Final Text
07.03.2025

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

Between

(1) BTC SURE GROUP LIMITED
SURE (GUERNSEY) LIMITED

and

(2) JT GROUP LIMITED
JT (GUERNSEY) LIMITED **Appellants**

-and-

GUERNSEY COMPETITION AND REGULATORY AUTHORITY **Respondent**

Hearing dates: 7th to 10th November 2022

Judgment handed down: 7th March 2025

Before: Sir Richard McMahon, Bailiff

Counsel for the First Appellants: **Advocate E R Gray**
Counsel for the Second Appellants: **Advocate J J Barclay**
Counsel for the Respondent: **Advocate G S K Dawes**

Cases, Texts & Legislation referred to:

The Competition (Guernsey) Ordinance, 2012
The Royal Court Civil Rules, 2007
The Competition Appeal Tribunal Rules 2015
C(2010) 7694 final, Case COMP/39258 *Airfreight* (Commission, 9 November 2010)
Case AT.39824 *Trucks* (Commission, 27 September 2017)
The European Union (Competition) (Brexit) (Guernsey) Regulations, 2021
The European Union (Brexit) (Bailiwick of Guernsey) Law, 2018
The Interpretation and Standard Provisions (Bailiwick of Guernsey) Law, 2016
Medical Specialist Group LLP v GCRA 2023 GLR 17
Competition Act 1998
Napp Pharmaceutical Holdings Limited v Director General of Fair Trading (unreported, 8 August, 2001); (unreported, 15 January 2002)
Aberdeen Journals Limited v Director General of Fair Trading (unreported, 19 March 2002)
Case C-612/12 P *Ballast Nedam NV v European Commission* [2014] 4 CMLR 26
Joined Cases C-322/07 P, C-327/07 P and C-338/07 P *Papierfabrik August Koehler AG v Commission of the European Communities* [2009] 5 CMLR 20
Bushell v Secretary of States for the Environment [1981] AC 75
R v Home Secretary, ex parte Doody [1994] 1 AC 531
R v North and East Devon Health Authority, ex parte Coughlan [2001] QB 213
R v Westminster City Council, ex parte Ermakov [1996] 2 All ER 302
GCRA Guideline 2 – Anti-Competitive Agreements
Apex Asphalt and Paving Co. Ltd v Office of Fair Trading [2005] CAT 4

Case C-8/08 *T-Mobile Netherlands BV v Raad van Bestuur van de Nederlandse Mededingingautoriteit* [2010] Bus LR 158
Case C49/92 P *Commission v Anic Partecipazioni SpA* [2001] 4 CMLR 17
Case C-85/15 P *Feralpi Holding SpA v European Commission* (unreported, 21 September 2017)
The Human Rights (Bailiwick of Guernsey) Law, 2000
Walters v States Housing Authority 1997-99 GLR 15
Bordeaux Services (Guernsey) Ltd v GFSC (unreported, 11 May 2016)
Stagecoach Group plc v Competition Commission [2010] CAT 14
Case C-501/11 P *Schindler Holding Ltd v European Commission* [2013] 5 CMLR 39
European Convention for the Protection of Human Rights and Fundamental Freedoms
Competition and Markets Authority v Flynn Pharma Limited [2020] EWCA Civ 339
Case C-238/05 *Asnef-Equifax, Servicios De Información Sobre Solvencia Y Crédito SL v Asociación De Usuarios De Servicios Bancarios (Ausbanc)* [2007] 4 CMLR 6
OECD *Information Exchanges between Competitors under Competition Law* (2011)
Case C-382/12 P *Mastercard Inc. v European Commission* (unreported, 11 September 2014)
Case T-7/98 *SA Hercules Chemicals NV v Commission* (unreported, 17 December 1991)
Joined Cases T-25/95 etc *Cimenteries CBR SA v Commission* [2000] 5 CMLR 204
Case C-609/13 P *Duravit AG v European Commission* (unreported, 26 January 2017)
Case C-455/11 P *Solvay SA v European Commission* [2014] 4 CMLR 14
Case C-209/07 *Competition Authority v Beef Industry Development Society (Irish Beef)* [2009] 4 CMLR 6
Case C-67/13 P *Groupement des Cartes Bancaires v Commission* [2014] 5 CMLR 22
Case C-373/14 P *Toshiba v Commission* [2016] 4 CMLR 15
Case 56/65 *Société Technique Minière v Maschinenbau Ulm GmbH* [1966] CMLR 357
Case C-32/11 *Allianz Hungária Biztosító Zrt v Gazdasági Versenyhivatal* [2013] 4 CMLR 24
Gascoigne Halman Ltd v Agents' Mutual Ltd [2019] EWCA Civ 24
Case C-345/14 *SIA "Maxima Latvija" v Konkurences Padome* [2016] 4 CMLR 1
Case T-328/03 *O2 (Germany) GmbH & Co OHG v European Commission* [2006] 5 CMLR 5
Case T-399/16 *CK Telecoms UK Investment Ltd v European Commission* [2020] 5 CMLR 13
Balmoral Tanks Ltd v CMA [2019] EWCA Civ 162
Case C-286/13 P *Dole Food v Commission* (unreported, 19 March 2015)
Lexon (UK) Ltd v CMA [2021] CAT 5
Case T-762/14 *Koninklijke Philips NV and Philips France v Commission* [2017] 4 CMLR 15
Whish & Bailey, *Competition Law* (10th ed.)
Case CE/8950-08 *RBS/Barclays* (Office of Fair Trading, unreported, 20 January 2011)
Case C-97/08 P *Akzo Nobel NC v Commission* [2009] 5 CMLR 23
Case T-190/06 *Total SA and Elf Aquitaine SA v European Commission* (unreported, 14 July 2011)
South Bucks District Council v Porter (No. 2) [2004] 1 WLR 1953
C-294/13 P *Fresh Del Monte Produce Inc v European Commission* [2015] 5 CMLR 7

Introduction

1. By a Decision dated 20 December 2021, the Guernsey Competition & Regulatory Authority, the Respondent, decided that the Appellants had infringed the prohibition imposed by section 5(1) of the Competition (Guernsey) Ordinance, 2012, which relates to the prohibition on agreements between undertakings which have the object of preventing competition within any market in Guernsey for goods or services (see para. 7.1). That Decision is addressed to BTC Sure Group Limited, Sure (Guernsey) Limited, JT Group Limited and JT (Guernsey) Limited, each of which has appealed the Decision pursuant to section 46 of the 2012 Ordinance. The two Sure entities have been represented by Advocate Gray and the two JT entities by Advocate Barclay. In this judgment, I will generally combine both entities each time by referring to them as "Sure" and "JT" respectively. I will set out the grounds of appeal each advances in more detail when I turn to their pleadings. The Respondent has been represented by Advocate Dawes.

2. The Appellants' Causes were tabled on 20 January 2022. There was a Consent Order made by the Deputy Bailiff on that date which joined the two appeals pursuant to rule 31 of the Royal Court Civil Rules, 2007. As such, because the appeals were *crochetées* from that time, they have been dealt with together. (That Consent Order also placed the actions on the Rôle des Causes en Preuve, supposedly pursuant to rule 14, although that rule refers to matters being defended and placed on the Rôle des Causes à Plaider.) There was subsequently a directions hearing before me on 11 February 2022.

3. At that hearing, I decided that there was no requirement for any defences to be tabled. This was consistent with the approach this Court takes to all statutory appeals. This issue was re-visited at a further hearing on 11 May 2022, at which it was suggested that what happens in England and Wales might be adopted as a means of the Respondent identifying a summary of the grounds for opposing the relief being sought, but I was not persuaded that this was appropriate. In doing so, I explained that what "*the respondent authority potentially cannot do is go beyond the terms of the decision that it has already reached*". There was, in my view, no merit in this Court aligning itself to the approach in England and Wales derived from the Competition Appeal Tribunal Rules 2015 in those circumstances. The "*arguments of fact and law upon which*" the Respondent can rely "*are already in existence on the face of the decision notice itself.*"

4. These appeals are only concerned with the Decision. The Respondent has since imposed financial penalties on both sets of Appellants pursuant to section 32(4) of the 2012 Ordinance. Appeals have been instituted but those appeals have not been joined to these appeals because the Respondent took rather longer to reach those penalty decisions than had been envisaged by the terms of the Decision. In those circumstances, I decided that it would be inappropriate to seek to tackle those appeals at the hearing. If the Appellants lose their appeals, the appeals against the financial penalties may then be continued.

5. The Appellants set out their contentions on the appeals against the Decision in Skeleton Arguments dated 23 September 2022. On behalf of the Respondent, Advocate Dawes' Skeleton Argument is dated 7 October 2022. The two Skeleton Arguments in reply are dated 21 October 2022. I will deal with the various arguments advanced when I turn to each of the grounds of appeal.

6. The hearing took place for four days commencing on 7 November 2022. I have since been provided with transcripts of what was said. At the conclusion of the hearing, I reserved judgment. It has taken me far longer than it should have to prepare this reserved judgment. At the time, it joined a long list of other judgments that I had reserved and I have been steadily working my way through them. I can only apologise to the parties for the slowness of resuming consideration of this matter, where I have largely been dealing with the backlog of reserved judgments in date order.

The pleadings

7. It is helpful at this stage to set out the grounds of appeal being advanced by the Appellants in their Causes. I am doing so in order to serve as a reminder as to what is challenged by the Appellants.

8. The Sure Cause contains eight grounds of appeal. They are helpfully summarised in para. 3:

> "*(1) The GCRA made a material error as to the procedure in that, contrary to s. 43(2)(b) of the 2012 Ordinance, it failed, prior to adopting the Decision, to give notice in writing to Sure "stating the terms of, and the grounds for, the proposed decision".*

(2) The GCRA made material errors as to the facts and/or was unreasonable and/or made an error of law and/or made a material error as to procedure in its findings at paras 6.9, 6.11, 6.19, 6.20 and 6.38 of the Decision in that:

(i) the Parties did not provide to one another information about the course of conduct that they were contemplating adopting on the market in relation to the matters set out in para. 6.9 of the Decision;

(ii) the Parties did not benefit from any reduced uncertainty about how the other would operate on the market;

(iii) JT's slide deck dated 31 May 2019 did not evidence any reduction in uncertainty about how Sure would operate on the market;

(iv) the Parties did not take into account the information received when determining their market conduct;

(v) the Parties could not alter their market conduct (by changing their mobile network infrastructure and/or launching 5G) without first obtaining regulatory and political approval for the proposals that there were under discussion; and/or

(vi) the GCRA erred in law at para. 5.8 of the Decision in treating EU and UK cases on their respective prohibitions on agreements and concerted practices with the object or effect of "preventing, restricting or distorting" competition as persuasive on the scope of s. 5(1) of the 2012 Ordinance, the terms of which section were given much more limited scope by the legislature which restricted the prohibition to agreements with the object or effect of "preventing" competition and/or erred in finding an infringement in the absence of any finding of fact that the object of the arrangements was to "prevent" competition.

(3) The GCRA made a material error as to the facts and/or an error of law in that it wrongly relied on the way in which each Party "communicates those decisions [i.e. decisions about changes to mobile network infrastructure and the speed at which 5G is introduced] to the regulator and the Government" as a particular of "the course of conduct that they were contemplating adopting on the market".

(4) The GCRA made a material error as to procedure, a material error of fact and/or was unreasonable in failing to provide reasons regarding and/or rejecting the submission that the politicians and regulators encouraged telecoms operators in the Channel Islands to explore potential means of delivering 5G and the Parties did so.

(5) The GCRA erred in law and/or made a material error as to fact and/or was unreasonable and/or made a material error as to procedure in characterising the exchange of information as an infringement by "object" in that:

(i) the GCRA erred in law in disregarding important parts of the legal and economic context and the facts;

(ii) in law, discussions about consolidation of mobile network infrastructure do not give rise to an infringement "by object" and require an analysis of their effects on the market;

(iii) the discussions did not, and were not likely to, alter Sure's position in Guernsey;

(iv) the discussions did not prejudice Airtel's position;

(v) the discussions had no effect on any future competitive tender for 5G spectrum;

(vi) there was no "object" infringement in the Parties briefing the GCRA on their progress with negotiations; and/or

(vii) the GCRA erred in law in its interpretation of agreements having the object of "preventing" competition.

(6) The GCRA erred in law and/or made material errors of fact in finding a single continuous infringement:

(i) the GCRA erred in law and/or made a material error of fact in finding a single continuous infringement in that there were no individual infringements;

(ii) the GCRA made material errors of fact in its description of the Parties' overall plan and common objective; and

(iii) the GCRA erred in law and/or made a material error of fact in finding that the alleged sharing of competitively sensitive information set out in Decision, paras 6.9, 6.10, 6.11, 6.19 and 6.20 formed part of the overall plan and common objective set out in Decision para. 6.21.

(7) The GCRA erred in law and/or made material errors of fact in finding that the duration of the "anti-competitive conduct" ran from 22 August 2018 to 6 November 2019:

(i) the GCRA erred in law and/or made a material error of fact in finding an ongoing infringement in that there were no individual infringements; and/or

(ii) the GCRA erred in law and/or made a material error of fact in finding a single continuous infringement.

(8) The GCRA:

(i) erred in law in finding that BTC Sure Group Limited was liable for any infringements by its subsidiary, Sure (Guernsey) Limited unless it discharged the burden of proof of showing that its subsidiary acts independently on the market; and/or

(ii) made a material error of procedure in that it failed to provide adequate reasons for such attribution of liability."

9. Each of these grounds is then developed in the rest of the Cause. By reference to the grounds available, as found in section 46(2) of the 2012 Ordinance, neither paragraphs (c) and (d) is advanced, but the other grounds are (and there is some overlap between them):

> "*The grounds of an appeal under this section are that –*
>
> *(a) the decision was ultra vires or there was some other error of law,*
>
> *(b) the decision was unreasonable,*
>
> *(c) the decision was made in bad faith,*
>
> *(d) there was a lack of proportionality,*
>
> *(e) there was a material error as to the facts or as to the procedure.*"

10. In the event, ground (2)(vi) was not pursued. It relates to a misreading of the 2012 Ordinance. Although section 5(1) refers only to "*preventing*" competition within any market in Guernsey, "*prevent*" is then defined in section 60(1) as meaning "*in relation to competition, … prevent restrict or distort competition or, in each case, attempt to do so*". This similarly applies to ground (5)(vii). Although Advocate Dawes highlighted that "*attempt*" appears in this definition, I can see no reference to that aspect in the Decision, meaning that it has no bearing on the infringement found.

11. In JT's Cause, there is no equivalent summary and the grounds are set out individually in various sections of the Cause. The first ground is section (C):

> "*Error of law in relying on the, non-applicable, coincidences principle at the expense of the correct approach to the standard of proof*".

The second ground is found in section (D):

> "*The GCRA acted unreasonably, and made a material error of fact, in rejecting the obvious innocent explanation of the discussions between JT and Sure: the need (recognised and encouraged by the GCRA) for existing operators to discuss the various scenarios set out in the Policy Statement, including the first scenario in which, according to the Statement, "Sure would form the basis of the Netco in Guernsey and JT in Jersey*".

The third ground is in section (E):

> "*The GCRA acted unreasonably, and made a material error of fact, in relying on a "bright line" between its characterisation of the "Pooled Infrastructure Scenario" – the scenario expressly envisaged in the first option by the Committee in its Policy Statement, and which the parties were encouraged to discuss – and what it alleges to be a wholly different scenario discussed by the parties (the so-called "Bilateral Home Network Scenario")*".

The fourth ground is found in section (F):

> "*The discussions complained of, however they are viewed, concerned only hypothetical scenarios, the realisation of which was wholly dependent on the actions of the relevant authorities, including the GCRA: the GCRA acted unreasonably, and made errors of*

> *law and fact, in failing to draw the correct conclusions from those facts as to the existence, or nature, of any concurrence of wills*".

The fifth ground is in section (G):

> "*Contrary to JT's rights of defence, the Statement of Objections failed to make the allegations now made in the Decision that JT infringed section 5(1) of the Ordinance by disclosing to Sure its approach to speed of deployment of 5G and that the parties both infringed that section by agreeing "to allow the Parties to control the speed of implementation of 5G in their 'home' island and to introduce it at a pace determined by them*"".

There is then a general ground in section (H):

> "*Against the background of the errors of law and fact identified above, the evidence relied on in section 4 of the Decision fails to prove to the requisite standard any infringement by JT of section 5(1) of the Ordinance*".

12. The parties approached these grounds as overlapping with the grounds pleaded by Sure. There is some obvious overlap between each set of grounds. For example, JT's fifth ground is effectively the same as Sure's first ground. There is, though, no equivalent in JT's Cause to Sure's eighth ground. Further, to the extent that a particular aspect of JT's grounds is missing from what Sure has pleaded, I cannot simply treat that aspect as being part of JT's appeal. The purpose of section 46(3)(b) of the 2012 Ordinance is to ensure that the summons prior to tabling an appellant's Cause states "*the grounds and material facts on which the appellant relies*". Accordingly, if a ground has been omitted from one Cause, it cannot be pursued by that Appellant.

Additional evidence

13. Although it is slightly unusual for there to be affidavit evidence, at the hearing Advocate Dawes confirmed that the Respondent had no objection to the First Affidavit on behalf of Sure from Ian Kelly, which was sworn by him on 16 January 2022, being considered. Part of the exhibit has been sealed on the Court's file because it contains confidential information (as agreed by the Consent Order on 20 January 2022, and as subsequently confirmed in the Acts of Court on 11 February and 11 May 2022). Mr Kelly was the former CEO of Sure (Guernsey) Limited. Although I will describe the content of this evidence in greater detail in due course, this is adduced to show that, if Sure's first ground of appeal were to be successful then these are matters that would have been raised by Sure in response to what should have been a further proposed decision under section 43 of the 2012 Ordinance.

14. The next piece of evidence is from the Respondent's Legal Director, Sarah Livestro, who swore her First Affidavit on 17 June 2022. In it she provides some background information about the membership of the Respondent and refers to the process that was followed up to and when taking the Decision. Quite a lot of that information appears in the Decision itself, but is supplemented by this analysis. Ms Livestro also comments on some matters raised in the appeals, but these are really for legal submissions rather than factual evidence. In an attempt to assist, she sets out some background information on the various generations of telecommunications and about the Respondent's role in the allocation of spectrum.

15. Some criticism is made of the content of Ms Livestro's Affidavit in the final Affidavit filed, which is from Alistair Beak, who replaced Mr Kelly as the CEO of Sure (Guernsey) Limited, and which he swore on 8 July 2022. The opportunity to file and serve evidence was given by the Act of Court dated 11 May 2022. Mr Beak suggests that the Respondent is seeking to repair the holes in the Decision through Ms Livestro's evidence.

16. Whilst I have considered all the evidence submitted in these three Affidavits, as I commented at the directions hearing on 11 May 2022, there should have been no need for anything supplementing what is found on the face of the Decision. To the extent that any comments in the Affidavits of Ms Livestro and Mr Beak seek to supplement the terms of the Decision, I have disregarded what is found in their evidence. In particular, because the appeals against the financial penalties imposed are for another day, anything exhibited by them relating to the penalties is of no relevance to these appeals.

The Decision

17. I consider it helpful also to refer quite extensively to what is found on the face of the Decision. I am doing so at this point in the judgment so that the context of the grounds is apparent from the outset.

18. The Decision is split into a number of parts. As I have already noted, the finding made is at para. 7.1, but this does no more than to conclude that the Respondent finds that the parties have infringed the prohibition in section 5(1) of the 2012 Ordinance. This bare statement does not contain any reasoning, which must be sought elsewhere in the Decision.

19. In Advocate Barclay's Skeleton Argument in reply, he points out that the Decision does not contain any definitive statement of precisely what the alleged infringement is. He suggests that this is contrary to "*good regulatory practice*" and offers as an example of how the European Commission sets outs its findings in respect of *inter alia* Article 101, TFEU in an operative part (as shown in a lengthy decision dated 9 November 2010, C(2010) 7694 final in Case COMP/39258 *Airfreight*, where the operative part refers to the Commission having adopted a decision and then sets out in summary form each infringement found, the first of which, in Article 1, lists those undertakings found to have infringed Article 101, TFEU "*by participating in an infringement that comprised both agreements and concerted practices through which they coordinated various elements of price to be charged for airfreight services on routes between airports within the EEA*"). I have some sympathy with this suggestion. If nothing else, by reference to the example given, although the same applies to the other Articles of the Commission's decision, it confirms that there were "*both agreements and concerted practices*". Whilst I appreciate (as I will proceed to explain in due course) that section 60(1) of the 2012 Ordinance defines an "*agreement between undertakings*" as meaning "*any type of agreement, arrangement or understanding between undertakings, whether or not legally enforceable, and includes a decision by an association of undertakings and a concerted practice involving undertakings*", so that it is not wrong to refer to the finding made that there is an infringement of the "*prohibition on agreements between undertakings*", it would be easier to understand the basis of the infringement found if the Respondent set out clearly the basis on which the infringement has been found in the final section of the Decision confirming the decision reached by it. As Advocate Gray put it in her oral submissions, she expected to respond to a case based on a concerted practice and not any formalised agreement. However, the reasoning for the finding appearing in para. 7.1 of the Decision has to be ascertained from the rest of the Decision, which contains the following parts.

20. The third part of the Decision contains the factual background. The fourth part contains the conduct. The fifth part contains the legal framework. The sixth part contains the legal assessment. Each of these parts needs to be read together in order to understand the basis on which the Respondent has found an infringement of section 5(1) of the 2012 Ordinance, although the sixth part is the most important, drawing together what precedes it. Paragraph 6.1 states that the "*GCRA proposes to find as follows*", but I think that must be a slip, seemingly left over from an earlier stage, and should just refer to its findings.

21. Starting with the factual background, para. 3.4 refers to the document published by the Committee *for* Economic Development on 19 June 2018, "The Future of Telecoms", which is

defined in the Decision as the "*Telecommunications Sector Policy Statement*". Although I will need to consider this document in more detail in this judgment, para. 3.7 sets out the Respondent's view about what it contains, noting in the following paragraph that "*none of these scenarios could have been achieved without collaboration between all operators*":

> "*The three possible scenarios (which would have been alternatives to the award of 5G spectrum through a competitive process) put forward by the Government were as follows:*
>
> *(a) All network providers (i.e. JT, Sure and Airtel) forming a joint venture or some other special purpose vehicle (**Netco**) to pool their existing infrastructure resources, fixed and mobile. The Netco would then be tasked with rolling out and operating 5G and legacy networks in Guernsey. Given the relative scope and resources of the existing network operators, it was envisaged that Sure would form the basis of the Netco, which would manage the entire pooled infrastructure as described above, in Guernsey. In this Decision, this scenario is referred to as the **Pooled Infrastructure Scenario**.*
>
> *(b) Tasking a new network company (which could be a consortium of the existing operators) with building a standalone 5G (**SA 5G**) network independently from existing mobile infrastructure. This new 5G network company would be awarded the exclusive licence for 5G and existing operators would not be allowed to build their own 5G networks. Alternatively, an interested third party, such as a telecoms infrastructure vendor or another global telecoms operator, could be invited to construct the new 5G network. In this Decision, this scenario is referred to as the **Single SA 5G Scenario**.*
>
> *(c) Maintaining competitive networks but putting in place legislative and regulatory measures to require sharing of RAN and transmission backhaul infrastructure to reduce the environmental impact of competing island wide networks. In this Decision, this scenario is referred to as the **Mandated Infrastructure Sharing Scenario**.*"

22. Paragraph 3.10 refers to two industry forums that were convened by the Respondent, "*a 5G pre-summit in Jersey in July 2018 and a subsequent 5G summit in Guernsey in November 2018.*" Thereafter, reference is made to a letter dated 26 April 2019 sent by the President of the Committee *for* Economic Development to the three incumbent operators.

23. In May 2019, the Respondent consulted on a draft statement of intent, relating to the allocation of 5G spectrum in Guernsey, which the Decision defines as the "*Draft SOI*". As a result of the responses received, para. 3.15 records that:

> "*… it became clear that it would not be technically possible to construct a single 5G network (either SA 5G or NSA 5G) as envisaged in the Telecommunications Sector Policy Statement of June 2018 and described in the GCRA's Draft SOI. This was because the responses indicated that:*
>
> *(a) A non-standalone 5G network (**NSA 5G**) owned by one operator could not interoperate with the required underlying 4G networks of other operators. This meant that the Single Pooled Infrastructure Scenario and the Mandated Infrastructure Sharing Scenario described at paragraph 3.7(a), (c) above were not feasible;*

> *(b) In respect of the Single SA 5G Scenario (b), described at paragraph 3.8(a) above, the current technology did not support the construction of a SA 5G network.*"

The reference in para. 3.15(b) to "*paragraph 3.8(a) above*" appears to be an error and should. I think, have referred to paragraph 3.7(b).

24. As a result, on 7 August 2019, the President of the Committee *for* Economic Development wrote to both sets of Appellants setting out his Committee's conclusions (as quoted in para. 3.16).

25. The next few paragraphs in the Decision set out who the Parties to it are, adding (at para. 3.30) that:

> "*JT and Sure are competitors on various mobile and fixed telecommunications markets in Guernsey. Specifically, they operate competing mobile network infrastructures. They also compete in providing mobile services to consumers at the retail level.*"

26. The final aspect of the third part of the Decision describes the Respondent's investigation process. The chronology set out from para. 3.32 appears to be uncontentious. Once the memoranda of understanding had been reviewed (and it is only the document relating to Guernsey that matters), the Respondent opened its investigation pursuant to section 22 of the 2012 Ordinance (para. 3.43) into the suspected contraventions. The letters sent to the Appellants referred both to section 5(1) and section 1(1).

27. At the same time, information requirements were issued to the Appellants pursuant to section 23 of the 2012 Ordinance. The Appellants responded to those notices on 25 July 2019 (paragraphs 3.47 and 3.48).

28. The memoranda of understanding were terminated by JT on 6 November 2019, with Sure accepting the request to terminate them the following day (paragraphs 3.49 and 3.50).

29. On 20 January 2020, the Respondent issued what it has described as the "*First SO*", which is a notice of a proposed decision where there is a right of appeal conferred by section 46 of the 2012 Ordinance, which is a requirement imposed by section 43. On the same date, it sent further notices requiring information to be provided pursuant to section 23. Those notices were responded to by the Appellants on 28 February 2020 and, as set out in para. 3.56, the disclosure of further information by JT ran to over 1,800 pages. Accordingly, and as a result of this disclosure (para. 3.57):

> "*… the GCRA took the view that there were reasonable grounds to suspect that the Parties' conduct raised additional competition concerns under Guernsey competition law, namely that the Parties had entered into an agreement or agreement pursuant to which they would consolidate and/or share mobile networks in Guernsey.*"

Ms Livestro wrote to the legal representatives of the Appellants on 2 October 2020 informing them that the scope of the Respondent's investigation had been extended.

30. During December 2020, three interviews were held with personnel from Sure, being Mr Kelly, Mr G (Sure's Chief Operating Officer) and Steven Ozanne (Sure's Wholesale Director). Such interviews result from the powers in section 23(4) of the 2012 Ordinance. No interviews were held with any JT personnel, as explained in para. 3.61 for the reasons given there. However, a further requirement to provide information pursuant to section 23 was made by a notice dated 31 March 2021, to which JT responded on 9 April 2021.

31. On 21 April 2021, the Respondent provided a new proposed decision, as required by section 43 of the 2012 Ordinance, by which it proposed to find that the Appellants had contravened section 5(1) (referred to during these appeals as the "*Second SO*" or just "*SSO*"). It was confirmed that "*This Statement of Objections supersedes the previous Statement of Objections issued on 20 January 2020, which is withdrawn*" (para. 1.5). The Appellants submitted written representations on 18 June 2021 and oral representations were made by Sure on 9 September 2021 and by JT on 7 October 2021. I will leave referring to all these documents in more detail until later in this judgment.

32. Against that procedural background, the fourth part of the Decision describes the parties' conduct. In doing so, it refers to the Telecommunications Sector Policy Statement, the 5G pre-summit in July 2018 before moving on to the contacts between the Appellant in section C of the fourth part. The position is summarised in para. 4.8:

> "*The bilateral contracts between the Parties involved the discussion and/or exchange of information in relation to the development of a Bilateral Home Network Scenario for Guernsey, which consisted of:*
>
> *(a) The proposition that Sure and JT would work together on an "open working" basis to achieve a mobile network infrastructure split along Bailiwick lines within five years. This network split would be achieved through the removal by JT of its mobile network infrastructure from Guernsey.*
>
> *(b) The commercial strategy that JT was contemplating adopting in respect of the speed of deployment of 5G, which by March 2019 had been incorporated into the proposed implementation timelines for the Bilateral Home Network Scenario.*
>
> *(c) The development of a common "line to take" with Government and the GCRA in relation to 5G, to support the Bilateral Home Network Scenario.*"

33. The first meeting referred to was on 22 August 2018. As well as commenting on the attendance notes that had been provided, there is an explanation about what the Respondent has termed "*the Bilateral Home Network Scenario*" in para. 4.11:

> "*The 22 August Attendance Notes also indicate that rather than beginning to explore one of the potential scenarios set out in the Telecommunications Sector Policy Statement as described above at paragraph 3.7 (the Pooled Infrastructure Scenario, the Single SA 5G Scenario or the Mandated Infrastructure Scenario), the Parties instead began to discuss a Bilateral Home Network Scenario – a bilateral arrangement pursuant to which Sure would retain its mobile network infrastructure in Guernsey and the JT mobile network infrastructure in Guernsey would be removed, thus creating "one network" in Guernsey*".

This was not one of the scenarios set out in the Telecommunications Sector Policy Statement (para. 4.12) and Airtel was not involved in the meeting (para. 4.15).

