

GETTING THE
DEAL THROUGH 

Telecoms and Media 2015

Contributing editors

Laurent Garzaniti and Natasha Good
Freshfields Bruckhaus Deringer LLP

Publisher
Gideon Robertson
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Business development managers
Alan Lee
alan.lee@lbresearch.com

Adam Sargent
adam.sargent@lbresearch.com

Dan White
dan.white@lbresearch.com



Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

© Law Business Research Ltd 2015
No photocopying: copyright licences do not apply.
First published 2000
Sixteenth edition
ISSN 1471-0447

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of March 2015, be advised that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



CONTENTS

Global Overview	6	Germany	103
Laurent Garzaniti, Natasha Good and Hein Hobbelen Freshfields Bruckhaus Deringer LLP		Norbert Nolte, Christoph Werkmeister and Theresa Ehlen Freshfields Bruckhaus Deringer LLP	
Network Sharing	9	Ghana	109
Malcolm Webb Webb Henderson		Josiah Kojo Ankoma-Sey and Susan-Barbara Adjorkor Kumapley Bentsi-Enchill, Letsa & Ankomah	
National Security Reviews in the US Telecoms Sector	12	Greece	114
Kent Bressie Harris, Wiltshire & Grannis LLP		Dina Th Kouvelou and Nikos Th Nikolinakos Nikolinakos - Lardas & Partners Law Firm	
Angola	15	Hong Kong	120
António Vicente Marques AVM Advogados		Chuan Sun, Victoria White and Fiona Chan Freshfields Bruckhaus Deringer	
Australia	21	India	127
Simon Muys, Peter Waters and Adelina Widjaja Gilbert + Tobin		Atul Dua, Salman Waris and Arjun Uppal Seth Dua & Associates	
Austria	29	Indonesia	134
Bertram Burtscher and Gernot Fritz Freshfields Bruckhaus Deringer LLP		Agus Ahadi Deradjat, Kevin Omar Sidharta and Serafina Muryanti Ali Budiardjo, Nugroho, Reksodiputro	
Belgium	35	Ireland	141
Laurent Garzaniti, Hein Hobbelen and Anneleen Straetemans Freshfields Bruckhaus Deringer LLP		Helen Kelly, Nina Cummins and Darach Connolly Matheson	
Bermuda	43	Italy	148
Timothy Frith MJM Barristers & Attorneys		Tommaso Salonicco and Luca Ulissi Freshfields Bruckhaus Deringer LLP	
Brazil	49	Japan	156
Ricardo Barretto Ferreira and Paulo Brancher Barretto Ferreira e Brancher Sociedade de Advogados (BKBG)		Chie Kasahara Atsumi & Sakai	
Bulgaria	55	Kenya	161
Violetta Kunze and Milka Ivanova Djingov, Gouginski, Kyutchukov & Velichkov		Richard Harney, Angela Waki and Candice Kola Coulson Harney	
Canada	62	Lithuania	166
Laurence J E Dunbar, Leslie J Milton, Scott M Prescott and Stephen P Whitehead Fasken Martineau DuMoulin LLP		Indrė Burbulytė Tark Grunte Sutkiene	
Chile	69	Macedonia	172
Alfonso Silva and Eduardo Martin Carey		Gjorgji Georgievski and Simona Kostovska ODI Law Firm	
China	77	Myanmar	179
Chuan Sun, Victoria White and Billy Lui Freshfields Bruckhaus Deringer		Chester Toh, Alroy Chan, Daryl Larry Sim and Bryant Chiang Rajah & Tann Singapore LLP / Rajah & Tann NK Legal Myanmar Company Limited	
European Union	86	Netherlands	184
Laurent Garzaniti, Thomas Janssens, Hein Hobbelen and Alexia Burckett St Laurent Freshfields Bruckhaus Deringer LLP		Onno Brouwer, Winfred Knibbeler and Nima Lorjé Freshfields Bruckhaus Deringer LLP	
France	96	New Zealand	190
Jérôme Philippe and Aude-Charlotte Guyon Freshfields Bruckhaus Deringer LLP		Malcolm Webb and Joshua Woo Webb Henderson	

