedy the effects of the contravention”. The scene is therefore set for a difficult exercise on the part of the JCRA. In Figure 11 below we give an example of a situation where the limitations of the procedure meant that in practice the JCRA was powerless to take action.

Civil proceedings

If the JCRA issues a direction, then, should the licensee ignore it, Art 19(8) provides for the possibility that the JCRA may bring civil proceedings, effectively asking for judicial intervention to compel compliance with the direction. This would appear to be a rather cumbersome, and potentially costly, way to ensure compliance. It is difficult to see that any authority would wish to undertake the expenses and the effort of judicial action to compel compliance with a direction in cases other than the most blatant failures on the part of a licensee to comply with a direction.

Revocation of licence

The only remedy available to the JCRA directly for non-compliance is revocation of the licence under Art 20. Licensees know that this drastic option is not a realistic threat and so this provision has very limited deterrent effect. The difficulties that this system poses in Jersey are outlined in Figure 11 below.

Crucially, the JCRA lacks the powers to fine an operator for non-compliance with a licence obligation, a regulatory power that most regimes give to their telecommunications regulators (by way of comparison, OUR, the Guernsey regulator, has the power to fine operators under Art 28 of The Telecommunications (Bailiwick of Guernsey) Law 2001). In the UK, although the Telecommunications Act 1984 did not grant the regulator the powers to fine, the system was found to require it and the power to fine operators was a prominent feature of the legislative debate leading to the adoption of the Communications Act 2003.

Third party action

Art 19(6) introduces the possibility for a third party affected by non-compliance of the licensee with a direction of the JCRA to sue the licensee for damages. One advantage of a provision drafted in these terms is that, if there is a direction, and the licensee is not complying with it, the third party would not need to prove wrongdoing. Provided that the quantum of damages is established, there would be a possibility to claim damages. The possibility to make use of this provision should perhaps be made clearer to potentially affected third parties.

Having said this, the experience in other jurisdictions that have attempted to introduce third party actions for damages is mixed. In the UK, so-called “piggy-back” actions under s. 47A of the Competition Act for breaches of the competition rules are slowly obtaining acceptance. It should be remembered that even in the

European Community, despite a twenty year campaign by the European Commission aimed at encouraging private actions for damages for breach of competition rules, private actions are rare.

It is unlikely that, in a small jurisdiction like Jersey, private actions for breach of licence conditions will become a feature of the legal landscape. The possibility of such an action has therefore limited deterrent effect. Any deterrent effect is further limited by the fact that before third parties can sue for damages, the JCRA needs to have issued a direction, which is itself a long process. Art 19(7) weakens this provision even further; it is a defence for the licensee to prove that it took all reasonable steps and exercised all due diligence to ensure compliance.

Accountability

Regulators should be accountable for their actions, not only in terms of having their decisions subject to proper appeal procedures but also in terms of properly accounting to the legislature for their actions and the way in which they carry out their functions and use their resources.

Appeals process

On the first point, namely the appeal procedures that apply to the JCRA's decisions, Art 12 of the TL deals with appeals against decisions of the JCRA as a telecommunications regulator. In broad terms, a legislator can design an appeal mechanism which is limited to "judicial review" of a decision: the courts will review decisions of the regulator to determine whether there were errors of law or procedure. This is limited to re-assessment of the facts considered by the regulator and cannot consider matters when these were not available to the regulator at the time of the decision.

Alternatively, the legislator can decide that anyone affected by a decision has the right to a full appeal on merit, giving to the judge the power to reconsider all the evidence already considered by the regulator and, in extreme cases, even substitute its own decision to the regulators. This latter route is usually followed when a specialised tribunal is established, with the necessary expertise.

Although this is not entirely clear, it appears that Art 12 of the TL is drafted to give applicants a right to a "judicial review plus". The appeal is not a full appeal on merit, but the courts are not restricted to a consideration of questions of fact or law which were before the JCRA at the time of the decision.

