



# Regulatory Consultation Process

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## Information Note

# Channel Islands Competition and Regulatory Authorities

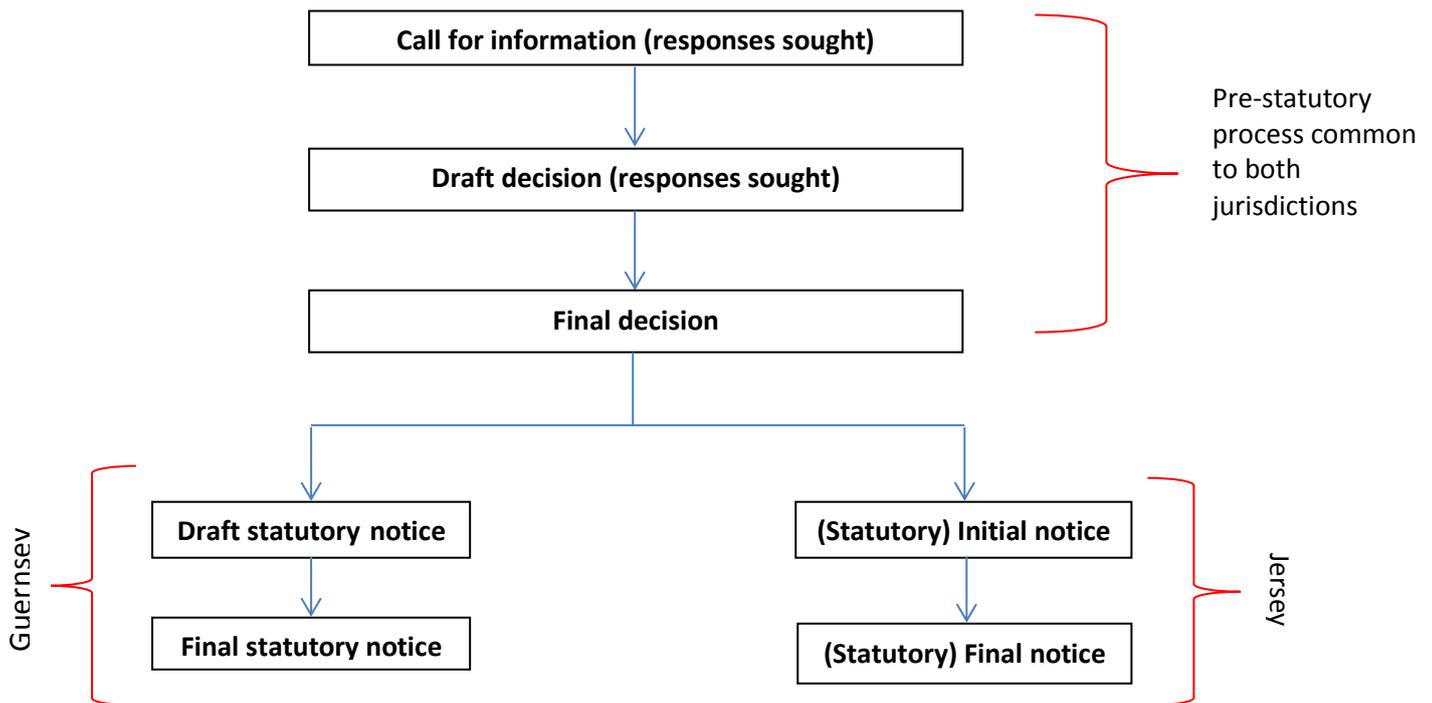
**Document No: CICRA 18/29**

**July 2018**

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1. Before carrying out certain regulatory functions, both the JCRA and the GCRA carry out a consultation (which is not a legal requirement in either jurisdiction). However, after completing the non-statutory consultation phase, both authorities must follow a formal statutory process, which is materially different in the two jurisdictions.
2. In April 2018, and for the reasons set out in its consultation document<sup>1</sup>, CICRA consulted on the introduction of a new pre-statutory process, which is set out below in diagrammatical form:



