REGULATORY AUTHORITY OF BERMUDA

Electronic Communications Sectoral Review

Preliminary Report

Preliminary Decision and Order

Matter: 20220727

Date: 26 January 2023

Responses Due: 28 February 2023

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Contents

1 Introduction

1. The purpose of this Preliminary Report (the **Preliminary Report**) is to: (i) present the Regulatory Authority's (**RA**) assessment of the responses to the Electronic Communications Sectoral Review Consultation Document (the **Consultation Document**) and to seek public comment on the RA's proposed recommendations that will be set forth in a Final Report.

2. This Preliminary Report is structured as follows:

   a. section II outlines the Consultation Procedure;

   b. section III sets out the legislative context and framework;

   c. section IV sets out the background;

   d. section V summarises the responses to the Consultation Document and provides the RA's preliminary recommendations; and

   e. section VI provides a summary of the RA's preliminary recommendations.

3. At the conclusion of the consultation process, the RA will issue a Final Report.

2 Consultation Procedure

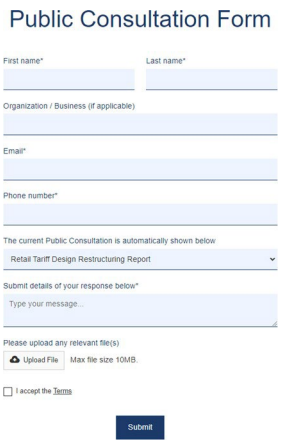
6. This invitation to provide responses to the Preliminary Report is being undertaken according to sections 69 to 73 of the RAA and section 18 of the ECA. The procedure and accompanying timelines (as set out in section 70 of the RAA), under which this consultation is taking place has been set out below.

7. Written comments should be submitted before 11:59 PM (Bermuda time) on 28 February 2023.

8. The RA invites general comments from members of the public, electronic communications sectoral participants and sectoral providers, and other interested parties.

9. Any submission must include the name, address and occupation of the commenting party. It must be signed by the individual, in the case of a personal submission, or by an authorised representative of any business. Personal submissions must declare any relevant link to a licensed or government body, whether commercial or personal (ie, family, etc). Where a business is not a licensed carrier, any business's submission must declare commercial relationships to any licensed operator.

10. Responses to this Preliminary Report should be filed electronically in MS Word or Adobe Acrobat format. Parties wishing to file comments should go to the Public Consultation Directory on the RA's website using this link: https://www.ra.bm/feedback/public-consultations-directory.



Please note that this consultation response form will only be available for "open" consultations.

11. On the Public Consultation Directory Page, you will be able to select the consultation titled "Comments on Electronic Communications Sectoral Review – Preliminary Report". At the bottom of the consultation page, you will find a link to "Open Consultation Form". This will generate a web-based form that will allow you to enter your contact information and attach your submission.

12. All comments should be clearly marked "Comments on Electronic Communications Sectoral

Review – Preliminary Report" and should otherwise comply with Rules 18 and 30 of the RA's Interim Administrative Rules.

13. The RA intends to make responses to this Preliminary Report available on its website. If a commenting party's response contains any information that is confidential in nature, a clearly marked "Non-Confidential Version", redacted to delete the confidential information, should be provided together with a complete version that is clearly marked as the "Confidential Version." Redactions should be strictly limited to "confidential information," meaning a trade secret, information whose commercial value would be diminished or destroyed by public disclosure, information whose disclosure would have an adverse effect on the commercial interests of the commenting party, or information that is legally subject to confidential treatment. The "Confidential Version" should highlight the information that has been redacted. Any person claiming confidentiality in respect of the information submitted must provide a full justification for the claim. Requests for confidentiality will be treated in the manner provided for in Rule 30 of the RA's Interim Administrative Rules.

14. Individuals making personal submissions may request that personally sensitive information (eg, their name, address) is redacted from the publication of their statements. Any individual claiming that other information submitted is confidential must provide a full justification for the claim. Requests for confidentiality will be treated in the manner provided for in Rule 30 of the RA's Interim Administrative Rules.

15. In accordance with section 73 of the RAA, any interested person may make an *ex parte* communication during this consultation process, subject to the requirements set forth in this paragraph 13. An *ex parte* communication is defined as any communication to a Commissioner or member of staff of the RA regarding the matter being consulted on in this Consultation Document, other than a written submission made pursuant to this Section 2. Within two business days after making an *ex parte* communication, the person who made the *ex parte* communication shall submit the following to the RA: a written description of the issues discussed, and positions espoused; and a copy of any written materials provided.

16. The principal point of contact at the RA for interested persons for this Consultation Document is Richard Ambrosio, who may be contacted by email, referencing "Comments on Electronic Communications Sectoral Review – Preliminary Report" at consultation@ra.bm" or by mail at:

    Richard Ambrosio
    Regulatory Authority
    1st Floor, Craig Appin House
    8 Wesley Street
    Hamilton, Bermuda

17. The RA tentatively plans to issue a final report in this matter by the end of fiscal year 2022/2023. This timeline will ultimately depend on several factors beyond the RA's control, such as the nature of any public comments submitted. However, reasonable efforts will be made to attempt to adhere to this indicative timeframe.

18. In this Preliminary Report, except insofar as the context otherwise requires, words or

expressions shall have the meaning assigned to them by the ECA, the RAA and the Interpretation Act 1951.

19. This Preliminary Report is not a binding legal document and does not contain legal, commercial, financial, technical or other advice. The RA is not bound by this Preliminary Report, nor does it necessarily set out the RA's final or definitive position on particular matters. To the extent that there might be any inconsistency between the contents of this Preliminary Report and the due exercise by the RA of its functions and powers, and the carrying out of its duties and the achievement of relevant objectives under law, such contents are without prejudice to the legal position of the RA.

3 Legislative Context

20. The RA has a duty under section 12 of the RAA to ensure that the regulation of the electronic communications sector promotes competition, the interests of residents and consumers of Bermuda, the development of the Bermudian economy, Bermudian employment and Bermudian ownership, and innovation.

21. The RA has a legal obligation under section 17 of the RAA to conduct a comprehensive review of each regulated industry sector every three years, including all policies, legislation, regulations, and administrative determinations applicable to the sector.

22. Section 17(3) of the RAA requires the RA to issue a preliminary report no later than six months after the date on which the RA issued the Consultation Document.

23. Section 72 of the RAA outlines the required contents of the preliminary report which are set out below. The preliminary report should:

    a. summarise significant material in the administrative record;
    b. provide a reasoned explanation of the basis on which the RA made any significant factual finding, policy determination and legal conclusion;
    c. in the case of a preliminary report, state the RA's preliminary conclusions; and
    d. establish the procedures and time frames for submitting responses regarding the preliminary report, recommendation or decision and order.

24. On this basis, this document constitutes the RA's Preliminary Report under section 17(3) of the RAA.

25. The RA is not bound by the Consultation Document, nor any resulting Preliminary Report, nor does it necessarily set out the RA's final or definitive position on any matter. To the extent that there may be any inconsistency between the contents of this Preliminary Report and the carrying out of the RA's duties and achievement of its objectives under law, such contents are without prejudice to the legal position of the RA.

4 Background

26. The the Electronic Communications Sectoral Review Consultation Document (the **Consultation Document**) invited the public, sectoral participants and sectoral providers, as well as other interested parties to submit responses commenting on the Consultation Document and to respond to the consultation questions.

27. Responses to the Consultation Document were solicited from the public electronically through the RA's website at www.ra.bm.

28. The response period commenced on 27 July 2022 and concluded on 31 August 2022.

29. The RA received three responses to the Consultation Document from the following entities:

    (i) One response from Bermuda Electric Light Company Limited (**BELCO**);

    (ii) LinkBermuda Limited (**Link**); and

    (iii) One Communications Ltd and its affiliates, Bermuda Digital Communications Ltd (**BDC**) and Logic Communications Ltd (**Logic**) (together **OneComm**).

30. BELCO asked the RA to clarify if the recommendations made by the RA to amend the RAA, eg adjudication, enforcement, public consultation process and surplus fund would be applicable to all sectors. The RA clarifies that the recommendations made in the Consultation Document to amend the RAA would be applicable to all sectors. However, the RA acknowledges that the proposal made in the Consultation Document regarding the surplus fund was made because of an oversight. The Minister of Finance on 22 March 2019, under section 38 of the RAA, approved the creation of a project fund for work plan projects and projects in projects. The Minister of Finance also approved the creation of a Litigation Reserve Fund to hold up to $1.5 million (more details below).

31. The RA thanks BELCO, Link and OneComm for the responses submitted.

32. The RA notes that in their reply, OneComm referred to replies previously submitted to the RA via other consultations. Given this, the RA confirms that it has reviewed those past replies to prepare this Preliminary Report.

5 Summary and discussion of responses to the Consultation Document

33. The RA discusses the responses received by referring to the paragraphs and subjects of the Consultation Document.

General Comments to the Consultation made by Link and OneComm

34. Link and OneComm provided general comments to certain paragraphs of the Consultation Document. As such the RA addresses these general comments below.

Paragraph 5 of Consultation Document

35. OneComm commented on the RA's statement at paragraph 5 of the Consultation Document:

> *For the avoidance of doubt, the Sectoral Review is separate from the process relating to the market review of the EC Sector (**Market Review**) required under part 4 of the Electronic Communication Act 2011 (**ECA**). This Final Report does not directly deal with the specific issues raised as part of the Market Review. The last Market Review was completed on 1 September 2020,[1] culminating in the Regulatory Authority (Market Review of the Electronic Communications Sector) General Determination 2020.*

36. OneComm notes that there was an error in the second sentence of Paragraph 5 as it referred to a "Final Report". The RA acknowledges this and informs that the said sentence should have referred to the "Consultation Document".

37. Regarding Paragraph 5 OneComm stated on pages 1 and 2 of their letter:

> *While we agree that the statutory process for sectoral review is separate and distinct from the market review process, consultation regarding current market conditions is a required component of the CD. Section 17(2) of the Regulatory Authority Act 2011 (the "RAA") states*
>
> > *17(2) The Authority shall initiate the review process by publishing a consultation document, pursuant to section 70, inviting comment regarding-*
> > *(a) market conditions in the sector;*
> > *(b) regulations and administrative determinations applicable to the sector that should be made, modified or revoked; and*
> > *(c) any other issues found to be relevant by the Authority.*
>
> *The CD must invite comment regarding market conditions in the sector. The RA's statement that the CD "does not directly deal with the specific issues raised as part of the Market Review" appears contrary to that requirement. Moreover, the CD contains no explicit invitation to comment on market conditions in the sector, thereby raising a concern that the CD is statutorily deficient.*

38. The statement made by the RA at paragraph 5 of the consultation document related to the Market Review under Part 4 of the ECA. As can be seen legislation envisaged a separate process/procedure for the Market Review and the Electronic Communications Sectoral Review. Section 17(6) of the RAA establishes that the RA must initiate the Electronic Communications Sectoral Review no later than three years after the date on which the RA issues the final report specified in section 17(4) of the RAA. Section 23(6) of the ECA establishes that the Market Review to determine significant market power in relevant markets is to be concluded within a period of not more than four years after the conclusion of the previous review. If these reviews were intended to take place at the same time, there would be a statutory obligation to conduct them in tandem.

