

# STATES OF JERSEY

## Economic Affairs - Telecom Privatisation Sub-Panel

TUESDAY, 19th DECEMBER 2006

**Panel:**

Deputy G.P. Southern of St. Helier (Chairman)

Senator B.E. Shenton

Deputy G.C.L. Baudains of St. Clement

Deputy J.G. Reed of St. Ouen

Deputy J.A. Martin of St. Helier

Mr. D. Parker (Adviser)

**Witnesses:**

Mr. B. Brown (Executive Director, Jersey Competition Regulatory Authority)

Mr. C. Webb (Legal Adviser, Jersey Competition Regulatory Authority)

**Deputy G.P. Southern:**

Well, welcome again to this Scrutiny Panel investigating the potential sell off of Jersey Telecom. I am aware that we met once already and that we want to explore just a relatively small number of issues -- that we do not repeat ourselves. Just to start it off, could you tell us what your legal powers are in relation to the privatisation - or possible privatisation - of Jersey Telecom and in what ways you are permitted to intervene in that process?

**Mr. B. Brown (Executive Director, Jersey Competition Regulatory Authority):**

Yes. Our powers are basically 2-fold. First of all we have an advisory role. As you may know, we have been asked by the Minister for Economic Development to advise him on whether there are ways the proposed sale could be structured in a way which would benefit competition and/or economic growth. We are currently engaged in that exercise. Our second role would arise if and when an acquisition or proposed acquisition of Jersey Telecom is made and that would require to be notified to us for approval under the Competition Law. So, those are the 2 roles which the JCRA has in this proposed sale.

**Deputy G.P. Southern:**

It seems to me it has not been made clear to us yet, but at what stage might you be invited in to discuss competition issues in the process of filing down a bit; arriving at the final bit.

**Mr. B. Brown:**

Well, the normal process in terms of acquisitions which are notified to us is that when parties are at the early stages of reaching agreement on the terms of a sale and they realise that they have to come to us

for a prior approval, they would typically come to us for an informal discussion as to what the prospects of approval were; what sort of information the JCRA would need in considering the application; what the sort of timescale is likely to be and so on. So, that would be typically the stage at which we would first become involved.

**Mr. C. Webb (Legal Adviser, Jersey Competition Regulatory Authority):**

If I could just add something to that. In the Competition Law, the merger rules, we cannot give guidance with respect to just hypothetical or proposed acquisitions. How we have interpreted that in the past is we allow parties to file -- they do not need to wait for definitive merger agreement between the parties. We allow them to file. They at least have to be at the stage of a signed Memorandum of Understanding or letter of intent or similar - heads of terms agreement - between the parties before they can file a merger form.

**Deputy J.A. Martin:**

When you say “timescale” from that point on, what would be the timescale?

**Mr. C. Webb:**

For review?

**Deputy J.A. Martin:**

Yes.

**Mr. C. Webb:**

Our mergers and acquisitions guidelines say that for a merger that does not appear to create competition issues, we try to reach a decision within 30 days of a complete application being received. For a merger that does raise competition questions, again, the test is whether the merger substantially lessens in competition in Jersey or any part thereof. For applications that do create considerable questions in that regard, our guidelines state we can take an additional 4 months, potentially 5 for particularly complex transactions or if the parties offer commitments to basically resolve our concerns.

**Deputy J.A. Martin:**

So, up to 6 months?

**Mr. C. Webb:**

Up to 6 months for a complex transaction, yes.

**Mr. B. Brown:**

Those are not binding. Those are kind of target dates.

**The Deputy of St. Ouen:**

Could I ask, regarding the initial first step - informal discussions - has any department of the States, individual, come to you to engage any formal discussions regarding possible conflict; a party that may be interested in purchasing Jersey Telecom?

**Mr. B. Brown:**

We have not, as of today, had any formal approaches in that regard. I mean, the subject of potential acquirers has come up in very informal discussions but there has been no request for a meeting to discuss the details of any particular acquisition.

**The Deputy of St. Ouen:**

Have you given any indication as to who may be suitable and who definitely would not be suitable?

**Mr. B. Brown:**

No.

**The Deputy of St. Ouen:**

If you were asked, would you be able to give that information?

**Mr. B. Brown:**

If the parties came forward, or if Jersey Telecom and/or a proposed acquirer came to us and asked us what we thought about a particular combination, yes, we would be able to express an informal view but we would not be able to give any definitive view without a full merger application with all the facts in front of us.

**The Deputy of St. Ouen:**

Can I just explore this avenue further? Obviously we are well aware that there are a number of companies currently with licences providing services on this Island and also in Guernsey. It has been suggested that, for instance, Cable and Wireless may be or could be a prospective purchaser. Now, obviously I would be interested to know your view on that particular aspect. You have got a major monopoly-type position - dominant position - in Guernsey; a major company over here. If they turned around and said: "We wanted to buy Jersey Telecom" what would be your initial view and concern?

**Mr. B. Brown:**

Well, I think it would be first to advise the parties on that. I am not sure how appropriate it would be for us to give the Panel our views on that particular situation if that arose. Just on an objective basis, there are competition issues obviously which would need to be looked at, but beyond that I do not think we

can say much.

**Mr. C. Webb:**

Would it be helpful, Deputy Reed, if I just went through somewhat the process and the factors we would look at and that kind of thing?

**The Deputy of St. Ouen:**

Yes, please.

**Mr. C. Webb:**

In our M and A (mergers and acquisitions) guidelines, again the test is: does the merger substantially lessen competition in Jersey or any part thereof? The procedure we go about doing that is defining relevant product and geographic markets like, say, mobile telephony, fixed telephony, in Jersey. In looking at the horizontal overlaps between the parties subject to the merger: who else is in the relevant markets? So let us just say company A, company B had 50 per cent/50 per cent of the market, that leads to 100 per cent. That is interesting to the analysis but it is not the end of the analysis because then we go on and say: "Well, what are the barriers to entry into the market; whether that dynamic affects the market; you know, are new technologies coming in that could prevent the parties from acting anti-competitively?" We also go on and look at, well, what are the other pro-competitive efficiencies the parties are promising from the transaction? So, it is kind of the first stage is to define all the markets, look at the overlaps, but the end result, based on what the dynamic effects on the market and the efficiencies, the guidelines say we look at the merger and the competitive effect it has on a whole in the round. At the end of the day we have to say: "Is this a good or bad transaction for the consumers?"

