



# **Services Regulation in the Caribbean**

## **Information and Communications Technology**

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**Inter-American  
Development Bank**

Integration and Trade  
Sector

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## Abstract

CARIFORUM States have generally taken a cautious approach in adopting commitments under the Economic Partnership Agreement by having them reflect their World Trade Organization commitments, excluding sensitive subsectors, and inscribing broad horizontal reservations. This report assesses the regulatory framework for trade and investment in five areas – horizontal measures, information and communications technologies, transport services, professional services, and tourism services in Barbados, Belize, Guyana, Jamaica, and Trinidad and Tobago under the CARIFORUM – European Union Economic Partnership Agreement. The analysis concludes that of the five areas reviewed, adjustments are recommended principally to legislation covering information and communications technologies, professional services, and transport services.

The report is part of the series: SERVICES REGULATION IN THE CARIBBEAN, which includes the present technical note of Information and Communications Technology as well as a Summary Report and 4 technical notes. To access them, you may either go to the web page [www.iadb.org/publications](http://www.iadb.org/publications) or use the links below:

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## INFORMATION AND COMMUNICATIONS TECHNOLOGY SERVICES

The information and communications technologies (ICT) sector is a combination of manufacturing and services industries that capture, transmit, and display data and information electronically. ICT services may be identified by their output, which is to process and communicate information by electronic means. The breath of ICT services traded globally is not captured by the UN Central Product Classification (CPC) system. The CPC omits significant core ICT services such as web hosting and application provisioning.<sup>1</sup> The services industries that could potentially fall under the heading of ICT services include wholesaling of machinery, equipment, and supplies of ICT goods; renting of office machinery and equipment (including computers); telecommunications; and computer and related activities.<sup>2</sup>

Legislation on the ICT sector is largely limited to telecommunications in almost all of the countries reviewed, although there is evidence that this is evolving with increasing recognition of the key role ICT services play in economic growth and development.<sup>3</sup> The assessment of the ICT sector presented in this chapter reflects the existing legal framework. As such, our focus is essentially on telecommunications services.

The legislation on computer and related services (CPC 84)<sup>4</sup> in the five countries that are the subject of this review is largely limited to the treatment of data, trade secrets, confidentiality, and cybercrimes. The EPA Understanding on computer services defines the scope of the sector and provides a non-exhaustive list of computer services (which is largely definitional). The EPA draws an important distinction between the enabling service and the content or core service, which is not covered by CPC 84.<sup>5</sup> A useful comparison may be made with the definition of telecommunication services in Article 94 of the EPA, discussed below. Both definitions draw attention to the fact that ICT services are classified in a technology-centric manner.

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<sup>1</sup> Note that this underpins proposals on further revisions of the CPC; e.g., “Classifying Information and Communication Technology (ICT) Services,” Working Party on Indicators for the Information Society, OECD, DSTI/ICCP/IIS(2006)11/FINAL.

<sup>2</sup> See “Measuring the Information Economy 2002,” Annex I: The OECD Definition of the ICT Sector, viewed online at: <http://www.oecd.org/dataoecd/34/37/2771153.pdf>.

<sup>3</sup> E.g., “Government of Jamaica, Information and Communications Technology Policy,” prepared by the Information and Telecommunications Department of the Office of the Prime Minister, March 2011, viewed at [http://www.jis.gov.jm/pdf/GOJ\\_ICTPOLICY\\_March2011.pdf](http://www.jis.gov.jm/pdf/GOJ_ICTPOLICY_March2011.pdf).

<sup>4</sup> The category of computer and related services (CPC 84) includes consultancy services related to the installation of computer hardware; software implementation services; data processing services; data base services; maintenance and repair services of office machinery and equipment, including computers; and other computer services.

<sup>5</sup> See EPA, Article 88.

Significantly, the EPA Understanding on computer services does not impose new obligations, but merely clarifies the scope of the specific commitments which States may have undertaken in Annex IV of the EPA.<sup>6</sup>

***The EPA regulatory framework on telecommunications***

Telecommunications is broadly defined in the GATS Annex on Telecommunications as “the transmission and reception of signals by any electromagnetic means.” The definition of telecommunications services in the EPA is slightly more precise than that found in the GATS.<sup>7</sup> The EPA definition highlights the distinction between the transmission and reception of electromagnetic signals and the content of whatever is transmitted. The definition of telecommunications services relates exclusively to the former, i.e., it is limited to transmission and reception and does not cover content. The EPA adopts the approach taken in the GATS Services Sectorial Classification List<sup>8</sup> in breaking down telecommunications into 14 sub-sectors (a. - n.) and an "other" category (paragraph o.).<sup>9</sup> Services commonly known as "basic"

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<sup>6</sup> Note that all countries reviewed have undertaken commitments on consultancy services related to the installation of computer hardware (CPC 841), software implementation services (CPC 842) (for Trinidad and Tobago this is limited to systems and software consulting services), data processing services (CPC 843) (for Trinidad and Tobago this is limited to information services, e.g., drafting and engineering services, digitizing, and vectoring, data entry, remote telemarketing), and data base services (CPC 844). All countries have bound modes 1, 2, and 3 without reservation save for Belize, which has imposed a condition on market access for commercial presence of a minimum 50 per cent local participation and transfer of knowledge and technology. Guyana and Barbados have undertaken additional bound commitments for maintenance and repair services of office machinery and equipment including computers (CPC 845); and Barbados and Trinidad and Tobago have undertaken additional commitments for data preparation services and other computer services not elsewhere classified (n.e.c.) (CPC 849).

<sup>7</sup> See EPA, Article 94(1)(a), which defines "telecommunications services" as all services consisting of the transmission and reception of electromagnetic signals, but not covering the economic activity consisting of the provision of content that requires telecommunications for its transport. The definitions in Article 94 of the EPA largely correspond to those of the GATS Telecoms Reference Paper. A notable exception is the definition of “regulatory authority,” which is new.

<sup>8</sup> MTN.GNS/W/120, July 10, 1991.

<sup>9</sup> See EPA, Article 94(1)(a), which defines telecommunications services as all services consisting of the transmission and reception of electromagnetic signals, but not covering the economic activity consisting of the provision of content that requires telecommunications for its transport. The 14 subsectors in the GATS Services Sectorial Classification list are:

- |    |   |               |
|----|---|---------------|
| a. | Voice telephone services                    | 7521          |
| b. | Packet-switched data transmission services  | 7523**        |
| c. | Circuit-switched data transmission services | 7523**        |
| d. | Telex services                              | 7523**        |
| e. | Telegraph services                          | 7522          |
| f. | Facsimile services                          | 7521**+7529** |
| g. | Private leased circuit services             | 7522**+7523** |
| h. | Electronic mail                             | 7523**        |
| i. | Voice mail                                  | 7523**        |

telecommunications are formally referred to as "public telecommunications transport networks and services" (PTTNS) and are generally seen as covering sub-sectors a. through g. of the GATS classification list (in addition to certain services falling within the "other" category that provide real-time transmission of customer supplied information). Other services (e.g., subsectors h. through n. and certain services within the "other" category), are generally referred to as "value-added" telecommunication services.<sup>10</sup>

The EPA regulatory framework provides special rules which govern telecommunications services in addition to the national treatment and market access obligations and general rules on transparency and procedural fairness. The EPA regulatory framework may be described as "GATS plus"; that is to say, it goes beyond the obligations imposed by the GATS as well as the additional obligations set out in the GATS Telecommunications Reference Paper. For those countries reviewed that have indicated in their Schedule of Specific Commitments to the GATS that they have undertaken the additional commitments in the Telecommunications Reference Paper, (all, that is, except Guyana), the principal new obligations imposed by the EPA are:

- The provision for a right of appeal against regulatory decisions.<sup>11</sup>
- The requirement that licensing fees be capped at the level of costs.<sup>12</sup>
- The obligation to establish compensation mechanisms for the provision of universal service.<sup>13</sup>
- The obligation to ensure confidentiality of telecommunications and related traffic data.<sup>14</sup>
- The obligation for the national regulatory authority to intervene, where requested, to settle disputes between service suppliers.<sup>15</sup>

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j.	On-line information and data base retrieval	7523**
k.	Electronic data interchange (EDI)	7523**
l.	Enhanced/value-added facsimile services, incl. store and forward, store and retrieve	7523**
m.	Code and protocol conversion	n.a.
n.	On-line information and/or data processing (incl.transaction processing)	843**
o.	Other	

<sup>10</sup> Note that the classification scheme is supplemented and further refined by the *Notes on Scheduling Basic Telecoms Commitments* that emerged from the WTO negotiations on basic telecommunications; see Note by the Chairman, Group on Basic Telecommunications, S/GBT/W/2/Rev.1, 16 January 1997. See also "Telecommunications Services: Background Note by the Secretariat," WTO doc. S/C/W/299, 10 June 2009.

<sup>11</sup> See EPA, Article 95.

<sup>12</sup> See EPA, Article 96.

<sup>13</sup> See EPA, Article 100.

<sup>14</sup> See EPA, Article 101; see also EPA, Title IV, which addresses the comprehensive framework that States have used to implement data protection.

Key aspects of the regulatory framework addressed below provide benchmarks for assessing the legislation and regulations of the five countries reviewed.

*General observations on the legislation in the countries reviewed*

The telecommunications acts of all five countries are evidence of the progressive liberalization of the sector in the region. The Telecommunications Act CAP 47:31 of Trinidad and Tobago notably was designed to establish a comprehensive and modern legal framework for a liberalized, competitive telecommunications sector, facilitating the entry of new service providers and the end of the virtual monopoly that previously existed in which the Telecommunications Services of Trinidad and Tobago served as the principal provider of telecommunications services in the country.<sup>16</sup>

The Telecommunications Act CAP 282B of Barbados facilitated the progressive liberalization of the telecommunications sector, taking into account the benefits of introducing advanced telecommunications technologies and an increased range of services, with due regard to the public interest and national security concerns. The Schedule to the Barbados Telecommunications Act sets out the transitional arrangements that were implemented for market liberalization and competitive pricing in accordance with a memorandum of understanding between the Government of Barbados and Cable and Wireless BARTEL Limited and Cable and Wireless BET Limited (signed October 16, 2001). These include altering the revenue-sharing arrangements to reduce and gradually eliminate the subsidy between international and domestic rates, and a three-phase approach to licensing new entrants into the market. Not until Phase III of the Transition Timetable could the minister grant licenses for international long-distance and fixed line services.<sup>17</sup> After the commencement of each phase, a licensee was entitled to apply for removal of any license conditions that were not required to be imposed by the minister in that phase in accordance with the schedule.<sup>18</sup> It was envisioned that the transition period would end in August 2003, but difficulties which arose in the process

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<sup>15</sup> See EPA, Article 102.

<sup>16</sup> The Telecommunications Act of Trinidad and Tobago provides for its phased entry into force; while some provisions came into operation on July 5, 2001, other provisions came into operation on June 30, 2004; see Telecommunications Act, section 1A. The act also repeals the Wireless Telegraphy Ordinance, Cable and Wireless (West Indies) Limited Ordinance, and Trinidad and Tobago Telephone Act; see Telecommunications Act, section 85.

<sup>17</sup> See Telecommunications Act CAP 282B, Schedule, paragraphs 4-8.

<sup>18</sup> See Telecommunications Act CAP 282B, Schedule, paragraph 9.



extended this to February 2005.<sup>19</sup> An unusual feature of the Barbados Telecommunications Act in this more liberal era is the reservation to the Crown of a residual exclusive right (i.e., subject to the provisions of the act) to provide telecommunications services in Barbados.<sup>20</sup>

In Jamaica, the Telecommunications Act has been under review in light of a new ICT policy that is subject to a public consultation process. Former prime minister, the Hon. Bruce Golding, explained that “[e]ven though it is a statute of relative vintage, we found that it had already become obsolete and in fact was impeding many of the new areas of competition that did not exist at the time when the legislative work was being done.”<sup>21</sup> The proposed amendments were intended to address issues raised by the OUR that are subject to public consultation, such as number portability. Other amendments that were fast-tracked included empowering the regulator to obtain information from licensees without a formal enquiry; the automatic amendment of the terms and conditions of all interconnection agreements to conform to the most current reference interconnection agreement authorised by the regulator; and enabling the regulator to determine application rates and charges to take into account all relevant factors, including cost orientation and local and international benchmarks. The proposed changes also addressed the power of the regulator to prescribe, after consultation with the FTC, competitive safeguards aimed at preventing anti-competitive activity in the market; and to make special provision for the protection of small service providers in utilizing services offered by large carriers (including the power and responsibility of the regulator to examine and approve customer contracts for wholesale and retail services).<sup>22</sup> The former administration had undertaken to introduce amendments to the legislation by mid-October 2011. However, this was overtaken by a series of political events which culminated in a change of administration. During the first week of May 2012, amendments to the Telecommunications Act were tabled in Parliament and have now been passed. It is unclear whether additional reforms that have been raised will be subject to further consultations and consequential amendments to the legislation.

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<sup>19</sup> E.g., Linda Schmid, “Barbados: Telecommunications Liberalization,” WTO case study viewed online at [http://www.wto.org/english/res\\_e/booksp\\_e/casestudies\\_e/case4\\_e.htm#fntext18](http://www.wto.org/english/res_e/booksp_e/casestudies_e/case4_e.htm#fntext18).

<sup>20</sup> See Telecommunications Act CAP 282B, section 3.

<sup>21</sup> E.g., “New Telecom Act Coming for Jamaica – Providers surprised with their Own Regulator.” GEEZAM, <http://www.geezam.com/new-telecom-act-coming-for-jamaica-providers-surprised-with-their-own-regulator/>.

<sup>22</sup> See “Gov’t Committed to Timeline for Changes to Telecommunications Act”, Jamaica Information Service, <http://www.jis.gov.jm/news/opm-news/28666-govt-committed-to-timeline-for-changes-to-telecommunications-act>

The legislative framework for telecommunications services in Belize for the most part suggests an open competitive market with certain important caveats, as described below. The sector has been marked by certain well publicized disputes since attempts were made to complete the privatization process in 2003, which had begun in 1989.<sup>23</sup> Litigation is on-going and is discussed below where relevant.

The regulatory framework for telecommunications services in Guyana is most distinguishable from that existing in the other countries reviewed. Guyana is the only country of the five that has not undertaken the additional GATS commitments in the Telecommunications Reference Paper. Guyana's GATS Schedule of Commitments includes only one communications subsector, i.e., "online information and data base retrieval,"<sup>24</sup> with a reservation on commercial presence under market access, where it is specified that public telecommunication transport networks and services were being provided by a monopoly supplier operating under a 20-year license with an option to renew for a further 20-year period.<sup>25</sup>

Guyana has undertaken more extensive commitments under the EPA, but these remain tentative in key areas. It may be noted, for example, that Guyana has undertaken commitments on "voice telephone services (CPC 7521)" but has indicated that this concerns "non-public use only." Significantly, CPC 7521 concerns public telephone services;<sup>26</sup> private line services are classified under business network services (CPC 7522). Guyana has also excluded private leased circuit services (CPC 7522, 7523) and packet-switched and circuit-switched data transmission services (CPC 7523), though undertaking commitments on telex services as well as certain other data and message transmission services (CPC 7523), telegraph services (CPC 7522) and facsimile services (CPC 7521, 7529). Commitments have also been undertaken on Internet and Internet access (except voice) (leased lines only) and mobile services for public use, terrestrial based but not satellite based. The list of Guyana's commitments, of which the afore-mentioned merely provide a sample, does not signal an intent to liberalize the voice telephony market beyond the status quo.

The regulatory environment in Guyana is defined by the Telecommunications Act CAP 47:02 of 1990; the purchase agreement of the same year between the Government of Guyana and

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<sup>23</sup> E.g., *Attorney General of Belize, ECOM Limited and Belize Telecommunications Limited v. Belize Telecom Limited and Innovative Communications Company LLC* [2009] UKPC 10.

<sup>24</sup> WTO document GATS/SC/37, 15 April 1994.

<sup>25</sup> See also WTO TPR Report, WT/TPR/S/218/Rev.1.

<sup>26</sup> Note that CPC 7521 covers public local and long distance services as well as mobile services.

a private company based in the United States, Atlantic Tele-Network Inc. (ATN); the license held by the Guyana Telephone and Telegraph Company Ltd (GT&T) and other licenses subsequently granted to other operators and telecommunications service providers; the Public Utilities Commission Act of 1999,<sup>27</sup> and the Post and Telegraph Act CAP 47:01. The Telecommunications Act CAP 47:02 does not apply to radio or television broadcasting services (other than cable program services) provided by any broadcasting agency which are governed by the Post and Telegraph Act CAP 47:01.<sup>28</sup> The Telecommunications Act imports certain provisions of the Post and Telegraph Act (dealing with the construction of apparatus, use of signals, etc) and addresses the coordination of the exercise of functions under the act and licensing powers in relation to, *inter alia*, wireless telegraphy.<sup>29</sup>

The telecommunications sector is characterized by a *de jure* monopoly in fixed telephony and a *de facto* duopoly in mobile telephony. However, recent efforts to liberalize the market and implement significant legislative reforms have stalled. It was anticipated that the Telecommunications Bill and Public Utilities Commission Amendment Bill would have been adopted in the final sitting of the Parliament in September 2011 (before it was dissolved to make way for national elections), but the bills were withdrawn. In withdrawing the bills the

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<sup>27</sup> See also Public Utilities Commission Act 1999, section 4, which defines a public utility as any person (including the lessee, trustee, receiver, or liquidator of such person) who or which owns facilities used to provide or provides certain services including the conveyance or transmission of oral, written, digital or any other form of messages or communications by telephone, wireless telephony, telegraphy, or wireless telegraphy, satellites, cable television, telecommunications service providers, pay telephone service providers, telecommunications resellers, internet and other telecommunications network service providers, radio common carriers, or cellular mobile providers or any other method of transmission, currently offered to the public or offered as common carriage in the future. A person is not deemed to be a public utility where such person merely provides a service only to a public utility, or itself, its employees or tenants, and such service is not resold to or used by others.

<sup>28</sup> The Telecommunications Act CAP 47:02 of Guyana defines “telecommunications services” as including a service consisting of the conveyance by means of a telecommunications system (i.e., a system for the conveyance, through the agency of electric, magnetic, electromagnetic, electrochemical or electromechanical energy) of speech, music and other sounds; visual images; signals serving for the impartation (whether as between persons and persons, things and things or persons and things) of any matter otherwise than in the form of sounds or visual images; or signals serving for the actuation or control of machinery or apparatus; as well as a directory information service; and a service consisting of the installation, maintenance, adjustment, repair, alteration, moving, removal or replacement of apparatus which is or is to be connected to a telecommunications system.

<sup>29</sup> See Telecommunications Act CAP 47:02, sections 1, 2, 31 and 40; see also *ibid*, section 57, which provides that “[e]xcept as otherwise provided in section 31, the provisions of the Post and Telegraph Act shall not apply to any matter for, or in respect of, which provision has been made in this Act.” Note also that the act defines wireless telegraphy as meaning the emitting or receiving, over paths that are not provided by any material substance constructed or arranged for that purpose, of electromagnetic energy, being energy which either (i) serves for the conveying of messages, sound or visual images, or for the actuation or control of machinery or apparatus; or (ii) is used in connection with the determination of position, bearing, or distance, or for the gaining of information as to the presence, absence, position or motion of any object or of any objects of any class, with certain provisos, Compare Post and Telegraph Act CAP 47:01, section 2”, which defines “wireless telegraphy”, *infra*.

government proposed that the matter be considered by the new Parliament, and explained that it was felt that significant comments which were made at a late stage warranted the deferral.<sup>30</sup>

The Guyana Telephone and Telegraph Co. Ltd. (GT&T) is controlled by Atlantic Tele- Network Inc. (ATN) which owns 80 per cent of GT&T's shares, while the remaining 20 per cent is owned by the Government of Guyana. Potential investors have been sought to purchase the government's share (en bloc).<sup>31</sup> In December 1990 GT&T obtained a 20-year exclusive license, renewable at the choice of the company for another 20 years; exclusivity applies to all national and international voice and data transmission, competition is permitted in cellular mobile services, internet access, and call center services via VSAT (very small aperture terminals).<sup>32</sup> Internet service providers (ISPs) are not regulated in Guyana and do not require a license to operate. They must, however, normally obtain a connection to the internet through the facilities of GT&T based on the company's assertion that it has exclusive rights in national and international voice and data transmissions. Some ISPs provide services via satellite, by holding only a spectrum license issued by the National Frequency Management Unit, which, *inter alia*, registers internet providers. The provision of voice over internet protocol (VoIP) is not regulated in Guyana, although GT&T has argued that this service falls within the exclusive rights which it enjoys under its license.<sup>33</sup>

#### *A few general observations*

Some general observations may be made of the regulatory framework in the countries reviewed. In most instances, telecommunications services are defined as a public utility governed by utilities regulations as well as competition legislation. Older enactments regulating radio and

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<sup>30</sup> The Telecommunications Bill and the Public Utilities Commission (Amendment) Bill would have created a new regulator, the Telecommunications Agency, and a new framework of regulations covering the management of interconnection rates and the liberalization of international call termination. E.g., <http://www.kaieteurnews.com/2011/09/23/telecoms-legislation%E2%80%A6govt-postpones-passage-to-next-parliament/> <http://www.telegeography.com/products/commsupdate/articles/2011/09/23/government-drops-telecoms-bill-at-the-eleventh-hour/>

<sup>31</sup> E.g., <http://www.kaieteurnews.com/2011/07/26/cabinet-to-consider-chinese-co-bid-for-govt-share-in-gtt-ramjattan/>. See also WTO Trade Policy Review, WT/TPR/S/218/Rev.1, which suggests that there is significant contention in relation to the parameters of the GT&T licence and it is not clear whether the license is limited in terms of service provided via technology that was available in 1990 when the license was granted.

<sup>32</sup> See also B. Persaud, Commissioner PUC, "Overview of Telecommunication Sector Guyana: A Regulatory Perspective," Guyana, June 2006.

<sup>33</sup> See also Peter A Stern, "Promoting Investment in Information and Communication Technology in the Caribbean" IADB Economic & Sector Study Series, RE3-06-001, May 2006, pp. 60-66; <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=917357>, which notes that many Internet Cafes offer VoIP international calling.

telegraph services continue to be significant, particularly with regard to the regulation of the spectrum.<sup>34</sup> The scope of the telecommunications sector as defined in domestic law is fairly consistent between countries and with the relevant international agreements.<sup>35</sup>

Telecommunications legislation establishes the framework for the management and regulation of telecommunications, including the basis for authorizing the ownership and operation of networks, the provision of universal service at affordable rates, the prevention of unfair competitive practices by carriers and service providers, and the overall sustainable development of the sector. Also significant is that most telecommunications acts require authorities to ensure compliance with the government's international obligations with respect to telecommunications,<sup>36</sup> which may be read to include the GATS and the EPA.

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<sup>34</sup> But see Western Union Telegraphy Company Act CAP 284 of Barbados, which appears to be largely of historical value only.

<sup>35</sup> E.g., Telecommunications Act of Jamaica, section 2, which defines telecommunications as the transmission of intelligence in any form or combination of forms by means of guided or unguided electromagnetic, electrochemical or other forms of energy, transmitted between persons and persons, things and things or persons and things. Section 2 further provides that "intelligence" may be in the form of speech, music or other sounds; visual images, whether still or animated; data or text; any type of signals; or any other form or any combination of forms. A "telecommunications network" is defined as a system or any part thereof, whereby a person or thing can send or receive intelligence to or from any point in Jamaica, in connection with the provision of a specified service to any person; and "telecommunications service" as a service provided by means of a telecommunications network to any person for the transmission of intelligence from or within Jamaica without change in the content or form and includes any two way or interactive service that is provided in connection with a broadcasting service or subscriber television service. Similarly, the Radio and Telegraph Control Act of Jamaica defines "telecommunications" as any transmission, emission, or reception of signs, signals, writing, images and sounds or intelligence of any nature by wire, radio, or any visual or other electromagnetic system; see Radio and Telegraph Control Act, section 2. The Telecommunications Act of Trinidad and Tobago provides another example. The term "telecommunications service" is defined as a service using telecommunications whereby one user can communicate with any other user in real time, regardless of the technology used to provide the service, and includes a public telecommunications service, a private telecommunications service, a closed user group service, and a radio communication service; see Trinidad and Tobago Telecommunications Act, section 2; note that "telecommunications" is defined as including the transmission, emission or reception of signals, writing, pulses, images, sounds, or other intelligence of any kind by wire, wireless, optical or electromagnetic spectrum or by way of any other technology.