Nigeria	196
<hr/>	
Tamuno Atekebo, Otome Okolo and Chukwuyere E Izuogu Streamsowers & Köhn	
Poland	202
<hr/>	
Eligiusz Krześniak Squire Patton Boggs	
Russia	208
<hr/>	
Igor Gerber, Andrey Filippenko and Olga Melekhina Freshfields Bruckhaus Deringer LLP	
Singapore	214
<hr/>	
Chong Kin Lim, Charmian Aw and Shawn Ting Drew & Napier LLC	
South Africa	228
<hr/>	
Ridwaan Boda, Anneke Meiring and Mpho Thulare ENSafrica	
Switzerland	233
<hr/>	
Marcel Meinhardt, Astrid Waser and Mario Strelbel Lenz & Staehelin	
Taiwan	239
<hr/>	
Robert C Lee YangMing Partners	
Turkey	243
<hr/>	
Gönenç Gürkaynak and İlay Yılmaz ELIG, Attorneys-at-Law	
Ukraine	249
<hr/>	
Volodymyr Igonin and Taisiia Asadchykh Vasil Kisil & Partners	
United Kingdom	254
<hr/>	
Rod Carlton, Mark Sansom, Olivia Hagger and Thomas Cooling Freshfields Bruckhaus Deringer LLP	
United States	265
<hr/>	
John Nakahata, Kent Bressie, Paul Margie and Michael Nilsson Harris, Wiltshire & Grannis LLP	

Bermuda

Timothy Frith

MJM Barristers & Attorneys

Communications policy

1 Regulatory and institutional structure

Summarise the regulatory framework for the communications sector. Do any foreign ownership restrictions apply to communications services?

The regulatory and institutional framework for the telecommunications industry in Bermuda has recently been reformed to ensure that Bermuda has reliable and affordable access to electronic communications systems necessary for it to compete effectively in the international business and tourism markets.

Under the previous Telecommunications Act 1986 the regulatory function in Bermuda for telecommunications and broadcasting had been performed by four separate bodies:

- the Minister with responsibility for telecommunications (the Minister);
- the Department of Telecommunications (which assisted the Minister in regulating the market);
- the Telecommunications Commission (which acted in an investigative and advisory role for tasks delegated by the Minister pursuant to section 8 of the Act); and
- the Broadcasting Commission (which also assisted in delegated regulatory functions).

This fragmented regulatory structure was inefficient and unsatisfactory. Further, the Telecommunications Act 1986 regulated a wide range of telecommunications and broadcasting infrastructure and services through a multiplicity of licences. This regulatory framework was not capable of dealing efficiently with the development of telecommunications technology when the convergence of technologies and service platforms has meant that a unified regulatory regime is appropriate.

The Telecommunications Act 1986 prevented carriers from offering service bundles outside of their authorised class and carriers had been largely restricted to one of three classes of service, namely international, ISP or domestic telephone provider. This made little economic sense when faced with the development of digital technology, which allowed for large efficiencies to be made when multiple services could be provided over one network.

The licensing restrictions and regulatory inefficiency caused Bermuda to fall behind other countries as the investment required for such technological innovation was prohibitive in circumstances where a wider range of services could not be offered by individual carriers.

In response to pressure from the industry, the Minister produced a telecommunications regulatory reform policy on 18 November 2008. Following a lengthy development and consultation period, the following acts were passed that now provide the twin foundations of Bermudian telecommunication reform: the Electronic Communications Act 2011 and the Regulatory Authority Act 2011.

The Electronic Communications Act 2011 was brought into force on 28 January 2013.

The Electronic Communications Act 2011 has introduced the concept of an integrated communications operating licence (ICOL) as the regulatory cornerstone of the reforms. The grant of the licence is overseen by the Regulatory Authority, a body responsible for licensing and the creation and implementation of regulations to effect government telecommunications policy from the Minister of Education and Economic Development. The Electronic Communications Act 2011 provides the primary and

enabling provisions regulating electronic communications services and networks, while television and radio broadcasting remain regulated by the Telecommunications Act 1986, the Broadcasting Commissioner's Act 1953 and associated regulations made pursuant to their specific enabling provisions.

The Regulatory Authority itself was established pursuant to the Regulatory Authority Act 2011, which also came fully into force on 28 January 2013. The Authority has a wide range of responsibilities in electronic communication services and networks and spectrum management. The Regulatory Authority is responsible for promoting competition, for protecting consumers and for encouraging innovation. Its function involves dealing with complex issues of law, economics and technology and ensuring that its decisions are taken fairly and are clearly explained. The Regulatory Authority enables competition in the communications sector by facilitating market entry through ICOLs to provide networks and services and by regulating access to networks so as to develop effective choice for both business and residential consumers. In a rapidly evolving sector, both in technological and commercial terms, the Regulatory Authority provides the framework for the introduction of new services.