**The Deputy of St. Ouen:**

Right. Just so, again, I get it clear in my own mind, currently it is not your belief that there are any competitors within the marketplace at the moment that would be discounted or unable to compete for the purchase?

**Mr. B. Brown:**

We could not say that in advance. We would not discount anybody in advance. Any proposed transaction would be looked at with the criteria which Charles has just described.

**The Deputy of St. Ouen:**

Could I go on to say, what account will you take - or discussions will happen - between yourselves and the Guernsey regulator with regard to Jersey Telecom and the sale of?

**Mr. B. Brown:**

I think our primary duty - in fact, our only role in respect of the Jersey Competition Law - is to look at the effect on the Jersey market. So, I am not quite sure how relevant it would be for us to engage in discussions with the Guernsey regulator. If the Guernsey regulator came to us with inquiries about a transaction that had been notified to us for approval, then we may or may not be able to answer any queries that they put forward but as far as our own law is concerned, it is difficult to see how the Guernsey regulator would be relevant to assessing the effect on competition in Jersey.

**The Deputy of St. Ouen:**

Just thinking, obviously we are aware that Jersey Telecom has a subsidiary I believe in Guernsey and now obviously -- I mean, we are talking hypothetically here but if Jersey Telecom was sold as a whole, it obviously would include the subsidiary in Guernsey.

**Mr. B. Brown:**

Yes.

**The Deputy of St. Ouen:**

I just wondered what consideration do you give or whether that is, as you said, in the isolated case of Jersey only or whether you do consider that aspect.

**Mr. B. Brown:**

No, our assessment would have to be based on the effect on the Jersey market. Now, if it was the case that Guernsey had their own competition law, then the transaction may, depending on the identity of the purchaser, have implications on the Guernsey market. In those situations you can imagine that there is more scope for discussion and if one authority was minded to block the transaction and another authority was minded to allow it, then that may give rise to a difficult situation for the parties and there may be scope for engaging in discussions to try and resolve that. But the current situation is that Guernsey does not have a competition law and my understanding is that under the Guernsey Telecoms Law they would not have the same power to review such a transaction.

**Mr. C. Webb:**

They may have some power to review it under a licence condition, change control of a licensee. There is a power in our licence for that, but you are right, there is no mandatory merger filing under the Guernsey competition law and there is no -- the test we would apply in Jersey, to substantially lessen the competition, would not, I believe, be the same test that would be applied in Guernsey because there is no competition law in Guernsey.

**The Deputy of St. Ouen:**

So, how does the licence aspect fit in to your acquisitions and mergers determination? In other words,

you make a decision but then obviously we are aware that licences cannot just be transferred; you have control over that.

**Mr. B. Brown:**

Well, if it is an acquisition of Jersey Telecom itself, Jersey Telecom has a parent/subsidiary relationship with its Guernsey operation so one would imagine that an acquisition of the Jersey Telecom group would include the acquisition of the Guernsey subsidiary so, as I say, I find it difficult to see how the Guernsey regulator would have --

**The Deputy of St. Ouen:**

But I am speaking locally. We are aware that you issue licences and that your licences cannot be simply transferred from one company to another without obviously your control.

**Mr. B. Brown:**

Yes. Well, we are not talking here about the transfer of a licence as I understand it. We are talking about the acquisition of a company which already has a licence.

**The Deputy of St. Ouen:**

Right, okay, so it would be the sale of Jersey Telecom to an existing company that would have a licence?

**Mr. B. Brown:**

That is my understanding, yes.

**Deputy J.A. Martin:**

Can I just come in there about Guernsey not having competition? In your last transcript you stated that most of you, JCRA, are competition experts and Charles Webb too, is he?

**Mr. B. Brown:**

Yes.

**Deputy J.A. Martin:**

As our competition lawyer, can you explain to me - I know there is obviously a big difference - your background, and you class yourself as expert in competition. But we were told by the Treasury Minister we need experts in regulatory -- regulating the new telecoms markets. Would you say or explain the difference to me?

**Mr. B. Brown:**

Well, the JCRA is both the competition authority and a regulatory authority. The roles to some extent overlap in the sense that competition law is designed to maintain/promote competition and the Telecoms Law has a primary objective to -- sorry, not a primary objective, but one of the objectives of the Telecoms Law is to promote competition wherever appropriate. So, there is an overlap between the 2 and I would regard JCRA and its staff as being experts in both regulation and competition law.

**Deputy J.A. Martin:**

Then you go on to say later on that you do not know further down the line how much competition the market in Jersey can sustain. Basically you say you will have to wait and see how it pans out. I think what Deputy of St. Ouen was saying, we very likely could end up with a takeover and have one company in the telecoms market in Jersey 2 or 3 years down the line and we have concerns about the regulatory powers and the money you would need to regulate one multinational company.

**Mr. B. Brown:**

I think there are perhaps 2 separate issues that you have raised there. One is the concern about having a single telecoms operator. Well, in a sense, that is what the mergers powers in the Competition Law are there to safeguard against. I mean, it may be that if the economics of the market are such that only one operator can be sustained then that is one thing, but if there are 2 separate competitors at the moment who decide to merge then that is clearly an issue that we would need to look at under the merger rules and we would have the power to block that transaction if we believe that the effect was going to be to reduce competition to such an extent that prices to consumers could be increased and adverse consequences of that nature would flow from that. But we would have powers to stop that from happening. You raised the issue about, I think, the cost of regulating a multinational company. Well, we --

**Deputy J.A. Martin:**

Well, at the moment you are having problems with JT, and I do not know how far down the line, about sharing the numbers, and at the end of the day you cannot make them do that without going to court. Am I correct? If they do not comply.

**Mr. B. Brown:**

Yes, that will be one choice of action that is open to us. If they do not comply with the direction, then we would have the ability to go to court to obtain an order. That is a course of action that would be open to us. We have not decided yet whether that is a course of action that we are going to take.

**Deputy J.A. Martin:**

What other course of action would there be?

**Mr. B. Brown:**

Not going to court or, you know, we have not reached a decision on that. We have received substantial submissions in response to our initial notice which we are considering. We have not yet decided what course of action we are going to take.