34. From para. 4.17 there is reference to the development of a line to take with the Respondent and with the States of Guernsey referring to:

> "*… the evidence demonstrates that the Parties also discussed some of the practicalities around joint development and implementation of the "one network" approach (i.e. the Bilateral Home Network Scenario) that they had been discussing and joint messaging that they should adopt. The proposals included joint marketing and PR to ensure a*

> *clear message was presented to external stakeholders, the signing of a letter of intent, sharing "crown jewels" and working up a common "public and regulatory" approach.*"

35. The next meeting referred to took place on 7 November 2018 in London, which was a fortnight before the 5G summit held in Guernsey. On this occasion, the Batelco Group CEO was also present. The information provided in paragraphs 4.19 and 4.20 includes Sure's response to an information requirement that there "*May have been some limited discussions regarding general network sharing and at the time the general inclination of both parties [was] not to support*" and JT stating that it was not aware of any discussion at the meeting "*relating to SA 5G mobile networks*" and was unable "*to confirm whether or not any discussions regarding mobile network consolidation took place.*"

36. A subsequent meeting, developing what had been discussed on 22 August 2018 took place on 9 January 2019. Under a heading "*Bilateral Home Network Scenario*", in para. 4.23 reference is made that "*rather than beginning to explore one of the three potential scenarios put forward by the States of Guernsey in the Telecommunications Sector Policy Statement (namely the Pooled Infrastructure Scenario, the Single SA 5G Scenario and/or the Mandated Infrastructure Sharing Scenario) to enable the roll out of 5G services in Guernsey in line with, or earlier than the UK, the documents demonstrate that the Parties continued to discuss a reciprocal Bilateral Home Network Scenario on a bilateral basis – i.e. each of JT and Sure would cease to operate a mobile network on its non-home island (see paragraphs 4.11 – 4.12).*" Further, in para. 4.25 there is also reference to the "line to take": "*the 9 January Attendance Notes record the Parties' agreement on a common approach to take in their individual upcoming discussions with the States of Guernsey and the GCRA, which is presumed to refer to the bilateral meetings that would take place on 16 January 2019.*" The line to take "*was that the Parties were happy to invest in 5G in the short term, that they were co-operating and that they were discussing infrastructure sharing.*"

37. The meetings with each set of Appellants on 16 January 2019 are covered in paragraphs 4.27 and 4.28. The first records that "*neither JT nor Sure disclosed the Bilateral Home Network Scenario discussions that had taken place and continued to take place between them.*" It appears that Mr Kelly may also have met that same day with Graeme Millar, the CEO of JT, on the basis of what is stated in an internal JT note dated 23 January 2019 and a Sure summary of the meeting between the two Chief Executives, with the JT document referring to "*discussing their [Sure's] preference for one mobile network for Guernsey*".

38. The next section covers contact between the Appellants between March and May 2019. Paragraph 4.31 records that "*the Parties exchanged information on projected costs as well as information related to the number of sites, site types, capacity and spectrum*", by reference to an e-mail sent on 22 May 2019 by Thierry Berthouloux to Mr Millar. After referring to other communications within Sure, para. 4.35 sets out that:

> "*The exchanges between the Parties demonstrate that the Bilateral Home Network Scenario continued to be actively explored by them on a bilateral basis and without involving Airtel (the second largest mobile operator in Guernsey by market share).*"

The conclusion is drawn in para. 4.36 that "*contrary to the scenarios set out in the Telecommunications Sector Policy Statement, they did not intend Airtel's network to be part of any "one network" solution.*" It is said that the point was picked up in a subsequent JT internal slide presentation circulated on 26 May 2019 (para. 4.37: "*Airtel expected to raise complaint or demand access to National roaming structure*").

39. As regards the speed of implementation of 5G, in para. 4.38 it is stated that "*contrary to the aspirations set out in the Telecommunications Sector Policy Statement, the Bilateral Home*

Network Scenario being discussed by the Parties was not intended to facilitate an early adoption of 5G." Instead, they proposed "*to introduce 5G gradually and only after a period of at least two years.*" This "*had been explicitly incorporated into the Parties' development of the Bilateral Home Network Scenario*", which was "*consistent with the commercial strategy shared by JT with Sure at the 22 August 2018 meeting, namely that it did not intend to be an early adopter of 5G but rather wished to squeeze all value out of 4G before edging into 5G (paragraph 4.10).*"

40. Moving on to the next few paragraphs, the Decision mentions an approach to Ericsson, which was made in March 2019. Paragraph 4.39 records that an e-mail sent on 25 April 2019 summarised the scenarios Ericsson was to consider, all of which "*were based on the Bilateral Home Network Scenario, i.e. the premise that JT would remove its mobile network.*" A response was received on 9 May 2019, which included confirmation that "*a quotation based on release 16 (required for SA 5G) could not be provided as the standards were not yet complete and that an Ericsson 5G network could not be made to interoperate with the 4G networks of other equipment vendors without degrading the end-user experience significantly*" (para. 4.40). As a result, para. 4.41 states:

> "*On the basis of the evidence, the GCRA therefore notes that the Parties must have been aware at a senior level, by early Q2 of 2019 at the latest, that the technology required to support a SA 5G network would not be available for some time and that a single NSA 5G network could not interoperate with multiple 4G networks and/or 4G networks of other equipment vendors.*"

41. The next document addressed was sent by Mr Kelly to *inter alia* Mr Millar on 20 May 2019 which the Decision refers to as the "*Principles Document*". It is said that the approach set out therein "*was consistent with both the Bilateral Home Network Scenario and the Parties' commercial strategy regarding the speed of implementation of 5G, which had first been shared at the 22 August 2018 meeting and had subsequently been developed by the Parties and incorporated into the Bilateral Home Network Scenario*" (para. 4.42). This document referred to "*5G build commitments by Sure and JT*", where Sure would build and maintain "*the required 5G infrastructure in Bailiwick of Guernsey*" and JT would do similarly for Jersey. In relation to mobile network consolidation, the Parties were "*to investigate the consolidation of other domestic mobile networks to realise operating cost, capex and environmental synergies*". By this time, the Respondent considers that the Parties were aware that "*5G networks could not operate independently of 4G networks*" and that a "*single NSA 5G network could not interoperate with multiple 4G networks*". Consequently, the view was that (para. 4.47):

> "*If JT had removed its 4G infrastructure from Guernsey, as envisaged under the Bilateral Home Network Scenario, it would have been unable to provide 5G services in Guernsey using its own 4G network. This would have left it (and other operators) in the position of an MVNO [Mobile Virtual Network Operator] and thus dependent on the decisions of the network operator owner and operator (Sure) as to the timing of the roll out of 5G.*"

42. On 31 May 2019, Daragh McDermott of JT circulated a slide presentation to JT board members. The third slide is quoted in para. 4.50:

> - "*Defend JT position as mobile network operator in Jersey at all cost*
>
> - *Prefer process of licences being issued to operators using a 'beauty contest' approach*
>
> - *Though not the preferred option, JT willing to pursue a single 5G network option if necessary*

- *Be aggressive in Guernsey*
    - *Again, prefer 'beauty contest' of issuing 5G licences*
    - *Should single network be only option in Guernsey, the [sic] aggressively pursue*
    - *Be prepared to consider an alternative approach to Guernsey operation if necessary to secure position in Jersey*".

Paragraph 4.51 explains that an earlier iteration of the final bullet point was "*Be prepared to trade Guernsey if it means we can successfully defend Jersey*". Although it is not explicit, it appears that the earlier version was revised before being circulated to the JT board members.

43. The conclusion is then set out in para. 4.53:

> "*These slides demonstrate that, in the absence of the contacts between the Parties as described above (i.e. under conditions of normal competition), there would have been vigorous competition for any Guernsey 5G spectrum award; JT's preferred strategic approach in Guernsey was to "be aggressive" (paragraph 4.50). However, while JT continued to prefer a competing network model approach within each Island, as had been the case for the 4G awards, it was prepared to alter this approach and "trade" with Sure, thereby undermining normal competition by removing itself as a mobile infrastructure network operator in Guernsey to defend "at all cost" (para. 4.50) its position as the mobile infrastructure network operator in Jersey. As set out in detail in this section, through the development of the Bilateral Home Network Scenario, JT had consistently and over a period of months communicated to Sure that it was contemplating removing its mobile network infrastructure from Guernsey.*"

44. The next issue covered relates to the memoranda of understanding concluded in June 2019. The Decision refers to two memoranda of understanding, one for each of Guernsey and Jersey (although the Jersey one can only have had relevance to any investigation in that jurisdiction). Paragraph 4.55 sets out that:

> "*The GCRA considers that although, on their face, the MOUs relate only to the construction of SA 5G networks, the background facts, as evidenced by the documents cited below, demonstrate that the conclusion of the MOUs and the circumstances that reflect the Parties' continuing concertation on a number of issues first raised in their meeting of 22 August 2018, namely:*
>
> *(a) Development of the Bilateral Home Network Scenario;*
>
> *(b) Exchange of information on intended future speed of implementation of 5G (which by this point had been incorporated into the Bilateral Home Network Scenario);*
>
> *(c) The development and delivery of a joint "line to take" with the Government and the GCRA.*"

45. The background was contact from a consultant, Ian Campbell, who was assisting the Guernsey Investment Find, which was working with MXC Capital. An e-mail was sent by him to Mr Millar and to Mr Kelly on 6 June 2019. This e-mail was then circulated by each within their respective companies. When Mr Kelly circulated this, he indicated that discussions had been held with JT and "*that we want to agree a non binding MOU*". Paragraph 4.61 quotes from

Sure's Written Representations. This approach "*caused concerns on Sure's part … JT seemingly had concerns that were similar to Sure's. The apparently similar concerns on the part of Sure and JT led to the rapid drafting and agreement of the MOU on 11 June 2019.*" Initially, a first draft of the MOU for Jersey was provided to Mr Kelly, where the expectation was that the Guernsey draft would contain identical provisions. Mr Kelly forwarded the draft to colleagues, and explained that "*its simplicity is appealing. It basically says that we will work together on mutual home networks*" (para. 4.65). Mr Kelly attached the "*Principles Document*", referencing the fourth option, which is set out at para. 4.66:

> "*Parties to investigate the consolidation of other domestic mobile networks to realise operating cost, capex and environmental synergies and protect against future reversal of possible single 5G approach; Single mobile networks in each of GSY and JSY owned by Sure and JT respectively.*"

46. The Respondent's assessment at para. 4.74 states:

> "*The evidence described above demonstrates that:*
>
> *(a) "Long conversations" between senior executives of each of the Parties took place on 6 June 2019 and these discussions led to JT indicating to Sure its support for progressing more rapidly the Bilateral Home Network Scenario discussions in which the Parties had been engaged since 22 August 2018 (paragraphs 4.60 – 4.62).*
>
> *(b) According to Sure the perceived threat posed by the States of Guernsey's engagement with MXC, which the Parties were concerned demonstrated a loss of confidence in their ability to deliver 5G in Guernsey and which the Sure CEO described as "super concerning", led to the signing of the MOU. This demonstrates that the Parties intended to try to remain in control of the speed of implementation of 5G in Guernsey. Their ability to do so would have been undermined if MXC had managed to partner successfully with another telecommunications operator (paragraphs 4.60 – 4.62).*
>
> *(c) The MOUs represented co-ordination by the Parties on a "line to take" with the States of Guernsey and the GCRA, namely that each was still "in the game" with respect to the implementation of 5G in line with the ambitions of the States of Guernsey. The MOUs, which related to the construction of SA 5G networks, did not, however, represent the actual nature of the contacts between the Parties, which had focussed on the development of a Bilateral Home Network Scenario based on a single 2G – 4G network with the incremental introduction of 5G on a non-standalone basis. As noted by the Sure CEO, the MOU "certainly [did] not go into wider network sharing options per 4 of the principles!!!" (i.e. did not accurately reflect the true nature of the discussions between the parties to date). This conclusion is supported by:*
>
> *(i) the exchange of e-mails between the JT CEO and Tamara O'Brien, which demonstrate that the MOU was not the "biggie" that it appeared to be (as assumed by Ms O'Brien) but rather was intended to convey a message to politicians and the regulator that the Parties were still "in the game" (paragraph 4.60 – 4.62; 4.65; 4.69 – 4.70);*
>
> *(ii) the e-mail from Ms Durnell to Mr Kelly which notes that the purpose of the MOU was "so we can show the Government that yes, we are already engaged in this and talking" (paragraph 4.68).*"

47. The Respondent was informed on 12 June 2019 that the MOUs had been concluded. The next day, a copy of the MOU was requested. Copies were eventually provided on 20 June 2019 (para. 4.83). In the meantime, Mr Berthouloux of JT sent an e-mail to Ericsson on 13 June 2019, which is quoted in para. 4.77, which the Respondent considers was not a genuine request for information because of the response received on 16 May 2019 that "*no quotation for a SA 5G network could be provided*", simply to make the same request less than a month later. It was known that it was impossible to construct a SA 5G network, resulting in the conclusion (para. 4.82) that:

> "*The GCRA therefore considers that the evidence, and in particular the timings of the emails sent on 13 June 2019, demonstrates that the Parties approached Ericsson to produce a quotation to demonstrate ("fuel the scenario") that they were genuinely exploring the construction of a SA 5G network, when this was not the case. The GCRA considers that this is further evidence that, as had been the case throughout the period of the conduct in question, the Parties continued to collaborate on a "line to take" with Government and with the GCRA that did not reflect their actual intentions or conduct.*"

48. The final few paragraphs in this fourth part of the Decision deal with the responses made by the Appellants to the Respondent's draft Statement of Intention. The responses were received on or about 14 June 2019, so a few days after signing the MOUs. In the responses both sides stated that "*the construction of a SA 5G network was not currently possible*". This was regarded as directly contradicting "*the assumptions on which the MOUs were based*" (para. 4.84). Sure's response also queried how another operator might affect the "*three mobile network operators that have yet to recoup their 4G investment*" (para. 4.85), adding that it "*could seriously threaten the ongoing viability of the existing networks and further put at risk the sustainability of effective competition.*" It was suggested that pursuing this option might lead to "*one or more legal challenges by the existing mobile network operators*" (para. 4.86).

49. The fifth part of the Decision sets out the legal framework. These are matters that I will need to address later in this judgment, so I do not intend to recite the contents of this part now. The only comment I will make is that what is set out in the fifth part is rather theoretical and it might have been better to relate each element more directly to the conduct described rather than leaving this to the sixth part, which contains the legal assessment. Although there are cross-references to other aspects in the Decision, it seems to me that the infringement of the prohibition imposed by section 5(1) of the 2012 Ordinance found in para. 7.1 necessarily has to relate to the assessment made in this sixth part, whatever theorising there may be found in the fifth part.

50. In para. 6.2, the Respondent concludes that it does not need "*a full market definition analysis but will proceed on the basis that the frame of reference for its assessment is the provision of mobile telephony services in Guernsey*". This is narrower than providing telephony services in Guernsey, but broader than just 5G and must encompass earlier 2G, 3G and 4G networks. Further, because section 22 enables the Respondent to open an investigation into a suspected contravention of the Ordinance, it follows that the scope of the investigation is set out in the notice given to the Appellants. This derives from the original notices dated 4 July 2019, which referred both to sections 1(1) and 5(1) and referred to constructing "*a 5G standalone mobile network in the Bailiwick of Guernsey*", as well as referring to entering into an agreement with one or more other undertakings in relation thereto. The investigation was later expanded on 2 October 2020 to add that the Respondent had "*reasonable grounds to suspect that Sure and JT have entered into an agreement or agreements pursuant to which they would consolidate and/or share mobile networks in Guernsey and that that agreement or those agreements may contravene section 5(1)*". The right of appeal in section 46 of the Ordinance enables an undertaking aggrieved by a decision of the Respondent, "*following an investigation conducted under section 22(1) or (2)*" that the undertaking has contravened *inter alia* section 5(1). Accordingly, the extent of the suspected infringement being investigated necessarily shapes the

finding of an infringement, and the Respondent's decision about the relevant market really ought to reflect its investigation, as it had been notified to the Appellants.

51. From paragraphs 6.3 to 6.6, the Respondent sets out its view that both JT Appellants "*form a single undertaking*" and that both Sure Appellants also "*form a single undertaking*". This issue is one of Sure's grounds of appeal, but not within JT's grounds. I will deal with this issue discretely later.

52. Paragraph 6.8 applies "*the principles set out above at paragraphs 5.19 – 5.32 to the evidence set out at paragraphs 4.7 – 4.83*", in order to find "*that the conduct of the Parties amounts to an agreement and a concerted practice under section 5(1)*". In para. 6.7, there is a summary of the principles set out more fully in paragraphs 5.19 to 5.32:

> "*(a) An agreement/arrangement arises where there is a concurrence of wills between two (or more) parties to act on the market in a specific way in accordance with the terms of the agreement, even if the specific features of the restriction envisaged are still under negotiation. "Agreement" includes inchoate understandings and partial and conditional agreements in the bargaining process which lead up to the definitive agreement. Agreement on a comprehensive common plan is not necessary. It is sufficient that the undertakings involved have expressed their joint intention to behave on the market in a certain way.*
>
> *(b) A concerted practice is a form of co-ordination falling within the scope of section 5(1) of the 2012 Ordinance and refers to conduct pursuant to which the parties knowingly substitute practical co-operation for the risks of competition. This concept must be understood in the light of the principle that each economic operator must determine independently the policy that it intends to adopt on the market.*
>
> *(c) The requirement of independence strictly precludes any contact between operators, the object or effect of which is to disclose to a competitor the course of conduct which they have decided to adopt or are contemplating adopting on the market.*
>
> *(d) Where there is a series of contacts between undertakings in pursuit of a single economic aim, such conduct as a whole may be treated as a single agreement and a concerted practice rather than a series of separate agreements and/or concerted practices.*"

The finding in para. 6.8 is then elaborated upon.

53. Paragraph 6.9 contains the Respondent's first finding that:

> "*(a) whether an undertaking retains mobile network infrastructure in, or removes mobile network infrastructure from, a territory in which it is active; and*
>
> *(b) the speed at which and/or the way in which it introduces a new product, such as 5G, into the market; and*
>
> *(c) the way in which it communicates those decisions to the regulator and Government*

> *are all matters that clearly form part of that undertaking's commercial strategy and relate to the course of conduct that that undertaking is contemplating adopting on the market.*"

54. Its second finding is in para. 6.11:

> "*Second, as summarised at paragraph 4.8 above and described fully in the subsequent paragraphs, and contrary to the requirement that each economic operator must determine its contemplated market conduct independently, the GCRA has found that the Parties engaged in repeated reciprocal contacts through meetings and exchanges of opinion and information, pursuant to which one or both disclosed to the other, and the other accepted the disclosure of, the course of conduct that they were contemplating adopting on the market in relation to the matters set out in paragraph 6.9 above.*"

The paragraphs that follow then repeat the various meetings that took place on 22 August 2018, 9 and 16 January 2019 and March 2019, with cross-references to the paragraphs in the fourth part. Paragraph 6.13 refers to development of "*the Bilateral Home Network Scenario*". Paragraph 6.15 refers to the approach to Ericsson. Paragraph 6.16 refers to the Principles Document. Paragraph 6.18 states:

> "*The conclusion of the MOUs, and the approach by the Parties to Ericsson to produce a quotation for SA 5G network equipment represented co-ordination on a "line to take" by the Parties to support their work on the Bilateral Home Network Scenario (paragraphs 4.55 – 4.83).*"

Through cross-referencing the whole section to which para. 6.8 refers, it is apparent that the factual findings made in those paragraphs are used as the basis for the conclusion that there was an infringement of section 5(1).

55. Its third finding is set out in para. 6.19:

> "*Third, these repeated contacts and exchanges of information significantly reduced the uncertainty of each party about the way in which the other Party was contemplating operating on the market. This is demonstrated in particular by the internal JT slide presentation of 31 May 2019, which noted that its preferred approach would be to "be aggressive in Guernsey" but that it needed to "defend JT as mobile network operator in Jersey at all cost" with the earlier version of that presentation noting that JT would "be prepared to trade Guernsey if it means we can successfully defend Jersey" (see paragraphs 4.41 – 4.51 above). The only "pro" of allowing Sure to secure the single 5G licence in Guernsey, in JT's view, was that this would "potentially secure JT's network position in Jersey". In other words, in the absence of the concerted practice, JT would have been "aggressive" in Guernsey and would have had to have accepted the risk of not being able successfully to defend Jersey. As a result of the concerted practice, however, JT contemplated altering its behaviour in Guernsey (i.e. not being aggressive but rather "trading" Guernsey) in order to protect its own position in Jersey. It would have been able to protect this position by agreeing with Sure on the approach that Sure would take in Jersey in return for JT altering its approach in Guernsey.*"

56. Its fourth finding is in para. 6.20:

> "*Fourth, the fact that both JT and Sure remained active on the market gives rise to a presumption that each took into account the information disclosed when determining their market conduct. The Parties could not "unknow" the information that they exchanged in respect of the Bilateral Home Network Scenario and the commercial*

> *strategy that each was contemplating adopting in relation to mobile network infrastructure and the introduction of 5G to Guernsey.*"

57. Its fifth finding is set out in para. 6.21:

> "*Fifth, the GCRA finds that the conduct described above constitutes a series of contacts and exchanges of information between the Parties. The conduct was characterised by an overall plan pursuing a common objective (namely the exploration and development of the Bilateral Home Network Scenario which the Parties contemplated would allow them to control the speed of implementation of 5G in Guernsey, supported by an agreed "line to take" with the regulator and the Government). Each of Sure and JT intended to contribute, by its own conduct, to the overall plan. Each of JT and Sure were aware of the conduct of the other in pursuing the common plan.*"

Accordingly, the Respondent found that "*this conduct amounts to a single agreement and a concerted practice*" (para. 6.22).

58. The next paragraphs address first some arguments raised on behalf of JT, which the Respondent rejects (para. 6.25). The explanation offered for rejecting the arguments is in para. 6.26:

> "*When establishing an infringement of section 5(1) of the 2012 Ordinance, the GCRA must prove the infringements which it has found and adduce evidence capable of demonstrating to the requisite legal standard the existence of facts constituting the infringement. It must show precise and consistent evidence in order to establish the existence of the infringement and to support the conclusion that the alleged infringements constitute appreciable restrictions on competition within the meaning of section 5(1) of the Ordinance. That requirement is not satisfied, in particular, where a plausible explanation can be given for those alleged infringements which rules out an infringement of the 2012 Ordinance.*"

The Decision then cites from para. 224 of a Commission decision dated 27 September 2017, Case AT.39824 ***Trucks*** (which also includes that "*in most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules*") as supporting its conclusion that "*the body of evidence relied on by the institution, viewed as a whole*" demonstrates that the Appellants "*engaged in a single agreement and a concerted practice which consisted of the discussion and development of the Bilateral Home Network Scenario*" (para. 6.28). As such, the Respondent was entitled to draw inferences from the material it reviewed.

59. The next issue addressed, again raised by the Appellants in their representations, relates to the fact that any agreement or concerted practice "*was non-binding and/or exploratory and/or they had not unequivocally committed to it.*" This is similarly rejected by the Respondent (para. 6.31), in which there is further repetition that "*the conduct pursued a single economic aim, namely the exploration and development of the Bilateral Home Network Scenario in order to enable Sure to control the speed of implementation of 5G in Guernsey, supported by an agreed "line to take" with the Government and the GCRA.*"

60. The next issue addressed is that the Appellants raised the fact that any "*agreement/concerted practice would have been impossible to implement because it would have been or could have been subject to regulatory and/or political approval and/or exemption*" (para. 6.32). In doing so, reference is made to conditions attaching to the Appellants' mobile telecommunications licences. This is an argument that has been repeated on these appeals and so I will deal with it in due course. Although it is referred to as a finding in para. 6.38, rather than a conclusion rejecting the arguments raised, it is apparent that the Respondent also rejected these arguments.

61. The next issue addressed relates to another argument advanced by the Appellants relating to the encouragement given to them by the States of Guernsey and the predecessor of the Respondent as regulator. Again, this is rejected by the Respondent, referring in para. 6.41 to this "*being based on a mischaracterisation of the Telecommunications Sector Policy Statement*" and the fact that even if there had been encouragement to the Appellants "*to implement the Bilateral Home Network Scenario (which they were not) such encouragement or requests would not absolve the Parties of liability for entering into the agreement/concerted practice described above.*" Both bases are then set out in more detail in the following paragraphs.

62. Each of the issues raised on behalf of the Appellants has been dealt with in this sixth part, but none of it reflects the findings made that I have set out above. These are the reasons why the representations made in respect of the SSO were being rejected. Whilst they form part of the Decision, they do not in themselves explain the infringement found by the Respondent. Instead, they reflect the representations made and explain the reasons given for rejecting each of them.

63. However, the next set of paragraphs do form an operative part of the Decision to find that the Appellants infringed section 5(1) and they relate to the conclusion that it was an infringement by object. In para. 6.46 there is a finding that the conduct set out in paragraphs 4.7 to 4.83 "*amounted to an anti-competitive agreement and a concerted practice by object.*" The position is again summarised in para. 6.47:

> "*As set out above, pursuant to the agreement and concerted practice, the Parties disclosed to each other the commercial strategy/course of conduct that one or both intended to adopt in the market in relation to:*
>
> *(a) The contemplated removal by JT of its mobile network infrastructure from Guernsey, pursuant to the Bilateral Home Network Scenario;*
>
> *(b) The speed at which and/or the way in which the Parties intended to introduce a new product (5G) into the market;*
>
> *(c) The way in which the Parties communicated those decisions to the GCRA and the Government.*"

64. By reference to its earlier findings in this sixth part, in particular as set out in paragraphs 6.9, 6.10 and 6.19 (see para. 6.48), the Respondent concludes that prima facie "*this conduct amounts to a restriction by object*" (para. 6.50). It then gives three reasons for reaching that conclusion in paragraphs 6.52 to 6.54, referring to the high combined share of the total mobile subscriptions in Guernsey (76% combined) and the consequences for the third provider, Airtel, being excluded from the Bilateral Home Network Scenario, the plan to award a single licence for 5G, so that "*the fact that JT had communicated to Sure that it was contemplating removing its 2G – 4G mobile network infrastructure from Guernsey meant that, at the least, uncertainty as to how JT might have behaved in any competitive 5G spectrum award process would have been reduced*", and that the Appellants "*acted together to draft the MOU in an attempt to prevent or discourage the States of Guernsey from pursuing the option*" arising from interest being expressed by the Guernsey Investment Fund and MXC.

65. There are two final matters raised in this sixth part. The first (in para. 6.55) is that, in accordance with what is found in the Respondent's Guideline 2, the conduct described was "*capable of having an appreciable effect on competition*" and the duration of the infringement was found to run from 22 August 2018 until the termination of the MOU on 6 November 2019.

66. I have set out a lot of detail from the Decision for a number of reasons. It is the basis on which the findings of infringement of section 5(1) of the 2012 Ordinance are found. Given the first ground of appeal by Sure, and the fifth of JT, both challenge whether the Decision could

properly follow the SSO, I consider that it is important to set out how the infringements described in the Decision are articulated in order to be able to determine, by reference to a detailed analysis of the SSO, which will follow, whether the Respondent has or has not complied with its obligations under the Ordinance. Moreover, the reasoning within the Decision is the only basis on which the Respondent can now support its conclusions that the infringements found should not be set aside. I appreciate that I have set out more of the Decision than might be normal, but I have done so because the basis of what the Respondent has found is central to these appeals.

Preliminary points

67. Before I turn to Sure's first ground of appeal (and JT's fifth ground), I will cover two preliminary matters.

68. The first relates to what is said at the early paragraphs of the fifth part of the Decision, dealing with the legal framework. It notes that the 2012 Ordinance came into force on 1 August 2012 and then continues:

> "*5.3 In respect of conduct that took place before 23 February 2021, the GCRA was obliged to take account of the treatment of corresponding questions under European Union (**EU**) competition law when determining questions in relation to Guernsey competition law but was not prevented from departing from EU precedents where this was appropriate in light of the particular circumstances of the Bailiwick. With effect from 23 February 2021 the GCRA may take those principles into account.*
>
> *5.4 Given that the conduct in question occurred before 23 February 2021, the GCRA will take account of the treatment of corresponding questions under EU competition law when assessing this conduct.*"

69. Although neither of the Appellants has raised this directly as a ground of appeal, I take the view that this approach amounts to a legal error.

70. Section 54 of the 2012 Ordinance was amended by the European Union (Competition) (Brexit) Regulations, 2021. The provision now reads:

> "*The Authority and the Court may in determining questions arising in relation to –*
>
> *(a) the abuse by one or more undertakings of a dominant position within any market in Guernsey for goods and services,*
>
> *(b) anti-competitive practices between undertakings, and*
>
> *(c) the merger and acquisition of undertakings,*
>
> *take into account the principles laid down by and any relevant decisions of the Court of Justice or General Court of the European Union in respect of corresponding questions arising under Community law in relation to competition within the internal market of the European Union.*"

Prior to the amendment made by the 2021 Regulations, this section used "*must*" where it is now "*may*".

71. I have looked carefully at the 2021 Regulations to see whether there is any suggestion that the change made is subject to some transitional provision. The Regulations are brief and it is clear that there is no specific transitional provision on their face. They were made under the European Union (Brexit) (Bailiwick of Guernsey) Law, 2018. Section 13 of the 2018 Law gives effect to schedule 1 to that Law, which includes consequential, transitional and saving provision. Having looked at that schedule, I am not persuaded that it affects matters following the change in legislation brought about by the 2021 Regulations. It may have preserved matters following exit day, but only until 23 February 2021, when the Regulations were made and took effect. Indeed, whilst I appreciate that the Explanatory Note to the Regulations simply offers an explanation about their effect, I am satisfied that it is accurate: "*the taking into account of EU principles and decisions by the Guernsey Competition and Regulatory Authority and Royal Court, is discretionary rather than mandatory.*"

72. During the course of the hearing, Advocate Dawes accepted that legislation is always speaking. That principle is stated in section 10 of the Interpretation and Standard Provisions (Bailiwick of Guernsey) Law, 2016: "*Unless the contrary intention appears, an enactment continues to have effect and may be applied from time to time to the circumstances as they arise.*" Because I have not identified any contrary intention, it follows that when the change to section 54 of the 2012 Ordinance was made in 2021 anything falling to be done after that date, even if it related to facts arising earlier, was subject to the discretion as to whether to apply EU principles rather than it being an obligation. To that extent, where the Respondent uses "*will take account*" in para. 5.4 of the Decision, this was wrong.

73. That said, where Guernsey currently has little by way of jurisprudence in respect of competition law decisions (and at the time of the hearing the decision in *Medical Specialist Group LLP v GCRA* 2023 GLR 17 had not been handed down, with this being the second such case), I fully accept that regard can be had for persuasive authority to decisions from other jurisdictions. This extends to decisions taken under EU law, where the terms of the 2012 Ordinance have been derived from similar provisions (eg, Article 101, TFEU) and also under provisions applying in the United Kingdom, such as the Competition Act 1998. The difference, though, is that before 23 February 2021 section 54 of the Ordinance required both the Respondent and this Court generally to apply those principles whereas now they are discretionary. They are still relevant, but their status has changed. The principles can be adopted and applied but there is no legal requirement to do so. They are persuasive and may, in some instances, be highly persuasive, but they do not bind.