According to Art 13, lodging an appeal with the court can have a suspensory effect against the decision, but the regulatory measure would stand unless the court suspends it pending the appeal, in line with best practice. Art 13(7) seems an odd provision, which would suggest that an appeal against a condition by someone who is not the licence holder, amounts to an appeal against the grant of the whole licence. It may be useful to clarify the rationale for this provision, as it seems unusual.

Functions and resources

The JCRA's accountability to the States for its actions is contained in Articles 17 and 18 of the CRAL, which oblige the JCRA, broadly, to maintain and publish accounts and audit information. Although the information actually published is perhaps more limited than it could be, it appears that from a legal standpoint nothing would be gained from imposing more wide-ranging requirements.

Existing powers – some legal issues in practice

Substantive

As seen in chapter 4 above, a number of stakeholders consider that the JCRA may be too focussed on exercising its competition law powers, rather than prioritising the use of regulatory tools. A stakeholder made the point that unless regulation is properly established and enforced, and compliance monitored, there may never be a competitive environment in which it makes sense to apply competition law powers.

This may be true but as the analysis above shows, the JCRA's competition powers are so much more wide-ranging than its powers under the TL, so as to skew what should be a balanced use of both sets of powers in favour of the competition law powers. So, when stakeholders point out that a number of complaints against JT under the competition rules remain open after a number of years, they may not fully appreciate the complexity of proving a competition law case (especially in cases of margin squeezes) and the difficulty facing the JCRA in looking for an alternative (regulatory) basis for intervention.

The experience from other jurisdictions shows that regulators with concurrent competition law and regulatory powers in the telecommunications sector would naturally tend to use the regulatory tools (which can be deployed faster and usually with a lower evidential threshold) more often than the competition law powers, even though these may be more wide-ranging.

The following is an extract from a supplementary memorandum presented by David Edmonds, the then Director General of Telecommunications in the UK, to a UK Parliamentary Select Committee on Public Accounts in 2003. The context is the use of Oftel's powers in the investigation of a complaint by a company called Vanco against BT. The question was why had the regulator chosen to pursue BT under the telecommunications powers of enforcement rather than the competition law powers. The full text of the memorandum is available at:

<http://www.publications.parliament.uk/pa/cm200304/cmselect/cmpublicacc/405/3111014.htm>

“Oftel opened its investigation on 11 December 2002 and closed it on 3 March 2003. Oftel considered carefully the options available to conduct the investigation and decided to investigate the matter under the Telecommunications Act 1984. This was also the stated preference of the complainant after taking its own legal advice. I chose to use this instrument, which did not contain any provision to impose financial penalties on discovery of a breach of BT's licence conditions, rather than our Competition Act powers because:

- *The lower threshold for a Provisional Order to tackle a breach of the Telecommunications Act (loss or damage to an affected party) was met, and therefore action could be taken much more quickly under this route.*
- *The Competition Act threshold for interim measures which, if met, would allow Oftel to take enforcement action at an early stage in its investigation and prevent further potential abuse was unlikely to be met in this case, as the harm to Vanco, although real, would probably not have met the test of the prevention of "serious, irreparable damage to a particular person or category of person" set out in the statute.*
- *It was considered that more than one instance of this practice may have been required to constitute an abuse under the Competition Act. To have sought such evidence would have delayed resolution on this case and, as we indicated to the Committee, subsequent investigation did not reveal any similar cases or patterns of behaviour by BT or the agents it used.*

The Communications Act 2003 came into force on 25 July 2003 after Oftel closed this investigation. Under the new Act Oftel (and Ofcom) has the power to fine if a breach persists following notification of a breach by Oftel (or Ofcom). Oftel argued

strongly for this power in the course of debates on the White Paper and draft Bill which preceded the statute.”

Procedural

Procedurally, as indicated in section 5, it appears that the JCRA could do more to ensure that regulatory action is transparent and that stakeholders are well informed about its activities. This could involve the publication of KPIs, market information and the compliance of operators with significant market power with their licence conditions.