<sup>36</sup> E.g., Telecommunications Act CAP 282B of Barbados, sections 4 and 5; Telecommunications Act CAP 47:02 of Guyana, sections 50 and 55, which confers on the minister the power to give directions where it appears to be requisite or expedient to do so in the interest of national security or Guyana's foreign relations, including the fulfillment of an obligation binding on the government by virtue of it being a member of an international organization or a party to an international agreement, or attainment of any object of such organization or agreement, or to enable the government to become a member of such an organization or a party to such an agreement; Telecommunications Act of Trinidad and Tobago, section 22(3)(b), which provides for the possible amendment of a concession to implement international obligations; but see *ibid.*, section 77, which provides, *inter alia*, that the obligations of a concessionaire operating a telecommunications network or providing a telecommunication service shall not be abrogated by reason of any international agreement to which Trinidad and Tobago is a party.

## **The Regulatory Authority**

Article 95 of the EPA requires that the regulatory authority for telecommunications services shall be “legally distinct and functionally independent from any supplier of telecommunications services.” “Regulatory authority” is defined as the *body or bodies* charged with the regulation of telecommunications.<sup>37</sup> The EPA further provides that “[t]he regulatory authority *shall be sufficiently empowered to regulate the sector*. The tasks to be undertaken by a regulatory authority shall be made public in an easily accessible and clear form, *in particular where those tasks are assigned to more than one body*.”<sup>38</sup> The regulator must be impartial with respect to all market participants. A supplier affected by the decision of a regulatory authority must have a right to appeal against that decision to an appeal body that is independent of the parties involved.<sup>39</sup>

The telecommunication regulatory bodies in all five countries are established as legally distinct entities, i.e., autonomous institutions, with shared jurisdiction with other regulatory agencies and subject to directions from the minister with responsibility for telecommunications. The independence of the telecommunications regulatory bodies is established in the relevant legislation, which generally forbids the holding or acquisition of any interest in a telecommunications supplier by persons serving as commissioners, as well as employees and members of the administrative staff of the regulatory bodies.<sup>40</sup> The implementation of this requirement varies. General procedures for general judicial review, as previously discussed in the introductory chapter, apply in all five countries.

### *Barbados*

The Barbados legislation confers on both the minister and the Fair Trading Commission (FTC) key functions in administering the telecommunications regime. The Fair Trading Commission Act CAP 326B establishes the FTC as a body corporate with a chairman, deputy chairman and

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<sup>37</sup> See EPA, Article 94(1) (b).

<sup>38</sup> See EPA, Article 95(2) (added emphasis).

<sup>39</sup> See EPA, Article 95(3) and (4), which further provides that where the appeal body is not judicial in character, written reasons for its decision shall always be given, and its decisions shall also be subject to review by an impartial and independent judicial authority. Decisions taken by appeal bodies shall be effectively enforced. Note that the right to an appeal is further affirmed in Article 96(3) (c) which provides that where a license is required “the applicant of a license shall be able to seek recourse before an appeal body in case a license is unduly denied.”

<sup>40</sup> E.g., Public Utilities Commission Act (CAP 223) of Belize, section 10; Public Utilities Commission Act 1999 of Guyana, sections 5, 8, 9, 10 and 21. Note that a commissioner is not deemed to have an interest in a public utility merely because he/she is a subscriber or user of a telephone, or uses the services of any public utility.

no more than nine other commissioners appointed by the minister, who may also terminate any commissioner's appointment on stated grounds, including where he/she fails to disclose an interest in a service provider or business enterprise or competitor thereof under an investigation by the FTC or the subject of FTC deliberations.<sup>41</sup> Where a commissioner discloses an interest in a matter, the chairman and other commissioners must determine whether it is significant, and the commissioner is precluded from the investigation or deliberation. The act requires that the interest of the commissioner must be disclosed to the public, whether it is significant or not; and where it is significant, the commissioner may not participate in the relevant proceedings. The minister is empowered to appoint another commissioner whenever a commissioner cannot act for whatever reason.<sup>42</sup>

The Fair Trading Commission Act tasks the FTC with enforcing the Utilities Regulation Act and any laws relating to consumer protection and fair competition that the FTC has jurisdiction to administer, including the Telecommunications Act.<sup>43</sup> The FTC acts as a telecommunications regulator in promoting competition between carriers and service providers and the administration of pricing mechanisms for telecommunication services in accordance with the Telecommunications Act, the Fair Trading Commission Act, and the Utilities Regulation Act. The FTC and minister, however, only exercise their functions in respect of rate-setting mechanisms where the market is insufficiently competitive to ensure that the interests of consumers are protected.<sup>44</sup>

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<sup>41</sup> See Fair Trading Commission Act CAP 326B, sections 3 and 8, and Schedule, which further provide for the termination of the appointment of a commissioner where he/she fails without reasonable cause to attend three consecutive FTC meetings; or is deemed to be unfit to discharge the functions of a commissioner; or becomes bankrupt or has made an arrangement with his/her creditors; is incapacitated by physical or mental illness; or engages in misbehavior such as fraud; or has a conflict of interest as a result of engaging in paid employment that conflicts with the functions of the FTC. Note that merely being a subscriber to the service provider does not signify having an interest.

<sup>42</sup> See Fair Trading Commission Act CAP 326B, sections 9 and 10.

<sup>43</sup> See Fair Trading Commission Act CAP 326B, section 4; see also Utilities Regulation Act CAP 282, Fair Competition Act CAP 326C, Consumer Protection Act CAP 326D, and Telecommunications Act CAP 282B. Note that the Fair Trading Act addresses the responsibility of the FTC in language similar to the Utilities Regulation Act with respect to establishing, monitoring and reviewing principles, rates and standards of service, and hearing and determining complaints by consumers; as well as language similar to the Fair Competition Act with regard to keeping commercial activities under review, and investigating anti-competitive business practices. The act empowers the FTC, whether on its own initiative or on the request of any person, to carry out any investigation that it considers necessary or desirable in connection with matters falling within the act, the Utilities Regulation Act and other laws where the FTC has jurisdiction, including the Telecommunications Act.

<sup>44</sup> See Telecommunications Act CAP 282B, section 6, 8, 9 and 39; note that certain exemptions apply, most notably, with respect to the facilities used for non-commercial purposes by the Barbados Defence Force or the Royal Barbados Police Force, and services which are part of an electricity distribution network. See also *ibid*, Part VIII on

The Utilities Regulation Act CAP 282 regulates utility services defined as including the supply of domestic and international telecommunications services. The FTC is tasked with specific responsibilities under the act including establishing principles for arriving at the rates to be charged, setting maximum rates, and monitoring the rates charged to ensure compliance; determining and monitoring the standards of service; and carrying out periodic reviews of the rates and principles for setting rates and standards of service.<sup>45</sup> The act provides that no service provider may supply utility services at rates that are unduly preferential or unduly discriminatory, or that unduly prejudice or disadvantage any person or locality, or a particular description of traffic, or extend to any person any agreement, rule, facility, or privilege unless this is regularly and uniformly extended to all persons under substantially similar circumstances and under the same conditions of service.<sup>46</sup> Provision is made for the minister, on an application of a service provider to the FTC, to exempt a utility service or any part of such service from the application or all or any of the provisions of the act where the relevant market is effectively competitive; the minister may act on the recommendation of the FTC or his/her own initiative.<sup>47</sup>

### *Belize*

In Belize, the Public Utilities Commission Act (CAP 223) establishes the Public Utilities Commission (PUC) as an autonomous institution.<sup>48</sup> The independence of the commissioners, employees and members of the administrative staff of the commission is promoted under the act,

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the use of an incentive-based rate-setting mechanism to establish rates where there is only one service provider and the minister, after consulting with the FTC, determines that it is a dominant carrier or that the market is not sufficiently competitive.

<sup>45</sup> See Utilities Regulation Act CAP 282, sections 2-4 and Schedule, which further provide that in establishing the relevant principles, the FTC is mandated to have regard to the promotion of efficiency on the part of service providers; and ensuring that an efficient service provider will be able to finance its functions by earning a reasonable return on capital. In determining standards of service, the FTC must take into account the rates being charged, the need for universal service and national environmental policies.

<sup>46</sup> See Utilities Regulation Act CAP 282, section 13, which provides for further permitting the charging of reduced rates to charitable organizations and disadvantaged persons with FTC approval. See also *ibid*, sections 26-30, which provides providing that in certain instances of persistent noncompliance with an order of the FTC concerning rates, principle, or standards of service, and the public interest in the provision of the utility service is substantially prejudiced, or the service provider does not provide a reasonable explanation for noncompliance, the act empowers the FTC to apply to the high court for an order that the court appoint an administrator to manage the business of a service provider.

<sup>47</sup> See Utilities Regulation Act CAP 282, section 37.

<sup>48</sup> See Public Utilities Commission Act (CAP 223) section 3(2). The commissioners are appointed by the governor-general acting on the advice of the prime minister given after consultation with the leader of the opposition; *ibid*. section 4(1) (b).



which forbids the holding or acquisition of any interest in a public utility provider.<sup>49</sup> The procedures established for the PUC are designed with a view to ensuring impartiality,<sup>50</sup> and the functions of the PUC are clearly set out in law.<sup>51</sup> Suggestions have been made that the PUC was not initially provided with adequate resources to effectively fulfil the mandate it has been given in domestic law. However, it appears that in recent years this has improved.

The Public Utilities Commission Act authorizes the PUC to hear complaints against public utility providers, including telecommunications service suppliers.<sup>52</sup> This is affirmed in the Telecommunications Act, which provides that “[a]ny disagreements or disputes over interconnection charges, terms and practices of public telecommunication service providers shall be submitted to the PUC for resolution.”<sup>53</sup> An appeal may be made on a question of law to the Supreme Court,<sup>54</sup> which may also grant injunctions where necessary on the application of the PUC or a member of the public.<sup>55</sup>

### *Guyana*

The Public Utilities Commission (PUC) established under the Public Utilities Commission Act consists of a chairman and four members to be appointed by the minister from among persons of high character and integrity with extensive and relevant professional expertise. Commission members may not directly or indirectly hold, acquire, or become interested in any share, stock, debenture, or other security of any public utility; have any interest in any contract or agreement for the construction of any works for a public utility; hire themselves as consultants or hire consultants for the commission from any company or entity in which they have any interest, directly or indirectly; or receive any other benefit, directly or indirectly, from a public utility.

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<sup>49</sup> See Public Utilities Commission Act, section 10.

<sup>50</sup> E.g., Public Utilities Commission Act, section 31 (for example subsection (4), which requires that “While a matter is pending before the Commission, both the Commissioners and the Commission’s staff shall not consult with a person or entity substantially affected by the matter, without giving notice and an opportunity to be present to all persons interested in the matter.” See also EPA, Article 95(3) mandating that decisions and procedures of the regulatory authority be impartial.

<sup>51</sup> See Public Utilities Commission Act, sections 22 and 23; see also EPA, Article 95 (2), which requires, *inter alia*, that “The tasks to be undertaken by a regulatory authority shall be made public in an easily accessible and clear form.”

<sup>52</sup> See Public Utilities Commission Act, section 24.

<sup>53</sup> See Telecommunications Act (CAP 229), section 23(1).

<sup>54</sup> See Public Utilities Commission Act, sections 32-36; see also EPA, Article 95(4) providing for a right of appeal to an independent agency.

<sup>55</sup> See Telecommunications Act, section 47; see also *Belize Telemedia Ltd vs. Speednet Communications Ltd*, Civil Appeal No. 27 of 2009.

Provision is made for the disclosure of any potential conflicts of interest a member of the PUC may have in any matter which is before the commission and for the member not to take part in any deliberation or any decision of the commission relating to the matter. The Public Utilities Commission Act further states that the decisions and orders of the commission shall be fair; and in the exercise and discharge of its functions the commission shall not be subject to the direction or control of any person or authority.<sup>56</sup>

The PUC is responsible for regulating, *inter alia*, telecommunications operators with respect to the tariffs which may be charged, interconnection, expansion programs, and quality of service. The PUC is bound in the exercise of its functions to give effect to the Telecommunications Act 1990 and any other law governing a public utility subject to the commission's jurisdiction. This, however, is made subject to the terms of any license issued by the government to a public utility, and the terms of any agreement between the government and a public utility or between the government and an investor that is in relation to the privatization or capitalization of the public utility.<sup>57</sup>

The director of telecommunications, a post established under the Telecommunications Act, is largely responsible for administering the legislation with the consent of, or in accordance with the general authorization given by the minister. There appear to be certain regulatory overlaps between the director of telecommunications and the PUC as regards its responsibilities in relation to telecommunications tariffs, interconnection, expansion programs, and quality of service.<sup>58</sup> Reportedly, however, there have been few conflicts as the post of director of telecommunications was apparently not filled until November 2007 (some 17 years after the

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<sup>56</sup> See Public Utilities Commission Act 1999, sections 5, 8, 9, 10 and 21; note that commissioners must have expertise in trade, finance, economics, law, accounting, engineering, or business management, or extensive experience in matters relevant to the functions of the commission. A commissioner is not deemed to have an interest in a public utility merely because he/she is a subscriber or user of a telephone, or uses the services of any public utility

<sup>57</sup> See Public Utilities Commission Act 1999, section 21(1); see also *ibid*, sections 25, 27, 33 and 87, which addresses standards of service, extension of service, rates and the PUC's rule-making powers, respectively, and giving precedence to the provisions of a license or agreement with the government over any written law. But note that the reference to "written law" does not include the Constitution. Note also that the Public Utilities Commission Act 1999 prohibits public utilities, including licensed telecommunications providers, from issuing any stocks, shares, or debentures, or other evidence of indebtedness (payable after more than one year), unless the approval of the PUC is first obtained or the instrument is issued in accordance with an agreement between the government and the public utility and/or investor; see Public Utility Commission Act 1999, section 47.

<sup>58</sup> See Public Utilities Commission Act 1999, which repeals and replaces the Public Utilities Commission Acts of 1990 and 1997.

legislation was enacted) and the director reportedly has no staff or other facilities to provide support.<sup>59</sup>

The EPA, as noted above, requires that the telecommunications regulator be adequately resourced. It has been noted that the director of telecommunications and the PUC both exercise regulatory functions in the telecommunications sector. The PUC as a co-regulator for the sector acts in an advisory capacity to the minister and is given certain investigatory powers; it may hear complaints and issue orders subject to appeal and/or enforcement through the courts.<sup>60</sup>

The resources of the commission may be supplemented, after consultation with the minister, by retaining the services of professional persons. However, the act provides that the recommendations of such persons as may be retained are not binding on the PUC. Provision is also made for the commission to establish an office of economic research to collect and compile information that may be of assistance to the commission in the exercise or discharge of its function.<sup>61</sup>

Other important regulatory and policymaking bodies in the telecommunications sector include the National Frequency Management Unit (NFMU), which is responsible for managing the radio frequency spectrum (as discussed below), and the Office of the Prime Minister, which addresses policy matters.

### *Jamaica*

The Telecommunications Act provides that the Office of Utilities Regulation (OUR), established under the Office of Utilities Regulation Act, is the statutory independent telecommunications regulator for the purposes of the Telecommunications Act. The OUR is charged with, *inter alia*, receiving and processing applications for licences and making recommendations to the minister in relation thereto, investigating conduct that appears to be in contravention of the act, and promoting competition among carriers and service providers.<sup>62</sup> The Telecommunications Act

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<sup>59</sup> See WTO TPR Report at p. 76, paragraph 107; see also Telecommunications Act, section 37, which sets out the general functions of the Director.

<sup>60</sup> See Public Utilities Commission Act 1999, sections 21, 23, 24 and Parts X, XII & XIII; note that the decisions of the PUC are subject to appeal in the Court of Appeal.

<sup>61</sup> See Public Utilities Commission Act 1999, sections 17 and 22.

<sup>62</sup> See Telecommunications Act, section 4(1); see also *ibid*, section 6, which provides that the minister may give directions of a general nature to the OUR as to policy that he/she considers necessary in the public interest, and that the OUR shall give effect to those directions.

mandates the OUR in exercising its functions to “observe reasonable standards of procedural fairness, act in a timely fashion and observe the rules of natural justice.”<sup>63</sup>

The Office of Utilities Regulation Act establishes the OUR as the statutory regulator for all prescribed utility services, including telecommunications, and mandates the OUR to, *inter alia*, promote efficiency, encourage competition, and protect the interest of consumers; it is also charged with the development and use of indigenous resources.<sup>64</sup> The OUR has various statutory powers; it may, for example, hold an enquiry on its own motion or on the basis of a complaint into the operations of any prescribed utility service (including telecommunications) and, if necessary, order that remedial measures be taken.<sup>65</sup> The jurisdiction of the OUR with respect to telecommunications services therefore derives from both the Telecommunications Act and the Office of Utilities Regulation Act.

The Telecommunications Act provides for the establishment of the Spectrum Management Authority, which performs functions delegated by the minister with respect to the allocation, licensing, and management of the spectrum, having regard to the objects, provisions and purposes of the act and the provisions of the Radio and Telegraph Control Act.<sup>66</sup> Recent amendments to the Telecommunications Act strengthen the powers of the authority in respect of the suspension and revocation of spectrum licenses.<sup>67</sup>

The announced policy of the former administration (led by the Hon. Prime Minister Bruce Golding) was that the telecommunication division of the OUR would be spun off as a separate entity, because it was felt that the sector is so important and dynamic that it requires its own regulatory agency.<sup>68</sup> It is unclear whether the new administration (led by the Hon. Prime

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<sup>63</sup> See Telecommunications Act, section 4(2), which states that without prejudice to the generality of this requirement, the OUR is further expressly required to consult in good faith with persons who are or are likely to be affected by the decision; give to such persons an opportunity to make submissions to and to be heard by the office; have regard to the evidence adduced at any such hearing and to the matters contained in any such submissions; give reasons in writing for each decision; and give notice of each decision in the prescribed manner.

<sup>64</sup> See Office of Utilities Regulation Act, sections 2-4 and First Schedule, which sets forth prescribed utilities to include telecommunications, transport, electricity, and water and sewerage services. Note also that this does not suggest that the encouragement given to use indigenous resources is implemented through local content requirements.

<sup>65</sup> See Office of Utilities Regulation Act, sections 8, 8A and 9.

<sup>66</sup> See Telecommunications Act, sections 21-23.

<sup>67</sup> See Telecommunications Act, section 23A.

<sup>68</sup> E.g., “OUR to spin off telecoms division: Big 2 backs plan for single regulator,” *The Gleaner*, Sunday, July 24, 2011, <http://jamaica-gleaner.com/gleaner/20110724/business/business1.html>; *TeleGeography*, 25 July 2011, <http://www.telegeography.com/products/commsupdate/articles/2011/07/25/jamaican-regulator-may-split/>.

Minister Portia Simpson) will implement the proposal to create a new regulatory agency for the telecommunications sector in light of recent objections voiced by the OUR.<sup>69</sup> It may be noted that a similar proposal for an independent telecommunications regulator had been mooted by the current administration during its previous term in office.

### *Trinidad and Tobago*

The Telecommunications Authority of Trinidad and Tobago established under the Telecommunications Act CAP 47:31 is managed by a board comprised of individuals appointed as representative of diverse sectors of society, skills, training, and experience.<sup>70</sup> The minister may give written directions to the authority on matters of general public policy and the authority must give effect to that policy.<sup>71</sup> The act requires the minister responsible for telecommunications and every board member, on appointment and annually thereafter, to make a declaration of any actual or contingent pecuniary interest in any network or service regulated by the authority and any entity carrying on any business with the authority in the exercise of its functions. The obligation to disclose also arises whenever relevant facts come to the knowledge of the minister or board members. The act provides that a disclosure of interest in a matter by the minister precludes him/her from withholding that approval. A disclosure by a board member precludes that member from taking further part in any deliberation or decision of the board with respect to that matter.<sup>72</sup>

The Telecommunications Act details the functions and powers of the Telecommunications Authority, which is responsible for monitoring and regulating the sector and preventing anti-competitive practices.<sup>73</sup> Provision is made for a person aggrieved by a decision of the minister or authority to submit new evidence so that the matter may be reconsidered,<sup>74</sup> in addition to the general facility for judicial review.

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<sup>69</sup> E.g., Observer Newspaper, January 16-20, 2012.

<sup>70</sup> See Telecommunications Act of Trinidad and Tobago, section 6.

<sup>71</sup> See Telecommunications Act of Trinidad and Tobago, section 19.

<sup>72</sup> See Telecommunications Act of Trinidad and Tobago, section 15; note that a person who, or a nominee or relative of whom, is a shareholder who owns shares in excess of 5 per cent, or is a partner in a company or other body of persons other than a statutory authority or who is an employee thereof, is treated as having an actual or contingent pecuniary interest.

<sup>73</sup> See also Telecommunications Act of Trinidad and Tobago, section 18.

<sup>74</sup> See Telecommunications Act of Trinidad and Tobago, section 83.

### **Authorization requirements and procedures**

Article 96 of the EPA addresses States' obligations regarding authorization to provide telecommunications services. The basic guiding principle is that the "[p]rovision of services shall, as much as possible, be authorized following mere notification." However, a license can be required to address issues of attributions of numbers and frequencies. The clear identification of two areas where licensing may be required would seem to underscore the obligation against the general use of a non-automatic licensing regime. The inclusion of the phrase "as much as possible" softens the undertaking but supports the view that authorization following mere notification should be the norm, rather than the exception. As such, it may be argued that the maintenance of a non-automatic licensing regime requires justification, i.e., some demonstration that a mere notification system is not feasible.

The language of the EPA draws heavily on EU regulations in the telecommunications sector. A review of the EU Authorisation Directive is instructive. The EU Directive covers authorizations of all electronic communications networks and services whether they are provided to the public or not.<sup>75</sup> The basic principle espoused is that the least onerous authorization system possible should be used to allow the provision of electronic communications networks and services in order to stimulate the development of new electronic communications services and pan-European communications networks and services, and to allow service providers and consumers to benefit from the economies of scale of the single market.<sup>76</sup> The directive seeks to achieve those aims by providing for the general authorization of all electronic communications networks and services without requiring any explicit decision or administrative act by the national regulatory authority and by limiting any procedural requirements to *notification only*. Where member States require notification by providers of electronic communication networks or services when they start their activities, they may also require proof of such notification having been made by means of any legally recognized postal or electronic acknowledgement of receipt of the notification. Such acknowledgement should, in any case, not consist of or require an

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<sup>75</sup> Note that the directive only applies to granting rights to use radio frequencies where such use involves the provision of an electronic communications network or service, normally for remuneration. The self-use of radio terminal equipment, based on the non-exclusive use of specific radio frequencies by a user and not related to an economic activity, such as use of a citizen's band by radio amateurs, does not consist of the provision of an electronic communications network or service, and is therefore not covered by the directive; see EU Authorisation Directive, preambular paragraph 5

<sup>76</sup> See EU Authorisation Directive, 7<sup>th</sup> preambular paragraph.

administrative act by the national regulatory authority to which the notification must be made.<sup>77</sup> This extends in principle to rights of use of radio frequencies and numbers,<sup>78</sup> though special rules apply to authorizations for the allocation of frequencies, numbers, rights of way, and other scarce resources.<sup>79</sup>

In the case of electronic communications networks and services not provided to the public, the EU directive recognizes that it is appropriate to impose fewer and lighter conditions than are justified for electronic communications networks and services provided to the public.<sup>80</sup>

The directive ostensibly seeks to minimize the administrative burden of regulation on the service supplier and the regulator. It recognizes that subjecting service providers to reporting and information obligations can be cumbersome, both for the undertaking and for the national regulatory authority concerned. Such obligations should therefore be proportionate, objectively justified, and limited to what is strictly necessary.<sup>81</sup> It is not necessary to require systematic and regular proof of compliance with all conditions under the general authorization or attached to rights of use. Additionally, a supplier has a right to know the purposes for which the information it should provide will be used. The directive expressly states that the provision of information should not be a condition for market access. For statistical purposes a notification may be required from providers of electronic communication networks or services when they cease activities.<sup>82</sup>

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<sup>77</sup> See EU Authorisation Directive, 8<sup>th</sup> preambular paragraph and Article 3(2), which provides that “... [t]he undertaking concerned may be required to submit a notification but may not be required to obtain an explicit decision or any other administrative act by the national regulatory authority before exercising the rights stemming from the authorisation. Upon notification, when required, an undertaking may begin activity, where necessary subject to the provisions on rights of use...”