39. The last EC Market Review was completed in September 2020. The next EC Market Review is scheduled to be commenced in fiscal year 2023-24 and completed by 1 September 2024.

40. Since 2020, the RA has conducted an annual EC market analysis that collects information from the EC sectoral providers and other stakeholders. Data has been collected and published for 2019, 2020[1] and 2021[2]. The 2022 report is scheduled to be completed and published later in April 2023.

41. In addition to the annual EC market analysis, the RA also collects information from all EC sectoral providers in the form of quarterly financial reports.

RA's Response:

42. The RA's position is that a reasonable picture of EC market conditions (regarding section 17 (2) of the RAA) between official EC market reviews is provided through the annual EC market analysis reports and the quarterly financial reports. However, recognizing the comment made by OneComm in their submission, respondents are welcome to make any comments vis-à-vis market conditions that they feel are appropriate to this process.

RA's resubmission of Recommendations made in the 2018 Sectoral Review

43. OneComm stated that it was insufficient for the RA to reiterate recommendations made in the Final Report of the Electronic Communications Sectoral Review dated 30 November 2018 without providing additional detail or evidence to the policy need. On pages 2 and 3 of the letter, OneComm stated:

> *In large part, the RA's CD repeats recommendations made in the 2018 Report without providing any additional detail or evidence as to the policy need underlying the reiterated recommendation. If the 2018 recommendation did not result in the legislative*

[1] *Annual Market Analysis 2019/2020 - Electronic Communications Sector*. 21 March 2022. https://global-uploads.webflow.com/62670c93ceef61f2e8acc1ce/62f4291bf09d0311e59bff1f_2022%2003%2021%20-%20EC%20Annual%20Market%20Analysis%20Report%20for%202019%20and%202020%20-%20Final.pdf

[2] *Annual Market Analysis 2021 Electronic Communications Sector.* 18 October 2022. https://global-uploads.webflow.com/62670c93ceef61f2e8acc1ce/6362cb5d4fea18e5be8fa505_Electronic%20Communications%20Annual%20Market%20Analysis%20Report%202021.pdf

action recommended by the RA, the RA's implicit conclusion should be that their case for change was insufficient, or perhaps inconsistent with current legislative intent. The RA's "ask again" approach essentially ignores the Minister's and Parliament's past decision to not proceed with the RA's 2018 recommendation. If the basis of the original 2018 recommendation has persisted or exacerbated, the RA should provide details of such matters as part of the relevant factual and legal background required for the CD.

Section 70 of the RAA states:

> ***Consultation document***
> *70 (1) The Authority shall commence a public consultation by publishing a consultation document on its official website.*
>
> (2) *The consultation document shall include—*
>
> (a) *the relevant factual and legal background;*
>
> (b) *the issues on which public comment is sought;*
>
> (c) *any tentative conclusions that the Authority has reached including, where appropriate, proposed language for any regulations that the Authority proposes to recommend to a Minister or any administrative determination that the Authority proposes to adopt;*
>
> (d) *any questions that the Authority may request interested parties to address;*
>
> (e) *the date by which responses must be filed;*
>
> (f) *the deadline for completion of the consultation process and the issuance of a final report, recommendation or decision and order; and*
>
> (g) *the name and contact information for the staff member who will serve as the principal point of contact for interested persons during the public consultation.*

To properly fulfill the legal requirements for the CD, the RA needs to ensure the CD, inter alia, complies with all aspects of sections 17 and 70. For any repeated recommendation, the relevant factual and legal background should recognize legislative inaction on the point since the prior review, and the additional factual basis (beyond what was provided in 2018) for why this recommendation merits reiteration and reconsideration by the Minister and Parliament.

RA's Response:

44. Respectfully, the RA disagrees with OneComm's position. The fact that no further action was taken by the Minister or Legislature pursuant to the 2018 recommendations does not equate to an active decision to reject those recommendations. Even if it did, it does not necessarily follow that the RA would be precluded from reiterating a previous recommendation that it regards as appropriate where the underlying policy context justifies the continued recommendation.

45. The RA's position is that the underlying basis for many of the 2018 recommendations

remains unchanged. This position was expressed as part of the Consultation Document and was the basis for readopting those recommendations in 2022. This is sufficient to discharge the RA's legal obligation under section 70(2)(a) of the RAA to provide the relevant factual and legal background. Of course, any such recommendations which are put forward to the Minister would still have to be subject to consultation, hence this Sectoral Review. The RA's position that the underlying basis for a 2018 recommendation continues to hold should provide consultation respondents with sufficient reasoning to provide intelligent consideration of the proposal in question – see the "Gunning Principles" first laid out in *R v Brent London Borough Council, ex parte Gunning* (1985) 84 LGR 168.

46. Policymaking is a dynamic, multivariable process. There are many reasons why a political actor chooses not to act, such as competing priorities and resource constraints. When the Minister or Legislature choose to act, or not to act, this is a question for them. If the recommendation made would advance the sector or the RA's regulatory interest in that sector, it is the RA's duty to continue making the recommendation. To insist that the RA's authority to make recommendations is constrained by the Minister's or the Legislature's past policy choices on a matter is to read into the statute an additional procedural requirement which the language of the provision cannot bear.

Adding Regulation or Facilitating Regulatory Action

47. OneComm stated that the Sectoral Review should not focus on adding regulation or facilitating regulatory action. Pages 3 and 4 of OneComm's letter states as follows:

> *Given the varying kind and scale of the recommendations in the CD, it appears that legislative change is sought to facilitate all efforts by the RA to accomplish what it believes are worthy, but difficult to obtain, goals and objectives. In essence, the underlying theme in the CD is to make it easier for the RA to intervene or act in some way in pursuit of its objectives.*
>
> *The breadth of sectoral review needs to include the possibility that regulation and past regulatory action may no longer be needed or fit for purpose, and that replacement regulation is not always required. Recommending less intrusive regulatory measures or, in appropriate cases, deregulation, should also be considered as options in the Consultation.*
>
> *Section 16 of the RAA states:*
>
> ***Regulatory Principles***
> *16. In performing its duties under this Act, the Authority shall –*
> *(a) act in a timely manner;*
> *(b) rely on market forces, where practicable;*
> *(c) rely on self-regulation and co-regulation, where practicable;*
> *(d) act in a reasonable, proportionate and consistent manner;*
> *(e) act only in cases in which action is needed;*
> *(f) operate transparently, to the full extent practicable;*
> *(g) act without favouritism to any sectoral participant, including any sectoral*

participant in which the government has a direct or indirect financial interest;
(i) not act in an unreasonably manner; and
(j) act free from political interference.

Subsections (b), (c) and (e) make clear that the RA should rely on market forces, where practicable; rely on self-regulation and co-regulation, where practicable; and act only in cases in which action is needed. These principles apply within the context of sectoral review, but do not appear to have been actively considered throughout the CD

Email mobility (also referred to as "email forwarding") provides an illustrative example of the point. The first email mobility consultation was commenced by the RA in August 2013. A preliminary report dated December 2015 recommended regulatory action be taken to mandate email mobility. After receiving numerous submissions regarding the preliminary decision and order, the RA failed to finalize a final decision and order. Instead, the issue of email mobility was raised again as part of the 2018 Sectoral Review where the RA recommended to the Minister that the ECA be amended to mandate email mobility. In the ensuing absence of legislative amendment, the RA held a Principles of Consumer Protection Consultation over the course of 2019 and 2020 where the issue was not considered. It is therefore surprising that the RA feels the need to again recommend to the Minister the mandating of email mobility/forwarding as part of this Consultation for sectoral review.

The RA's efforts on email mobility/forwarding began in 2013 and in the ensuing 9-year period, across 2 regular consultations and now 2 different sectoral review consultations, no legislative amendment or final regulatory measures have resulted. Moreover, in the current CD, the RA has provided no new or continuing evidence that current market conditions warrant regulatory intervention on this issue. Given the lack of action over the 9-year period, and the apparent absence of a current problem, it is appropriate to turn back to sections 16 (b), (c), and (e) of the RAA and consider whether any regulatory action is required in this instance.

48. Link also stated in their response that regulatory intervention should only occur when necessary. At paragraphs 2 and 3 of their response they stated:

2. Link appreciates the opportunity to provide comments on this matter. Link recognizes the RA's function to forward the goals of ensuring the people of Bermuda are provided with reliable and affordable access to quality electronic communications services, encourage the orderly development of the EC Sector, encourage sustainable competition in the sector, and promote investment and innovation. These are important goals which can be achieved through careful and practical implementation of regulation in the EC Sector and the RA's continued support of electronic communications service providers in Bermuda.

3. Link submits that in order to support the regulatory objectives outlined above, regulatory intervention should only occur when necessary and to the minimum extent required in order to provide operators the flexibility they need to successfully operate and promote sustainable competition in the market. It is imperative that regulation be directed at a clear and demonstrated need, and not add additional unnecessary cost and burden on operators which then limits their ability to provide affordable services.

RA's Response:

49. The RA agrees in principle with Link and OneComm. The RA is aware of its statutory obligations contained in the RAA, ECA, EA and SCCA. The RA's view and intention are to only add regulatory measures when necessary. Recommendations made to add regulation and to facilitate regulatory action were made because the RA found it fit to recommend them to fulfil its statutory mandate.

50. The RA further agrees with OneComm regarding the Email Mobility consultation process that was commenced in 2013[3] and updated in 2015[4]. The RA has not received any further complaints from sectoral participants since that time. It is believed that various solutions (including charging a small recurring fee for email services) is in existence in the market. The RA therefore will remove this recommendation from this sectoral review while reserving the option to re-open the previous email consultation or consider the matter as part of the next EC Market Review.

Response to Specific Comments to the Consultation Document

51. The below paragraphs contain comments that the RA received to the recommendations made in the Consultation Document.

Service continuity – Submarine Communications Cables – Paragraphs 27 to 31

52. In the Consultation Document, the RA provided information regarding the development of service continuity and in particular the in-shore protection of submarine cable or "off-island' connectivity to Bermuda which was identified in the 2018 Sectoral Review.

RA's Response:

53. The RA received no comments in relation to this matter. This was expected since the RA made no recommendations in respect of this matter.

