Effective dispute resolution

A pressing priority for policy-makers and regulators

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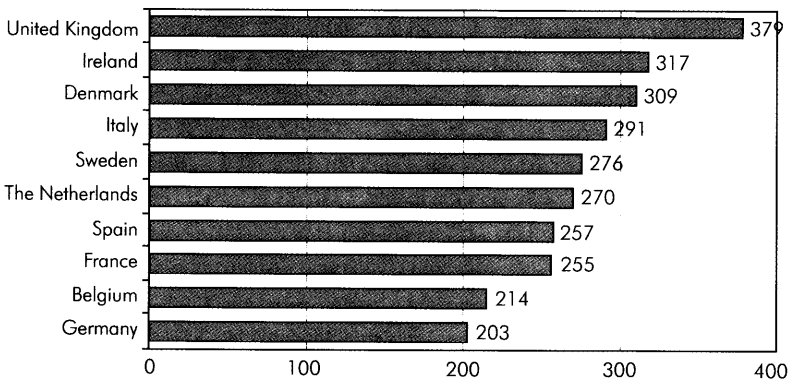
Dispute resolution is rising to a high place on the agenda of policy-makers and regulators in the telecommunication sector. Markets undergoing liberalization, increased numbers of operators and service providers and complex inter-relations, changing technologies and adjusting regulatory paradigms are all contributing to an increasing number of disputes.

Common disputes which regulatory intervention is often called upon to resolve range from interconnection, abuse of dominant position, frequency allocation, pricing and numbering, service quality, licence fees and interpretation of licence terms to consumer complaints. Some of these disputes may signal a healthy level of competition, with dispute processes merely used as another strategic tool in the competitive game. Yet disputes also often centre on key areas of regulatory policy where liberalization has not yet had its full effect. Where the regulatory framework is inadequate, as is the case for example with local loop unbundling (LLU) in many countries, disputes may mask a deeper problem that remains unresolved.

Dealing with disputes efficiently, transparently and consistently strengthens investor confidence in the impartiality of regulators and judges who may be called on to adjudicate them. In this regard, what is frequently said about good regulatory practice is just as true for dispute resolution practice. Investors and operators increasingly rank regulatory regimes and markets according to a number of factors. Thus, as demonstrated by the results of a recent survey conducted on behalf of the European Competitive Telecommunications Association (ECTA) summarized in Figures 1 and 2, investment depends upon having an effective regulatory regime.

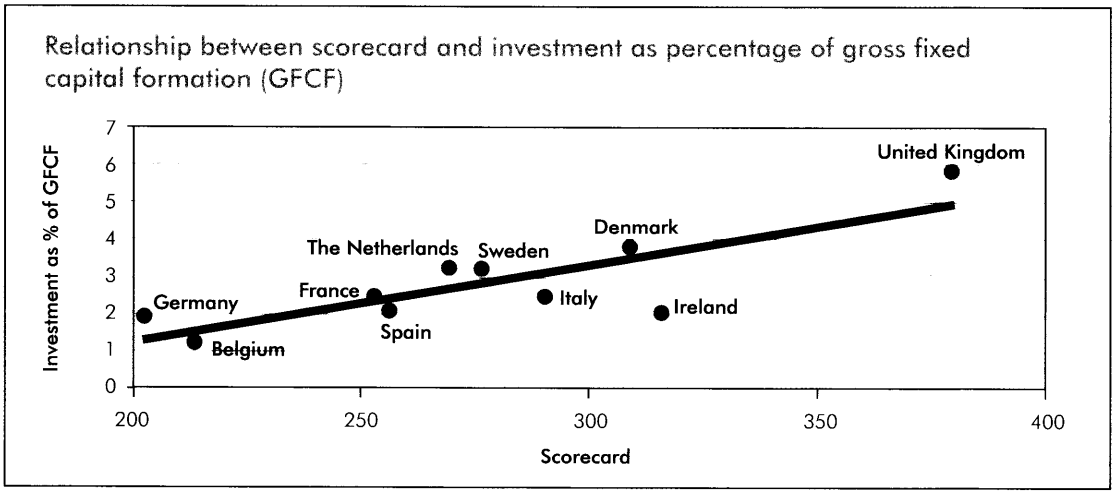
Figure 1 — Comparative effectiveness of regulatory regimes

Regulatory scorecard results



Source: Regulatory Scorecard, ECTA. Extracted from the presentation of G. Moir, Vice President of BT Global Services at the ITU/BDT European Workshop on Dispute Resolution, 31 August to 2 September 2004.