74. The second preliminary comment I will make relates to how the Respondent appears to have gone outside the ambit of its Decision in order to support its conclusions. As I commented towards the start of this judgment, referring to the directions hearing that took place on 11 February 2022, the Respondent is required to defend its Decision by reference to the reasoning contained within it. What it cannot properly do is to refer to matters that it could have included in the Decision but chose not to rely on. In other words, it is not open to the Respondent to rely on some other material about which no mention is made on the face of the Decision as a means to justifying why its finding of an infringement of section 5(1) should now be upheld.

75. As an experienced Advocate, Advocate Dawes should not have sought to approach the appeals in that way in his Skeleton Argument. It is an excessively long Skeleton Argument anyway, made even longer by reference to matters that should not have been included in it. I do not accept the submission he made at the hearing that it was permissible to rely on material available to the Respondent at the time it took the Decision. I also do not accept that what is found in the Skeleton Argument stays within the four corners of the reasoning in the Decision. I consider that it seeks to go further.

76. This approach is, in my view, entirely consistent with how this Court has dealt with statutory appeals for many years. The basis of the decision reached, and which the Respondent has to

defend, must follow from the reasoning contained in the decision reached. If something has not been referred to, and so relied on, even if it was material available to the Respondent at the time it reached the Decision, I take the view that it would be irrational for the Respondent to seek now to rely on that material. Because of the reasons it gave for finding the infringement that it has found, it would be unfair for it now to seek to rely on anything extraneous. The Respondent's defence of its Decision stands and falls on the reasoning contained therein. As Advocate Barclay notes, even in the Respondent's Skeleton Argument, despite the Decision moving away from the market-sharing agreement referred to in the SSO, there are numerous references to alleged market sharing. Accordingly, to the extent that the Respondent seeks to refer to matters not addressed in its Decision, I agree with the submissions of Advocates Gray and Barclay that this is impermissible. All this means is that any purported reliance on extraneous material will be ignored, but referring to any material that is referred to in the Decision is permissible.

77. I can set out one example of this, derived from Advocate Gray's Reply Skeleton Argument. She points out that paragraphs 130 to 154 of Advocate Dawes' Skeleton Argument put forward an entirely new case, referring to new reasons and even new evidence that does not appear in the Decision. Within that section, in para. 145 there is even reference to "*the fact that Sure has recently announced plans to acquire Airtel*", which was a development after the Decision was taken and so can have no bearing on the lawfulness of the infringement found in the Decision. As a result, I am prepared to proceed on the basis that anything mentioned in the Decision can be relied upon by the Respondent but anything that is not will have to be disregarded.

78. This approach is also consistent with what happens elsewhere. For example, in *Napp Pharmaceutical Holdings Limited v Director General of Fair Trading* (unreported, 8 August 2001), at para. 77 the Tribunal stated:

> "*It is particularly important that the Director's decision should not be seen as something that can be elaborated on, embroidered or adapted at will once the matter reaches the Tribunal. It is a final administrative act, with important legal consequences, which in principle fixes the Director's position. In our further view investigations after the decision of primary facts, in an attempt to strengthen by better evidence a decision already taken, should not in general be countenanced.*"

In a further decision in these proceedings (unreported, 15 January 2002), the Tribunal stated (at para. 133):

> "*On this point, for the same reasons that we consider that our discretion to allow the Director to submit further evidence should be exercised sparingly, we accept Napp's basic submission that, in principle, the Director should not be permitted to advance a wholly new case at the judicial stage, nor rely on new reasons. To decide otherwise would make the administrative procedure, and the safeguards it provides, largely devoid of purpose; the function of this Tribunal is not to try a wholly new case. If the Director wishes to make a new case, the proper course is for the Director to withdraw the decision and adopt a new decision, or for this Tribunal to remit.*"

79. Similarly, in *Aberdeen Journals Limited v Director General of Fair Trading* (unreported, 19 March 2002), this decision in *Napp* is referred to but by way of explaining that the position was different. One of the differences was that the additional documents being relied on by the Director went "*directly to an essential part of the case*", in that instance about the relevant market, which was something the Director had to establish in the course of the decision under appeal, and required to put during "*the course of the administrative procedure*", meaning that the appellant in that case "*did not know the Director was relying on these documents*" until there was a defence lodged. In the present appeals, the Respondent has not sought any leave to rely upon material that is not set out on the face of the Decision. Because I dispensed with any

need for the Respondent to put forward a summary of its case, on the basis that the reasoning found on the face of the Decision acted as a constraint on what it could properly refer to, the first time the Appellants knew that the Respondent intended to go outside the terms of the Decision was upon receipt of its Skeleton Argument. This is irregular and, in my judgment, unsatisfactory, which is why I have set out in some detail why it is that I will not generally have regard to anything outside of the terms of the Decision itself. The one real exception relates to anything in response to the submissions made on behalf of the Appellants.

First ground – procedural unfairness

80. I will cover Sure's first ground of appeal (and JT's fifth ground) straightaway and without first commenting on the nature of an appeal under section 46 of the 2012 Ordinance. This ground strikes me as going to the heart of these appeals because it alleges that the Respondent has acted procedurally unfairly and, if that is correct, this would be sufficient to allow the appeals.

81. It is important to place this ground of appeal into context. Section 43(1) of the 2012 Ordinance imposes an obligation on the Respondent to follow the provisions of that section where a right of appeal is conferred by section 46. There is no dispute that section 46 was engaged, which is why the SSO was provided. Section 43(2) provides that:

> "*The relevant authority shall serve on the undertaking concerned a notice in writing –*
>
> *(a) stating that the relevant authority is proposing to take the decision,*
>
> *(b) stating the terms of, and the grounds for, the proposed decision,*
>
> *(c) stating that the undertaking may, within a period of 28 days beginning on the date of the notice or such longer period as may be specified in the notice, make written or oral representations to the relevant authority in respect of the proposed decision in such manner as the relevant authority may from time to time determine, and*
>
> *(d) giving particulars of the right of appeal which would be exercisable under section 46 if the relevant authority were to take the proposed decision.*"

In the circumstances of the present case, subsections (4) and (5) do not apply, but subsection (3) requires the Respondent, as the relevant authority, to "*consider any representations made in response to a notice served under subsection (2) before giving further consideration to the proposed decision.*"

82. The issue in respect of these grounds of appeal is whether or not the Respondent, having abandoned its First SO and replaced it with its SSO was required under the terms of the 2012 Ordinance to start once again rather than proceed to take the Decision because the grounds for the Decision taken differ from those set out in the SSO.

Parties' contentions

83. As Advocate Gray puts it on behalf of the Sure Appellants, the Decision is a significant and materially different re-working of the case by the Respondent from the SSO. In particular, the Decision relies upon a presumption, noted in para. 6.20 of the Decision, that had not been put to Sure, developing a new analysis of the alleged information that had been shared, re-working its analysis of the infringement by object and switching from an allegation of a market sharing agreement (facilitated by the exchange of competitively sensitive information) to an allegation based on the exchange of competitively sensitive information. It is further suggested by her

that the changes made between the SSO and the Decision were such that it was a legal requirement on the Respondent to do what it had previously done and to serve a further notice of its proposed decision pursuant to section 43 of the 2012 Ordinance.

84. In support of those arguments, she refers to a principle found in EU case law that it is inappropriate to rely on a presumption in a final decision that has not been put, thereby enabling the party alleged to have infringed the rules to produce evidence to rebut it. In part, this is the purpose of the Affidavit of Mr Kelly, demonstrating what more could have been explained had the presumption relied upon been put to Sure. This is done by reference to Case C-612/12 P *Ballast Nedam NV v European Commission* [2014] 4 CMLR 26, which relates to an alleged cartel in the Netherlands relating to road pavement bitumen. Paragraphs 24 to 26 of the judgment are relied on for the principle, with paragraph 25 stating:

> "*… the General Court erred in law with regard to the requirement that the statement of objections be sufficiently clear, in accordance with which it is necessary for the statement of objections to indicate in which capacity an undertaking is called upon to answer the allegations (Papierfabrik August Koehler at [39]).*"

85. Advocate Gray has also referred to the case mentioned in that paragraph as support for the principle that any statement of objections must be sufficiently clear to enable the undertaking addressed to make known its views on the relevance of the facts being alleged. In Joined Cases C-322/07 P, C-327/07 P and C-338/07 P *Papierfabrik August Koehler AG v Commission of the European Communities* [2009] 5 CMLR 20, another case relating to an alleged cartel, but this time in respect of carbonless paper, the first set of paragraphs relied on are those numbered 34 to 36:

> "*34. It is settled case law that in all proceedings in which sanctions, especially fines or penalty payments, may be imposed, observance of the rights of the defence is a fundamental principle of Community law which must be complied with even if the proceedings in question are administrative proceedings (F Hoffmann La Roche & Co AG v Commission of the European Communities [1979] E.C.R. 461; [1979] 3 C.M.L.R. 211 at [9] and Arbed SA v Commission at [19]).*
>
> *35. To that end, Regulation 17 provides that the parties are to receive a statement of objections which must set forth clearly all the essential facts upon which the Commission is relying at that stage of the procedure. That statement of objections constitutes the procedural safeguard applying the fundamental principle of Community law which requires observance of the rights of defence in all proceedings (see, to that effect, Musique Diffusion Francaise SA v Commission of the European Communities [1983] E.C.R. 1825; [1983] 3 C.M.L.R. 221 at [10]).*
>
> *36. That principle requires, in particular, that the statement of objections which the Commission sends an undertaking on which it envisages imposing a penalty for an infringement of the competition rules contain the essential elements used against it, such as the facts, the characterisation of those facts and the evidence on which the Commission relies, so that the undertaking may submit its arguments effectively in the administrative procedure brought against it (see, to that effect, ACF Chemiefarma v Commission of the European Communities [1970] E.C.R. 661 at [26]; AKZO Chemie BV v Commission of the European Communities [1991] E.C.R. I-3359; [1993] 5 C.M.L.R. 215 at [29]; A Ahlström Osakeyhiö v Commission at [135] and Arbed SA v Commission at [20]).*"

She has also relied on paragraphs 40 and 41, the latter of which includes that "*the statement of objections had not enabled Bolloré to acquaint itself with the objection based on that involvement or even with the facts established by the Commission in the decision in support of that objection, so that Bolloré had been unable properly to defend itself during the administrative procedure vis-à-vis the objection and the facts in question.*"

86. These are, Advocate Gray submits, no more than generally accepted principles about fair process, as shown by comments of the highest persuasive authority in the United Kingdom. For example, in *Bushell v Secretary of State for the Environment* [1981] AC 75, Lord Diplock comments (on page 96) that:

> "*Fairness, as it seems to me, also requires that the objectors should be given sufficient information about the reasons relied on by the department as justifying the draft scheme to enable them to challenge the accuracy of any facts and the validity of any arguments upon which the departmental reasons are based.*"

Indeed, on the previous page His Lordship had also commented that:

> "*Ministers come and go, departments, though their names may change from time to time, remain. Discretion in making administrative decisions is conferred upon a minister not as an individual but as the holder of an office in which he will have available to him in arriving at his decision the collective knowledge, experience and expertise of all those who serve the Crown in the department of which, for the time being, he is the political head. The collective knowledge, technical as well as factual, of the civil servants in the department and their collective expertise is to be treated as the minister's own knowledge, his own expertise. It is they who in reality will have prepared the draft scheme for his approval; it is they who will in the first instance consider the objections to the scheme and the report of the inspector by whom any local inquiry has been held and it is they who will give to the minister the benefit of their combined experience, technical knowledge and expert opinion on all matters raised in the objections and the report.*"

It strikes me that this is also a matter that I can properly take into account as between the SSO and the Decision in the present case, making appropriate adjustments to the language to reflect the Respondent and its staff.

87. Reference is also made to the observations of Lord Mustill in *R v Home Secretary, ex parte Doody* [1994] 1 AC 531, which related to His Lordship's comments about fairness (on page 560), which follow from what he described as "*essentially an intuitive judgment*" and cases that "*are far too well known*" to need to be cited:

> "*From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may*

> *weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.*"

88. Finally, Advocate Gray refers to *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213, in which the English Court of Appeal referred to the effectiveness of consultation (at para. 108):

> "*It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken: R v Brent London Borough Council, Ex p Gunning (1985) 84 LGR 168.*"

89. In her oral submissions she referred also to *R v Westminster City Council, ex parte Ermakov* [1996] 2 All ER 302, in which Hutchinson LJ explained why this is a necessary part of the requirement to give reasons, as required of the Respondent in accordance with section 44 of the 2012 Ordinance:

> "*(2) The court can and, in appropriate cases, should admit evidence to elucidate or, exceptionally, correct or add to the reasons; but should, consistently with Steyn LJ's observations in Ex p Graham, be very cautious about doing so. I have in mind cases where, for example, an error has been made in transcription or expression, or a word or words inadvertently omitted, or where the language used may be in some way lacking in clarity. These examples are not intended to be exhaustive, but rather to reflect my view that the function of such evidence should generally be elucidation not fundamental alteration, confirmation not contradiction. Certainly there seems to me to be no warrant for receiving and relying on as validating the decision evidence – as in this case – which indicates that the real reasons were wholly different from the stated reasons. It is not in my view permissible to say, merely because the applicant does not feel able to challenge the bona fides of the decision-maker's explanation as to the real reasons, that the applicant is therefore not prejudiced and the evidence as to the real reasons can be relied upon. This is because, first, I do not accept that it is necessarily the case that in that situation he is not prejudiced; and, secondly, because, in this class of case, I do not consider that it is necessary for the applicant to show prejudice before he can obtain relief. Section 64 requires a decision and at the same time reasons; and if no reasons (which is the reality of a case such as the present) or wholly deficient reasons are given, he is prima facie entitled to have the decision quashed as unlawful.*
>
> *(3) There are, I consider, good policy reasons why this should be so. The cases emphasise that the purpose of reasons is to inform the parties why they have won or lost and enable them to assess whether they have any ground for challenging an adverse decision. To permit wholesale amendment or reversal of the stated reasons is inimical to this purpose. Moreover, not only does it encourage a sloppy approach by the decision-maker, but it gives rise to potential difficulties. In the present case it was not, but in many cases it might be, suggested that the alleged true reasons were in fact second thoughts designed to remedy an otherwise fatal error exposed in judicial review proceedings. That would lead to applications to cross-examine and possibly further discovery, both of which are, while permissible in judicial review proceedings, generally regarded as inappropriate. Hearings would be made longer and more expensive.*"

Section 44(2) refers to "*the grounds for*" the decision taken by the Respondent, but I regard this as interchangeable for "*reasons*" in this passage.

90. As Advocate Barclay puts it on behalf of the JT Appellants, this is the strongest ground of appeal. In JT's Cause, the ***Papierfabrik August Koehler*** case is expressly mentioned. He similarly points out that the proposal to find a market sharing agreement disappears between the SSO and the Decision, albeit that Advocate Dawes' Skeleton Argument appears to retain vestiges of that proposal. In summary, the case set out in the SSO was the case the JT Appellants had to meet at that time, focusing on a market-sharing agreement, but the terms of the Decision are different and this was not the case that they had addressed in their representations on the SSO. This is apparent from reviewing those representations. He suggested that each time the Respondent's case collapsed, it searched around in the rubble to see what was left and could be relied upon instead. No additional authorities are relied on by him.

91. The response from the Respondent is found towards the end of its Skeleton Argument. Given that it was Sure's first ground of appeal, this appears to me to be a little odd. Advocate Dawes suggests that there was no need for a third statement of objections, ie, a notice pursuant to section 43 of the 2012 Ordinance, because in the Decision the finding of an infringement is narrower than in the SSO, which would have entailed further lengthening an already lengthy process. He also submits that the question to ask is "*whether, in the light of the particular circumstances of the case, including the fact that the statutory regime anticipates that the reasoning in the final infringement decision may (once the Authority has considered the consultation responses) differ from that in the consultation, the procedure adopted by the Authority, combined with these appeal proceedings, will ultimately have caused the Parties any material unfairness.*" In considering that issue, he suggests that the Court might focus on "*whether the essence of the information sharing infringement finding in the Decision was put to the parties in the SSO.*" In doing so, he highlights some of the paragraphs mentioned in para. 6.8 of the SSO.

92. In respect of the arguments mounted about the presumption, Advocate Dawes points out that para. 6.9 in the SSO broadly reflects what becomes para. 6.20 in the Decision. He has also drawn attention to various elements in the responses to the SSO made by the Sure Appellants referring to "*competitively sensitive information*".

93. However, if contrary to his submissions, the Court considered that there had been unfairness in the procedure adopted, this could be cured by the Court considering the arguments advanced on the appeal without needing to remit the matter, on the basis that any subsequent finding of infringement would be likely to be appealed again.

94. In Advocate Dawes' oral submissions, he suggested that the market sharing arrangement referred to in the SSO had become the Bilateral Home Network Scenario in the Decision. This was no more than a re-labelling. He acknowledged that the Respondent had pulled back from finding that there had been an agreement. He also suggested that it would be permissible to include in a section 43 written notice (or statement of objections) a proposal to find an infringement of sections 1(1) and 5(1) and then only to proceed in the final decision to one of those findings. The part setting out the conduct is remarkably similar in both documents. In summary, each document is consistent with each other and falls within a margin of appreciation open to the Respondent. He acknowledged that it was a question of degree and ultimately a matter for the Court's judgment. However, in his submission this was not a material procedural error, especially by having regard to the substance of the infringement found.

The SSO

95. In order to consider the grounds of appeal advanced by the Appellants, it will be necessary to conduct a similar exercise as that in relation to the Decision in order to understand whether there has been compliance with section 43 or whether Sure's first ground (and JT's fifth ground) have merit and, if so, how to deal with that. I will, therefore, also need to quote extensively from the SSO.

96. Once again, the proposed finding in the SSO is set out in para. 7.1: "*the GCRA proposes to find that the Parties have infringed the prohibition imposed by section 5(1) of the 2012 Ordinance (prohibition on agreements between undertakings which have the object of preventing competition within any market in Guernsey for goods and services).*" To that extent, the proposed finding mirrors the finding actually made in the Decision. I take the view that this relates to the terms of the decision the Respondent was proposing to make, but what matters will be the grounds on which that finding, proposed in the SSO, was going to be based.

97. It is made clear in para. 1.6 of the SSO that the document would serve as the notice in writing required by section 43(2) of the 2012 Ordinance.

98. Although in the Decision the second part, termed as an "*executive summary*", is expressly not part of the Decision, in the SSO, the second part is referred to as a synopsis and is not stated as <u>not</u> forming part of the proposed decision, so I consider it is appropriate to refer to it:

> "*On the basis of the evidence available to it, the GCRA provisionally concludes that:*
>
> *i.* *Sure and JT, as close competitors, colluded to achieve an outcome where each would attain a far stronger market position as the operator of existing and future mobile network infrastructure in their respective home markets, achieved not by fair and open competition, but through a secret arrangement with each other.*
>
> *ii.* *The collusion was based on a coordinated exchange over more than a year between Sure and JT, which amounts to a Channel Islands wide market sharing agreement. The agreement was that:*
>
> *a.* *Sure would acquire JT's mobile network infrastructure in Guernsey by trading its mobile network infrastructure in Jersey and vice versa and, subsequently,*
>
> *b.* *Each of Sure and JT would construct the single standalone 5G network in its "home" island.*
>
> *iii.* *The parties entered into these arrangements to protect their own interests at the expense of consumer interests. The impact of competitors engaging in this form of cartel behaviour (had it been successful) was likely to have manifested in poorer value for money, less innovation, and less choice for consumers.*
>
> *iv.* *Airtel was a growing competitive threat to Sure and JT, having steadily won significant market share from both parties since it entered the Guernsey market. Had the cartel agreement been successful, it would have disadvantaged Airtel's business given:*
>
> *a.* *Airtel's reliance on JT's mobile mast infrastructure to deliver its mobile services which was either going to be removed or traded with by JT with Sure, and*

b. The fact that the arrangements would have improved Sure's network by the addition of optimal JT sites.

The parties colluded in the knowledge that the arrangement risked weakening this rival.

v. This collusion was also likely to have made entry into the Guernsey market less likely for a potential new investor, MXC.

vi. Sure and JT entered into this market sharing arrangement in secret over an extended period of time, knowing States of Guernsey officials, the GCRA and other market participants were unaware of the true extent of their collaboration. The parties did this despite ongoing discussions with Ministers, States officials, and GCRA officials about future mobile network provision and the obvious relevance of their collusion to policy and regulatory priorities at the time including in respect of the impact the collusion would have in preventing a reversal of position by the States of Guernsey should they decide to revisit these policy priorities.

vii. During the investigation the parties attempted to maintain a narrative that they had been compelled to collude because of pressure brought on them by the States of Guernsey and the GCRA. This is contradicted by internal communications that the GCRA has obtained which show that the parties entered into close and secret discussions at the most senior executive level of their respective organisations at an early stage of the States of Guernsey's policy thinking.

viii. Sure and JT's internal communications further show that at a senior level both parties were aware that their behaviour was likely to raise concerns and attempted to portray their discussions as merely 'network sharing'. What they had in fact been engaged in was a hard core competition law restriction, attempting to carve up Channel Islands markets in a secret arrangement between them. Documents obtained reveal that within hours of the GCRA making initial enquiries following an announcement by Sure and JT of a Memorandum of Understanding (with proposals for a stand-alone 5G network), the parties approached an equipment provider to produce a report to 'fuel the scenario' they were attempting to portray. The exchanges that led to the signing of the Memorandum of Understanding noted that material aspects of their true collusion with each other, which related to existing infrastructure, were being deliberately excluded."

99. Further, whilst I appreciate that the executive summary in the Decision does not form a part of it, I will refer to it as a means of comparing what was being proposed in the SSO with the executive summary from which the explanation of the rest of the Decision might be gleaned, although I fully understand that I will have to refer to the body of the SSO as well:

"*Legal Framework*

- *The Ordinance came into force on 1 August 2012.*
- *It prohibits agreements between undertakings that have the object or effect of preventing competition within any market in Guernsey for goods or services.*

Anti-competitive agreement / concerted practice

- *The concept of an agreement centres around the concurrence of wills between two parties.*

- *A concerted practice is a form of co-ordination between undertakings which, without having reached the stage where an agreement properly so called has been concluded, knowingly substitutes practical co-operation between them for the risks of competition.*

- *This requirement of competition strictly precludes any direct or indirect contact between undertakings, the object or effect of which is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting in the market.*

- *In particular a concerted practice may arise if there are reciprocal contacts between the parties which have the object or effect of removing or reducing uncertainty as to future conduct on the market. Such contacts are presumed to have an effect on conduct where both parties remain active on the market.*

- *Where there is a series of contacts between undertakings in pursuit of a single economic aim, the conduct as a whole may be treated as a single agreement and a concerted practice.*

The GCRA's investigation

- *The GCRA's investigation has found that JT and Sure engaged in a single continuous anti-competitive agreement and concerted practice.*

    - *Through multiple contacts and exchanges of information, JT and Sure disclosed to each other the course of conduct / commercial strategy that one or each of them was contemplating adopting on the market.*

    - *These contacts and exchanges significantly reduced the uncertainty of each about the way in which the other was contemplating behaving on the market.*

    - *The Parties remained active on the market throughout, thus it is assumed that the agreement/concerted practice had an effect on their market conduct.*

    - *The conduct amounts to a single continuous agreement / concerted practice.*

- *This course of conduct by the Parties constitutes an anti-competitive agreement and a concerted practice by object:*

    - *An exchange of information between competitors has an anti-competitive object if, as the GCRA has found to be the case here, the exchange is capable of removing uncertainties concerning the intended conduct of the participating undertakings.*

    - *An examination of the legal, economic and factual context confirms that the agreement and concerted practice constituted a restriction of competition by object.*

- *The agreement and concerted practice is conduct capable of having an appreciable effect on competition.*

Penalty

- *The Authority will be minded to impose a financial penalty where it finds a restriction of competition by object. It will therefore now consider whether it would be appropriate to issue a draft penalty statement to JT and/or Sure in respect of the infringements described in this Decision.*"

100. A simple comparison between the terms of the synopsis in the SSO and the executive summary in the Decision shows that there are no longer any references to "*collusion*" or a "*market sharing agreement*", or even to this having been carried out secretly. Instead, there are now references, as shown in the Decision itself, to concerted practices, so I have looked carefully first at any differences between the fifth part of both documents, relating to the legal framework.

101. Despite the SSO being dated 21 April 2021, and so after the 2021 Regulations were made and took effect, para. 5.3 of the SSO quotes section 54 as it operated before the Regulations changed "*must*" to "*may*". Whilst this was corrected in para. 5.3 of the Decision, I have already noted that, in the absence of any transitional provision applying, both at the time of the SSO and the Decision, there was no obligation to apply EU law. Further, both refer to guidance published by the European Commission but, save to the extent that any guidance refers to "*relevant decisions of the Court of Justice or General Court of the European Union*", section 54 does not refer to such guidance. At best, it is of persuasive authority.

102. The other paragraphs in the section dealing with sources of law are identical, as is the reference in para. 5.7, SSO, which is para. 5.8, Decision, relating to the competition infringement prohibitions. Similarly, the paragraphs dealing with how section 5(1) of the 2012 Ordinance affects "*undertakings*" are the same. This also applies to the paragraphs relating to attribution of liability and the single paragraph about the relevant market.

103. The next section, lettered "G", is headed "*Existence of arrangement/agreement*" in the SSO, which becomes "*Existence of agreement/concerted practice*" in the Decision. Paragraphs 5.19 and 5.20 are the same in both documents. Thereafter, the Decision becomes more expansive than the SSO. However, in the SSO there are several paragraphs about concerted practices, although paragraphs 5.21 and 5.22 in the Decision are more detailed than the equivalent paragraphs in the SSO. In the Decision, there is a separate heading "*Concerted practice*", which is not found in the SSO.

104. In the SSO, paragraphs 5.24 to 5.29 inclusive cover concerted practices. Aside from the reference to the definition of "*agreement between undertakings*" in section 60 of the 2012 Ordinance, there are four footnotes relating to EU decisions (two of which refer to the same case and the same paragraph therein). In the Decision, paragraph 5.24 onwards stops at para. 5.27. Instead of referring to its Guideline 2 – Anti-Competitive Agreements (in para. 5.29 of the SSO), para. 5.27 of the Decision refers instead to the summary of principles given by the Competition Appeal Tribunal in *Apex Asphalt and Paving Co. Ltd v Office of Fair Trading* [2005] CAT 4. In doing so, the reference in para. 5.28, SSO to the concept implying "*conduct on the market pursuant to such collusion, and a relationship of a cause and effect between the two; however this can be presumed where an undertaking participating in concertation remains active on the market*" is found instead in the summary of principles from the 2005 case. Accordingly, the emphasis is different but the principles are set out in both documents.

105. However, in the Decision there are then several paragraphs under headings of "*Single continuous infringement*" and "*Agreement not required by national legislation*" that do not appear in the SSO, before each document then continues with a section headed "*Hindering or*

preventing competition by object". The inference is that these are additional matters that the Respondent has referred to, but which were not on the face of the SSO. There are various additional authorities also relied on in the footnotes in the Decision.

106. The section on hindering or preventing competition by object in both documents begins with the same references (paragraphs 5.30 to 5.36 in the SSO and paragraphs 5.33 to 5.39 in the Decision). Paragraphs 5.37 and 5.38 in the SSO are also included as paragraphs 5.41 and 5.42 in the Decision. However, in the Decision, an additional paragraph 5.40 has been added, being a further reference to Case C-8/08 *T-Mobile Netherlands BV v Raad van Bestuur van de Nederlandse Mededingingautoriteit* [2010] Bus LR 158, which is not mentioned in the SSO. Paragraph 5.40 of the Decision refers to the principle that an "*agreement/concerted practice may have an anti-competitive object even where there is no direct link between that practice and the prices or terms and conditions offered to end users*".

107. In the SSO, two paragraphs appear under the heading "*Market sharing*":

> "*5.39 The competition law prohibitions expressly apply to agreements or concerted practices that "share markets or forms of supply", under section 5(2)(c) of the 2012 Ordinance.*
>
> *5.40 It is settled case-law that market-sharing constitutes a particularly serious breach of the competition rules. Moreover, agreements that aim to share markets have, in themselves, an object restrictive of competition, and such an object cannot be justified by an analysis of the economic context of the anticompetitive conduct concerned.*"

The omission of these paragraphs in the Decision supports the view that the Respondent had moved away from any consideration of a market-sharing agreement.

108. In respect of the final four paragraphs of the SSO and the Decision, only the first of them differs. Paragraph 5.41 has been condensed in para. 5.43 of the Decision, although both refer to "*removing uncertainties*".

109. Having considered the fifth part of the SSO and the Decision, it remains unclear whether the changes made reflect a slightly different focus in the Decision or whether there is a sufficiently significant departure from the grounds being advanced in the SSO that it was a requirement for the Respondent to issue a further notice in writing, or Statement of Objections, pursuant to section 43 of the 2012 Ordinance. As a result, I need to consider carefully the way in which the facts and the legal framework are set out in the sixth part of the SSO in order to ascertain whether the basis has shifted to such an extent that the Respondent has failed to comply with sections 43 and 44.

110. In relation to the relevant market, para. 6.2 of the Decision does not include the reference towards the end of para. 6.2 in the SSO to "*the provision of wholesale and retail mobile telephony services*" and instead refers only to "*the provision of mobile telephony services*". However, I do not regard that change as being in itself sufficient to require a new notice in writing.

111. The paragraphs referring to the two groups of undertakings, and concluding that both the Sure and JT entities "*form a single undertaking*" are largely the same in the SSO and the Decision. It remains unclear to me why both refer in para. 6.3 to what is stated in para. 5.13, referring to section 56(1) of the 2012 Ordinance confirming that "*it applies to States-controlled entities wherever they are "carrying on a business'*"" in the context that "*JT is 100% owned by the States of Jersey*", when section 60(1) of the Ordinance defines "*States*" as "*the States of Guernsey*", so it has no bearing on the position in Jersey. This appears to be an error, but it is

not one relied on by the JT Appellants. In para. 6.6 a sentence is omitted in the Decision that appears in the SSO ("*In that regard, the GCRA notes that key personnel from the Third Addressee were present at at least one of the meetings between the Parties (see paragraph 4.12 above) at which the conduct at issue took place and that Mr Kelly "briefed Batelco" on the proposed arrangements between the Parties (see paragraph 4.35 above)*"). Subject to what I say later about Sure's eighth ground of appeal, one of the reasons for this change appears to be the different references to earlier material in the SSO, where para. 6.8 refers just to "*paragraphs 4.5 – 4.7, 4.14 – 4.15, 4.19 – 4.21, 4.24 – 4.29, 4.36, 4.46, 4.48 and 4.59*", whereas para. 6.8 in the Decision refers more generally to "*the evidence set out at paragraphs 4.7 to 4.83*", which necessarily encompasses the two paragraphs that were otherwise extracted and mentioned expressly in para. 6.6 of the SSO. Again, this difference would not, in my view, be sufficient to require a new notice in writing.