**Deputy G.P. Southern:**

I am aware it is, at this stage, a hypothetical question, but nonetheless I will ask it. In a case where you were forced to go to court because a provider was being recalcitrant, how does that get funded because the Minister for Economic Development seems to be saying that he would fund whatever was necessary to ensure that you could go to court and enforce the regulation? Can you tell us something about funding in that particular extreme case.

**Mr. B. Brown:**

Yes. In principle, our costs under the Telecoms Law are borne by the operators through the licence fees so that that is how expenses under the Telecoms Law are funded. Whereas under the Competition Law, the money comes from the States so I think one of the questions would be, in answering your question, whether the enforcement action that was taking place, or the litigation that was taking place, is litigation under the Telecoms Law or under the Competition Law.

**Deputy G.P. Southern:**

Right, so it could be either and so the funding could be either. Presumably if you are going to recoup the litigation costs under the Telecoms Law, that would be reflected in the cost of the licence subsequent presumably to you winning that particular case?

**Mr. B. Brown:**

Yes. I mean, I have to say the situation has not arisen yet and I suppose, to a certain extent, it would be in the hands of the court to make whatever award of expenses it felt was appropriate, but as a matter of principle, our telecoms costs by law are funded through the licence fees.

**Deputy G.P. Southern:**

Right, okay.

**The Deputy of St. Ouen:**

Can I ask how do you see, or would you see competition developing in the telecommunications in Jersey in the absence of Jersey Telecom being sold? In other words, if the States retained a major stake in it.

**Mr. B. Brown:**

Well as you know, as we discussed last time, we made a distinction between the fixed line sector and the



mobile sector where the competition dynamics of the market are somewhat different. In the fixed sector my understanding is that Cable and Wireless has entered the market, albeit it does not have its own network so it is competing on a service level basis. I do not know what its future intentions in that market are. That would be a matter to put to them. In the mobile market I am sure you are aware that we have recently had Cable and Wireless entering the market in competition with Jersey Telecom. My understanding is the Jersey AirTel is still intending to enter the market as a third competitor and one would expect - one would hope - that that would lead to benefits in terms of price, quality of service, choice to consumers. We are already seeing the effect of competition in the mobile market in terms of the offers that have been made to consumers, in terms of the shops that have sprung up on the High Street. We would hope that that trend would continue with the entry of a third competitor in the marketplace.

**The Deputy of St. Ouen:**

Is it possible that although one might see reduction in prices in certain areas - we have highlighted mobile as the prime example - that it is quite possible that as the companies compete and meet the requirements of presenting of accounts, a cross-subsidisation, that you could see an adjustment in tariffs for some other services where, in fact, those tariffs could increase?

**Mr. B. Brown:**

That is conceivable, yes.

**The Deputy of St. Ouen:**

Would you say that that is generally what happens over a period of time within a competitive environment?

**Mr. B. Brown:**

I would not say it is the general rule, no. I mean, if you are talking perhaps of the prospect of price reductions in mobile being reflected in higher prices in fixed line services, I do not think that is a necessary consequence.

**The Deputy of St. Ouen:**

I am just thinking, obviously I appreciate you have asked for separated accounts to try and identify whether there is any cross-subsidisation happening in Jersey Telecom. I mean, that is an extremely complex subject anyway because it is determining of costs and so on and so forth; apportionment of costs. But it is quite conceivable that within that mix that certain areas - more profitable areas - are financially supporting others that are less profitable and, hence, that question that I ask. Would you anticipate that over a period of time that you would see companies coming forward and saying: "Actually these tariffs are -- it is necessary for these tariffs to go up because ..."?

**Mr. B. Brown:**

It is conceivable. I would say that cross-subsidy in itself is not a breach of the licence. The licence refers to unfair cross-subsidy and what that would normally mean is that a cross-subsidy would be problematic if the effect of it was to make it difficult for competitors in the cross-subsidised market to compete because the prices are so low. So, it is not an outright prohibition on cross-subsidy.

**The Deputy of St. Ouen:**

Can I just follow up that cross-subsidy questioning, or question rather? How do you manage the global or international telecom provider and ensure that the provider - that company - is not cross-subsidising, and thereby competing unfairly, in our local marketplace?

**Mr. B. Brown:**

The multinational company would be operating through a local subsidiary which would be licensed by the JCRA. If that entity was being unfairly cross-subsidised or was engaging in predatory pricing, then that would raise competition issues which we could address under the Competition Law. That would require a determination that the company that was engaging in this activity was dominant, i.e. had market power in the local marketplace.

**The Deputy of St. Ouen:**

What I am saying is how do you identify that cross-subsidy if - although albeit we have got a local subsidiary here - you have got a multinational company with services and shared services and management and everything else, off Island?

**Mr. B. Brown:**

Well, we would be entitled under the Law to require the company to produce information about its costs - the costs of operating the service in Jersey - and if it emerged that the prices which were being charged in Jersey were insufficient to cover costs, then that would be an indication that the services were being cross-subsidised from another source.

**The Deputy of St. Ouen:**

Would that only be the case if that company was dominant in the marketplace?

**Mr. B. Brown:**

Yes. I mean, as the law currently stands, we would need to find that the company that was engaging in that pricing had market power.

**The Deputy of St. Ouen:**

Right, so a newcomer - a large multinational - coming to compete on Island could indeed -- I am not suggesting they do but could indeed use some form of cross-subsidy to aggressively compete in our local marketplace and we would be relatively unaware apart from noticing the effect that it has on our local companies?

**Mr. B. Brown:**

Well, we would not necessarily be unaware. As I say, we would have the power to require production of cost information to establish the basis on which the prices were being charged. We would also look at whether even though the company was a relatively new entrant with a relatively small market share, whether indeed it had market power in the marketplace which enabled it to behave in that sort of way. We would also have powers, if we felt that the current licence was insufficient to deal with that sort of situation, to tighten the licence obligations. So, there would be a range of powers that would be open to us to address that. Charles, have you --

**Mr. C. Webb:**

I have nothing else to add to that.

