



Cable & Wireless Guernsey and Cable & Wireless Jersey - Notification of change of control

Final decision

Channel Islands Competition and Regulatory Authorities

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1. Introduction

Parties who operate telecommunications networks or offer telecommunications services in the Channel Islands are, generally speaking, obliged to hold a licence. For the Bailiwick of Guernsey, licences are issued by the Guernsey Competition and Regulatory Authority (**GCRA**) under section 1 of *The Telecommunications (Bailiwick of Guernsey) Law, 2001 (Guernsey Telecoms Law)*. In Jersey, licences are issued by the Jersey Competition Regulatory Authority (**JCRA**) under Article 14 of the *Telecommunications (Jersey) Law 2002 (Jersey Telecoms Law)*.

For the purposes of this document, the GCRA and the JCRA are together referred to as the Channel Islands Competition and Regulatory Authorities, or **CICRA**, and all references in this document to CICRA should therefore be read as references to each of the GCRA and JCRA, unless the context otherwise requires.

Each of the individual¹ telecoms licences issued by CICRA contains a condition requiring the licence holder to notify CICRA when it becomes aware of a proposed or actual change in the identity of the person (or group of persons) that has ultimate control of the licence holder. CICRA must then decide whether to approve or refuse the change of control, or to approve the change subject to changes to conditions in the licence holder's licence.

The concept of "control" is defined in the licence, and focuses on the possession of any power or right to direct the management or policies of the licensee. In cases where a licensee has a parent company that is listed on a stock exchange, it is possible that that company will have ultimate control of the licensee (although it is also possible that major shareholders of that parent company could themselves be regarded as having ultimate control of the subsidiary). Where the licensee's shares are held privately, it is possible that one or more shareholders may be regarded as holding control for the purposes of the licence.

Following the announcement in December 2012 that Bahrain Telecommunications Company BSC (**Batelco**) had signed an agreement to acquire the Monaco & Islands division of Cable & Wireless Communications plc (**CWC**), which includes Cable & Wireless Guernsey Limited (**CWG**) and Cable & Wireless Jersey Limited (**CWJ**), CICRA

¹ That is, excluding the General Class Licence issued by the JCRA, which applies to certain telecoms activities in Jersey

issued a consultation document in January 2013 in relation to its approach to change of control notifications under telecommunications licences granted by CICRA².

The purpose of the public consultation was to seek the views of respondents as to the application of the change of control provisions in telecoms licences in the Bailiwicks of Guernsey and Jersey, in particular in the context of the proposed acquisition of CWG and CWJ by Batelco.

In conjunction with the consultation, CICRA also requested and received information from Batelco, CWG and CWJ, in order to gain a better understanding of the structure of the proposed acquisition and to assess whether the change to the ownership could jeopardise the willingness and ability of CWG and CWJ to provide sustainable telecommunications services and to comply with their licence conditions.

The consultation document noted CICRA's initial view that the question of whether to approve a change of control of a telecoms licensee would depend to a large extent on the importance of the licensee's assets and services to the overall telecoms market. This remains CICRA's view. We have concluded that the impact on consumers and the wider economy of a serious breakdown in the operations of CWG (given its role as the operator of the fixed-line network in Guernsey, and by far the largest mobile operator in Guernsey) would be considerably greater than the same occurrence with respect to CWJ, or a smaller operator in either Bailiwick. Accordingly, whilst the proposed acquisition by Batelco would result in a change of control of two licensees (CWG and CWJ), the focus of this decision has been on the effect of the proposed change of control on CWG.

In light of the importance of the assets and services under control of CWG to consumers in Guernsey and the economy of the Bailiwick of Guernsey, we have reviewed in some detail the capacity of Batelco as a new controller of CWG to provide sustainable telecommunications services and to comply with its licence conditions. We have also considered whether the proposed change of control gives rise to new regulatory risks. After considering the responses to the consultation received from various stakeholders, responses to the provisional decision, as well as the material provided by Batelco, CWG and CWJ, we have concluded that we should approve the proposed change of control. However, for reasons set out below, CICRA considers that certain modifications should be made to the fixed telecommunications services licence of CWG in Guernsey, as a condition of this approval.