[3] https://www.ra.bm/public-consultations/email-mobility-2013
[4] https://www.ra.bm/public-consultations/email-mobility-preliminary-report-decision-and-order-2015

Service continuity – Integrated Communications Operating Licence (ICOL) – Paragraphs 32 to 44 of the Consultation Document

The RA recommended the inclusion of express language in appropriate legislation and/or an amendment to [ICOLS] which imposes an obligation on sectoral providers to:

- *establish a specific service restoration plan, which the RA can order to be amended if it is considered inadequate;*
- *submit periodic financial reports to the RA to allow the RA to effectively assess their financial stability;*
- *notify the RA of any risks to their future financial stability (i.e. legal proceedings) or significant changes in their financial position (i.e. risk of insolvency); and*
- *notify the RA before discontinuing any service to wholesale customers due to non-payment or insolvency;*

Restoration Plan

54. Regarding the establishment of service restoration plan, OneComm stated under Section A, pages 4 and 5 of their letter:

> *As stated in our 2018 Response, it is a prudent and standard business practice for a provider to have in place arrangements for redundant (restoration) capacity in case of outages on their primary subsea capacity ("Secondary Capacity"). One Communications has put in place sufficient Secondary Capacity to back up our primary subsea capacity needs and ensure service continuity in the case of major service interruption.*
>
> *There is no need for regulation to require what is already industry standard and sound business planning. Consumers, and the market in general, require that a provider have a proper restoration plan in case of outages. The extent to which a provider avails itself of such Secondary Capacity results will determine the long-term reliability of its services. A prudent provider will properly manage the balance of having sufficient redundancy and the additional costs of Secondary Capacity. How each provider manages this balance is a competitive feature in the market, as Secondary Capacity is a significant component of the cost base and pricing for home and business connectivity in Bermuda. Introducing regulation to mandate such practices is unnecessary and may reduce competitive dynamics rather than promote competition.*

RA's Response:

55. **The RA notes the concerns expressed by OneComm. The RA's preliminary view is that there is no immediate need to regulate. However, the RA reserves its rights to look at this issue in the future**.

Periodic Financial Reports

56. Regarding submission of periodic financial reports, both Link and OneComm submitted that there was no need for increased obligations regarding financial reporting.

57. Link stated at paragraph 7 of their response:

> *7. Link submits that there is no demonstrated need for increased obligations around the scope or frequency of financial reporting. ICOL holders already provide regular financial reporting to the RA. Link submits that the existing reporting processes should be sufficient to address the RA's concerns. If there are additional concerns with a particular operator the RA can inquire directly with that operator. Increased reporting requirements create additional unnecessary burden on operators which takes time and resources away from other operations.*

58. OneComm stated under Section A page 5:

> *One Communications and all other ICOL holders file frequent financial reporting with the RA under existing regulation including section 53 of the RAA and section 4.6 of the Filing Fee Instructions. Requiring ICOL holders to file additional financial information beyond those requirements is duplicative and wasteful of resources. Service provider resources are better directed to operating more efficiently and competing more aggressively in the market.*
>
> *With respect to insolvency risk, as stated in our 2018 Comments, individuals and business customers have choices in the market. In 2022, this is truer than ever before with the advent of stronger resellers and new entrants. Continuity of service is important, and customers can in the first instance choose providers who are well-financed and have a long history of operating stability. If their provider becomes insolvent, they can switch providers within a reasonable timeframe. Customers are sufficiently empowered to deal with the possible insolvency of an ICOL holder. There is no need for the RA to layer in additional reporting and accounting obligations to manage the risk for consumers.*

RA's Response:

59. The RA thanks Link and OneComm for their comments. On further reflection, the RA agrees that the tools which already exist are likely sufficient to allow the RA to collect the desired information. In particular, section 53 of the RAA sets out reporting requirements which are common to all authorization holders, section 60 of the RAA allows the RA to engage in informal fact-finding and section 91 of the RAA allows the RA to order the production of information. Accordingly, no further recommendations for legislative change will be made.

60. Instead, there will be a need to ensure that the tools the RA have are used more effectively. To that end, the RA reiterates the following for the RA's most recent Work Plan consultation with respect to section 53 of the RAA:

> ***It is critical that the RA robustly enforce this statutory requirement in order to ensure public confidence in the work of the RA.***

The RA will work with all sectoral providers to establish a calendar aimed at bringing all licensees into compliance. This cross-sectoral project will involve determining the extent to which licensees are in compliance with these reporting requirements, developing a staggered calendar for compliance, and driving through compliance through important milestones which are communicated with the sectors following consultation with them.

Notification regarding disconnection of wholesale customers

61. The RA recommended updating the ECA to require ICOL holders, particularly those offering services subject to SMP remedies, to notify the RA before discontinuing any services to wholesale customers. This recommendation was discussed by both Link and OneComm.

62. Link stated at paragraph 8:

> *8. Link submits that an obligation for ICOL holders to notify the RA prior to disconnecting from wholesale customers due to non-payment or insolvency is unnecessary. These relationships are governed by commercial contractual arrangements which should be sufficient to address such scenarios. Link submits that there is nothing to suggest additional regulatory intervention into these arrangements is needed.*

63. OneComm stated under Section A, pages 5 and 6 the following:

> *As per our 2018 Comments, section 3.12 of the FibreWire Model Access and Interconnection Agreement (an agreement reviewed and approved by the RA) which states:*
>
> > *Without prior notice to the CP, OneComm may, after notifying the RA, immediately suspend the supply of Service, in whole or in part, if… the CP is determined by a competent authority to be Insolvent, and the RA has given its prior written approval and shall take reasonable endeavors to advise the CP's relevant Contract prior to suspension in respect to subclause (a) and attempt prompt resolution and otherwise at or around the time of the suspension and shall give the CP written confirmation of any such suspension under this clause as soon as is reasonably possible (and no later then the Working Day following the suspension), including reasons for such suspension.*
>
> *Given this provision, there is no need for additional legislation or ICOL conditions to be implemented.*
>
> *In respect of discontinuing services to consumers (both business and individual) of electronic communication services, we refer the RA to section 18 of every ICOL:*
>
> > ***18 DISCONTINUATION OF SERVICE; SURRENDER OF LICENCE***
> >
> > ***18.1*** *Subject to any Ex Ante remedies imposed on the Licensee pursuant to Sections 23 and 24 of the ECA, the licensee shall not discontinue the general provision of any Electronic Communications Service unless the Licensee first provides the*

Authority and affected Subscribers and Other Licensees with no less than 60 days advance notice, or such other greater or lesser notice as the Authority may determine, of the discontinuation of service. The Licensee shall make such reasonable efforts as the Authority may require to transition affected Subscribers and Other Licensees from the discontinued Electronic Communications Service to a reasonable alternative service provided by either the Licensee or an Other Licensee.

This provision clearly requires notice to customers and the RA prior to discontinuing services. There is no need for further regulation of this point.

RA's Response:

64. The RA acknowledges OneComm's submission on this matter. The RA accepts that properly constructed commercially agreed interconnection agreements should provide sufficient protection for wholesale channel partners.

65. The RA intends to review all interconnection agreements between sectoral providers and reserves the right to revisit this issue outside of this sectoral review and/or as part of any other relevant consultation.

66. Based on the above, the RA agrees that this particular item can be removed from this sectoral review.

Amending the RAA to Order Management or Operations Audits

67. Both Link and OneComm responded to the RA's recommendation to amend the RAA. The proposed amendment would allow the RA to order management or operations audits of any sectoral provider it oversees.

68. Link stated at paragraphs 9 and 10 of their response:

9. Link has concerns with the management and operational audit powers described in the Consultation Document. The RA already has broad investigative powers including the powers to request production of information. However, the audits contemplated by the RA in the Consultation Document propose investigations into the financial, technical, or operational capacity of an operator to comply with legislation and regulation, as well as "an evaluation of the efficiency of the company's management, performance or operations in any respect".

10. Link respectfully submits that the audits described in the Consultation Document go beyond the mandate of the RA and the appropriate level of intervention from a regulator. Section 16 of the RAA notes the RA shall, in carrying out its duties, rely on market forces where practicable, act only in cases in which action is needed, and rely on self- regulation where practicable. Further, both the RA and the Electronic Communications Act 2011 ("ECA") highlight the importance of sustainable competition. Beyond complying with applicable laws and regulations, private companies must be free to operate in the manner they assess to be best to support their business. This is key to long term sustainable competition. Allowing a regulator to evaluate the management, performance, and operations of a company and make

recommendations based on that evaluation is a severe interference with market forces and does nothing to further the long term goal of sustainable competition. Link is unclear what goals the RA aims to achieve with this recommendation.

69. OneComm stated under Section A, page 6 the following:

We refer the RA to section 15 of every ICOL:

15 INFORMATION, AUDITS AND INSPECTION

15.1 *In addition to the information required by Section 53 of the RAA, the Licensee shall promptly provide the Authority with any documents, accounts, reports, returns, estimates or other information required by the Authority to carry out its responsibilities under the RAA and ECA, including information regarding (a) the services or equipment provided to Users, Other Licensees and Persons with Class Licences, (b) the rates and charges for such services and equipment, (c) copies of contracts with Other Licensees, (d) statistics regarding usage of the Licensee's Electronic Communications Networks and Electronic Communications Services, (e) relevant activities, operations, or shareholdings of any Related Persons, and (f) any arrangements or relationships between the Licensee and any Related Persons that the Authority determines to be relevant to competition in the sector. For purposes of Condition 15.1, "Related Person" shall mean any entity that directly or indirectly owns, is directly or indirectly owned by, or is under common ownership with, the Licensee, as evidenced by the ownership of five per cent or more of the shares, stock or other securities or voting rights of the owned entity, including through an arrangement of any type.*

15.2 *The Licensee shall permit the Authority or Persons designated by the Authority to examine, investigate or audit, or procure such assistance as the Authority may require to conduct an examination, investigation or audit of, any aspect of the Licensee's business.*

15.3 *Subject to the provisions of Section 92 of the RAA, the Licensee shall permit the Authority or Persons designated by the Authority to enter the Licensee's premises, and shall facilitate access by them to premises used by the Licensee, to conduct an inspection, examination, investigation or audit of the Licensee.*

Given these provisions, there is no reason to seek amendment of the RAA. If the RA finds such powers to be inadequate, it needs to clearly explain its position in this Consultation.

RA's Response:

70. The RA notes Link and OneComm's position regarding this issue. The RA is aware that there are provisions within ICOL licences that cover this eventuality. However, this inclusion was intended to address potential challenges regarding the ability to order management or operational audits for other licences and in other sectors.

71. RA is aware that there may be some impetus for a multisectoral approach to be embedded in the RAA. If that is the case, it would address this concern.

72. Taking the above comments into account, the RA will remove this recommendation from this EC Sectoral Review.

Government Authorization Fees – Paragraphs 45 to 51 of the Consultation Document

The RA recommended to the Minister the adoption of a tiered Government Authorization Fee (GAF) structure to replace the current GAF structure *which has the unintended consequence of disincentivizing prospective smaller sectoral providers from entering into, or participating in, the electronic communications market. The recommendation of a tiered GAF structure will thereby foster competition by encouraging the entry or expansion of prospective and/or existing smaller market participants.*

The RA further recommended to the Minister that the lowest band of the proposed GAF tiered structure be exempt from taxation.

73. Both Link and OneComm provided responses regarding the RA's recommendation to adopt a tiered GAF structure. The tiered GAF structure would replace the current GAF structure to incentivize prospective smaller sectoral providers to enter and participate in the electronic communications market.