**Deputy G.C.L. Baudains:**

Yes, if I could just take that theme a little bit further, what Deputy Reed was bringing up a couple of moments ago. One thing that does concern us is the possible cherry picking by incoming competitors which is obviously what they would try to do to take the most profitable business. Is there not a danger that by doing that you are leaving the incumbent - or at least one operator - with universal service obligations and unprofitable lines? So, in some cases private lines were clearly going to be hitherto subsidised by, to some extent, by business. So, there will then be a realignment of tariffs to the disadvantage of the less well-off people in the community; the old aged pensioners; the little old lady living down the end of the road would hardly be profitable for a telecoms company to service their line. They are going to end up surely paying about 5 times what they did previously. How much regard do you have for that when you are regulating?

**Mr. B. Brown:**

Well, there is a universal service obligation in Jersey Telecom's licence and that condition requires services to be affordable to everybody on the Island so I do not think the danger that you have described is going to be a real danger in practice. That ...

**Deputy G.C.L. Baudains:**

It just seems to me that by stripping out the most profitable parts and that being used among the competitors for their own business interest, the people who are less advantaged could lose out by readjustment of tariffs as a consequence. Is that taken into account when you ...?

**Mr. B. Brown:**

As I said, the requirement under the universal service obligation is to offer affordable fixed lines to everybody on the Island and that could not change without the JCRA's approval so it would not be a question of raising prices to particular groups if that was in breach of that principle. The question of cherry picking, as you describe it, does raise the subject which we discussed last time about contributions to the universal service fund so that would be an issue that may arise and we would look at that.

**Deputy G.C.L. Baudains:**

Yes, I was just wondering because it does seem to me that ultimately one firm is going to be ending up with most of the obligations whereas the other firms will be getting the most profitable business so there needs to be some way for you to adjust that. You have the tools to do that?

**Mr. C. Webb:**

Yes, we have the tools. I believe in response to the panel's questions last time we submitted an OECD chart about how other jurisdictions have set up a universal service fund and how they have different operators contribute to the fund.

**Deputy G.P. Southern:**

In history, examining BT and competition in the UK, there certainly was, I believe, this trend that the beneficiaries were international calls, business calls and that the person at the end of the line at St. Ouen did tend to lose out; very much so in the UK development of competition. That will impact the trend.

**Mr. B. Brown:**

I think you may well be right but again this is Jersey and we have our Jersey law which says that services have to be affordable to all users and it is our responsibility to make sure that that happens.

**Deputy J.A. Martin:**

Can I ask you then basically where you are with the work you are doing for the Economic Development Minister and if you have engaged any expert consultants, because you seem to have quite a large workload and you also only seem to appear to -- you estimate about £18,000 and a couple of months to do what I would call a full economic cost of the sale of JT to Jersey? That is how wide your terms of reference could be. What I want to know is is that what is being done, and if it is, are you doing it in your budget and who is doing it?

**Mr. B. Brown:**

Yes, well, I can give you an update on that. As you know, we have been asked -- I think you have seen

the terms of reference which --

**Deputy J.A. Martin:**

Yes.

**Mr. B. Brown:**

We said to the Minister that we would aim to complete the report by the end of this year. We are still on target to achieve that so we are planning to report to the Minister by the end of this year. In terms of the cost, we estimated an initial cost of ourselves - the JCRA's work - as being £18,000. We agreed with the Minister - with the EDD (Economic Development Department) - that if we felt that that was going to be insufficient or if we felt at any point that it was appropriate to engage consultants to ensure the delivery of the advice, then we would come back to the Minister and request additional funding. It became clear to us since the last Panel hearing that on one aspect of the advice that we were being asked to give, it would be appropriate to seek external help. So we raised that with the Minister as well as the proposed budget for that external advice and that was approved by the Minister. We have commissioned that input. We have received that input and we are taking that input into account in delivering our advice to the Minister.

**Senator B.E. Shenton:**

Why did you accept the role that the Minister asked you? The Minister asked you for a report and you said: "Yes, we will do it." Now, I assume you could have said: "No, we are too busy. We are a competition authority and this is slightly outside our remit." Why did you not say that, bearing in mind your workload?

**Mr. B. Brown:**

Well, we accepted because it was precisely within our remit in terms of the fact that Article 6.4 of the Competition Regulatory Authority Law provides for us to give advice to the Minister on any aspect of competition, monopolies, utilities. It is very widely drafted. What he was essentially asking us to advise on were matters to do with competition and economic regulation so we felt that that was entirely within our remit. However, we recognised, as I said, that on one aspect of it, a particularly specialised type of regulatory input was needed.

**Deputy J.A. Martin:**

Could you elaborate on that or is there some sort of confidentiality --

**Mr. B. Brown:**

Yes, essentially the likely costs of putting certain -- well, sorry, I will rephrase that. One of the aspects that we were asked to look at was whether it would be beneficial from the point of view of economic

development and competition for the States to sell Jersey Telecom in parts as opposed to as a whole company. Obviously that raises cost implications if that were a way forward, and the advice that we sought externally was in trying to quantify what the likely costs would be.

**Deputy G.P. Southern:**

The context in which that was set, talking about structurally separating telecoms, or JT rather, it was a 2001 OECD recommendation. Our understanding is that that recommendation has been somewhat superseded by the EU which advises now that accounting separation is sufficient so that you can see the funding and that is all that is required rather than physical structural separation. Do you have a comment on that at all?

**Mr. B. Brown:**

Yes. I mean, that is certainly not my understanding of where the EU is heading. I think in a fairly recent speech the Commissioner who is responsible for telecommunications, said that structural separation - or rather operational separation I think was really what she was describing - is something that member states needed to look at. If you look at things on a national level, Ofcom (Office of Communications) in the UK have taken the view that accounting separation is not sufficient to ensure that the incumbent operator treats its wholesale customers on a non-discriminatory basis and they have moved towards a concept called "operational separation" which is not full structural separation but nevertheless is a stage beyond accounting separation. We are aware that other countries are similarly looking at doing this. I believe New Zealand and Australia have been looking at it. I know that if we look at small jurisdictions, that the Faroe Islands have put a form of structural separation into place. So, I think it is something that other jurisdictions are actively looking at and I think it is a legitimate question, particularly in the context of a proposed privatisation. These other jurisdictions are looking at it in terms of an operator which has already got a licence where difficulties have arisen in enforcing the rules and options other than accounting separation are being looked at as a means of improving the ability to enforce non-discrimination. What we have got is a slightly different situation where the States is looking at the possible sale of Jersey Telecom and I think it is a perfectly legitimate question to ask whether it is wise to sell the company as a complete entity or whether selling, for example, the network separately from the retail operation or from the mobile operation would be preferable.