<sup>78</sup> See EU Authorisation Directive, Article 5(1), which provides that, where possible, in particular where the risk of harmful interference is negligible, the use of radio frequencies should not be subject to the grant of individual rights of use but should form part of the general authorization.

<sup>79</sup> E.g., EU Authorisation Directive, Article 7, which sets forth procedures for limiting the number of rights of use to be granted for radio frequencies.

<sup>80</sup> See EU Authorisation Directive, 16<sup>th</sup> preambular paragraph.

<sup>81</sup> See EU Authorisation Directive, Article 3(3), which provides that “[t]he notification referred to in paragraph 2 shall not entail more than a declaration by a legal or natural person to the national regulatory authority of the intention to commence the provision of electronic communication networks or services and the submission of the minimal information which is required to allow the national regulatory authority to keep a register or list of providers of electronic communications networks and services. This information must be limited to what is necessary for the identification of the provider, such as company registration numbers, and the provider's contact persons, the provider's address, a short description of the network or service, and an estimated date for starting the activity.”

<sup>82</sup> See EU Authorisation Directive, 28<sup>th</sup> preambular paragraph.

The implementation of a notification system does not preclude the continued imposition of appropriate licensing fees. Even a notification system will incur some administrative costs. The Authorization Directive clarifies EU policies on licensing fees that are reflected in the EPA. The directive provides that administrative charges may be imposed on providers of electronic communications services in order to finance the activities of the national regulatory authority in managing the authorization system and for granting rights of use. Such charges should be limited to the actual administrative costs for those activities. For this purpose, transparency should be created in the income and expenditure of national regulatory authorities by means of annual reporting about the total sum of charges collected and the administrative costs incurred. This will allow for verification that administrative costs and charges are in balance.<sup>83</sup> The correlation between fees and the effective budgetary requirements of the regulator is a basic obligation of the regulatory framework on telecommunications provided for in the EPA that goes beyond the additional disciplines of the GATS Telecommunications Reference Paper.

It is recognized that with acceptance of a general authorization system it will no longer be possible to attribute administrative costs and, therefore, charges to individual undertakings, except for the granting of rights to use numbers, radio frequencies, and for rights to install facilities. Any charges imposed should be in line with the principles of a general authorization system. The EU directive cites as an example of a fair, simple, and transparent method for establishing the costs to be borne by individual undertakings as a turnover related distribution fee. Alternatively, where administrative charges are very low, flat rate charges, or charges combining a flat rate basis with a turnover related element, could also be appropriate.<sup>84</sup> Although not dispositive on the sorts of charges that would satisfy EPA requirements, the EU Directive is instructive.

Article 12 of the Authorisation Directive provides:

1. Any administrative charges imposed on undertakings providing a service or a network under the general authorization or to whom a right of use has been granted shall:
  - (a) In total, *cover only the administrative costs* that will be incurred in the *management, control and enforcement* of the general authorization scheme and of rights of use and of

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<sup>83</sup> See EU Authorisation Directive, 30<sup>th</sup> preambular paragraph.

<sup>84</sup> See EU Authorisation Directive, 31<sup>st</sup> preambular paragraph.



specific obligations ..., which may include costs for international cooperation, harmonization and standardization, market analysis, and monitoring compliance and other market control, as well as regulatory work involving preparation and enforcement of secondary legislation and administrative decisions, such as decisions on access and interconnection.

(b) Be imposed upon the individual undertakings in an objective, transparent and proportionate manner that minimizes additional administrative costs and attendant charges.

2. Where national regulatory authorities impose administrative charges, they shall publish a yearly overview of their administrative costs and of the total sum of the charges collected. In the light of the difference between the total sum of the charges and the administrative costs, appropriate adjustments shall be made.

Article 96 of the EPA essentially imports the above-noted EU directives on the telecommunications sector into the CARIFORUM regulatory regime. Article 96 on “Authorisation to provide telecommunications services” states:

1. Provision of services shall, as much as possible, be *authorized following mere notification*.

2. A license can be required to address issues of attributions of numbers and frequencies. The terms and conditions for such licenses shall be made publicly available.

3. Where a license is required. License fees required by the EC Party or by the signatory CARIFORUM States for granting a license *shall not exceed the administrative costs normally incurred in the management, control and enforcement* of the applicable licenses.

The elaboration of the nature of the costs that may be treated as related to the “management, control and enforcement” of licenses found in Article 12 of the Authorization Directive (quoted above) suggests a fulsome interpretation of the phrase.

In addition to administrative charges, usage fees may be levied for the use of radio frequencies and numbers to ensure the optimal use of such resources. These fees should not hinder the development of innovative services and competition in the market.<sup>85</sup> Significantly, the

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<sup>85</sup> See also EU Authorisation Directive, Article 13, which provides that “Member States may allow the relevant authority to impose fees for the rights of use for radio frequencies or numbers or rights to install facilities on, over or

directive is without prejudice to the purpose for which fees for rights of use are employed. For instance, such fees may be used to finance activities of national regulatory authorities that cannot be covered by administrative charges.<sup>86</sup>

The directive also recognizes the need for possible transitional measures, since there may be circumstances under which the abolition of an authorization condition regarding access to electronic communications networks would create serious hardship for one or more undertakings that have benefited from the condition.<sup>87</sup>

Article 96 of the EPA also imposes specific disciplines on procedural fairness in authorizing telecommunications services. It requires that:

- All the licensing criteria and a reasonable period of time normally needed to reach a decision concerning an application for a license must be made publicly available.
- The reasons for the denial of a license must be made known in writing to the applicant upon request.
- An applicant for a license must be able to seek recourse before an appeal body in case a license is unduly denied.<sup>88</sup>

The licensing regime for telecommunications services is a central feature of all countries reviewed. The facility for class licenses in the legislation provides an avenue for implementing the EPA obligation that States allow the supply of services, as much as possible, following mere notification. The basis on which license fees are assessed varies somewhat from country to country and demonstrates, in certain instances, best practices that could be adopted by other countries in the region. Additionally, the rules of transparency and procedural fairness are generally affirmed in the legislation of all five countries.

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under public or private property which reflect the need to ensure the optimal use of these resources. Member States shall ensure that such fees shall be objectively justified, transparent, non-discriminatory and proportionate in relation to their intended purpose and shall take into account the objectives in Article 8 of Directive 2002/21/EC (Framework Directive).”

<sup>86</sup> See EU Authorisation Directive, 32<sup>nd</sup> preambular paragraph.

<sup>87</sup> See EU Authorisation Directive, 37<sup>th</sup> preambular paragraph.

<sup>88</sup> Note that the right to an appeal stated in Article 96 essentially repeats the obligation imposed by Article 95(4) of the EPA.

## ***Barbados***

The Telecommunications Act of Barbados requires anyone wishing to own or operate a telecommunications network to obtain a carrier license; anyone wishing to provide telecommunications services to the public to obtain a service provider license; and anyone requiring use of the spectrum for either aforementioned purpose to obtain a spectrum license. Persons seeking to distribute, lease, trade, offer for sale, sell, or import for sale any prescribed telecommunications or radio communications apparatus must obtain a dealer's license, and persons wishing to own or operate a VSAT (i.e., very small aperture terminal satellite facility) must obtain a VSAT license.<sup>89</sup>

The requirement for licensing *versus* mere notification is fundamental to the approach adopted in the legislation, and may be contrasted with the general principle stated in Article 96 of the EPA.

The conditions for granting a carrier license, service provider license and VSAT license are addressed in Part IV of the Telecommunications Act, the provisions of which also apply to the grant, renewal, suspension or revocation of spectrum licenses (as noted below). An applicant for a license must demonstrate that it is able to comply with the obligations imposed by the act and that it possesses the technical qualifications and financial resources necessary to perform the obligations attached to the license. The act addresses the matters that the minister is mandated to consider in determining whether or not to grant a license; however, the minister is not mandated to grant a license to any applicant.<sup>90</sup>

The Telecommunications (Public Telecommunications Licensing) Regulations, 2003, requires a person who wishes to obtain a carrier license, service provider license, VSAT license or dealer's license to submit information on the ownership of the proposed operation and any interest held in other operations and services which require licenses under the act. The regulations prohibit the issuance of a license to an applicant who has a controlling interest in another carrier unless that applicant has first obtained the written approval of the minister.<sup>91</sup> The regulations provides a three- month period within which an applicant for a license should be notified of the minister's final determination; provision is made for an extension with reasons provided for the delay and a reasonable estimate of the time when a decision will be given. The

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<sup>89</sup> See Telecommunications Act CAP 282B, section 10.

<sup>90</sup> See Telecommunications Act CAP 282B, sections 11 and 12.

<sup>91</sup> See Telecommunications (Public Telecommunications Licensing) Regulations, 2003, regulation 4.

regulations further specify the conditions under which a license is granted shall be non-discriminatory, i.e., there shall be similar treatment of all telecommunications providers that are of a similar type of telecommunications network or service, and no telecommunications provider or class of telecommunications providers shall be favoured over another provider or class of providers.<sup>92</sup>

The Telecommunications (Licence Class) Regulations, 2003, addresses the exercise of the minister's authority to issue class licenses, i.e., a general authorization which covers a group of users and permits them to offer certain telecommunication services to the public on the conditions set out in the license. The services covered by the regulations include internet services, paging services, services provided by sellers and dealers, and other services such as Call-back, Internet-based Voice or Data, International Calling Card (ICC), and Audiotex services. A class license is published in the *Official Gazette* and automatically authorizes the provision of covered services where the conditions are met, including an annual operating fee. Failure to fulfil the stated conditions may lead to the revocation of the license subject to an application for review in accordance with the Telecommunications Act.<sup>93</sup> The provision for general authorization to be granted through class licenses could facilitate the introduction of a mere notification regime as contemplated in the EPA.

The Telecommunications Act provides that a license may not be granted for a period longer than 25 years, and may not be assigned or otherwise transferred without prior written permission.<sup>94</sup> The minister may modify a license where necessary in the public interest upon two-day notice. Where the minister intends not to renew a license or to suspend or revoke a license, he/she must provide the licensee with an opportunity to make written submissions or remedy the breach of terms of conditions of the license, as the case may be.<sup>95</sup> A public

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<sup>92</sup> See Telecommunications (Public Telecommunications Licensing) Regulations, 2003, regulations 8 and 9; but note the proviso that a license issued to a designated universal service carrier or issued to a licensee declared to be dominant by the minister, shall not be considered to be discriminatory in respect to terms contained in the license that are related to the designation and obligations imposed upon the licensee as the universal service carrier or as a dominant provider.

<sup>93</sup> See Telecommunications (Licence Class) Regulations, 2003 (as amended), regulations 2-8. See also Telecommunications Act CAP 292B, section 13, which provides that licenses are subject to the payment of an annual license fee; failure to pay the fee may lead to suspension or revocation of a license.

<sup>94</sup> See Telecommunications Act CAP 292B, sections 14, 16 and 20.

<sup>95</sup> See Telecommunications Act CAP 292B, sections 17-19.

telecommunications licensee desirous of renewing a license is required to give notice.<sup>96</sup> Similar obligations are imposed by the act on a person wishing to own or operate a private telecommunications network or provide a private telecommunications service.<sup>97</sup>

A dealer's license is treated within Part XI of the Telecommunications Act which provides that no person shall sell, trade, lease, offer for sale, or import for sale any telecommunications or radio communications apparatus that has been prescribed without first obtaining a dealer's license, which is renewable but not transferable.<sup>98</sup>

The Telecommunications (Call Centre) Regulations, 2003, provides for the licensing of call centres operated by a business registered in Barbados. Call centre activity is described as the business of exclusively making and receiving telephone calls to and from call centre premises located in Barbados for telemarketing purposes. The license obtained from the chief telecommunications officer allows for the use of bidirectional VSAT (which can both receive and transmit information) on certain conditions, including certification of the call centre by the Barbados Industrial Development Corporation. A license is not transferable and may be revoked by the minister where the regulations or any of the conditions imposed thereby are breached, subject to the provision for a review in accordance with the Telecommunications Act.<sup>99</sup>

The Telecommunications (Cyber Café) Regulations, 2003, provides for the licensing of cyber cafés by the Chief Telecommunications Officer on payment of the prescribed fee. A "cyber

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<sup>96</sup> See Telecommunications (Public Telecommunications Licensing) Regulations, 2003, regulation 10, which requires three-year notice or such later date as the minister determines for the renewal of a carrier license, and one year in the case of a service provider license or VSAT license.

<sup>97</sup> See Telecommunications Act CAP 292B, sections 22-24, which provides that a person wishing to own or operate a private telecommunications network, or provide a private telecommunications service, is required to obtain a private network license or private telecommunications service license. Where such a licensee uses spectrum, he/she must also obtain a spectrum license. A licensee of a private telecommunications network or service may not offer the network or service for sale or otherwise dispose of same without first obtaining a license to do so.

<sup>98</sup> See Telecommunications Act CAP 292B, sections 56 and 57. Note that a person holding a license for radiocommunications apparatus for private use may sell or dispose of the apparatus without being a licensed dealer. See also *ibid*, Part XII, section 65, which deals with the licensing of radio communications on the basis of, *inter alia*, reciprocal intergovernmental arrangements. See also Telecommunications (Prescribed Telecommunications and Radiocommunications Apparatus) Regulations, 2003, and Telecommunications (Restrictions and Prohibitions) Regulations, 2003 (as amended), which requires a dealer's license for the importation, certification and registration of certain telecommunications and radiocommunications apparatus, and prohibits the importation of certain telecommunications and radiocommunications equipment and devices; and Telecommunications (Certification Standards) Regulations, 2003, which promulgates certification standards and a code of practice for certified technicians who are required to have undergone training and the requisite experience.

<sup>99</sup> See Telecommunications (Call Centre) Regulations, 2003, regulations 2-8, which further require that the VSAT be used solely for the call center business, that there be no interconnection of the VSAT to the PSTN or the network of domestic mobile carriers, there be no resale of any third party telecommunications services, lease or provision of any third party telecommunications services via the VSAT, that the licensee has been granted a VSAT license, and that the licensee undertakes not to make these telecommunications services available to third parties.

café" is defined as a business premise that offers paid access to Internet or computer services. With the institution of Phase III of the Transition Timetable, licensees were authorized to provide Voice over Internet Protocol (VoIP) Services. A license is not transferable and may be revoked for failure to comply with any of its conditions or the Telecommunications Act, subject to the possibility of a review in accordance with the act.<sup>100</sup> Additionally, it may be noted that pursuant to the VoIP regulatory framework, services can only be provided by companies that are registered and licensed in Barbados as a means of ensuring that service providers comply with local consumer protection legislation.<sup>101</sup> A provision for registration and licensing that is applied in a non-discriminatory manner need not breach Barbados' obligations under the EPA, which include bound commitments without reservation on modes 1, 2, and 3 on the provision of Internet and Internet access (except voice).

### *License fees*

The Telecommunications (Licence Fees) Regulations, 2003, imposes flat application and annual operating fees for value added services in respect to an individual license of a service provider; only a smaller annual fee (and no application fee) is imposed on value added services in respect of a provider's class license, as there is no formal application process. International, mobile, fixed wireless and fixed service and network providers pay a flat application fee and annual operating fee for the first year and thereafter a percentage (3 per cent or 1.5 per cent) of adjusted revenue (taking into account interconnection charges paid to any carrier) for licensable activity, whichever is greater. The annual operating fees for fixed and mobile VSATs are a percentage of annual gross turnover or a flat rate depending on the circumstances, in addition to a flat application fee. The annual operating fees of public data communications services and network providers and internet backbone services are a percentage (1 per cent) of the annual gross turnover or a flat fee, whichever is greater; this is in addition to a flat application fee. The

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<sup>100</sup> See Telecommunications (Cyber Café) Regulations, 2003, regulations 2-6.

<sup>101</sup> See Barbados Practice Note: Regulation of Voice over Internet Protocol, viewed on line at <http://www.ictregulationtoolkit.org/en/PracticeNote.3272.html+Barbados+telecommunications+number+portability&ct=clnk>. Note that Class 1 VoIP Service Providers must be licensed as a domestic and/or international operator in Barbados. Class 3 VoIP Services may only be offered or resold by companies that are registered in Barbados and that hold a value-added service license. Vendors of any classes of VoIP equipment must be registered in Barbados and must hold a valid sellers and dealers license.

application and annual operating fees for private fixed telecommunications networks are flat fees.<sup>102</sup>

A significant undertaking of the EPA is the requirement stated in Article 96(3) (d) that license fees should not exceed administrative costs. As noted above, this is a “WTO plus” obligation and precludes the auctioning of licenses (save where managing scarce resources, for example, the spectrum). Other charges, such as percentage fees, are not directly linked to administrative costs.

The FTC is primarily financed by sums voted by Parliament and levied on service providers to meet annual expenses. The act provides that the total amount levied on service providers should, taking one year with another, be equal to the costs properly attributable to the regulation of utility services provided by the service providers. The maximum amount that may be levied on a service provider is 1 per cent of that service provider’s gross sales.<sup>103</sup> It not clear whether the licensing fees imposed by the Telecommunications Act cover those levied under the Fair Trading Commission Act or are additional. The EPA requirement that licensing fees for telecommunications providers must approximate administrative costs suggests the need for closer review of the fee structure in Barbados.

A revenue-based contribution regime such as prescribed in the Telecommunications (Licence Fees) Regulations, 2003 (as amended) may not necessarily exceed administrative costs taking into account the tasks assigned to the regulator. Some telecommunications regimes provide for annual adjustments to supplement fees based on the actual expenditures of the regulator.<sup>104</sup> While this is not required by the EPA it may be suggested that good faith attempts should be made by the regulator to ensure that the licensing fees imposed somewhat approximate administrative costs.

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<sup>102</sup> See Telecommunications (Licence Fees) Regulations, 2003 (as amended), regulations 3-5 and 8, and First and Second Schedules.

<sup>103</sup> See Fair Trading Commission Act CAP 326B, section 19. Note that the funds of the FTC must be applied to defraying operating expenses and creating reserves determined by the FTC and approved by the minister responsible for finance. The FTC is required to keep proper accounts and adequate financial and other records. A report of the activities of the FTC and its audited accounts are laid before both Houses of Parliament each year; see also *ibid*, sections 21 and 22.

<sup>104</sup> E.g., Canada Radio-television and Telecommunications Commission, [www.crtc.gc.ca](http://www.crtc.gc.ca); see also *supra* with respect to the Trinidad and Tobago regime on license fees.

## *Belize*

Belize as a CARICOM LDC was required to make fewer commitments under the EPA and, in doing so, has largely succeeded in securing sufficient policy space to maintain existing measures affecting services, including the telecommunications sector. Where Belize has undertaken liberalization commitments on telecommunications services it has generally conditioned its EPA market access commitments on modes 1 and 3 (cross-border supply and commercial presence) through the use of facilities provided by licensed operators. The exceptions are for mode 1 paging services where there is no restriction; and for mode 3, trunked radio system services and paging services, which may only be supplied through joint venture arrangements with Belizean nationals. With regard to voice telephone services, call back and refile is not permitted on mode 1, and economic needs tests may be applied to commercial presence.<sup>105</sup> In addition to the sectorial reservations mentioned previously, Belize has inscribed broad horizontal reservations subjecting all service providers accessing the Belize market through commercial presence to, *inter alia*, any “operating condition” required by *existing laws and regulations*.<sup>106</sup>

It may be recalled from the discussion in the preceding chapter that the interpretation of the term “operating condition” may be interpreted to cover any circumstance that may arise during the operating cycle of a business, i.e., the time from the acquisition of materials or services (whether the purchase of items for inventory or production) to the final cash realization from that acquisition (e.g., sale of a product made from that asset). On this interpretation the Government of Belize has largely<sup>107</sup> removed from challenge *existing* laws and regulations affecting mode 3 (commercial presence) service suppliers, which are also expressly required to “incorporate or establish the business locally in accordance with the relevant provisions of the Laws of Belize.”<sup>108</sup> The implications of the EPA Regulatory Framework on telecommunications are thus less significant for Belize than for the other four countries reviewed.

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<sup>105</sup> See also Telecommunications Act, section 15, which provides that “no person shall provide any telecommunication service except under and in accordance with a telecommunication service licence issued by the PUC.” Note that section 16 of the act provides the criteria for granting licenses.

<sup>106</sup> The full inscription in the annex provides: “Where relevant the business shall also be subject to relevant Acts pertaining to property acquisition, lease and rental, and any operating condition that may be subject to existing laws and regulations.”

<sup>107</sup> Where existing laws are not *per se* discriminatory and/or restrict market access but grant discretionary authority that is open to such application, it would seem the actions of officials may be challenged in appropriate cases. An example of this sort of legislation is the Trade Licensing Act discussed below.

<sup>108</sup> The Companies Act of Belize (Cap 250) prohibits large associations or partnerships from engaging in commercial activities unless registered as a company under the act; see Companies Act, section 3(2): “No company, association,



The provision of telecommunications services in Belize requires a license. The indication in Annex IV.F that market access through modes 1 and 3 is only permitted through licensed operators, and that suppliers are subject to operating conditions, affirms the *status quo* and preserves the continued legitimacy of using a non-automatic licensing regime as opposed to a mere notification system. Where licenses are required, obligations relating to transparency and procedural fairness apply.<sup>109</sup> In this regard, the Telecommunications Act conforms to Belize's EPA commitments (and, indeed, appears to go beyond its requirements) in providing for the publication of terms and conditions of every license<sup>110</sup> (and not merely "such licenses" as required by the EPA which, read in context, may be interpreted less strictly).<sup>111</sup> The Telecommunications (Licensing Classification, Authorisation and Fee Structure) Regulations also expressly provides for the issuance of licenses on a non-discriminatory basis.<sup>112</sup> The provisions for appeal to the Supreme Court on decisions from the PUC on any matter have already been noted above.

As regards licensing fees, the Telecommunications (Licensing Classification, Authorisation and Fee Structure) Regulations stipulate the payment of an annual license fee to the PUC as from the second year, consisting of 1.5 per cent of gross revenues from the previous year.<sup>113</sup> A significant undertaking of the EPA is the requirement stated in Article 96(3) (d) that

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or partnership consisting of more than twenty persons shall be formed for the purpose of carrying on any other business [i.e. other than banking for which the limit is ten persons] that has for its object the acquisition of gain by the company, association, or partnership, or by the individual members thereof, unless it is registered as a company under this Act, or is formed in pursuance of some other Act or law."

<sup>109</sup> See Article 96(3) (a), (b) and (c). Note that the GATS Telecoms Reference Paper does not require the facility for an appeal imposed by the EPA.

<sup>110</sup> See Telecommunications Act, section 13; see also section 26(4).

<sup>111</sup> Article 96(3) (a) of the EPA reflects the basic GATS Telecoms Reference Paper disciplines on the administration of licenses. Unlike the requirement with respect to courier services which mandates making publicly available the terms and conditions of *individual* licenses, Article 93 only requires that that terms and conditions for "such licenses" must be made publicly available.

<sup>112</sup> See Regulation 10 (2), which provides that "For the purpose of this regulation, an Individual Licence, Class Licence or Frequency Authorisation is issued on non-discriminatory terms if: (a) telecommunication providers of similar types of telecommunications networks are treated similarly; (b) the licence or authorisation does not favor any one telecommunications provider; and (c) the issuance of the licence or authorisation does not, and is not likely to, adversely affect competition in any market."

<sup>113</sup> The annual license fee is a distinct charge which may be distinguished from business taxes on receipts imposed under the Income and Business Tax Act (CAP 55); see Chapter II. For telecommunication services the tax is levied at a rate of 24.5 per cent. See also Schedule 3, "Telecommunications Interconnection and Infrastructure Sharing (Rates, Fees and Charges) Regulations (Amended) 2010, para 6(f) "Taxes/Licence Fees are defined as the annual taxes and licence fees payable to the Government of Belize or the Public Utilities Commission (PUC), respectively, in respect of revenues associated with the provision of a relevant service or with the implementation or execution of any relevant arrangements between licensees, and are expressed arithmetically as follows: Taxes/Licence Fees = (TSR + OI) x (TR +LFR) where: (i) TSR is the Total Service Revenue defined in section 4(a); (ii) OI is the Other

license fees should not exceed administrative costs. A revenue-based contribution regime may meet this requirement where revenues approximate expenditures attributable to the tasks assigned to the regulator. Some telecommunications regimes provide for annual adjustments to supplement, or lay a basis for repaying (or giving credit for), a portion of fees collected based on the actual expenditures of the regulator.<sup>114</sup> While this is not required by the EPA, it is reasonable to suggest that attempts should be made to ensure that the licensing fees imposed remain somewhat approximate to administrative costs.