74. Link Bermuda stated at paragraphs 11 and 12:

> *11. The RA is adopting the recommendation to develop a tier-based Government Authorization Fee ("GAF") structure as opposed to the existing percentage of revenue GAF structure. This recommendation is based on the rationale that fees may create a barrier to entry or expansion in the market for smaller providers as they may take time to generate a profit due to higher up-front investment costs.*
>
> *12. Consistent with our comments on this matter when it was recommended in the previous sectoral review, Link submits that barriers to entry in the market are more likely to be as a result of the high cost of network investments rather than fees. Despite being a smaller provider, Link submits that the percentage based fee calculation is more appropriate than a tiered system as it results in the equitable treatment of all operators. Link disagrees with the RAs assessment that the tiered structure is effectively non- discriminatory, as it results in different rates for different operators.*

75. OneComm responded under Section B, page 7 of their letter as follows:

> *In response to the RA's proposed adoption of a tiered government fee structure, we draw the RA's attention to our 2018 Comments at section C where we state:*
>
> *With respect, the proposed tiered fee structure is neither objective nor reasonable. While*

we do not agree with the level or degree of current taxation, the percentage mechanism for taxation works properly to apportion tax by revenue dollar. A small firm that makes $100,000 of taxable revenue will pay $5,250 of government and RA authorization fees. A large firm that makes $100 million of taxable revenue will pay $5.25 million in taxes and fees. The proportionality issue is properly addressed by the differences in revenue and the application of a percentage tax, rather than a flat nominal amount. All firms should bear the costs of regulation in proportion, and it is our position that they currently do. A flat percentage is not regressive in the manner implied by the Report.

If small firms pay less than the 5.25%, larger firms will essentially be subsidizing the cost of regulation and government policy for small firms. All other firms would have to pick up the rest of the RA fees as the RA's budget recommendations determine the percentage of tax charged, and the RA is not proposing to reduce its budget to cover the shortfall caused by lower rates for small firms. Every budgetary dollar not charged to a small firm must be raised from the larger firms. This approach is discriminatory. It institutionalizes a regulatory bias to supporting certain firms at the cost of others and, as a consequence, fosters smaller, financially weak competition. The statutory framework of the RA was not enacted to systematically favour some firms (that are arbitrarily designated as small) at the expense of all other firms. The regulatory goal should be effective competition on a level playing field, not regulated cross-subsidization between firms.

The high fixed costs of the industry are a natural barrier to entry in this market, but they are a reality of the business. All firms face that competitive reality equally and should have to invest capital and pay the fees necessary to compete in the sector. Moreover, we note that regulation has already been used to try and remediate the issue of high fixed costs. Most of the smaller firms who might benefit from the tiered fee approach have already avoided the largest fixed costs of the sector by availing themselves of wholesale options historically mandated by the RA. The very high costs of market entry (i.e. building a network) are not part of their chosen business model. Accordingly, those same costs should not now be used to justify discriminatory taxation, if in fact discriminatory taxation can be justified at all.

The RA links this recommendation to the promotion of competition. Again, with respect, favouring small players at the expense of larger firms promotes certain competitors, not competition overall. Moreover, we refer the RA to section 16 of the RAA as set out above. In particular, subsection (h) explicitly states the RA shall, in performing its duties, act without favouritism to any sectoral participant. We also note the market entry of Wave Bermuda Ltd. (also known as "Horizon Communications") occurred without the benefit of a lower tiered GAF or an initial GAF exemption. Clearly, the equal GAF percentage did not prevent or inhibit entry in that instance, and to now implement the proposed tiered structure would ironically require Horizon Communications to subsidize smaller firms who enter thereafter.

RA's Response:

76. The RA notes OneComm's comments suggesting that this recommendation amounts to

favouring small players at the expense of larger firms. The RA accepts in principle that competition law should promote competition *per se* rather than favour competitors. However, the RA does not accept that this was the effect or intention of the original recommendation. Suggesting a mechanism to foster competition is far from acting in a discriminatory manner or favouring a sectoral provider. Providing a degree of preferential treatment for smaller firms is aimed at fostering competition as it is predicated on allowing new entrants to a market some room to survive and ultimately bring competitive pressures to bear in the markets.

77. However, on further reflection, the RA does accept that the theory underlying its previous recommendation is based on smaller participants taking advantage of such relief to ultimately grow in size to become an effective competitor. As the participant grows, it would accordingly advance into a new tier thereby attracting higher fees. A market participant may remain small to take advantage of the tiered fee structure. This could be as a result of particular strategic choices that are made to serve a boutique market segment. This could also be a function of poor management.

78. Accordingly, the RA withdraws the said recommendation.

Amendments to the RAA – Enforcements – Paragraphs 52 to 56 of the Consultation Document

The RA recommended to the Minister the amendment of various sections of the RAA identified during the RA's fully comprehensive review. These suggested amendments included, but were not limited to, the following:

- ***Amend the existing adjudication process and enforcement process*** *to ensure that the RA is afforded the ability to quickly and effectively resolve circumstances and impose remedies where there has been a breach, or alleged breach of an ICOL holder's legal obligations, or there are disputes between two sectoral providers or a sectoral provider and a consumer.*

  […]

79. BELCO, Link and OneComm commented on the RA's recommendation to amend the existing adjudication and enforcement processes. The RA recommended amendments to ensure that it had the ability to resolve circumstances quickly and effectively. The RA also made the recommendations to impose remedies in case of a breach, or alleged breach of an ICOL holder's legal obligations, or disputes between two sectoral providers or a sectoral provider and a consumer.

80. BELCO stated on pages 2 and 3 of their letter:

> *In the Consultation Document, at paragraph 56, the RA recommends amendment of the RAA to replace the adjudication and enforcement process with a warning and decision notice procedure based on that of the Bermuda Monetary Authority (the "BMA"). Among the concerns raised in support of such recommendation, the RA suggests that recent enforcement*

and adjudication processes were "expensive, cumbersome, and time-consuming processes not too dissimilar to a fully contested court proceeding."

As an overarching statement, BELCO notes that it welcomes a right-sized procedure that provides certainty for all stakeholders, including customers, and believes that any procedures that result in arbitrary outcomes in which sectoral providers are not afforded the opportunity to be heard ought to be avoided. The following are some specific observations that BELCO wishes to raise at this time:

BELCO questions whether the BMA is the appropriate comparator when considering other regulatory regimes that may provide insight for new policies or procedures for adoption by the RA. The utility industry is not akin to the financial services industry such that the BMA does not appear to represent the most appropriate comparator for the RA in these circumstances. Specifically in relation to electric utility regulation, there may be other regimes that would be more appropriate to consider. This is particularly so given that many of the electricity sector principles relevant in Bermuda electricity regulation are akin to those in North America.

Although it would remain to be determined whether the court-like approach employed in many of the North American jurisdictions in which BELCO's affiliates operate would be appropriate for Bermuda, the benefit of such would be increased certainty and the appearance of the principles of natural justice being upheld. BELCO suggests that the RA fully cavasses sectoral participants on possible replacements for existing procedures before concluding that anyone replacement option should be adopted.

BELCO does not necessarily disagree with the abolition of the independent presiding officer, but BELCO disagrees that any such abolition should remove the need for adjudication altogether. BELCO therefore does not support the replacement of the adjudication process and its replacement with a warning and decision process at this time.

BELCO wonders whether the RA has given any thought to a process in which the adjudicators would, rather than being IPOs, be some or all of the commissioners themselves. BELCO's affiliates are accustomed to similar processes in which commissioners hear all matters brought before the authoritative body no matter how mundane. Adjudicative processes lend themselves well to upholding the rules of fairness and natural justice that the RA suggests it would like to uphold.

81. Link was supportive of the RA's recommendation regarding the enforcement process. However, it was not supportive of the RA's recommendation to impose penalties of either 10% of total annual turnover or the sum of $500,000 whichever was the higher of those two numbers. Link stated the following at paragraphs 13-15 of their response:

13. The RA is adopting the recommendation to make amendments to the RAA to replace the adjudication and enforcement process with a warning-and-decision-notice procedure. This is based on the RA's experience with the existing processes which they explain have proven to be expensive, cumbersome, time-consuming, and inefficient at reaching any sense of finality. Further, they noted under the current process the RA may play a role as both a party to an adjudication as well as the ultimate decision-maker.

14. Link does not have significant experience with the existing enforcement process. However, Link is generally supportive of initiatives to improve the efficiency of such processes. We wish to emphasize that any new enforcement processes should be transparent, proportionate, and fair.

15. Regarding civil penalties, Link submits the existing penalties should be sufficient and does not need to be adjusted to the higher of the current allowed penalty (up to 10% of annual turnover) or $500,000. There is no evidence to suggest the current penalties are not sufficient.

82. OneComm disagreed with the RA's recommendation and stated under Section C, page 8 of their letter:

As in 2018, the RA again recommends drastic changes to the legislation in relation to enforcement actions and adjudication because the existing processes are "somewhat counterproductive and cumbersome" and are "time-consuming processes not too dissimilar to a fully contested court proceeding". No factual evidence is provided in support of these comments.

With respect, we disagree with this recommendation. As stated in our 2018 Comments, our main concern is with the apparent elimination of any element of independent investigation and judgement. The RA proposes that enforcement matters should not be vested in an independent presiding officer, but instead should be directly vested in the RA. This removes any element of objectivity or independence in the process. The powers of the BMA are customized to the industry they regulate, which is very different from the electronic communications sector. We also refer the RA to the BMA Enforcement Guide which describes the distinct roles played by the Chief Enforcement Officer, the supervisor and the Enforcement Committee.

We also note the RA's related proposals to expand civil penalties and add public censure, while still maintaining its current remedial powers regarding restitution, directions, and suspension, revocation or modification of licences. In summary, it appears the RA is asking to be given the enforcement and adjudication powers of the BMA in addition to its existing statutory powers. The CD provides no explanation as to how its existing powers are insufficient. Simply labelling such powers as costly, cumbersome and time-consuming to implement does not provide the factual and legal background needed to justify such a dramatic expansion of the RA's powers.

In proposing a warning-and-decision notice procedure based on the sectoral legislation of the BMA, the RA proposes that the legislation would only provide a framework and that the RA will be able to "flesh out the processes" through documentation available on their website. We do not agree with the substance of the proposals, and we do not agree with the notion that such important details can be detailed at some later date. And, at the very least, the legislative changes, "fleshed out" policy documents and enforcement principles should be subject to further public consultation so that any concerns of sectoral providers can be properly voiced.

83. BELCO was not supportive of the RA replacing the adjudication process with a warning and decision process currently.

84. BELCO enquired if the RA had considered a process where the IPO would be replaced by the Commissioners of the RA's board. This is because BELCO's affiliates are used to similar processes. BELCO suggested that the RA's Commissioners would hear all matters brought before the RA regardless of how mundane these matters were.