112. The principal finding proposed to be made in the SSO is set out under a heading "*Agreements*" and covers paragraphs 6.7 to 6.12. In the Decision, the heading has been modified to "*Agreements/concerted practices*". The section up to the next heading, which is "*infringement by object assessment*", in the Decision covers paragraphs 6.7 to 6.45. However, that in itself does not necessarily mean that a further notice in writing was required because, as I have already set out, some of those paragraphs rehearse and dismiss the representations made by the Appellants. What matters will be the grounds advanced in the SSO for the finding then made in para. 7.1 that section 5(1) of the 2012 Ordinance had been infringed.

113. Paragraph 6.7 cross-refers to the "*principles set out above at paragraphs 5.19 – 5.29*", which led the Respondent to propose that "*the contacts between the Parties amount to an "agreement"/"concerted practice" under section 5(1)*". As I have already commented, the paragraphs in both the SSO and the Decision relating to these principles are not significantly different, although there are some changes between them.

114. The next two paragraphs in the SSO contain the heart of the Respondent's reasoning:

> "*6.8 As set out above at paragraphs 4.5 – 4.7, 4.14 – 4.15, 4.19 – 4.21, 4.24 – 4.29, 4.36, 4.46, 4.48 and 4.59, through repeated meetings and exchanges of opinion and information, the Parties disclosed to each other the course of conduct that each was contemplating adopting on the market, namely that JT would cease to be a mobile network operator in Guernsey in respect of existing (2G/3G/4G) and future (5G) technology in return for Sure adopting the same course of conduct in Jersey.*
>
> *6.9 These repeated contacts significantly reduced the uncertainty of each Party about the way in which the other Party was contemplating operating on the market and enabled each to adapt its own commercial strategy accordingly. For example, the internal JT slide presentation of 31 May 2019 noted that its preferred approach would be to "be aggressive in Guernsey" but that it needed to "defend JT position as mobile network operator in Jersey at all cost" with the earlier version of that presentation noting that JT would be "prepared to trade Guernsey if it means we can successfully defend Jersey" (see paragraphs 4.35 – 4.39 above). The only "pro" of allowing Sure to secure the single 5G licence in Guernsey, in JT's view, was that this would "potentially secure JT's network position in Jersey". In other words, JT was prepared to alter its preferred stance of being aggressive in Guernsey only if that meant that it was able to protect its own position in Jersey. It was able to protect this position by agreeing with Sure on the approach that Sure would take in Jersey in return for JT altering its approach in Guernsey.*"

115. In the subsequent paragraphs in the SSO, the Respondent sets out what the Appellants had already commented upon prior to the SSO being issued, eg, that "*the agreement or concerted practice … was non-binding and/or merely explanatory*", before concluding (in para. 6.12) that this did not "*prevent the arrangements (including the Memorandum) from qualifying as an "agreement" or "concerted practice"*".

116. Because para. 6.8 specifies certain paragraphs in the fourth part of the SSO as the basis on which it proposed to find an infringement of section 5(1) of the 2012 Ordinance, it is necessary to consider each of those paragraphs to place this finding into context.

117. Paragraphs 4.5 to 4.7 refer to the meeting on 22 August 2018, although the detail of that meeting is found in para. 4.4 of the SSO. Paragraph 4.5 refers to and quotes from an attendance note of that meeting produced by JT and what appears to be a departure from what has been contained in the Telecommunications Sector Policy Statement, noting that the Appellants "*instead began to discuss an arrangement under which JT would cease to operate its existing (at least the 3G and 4G) mobile networks in Guernsey in return for Sure doing the same in Jersey*". Paragraph 4.6 refers to the Appellants appearing to have discussed a five-year time frame, with para. 4.7 stating:

> "*Despite the fact that Sure and JT were (and remain) close competitors for the provision of mobile network services in Guernsey, these accounts suggest the Parties shared their strategic approach to whether, and the speed at which, they would remain in, exit from or enter the market for the provision of mobile network services (2G/3G/4G and 5G) and discussed the execution of a Channel Islands market sharing arrangement in respect of their mobile network infrastructure. They did so at the most senior level of the organisation.*"

I have been unable to identify an equivalent paragraph to this in the Decision, but there are references to the attendance notes (eg, para. 4.11, Decision), albeit in the context of the Bilateral Home Network Scenario.

118. Paragraphs 4.14 and 4.15 in the SSO refer to the meeting on 9 January 2019. Paragraph 4.21 of the Decision reflects the content of para. 4.14 of the SSO, with para. 4.15 of that document being spread across paragraphs 4.23 and 4.24 of the Decision. Accordingly, I consider that any changes between the two documents are no more than stylistic and not substantive.

119. The next three paragraphs referenced in para. 6.8 of the SSO refer to a meeting taking place on 23 January 2019 and then some subsequent contacts in March 2019. Paragraph 4.19 in the SSO appears to be repeated in the Decision at para. 4.28. The examples of contacts in March 2019 found in para. 4.20 of the SSO are largely repeated in para. 4.30 of the Decision, albeit with a change of emphasis because the SSO makes no reference to the Bilateral Home Network Scenario found in para. 4.30 of the Decision. However, the examples given are the same, although in the Decision reference to the risks mentioned in the SSO in para. 4.20(c) has been moved to para. 4.35. Inbetween, the Decision refers to material that was included in the SSO in a slightly different place, eg, paragraphs 4.25 and 4.26, to which I will turn shortly. The material referred to in para. 4.21 of the SSO has also been moved around for the Decision and is found in para. 4.38. The same four examples are given, which relate to the "*agreed "line to take"*". In the SSO, there is a cross-reference to para. 4.17, which is not one of those mentioned in para. 6.8. Further, by the time of the Decision, para. 4.38 refers to the development of the Bilateral Home Network Scenario. However, the material to which reference is made in these three paragraphs in the SSO do find their way into the Decision.

120. Moving next to the six paragraphs grouped together, para. 4.24 in the SSO states:

> "*As explicitly recognised by the Parties, obstacles to accessing a number of JT's sites in Guernsey would have left Airtel exposed as a business, potentially to the extent that may have led to its exit from the market (see paragraphs 4.8, 4.15, 4.20, 4.22 and 4.23).*"

This is a further instance where not all of the paragraphs being cross-referenced are set out in para. 6.8. It is unclear, therefore, whether the Respondent intended to overcome this issue by referring collectively in the Decision to all the paragraphs from 4.7 to 4.83.

121. Paragraphs 4.25 to 4.28 in the SSO appear as paragraphs 4.31 to 4.34 in the Decision. The wording used in para. 4.31 in the Decision starts with slightly different wording from the way it was put in the SSO, which was to refer to "*The Parties exchanged information on projected costs related to the network/consolidation /swap as well as information related to the number of sites, site types, capacity and spectrum*", instead referring to the Bilateral Home Network Scenario, all by reference to the e-mail sent by Mr Berthouloux to Mr Millar. Paragraphs 4.26 to 4.28 in the SSO are identical to paragraphs 4.32 to 4.34 in the Decision.

122. Whilst para. 4.29 in the SSO becomes para. 4.39 in the Decision, with some modifications, the wording has evolved. In the SSO, para. 4.29 states:

> "*In March 2019, the Parties approached Ericsson to explore various sharing and consolidation options. The various scenarios were outlined in an e-mail of 25 April 2019 from Mr F, Chief Operating Officer (Sure) to Gerald Smith (Ericsson) and Mr Berthouloux (JT), copied to Mr Knights (JT) and Mr Ozanne (Sure). All of the options put forward by the Parties were based on the premise that Sure would remove its existing mobile network infrastructure from Jersey and JT would remove its existing mobile network infrastructure from Guernsey.*"

Paragraph 4.39 in the Decision does not refer to "*various sharing and consolidation options*", but just "*a number of new network infrastructure options*" and ends with "*Consistently with all the discussions and contacts between the Parties described above, all of the scenarios put forward by the Parties were based on the Bilateral Home Network Scenario, i.e. the premise that JT would remove its mobile network infrastructure from Guernsey and that Sure would retain its mobile network infrastructure in Guernsey.*"

123. It is the conclusion proposed in para. 4.30 in the SSO that also needs to be borne in mind, because it draws on the paragraphs immediately preceding it:

> "*The evidence above therefore indicates that by March 2019, the collusion between the Parties, who are close competitors, had progressed to the point where detailed planning and joint working on the market sharing agreement took place between senior members of each organisation (see, for example, the e-mail between Mr G, Chief Operating Officer, Mr Berthouloux and Ericsson of 25 April 2019 – paragraph 4.29). This included the sharing of strategic and commercially sensitive information, including information on projected costs, savings and site swaps (see paragraphs 4.26 – 4.27).*"

At the time, it appears that the collusion mentioned was being viewed as part of a "*market sharing agreement*".

124. Paragraph 4.36 in the SSO relates to an e-mail Mr Kelly sent on 20 May 2019. The content is separated in the Decision into a number of different paragraphs (4.42, 4.43, 4.44 and 4.49). Because there is another conclusion in para. 4.37, which can only relate to the content of the paragraphs after para. 4.30, including para. 4.34, which broadly reflects para. 4.40 in the Decision, the content of this conclusion also needs to be borne in mind:

> "*The evidence set out above demonstrates that, faced with the prospect of competing in Guernsey against each other for a single 5G award competitive process, senior executives of the Parties (who are close competitors on various mobile network markets in Guernsey) continued to share their strategic approach to 5G and further to explore the market sharing arrangement in respect of their existing mobile networks. (see paragraph 4.7). In particular, part 4 of the Principles Document which covers the consolidation of their existing mobile networks (2/3/4G) sets out a defensive strategy to be employed should the States decide to explore competing 5G networks rather than a "single 5G network' approach in Guernsey, as had been the case for 4G awards. Had JT removed its 4G infrastructure from Guernsey, this would have insulated Sure from competition from JT in respect of future provision of 5G mobile network services in Guernsey, at least in the short to medium term, since 5G networks were not able to operate independently of 2/3/4G networks.*"

Again, there is reference to a market sharing arrangement.

125. The next paragraph referred to in para. 6.8 of the SSO is para. 4.46, which refers to an e-mail sent by Mr Campbell on 6 June 2019 being forwarded by Mr Kelly to others (Alan Ibbotson (Chief Financial Officer – Batelco), Ms Durnell and Mr G), with the text of what he sent being quoted. This same paragraph appears in the Decision as para. 4.60. Again, there is a conclusion suggested in para. 4.47 from the "*evidence described above*", which can only really be para. 4.38 onwards (or possibly even para. 4.42), that again refers to "*market sharing discussions*" (para. 4.47(b)), where in para. 4.41 there was reference to the slides mentioned as demonstrating that "*in the absence of the market sharing agreement (i.e. under conditions of normal competition), there would have been vigorous competition for any single Guernsey 5G spectrum award*".

126. Paragraph 4.48 in the SSO refers to the first draft of an MOU for Jersey provided on 10 June 2019 to Mr Kelly by Mr McDermott. The text of the covering e-mail is quoted. In the Decision, para. 4.63 covers this e-mail, but the text is not quoted.

127. The final paragraph cross-referenced in para. 6.8 of the SSO is para. 4.59, which refers to an e-mail sent on 12 June 2019 by Mr McDermott to JT Board members, referring to the signing of the non-binding MOU with Sure. In the Decision, the same text is found in para. 4.72.

128. The selective nature of these cross-references to the fourth part of the SSO must, therefore, form the basis for the finding of an infringement proposed to be made by the Respondent. Even where there are other paragraphs in the SSO that might be regarded as being incorporated because of the content of these paragraphs, this appears to be the basis on which the infringement was proposed to be found.

129. I also consider that the way the matter is then addressed later in the sixth part of the SSO has relevance. For example, under the heading "*Infringement by object assessment*", para. 6.14 states:

> "*The Parties have repeatedly sought to characterise the arrangements between them as "network sharing". However, as the evidence set out above makes clear, the true nature of the agreement or concerted practice, rather than constituting network sharing instead was designed to facilitate market sharing, which is one of the most serious types of anti-competitive restriction (see paragraphs 5.39 – 5.40 above).*"

130. In the fourth part of the SSO (dealing with the conduct), to which I have just referred, a summary is given after para. 4.1 and before para. 4.2:

"*The evidence set out below demonstrates that the Parties engaged in a Channel Islands market sharing agreement / concerted practice.*

Pursuant to that agreement / concerted practice, the Parties agreed:

1. That JT would remove its mobile network infrastructure from Guernsey in return for Sure removing its mobile network infrastructure from Jersey.

This meant that:

a. The Parties would have ceased to compete with each other for the provision of existing 2G/3G/4G mobile network services in Guernsey;

b. Had JT removed its 2G/3G/4G infrastructure from Guernsey, this would have insulated Sure from competition from JT in respect of the future provision of non-standalone 5G mobile network services in Guernsey since 5G non-standalone networks are not able to operate independently of 4G networks;

c. A potential new entrant (MXC/Guernsey Investment Fund), which was exploring acquiring JT's mobile network infrastructure in Guernsey in order to offer 5G non-standalone services using that network, would have been prevented or hindered from entering the market for the provision of mobile network services in Guernsey;

d. The position of the existing mobile network operator, Airtel, would have been weakened relative to that of its competitors since:

i. Sure's mobile network infrastructure would have been improved by the acquisition of certain sites from JT; and

ii. JT's masts, certain of which are used by Airtel, would have been removed.

2. That Sure would construct the single 5G standalone network in Guernsey and that JT would construct the single standalone network in Jersey. Each agreed therefore not to compete with the other in respect of the provision of SA 5G mobile network services in their non-home island."

Having reviewed the entirety of the SSO, I am satisfied that this is an accurate summary of its contents.

Discussion

131. Having undertaken such a detailed consideration of what was in the SSO and what remained in the Decision, I accept that the position is not quite the same as between the First SO and the SSO. The First SO, dated 20 January 2020, had similarly proposed to find only an infringement of section 5(1) of the 2012 Ordinance, but largely by reference to the execution of the Memorandum of Understanding, which was said to have "*facilitated the existence of a concerted practice between the Parties*" (para. 5.11) with the other contacts listed in para. 5.12 also forming "*part of the concerted practice*". Paragraph 1.5 of the SSO expressly withdrew that previous Statement of Objections, and replaced it with what was set out in the SSO. If nothing else, this demonstrates that the Respondent was aware that it needed to re-formulate the grounds on which it was proposing to find an infringement if they changed. Accordingly,

the primary issue is whether or not the grounds for the infringement found in the Decision differ from those in the SSO and, if so, the consequences flowing therefrom.

132. Although section 54 of the 2012 Ordinance does not require the Respondent, or this Court, to take into account the decisions of the EU courts, I am satisfied that it is appropriate to have regard to them. Similarly, I am also persuaded that I should consider the general principles derived from England and Wales. In my judgment, the principles to which Advocate Gray, in particular, has referred, are all applicable as a matter of Guernsey law, especially in relation to the obligations placed on the Respondent by the 2012 Ordinance. What matters will be the extent of their persuasive effect.

133. Section 43 is mandatory. It requires the Respondent to serve a notice in writing "*stating the terms of, and the grounds for, the proposed decision*" (subsection (2)(b)). Both the Sure and JT Appellants argue that this is a material error as to the procedure (pursuant to section 46(2)(e)). Neither has asserted that this amounts to an error of law, although non-compliance with what the legislature has enacted might be regarded as such an error. I have concentrated on whether or not the grounds in the Decision reflect those that were set out in the SSO.

134. Throughout the SSO, I have been unable to see any reference to the Bilateral Home Network Scenario. In the Decision, this is very much at the heart of the finding of an infringement, to which there are multiple references. Conversely, in the Decision there are no longer any references, as found in the SSO, to "*market sharing*", whether by reference to an agreement or arrangement or even a concerted practice. Paragraph 4.38(d) in the Decision refers to a shared slide presentation that mentions "*the view of 2G/3G/4G sharing (meaning the Bilateral Home Network Scenario)*", so I have considered whether the many references to the Bilateral Home Network Scenario can properly be regarded as the Respondent using a convenient label to describe what had been put in the SSO.

135. Whilst I accept that the facts set out in the SSO in the fourth part are broadly similar to those set out in the Decision, I take the view that the "*grounds*" for finding an infringement ought to have been sufficiently clear to the Appellants to enable them to target the representations they wished to make in relation to the section 43 notice (ie, the SSO). The tenor of the SSO was to propose to find that there had been a market sharing agreement (acknowledging that such an agreement can, in accordance with the definition in section 60(1) of the 2012 Ordinance, arise from a concerted practice). This is made particularly clear from the paragraphs in the SSO dealing with the conclusion that this was an infringement by object. Each of paragraphs 6.13, 6.14 and 6.15 refer to "*market sharing*", with the latter paragraph starting with an explanation that "*JT would have withdrawn from the provision of existing and future mobile network services in Guernsey (2G/3G/4G and NSA 5G) by removing its mobile network infrastructure from Guernsey in return for Sure taking the equivalent steps in Jersey.*" Whilst para. 4.38(d) of the Decision, to which I have just referred, appears to relate some part of that explanation to what has become the Bilateral Home Network Scenario, I am not persuaded that purporting to use different terminology in this way means that the substance remains the same. By reference to Lord Mustill's explanation in *ex parte Doody*, that is my intuitive judgment, having undertaken a detailed analysis of the SSO and compared it with the Decision.

136. In para. 3.9 of the Decision, the outcome described as the Bilateral Home Network Scenario is put broadly as "*competing operators to agree between them which of their individual existing network infrastructures would be retained to support the future operation of 5G services and which would be removed*", which I regard as putting the position wider than in para. 4.38(d). Further, the absence of any mention at all of the Bilateral Home Network Scenario in the SSO leads me to conclude that this was indeed a different basis for the finding of an infringement under section 5(1) from the way it was put in the SSO. I do not accept the submission of Advocate Dawes that this was a narrowing of the grounds on which the infringement has been found. In my view, this was a move away from the proposal to find a "*market sharing*

agreement", which was said in para. 6.14 of the SSO to be "*one of the more serious types of anti-competitive restriction*" but the paragraphs to which reference was made (paragraphs 5.39 – 5.40) do not feature in the Decision. I take the view that this is more than a convenient use of a label and amounts to a further shift of emphasis for the finding then made.

137. I am, therefore, persuaded of the fourth of the examples given in the Sure Appellants' Cause that this difference of approach between the SSO and the Decision required the Respondent to serve a further section 43 notice. I accept that section 43 requires the Respondent to set out both the terms of the infringement proposed to be found and the grounds relied on. The Appellants' rights of defence are adversely affected if the Respondent then moves directly to taking a decision on a different basis to that set out in its section 43 notice. In my judgment, this amounts to a material error as to the procedure and opens the gateway to allowing the Appellants' appeals.

138. The first basis pleaded in Sure's Cause relates to the presumption mentioned in para. 6.20 of the Decision which it is said was not put to the Appellants in the SSO. In response to this, Advocate Dawes submits that the position broadly reflects the content of para. 6.9 in the SSO (which I have already quoted). However, para. 6.20 in the Decision, referring to the Appellants remaining active on the market resulting in "*a presumption that each took into account the information disclosed when determining market conduct*", is not mentioned at all in para. 6.9 of the SSO. As a result, I do not accept Advocate Dawes' submission.

139. Although it was not raised by any of the Advocates, it seems to me that there was reference in the SSO to such a presumption in para. 5.28 of the SSO:

> "*The concept of a concerted practice implies conduct on the market pursuant to such collusion, and a relationship of cause and effect between the two; however this can be presumed where an undertaking participating in concertation remains active on the market.*"

This is a principle deriving from Case C49/92 P *Commission v Anic Partecipazioni SpA* [2001] 4 CMLR 17 and, in particular, para. 121:

> "*For one thing, subject to proof to the contrary, which it is for the economic operators concerned to adduce, there must be a presumption that the undertakings participating in concerting arrangements and remaining active on the market take account of the information exchanged with their competitors when determining their conduct on that market, particularly when they concert together on a regular basis over a long period, as was the case here, according to the findings of the Court of First Instance.*"

(This reference had also been given in para. 4.30 of the First SO.)

140. The difficulty for the Respondent is that, in the SSO, having referred to this principle in its analysis of the legal framework it is then not applied in the sixth part covering the legal assessment. Further, by the time of the Decision, although para. 6.20 states the principle, the basis for it appears to have changed from relying on para. 121 of the *Anic* case, to being subsumed into the principles stated using the *Apex Asphalt and Paving Co* case (see para. 5.27(i)). There is only one reference to the *Anic* case in the Decision (para. 5.28(c)), but that refers to different paragraphs.

141. If this had been the only basis on which the Appellants argued that there had been an error of procedure as between the SSO and the Decision, I would have been unlikely to have accepted it, although I would have criticised the Respondent for not carrying forward the reference made to the presumption in para. 5.18 into its legal assessment in the sixth part of the SSO. In the SSO, the presumption is mentioned but it is not then applied. As such, on one analysis it was

put to the Appellants, but the significance of it could not be appreciated because it did not form part of the legal assessment, which in my view relates to how the infringement proposed to be made is reached. Therefore, had this been the only complaint, my intuitive judgment may well have fallen the other side of the line.

142. However, because this is one of a number of bases advanced by the Appellants on this ground of appeal, I am more inclined to regard this as further support to the conclusion I have reached that there has been a material error as to the procedure. Because the SSO did not rely on the presumption for the infringement proposed to be found, to then rely on it in the Decision reinforces the view that this should have meant another section 43 notice in writing had to be served. I regard this omission as falling within the principle derived from the ***Papierfabrik August Koehler*** case.

143. The second basis on which the Sure Appellants say there has been non-compliance with section 43 of the 2012 Ordinance relates to their level of understanding about one of the matters appearing in the Decision findings in para. 6.9 which refers to "*the speed at which and/or the way in which it introduces a new product, such as 5G, into the market*". This was not central in the SSO. It appears in para. 4.7, but is not then used in the legal assessment part, save for the cross-reference found in para. 6.8, where it is one of a number of different examples of levels of contact ("*repeated meetings and exchanges of information … each was contemplating adopting on the market*").

144. Similarly, complaint is made about another of the findings found in para. 6.9 of the Decision relating to "*the way in which it communicates those decisions to the regulator and the Government*". In part, this demonstrates a departure from the language in the SSO, referring to the level of secrecy involved in the arrangement.

145. The matters set out in para. 6.9 of the Decision are referred to in para. 6.11 as being "*the course of conduct that they were contemplating adopting on the market in relation to*" what was contained in para. 6.9. Accordingly, the Sure Appellants (with support from the JT Appellants who have adopted these arguments) complain that this was not a fair procedure because it did not feature as part of the proposed grounds for the final Decision. This is another reason for Mr Kelly's Affidavit evidence.

146. Having regard to the fairness principles advanced by Advocate Gray, with support from Advocate Barclay, the absence from the SSO of putting matters as directly as they are found in para. 6.9 of the Decision is a matter that does, in my view, support the argument that there needed to be a further notice in writing pursuant to section 43 of the 2012 Ordinance. If the approach that the Respondent wished to take, having considered the representations made by the Appellants, involved departing from the reasoning set out in the SSO, just as it had done between the First SO and the SSO, a fresh notice was necessary. As regards those matters in the Decision that consider and then reject the representations made, this would not have required a fresh notice under section 43 because the grounds for finding an infringement would be the same. It is because the Respondent has moved to its final Decision without affording the Appellants a further opportunity to make representations on what I consider to be a different case, ie, the grounds for reaching the proposed decision, that the right of defence has been violated.

147. The final basis pleaded in Sure's Cause relates to the way in which the Respondent has analysed an infringement by object. Paragraph 6.53 in the Decision is said to contain a new allegation that did not feature in the SSO. It relates to the States of Guernsey having informed the Appellants "*that it intended to award a single licence for 5G spectrum through a competitive process*", with the footnote pointing out that the last time this was done was the letter sent by the President of the Committee *for* Economic Development on 26 April 2019, which is mentioned in para. 3.12 of the Decision and that broadly reflects what was in para. 3.10 in the

SSO. However, it is the fact that it is given as one of three reasons for finding an infringement by object that is raised by Advocate Gray. Again, she submits that the Sure Appellants would have responded differently if this had been relied on in the SSO to support the proposed finding that this was an infringement by object. (I will deal separately with Sure's fifth ground of appeal later in this judgment.)

148. In the SSO, having set out its conclusion in the paragraphs to which I have already referred, the Respondent in para. 6.17 relies on the "*facts and matters*" that follow in this regard. One of those matters, as set out in para. 6.18(a), was that the "*States of Guernsey was exploring the possibility of awarding a single 5G spectrum licence to a consortium of operators, joint network company or a single operator in Guernsey*", which is arguably broader than the conclusion reached in the Decision at para. 6.53. Further, in the SSO in para. 6.19 there are references to the circumvention of normal conditions of competition arising if, as a result "*of removing its 2G/3G/4G mobile network infrastructure from Guernsey, JT would not be able to provide 5G non-standalone network services in Guernsey*".

149. This is, therefore, an example of where I accept Advocate Dawes' submission that the differences between the SSO and the Decision amount to a narrowing of the basis on which the infringement set out in the Decision has been taken. Whilst the way it is described by the Respondent in the Decision is more direct than drawing together the material found in the SSO, I am satisfied that this is not a valid example of where a fresh written notice under section 43 of the 2012 Ordinance was required. Once again, had this been the only basis on which the Appellants had argued non-compliance with section 43, I would have rejected this ground of appeal.

150. There is support in the authorities to which I have been referred for reaching the conclusion I have to allow the appeals on this ground. For example, in Case C-85/15 P *Feralpi Holding SpA v European Commission* (unreported, 21 September 2017), which related to a right of a further hearing as part of the administrative process, para. 47 explains:

> "*Accordingly, the procedure is necessarily vitiated, regardless of any possible detrimental consequences for Feralpi that could result from such an infringement (see, to that effect, judgments of 6 November 2012, Commission v Éditions Odil Jacob, C-553/10 P, paragraphs 46 to 52, and of 9 June 2016, CEPSA v Commission, C-608/13 P, EU:C:2016:414, paragraph 36).*"

Whilst Advocate Dawes attempted to distinguish this decision, I am persuaded that it sets out a general principle that where the procedure is not followed properly, it necessarily follows that the appeal will be allowed.

151. However, having reached the conclusions that I have about Sure's first ground of appeal and JT's fifth ground of appeal, it follows that I have to consider next the outcome that follows.

Outcome

152. Section 46(5) of the 2012 Ordinance provides:

> "*On an appeal under this section the Royal Court may –*
>
> *(a) set the decision of the relevant authority aside and, if the Royal Court considers it appropriate to do so, remit the matter to the relevant authority with such directions as the Royal Court thinks fit, or*
>
> *(b) confirm the decision in whole or in part.*"

153. Having found that the Respondent did not comply with its obligation to issue a fresh notice pursuant to section 43 and chose instead to move directly to its final Decision, but on different grounds from those set out in its SSO, which in my view is a material error as to the procedure that it had to follow (section 46(2)(e)), I have considered whether I should follow Advocate Dawes' suggestion and not allow the appeals on this ground but rather consider how the matters have now been argued and reach a conclusion based on those arguments. I recognise that the options set out in section 46(5) are preceded by the word "*may*". In those circumstances, it would be open to the Court, even having found that a ground of appeal has been successful, to confirm the Respondent's decision in whole or in part. However, I am not persuaded that I should do so.

154. Procedural safeguards are, in my view, important. The approach taken in the 2012 Ordinance is to require the Respondent, when taking a decision that can be appealed to this Court, to give notice of its proposed decision and, most importantly, the grounds for proposing to take that decision on each undertaking potentially affected. I am satisfied that the Respondent fell into error when it modified the reasoning underpinning its finding of an infringement of section 5(1) to the extent that it has between the SSO and the Decision. Accordingly, I take the view that it was incumbent on the Respondent, potentially in short order, just as it had done following its change of approach between the First SO and the SSO, to re-cast the grounds on which it proposed to find an infringement and invite any further representations that the Appellants wished to make. It does not matter that the process had already taken some time, it still called for a re-engagement with section 43. Fairness matters and, in the absence of a fair procedure, I consider that the most appropriate course is to set the Decision aside. I consider that this approach is consistent with the principles to which I have referred relating to fairness, both within the context of decision taken by EU courts and also more generally. The Appellants lost an opportunity to make further representations in relation to such a re-cast proposed decision. This cannot, in my opinion, be corrected simply by considering the other grounds of appeal now being advanced.

155. I have noted that the Sure Appellants raised their concerns with the Respondent shortly after receipt of the Decision in a letter dated 23 December 2021, to which a response was received the following day from the Respondent. That response declined to withdraw the Decision, meaning that the appeal had to be instituted against it. This is a further reason why I do not consider that it would be appropriate to follow the suggestion from Advocate Dawes. He did, however, also recognise in his oral submissions that there could not be a remittal of the case if the conclusion was that a further Statement of Objections was required.

156. As a result, I will set aside the Decision as it affects both the Sure and the JT Appellants. There is, in my view, no need to give any directions to the Respondent. It will simply be a matter for the Respondent as to whether it wishes to serve a fresh written notice pursuant to section 43.

Other grounds – preliminary comments

157. Having allowed the appeals, I will comment as briefly as I can on the other grounds that have been raised by the Appellants, even though it is not strictly necessary to do so. Before turning to those grounds, I will make some comments about the nature of these appeals, because the parties disagreed about certain aspects of them.

158. In doing so, I do not need to repeat what I set out in *Medical Specialist Group LLP v GCRA* between paragraphs 33 and 50. Unsurprisingly, my views about the nature of an appeal under the 2012 Ordinance have not changed, but I can summarise the key points.

159. As I stated therein, "*the grounds under the 2012 Ordinance are, in my view, wider than conventional judicial review*" (para. 41). I also concluded that the way to categorise an appeal under section 46 that can lead to significant financial penalties engages "*the criminal*

jurisdictional elements set out in Article 6, ECHR" and did so by reference to *Napp Pharmaceutical Holdings Limited v Director General of Fair Trading*, to which I have referred previously. I further concluded that section 3 of the Human Rights (Bailiwick of Guernsey) Law, 2000 enabled me to "*construe section 46 in such a way that the powers it confers upon this Court are consistent with the Article 6, ECHR rights enjoyed by the [Appellant] bringing this appeal. Although there is nothing on the face of section 46 that explicitly states that there is a full merits review and there is no power for this Court to substitute its own decision for that of the GCRA, the overall manner in which this Court can either set aside, or set aside and remit with directions, any decision of the GCRA subject to these appellate provisions, means that this independent and impartial Court should be treated as being a Court of full jurisdiction for the purposes of ensuring that the [Appellant's] rights are met*" (para. 49).