² CICRA 13/01, *Approach to change of control notifications under telecommunications licences - Consultation Document*, 11 January 2013

2. Structure of the decision

This decision is structured as follows:

Section 3:	This section details the legal background to the process for reviewing changes of control
Section 4:	This section summarises the provisional decision and submissions received in response to CICRA's provisional decision on the change of control notifications
Section 5:	This section explains CICRA's final decision and the licence condition modifications as a condition of the approval of change of control

In line with CICRA's policy, responses to the provisional decision are available on the CICRA website.

3. Legal Background

Change of control provisions in telecoms licences

As noted above, telecoms licences in Guernsey and Jersey each contain change of control provisions, in very similar form. As an example, Conditions 2.5 and 2.6 of CWG's fixed telecoms licence provide as follows:

2.5 The Licensee shall notify the [GCRA]:

(a) of any proposed Change of Control of the Licensee forthwith upon the Licensee, or its Chairman, Chief Executive Officer, Chief Operating Officer or any Director becoming aware of the proposed change; and

(b) in any event, on the occurrence of any Change of Control of the Licensee, within thirty days of that event.

2.6 On receipt of notification the [GCRA] may:

(a) approve the proposed change or the change in writing;

(b) disapprove the proposed change or the change in writing, giving reasons; or

(c) approve the proposed change or the change subject to the Licensee accepting a modification of the Licence under Section 8 of the Telecommunications Law,

and, or in addition to any of the above measures, the [GCRA] may issue such directions to the Licensee or invoke any of the sanctions, penalties or remedies in the Law or the Licence as the [GCRA] considers necessary or appropriate.

In taking action under this section, the [GCRA] may have regard to whether or not the [GCRA] would have awarded the Licence to the Licensee had the Change of Control taken effect prior to the award.

The concepts of control and change of control are defined in Condition 2.7 of CWG's fixed licence (and equivalent provisions in other telecoms licences):

In this Condition 2, "Control" shall mean any direct or indirect possession of any power or right that enables a person or group of persons to direct, or cause the general direction of, the management or policies of the Licensee by any means and in any event, a person or group of persons shall be deemed to Control the Licensee if:

(a) he or they exercises or controls the exercise of fifty-one per cent or more of the votes able to be cast at general meetings of the Licensee on all, or substantially all, matters; or

(b) he is or they are able to appoint or remove directors holding a majority of voting rights at board meetings on all, or substantially all matters or is able to appoint or remove a majority of the governing body of the Licensee; or

(c) he or they exercises or controls the exercise of fifty-one per cent or more of the partnership or other ownership interests of the Licensee,

and, in each case, reference to the Licensee shall include any person or group of persons who Controls the Licensee in any of such ways, and "Change of Control" shall mean any change as a result of which any other person or group of persons acquires Control.

Statutory duties of CICRA when exercising telecoms regulatory functions

CICRA's view is that the approach to the assessment of change of control notifications should be informed by the statutory duties imposed on CICRA under the telecoms statutes in Jersey and Guernsey (or, in Guernsey, the general duties imposed on the GCRA in respect of all utility regulation functions). For this reason, the relevant provisions of those laws are set out below.

Section 2 of *The Regulation of Utilities (Bailiwick of Guernsey) Law, 2001* provides as follows:

In exercising their respective functions and powers [under this Law and any Sector Law], the States and [the Guernsey Competition and Regulatory Authority ("the Authority")] shall each have a duty to promote (and, where they conflict, to balance) the following objectives –

(a) to protect the interests of consumers and other users in the Bailiwick in respect of the prices charged for, and the quality, service levels, permanence and variety of, utility services,

(b) to secure, so far as practicable, the provision of utility services that satisfy all reasonable demands for such services within the Bailiwick, whether those services are supplied from, within or to the Bailiwick,