In particular:

1. The JCRA should publish a forward looking annual plan with specific and measurable objectives (see note on SMART objectives in section 5 on Resources and Efficiency). It should publish a report on its performance against these objectives as part of its annual report.
2. The JCRA should publish guidelines as to the process and timelines for an investigation of a case.
3. The JCRA should publish information about cases opened, closed and progress in investigations on a regular basis.
4. The JT separated financial accounts should be published (ie made publicly available), unless there are compelling reasons not to do so. Non-publication of separated accounts appears to be a significant departure from international best practice (including UK, Ireland, etc.). The publication of separated accounts promotes transparency and enables market participants to scrutinise compliance with licence conditions by JT.
5. The JCRA should inform the operator which is the subject of a complaint, about the nature of the complaint, as far as it is practical to do so. Accordingly, the JCRA should be expected to send a copy of the complaint to the operator whose behaviour is being investigated in all but exceptional circumstances.

Legally, there does not appear to be a duty imposed on the JCRA to publish a CBA for its proposed regulatory intervention. JT indicated that in their view the fact that the JCRA's duties in Art 7(2) are stated to be “duties in the manner best calculated to” (achieve a stated objective) implies a duty on the JCRA to produce a full CBA in all cases. However, we consider that if the legislator intended to impose such a wide-ranging obligation on the JCRA, this would have been

properly stated in a legislative measure. In any event, we recommend that the JCRA has due regard to the costs and implications for affected parties in its assessment of proposed regulatory functions under Art 7 and Art 11 TL. The potential resource implications of these proposals have been noted in section 5. From a legal perspective, there appears to be no reason why the JCRA could not implement measures leading to greater transparency immediately. We understand that work to increase transparency is currently underway at the JCRA.

Investigation and enforcement

The issues associated with the attempt by the JCRA to impose MNP is an example of the shortcomings of the current regulatory framework. The following chronology of events in the MNP case illustrates the difficulties faced by JCRA and the way in which being able to provide a pan-Channel Islands solution may help in some cases:

- 1 May 2007 – the JCRA issues Initial Notices to modify the licences of JT, Airtel-Vodafone and C&W to require the introduction of MNP;
- 13 August 2007 – the JCRA issues Final Notices that the JCRA would proceed with licence modifications requiring the operators to implement MNP within five months from when the modification took effect;
- 6 September 2007 – JT filed a Notice of Appeal under Art 12 TL. The modifications to JT's licence were suspended while the appeal was heard. The JCRA therefore suspended implementation for all three licensees for the same duration;
- 17 December 2007 – JT and JCRA agree to adjourn the hearing in order to consider a potential pan-Channel Islands solution to MNP;
- 8 February 2008 – agreement is reached for the introduction of MNP on a pan-Channel Islands basis (the JCRA and the Guernsey regulator co-operated to achieve this result) by 1 December 2008; and
- 14 March 2008 – Initial Notices issued to the three licensees to modify their licences to introduce an MNP obligation from 1 December 2008. The preparations seem to be on track to meet this deadline.

Other examples are maybe less high profile but illustrate the daily difficulties associated with investigation and enforcement. For example, Figure 11 gives details of the issues raised by the JCRA's attempted enforcement of JT's licence

condition for what could be considered a relatively minor breach, namely non-publication of pricing information. This is a breach that a regulator with appropriate regulatory powers should be able to tackle.

Figure 11: an example of the difficulties with the current procedures

Under Condition 33.1 of its licence, JT must publish any new prices, any discounts on published prices and any “special offers” 21 days before they come into effect.

Between April and October 2006, JT made a number of price changes, discounts and special offers, but it appears that it failed to publish them 21 days in advance, thus breaching Condition 33.

In November 2006, the JCRA published an Initial Notice under Art 11(1) of the TL stating what the breaches were and that it was going to issue a direction under Article 19, requiring JT to comply with Condition 33.

JT submitted its observations regarding the allegations of breach of Condition 33. It made the point that those breaches were either not really infringements or alternatively that they were trivial under the terms of Art 19(2).

