

# DISPUTE RESOLUTION IN TELECOMS— THE REGULATORY PERSPECTIVE

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## Background and Introduction

This article is about regulatory and quasi-regulatory mechanisms for resolving disputes relating to telecoms networks and services in the UK. These issues are important now for two reasons. First, they are of large and increasing importance to the economy as a whole. Secondly, the Communications Act 2003,<sup>1</sup> together with the creation of a new regulator, Ofcom, has generated important changes in how these disputes are handled.

Disputes about new media and communications services in general are an increasingly important area which has attracted considerable comment. Network disputes, however, are comparatively neglected when compared with, say, disputes about the treatment of intellectual property on the web. This is surprising because network disputes are extremely important. There are two reasons for this: first, they are often extremely large in quantum and, second, they will often dictate market structure.<sup>2</sup> For example, a debate about termination rates for calls to mobile networks<sup>3</sup> has rumbled across Europe and the world for the last ten years. An authoritative study<sup>4</sup> recently noted that in France, Germany and the UK, mobile termination rates in the five years between 1998 and

2002 resulted in charges of €19bn over cost-oriented rates designed to replicate the effect of a competitive market. This situation has effectively formed the battleground for a tripartite dispute between fixed network operators, mobile network operators and regulators in those three countries.<sup>5</sup> Needless to say, the quantum dwarfs the size of most commercial litigation. The same report concluded that “It is clear . . . that transfers on this scale will have significantly affected—and are still affecting—the shape of the telecoms sector in Europe.” In fact, one does not have to look to academic studies to understand how regulatory disputes shape the sector—it is a matter of everyday experience. For example, the ability for end-users to buy internet access from a variety of suppliers is a direct product of a series of regulatory disputes.<sup>6</sup>

This article deals, broadly, with two kinds of regulatory disputes in telecoms—disputes between network operators (“inter-operator disputes”) and disputes between end-users and their supplier (“end-user disputes”). Inter-operator disputes fall within the remit of regulators because the connection of networks (together with the passing of voice and data traffic between them) is rightly deemed a matter of broad public interest—these disputes will often address issues either of entrenched market power or of network bottlenecks which may prevent (for example) end-to-end connectivity of telephone calls. It is not sufficient to leave these disputes to the general law and the courts. It is less clear why end-user disputes—whose subject will often be the amount of a bill or a failure to respond properly to a fault report—should be subject to greater continuing regulatory control in telecoms than anywhere else in the economy. In practice, however, these disputes are treated with a fairly light regulatory hand, as will become apparent.

## Legislative Framework

### EC Directives

The UK legislative requirements for dispute resolution mechanisms in the communications sector are derived originally

1 The Communications Act 2003 created a new national regulatory framework for the UK but also implemented into UK Law the provisions of various EC Directives which are relevant to this article, all dated March 7, 2002: Directive 2002/21 on a common regulatory framework for electronic communications and services (Framework Directive), Directive 2002/20 on the authorisation of electronic communications networks and services (Authorisation Directive), Directive 2002/19 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) and Directive 2002/22 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive). Together, these are referred to as the 2002 Package. They are available on the European Commission's website at [http://europa.eu.int/information\\_society/topics/telecoms/regulatory/new\\_if/index\\_en.htm](http://europa.eu.int/information_society/topics/telecoms/regulatory/new_if/index_en.htm)

2 Market structure in telecoms is important because the sector is important in its own right—estimates for the sector's turnover in 2003 range between £34bn (Ofcom) and £50bn (Office of National Statistics)—and as an essential enabler for all other businesses.