With a land mass of only 21 square miles and a population of approximately 65,000, Bermuda has traditionally imposed controls on the acquisition of land by foreign nationals and the restriction of the right of foreign-owned companies to carry on business in Bermuda. Successive Companies Acts have provided the mechanism whereby participation in the local economy is restricted to Bermudian-owned companies. Sections 113, 114 and the third schedule to the Companies Act 1981 provide that a local company carrying on business in Bermuda must be at least 60 per cent owned and controlled by Bermudians. However, in line with the economic policy of encouraging outside investment in Bermuda the 60/40 rule has recently been relaxed with regard to certain prescribed industries.

The Companies Amendment Act 2012, which came into force on 27 July 2012, provides exceptions to the 60/40 rule. Pursuant to the amended sections 113 and 114, a telecommunications company that is listed on a designated stock exchange is permitted to carry on business in Bermuda. The abrogation of the rule also extends to other prescribed industries such as energy, insurance, hotel operations, banking and international transport services by ship or aircraft. Bermuda is therefore opening its doors to foreign investment in the telecommunications market and is ready for international business.

2 Authorisation/licensing regime

Describe the authorisation or licensing regime.

In accordance with the Electronic Communications Act 2011 no person may establish, construct or operate an electronic communications network or provide an electronic communications service within the territorial limits of Bermuda or between Bermuda and another country without a valid communications operating licence authorising such activity. There are two principal types of licence: a communications operating licence pursuant to section 16 of the Electronic Communications Act 2011 and an ICOL pursuant to section 18 of the Act. Following the coming into force of part 5 of the Regulatory Authority Act 2011, the Authority has the power to grant individual and class licences in accordance with section 48(2) of the Regulatory Authority Act 2011. Under section 48(4) of the Regulatory Authority Act 2011, the Authority by general determination has established the process for obtaining a class licence and the process for obtaining an ICOL.

Applications are dealt with promptly and further information is available on the authority's website at www.rab.bm. The identities of the holders of class licences and the text of the ICOLs themselves are now published on the Authority's website. The Authority has now granted 20 ICOLs pursuant to the Electronic Communications Act 2011 with many of the ICOLs being granted under the transitional provisions of Part 12 of the Act transferring licences granted under the Telecommunications Act 1986 into the new regime.

With regard to duration, section 17 of the Electronic Communications Act 2011 provides that the Regulatory Authority is able to specify the duration of the licence. Section 18(3) of the Electronic Communications Act 2011 provides that the term of an ICOL shall not exceed 20 years. It is currently the practice to set the duration at this 20-year maximum in accordance with the basic terms and conditions of an ICOL set out in Electronic Communications (Integrated Communications Operating Licence) Regulations 2013. The full terms and duration of all current ICOLs can be found at www.rab.bm/icol-holders.

The licensee must pay to the Regulatory Authority such government authorisation fees as may be prescribed pursuant to section 52 of the Regulatory Authority Act 2011 and Government Fees Act 1965, and regulatory authority fees pursuant to section 11 of the Electronic Communications Act 2011, and section 44 of the Regulatory Authority Act 2011.

Currently ICOL licence fees are calculated as 1.75 per cent of the licensee's relevant turnover payable quarterly in arrears in accordance with Electronic Communications (Regulatory Authority Fees) Regulations 2014.

In addition the licensee must also pay such contribution as is specified by the Minister to support the development of Universal Service Provisions and Number Portability pursuant to section 34 and section 47 of the Electronic Communications Act 2011.

3 Flexibility in spectrum use

Do spectrum licences generally specify the permitted use or is permitted use (fully or partly) unrestricted? Is licensed spectrum tradable or assignable?

The Electronic Communications Act 2011 provides in part 7 that a spectrum licence is required in addition to a communications operating licence. Section 38 of the Act makes it clear that both licences are required. Part 7 of the Electronic Communications Act 2011 provides the Minister with the power to make general policies with respect to the management and allocation of spectrum pursuant to section 35 of the Act. Under section 36 of the Act, enabling powers are given to the Authority for the implementation of the general policies and regulations made by the Minister in respect of radio frequencies. Section 36(2) of the Act sets out the areas in which the Authority will implement regulations. Section 36(2) of the Act also provides the Authority with the enabling power to specify the criteria and procedures for the assignment of radio frequencies, the awarding of individual spectrum licences and the establishment of spectrum class licences and the granting of licence exemptions. When a demand for radio spectrum licences in Bermuda exceeds supply, section 36(2)(e) provides the Authority with the power to issue regulations concerning the conduct of selection processes, auctions, lotteries or hybrid processes for the award of spectrum licences. Spectrum licences restrict the use of spectrum and each licence refers to assigned frequencies.

Spectrum licences have been issued with their assigned frequencies and are published on the Authority's website. Timelines have now been published for the recovery of underused spectrum. Currently nine providers have spectrum licences and the Authority published its draft decision on which spectrum assignments would be renewed on 15 October 2014. The Authority has no current plans to auction spectrum allocation. The Minister's policy statement on spectrum was released on 22 September 2014 and a weighted application process is now subject to a consultation process.