RA's Response:

85. BELCO was supportive of the RA's recommendation that an undertaking in lieu of enforcement proceedings be permitted at any stage of enforcement. However, it stated that an undertaking could not be requested until the provisions of section 93(2) of the RAA are taken.

86. The RA notes that OneComm criticized the RA's proposal to have an enforcement process like the BMA process. BELCO questioned if the BMA enforcement process was the comparator when considering other regulatory regimes. The main allegation was that the BMA enforcement process refers to a different sector.

87. Regarding BELCO's proposal to replace the IPO with a Commissioner of the RA's Board the RA advises that it has considered such a solution. However, to replace the IPO with a member of the RA's Board section 76(3)(b) of the RAA would have to be amended. Section 76(3)(b) of the RAA states:

> **76(3) A person may serve as an independent presiding officer in an enforcement proceeding, if the person –**
> **(b) is not –**
> **(i) a member of the Board;**
> **(ii) a member of staff; or**
> **(iii) an agent or legal representative of the Authority.**

88. It is the RA's view that the RAA is too prescriptive. As can be seen a simple solution suggested by BELCO to change the enforcement procedure cannot be readily implemented due to statutory restrictions.

89. Regarding concerns raised by BELCO and OneComm to follow Bermuda Monetary Authority's (BMA) enforcement procedures, the RA is aware of the BMA operating in a different sector. It is the RA's view that the fact that BMA regulates a different sector does not diminish the value of its enforcement process. This is a local process that has not been considered to overlook the principle of natural justice. The RA also believes that with proper adaptations the BMA process can be applied to the EC sector.

90. The RA notes OneComm statement that it did not provide factual evidence that the adjudication proceeding is counterproductive and cumbersome. In response to this the RA advises that in 2020, the RA had two enforcement proceedings relating to fees owed to the RA. The appointment of the IPO was a slow process. Once appointed the IPO had to become familiar with the RA's adjudication rules set out in the Regulatory Authority (Adjudication

Rules) General Determination 2014 (Adjudication Rules). The said rules are very prescriptive in that the parties are not able to agree an adjournment and advise the IPO of its agreement. The parties have to submit a request to adjourn, and the IPO will then decide if it agrees to such adjournment. Additionally, if the parties reach a settlement that is satisfactory to them, they still have no discretion to enter the said terms without the IPO's approval. The IPO then must submit its decision to the RA Board of Commissioners. This is because the decision of the IPO needs to be approved by the RA's board. All this interaction cost money to the RA and to the sectoral provider. Although the parties were cooperating with the IPO, the liability not being contested and the enforcement proceedings being resolved on paper the said proceedings extended to 6 and 11 months. It is the RA's view that since liability was not contested the RA should have had the power to issue an Order and enforce it right away. However, due to the statutory requirement under the RAA the IPO had to decide every single procedural step to resolve the said enforcement proceedings. The RA spent significant time, internal resources and costs for this uncontested enforcement procedure. It is anticipated that a warning-and-decision-note procedure will substantially reduce these costs.

91. A proposal to streamline the adjudication and enforcement process is far from a drastic change. It is the RA's view that modernizing inefficient, cumbersome, and costly procedures is part of the RA's statutory obligations. The RA wants the ability to flesh out the process internally rather than having it again overly prescribed in legislation. The current adjudicative rules provide no room for the RA to amend the procedure when necessary.

92. There are a few points that the RA would like to clarify regarding the adjudication and enforcement process. Firstly, by proposing a warning-and-decision-notice procedure the RA is not attempting to circumvent the principles of natural justice. The main features BMA's warning-and-decision-notice procedure is as follows:[5]

(a) Is sent in writing stating the proposed action and provides reasons for the action;

(b) Affords the warned party ample opportunity to object to it;

(c) Confirms that the party affected can respond to the proposed action within a specified time;

(d) If BMA receives no representations within the specified period, it will assume that the allegations and conclusions set out in the warning notice are undisputed;

(e) If the party accepts the findings made by BMA but believes that a lesser outcome should be imposed, that party can propose an alternative outcome and explain the reason why the said outcome is more appropriate;

(f) All written representations are carefully reviewed by BMA; and

(g) If representations are satisfactory BMA serves on the appropriate party a Notice of

[5] Bermuda Monetary Authority, 'Enforcement Guide: Statement of Principles & Guidance on the exercise of enforcement powers', (*Bermuda Monetary Authority*, 2018) < Enforcement - Policy And Guidance - BMA > Accessed 2 November 2022

Discontinuance.

93. A party dissatisfied with the BMA's enforcement actions listed below, can Appeal to a tribunal appointed by the Ministry of Finance:

(a) Imposition of directions, restrictions and conditions;

(b) Imposition of a civil penalty;

(c) Injunctions;

(d) Public censure;

(e) Prohibition orders against individual directors and officers;

(f) Objections to controllers; and

(g) Revocation of licence and cancellation of registration (AML only).

94. BMA's legislation also affords an affected party a right of appeal to the Court on a question of law related to a decision of a Tribunal, and a further appeal from the Court to the Court of Appeal, with leave. It should be noted that the RA is not proposing such a tribunal. Instead, the RA wishes to retain a direct right of appeal to the Supreme Court pursuant to section 96(1) of the RAA. This affords any person aggrieved by a decision of the RA to appeal to the Supreme Court.

95. For completeness, it should be noted that the RA regards the provision as constitutionally permissible within Bermuda. Kawaley J (as he then was) stated at paragraph 50 of his judgment in Fay and Payne v The Governor and the Bermuda Dental Board:

> ***[50] In summary, it appears to be settled law that professional disciplinary proceedings looked at as a whole must conform to section 6(8) of the Bermuda Constitution. A disciplinary tribunal need not comply with section 6(8) of the Constitution if there is a right of appeal to 'an independent and impartial tribunal'.***

96. This reflects the principle established by the European Court of Human Rights in applying Article 6(1) of the European Convention on Human Rights, which is applicable to Bermuda, and to which local courts will have regard. Where an adjudicatory body determining disputes over "civil rights and obligations" does not comply with Article 6 para. 1 in some respect, no violation of the Convention can be found if the proceedings before that body are "subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6 para. 1". See paragraph 29 of the judgment of the Court in Albert and Le Compte v Belgium (10 February 1983, Application no. 7299/75; 7496/76), reaffirmed at paragraph 40 of its judgment in Bryan v UK (22 November 1995, Application no. 19178/91).

97. More recently, Subair Williams J. confirmed in her judgment in Keiva Maroney-Durham and Bermuda Bar Council the decision reached by Kawaley J (as he then was) in Fay and Payne v The Governor of Bermuda and the Bermuda Dental Board and the Privy Council's decision in *Preiss v General Dental Council* [2001] 1 WLR 1926. At paragraphs 81 and 82 of her judgment

Subair Williams J. stated:

> ***81. Moving past the subject of mode of hearing, I should also consider whether this application of section 10E(4)(d)(ii) entitles the Bar Council to assume the role of both the complainant and judge in its own cause, thereby breaching section 6(8) of the Constitution and the related principles of natural justice. While I am not seized of any constitutional challenge to section 10E(4)(d)(ii), I would opine that the section allows for the question of non-disclosure to be determined fairly. The statutory framework for a determination under section 10E(4)(d)(ii) is subject to an appeal by way of a full rehearing. As observed by Kawaley J (as he then was) in Fay and Payne v The Governor and the Bermuda Dental Board, the Privy Council in Preiss v General Dental Council [2001] 1 WLR 1926 accepted that the availability of a full rehearing on appeal was sufficient to bring a statutory regime for professional disciplinary matters within the boundaries of the rule of natural justice. The judgment of the Judicial Board was delivered by Lord Cooke of Thorndon who said [9-10]:***
>
> > ***"9. The appellant accepts that the points taken under article 6(1) cannot succeed if the Board is itself prepared to conduct a complete rehearing of the case, including a full reconsideration of the facts and of the question whether the facts found amount to serious professional misconduct. Their Lordships consider that the position is no different under the common law rules of natural justice applicable to proceedings before domestic tribunals: compare Calvin v Carr [1980] AC 574.***
> >
> > ***10. As the Board has undertaken such a complete rehearing (a subject to 30 which their Lordships will return), to discuss the appellant's points might seem unnecessary; but, for several reasons, it is as well to do so. First, a disciplinary system in which a hearing satisfying article 6(1) could be secured only by going as far as the Privy Council could not be commended. Secondly, the right is to have such a hearing within a reasonable time. Although there has been no suggestion of undue overall delay in this instance, that might not always be the case. Thirdly, it has recently been emphasised in a judgment of an English Divisional Court (Regina v Secretary of State of the Environment, Transport and The Regions, ex parte Holding & Barnes plc, 13th December 2000) that the proceedings as a whole have to be considered in deciding whether article 40 6(1) is satisfied. While again this does not apply to the instant case, there may be some risk of unpredictable circumstances where even a full Privy Council rehearing is not enough. Last, the General Dental Council has embarked on a programme of constitutional reform. Some observations on the disciplinary structure as it has operated in the past may be useful."***
>
> ***82. Commenting on this passage, Kawaley J in Fay and Payne v The Governor and the Bermuda Dental Board [35] rightly pointed out:***
>
> > **"35.** ***This passage is instructive in the context of the present application for the following reasons. Firstly, it illustrates the well recognised principle that complaints about non-compliance with fundamental fair hearing rights which occur before a statutory tribunal (other than a court) which is not itself sufficiently independent or impartial can be cured where a right of appeal to a constitutionally compliant***

***tribunal exists. Ancillary to this first proposition, the cited passage from Lord Cooke's judgment reminds us of the important implicit underlying principle, that in considering compliance with section 6(8), the proceedings as a whole must be looked at. Secondly, the cited passage illustrates the equally well recognised proposition that the fair hearing rights under section 6(8) of the Bermuda Constitution are substantially the same as the common law rules of natural justice*.**

98. The RA notes OneComm concern in their 2018 response that an appeal process is costly. It is the RA's view that the BMA procedure is fair and that having a protracted adjudicative process will not remedy the expenses related to an Appeal. Additionally, having an expeditious and less expensive procedure affords the aggrieved party the ability to Appeal to the Supreme Court without having to incur high costs in a long enforcement proceeding.

99. It is the RA's preliminary view that the BMA's warning-and-decision-notice is a fair procedure. Additionally, the BMA procedure is not as lengthy as the RA's enforcement procedure prescribed under the Adjudication Rules. The BMA's warning-and-decision-notice is a more expeditious procedure. As demonstrated above, the warning-and-decision-notice allows the parties to issue an appeal sooner if necessary. The RA considered amending the Adjudication Rules via a new general determination to shorten the enforcement procedure. However, it is the RA's view that amending the rules without amending the RAA will not provide the RA the ability to eliminate the requirement to appoint an IPO to preside over enforcement proceedings. The RA is also not able to implement BELCO's suggestion that a Commissioner of the RA's Board be appointed to deal with the adjudication and enforcement proceedings.

