



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

Provisional 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 provisional 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, as well as all the material provided by Batelco, CWG and CWJ, we have provisionally 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. Next Steps

This provisional 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 submissions received in response to CICRA's consultation on the principles to be applied when considering change of control notifications |
| Section 5: | This section sets out CICRA's approach to the present change of control notifications |
| Section 6: | This section details the areas that CICRA has considered as part of its operational review of Batelco as a proposed new controller of CWG and CWJ |
| Section 7: | This section sets out CICRA's rationale for concluding that the fixed telecommunications licence of CWG should be modified as a condition of its approval of the change of control, and the text of the proposed new licence conditions |

Interested parties are invited to submit comments in writing or by email on the provisional decision to one of the following addresses:

| GCRA | JCRA |
|---|---|
| Suites B1 & B2 Hirzel Court St Peter Port Guernsey GY1 2NH Email: info@icra.gg | 2 nd Floor, Salisbury House 1-9 Union Street St Helier Jersey JE2 3RF Email: info@icra.je |

All comments should be clearly marked "*Provisional Decision – Cable & Wireless Change of Control*" and should arrive by **12 noon on Friday, 8 March 2013**.

In light of Batelco's announced intention to complete its acquisition of the Monaco & Islands division of CWC (including CWG and CWJ) by the end of March 2013, we

intend to issue a final decision in respect of the change of control notifications by no later than Friday, 15 March 2013.

In line with CICRA's policy, we intend to make comments on the provisional decision available on the CICRA website. Any material that is confidential should be put in a separate annex and clearly marked as such so that it may be kept confidential. CICRA regrets that it may not be in a position to respond individually to the responses to this provisional decision.

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

As stated in section 4 below, CICRA's provisional 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. Consultation Responses

On 11 January 2013, CICRA published a consultation paper in relation to change of control provisions in telecommunications licences in the Channel Islands. The consultation sought views from respondents on the approach that we should take to an assessment of proposed changes of control in the telecoms sector, noting that CICRA had no formal guidance in place, and had issued no decisions on change of control notifications that included reasons. In particular, respondents were asked to indicate:

1. what factors they considered to be relevant to an assessment of a change of control under the relevant provisions in the licences; and
2. whether a commitment to support the respective States' strategic objectives with respect to the telecommunications sector should be regarded as a relevant factor for consideration, and if so, the best method by which to secure such a commitment.

We received submissions from the following respondents:

- ACS Telecommunications Consultants;
- The Guernsey Chamber of Commerce;
- The Guernsey Commerce and Employment Department;
- Batelco Group / Cable & Wireless Guernsey Ltd / Cable & Wireless Jersey Ltd;
- The Trustees of the Cable & Wireless Guernsey Pension Scheme;
- LP Telecoms Limited;
- Alex Taylor (Wellsprings Ltd);
- Prospect;
- Stan Fitzgerald; and
- Airtel-Vodafone.

A number of these responses were marked as confidential or contained confidential information provided alongside a public response. To the extent that respondents have permitted, responses have been published on the CICRA website. In addition, the main points of many of the submissions are summarised below.

Our response to the points made in these submissions is principally dealt with in sections 5 and 7 below (although a provisional view on the issue of whether pensions issues can be considered in this process is provided directly in this section 4).

Summary of consultation responses

The comments of **three respondents** related solely to the **existing and future pension rights**, including funding requirements and the levels of benefits agreed between CWG and its employees.

On the basis of these representations, CICRA recognises that there is substantial concern among at least some CWG employees over the security of their future pension arrangements. However, while the costs involved in providing employee benefits might be a relevant factor in any review of a licensee's cost base when setting a regulatory price control, we consider that pensions funding falls outside our statutory duties outlined in section 3 above. We have therefore reached the provisional conclusion that arrangements with respect to pensions would not be an appropriate factor to consider in an assessment of changes of control of telecom licensees.