(c) to ensure that utility activities are carried out in such a way as best to serve and contribute to the economic and social development and well-being of the Bailiwick,

(d) to introduce, maintain and promote effective and sustainable competition in the provision of utility services in the Bailiwick, subject to any special or exclusive rights awarded to a licensee by [the Authority] pursuant to States' Directions,

(e) to improve the quality and coverage of utility services and to facilitate the availability of new utility services within the Bailiwick, and

(f) to lessen, where practicable, any adverse impact of utility activities on the environment,

and, in performing the duty imposed by this section, the States and [the Authority] shall have equal regard to the interests of the residents of all islands of the Bailiwick.

In Jersey, the statutory duties imposed on CICRA in respect of its telecoms regulatory functions are set out in Article 7 of the Jersey Telecoms Law:

(1) The Minister and the Authority shall each have a primary duty to perform his, her or its functions under this Law in such manner as each considers is best calculated to ensure that (so far as in his, her or its view is reasonably practicable) such telecommunication services are provided, both within Jersey and between Jersey and the rest of the world, as satisfy all current and prospective demands for them, wherever arising.

(2) In so far as it is consistent with paragraph (1) to do so, the Minister and the Authority shall each –

(a) perform his, her or its functions under this Law in such manner as each considers is best calculated to protect and further the short-term and long-term interests of users within Jersey of telecommunication services and apparatus, and perform them, wherever each considers it appropriate, by promoting competition among persons engaged in commercial activities connected with telecommunications in Jersey;

(b) perform his, her or its functions under this Law in such manner as each considers is best calculated to promote efficiency, economy and effectiveness in commercial activities connected with telecommunications in Jersey;

(c) perform his, her or its functions under this Law in such manner as each considers is best calculated to further the economic interests of Jersey;

(d) perform his, her or its functions under this Law in such manner as each considers is best calculated to impose a minimum of restriction on persons engaged in commercial activities connected with telecommunications in Jersey;

(e) in performing his, her or its functions under this Law, have regard to the need to ensure that persons engaged in commercial activities connected with telecommunications in Jersey have sufficient financial and other resources to conduct those activities; and

(f) in performing his, her or its functions under this Law, have regard to any special needs of persons who are disabled or have limited financial resources or have particular needs.

(3) The Minister and the Authority shall, in considering whether the services referred to in paragraph (1) satisfy the demands referred to in paragraph (1), have regard to –

(a) whether the services are accessible to and affordable by the maximum number of business and domestic users;

(b) whether there is innovation in the services and their provision;

(c) whether the services are of high quality and are reliable;

*(d) whether users are able to express their views about the provision of the services;
and*

(e) any objectives that the States prescribe by Regulations, including, but not limited to –

(i) the provision of a universal service, a social service or any form of cross-subsidized service, and

(ii) the provision of certain services at uniform tariffs or at tariffs that are cross-subsidized by other tariffs.

4. CICRA's Provisional Decision

On 25 February 2013, CICRA published a provisional decision in relation to the proposed change of control of CWG and CWJ. The provisional decision set out specific modifications to the fixed telecoms licence of CWG as a condition for approval of the change of control and sought views from respondents on those.

Due to the different positions of CWG and CWJ in the respective islands of Guernsey and Jersey, CICRA's provisional conclusion was that it would not be appropriate to undertake a detailed review of the change of control with respect to CWJ.

We also noted the importance of off-island connectivity to the economy of Guernsey, as well as the gravity of the concerns raised, in particular in relation to current prices. CICRA's provisional conclusion was that, as a matter of law, its powers with respect to a change of control are limited to addressing matters that arise as a result of the change of control. CICRA's provisional view was that it would be inappropriate for other matters to be considered as part of this process.