Figure 2 — The importance of an effective regulatory regime to investment



Source: *Regulatory Scorecard, ECTA. Extracted from a presentation by G. Moir, Vice President of BT Global Services, to the ITU/BDT European Workshop on Dispute Resolution, 31 August to 2 September 2004.*

Figure 1 shows the effectiveness of the various national regulatory authorities, or NRAs. The survey measured the powers and performance of NRAs in Europe and the regulatory regimes overall. The ECTA scorecard looked at 66 criteria and divided them into five main sections: general powers of the NRA, effectiveness of the dispute settlement body, application of access regulations, availability of key access products, and implementation of the new regulatory framework (NRF) introduced in July 2003. Figure 2 maps the effectiveness of the regulatory regime against investment in the sector. This is measured as gross fixed capital formation investment in telecommunication infrastructure compared to other capital asset investment in the economy. The study concluded that there was a remarkable correlation between regulatory effectiveness and investment.

The importance of dispute resolution to effective regulatory policy makes it a strategic priority for policy-makers and regulators. The broad implications for market structure and the relevance of financial, technical and operational issues mean that in many cases disputes require the involvement of market specialists, economists and those with a deep grasp of the underlying policy aims — in addition to lawyers. Dispute resolution in the telecommunications sector is not merely a matter of serving justice and resolving disputes but of implementing policy on how the structure of the market shall develop.

Dispute resolution as a diagnostic tool

Dispute resolution offers insights into current problems with the state and structure of the market — its competitiveness and impediments to competition and investment. For example, disputes over price squeezes may reveal an underlying lack of price rebalancing which renders the market economically unviable for new competitors. In recent years, this has been illustrated in some European countries in connection with LLU. Such disputes may illustrate the need for targeted policy to develop the market in the desired direction.

Dispute resolution can also offer insights into inadequacies in the regulatory regime too. Most countries have disputes of one sort or another which show regulatory fault lines and offer regulators an opportunity to tailor, improve or even overhaul the regulatory regime. To take a common example, interconnection disputes in many countries have over time suggested the need for interconnection rules and guidelines to govern negotiation and ongoing management of the interconnection relationship. Many regulatory authorities now issue such guidelines for technical, operational and financial

aspects of interconnection. Where such guidelines are well policed they are a helpful contribution to improving competition in the market and reducing disputes that would otherwise have arisen. Investors are likely to invest more — and more confidently — where regulatory authorities have learned from disputes and begun to anticipate them in this way.

Dispute resolution structures and resources

Given the importance of dispute resolution to the sector, how are disputes being handled and how could they be handled better? A range of dispute resolution mechanisms and techniques include court processes and regulatory adjudication, arbitration and expert determination, as well as mediation and consultation. Some of these mechanisms may be more "adjudicative" where a third party takes an enforceable decision for the parties (such as court cases, regulatory adjudication and arbitration) or more "voluntary" where the parties take more responsibility for it themselves (such as mediation and, to the extent the parties choose the arbitrator, arbitration). Other dispute resolution mechanisms may be more "official" where government departments or regulatory authorities play a significant role (e.g., as judge, adjudicator or mediator), and more "unofficial" where government departments and regulatory authorities are less involved (e.g., in arbitration or private mediation).

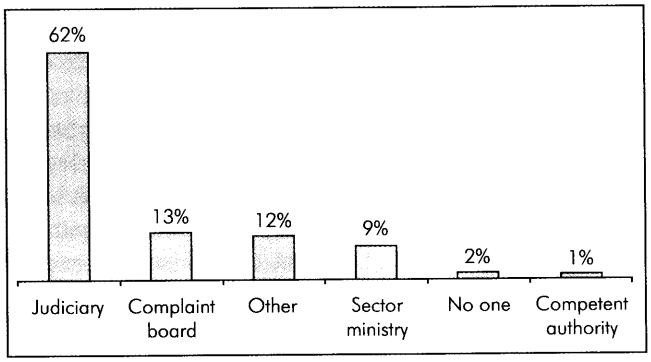
The key concern for policy-makers and regulators is to work out where and how they can best intervene in the range from "adjudicative" to "voluntary", and where their interventions fit best along the continuum from "official" to "unofficial". This means keeping a creative and open mind about the role of the official sector.

Potential new investors in telecommunication operators and service providers will almost without exception confirm that effective enforcement by the official sector through regulatory adjudication is an essential condition for confident investment. Yet, there are ways for a range of less official and more voluntary mechanisms to play a supportive and sometimes alternative role in telecommunication dispute resolution.