3 Termination rates are the pence-per-minute charges which a must be paid for sending a telephone call to another network. This will typically be paid by the originating network (*i.e.* the network which the calling party is using) to the terminating network (*i.e.* the network to which the called party is connected). For the avoidance of doubt, the discussion here does not imply any position in the arguments about the proper level for those charges. The most complete recent examination of the issue was by the UK Competition Commission, available on their website at [www.competition-commission.org.uk/rep\\_pub/reports/2003/475mobilephones.htm](http://www.competition-commission.org.uk/rep_pub/reports/2003/475mobilephones.htm)

4 University of Warwick, CERNA, WIK Consult: “How mobile termination charges shape the dynamics of the telecom sector”, [www.cerna.ensmp.fr/Documents/OB-GLB-F2M-FinalReport.pdf](http://www.cerna.ensmp.fr/Documents/OB-GLB-F2M-FinalReport.pdf)

5 Needless to say, the dispute was handled differently in different countries. In the UK, the matter was the subject of two formal resolutions by the MMC and, later, the Competition Commission (first Report: “Cellnet and Vodafone: Reports on references under section 13 of the Telecommunications Act 1984 on the charges made by Cellnet and Vodafone for terminating calls from fixed-line networks, December 1998”; second report, above, n.2. Fixed operators participated actively in both inquiries.) In France, the French NRA, ART, imposed a series of price cuts from 1998, including one which resulted directly from a dispute raised by MFS, a fixed network operator. In Germany, the regulator has traditionally been reluctant to interfere in this area but has recently taken more active steps following a complaint by 01051 Telecom.

6 Perhaps the most important of these was the so-called FRIACO dispute which enabled alternative providers to provide dial-up internet services with unlimited fixed-price access using 0800 numbers. More recently, the DataStream series of disputes has

from two directives from the 2002 Package. For inter-operator disputes, the operative provisions are contained in Art.20 of the so-called Framework Directive (referenced also in recital 19 to the Access and Interconnection Directive). The provisions are surprisingly broad. They cover any dispute between undertakings providing communications services or networks in a Member State in connection with obligations under the Framework Directive or any other Directive in the 2002 package.<sup>7</sup> These obligations will often be SMP conditions, which are specific obligations imposed by national regulators on players with market power.<sup>8</sup> SMP conditions can only be imposed following a rigorous market analysis process.<sup>9</sup> But the dispute could also be about more general obligations, such as the general obligation under Art.4(1) of the Access Directive, which obliges all operators of communications networks to negotiate interconnection on request. Art.5(4) of the Access Directive provides a route for an even wider set of disputes—broadly, anything relating to access and interconnection in the field of communications networks—to fall within the Art.20 procedures.

The key features of the Art.20 procedure are as follows:

- National Regulatory Authorities (NRAs)—Ofcom, in the UK—should generally resolve inter-operator disputes within four months of the dispute being referred to them.
- NRAs should have the option to refer the dispute to alternative means (mediation is specifically mentioned) if they take the view that this would be a better way to resolve the dispute quickly and effectively.
- If the dispute is referred to be decided by alternative means, either party may refer the dispute back to the NRA after four months has elapsed.
- The NRA should then decide the dispute themselves within another four-month window.
- The NRA must have regard to the broad policy objectives set out at Art.8 of the Framework Directive. As the result of a convoluted negotiation procedure, these general objectives appear haphazard but are generally unarguable—for example, “ensuring that users, including disabled users, derive maximum benefit in terms of choice, price, and quality”.
- The Art.20 procedure should not preclude either party from taking court action. The attitude of the UK courts to this particular provision has not yet been tested.

enabled alternative network providers to compete in the wholesale access market for broadband services.

<sup>7</sup> This would include disputes arising under Art.4 of the Access and Interconnection Directive which provides that: “Operators of public communications networks shall have a right and, when requested by other undertakings so authorised, an obligation to negotiate interconnection with each other for the purpose of providing publicly available electronic communications services, in order to ensure provision and interoperability of services throughout the Community.”

<sup>8</sup> The substantive element of SMP Conditions is outside the scope of this article. Each set of conditions would merit a long article in its own right. For an example of SMP Conditions, see the Ofcom publication, “Review of the retail leased lines, symmetric broadband origination and wholesale trunk segments markets; Final Statement and Notification; Identification and analysis of markets, determination of market power and setting of SMP conditions”. The document is 650 pages long. The more intrepid reader can find it at [www.ofcom.org.uk/consultations/past/?a87101](http://www.ofcom.org.uk/consultations/past/?a87101)

<sup>9</sup> This process is specified at Arts 14–16 of the Framework Directive, but it is set out in much greater detail in the European Commissions Recommendation on Relevant Markets (2003/311) and its accompanying explanatory notes.