160. Within the context of the present appeals, Advocate Gray submits that the provisions found in the Competition Act 1998, which are similar to those in the 2012 Ordinance, can be applied, requiring there to be an intensive judicial scrutiny of the exercise of what amount to intrusive, quasi-criminal powers.

161. By contrast, Advocate Dawes described the grounds in section 46 as "*limited*", noted that it is not a rehearing, nor was it concerned with the merits of the decision. He referred to the use of "*unreasonableness*" amongst the grounds, mentioning how that had been described by Beloff JA in *Walters v States Housing Authority* 1997-99 GLR 15. He also referred to what I had said in *Bordeaux Services (Guernsey) Ltd v GFSC* (unreported, 11 May 2016). He highlighted the guidance offered by the Competition Appeal Tribunal in *Stagecoach Group plc v Competition Commission* [2010] CAT 14 in para. 45:

> "*Where Stagecoach asserts that there is no or no sufficient evidence to support one of the Commission's key findings, Stagecoach must show either that there is simply no evidence at all to support the Commission's conclusions or that on the basis of the evidence the Commission could not reasonably have come to the conclusions that it did. The fact that the evidence might have supported alternative conclusions, whether or not more favourable to Stagecoach, is not determinative of unreasonableness in respect of the conclusion actually reached by the Commission. We must be wary of a challenge which is "in reality an attempt to pursue a challenge on the merits of the Decision under the guise of a judicial review", which is how the Commission characterised Stagecoach's Ground 2.*"

162. This leads the Respondent to submit that the Appellants have to show that the Decision fell outside the range of reasonable decisions open to the Respondent on the evidence available to it and it is not enough that the Court would have reached a different conclusion. In respect of any arguments based on unreasonableness as a ground, I agree. This is consistently the way in which what I described as Jurats' unreasonableness operates. There used to be directions to the Jurats about mental gymnastics but now that the issue falls to be resolved by a judge sitting alone, these principles continue to apply. However, where I disagree with this submission is that it is not open to the Respondent to rely on material it could have referred to in the Decision but chose not to mention. The reasoning in the Decision is as far as the Respondent can go and it cannot properly rely on matters that it could have mentioned but chose not to. Further, the range of responses open to the Respondent only applies to the one ground of the reasonableness of its Decision. Other grounds of appeal are advanced by the Appellants and they are not, in my view, covered by this principle. As the statutory grounds in section 46 of the 2012 Ordinance are wider than conventional judicial review, the approach from the *Stagecoach* case does not assist.

163. Advocate Dawes also relies on what Advocate General Kokott stated in Case C-501/11 P *Schindler Holding Ltd v European Commission* [2013] 5 CMLR 39:

"*25. It is recognised that competition law is similar to criminal law, but it is not part of the core area of criminal law.*

26. According to the case-law of the European Court of Human Rights, outside the 'hard core' of criminal law the criminal-head guarantees under Article 6 ECHR will not necessarily apply with their full stringency.

27. With regard to competition law, this means that fines to penalise cartel offences do not necessarily have to be imposed by an independent tribunal, but the relevant power may in principle also be transferred to an administrative authority. The requirements laid down in art. 6 ECHR are satisfied if the undertaking concerned is able to refer any decision on the imposition of a fine in cartel proceedings adopted against it to a judicial body that has full jurisdiction (French: 'pleine juridiction').

28. According to the case law of the European Court of Human Rights, the court charged with review of decisions to impose fines in cartel proceedings must have the power to "quash" in all respects, on questions of fact and law, the decision by the administrative authority. Contrary to initial impressions, this does not necessarily mean that the court itself must be able to alter (French: "réformer") substantively the decision to impose a fine in every respect. Rather it is sufficient that the court has jurisdiction to examine all questions of fact and law relevant to the dispute and to annul in all respects the challenged decision."

I take the view that this supports, rather than detracts, from the analysis I undertook in the *MSG* case. I remain of the view that the criminal aspects of the rights conferred by Article 6 the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") apply and I also consider, for the reasons I gave before, that for these purposes this Court is a court of full jurisdiction.

164. Advocate Dawes also relied on what in many contexts is regarded as a "*margin of appreciation*", referring in particular to the way this had been put by the English Court of Appeal in *Competition and Markets Authority v Flynn Pharma Limited* [2020] EWCA Civ 339, in the paragraphs commenting on the supervisory jurisdiction of the Tribunal:

"*135. To determine this Ground of Appeal it is necessary to be clear, from the outset, as to the difference between the judgment call that competition authorities must make under the Chapter II prohibition and Article 102, and the powers of courts and tribunals called upon to supervise the decisions of such authorities. The CMA wrongly elides two quite different principles. I accept that the CMA has a "margin of manoeuvre" (the terms used by the Court in Latvian Copyright) or "appreciation" or "discretion" (there is no magic in the different terms). This flows from the fact that the legal test under Section 18(2)(a) CA 1998 and Article 102(a) is broad brush and necessarily confers a significant latitude upon a competition authority as to the methods and evidence bases that it resorts to in order to prove an abuse of unfair pricing. This much is well established in case law.*

136. But this is quite different in principle to the question whether the Tribunal, as a supervisory judicial body, must pay deference to that exercise of judgment. Under the CA 1998 the Tribunal has a merits jurisdiction as to both law and fact and upon the basis of established case law it is not bound to defer to the judgment call of a competition authority. It is empowered under the legislation to come to its own conclusions on issues of disputed fact and law and can hear

fresh evidence, not placed before the CMA, to enable it to do so. The conferral of a merits jurisdiction upon the Tribunal flows from important legal considerations relating to the rights of defence and access to a court, under fundamental rights such as Article 6 of the Convention. The starting point is that competition law is treated as a species of criminal law. There is a wealth of case law establishing this. The Tribunal recognised this in Napp (ibid) at paragraphs [99] – [100], applying the jurisprudence of the Court in Case C-235/92 P Montecatini v EC Commission [1999] ECR I-4575 at paragraphs [175] and [176]. This conclusion was subsequently confirmed by the European Court of Human Rights in Menarini Diagnostica SRl v Italie (27th September 2011) ("Menarini") in relation to Italian competition law and Article 6. In Argos/Littlewoods v Office of Fair Trading [2006] EWCA Civ 1318 at paragraph [18], on an appeal in relation to alleged price fixing, the Court of Appeal recognised the necessary connection between a full merits hearings and Article 6: "The appeals to the Tribunal in the present cases were, in effect, full hearings with such relevant evidence as any party wished to adduce, witnesses being cross-examined if appropriate. That is necessary so as to ensure that Article 6 of the European Convention on Human Rights is satisfied.""

165. One of the differences between the position in the United Kingdom and in Guernsey is that there is a statutory right of appeal on broad grounds. This is wider than what might be referred to as standard judicial review grounds. The approach in this Court is not to follow slavishly what might be the approach before the Competition Appeal Tribunal. Indeed, to purport to do so would fail to recognise the different jurisdiction conferred upon this Court. There is no fresh evidence supplementing the reasoning found in the written Decision. Whilst anyone who gives evidence by way of an Affidavit might be called upon to be cross-examined, this would be unusual for any statutory appeal. I have just confirmed that I accept that the margin of appreciation (or whatever other term might be used) exists in relation to what I continue to term "Jurats' reasonableness" but that principle does not extend, in my view, to the other grounds. To that extent, I agree with Advocate Dawes, but this is of very limited relevance on these appeals.

166. To the extent that Advocate Dawes suggested that the categorisation of these matters as criminal was inappropriate, I disagree for the reasons previously given. Accordingly, I have some sympathy with Advocate Barclay's submission that the Appellants benefit from the presumption of innocence found in Article 6(2), ECHR (as also explained in the second of the judgments in the *Napp* case). I accept that this is not necessarily to be applied strictly, as shown in *Schindler*, but it is still potentially relevant. In other words, the Respondent should not proceed on any assumption that the Appellants have contravened section 5(1) of the 2012 Ordinance, but rather must explain satisfactorily why its finding of an infringement is justified and appropriate.

167. As regards the incidence of the burden of proof, as Advocate Dawes reminded me, this was mentioned in the second judgment in the *Napp* case, which also refers to inferences and presumptions. I am satisfied that these principles can be applied as a matter of Guernsey law:

"*109. In those circumstances the conclusion we reach is that, formally speaking, the standard of proof in proceedings under the Act involving penalties is the civil standard of proof, but that standard is to be applied bearing in mind that infringements of the Act are serious matters attracting severe financial penalties. It is for the Director to satisfy us in each case, on the basis of strong and compelling evidence, taking account of the seriousness of what is alleged, that the infringement is duly proved, the undertaking being entitled to the presumption of innocence, and to any reasonable doubt there may be.*

> *110. That approach does not in our view preclude the Director, in discharging the burden of proof, from relying, in certain circumstances, from inferences or presumptions that would, in the absence of any countervailing indications, normally flow from a given set of facts, for example that dominance may be inferred from very high market shares (Case 85/76 Hoffman-La Roche v Commission [1979] ECR 461, paragraph 41); that sales below average variable costs may, in the absence of rebuttal, be presumed to be predatory (see the opinion of Advocate General Fennelly in Cases C-395/96P and 396/96P Companie Maritime Belge v Commission [2000] ECR I-1442 at paragraph 127); or that an undertaking's presence at a meeting with a manifestly anti-competitive purpose implies, in the absence of explanation, participation in the cartel alleged: Montecatini v Commission, cited above, at paragraphs 177 to 181.*
>
> *111. Presumptions of this kind simply reflect inferences that can, in normal circumstances, be drawn from the evidence: they do not reverse the burden of proof or set aside the presumption of innocence: Montecatini at paragraph 181. Being essentially evidential in character, such presumptions are hardly equivalent to statutory 'reverse onus' provisions of the kind considered in R v Lambert, cited above. But even in the case of such a statutory provision, Article 6(2) of the ECHR does not prohibit a permissive or evidentiary presumption from which a trier of fact may (as opposed to must) draw an inference of guilt: see again R v Lambert, notably Lord Steyn at paragraph 40, Lord Hope at paragraphs 87 to 91 and Lord Clyde at paragraphs 150 to 158. If a defendant undertaking seeks to rebut the presumption in question, the legal burden of proof remains on the Director to show that an abuse is established.*"

168. I can also usefully comment at this point about the suggestion in Advocate Dawes' Skeleton Argument that competition law is a specialist area, as explained in Ms Livestro's Affidavit setting out the experience of the members of the Respondent, thereby conferring a degree of deference to their expertise when taking the Decision. This is squarely challenged by the Appellants. I agree that there is no basis for affording the Respondent any special deference. I have just explained that I agree that if the reasonableness ground is being considered that there will be a range of reasonable decisions open to the Respondent and it would only be if the Decision falls outside that range that the appeal on such a ground should be allowed. In that sense, there is a margin of appreciation open to the Respondent, but that arises under general principles rather than from any acknowledged expertise in this area. If some other ground of appeal is engaged (and I have already allowed the appeal on the basis of a material error as to the procedure, which is not something where I am persuaded I should have tailored my decision because the members of the Respondent, and possibly their advisers, have additional expertise), the persons who took the Decision really do not matter in this assessment. As Lord Diplock noted in the ***Bushell*** case, such persons come and go, but the organisation itself continues. As a result, I reject that particular submission.

Factual summary

169. I have already set out the terms of the Decision towards the start of this judgment. The matters are contained in the fourth part of the Decision, starting with the Telecommunications Sector Policy Statement published on 19 June 2018. It is necessary here to flesh out some of the summary found in the Decision to put the remaining grounds of appeal into context.

170. As the Telecommunications Sector Policy Statement explains, it results from the States' Policy and Resource Plan. This is a set of priorities that is generally reviewed and renewed on an annual basis. At that time, there were 23 policy objectives of which the fourth was Digital Connectivity, which was then described as being:

> "*The digital industry, and the digital enablers for industry, are a strong focus for the States of Guernsey, owing to it being a high value, low footprint economic activity, suitable for a small island where land and workforce are at a premium. Digital connectivity is a priority in order to facilitate and support that industry. Additionally, there is also a need for government and local businesses to become digital by default if they are to remain competitive. The island's aims for this policy are set out in the Digital Strategic Framework Document, which prioritises the following:*
>
> - *Driving digital sector growth*
> - *Delivering next generation digital infrastructure*
> - *Developing the digitally skilled workforce in the future*
> - *Providing world leading and proportionate legal, compliance and regulatory environment*".

The purpose of the Telecommunications Sector Policy Statement was to lay out how the second of those priorities would be achieved "*through the existing competitive market, regulation and targeted Government support*".

171. The Committee *for* Economic Development had three key objectives, derived from a number of core assumptions, which were that the "*Government role is to set the policy direction and objectives but for the market to deliver them within a regulated structure*", "*Government's role is not to interfere with a working competitive market, if that market will deliver policy objectives*" and "*Government can support the market where the commercial economic case cannot be made*". Of the three key objectives, only the third is relevant, aiming for "*Provision of next generation mobile technology in line, or earlier than the UK*", adding that "*The standard for next generation mobile technology has not yet been set but is likely to require significant investment by the telecommunications operators.*"

172. The Telecommunications Sector Policy Statement confirmed that:

> "*The Guernsey mobile communications market is dominated by Sure, with JT and Airtel-Vodafone sharing just 40% of the market between them. This domination in the market is not down to any significant service or network differentiation but is rather a historical association to the Guernsey Telecom days prior to today's competitive landscape.*
>
> *All 3 operators have rolled out very similar network capabilities and service offerings and the small differences in coverage and capacity are purely a consequence of the disparate siting of individual elements of the radio infrastructure. True competition exists almost exclusively in the commercial and customer service domains.*
>
> *While site sharing is relatively common and encouraged, there is currently no true infrastructure sharing between Operators in Guernsey which can cause issues for new entrants.*"

Reference was also made to environment concerns involving the Independent Commission on Non-Ionising Radiation Protection (ICNIRP), with the document commenting that:

> "*In addition to the licence obligations imposed on each operator, CICRA carries out annual audits of telecoms masts and antennas. This includes a biannual survey of all masts, most recently carried out last year following the completion of the roll out of*

4G mobile services. The full results, with an interactive map of locations and detailed reports for each individual site are available on CICRA's website. None of the sites surveyed in Guernsey or across the Bailiwick was found to exceed the standards set by the ICNIRP.

The introduction of 5G services is likely to result in more antennas to provide better coverage and the faster data speeds that users demand. Each generation of mobile equipment has become more efficient and required less power to carry data services, 5G is no exception and we would expect that the overall power levels of individual antennas and masts [per gigabit/megabit of data] would be lower than for previous generations of mobile services.

That does not mean we are complacent, and we expect CICRA to impose the same tough standards and inspection regime on 5G services as it currently applies, and to take account of changes and updates to the ICNIRP standards as they are revised."

173. In relation to 5G, the Telecommunications Sector Policy Statement explained that the "*potential situation where telecommunications companies can no longer compete for market share on the basis of speed and coverage and the requirement to reduce environmental impact means that 5G in Guernsey, as elsewhere, will likely require new models for infrastructure ownership and competition.*" Further, "*Whilst stakeholders recognise the necessity to realise economies of scale when thinking about 5G networks, the proven, albeit historical, merits of competition at the infrastructure level may see operators continue to want to build and own their own 5G networks.*" The statistics from a survey of mobile industry CEOs showed an equal split between those favouring owning and operating their own network and those preferring widespread network sharing. (This is clearly a reference to a broader analysis than just the Bailiwick market.) Moreover:

> "*Network site sharing, already a reality for operators in Guernsey, will continue to be supported and actively encouraged by policymakers and regulators. Given the level of investment needed for network densification in the 5G era, the business case for infrastructure sharing, including full RAN sharing is likely to become more attractive and could become compelling for operators.*"

174. Under the heading "*New Network Options*", three options are explained, with the words preceding them explaining that they "*are aimed at developing an environment where network connectivity, quality and availability are ubiquitous, reducing or removing incentives for competition at the network level and bringing about wholesale change to the criteria driving investment in networks. By de-coupling network and service, so new competitors can build innovative business cases to enter the market.*" The document adds that "*both fixed fibre, legacy mobile capability and 5G will co-exist for some time.*" The three scenarios were to build and operate just a single network and encourage multiple service providers to offer services using it; maintain the existing fixed and legacy mobile state of play and build a single new 5G network; and maintain the current competitive network situation but pursue a determined approach to RAN sharing for 5G through legislation, planning rules and regulatory policy.

175. In respect of the first of these scenarios, further detail is set out as follows:

> "*Form a joint venture (or some other special purpose vehicle) of network providers to pool their existing infrastructure resources, fixed and mobile. This new "Netco" would be tasked to roll out and operate 5G and legacy networks in Guernsey. Access to the network would be open to any service provider on a regulated basis – for example an "access fee" based on the number of users, and a "per GB fee" for usage. Access for IoT and critical communication services would be provided on a different fee structure designed to encourage widespread adoption.*

> *Planning policy could encourage the rapid rollout and densification of the single 5G network.*
>
> *The system for the award of radio spectrum licences – designed in an era of competition at the network level, should be changed and one licensee (the "Netco") should receive all of the available spectrum without usage restrictions, but with agreed objectives for coverage and quality. Without the driver of competition, a realistic fee for use of spectrum would need to be agreed.*
>
> *Given the relative scope and resources of the existing network operators, it is envisaged that Sure would form the basis of the Netco in Guernsey and JT in Jersey if a similar approach is taken across the Channel Islands.*"

176. Then in respect of the second scenario, one possibility was for a "*new network company (could be a consortium of existing operators) would be given the exclusive licence for 5G and the existing operators would not be allowed to build 5G networks.*" The alternative was to invite "*new 3rd parties to build the 5G network.*" Finally, in respect of the third scenario, it was recognised that for operators looking to rollout 5G, "*potentially requiring many times more radio stations to be deployed than the existing 4G networks, a legislative and regulatory environment that requires RAN and transmission backhaul infrastructure sharing will drastically reduce the environmental impact of competing island wide networks*". The document then adds that:

> "*The advent of the 5G standard and the GSMA proposition of boundless connectivity for all does however challenge the current models for telecommunications competition. The role of Government is therefore to encourage, support and provide certainty to the investment decisions being made by the telecommunications companies; whilst discouraging under and over investment that will both have a negative impact on the consumer. As the standard for 5G has yet to be set Government wishes to encourage a meaningful discourse with itself, the telecommunications operators and CICRA with the aim of the successful delivery of the third policy objective of the 'Provision of next generation mobile technology' as fast as, if not earlier than the UK.*"

177. The summary section towards the end of the Telecommunications Sector Policy Statement sets out that:

> "*Next generation mobile does challenge the way networks and infrastructure have traditionally been built and potentially changes the competitive environment from where operators compete on coverage and speed to one where they compete on price and customer service. The challenge is to ensure the investment decisions deliver the objective of boundless connectivity without either over or under investment in infrastructure. The challenges of transforming the way networks are built and owned should not be underestimated. Operators have made significant investments to realise the networks they have today and may resist. However, Government, and the regulator, have important roles to plan developing, in partnership with the Telecommunication Companies, the most effective and efficient model for either a single network or network sharing that enables the right investment decision to be made. CICRA will now develop the regulatory framework that encourages innovative options for shared infrastructure deployment and incentivises achievement of connectivity goals.*"

178. I have set out the content of the Telecommunications Sector Policy Statement in some detail because a number of the grounds of appeal refer to it, whether directly or indirectly. Thereafter, what is set out in the fourth part of the Decision has already largely been referred to. Because the Decision states in para. 4.7 that the bilateral contacts between the Appellants "*appear to have begun shortly after the 5G pre-summit meeting*" held in July 2018, I have reviewed the

slides generated and circulated on 10 July 2018 following that 5G pre-summit as a means of understanding the issues raised at it, but particularly as they affected Guernsey, rather than Jersey. The Chief Information Officer at that time gave a presentation that included reference to what has become known as the Telecommunications Sector Policy Statement. There were also presentations by representatives of JT and Sure, as well as from a representative from Airtel. Other presentations were made by planning officials and there was a question and answer session at the end. To the extent that any of this has relevance to the grounds of appeal, I will deal with this matter at that point.

Nature of infringement

179. Against that background, I will turn to the other grounds of appeal, starting with those found in grounds 2 to 5 on behalf of Sure, which overlap with some of those advanced on behalf of JT. In her Skeleton Argument, Advocate Gray grouped these four grounds together, noting that the other grounds were set out in sufficient detail in Sure's Cause. Whilst these grounds are inter-related, I will endeavour to deal with each discretely. Advocate Gray, with support from Advocate Barclay, focused in particular on the fifth ground of appeal, relating to the conclusion that this was an infringement by object. Before I can properly deal with that ground, I will need to address whether the conclusions referenced in the second ground (noting that the sixth aspect was not pursued because it resulted from a misreading of the 2012 Ordinance) can be sustained by the Respondent. In doing so, I will touch on the fourth ground, which overlaps significantly with JT's second ground, relating to the rejection by the Respondent of the innocent explanation offered in respect of the contacts forming the basis of the finding of an infringement. The third Sure ground of appeal is a specific aspect of whether or not the contacts set out in the Decision could extend to the manner in which the Appellants communicated with the regulator and the States of Guernsey.

180. It is important to remember first what section 5(1) of the 2012 Ordinance covers: "*agreements between undertakings which have the object or effect of preventing competition within any market in Guernsey for goods or services are prohibited*". Section 5(3) provides that "*Subsection (1) applies only if the agreement is, or is intended to be, implemented in Guernsey*." The definition is section 60(1) of "*agreements between undertakings*" is "*any type of agreement, arrangement or understanding between undertakings, whether or not legally enforceable, and includes a decision by an association of undertakings and a concerted practice involving undertakings*". The term "*concerted practice*" is not defined. According to section 5(6), all agreements described in section 5(1) are referred to in the Ordinance as "*anti-competitive practices*" and, by section 5(4), such an agreement "*is void to the extent that it comprises or includes an agreement prohibited by subsection (1).*"

181. I accept what Advocate Dawes said about not construing the Decision as if it were a statute. It is clear that it is not, but rather is a document produced under the terms set out in the Ordinance. As a result, a different approach is, therefore, required to it than when it comes to construing an item of legislation. What matters will always relate to the adequacy of the reasoning contained within it.

182. Sure bases its second ground of appeal on the findings made at paragraphs 6.9, 6.11, 6.19, 6.20 and 6.38 of the Decision. I have already set out the first four of these paragraphs earlier in this judgment, and so do not need to repeat them here. The final paragraph begins with the way in which the Respondent has dealt with some arguments raised by the Appellants before the Decision was taken. The paragraph states:

> "*(a) As stated above (paragraphs 6.9 – 6.21) the GCRA has concluded that the Parties engaged in a single continuous infringement that amounts to an agreement and a concerted practice. They disclosed their contemplated market conduct to each other through reciprocal contacts. Those contacts*

significantly reduced the uncertainty of each Party about the way in which the other was contemplating operating on the market. The fact that each of JT and Sure remained active on the market gives rise to a presumption that each took account of the information disclosed when determining their own market conduct. The fact that the arrangements may not have been put (fully) into effect does not affect this conclusion (see paragraph 5.22) above). It follows that the question of whether or not the Bilateral Home Network Scenario was capable of implementation is irrelevant; the conduct described above amounted to an agreement and a concerted practice.

(b) Further and in any event, even if it is accepted that JT, had it wished to remove its mobile network infrastructure from Guernsey, would have been required to inform the GCRA of its intentions to do so pursuant to Licence Condition 22 of its Mobile Telecoms Licence, the GCRA does not accept that such consent would necessarily not have been obtained and that the Bilateral Home Network Scenario would therefore have been incapable of implementation. This is because all that Licence Condition 22 requires is that a Licensee informs the GCRA of its intention to cease to offer the Licensed Mobile Telecommunications Services. Licence Condition 22 does not require a Licensee to disclose to the GCRA the reason for its decision to cease to offer those services. As such, it would not necessarily have been obvious, on the face of any such request for consent (unless JT had decided to disclose it to the GCRA) that JT's decision to cease to offer the Licensed Mobile Telecommunications Services was not purely unilateral (and would therefore not raise any issues under the law prohibiting anti-competitive agreements) rather than being the result of the conduct that the GCRA has concluded amounts to an agreement and a concerted practice. There is therefore no evidence to support the view that the GCRA would have become aware of the Bilateral Home Network Scenario through the operation of Licence Condition 22 and logic dictates that it could not have withheld its consent on the basis of an agreement/concerted practice of which it was not aware. It is therefore incorrect to state that Licence Condition 22 would have prevented the implementation of the Bilateral Hoe Network Scenario on that basis that that Licence Condition would have required JT to disclose its existence to the GCRA, which would then have refused to consent to it. For completeness, the GCRA notes that the 5 year timeframe being considered by the Parties for the implementation of the Bilateral Home Network Scenario would have been achievable, even if JT had been required to give three years notice of its intention to cease to provide Licensed Mobile Telecommunications Services in accordance with the provisions of Licence Condition 22. The same conclusions apply to the arguments put forward by Sure in respect of condition 2 of its Mobile Telecoms Licence.

(c) Further, and in any event, conduct that breaches section 5(1) of the 2012 Ordinance remains prohibited until the point at which any exemption is granted. The arguments of the Parties are, in part, based on the premise that they might have applied for certain exemptions or that certain exemptions might have been applied to their conduct. However, this is speculative; no such applications were made and no such exemptions were applied for and, as such, the conduct remains prohibited if it falls within the scope of section 5(1) of the 2012 Ordinance. The GCRA also observes that conduct that amounts to a restriction of competition by object is, in any event, unlikely to qualify for exemption from the prohibition on anti-competitive agreements.

> *(d) The argument that the conduct amounted to a merger is entirely speculative and unsupported.*
>
> *(e) The arguments relating to the possible refusal of consent by Ofcom to allow the transfer of spectrum are similarly speculative. In any event, the Parties have not produced evidence to demonstrate that the Bilateral Home Network Scenario could not have operated without the transfer of JT's Guernsey spectrum to Sure. As such, these arguments do not demonstrate that the conduct described above does not amount to an agreement and a concerted practice.*"

183. When these paragraphs are read together, as I consider they must be, they constitute the basis on which an infringement of section 5(1) was found. The various grounds advanced by Sure and supported by JT challenge these findings on the grounds set out.

184. Although it is not the way it has been put by the Appellants. I have noted that the definition of "*agreement between undertakings*" in section 60(1) of the 2012 Ordinance refers to <u>including</u> "*a concerted practice involving undertakings*". Accordingly, I find it unhelpful in the Decision that there are numerous references to "*an agreement and a concerted practice*" where the definition clarifies that any finding of a concerted practice is covered by the definition of "*agreement between undertakings*". If the Respondent wished to rely on the inclusionary nature of the definition it is still, for the purposes of the Ordinance, an agreement. However, it would have assisted me if it were made clear whether what was being found was an agreement, and if so whether legally enforceable or not, or whether it was regarded as an arrangement or an understanding or whether the principles applicable to a concerted practice were relied on. In the end, because no point has been taken by the Appellants, this does not really matter but I would encourage the Respondent to be clear in any future findings of infringement because I consider that it is inaccurate to refer to an agreement <u>and</u> a concerted practice, when the latter is included as an agreement in accordance with the language used in the Ordinance.

185. Further, there is a footnote in Advocate Dawes' Skeleton Argument that explains that in EU law the notions of agreement and concerted practice overlap. Case C-238/05 <u>*Asnef-Equifax, Servicios De Información Sobre Solvencia Y Crédito SL v Asociación De Usuarios De Servicios Bancarios (Ausbanc)*</u> [2007] 4 CMLR 6 is cited in support and particularly para. 32 thereof:

> "*In effect, while that provision distinguishes between "concerted practices", "agreements between undertakings" and "decisions by associations of undertakings", the aim is to have the prohibitions of that article catch different forms of co-ordination and collusion between undertakings (see <u>Commission v Anic Partecipazioni</u> (C-49/92 P) [1999] E.C.R. I-4125; [2001] 4 C.M.L.R. 1 at [112]). Accordingly, in the present case, a precise characterisation of the nature of the co-operation at issue in the main proceedings is not liable to alter the legal analysis to be carried out under Art. 81 EC.*"

Whilst this might be satisfactory for the purposes of EU law, in my view it does not address the way in which the 2012 Ordinance was drafted and has been enacted. All that is required is to find an agreement between undertakings, but it would assist to know the basis on which that agreement, as defined, has been identified. If it is a concerted practice, it would be better to be explicit about that.

186. Similarly, Advocate Dawes' Skeleton Argument also explains that the definition of "*prevent*" in section 60(1) is used as shorthand for "*prevent, restrict or distort*" (which is why some of Advocate Gray's pleaded grounds of appeal fell away), but that the definition also extends in each of those cases to an "*attempt to do so*". It is suggested that this demonstrates that competition law in Guernsey goes beyond EU or UK competition law, but this matters not because it is not the way in which any finding of an infringement in the Decision is made.

Accordingly, there was no need to refer to this aspect of the definition. Both issues are good examples of the unduly academic approach contained in the Skeleton Argument, and also reflected in the content of the Decision itself.

Guidelines

187. I can also refer here to the ability for the Respondent to publish guidelines in accordance with section 55 of the 2012 Ordinance. This is particularly relevant in the present appeals because of its Guideline 2 on Anti-Competitive Practices. Section 55(7) provides that these published guidelines "*are admissible in evidence*" and if I consider that they are "*relevant to any question arising in the proceedings then the guidelines may be taken into account in determining that question*". However, section 55(6) confirms that, unless the guidelines provide otherwise, they do not bind the Respondent or any other person or body, which must extend to this Court and that "*they are merely indicative of the Authority's likely approach to any particular issue*".