Five other respondents highlighted the importance of **international connectivity** for all telecoms users in the Channel Islands and noted that CWG operates a fixed network infrastructure that is of vital interest to the Channel Islands' economies. Although a strong emphasis has been made on CWG's ability to influence the price and quality of international connectivity in Guernsey, it has also been suggested that CWG is able to influence the price and quality of international connectivity in Jersey through its high share of capacity available on the fibre network associated with the Channel Islands Electricity Grid (**CIEG**), as one of the key telecoms assets connecting Jersey to Guernsey and other off-island destinations.

One respondent commented on the integral part played by telecoms services and by CWG and its competitors in the development of the Guernsey economy and, in particular, on the importance of providing low cost, high speed connectivity to the rest of the world. This respondent's main concern was that the cost of off-island connectivity and direct internet access in Guernsey has not reduced in line with the rest of the world or sufficiently to compete with "onshore" locations such as London. In their view, this represents a serious risk to Guernsey's economy.

This respondent noted their understanding that the standing of Cable & Wireless plc as a global player in the telecommunications market (prior to the demerger of CWC) was a key element of decision by the States of Guernsey to sell the former Guernsey Telecoms to it. They contended that, in order to compensate for the reduced global presence and market power of Batelco compared with Cable and Wireless, increased competition in off-island connectivity should be a condition of approval of the change of control. They believed that this could be achieved by returning the CIEG fibre allocations to public ownership and making them openly available to other operators on a cost-plus basis.

Another respondent noted that their main concern was CWG's free inheritance of dark fibre on the CIEG cable to France. Guernsey Telecoms was initially sold on the proviso that the buyer would provide high speed worldwide connections to attract new industry to Guernsey and create low cost on-island broadband. The low initial price and free dark fibre to France were intended to encourage on-island investment and development.

Their view was that this had not been delivered, and that an independent review of the original tender and response documents should be carried out to confirm the commitments and whether they had been delivered. The remedy for failing to deliver would be to release off-island dark fibre on the CIEG connection and make it available to the market.

A third respondent expressed its view that the proposed acquisition must not be approved until such time as the situation regarding CWG's and CWJ's bandwidth pricing (both on-island and off-island service) is fully understood and measures are in place to ensure the telecommunications market moves in a direction that supports the wider economic development objectives of the States of Guernsey and the States of Jersey, respectively. In particular, price control arrangements should be extended and include all half and full circuit off-island private circuit and data services.

The respondent further noted that when Guernsey Telecoms was sold to Cable & Wireless plc in 2002, CWG acquired all of Guernsey Telecoms' interests in the non-telemetry elements of the CIEG fibre optics. The respondent contended that the transfer of all of Guernsey Telecoms' assets and its interests in the CIEG telecommunications fibres not only conflicted with the States of Guernsey's objectives for market liberalisation but may also have created a situation where there is a potential breach of competition law regarding access to off-island fibre capacity. Accordingly, the respondent submitted that CICRA should undertake a full examination of the market for off-island and inter-island connectivity, especially the use of the CIEG telecommunication fibres, before approval of the proposed acquisition. In the event of CICRA finding that the market is not working in line with the respective Channel Islands' competition laws, it should require the parties involved in the acquisition to divest themselves of their interests in those fibres or place specific licence conditions to ensure an open and competitive market.

In its consultation response, **Guernsey's Commerce & Employment Department** also emphasised the importance to Guernsey of internationally competitive Information and Communications Technology (ICT) infrastructure, and considered it vital that any owner of a telecommunications operator in Guernsey put its strategic data connectivity assets to the most effective and efficient use possible, for the benefit of the Bailiwick's residents, businesses and economy. The Department supported

CICRA's preliminary view that change of control notifications should be assessed by reference to CICRA's statutory duties, and highlighted the importance of the duties relating to consumer protection and contribution to the economic and social development of the Bailiwick.