4 Ex-ante regulatory obligations

Which communications markets and segments are subject to ex-ante regulation? What remedies may be imposed?

Under part 4 of the Electronic Communications Act 2011, the Regulatory Authority has the power pursuant to section 20 to make administrative determinations that impose ex-ante remedies on a communications provider in respect of its provision of electronic communications or the

provision and subscription of audio-visual programming content in relevant markets if, individually or together with others, the communications provider has significant market power in that market. If, following the market review procedure under section 23 of the Act, the Authority concludes that under section 24 of the Act the imposition of one or more ex-ante remedies is necessary to prevent or deter anti-competitive practices, the Authority may make an administrative determination imposing one or more of the following obligations on any communications provider found to have significant market power in a relevant market:

- the obligation to interconnect its electronic communications network with a network of another communications provider;
- the obligation to provide wholesale services to other communications providers for resale;
- the obligation to meet reasonable requests for access to and the use of specified network elements and associated facilities and services;
- the obligation to meet reasonable requests for access pursuant to the terms and conditions that may be established by the Authority including:
 - access to physical infrastructure including buildings, ducts and masts;
 - access to number translation or systems offering equivalent functionality;
 - access to fixed and mobile networks, in particular, access necessary to facilitate virtual network services;
 - access to subscription audio-visual services; and
 - such other forms of access to line or wireless network features and functionality as may be determined by the authority to be necessary to promote or protect effective competition in a relevant market.

The entry into force of the Electronic Communications Act 2011 in Bermuda heralded the introduction of wide-ranging regulatory intervention in the arena of interconnection disputes. Section 24(1) provides the Authority with the power to impose ex-ante remedies that are necessary to prevent or deter the anti-competitive effects caused by the presence of significant market power in the telecommunications market. The remedies themselves are set out in section 24(1)(a)-(o).

In particular, section 24(1)(a) provides that the Authority by administrative determination may impose an obligation on a telecommunications service provider to interconnect its electronic communications network with the network of another communications provider for the purpose of originating, transiting or terminating traffic, and to provide such interconnection pursuant to terms and conditions specified by the Authority. Furthermore, the Authority can require a telecommunications company to provide wholesale services to other communications providers for resale where the Authority deems it necessary to offer specified minimum features, functionality and other attributes. Such remedies may be withdrawn under section 25 where as a result of a market review conducted pursuant to section 23 the Authority determines that a relevant market is effectively competitive. In such circumstances the Authority shall not impose any ex-ante remedies in respect of that market and shall remove any ex-ante remedies previously imposed within a reasonable period of time, but the Authority may decide not to remove certain obligations, including transparency and accounting operation obligations, if they continue to be necessary to preserve effective competition in cases where a closely related relevant market is subject to ex-ante regulation. The initial Market Review was published by the Authority in April 2014.

5 Structural or functional separation

Is there a legal basis for requiring structural or functional separation between an operator's network and service activities? Has structural or functional separation been introduced or is it being contemplated?

The Electronic Communications Act 2011 specifically provides at section 18 of the Act that an ICOL authorises the licence holder to operate and provide public electronic communications networks and electronic communications services transmitted by means of such networks within the territorial limits of Bermuda or between Bermuda and another country subject to the availability of spectrum and the grant of any necessary spectrum licences or permits in accordance with part 7 of the Act. The Authority can require structural or functional separation. There are current remedies

in place with respect to wholesale services for internet access from two providers. These remedies were effective from August 2013.

6 Universal service obligations and financing

Outline any universal service obligations. How is provision of these services financed?

Part 6 of the Electronic Communications Act 2011 regulates universal service provision and the funding of such services. Section 32(1) provides that the Minister may make general policies and as necessary, regulations concerning the provision of universal service by one or more providers of public electronic communications including:

- the types of services that should be subject to mandatory universal service provision;
- whether any particular type or group of users should be eligible to certain universal services pursuant to social tariffs; and
- the sources of any special funding for the provision of these services, if required, and the basic framework of any funding scheme that may be deemed necessary, in accordance with section 34.

The policies made by the Minister and any applicable regulations ensure that requests of connection by end-users at a fixed location to a public electronic communications network or networks covering the geographic area of Bermuda and offering international access via undersea cables can be met by at least one ICOL holder and that the connection provided shall be at a minimum capable of supporting voice telephony, fax and functional internet access. Pursuant to section 33 of the Electronic Communications Act 2011, the Regulatory Authority shall assist the Minister in formulating and implementing any general universal service policy and regulations that may be considered or made pursuant to section 32. This includes consultation with industry participants and consumers concerning the relevant issues and options.