For end-user disputes, the relevant provisions are at Art.34 of the Universal Service and User Rights Directive.<sup>10</sup> This provides that:

- “Transparent, simple and inexpensive out-of-court procedures” must be available for resolving a broad range of consumer (*i.e.* non-business user) disputes.
- Member States may extend those schemes to include other classes of user.
- The procedures are without prejudice to “national court procedures”.

The importance of dispute resolution mechanisms for consumers is emphasised elsewhere in the 2002 package of directives. For example, Art.8(4) of the Framework Directive specifies that NRAs must act to:

“promote the interests of citizens of the European Union . . . by . . . ensuring a high level of protection for consumers in their dealings with suppliers, in particular by ensuring the availability of simple and inexpensive dispute resolution procedures carried out by a body that is independent of the parties involved”.

Article 21 of the Framework Directive sets out procedures for regulatory resolution of international disputes within the EU. These provisions are interesting academically but are very rarely invoked. This is because the manifestations of market power in these markets tend to be a function of historical monopolies (BT, France Telecom, Deutsche Telekom and so on) or absolute barriers to entry (allocations of mobile spectrum to a limited number of players) which, in each case, are national in nature. Regardless of the reason, international regulatory resolution is not considered in this article because of its limited practical relevance.<sup>11</sup>

The 2002 Package set a framework for resolution of inter-operator and end-user disputes which naturally applies in all EU Member States. Notably, they allow considerable latitude to Member States as to the extent to which alternative dispute resolution mechanisms are used.

## Communications Act

The scheme in the Directives is simple in concept but complex in construction: while the bones of the scheme are described at Art.20 of the Framework Directive, identifying the kind of disputes which can form the basis of a dispute is complex (in that the reader has to identify all the obligations in the 2002 Package). The process of implementing the provisions of Art.20 into UK law has reversed that. The procedural elements of the Communications Act are more complicated than would appear necessary from the Directives. This is to be expected because it is incumbent on Member States implementing Directives to put flesh on their bones. In the Communications Act formulation, however, there is little room for confusion about the types of disputes which can be decided under the procedure.

The law on inter-operator disputes is contained in ss.185–191 of the Communications Act. Section 185(1) provides that the procedure applies “in the case of a dispute relating to the provision of network access if it is . . . (a) a dispute between different communications providers.” Other types of dispute to which the procedure can apply are listed,

<sup>10</sup> Directive 2002/22.

<sup>11</sup> This is not to say that international regulatory issues are not important. In a number of areas—for spectrum harmonisation, the administration of numbering schemes, and so on—they are increasingly so. For more information, see [www.itu.int](http://www.itu.int).

but the scope of s.185(1)(a) is sufficiently wide to encompass most inter-operator disputes which fall within the ambit of this article.<sup>12</sup> Disputes which fall within s.185 may be referred to Ofcom by either party for resolution. Subsection (4) provides that Ofcom may specify how disputes are to be brought to it (which is discussed later). Sections 186–188 match the requirements of the Framework Directive in providing that Ofcom may refer disputes to ADR if they consider it appropriate to do so; that, if they decide to hear a dispute themselves, they must normally decide it within four months; that if ADR is not successful the dispute can be referred back to Ofcom; and so on. One interesting point is that, while the Act and the Directives are generally prescriptive on the question of timescales (the four-month time limit having been introduced precisely because of concern that some disputes have taken years to resolve), there is a loophole in the s.186 procedure: there is no time limit within which Ofcom must decide whether or not it is appropriate for them to hear a dispute themselves or whether it should be referred to ADR. This was the subject of surprisingly heated debate between the industry and the Department of Trade and Industry as the Act was being drafted.<sup>13</sup>

In acting to resolve a dispute, Ofcom has wide powers to take a variety of steps (s.190) including making a declaration setting out the rights and obligations of the parties, fixing the terms or conditions of transactions between the parties to the dispute, imposing an obligation, enforceable by the parties to the dispute, to enter into a transaction between themselves on the terms and conditions fixed by Ofcom, and ordering payments to reflect retrospective adjustments of charges. They also have power to make costs awards to parties to disputes and, in exceptional cases, to Ofcom itself (neither of which powers has yet been used).<sup>14</sup>

End-user disputes are dealt with at ss.52ff of the Communications Act. These sections provide that Ofcom may specify, through General Conditions (see below):

“procedures, standards and policies [for] . . . the handling of complaints made to public communications providers by any of their domestic and small business customers . . . [and] the resolution of disputes between such providers and any of their domestic and small business customers”.