3. Three responses to the consultation were received<sup>2</sup>. The first (from Airtel) was positive. The second (from PoJ) was broadly supportive of the approach set out by CICRA, as well as making further suggestions (which CICRA will keep under review as it gains experience of operating the new process in practice) as to how the proposed process might be improved.
4. The third (from Sure) put forward two proposals:
  - a. That the JCRA should issue guidance on how it intends to apply Article 11(11) of the Telecommunications (Jersey) Law 2002 (the “2002 Law”), which provides that the JCRA “may” give fresh initial notice under that Article. Sure considers that the absence of such guidance provides an incentive for stakeholders to “withhold significant information until the consultation process has commenced, knowing that this is likely to mean that the JCRA will issue a fresh initial notice, even though it is not obliged to do so”;

<sup>1</sup> CICRA 18/11, attached as Annex 1

<sup>2</sup> From Airtel, Sure and Ports of Jersey, attached as Annex 2

- b. That the JCRA should put in place “*measures to deter stakeholders for attempting to game the process by withholding critical information that is likely to lead to changes in the JCRA’s final decisions from those proposed in the consultation document*”.
5. CICRA notes that the statutory process in Jersey does not prohibit respondents from submitting new information to the JCRA during a regulatory consultation process. On the contrary, the possibility that new information or new arguments may be presented after the issue of an Initial Notice is provided for by the 2002 Law, which explicitly requires the JCRA to consider such submissions<sup>3</sup> before either issuing a Final Notice or issuing a fresh Initial Notice. In addition, where a JCRA decision is being appealed, the 2002 Law provides that the Royal Court may consider evidence that was not before the JCRA when it made its decision<sup>4</sup>. It follows that JCRA guidelines on the circumstances under which it would (or would not) issue a fresh Initial Notice would not (and, indeed, should not aim to) prevent the submission by a respondent of new information. The ability of a respondent to do is built into the statutory process. The aim of the JCRA in putting in place this new regulatory consultation process is not to prevent the submission of full information to it by respondents. Rather, it is to enable the provision of such information at an early, pre-statutory stage to enable the statutory process to proceed more smoothly.
6. For the reasons set out above, the JCRA does not therefore consider that it would be appropriate (even it were able to do so) to put in place “*measures to deter stakeholders for attempting to game the process*”. Respondents are entitled to put forward additional information should they wish to do so; CICRA expects that all parties will engage with it in good faith and will provide information at the earliest possible opportunity.
7. Prior to carrying out the regulatory functions identified in the consultation document, and with effect from the date of the publication of this information note, CICRA will therefore use the pre-statutory process set out above. It will use its experience of operating this new system to inform consideration of whether a set of consultation guidelines or principles could usefully be developed.
8. CICRA wishes to record its thanks to all respondents who responded to this consultation.

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<sup>3</sup> 2002 Law, Article 11(4).

<sup>4</sup> 2002 Law, Article 12(4).