The Department considered that CICRA should have regard to the following qualities in any controller of CWG:

- The intention to maintain and enhance the telecommunications operator's data-carrying infrastructure, demonstrated through a detailed long-term investment plan.
- A genuine long term commitment to the Island, and a dedication to encouraging growth in both local business and inward investment, achieved through:
 - Supplying a range of suitable fixed and wireless telecommunications products and services, which meet the demands of both residential customers and business customers of all sizes;
 - A commitment to provide competitive and transparent pricing for these products and services, so as to allow the Island's businesses to compete effectively in the global economy; and
 - Maintaining a significant on-Island presence, achieved through maximising the utilisation of the local labour force and investing in employees' skills.

The Department submitted that a commitment to ensuring that Guernsey's ICT infrastructure is resilient and internationally competitive should be regarded as a relevant factor for consideration by CICRA, and that ultimately CICRA would be best placed to make a decision on the most appropriate method to secure such a commitment.

Batelco, CWG and CWJ presented a combined response to CICRA's consultation and outlined their view on the approach to change of control in general, as well as to the proposed acquisition of CWG and CWJ by Batelco.

Batelco/CWG/CWJ agreed that it is relevant for CICRA to consider the extent to which it would have awarded the licences to the respective licensees had the change of control taken effect prior to the award. The parties understood that this test related to the importance of the assets to the overall telecoms markets and indeed, to the wider economy, and acknowledged that it would be relevant for CICRA to satisfy itself that the indirect change of control from CWC to Batelco would not affect the ability or willingness of CWG to continue to provide high quality, sustainable telecoms services in Guernsey, or to comply with its licence conditions or other regulatory requirements.

Batelco/CWG/CWJ explained that neither CWG nor CWJ will rely on Batelco, as its ultimate parent company, for the financing of its capital expenditure. Instead, as is the case under the current ultimate ownership by CWC, all capital expenditure is self-funded by the relevant business unit.

The parties further gave some examples to demonstrate their genuine continued commitment to capital expenditure, by claiming that CWG will:

- continue to roll out its MSAN deployment to increase broadband services and coverage;
- continue to improve its mobile network coverage;
- continue to introduce new telecommunication services to meet new customer demands, including where appropriate, investment in new 4G/LTE services

Batelco/CWG/CWJ noted that the commercial management of CWG and CWJ will remain in the hands of the current CWG and CWJ management teams, and such teams will be fully supported by Batelco, in particular its senior executives at a group level. However, they also highlighted that Batelco has extensive experience in the telecommunications industry and that it continually innovates in order to provide customers with the latest advances in technology. In addition, the parties were keen to assure CICRA that Batelco does not intend to risk the financial stability of CWG and CWJ or to expose them to any form of jeopardy by seeking to charge their assets inappropriately or prejudice their licences in any adverse way.

Batelco stated that it takes regulatory compliance very seriously, which is reflected at the Board level by a Regulatory Affairs Sub-Committee comprised of board directors that reports to the main Batelco Board on regulatory issues and developments, and that it has regulatory specialists that manage regulatory affairs of various Batelco group companies.

The parties further contended that they fully recognise the strategic importance of the telecommunications infrastructure to the economies of both the Bailiwick of Guernsey and Bailiwick of Jersey. As Guernsey's incumbent operator, it was stated that CWG has always fully supported the States' strategic objectives for the sector and provided that these objectives continue to be set in an objective, transparent and evidence-based manner, will continue to do so.

CWG noted that it is already actively engaged, through participation in the ICT Strategy Working Group meetings, in the Commerce & Employment Department's attempts to help create the right environment for business to prosper, and to ensure that Guernsey can continue to attract inward investment.

5. CICRA's Proposed Approach

CICRA's preliminary views in the consultation

The consultation document set out CICRA's preliminary views on how the change of control provisions in telecoms licences should be interpreted and the factors that are likely to be relevant to a review of a change of control notification.