Having considered the observations of JT, JCRA published a Final Notice under Art 11(4) TL.

The Final Notice stated that JT’s infringement might have been based upon a misunderstanding of Condition 33 and so, in the interests of “proportionality” and instead of issuing a direction requiring compliance, the JCRA would instead publish a Guideline on Condition 33, which would describe the types of price changes and discounts which are covered by Condition 33.

The issue of cross channel co-operation

The MNP case highlights the importance of pan-island co-operation between Jersey and Guernsey. From a legal perspective, there is nothing in the legislation that would prevent informal co-operation of the type which is already occurring between the two regulators.

Future issues

Privatisation

As mentioned in other parts of this report, a number of stakeholders have pointed out that privatisation may herald a period of more aggressive action by JT than has previously been the case. The point has been made in section 5 and elsewhere that privatisation may result in a more litigious environment, in which any shortcomings in the powers available to the JCRA will become even more apparent. Therefore, the need to ensure that the legal powers are appropriate and proportionate as recommended in this report will be even more acute if privatisation were to occur.

We have discussed previously (see impact of privatisation section in section 4) the need to ensure that measures are in place to allow for intervention and proper consideration of issues with leveraging of a newly privatised JT. The legal mechanism by which JCRA could impose measures to limit the amount of leverage would be the change of control provisions in the licence (Conditions 2.5 and 2.6). We consider that these provisions are sufficient to ensure that on a change of control, new conditions are imposed on the licensee to deal with this issue.

Convergence

In a number of countries, regimes are being implemented in which a regulator is granted powers not only in telecommunications but also in broadcasting. This provision ensures that the operations of mobile and fixed telecommunications systems is subject to as much as possible the same scrutiny by the same regulator as broadcasting (television and radio). If regulation of content is an issue, then the converged telecommunications / broadcasting regulator will also deal with issues of content regulation across the various platforms. Regulation of content does not appear to be an issue in Jersey, where in any event content is

regulated by Ofcom. Further, the research and interviews conducted for the preparation of this report have not shown that stakeholders feel the need for local radios or local cable operators to be subject to rules similar to the rules to which telecommunications operators are subject. Conceivably this could become an issue in Jersey and therefore it may be advisable to keep the matter under review.

Structural separation

The view has been expressed that the JCRA lacks the powers to mandate structural separation of JT should it conclude that it is necessary to do so. It would appear that this is not strictly the case from a legal perspective, as it is at least theoretically open to the JCRA as the competition authority to order structural remedies as a way to address abuses of dominance.

Under the Competition Law, the JCRA has the power to make orders in this way. The reason why this possibility is referred to as “theoretical” is that there are few precedents. The lack of precedents is one reason for the debate at the European level in favour of introducing structural separation as a specific remedy available to the regulators in the new telecommunications regulatory package. It would be possible to adopt similar legislation in Jersey to specify the availability of the remedy in the future.

An alternative would be to give the JCRA the powers to carry out sectoral investigations under the competition rules, which the JCRA currently lacks. In the UK, there is precedent for functional or structural separations to be carried out as a result of such investigations. The creation of Openreach within BT, a form of functional separation¹⁴ was achieved as a result of a market investigation under the Enterprise Act in the UK.

An analysis of the competition powers of the JCRA is beyond the scope of this report. The power of the JCRA could be extended under the competition rules to allow for a more rounded approach to matters of competition and regulation. The extension would allow the authority to carry out market reviews (not just in the telecommunications sector) where, due to structural reasons, competition may not be working as desired. But, without the implication that this may be due to any dominant operator abusing its market position. Under this approach, the JCRA would clearly have the power to order structural separation, but only in cases

¹⁴ This is not a structural separation as Openreach, BT Retail and BT Wholesale are all fully owned by BT Group

where a market investigation shows that this would be advisable, with all the safeguards afforded by the system by way of appeals against the decision of the authority.