Here again there was controversy when the Act was drafted. As noted above, the Universal Service Directive requires that out-of-court dispute resolution be available for domestic users but that Member States could extend those procedures to cover other users. The UK government chose to extend those rights to “small business customers”—defined, in this case, to include any business with 10 or fewer employees. This was criticised as being a gold-plating of the directive.

## Conditions of Entitlement and SMP conditions

Anyone who provides an electronic communications network or service does so pursuant to General Conditions of Entitlement issued pursuant to s.45(1) of the Communications

<sup>12</sup> Certain types of dispute are explicitly excluded from the s.185 procedure. They are listed at s.185(7) but are not directly relevant to this article.

<sup>13</sup> The author chaired the alternative networks' Communications Act Working Group, which negotiated the Act with DTI on behalf of the industry.

<sup>14</sup> Note also that Ofcom is given formidable information-gathering powers in connection with dispute resolution—see s.135ff of the Communications Act

Act.<sup>15</sup> These Conditions are an important element of the telecoms regulatory framework in a general sense and contain key operative provisions relating to end-user disputes.

Broadly, providers of networks and services must join a dispute resolution scheme for consumer and small-business users which has been approved by Ofcom (Condition 14.3) and must also have their own complaints-handling process (Condition 14.2).

It is also a requirement (Condition 9.2) that contracts between a provider of communications services and a consumer must specify “the method of initiating procedures for settlement of disputes in respect of the contract.” This maps precisely Art.20(2)(g) of the Universal Service and User Rights Directive. The condition does not refer specifically to procedures put in place under Conditions 14.2 and 14.3, but is generally taken to include both these procedures and any others which the provider of services may have. This is particularly relevant because, as will be seen below, industry-sponsored schemes for end-user dispute resolution generally require that a provider's own internal complaints procedures must be followed before recourse can be had to the scheme.

Ofcom has wide powers to enforce the General Conditions of Entitlement which include, ultimately, the power to find infringers up to 10 per cent of their turnover and to revoke their right to continue to provide services.

Both the General Conditions of Entitlement and any SMP Conditions may, of course, give rise to substantive duties which may form the subject matter of a dispute.

## Appeals

Appeals from regulatory decisions are outside the scope of this article but it is worth noting for completeness that Ofcom decisions in regulatory disputes can generally be appealed to the Competition Appeal Tribunal.

## Dispute Resolution in Practice

This section looks at the practical implementation of the legislative framework. In a relatively short period, a number of approaches to both inter-operator and end-user disputes have been born in the UK. These range from the conservative—simple resolution of a dispute by Ofcom—to the innovative (the establishment of competing ADR schemes for end-users and the appointment of an Adjudicator to hear some of the most high profile disputes involving BT's local network).

## Inter-operator Disputes—Ofcom's Approach

Ofcom's policy on handling inter-operator disputes is, at first glance, relatively conservative. The approach can be summarised as follows:

- Parties to a dispute must take reasonable steps to resolve it by negotiation before Ofcom will hear it; any party submitting a dispute must also submit evidence of failed negotiation.

<sup>15</sup> These Conditions were in fact issued by the Director General of Telecommunications (*i.e.* Ofcom) on July 22, 2003. The Communications Act 2003 (Commencement Order No. 1) Order 2003 (made under ss.411 and 408 of the Act) brought certain provisions of the Act into force on July 25, 2003 and enabled Ofcom to exercise some powers under the Act (including the powers under s.45).