In particular, our preliminary views were that:

- a consideration of whether the prospective controller would have been granted a licence by CICRA to operate the network or provide the telecoms services was likely to be relevant to an assessment of whether, and on what conditions (if any), to allow a change of control in the licensee. However, the position should be considered as if the award of the licence were to have occurred in the present day, rather than at the time of the actual award (i.e. in CWG's case, 2001);
- the consideration of whether a controller would have been granted a licence may be related to the importance of the assets and services provided by the licensee in the context of the overall telecoms market;
- the focus of an assessment of a change of control should be on whether the change to the control of the relevant licensee jeopardises its willingness or ability to provide high quality, sustainable telecoms services, or to comply with its licence conditions or other regulatory requirements; and
- overall, the general statutory duties which apply to the exercise by CICRA of telecoms regulatory functions – section 2 of *The Regulation of Utilities (Bailiwick of Guernsey) Law, 2001* and Article 7 of the Jersey Telecoms Law, which are reproduced in section 3 of this provisional decision – will also apply to CICRA's assessment of a change of control notification. Those general duties refer to such factors as the need to protect the interests of consumers and users, and to ensure the provision of services that satisfy all reasonable, or "current and prospective", demand for such services.

We have also stated our preliminary view that regulatory risks arising from new control, and therefore relevant factors for the consideration of a change of control notification, could include the following:

- a. The new controller is unwilling or unable to provide sufficient finance to the licensee (including retained earnings) to allow it to undertake capital expenditure:
 - i. to fulfil universal service obligations;

- ii. to meet increased demand for services;
 - iii. to improve the quality and coverage of telecommunications services, and
 - iv. to facilitate the availability of new telecommunications services;
- b. An assessment of the materiality of risks to the financial and commercial independence of the licensee;
 - c. The new controller does not have the operational or managerial expertise to operate the licensee's network;
 - d. The new controller jeopardises the financial stability of the licensee, whether by increasing its gearing levels, allowing charges over the licensee's core assets or requiring the licensee to cross-guarantee other group businesses' liabilities; and
 - e. The new controller refuses to allow the licensee to take action to comply with licence obligations or directions from the regulator. For example, the new controller's record of regulatory compliance under relevant telecommunications laws in any of the jurisdictions where the new controller holds a telecommunications licence might be relevant to this factor.

CICRA's approach to the provisional decision and key issues

To the extent that respondents to the consultation commented on the preliminary views set out above, they were generally supportive of the general approach outlined in the consultation. As such, it has been adopted for the purposes of this provisional decision (and, to the extent appropriate, is likely to guide our review of future notifications of changes of control for telecoms licensees).

Given that approach, there have been two main strands to our review of the existing proposed change of control:

First, a high-level operational review has been undertaken of the new controller, Batelco, and its plans for the businesses currently conducted by the licensees, in a similar fashion to the review that might be carried out by CICRA when receiving an application for a new telecoms licence. This process has considered a range of issues (and potential regulatory risks), including, in particular, operational and managerial expertise, access to capital and investment plans, and history of regulatory compliance. A discussion of this operational review is set out in Section 6.

Second, consideration has been given to whether the change of control gives rise to particular regulatory risks, such that it would be appropriate to seek modifications to the conditions in the licences of the relevant licensees. For example, licence modifications could address issues such as the financial and commercial independence of the licensees, and the ability of the licensees to take action to comply with licence obligations or directions from the regulator. Section 7 of this provisional decision sets out CICRA's provisional decision on licence modifications.

In addition, it has been necessary to reach provisional conclusions on two key issues:

1. Should CICRA take a different approach to considering the change of control of CWG to that of CWJ?
2. Should the review be confined to matters occasioned by the proposed change of control?

Should a different approach be taken in respect of CWG and CWJ?

In the consultation, we stated that the consideration of whether a controller would have been granted a licence may be related to the importance of the assets and services that they would have controlled to the overall telecoms market. After reviewing the consultation responses, this remains our view.

It is instructive that virtually all of the consultation responses concerned the effect of the change of control on CWG (and, in particular, CWG's fixed-line services). The impact on consumers and the wider economy of a serious breakdown in CWG's operations (given its role as the operator of the main 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. Moreover, CWG has significant market power in a range of fixed and mobile markets in Guernsey and a significant market share in a number of other markets, and is a major provider of wholesale services to other telecoms operators. It also has a requirement to fulfil certain public service conditions, including the universal service obligation imposed by direction of the States of Guernsey.