Key findings

1. Our review suggests that the enforcement process in Jersey is slow and cumbersome. The need for a process involving initial notice, followed by final notice, followed by a determination hampers effective regulatory intervention. This is especially the case where the regulatory function exercised by the JCRA is an enforcement / compliance one.
2. In all cases, consultations can be unnecessarily protracted due to the need or perceived need to start with a fresh draft notice when the JCRA intends to make any changes to its original proposal.
3. The deterrent effects of the existing regulatory measures are very limited. The possibility to fine operators for a breach of a licence condition is a well recognised regulatory tool currently not available in Jersey.
4. Legally, there is nothing stopping the JCRA from introducing greater transparency to its activities or guidelines as to how it will interpret the law.

7 Conclusions and Recommendations

Conclusions

Our review suggests that the JCRA appears slightly under-resourced for its telecommunications regulatory activities compared to other microstates regulators. In the future, the potential market development scenarios such as the possible privatisation of JT, also suggest that an increase of resources may assist the JCRA in carrying out its mission.

We note that, in terms of market outcomes (e.g. price levels and structure, penetration, service quality and range) Jersey compares relatively favourably with the other countries selected in our analysis. This is despite a lack of competition in a number of markets, such as fixed telephony, where JT is still very dominant. We note also that wholesale product offerings seem underdeveloped compared to other markets and may hinder the development of competition in Jersey. Mobile telephony however has seen the entry of powerful players and the introduction of number portability may enhance mobile competition.

The stakeholders we interviewed all praised the quality of the relationship they had with the JCRA but also highlighted a number of shortcomings associated with the regulatory process, resources, functions and legal powers of the authority. Many were able to compare and contrast their experiences of the regulatory framework of the States of Jersey with the rules and regulations in Guernsey. Generally it was felt that some of the features of the Guernsey framework would be a welcome addition to the Jersey regulatory regime. Our review suggests for example that more powers would strengthen the JCRA's ability to effectively regulate the telecommunications market.

Transparency and accountability were also important themes in our interviews and most stakeholders expressed some concerns regarding the opacity of the decision making process, regulatory accounts, long term objectives and case handling process, especially compared to other regulatory authorities.

Finally, our review of the powers, functions and resources of the JCRA suggests that a number of steps could be taken to improve regulatory effectiveness in the States of Jersey. We summarise our recommendations in the next section.

Summary of recommendations

1. Our review provides evidence that additional regulatory resources would strengthen the JCRA's ability to effectively regulate the sector. This is desirable whether or not JT is privatised, but will have particular relevance in the event of the privatisation of JT. Such additional resources would ensure that strategic regulatory projects and activities are not cancelled or delayed as a result of other unplanned events or legal action.
2. Our review shows that increased transparency and accountability would enhance the effectiveness of the regulatory process. We therefore recommend that in carrying out its functions, the JCRA publishes additional information regarding:
 - a. the strategic context within which it sets its yearly objectives;
 - b. the details of the objectives it sets itself and measures against which success will be assessed (KPIs);
 - c. an up-to-date list of cases under investigation (an ongoing requirement); and
 - d. market statistics on a range of market outcomes including market share information on broadband internet access, retail voice calls, leased lines and mobile services.
3. We recommend that the procedure in Art 11 be reconsidered. We recommend that the need for an initial notice, followed by a final notice be superseded by a less prescriptive regime. This regime would impose on the JCRA an obligation to consult on proposals before the proposals become final but with no provision as to the need for a fresh notification should the authority decide to change the proposals (repealing Art 11(10) in its entirety). Generally applicable principles of judicial review or "judicial review plus" should be sufficient to give protection to affected parties should the regulator decide to implement a measure totally out of line with the proposals on which the regulator had originally consulted.
4. We recommend that any wide-ranging duty to consult (in recommendation 3 above) should be restricted to those regulatory decisions that serve a "policy"

function. The JCRA needs to be able to issue decisions when exercising its compliance / enforcement powers (such as the power to fine for breach of licence conditions) in a timely manner and without a stringent duty to consult on the terms of a decision