**Senator B.E. Shenton:**

But how can that be better for the consumer?

**Mr. B. Brown:**

Well, if it is the case that, for example, by separating the network from the retail operation, that promotes non-discrimination and fair competition between retail competitors, then by promoting competition - by enhancing competition - that helps consumers in that that would logically lead to the

usual benefits from competition, namely lower prices, greater choice, quality of service. If you have a level playing field on a retail basis, that is more conducive to the consumer interest.

**Deputy G.P. Southern:**

But would it not also encourage the ultimate cherry picking? Break up an already relatively small operation into yet smaller bits, you are inviting people to pick off the bits that they want; effectively cherry picking?

**Mr. B. Brown:**

I do not see that because -- I hasten to add, this is all hypothetical and we have formed no view yet as to whether separation should take place but on a hypothetical basis, I think if you have a network entity, which in my view is likely to be a natural monopoly, then by definition there is no prospect of competition in the network market. There is one network company in the same way as in Jersey we have one electricity network, one water supplier and one gas supplier. So, it is difficult to see how there could be any prospect of cherry picking in terms of the network part of the business. As far as the retail operations are concerned, well, you know, the market one would hope was competitive, would continue to be competitive across all services.

**The Deputy of St. Ouen:**

The Treasury Minister has declared that, given the opportunity, he is looking to maximise the proceeds from the sale of Jersey Telecom. Bearing that in mind, and if the States support the proposed sale and the Treasury Minister is given responsibility to conduct that sale and he selects a buyer for Jersey Telecom, what would happen if then subsequently when you were consulted regarding the merger and acquisitions, if you vetoed that purchase? Could that situation arise?

**Mr. B. Brown:**

Yes, it certainly could. If we believed that the proposed merger would substantially lessen competition, as Charles described, we would have power to block it or approve it subject to conditions. There would be 3 options. We can either approve it unconditionally if there is no effect on competition. We could approve it subject to conditions if we believe that there are certain ways in which if, for example, certain businesses were divested that we could approve it subject to divestiture of certain businesses. Or we could block it.

**The Deputy of St. Ouen:**

In that case surely would it not be better to be advising the Treasury Minister to be seeking guidance from yourself as who may or may not be a prospective purchaser at this moment in time prior to accepting or even entering the tendering process?

**Mr. B. Brown:**

Well, I think as Charles mentioned, we cannot really give guidance on a deal without some reasonable intention that that is the deal that is going to emerge.

**The Deputy of St. Ouen:**

No, I appreciate that.

**Mr. B. Brown:**

It is open to the Minister at any time to come to the JCRA and request our guidance - our advice - and we would do our best to give that. But quite how meaningful the advice would be if we are talking a purely hypothetical basis. It is difficult to say. It is much more easier to give advice if you have got a concrete proposal in front of you.

**Senator B.E. Shenton:**

Can I just turn that around? There is no competitor at the moment with more than a 7 per cent market share. Can you argue that a 7 per cent market share is significant for you to step in?

**Mr. B. Brown:**

It is conceivable. You have to look at not just the actual effect on competition but the prospective effect on competition, and if the effect of the acquisition is to prevent competition which would otherwise emerge then that would be a relevant consideration for us to look at.

**Mr. C. Webb:**

Yes, I mean, also if you look at kind of international practice on mergers generally concerns are raised on, say, hypothetically in a market you have 3 competitors shrinking to 2. Part of competition is protecting consumer choice. 3 to 2 mergers, they are not no-go but generally they have a hard burden in front of the agency. Another factor or another kind of theory out there is the elimination of a maverick. Let us say that you have 5 players in a market and they -- it is getting hypothetical -- an incumbent is buying out a 7 per cent market share player. That 7 per cent market share player is someone who has been a price cutter, gaining a lot of customers; disruption in the market. That is another thing which -- kind of more the dynamic I think of competition that agencies look at. So, it is not just a simple mathematical formula of 7 per cent: "Oh, it is insignificant." It is a little more complex than that.

**Senator B.E. Shenton:**

So, you would even look at someone like AirTel with a zero per cent market share?

**Mr. C. Webb:**

Potentially. Potentially. It is not automatically discounted.



**Deputy G.P. Southern:**

But the 3 into 2 hypothetical situation may well be the real one. Certainly if you allow the 2 competitors now to bid for Jersey Telecom, they may well succeed and it is a 3 to 2 situation in which you would have to examine very carefully whether you would permit that particular change.

**Mr. B. Brown:**

Yes.

**Deputy G.P. Southern:**

It seems to me if someone were in the running, they might have a legitimate expectation, having won the bid, to be allowed to carry out what they are there for and this could cause -- and, again, it comes back to my earlier question I think where we started with, at what stage are you going to get involved because if that is a late stage, then it could well be that we are asking for trouble. Whereas earlier on you might rule people out. Clearly say if there is a 3 to 2 situation, you know: "Do not go there."

**Mr. B. Brown:**

It is really entirely up to the States at what point they bring it forward to us for our consideration. In some cases looking at other mergers and acquisitions in other sectors, our experience is that quite often companies sign up to the deal so that it is contractually binding but subject to the condition that it obtains approval from the competition authority. If that approval is not forthcoming within a certain period then the whole deal falls away. That is one way the States might approach it. Another way they might approach it is instead of signing up a deal with a prospective purchaser is to say: "Well, no, we do not want to waste time negotiating with the parties and reaching agreement on the commercial terms without any certainty as to whether the JCRA is going to approve it" and that is where they would come to us with a request for guidance. Now, that involves a cost. There is provision under the Competition Law for us to recover our costs in dealing with merger applications through a fee so that tends to mean in practice that until such time as the parties are seriously considering doing the deal they will not come to us for approval. As Charles said, our normal practice is that we have to have kind of good faith evidence of an intention to do a deal before committing our resources to that.