We have considered whether there is reason to believe that the position with respect to off-island connectivity would be affected by the acquisition of CWG (or CWJ) by Batelco. We identified that there was a need to inquire as to whether CWG's existing arrangements for international connectivity from the UK and France would change after the acquisition, and obtained information on that topic from CWG. However, we provisionally concluded that any existing concerns regarding inter-island or off-island connectivity have arisen during the ownership of CWG by CWC, and are not altered or accentuated by the proposed change of control to Batelco.

CICRA's 2013 work programme includes completion of a review of the off-island connectivity market, and this will proceed regardless of the proposed change of control.

CICRA's high level review of the information provided by the parties supported the view that:

1. Batelco has extensive experience in the telecommunications industry, a track record of innovation and investment, and a history of overall regulatory compliance in the jurisdictions in which it currently operates;
2. The existing commercial and financial management of CWG and CWJ will remain with the current management teams, fully supported by Batelco;
3. The Fiscal and Economic Plan of the States of Guernsey and the Commerce and Employment Business Plan emphasise the importance of ICT as a key work priority

for both existing business and new business streams in growing the economy moving forward. Economic growth and participation in a flourishing telecoms sector are beneficial to the business health of the incumbent business and a strong alignment therefore exists between the goals of States policy and that of the incumbent's telecoms business;

4. The on-going transition toward data-based network infrastructure, to deliver present and future telecoms services using internet protocol (IP) technology, will place investment demands on all telecom businesses, including in the Channel Islands. The technology paths of telecom businesses are driven to a significant degree by developers, device manufacturers and international standards. These parties and bodies increasingly have a role and influence on the pace and scale of investment by telecoms providers, if those providers are to sustain growth and ensure efficiency. There are compelling business reasons for Batelco to conduct a significant programme of capital expenditure in the CWG business over the next five years, and CWG and Batelco have the financial means to undertake such investment;

5. There will be no reduction in international connectivity as a result of the change of control, and all current arrangements in relation to international connectivity for data and voice telecommunications services held by CWG will remain with CWG, with overall ownership under the change of control passing to Batelco;

6. Batelco will maintain in place all of the current international connectivity offered by CWG and will look to build upon it and optimise it in the future, having regard to existing Batelco international connectivity arrangements and opportunities in the market;

7. Batelco intends to work with CWG management to ensure that CWG offers world-class data services to international clients; and

8. New commercial arrangements will be negotiated with the preferred interconnect partners in the normal course of business, with no change in the process resulting from the proposed acquisition.

As a result of this review, CICRA's provisional view was that, together with the proposed changes to CWG's fixed telecommunications licence, this will provide the appropriate incentives and regulatory environment to secure the future of international connectivity and investment in CWG by Batelco.

We provisionally concluded that some modifications to the existing conditions in the fixed telecommunications licence of CWG were warranted, through the addition of two new conditions, relating to:

- the ability of the business to carry out its functions; and

- the ability of the business to provide information and comply with its obligations.

These new conditions were intended to reinforce existing ring-fencing provisions (contained in Condition 2.10), to mitigate potential regulatory risks resulting from the proposed change of control, and to address some of the concerns raised by respondents to the consultation by ensuring that CWG retained appropriate control and financial resources within the business. A separate parent company/controller undertaking was also intended to address some of the concerns raised about the potential remote management of the business and secured the availability of information to meet regulatory and statutory requirements.

Summary of submissions on the provisional decision

We received submissions on the provisional decision from the following respondents:

- Batelco/CWG/CWJ;
- LP Telecoms Limited; and
- Deputy D. Jones.

To the extent that respondents have permitted, responses have been published on the CICRA website. In addition, the main points of certain of the submissions are summarised below.

The response from Batelco Group, CWG and CWJ raised concerns over the text of the proposed new licence conditions, specifically LC2.11, stating that if adopted, it would severely constrain the business's operational efficiency under the fixed telecommunications licence of CWG. CWG submitted revised wording to address these concerns.

Deputy Jones emphasised the importance of fixed telecoms services to Guernsey, the need for high quality services and protection of consumer interests.