5. We recommend that whilst any necessary legislative changes go through the States, it is recommended that the JCRA consider issuing guidance on the way that it intends that Art 11(10) should be interpreted.
6. We recommend that the JRCA be granted the power to fine operators in breach of a licence condition up to 10% of turnover, in line with other jurisdictions.
7. We recommend that the JCRA has due regard to the costs and implications for affected parties prior to exercising regulatory functions under Articles 7 and 11 of the TL.
8. We recommended that JT's separated accounts are published (i.e. made publicly available) by the JCRA. JT should be free to make representations to the JCRA as to the confidentiality of such information.
9. We recommend that there is a provision for the JCRA to publish clarification on a licence measure. Such a provision would enable the JCRA to circumvent cumbersome licence modification procedures without being faced with the accusation that it was unlawfully avoiding Art 11. The ability to clarify the position in relation to licence conditions would also serve the interests of legal certainty and ensure improved compliance.

Appendix I: Data Sources and References

Population and GDP Data:

CIA, *The World Fact Book* –

<https://www.cia.gov/library/publications/the-world-factbook/geos/mt.html>

Revenue, Expenditure and number of staff:

Liechtenstein: *Bericht zur Landesrechnung 2007*

Guernsey: *Office of Utility Regulation Annual Report and Accounts, 2006*

Jersey: *Jersey Competition Regulatory Authority, Annual Report 2007*

Barbados: *Fair Trading Commission, Annual Report 2007*

Malta: *MCA – Annual Report and Financial Statements, 2007*

Cyprus: *OCECPR – Annual Report, 2007*

Ireland: *ComReg, Annual Report Year Ended June 2006*

UK: *Ofcom Annual Report 2006/07*

Output

All data derived from annual reports

Outcome

Broadband and Mobile penetration:

Liechtenstein: *Amt fuer kommunikation, Oeffentliche Konsultation, Analyse Breitbandmarkt (M12), April 2008* and *Amt fuer Kommunikation, Analyse des Vorleistungsmarktes für den Zugang und die Originierung in öffentlichen Mobiltelefonnetzen (M15), Juli 2008*

Guernsey, Jersey: Interviews

Barbados, Malta, Cyprus, Ireland, UK: ITU, *ICT eye, 2007*

Market Share of Incumbents:

Liechtenstein: *Amt fuer kommunikation, Oeffentliche Konsultation, Analyse Breitbandmarkt (M12), April 2008* and *Amt fuer Kommunikation, Analyse des Vorleistungsmarktes für den Zugang und die Originierung in öffentlichen Mobiltelefonnetzen (M15), Juli 2008*

Guernsey, Jersey: Interviews

Malta, Cyprus, Ireland, UK: *Commission of European Communities: Progress Report On the single European electronic communications market 2007 (13th Report)*

Interconnection prices:

Liechtenstein: RIO -

<http://www.telecom.li/CFDOCS/cmsout/admin/index.cfm?GroupID=171&MandID=1&meID=1065&>

Guernsey: RIO - <http://www.surecw.com/guernsey/page-614>

Jersey: RIO - <http://www.jerseytelecom.com/templates/LayoutB.aspx?id=663>

Barbados: RIO

Malta, Cyprus, Ireland, UK: *Commission of European Communities: Progress Report On the single European electronic communications market 2007 (13th Report)*

2 Mb/s retail offer:

Liechtenstein: (5 Mb/s) LTN website –

<http://www.telecom.li/cfdocs/cmsout/admin/index.cfm?GroupID=171&meID=263>

Guernsey: Sure website – <http://www.surecw.com/guernsey/page-1451>

Jersey: (20 GB allowance) Jersey Telecom website –

<http://www.jerseytelecom.com/templates/LayoutB.aspx?id=184>

Barbados: C&WG website –

<http://www.caribsurf.com/services/access/cwbroadband/packages.cfm>

Malta: Go website – <http://www.go.com.mt/Default.aspx?ID=1094>

Cyprus: (1 Mb/s) CYTA website –

<http://www.cytawebshop.cyta.com.cy/OrderAndBilling/ProductsAndServices/ProductG3.aspx?id=14>