**Mr. C. Webb:**

If I could just add also one thing: kind of prior to coming to JCRA I was on the private side; a private anti-trust attorney in Washington DC (USA) advising parties on potential mergers and the M and A rules we are talking about here in Jersey obviously are not secret. Our M and A guidelines are on our website as are the M and A thresholds and the companies that, you know, have been publicly stated about having an interest in JT - or basically any potential purchaser of JT - is going to be a very sophisticated company with probably very good legal advice of their own. So, you have to talk about,

Deputy Southern, legitimate expectation. I mean, the fact that a company is coming and buying JT, the fact that there would be a merger approval would not be a surprise to the purchaser. On the other hand, I would expect the purchaser from day one of the initial meeting to present very convincing evidence to us about why the deal should go through.

**Deputy G.P. Southern:**

Sure. James?

**The Deputy of St. Ouen:**

It has been suggested by a number of different sources that we have spoken to that our local regulator, the JCRA, has limited resources and a huge portfolio, remit; call it what you like. What is your reaction to that comment?

**Mr. B. Brown:**

Yes, I think most competition authorities will have more work or more potential work than they can deal with at any given time. That is our experience so we have to prioritise carefully. Obviously in a small jurisdiction it is a balance. We think the States, in terms of how it is resourced, the JCRA has got the balance about right for a small jurisdiction. But at any given point of time there could well be a large number of competition issues to deal with and we have to obviously prioritise to make sure we hit the right targets.

**The Deputy of St. Ouen:**

We have been made aware that obviously telecoms is a very technologically advanced business expanding rapidly and changing daily almost. I am led to believe that one area of technology that currently does not seem to fall into our sort of regulatory framework is a thing called VoIP (voice over internet protocol). I do not know if you support that view but that being the case, and also the experience of others, do you believe that we need to look at forming some form of telecommunication/broadcasting type entity or regulatory authority that is slightly separate or a separate part of JCRA?

**Mr. B. Brown:**

I think that would be a matter for the States. I think at one point there was a kind of cross-disciplinary forum - I forget what it was called - which involved representatives of the States, representatives of IT (information technology) companies and the JCRA was represented. I am not sure if you are aware of that but perhaps in the move to ministerial government and all the changes, it has fallen by the wayside, but there was a cross-disciplinary group of that kind which was looking at precisely these issues and that may be something that would be worth considering resuscitating.

**The Deputy of St. Ouen:**

How would you pick up, for argument's sake, VoIP in the future? If you have advancing technologies and they are currently do not fall within your regulatory framework, how do you capture those?

**Mr. B. Brown:**

I do not think it is a question of capturing it. I mean, as the law currently stands, we regulate telecommunications and if the activity requires a licence then we are entitled to regulate. If it is believed that we should have a regulatory role in connection with VoIP providers then that would be up to the States to give us those powers. But clearly to the extent that VoIP poses a threat to existing players such as Jersey Telecom then that is a very relevant consideration for us to look at in terms of the degree of regulation to which the existing players are subject. I mean, if as a result of development such as VoIP the market is becoming much more competitive, then that may raise an argument that certain regulations which currently exist should be relaxed. So, it would be certainly relevant in that context.

**The Deputy of St. Ouen:**

The relaxing of existing regulations rather than the introduction of extra ones to capture the new technology or the new --

**Mr. B. Brown:**

I think that would be more likely on a hypothetical basis, yes.

**Senator B.E. Shenton:**

So, going back to the Ozouf report, because I am not happy there because you seem to me to be – you have said all the way through you are the regulator. Okay, here you are moving to “adviser” rather than “regulator”. You are going to make recommendations and then you are going to regulate them. Now, when we had the investment bankers in, they thought it was quite unbelievable that the government was asking the regulator to advise on the sale. It just seems to be completely ludicrous to me. You are, at the end of the day, the regulator.

**Mr. B. Brown:**

I think, as I mentioned last time, we have 2 roles here: we have a regulatory role and we have an advisory role and both of those are roles which are given to us by Jersey law. The advisory role is given to us by the Competition Regulatory Authority (Jersey) Law 2001 where we have the power to advise the States - or more specifically the Economic Development Minister - on any matter to do with regulation or competition, utilities, et cetera, and that would certainly cover advice on the particular aspect of the proposed sale that we have been asked to look at. So that advisory role is there and we have a regulatory role under the Telecoms Law. I think the other distinction that needs to be made is the nature of the advice that we are giving. There are at least 2 policies which this proposed sale

implicates. One is the policy of the States as shareholder trying to maximise the value of the shareholding. That is one aspect. There is the other aspect which we are looking at which is the way in which the sale could be structured. Is there a way in which the sale could be structured which would enhance competition and be beneficial to the economy? My understanding is that Citigroup, the financial advisers, are advising on the aspect of shareholder value and how to maximise that through the sale and we have been asked to advise on the economic aspects. Those 2 policies, as they are applied to a proposed sale, may or may not conflict. It is difficult to say whether there will be a conflict until such time as we have decided what our advice is and how we see what the advice of the corporate finance people are. I mean, to give you a hypothetical example, if our advice ended up being that from an economic point of view it would be beneficial to sell the network separately from the retail services, and if it was the case that the corporate finance people said that that combination would be neutral or it might even enhance shareholder value, then there would be no conflict but we do not know that at this stage until such time as the advice is delivered. Now, if the advice from the 2 sources ends up going in different directions, then the States will have to make a decision as to which way they want to go. So, I think to summarise, my answer to your question: we do not see any difficulty in performing an objective advisory role. In circumstances where we are adviser we have a duty to give objective advice and insofar as we have a regulatory role, we have a duty to exercise our regulatory powers in an appropriate fashion and, secondly, we are also very clear about the remit within which we have been asked to advise and that remit is only one aspect of the States' considerations in deciding whether to sell Jersey Telecom and, if so, in what form.

**Mr. C. Webb:**

If I could just add to Bill's response, taking from my home jurisdiction - the United States - right now Congress is undergoing kind of a loose -- similarly because I do think the principle is there. Congress in the United States is undergoing a review of the anti-trust rule of the United States called the Anti-Trust Modernisation Committee. They have been holding a series of hearings on Capitol Hill for quite some time now. Now, as part of those hearings they are relying on evidence from other parties as well but they are relying on advice given by the Department of Justice and the Federal Trade Commission. Now, just the fact that those happen to be the cops of the anti-trust law does not disqualify them from giving advice on what the future of anti-trust law in the United States should be. Indeed I think Congress sees their expertise in enforcing the law, sees their opinion on what the role should be as valuable but, kind of like here, the ultimate decision of what the future will be lies with the elected officials; not with the experts who have been asked to give advice.