**ANNEX 1**



# Regulatory Consultation Process

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## Consultation Document

# Channel Islands Competition and Regulatory Authorities

**Document No: CICRA 18/11**

**April 2018**

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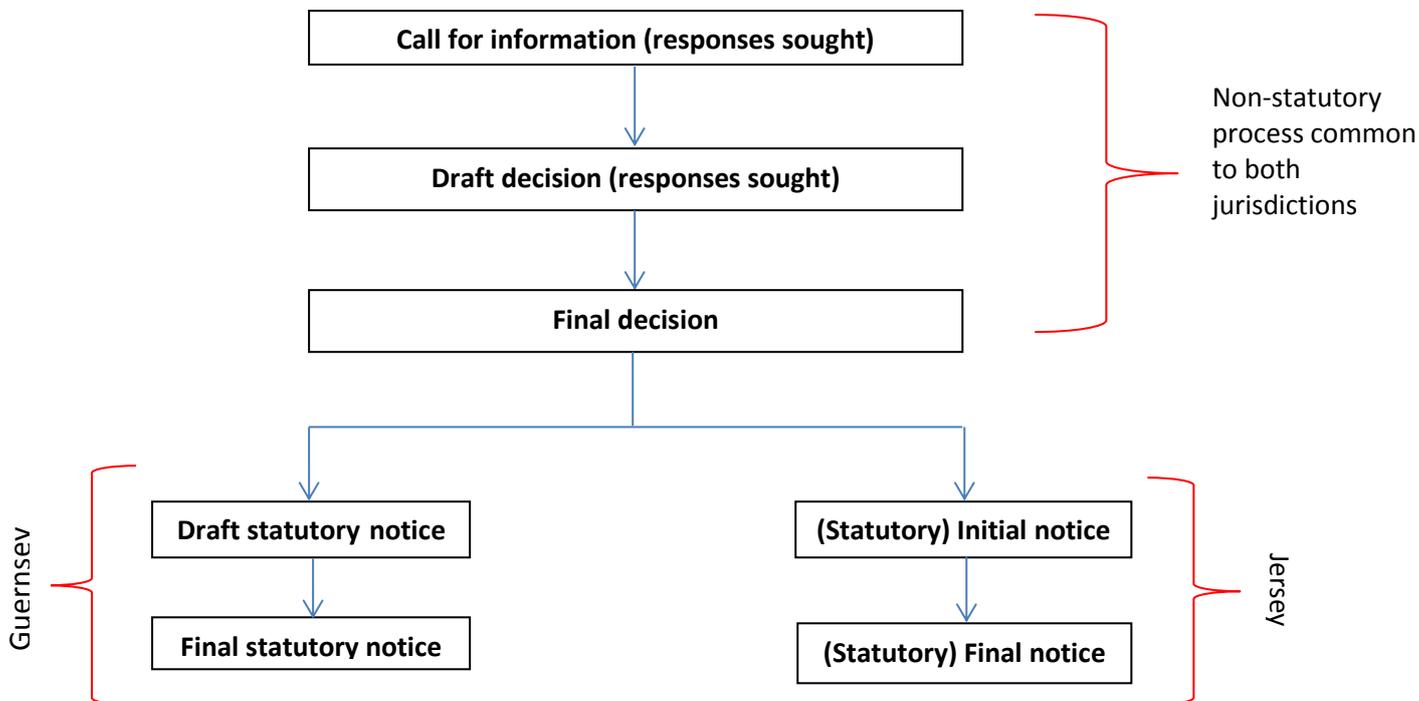
1. Before carrying out certain regulatory functions, both the JCRA and the GCRA carry out a consultation (which is not a legal requirement in either jurisdiction). However, after completing the non-statutory consultation phase, both authorities must follow a formal statutory process, which is materially different in the two jurisdictions.
  
2. In summary:
  - (a) In Guernsey, before making certain decisions<sup>5</sup>, the GCRA must:
    - i. Publish notice of its proposed decision;
    - ii. Allow at least seven days for written representations to be made;
    - iii. Consider the representations;
    - iv. Make its decision; and
    - v. Publish notice of that decision.
  
  - (b) In Jersey, before exercising a (specified) regulatory function as defined under the applicable law<sup>6</sup>, the JCRA must:
    - i. Give initial notice in the form and with the content prescribed in the relevant law;
    - ii. Allow at least 28 days for representations to be made<sup>7</sup>;
    - iii. If representations are made which lead the JCRA to alter the content of the initial notice materially, withdraw the initial notice and issue a fresh initial notice;
    - iv. If representations are made which do not lead to the JCRA materially altering the content of the initial notice, issue a final notice in the form and with the content specified by the law.
  
3. It can be seen that the two jurisdictions adopt markedly different approaches in this area, with the Jersey procedure being significantly more prescriptive and longer than that applied in Guernsey. This leads to duplication of effort for both CICRA and respondents, since it can involve producing and responding to two distinct sets of documents at each stage of the process. In addition, the highly prescriptive statutory process that is in place in Jersey makes it difficult to seek the views of respondents at an early stage in a formal, but flexible, manner.
  