5. CICRA's Final Decision

Due to the different positions of CWG and CWJ, CICRA has not undertaken a detailed review of the change of control with respect to CWJ. While CWJ plays an important role in bringing competition to both the mobile and fixed services markets in Jersey, it has considerably lower market shares than CWG in Guernsey, and does not hold significant market power (other than in the market for termination of calls on its own network). It also does not supply wholesale services to other operators.

CICRA has also taken the view that its powers with respect to a change of control are limited to addressing matters that arise as a result of the change of control and it would therefore be inappropriate for other matters to be considered as part of this process.

Following a review of the evidence provided, CICRA concludes that:

1. Batelco has extensive experience in the telecommunications industry, a track record of innovation and investment, and a history of overall regulatory compliance in the jurisdictions in which it currently operates;
2. The existing commercial and financial management of CWG and CWJ will remain with the current management teams, fully supported by Batelco;
3. The Fiscal and Economic Plan of the States of Guernsey and the Commerce and Employment Business Plan emphasise the importance of ICT as a key work priority for both existing business and new business streams in growing the economy moving forward. Economic growth and participation in a flourishing telecoms sector are beneficial to the business health of the incumbent business and a strong alignment therefore exists between the goals of States policy and that of the incumbent's telecoms business;
4. The on-going transition toward data-based network infrastructure, to deliver present and future telecoms services using internet protocol (IP) technology, will place investment demands on all telecom businesses, including in the Channel Islands. The technology paths of telecom businesses are driven to a significant degree by developers, device manufacturers and international standards. These parties and bodies increasingly have a role and influence on the pace and scale of investment by telecoms providers, if those providers are to sustain growth and ensure efficiency. There are compelling business reasons for Batelco to conduct a significant programme of capital expenditure in the CWG business over the next five years, and CWG and Batelco have the financial means to undertake such investment;

5. There will be no reduction in international connectivity as a result of the change of control, and all current arrangements in relation to international connectivity for data and voice telecommunications services held by CWG will remain with CWG, with overall ownership under the change of control passing to Batelco;

6. Batelco will maintain in place all of the current international connectivity offered by CWG and will look to build upon it and optimise it in the future, having regard to existing Batelco international connectivity arrangements and opportunities in the market;

7. Batelco intends to work with CWG management to ensure that CWG offers world-class data services to international clients; and

8. New commercial arrangements will be negotiated with the preferred interconnect partners in the normal course of business, with no change in the process resulting from the proposed acquisition.

Having considered the response from Batelco/CWG/CWJ on the proposed modifications to the fixed telecoms licence currently held by CWG, CICRA emphasises that the need for a modern telecommunications business to draw on external resources, expertise and facilities is fully recognised. The licence conditions proposed in the provisional decision have therefore been modified where it was considered necessary to clarify or avoid risk of misinterpretation of what is required.

In finalising this aspect of the decision, CICRA has been mindful that the size of the market in the Channel Islands is likely to comprise a minor part of any international telecoms business. It is also reasonable that stakeholders have reassurances in this area, since it is vital that the Guernsey telecommunications business can sustain itself when it might otherwise be placed at risk by virtue of its size within a larger business. CICRA has also taken into account the present market environment and international developments, specifically in the area of telecoms.

Having taken these matters into consideration, it is intended that the licence conditions set out in this final decision safeguard the ability of CWG to provide licensed telecommunications services without reliance on financing, management resources or other approval processes from third parties to such an extent that this inhibits its ability to deliver its licensed obligations. CICRA will therefore ensure the financial resources, management resources and systems of internal control necessary to fulfil the conditions of licences issued under its powers are adequately safeguarded to mitigate the risks to which a small market such as Guernsey is exposed.

CICRA requires as a condition of its approval of the change of control modifications to the existing conditions in the fixed telecommunications licence of CWG. The new conditions relate to:

- the ability of the business to carry out its functions; and
- the ability of the business to provide information and comply with its regulatory obligations.

In the present case, we will expect the parent company/controller undertakings to be put in place before the transfer of control occurs.