### *Guyana*

The Telecommunications Act of Guyana requires a service provider to obtain a license in order to run a telecommunications system. The license is granted by the minister after consultation with the director of telecommunications or may be granted by the director with the minister's consent (or general authorization). A license may be granted to all persons, to persons of a class or to a particular person.<sup>115</sup> The provision for granting a single license to all persons would suggest that the existing legislation, in principle, could accommodate a system of authorization following mere notification in accordance with the guiding principles set out in the EPA.<sup>116</sup> While a license theoretically may be granted to all persons, the authorities also contemplate the grant of an exclusive license in respect of any telecommunications system operating throughout Guyana or within specified districts. For example, Guyana Telephone and Telegraph Co. Ltd (GT&T) has held an exclusive license for the past 20 years. It may be recalled that the EPA Regulatory Framework is only relevant where specific commitments have been undertaken,<sup>117</sup> and Guyana has undertaken limited EPA commitments on voice telephone services.<sup>118</sup>

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Income defined in section 4(b); (iii) TR represents the legal tax rate, being 24.5% for the time being; (iv) LFR represents the legal annual licence fee rate where applicable, being 1.5% for the time being.”

<sup>114</sup> E.g., Canada Radio-television and Telecommunications Commission, [www.crtc.gc.ca](http://www.crtc.gc.ca).

<sup>115</sup> See Telecommunications Act CAP 47:02, sections 5-7, which further underlines that the telecommunications system must strictly conform to the conditions stated in the license. But note that certain exceptions are expressly stated: the requirement for licensing is not contravened where, for example, a broadcasting agency runs a telecommunications system (with certain provisos), or by the running of a telecommunications system that only conveys light and things conveyed are perceived by the eye, or the running of system not connected to another on a single set of premises in single occupation.

<sup>116</sup> See EPA, Article 96.

<sup>117</sup> See EPA, Article 94(2).

<sup>118</sup> Note that this is limited to non-public use only, and no commitments have been undertaken on mobile services (satellite based) (as opposed to terrestrial based where commitments have been undertaken for modes 1, 2, and 3 without reservation), and other relevant subsectors including packet-switched data transmission services, circuit-switched data transmission services, private leased circuit services, code, and protocol conversion.

The Telecommunications Act sets out the conditions for the grant of a license. It provides that before granting a license, the minister or director must give notice of the intention to grant the license and set out its effect, stating the reasons why the license is being granted, and specifying the time (not less than 28 days from date of publication of the notice) within which representations or objections with respect to the proposed license may be made. The minister or director must take into account any such representations or objections in granting the license. This requirement does not apply to the grant of a license to the GT&T as the successor to the Guyana Telecommunication Corporation nor any license granted pursuant to an agreement between the government and any operator. Indeed, where such agreement with the government exists, it is expressly provided that the minister need not consult with the director in granting the license.<sup>119</sup>

Provision is made for the minister to modify the conditions of a license (where notice is given stating the effect of the proposed modifications, reasons for them and an opportunity for representations or objections to be made). The director is empowered to enforce the law and conditions of the license through provisional or final orders, and ultimately revoke the license where the telecommunications operator refuses or fails to comply. An aggrieved operator may have recourse to the courts.<sup>120</sup>

The Telecommunications Act provides that one of the conditions included in a license may concern fees, but provides few details in this regard.<sup>121</sup> It may be recalled that such fees are subject to special EPA disciplines (discussed above). Provision is also made for fees in relation to any approval process concerning the installation, maintenance, adjustment, repair, alteration, moving, removal, or replacement of apparatus which is or is to be connected to any licensed telecommunication system, as well as meters approved for use in connection with such systems. The act allows the minister to delegate his/her authority in this regard and to permit the person appointed to retain any fees received by him/her.<sup>122</sup> As such, it may be suggested that the fees assessed in relation to the approval process for apparatus connected to a telecommunications system are likely to be commensurate to the service provided.<sup>123</sup>

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<sup>119</sup> See Telecommunications Act CAP 47:02, sections 7(10) and 8.

<sup>120</sup> See Telecommunications Act CAP 47:02, sections 12-16.

<sup>121</sup> See Telecommunications Act CAP 47:02, section 7(6).

<sup>122</sup> See Telecommunications Act CAP 47:02, sections 18, 20, 22 and 23.

<sup>123</sup> But note that one may not assume that this applies to fees for licenses to provide basic telecommunications services which are subject to EPA disciplines.

The PUC budget is funded by an annual assessment upon the public utilities under its jurisdiction. The Public Utilities Commission Act limits the assessment on telecommunications providers to a sum not exceeding 1 per cent of gross revenue derived from services in the most recent financial year. To the extent that the PUC's expenses are not covered within its budget, the PUC may bill a service provider that has been investigated or had proceedings taken against it for any expenses incurred by it in connection with any such investigation or proceedings under the act and all expenses of any litigation (including appeals) arising from such investigation etc.<sup>124</sup>

The relationship between the assessment imposed by the PUC under the Public Utilities Act and the provision for a fee as a possible condition of granting a license under the Telecommunications Act merits further scrutiny.

### ***Jamaica***

The Telecommunications Act provides that a person may not own or operate a facility (i.e., a physical component of a telecommunications network including wires, lines, poles, ducts, sites, towers, satellite earth stations, and submarine cables) in Jamaica unless that person is the holder of a carrier license; may not provide specified services to the public,<sup>125</sup> whether by means of that facility or otherwise, unless the person is also the holder of a service provider license; and may not sell, trade in or import any prescribed equipment unless that person is the holder of a dealer license.<sup>126</sup> The OUR is required to maintain a register available for public inspection, containing

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<sup>124</sup> See Public Utilities Commission Act 1999, sections 64 and 65, which further provides that no later than 45 days before beginning of the financial year the commission must determine and notify each public utility of the annual assessment upon each other public utility under the commission's jurisdiction. Note also that any additional sum imposed on a telecommunications service provider may not exceed, in proceedings concerning rates half of a per cent of gross revenues or such other sum derived from an agreement with the government, and in the case of all other investigations one-tenth of one per cent.

<sup>125</sup> See Telecommunications Act, section 9 (4) and (5), which provides that a specified service is provided to the public if it is supplied, directly or indirectly, for a fee to a person (other than a connected person or any of its employees or officers or a closed user group), is connected to a public network; or provides customers with the capability to use the service for originating specified services to or terminating such services from the public switched telephone network. Additionally, the marketing and sale of international services to the public within Jamaica constitute the provision of a specified service to the public.

<sup>126</sup> See Telecommunications Act, section 9. Note that exemptions are provided for facilities used solely on a single premises; for domestic purposes; as part of an electricity transmission or distribution system; to provide emergency telecommunications services; or by an industry or organization (e.g., maritime, aeronautical) to provide services to its members. The licensing requirements also do not apply to facilities owned or operated by the Jamaica Constabulary Force or the Jamaica Defence Force.

all applications for carrier, dealer and service provider licenses received and all such licenses granted.<sup>127</sup>

The Telecommunications Act requires the minister to give directions to the OUR to invite applications for the grant of carrier and/or service provider licenses, specifying the number of licenses to be issued and the facilities and/or specified services in relation to which the licenses will be granted.<sup>128</sup> The OUR publishes the relevant notice and receives and reviews applications with a view to making an appropriate recommendation to the minister. The factors which may be taken into account by the OUR are open ended and include all such matters that the OUR considers relevant.<sup>129</sup> Similarly, the Office of Utilities Regulation Act provides that the recommendations of the OUR on an application to provide any prescribed utility service, including telecommunications services, is informed by the ability of the applicant to meet the needs of the community in an efficient manner. The OUR is mandated to take into account a number of factors including the provision of an economical and reliable service that provides a reasonable return on capital invested in supplying the service.<sup>130</sup>

The minister may grant the license, whether for a carrier, service provider or dealer, or may refer the matter back to the OUR for further consideration. Where the minister refuses to grant the license, he/she must give written reasons.<sup>131</sup> The Telecommunications Act allows the minister or OUR to reconsider a decision that has been made in certain circumstances.<sup>132</sup> A

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<sup>127</sup> See Telecommunications Act, section 19. Note that recently adopted amendments to the Telecommunications Act modify the definition of a license to exclude a spectrum license granted under the act, and the definition of a licensee accordingly; see Telecommunications Act, section 2(1). See also amendments to section 7 of the Telecommunications Act providing a definition of “confidential information,” and the insertion of a new section 7A on information that is not to be regarded as secret and confidential and which the OUR or Spectrum Management Authority may disclose.

<sup>128</sup> The Telecommunications Act establishes the Jamaica Telecommunications Advisory Council, which advises the minister on all matters relating to telecommunications services, including codes of conduct in relation to the telecommunications activities of licensees and their agents and inter-licensee relationships; see Telecommunications Act, sections 58 and 59.

<sup>129</sup> See Telecommunications Act, section 11, which also requires that the OUR in making its recommendation to the minister determine whether the applicant is a fit and proper person to be granted a license, is an undischarged bankrupt or has previously been granted a license that was revoked; and determine whether any connected person (e.g., a holding company or subsidiary) has previously been granted a license which was revoked.

<sup>130</sup> See Office of Utilities Regulation Act, section 4A.

<sup>131</sup> See Telecommunications Act, section 13.

<sup>132</sup> See Telecommunications Act, section 60, which provides that the minister, in reconsidering his/her decision, may confirm, modify or reverse the decision or any part thereof. The OUR may only reconsider its decision where new facts are adduced, there are changed circumstances or the decision was based upon material errors of fact or law. See also the Office of Utilities Regulation Act, section 4B, which provides that where an application to provide any prescribed public utility is refused, the applicant is given an opportunity to show cause why the license should be granted, and the minister may, having regard thereto, grant the application.

person aggrieved by a decision of the OUR may appeal to the Appeal Tribunal established under the Telecommunications Act. The tribunal may confirm, modify or reverse the decision; it may also send the decision back to the OUR for reconsideration or may dismiss the appeal. The act expressly requires the Appeal Tribunal to observe reasonable standards of procedural fairness and the rules of natural justice and act in a timely fashion.<sup>133</sup>

The Telecommunications Act provides for the renewal of licenses for a period equivalent to the period for which the original license was granted where the applicant has not breached the terms of the original license, the act or any regulations made thereunder.<sup>134</sup> A licensee must receive the prior approval of the minister if it wishes to assign its license or transfer control of any operations.<sup>135</sup>

The Radio and Telegraph Control Act establishes the Radio and Telegraph Control Advisory Committee to advise the minister on matters related to radio and telegraph control. The act requires persons wishing to establish, maintain or use any radio or telegraph station or apparatus within Jamaica to obtain a license unless he/she is the holder of a license granted under the Broadcasting and Radio Rediffusion Act or otherwise exempted.<sup>136</sup> ‘Telegraphy’ is defined under the act as a system of telecommunication which is concerned in any process providing transmission and reproduction at a distance of documentary matter such as written or printed matter or fixed images, or the reproduction at a distance of any kind of information in that form.<sup>137</sup> The Radio and Telegraph Control (Exemptions) Regulations, 1973 (made pursuant to section 5(1) (d) of the Act) exempts, *inter alia*, any telegraph station or apparatus which depends for its operation on and is connected to any licensed common carrier systems. The regulation defines "common carrier" as a lawfully authorized company or organization carrying out a telecommunication service available to the general public in accordance with the terms and

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<sup>133</sup> See Telecommunications Act, sections 61 and 62. It may be noted that provision is not made for the Appeal Tribunal to review decisions of the minister. However, the minister’s decisions are subject to general principles of judicial review.

<sup>134</sup> See Telecommunications Act, section 15, which refers to, *inter alia*, conduct amounting to a “material contravention” of the Act or any regulations made thereunder.

<sup>135</sup> See Telecommunications Act, section 17.

<sup>136</sup> See Radio and Telegraph Control Act, sections 3-6. See also Broadcasting and Radio Re-Diffusion Act, sections 6 and 8, which provides that no person shall establish, maintain or operate in Jamaica any radio re-diffusion system except under and in accordance with the terms of a license granted under the act that may be either exclusive or non-exclusive.

<sup>137</sup> See Radio and Telegraph Control Act, section 2. See also Telegraph Act vesting in the Postmaster-General (subject to the directions of the minister) the laying out, construction, erection, maintenance and altering, of the telegraphs and the control of the expenditure of all sums allotted thereto. The term “telegraphs” is defined as electric telegraphs, including post office telephone lines or works constructed or authorized under the act.

conditions of their authorization.<sup>138</sup> As such, licensed telecommunications service providers are generally exempt.

### *License fees*

The Telecommunications Act provides that the application fee that is determined by the minister must be sufficient to recover the costs of processing the application.<sup>139</sup> Provision is made for the OUR to impose an annual regulatory fee in relation to all carrier licenses and service provider licenses. The amount of the regulatory fee is established as a reasonable estimate of the costs which will be incurred by the OUR in relation to the regulation of the specified services to which the licenses relate, i.e. the regulation costs. The OUR is mandated to apportion regulation costs reasonably and equitably among licensees, and may impose a surcharge for late payment.<sup>140</sup>

The funds of the OUR consist of license fees and regulatory service fees and sums and other property made payable to the office.<sup>141</sup> The Telecommunications (Regulatory Fees) Regulations, promulgated by the OUR, provides a schedule of regulatory fees payable by telecommunications licensees. The regulations clarify that the “annual regulatory fees payable to the Office by Licensees, are based upon the cost of regulatory effort as reflected in the budget of the Office, a summary of which is tabled in Parliament annually. This cost is assessed for each company by a pro rata allocation of the total cost for the sector according to the number of active customer lines where applicable or otherwise on the basis of the Office's estimates of minimum identifiable cost of regulatory effort extended on behalf of individual licensees.”<sup>142</sup>

Although the Telecommunications (Regulatory Fees) Regulations, 2010/11 sets out a formula for the calculation of regulatory fees it contains a proviso that no licensee shall be required to pay in excess of 0.3 per cent of annual revenue. Where information is not available for the calculation of fees according to the formula minimum, regulatory fees apply. It is assumed that most of the smaller licensees will pay the minimum fees. The OUR regulatory fee appears to be distinct from the prescribed licensing fee. Under the EPA regulatory framework the licensing fee must be linked to administrative costs; *viz.*, essentially what is covered by the

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<sup>138</sup> See Radio and Telegraph Control (Exemptions) Regulations, 1973, regulation 2.

<sup>139</sup> See Telecommunications Act, section 12.

<sup>140</sup> See Telecommunications Act, section 16.

<sup>141</sup> See Office of Utilities Regulation Act, section 6.

<sup>142</sup> See Telecommunications (Regulatory Fees) Regulations, regulation 1.

regulatory fee imposed by the OUR. It is unclear whether any additional fees which may be imposed in this regard are cost-based or simply a premium payment.

### ***Trinidad and Tobago***

The Telecommunications Act provides for the grant of “concessions” to operate a public telecommunications network, or provide a public telecommunications service or broadcasting service. Timelines are established within which the Telecommunications Authority of Trinidad and Tobago must make a recommendation to the minister and the minister make his/her decision on an application to provide telecommunications services. The minister must provide reasons in writing and the position of the minister and the recommendation of the authority must be published.<sup>143</sup> The legislation, as such, goes beyond obligations on transparency and procedural fairness stated in Article 96 of the EPA in providing reasons even without a request and establishing clear timelines in law. A person aggrieved by a decision of the minister or authority may request that the decision be reconsidered based upon information not considered previously;<sup>144</sup> this applies in addition to the general right of judicial review.

The Telecommunications Act requires persons wishing to establish, operate, or use a radio-communication service or install, operate, or use any radio-transmitting equipment to obtain a license. The act mandates the authority to notify an applicant of its determination within 90 days of receipt of the application; to make available for public scrutiny the terms of all licenses (withholding information contrary to national security or other international obligations); and publish a notice of all licenses issued.<sup>145</sup> Licensees are required to pay annual fees, and are not permitted to transfer control of or assign the license without written approval of the authority (which may not be unreasonably withheld). The conditions stated in a license must

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<sup>143</sup> See Telecommunications Act of Trinidad and Tobago, section 21. Note that where a concession is granted the act provides for its renewal unless there has been a failure to operate within the terms of the concession, and/or comply materially with the act and/or any lawful direction of the authority; see *ibid*, section 31.

<sup>144</sup> See Telecommunications Act of Trinidad and Tobago, section 83, which provides that the minister or the authority, as the case may be, is required to consider the new information submitted and decide accordingly.

<sup>145</sup> See Telecommunications Act, section 36. But note that any person has the right to request that any proprietary or confidential documents, information or matters provided or submitted to the Authority be maintained secret and confidential. The authority, however, may disclose materials which it considers necessary to the discharge of its functions; see *ibid*, Article 80.



include the circumstances under which the license may be amended, including changes in national legislation and the implementation of international obligations.<sup>146</sup>

### *Concession and Licensing fees*

The Telecommunications Act establishes the basis on which fees may be charged for any concession or license and any service which the authority provides. Fees charged by the authority, save with respect to licenses for frequency bands of the spectrum, must be commensurate with the cost of providing the services, operating the authority, and administering concessions or licenses, and must be charged on a just and reasonable basis.<sup>147</sup> The use to which the funds of the authority may be applied is prescribed in the act and relates to the discharge of the authority's duties, functions and contractual obligations. Provision is made for a percentage of the funds collected in respect of concessions and licenses to be transferred to the account set aside for funding the universal service obligation at the discretion of the authority.<sup>148</sup>

The authority publishes on its website the total revenues collected and the total costs incurred in respect of concessions during the financial year. At the end of each financial year the authority is required to recalculate the concession fees payable by each concessionaire on the basis of the total revenues of the telecommunications and broadcasting sectors in that financial year (inclusive of any projected revenues). Significantly, any difference between the concession fee so calculated and the concession fee actually paid by the concessionaire for the relevant year is refunded or recovered as the case may require in the next invoice issued to that concessionaire.<sup>149</sup> Minimum annual concession fees are also applied,<sup>150</sup> in addition to a

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<sup>146</sup> See Telecommunications Act, section 37; see also *ibid*, section 39(2) and (7), which provides that the minister or the authority may amend the license in the stated circumstances but subjecting this decision to possible review by the High Court. But note also *ibid*, section 77, which includes the clarification that the obligations of a licensee providing a radio-communication service shall not be abrogated by reason of any international agreement to which Trinidad and Tobago is a party. Note also that the act provides for the renewal of a license for a term equal to that which it was first granted unless there has been a failure to operate within the terms of the license, and/or comply materially with the act and/or any lawful direction of the authority; see *ibid*, section 39(8).

<sup>147</sup> See Telecommunications Act, section 52.

<sup>148</sup> See Telecommunications Act, section 53. Note that the funds of the authority include funds appropriated by Parliament, special grant funds, fees for services rendered, fees for licenses and concessions, and sums collected in respect of universal service obligations (which are placed in a separate account). At the end of each financial year, any surplus of funds (excluding those set aside in respect of the universal service obligation) remaining in the authority's account opened after defraying authorized expenditures are paid into the Consolidated Fund; see *ibid*. Note also that the authority is exempt from duties, taxes, fees, charges, provisions of assessments, levies, and imposts on its income or on assets which it acquires for its own use; *ibid*, section 54.

<sup>149</sup> See Telecommunications (Fees) Regulations, regulations 6 and 9.

numbering fee charged in relation to each number assigned to a concessionaire with the right to provide a public telephone service as well as an application fee.<sup>151</sup>

The scheme for assessing concession fees accords well with that provided for in the EPA. The provision for annual adjustments to supplement fees based on the actual expenditures of the regulator may be compared with the Canadian system on telecommunications license fees,<sup>152</sup> and may be cited as an example of best practices for other CARIFORUM States to emulate.

### **Competitive safeguards on major suppliers**

Article 97 of the EPA requires that appropriate measures be put in place to prevent suppliers (who, alone or together are a major supplier) from engaging in or continuing anti-competitive practices. A non-exhaustive list of anti-competitive practices is provided, including engaging in anti-competitive cross-subsidization; using information obtained from competitors with anti-competitive results; and not making available to other services suppliers, on a timely basis, technical information about essential facilities and commercially relevant information that are necessary for them to provide services.

A "major supplier" in the telecommunications sector is defined in Article 94(1) (d) of the EPA as a supplier with the ability to materially affect the terms of participation (having regard to price and supply) in the relevant market for telecommunications services as a result of control over essential facilities<sup>153</sup> or the use of its position in the market.

Title IV, Chapter 1 of the EPA requires States to implement national competition legislation. For CARICOM States party to the Single Market the obligation is to comply with Chapter 8 of the Revised Treaty of Chaguaramas (CARICOM Treaty).<sup>154</sup> This will entail the establishment of national competition authorities (where they do not currently exist) to cooperate with the regional Competition Commission which has jurisdiction to apply the rules of competition in respect to anti-competitive cross-border business conduct, including

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<sup>150</sup> See Telecommunications (Fees) Regulations, regulation 10, which provides that the total annual concession fee for any concessionaire that holds a national territorial or major territorial concession shall not be less than \$10,000 and the annual concession fee for any other concessionaire shall not be less than \$1,000.

<sup>151</sup> See Telecommunications (Fees) Regulations, regulations 14 and 16.

<sup>152</sup> E.g., Canada Radio-television and Telecommunications Commission, [www.crtc.gc.ca](http://www.crtc.gc.ca).

<sup>153</sup> See EPA, Article 94 (1)(c) defining "essential telecommunications facilities" as facilities of a public telecommunications transport network and service that: (i) are exclusively or predominantly provided by a single or limited number of suppliers; and (ii) cannot feasibly be economically or technically substituted in order to provide a service.

<sup>154</sup> See EPA, Article 125(3) (b).

telecommunications services.<sup>155</sup> The control of anti-competitive behaviour, and in particular the conduct of a dominant supplier in the telecommunications sector, is one of the tasks assigned to national telecommunications regulators in all countries reviewed.

Consideration should be given to the interface between national and regional competition authorities and the national telecommunications regulator. Reference to EC practices may be instructive having regard to the common principles underpinning the regulatory framework prescribed in the EPA and the afore-mentioned EC directives. Reference may also be made to Directive 2002/21/EC of the European Parliament and of the Council of March 7, 2002, on a common regulatory framework for electronic communications networks and services (Framework Directive) which further elaborates on, *inter alia*, the requirement for appropriate consultation and cooperation on matters of common interest between telecommunications regulatory authorities and national authorities entrusted with the implementation of competition law and consumer law. It suggests that a clear definition of the respective tasks of each agency should be established and information sharing should be encouraged, with due regard to maintaining the required level of confidentiality.<sup>156</sup>

### ***Barbados***

The Fair Competition Act CAP 326C is expressly made applicable to any utility service provider. The Fair Trading Commission (FTC) is charged with administering the act, and is responsible for, *inter alia*, carrying out investigations into trading practices and reviewing commercial activities to prevent the abuse of a dominant position by any enterprise, eliminating anti-competitive agreements, and taking appropriate measures in preventing or controlling mergers.<sup>157</sup> Merger control is a distinct feature of the Barbados legislation.<sup>158</sup> Other acts in the region, such as the Jamaica Fair Competition Act and other subsequent enactments designed to implement the Revised Treaty of Chaguaramas establishing the CARICOM Single Market and

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<sup>155</sup> See CARICOM Treaty, Articles 168 and 173.

<sup>156</sup> See EU Framework Directive, Article 3.

<sup>157</sup> See Utilities Regulation Act CAP 282, sections 2-5, which defines "anti-competitive practice" or "anti-competitive business conduct" in terms of a practice or conduct amounting to or resulting in an unreasonable restraint of trade or any act of competition in industrial or commercial matters, including the conclusion of any agreement or the establishment of any arrangement that restricts trade, maintains or is likely to result in the maintenance of a dominant position, or constitutes a pricing regime respecting a particular product or trade that is controlled by the supplier or purchaser. Note that the act does not apply to activities expressly authorized or required under any treaty or agreement to which Barbados is a party.