- Parties referring disputes must accompany the reference with a statement by an officer of the company that “best endeavours”<sup>16</sup> have been used to resolve the dispute through commercial negotiation.
- Ofcom will not open a dispute until its scope is clearly fixed.
- Disputes between operators without market power will normally be referred by Ofcom to some form of ADR in the absence of identifiable consumer detriment.
- Disputes involving an operator with market power will normally be heard by Ofcom themselves.
- Where Ofcom hears a dispute, it will generally use its formal information-gathering powers.<sup>17</sup>

This is a sensible, unexciting policy, and in most cases it will be precisely the right approach. It is relatively similar to the approach taken by Ofcom’s predecessor, Oftel.<sup>18</sup> The indications so far are that it is an effective and robust process. It gives Ofcom considerable latitude to handle disputes in a way which matches their policy approach. There are two points, however, which really stand out. First, there must be a real question as to whether Ofcom’s policy-driven approach—that it will hear disputes only in circumstances which meet its criteria—are in fact compatible with the Communications Act, which generally *requires* them to hear and decide disputes. Ofcom’s latitude to refuse to hear disputes is confined to the limited circumstances set out in s.185(3).<sup>19</sup> There is a power for Ofcom to specify the “form” in which disputes must be submitted, but this is surely intended to be limited to, literally, a form to be filled in. Second, Ofcom has shown itself willing when necessary to depart from its stated policy approach in a way which is quite shatteringly innovative—as described in the next section.

### Inter-operator Disputes—the Telecoms Adjudicator

Local Loop Unbundling (LLU) is shorthand for a process by which alternative telecoms operators take over from BT the physical possession of the twisted pair of copper wires which runs from a BT local exchange to the end-user premises—the

wires over which traditional telephone services are provided. With this (at the request of the relevant customer), the alternative player can attach its own equipment to each end of the wires and provide its own services directly to the customer (normally broadband using DSL technology). BT—together with other former monopoly suppliers across Europe—is obliged by the terms of SMP conditions imposed on it by Ofcom to provide LLU.

The process, however, is complicated. Alternative players need to install their own equipment in BT exchanges; this generates building works and the need to establish access arrangements. Complicated processes need to be established to transfer the connection of copper wires from BT to the alternative operator (using something called a tie cable). Electronic ordering systems need to be set up. This is resource intensive—meaning that detailed forecasting mechanisms are essential. Followers of the telecoms industry will remember that when LLU was first introduced in the UK in the year 2000, it attracted massive interest. That interest evaporated, however, when the industry, led by Oftel, could not make the processes work at an acceptable cost.

Ofcom set out to fix LLU—because it is seen as a potential “magic bullet” solution to achieving fully competitive mass-market broadband provision—and have achieved some really astonishing successes.<sup>20</sup> But they recognised that the process issues were so complicated that something new was needed. As a regulator for the whole communications sector, Ofcom had already used an adjudication process to handle disputes relating to television advertising. The same idea was adapted to resolve the complex product and process issues surrounding LLU.

The Telecoms Adjudicator is, essentially, a simple concept (although extremely complex in execution). The parties to the process—BT and those alternative players with an interest in LLU—sign up to a contractual framework which gives the Adjudicator a dual role: facilitation (to enable the industry to reach agreement without dispute) and dispute resolution. The objectives of the adjudicator, in hearing disputes, which are set out in the Dispute Resolution Rules of the scheme (at r.6.4.1), are stated to be “to help ensure the rapid delivery of products and processes which:

- are, and remain, equivalent in terms of outcome to that which BT delivers to itself, so that the products and processes allow LLUOs to compete on a level playing field with BT in downstream markets based on LLU products;
- are, and remain, fit for purpose and appropriately industrialised; and
- support broad take-up of LLU (including shared and fully unbundled loops).<sup>21</sup>

Rulings of the Adjudicator are binding on the parties unless superseded by, for example, a court order. Ofcom has stated that any dispute referred directly to it which could fall under the Adjudicator’s LLU remit is likely to be referred to him.

The success of the adjudication scheme is only capable of being judged retrospectively by the success of the LLU process. Early signs, however, are that the process is capable

<sup>16</sup> It is not clear whether this is intended to equate with the approach a court might take in assessing the scope of a “best endeavours” obligation in a contract. Ofcom have formulated it elsewhere as describing a situation where “all avenues of commercial negotiation have failed”, but alternatively, in a situation where one party has engaged in a tactical failure to negotiate, the referring party need show only that it “has taken reasonable steps to engage the other party in commercial negotiations”. The cases which Ofcom has in fact heard imply that “best endeavours” as a lawyer would understand the term are not required.