No licence modifications are sought for CWG's mobile telecommunications licence in Guernsey. There are competing mobile networks operated by JT (Guernsey) Limited and Guernsey Airtel Limited, so fewer concerns arise with respect to ring-fencing and the removal of control over assets.

Text of new licence conditions

The text of the new licence conditions for CWG's fixed telecommunications licence is set out below. Licence numbering has been chosen to avoid conflict with existing licence conditions and subsequent modifications.

LC 2.11 - Ring Fencing

In order to facilitate the ability of the Licensee at all times to provide Licensed Telecommunications Services without undue reliance on third parties (including Associated Companies, whether in Guernsey or elsewhere), the Licensee shall at all times act in a manner best calculated to ensure that it has, or has access to, adequate -

a. financial resources; and

b. management resources and systems of internal control,

to enable it to secure the provision of Licensed Telecommunications Services including any investment necessary to fulfil its obligations under the Licence.

The Licensee shall ensure that its access to resources and systems referred to above is not dependent upon the discharge by any other person of any obligation under, or arising from, any agreement or arrangement under which that other person has agreed to provide any services to the Licensee. For the avoidance of doubt, this condition 2.11 shall not prevent the Licensee from procuring operational resources or facilities from any other person (including an Associated Company).

LC 2.12-2.18 Undertakings from Ultimate Controller

2.12. The Licensee shall procure from the Ultimate Controller of the Licensee and, when the Ultimate Controller is not a Guernsey company, procure from the ultimate parent company of the Licensee, legally enforceable undertakings in favour of the

Licensee in a form agreed by the Authority as appropriate and expressed to remain in force for as long as the Licensee retains its Licence. Should the Licensee cease to hold a dominant position in a relevant market then the Authority may modify this licence condition to take account of the change in circumstance.

2.13. The undertakings referred to in sub-paragraph (1) shall provide that -

a. the persons providing the undertakings will, and will procure that each of their subsidiaries (other than the Licensee and its subsidiaries) will, give to the Licensee all such information as could reasonably be expected to be necessary to enable the Licensee to comply with its obligations under Relevant Legislation and in order to comply with conditions of the Licence or directions of the Authority under the Relevant Legislation or the Licence; and

b. the persons providing the undertakings will, and will procure that each of their subsidiaries (other than the Licensee and its subsidiaries) will, refrain from any action which would or could reasonably be expected to cause the Licensee to breach any of its obligations under Relevant Legislation or the conditions of the Licence.

2.14. "Relevant Legislation" is defined for the purposes of condition 2.13 as The Telecommunications (Bailiwick of Guernsey) Law, 2001, The Regulation of Utilities (Bailiwick of Guernsey) Law, 2001, The Competition (Guernsey) Ordinance, 2012, The Wireless Telegraphy (Guernsey) Order, 2006 and The Communications (Bailiwick of Guernsey) Order, 2003, or any subsequent legislation covering subjects equivalent to the legislative instruments listed above.

2.15. The Licensee shall, not later than one week after the completion of any Change of Control, produce to the Authority the original of each of the undertakings given to it in accordance with condition 2.12 and provide to the Authority such certified copies of those undertakings as it may require.

2.16. The Licensee shall immediately inform the Authority in writing if it becomes aware that any such undertaking as is referred to in condition 2.12 has ceased to be legally enforceable or that there has been any breach of its terms.

2.17. The Licensee shall not, except with the written consent of the Authority, enter directly or indirectly into any contract or arrangement with the Ultimate Controller of the Licensee (or the ultimate parent company of the Licensee as the case may be) or any Associated Company (other than subsidiaries of the Licensee) at a time when:

(i) any one of the undertakings complying with condition 2.12 does not subsist; or

(ii) there is an unremedied breach of any one of those undertakings.

2.18. For the purposes of this Condition, "Ultimate Controller" means any person who or which (alone or jointly with others, and directly or indirectly) in the reasonable opinion of the Authority is in a position to Control the Licensee.