Section 34 of the Act allows for the establishment of the universal service funding scheme. The Act allows the Authority on its own initiative or upon request of the Minister to prepare a report following public consultation in order to assess whether the establishment of a funding scheme to support or promote the provision of universal service is necessary and proportionate taking into account all factors specified by the Minister or found to be relevant by the Authority, including:

- whether the mandatory provision of access to universal services or the offering of social tariffs imposes a financial burden on one or more designated communications providers, and the extent of any such burden; and
- whether any financial burden identified is unreasonable, based on an evaluation of all relevant factors, including the value of any historic commercial advantages enjoyed by a communications provider as a result of special rights previously enjoyed.

If, following the report, the Authority recommends the establishment of the universal service funding scheme, the Minister shall propose the procedures and requirements for establishing and controlling the funding scheme as set out in section 34(3) of the Electronic Communications Act 2011. There are currently no universal service obligations in place.

7 Number portability

Describe the number portability regime in your jurisdiction.

Pursuant to section 47 of the Electronic Communications Act 2011 the Regulatory Authority, no later than six months following the date of commencement of part 8 of the Act, was to identify the technical requirements and timetable for implementing number portability or the equivalent and was tasked with imposing any conditions on the relevant communications providers that it concluded would be necessary to facilitate switching between communications providers by customers in order to promote effective competition. Under the Electronic Communications Act 2011 number portability is now an obligatory feature of services offered by communications providers in Bermuda. In accordance with its statutory obligations the Authority published its determination on number portability on 16 August 2013. Number portability is now required and any ICOL holder who requests portability must also give it.

8 Customer terms and conditions

Are customer terms and conditions in the communications sector subject to specific rules?

Customer terms and conditions in Bermuda are subject to a certain minimum specification. In line with the underlying economic rationale of the telecoms reforms under the Electronic Communications Act 2011, consumer protection provisions are provided by the Authority in accordance with its powers under part 5 of the Electronic Communications Act 2011. The rights of customers and consumers are protected by general determinations of the Authority pursuant to its powers under section 26 of the Electronic Communications Act 2011. The Electronic Communications (Integrated Communications Operating Licence) Regulations 2013 sets out minimum terms and conditions at clause 14 including:

- clear and transparent rates and business terms;
- the identity and address of the licensee;
- details of maintenance services offered;
- particulars of prices and tariffs, and the means by which up-to-date information on all applicable tariffs, discounts and maintenance charges may be obtained;
- the duration of the contract, provided the subscriber will have the option of entering into a contract with a fixed term of no more than 12 months on fair and reasonable terms;
- the conditions including any charges for the renewal and termination of services and of the contract;
- compensation and refund arrangements if quality-of-service levels to which the licensee has committed and not met;
- the procedures initiating and resolving disputes in respect of the contract; and
- any other information that may be required by the Authority.

In addition, specific consumer protection is provided in the following areas:

- unsolicited communications are regulated pursuant to section 27 of the Electronic Communications Act 2011;
- premium rate services are regulated pursuant to section 28 of the Electronic Communications Act 2011;
- confidentiality of customer information is protected pursuant to section 29 of the Electronic Communications Act 2011; and
- privacy of telecommunication is protected pursuant to section 30 of the Act subject to the public policy exceptions set out in that section.

All of these requirements are set out in the draft licence annexed to the Electronic Communications (Integrated Communications Operating Licence) Regulations 2013.

The Authority has now set the minimum requirements of a residential consumer contract in a General Determination dated 3 October 2014.

9 Net neutrality

Are there limits on an internet service provider's freedom to control or prioritise the type or source of data that it delivers? Are there any other specific regulations or guidelines on net neutrality?

The Regulatory Authority has the power under part 4 of the Electronic Communications Act 2011 to enforce net neutrality. The Authority has scheduled work to be carried out with regard to net neutrality in 2015/2016.

10 Next-Generation-Access (NGA) networks

Are there specific regulatory obligations applicable to NGA networks? Is there a government financial scheme to promote basic broadband or NGA broadband penetration?

NGA networks will be regulated by the Regulatory Authority pursuant to the Electronic Communications Act 2011 and the Bermuda Regulatory Authority Act 2011. An NGA network is an electronic communications network for the purpose of the Electronic Communications Act 2011. Providers of NGA networks therefore require a licence issued by the Regulatory Authority pursuant to section 12 of the Electronic Communications Act 2011. However, there are currently no specific regulations in respect of NGA networks as opposed to generic regulation as an 'electronic communications network'.