188. Guideline 2 is dated June 2021. It reflects the change made to section 54 of the 2012 Ordinance earlier that year. Under the heading "Concerted practices" it states:

> "*'Agreement' includes the EU competition law concept of concerted practices. A concerted practice may exist where there is informal co-operation without any formal agreement or decision.*
>
> *In considering if a concerted practice exists, the GCRA will normally follow relevant European Community precedents established under Article 101 of the TFEU. The evidence that will be required to establish an infringement includes:*
>
> - *the existence of positive contacts between the parties; and*
> - *parallel behaviour as a result of such contacts that leads to conditions of competition that do not correspond to the normal conditions of a market.*
>
> *The following are examples of factors which we may consider in establishing if a concerted practice exists:*
>
> - *whether the parties knowingly enter into practical co-operation;*
> - *whether the behaviour in the market is influenced as a result of direct or indirect contact between businesses;*
> - *the level of transparency in the market (that is, the extent to which different firms can gain access to sensitive information from other firms, either directly or indirectly);*
> - *the structure of the relevant market and the nature of the product involved; and*
> - *the number of businesses in the market, and where there are only a few businesses, whether they have similar cost structures and outputs.*"

189. There is also a discrete section in this guideline dealing with "Information Disclosure", which states:

> "*The disclosure of information, whether one-way disclosure or an exchange, may have an effect on competition where it serves to remove uncertainties in the market and*

> *therefore eliminate competition between businesses, such as where information is exchanged on pricing intentions (see below). It does not matter that the information could have been obtained from other sources. Whether the information disclosure has an effect on competition, or is even found to have the object of preventing competition, will depend on the circumstances of each case: the market characteristics, the type of information and the way in which it is disclosed.*
>
> *As a general principle, the GCRA considers that the smaller the number of businesses operating in the market, the more frequent the disclosure, and the more sensitive and confidential the nature of the information which is disclosed, the more likely there is to be an effect on competition.*
>
> *An agreement between competing businesses to exchange commercially sensitive information, whether directly or indirectly is likely to be regarded as having the object of preventing competition.*"

After dealing with disclosure of price information, the Guideline turns to other disclosures:

> "*The disclosure of information on matters other than price may have an appreciable effect on competition, depending on the type of information disclosed and the market to which it relates. The disclosure of statistical data, market research and general industry studies for example is unlikely to have an appreciable effect on competition provided that the information disclosed does not enable confidential or sensitive business information to be shared.*"

190. There is nothing that is particularly controversial in what is set out in Guideline 2. In many respects, it contains a high level analysis of the basic provisions as found in the 2012 Ordinance, although it does in places attempt to give some examples of what might be regarded as an infringement and what might not. I doubt that there is anything contained in the Guideline that affects any basis of these appeals, so I am not persuaded that I need to regard any of it as being relevant.

191. Although Advocate Gray has focused on whether there could properly be a finding of an infringement by object (Sure's fifth ground of appeal), I consider that I need first to ascertain whether there was an infringement of section 5(1) of the 2012 Ordinance capable of being found at all and, if so, on what basis.

192. In this regard, I have reminded myself that the object (or effect) of the agreement must prevent competition "*within any market in Guernsey*" and para. 6.2 of the Decision proceeds on the basis of the market being "*the provision of mobile telephony services in Guernsey*". To the extent that reference is made to what might happen in Jersey, this is of no direct relevance to the assessment made by the Respondent about what will be implemented in Guernsey. Paragraph 6.9 refers to the finding made that the matters listed "*clearly form part of that undertaking's commercial strategy*" and so to "*the course of conduct that that undertaking is contemplating on the market*". The first of the matters listed (para. 6.9(a)) relates to "*whether an undertaking retains mobile network infrastructure in, or removes mobile network infrastructure from, a territory in which it is active*". The territory to which reference is made here should only be Guernsey. I do not think it can apply to Jersey, because of the effect of section 5(3), even if that is the intended promise for acting in a particular fashion in Guernsey. Similarly, the second matter listed (para. 6.9(b)) relates to "*the speed at which and/or the way in which it introduces a new product, such as 5G, into the market*". Again, that can only be a reference to the introduction of 5G in Guernsey. The third and final matter mentioned (para. 6.9(c)) relates to "*the way in which it communicates those decisions to the regulator and the Government*". For these purposes, this can only refer to the regulator in Guernsey, being the Respondent, and the States of Guernsey, which is a single legal entity, but acts through various

Committees. Because the market is confined to Guernsey, it follows that this finding must be considered in the light of these matters.

193. The reason for emphasising this aspect of the appeals is that, on behalf of the Sure Appellants, Advocate Gray criticises the third basis set out in para. 6.9 because how matters are communicated to the Respondent or even to the States of Guernsey does not indicate what Sure was contemplating adopting on the market, as defined. This is the third ground of appeal, covered in paragraphs 110 and 11 of the Cause. It is suggested that this is a material error of fact.

194. If viewed in isolation, I agree. It is clumsy to refer in para. 6.9(c) of the Decision to the manner of how the Appellants communicated with others without setting out in more detail what this means. Indeed, in his oral submissions, Advocate Dawes accepted that the manner of communication of what had happened does not of and by itself amount to an infringement of section 5(1). This was a limited concession on the basis that it was evidence of what was going on, although that is not how it is put on the face of the Decision.

195. The communications may support a conclusion that the exchanging of information, which forms the basis of the finding of infringement as it affects the market the Respondent has identified, but I accept that in itself this is not indicative of any stance being taken in respect of the market. At best, the manner of communication, or possibly the absence of what the Respondent might regard as the required transparency with it, may be supportive of a separate finding about how the Appellants were acting in relation to the market, but these are not, in my view, matters that directly amount to any form of infringement of the prohibition in section 5(1) of the 2012 Ordinance. In particular, it cannot be said that any such communications reduce or remove the degree of uncertainty as to the operation of the market. By conflating these matters, I am satisfied that the Respondent has fallen into error. If this were the only criticism, however, it might not, in itself, be sufficient to have the entirety of the Decision set aside.

Infringement

196. As regards the finding of an infringement on the other bases in para. 6.9 of the Decision, it is further suggested that nothing that was shared between Sure and JT was confidential because JT had made it clear at the conferences, and so in a public forum, that 5G should not be adopted quickly. What information was exchanged was not "*actionable intelligence*". The Appellants were responding to encouragement from the States of Guernsey, and so also from the Respondent, to have discussions about infrastructure sharing. Further, even if the information concerned is considered as a pure information exchange, without addressing the legal, economic and factual context, it did not remove the degree of uncertainty as set out in para. 6.19 of the Decision, which I have already quoted. In her Skeleton Argument in reply, Advocate Gray points out that this aspect of Sure's appeal is not addressed by the Respondent because instead it seeks to run a different, and new, case.

197. Advocate Gray also relies on some material from the Organisation of Economic Co-operation and Development ("OECD") *Information Exchanges between Competitors under Competition Law*, which was published on 11 July 2011, arising from some roundtable discussions. I have considered this document carefully, noting that Advocate Gray suggests that the principles it contains are reflected in Case C-382/12 P *Mastercard Inc. v European Commission* (unreported, 11 September 2014), and in particular what was stated at paragraphs 90 to 92:

> "*90 Where it is not possible to dissociate such a restriction from the main operation or activity without jeopardising its existence and aims, it is necessary to examine the compatibility of that restriction with Article 81 EC in conjunction with the compatibility of the main operation or activity to which it is ancillary,*

even though, taken in isolation, such a restriction may appear on the face of it to be covered by the prohibition rule in Article 81(1) EC.

91 Where it is a matter of determining whether an anti-competitive restriction can escape the prohibition laid down in Article 81(1) EC because it is ancillary to a main operation that is not anti-competitive in nature, it is necessary to inquire whether that operation would be impossible to carry out in the absence of the restriction in question. Contrary to what the appellants claim, the fact that that operation is simply more difficult to implement or even less profitable without the restriction concerned cannot be deemed to give that restriction the 'objective necessity' required in order for it to be classified as ancillary. Such an interpretation would effectively extend that concept to restrictions which are not strictly indispensable to the implementation of the main operation. Such an outcome would undermine the effectiveness of the prohibition laid down in Article 81(1) EC.

92 However, that interpretation does not mean that there has been an amalgamation of, on the one hand, the conditions laid down by the case-law for the classification – for the purposes of the application of Article 81(1) EC – of a restriction as ancillary, and, on the other hand, the criterion of the indispensability required under Article 81(3) EC in order for a prohibited restriction to be exempted."

The crux of this submission is that the Respondent failed to take into account that there was a legitimate reason for the Appellants to be exchanging the information that was exchanged, as a result of the encouragement given to them to do so, which meant that what was shared did not amount to an infringement of section 5(1) of the 2012 Ordinance. The Decision needed to spell out why that legitimate purpose argument was being rejected.

198. Advocate Barclay comments that the discussions between the Appellants related to a hypothetical situation. The only way in which there could have been conduct on the market identified would have been if there had been steps taken to develop what in the Telecommunications Sector Policy Statement is referred to by the Respondent as the Pooled Infrastructure Scenario. Indeed, the detailed way in which this is set out in Sure's Cause in para. 71 is expressly adopted by the JT Appellants. It focuses on the findings made in the Decision between paragraphs 6.12 and 6.18, which are intended to support the finding made in para. 6.11, to which I have already referred. He also pointed out that none of the Respondent's case had been put to anyone from JT in an interview because, as set out in para. 3.61 of the Decision, "*it had not been possible to arrange GCRA interviews with JT personnel*" for the reasons given, hence the decision to request further written information instead. It was implicit that he considered that this had placed JT at a disadvantage.

199. That Telecommunications Sector Police Statement encouraged communication between the operators, as demonstrated in some of the passages I have already quoted from it. This is clear, in particular, from encouraging "*a meaningful discourse*". This aspect has not been adequately addressed. It is almost as if the Respondent has devoted so much time and effort into the process it has followed that it meant it felt obliged to find an infringement, which Advocate Barclay refers to as a form of "*confirmation bias*".

200. During the course of his oral submissions, he criticised Advocate Dawes for the way he had suggested that the Appellants had behaved badly. He suggested that this was entirely the wrong test and what the Court needed to concentrate on was whether the Decision had set out properly an infringement of section 5(1) of the 2012 Ordinance that could be sustained in spite of the contrary contentions on behalf of the Appellants. This did not turn on whether the Respondent disliked the way that the Appellants had conducted themselves. What needed to be considered

properly was the real world, rather than a theoretical one, in which the conduct found to infringe that section was shown to have had a real effect on consumers. He further suggested that the Respondent had been viewing matters through the wrong prism, seeing matters more darkly than necessary.

201. In response, Advocate Dawes suggested that the basis of a finding of infringement was clearly established, pointing out that the burden of persuasion fell on the Appellants, whereas in taking the Decision he accepted that the burden fell on the Respondent to assert the manner of the infringement found. He concentrated on the options set out in the Telecommunications Sector Policy Statement, which envisaged a form of joint venture and not what the contacts between the Appellants showed they were contemplating, which was to share the Channel Islands market between them. He suggested that the position of JT in Jersey necessarily had an impact on the position in Guernsey.

202. Advocate Dawes acknowledged that the Respondent accepted that there had been an element of encouragement to discuss matters. What was envisaged was that the three operators in Guernsey would consult one another appropriately. What was not envisaged was that the Appellants would proceed and exclude Airtel from these discussions. Further, the information exchanged, as set out in the Decision, was commercially sensitive and so could properly be viewed as amounting to an object infringement. The real mischief in the exchanges between the Appellants was that they saw themselves carving up the markets between them. There had been no proper consideration of the options set out in the Telecommunications Sector Policy Statement. In any event, Airtel should have been a core participant.

203. In respect of the JT slides referred to in para. 6.19 of the Decision, this showed the way that JT was thinking and so extended to what Sure must also have been thinking at that time. It was given as an example and was not the entire picture on that issue. The Memorandum of Understanding in respect of Guernsey (as also the MOU in respect of Jersey) was misleading. The Appellants could not collude in the way they did and seek to shut out a potential competitor. He suggested it was an example of what was a concerted practice between the Appellants. It was established simply by referring to any discussion between the Appellants about the speed of roll out of 5G. (During the course of his oral submissions, it became clear that the Respondent no longer asserted any form of agreement *per se*, but placed its case formally on the ground that there had been activities that amounted to a concerted practice.) He suggested that the bar is set comparatively low for a regulator to establish a concerted practice. What the Decision did was to explain why the exchanges between the Appellants was so far removed from the options set out in the Committee's document. The documents referred to showed that the Appellants had behaved badly (to which I have already made reference).

204. Although it would have been helpful if the Decision had spelt out that the Respondent was relying on there being a concerted practice, on the basis that this is how the hearing proceeded, I will look only at that aspect and will not comment further on the shift from an actual agreement (where the First SO had based itself on the MOU, and the SSO had, it seems to me, based itself on the allegation that there had been a market-sharing agreement) to what is said to be a concerted practice. If this were the case, as it now appears to be, then there was no need to include on the face of the Decision the paragraphs in the fifth part dealing with an agreement.

Discussion

205. The starting point, in my opinion, should always be what is set out on the face of the 2012 Ordinance. Support for how to interpret the language used can properly be derived from other sources, particularly where there is comparatively little domestic learning at the present time. I can also have regard to the combination of factors set out in the Respondent's Guideline 2, where the Respondent will consider both positive contacts and "*parallel behaviour as a result of such contacts*". Of course, section 54 enables the Respondent and the Court to have regard

to "*relevant decisions of the Court of Justice or General Court of the European Union*" to assist in the approach to "*corresponding questions*" and I accept that having regard to principles derived from English law (or indeed any other system of law that uses these concepts) is also possible.

206. It is surprising that, in the Decision, as I have already noted, the Respondent switches from references it had made in the SSO to citing the principles found in *Apex Asphalt and Paving Co Limited v Office of Fair Trading*. It will probably assist to set out first what is said about a concerted practice by reference to two EU decisions, before citing in full the way it is put in para. 5.27 referring to the *Apex* case.

207. Paragraph 5.25 explains, using para. 241 of Case T-7/98 *SA Hercules Chemicals NV v Commission* (unreported, 17 December 1991) as it basis, that:

> "*The object of the Treaty in creating a separate concept of concerted practices was to prevent undertakings from avoiding the application of Article 101(1) by:*
>
> > *"colluding in an anti-competitive manner falling short of a definite agreement by, for example, informing each other in advance of the attitude each intends to adopt, so that each could regulate its commercial conduct in the knowledge that its competitors would behave in the same way."*"

Using Joined Cases T-25/95 etc *Cimenteries CBR SA v Commission* [2000] 5 CMLR 204 as the source, in para. 5.26 it is said that:

> "*The concept of "concerted practice" encompasses:*
>
> > *"... a form of coordination between undertakings which, without having reached the stage where an agreement properly so called has been concluded, knowingly substitutes practice co-operation between them for the risks of competition."*"

208. In his Skeleton Argument, Advocate Dawes also cites briefly the description of a concerted practice taken from Case C-609/13 P *Duravit AG v European Commission* (unreported, 26 January 2017) and, in particular, para. 135 thereof:

> "*... the exchange of commercial information between competitors in preparation for an anticompetitive agreement suffices to prove the existence of a concerted practice within the meaning of Article 101(1) TFEU. In that regard, it is not necessary to show that those competitors formally undertook to adopt a particular course of conduct or that the competitors colluded over their future conduct on the market (see, to that effect, judgment of 5 December 2013, Solvay v Commission, C-455/11 P, not published, EC:C:2013:796, paragraph 40).*"

He also sets out more than just para. 40 of Case C-455/11 P *Solvay SA v European Commission* [2014] 4 CMLR 14 at para. 160 of his Skeleton Argument. Paragraph 40 refers to "*the exchange of commercial information between competitors in preparation for an anti-competitive agreement*".

209. However, the fuller explanation in the Decision is para. 5.27, referring to para. 206 of the *Apex* case:

> "*The EU case law on concerted practice was summarised by the UK Competition Appeal Tribunal (**CAT**) as follows:*

(a) The concepts of agreement and concerted practice are intended to catch forms of collusion having the same nature and are only distinguishable from each other by their intensity and the form in which they manifest themselves;

(b) The term concerted practice refers to a form of coordination between undertakings which knowingly substitutes, for the risks of competition, practical cooperation between them;

(c) The criteria of coordination and cooperation laid down by the case law of the ECJ, which in no way require the working out of an actual plan, must be understood in the light of the concept inherent in the provisions of the TFEU relating to competition that each economic operator must determine independently the policy which it intends to adopt on the common market;

(d) The requirement of independence strictly precludes any direct or indirect contact between such operators, the object or effect of which is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market;

(e) In particular a concerted practice may arise if there are reciprocal contacts between the parties which have the object or effect of removing or reducing uncertainty as to future conduct on the market;

(f) Reciprocal contacts are established where one competitor discloses its future intention or conduct on the market to another when the latter requests it or, at the very least, accepts it;

(g) It is sufficient that, by its statement of intention, the competitor should have eliminated or, at the very least, substantially reduced uncertainty as to the conduct on the market to be expected on his part;

(h) A concerted practice implies, besides undertakings concerting together, conduct on the market pursuant to those collusive practices, and a relationship of cause and effect between the two;

(i) There is a presumption that the undertakings participating in concerting arrangements and remaining active on the market take account of the information exchanged with their competitors when determining their conduct on that market, particularly when they concert together on a regular basis over a long period;

(j) Although the concept of a concerted practice presupposes conduct of the participating undertakings on the market, it does not necessarily imply that that conduct should produce the concrete effect of restricting, preventing or distorting competition.

(k) It follows from the actual text of [Article 101(1) TFEU] that concerted practices are prohibited, regardless of their effect."

210. I have set out these paragraphs in full because they necessarily form the basis for the conclusion reached in the Decision that the Appellants had engaged in a concerted practice. Having looked carefully at the whole of the *Apex* case, it is apparent that even in para. 206, which is said to form the basis of the principles summarised by the Respondent in para. 5.27, there are plenty

of references to the case law from the European courts. This is consistent with section 54 of the 2012 Ordinance, even though the text of that paragraph omits the numerous references. To that extent, I am satisfied that the Respondent has set out sufficiently the basis on which it finds a concerted practice, provided that the analysis of the facts also contained in the Decision support that conclusion. It is not entirely clear to me that there is an adequate explanation about the parallel behaviour resulting from the contacts between the Appellants set out in the Decision.

211. One aspect that is clear, and on which I intend to focus, is the requirement that the reasoning given must explain how the contact between the Appellants reduced uncertainty about actions on the market to the extent required. I have already quoted the whole of para. 6.19 of the Decision earlier in this judgment. This is how the Respondent finds that this aspect was met. I am not persuaded that what is set out in that paragraph is satisfactory as the reasoning for the Respondent's conclusion. I agree with Advocate Gray's comment that it does not appear that what was stated in para. 6.19 appears to have dampened JT's enthusiasm to compete.

212. I do not accept that this paragraph in the Decision amounts to an example of other matters, as Advocate Dawes suggested it was. This is described as a finding following what is set out in para. 6.9. As is made clear from the content of para. 5.27 of the Decision, it was necessary for the Respondent to set out the grounds relating to how it said the contact between the Appellants significantly reduced the uncertainty on the market. That is what para. 6.19 addresses. The only matter referred to therein is the JT slide presentation, which referred to the position that JT would take in Jersey. I do not regard the use of "*in particular*" as indicative that there were other matters that could also be used to establish the level of uncertainty required.

213. I am not convinced that relying on an earlier version which included a reference to being "*prepared to trade Guernsey if it means we can successfully defend Jersey*", which was not then circulated, even internally to the JT board members, is an appropriate basis from which to conclude that there was a reduction of the required degree in the uncertainty as it related to Guernsey (which is, of course, the basis on which any finding of a concerted practice has to relate to). The conclusion in para. 6.19 is that, as a result of the concerted practice, someone had previously written that Guernsey would be traded, but that version of the slide does not appear to be anything other than a working draft and it was not apparently circulated to board members in that form. I am not satisfied that this can properly be relied upon when it was not even shared with the JT board members. In any event, as the only example given of supporting material demonstrating how the Respondent assessed that there was an appropriate level of reduction in uncertainty, it seems to me to be marginal at best as to whether something that was internal to JT can be said to show that it applied equally to Sure. Further, because JT's focus was on preserving its position in Jersey, this is not of direct relevance to the situation under the 2012 Ordinance. As a result, had I needed to do so, I would have concluded that the ground about reduced uncertainty as to how each of the Appellants would operate on the market (eg, Sure's ground 2(ii) and (iii)) would have been made out because the Respondent had failed to set out the ground on which this component of the concerted practice was established satisfactorily. In short, para. 6.19 is insufficient.

214. This leads me on to the issue raised by Advocate Barclay that the Appellants were addressing a hypothetical situation (ground F). I think I can sensibly combine this consideration with the ground in Sure's Cause about the need for regulatory and political approval (ground 2(v)), especially as Advocate Barclay aligned himself to the content of para. 71 of Sure's Cause. However, on the basis that I do not believe that the Respondent relies any longer on there being a form of agreement, for which a "*concurrence of wills*" is needed, I can skip over those parts of this ground that refer to such matters.

215. This issue also engages the terms of Condition 22 on JT's licence, dated 20 April 2015, permitting it to provide Licensed Mobile Telecommunications Services. The terms of

Condition 22.1 are set out in para. 6.33 of the Decision, to which I have added reference to Condition 22.2 for the sake of completeness:

> "*22.1 If the Licensee proposes to cease to provide all or a material part of the Licensed Mobile Telecommunications Services, it shall give not less than three years notice in writing to the GCRA of the proposal and its plans in relation to the cessation of such services. Such cessation shall be effected only with the consent of the GCRA and in accordance with any directions given in relation thereto by the GCRA and the Licensee shall comply with any such directions.*
>
> *22.2 If the GCRA receives a notice under Condition 22.1 or if the GCRA has made a decision pursuant to section 28 of the Telecommunications Law to suspend or revoke the Licence, the GCRA may after consultation with the Licensee direct it in writing to take such steps as are specified in the direction, being steps that he considers necessary or expedient to ensure the safety of the Licensed Mobile Telecommunications Services or the continuity and continuation of the provision of Licensed Mobile Telecommunications Services or any constituent parts thereof, and the Licensee shall comply with any such directions.*"

216. In Ms Livestro's Affidavit, she suggests at para. 75 that the points being made by the Appellants about Condition 22.1 on JT's licence are based on a misunderstanding, that is then developed in as follows:

> "*… had JT removed its RAN equipment from Guernsey, it would nevertheless have been able to offer LMTS on an MVNO basis. Had it done so, no notification to the GCRA under License 22.1 would have been required.*"

I take the view that this is an attempt to supplement the explanation found on the face of the Decision, which is what the Respondent necessarily has to support.

217. I have already set out that the Decision deals with the representations made by the Appellants and the way that this condition is dealt with is found in para. 6.38(b), which I have already quoted in full. The reference therein to Sure's Licence Condition 2.2 is to the provision quoted at para. 6.35 of the Decision.

218. As a result, the alternative explanation offered in Ms Livestro's evidence does not reflect the reasoning given in the Decision for rejecting the representations made by the Appellants. It is not, in my view, permissible for the Respondent to seek to supplement its reasoning in this manner. The starting point of the issue of regulatory or political approval is para. 6.32 of the Decision and the paragraphs that follow up to and including para. 6.38, in which there is no reference to the possibility of JT being able to use the network of another operator as a Mobile Virtual Network Operator (MVNO). Instead, the Respondent necessarily has to rely on the reasoning (or grounds) set out in the Decision.

219. I take the view that the wording in Licence Condition 22.1 of JT's licence does impose a requirement on JT to give a minimum of three years' notice of its intention to cease to provide all or a material part of the Licensed Mobile Telecommunications Services covered by its licence. Further, it is clear that it could only be effected if there was consent from the Respondent. I think it is rather artificial for the Respondent to suggest that it might not be told the reason why JT was proposing to cease in at least three years' time to offer a material part of the Licensed Mobile Telecommunications Services because, if no reason were given, Condition 22.2 would enable the Respondent to consult with JT about this, potentially with a view to giving directions. I somehow doubt that the Respondent would be prepared to consent to the removal of all or a material part of those services without first enquiring what the reason

was. As such, I am not persuaded that the way in which the Respondent has chosen to reject the argument made in the Appellants' representations, as set out in para. 6.38(b) of the Decision, amounts to adequate reasoning for that decision.

220. Instead, I prefer the arguments advanced by the Appellants that, as Advocate Barclay put it, in the real world there would inevitably have been the need for JT to have explained its reason for removing core parts of its infrastructure in accordance with the Bilateral Home Network Scenario referred to in the Decision. This would have been a necessary corollary of complying with JT's Licence Condition 22.1. Further, I consider that, if the Respondent had not been told the reason underpinning the giving of notice, for which consent was required from the Respondent, there would have been a request for some explanation. Whether or not the Respondent would then have given its consent does not matter for this purpose, because the process that would have had to be followed would have meant that what had been discussed by the Appellants exchanging information, being the basis for the concerted practice found, would, on the balance of probabilities, have required regulatory consent. In addition, given the relationship between the States of Guernsey and the Respondent, and the ability of the former to give the latter direction, if there were also the need for governmental consideration, consent from a committee of the States would also have been needed.

221. For these reasons, had I needed to consider the substance of the finding made by the Respondent, I would also more likely than not have decided that these further grounds, based on the hypothesis and/or the need for regulatory consent would have been a basis for allowing the appeals.

222. I can deal quite briefly with the ground raised about the level of encouragement from politicians and regulators before I cover in greater detail Sure's fifth ground of appeal relating to the finding of an object infringement.

223. One of the reasons for setting out in some detail the terms of the Telecommunications Sector Policy Statement was so as to be able to address the ground of appeal raised by JT (in section (E)) about there appearing to be a "bright line" between what that document set out and the development of what the Decision terms the Bilateral Home Network Scenario. There is also an overlap here, in my view, with JT's second ground about the manner in which the Respondent rejected the innocent explanation offered for the discussions the Appellants had. I am, therefore, going to cover a number of these issues as generally as I can.

224. On behalf of the Respondent, as I have already noted, Advocate Dawes accepted that there was a level of encouragement offered, albeit he further suggested that it should have involved Airtel as well as the Appellants. As a result, what matters is whether the encouragement offered at the outset has been abused. There is also the related question as to whether the Appellants were obliged to have regard to the different scenarios set out in the Telecommunications Sector Policy Statement as being exhaustive.

225. On that latter point, I am not persuaded that the only discussions that could properly be had were limited to the scenarios that the document set out. As is pleaded by Sure (and seemingly not opposed), the then chairman of CICRA at the summits held in 2018 used the word "*collude*" when describing how the Appellants might seek to cooperate in identifying their preferred outcome. On the basis that the Decision states that the unwarranted collusion began shortly after the pre-summit in Jersey in July 2018, which in turn followed the publication of the Committee's document a month or so beforehand, it was necessary for the Respondent to put the exchanges of information into its appropriate context.

226. First, I am not persuaded that the Telecommunications Sector Policy Statement was exhaustive in offering the three scenarios set out therein. As was explained in it, through "*de-coupling network and service, so new competitors can build innovative cases to enter the market*", and

that "*both fixed fibre, legacy mobile capability and 5G will co-exist for some time*", the three scenarios listed do not appear to be the only matters that the operators could properly discuss. More particularly, towards the end of the document (under the heading "*Summary & Recommendations*"), as I have already quoted, reference is made to investment decisions, showing the need for there to be discussions "*in partnership with the Telecommunication Companies*" to ensure that "*the most effective and efficient model for either a single network or network sharing that enables the right investment decisions to be made*". It is not explicit there that the only matters that the Appellants, as two of the operators, could discuss were those options spelt out on the face of this document. Further, I consider that the Respondent should have been more prepared than it appears to have been to recognise that there was scope, both on the basis of the Telecommunications Sector Policy Statement and the encouragement given at the Jersey pre-summit, for the Appellants to consider other options that would, in their view, be more appropriate as the basis of their investment decisions.

227. It is also arguable that the broadening of the Respondent's investigation, as notified to the Appellants on 2 October 2020, did not extend to the matters now found in the Decision. As I have already noted, what those letters stated was that the Respondent had "*concluded that, in addition to [what it had already set out to investigate], there are reasonable grounds to suspect that Sure and JT have entered into an agreement or agreements pursuant to which they would consolidate and/or share mobile networks in Guernsey*", which may contravene section 5(1) of the 2012 Ordinance. Because a decision capable of being appealed under section 46 follows an investigation carried out by the Respondent under section 22, any limitation placed on what was being investigated in the notice given to the undertakings in question (and including the exercise of powers under section 23), may be regarded as limiting the scope of the investigation and finding. Accordingly, because there was no reference in the letters sent on 2 October 2020 to anything outside of consolidating and/or sharing mobile networks, the Bilateral Home Network Scenario ought not to have been regarded as constituting a "bright line" between what was in the Committee's document and what was then discussed by the Appellants. I am persuaded that disregarding that there was scope to discuss other matters is another error into which the Respondent appears to have fallen.

228. This also begs the question as to whether what was discussed, with encouragement, can be said to have had an effect on the market. I accept, as Advocate Dawes explained, that there is a low bar for a finding of a concerted practice (assuming for a moment that all the elements required, as set out in para. 5.27 of the Decision, are shown). In respect of the possibility, subject always to securing approval, that some of JT's existing infrastructure might be removed from Guernsey, I can also accept that this would affect the existing market. One of the difficulties is that the Respondent combines what the position currently is with the position as it might in the future be in relation to the speed of rollout of 5G. I am not persuaded that it was helpful to cover both of these aspects in the way the Respondent has. I take the view that these are different issues. The former relates to information about existing infrastructure, whereas the latter is something that appears already to have been in the public domain because of what was said at the summits.

229. Another associated issue is where the Respondent refers to different exchanges of information at different times. By way of example, the earlier contacts followed from each of the summits. At that time, it was unknown whether there might be any new entrant to the market. This only arose much later. As a result, the earlier contacts have to be put into the context of what the Appellants knew at any given time. At the time of those earlier contacts, they were not responding to the possibility of MXC, with assistance from the Guernsey Investment Fund, seeking to enter the market. This could only have become a relevant factor from the time that the possibility of this happening was known to the Appellants. As a consequence, whenever considering the nature of the contact, I take the view that it is important to set that against the background of what was known at the time.

230. Whilst I could spend time analysing each step of the Appellants' conduct by reference to how it is set out in the fourth part of the Decision, I will not do so because I am only commenting on these other grounds of appeal to the extent that it is necessary if my primary conclusion is said to be wrong. Instead, I will summarise my thoughts.