4. In order to address these issues, CICRA proposes to put in place a new pre-statutory process, which is set out below in diagrammatical form:

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<sup>5</sup> Various decisions under the Telecommunications (Bailiwick of Guernsey) Law, 2001; the Post Office (Bailiwick of Guernsey) Law 2001; the Electricity (Guernsey) Law 2001.

<sup>6</sup> “Specified regulatory function” as defined under the Telecommunications (Jersey) Law 2002; the Postal Services (Jersey) Law 2004; “regulatory functions” as defined under the Air and Sea Ports (Incorporation) (Jersey) Law 2015.

<sup>7</sup> If no representations are made, the initial notice will come into effect automatically after the 28 day period for making representations has expired.



5. CICRA considers that the above process would address the problems identified, as it:

- (a) Would enable respondents to make any representations or objections to a CICRA proposal at an early, informal and pre-statutory stage. This would enable CICRA to deal with the responses flexibly and thoroughly before beginning the statutory process;
- (b) Would enable CICRA to run a single consultation process with a single set of documents up to and including the “final decision” stage, which, where issues are common to both jurisdictions in the telecommunications sector, would reduce the administrative burden on respondents and on CICRA. Separate sets of documents (one for each jurisdiction) would be produced at the statutory stage and, assuming that all relevant matters had been considered at the pre-statutory stage, could be relatively short.

6. Interested parties may submit comments on the content of this consultation to CICRA in writing or by email to the following addresses:

<p>CICRA Suite 4, 1st Floor, La Plaiderie Chambers, La Plaiderie, St Peter Port, Guernsey, GY1 1WG</p> <p><a href="mailto:info@bicra.gg">info@bicra.gg</a></p>	<p>CICRA 2nd Floor Salisbury House, 1 - 9 Union Street, St Helier, Jersey, JE2 3RF</p> <p><a href="mailto:info@bicra.je">info@bicra.je</a></p>
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7. The closing date for submission of responses is 21 May 2018.

## **ANNEX 2**

**From:** Lisa Moyse [<mailto:Lisa.Moyse@airtel-vodafone.com>]

**Sent:** 20 April 2018 15:57

**To:** Jill Perkins

**Subject:** Re: CICRA Regulatory Consultation process

Hi Jill

We are ok with the proposed changes within this consultation, would you require that clarity in a formal letter as we have no other comments to add ?

KR

Lisa

**Lisa Moyse**

Head-Roaming & Regulatory Affairs

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**PORTS OF JERSEY**  
YOUR ISLAND GATEWAY

**Ports of Jersey's Response to CICRA's  
Consultation on their Regulatory  
Consultation Process**

**May 2018**

# Ports of Jersey's Response to CICRA's Consultation on their Regulatory Consultation Process

## Introduction

Ports of Jersey welcomes CICRA's consultation on their regulatory consultation process and believes that this is a very helpful and positive move that will allow CICRA to align the pre-statutory processes in Jersey and Guernsey and to improve other aspects of the consultation process. We believe that the aim of consultation should be to help CICRA reach a sensible constructive outcome that meets its statutory duties through taking account of the reasoning and views of interested stakeholders, rather than rigidly following a particular process. This paper sets out our response to the issues set out in CICRA's consultation as well as our comments on the wider regulatory consultation process which we think could usefully be developed into a published note on CICRA consultation guidelines or principles<sup>8</sup>.

## Non-Statutory process for consultation

POJL agrees that it could be helpful to have a non-statutory process prior to the formal statutory initial and final notices. We agree that this might include a Call for Information and Draft Decision that prompt written responses followed by a Final Decision, however we also see benefit in including other, wider (and potential more informal) approaches to consultation including meetings with stakeholders and/or stakeholder groups, workshops, online tools, focus groups, presentations etc. as part of the consultation process both in terms of obtaining information and developing and discussing policy proposals. This can allow in-depth discussion about the details of regulatory proposals with stakeholders who are directly affected or have a strong interest in the issue, while at the same time allowing a wide range of stakeholders to register their views without necessarily needing to write a detailed consultation response.