<sup>17</sup> Ofcom’s “Guidelines for the handling of competition complaints, and complaints and disputes about breaches of conditions imposed under the EU Directives” can be found at [www.ofcom.org.uk/bulletins/comp\\_bull\\_index/eu\\_directives/guidelines.pdf](http://www.ofcom.org.uk/bulletins/comp_bull_index/eu_directives/guidelines.pdf)

<sup>18</sup> There are many examples of this procedure in practice. One of the most important was the dispute between Energis Communications Limited and British Telecommunications plc about the provision of wholesale alternative interface dedicated transmission capacity. In practice this dispute took considerably longer than the four months allowed, but this was related to delays in fixing the applicable SMP conditions. This type of delay has affected many disputes in the transition to the new regime mandated by the 2002 Package. See [www.ofcom.org.uk/consultations/past/dd\\_shot\\_haul\\_data/?a87101](http://www.ofcom.org.uk/consultations/past/dd_shot_haul_data/?a87101). Other examples can be found in Ofcom’s confusingly-named competition bulletin: [www.ofcom.org.uk/bulletins/comp\\_bull\\_index/?a87101](http://www.ofcom.org.uk/bulletins/comp_bull_index/?a87101)

<sup>19</sup> This is intended as an observation rather than a criticism; in fact, Ofcom’s robust approach to the legislative framework may enable it to carry out its broad functions more effectively.

<sup>20</sup> Notably in driving price reductions of up to 70 per cent in rental charges payable to BT for copper loops.

<sup>21</sup> All the scheme documentation was agreed between Ofcom and the industry and the agreement of these three principles generated particular controversy over whether equivalence between the alternative player and BT should be stated to be “in terms of outcome” or “in terms of input”.

of generating successes. As an approach, it represents a willingness on the part of Ofcom to innovate and to divert from their fairly conservative policy that disputes involving players with market power should not be referred to ADR. It is unlikely that such a resource-intensive process would be considered in anything but the most important cases. That said, the approach of Ofcom so far is instinctively attractive and looks likely to produce good results.

### Inter-operator Disputes—Industry-sponsored Schemes

As mentioned above, Ofcom policy is that it will generally not hear disputes between two players without market power. What then is to become of regulatory disputes in such cases? The first and obvious point to make is that there will be many fewer regulatory disputes in areas where no player has market power. Disputes between players without market power are much more likely to follow the ordinary course of commercial disputes—negotiation, ADR and, if necessary, court proceedings. Recognising that there may be a need for a means to resolve disputes with a regulatory angle, however, the alternative and mobile sectors have taken steps to establish an ADR scheme to handle them. In each case, the UK Chartered Institute of Arbitrators and, although it has handled some disputes, it is reasonably clear that it will have less of an enduring effect on the shape of the market than Ofcom's work. This is not a criticism; on the contrary. An ADR scheme which enables players without market power to have disputes handled quickly and effectively is to be welcomed.<sup>22</sup>

### End-user Disputes—OTELO and CISAS

The UK industry has established two major disputes-handling bodies for end users.

The Office of the Telecoms Ombudsman (or "OTELO" as it is branded)<sup>23</sup> was established by a working group run by the industry but sponsored, originally, by Oftel. It hears disputes from most of the fixed telecoms industry and from two of the four major mobile operators. The scheme is headed by the Ombudsman, Elizabeth France, who is well known from her former role as Information Commissioner. Its complaints-handling process has been active from January 1, 2003. Complaints are handled according to a clearly defined process with tight deadlines. OTELO has power to make a maximum award to complainants of £5,000 including VAT. The organisation is a company limited by guarantee and participating organisations become shareholders. Member companies must have the opportunity to resolve disputes prior to reference but have no appeal rights. Complainants, on the other hand, can still take their grievances to court if they are unhappy with the outcome of the OTELO process. Member companies have no veto over ombudsman decisions but they fund the scheme and, as a last resort, can leave for a different scheme. Thus far, OTELO has heard approximately 300 complaints per month.