11 Data protection**Is there a specific data protection regime applicable to the communications sector?**

Section 31 of the Electronic Communications Act 2011 provides criteria for the storage and disclosure of customer data as well as the reporting of data breaches.

12 Key trends and expected changes**Summarise the key emerging trends and hot topics in communications regulation in your jurisdiction.**

The electronic communications sector in Bermuda underwent root-and-branch reform pursuant to the implementation of the Electronic Communications Act 2011 and the Regulatory Authority Act 2011, which both came into force in 2013. The current trends are the regulation of 'over the top' services, net neutrality and bundling.

Media**13 Regulatory and institutional structure****Summarise the regulatory framework for the media sector in your jurisdiction.**

In Bermuda broadcasting is regulated in accordance with the Telecommunications Act 1986 and regulations made pursuant to section 59 of that Act. Content is regulated by the Broadcasting Commission pursuant to the Broadcasting Commissioner's Act 1953 and Television Broadcasting Service Regulations 1987. The Telecommunications Act 1986 and the Broadcasting Service Regulations made under section 11 of the Broadcasting Commissioner's Act 1953 continue to govern broadcasting and broadcasting content. However, the provision of electronic communications including telephone, internet and voice over internet provision is regulated by the Electronic Communications Act 2011 and the content of such mobile and internet services are also regulated by the Act in accordance with section 4(1)(d) and part 5 of the Act.

14 Ownership restrictions**Do any foreign ownership restrictions apply to media services? Is the ownership or control of broadcasters otherwise restricted? Are there any regulations in relation to the cross-ownership of media companies, including radio, television and newspapers?**

The implementation of the Electronic Communications Act 2011 does not affect the regulation of broadcasting activities in Bermuda, which remain regulated by the Telecommunications Act 1986. Under the Electronic Communications (Transitional) Regulations 2013 the Telecommunications Act 1986 ceased to apply to the electronic communications sector other than broadcasting.

There are currently stringent restrictions on ownership of a broadcaster in Bermuda. Under section 12(1) of the Telecommunications Act 1986 no broadcasting licence shall be granted unless the Minister is satisfied that the control of the broadcasting company is vested in persons who possess Bermudian status in accordance with the Bermuda Immigration and Protection Act 1956. Section 114 of the Companies Act 1981 provides that no local company shall carry on business of any sort in Bermuda unless it complies with part 1 of the third schedule to the Act. The third schedule provides that the company shall be controlled by Bermudians with at least 60 per cent of the total voting rights in the company being exercisable by Bermudians. Further the percentage of Bermudian directors and the percentage of shares beneficially owned by Bermudians in the company shall not be less than 60 per cent. This 60/40 rule was abolished by the Companies Amendment Act 2012 in respect of certain prescribed industries – telecommunications, energy, insurance, hotel operations, banking and international transport services by ship and air. Broadcasting is not yet a prescribed industry and is still governed by the 60/40 rule.

15 Licensing requirements**What are the licensing requirements for broadcasting, including the fees payable and the timescale for the necessary authorisations?**

Broadcasting licences are currently granted by the Minister following advice from the Broadcasting Commission pursuant to section 11 Telecommunications Act 1986. The applicant for a licence provides written evidence of its suitability for a licence and the Commission hears the application pursuant to section 11(2) Telecommunications Act 1986. Following the hearing the Commission submits a report to the Minister with its recommendations. The Minister may then grant or refuse the licence or remit to the Commission for further inquiry for recommendations within 30 days or such longer period as the Minister may allow. In such a case the final decision is made as soon as possible after receiving the second report from the commission in accordance with section 11(6) Telecommunications Act 1986. Under the Government Fees Amendment Regulations 2012 a radio or television licence costs 3 per cent of the broadcaster's revenue. The regulation of broadcasting has been unaffected by the implementation of the Electronic Communications Act 2011.

16 Foreign programmes and local content requirements**Are there any regulations concerning the broadcasting of foreign-produced programmes? Do the rules require a minimum amount of local content? What types of media fall outside this regime?**

In Bermuda programme content is governed by section 8 of the Broadcasting Commissioner's Act 1953 and the Television Broadcasting Service Regulations 1987. Section 8(1) of the Broadcasting Commissioner's Act 1953 prohibits the broadcast of any material that offends good taste or decency, is likely to encourage or incite crime, lead to disorder, or be offensive to public feeling.

Regulation 4(1) of the Television Broadcasting Service Regulations 1987 imposes an obligation on the broadcaster to classify programmes in accordance with the criteria set out in that regulation. Pursuant to regulation 5, the broadcaster has an obligation to allocate broadcasting time to certain categories of programmes as set out in regulation 5(1)-(4).