We encourage CICRA to have more interaction and meetings as they develop their policy – both before and during the process and to make it more of a discussion about the merits and practicalities of different options and what is trying to be achieved. We believe that CICRA should be prepared to set out their evidence and analysis and justify their proposed approach. The 'ping pong' of publishing a consultation, waiting for a month for responses, reissuing the consultation if there are significant issues raised and responding again, with very few if any meetings to debate the issues raised is cumbersome, not a good way to develop policy and often leads to delays and policy paralysis. Policy should be developed in a timely manner by debating and exploring the issues, consulting and considering the evidence and arguments for any particular policy outcome.

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<sup>8</sup> For example the States of Jersey have published their consultation code of practice at <https://www.gov.je/Government/Consultations/Documents/20150708%20ID%20States%20Code%20of%20Practice%20on%20Consultation%20CLS.pdf> and Ofcom have published consultation principles at <https://www.ofcom.org.uk/consultations-and-statements/how-will-ofcom-consult>

We believe that the process should be flexible and proportionate to the importance of the issue concerned and the time scale available – for example developing a 5 year regulatory charging framework should include a more detailed and iterative policy development process including pre-statutory as well as statutory consultation stages, while agreeing a one year price rise might only require the statutory stage. There is a danger that a 5 stage non-statutory and statutory process as set out in the consultation extends the policy development timescales unnecessarily.

### **Setting a timetable for the policy development process**

We believe that at the start of the process CICRA should set out its proposed timetable for completing the non-statutory and statutory processes (with an indicative timeline for the different consultation steps involved), so that stakeholders are aware of the expected timescales (recognising that there will be occasions when policy development takes longer than originally planned). This would complement the details set out in CICRA’s annual work programme.

### **Publication of consultation responses**

We believe that it is important for CICRA to publish all consultation responses on their website in a timely manner (we would suggest within 2-3 weeks of the completion of the consultation period) and certainly before any further policy development on the matter.

We note that CICRA states in most of its consultations that *“it is CICRA’s normal practice to publish consultation responses on its website”*, and that its more recent publications have included publication of responses to the previous consultation. We welcome this improvement, and would like to see early publication of responses incorporated into CICRA’s formal consultation process<sup>9</sup>. We also welcome the inclusion of a summary of the consultation responses in the subsequent policy document and would like to see this practice continued.

### **Responding to stakeholder comments**

We believe that it is important for CICRA at each stage in the policy development process to properly address and respond to each of the points raised by stakeholders in previous stages<sup>10</sup>. We believe that this is key to good policy making and will help to ensure that the decisions that CICRA reaches are transparent, well thought through and evidence based, we therefore welcome CICRA’s aim to *“deal with the responses flexibly and thoroughly”*. Responding to stakeholders comments is an important statutory requirement- where

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<sup>9</sup> Where a respondent prefers that some of their response should remain confidential, then the name and the non-confidential parts of the response should be published.

<sup>10</sup> for example in its response to the consultation on port operations market power (CICRA 16/15), POJL raised the important issue of countervailing buyer power as a reason why POJL did not have market power, however CICRA covered some of the points in the Final Notice, given the timescales unfortunately POJL did not have opportunity to respond.

representations are made to the Initial Notice, the law<sup>11</sup> requires that the JCRA must issue a Final Notice “*summarizing the representations received, and setting out or summarizing the JCRA’s response thereto, and the reasons for that response*” although this has not always been the case<sup>12</sup>.

### **Provision of advanced copies of regulatory documents for checking**

It is standard practice in UK regulation to provide an advanced copy of relevant parts of regulatory documents to the regulated company up to a week in advance of publication so as to allow them to check for factual accuracy and commercial confidentiality. In addition, it is standard practice to provide a final embargoed version of the document to the regulated company 24 hours before publication to allow them to prepare a Press Release or other media response<sup>13</sup>.