<sup>158</sup> See Fair Competition Act CAP 326C, sections 20 and 21.

Economy (CARICOM Treaty), do not require approval for mergers, but *ex post facto* regulate any possible anti-competitive effects. The Fair Competition Act provides that an enterprise must not be treated as abusing a dominant position where, *inter alia*, its behaviour was exclusively directed to promoting technical or economic progress and consumers were allowed a fair share of the resulting benefit, or the effect or likely effect of its behaviour in the market is the result of its superior competitive performance.<sup>159</sup> Provision is also made for any person to apply to the FTC for authorization to pursue a business practice that appears to be contrary to the act. The FTC may do so where it is satisfied that the activity is likely to promote the public benefit and is reasonable in the circumstances.<sup>160</sup> The act provides for appeals from the FTC to a judge in chambers.<sup>161</sup>

The FTC is charged with cooperating with the CARICOM/Community Competition Commission and competition authorities of other member States for the purpose of detecting and preventing anti-competitive business conduct and exchanging information relating to such conduct. Where an FTC inquiry or investigation involves anti-competitive business conduct by an enterprise in another CARICOM member State, which has the effect of lessening competition in Barbados, the FTC must refer the matter to the Community Competition Commission.<sup>162</sup>

The use of information obtained from competitors with anti-competitive results is conduct that must be sanctioned in accordance with the EPA that finds expression in the common law and more recent legislation on the protection of intellectual property rights. Reference may be made to the Protection Against Unfair Competition Act CAP 329A which is primarily designed to address Barbados' obligations under the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights and which allows for proceedings to be instituted in the High Court against industrial or commercial activities contrary to honest business practices that create confusion or are likely to mislead the public, damage the goodwill or reputation of another enterprise, or results in the disclosure of secret information without the consent of the

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<sup>159</sup> See Fair Competition Act CAP 326C, section 16.

<sup>160</sup> See Fair Competition Act CAP 326C, sections 29-31, which further empowers the FTC to revoke an authorization as necessary.

<sup>161</sup> See Fair Competition Act CAP 326C, sections 36-38.

<sup>162</sup> See Fair Competition Act CAP 326C, sections 5(6) and 45-47 and Schedule, which provides the Community Competition Commission with powers to take action within Barbados, and which make the decisions of the Community Competition Commission binding and enforceable in the High Court to the same extent as a decision made by the FTC.

rightful holder.<sup>163</sup> The principle is also expressed in regulations under the Telecommunications Act, such as the Telecommunications (Resale) Regulations, 2005, which provides that information received by a licensee may be used only for the purpose for which it was supplied, and may not be passed on to other parts of the same business, affiliates, or partners for whom such information could provide a competitive advantage.<sup>164</sup>

### *'Dominance'*

A dominant carrier is defined under the Telecommunications Act in terms of the lack of any effective constraining competitive market forces.<sup>165</sup> The Telecommunications (Declaration of Dominance) Regulations, 2005, made pursuant to sections 26(3) and 110(1)(h) of Telecommunications Act concerning the determination of dominance by the minister, declares that Cable & Wireless (Barbados) Limited, incorporated as such under the Companies Act, is the dominant carrier in respect to the provision of international telecommunications services and fixed telecommunications services. This is based on the criteria specified in the act and certain additional stated considerations, including the presence of competitors, their share of the relevant market, and existing capacity to expand operations to attract a significant number of the customers of other competitors. It may be recalled that the transitional arrangements set out in the schedule to the Telecommunications Act that implements an MOU between the government and Cable & Wireless include alteration of the revenue-sharing arrangements to reduce and gradually eliminate the subsidy between international and domestic rates. As noted above, anti-competitive cross-subsidization is one of the practices targeted in the EPA, and this appears to be one of the factors addressed in the transition towards market liberalization.

The Telecommunications Act provides for a dominant carrier to apply for a change of status, i.e. to become a nondominant carrier, and for the minister to review the determination of

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<sup>163</sup> See Protection Against Unfair Competition Act CAP 329A, sections 3 and 4. Note that information is considered “secret information” if it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons that normally would have knowledge of or access to the kind of information in question; has commercial value because it is a secret; and the rightful holder has taken reasonable steps under the circumstances to keep it secret; see also *ibid*, section 8.

<sup>164</sup> See Telecommunications (Resale) Regulations, 2005, regulation 7.

<sup>165</sup> See Telecommunications Act CAP 292B, section 26(3), which provides that “[i]n this Part ‘dominant carrier’ means a carrier that the Minister determines to be dominant based on that carrier not being effectively constrained by competitive forces in a particular telecommunications market and such other criteria as the Minister prescribes.” See also Fair Competition Act CAP 326C, section 16(2), which provides a similar definition of dominance.

dominance made in the regulations in respect to telecommunications services in any sector with a view to ensuring that criteria are consistently met or whether the criteria should be altered.<sup>166</sup>

### ***Belize***

The Telecommunications Act does not specify how anti-competitive effects are determined. However, the act targets existing or dominant licensees to prevent anti-competitive practices.<sup>167</sup> Additionally, EPA prescriptions on the sharing and use of confidential information are general obligations imposed on licensees which are required, *inter alia*, to supply to interconnecting licensees, upon request, with information about their network and services as may be necessary for interconnecting licensees to plan and operate their networks and services. All information provided shall be used to facilitate interconnection only, and shall not be disclosed to any third party without the expressed written consent of the information provider.<sup>168</sup>

The act and regulations adopted thereunder affirm and conform to the pro-competitive safeguards of the EPA regulatory framework. This, however, has not necessarily fostered a high level of competition in the telecommunications market. Special arrangements with Belize Telemedia Limited (BTL) established the company's dominant position in the market prior to its recent nationalization. The Belize Constitution (Ninth Amendment) Act, 2011, provides that the "Government shall have and maintain at all times majority ownership and control of a public utility provider."<sup>169</sup> The term "public utilities" is defined as including telecommunication services and BTL is defined as a "public utility provider"; "majority ownership and control" means the holding of not less than 51 per cent of the issued share capital of a public utility provider together with a majority in the board of directors, and the absence of any veto power or

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<sup>166</sup> See Telecommunications (Declaration of Dominance) Regulations, 2005, regulations 2-8, which also revokes the Telecommunications (Declaration of Dominance) Regulations, 2003.

<sup>167</sup> E.g., paragraph 7 of Schedule 1, "Belize Telecommunications Interconnection Regulations (Amended) 2010." See also Telecommunications Act, sections 26 and 42. But note that the legislation does not specify how anti-competitive effects are determined.

<sup>168</sup> See paragraph 5 of Schedule 1, "Belize Telecommunications Interconnection Regulations (Amended) 2010." Note that provision is made for the possible exemption of certain information. Special provision is made for the treatment of confidential information in the establishment of rates, fees, and charges; see Schedule 3, "Telecommunications Interconnection and Infrastructure Sharing (Rates, Fees and Charges) Regulations (Amended), 2010, paragraph 15. See also the Telecommunications Act, section 9 "Obligation of secrecy" and sections 31(5) and 32 on the confidentiality of information submitted to the PUC.

<sup>169</sup> See Belize Constitution (Ninth Amendment) Act 2011, section 4, which refers to the new section 144 of the Constitution, providing further that any alienation of the government shareholding or other rights, whether voluntary or involuntary, that may derogate from government's majority ownership and control of a public utility provider shall be wholly void and of no effect.

other special right given to a minority shareholder that would inhibit the government from administering the affairs of the public utility provider freely and without restriction.<sup>170</sup> While BTL is defined as a public utility provider, no other telecommunications providers have been so designated.<sup>171</sup> It has been suggested that the intention is not to nationalize the industry but merely to ensure government control over the dominant supplier.<sup>172</sup> Still, the implications for private sector participation and a desirable level of competition in the telecommunications industry are unclear.

### ***Guyana***

The responsibilities assigned under the Telecommunications Act to the minister and director of telecommunications include maintaining and promoting effective competition between persons engaged in commercial activities connected with telecommunications in Guyana, *subject to any monopoly or exclusive rights or licenses granted under the act*;<sup>173</sup> promoting the provision of competitive international transit services by persons providing telecommunications services in Guyana; enabling persons providing telecommunications services in Guyana to compete effectively in the provision of such services outside Guyana; enabling persons producing telecoms apparatus in Guyana to compete effectively in the supply of such apparatus both in and outside Guyana; and promoting the interests of consumers, purchasers and other users of telecommunications services in Guyana.

The promotion of competition under the Telecommunications Act is made subject to the special arrangements as may be granted to a telecommunications supplier. The importance of increasing competition within the telecommunications sector as a means to enhance general competitiveness has been recognized in efforts to introduce new legislation that would liberalize the sector. While that has stalled, the Competition and Fair Trading Act of 2006 provides a

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<sup>170</sup> See Belize Constitution (Ninth Amendment) Act 2011, section 4 inserting a new Part XIII (including sections 143-145) to the Constitution of Belize; the new section 143 of the Constitution defines the terms as stated in the main text.

<sup>171</sup> Note that the new section 143 of the Constitution provides that for any other entity to be designated as a public utility provider for the purpose of Part XIII of the Constitution would require a resolution passed by the National Assembly.

<sup>172</sup> E.g., <http://wikileaks.org/cable/2009/09/09BELMOPAN332.html>, which suggests that the nationalization was “a special measure for a special case.”

<sup>173</sup> See also Telecommunications Act CAP 47:02, section 2, which defines “commercial activities connected with telecommunications” as meaning any of the following, that is to say, the provision of telecommunication services, the supply or export of telecommunication apparatus, and the production or acquisition of such apparatus for supply or export.

framework for dealing with competition concerns. The act establishes the Competition Commission, which is slated to become functional as the Competition and Consumer Affairs Commission.<sup>174</sup> This presumably suggests marrying the Consumer Affairs Commission established under the Consumer Protection Act, 2004,<sup>175</sup> with the Competition Commission referred to in the 2006 legislation. The relationship between the Public Utilities Commission (PUC) and the Guyana Competition and Consumer Affairs Commission is not fully defined, although the Competition and Fair Trading Act does address this.

The Competition and Fair Trading Act applies to public utilities, but requires the Competition Commission to consult with the PUC before exercising its functions in relation to such activities. The act mandates that the Competition Commission strictly confine itself to discharging its functions in relation to matters falling within the provisions of the act; and that the PUC strictly confine itself to discharging the functions specified under the Public Utilities Commission Act. It is further provided that any authority that is essentially a function of, or which over time has been discharged by the PUC, may not be discharged by the Competition Commission.<sup>176</sup> As noted above, the Competition and Consumer Affairs Commission is still not functional. Moreover, its role in promoting pro-competitive disciplines in the

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<sup>174</sup> See Competition and Fair Trading Act 2006, sections 4 and 5, which establishes the Competition Commission with the objectives of promoting, maintaining, and encouraging competition and enhancing economic efficiency in production, trade and commerce; prohibiting anti-competitive business conduct which prevents, restricts or distorts competition or constitutes the abuse of a dominant position in the market; and promoting the welfare and interest of consumers. See also Consumer Protection Act 2004, sections 5 and 6, which establishes the Consumer Affairs Commission and sets out its functions.

<sup>175</sup> See Consumer Protection Act 2004, sections 2-6. The Consumer Protection Act, 2004, applies to all persons involved in any trade and establishes a Consumer Affairs Commission that may conduct investigations into consumer complaints or on its own initiative. Note that this applies whether the business is one of purchasing or vending of goods or services, but the provision of services excludes services under a contract of employment. but covers other engagements for gain or reward. The act also provides for the registration of organizations purporting to provide services for the protection of consumers. The Consumer Protection Act restricts a service provider (foreign or domestic) from providing services that have not been requested by the consumer and requires records to be kept; it also prescribes good business practices. The act establishes the Consumers Fair Trading Tribunal with all the powers and authority vested in the High Court in the exercise of its civil jurisdiction, and makes provision for the Court of Appeal to give its opinion on a question of law as may be referred to it by the Tribunal; see also *ibid*, sections 21-24, 39, 40, 49 and 60.

<sup>176</sup> See Competition and Fair Trading Act, section 4. Note that “consult” is defined in the act by reference to the interpretation provided in section 232 of the Guyana Constitution i.e., “consultation” or “meaningful consultation” means the person or entity responsible for seeking consultation shall (a) identify the persons or entities to be consulted and specify to them in writing the subject of the consultation and an intended date for the decision on the subject of consultation; (b) ensure that each person or entity to be consulted is afforded a reasonable opportunity to express a considered opinion on the subject of the consultation and (c) cause to be prepared and archived a written record of the consultation and circulate the decision or entities consulted.



telecommunications sector will likely be more clearly defined in the new legislation on telecommunications should discussions on its passage resume in the legislature.

### *Jamaica*

The Telecommunications Act expressly proscribes unfair arrangements including cross subsidization, and authorizes the OUR, after consultation with the Fair Trading Commission (FTC), to prescribe certain competitive safeguards in relation to a dominant public telecommunications carrier, including safeguards ensuring that information supplied by other carriers for the purpose of facilitating interconnection is not used for any uncompetitive purpose. The OUR is charged with determining whether a public telecommunications carrier should be classified as dominant.<sup>177</sup> A supplier may hold a dominant position in a market by itself or together with an interconnected company. The concept of “joint dominance” as recognized in Article 97 of the EPA is, however, not expressly recognized in the legislation. The OUR may impose competitive safeguard rules only if they are necessary for the identification or prevention of abuse of a dominant practice by a dominant public telecommunications carrier, and if no other means are available to the OUR for the provision of an adequate remedy in relation to the abuse or practice.<sup>178</sup> Currently there are no such competitive safeguard rules since these measures are arguably not required under existing market conditions.

The OUR has a duty to consult with the FTC and refer matters to it in cases where the OUR determines that an issue is of substantial competitive significance to the provision of specified services, and falls within the functions of the FTC under the Fair Competition Act.<sup>179</sup> The FTC is charged under the Fair Competition Act with investigating alleged anti-competitive business practices.<sup>180</sup> The act is designed to cover all activities carried out for gain or reward or

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<sup>177</sup> See Telecommunications Act, sections 27 and 28 (as recently amended to broaden the scope of the provisions to apply not only to voice services but also so data and other telecommunications services); note that the concept of dominance in the telecommunications market is defined in accordance with section 19 of the Fair Trading Act. In making a determination that a carrier is a dominant public telecommunications carrier the OUR must consult with the Fair Trading Commission and take any recommendations made into account. Note also that the OUR may, where it considers necessary, decide that a particular service should be treated as a telecommunications service; see Telecommunications Act, sections 2 and 52. A “public telecommunications carrier” is defined as a carrier that owns and operates a public network used to provide telecommunications services to the public.

<sup>178</sup> See Telecommunications Act, section 35; see also *ibid*, section 36, which provides for rules imposing on a dominant public telecommunications carrier the responsibility to offer a particular form of indirect access to its network to other interconnection providers where necessary in the interest of customers.

<sup>179</sup> See Telecommunications Act, section 5.

<sup>180</sup> See Fair Competition Act, sections 4 and 5.

in the course of which goods or services are manufactured, produced, or supplied. The term “service” is defined to cover industrial, trade, professional, or other services (excluding services supplied under a contract of employment). Certain exclusions are provided, including a general exception with regard to activities expressly approved or required under any treaty or agreement to which Jamaica is a party.<sup>181</sup> The provisions of the Fair Competition Act also do not affect an agreement between the minister and a universal service provider in relation to the universal service obligation or any agreement approved by the OUR after consultation with the Fair Trading Commission.<sup>182</sup> This is consistent with the general recognition that universal service obligations are not regarded as anti-competitive *per se* provided they are administered in a transparent, objective and non-discriminatory way.<sup>183</sup>

The Fair Competition Act provides that certain agreements that contain provisions likely to have the effect of substantially lessening competition in a market are not enforceable. These overlap with some of the specific proscriptions found in the Telecommunications Act, including agreements that apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage, (reference may be made in this regard, for example, to the prohibition on discrimination in terms and conditions concerning interconnection and access to facilities in telecommunication services); or agreements which make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts, being provisions that have or are likely to have the effect of lessening competition (reference may be made, for example, to the need for sufficient unbundled telecommunications transactions).<sup>184</sup> In controlling anti-competitive practices, the FTC is also

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<sup>181</sup> See Fair Competition Act, sections 2 and 3.

<sup>182</sup> See Telecommunications Act, section 73. Note that in general the provisions of the Telecommunications Act should not be construed as affecting the right of any person to refer a matter to the Fair Trading Commission in accordance with the Fair Competition Act.

<sup>183</sup> See EPA, Article 100(2). Note also that the administration of universal service obligations must be neutral with respect to competition; see also the WTO Telecoms Reference Paper.

<sup>184</sup> See Fair Competition Act, section 17; note that certain exceptions are provided for, most notably, where an agreement has been expressly authorized by the commission or the commission is satisfied that the agreement contributes to certain stated objectives. Additionally, where an agreement between competitors contains an exclusionary provision which prevents, restricts, or limits the supply of goods or services it may also not be given effect; see *ibid*, section 18.

authorized to take action against the abuse of a dominant position.<sup>185</sup> The act further proscribes actions which restrict the market or are otherwise seen as offenses against competition.<sup>186</sup>

### ***Trinidad and Tobago***

The Telecommunications Act requires that every concession for a public telecommunications network, public telecommunications service, and broadcasting service prohibit anti-competitive pricing and other related practices.<sup>187</sup> The act authorizes the Telecommunications Authority of Trinidad and Tobago to establish price regulation regimes (which may include setting, reviewing, and approving prices) where there is insufficient competition in the market, such as where one supplier has a dominant position, where there is cross-subsidization of telecommunication services (that requires the prior written approval of the authority),<sup>188</sup> or where the authority detects anti-competitive pricing or acts of unfair competition.<sup>189</sup>

It is also made a condition of every concession for a public telecommunications network and public telecommunications service that, where applicable, the concessionaire provide users, under conditions which are published or are otherwise filed with the authority, with access to and the opportunity to use such network or service on a fair and reasonable basis without discrimination among similarly situated users; permit the resale of its telecommunications service by not imposing unreasonable or discriminatory conditions or limitations on such resale; and make available to other providers of telecommunications services, on a timely basis, technical information regarding the operator's network, including planned deployment of equipment and other relevant information necessary for the provision of such services.<sup>190</sup> As

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<sup>185</sup> See Fair Competition Act, sections 19-21.

<sup>186</sup> See Fair Competition Act, sections 33-41. Note that any person aggrieved by a finding of the Commission may appeal to a Judge in chambers; see *ibid*, sections 49 and 50. See also the Consumer Protection Act 2005, which is designed to protect the public against misleading and deceptive conduct and unfair practices in trade and business, whether concerning goods or services.

<sup>187</sup> See Telecommunications Act of Trinidad and Tobago, section 22.

<sup>188</sup> See also Telecommunications Act of Trinidad and Tobago, section 24.

<sup>189</sup> See Telecommunications Act, sections 22(1)(b) and 29(2).

<sup>190</sup> See Telecommunications Act of Trinidad and Tobago, section 24. See also Telecommunications (Access to Facilities) Regulations, regulation 8, which requires that information be provided within 28 days of a request, but providing for exemptions on grounds of confidentiality or competitive sensitivity. The regulations require that the information provided be used for the purpose of facilitating access only, and not be disclosed to any third party without the prior written permission of the concessionaire who provided the information; the parties must also execute a non-disclosure agreement in favor of the concessionaire providing the information. See also Telecommunications (Interconnection) Regulations, regulation 10.

such, the act and regulations made thereunder address key obligations on cross-subsidization, non-discrimination, information sharing, and confidentiality.

The act defines the concept of “dominance”; it provides that the authority may determine that an operator or provider is dominant where, individually or jointly with others, it enjoys a position of economic strength affording it the power to behave, to an appreciable extent, independently of competitors, customers, and ultimately consumers. In making this determination, the authority is mandated to take into account the following factors: the relevant market; technology and market trends; the market share of the provider; the power of the provider to set prices; the degree of differentiation among services in the market; and any other matters that the authority deems relevant.<sup>191</sup>

There are few additional measures in the act specifically addressing competition in the telecommunications sector. This is noteworthy in light of the non-applicability of the Fair Trading Act CAP 81:13 to companies which are subject to the Telecommunications Authority.<sup>192</sup> The approach adopted in the Trinidad and Tobago Act may be contrasted with that of other countries reviewed with legislation specifically addressing anti-competitive behaviour.

The non-applicability of the Fair Trading Act to telecommunications suppliers may also be contrasted with the approach taken with respect to service providers within the meaning of the Regulated Industries Commission Act. The competition regime defined in the Fair Trading Act applies to covered suppliers, though the responsibility for enforcement of the act lies with the Regulated Industries Commission.<sup>193</sup>

Nonetheless, the specific proscriptions of Article 97 of the EPA, which requires the implementation of competitive safeguards on major suppliers, appear to be met by the general disciplines imposed by the Telecommunications Act.<sup>194</sup>

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<sup>191</sup> See Telecommunications Act, section 29(8).

<sup>192</sup> See Fair Trading Act, section 3(1)(g).

<sup>193</sup> See Fair Trading Act, section 3(2). Note also that where a merger or an anti-competitive agreement would fall within the purview of the commission in circumstances where any of the companies involved is a service provider, the Regulated Industries Commission may not make a decision before it consults with the commission; see *ibid*, section 3(3).

<sup>194</sup> Article 94 of the EPA requires States to prevent suppliers, who alone or together are a major supplier, from engaging in or continuing anti-competitive practices. The specific practices highlighted address engaging in anti-competitive cross-subsidization; using information obtained from competitors with anti-competitive results; and not making available to other services suppliers on a timely basis technical information about essential facilities and commercially relevant information that are necessary for them to provide services. Although the Trinidad and Tobago Telecommunications Act does not address all these activities in the context of competition regulation, the

Reference may also be made to the Protection against Unfair Competition Act CAP 82:36, which provides that any act or practice (including an omission to act) in the course of industrial or commercial activities<sup>195</sup> that is contrary to honest practices constitutes an act of unfair competition. Any person damaged or likely to be damaged by an act of unfair competition is entitled to civil remedies obtainable under the law of Trinidad and Tobago.<sup>196</sup> Specifically with regard to the use of information, the act provides that any act or practice in the course of industrial or commercial activities that results in the disclosure, acquisition, or use by others of secret information without the consent of the person lawfully in control of that information (i.e., the “right holder”) in a manner contrary to honest commercial practices is an act of unfair competition.<sup>197</sup>

### **Interconnection**

Article 98 of the EPA on “interconnection” takes into account WTO jurisprudence in the *Mexico – Measures Affecting Telecommunications Services* (WT/DS204), which interprets the GATS Annex on Telecommunications and the Telecommunications Reference Paper. Article 98 of the EPA provides that all telecommunications service providers have the right to negotiate interconnection with every other provider suggesting a regulatory framework that promotes open commercial negotiations. The information provided during the process of negotiating interconnection must be used solely for the purpose supplied paying due regard to principles of confidentiality. As with the GATS Telecommunications Reference Paper, provision is made for non-discriminatory terms and conditions and timely interconnection based on cost-oriented rates that are transparent and reasonable. The procedures for interconnection to a major supplier must be made publicly available and also interconnect agreements with major suppliers or reference interconnection offers. Provision should be made for the referral of disputes to an independent agency.<sup>198</sup>

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act imposes disciplines on all the afore-mentioned conduct and would therefore seem to appropriately address this aspect of the EPA regulatory framework for telecommunication services.

<sup>195</sup> See also Protection Against Unfair Competition Act, section 2, which defines industrial or commercial activities as including the activities of professionals and other such persons.

<sup>196</sup> See Protection Against Unfair Competition Act, section 4.

<sup>197</sup> See Protection Against Unfair Competition Act, section 9.

<sup>198</sup> See EPA, Article 98; see also EPA, Article 102 on disputes between service suppliers, which provides that the national regulatory authority shall issue a binding decision to resolve a dispute in the shortest possible timeframe. Where cross-border suppliers are involved, the national regulatory authorities must coordinate efforts. Note that there is no equivalent requirement in the GATS Telecoms Reference paper.