Some regulators, for example, Ofcom in the United Kingdom, emphasize regulatory adjudication as important for disputes between a party with significant market power and one without. Yet, even where there is a disparity of power between parties, the necessity of effective regulatory adjudication does not preclude use of mediation processes to more clearly define issues under dispute and explore potential areas of common ground. Indeed, mediation may be mistakenly claimed by some to be an alternative solution to disputes when actually it is really just a group of techniques designed to assist disputing parties in re-examining their own needs and improving communications with each other to capitalize where interests may converge. Even further along the "voluntary" axis are consultation processes, which may be used by regulators to understand problems in the market before disputes arise: dispute prevention is as important as dispute resolution.

Must the official sector be involved in all aspects of dispute resolution? For many countries, this question can be daunting, since dispute resolution consumes extensive resources — economic analysis, market knowledge, legal procedures, operational understanding and technical expertise. Added to this is the importance of ensuring that decisions are the right ones and are reached through fair processes taking into account appropriate information. The courts often become involved in appeals and judicial review, as shown in Figure 3. Many countries find that dispute resolution becomes

Figure 3 — To whom can parties appeal against a regulator's decision?



Source: ITU World Telecommunication Regulatory Database, 2003–2004.

Table 1— Involvement of the official and non-official sectors

Each dispute resolution technique has a different level of involvement of the official sector

	Regulatory adjudication	Arbitration	Non-binding determination	Mediation/ conciliation
Controlling the process	Official	Parties and arbitrator	Parties and expert	Parties and mediator
Choice of 3rd party	Official	Parties	Parties	Parties of official
Identify of 3rd party	Official	Non-official	Non-official	Non-official or official
Deciding result	Official	Arbitrator	Expert	Parties
Review of process/result	Official	Official	Unusual	Probably none
Enforcement	Official	Official	Parties	Parties

Source: *Rory Macmillan, Lawyer and Mediator. Extracted from Mr Macmillan's presentation at the ITU/BDT European Workshop on Dispute Resolution, 31 August to 2 September 2004.*

a lengthy process. This in itself can undermine the development of the market. The sector is changing so rapidly with new technologies and business models that delays in resolving disputes will put a drag on the sector. This is not only true for less developed countries. Indeed, many European countries are experiencing extensive delays — that are harmful to the market — both at the initial adjudication level as well as at the review and appeal levels in the courts.

For these reasons, regulatory authorities across the world are looking increasingly to alternative approaches to resolving disputes. As yet, their initiatives are at an early stage. They include use of ombudsmen schemes (e.g., in the United Kingdom); further use of mediation (e.g., Ireland); introduction of arbitration arrangements (e.g., Jordan, Hungary and Australia); streamlining appeal procedures (e.g., Spain, Germany and The Netherlands); and broad sector consultations concerning underlying problems (e.g., in Denmark).

Many of these have the advantage of drawing on resources beyond the official sector — from veterans of the telecommunication industry and others from the dispute resolution community of mediators and arbitrators. Even individual companies and private sector groups such as the UK Competitive Telecom Association are establishing schemes to deal with disputes using the resources and long experience of institutions such as the Chartered Institute of Arbitrators.

Innovative approaches include hybrids of official/unofficial and adjudicatory/voluntary schemes, such as the new local loop unbundling adjudication scheme introduced in the United Kingdom. The scheme is voluntary in that it is based on contractual agreements between incumbent British Telecom and operators seeking access to BT's local loop, but it has some official endorsement from the role Ofcom played in establishing it and its ongoing role in appointing the adjudicator. The adjudicator is supposed to be independent and so partly unofficial. He or she may adjudicate or mediate disputes, thus allowing a selection of techniques. The scheme is new and it remains to be seen how it will work, including how the independent adjudicator's decisions will relate to Ofcom policy.

Thus numerous initiatives are afoot to develop and improve dispute resolution in the telecommunication sector. How these unfold in practice will determine the effectiveness of regulatory policy, scale of investment flows and success of competition in years to come. ■

Contributed by Rory Macmillan, co-author of the ITU/World Bank publication "Dispute Resolution in the Telecommunications Sector: Current Practices and Future Directions" (available at http://www.itu.int/ITU-D/treg). Mr Macmillan is a lawyer, adjudicator and mediator in the telecommunication sector (rory@rorymacmillan.com). Some of the disputes mentioned in this article are discussed in more detail in the ITU/World Bank publication.