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.

Due to the different positions of CWG and CWJ outlined above, we have provisionally concluded that it would not be appropriate to undertake a detailed review of the change of control with respect to CWJ. While such decisions will turn on their facts, it is likely that CICRA would take an equivalent view with respect to

future changes of control for other telecoms licences in a similar position to that of CWJ.

Should the review be confined to matters occasioned by the change of control?

A significant number of consultation responses raised the issue of CWG's provision of off-island connectivity. For example, as quoted in section 4 above, one respondent contended that CICRA should conduct a full examination of the market for off-island and inter-island connectivity, especially the use of the CIEG telecommunication fibres, before approving the proposed change of control.

We note 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 is 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. On this view, 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 (see section 6 below). However, we have 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.

6. Operational review

As proposed and outlined in Section 5 above, we have conducted a review of the ability of Batelco as a new controller of CWG to provide sustainable telecommunications services and to comply with its licence conditions for the benefit of the consumers and other users in the Bailiwick of Guernsey.

In our view, it is appropriate that the intensity of this review and the areas explored in it should be guided, at least in part, by the identity and experience of the proposed new controller. For example, when engaging in this review, we have had regard to the fact that Batelco is an existing operator of fixed-line and mobile networks in its home jurisdiction of Bahrain, as well as a fixed wireless and mobile network operator in a number of other jurisdictions in the Middle East. A more intensive review of technical competence would arguably have been necessary if the proposed new controller had been a financial investor with no background in the provision of telecoms services, or even an existing telecoms provider whose current activities were limited to wireless services, rather than fixed-line networks.

Information sought from CWG, CWJ and Batelco

Set out below are categories of information that CICRA initially sought from CWG, CWJ and Batelco:

1. Any business plans, analyses, reports, studies, surveys or any comparable documents prepared by or for the new controller for the purpose of assessing or analysing its proposed acquisition of the Licensee;
2. Details of the sources of funding for the new controller's acquisition of the Licensee;
3. Brief résumés of key managerial staff of the new controller, indicating relevant prior experience, qualifications and other sources of expertise as appropriate;
4. Corporate structure chart showing the proposed shareholding link between the new controller and the Licensee after the acquisition;

5. Audited accounts (if available), including a balance sheet, profit and loss account, and cash flow projections, for (i) the new controller and for (ii) the Licensee;
6. Details of the annual capital expenditure of the Licensee for the last five financial years;
7. Forecasts of the annual capital expenditure for the Licensee for a period of at least five financial years, and identification of any individual capital expenditure projects within that overall capex program;
8. List of all telecommunications licences held by the new controller or its subsidiaries;
9. List of all violations decisions/warnings/penalties issued under relevant telecommunications laws in any of the jurisdictions where the new controller or its subsidiaries hold a telecommunications licence; and
10. Description of the relationship, including the delegation of powers/responsibilities in the decision-making process, between the executive management of the new controller and the Licensee, in particular with relation to the decision-making process applicable to the regulatory compliance of the Licensee.

After reviewing this information, and the responses provided to the consultation, further information was sought from CWG, CWJ and Batelco. These supplementary questions focussed on the future of international telecoms connectivity links to Guernsey, and commitments from Cable & Wireless plc to the States of Guernsey upon purchase of Guernsey Telecom Limited:

11. What arrangements are currently in place for international connectivity for data and voice telecommunications services required and used by CWG to exchange data and voice traffic coming into and going out of the Channel Islands?
12. Which of these arrangements will remain in place after the proposed change of control? Which (if any) of the assets to provide these services – international cables, fibres or IRUs and associated infrastructure (cable landing stations, overland connections, access/usage agreements) are currently held by CWG and so will pass

to Batelco, and which will remain with CWC or Cable & Wireless Worldwide plc?