## ***Barbados***

The Telecommunications Act CAP 282B requires a carrier to provide interconnection services to its public telecommunications network on request from another carrier. Interconnection must be offered at all feasible points (in addition to network termination points offered to the end-users) subject to the payment of charges that reflect the cost of construction of any additional facilities necessary for interconnection, and be provided on terms that are transparent and non-discriminatory. Interconnection must be made available in a timely fashion, be sufficiently unbundled, and be offered at charges that are cost-oriented. The precise terms and conditions of interconnection should be agreed through commercial negotiations, or conform to an approved Reference Interconnection Offer (RIO) where this is required; failing this they are determined by the FTC.<sup>199</sup> The Telecommunications Act requires the FTC to keep a register of interconnection agreements and RIOs for public inspection.<sup>200</sup>

A dominant carrier is required to file with the FTC a RIO setting out the terms and conditions upon which other licensed carriers will be permitted to interconnect with the interconnection provider's public telecommunications network, including interconnection charges, location of points of interconnection, access to ancillary services, dispute resolution procedures, and the maintenance of confidentiality in relation to certain aspects of the agreement.

The RIO must be consistent with the principles of interconnection established in the act and approved by the FTC. In making its decision the FTC is mandated to consult with the carrier

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<sup>199</sup> See Telecommunications Act CAP 292B, section 25, which further provides that interconnection charges and the quality of service provided must be no less favorable than for similar services or facilities supplied by the interconnection provider for its own purposes, that of a subsidiary of the carrier, or any non-affiliate service supplier. Interconnection services must allow end-users of public telecommunications services to exchange telecommunications with other users regardless of the carrier to which the end-user is connected. See also 2010 Annual Report of the Fair Trading Commission, viewed online at [http://www.ftc.gov.bb/library/2011-01-12\\_ftc\\_annual\\_report.pdf](http://www.ftc.gov.bb/library/2011-01-12_ftc_annual_report.pdf) Compare Utilities Regulation Act CAP 282, sections 2-4 and 13 and Schedule, which regulate utility services defined as including the supply of domestic and international telecommunications services. The FTC is tasked with specific responsibilities under the act including establishing principles for arriving at the rates to be charged, setting maximum rates, and monitoring the rates charged to ensure compliance; determining and monitoring the standards of service; and carrying out periodic reviews of the rates and principles for setting rates and standards of service. The act provides that no service provider may supply utility services at rates that are unduly preferential or unduly discriminatory, or unduly prejudice or disadvantage any person or locality, or a particular description of traffic, or extend to any person any agreement, rule, facility or privilege unless this is regularly and uniformly extended to all persons under substantially similar circumstances and under the same conditions of service. Provision is made for the minister, on an application of a service provider to the FTC, to exempt a utility service or any part of such service from the application or all or any of the provisions of the act where the relevant market is effectively competitive; the minister may act on the recommendation of the FTC or his/her own initiative; see *ibid*, section 37.

<sup>200</sup> See Telecommunications Act CAP 292B, section 30(1).

providing the RIO and any other carriers likely to seek interconnection to that carrier's network, and have regard to, *inter alia*, the need to promote competition, the long-term interests of end-users, government policy on interconnection, and the requirements of the act. Where the FTC refuses to approve the RIO or a part thereof, it must consult with the carrier to have any deficiencies remedied; if satisfied, the FTC may approve an amended RIO.<sup>201</sup>

Where a RIO is in effect and accepted by the person requesting interconnection with a telecommunications network it forms the basis of the agreement between the parties. Where this is not the case, the requesting and requested party would have to negotiate an agreement and submit this for FTC approval. Where the agreement does not comply with the interconnection principles set out in the act, unfairly discriminates against other carriers, or is otherwise unlawful, the FTC may require the parties to vary any agreement and, should they fail to do so, make an order stating the amendment to be made. Where the interconnection provider refuses to provide interconnection services or limits, or terminates an agreement for interconnection, the matter may be referred to the FTC for review.<sup>202</sup>

Bypassing an international telecommunications network is prohibited. In this regard, it should be noted that Barbados has made a sectoral reservation on market access in relevant areas such as voice telephone services on modes 1 and 3 (non-public) stipulating that “two-ended breakout not permitted.” The Telecommunications Act allows a carrier or service provider to discontinue the provision of specified services or disconnect any facility where there are reasonable grounds to believe that the person to whom the services are provided or the owner or operator of the facility is engaging in bypass operations or other conduct prohibited under the act. A carrier or service provider whose service or facility has been discontinued or disconnected may appeal to the minister for a review and the minister may order the restoration of the service or facility and investigate the matter through the appointment of inspectors. An aggrieved party

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<sup>201</sup> See Telecommunications Act CAP 292B, sections 26 and 27; see also *ibid*, section 25(2), which sets out the principles of interconnection.

<sup>202</sup> See Telecommunications Act CAP 292B, sections 28 and 29, which further provides that an interconnection provider may refuse interconnection for the protection of the safety of a person, and the security or integrity of the network, or due to the difficult technical and engineering nature of the interconnection; and that an interconnection provider may limit or terminate its services to protect the security of its network or safety of any person or where the other party fails to comply with the terms of the agreement. Note that the act contemplates the FTC possibly awarding compensation for financial loss resulting from a wrongful decision of an interconnection provider to limit or terminate an interconnection agreement or cease to offer those services.

may also seek a review by the court of the action taken in respect of the discontinuance or disconnection.<sup>203</sup>

The Telecommunications (Resale) Regulations, 2005, establishes the framework within which the minister may require a licensee to make available for resale certain services (i.e., international voice minutes provided for switchless resale or circuits leased from an international carrier who holds a valid international carrier license) supplied over a telecommunications network operated under an exclusive license, where this would not adversely affect the provision of service to existing customers or the efficient operation by the licensee of its licensed network.<sup>204</sup> The regulations provides that a licensee may not communicate or allow access to confidential information received from another licensee as a consequence of a resale service relationship, unless authorized by that other licensee in writing, pursuant to the act or any other law.<sup>205</sup>

### ***Belize***

The Belize Telecommunications General Order (Interconnection, Infrastructure Sharing, International Access) (Amended) No. 1 of 2010 (18<sup>th</sup> August 2010) (hereinafter “Telecommunications General Order”) “deems it to be in the public interest for all telecommunication service licensees to share infrastructure, networks or facilities with other licensees for the provision of telecommunications services,”<sup>206</sup> and further directs that this be done “on reasonable and non-discriminatory terms upon reasonable request.”<sup>207</sup>

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<sup>203</sup> See Telecommunications Act CAP 292B, sections 67, 74 and 75. See also *ibid*, section 18(4), which provides that section 22 of the Utilities Regulation Act CAP 282 prohibiting the cessation of utility services without FTC permission does not apply with respect to telecommunications services.

<sup>204</sup> See Telecommunications (Resale) Regulations, 2005, regulation 3 and Schedule.

<sup>205</sup> See Telecommunications (Resale) Regulations, 2005, regulation 7.

<sup>206</sup> Telecommunications General Order, paragraph 4, which states that this is upon reasonable request, where any such licensees possess or operate infrastructure, networks or facilities that can adequately satisfy the demands or requirements of such licensees, and that any other licensee may request that such infrastructure, network or facility be shared.

<sup>207</sup> See Telecommunications General Order, paragraph 6. See also Belize Telecommunications Interconnection and Infrastructure Sharing Regulations Order (Amended) (18<sup>th</sup> August 2010), which provides that that interconnection network and facilities and interconnection agreements between telecommunications licensees are governed by Schedule 1; infrastructure and facilities sharing and any agreements therefore between telecommunications licensees are governed by Schedule 2; and rates, fees or charges in respect of interconnection and infrastructure and facilities are governed by Schedule 3. Paragraph 6 of Schedule 1, “Belize Telecommunications Interconnection Regulations (Amended) 2010,” imposes a requirement on licensees to enter into infrastructure sharing arrangements for the purpose of effecting interconnection. Note that Schedule 2 “Telecommunications Infrastructure and Facilities Sharing Regulations (amended),” paragraph 8, provides that the PUC may consider any failure to conclude an infrastructure and facilities sharing agreement within 28 days to constitute a dispute and intervene to resolve the



Telecommunication service licensees may procure international telecommunications services directly from, and enter into commercial arrangements directly with, foreign public telecommunication service licensees.<sup>208</sup>

All licensed telecommunications service suppliers have the “right and, when requested, an obligation to negotiate interconnection with each other for the purpose of providing public telecommunications services, including access to technical interfaces, protocols or other key technologies or facilities that are indispensable for the interoperability of public network services.”<sup>209</sup>

Licensees are also required to supply to interconnecting licensees upon request, such information about their network and services as is necessary and sufficient for interconnecting licensees to plan and operate their networks and services. All information which is provided shall be used for the purpose of facilitating interconnection only, and shall not be disclosed to any third party without the expressed written consent of the information provider.<sup>210</sup> A licensee is required to provide interconnection under the same terms and conditions and of the same quality as it provides for its own networks and services, the networks and services of its subsidiaries and partners, or the networks and services of any other licensee to which it provides interconnection.<sup>211</sup> Similar obligations apply with respect to infrastructure and facilities

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dispute in accordance with the Belize Telecommunications Act or any orders or regulations made by the commission. See also Telecommunications Act, section 22.

<sup>208</sup> See Telecommunications General Order, paragraph 7(a) But note *ibid*, paragraph 7(b), providing that “(b) no telecommunication service licensee shall be allowed unrestricted access to any foreign telecommunications network or facility, and the responsibility to restrict such access is vested in the Public Utilities Commission, which shall prescribe the terms and conditions by which such access shall be restricted.”

<sup>209</sup> Schedule 1, Belize Telecommunications Interconnection Regulations (Amended) 2010, paragraph 4; see also Schedule 2, “Telecommunications Infrastructure and Facilities Sharing Regulations (amended), paragraph 4, which provides, *inter alia*, a right and, when requested, an obligation to negotiate the sharing of infrastructure and facilities with each other for the purpose of providing public telecommunications services right and, when requested, an obligation to negotiate the sharing of infrastructure and facilities with each other for the purpose of providing public telecommunications services.

<sup>210</sup> See paragraph 5 of Schedule 1, “Belize Telecommunications Interconnection Regulations (Amended) 2010.” Note that provision is made for the possible exemption of certain information. Special provision is made for the treatment of confidential information in the establishment of rates, fees, and charges. See Schedule 3, “Telecommunications Interconnection and Infrastructure Sharing (Rates, Fees and Charges) Regulations (Amended), 2010, paragraph 15. See also the Telecommunications Act, section 9 “Obligation of secrecy” and sections 31(5) and 32 on the confidentiality of information submitted to the PUC.

<sup>211</sup> See paragraph 9 of Schedule 1, “Belize Telecommunications Interconnection Regulations (Amended) 2010”; note that the commission may determine any failure to conclude an interconnection agreement within 60 days of the receipt of a request to constitute a dispute and intervene to resolve the dispute in accordance with the Belize Telecommunications Act or any orders or regulations made by the commission; see Schedule 1, paragraph 14.

sharing.<sup>212</sup> Certain obligations are targeted at existing or dominant licensees with a view to preventing anti-competitive practices.<sup>213</sup>

Provision is made for all relevant rates, fees, and charges to be based on costs determined in accordance with prescribed costing methodologies, models, or formulae.<sup>214</sup> The PUC is provided with the authority to seek to resolve all disagreements or disputes on matters within its jurisdiction “in any reasonable manner it thinks is best calculated to achieve the objectives of these regulations, the Belize Telecommunications Act and the Public Utilities Commission Act.”<sup>215</sup>

### ***Guyana***

The Telecommunications Act of Guyana may be distinguished from the legislation in the four other countries reviewed. The act addresses the provisions of access to and sharing of telecommunications facilities and infrastructure, but provides few details on the terms for accessing technical interfaces which would allow for the interoperability of public network services. The Telecommunications Act requires service providers to share facilities such as conduits, poles, wires, switchboards, exchanges, works, or other equipment where convenience or necessity requires such use and where this will not result in irreparable injury to the owners or other users of the equipment or in any substantial detriment to the service provided. The act provides that a license may authorize interconnection with other telecommunications systems of

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<sup>212</sup> See Schedule 2, “Telecommunications Infrastructure and Sharing Regulations (amended)”, paragraph 7

<sup>213</sup> E.g., paragraph 7 of Schedule 1, “Belize Telecommunications Interconnection Regulations (Amended) 2010.” See also Telecommunications Act, sections 26 and 42. But note that the legislation does not specify how anti-competitive effects are determined.

<sup>214</sup> E.g., Schedule 1, “Belize Telecommunications Interconnection Regulations (Amended) 2010,” paragraph 18; Schedule 2, “Telecommunications Infrastructure and Sharing Regulations (amended),” paragraph 11. Note that Schedule 3, “Telecommunications interconnection and Infrastructure Sharing (Rates, Fees and Charges) Regulations (amended), 2010,” defines the public telecommunications services licensee’s costs as “the incremental cost, and may include allowance for a reasonable return on capital investment”; see paragraph 4 (1). See also Schedule 3, paragraph 10, which requires that proposed new rates, tariffs, fees, or charges or any proposed amendments, along with all pertinent information, must be submitted to the PUC for its consideration at least 35 days prior to the proposed introduction of any such new or amended rates, tariffs, fees, or charges. See also Telecommunications Act, sections 21(3), 22(2)(f), 25 and 26(2). Note that the PUC may impose limits on potential profits, e.g., price caps, maximum-rate-of-return, if deemed necessary, in order to prevent unfair business practices in a “competitive market.”

<sup>215</sup> E.g., Schedule 2, “Telecommunications Infrastructure and Sharing Regulations (amended),” paragraph 18; Schedule 1, “Belize Telecommunications Interconnection Regulations (Amended) 2010,” paragraph 27.

any apparatus, and/or the provision of any specified telecommunications services, and include any conditions as may appear requisite or expedient.<sup>216</sup>

Subject to the conditions stated in a license or an agreement with the government, the PUC may, by order, require that two or more public utilities enter into arrangements for interchange, interconnection, joint or combined, or other arrangements, for the provision of any service, upon such terms and conditions as the PUC may determine.<sup>217</sup> The license granted to GT&T reportedly requires it to negotiate with other providers on interconnection. The act does not require the unbundling of the local loop. It allows the resale (i.e., non-facilities-based supply) of all types of telecom services (save for voice services over fixed lines which fall within GT&T's exclusive license). Guyana reportedly also allows the provision of international call-back services.<sup>218</sup>

The legislation in Guyana is deficient in that it does not expressly fulfill the requirements of Article 98 of the EPA. The rules on interconnection, including the provision for cost-oriented rates, publicity for procedures for interconnection and interconnection agreements with major suppliers, and the referral of disputes to an independent agency, may be made conditions of a license. However, the legislation does not mandate any specific terms and it is unclear whether the legislation is being implemented in a manner consistent with the EPA regulatory framework.

### ***Jamaica***

The Telecommunications Act requires all carriers upon request to permit interconnection of their public network with that of another carrier. Recent changes to the act (May 2012) require interconnection not only to voice services but also to data and other telecommunications

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<sup>216</sup> See Telecommunications Act CAP 47:02, sections 7 and 8, which provide for the possible inclusion of conditions requiring a person to (a) provide such telecoms services as specified; (b) connect to any telecommunication system to which the license relates, or permit the connection to any such system or other telecommunications systems and such apparatus as specified; (c) permit the provision by means of any telecommunications system to which license relates of such services as are specified in the license; (d) not show undue preference or exercise undue discrimination against persons of any class or description (including persons in rural areas) as respects any service provided, connection made or permission given in pursuance of such conditions as are stated in the license; and (e) publish a notice specifying the charges (or method to be adopted for determining same) and other terms and conditions that are to be applicable to such services so provided, connections made etc. Note that licenses may include provisions in relation to works, and provision is made in the Telecommunications Act for approval to be given to persons carrying out the relevant operations dealing with apparatus for connection to telecommunications systems, meters, etc. See *ibid*, sections 18 -23; "relevant operations" is defined as the installation, maintenance, adjustment, repair, alteration, moving, removal, or replacement of apparatus that is or is to be connected to any telecommunication system to which a license relates.

<sup>217</sup> See Public Utilities Commission Act 1999, section 36.

<sup>218</sup> See WTO TPR Report, WT/TPR/S/218/Rev.1, p.77, paragraph 112.

services. The terms and conditions of an interconnection agreement must be in accordance with the relevant reference interconnection offer (RIO), based on an agreement between the interconnection seeker and provider or determined by the OUR acting as arbitrator in a pre-contract dispute.<sup>219</sup> Copies of interconnection agreements must also be lodged with the OUR.<sup>220</sup>

The OUR may object to any interconnection agreement and, either on its own initiative or in resolving a dispute between operators, make a determination of the terms and conditions of call termination, including charges. An operator's call termination charges should be based on the principle of cost orientation. However, where the OUR determines termination charges in relation to a non-dominant operator, the OUR may consider reciprocity (i.e., basing a carrier's interconnection charges on those of another carrier), local or international benchmarks, or any other relevant approaches.<sup>221</sup> Recent amendments to the act allow the OUR on its own initiative, in assessing an interconnection agreement, to make a determination of the terms and conditions, including charges, or resolve post-contract disputes; any such determination of the OUR is binding. The OUR is also given the power to set interim rates where there is a marked diversity in rates or where there is market shock, pending the completion of the OUR's rate determination process.<sup>222</sup>

The OUR's authority to prescribe rates is also derived from the Office of Utilities Regulation Act. This, however, does not apply where the enabling instrument specifies the manner in which rates may be fixed by a licensee or specified organization.<sup>223</sup>

The Telecommunications Act makes it is unlawful to engage in bypass operations.<sup>224</sup> In this regard it may be noted that Jamaica has inscribed a reservation on its commitments with regard to trunked radio system services on mode 3, commercial presence, stating that "Interconnection can only be done through commercial arrangements with a licensed carrier"; and left unbound mode 1, cross-border supply, voice telephone services. With regard to

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<sup>219</sup> See Telecommunications Act, sections 31 and 34. See also *ibid*, section 27 defining a "reference interconnection offer" as an offer document setting out matters relating to the price and terms and conditions under which a public telecommunications carrier will permit interconnection to its public network.

<sup>220</sup> See Telecommunications Act, section 29(3).

<sup>221</sup> See Telecommunications Act, section 29.

<sup>222</sup> See Telecommunications Act, section 37A.

<sup>223</sup> See Office of Utilities Regulation Act, section 11.

<sup>224</sup> See Telecommunications Act, sections 9, 51 and 63, which provide further that a carrier or service provider may, on application to the OUR and on such terms and conditions as the OUR may specify, discontinue the provision of a specified service or disconnect any facility if there are reasonable grounds to believe that a person is engaging in bypass operations.

international voice, data, and video transmission services supplied to firms involved in information processing located within free zones, Jamaica has entered a reservation on mode 3, commercial presence, stating that “Until 1 September 2013, interconnection with the local public switched networks not permitted. Services to unauthorized parties not permitted.” The latter mentioned reservation relates to transitional measures which were provided for under the Telecommunications Act.<sup>225</sup>

The Telecommunications Act provides that a carrier may permit another carrier access to its land or any facility where reasonable notice and compensation is provided and access is technically feasible, would not threaten the integrity of the providing carrier’s network or prevent the fulfilment of other reasonably anticipated requirements for use of the land or facility. Where a carrier is denied access, or permission is unreasonably delayed, the carrier may make an application to the court for an order permitting entry.<sup>226</sup> New provisions on sharing facilities and infrastructure, including the power of the OUR to determine the terms and conditions of access as well as to resolve disputes, are included in recent amendments to the act.<sup>227</sup>

### ***Trinidad and Tobago***

The Telecommunications Act sets out the conditions for interconnection which must be included in a concession for a public telecommunications network or public telecommunications service. These would require a concessionaire to provide for direct and indirect interconnection with the public telecommunications networks or public telecommunications services of other concessionaires; and the transmission and routing of the services of other concessionaires, at any technically feasible point in the concessionaire’s network. In respect of this, the act requires a concessionaire to, *inter alia*,<sup>228</sup>

- Comply with guidelines and standards established by the authority to facilitate interconnection.

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<sup>225</sup> See Telecommunications Act of Jamaica, section 78,

<sup>226</sup> See Telecommunications Act of Jamaica, sections 54 and 55.

<sup>227</sup> See Telecommunications Act of Jamaica, section 29A.

<sup>228</sup> See Telecommunications Act of Trinidad and Tobago, section 25. See also Telecommunications (Interconnection) Regulations, regulations 3, 5, 13, 15, 16, 18, 19, 22, 28, 31 and 32, which further provide for, *inter alia*, interconnection on non-discriminatory terms and conditions; setting interconnection rates based on costs that comport with internationally accepted standards for such benchmarks; making such terms and conditions available to other concessionaires; the publication of interconnection agreements; and similar obligations concerning reference interconnection offers (RIOs).

- Provide, upon request, points of interconnection in addition to those offered generally to other concessionaires, subject to rates that reflect the concessionaire's total economic cost of constructing additional facilities necessary to satisfy such request.
- Publish the prices and the technical and other terms and conditions pertaining to its offer for the elements of interconnection.
- Provide the elements of interconnection to other concessionaires of public telecommunications networks and public telecommunications services in a manner that is at least equal in both quality and rates to that provided by the concessionaire to a subsidiary, affiliate, or any other party to which the concessionaire provides interconnection.
- Promptly negotiate, upon the request, and endeavour to conclude an agreement with regard to the prices and the technical and other terms and conditions for the elements of interconnection. Provide the authority with a copy of any agreement which is concluded. Offer the terms and conditions of any negotiated agreement to any other concessionaire of a public telecommunications network or public telecommunications service on a non-discriminatory basis.

An operator is also required to provide other concessionaires with access to the facilities that it owns or controls. Such access is to be negotiated on a non-discriminatory and equitable basis and may be denied only where there is insufficient capacity in the facility, or for reasons of safety, security, reliability, or difficulty of a technical or engineering nature. At the request of either party, the authority may assist in negotiating a settlement.<sup>229</sup>

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<sup>229</sup> But note that access to facilities does not include interconnection; see Telecommunications Act of Trinidad and Tobago, section 26(5). See also Telecommunications (Access to Facilities) Regulations, regulation 5, which requires a concessionaire to provide access under the same terms and conditions and of the same quality as it provides for its own networks and services, the networks and services of its subsidiaries and partners or the networks, and services of any other concessionaire to which it provides access. A concessionaire failing to provide access on such terms must prove to the authority that it is not technically feasible to do so. See also *ibid*, regulation 23 (denial of access requests); regulation 18 (setting access rates based on costs that comport with internationally accepted standards for such benchmarks); regulation 17 (publication of access agreements on the authority's website); regulations 11, 13, 24 and 25 (the authority's role in settling disputes).

### **The Management of scarce resources: the spectrum and numbers**

Article 99 of the EPA on “Scarce resources,” including frequencies, numbers and rights of way, requires that the procedures for their allocation and use be implemented in an objective, timely, transparent, and non-discriminatory manner. Significantly, the disciplines imposed on fees for licenses to supply telecommunications services in Article 96 of the EPA are not applicable to the allocation and use of the spectrum and numbers. Article 99 further requires that the current state of allocated frequency bands be made publicly available, though detailed identification of frequencies allocated for specific government use is not required.

#### ***Barbados***

The National Spectrum Management Plan details how the spectrum is to be used to promote economic and orderly operations. It also sets forth the procedures for authorizing its use, which may include auction, tender, fixed price, or other stated criteria, taking into account the need to recover the cost incurred in the management of the spectrum.<sup>230</sup> The procedures for authorization contemplated under the act are consistent with EPA prescriptions on the management of scarce resources. The rules applicable to the grant and assignment of, suspension, revocation, or refusal to renew a carrier and service provider licenses also generally apply to licensing of the spectrum. Provision is made for the minister to modify a spectrum license after consultation with the licensee and upon one year’s prior written notice where he/she is of the view that this is necessary for the better use of the spectrum. Where this occurs, reasonable compensation should be made.<sup>231</sup> The minister is responsible for allocating frequency bands for particular types of telecommunications networks, telecommunications services and radio communications, and must maintain a register of spectrum licenses available to the public for inspection upon payment of a fee.<sup>232</sup>

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<sup>230</sup> See Telecommunications Act CAP 292B, sections 40 and 41. Note that the National Spectrum Management Plan is made available to the public on payment of the prescribed fee. See also *ibid*, section 46, which provides for the grant of a special spectrum license in cases of emergency; such licenses may be granted for a period not exceeding 10 days and are non-renewable. See also Telecommunications (Licence Fees) Regulations, 2003, regulation 3 and First Schedule, Parts I and II, which provide for a flat application fee and an annual fee payable per frequency, which varies depending on the band width and MHZ.