The other major scheme is the Communications and Internet Services Adjudication Scheme (or "CISAS"), which is run by the Chartered Institute of Arbitrators. Members of this scheme include major ISPs such as Wanadoo and two of the four major mobile operators. It is also supported by ISPA, the

leading industry association representing ISPs. CISAS began operations in December 2003 and, during the first six-month period, 821 enquiries were made to CISAS with regards to disputes with member companies. Of those enquiries, 127 led to the customer making an application for adjudication.

Both CISAS and OTELO operate a gating system whereby complainants must exhaust their suppliers' internal dispute mechanisms before resorting to the dispute resolution scheme.

### International

How does the UK approach to dispute resolution compare internationally? This section describes briefly some equivalent dispute resolution mechanisms from around the world.

All EU Member States are, of course, governed by the framework in the 2002 Package of Directives. Thus, in most Member States, adjudication by the National Regulatory Authority will be the likely first port of call. Approaches here vary widely from state to state. Proceedings with RegTP, the German regulator, are highly formalised: they involve formal oral hearings and have been described as being closer to court proceedings.<sup>24</sup> Other national regulators, both within and outside the EU, have taken a less formal, more inventive approach. In Denmark, for example, the Telecommunications Complaints Board is a specialist panel, with multi-skilled members, empowered to hear inter-operator disputes, while the Telecommunications Consumer Board is a specialist body established by statute to hear end-user complaints (the majority of its workload coming from complaints about bills).

For the really imaginative approaches to these issues, one has to look further afield. In Romania, a special procedure has been established for the reference of inter-operator disputes to mediation. When any dispute is referred to the regulator, the parties are offered the chance to attempt to resolve the dispute through a mediation scheme which is sponsored—but not administered—by the regulatory authority. If both parties accept the mediation route, there is a 30-day window in which a mediation must take place. If, at the end of that time, the mediation process is not successful, the dispute is heard by the regulator. If this process is to be effective—it is relatively new—then the really difficult disputes will jump the mediation stage and go straight to the regulator. Easier disputes—where there is a genuine prospect of agreement between the parties—should naturally be decided in the mediation process. This should produce better results and reduce pressure on the regulator.

In Nigeria, disputes are heard in the Consumer Court, which is televised. This raises the prospect of an enthralled television audience watching hearings about Long Run Incremental Cost methodologies for interconnection charging, and other similarly exciting issues.

In India, the Telecom Dispute Settlement and Appellate Tribunal (TDSAT) was established in the year 2000 by an amendment to the Telecom Regulatory Authority of India Act, 1997. TDSAT now carries out all the dispute-resolution functions which were formerly carried out by the regulator. The idea here was that a really specialist disputes tribunal could bring extra focus and expertise to its functions. TDSAT

<sup>22</sup> For more information see [www.itu.int/ITU-D/treg/Events/Seminars/2004/Geneva/Documents/Hunt\\_thurs.pdf](http://www.itu.int/ITU-D/treg/Events/Seminars/2004/Geneva/Documents/Hunt_thurs.pdf)

<sup>23</sup> See [www.otelo.org.uk](http://www.otelo.org.uk)

<sup>24</sup> It is perhaps no coincidence that in Germany there is an extraordinarily high rate of appeals from regulatory decisions.

has judicial, administrative and technical expertise. Thus, while it has all the jurisdiction of a court, it has a wider range of skills. The TDSAT model is unique and is widely held to be a successful one.

### **Conclusions**

UK telecoms regulation is often held up as a world leader. In the field of regulatory dispute resolution, there have been huge advances over recent years. Robust procedures now exist to resolve end-user disputes. It also seems that Ofcom has settled on an approach to inter-operator disputes which

will deliver results. Ofcom appears prepared to take exceptional steps to deal with exceptional issues, but will rely on a standard and fairly conservative policy for more ordinary disputes. For the future, there may be a greater role for ADR and, perhaps, specialist tribunals. The UK is unlikely to follow the Indian model, for the moment at least, because inter-operator disputes have the potential to set the course of telecoms policy—not something which Ofcom would give up lightly. An approach more closely akin to the excellent Romanian model—with a formal but optional mediation stage built it—would be a more likely and potentially beneficial development.