231. Ultimately, and bearing in mind that the Respondent has confirmed that it has found a concerted practice, the burden of establishing which fell on it within the Decision, it is a matter of judgment for it as to whether, on a balance of probabilities, the infringement is made out. The level of encouragement to which the Appellants have referred is clearly a factor that has to be taken into account. However, as Advocate Gray acknowledged, it would be wrong in principle if Sure were to regard the level of encouragement as being to go so far as to breach the requirements not to engage in anti-competitive practices. The Telecommunications Sector Policy Statement did include the comment that, because of "*the relative scope and resources of the existing network operators, it is envisaged that Sure would form the basis of the Netco in Guernsey*". I am not convinced that the Respondent has properly factored that initial indication into account in its approach to the information exchanged between the Appellants. Given that I have concluded that the Committee's document should not have been regarded as exhaustive of the options that could be discussed between the Appellants, which would have included Airtel, should they have wished to do so, I consider that it is marginal as to whether Sure's fourth ground of appeal and JT's second ground (in section (D)) has been established.

232. To the extent that this is said to be unreasonable, I have borne in mind that this is the modern version of what I have referred to as "Jurats' unreasonableness". It is here that there is a proper margin of appreciation available to the Respondent. I have asked myself, giving the usual direction first as to how Jurats' unreasonableness would be approached if it were an issue for the Jurats to determine, whether the finding made falls outside of the range of responses open to the Respondent. Putting to one side for the moment the issue about uncertainty, on the level of information sharing and having regard to what was known from time to time by the Appellants, it strikes me that these grounds may not be made out. I reach that provisional conclusion on the basis that I have already found other failings on the part of the Respondent and so, if I were to consider these grounds in isolation, had these been the only matters on which the appeal turned, I would probably have dismissed the appeal.

Infringement by object

233. This leads me neatly to Sure's fifth ground of appeal, to which Advocate Barclay has aligned JT's position under one of the general grounds of appeal pleaded on behalf of JT, relating to an infringement by object. This was an area on which Advocate Gray focused heavily in her oral submissions, developing what was set out in her Skeleton Argument. Even if the other grounds pleaded in Sure's Cause as grounds two to four had been rejected, which they have not been completely, this was a central plank of her submissions.

234. I will start by referring to what is set out on the face of the Decision. Paragraph 5.36 sets out that:

> "*Object infringements are those forms of collusion between undertakings which can be regarded, by their very nature, as being injurious to the proper functioning of normal competition. In such cases, the restrictive effect on competition is presumed.*"

In respect of the first sentence, the footnote refers to three cases: Case C-209/07 *Competition Authority v Beef Industry Development Society (Irish Beef)* [2009] 4 CMLR 6 (para. 17); Case C-67/13 P *Groupement des Cartes Bancaires v Commission* [2014] 5 CMLR 22 (para. 50); and Case C-373/14 P *Toshiba v Commission* [2016] 4 CMLR 15 (para. 26). In respect of the second sentence, as well as para. 49 and para. 26 of the last two cases mentioned, the footnote also refers to the *T-Mobile Netherlands* case (para. 29).

235. Paragraph 5.37 in the Decision quotes a part of para. 31 of the decision in *T-Mobile Netherlands*, which I will cite in full to place it better into its context:

> "*With regard to the assessment as to whether a concerted practice, such as that in issue in the main proceedings, pursues an anti-competitive object, it should be noted, first, as pointed out by the Advocate General at para 46 of her opinion, that in order for a concerted practice to be regarded as having an anti-competitive object, it is sufficient that it has the potential to have a negative impact on competition. In other words, the concerted practice must simply be capable in an individual case, having regard to the specific legal and economic context, of resulting in the prevention, restriction or distortion of competition within the common market. Whether and to what extent, in fact, such anti-competitive effects result can only be of relevance for determining the amount of any fine and assessing any claim for damages.*"

Paragraph 5.38 starts by suggesting that the "*EU Court of Justice has more recently summarised the effect of the case- law*" citing para. 51 of the *Cartes Bancaires* case:

> "*Consequently, it is established that certain collusive behaviour, such as that leading to horizontal price-fixing by cartels, may be considered so likely to have negative effects, in particular on the price, quantity or quality of the goods and services, that it may be considered redundant, for the purposes of applying art. 81(1) EC, to prove that they have actual effects on the market (see, to that effect, judgment in Bureau National Interprofessionel du Cognac (BNIC) v Clair (123/83) … [1985] 2 C.M.L.R. 430 at [22]). Experience shows that such behaviour leads to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers.*"

236. Paragraph 53 of that judgment is also quoted by the Respondent at para. 5.39, after the initial comment that "*an agreement/concerted practice should be assessed in its economic and legal context, as well as in light of the facts of the market in question, in order to determine whether its object was anti-competitive*":

> "*According to the case law of the Court, in order to determine whether an agreement between undertakings or a decision by an association of undertakings reveals a sufficient degree of harm to competition that it may be considered a restriction of competition "by object" within the meaning of art. 81(1) EC, regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part. When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question (see, to that effect, judgment in Allianz Hungária Biztosító at [36] and the case law cited).*"

237. In para. 5.40 of the Decision, a short quotation is given from para. 38 of the *T-Mobile Netherlands* case, before this section ends with these paragraphs:

> "*5.41 The assessment of the objectives of an agreement should be carried out objectively: it does not depend on the parties' subjective intentions, and there may be an infringement by object where the parties acted without any subjective intention of restricting competition.*
>
> *5.42 In addition, there may be an infringement by object even where the parties have not implemented their agreement, though it may be relevant to consider the way in which an agreement is implemented as part of the assessment of the agreement.*"

The cases referred to in the footnotes to these paragraphs largely repeat some of those already mentioned.

238. Applying those principles, at para. 6.46 of the Decision the Respondent concludes that the Appellants' conduct "*amounted to an anti-competitive agreement and a concerted practice by object*". The findings made in para. 6.9 are repeated in para. 6.47, and para. 6.19, relating to removing uncertainty, is also cross-referenced in para. 6.48, referring in para. 6.49 to what had been stated at the end of para. 43 of *T-Mobile Netherlands*:

> "*An exchange of information between competitors is tainted with an anti-competitive object if the exchange is capable of removing uncertainties concerning the intended conduct of the participating undertakings.*"

239. From para. 6.52 onwards, the Respondent sets out how it has concluded that it has given consideration to the legal, factual and economic context. It begins by noting that the two Parties (as used in the Decision) are two of the three mobile network operators in Guernsey, with "*a high combined share of total mobile subscriptions*", referring to a 2019 statistic of this being 76%, before adding:

> "*Given that context, the agreement/concerted practice would be likely to have the potential to materially strengthen the already strong position of Sure, both by removing JT's competing mobile network infrastructure from Guernsey and also by potentially degrading the competitive position of Airtel. It therefore has the potential to damage both "the structure of the market and competition as such". This conclusion is supported by the following evidence:*
>
> *(a) The note of the meeting held on 9 January 2019 contemplates that the agreement / concerted practice between the Parties might lead to the exit of Airtel from the market ("Airtel outcome if not in the market" – paragraph 4.24);*
>
> *(b) An email of 18 March 2019 from Mr Ozanne to JT notes that Airtel currently shared a number of JT sites in Guernsey. This would cause issues when trying to decommission JT's Guernsey network and combining antennas (Sure and JT) would be more difficult "where Airtel occupied second place on a structure, "Airtel" is noted as a problem created by the agreement/concerted practice, while a subsequent JT internal slide presentation notes that*
>
> > *"Airtel expected to raise complaint or demand access to National roaming structure; CNI [Critical Network Infrastructure] – total reliance on one mobile network operator in each island, dependant on Airtel outcomes".*
>
> *It was therefore clearly in the contemplation of the parties:*
>
> *(i) That Airtel would not be included in the Bilateral Home Network Scenario; and*
>
> *(ii) The arrangements might cause Airtel to leave the market, leaving each of JT and Sure as the sole mobile network operator in their "home" island.*"

240. The second and third reasons are found in the two following paragraphs:

"*6.53 Second, the States of Guernsey had informed the Parties that it intended to award a single licence for 5G spectrum through a competitive process. Because 5G could not, at that time, be provided independently of an existing 4G network, it would not have been possible for JT to operate a 5G network in Guernsey had it removed its 4G network. In this context, the fact that JT had communicated to Sure that it was contemplating removing its 2G – 4G mobile network infrastructure from Guernsey meant that, at the least, uncertainty as to how JT might have behaved in any competitive 5G spectrum award would have been reduced.*

6.54 Third, the Guernsey Investment Fund / MXC were actively exploring the possibility of becoming a mobile network infrastructure owner in Guernsey in order to further the ambitions of the States of Guernsey to see an early adoption of 5G in Guernsey. They had approached Sure, JT and Airtel (paragraph 4.60) to express an interest in purchasing their mobile network infrastructure in Guernsey. The evidence above demonstrates that the Parties acted together to draft the MOU in an attempt to prevent or discourage the States of Guernsey from pursuing this option. The conduct of the Parties was therefore capable, in this case, of damaging the structure of the market and competition as such."

241. This is the reasoning, or grounds, found in the Decision on which the Respondent is required to base its response to these appeals. It can, of course, also respond to the arguments put by the Appellants in their Skeleton Arguments and oral submissions, but these paragraphs are the basis for the finding of an infringement by object.

242. On the face of Sure's Cause, several arguments are advanced as to why this conclusion of an object infringement should not have been made. There is a challenge based on the Respondent disregarding important aspects of the legal and economic context. Some of these issues have already been touched on when dealing with the other grounds. Advocate Gray relies on various cases, as set out in para. 131 of the Cause, which indicates that there should have been a proper analysis of the effects of the Appellants' conduct, rather than reliance on an infringement by object. In any event, the discussions did not, or were not likely, to have altered Sure's position on the market in Guernsey because what was being discussed was one possibility, but there was no actual course of conduct being confirmed. Nor would there have been an effect on Airtel's position unless and until steps were taken to implement some agreement involving JT giving the required notice to remove its own infrastructure. In the absence of an agreement, it is difficult to equate the position as a concerted practice with the situations referred to in some of the cases being relied on. Paragraph 6.53 does not show how it necessarily follows that JT would have behaved were there to be a competitive 5G spectrum competition without there first having been something firmer about JT removing its 2G to 4G infrastructure. This is a step in the reasoning falling outside the range of responses that the Respondent could properly have made, which also ignores what is relied upon elsewhere in the Decision about JT pursuing matters aggressively. Complaint is also made about the reliance on the MOU, which had formed the basis of the First SO, but then this was dropped by being withdrawn, so the references in para. 6.54 are also inappropriate as forming the basis for a finding of an object infringement. This ground was developed by Advocate Gray in her Skeleton Argument and at the hearing. She suggested that there is a higher bar to surmount before the infringement by object could properly be found.

243. Whilst section 5(1) of the 2012 Ordinance refers to an infringement occurring by reference to "*object or effect*", there has been no attempt by the Respondent to consider "*effect*" because it has concluded that this was an infringement by object. However, in the ***Beef Industry Development Society*** case, the combination of paragraphs 15 and 17 in the judgment demonstrates that these concepts are disjunctive (because of the use of "*or*"), meaning that "*the*

precise purpose of the agreement" must be considered so that, if not shown "*to be sufficiently deleterious*", there will need to be consideration as to what factors are present to show competition has been shown to be affected "*to an appreciable extent*". That said, there are "*certain forms of collusion between undertakings*" that "*can be regarded, by their very nature, as being injurious to the proper functioning of normal competition*" (as set out in para. 5.36 of the Decision).

244. However, Advocate Gray relies on para. 58 of the *Cartes Bancaires* case as indicating that the Respondent erred in law when it did not set out that it is a principle that any finding of an infringement by object can only be made through a restrictive interpretation of this concept. Paragraph 58 states:

> "*Secondly, in the light of that case law, the General Court erred in finding, in [124] of the judgment under appeal, and then in [146] of that judgment, that the concept of restriction of competition by "object" must be interpretated "restrictively". The concept of restriction of competition "by object" can be applied only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects, otherwise the Commission would be exempted from the obligation to prove the actual effects on the market of agreements which are in no way established to be, by their very nature, harmful to the proper functioning of normal competition. The fact that the types of agreements covered by art. 81(1) EC do not constitute an exhaustive list of prohibited collusion is, in that regard, irrelevant.*"

The reference in that paragraph to "*that case law*" is a reference to what was in the previous paragraph, referring to the matters set out in paragraphs 49 to 52 of the judgment. The cases include Case 56/65 *Société Technique Minière v Maschinenbau Ulm GmbH* [1966] CMLR 357 and Case C-32/11 *Allianz Hungária Biztosító Zrt v Gazdasági Versenyhivatal* [2013] 4 CMLR 24, to which reference was also made in para. 53, which I have already cited. The only other case mentioned in the corresponding paragraph is the case also mentioned in para. 51 of the *Cartes Bancaires* case. I note that there appears to be a degree of consistency in the matters to which the EU courts refer. Advocate Barclay similarly referred to the need to interpret the principle restrictively.

245. This approach has found favour with the English Court of Appeal in *Gascoigne Halman Ltd v Agents' Mutual Ltd* [2019] EWCA Civ 24, where the judgment given by Newey LJ refers to the relevant paragraphs from the *Cartes Bancaires* case (para. 35) before setting out para. 58 in para. 37. I consider that there is a helpful reminder in para. 38 of the judgment:

> "*The General Court had thus been wrong to consider that the concept of restriction of competition "by object" should not be interpreted "restrictively". In other words, the concept is to be interpreted restrictively. Whish and Bailey, "Competition Law", 9th edn (OUP, 2018), comments (at 125):*
>
> > *"the clear statement [in Cartes Bancaires] that the concept of an object restriction should be interpreted restrictively is a very significant one and means, at the very least, that the size of the object box should not be expanded unduly*"*."*

246. Advocate Gray also relies on Case C-345/14 *SIA "Maxima Latvija" v Konkurences Padome* [2016] 4 CMLR 1. This case involved a request for a preliminary ruling in relation to a commercial lease which included a term that the lessee could oppose the letting by the lessor, within the centre, of commercial premises to other tenants (see para. 15). At para. 18 of the judgment, confirmation was given that "*the concept of restriction of competition "by object" … must be interpreted restrictively*". However, the focus, as explained in para. 20, has to be on

the terms of the agreement: "*the essential legal criterion for ascertaining whether an agreement involves a restriction of competition "by object" is therefore the finding that such an agreement reveals in itself a sufficient degree of harm to competition for it to be considered that it is not appropriate to assess its effects*". What was in issue was removed from cases such as "*horizontal price-fixing by cartels*" (an example given in para. 19), leading to the conclusion that:

> "*22. Even if the clause at issue in the main proceedings could potentially have the effect of restricting the access of Maxima Latvija's competitors to some shopping centres in which that company operates a large shop or hypermarket, such a fact, if established, does not imply clearly that the agreements containing that clause prevent, restrict or distort, by the very nature of the latter, competition on the relevant market, namely the local market for the retail food trade.*
>
> *23. Taking account of the economic context in which agreements, such as those at issue in the main proceedings are to be applied, the analysis of the content of those agreements would not, in the light of the information provided by the referring court, show, clearly, a degree of harm with regard to competition sufficient for those agreements to be considered to constitute a restriction of competition "by object" within the meaning of art. 101(1) TFEU.*"

On this basis, Advocate Gray points out that even in a case where there is potentially anti-competitive harm, there is a requirement for there to be clarity to avoid the necessity of assessing the adverse effects.

247. She deals with the cases set out in para. 131 of Sure's Cause to make the point that there are already several examples of cases in which the conclusion was reached that there needed to be a proper balance of the actual effects of the arrangement rather than jumping straight to the outcome that it was an infringement by object. These cases related to discussions between mobile operators to improve services.

248. The first case to which Advocate Gray refers is Case T-328/03 *O2 (Germany) GmbH & Co OHG v European Commission* [2006] 5 CMLR 5. This was a challenge to a Commission decision taken in 2004, following O2 and T-Mobile notifying the Commission about a framework agreement relating to 3G. As a matter of principle, the court set out that:

> "*66. In order to assess whether an agreement is compatible with the Common Market in the light of the prohibition laid down in Art. 81(1) EC, it is necessary to examine the economic and legal context in which the agreement was concluded (Béguelin Import (22/71): [1979] E.C.R. 949; [1972] C.M.L.R. 81 at [13]), its object, its effects, and whether it affects intra-Community trade taking into account in particular the economic context in which the undertakings operate, the products or services covered by the agreement and the structure of the market concerned and the actual conditions in which it functions (Oude Luttikhuis (C-399/93) [1995] E.C.R. I-4515 at [10]).*
>
> *67. That method of analysis is of general application and is not confined to a category of agreements (see, as regards different types of agreements, Société Minière et Technique (56/65): [1966] E.C.R. 235; [1966] C.M.L.R. 357 at [249]-[250]; DLG (C-250/92): [1994] E.C.R. I-5641; [1996] 4 C.M.L.R. 191 at [31]; John Deere v Commission (T-35.92): [1994] E.C.R. II957 at [51] & [52]; and European Night Services v Commission (T 372, 375, 384 & 388/94): [1998] E.C.R. II-3141; [1998] 5 C.M.L.R. 718 at [136] & [137]).*

> *68. Moreover, in a case such as this, where it is accepted that the agreement does not have as its object the restriction of competition, the effects of the agreement should be considered and for it to be caught by the prohibition it is necessary to find that those factors are present which show that competition has in fact been prevented or restricted or distorted to an appreciable extent. The competition in question must be understood within the actual context in which it would occur in the absence of the agreement in dispute; the interference with competition may in particular be doubted if the agreement seems really necessary for the penetration of a new area by an undertaking (Société Minière et Technique at [249] – [250]).*"

249. The second case is Case T-399/16 *CK Telecoms UK Investment Ltd v European Commission* [2020] 5 CMLR 13. I have noted what is stated therein about the possibility that network-sharing agreements may be pro-competitive:

> "*339. According to the Commission's decision-making practice relating to art. 101(1) and (3) TFEU, network-sharing agreements, which involve the pooling of certain infrastructures, present, from that point of view, competitive risks which vary according to the context and whether the type of sharing is active or passive. Depending on the method of co-operation chosen, the independence of operators and the risk of collusion are more or less prevalent and the risks of undermining competition are more or less significant. At the same time, network-sharing agreements may produce substantial economic benefits in terms of costs savings, improved coverage, and faster network roll-out (see, in particular, Commission Decision 2003/570 of 30 April 2003 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/38/370 – O2 UK Limited/T-Mobile UK Limited) (UK Network-sharing agreement) ([2003] OJ L20059), and Commission Decision 2004/207 of 16 July 2003 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Cas COMP/38.369 – T-Mobile Deutschland and O2 Germany: Network Sharing Rahmenvertrag) ([2004] OJ L75/32)).*
>
> *340. The Court finds that a network-sharing agreement may, when it is concluded, result in pro-competitive effects, thus counteracting the restrictions which it contains, does not necessarily mean that the termination, renegotiation, or that each subsequent alteration to its balance following a concentration may necessarily be characterised as a significant impediment to effective competition.*"

I can also usefully refer to two additional paragraphs from this judgment:

> "*360. The barriers to competition and thus the harm to consumers would result from the disappearance of the competitive relationship between the parties to the concentration and from the fact that no remaining competitor or potential entrant would be in a position to compete effectively with the merged entity. Aside from the effects on prices, since the entity resulting from the concentration would no longer be subject to the same pressure which previously existed between the parties to the concentration, the concentration would also have repercussions on the quality of the offer and choice made available to customers (see, to that effect, Ryanair at [224]).*
>
> *361. The absence of a thorough examination of that issue constitutes a weakness in the analysis carried out by the Commission in the contested decision, which,*

> *in order to succeed, would require particularly solid and convincing reasoning in relation to the effects on competitors.*"

250. Against that background, Advocate Gray submits that the discussions between the Appellants referred to in the Decision were not, by their very nature, injurious to competition. The potential to share mobile telephony infrastructure is not necessarily an infringement by object, because the effects on competition are ambiguous. In those circumstances, the Respondent should not have concluded that this was an infringement by object but should instead have proceeded to analyse whether or not the effects of the exchanges could be said to infringe section 5(1) of the 2012 Ordinance. The cases to which I have just referred formed part of Sure's representations, yet they are not addressed in the Decision, although some of the other arguments are addressed and rejected. If nothing else, it would have assisted to see what response the Respondent had to those representations.

251. In any event, what was exchanged was not confidential information. The references in para. 6.13 of the Decision to exchanges of information about "*projected costs, sites, site types capacity and spectrum*" (said to be from at least March 2019) needs to be viewed in the context of the need to obtain approval from the Respondent. As regards the speed of introduction of 5G, the views of JT were made known in the presence of the Respondent and others, so this was not confidential. Further, this needed to be considered in light of the encouragement for the Appellants to consider formulating a joint proposal. I have already commented that the manner in which it is said to involve communications with the Respondent and/or the States of Guernsey is not something that impacts on the market. I have also already touched on the issue as to whether there was any uncertainty on that market.

252. Advocate Barclay aligned the position of the JT Appellants to the arguments developed by Advocate Gray on this ground, which is why I have not referred separately to any of his submissions.

253. In response, Advocate Dawes points out what was said in the English Court of Appeal in *Balmoral Tanks Ltd v CMA* [2019] EWCA Civ 162, referring to some of the cases mentioned previously (at para. 17):

> "*Elaborating on the meaning of "concerted practice", the CJEU said this in Case 40/73 Cooperatieve Vereniging "Suiker Unie" UA v Commission of the European Communities [1976] 1 C.M.L.R. 295:*
>
> > *"[173] The criteria of co-ordination and co-operation laid down by the case law of the Court, which in no way require the working out of an actual plan, must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition that each economic operator must determine independently the policy which he intends to adopt on the Common Market, including the choice of the persons and undertakings to which he makes offers or sells.*
> >
> > *[174] Although it is correct to say that this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does however strictly preclude any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market."*

Accordingly, "the exchange of information between competitors is liable to be incompatible with the competition rules if it reduces or removes the degree of uncertainty as to the operation of the market in question, with the result that competition between undertakings is restricted" (Case C-9/08 T-Mobile Netherlands BV v Raad van bestuur van de Nederlandse Mededingsautoriteit [2010] Bus. L.R. 158, at [35] of the judgment)."

254. In his Skeleton Argument, Advocate Dawes also refers to Case C-286/13 P *Dole Food v Commission* (unreported, 19 March 2015):

> "*113 In that regard, it is apparent from the Court's case-law that certain types of coordination between undertakings reveal a sufficient degree of harm in competition that it may be found that there is no need to examine their effects (judgment in CB v Commission, C-67/13 P, EU:C:2014/2204, paragraph 49 and the case-law cited).*
>
> *114 That case-law arises from the fact that certain types of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition (judgment in CB v Commission, C-67/13 P, EU:C:2014/2024, paragraph 50 and the case law cited).*
>
> *115 Consequently, it is established that certain collusive behaviour, such as that leading to horizontal price-fixing by cartels, may be considered so likely to have negative effects, in particular on the price, quantity or quality of the goods and services, that it may be considered redundant, for the purposes of applying Article 81(1) EC, to prove that they have actual effects on the market. Experience shows that such behaviour leads to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers (judgment in CB v Commission, C-67/13 P, EU:C:2014:2024, paragraph 61 and the case law cited).*"

(Given that each of these three paragraphs does no more than refer to three paragraphs in the decision cited each time, it would, in my view, have been better to have referred to the original source of these principles rather than cite this case, particularly where reliance is already placed on the *Cartes Bancaires* case. Referring to a second authority adds nothing to the principle established in the *Cartes Bancaires* case.)

255. Reliance is also placed on the summary of principles set out in *Lexon (UK) Ltd v CMA* [2021] CAT 5 (where para. 187(6) was most referred to, but I will set out the whole paragraph to put that principle, with which the Appellants' Advocates agreed, into better context). These principles were extracted from consideration of the *T-Mobile* case, *Balmoral v CMA* and also Case T-762/14 *Koninklijke Philips NV and Philips France v Commission* [2017] 4 CMLR 15 as set out in the preceding paragraph:

> "*(1) Each economic operator must determine independently the policy which it intends to adopt including the choice of the persons and undertakings to which it makes offers and sells (T-Mobile, paragraph 32; Dole, paragraph 119; Philips GC, paragraph 60; Balmoral CAT, paragraph 38; and Balmoral CoA, paragraph 17).*
>
> *(2) This requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors. It does however strictly preclude any direct or indirect contact between such operators by which an undertaking may influence the conduct on the market of its actual or potential competitors or disclose to them its decisions or intentions concerning its own conduct on the market where the object or effect of such contact is*

to create conditions of competition which do not correspond to the normal conditions of competition in the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings involved and the volume of the market (T-Mobile, paragraph 33; Dole, paragraph 120; Philips GC, paragraph 61; Balmoral CAT, paragraph 38; and Balmoral CoA, paragraph 17).

(3) The exchange of information between competitors is incompatible with the competition rules if it reduces or removes the degree of uncertainty as to the operation of the market in question, with the result that competition between undertakings is restricted (T-Mobile, paragraph 35; Dole, paragraph 121; Balmoral CAT, paragraphs 39,82 and 119; and Balmoral CoA, paragraph 17).

(4) The exchange of information which is capable of removing uncertainty between participants as regards the timing, extent and details of the modifications to be adopted by the undertakings concerned in their conduct on the market must be regarded as pursuing an anticompetitive object (T-Mobile, paragraph 41; Dole, paragraph 122; Philips GC, paragraph 62; and Balmoral CAT, paragraph 50).

(5) Article 101 TFEU is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such (and therefore, in order to find that a concerted practice has an anticompetitive object, there does not need to be a direct link between that practice and consumer prices): (T-Mobile, paragraphs 38 and 39; and Dole, paragraph 125).

(6) The concept of a concerted practice, as it derives from the actual terms of Article 101(1) TFEU, implies, in addition to the participating undertakings concerting with each other, subsequent conduct on the market and a relationship of cause and effect between the two. Subject to proof to the contrary, which the economic operators concerned must adduce, it must be presumed that the undertakings taking part in the concerted action and remaining active on the market take account of the information exchanged with their competitors in determining their conduct on that market. Such a concerted practice is caught by Article 101(1) TFU, without the need to establish the existence of anticompetitive effects on the market (T-Mobile, paragraph 51; Dole, paragraphs 126-127; Philips GC, paragraphs 64-65; and Balmoral CAT, paragraphs 40, 44, 46 and 119).

(7) The fact that information exchanged with competitors could be gathered in the market does not prevent it from giving rise to an infringement. That information could enable participants to be aware of the relevant information more simply, rapidly and directly than they would from participating in the market (Balmoral CAT, paragraphs 43 and 122).

(8) An exchange of information on a single occasion can potentially give rise to a concerted practice (T-Mobile, paragraph 59; Balmoral CAT, paragraph 46; and Balmoral CoA, paragraph 18)."

256. These principles are reflected in the Respondent's Guideline 2 relating to Anti-Competitive Agreements. I have already quoted the section about disclosing information, including the sentence concerning whether "*the information disclosure has an effect on competition, or is even found to have the object of preventing competition*", which "*will depend on the circumstances of each case: the market characteristics, the type of information and the way in which it is disclosed.*" Reference is also made in Advocate Dawes' Skeleton Argument to some draft guidelines published by the European Commission in March 2022. I have paid no regard to these draft guidelines on the basis that this post-dates the Decision which is the subject of

these appeals. There should have been no reference to matters that could not have been taken into account by the Respondent when it took its Decision.

257. Advocate Dawes also relies on the summary given in Whish & Bailey, *Competition Law* (10th ed.), relating to the assessment made by the Advocate General in the *T-Mobile* case (at page 126):

> "*Advocate General Kokott's Opinion in T-Mobile includes an interesting discussion of why Article 101(1) makes a distinction between object and effect restrictions. First, the classification of certain types of agreement as restrictive by object 'sensibly conserves resources of competition authorities and the justice system'. The fact that a competition authority does not need to demonstrate, for example, that a horizontal price-fixing agreement produces adverse economic effects relieves it of some of the burden that would otherwise rest upon it. Second, the Advocate General pointed out that the existence of object restrictions 'creates legal certainty and allows all market participants to adapt their conduct accordingly', adding that, although the concept of restriction by object should not be given an unduly broad interpretation, nor should it be interpreted so narrowly as to deprive it of practical effectiveness. Thirdly, she pointed out that, just as the law that forbids people from driving cars when under the influence of alcohol does not require, for a conviction, that the driver has caused an accident – that is to say, proof of an effect – in the same way, Article 101(1) prohibits certain agreements that have the object of restricting competition, irrespective of whether they produce adverse effects on the market in an individual case. Such agreements will be permitted, therefore, only where the parties can demonstrate that they will lead to economic efficiencies of the kind set out in Article 101(3), and that a fair share of those efficiencies will be passed on to consumers.*"

(The example about driving with excess alcohol is no longer a particularly good one because of other offences that have been enacted that make the consequences of doing so in the event of causing death or serious injury significantly worse, although I understand the basic principle.)

258. In his oral submissions, Advocate Dawes also drew attention to what had been stated in the *Lexon* decision shortly after para. 187, supporting his contention that there did not need to be a root and branch analysis undertaken by the Respondent. The paragraphs he referred to state:

> "*193. It is then necessary, in accordance with the case law we have described, to consider whether the information exchanges were by their nature likely to cause serious harm to competition. We conclude that they were.*
>
> *194. Communications of this kind fall clearly within the scope of behaviour considered to be a concerted practice which by its nature can be expected to cause harm to competition and thus constitute an infringement by object. This is true as regards the jurisprudence to which we have already referred (see e.g. T-Mobile, Dole, Philips GC, Balmoral CAT and Balmoral CoA). It is also consistent with both economic theory and the decisional practice of competition authorities and, therefore, as we discuss below, consistent with "experience".*
>
> *195. Such conduct damages the fabric of competition by substituting coordination for competition and by reducing the level of uncertainty inherent in the competitive process. The behaviours that have been established have the necessary capacity to produce an anticompetitive effect, in particular the slowing of price decline in the market, and we find the CMA was correct to draw this conclusion.*"

259. The analysis set out in this section of the Respondent's Skeleton Argument culminates in para. 169 with the submission that: "*This case concerns an arrangement under which the Parties shared commercially sensitive information, a type of agreement recognised as having the object of restricting competition. As a result, a detailed assessment of the likely effects of the agreement in the light of its economic and legal context is not required or appropriate, as it could essentially amount to an effects analysis.*"

Discussion

260. Having summarised the parties' respective arguments, I should state at the outset that I accept that it is possible for there to be a concerted practice found by reference to there also being an infringement by object. This is clear from the cases to which I have referred, and in particular those mentioned in the Decision. It was, therefore, a conclusion that was open to the Respondent. The issue, therefore, is not whether it erred in law but rather whether it had a sound basis for reaching that conclusion.