<sup>231</sup> See Telecommunications Act CAP 292B, sections 44 and 45. Note also that a spectrum license may be modified for national security reasons, after consultations and upon two days prior notice.

<sup>232</sup> See Telecommunications Act CAP 292B, sections 42 and 49.

The Telecommunications Act imposes on the minister the responsibility for developing a National Numbering Policy and Plan to assign telephone numbers to telecommunications carriers on a non-discriminatory basis to ensure that sufficient numbering resources are available for carriers in accordance with the plan.<sup>233</sup> The powers of the minister with respect to planning, managing, and regulating numbering in Barbados have been delegated to the Barbados Numbering Administrator. The issue of number portability is addressed in the Telecommunications (Numbering) Regulations, 2003, as amended. The regulations contemplate the allocation of numbers to licensees on a non-discriminatory basis in a manner that would distinguish between each licensee and each particular telecommunications service, unless a determination is made in favour of providing number portability among different services. It calls for the National Numbering Plan to address the portability of allocated numbers, including rules about the maintenance of, and access to, databases that facilitate portability after the conduct of a cost-benefit analysis which suggests that the benefits to consumers arising from the making of rules outweigh the costs to all parties of complying with the rules. Where number portability is required, competitively neutral mechanisms for the recovery of the costs imposed on carriers by the requirement must be specified.<sup>234</sup>

### ***Belize***

The Public Utilities Commission (PUC) is responsible for the control, planning, administration, management, and licensing of the radio frequency spectrum required for compliance with the relevant international regulations, most notably, those of the International Telecommunication Union and its Radio Regulations, as agreed to or adopted by Belize. The spectrum allocation plan developed by the PUC defines how the radio spectrum may be used to ensure that the radio

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<sup>233</sup> See Telecommunications Act CAP 292B, section 50.

<sup>234</sup> See Telecommunications (Numbering) Regulations, 2003, regulations 2-7. Note that the rules may also require carriers to offer indirect access to other carriers, i.e., whereby customers are able to select the services of any licensee using a public telecommunications network and have their calls routed to a particular licensee without the use of an access code or other alternative dialling arrangement and without an unreasonable post-dialling delay. Note that the Barbados Regulator undertook a detailed cost benefit analysis taking into account current levels of competition, the costs of switching providers, and considerations related to whether customers actually viewed the inability to retain their number as a major inconvenience. Number portability was not implemented; see Julian Wilkins, Digicel head of Group telecoms public policy, CTU Caribbean Ministerial Strategic Seminar, Hilton Hotel, Port of Spain, February 9, 2011. Note that number portability is one of the rights and obligations attached to Class 1 Primary Line VoIP services as set out in the Practice Note on the Regulation of Voice over Internet Protocol under, viewed at <http://www.ictregulationtoolkit.org/en/PracticeNote.3272.html+Barbados+telecommunications+number+portability&ct=clnk>.



frequency spectrum is utilized and managed in an orderly, efficient, and effective manner, reducing congestion and interference in the use of frequencies, and providing opportunities for the introduction of the widest range of telecommunication services and the maximum number of users as is practically feasible.<sup>235</sup> The Telecommunications Act imposes a general obligation on the PUC to ensure that adequate publicity is given to the terms and conditions of every license issued under the act, and to maintain a register of all licenses granted that is made available to the public, save and except where the requirements of public policy or confidentiality otherwise require non-disclosure.<sup>236</sup>

The PUC is also responsible for developing a plan for numbering all telecommunications services and administering the use of such numbers to ensure non-discriminatory usage and to facilitate competition. Number portability within existing fixed line exchanges is supported in the legislation and technical considerations for number portability are included in the licenses of all suppliers of services.<sup>237</sup>

### *Guyana*

The National Frequency Management Unit (NFMU) took over the spectrum management functions of the former Guyana Telecommunications Corporation at the time of its privatization. It is tasked with receiving and processing applications for licenses in assigning and managing spectrum usage, and is responsible for administering the national numbering plan and all other numbering resources assigned to Guyana.<sup>238</sup>

Spectrum regulation in Guyana is based on section 63(1) of the Post and Telegraph Act CAP 47:01, which states that "[n]o person shall establish any wireless telegraph station, or install or work any apparatus for wireless telegraphy in any place, or on board any Commonwealth ship registered in Guyana, except under and in accordance with a license granted in that behalf by the Minister...."<sup>239</sup> "Telegraph" is defined as a wire or wires used for the purpose of telegraphic

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<sup>235</sup> See Telecommunications Act of Belize, section 12. Note that the frequency spectrum allocation plan is made available to the public at a prescribed fee.

<sup>236</sup> See Telecommunications Act of Belize, section 13.

<sup>237</sup> See Telecommunications Act of Belize, section 11.

<sup>238</sup> According to the Guyana Frequency Management Unit Order, 1990, the NFMU is responsible for all aspects of spectrum management from planning and allocation through licensing to monitoring and enforcement. See also NFMU online information, viewed at <http://www.nfmu.gov.gy/>.

<sup>239</sup> See Post and Telegraph Act CAP 47:01, section 63, which further clarifies that the section applies to a cable television transmitter or station, and "wireless telegraphy" includes television. Provision is made for the minister to prescribe the fees, terms, and conditions of licenses, etc. But note that provision is made for every sea-going

communication, with any casing, coating, tube, or pipe and the apparatus connected therewith for the purpose of telegraphic communication, and include any apparatus for transmitting messages or other communications by means of electricity. “Wireless telegraphy” means a system of communication by telegraph without the aid of any wire connecting the points from and at which the messages of other communications are sent and received.<sup>240</sup>

The Post and Telegraph Act CAP 47:01 grants the minister the exclusive privilege of establishing, maintaining and working telegraphs between Guyana and places outside of Guyana, with the proviso that the minister may grant a license, subject to such conditions as he/she thinks fit, to any person to establish, maintain, or work a telegraph between Guyana and any foreign jurisdiction.<sup>241</sup>

Spectrum licenses are awarded on a first-come, first-served basis. There is a license fee and annual frequency usage fees, which vary according to the type of wireless service, as prescribed in the regulations made under the Telecommunications Act, 1990 and the Posts and Telegraph Act. The fees are used to fund the operation of NFMU, with any surpluses sent to the Government’s Consolidated Fund.<sup>242</sup> After processing an application, the NFMU will normally advise the applicant that the license is ready to be issued.

Extended delays in granting spectrum licenses have been litigated in the courts. In one instance it was found that delays in excess of 15 years for an acknowledgement of an application for a license could not be justified and signalled an inordinate delay on the part of the NFMU in considering the request. The Court of Appeal found that the government had an unlawful

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Commonwealth ship registered in Guyana, being a passenger steamer or a ship of 1600 tons gross tonnage or upwards, to be provided with a wireless telegraph installation and one or more certified operators and watchers; see *ibid*, section 64. The licensing requirements applied to ships extend, with the necessary modifications, to aircraft; see *ibid*, section 65.

<sup>240</sup> See Post and Telegraph Act CAP 47:01, section 2, which also defines “telegram” as any message or other communication transmitted or intended for transmission by a telegraph, and includes any message or other communication transmitted or intended for transmission by a telephone or by any similar instrument or means; see also *ibid*, section 61(1) defining “telegraph” for the purposes of that section as an electric, galvanic, or magnetic telegraph, and includes, appliances and apparatus for transmitting or making telegraphic, telephonic, or other communication by means of electricity, galvanism or magnetism, whether the communication be transmitted by means of wires or cables, or without wires or cables.

<sup>241</sup> See Post and Telegraph Act CAP 47:01, sections 61 and 62. Note that where expedient in the public interest, the minister may by warrant under his hand require any person who owns or controls any telegraphic cable or wire etc used for sending or receipt of telegrams to or from any place out of Guyana to turn over the originals and transcripts of such telegrams and all other papers relating thereto.

<sup>242</sup> See also Peter A Stern, “Promoting Investment in Information and Communication Technology in the Caribbean” IADB Economic & Sector Study Series, RE3-06-001, May 2006, pp. 60-66; <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=917357>.

monopoly on the airwaves and that the NFMU failed to do its job with respect to considering radio license applications.<sup>243</sup> The EPA requires that procedures for the allocation and use of frequencies be implemented in an objective, timely, transparent and non-discriminatory manner. It is unclear whether NFMU practices have improved in recent years. The NFMU has indicated that it takes several factors into consideration in granting a license, including agreements between Guyana and other countries, the provisions of existing licenses, the public interest, the extraction of maximum benefits from the radio spectrum, electromagnetic compatibility of apparatus, and government policies.<sup>244</sup>

### ***Jamaica***

The Spectrum Management Authority established under the Telecommunications Act advises the minister on a national plan for the allocation of the spectrum which must conform to the International Telecommunication Union Table of Frequency Allocations and the granting of spectrum licenses, including maritime spectrum licenses).<sup>245</sup> An updated list of licensed spectrum users is posted on the authority's website.<sup>246</sup> The act provides for the payment of a spectrum license fee and a spectrum regulatory fee.<sup>247</sup> The regulatory fee is established at a level to cover the reasonable operating costs incurred by the Spectrum Management Authority in relation to spectrum licenses and is calculated on the same basis in relation to each holder of a carrier license and a service provider license.<sup>248</sup> The enforcement powers of the authority to investigate an apparent contravention of any term or condition of a spectrum license, or the failure to pay the prescribed fees, and recommend to the Minister the suspension or revocation of such license, are strengthened in recent amendments to the act.<sup>249</sup>

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<sup>243</sup> See *Vieira Communications Limited (VCT) v. AG* (2009).

<sup>244</sup> See NFMU online information, viewed at <http://www.nfmu.gov.gy/>.

<sup>245</sup> See Telecommunications Act, sections 21-23. Note section 20(4), which provides that the minister may delegate any of his/her functions under Part IV on spectrum management to the Spectrum Management Authority; see also Telecommunications (Delegation of Function) Order 2003.

<sup>246</sup> See <http://www.sma.gov.jm/spectrum-users>.

<sup>247</sup> See Telecommunications Act, sections 23(7) and 26.

<sup>248</sup> See Telecommunications Act, section 26. The Telecommunications (Spectrum Regulatory Fees) Regulations, 2003, establishes three different rates of regulatory fees: (Group 1) licensees who derive no significant commercial benefit from the use of the spectrum; (Group II, Level I) licensees whose business activities are wholly dependent upon the use of the spectrum; and (Group II, Level II) licensees who use the spectrum as a preferred means of communication. The fees paid by Group II, Level II are calculated on a basis which is double that of Group I. It may be recalled that license fees for the use of the spectrum as a scarce resource are not subject to the same disciplines as license fees for the provision of telecommunications services.

<sup>249</sup> See Telecommunications Act, section 23A.

The OUR is tasked with developing a plan numbering telecommunications services taking into account, *inter alia*, relevant international regulations and the need to promote efficient use of numbers and fair and open competition. The Telecommunications Act requires the OUR to assign numbers for telecommunications services to carriers and service providers on a non-discriminatory basis.<sup>250</sup>

The revisions to the Telecommunications Act that have been adopted following public consultations<sup>251</sup> allow the minister, after consulting with the OUR, to make rules imposing on any public telecommunications carrier the responsibility to offer number portability.<sup>252</sup> Formerly, the legislation required that the OUR undertake an assessment of whether the benefits likely to arise from imposing such a requirement would outweigh the likely costs and not impose an unfair burden on any carrier or service provider. The need for such studies was seen as superfluous given global market practices and consumer habits.

### ***Trinidad and Tobago***

The Telecommunications Authority of Trinidad and Tobago is charged with developing a spectrum plan to regulate the use of the spectrum with a view to promoting the economic and orderly utilization of frequencies for the operation of all means of telecommunications and to recover the cost incurred in the management of the spectrum.

The Telecommunications Act provides for the authority to grant licenses to authorize the operation or use of any radio communication service or any radio transmitting equipment, including that on board any ship, aircraft, or other vessel, in the territorial waters or airspace of Trinidad and Tobago.<sup>253</sup> The Spectrum Management Policy and Authorisation Framework define three types of licenses that may be granted by the authority: spectrum licenses to operate radio communication systems within a specified frequency band on a technology neutral basis; station

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<sup>250</sup> See Telecommunications Act, section 8.

<sup>251</sup> Noted that this was one of the issues raised by the OUR that was subject to public consultation in the review of the legislation; see “Gov’t Committed to Timeline for Changes to Telecommunications Act,” Jamaica Information Service, <http://www.jis.gov.jm/news/opm-news/28666-govt-committed-to-timeline-for-changes-to-telecommunications-act>.

<sup>252</sup> See Telecommunications Act, section 37(1) as amended. See also *ibid*, section 37(2), which defines “number portability” as the ability of customers to change service providers without having to change their telephone numbers.

<sup>253</sup> See Telecommunications Act of Trinidad and Tobago, section 36. Note that a license is not required for any radio-communication service on board any ship of war, military aircraft, or satellite registered in Trinidad and Tobago.

licenses to operate the specified station in accordance with technical parameters determined by the authority; and class licenses to use specific radio communication devices within specific technical and operational parameters that generally apply to low-powered mass-market consumer devices. An updated list of licenses is posted on the authority's website.<sup>254</sup>

The procedures for licensing use of the spectrum may include the licensing of frequency bands by auction, tender, at a fixed price, or based on stated criteria.<sup>255</sup> It may be recalled that license fees for the use of the spectrum as a scarce resource are not subject to the same disciplines as license fees for the provision of telecommunications services.

The authority is also responsible for developing a plan for numbering telecommunications services that may include procedures for assigning or reassigning telephone numbers to users. The authority administers and manages the numbering system, making numbers available to providers of telecommunications services on an equitable basis.<sup>256</sup>

### **Universal service**

The EPA defines “universal service” as “the set of services of specified quality that must be made available to all users within the territory regardless of their geographical location and at an affordable price.”<sup>257</sup> It expressly acknowledges the right of each State to define the kind of universal service obligation it wishes to maintain.<sup>258</sup> Universal service obligations must be administered in a transparent, objective, and non-discriminatory manner; they must be neutral with respect to competition and not more burdensome than necessary.<sup>259</sup> The EPA requires that all suppliers should be eligible to ensure universal service, and that the designation be made through an efficient, transparent, and non-discriminatory mechanism. In recognition that there are costs as well as market benefits that may be derived from the provision of universal service, the EPA requires that consideration be given to establishing a compensatory mechanism.<sup>260</sup>

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<sup>254</sup> See <http://www.tatt.org.tt/Home.aspx>

<sup>255</sup> See Telecommunications Act, section 41. See also Telecommunications (Fees) Regulations, regulation 19, which provides for the selection of persons for the grant of licenses for spectrum or frequency within certain bands through an auction or other competitive process utilizing the procedures set out in the Telecommunications Tenders Rules. The use of a competitive process to grant a license does not affect a concession fee payable for any concession in respect of which that license is granted.

<sup>256</sup> See Telecommunications Act, section 44.

<sup>257</sup> EPA, Article 94(1) (f).

<sup>258</sup> See EPA, Article 100(1).

<sup>259</sup> See EPA, Article 100(2).

<sup>260</sup> See EPA, Article 100(3).

An additional obligation forming part of the EPA regulatory framework requires that directories of all subscribers should be made available to users and updated on a regular basis (at least once a year), and that the organizations producing directories must not discriminate in the treatment of information that has been provided to them by other organizations.

### ***Barbados***

The Telecommunications Act imposes a universal service obligation on the universal service carrier designated by the minister. The criteria and method for designating a universal service provider is not stated in the legislation. It may be recalled that the EPA requires that the designation be made through an efficient, transparent, and non-discriminatory mechanism. The minister is required to give 12-month notice in writing where it has designated one carrier; the minister subsequently designates another carrier to be the universal service carrier. It is unclear whether all carriers are eligible to ensure universal service as required by the EPA.

The Telecommunications Act requires the minister to take measures to ensure that the universal service obligation is fulfilled as efficiently and economically as practicable and coordinated with cost-oriented pricing efforts which address underlying cost structures and levels. In addition, the minister must ensure that the excess costs incurred from providing the service are borne by all carriers and service providers on an equitable basis (through a system of access deficit charges and the Universal Service Fund); that the universal service obligation does not impose an unfair or unreasonable burden on the universal service provider or contributors to the provision of universal service; and that the universal service obligation is transparent, non-discriminatory, non-preferential, and competitively neutral.<sup>261</sup>

### ***Belize***

The PUC is responsible for ensuring that the public telecommunication service, in particular, basic telephone service, is accessible to the widest number of users. In addition it determines the services in respect of which the requirement of universal service is to apply, and the conditions to attach thereto, taking into account the needs of the public, affordability of the service and advances in technology. The PUC may impose, as a condition of the grant of a license, any

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<sup>261</sup> See Telecommunications Act CAP 292B, Part VII, sections 32-36. Note that the minister may modify the universal service obligation in consultation with the FTC, but must ensure that no unfair or unreasonable burden is placed on the universal service carrier or any person required contributing to the provision of the service.

obligations to provide universal service to the widest users, including those with disabilities or in a specified area or region, to the extent technically feasible and economically reasonable. The Telecommunications Act provides that any such licensee is entitled to compensation in relation to the actual costs incurred in meeting that obligation. The act also provides for the establishment of a fund which would include universal access development fees paid by providers of telecommunications services (public and private).<sup>262</sup>

The Belize legislation does not address key EPA principles applicable to universal service, i.e., that it must be administered in a transparent, objective and non-discriminatory manner, be neutral with respect to competition and not more burdensome than necessary, and be open to all suppliers as eligible to ensure universal service. It may be recalled, however, that the dominant service supplier in Belize has been designated a public utility service that must be majority owned by the government. This has implications for the implementation of the universal service obligation that will likely fall on the majority government-owned entity.

### *Guyana*

The Telecommunications Act directs the minister and the director to exercise their functions in a manner best calculated to secure universal service throughout Guyana, satisfying all reasonable demands for telephone and telegraph services including, in particular, emergency services, public call box services, and directory information services, while ensuring that persons who are to provide such services are able to finance them.<sup>263</sup> The Public Utilities Act also provides that the PUC, subject to the provisions of a license, government agreement, or law (most notably, the Telecommunications Act), may order a public utility to extend its service as it may deem reasonable and expedient, where such extension of existing service would provide sufficient business to justify this.<sup>264</sup> The license granted to GT&T reportedly includes universal service

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<sup>262</sup> See Telecommunications Act of Belize, sections 33 and 34.

<sup>263</sup> See Telecommunications Act of Guyana, section 4. Note that the act also requires the provision of free directory information services to blind or otherwise disabled persons where the provision of directory information services is made a condition of a license.

<sup>264</sup> See Public Utilities Commission Act 1999, sections 25-27, which further provide that where a license granted to a public utility restricts its service to specified areas, an order for extension of service may not require it to extend the service to any area outside the specified areas; and defining “sufficient business” as such business as will yield such gross revenue, within the extended area of service at the rates for the time being authorized, as will provide a sum not less than the cost of operations, maintenance, and depreciation, and will produce a reasonable return on the capital outlay in respect of such extension; and provide that where the minister and a service provider agree on what

obligations for ensuring universal fixed telephony services in Guyana. It is suggested, however, that GT&T has systematically missed its universal service targets, although the PUC, though empowered to impose fines, has not done so.<sup>265</sup>

In accordance with the Public Utilities Act, a public utility may submit for the approval of the PUC any program for developing and expanding facilities or services. The PUC, after considering the costs and benefits, must render a decision within 90 days.<sup>266</sup> Except where a license expires or is revoked, suspended, cancelled, or terminated, a service provider may not cease to supply services within its authorized areas or any part thereof without first obtaining the permission of the PUC.<sup>267</sup>

The legislation in Guyana does not address key EPA principles pertaining to universal service, most notably, that universal service obligations should be administered in a transparent, objective, and non-discriminatory manner: be neutral with respect to competition and not more burdensome than necessary; that all suppliers should be eligible to ensure universal service; and that designation be made through an efficient, transparent and non-discriminatory mechanism. It may be recalled that Parliament is reviewing proposed new legislation which should replace the current regulatory regime.

### ***Jamaica***

The Telecommunications Act establishes the basic principles for providing service to customers. Connection to the public voice network should be provided on request where technically feasible and economically reasonable; the provision of universal service should be efficient, economical and practicable; a licensee who is required to provide universal service is entitled to compensation; and a universal service levy may be imposed on a licensee.<sup>268</sup> The obligation to provide universal service may be determined either on the basis of an agreement between the minister and a licensee or by the minister on a recommendation of the OUR following a public

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is “sufficient business” in relation to that public utility, the PUC must have regard to it in determining whether the extension of service will provide sufficient business.

<sup>265</sup> See WTO TPR Report, WT/TPR/S/218/Rev.1, p. 77, paragraph 110.

<sup>266</sup> See Public Utilities Commission Act 1999, section 28, which further provides that where an agreement exists between the government and a public utility or investor, or the license granted to the public utility or a written law makes provisions for program for the development and expansion of facilities or services of a public utility, such program shall be deemed to be approved by the commission.

<sup>267</sup> See Public Utilities Commission Act 1999, section 30.

<sup>268</sup> See Telecommunications Act, section 38.



consultation process. The public consultations processes mandated by the act are also designed to ensure that the universal service obligation does not impose an unfair or unreasonable burden on the universal service provider, persons who are required to contribute to the universal service obligation levy, or customers of specified services.<sup>269</sup> The act, as such, accords with the basic EPA prescription that States shall assess whether the provision of universal service represents an unfair burden on organizations designated to provide universal service.<sup>270</sup>

The minister may designate a telecommunications carrier as a universal service provider and, on the recommendation of the OUR, deem any other licensee to be a universal service provider or to be so eligible. The process of designation requires public consultations and appears to conform to the requirements of the EPA.<sup>271</sup>

Substantial revisions have been made to the definition of the universal service obligation and the administration of the universal service levy in recent amendments to the Telecommunications Act adopted by Parliament in May 2012. The expanded definition of universal service takes into account the increasing importance of information and communications technology services to economic growth and development.<sup>272</sup> The revised legislation provides for the establishment of a Universal Service Fund as a body corporate with a board of management responsible for the general management of the resources of the Fund. Sums collected from the levy will be paid into the Universal Service Fund as opposed to the general Consolidated Fund and the auditor-general will be entitled to examine the accounts of the fund at all times.<sup>273</sup> The revisions to the act are designed to promote transparency and the objective administration of the universal service obligation in accordance with Jamaica's GATS and EPA obligations.

### ***Trinidad and Tobago***

The Telecommunications Authority of Trinidad and Tobago is responsible for the administration of the universal service obligation in accordance with the policy established by the minister. The authority determines the public telecommunications services in respect to which the requirement

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<sup>269</sup> See Telecommunications Act, section 42(2) (b).

<sup>270</sup> See EPA, Article 100 (2) and (3).

<sup>271</sup> See Telecommunications Act of Jamaica, section 39; see also Telecommunications (Universal Service Levy) Order, 2011.

<sup>272</sup> See Telecommunications Act, section 39(2) as amended.

<sup>273</sup> See Telecommunications Act of Jamaica, sections 38A-38G.

of universal service applies (which, at a minimum, must include a quality public telephone service) and the manner in which a public telecommunications service or value added service is to be provided and funded in order to meet the requirements of universal service for that service (including the obligations, if any, of the providers and users of the service). The authority, with the approval of the minister, may require that closed user group services, private telecommunications services, and value added services, as well as the users of such services and all telecommunications services generally, contribute to funding universal service. The recommendation of the authority and the minister's decision with reasons must be published. The obligation to provide or contribute to the funding of universal service must be applied on a non-discriminatory basis as between all similarly situated telecommunications service providers and users.<sup>274</sup>

In October 2011 the Telecommunications Authority published a finalized version of the “Universality Framework for Telecommunications Services in Trinidad and Tobago,”<sup>275</sup> a consultation document that elaborates on the scope of the universal service obligation to be implemented in line with the consultations that have occurred. The document further states that all concessionaires who provide telephone services will be required to provide directory assistance services (directly or indirectly) to all users. Free directory assistance services (and possibly also an integrated electronic Braille directory) must be provided to the visually impaired, and the provision of this service will be considered eligible for universality funding. This obligation is in accordance with Section C30 of the every concession agreement which states: “The concessionaire shall, if directed to do so by the Authority, provide free of charge printed annual (or at such other reasonable interval agreed with the Authority) integrated directories to all subscribers of telephone services.” The provision of this service to the differently-abled will qualify for universality funding, the level of which to be determined by the authority.<sup>276</sup>

### **Confidentiality of information**

Article 101 of the EPA on confidentiality of information requires that each State “ensure the confidentiality of telecommunications and related traffic data by means of a public

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<sup>274</sup> See Telecommunications Act of Trinidad and Tobago, section 28; see also *ibid.*, sections 24(1) (g) and 53.