13. What plans does Batelco have to alter the arrangements for supply of international connectivity to take advantage of its own access to international connectivity agreements for the business currently conducted by CWG if the proposed transaction proceeds? Over what timescale will these changes take place?
14. What plans are in place to replace agreements for international connectivity once the existing CWG contracts expire?
15. What contractual obligations were imposed on CWG as part of the sale process? Can CWG provide assurances that these obligations have been fulfilled?

CICRA's provisional views

We have not sought to summarise in this provisional decision the evidence presented by CWG, CWJ and Batelco in response to the information requests set out above. However, after reviewing this evidence, we consider that the information provided by the parties during the investigation broadly supports 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 believes 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.

7. Proposed New Licence Conditions

As set out in section 3 above, the change of control provisions in telecoms licences in the Channel Islands, including the licences held by CWG and CWJ, entitle CICRA, upon receipt of a notification, to approve or refuse the change of control, or to approve the change subject to modifications of conditions in the licence holder's licence.

We have provisionally concluded that some modifications to the existing conditions in the fixed telecommunications licence of CWG are 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 are intended to reinforce existing ring-fencing provisions (contained in Condition 2.10) and to mitigate potential regulatory risks resulting from the proposed change of control, and would address some of the concerns raised by respondents to the consultation by ensuring that CWG retains appropriate control and financial resources within the business. A separate parent company/controller undertaking will also address some of the concerns raised about the potential remote management of the business and secures the availability of information to meet regulatory and statutory requirements.

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.

We have considered whether to seek a modification of licence conditions in order to deal with the observations made by the Commerce & Employment Department with respect to the desirability of CWG's controller having a commitment to ensuring that Guernsey's ICT infrastructure is resilient and internationally competitive, demonstrated in particular through a detailed long-term investment plan. CICRA notes the very strong emphasis being put by Commerce & Employment on the development of a strong ICT sector in Guernsey, and acknowledges the importance of high quality and competitively-priced telecoms services to many potential areas of economic diversification for the island's economy. As set out in section 6 above, we have reviewed forecasts of the annual capital expenditure for CWG for the next five

financial years, together with details of individual capital expenditure projects within that overall capex programme. That material would show that Batelco intends to conduct a significant programme of capital expenditure in the CWG business over the next 5 years, and that CWG and Batelco together have the financial means to undertake such investment. Moreover, Batelco and CWG have stated that CWG (and CWJ) will continue to support the strategic objectives of the States of Guernsey (and the States of Jersey) post-acquisition.

Condition 16 of CWG's fixed telecommunications licence already includes quite comprehensive powers for CICRA to require CWG to set out its plans for investment in developing its telecommunications network. CWG is obliged under Condition 16.1 to "develop and operate the Licensed Telecommunications Network so as progressively to achieve standards in line with international best practice..." The powers in Condition 16 have not been actively pursued by CICRA in recent years. Our provisional conclusion is that with CWG passing to a new controller, it would be appropriate for us to use these existing powers to monitor closely CWG's development of fixed-line services in the initial years of Batelco's ownership.

Text of proposed new licence conditions

The text of the proposed 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

The Licensee shall at all times act in the manner best calculated to ensure that it has adequate -

- a. financial resources and facilities;*
- b. management resources; and*
- c. systems of planning and 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 above requirements must not be 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 in its capacity as a provider of Licensed Telecommunications Services.

LC 2.12-2.19 Undertakings from Ultimate Controller

- 1. 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. *The undertakings referred to in sub-paragraph (1) shall provide that -*
 - a. *those 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 may 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 company providing the undertaking will, and will procure that each of its subsidiaries (other than the Licensee and its subsidiaries) will, refrain from any action which would or may cause the Licensee to breach any of its obligations under Relevant Legislation or the conditions of the Licence.*
3. *“Relevant Legislation” is defined for the purposes of paragraph 2 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.*
4. *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.*
5. *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.*
6. *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.*

7. *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.*