100. Another point to be clarified is that the RA does not wish to exercise all of BMA's enforcement powers. As stated in the Consultation Document the RA wishes to have the following disposal options for enforcement:

(a) Civil Penalties – The BMA legislation allows for the imposition of a civil penalty of up to $500,000. The RAA allows for a penalty of up to 10% of total annual turnover. The maximum penalty imposable by the RA should be whichever is the higher of these two numbers.

(b) Restitution – The BMA legislation does not address restitution. The RAA does allow the RA to require a sectoral participant to make restitution to any person directly injured or otherwise prejudiced as a result of any contravention. This should be retained.

(c) Directions – The BMA legislation does allow for the issuing of directions, with variance across the sectoral legislation. The RAA allows for a uniform power to direct a sectoral participant to take, or refrain from taking, actions the RA reasonably determines to be necessary to ensure that the sectoral participant acts in conformity with its duties and obligations. This uniform power should be retained. For the avoidance of doubt, this provision should also make reference to powers by the RA to seek prohibition orders and court injunctions where appropriate.

(d) Suspension, revocation or modification of licence – The BMA legislation does not address these matters as part of its enforcement and/or disciplinary measures, whereas the RAA treats this as a separate disposal option following enforcement proceedings. If the legislation is to be amended to allow for streamlined processes, then there should be no practical difference as to how the RA approaches the question. However, for the sake of completeness, these should remain under the 'enforcement' heading.

(e) Public censure – The BMA legislation specifically contemplates this as a disposal option, but the RAA does not. This option should be included.

(f) Refer a matter to criminal prosecution – This option exists in both the BMA legislation and RAA. It should continue as a disposal option, but it should also exist independently of the process for enforcement action.

101. Link disagreed with the RA's proposal to adjust the civil penalties to the higher of the current allowed penalty that is up to 10% of annual turnover or $500,000. The RA notes that it is recommending a maximum penalty of either up to 10% of annual turnover or $500,000. The RA proposed the said penalties to effectively deter breaches of regulatory requirements. The maximum penalty is also proposed to appropriately impact the sectoral provider. The maximum penalty suggested should also incentivize management to change conduct of the sectoral provider at different levels within the organization.

102. OneComm disagrees with the RA's proposal to have the above disposal options for enforcement. The RA fails to understand the reason why OneComm objects to these proposals. The RA notes that disposal options should be proportional to the breaches occurred. It is the RA's view that none of the disposal sanctions proposed are disproportional.

RA's Response:

103. As explained in the Consultation Document, the RA wishes to implement a new enforcement regime under the RAA and Sectoral Legislation to achieve the following objectives:

(a) The procedures should be simple to navigate;

(b) The enforcement process should be streamlined;

(c) Enforcement options should be wide and varied;

(d) Decisions should be taken internally by the RA to the greatest extent possible, with a view to minimizing costs;

(e) All actions and decisions taken should continue to be guided by the regulatory principles of the RA contained in section 16 of the RAA;

(f) There should be appropriate consideration of the rules of fairness and natural justice, with an appropriate appeal process to the Courts; and

(g) To achieve each of the foregoing objectives, the legislation should provide only a framework and avoid being overly prescriptive; the RA should be able to flesh out the processes through policy documents and a statement of enforcement principles published on its website.

104. The RA notes for the sake of completeness that the BMA has published its statement of enforcement principles.[6] Ofcom has similarly published enforcement guidelines relating to matters over which it has authority.[7] Should this legislative proposal be adopted, the RA would take significance guidance from these documents. Furthermore, the RA commits to seeking public and sectoral comment on any proposed statement before it was to become effective.

105. Accordingly, the RA recommends that amendments be made to the RAA replacing the cumbersome adjudication and enforcement process with a simpler warning-and-decision-notice procedure based on that used in the sectoral legislation of the Bermuda Monetary Authority. The RA also reiterates its recommendation to widen its disposal options for enforcement as detailed in the Consultation Document and above.

Amendments to the RAA – Surplus funds – Paragraphs 57 to 61 of the Consultation Document

> ***The RA recommended to the Minister the amendment of various sections of the RAA identified during the RA's fully comprehensive review. These suggested amendments included, but were not limited to, the following:***
> *[…]*
>
> - ***Provide the ability to carry forward Surplus Funds** from one financial year to the next in order to remove unnecessary budgeting difficulties and to afford the RA the ability to account for workstreams that are conducted across multiple fiscal years.*
> *[…]*

106. Both Link and OneComm were supportive of the RA's recommendation to carry forward Surplus Funds. Also, both Link and OneComm expressed some reservations regarding the utilization of the Surplus Funds.

107. Link stated the following at paragraphs 16 and 17 of their letter:

> *16. The RA is recommending amending the RAA so that net surplus funds can be utilized for any deferred projects, or projects that carry over from the previous fiscal years, as well as for*

[6] Bermuda Monetary Authority. *Enforcement Guide: Statement of Principles & Guidance on the Exercise of Enforcement Powers*. September 2018. https://cdn.bma.bm/documents/2019-03-27-05-40-10-Enforcement-Guide-Statement-of-Principles-and-Guidance-on-the-Exercise-of-Enforcement-Powers.pdf.
[7] Ofcom. *Enforcement guidelines for regulatory investigations*. June 2017. https://www.ofcom.org.uk/__data/assets/pdf_file/0015/102516/Enforcement-guidelines-for-regulatory-investigations.pdf.

start-up funding for any new sectors assigned to the RA. This is based on the fact that there is a surplus most years and under the current legislation any surplus is divided between the Consolidated Fund, paid-up capital, and the RA's Reserve Fund. The RA explains that the current framework limits the RA's ability to operate efficiently.

17.Link is supportive of initiatives that may reduce our regulatory fees and may increase the overall efficiency of the RA's operations. With that said, it is important to ensure that any discretion around the ability to reallocate surplus funds does not result in insufficient funds available when needed for operational purposes. It is important that those contributing fees have fee certainty to plan for future years. In that context, we generally agree with providing the RA some flexibility to use surplus funds in one year for the following years' expenditures, with the caveat that this should not inadvertently result in even higher fees in subsequent years.

108. OneComm stated the following under Section D pages 8 and 9:

As per our 2018 Comments, we are supportive of any effort that will reduce the tax burden on our sector. The RA's proposal to use surplus funds from prior years to fund current and future years is welcome provided this results in an actual decrease in the tax burden for all sectoral participants. We would not support surplus funds being used to benefit some but not all participants, nor would we welcome the use of surplus funds for discretionary or overspending by the RA beyond its approved budget.

In paragraph 58 of the CD, the RA states (as it did in 2018) that it tends to err on the side of caution by over-budgeting which often results in surplus. This practice takes funds from the sector unnecessarily. Those funds could have been used to build networks, provide services or improve pricing. If statutory change to allow funds to be used in future years will eliminate the basis for the tendency to over- budget, we are supportive of the change.

RA's Response:

109. On further reflection, the RA notes that it has received tools short of legislative amendments that achieve the originally stated legislative objective. Under section 38 of the RAA, the Minister of Finance approved the creation of a project fund for stated work plan projects and projects in progress on 22 March 2019. In the same approval, the Minister of Finance also approved the creation of a Litigation Reserve Fund to hold up to $1.5 million. A copy of the letter from the Minister of Finance can be found on the RA's website[8]. Additionally, these approvals were detailed in the RA's Audited Annual Report 2018-2019[9] and in the RA's Work Plans for 2020-21, 2021-22, 2022-23 and 2023-24[10]. Lastly, as mentioned in the Work Plan 2022-23, the utilization of the surplus fund has decreased the RA's yearly budget.

110. The RA will remove this recommendation from this EC Sectoral Review.

[8] https://www.ra.bm/legal-documents/ministerial-approval-for-litigation-and-project-funds
[9] 62d72797e0a7162f6d550e11_2018 19 Annual Report-compressed.pdf (webflow.com)
[10] https://www.ra.bm/publications/reports

Amendments to the RAA – Public Consultations – Paragraphs 62 to 67 of the Consultation Document

> ***The RA recommended to the Minister the amendment of various sections of the RAA identified during the RA's fully comprehensive review. These suggested amendments included, but were not limited to, the following:***
>
> *[…]*
>
> - ***Amend the statutory requirement to conduct an initial public consultation as part of the General Determination process*** *to account for exceptional circumstances where an initial public consultation may not be required (i.e. due to technological and market developments, timing and sensitivity of the matter, inherent simplicity of the matter).*

111. The recommendation to amend the Public Consultation Process received responses from BELCO, Link and OneComm.

112. BELCO responded on pages 3 and 4 of their letter as follows:

> *The RA has recommended that the public consultation process be streamlined in two ways: 1) to create a two-stage process for public consultations in lieu of a three stage-process; and 2) to remove the need for a public consultation for a general determination save for in matters of public importance. BELCO does not support either of these changes for the reasons set out here:*
>
> *(15)Two-stage Process. It is unclear which aspect of the existing three-stage process the RA is proposing to remove, and the RA is asked to clarify. Either way, it is understood that the impetus behind the proposed streamlined approach is to enable the RA to be nimble. If that is correct, the RA is reminded that it has available to it the emergency general determination mechanism under section 66 of the RAA. Such mechanism enables the RA to respond to market and technological developments quickly and effectively.*
>
> *Another benefit to maintaining the three-stage process is that it provides stakeholders with multiple opportunities to raise technical, practical or other concerns that would not otherwise be taken into account. There have been consultation processes where the RA has modified or reversed its position after the first or second round of consultation.*
>
> *Given the value in allowing stakeholders multiple opportunities to comment upon an issue, and given that there is already a mechanism that affords the RA the opportunity to move swiftly, BELCO does not support a two-stage process at this time.*
>
> *2) Limited Consultations for General Determinations. The making of general*

determinations is one of the few instances in which stakeholders have the opportunity to comment on draft legislation.

Given the importance of general determinations, being statutory instruments, BELCO Is not supportive of the removal of an opportunity for stakeholders to participate in a legislative process.

113. Link stated at paragraphs 18 and 19 the following:

18. The RA recommends amending the provisions of the RAA governing the consultation process to create a two-stage, rather than three-stage, process while maintaining discretion for the RA to prepare additional documents as appropriate. Further, the RA recommends requiring consultations for the making of General Determinations only in cases of "public significance" allowing the RA to bypass consultations for routine administrative tasks. They define "public significance" as something that relates to a sectoral provider and is "likely to lead to (a) a major change in the activities carried on by the Office under this or any other Law; (b) a significant impact on a sectoral provider; or (c) a significant impact on members of the public."