For the purpose of the Broadcasting Commissioner's Act 1953 'broadcasting' means the act of transmitting or retransmitting radio communications intended to direct reception and use by any member of the public without charge. For the purpose of the Television Broadcasting Service Regulations 1987 'broadcasting' means broadcasting by television and includes any sound broadcast transmitted by a television station whether accompanied by a visual signal or not. Online and mobile content are outside this regime and are governed by the Electronic Communications Act 2011 further to section 4(1)(d) of the Act. The provision of cable television is currently governed by the Cable Television Services Regulations 1987 made under section 59 of the Telecommunications Act 1986.

17 Advertising**How is broadcast media advertising regulated? Is online advertising subject to the same regulation?**

In Bermuda commercial advertising on television is controlled by regulation 6 of the Television Broadcasting Service Regulations 1987, which limits commercial advertising to not more than 14 minutes of commercial advertising in any 60-minute broadcast period. The limit is increased to 16 minutes pursuant to regulation 6(2) in the time leading up to prescribed national holidays. Online advertising is not subject to the same regulation. Commercial and marketing practices of communications service providers are governed by part 5 of the Electronic Communications Act 2011 and the codes of practice and general determinations issued by the Regulatory Authority pursuant to section 26 of the Act.

18 Must-carry obligations**Are there regulations specifying a basic package of programmes that must be carried by operators' broadcasting distribution networks? Is there a mechanism for financing the costs of such obligations?**

In Bermuda the majority of television content is carried by cable. A holder of a cable network licence may carry television programmes broadcast

by a broadcasting station licensed in Bermuda. Under regulation 12(2) of the Cable Television Service Regulations 1987 a broadcasting station shall elect for every period of three years commencing 1 November 2008 whether they wish their television programmes to be carried on a 'must-carry' or a 'retransmission consent' basis. If must-carry is elected a licensee shall carry on the system free of charge all television programmes broadcast by a broadcasting station pursuant to regulation 12(4) of the Cable Television Service Regulations 1987. If retransmission consent is elected a licensee must, within 30 days, confirm whether it intends to carry the television programmes of a broadcasting radio station. Where retransmission consent is elected and a licensee chooses not to carry the television programmes it must within 14 days inform the public via public printed media and by a direct notice to its customer and must also within that 14-day period file revised tariff rates with the commissioner for the programme tier in which the television programmes will no longer be available. Further, where retransmission consent is elected under regulation 12(5) and a licensee chooses to carry the television programmes on a retransmission consent basis but is not able to reach commercial agreement within 60 days, either party may refer the matter to the Broadcasting Commission for determination.

19 Regulation of new media content

Is new media content and its delivery regulated differently from traditional broadcast media? How?

In Bermuda new media content is regulated by part 5 of the Electronic Communications Act 2011. The contents of traditional broadcast media will continue to be regulated by the Broadcasting Commissioner's Act 1953 and the Television Broadcasting Service Regulations 1987.

20 Digital switchover

When is the switchover from analogue to digital broadcasting required or when did it occur? How will radio frequencies freed up by the switchover be reallocated?

Television in Bermuda is delivered by cable services. Radio broadcasting (other than services delivered by cable) is analogue. The Electronic Communications Act 2011 provides the Regulatory Authority with power to monitor radio frequency use and to allocate unused spectrum under part 7 of the Act. There is currently no digital switchover date.

21 Digital formats

Does regulation restrict how broadcasters can use their spectrum (multi-channelling, high definition, data services)?

Spectrum use is managed and regulated by licence pursuant to sections 35 to 38 Electronic Communications Act 2011. The Regulatory Authority is empowered to define usage within the terms and conditions of the spectrum licence.

22 Media plurality

Is there any process for assessing or regulating media plurality (or a similar concept) in your jurisdiction? May the authorities require companies to take any steps as a result of such an assessment?

Cross-media hegemony is governed and controlled through part 4 of the Electronic Communications Act 2011 in particular through section 20(1), which empowers the Authority to impose ex-ante remedies on a communications provider in respect of electronic communications or the provision of audio-visual programming if the provider is assessed as having significant market power.

23 Key trends and expected changes

Provide a summary of key emerging trends and hot topics in media regulation in your country.

The Regulatory Authority has been established pursuant to the Regulatory Authority Act 2011. The Authority is responsible for the implementation of policies produced by the Ministry of Education and Economic Development. The Regulatory Authority consists of commissioners supported by professional staff. The Regulatory Authority is independent of the communications industry and is responsible for the implementation and enforcement of the policies produced by the Minister but is not involved in the policymaking process. The Regulatory Authority is currently implementing the reforms heralded by the coming into force of the Electronic Communications Act 2011 and associated statutory instruments in 2013. Full details of the work that the Authority is carrying out with regard to licensing and spectrum management can be found at www.rab.bm.