CICRA helpfully provided an advanced version of the recent quality of service second Initial Notice, which allowed POJL to point out a number of issues that were able to be corrected before publication and (we believe) led to an improved document. The lack of a similar process in advance of the 2018 price determination Initial Notice meant that a significant misunderstanding about the costs of POJL’s investment programme and therefore the price rise required as well as other important factual errors were not corrected before the IN was published, leading to an extended (and as yet unresolved) delay to the 2018 price determination process.

In order for factual accuracy and commercial confidentiality checking to work effectively, POJL require at least 2 to 3 working days to allow us to properly check the various matters set out in the CICRA document. Provision of an embargoed final version of the document the day before publication would be a welcome courtesy.

### **Conclusion**

POJL is pleased to respond to CICRA’s consultation on the regulatory consultation process and see this as a welcome and positive move. We believe that the changes that CICRA propose, together with the other wider moves that we suggest in our response could usefully be developed into a set of CICRA consultation guidelines or principles.

### **Ports of Jersey**

**May 2018**

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<sup>11</sup> Air and Sea Ports (Incorporation) (Jersey) Law 2015, Section 23(4)(b)

<sup>12</sup> We note that while the Final Notice for the 2018 price determination (CICRA 18/06) did include a summary of representations received, it did not set out or summarize the JCRA’s response to the representations received or the reasons for that response

<sup>13</sup> In cases of concerns over the release of price sensitive information, an advanced copy is provided at 5pm after the stock market has closed. Since POJL is not a listed company, this concern would not be relevant and there would be no barrier to earlier release.



# Sure's response to CICRA Document 18/11: Regulatory Consultation Process

May 21<sup>st</sup> 2018

## Introduction

Sure (Guernsey) Limited and Sure (Jersey) Limited (collectively referred to in this response as “Sure”) welcome CICRA’s consultation on the regulatory consultation process, which was published on the 10th April as CICRA document 18/11. Sure agrees with CICRA that the current consultation processes across the Channel Islands are not optimised. In addition, the individual consultation processes in these two jurisdictions are not individually optimised and Sure considers that CICRA<sup>14</sup> should therefore take this opportunity to address all the relevant issues.

The regulatory consultation processes in Jersey and Guernsey have their roots in the relevant local legislation and differ considerably from each other:

- The minimum statutory time period required for consultation in Jersey is 28 days<sup>15</sup>, whereas it is only 7 days in Guernsey<sup>16</sup>;
- The consultation processes differ in that the Jersey legislation provides for the JCRA (if it chooses) to reissue a Draft final notice if it changes its conclusions as a consequence of consultation responses<sup>17</sup>, whereas that provision is not included in the Guernsey legislation

CICRA is not able to make changes to the primary legislation in Jersey and Guernsey and is now instead proposing to insert a common consultation process for the two jurisdictions, before the statutory consultation processes.

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<sup>14</sup> In the response, we generally refer to CICRA, in its role as the joint communications regulatory body for the Channel Islands. Where, however, we are referring to the specific provisions of the Guernsey and Jersey regulatory laws and the duties of the respective individual regulator for each of these Bailiwicks, we will refer to the GCRA and JCRA respectively.

<sup>15</sup> Section 11 (9) of the Telecommunications (Jersey) Law.

<sup>16</sup> Section 5 (3) of The Telecommunications (Bailiwick of Guernsey) Law, 2001.

<sup>17</sup> Section 11 (11) of the Telecommunications (Jersey) Law.

## Sure's response to CICRA's consultation

Sure agrees with CICRA that the current consultation processes are suboptimal in that they differ between Jersey and Guernsey and there is a considerable amount of uncertainty surrounding CICRA's implementation of the statutory legal consultation requirements in each jurisdiction.

### Issues in relation to the Guernsey legislation

As noted by CICRA, section 5(3) of the Telecommunications (Bailiwick of Guernsey) Law, 2001 provides for a statutory consultation process of a proposed decision of at least 7 days. Whilst the GCRA has typically been applying a 28 days non-statutory consultation process before it has published its proposed decision, it has not provided any formal commitment to using 28 days. Sure considers that, alongside whatever other measures CICRA decides to take as a consequence of this consultation, this should include a formal commitment that CICRA will ensure that consultation periods for Jersey and Guernsey are aligned so that a minimum of 28 days is allowed for consultations in both Guernsey and Jersey. This would be entirely in compliance with the legal provisions and would add certainty to the regulatory framework.