<sup>275</sup> See <http://www.tatt.org.tt/LinkClick.aspx?fileticket=MVVTg3jB2Xs%3d&tabid=120>.

<sup>276</sup> See “Universality Framework for Telecommunications Services in Trinidad and Tobago”, *ibid.*, page 65.

telecommunication network and publicly available telecommunications services, without restricting trade in services.” The *duty* to ensure confidentiality of information imposed by the EPA may be compared with the “right to confidentiality” found in the GATS. Article 101 of the EPA overlaps with Chapter 6 of Title IV on the protection of personal data, which recognizes the importance of maintaining effective data protection regimes as a means of, *inter alia*, stimulating investor confidence.

### ***Barbados***

The Telecommunications Act sanctions the unlawful interference or interception of communications.<sup>277</sup> Additionally, a licensee may not disclose or use any information or document that relates to the content of any message or the private affairs or personal particulars of any person that comes to its attention by virtue of its business of providing telecommunications services, without the consent of that person.<sup>278</sup>

The Computer Misuse Act 2005 makes provision for the protection of computer systems and the information contained in those systems from unauthorized access or from abuse by persons authorized to have access. The act criminalizes certain acts which may interfere with computer systems whether done intentionally or recklessly and without lawful excuse or justification, including intercepting transmissions to, from or within a computer system that is not available to the public or electromagnetic emissions that are carrying computer data from a computer system.<sup>279</sup>

### ***Belize***

The Telecommunications Act requires every licensee and its employees and agents to treat as confidential any telecommunication message or any information relating to a telecommunication message that comes to their knowledge in the course of their duties. The act further makes it an

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<sup>277</sup> See Telecommunications Act CAP 282B, section 82.

<sup>278</sup> See Telecommunications Act CAP 282B, section 107. But note that this does not restrict disclosure or the use of information or documents required for the provision of telecommunications services; the performance of functions of the minister or FTC under the act and related enactments; the investigation or prosecution of a criminal offence pursuant to any law requiring such disclosure; the defense of the licensee in any proceedings brought against that carrier or service provider; or the court in connection with a court order made in civil proceedings

<sup>279</sup> See Computer Misuse Act 2005, Part II on “Prohibited Conduct.” Note that the Computer Misuse Act applies to acts or omissions taking place in Barbados, on a ship or aircraft registered in Barbados, or by a national of Barbados anywhere, provided that the person’s conduct would also constitute an offence under the law of a country where the offence was committed; see *ibid*, section 2.

offence to unlawfully interfere with, make use of, or record, the contents or substance of a telecommunication message. Any personal information of a subscriber must be kept confidential and not disseminated or used without the subscriber's consent or a court order.<sup>280</sup>

The government is reportedly also considering proposals for the development of a Data Protection and Privacy Bill and Cyber Crimes Bill.<sup>281</sup>

### ***Guyana***

The Telecommunications Act makes it an offence for any person engaged in running a public telecommunications system, other than in the course of one's duty, to intentionally modify or interfere with the contents of, or intentionally intercept a message sent by means of that system, or where a message so sent has been intercepted, intentionally disclose to any person the contents of that message. It is also an offence for such person to disclose to any person, other than in the course of one's duty, the contents of any statement of account specifying the telecommunication services provided for any other person by means of that system. This, however, does not apply to anything done in compliance with an order made by a court.<sup>282</sup>

The Telecommunications Act also imposes general restrictions on disclosure of information. No information with respect to any particular business that has been obtained under or by virtue of the provisions of the act, and which relates to the private affairs of any individual or to any particular business, may during the lifetime of that individual or the existence of the business, be disclosed without that person's consent.<sup>283</sup>

### ***Jamaica***

The Telecommunications Act requires every carrier and service provider to regard and deal with as secret and confidential all information regarding the type, location, use, destination, quantity, and technical configuration of services used by their customers. Disclosure of this information is permitted to certain security personnel and in other specified circumstances, most notably, with

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<sup>280</sup> See Telecommunications Act of Belize, section 44. But note that provision is made for a judge in chambers, upon an application by the D.P.P.; to authorize the interception of a telecommunications message where the judge is satisfied that information relating to the telecommunication message is material to any criminal proceedings, whether pending or contemplated, in Belize.

<sup>281</sup> See also "Government of Belize, Information Communication Technology and E-Government Initiative" viewed at: <http://mps.gov.bz/egov/modules/collaborate/index.php?page=Website+Guidelines>.

<sup>282</sup> See Telecommunications Act of Guyana, sections 34 and 35.

<sup>283</sup> See Telecommunications Act of Guyana, section 53 – but note that certain provisos apply.

the consent of the customer.<sup>284</sup> Additionally, the Interception of Communications Act makes it an offence to intentionally intercept a communication in the course of its transmission by means of a telecommunications network unless done pursuant to a warrant or in other limited circumstances provided in the law.<sup>285</sup>

The Cybercrimes Act, 2010, criminalizes unauthorized access or interference with any computer service, program, or data or making available devices or data for the commission of such offences.<sup>286</sup> The act defines "computer service" as including the provision of access to any computer or to any function of a computer, computer output, data processing and the storage or retrieval of any program or data; and "data" as including material in whatever form stored electronically, the whole or part of a computer program, and any representation of information or of concepts in a form suitable for use in a computer, including a program suitable to cause a computer to perform a function.<sup>287</sup>

### ***Trinidad and Tobago***

The Telecommunications Act requires that a concession for a public telecommunications network or a public telecommunications service include a condition that the concessionaire refrain from using, and maintain the confidentiality of any confidential, personal, and proprietary information of any user, other operator of a public telecommunications network or other provider of a telecommunications service originating from any such user, operator or provider; or any information regarding usage of the service or information received or obtained in connection with the operation of the concessionaire's network or service, for any illegitimate purpose. Such information may only be used or disclosed as required for the operation of the network or service, or in other limited specified circumstances.<sup>288</sup>

The Computer Misuse Act CAP 11:17 prohibits any authorized access, use, or interference with computers. The act makes it an offence for a person to knowingly and without

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<sup>284</sup> See Telecommunications Act of Jamaica, section 47.

<sup>285</sup> See Interception of Communications Act, section 3. Note that a communication is understood as being in the course of transmission by means of a telecommunications network at any time when the network by means of which the communication is being or has been transmitted is used for storing the communication in a manner that enables the intended recipient to collect it or otherwise have access to it.

<sup>286</sup> See Cybercrimes Act, sections 3-8. Note also that access with intent to commit or facilitate the commission of an offence is also criminalized; see in particular, *ibid*, section 4.

<sup>287</sup> See Cybercrimes Act, section 2.

<sup>288</sup> See Telecommunications Act of Trinidad and Tobago, section 24(1) (j).

authority cause a computer to perform any function for the purpose of securing access to any program or data held in that computer or in any other computer, or intercept or cause to be intercepted, directly or indirectly, any function of any computer by means of an electromagnetic, acoustic, mechanical, or other device.<sup>289</sup>

### **Dispute resolution**

Where a dispute arises between suppliers of telecommunications networks or services, Article 102 of the EPA provides that the national regulatory authority must be empowered, at the request of either party to the dispute, to issue a binding decision to resolve the dispute in the shortest possible timeframe. Where the dispute concerns the cross-border provision of services, the national regulatory authorities are expected to coordinate their efforts to resolve the dispute.<sup>290</sup> Two regional entities deserving particular mention with regard to the resolution of cross-border disputes are the Caribbean Telecommunications Union and the CARICOM Competition Commission.<sup>291</sup>

The Caribbean Telecommunications Union (CTU) established by CARICOM heads of government in 1989 is open to membership by all countries in the Caribbean region; all CARIFORUM States save for the Dominican Republic are members. Significantly, one of the functions of the CTU is to provide a forum for the discussion and resolution of telecommunications issues in the region.<sup>292</sup> The CTU may therefore be seen as a natural forum for the coordination of efforts with regard to disputes concerning the cross-border provision of telecommunications services. Where disputes concern anti-competitive behaviour, the pertinent regional body would be the CARICOM Competition Commission (CCC). The CCC is mandated

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<sup>289</sup> See Computer Misuse Act, section 3. Note that a person secures or gains access to any program or data held in a computer if by causing the computer to perform any function he/she alters or erases the program or data; copies or moves it to any storage medium other than that in which it is held or to a different location in the storage medium in which it is held; uses it; or causes it to be output from the computer in which it is held, whether by having it displayed or in any other manner. See also *ibid*, section 2, which defines defining “data” as representations of information or of concepts that are being prepared or have been prepared in a form suitable for use in a computer; and “intercept” as including, in relation to a function of a computer, listening to or recording a function of a computer, or acquiring the substance, meaning or purport thereof.

<sup>290</sup> Note that there is no equivalent provision in the GATS Telecommunications Reference Paper.

<sup>291</sup> Note that other regional bodies such as the Eastern Caribbean Telecommunications Authority (ECTEL) play an important role in the resolution of telecommunications disputes, but are not referred to herein as the countries reviewed, and do not form part of their membership.

<sup>292</sup> See Agreement for the Establishment of the Caribbean Telecommunications Union, Articles 2 and 4. Note also that in order to encourage regional and international cooperation in the field of telecommunications, the CTU may collaborate with international, regional and sub-regional bodies whose activities and interests are related to telecommunications; see *ibid*, Article 17.

under the Revised Treaty of Chaguaramas (CARICOM Treaty) to apply the rules of competition in respect to anti-competitive cross-border business conduct, and to co-ordinate the implementation of the Community Competition Policy. In discharging its functions, the CCC is tasked with monitoring anti-competitive practices of enterprises operating in the CARICOM Single Market and investigating and arbitrating cross-border disputes.<sup>293</sup>

### ***Barbados***

The Telecommunications Act gives the FTC responsibility for resolving disputes concerning actions taken by a telecommunications provider in refusing to provide interconnection services, limiting or terminating an agreement, or ceasing to offer such services. Any dispute that arises in negotiating an interconnection agreement may be referred to the FTC once all reasonable efforts have been made in good faith to resolve the dispute.<sup>294</sup> A carrier or service provider whose service or facility has been discontinued or disconnected may also appeal to the minister for a review and the minister may order the restoration of the service or facility and investigate the matter through the appointment of inspectors. Provision is also made for an aggrieved party to seek a review by the court of the action taken in respect of the discontinuance or disconnection.<sup>295</sup> Decisions of the minister and FTC are binding, though subject to review. Additionally, the filing of an application for review by the FTC (as opposed to the minister) does not preclude an appeal from the FTC's decision to the High Court.<sup>296</sup>

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<sup>293</sup> See CARICOM Treaty, Article 173.

<sup>294</sup> See Telecommunications Act CAP 292B, sections 28, 29 and 31, which provides that in resolving such disputes the FTC must consider, *inter alia*, the obligations or constraints imposed by the Telecommunications Act, Fair Trading Commission Act, and Utility Regulation Act; the desirability of stimulating innovative offers in the market and providing consumers with a wide range of telecommunications services; the government's interconnection policy; the availability of feasible alternatives to the interconnection requested; competition concerns; and the nature of the request in relation to the resources available to meet the request. Note that dispute resolution proceedings are held in camera unless the parties otherwise agree, but the decision of the FTC is published subject to any requirement for confidentiality.

<sup>295</sup> See Telecommunications Act CAP 292B, sections 67, 74 and 75.

<sup>296</sup> See Telecommunications Act CAP 292B, sections 104 and 105, which provide that any person aggrieved by a decision of the minister may file an application for a review of the decision and the minister may, where required, hold a further hearing and, on review confirm, modify or reverse the findings of his/her prior decision or any part thereof. A person aggrieved by a decision of the FTC may similarly file an application for a review, and the FTC may confirm, modify or reverse its prior findings or any part thereof. See also *ibid*, section 106, which provides that Part V of the Fair Trading Commission Act concerning reviews and appeals by the FTC, and judge and provision for a case stated upon a question of law applies in respect of FTC decisions under the act.

Where a dispute concerns alleged anti-competitive behaviour, the FTC is authorized to conduct an investigation under the Fair Competition Act CAP 326.<sup>297</sup> The Fair Trading Commission Act CAP 326B addresses the procedures for submitting a complaint to the FTC and for the conduct of an investigation, the FTC's powers in holding investigations, the timeframe for giving a decision in writing with supporting reasons, the facility for a review by the FTC of its decision, and possible appeal on a question of law to a judge of the High Court.<sup>298</sup>

The Utilities Regulation Act CAP 282 tasks the FTC with intervening in disputes between service providers with respect to sharing of equipment and facilities where required for public convenience or necessity. Where such use will not impair the owner or other users or result in any substantial detriment to the utility service, the FTC may direct that such use be permitted and prescribe the conditions to be observed and the compensation to be paid in respect thereof.<sup>299</sup> The procedures with regard to the filing of complaints, the FTC's investigation thereof, and the provisions for an appeal as set out in the Fair Trading Commission Act apply to proceedings under the Utilities Regulation Act.<sup>300</sup>

### ***Belize***

The Public Utilities Commission is responsible for monitoring every interconnection agreement and assisting in the resolution of any dispute relating thereto.<sup>301</sup> Any disagreements or disputes

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<sup>297</sup> E.g., 2010 Annual Report of the Fair Trading Commission, online, which may be viewed at [http://www.ftc.gov.bb/library/2011-01-12\\_ftc\\_annual\\_report.pdf](http://www.ftc.gov.bb/library/2011-01-12_ftc_annual_report.pdf). The report highlights certain unfair competition complaints including an abuse of dominance complaint made by Digicel against Lime concerning the manner in which they were contacting Digicel's customers and enticing them with promotional offers. The FTC found that the technique is widely used in marketing research and telesales and was not due to any privileged access to customer information due to Lime's position of dominance; therefore, there was no breach of section 16(3)(h) of Fair Competition Act. Lime also filed a complaint against Digicel claiming that its text messages to Lime customers had content which was inaccurate and malicious and would disrupt competition in the market. The FTC found that Digicel's conduct could be viewed as "normal" between competitive rivals and was not a breach of section 13(1) of the Fair Competition Act.

<sup>298</sup> See Fair Trading Commission Act CAP 326B, sections 23-41; note also that the FTC may state a case in writing for the opinion of a judge on a question of law.

<sup>299</sup> See Utilities Regulation Act CAP 282, section 24. Note that the FTC is also tasked with the responsibility of hearing and determining complaints by consumers regarding billings and the standards of service supplied by utility service providers, including suppliers of domestic and international telecommunications services. The act provides for the appointment of a public counsel to advise consumers (i.e., persons using a utility service for domestic purposes) and assist in preparing them for reviews and hearings and presenting arguments before the FTC in relation to, *inter alia*, complaints regarding billing and the standards of service supplied; see *ibid*, sections 2, 3, 6, 8 and 9 and Schedule.

<sup>300</sup> See Utilities Regulation Act CAP 282, section 25, which incorporate sections 23 to 32(1) (a) and sections 31(2) to 41 of the Fair Trading Commission Act.

<sup>301</sup> See Telecommunications Act of Belize, section 6(2) (k).



over interconnection charges, terms, and practices of public telecommunication service providers must be submitted to the PUC for resolution.<sup>302</sup> Similarly, the PUC is provided with the authority, where requested, to seek to resolve all disagreements or disputes concerning the sharing of facilities (on reasonable and non-discriminatory terms) on matters within its jurisdiction, in any reasonable manner it thinks is best calculated to achieve the objectives of the Belize Telecommunications Act and the Public Utilities Commission Act.<sup>303</sup>

### ***Guyana***

The Telecommunications Act imposes a duty on the director of telecommunications to consider (non-frivolous) representations on any matter relating to the provision of telecommunications services or supply of telecommunications apparatus in Guyana where the person has an interest in the matter. This is without prejudice to the provisions of the Public Utilities Commission Act.<sup>304</sup> The Public Utilities Commission Act provides that the PUC may hear complaints against any public utility, whether made by a consumer, representative class of consumer, another service provider or the minister.<sup>305</sup> The potential overlap of the jurisdiction of the director of

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<sup>302</sup> See Telecommunications Act of Belize, section 23, which further provides that in resolving such disputes or disagreements the PUC is to be guided by the following principles: the terms and practices for interconnection arrangements shall not discriminate unjustifiably between users of interconnection arrangements and similarly situated users; charges for interconnection services and facilities must reflect the licensee's costs defined as the incremental cost, and may include allowance for a reasonable return on capital investment; differences in charges between different users may only be justified based on cost differences directly attributable to providing interconnection for those users

<sup>303</sup> See Telecommunications General Order, paragraph 6. See also Schedule 1, "Belize Telecommunications Interconnection Regulations (Amended) 2010," paragraph 6, which imposes a requirement on licensees to enter into infrastructure sharing arrangements for the purpose of effecting interconnection. Note that Schedule 2 "Telecommunications Infrastructure and Facilities Sharing Regulations (amended)," paragraph 8, provides that the PUC may consider any failure to conclude an infrastructure and facilities sharing agreement within 28 days as constituting a dispute and may intervene to resolve the dispute in accordance with the Belize Telecommunications Act or any orders or regulations made by the commission. See also Telecommunications Act, section 22. E.g., Schedule 2, "Telecommunications Infrastructure and Sharing Regulations (amended)," paragraph 18; Schedule 1, "Belize Telecommunications Interconnection Regulations (Amended) 2010," paragraph 27.

<sup>304</sup> See Telecommunications Act CAP 47:02, section 39. Note also that the Telecommunications Act further provides that a party to actual or prospective proceedings (other than a telecommunications operator) may apply to the director of telecommunications for assistance on the ground that the case raises a question of principle; or that given its complexity it would be unreasonable to expect the applicant to deal with the case without assistance; or on the basis of any other special consideration. The assistance of the director may include giving advice, procuring or attempting to procure the settlement of the matter in dispute, arranging for advice by an attorney-at-law, and such other forms of assistance as the director may consider appropriate;. See Telecommunications Act CAP 47:02, section 41; note that the provision for technical assistance is made in relation to cases in connection with the Telecommunications Code as applied to a telecommunications operator or any exception or condition subject to which that code has effect as so applied; see also *ibid*, section 10.

<sup>305</sup> See Public Utilities Commission Act 1999, sections 52, 55 and 56, which further provide that where the PUC proposes to initiate proceedings against any public utility, the PUC must serve notice on the utility stating the

telecommunications and the PUC is reduced by the different areas of regulatory focus and reportedly has promoted collaboration between the two regulators on the basis of practice and precedent.<sup>306</sup>

### *Jamaica*

The Telecommunications Act provides that either party to a pre-contract dispute between an interconnection provider and interconnection seeker as to the terms and conditions of interconnection may refer the dispute to the Office of Utilities Regulation (OUR) for resolution. However, where neither party to the dispute is a dominant public voice carrier, the OUR may decline to act as an arbitrator in relation to the dispute.<sup>307</sup> Recent amendments to the Act address the OUR's authority to resolve post-contract disputes, defined as disputes between the parties to an interconnection agreement arising out of that agreement, and make such determinations as it sees fit.<sup>308</sup>

It may be recalled that Article 102 of the EPA requires the regulator, at the request of either party to a dispute between suppliers of telecommunications networks or services concerning rights and obligations arising from the EPA regulatory framework, to issue a binding decision to resolve the dispute. This obligation is not limited to disputes involving dominant suppliers. As above-noted the Telecommunications Act provides the OUR with discretion to decline to serve as arbitrator in certain cases involving pre-contract disputes. The objectives of

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reasons for the initiation of the proposed proceedings, with the particulars relating thereto and other relevant information.

<sup>306</sup> See WTO TPR Report at p. 76, paragraph 107, which suggests that the director and the PUC have collaborated on the basis of practice and precedent in areas such as consumer complaints. Note that both the PUC and the director of telecommunications are charged with exercising due care in the treatment of confidential information; see Telecommunications Act CAP 47:02, section 38, which requires that where the director publishes information for benefit of consumers, purchasers, and other users of telecommunications services, he/she must have regard for the need to exclude, so far as practicable, any matter concerning the private affairs of persons (whether individuals or bodies incorporated or not) which would or might seriously and prejudicially affect their interests; see also Public Utilities Commission Act, section 28, which provides that where the PUC makes available information concerning a development and expansion program to consumers it must take all due and reasonable care to protect trade secrets and confidential information or any other information that may aid a competitor of the service provider which may request that such information be maintained in confidence, and the PUC must "cooperate with" the service provider in this regard.

<sup>307</sup> See Telecommunications Act of Jamaica, section 34.

<sup>308</sup> See Telecommunications Act of Jamaica, section 29. But note that this must be consistent with any agreement reached between the parties as to matters that are not in dispute; the terms and conditions set out in a reference interconnection offer or any part thereof that is in effect with respect to the interconnection provider; and the principles prescribed in the act governing interconnection. Note also that the OUR may, on its own initiative, in assessing an interconnection agreement make a determination of the terms and conditions of call termination, including charges.

the legislation as stated in the act, however, provide for its implementation in a manner consistent with Jamaica's international commitments in relation to the liberalization of telecommunications.<sup>309</sup> Adopting a purposeful interpretation one may submit that the OUR should take due account of Jamaica's obligations under the EPA in exercising its discretion.

The Telecommunications Act provides the OUR with broad powers to carry out, on its own initiative or at the request of any person including a service supplier, investigations in relation to a person's conduct as will enable it to determine whether and to what extent that person is acting in contravention of the act.<sup>310</sup> Where a matter is of substantial competitive significance and falls within the functions of the Fair Trading Commission under the Fair Competition Act, the OUR will refer the matter to the FTC.<sup>311</sup> The act allows a person aggrieved by the decision of the minister or OUR to request that the matter be reconsidered. In the case of the OUR, this may only be done where new evidence is adduced or it is alleged that the decision was based on material errors of fact or law.<sup>312</sup> A person aggrieved by the decision of the OUR may appeal to a special Appeal Tribunal established under the Act. In making a decision the Appeal Tribunal must observe reasonable standards of procedural fairness and the rules of natural justice and act in a timely fashion.<sup>313</sup>

### ***Trinidad and Tobago***

The Telecommunications Authority of Trinidad and Tobago not only serves as the licensing agency, but is also charged with establishing a dispute resolution process to be utilized in the event of a complaint or dispute arising between parties in relation to the operation of a public telecommunications network, telecommunications or broadcasting service, relating to, *inter alia*, rates, billings, service, interconnection, and access to facilities. The authority is specifically tasked with investigating complaints by users, operators of telecommunications networks, providers of telecommunications and broadcasting services, or other persons arising out of the operation of a public telecommunications network, or the provision of a telecommunications service or broadcasting service, in respect of rates, billings, and services generally provided and

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<sup>309</sup> See Telecommunications Act of Jamaica, section 3.

<sup>310</sup> See Telecommunications Act of Jamaica, section 4(1) (d).

<sup>311</sup> See Telecommunications Act of Jamaica, section 5.

<sup>312</sup> See Telecommunications Act of Jamaica, section 60.

<sup>313</sup> See Telecommunications Act of Jamaica, sections 61 and 62.

granting relief where necessary.<sup>314</sup> The dispute resolution process is funded by the parties to the dispute and must be conducted in an open, non-discriminatory, and unbiased fashion, within 30 days after the filing of a dispute.<sup>315</sup>

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<sup>314</sup> See Telecommunications Act, section 18(1) (m). Note that the Regulated Industries Commission Act CAP 54:73, 1<sup>st</sup> June 2000, establishes the Regulated Industries Commission, which regulates the supply and distribution of electricity and water and the provision of sewerage and waste-water services. The act largely replaced the former Public Utilities Commission Act, but the Regulated Industries Commission is not the regulator for the telecommunications sector.

<sup>315</sup> See Telecommunications Act, section 82.