Regulatory agencies and competition law

24 Regulatory agencies

Which body or bodies regulate the communications and media sectors? Is the communications regulator separate from the broadcasting or antitrust regulator? Are there mechanisms to avoid conflicting jurisdiction? Is there a specific mechanism to ensure the consistent application of competition and sectoral regulation?

Bermuda has undergone root-and-branch regulatory reform in the communications sector. The telecommunications industry is regulated by the Regulatory Authority pursuant to the Regulatory Authority Act 2011 and the Electronic Communications Act 2011. Broadcasting content continues to be regulated by the Broadcasting Commission pursuant to the Broadcasting Commissioner's Act 1953. The provision of broadcasting services is currently licensed and regulated by the Telecommunications Commission pursuant to the Telecommunications Act 1986. Under Electronic Communications (Transitional) Regulations 2013 the continuing application of the 1986 Act to communications providers is regulated by the Regulatory Authority in place of the Telecommunications Commission.



BARRISTERS
& ATTORNEYS

Timothy Frith

tfrith@mjm.bm

Thistle House, 4 Burnaby Street
Hamilton HM 11
Bermuda

Tel: +1 441 292 1345
Fax: +1 441 292 0756
www.mjm.bm

25 Appeal procedure**How can decisions of the regulators be challenged and on what bases?**

Decisions of the Regulators can be challenged by appeal to the Supreme Court pursuant to part 9 of section 96 of the Regulatory Authority Act 2011. The appeal is limited to points of law or mixed law and fact save for sectoral participants appealing an enforcement order under section 93 of the Regulatory Authority Act 2011 where a rehearing is permitted.

26 Competition law in the communications and media sectors**Describe the key merger and antitrust decisions in the communications and media sectors adopted over the past year by your antitrust authority.**

In Bermuda there is no independent merger control authority. The Bermuda Monetary Authority does not regulate the conduct of business combinations of companies listed on the Bermuda Stock Exchange and there is no equivalent to the City Code on Takeovers and Mergers or the Takeover Panel. The anti-competitive effects of a merger are regulated by

the Regulatory Authority using powers contained in part 4 of the Electronic Communications Act 2011. The effective control of anti-competitive practices are now relevant in Bermuda following the opening-up of the telecommunications sector to foreign investment following amendments to the Companies Act 1981 by the Companies Amendment Act 2012, whereby the prescribed industries of telecommunications, energy, insurance, hotel operations, banking and international transport services are exempt from the requirement under section 114 to be 60 per cent owned and controlled by Bermudians.

Getting the Deal Through

Acquisition Finance	Dispute Resolution	Licensing	Public Procurement
Advertising & Marketing	Distribution & Agency	Life Sciences	Real Estate
Air Transport	Domains & Domain Names	Mediation	Restructuring & Insolvency
Anti-Corruption Regulation	Dominance	Merger Control	Right of Publicity
Anti-Money Laundering	e-Commerce	Mergers & Acquisitions	Securities Finance
Arbitration	Electricity Regulation	Mining	Securities Litigation
Asset Recovery	Enforcement of Foreign Judgments	Oil Regulation	Ship Finance
Aviation Finance & Leasing	Environment	Outsourcing	Shipbuilding
Banking Regulation	Foreign Investment Review	Patents	Shipping
Cartel Regulation	Franchise	Pensions & Retirement Plans	State Aid
Climate Regulation	Gas Regulation	Pharmaceutical Antitrust	Structured Finance & Securitisation
Construction	Government Investigations	Private Antitrust Litigation	Tax Controversy
Copyright	Insurance & Reinsurance	Private Client	Tax on Inbound Investment
Corporate Governance	Insurance Litigation	Private Equity	Telecoms & Media
Corporate Immigration	Intellectual Property & Antitrust	Product Liability	Trade & Customs
Cybersecurity	Investment Treaty Arbitration	Product Recall	Trademarks
Data Protection & Privacy	Islamic Finance & Markets	Project Finance	Transfer Pricing
Debt Capital Markets	Labour & Employment	Public-Private Partnerships	Vertical Agreements

Also available digitally



Online

www.gettingthedealthrough.com



iPad app

Available on iTunes



Telecoms and Media
ISSN 1471-0447



THE QUEEN'S AWARDS
FOR ENTERPRISE:
2012



Official Partner of the Latin American
Corporate Counsel Association



Strategic Research Sponsor of the
ABA Section of International Law