### Issues in relation to the Jersey legislation

Section 11 (11) of the Telecommunications (Jersey) Law, as amended in 2012, provides that the JCRA may re-consult on a proposed regulatory action if it decides to take a different course of action to that which it had originally proposed. The wording of 11 (11) – specifically: “...the Authority **may** give fresh notice...” [emphasis added] – clearly suggests that this is a discretionary power, available to the JCRA if it feels that it has made significant changes to its original proposals for regulatory action and that stakeholders should have the opportunity to make representations on its revised proposals.

This wording is a revision from the original wording of the Law, which imposed an *absolute* obligation on the JCRA to re-consult if it made *any* changes to its original proposed actions at all. The change was made to try to simplify the consultation processes in Jersey<sup>18</sup> and to make it more efficient. It was also recognised at the time that the changes would make the process less subject to gaming by stakeholders, who might otherwise have the incentive to withhold information until the formal consultation process, including the publication of an initial notice, and thus force the JCRA into a re-consultation process.

The JCRA has not, however, issued any guidance as to how it interprets the discretion now provided in the Law. It is Sure's experience from conversations with CICRA, that it still considers that it needs to re-consult if *any* changes are made from the actions proposed in the consultation document, whereas that is clearly not the case as the amended Law makes this discretionary. The uncertainty arising from the JCRA's lack of clarity on how it will apply the legislation in practice is unhelpful, as it still provides an incentive for stakeholders to withhold significant information until the consultation process has commenced, knowing that this is likely to mean that the JCRA will issue a fresh initial notice, even though it is not obliged to do so. This in turn also makes it very difficult to ensure that measures intended to be applied on a pan Channel Islands basis are applied consistently and at the same time.

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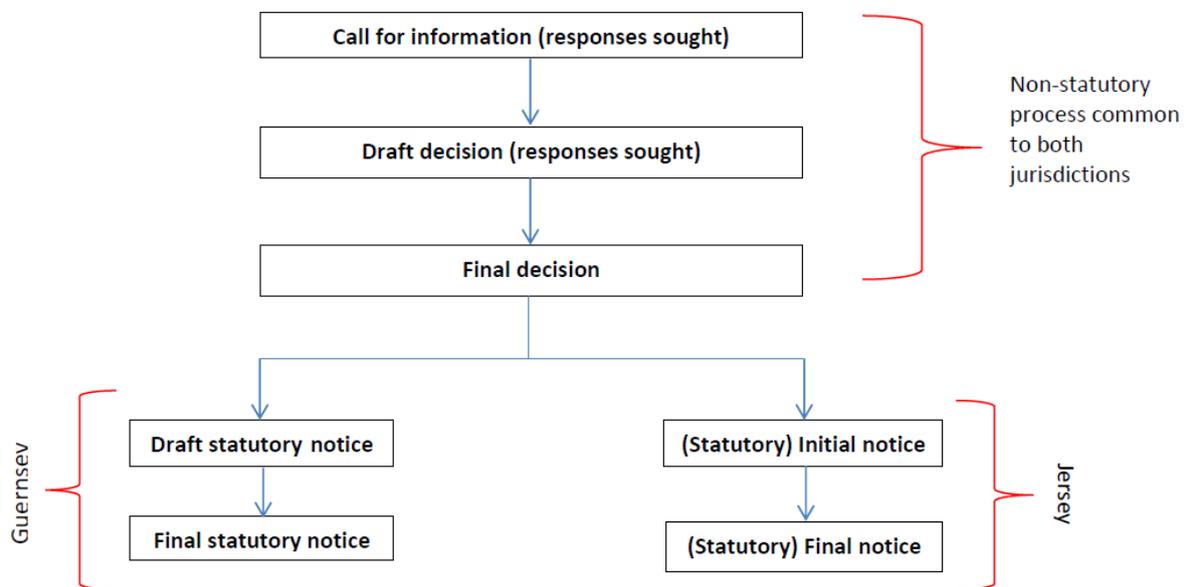
<sup>18</sup> See the 2011 paper attached as Annex A to this response, which is a proposition paper that was provided to the members of the States of Jersey to explain the reason for the proposed amendments to the 2002 Law.