261. I prefer the view that the possibility of finding an infringement by object is one to be interpreted restrictively. This was not mentioned on the face of the Decision. Based on the principle that the starting point for any consideration of how to approach these matters will be to construe the 2012 Ordinance, I think the change made to section 54 has particular relevance in relation to these appeals. There is no longer a requirement to follow decisions of the EU courts. They are, though, still of persuasive effect. Such decisions have been applied in cases decided in England and Wales. Within the hierarchy of persuasive decisions to which I can properly refer, I take the view that a decision of the English Court of Appeal is generally of more persuasive effect than a decision of the Competition Appeal Tribunal. Accordingly, I prefer what is set out in *Gascoigne Halman Ltd v Agents' Mutual Ltd* in this regard to the absence of any such reference in the *Lexon* decision. In other words, I am satisfied that it is appropriate for the operation of section 5(1) of the 2012 Ordinance to regard "*the object box*" as needing to be interpreted restrictively.

262. In addition to the short passage quoted from an earlier edition of Whish & Bailey's work, I find support for that approach in the current edition of that book. Beginning on page 130, there is a lengthy passage about the level of analysis required before concluding that it is an infringement by object, which I will set out in full:

> "*Irrespective of how large or small the object box might be, there remains a riddle: how much analysis should be undertaken when determining whether a particular agreement belongs to one box or the other? As we have seen, the Court in Cartes Bancaires said that in order to decide this regard must be had to the terms of the agreement, its objectives, the economic and legal context of which it forms a part, the nature of the goods or services affected and the structure of the market or markets in question. There is a danger that if this exercise requires extensive analysis it could undermine the very purpose of the object-effect distinction in the first place, which is to eliminate effects analysis in the case of object restrictions: a criticism of the Allianz Hungária judgment is that this is what the Court of Justice seemed to require, not least when it stated that it was necessary to take into account the structure of the market, the existence of alternative distribution channels and the respective importance and market power of the companies concerned. In her Opinions in T-Mobile and FSL Holdings v Commission Advocate General Kokott warned against the risk of 'mingling' object and effects analysis, a point which was also made by the EFTA Court in Ski Taxi SA v Norwegian Government.*
>
> *The authors of this book agree that there is a risk that an extended review of the economic and legal context in an object case might turn into effects analysis, which would undermine the object-effect distinction. It is, perhaps, with this risk in mind that*

> *the Court of Justice indicated in Toshiba v Commission and in FSL v Commission that the analysis of context may be 'limited to what is strictly necessary in order to establish the existence of a restriction of competition by object'. In some cases there will be a clear decisional practice that a particular type of agreement is restrictive by object – for example, horizontal price fixing or market sharing – in which case little analysis would be required; however, some other cases may be quite novel – for example, the pay for delay agreements in Paroxetine and the multilateral interchange fees in Gazdasági Versenyhivatal v Budapest Bank Nyrt – in which case deeper analysis will be required.*"

263. I have noted in that passage the reference to those situations in which there is an established approach to certain types of agreement and, by extension, I consider this also applies to concerted practices. One of those mentioned deals with market sharing. Within the SSO, this appeared to be the basis of the alleged infringement. However, by the time of the Decision, this had switched to being a finding that there had been exchanges of opinion and information. As a result, it is necessary to pay close attention to what is set out in the Decision as the basis for the conclusion that this amounted to an infringement by object.

264. Before I turn to what I have already set out, I can deal briefly with the comment in Whish & Bailey (page 126) about the Opinion of Advocate General Kokott in the *T-Mobile Netherlands* case about the desire that classifying certain types of agreement by object "*sensibly conserves resources of competition authorities and the justice system*". Within the context of the Respondent, I am not persuaded that this has the same resonance as it would in a larger jurisdiction, in particular within the parameters of the European Union. Whilst I believe that the Respondent is a small organisation, comparatively few of its decisions have come before this Court. Whilst Ms Livestro refers to the experience that the members have and also of their staff, there was no suggestion in that evidence that it is inundated with matters to consider. Accordingly, I am not hugely attracted to the notion that the Respondent can legitimately alight on a finding of infringement by object unless it is appropriate for it to do so. I also think that the Respondent misconstrued the effect of section 54 of the 2012 Ordinance (eg, in para. 5.4 of the Decision), treating the principles of EU law set out therein as applicable rather than weighing the persuasive effect of those cases. The combination of these factors means that a finding of an infringement by object should not be regarded as an easy option if, as appears to be the case within this jurisdiction, this is the first occasion on which it has been applied to a concerted practice. To that extent, I am not persuaded that there is such a wealth of practice within the Respondent that means that it can properly be said, as it was in the *Lexon* case, that this is consistent with any experience of the Respondent. It may be that there is such experience elsewhere, but I do not think that the experience of other regulators can necessarily be relied upon domestically. Further, it is not clear that the Respondent has followed the approach set out in the EC court decisions about the economic and legal context of the market in question. It largely seems to me that it has chosen to find an infringement by object as the easier conclusion on this issue.

265. That is, in my view, an important point here. Before the change to section 54 of the Ordinance, there was an instruction of the legislature to follow cases from the EU courts mentioned "*in respect of corresponding questions*". This meant that the wording in section 5(1) had to be construed in the light of any applicable decision. As regards information sharing, reliance was placed on *T-Mobile Netherlands* ("*if the exchange is capable of removing uncertainties*"), where I have already commented that I am not persuaded that what is set out in para. 6.19 of the Decision, to which reference is also made in para. 6.48, satisfactorily demonstrates that this uncertainty was adequately established. Moreover, the reasons given in paragraphs 6.52 to 6.54, which appear to contain the Respondent's conclusions on these issues, show briefly how it follows that this was an infringement by object.

266. The strongest point here is that the combined share of the market as set out in para. 6.2 was dominated by Sure, with JT and Airtel being smaller participants. The focus appears to be on the exclusion of Airtel, but very little is said about the opportunity for Airtel and, in the event that JT removed its 2G to 4G infrastructure from Guernsey (probably with approval from the Respondent), JT still being able to operate 5G on the basis of arrangements made with Sure, much in the same way as it would be for Airtel. The second reason relates to what would have arisen in the event that JT removed its mobile network infrastructure and the States of Guernsey proceeded to award a single licence for 5G spectrum, but I consider that this involves an element of speculation that the Decision fails to address over timing. If the basis of the concerted practice is that the discussions showed a direction of travel, and the letter sent by the President of the Committee *for* Economic Development on 26 April 2019 was the last occasion when this issue was raised, the subsequent discussions were all predicated on developing the so-called Bilateral Home Network Scenario, being something the Respondent regarded as outside the terms of the Telecommunications Sector Policy Statement, the realisation that it would become impossible to compete for that licence for 5G spectrum may well have been sufficient for JT to defer or abandon what had been discussed between the Appellants. In other words, the concerted practice may not have been preparatory to formulating some actual agreement. This is a further reason why the conclusion that this was an infringement by object may not be sustainable. The final reason relates to MXC, supported by the Guernsey Investment Fund, but this is a matter that only arose from 6 June 2019. This could not, therefore, have affected any of the exchanges prior to that date. It led to the preparation of the MOU a few days later but, as appears to have been the case when the Respondent abandoned its First SO, the MOU became background context rather than the focus of the Respondent's investigation. The reference to this factor in para. 6.54 of the Decision necessarily has to be viewed in its chronological context.

267. The result is that I am not persuaded that the reasoning set out in the Decision contains a sufficient analysis of why, under the 2012 Ordinance, the decision of the Respondent to conclude that this was an infringement by object is within the range of reasonable responses. I consider that too much reliance has been placed on section 54 as it operated before the change in February 2021. The Decision overlooks that there has been an acceptance that the object box falls to be construed restrictively, which is not even mentioned in the Decision. Moreover, because Guernsey has legislated for itself in the field of competition, I fear that the Respondent has placed more reliance than it ought to have done on decisions from elsewhere in concluding that this was bound to be an infringement by object. As a separate jurisdiction, unless and until there are decisions of Guernsey Courts binding this Court, there is no jurisprudence indicating what the outcome must be (once section 54 was amended). Whilst I accept that the decision in *Lexon* contains a useful summary of the principles as they apply in England and Wales, para. 187(3) refers to reducing or removing the degree of uncertainty, about which I have just commented, which puts into question how closely aligned to these principles the Decision of the Respondent is.

268. On balance, therefore, I am more inclined to the view that there needed to be consideration of the effects of the concerted practice rather than simply concluding that this was an infringement by object. I consider that the cases referred to in para. 131 of Sure's Cause tip the balance in favour of the need to consider the effects of the concerted practice on which the infringement is based. This is not, in my view, an area where it can be said that this is bound to be an infringement by object. Although I accept that this issue is finely balanced, I would probably have concluded, had I needed to do so, that this ground of appeal succeeds. However, I should stress here that I am not saying that I would inevitably have allowed the appeals on this ground, but I am offering an indication in case it becomes relevant. It may be resolved by the Respondent setting out more expansively its position or it may decide instead to undertake the effects analysis it had chosen not to pursue.

Other grounds

269. I can deal with the other grounds advanced by the Sure Appellants in their Cause comparatively quickly. These were not expanded much in Advocate Gray's submissions, which concentrated on the grounds of appeal I have already addressed. Instead, there is reference at para. 75 of her initial Skeleton Argument to these matters being adequately set out in the Cause. Where in her more extensive Skeleton Argument in reply she suggests that a failure on the part of Advocate Dawes in his responsive Skeleton Argument to address any of the issues raised means that the grounds are not contested, I will deal with these matters on the basis of what is set out on the face of the Decision. It was apparent from Advocate Dawes' oral submissions that the Respondent does not concede any aspect of the Appellants' appeals, even if his Skeleton Argument did not tackle every aspect of every ground pleaded in Sure's Cause.

Ground 6

270. Sure's sixth ground relates to the Respondent's finding that there was a single continuous infringement. The basis of this ground is that there should have been no findings of any individual infringement, so it follows that there could not be a single continuous infringement. In any event, the Respondent made material errors of fact in how it viewed the Appellants' overall plan and common objective and, in doing so, it was wrong to refer as the Respondent has to its findings in paragraphs 6.9 to 6.11 and 6.19 and 6.20 of the Decision. Even if there had been sharing of competitively sensitive information about commercial actions, there was no alleged plan to reorganise existing mobile network infrastructure in Guernsey.

271. On the face of the Decision, within the fifth part reliance is placed on how the issue was described in *Commission v Anic Partecipazioni SpA*, referring first to para. 81, which noted that an infringement "*may result not only from an isolated act but also from a series of acts or from continuous conduct*", before continuing:

> "*82. In the present case the Court of First Instance held, at paragraph [204] of the judgment, that, because of their identical object, the agreements and concerted practices found to exist, formed part of the systems of regular meetings, target-price fixing and quota-fixing, and that those schemes were part of a series of efforts made by the undertakings in question in pursuit of a single economic aim, namely to distort the normal movement of prices. It considered that it would be artificial to split up such continuous conduct, characterised by a single purpose, by treating it as consisting of several separate infringements, when what was involved was a single infringement which progressively manifested itself in both agreements and concerted practices.*
>
> *83. In such circumstances, the Court of First Instance was entitled to consider that an undertaking that had taken part in such an infringement through conduct of its own which formed an agreement or concerted practice having an anti-competitive object for the purposes of Article 85(1) of the Treaty and which was intended to help bring about the infringement as a whole was also responsible, throughout the entire period of its participation in that infringement, for conduct put into effect by other undertakings in the context of the same infringement. That is the case where it is established that the undertaking in question was aware of the offending conduct of the other participants or that it could reasonably have foreseen it and that it was prepared to take that risk.*"

272. The Respondent also seeks to support its analysis of there being a single continuous infringement by referring to a decision of the Office of Fair Trading, Case CE/8950-08 *RBS/Barclays* (unreported, 20 January 2011), taken by it under the Competition Act 1998. Paragraph 5.29 of the Decision states:

> "*Agreements and/or concerted practices may constitute a single continuous infringement, even where they vary in intensity and effectiveness.*"

This refers to para. 261 in the ***RBS/Barclays*** decision, although the cases cited in the footnotes as they apply to paragraphs 260-262, all of which appear under a heading of "*Single continuous infringement*", do not include the ***Anic*** case. To the extent that it is relevant (by which I question what weight can properly be given to what is set out in a decision of another competition regulator that does not appear to have been tested before any court), para. 262 sets out:

> "*The parties may show varying degrees of commitment to the common plan and there may well be internal conflict. The mere fact that a party does not abide fully by an agreement or concerted practice which is manifestly anti-competitive does not relieve that party of responsibility for it. Equally, the fact that a party may come to recognise that in practice it can 'cheat' on the agreement or concerted practice at certain times does not preclude a finding that there was a continuing single overall infringement.*"

273. The conclusion in the Decision is found in para. 6.21, which I have quoted previously but which I will repeat here:

> "*Fifth, the GCRA finds that the conduct described above constitutes a series of contacts and exchanges of information between the Parties. This conduct was characterised by an overall plan pursuing a common objective (namely the exploration and development of the Bilateral Home Network Scenario which the Parties contemplated would allow them to control the speed of implementation of 5G in Guernsey, supported by an agreed "line to take" with the regulator and the Government). Each of JT and Sure intended to contribute, by its own conduct, to the overall plan. Each of JT and Sure were aware of the conduct of the other in pursuing the common plan.*"

As a result, the following paragraph found the conduct to amount "*to a single agreement and a concerted practice rather than a series of separate agreements and/or concerted practices*".

274. I have already noted that developing the line to take does not, in my opinion, affect anything to do with the market. This had been set out in the Decision at para. 6.9(c), as well as repeated elsewhere. Accordingly, the basis of the finding that there was a single continuous infringement appears to be based on the common plan to affect the speed at which 5G would be introduced (as mentioned in para. 6.9(b)), although the reference to the Bilateral Home Network Scenario might extend this to JT removing existing infrastructure from Guernsey, ie, para. 6.9(a). However, as the Sure Appellants plead, the speed of implementation was always likely to rest more squarely on the States of Guernsey and, to some extent, also on the Respondent, dealing with the competition for the single 5G spectrum licence indicated to be available.

275. As a result, the reasoning given for reaching this conclusion is not as clear as it might be. However, I have some sympathy with the approach adopted by the Respondent once it is apparent that what it has found is a concerted practice. Had that concerted practice arisen from a single contact, it ought to have been categorised as a single infringement. However, given the manner in which the Respondent has found repeated contacts over a period of time stretching from August 2018 and into 2019, I consider that it is more appropriate to start from the premise that it was not necessary to find discrete infringements but instead to rely on the principle that these could be combined into a single continuous infringement. For these purposes, I am using the assumption that the Bilateral Home Network Scenario is as described in the Decision and amounts to an overall plan, where the effect is shown to be anti-competitive. In doing so, I recognise that I have already given indications that I would probably have found that some of the grounds advanced by the Appellants as to why there ought not have been an infringement of section 5(1) found means that I would probably have allowed the appeals on

those bases, however in viewing this ground discretely, I am not sure that I would have accepted that it resulted in the appeals being allowed.

Ground 7

276. Sure's seventh ground of appeal relates to the conclusion in the Decision that the duration of the infringement runs from 22 August 2018 until the MOU was formally terminated on 6 November 2019 (paragraphs 6.56 and 6.57). The two bases on which this conclusion is challenged both reflect other grounds advanced by Sure in respect of its sixth ground of appeal. First, it is said that there were no individual infringements, so it follows that the conclusion cannot cover any period at all. However, if there were some individual infringements, then each needs to be looked at separately and the duration would not be as long as the Respondent has said it was.

277. On the basis that I have allowed these appeals because of the Respondent's failure to comply with section 43 of the 2012 Ordinance, the duration ground is more academic than some of the other grounds. I have just set out that I have some sympathy with the Respondent's position that there was a single and continuous infringement as soon as reliance is placed on the multiple contacts. Running this infringement from 22 August 2018 makes sense if it can be shown that those first contacts formed part of the overall plan.

278. I have noted in particular that the duration of the infringement found by the Respondent has largely remained unchanged from the First SO, through the SSO and into the Decision. Whilst the First SO was formally withdrawn, the basis for this duration was said to be that "*the earliest contact appears to have taken place in August 2018. Coordination appears to have begun in earnest in January 2019. The Memoranda of Understanding were terminated on 6 November 2019.*" However, the timeframe was expanded slightly in the SSO, where para. 6.28 refers to the earliest contact being on 2 July 2018. This appears to be a reference to what was set out in para. 4.3, which was just prior to the Jersey pre-summit. However, this was subsequently changed in the Decision to refer instead to 22 August 2018, but the end date has remained consistent throughout as being when the MOU was formally terminated on 6 November 2019.

279. The shortening of the timeframe in the Decision was, in my view, sensible. Had it remained as it was in the SSO, I would have struggled to understand the basis of starting the concerted practice from earlier than the Jersey pre-summit. On the basis that the Decision refers to the Bilateral Home Network Scenario and draws on that first meeting on 22 August 2018, unless it can be said that this was not one part of the overall concerted practice relating to an overall plan, then this would be an appropriate date on which to start.

280. I am less persuaded by the termination date of the MOU between the Appellants as being when these contacts ended. On the one hand, I accept that the concerted practice found by the Respondent cannot be said to have continued beyond that date. The way it is put in the Decision is that the MOU "*formed an integral part of the agreement and the concerted practice*". I do not think that this is necessarily accurate. Once the First SO was withdrawn, the focus was no longer on the MOU. However, there appears to have been no re-consideration of the end date for the infringement found.

281. I have looked carefully at the MOU executed in respect of Guernsey dated 11 June 2019. Clause 3 confirms that it is non-binding. Clause 2 provides that each of the parties to it would be "*free to apply for licences for any available spectrum*", however, clause 1 referred to Sure securing a commercial 5G spectrum licence in the Bailiwick so as to construct a standalone network, to which JT would then be given access in return for payment to Sure. That really is the extent of it, although the recitals refer to enabling Sure to roll out the standalone 5G mobile network (on the basis that JT would do likewise under similar terms in Jersey).

282. Had I needed to do so, I would probably have concluded that the justification for retaining 6 November 2019 as the end of the anti-competitive practice found by the Respondent was taking matters to a later date than they needed to. Having regard to the fourth part of the Decision, setting out the Appellants' contact with each other, there is nothing mentioned beyond June 2019. In the third part of the Decision, broadly setting out a chronology, there is no suggestion of any later contact between the Appellants, although para. 3.49 recites the ending of the MOU on 6 November 2019, some months after responses were made to the opening of the Respondent's investigation. As Mr McDermott wrote to the Respondent on 6 November 2019, which was confirmed in his letter to Mr Kelly of the same date, the change of approach from the States of Guernsey, as set out in the letter from the Committee's President dated 7 August 2019, meant that the MOU was "*obsolete*" and so "*no longer needed*". In these circumstances, it may well be said that the duration noted on the face of the Decision runs for longer than strictly necessary. An earlier date could readily have been selected, whether that was by reference to the letter sent in August 2019 or possibly even the last recorded contact between the Appellants. The alternative is to regard the duration as a comparatively insignificant point, save to the extent that it has any impact on the discretionary financial penalties imposed, which can no longer be pursued by the Respondent on the basis that the Appellants' appeals have been allowed. In effect, I consider that the end date should have been re-visited when the Respondent changed its approach and moved away from a proposed infringement relating to market sharing, where the termination of the MOU may have had greater relevance, but once it alighted on the information sharing, the sharing of information appears to me to have ended earlier than November 2019. Accordingly, had I needed to do so, I would have allowed this ground of appeal as well.

Ground 8

283. Sure's eighth and final ground of appeal is unique because Advocate Barclay expressly did not pursue any similar appeal on behalf of the JT Appellants. It relates to the conclusion that Sure (Guernsey) Limited's parent, BTC Sure Group Limited, should have attributed to it the conduct of the former because "*the two Sure entities form a single economic unit and so a single undertaking*" (para. 6.6 of the Decision). This is based on the presumption mentioned in that paragraph which the Respondent concluded had not been rebutted. The basis for that presumption had been set out in para. 5.17 of the Decision:

> "*There is a rebuttable presumption to the effect that the parent company exercises a decisive influence over its subsidiary where the parent company owns (directly or indirectly) a 100% shareholding in its subsidiary. Where this is so, therefore, the GCRA will be able to regard the parent company as jointly and severally liable for the conduct and therefore for the payment of any fine imposed on its subsidiary, unless the parent company discharges the burden of proof of showing that its subsidiary acts independently on the market. In considering whether the presumption has been rebutted, the GCRA will consider all relevant factors relating to the economic, organisational and legal links which bind the subsidiary to its parent. However, the GCRA observes that the EU General Court has previously stated that the presumption is not rebutted by showing (on its own) that, for example, the subsidiary acts independently in specific aspects of its policy on the marketing of the affected products.*"

In the footnotes applicable to this paragraph, reference is made to Case C-97/08 P *Akzo Nobel NC v Commission* [2009] 5 CMLR 23 and Case T-190/06 *Total SA and Elf Aquitaine SA v European Commission* (unreported, 14 July 2011).

284. The first basis on which the Sure Appellants challenge this conclusion is that the burden of proof remains with the Respondent, but that there is an evidential burden placed on the undertaking in question to produce material seeking to rebut the presumption. This is advanced

as an error of law. Secondly, there is a material error as to procedure when the Respondent does not address in the Decision the representation put to it in the representations made, which refers to Condition 10 of the local entity's licence, and which relates directly to whether the local entity acted on the market independently. The reason found in para. 6.6 of the Decision that "*There is nothing in the material the GCRA has seen to rebut the presumption*" does not satisfy the reasoning expected in these circumstances by reference to what had been said in *South Bucks District Council v Porter (No. 2)* [2004] 1 WLR 1953, at para. 36 of the speech given by Lord Brown of Eaton-Under-Heywood:

> "*The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds.*"

285. I will deal with each of those two grounds separately. But first I will flesh out what appears on the face of the Decision by referring to the paragraphs in the cases referred to in the footnotes.

286. In the *Akzo Nobel* case, reliance is placed on the following two paragraphs:

> "*60. In the specific case where a parent company has a 100 per cent shareholding in a subsidiary which has infringed the Community competition rules, first, the parent company can exercise a decisive influence over the conduct of the subsidiary (see, to that effect, Imperial Chemical Industries v Commission at [136] and [137]) and, secondly, there is a rebuttable presumption that the parent company does in fact exercise a decisive influence over the conduct of its subsidiary (see, to that effect, AEG Telefunken AG v Commission of the European Communities (107/82) [1983] E.C.R. 3151; [1984] 3 C.M.L.R. 325 at [50] and Stora at [29]).*
>
> *61. In those circumstances, it is sufficient for the Commission to prove that the subsidiary is wholly owned by the parent company in order to presume that the parent exercises a decisive influence over the commercial policy of the subsidiary. The Commission will be able to regard the parent company as jointly and severally liable for the payment of the fine imposed on its subsidiary, unless the parent company, which has the burden of rebutting that presumption, adduces sufficient evidence to show that its subsidiary acts independently on the market (see, to that effect, Stora at [29]).*"

287. Identifying the applicable paragraph in the *Total and Elf Aquitaine* case is harder, because the document provided unhelpfully does not include paragraph numbers. As a result I have considered the whole of the content dealing with what is referred to as the "*fourth plea in law, alleging breach of the rules on holding a parent company liable for infringements committed by a subsidiary*", starting on page 3 of the document supplied, which runs through to page 7, where the conclusion is that "*the fourth plea in its entirety must be rejected*", principally because each of the three limbs had been rejected. Many of the comments cite the *Akzo Nobel* case. There is a general acceptance that the parent needs to adduce "*sufficient evidence to show that the subsidiary acts independently on the market*". Reference is made to the subsidiary acting on instructions from its parent. An assessment of the relevant factors relating to the economic, organisational and legal links between the parent and subsidiary needs to be undertaken, although:

> "*It is not necessary to restrict that assessment to matters relating solely to the subsidiary's commercial policy stricto sensu, such as the distribution or pricing strategy. In particular, the presumption in question cannot be rebutted merely by showing that it is the subsidiary that manages those specific aspects of its commercial policy, without receiving instructions (see, to that effect, Akzo Nobel and Others v Commission, paragraph 31 above, paragraphs 65 and 67).*"

288. In support of Advocate Gray's argument about the burden only being an evidential one, she refers to Joined Cases C-293/13 P and C-294/13 P *Fresh Del Monte Produce Inc v European Commission* [2015] 5 CMLR 7, in which para. 139 confirms that the "*analysis does not entail any reversal of the burden of proof*". Specific confirmation was given to point 117 of the Advocate General's Opinion, which stated:

> "*It was on the basis of that allocation of the burden of proof that the General Court examined the probative force of all the evidence submitted to it. It came to the conclusion, first, that there was sufficient proof of a decisive influence exercised by Del Monte over Weichert and, secondly, that Del Monte's counterargument was incapable of weakening the arguments advanced by the Commission. This approach cannot be criticised from a legal standpoint. It does not involve any reversal of the burden of proof, but is rather based on the normal interplay between the respective burdens of adducing proof, prior to consideration of the objective burden of proof.*"

289. In this regard, it is necessary to read the conclusion in para. 6.6 of the Decision with the explanation given in para. 5.17. Referring therein expressly to the requirement that "*unless the parent company discharges the burden of proof of showing that its subsidiary acts independently on the market*" does appear to go further than the principle set out in the *Del Monte* case. The implication is that the burden lies on the parent company, rather than being limited to an evidential burden. Prima facie this appears to set the bar higher than it is legally and so amounts to an error of law.

290. That also leads me to consider the reasoning set out in the Decision on this issue. It is, in my view, quite thin. Simply referring to a bald conclusion that the rebuttable presumption had not been discharged does not amount to satisfactory reasoning. I think it needed to be more expansive in order at least to address the representations made. This had been done in respect of some of the arguments raised by the Appellants in the sixth part, so it is noticeable that there was an omission in failing to address the representations made on behalf of the Sure Appellants.

291. In particular, and as pleaded in Sure's Cause, in their representations to the SSO, under the heading "*Attribution of Liability to Parent*", para. 3.121 expressly referred to Condition 10 of the local entity's telecoms licence, with added emphasis:

> "*The Licensee shall ensure that:*
>
> *(a) The administration and management of the business associated with the establishment, maintenance and operation of the Licensed Mobile Telecommunications Network and the provision of the Licensed Mobile Telecommunications services shall be conducted from the Bailiwick; and*
>
> *(b) Its business is conducted in a manner which the GCRA is satisfied is on a normal commercial basis and at arm's length from the business of any of its shareholders or Associated Companies.*"

292. Given that there was a sentence that was removed from para. 6.6 in the SSO before it became the Decision, I think it is helpful also to refer to para. 3.122 in Sure's representations:

"*The 2nd SO, para. 6.6 relies on two matters to support the proposed finding against Parent, neither of which is sustainable.*

3.122.1 First, para. 6.6 states that key personnel from the Parent were present at the meeting referred to in 2nd SO, para. 4.12 "at which the conduct at issue took place". However, para. 4.12 provides no evidence of the conduct complained about in the 2nd SO. It was a meeting in which (according to 2nd SO, para. 4.12) either there was no discussion at about mobile network consolidation or there was a limited discussion and the parties indicated that they did not support it. This provides no basis for a claim that representatives of the Parent were present at a meeting "at which the conduct at issue took place".

3.122.2 Secondly, para. 6.6 states that Mr Kelly of Subsidiary "briefed" Parent as noted in 2nd SO para. 4.35 (actually 4.36). The provision of information from Subsidiary to Parent is not inconsistent with Subsidiary acting independently on the market: the GCRA would need to point to evidence of Parent directing Subsidiary about how to act. There is none in the 2nd SO."

293. Through the removal of the sentence being addressed between the SSO and the Decision, I think I can properly infer that the Respondent accepted what is set out in para. 3.122 of Sure's representations. However, no mention is made of what is set out in the preceding paragraph of those representations, when it is clear from the principle articulated by Lord Brown that this was a matter that needed to be addressed on the face of the Decision. Even within what is set out in para. 5.17 of the Decision, the Respondent does not appear to have considered "*all relevant factors relating to the economic, organisational and legal links which bind the subsidiary to its parent*" in the light of Sure's representations. Moreover, it might be implicit in the removal of that one sentence that the Respondent accepted the representation made relating to the issue of the parent needing to give instructions to its subsidiary before there could be an attribution of liability (as shown by reference to the *Total and Elf Aquitaine* case, and also commented on at para. 65 in *Akzo Nobel* to demonstrate that this is not the only basis on which the presumption might be rebutted), but this is not re-visited more widely before the conclusion is reached that there could properly be attribution of liability to the parent company.

294. In short, I am satisfied that there should have been a more detailed explanation as to why the conclusion of the Respondent was being maintained. In particular, it was necessary to address the reference made to Condition 10. Whilst it is possible that the Respondent could explain how the parent "*exercises a decisive influence over the commercial policy of the subsidiary*", thereby making it jointly and severally liable for any penalty, I take the view that there is a paucity of reasoning in the Decision on this issue. The consequence is that, had I needed to do so, I would have been minded to allow the appeal of BTC Sure Group Limited on this ground. Accordingly, I would have set aside the Decision as against that entity, although, in the event that all other grounds had been dismissed, I would also probably have remitted the matter to enable the Respondent to seek to address the shortcomings in its reasoning.

Conclusion

295. For the reasons I have given, I will allow the appeals of both sets of Appellants against the Decision. The primary reason is that I have found that the Respondent failed to comply with section 43 of the 2012 Ordinance. The appeals are, therefore, being allowed on the basis of Sure's first ground of appeal and JT's fifth ground of appeal. Having provided the SSO, the Respondent needed to give a further notice in writing under that section , thereby enabling any further representations to be made, because the basis for the Decision that it produced following the SSO is different to the grounds that had been set out in the SSO. As a result, the Decision is set aside.

296. In case I am wrong to reach that primary conclusion, I have also explained how I would have approached the Appellants' other grounds of appeal. Some of those grounds of appeal would, in my view, have succeeded for the reasons I have also given. I have generally not set out what the outcome would have been, but it is quite possible that if I had not dismissed the appeals on the section 43 issue, I would have remitted the matter to the Respondent.

297. My expectation is that the costs of the appeal will follow the event. However, if any party wishes to seek an order other than that the Respondent shall pay the Appellants' costs on the recoverable basis, I suggest that party liaises with the Greffe to ascertain when a suitable date for a hearing relating to costs can be listed or that the parties agree an appropriate timetable for their respective submissions, possibly even with a view to the issue of costs being determined on the papers.