Ireland: (3 Mb/s) eircom website –

http://www.eircom.ie/cgi-bin/bvsm/bveircom/bladerunner/showContent.jsp?BV_SessionID=@ @ @ @1556068941.1224071307 @ @ @ @&BV_EngineID=cccdadefgkkkidicefeceiedffndffj.0&cid=BroadbandAlwaysOnRes&site=Res&chanId=-536889713&storeChanId=-536889713&clickIdAction=addClickID_gateway&clickIdTo=/bveircom/bladerunner/showContent.jsp&clickFrom=/bveircom/viewOnlineForm.jsp&clickFromCID=null&clickFromCategory=null

UK: (virtual 18 month contract) BT website –

http://www.productsandservices.bt.com/consumerProducts/displayCategory.do;JSESSIONID_ecommerce=L1ZfHPQWGxbpGL0PWjmhJz0vH63FwpyGLPF7w7SX RJm17QNZGJwp!-636293324?categoryId=CON-TOTAL-BB-R1

Leased Lines:

Liechtenstein: No data available

Guernsey: (Within Guernsey, 3 years) Sure website –

<http://www.surecw.com/guernsey/page-639>

Jersey: Jersey Telecom website –

<http://www.jerseytelecom.com/templates/LayoutB.aspx?id=1545>

Barbados: Interview

Malta, Cyprus, Ireland, UK: *Commission of European Communities: Progress Report On the single European electronic communications market 2007 (13th Report)*

Access Line:

Liechtenstein: LTN website –

<http://www.telecom.li/cfdocs/cmsout/admin/index.cfm?GroupID=171&meID=241>

Guernsey: Sure website – <http://www.surecw.com/guernsey/page-695>

Jersey: Jersey Telecom website –

<http://www.jerseytelecom.com/templates/LayoutB.aspx?id=1716>

Barbados: C&WB website –

http://www.candw.com.bb/barbados/products/voice/fixed_line.html

Malta: GO website – <http://www.go.com.mt/Default.aspx?ID=282>

Cyprus: CYTA website –

<http://www.cytawebshop.cyta.com.cy/OrderAndBilling/ProductsAndServices/ProductG3.aspx?id=1>

Ireland: eircom website – [http://www.eircom.ie/cgi-](http://www.eircom.ie/cgi-bin/bvsm/bveircom/bladerunner/showContent.jsp?BV_SessionID=@@@@1153341141.1224077214@@@&BV_EngineID=ccccadefgkkidhcefeceiedffndffg.0&cid=FirstHomePhoneLineRes&site=Res)

[bin/bvsm/bveircom/bladerunner/showContent.jsp?BV_SessionID=@@@@1153341141.1224077214@@@&BV_EngineID=ccccadefgkkidhcefeceiedffndffg.0&cid=FirstHomePhoneLineRes&site=Res](http://www.eircom.ie/cgi-bin/bvsm/bveircom/bladerunner/showContent.jsp?BV_SessionID=@@@@1153341141.1224077214@@@&BV_EngineID=ccccadefgkkidhcefeceiedffndffg.0&cid=FirstHomePhoneLineRes&site=Res)

UK: BT website –

<http://www.productsandservices.bt.com/consumerProducts/displayCategory.do?categoryId=CON-TOG-OPT-R1>

Local call charges:

Liechtenstein: LTN website –

<http://www.telecom.li/cfdocs/cmsout/admin/index.cfm?GroupID=171&MandID=1&melD=237&Lang=1&SubCategory2ID=210&ObjectID=473>

Guernsey: SURE website – <http://www.surecw.com/guernsey/page-997>

Jersey: Jersey Telecom website –

<http://www.jerseytelecom.com/templates/LayoutB.aspx?id=237>

Barbados: No data available

Malta, Cyprus, Ireland, UK: *Commission of European Communities: Progress Report On the single European electronic communications market 2007 (13th Report)*