Sure considers that, alongside whatever other measures CICRA decides to take as a consequence of this consultation, the JCRA should issue clarification of how it interprets its discretionary power to re-consult, and that such clarification should include measures to deter stakeholders for attempting to game the process by withholding critical information that is likely to lead to changes in the JCRA's final decisions from those proposed in the consultation document.

## CICRA's proposals

Whilst Sure is generally supportive of CICRA's objective of creating a more harmonious and consistent consultation framework across the two jurisdictions, we are concerned that the proposals as set out would not achieve this.

CICRA proposes to insert a common consultation process applicable in both Jersey and Guernsey, before the statutory consultation processes in the two jurisdictions. CICRA's illustration of the new consultation processes is copied below:



CICRA suggests that its proposals would achieve the following:

- a) *“Would enable respondents to make any representations or objections to a CICRA proposal at an early, informal and pre-statutory stage. This would enable CICRA to deal with the responses flexibly and thoroughly before beginning the statutory process;*
- b) *Would enable CICRA to run a single consultation process with a single set of documents up to and including the “final decision” stage, which, where issues are common to both jurisdictions in the telecommunications sector, would reduce the administrative burden on respondents and on CICRA. Separate sets of documents (one for each jurisdiction) would be produced at the statutory stage and, assuming that all relevant matters had been considered at the pre-statutory stage, could be relatively short.”*

Sure agrees that it would be helpful to have a common consultation process and not have to make responses to two separate consultation documents so, to an extent, we agree with the benefits of point a) above. The achievement of the benefits of a), however, depend significantly on the achievement of the benefits of b).

With regards to b) above, Sure considers that the proposal has a significant weakness in that it makes a critical assumption, namely: *“assuming that all relevant matters had been considered at the pre-statutory stage”*. Sure considers that, given the lack of clarity in relation to how the JCRA interprets its discretionary power to re-consult in Jersey (should the decisions in the statutory final notice differ from the proposals in the statutory initial notice), there could still be considerable incentives on stakeholders to withhold critical information until they respond to the statutory initial notice. This could cause not only a delay through re-consultation but also inconsistency between the final decisions made in Jersey and Guernsey.

In addition to not being likely to deliver the benefits CICRA suggests, Sure considers that CICRA’s proposals are likely to:

- take up a considerable amount of extra resources from both CICRA and stakeholders;
- add several months to the end-to-end consultation period; and thus
- delay the implementation of important regulatory measures, which could be to the detriment of the development of effective competition and ultimately to consumers.

If CICRA issues the clarification notices as suggested by Sure above to remove uncertainty and gaming incentives from the current statutory consultation processes, then Sure thinks that would constitute substantial improvements to the current consultation processes and practices.

With those clarifications, and with the need for re-consultation in Jersey reduced to a minimum, it should be possible for CICRA to issue joint consultation documents by simply adding a front section that explains that the document is issued by CICRA on behalf of the GCRA and the JCRA, quoting the relevant respective legal provisions. Where market consultations relate to specific market conditions in the two separate jurisdictions, the document could have separate Jersey and Guernsey sections as required.

Sure considers that the process outlined above would achieve the benefits sought by CICRA in its proposals without the need for introducing additional steps, and without resulting in delay to the introduction of potentially critical regulatory interventions.

Submitted on behalf of:

Sure (Guernsey) Limited and Sure (Jersey) Limited

21<sup>st</sup> May 2018

## **Annex A**

States of Jersey Proposition Paper explaining the rationale for the amendments to the Telecommunications (Jersey) Law