19. While Link generally supports measures that are intended to increase efficiency and reduce unnecessary steps for both the RA and operators, Link has some concerns with the recommendation to only require public consultation on matters of "public significance" and matters that could only have a "significant impact" on providers or the public. It is a well-established principle of regulatory best practice that input from impacted parties and stakeholders should be sought to inform the development of regulatory policies.1 This should not be limited to cases where the RA has assessed there may be a "significant impact" on impacted parties. Carrying out public consultations prior to making a General Determination ensures there are no unintended consequences from the regulation, improves the quality and efficiency of the regulation, and promotes public and industry confidence in the overall regulatory framework. Link submits that these principles are essential to an effective regulatory framework for the electronic communications sector in Bermuda. While the recommendation would still require consultations in matters of "public significance", it is unclear exactly how the assessment of what constitutes "public significance" would take place and there is a very real risk that matters that may seem innocuous to the RA could have an impact on sectoral providers. These unknowns and unintended consequences are exactly what consultations are intended to reveal. If the RA decides to adopt this recommendation, Link submits that the exception to public consultations must be applied very narrowly to avoid any unintended impacts on the sector.

114. OneComm stated under Section E, pages 9 and 10 of their letter:

The RA is seeking to amend the RAA to provide it discretionary power to skip the initial stage of the current public consultation process where the RA deems it unnecessary. In support of this proposal, the RA highlights the need to

respond quickly and effectively to market and technological developments, and it implies that respondents have delayed past consultations by seeking extensions for deadlines to submit responses. The RA cites the example of the Price Check Website decommissioning taking over two years even in the absence of controversy or comments from sectoral providers. Further, the RA references the Cayman Islands regulatory approach as a preferable model as it only requires public consultation for matters of 'public significance'.

One Comm disagrees with this proposal. Public consultation is a key component of the RA's general mandate. Any shortening of the consultative process may speed up the effort but only at the expense of public input. The RA's exercise of its statutory powers was intended to be tempered and influenced through the public consultation process. Both the RAA and the ECA are structured to ensure the RA's powers are used for the public benefit. Reducing opportunities for public consultation is inconsistent with that statutory approach.

With regard to respondents delaying past consultations by seeking extensions, we believe the RA's point is only part of the reason for delayed consultations. Yes, respondents seek extensions. One Comm has sought additional submission time in some circumstances to ensure it can properly participate in a consultation. We note, however, that the RA has in many cases taken months (and in some cases, years) to develop its consultation documents, preliminary orders and related materials. The RA retains off-island professional consultants to draft this material. When the documents are finally issued to the public (often on a Friday or the day before a holiday weekend)[2], they usually have a deadline of one month for submissions. Most sectoral participants and members of the public who participate in the consultations do not have dedicated regulatory resources; nor do they have the benefit of external professional economists and lawyers in preparing their responses.

With respect to the example used by the RA in decommissioning the Price Check Website, the timeline of greater than 2 years was not because of deadline extensions for respondents. The initial consultation document response period commenced on 29 March 2019 and concluded on 12 April 2019. There was only one response. More than a year later, on 30 April 2021, the RA issued its Preliminary Report, Decision and Draft General Determination in the matter. The response period commenced on the 30 April 2021 and concluded on the 14 May 2021. The RA received no responses to the Preliminary Report. The Final Report and Final Decision and Order in this matter was issued 27 May 2021, more than 2 years after the initial consultation document was issued. Of that period, only one month was spent waiting for public responses.

With regard to the RA's suggestion that the Cayman 'public significance' model be used, we suggest further research be done to determine whether such a model is more efficient and whether it results in better outcomes for the

market and the public. One Comm has many years of experience operating in the Cayman market, and we would ask the RA to provide more detail in this consultation as to why the Cayman model might be the better choice.

RA's Response:

115. The RA wishes to consult only when there is a valid reason to consult. Staff must prepare consultation documents, preliminary and final reports, and board briefings for each stage of the consultation. The staff and the Board also need to schedule meetings to deal with a trivial administrative matter. Staff and board's efforts could be focused elsewhere.

116. Public consultation is a process that involves the public in providing their views and feedback on a proposal to consider in the decision-making. The principles of consultation were set in the case *R v Brent London Borough Council, ex p Gunning (1985) 84 LGR 168* (Gunning principles). According to the Gunning principles there are four rules designed to make consultation fair and a valuable exercise. They are as follows:

a) The consultation must be undertaken at a time when proposals are still at a formative stage;

b) The proposer must give sufficient reasons for any proposal to permit intelligent consideration and response;

c) Adequate time must be given for consideration and response; and

d) The product of the consultation must be conscientiously considered in finalizing any proposals.

117. By way of a practical example, on 24 June 2021 the RA opened a Public Consultation to update the National Numbering Plan. This consultation was conducted due to a statutory requirement under section 46(3) of the ECA. The said public consultation received no responses from sectoral providers in all its stages. The National Numbering Plan Update consultation related to sectoral providers asking to be included in Bermuda's National Numbering Plan. The RA examined the applications submitted. Nothing was found by the RA to prevent assignment of numbers of the national numbering plan to the sectoral providers. This in the RA's view was an administrative task that did not need consultation. Despite the RA's view, it had to consult on the matter to update the national numbering plan due to a statutory requirement. The RA's view is that there was a very small possibility that the RA would change its decision relating to the assignment. This is because all requirements for the assignment of numbers of the national numbering plan were fulfilled by the sectoral providers. It is the RA's view that this type of public consultation is unnecessary.

118. Another example is the Decommissioning of the Electronic Communications Price

Comparison Website. While it is correct that some of the delay to conclude this consultation occurred due to the RA's staff turnover, the consultation dealt with yet another administrative task. If the RA did not have to consult regarding the proposal to decommission the electronic communications price check comparison website, this task could have been completed sooner.

119. The RA notes OneComm statement that most of the RA's documents are prepared externally. Respectfully, while this may have characterized the workings of the RA in the past, it is not the case today. The RA has made great efforts to bring this work inhouse. The RA only engages external assistance when it feels that more expertise is necessary. Even on those occasions, such experts tend to be hired on very limited engagements, with the documents in a consultation nearly always completed and compiled by internal staff.

120. The RA believes that the Cayman's consultation process is adequate for Bermuda because it is flexible and dynamic. There are frequent public consultations on policy, procedures and other matters of interest to licensees. Some consultations only have one phase. However, they have flexibility to add a second phase to the consultation. OfReg are also able to use alternate formats in the consultation process. They are able to conduct a working group or divide a consultation that is in progress so as to focus only on one issue. Thus, they can bring that issue to a determination before the work on other issues are 37ecognize.

121. Below are some of the reasons why the RA believes that the OfReg model is adequate for Bermuda which were taken from OfReg's Consultation Procedure Guidelines:[11]

> **6. [T]his document sets out the Consultation Procedure Guidelines and principles to be followed by the Office in its approach to conducting consultations with persons on administrative determinations3 which, in the opinion of the Office, are of public significance. As set out in subsection 7(3) of the URC Act, these are administrative determinations which relate to a sectoral provider or members of the public, and which are likely to lead to:**
>
> **(a) a major change in the activities carried on by the Office under the URC Act or any other act;**
>
> **(b) a significant impact on a sectoral provider; or**
>
> **(c) a significant impact on members of the public.**
>
> **7. These Guidelines will standardise the process by which consultations are conducted by**

[11] OfReg, Consultation Procedure Guidelines (30 June 2022) < www.ofreg.ky/viewPDF/documents/consultations/2022-07-04-05-36-02-OF-2022---G1---Consultation-procedure-guidelines.pdf > Accessed 24 October 2022

the Office, and will seek to ensure effective consultations. As such, an effective consultation should:

(a) involve, as far as possible, all persons who are affected or are likely to be affected;

(b) explain fully the different options being considered by the Office before a decision is made, if applicable;

(c) assist those with views to respond fully and in an informed manner; and

(d) provide a vehicle for the Office to hear, consider and respond to responses received.

8. While the Office will generally adhere to these Consultation Procedure Guidelines, it recognises the need for the procedure to be sufficiently flexible and dynamic to address the exigencies of the regulated sectors and life in general.

9. The Office establishes the following objectives for conducting consultations with the sectoral providers or members of the public:

(a) to obtain information and feedback from persons whose rights or interests may be materially affected by the proposed administrative determination;

(b) to ensure regulatory transparency and objectivity;

(c) to protect consumer interests, where appropriate;

(d) to ensure adequate and accurate information is shared;

(e) to strengthen persons' understanding, participation and confidence in the regulatory process;

(f) to ensure that persons are given the opportunity to express their views;

(g) to ensure that the Office has investigated the necessary aspects of an issue so that persons are adequately informed of the issues surrounding a matter; and

(h) to acquire substantive information and knowledge on any issue, in order for the Office to make informed decisions.

The Office notes that not every consultation will be general in nature. There may be instances where a consultation is targeted at a sectoral provider who the Office believes may experience a significant impact in the matter under consideration or sector providers who have the technical expertise to respond.

10. The Office will update these Guidelines from time to time to take account of best practice and ongoing experience with their application as well as comments received from interested parties.

11. If the Office decides to depart from the Guidelines in any particular consultation, the Office will set out its reasons for doing so.[4] Circumstances in which the Office may depart from the Guidelines include:

(a) where the Office may need to ensure that adequate and accurate information has been provided before dissemination and/or investigate the necessary aspects of an issue;

(b) where the Office may need to implement steps in order to protect consumer or public interests in urgent circumstances; and

(c) where the Office considers a consultation may need different stages or a different format[5] in order to prevent unfairness between consulting parties or place a consulting party in a disadvantaged position.

C. Method of Consultation

12. The Office will determine the method of the consultation process to take place in respect of any administrative determination proposed to be issued by the Office, depending on the nature of the administrative determination itself,6 the number of parties potentially affected by the administrative determination, and the impact on the regulated industry and the consultations with the public, licensees and sectoral providers. It may use the formal written consultation format detailed in part F below or it may use more informal processes, such as working groups, as set out in paragraphs 21-23 in the preliminary stages. In any event, the result in each completed consultation is a reasoned administrative determination.

D. Major Change/Significant Impacts

13. The Office notes that the statutory obligation to consult applies where the proposed administrative determination is likely to lead to a major change in the activities of the Office and/or a significant impact on the relevant persons. Setting out in guidelines in what circumstances such changes/impacts may be relevant is not appropriate, as the result of each change/impact will depend on the facts and circumstances of each proposed determination.

14. As a general approach, the Office envisages that it will consult in circumstances where the proposed administrative determinations have important legal and economic implications. These types of matters usually have the potential to impact a large number of parties and have significant public interest. Examples of past consultations are found on the website www.ofreg.ky/consultations.

122. The RA recommends that the legislative provisions regarding the conduct of public consultations be streamlined. Given the responses received, the RA preliminarily proposes two-stage approach public consultation with the possibility of extending it to a third stage. As exemplified above, OfReg has a flexible consultation approach. The RA wishes to establish a similar process in Bermuda.