**Senator B.E. Shenton:**

Yes, although in this instance you have been asked on a specific corporate entity, are you not? "How do we sell this?"

**Mr. C. Webb:**

But the principle still is, it is just advice and the policy is set by the elected official.

**Senator B.E. Shenton:**

It just seems - I cannot be convinced, I am afraid. Maybe -- I am from an investment background -- I just do not see why you ask the regulator to advise you on a sale at this stage.

**Mr. B. Brown:**

Well, we have done our best to try and explain the 2 roles.

**Deputy G.P. Southern:**

Sure and we will pay attention to the transcript no doubt in great detail when we get it. Can I take us on to a fresh aspect I put to the Treasury and Resources Minister this morning? We were talking about a particular privatisation and a particular sale which may or may not happen in the relatively near future. Project to several years down the line and somebody has bought out the people who buy it now and somebody buys them out. What protection do we have in little old Jersey over this, to prevent a situation like has happened with Telecom Italia whereby 2 purchasers down the line it was bought out with a heavily leveraged buyout by a company which basically has taken the profits to service its debts. Which, as a side issue, effectively captured the regulator because they said: "Look, we are carrying around this much debt. That is where our profits are going. They are not going to taxation. They are going into service this debt but if you squeeze us too hard, we will up sticks and go. You really cannot afford to lose your telecoms operation, so there" almost. "What can you do about it?" and the Italian regulator effectively was captured. Can we prevent that in little Jersey?

**Mr. B. Brown:**

I think it is a risk of any privatisation that once you have sold the business the States relinquishes control. It is difficult to see how you can avoid that.

**Deputy G.P. Southern:**

We are told that the regulator can control things and the key word is "control".

**Mr. B. Brown:**

Well, I am not sure that it can control the identity of the purchaser, at least beyond the competition remit that we have been discussing today. It is one thing if the existing licensee decides to sell part of its business then we do have a control over that but if it is the licensee itself which is being acquired, then unless it raises competition implications, it is difficult to see how we could control that. But it does raise the issue of course as to -- which is another aspect. It is nothing to do with economics but is the Jersey Telecom's network considered to be of such a strategic importance to Jersey that a sale should even be

contemplated? That is not something we can advise on.

**Deputy G.P. Southern:**

Not your issue particularly, no, but it is certainly the issue of this particular Panel. Can I take you on to perhaps a slightly wider issue and, again, you might not see it as your remit to comment on it at all, but please feel free: if you do not want to comment, do not. But the Treasury and Resources Minister has said part of his task is to maximise his return. He feels that investing in his own assets is a risky business. I did not quite follow that argument, but nonetheless that is the vision he has taken. You are submitting a report on the competition aspects of various ways of selling. Are you aware that anybody is looking at the broader economic aspects of the impact of a potential sale economically in the broader sense, other than competition?

**Mr. B. Brown:**

Well, I think we are looking at it in a slightly broader aspect than competition. We are looking at it in terms of economic growth and in particular the requirements of the Telecoms Law which are not just about competition. It is about ensuring that consumers - by which I mean not just private individuals but businesses - have access to the services that they need to operate. That is our primary duty under the Telecoms Law. Obviously one important category of business user is the financial services industry so we have to have regard to the fact that competition is just a means to an end. It is not an end in itself and that is why it is a secondary duty under the Telecoms Law and not a primary duty.

**Deputy G.P. Southern:**

It seems to me that your remit does say: "You are asked to advise me on the following issues: structure of JT that the JCRA believes best serves the States policy of promoting competition in telecommunications." It is quite a narrow brief: "And the costs of each of those various scenarios." So, competition and costs is the brief. You say you are looking wider than that because ...

**Mr. B. Brown:**

Yes. I mean, competition is obviously the key aspect in the terms of reference you have described. At the end of the day in all of our functions, whether that is enforcing regulation or giving advice, we have to have regard to our duties under Article 7 of the Telecoms Law.

**Deputy J.A. Martin:**

Economics on the whole of the impact on Jersey: on workers; on their families. You are not looking into that? It is not --

**Mr. B. Brown:**

The social aspects, yes.

**Deputy J.A. Martin:**

That is a word I did not really associate with economics until we met.

**Senator B.E. Shenton:**

What about future investment? I mean, you talk about structural separation but that could be pretty damning for future investment, so you are not bothered about it?

**Deputy J.A. Martin:**

It is not their remit.

**Senator B.E. Shenton:**

I know. It is just competition.

**Deputy J.A. Martin:**

We need someone to do that. In your opinion, is someone doing that?

**Mr. B. Brown:**

Competition is very relevant to future investment because if there is a fair competitive level playing field -- if you were a foreign investor and you are looking at entering a new market most, I think, investors would want to make sure that there is a fair level competitive playing field and not one which is, you know, skewed in favour of --

**Senator B.E. Shenton:**

Competition can also kill investment as well. If there are no margins there to generate the profits to reinvest, you can kill the telecom industry and kill the finance industry.

**Mr. B. Brown:**

Well, that is another aspect. I mean, if competition is fierce, there are winners and losers. That is the nature of a competitive market. Whether that is a scenario that would arise in telecoms, you know, it is difficult to say but we are talking here about mature companies who make mature business decisions and if they believe that they can compete successfully in a market then we feel, you know, they should be allowed to do that.

**Senator B.E. Shenton:**

But if everyone is competing at a loss, you have got no future investment.

**Mr. B. Brown:**

If everybody is competing at a loss, then that would raise questions as to whether they were behaving in a fair competitive manner and we would have to look at whether there was any predatory pricing and that sort of thing going on. Obviously the competition has to be sustainable and fair competition; not competition that prices below cost and that sort of thing.

**Deputy J.A. Martin:**

It does not always have to be prices. Like, one of the mobile operators are giving away X tickets to go ice-skating at the moment. I mean, and that can go stupid. I mean, could you regulate on that? You know: "Have one of our mobiles and we will give you this." I mean, can you regulate on that? It is not pricing; it is a free gift.

**Mr. B. Brown:**

Sorry, I would have to take advice from my legal adviser. I think we seem to be straying a bit beyond the --

**Deputy G.P. Southern:**

Then there is advertising 3 weeks in advance. I think we have strayed. One of the issues lying behind the prospective sale is that, with the introduction of competition, the Treasury Minister is concerned that the incumbent's - Jersey Telecom - profit levels are likely to reduce. What is your impression in terms of the place of the incumbents in telecoms markets elsewhere? It certainly is the impression we are getting that the incumbent retains largely in most areas - and certainly in small jurisdictions - a substantial volume of business and bits get picked off around it but it is a very marginal result. Could you confirm that?

**Mr. B. Brown:**

I think it varies from jurisdiction to jurisdiction but I think it is fair to say as a general observation that incumbents have tended to remain solid competitors in the marketplace.

**Deputy G.P. Southern:**

Then finally, the Treasury Minister this morning seemed to be under the impression that most sell offs were entire sell-offs; the state gives up all interest in telecoms companies, whereas in fact certainly our picture is that by and large they are often partial sell-offs with the State retaining some - and we come to the magic word - "control" still in that strategic asset. Again, do you have a comment on that? Certainly our picture is that sell-offs are usually partial.

**Mr. B. Brown:**

I think again the picture is varied internationally. I mean, if you look at the larger countries, it tends to be a complete sell-off; a complete privatisation. I believe that for example the Isle of Man incumbent



operator is now owned by Telefónica of Spain. EIRCOM in Ireland is owned by Babcock and Brown, or part of the Babcock and Brown Group. Whereas if you look at the Faroe Islands which I mentioned earlier, even though they have engaged in a form of structural separation, the network company is still State owned, as I believe is the retail operation although they have introduced competition alongside that. So, I think the picture varies from country to country.

**Deputy G.P. Southern:**

But partial sale is a common route, you suggest, in smaller jurisdictions?

**Mr. B. Brown:**

I think it is more likely in a smaller jurisdiction than a larger one because of perhaps the greater dependence on one network company to provide the telecoms network.

**Deputy G.P. Southern:**

Thank you.

**The Deputy of St. Ouen:**

Could I just ask a follow on from that? In your view, are there any specific concerns that would arise from the States selling a minority shareholding in Jersey Telecom? In other words, divesting itself and retaining a majority shareholding?

**Mr. B. Brown:**

Sorry, did you say selling a minority shareholding and retaining a majority shareholding?

**The Deputy of St. Ouen:**

Yes.

**Mr. B. Brown:**

I think the question there would be, and I will defer in a moment to my competition legal adviser, but the question there would be whether the size of the shareholding and the rights that went with the shareholding were sufficient to give the purchaser material influence in the affairs of the company. If that was the case then that would trigger our merger control rules again. Even if it was a minority shareholding, if it was sufficient to give material influence or to change the control of the company, then we would be entitled to look at that under the merger rules.

**Mr. C. Webb:**

I will correct Bill. That is the standard in UK competition law. Jersey follows Irish and EU competition law where our merger rules only come into play if there is a change of control of the target company and

the control is defined under the law as not material influence but a decisive influence as capable of being exercised with regard activities that would be undertaking. How that has been defined in the European courts is there is a better than odds-on chance that the wishes of the acquirer will be implemented by the acquired company. It is a factor test. You look at what per cent of the shareholding they are acquiring. How many board directors is the acquirer entitled to nominate? Are there special voting privileges that the acquirer is getting? It is a multi-factor test and at the end of that test, the end result of that is, if there is control being passed, then it is subject to our review under the merger laws. If there is not control being passed, it is not subject, it kind of falls below the law.

**The Deputy of St. Ouen:**

I just take a for instance: obviously you could choose to look for a strategic partner and sell a minority stake to that strategic partner securing the economies of scale, so on and so forth, and it could quite likely be, if it was strategic, a multinational company. Now, again, I hear what you are saying. There is a grey area that, dependent on the structure of that partnership, would depend on whether you actively get involved or not.

**Mr. C. Webb:**

Exactly and that is -- the devil would be in the detail. Lawyers love multi-factor tests and this is a multi-factor test. It is, again, what is the percentage of the shareholding? How many board directors are being nominated? Are there special voting rights? You know, who appoints the senior officers? You know, who has economic risk of the entity? It is those kind of factors. I could list the factors but to talk about anything more than that is difficult to go to.

**Mr. B. Brown:**

That would be the factors which would trigger the need to request JCRA approval, but then obviously if there was a "subject to approval", we would have to then apply the substantial lessening of competition test. So, depending on who the minority shareholder was, you know, that may or may not give rise to competition implications. That would be a substantive assessment.

**The Deputy of St. Ouen:**

Just one final one: could I argue that if I was to speed up the sale process, my quickest route would be partial sale, minority shareholder which would allow me to slip underneath that trigger point where the regulator goes: "Ah, this is a merger acquisition" and then over a period of time might continue to dispose of increasing shares?

**Deputy G.P. Southern:**

No, because as soon as you get to the level you --

**Mr. C. Webb:**

It would trigger it eventually.

**Deputy G.P. Southern:**

I hope it will be the last question. Just briefly, you talk about differences between the legal set-up for competition in Jersey and the Office of Utility Regulator in Guernsey. It has been suggested to us that the prospect of joint regulation is a realistic one. From our different bases, do you see that as a possibility?

**Mr. B. Brown:**

There is certainly a possibility. I think in terms of the mechanics of making it happen, that is perhaps more complicated because to have a single authority covering 2 jurisdictions would require some sort of international - if that is the right word - agreement between Guernsey and Jersey to put that in place. So, I think political and legal hurdles would have to be overcome before that could become --

**Deputy G.P. Southern:**

It is a political and legal minefield, I think. **[Laughter]** I will not be holding my breath then. Anybody?

**The Deputy of St. Ouen:**

No, thank you very much.

**Deputy G.P. Southern:**

Thank you very much for your time again.

**Mr. B. Brown:**

Thanks.

**Deputy G.P. Southern:**

It has been a useful session, thank you.