Amendments to the ECA – Paragraph 68 of the Consultation Document

The RA recommends to the Minister the amendment of various identified sections of the ECA in response to the RA's fully comprehensive review. These suggested amendments include, but are not limited to, the following:

- ***Remove the references to the adjudication process in sections 41 and 50 of the ECA*** *and replace with a reference to consultation. As currently constructed, section 41 of the ECA stipulates that in order to impose remedies for the inefficient use of Spectrum, the RA must have completed a lengthy and cumbersome adjudication process. Similarly, section 50(2)(b) of the ECA stipulates that an adjudication must be completed in order to approve an electronic communications technology, in accordance with section 50(2)(b) of the ECA. The proposed recommendation will ensure that the processes outlined in sections 41 and 50 of the ECA are more efficient.*

123. OneComm provided a response in relation to the RA's proposal to remove the references to the adjudication process in sections 41 and 50 of the ECA. OneComm disagreed with the RA's recommendation stating under Section F, page 10:

> One Comm disagrees with this proposal. The RA provides none of the required factual or legal background necessary to evaluate this recommendation. We can only assume the change from adjudication to consultation was intended to streamline the process and make it easier for the RA to make final decisions regarding Type Approvals (s. 50) and the efficient use of spectrum (s.41).
>
> This proposal must also be considered in conjunction with the RA's other proposals to shorten or reduce the public consultation process, and to simplify the adjudication process. When viewed in totality, there is a concerning theme of providing unfettered powers to the RA. While we understand the RA intends to exercise these streamlined powers for the public benefit, we do not believe these proposals recognize the public benefit of independent presiding officers in adjudication, and the constructive influence of public input in the consultation process. Parliament saw fit to design these processes with checks and balances. The RA has provided no compelling reason in support of its proposal.

RA's Response:

124. The RA takes note of OneComm's statement but must respectfully disagree that it is seeking unfettered powers. As explained in the Consultation Document, the RA sees does not regard it as necessary to conduct an adjudication to impose remedies for the inefficient use of spectrum or to approve an electronic communications technology. Instead, the RA proposed that a public consultation process be conducted.

125. The RA reiterates it recommendation that the references to the adjudication process in sections 41 and 50 of the ECA be replaced with a reference to consultation.

Moratorium review – Paragraphs 69 to 75 of the Consultation Document

The RA recommended to the Minister that the current Moratorium restricting the issuance and re-issuance of ICOLs is lifted *given the results obtained as part of the Sectoral Review and Market Review (i.e technological, market developments).*

126. As stated in the Consultation Document, the Moratorium was lifted by the Minister on 19 March 2019.

RA's Response:

127. As indicated in the Consultation Document no further recommendation is made in respect of this matter.

Consumer protection – Compensation – Paragraphs 76 and 77 of the Consultation Document

The RA recommended to the Minister the imposition of consumer compensation provisions for consumers *in the event of service failures, through a consumer protection general determination and the inclusion of supporting ICOL terms and conditions through an ICOL general determination.*

128. The RA recommended in 2018 and in the Consultation Document that the ECA and/or ICOL conditions be amended to require sectoral providers to compensate consumers, based on established levels of compensation, in the event of service failures resulting in service outages such as mobile outages or leased line outages.

129. OneComm provided a response to the RA's proposal under Section G, page 10 in the following terms:

> It is unclear why these issues are being addressed under the sectoral review. The RA has failed to provide the required factual and legal background on this issue.
>
> As the RA's recommendation is that general determinations be used to implement such measures, the RA has the power to commence public consultations that could ultimately result in its proposed general determinations. Pursuant to statute, there is no direct involvement of the Minister in such processes.
>
> With respect to the imposition of consumer compensation provisions, we will reserve further comments until the appropriate consultation is commenced. In the interim, we refer the RA to our past comments in its Principles of Consumer Protection Consultation in 2020.

RA's Response:

130. **The RA thanks OneComm for their response. As noted in section 7.10 (iii) of the RA's 2023-2024 Work Plan and Budget Consultation[12], the RA intends to update the Principles of Consumer Protection General Determination 2020. One of the items included in that work plan section is compensation for outages. Given this inclusion in the work plan and the required consultation for any determinations, the RA agrees with OneComm that this particular item can be removed from this report.**

Consumer protection – Email Forwarding – Paragraphs 78 and 79 of the Consultation Document

The RA recommended to the Minister the imposition of email forwarding provisions for consumers *that switch internet service providers, through a consumer protection general determination and the inclusion of supporting ICOL terms and conditions through an ICOL general determination.*

131. OneComm response regarding the RA's recommendation to impose email forwarding provisions under Section H, page 10 of their letter as follows:

> See our related comments on this issue above under the heading: "Sectoral Review Should Not Be Focused on Adding Regulation or Facilitating Regulatory Action".
>
> It is unclear why these issues are being addressed under the sectoral review. The RA has failed to provide the required factual and legal background on this issue. As per the previous section, the method of implementation proposed by the RA is through a general determination. Accordingly, it remains within the powers of the RA to commence a public consultation that might ultimately lead to a general determination on the point. We will reserve further comment on the issue of email mobility/forwarding until the appropriate consultation is commenced. In the interim, we refer the RA to our past comments in the relevant consultations in 2013, 2015 and 2018.

RA's Response:

132. **The RA agrees with OneComm with respect to the Email Mobility consultation process that was commenced in 2013 and updated in 2015. The RA has not received any further complaints from sectoral participants since that time. It is believed that various solutions (including charging a small recurring fee for email services) is in existence in the market. The RA therefore will remove this recommendation from this sectoral review. However, the RA reserves the right to re-open the previous email consultation or consider the matter as part of the next EC Market Review.**

[12] https://global-uploads.webflow.com/62670c93ceef61f2e8acc1ce/6381041477fad81a4e4b04cc_2022%2009%2030%20Work%20Plan%20and%20Budget%2023-24%20Consultation%20Document.pdf

Consumer protection – Additional Measures – Paragraphs 80 to 82 of the Consultation Document

The RA recommended to the Minister the adoption of additional Consumer Protection measures *which will be considered as part of a consumer protection general determination.*

133. OneComm replied under Section I, page 11 of their letter to the RA's recommendation as follows:

> It is unclear why these measures are being addressed under the sectoral review. The RA has failed to provide the required factual and legal background on this issue. As per the previous sections, the method of implementation proposed by the RA is through a general determination. Accordingly, it remains within the powers of the RA to commence a public consultation that might ultimately lead to a general determination on the point. We will reserve further comment on the issue of additional consumer protection measures until the appropriate consultation is commenced. In the interim, we refer the RA to our past comments in the consumer protection consultation concluded in 2020.

RA's Response:

134. The RA intends to update the Principles of Consumer Protection in the 2023-2024 fiscal year. No further recommendation is made in respect of this matter.

Radio spectrum – Paragraphs 83 to 87 of the Consultation Document

135. In the Consultation Document the RA reminded the public of the statements made in the 2018 Sectoral Review Final Report and of progress made regarding radio spectrum since that time.

136. BELCO and OneComm responded to the information provided.

137. BELCO's response was:

> At Paragraph 85 of the Consultation Document, the RA notes that a revised version of the Regulatory Authority (Grant of Spectrum Licences, Permits, and Exempted Frequencies) General Determination 2020 will be published in the current fiscal year. BELCO looks forward to participating in the consultation process.

138. OneComm response under Section J, page 11 of their letter was:

> It is unclear what the RA is proposing in this section of the CD. There are references to future consultations and a possible update to the Minister's 2014 Spectrum Policy. When these public processes are commenced, One Comm will participate as appropriate.

RA's Response:

139. The RA advises that the statement made was of informational nature. There was no proposal or recommendation made in relation to Radio Spectrum.

Legislative Amendment to allow the fulfilment of RA's mandate in the EC Sector – Paragraph 88 of the Consultation Document

140. The RA recommended the amendment of section 21(1)(b)(i) of the RAA to improve the administration and assist with continuity of the RA's Board. As such, the notice soliciting applications for the position of Commissioner should be published in the Gazette 180 days prior to the date on which a Commissioner's term is set to expire rather than 90 days. The RAA should also be amended to allow for a meaningful means of enforcing the deadline for appointing a Commissioner by the Selection Committee under section 21(4) of the RAA.

RA's Response:

141. No replies were submitted by sectoral providers, the public or interested persons in relation to this recommendation. The RA continues to hold the view that the said recommendation is necessary.

Annex 1 – Update to enforcement procedures – Paragraphs 1 to 28 of the Annex

142. BELCO responded to the RA's proposal to remove sections 57 and 58 of the RAA. On page 4 BELCO stated as follows:

> In summary, the RA appears to believe that sections 57 and 58 of the RAA ought to be removed because they are redundant. The RA suggests that such provisions are unnecessary because they limit the RA's involvement in disputes between sectoral providers or between sectoral providers and consumers to circumstances in which there is an event of an alleged act or omission that contravenes matters within the RA's remit. The RA suggests that the provisions are redundant because the RA can get involve' in alleged acts or omissions in any event.'
>
> BELCO generally agrees that redundancy within the regulatory framework is unnecessary and, potentially, confusing. In this case, however, express inclusion of both sections 57 and 58 of the RAA represents a signal for sectoral providers and consumers as to the sorts of matters in which the RA should be involved. As such, frivolous claims that will otherwise consume resources and ultimately increase costs for customers are reduced. The provisions also provide certainty for all parties. BELCO therefore suggests that the sections ought to be retained.

RA's Response:

143. **In order to clarify the position, the RA does not regard sections 57 and 58 of the RAA as redundant at this time. Rather, these provisions would become redundant in light of the recommendations contained in Annex 1 relating to the enforcement procedures under the RAA. Accordingly, the RA will link any changes in the provisions of sections 57 and 58 to any broader amendments relating to the RA's enforcement procedures.**

6 Summary of Preliminary Recommendations

144. In section 5 of this Preliminary Report the RA addressed the responses received from the sectoral providers. In section 5 the RA also provided its preliminary recommendations for the Sectoral Review. The RA welcomes comments from members of the public, electronic communications sectoral participants sectoral providers and other interested parties, on the proposed recommendations or any other matter related to this Preliminary Report. Below is a summary of the recommendations made in section 5 for ease of reference.

145. Regarding ICOL holders' future financial stability, the RA recommends that the RAA be amended to include a provision giving power to the RA to order management or operations audits of any sectoral provider it oversees.

146. Regarding discontinuation of wholesale service, the RA recommends updating the ECA to require ICOL holders, particularly those offering services subject to SMP remedies, to notify the RA before discontinuing any services to wholesale customers.

147. **Regarding amendment of adjudication and enforcement process, the RA recommends that amendments be made to the RAA replacing the cumbersome adjudication and enforcement process with a simpler warning-and-decision-notice procedure based on that used in the sectoral legislation of the Bermuda Monetary Authority. The RA also recommends that its disposal options for enforcement be widened as detailed in the Consultation Document and above.**

148. Regarding amendments to the RAA concerning public consultations, the RA recommends that the legislative provisions regarding the conduct of public consultations be streamlined. The RA recommends a two-stage approach public consultation with the possibility of extending it to a third stage.

149. Regarding amendments to the ECA, the RA recommends that the references to the adjudication process in sections 41 and 50 of the ECA be replaced with a reference to consultation.

150. Regarding fulfillment of the RA's mandate in the EC Sector, the RA recommends the amendment of section 21(1)(b)(i) of the RAA to improve the administration and assist with continuity of the RA's Board.