

Dispute resolution in telecoms
Regulatory disputes
ITU, Geneva

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31 August 2004

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1. THE NATURE OF REGULATORY DISPUTES

- ◆ CMA conference, 2004 - Lord Currie, Ofcom Chair, says:
 - *“We will encourage the industry to police itself, and find and support alternative dispute mechanisms”*
- ◆ Purpose of this presentation is to examine regulatory dispute resolution and its interface with other forms of ADR
- ◆ What is a regulatory dispute?
 - Disputes between (SMP or non-SMP) carriers about:
 - Principles of access/product availability
 - Terms of access
 - Financial conditions
 - Often some overlap between disputes and policy decisions; different approach in different countries and case by case
 - Consumer/end-user disputes/complaints

1. THE NATURE OF REGULATORY DISPUTES

- ◆ Why are regulatory disputes important?
 - They are often large in value
 - In France, Germany and UK, mobile termination rates, 1998-2002, resulted in charges of €19bn above cost-oriented rates
 - extrapolated for the whole EU = c€40bn over the 5 year period
 - The outcome of regulatory disputes can often dictate market structure
 - “It is clear... that transfers on this scale will have significantly affected – and are still affecting – the shape of the telecoms sector in Europe.”
 - Source: “How mobile termination charges shape the dynamics of the telecom sector”, University of Warwick, CERNA, WIK Consult
 - <http://www.cerna.ensmp.fr/Documents/OB-GLB-F2M-FinalReport.pdf>
- ◆ Not intended to imply a position in the debate about mobile termination

2. CASE STUDIES

- ◆ Local Loop Unbundling I
 - Oftel implemented LLU in 2000. It was a disaster.
 - Why? At least partly because the dispute resolution processes were not fit for purpose
 - Allocation of space in BT local exchanges
 - So-called “bow-wave” process:
 - Demand for collocation space out-stripped BT’s ability to supply
 - Bow-wave = a “fair” system for allocating space between LLU operators but not BT
 - So complicated it was administered by the UK Electoral Reform Society
 - Result: no LLUO could build to the exchanges they wanted – destroyed business cases
 - Other major problems in relation to charges, contracts, discrimination, migration – especially with delay
- ◆ Local Loop Unbundling II
 - Telecoms adjudicator looks much better equipped to deal with LLU

2. CASE STUDIES (continued)

- ◆ UK Leased Lines/ATM interconnect for DSL
 - Both examples of disputes driving policy decisions
 - Both originally raised as disputes for access
 - Now enshrined in policy decisions through SMP conditions
- ◆ Mobile termination rates
 - UK – driven by the regulator
 - Elsewhere – subject of regulatory disputes
 - e.g. Germany, recent dispute raised by 01051 telecom against Vodafone
- ◆ Consumer and non-SMP disputes
 - What is the role of the regulator?
 - Difficult for a consumer – an amateur – to bring complaints to a regulator against a carrier
 - No pure policy considerations
 - Would another approach be better?

2. CASE STUDIES (continued)

- ◆ UK Communications Act: s55 requires dispute resolution scheme for consumers and small businesses with fewer than 10 employees
- ◆ “Otelo”: UK Telecommunications Ombudsman
 - Ombudsman: Elizabeth France, former information commissioner
 - Rosaleen Hubbard, founding partner of Tower House Consulting, sits on the Council of the telecoms ombudsman
 - Complaints process active from 1 January 2003
 - Clearly-defined process with tight deadlines
 - Maximum award of £5000 including VAT
 - Member companies must have the opportunity to resolve disputes prior to reference but have no appeal rights; complainants can still go to Court
 - Approximately 300 complaints per month
 - Includes most major fixed telcos + mobiles representing 60% of customers
 - Member companies have no veto over ombudsman decisions... but
 - They fund the scheme and can leave for a different scheme
 - See www.otelo.org.uk; also www.cisas.org.uk
- ◆ UK altnets are building an ADR scheme for non-SMP disputes through the CIA (see www.arbitrators.org)

3. POINTS FOR ALTERNATIVE PLAYERS

- ◆ Be clear about regulatory targets; match them to business strategy
 - Examples:
 - New structure for voice interconnect tariffs (e.g. capacity -based)
 - Availability of wholesale LES/Ethernet lease lines
 - Cost-matching or service-based charges
 - Quantify to prioritise – can produce some surprising results
- ◆ Outline a clear strategy for achieving your goals
 - Decide on timescales and decision points
 - Consider all possible routes:
 - Is a regulatory dispute the best way forward?
 - Would a complaint or a policy -driven investigation be better?
 - Consider Court or other forms of dispute resolution
- ◆ Identify clearly what areas are in dispute
 - Stops the debate getting bogged-down in irrelevant areas
 - Consider pre-dispute or deal-driven mediation
- ◆ When negotiating with dominant players, keep full records
 - Time-consuming, but will save time if you have to go to the regulator

4. POINTS FOR GOVERNMENTS/REGULATORS

- ◆ Get the legislative framework right
 - A clear, wide set of powers:
 - Dispute resolution – whether invited or not (plus “own initiative” measures)
 - Fines
 - Clear, sweeping powers to take interim measures
 - The right to refuse to hear disputes
 - A clear, simple set of duties:
 - Not like the UK Communications Act!
 - A quick, decisive appeals mechanism to a genuinely expert body
 - No turf wars with (e.g.) national competition authority
- ◆ Get the policy issues sorted
 - What issues do you want to decide as policy?
 - What are you prepared to leave to disputes?
- ◆ Get the right people and structure
- ◆ Issue guidance to telcos – saves valuable regulatory time
 - What disputes can they bring to the regulator?
 - How? What information do they need to provide?
 - When must they use ADR?
 - See http://www.ofcom.org.uk/bulletins/comp_bull_index/eu_directives/?a=87101

5. POINTS FOR REGULATED PLAYERS

- ◆ Be strategic:
 - What are you prepared to give up?
 - Where do the boundaries lie – what are your obligations?
- ◆ Engage with your competitors
 - Understand their needs to help you serve them... or resist them
 - Ensure a link between their commercial strategy and your regulatory strategy
- ◆ Negotiate, negotiate, negotiate
 - For as long as you can
- ◆ Be influential at every stage
 - Negotiate the legislative framework as hard as you negotiate the commercial disputes
- ◆ Ensure a comprehensive (and highly visible) compliance programme is in place
- ◆ Be clear about what you can safely negotiate away
 - Consider pre-dispute mediation

6. CONCLUSIONS AND THE ROLE OF ADR

- ◆ Effective resolution of regulatory disputes is essential in telecoms:
 - Massive quantum of issues - €Bns
 - Policy significance – effects structure of market
- ◆ Regulatory determination dominates resolution of regulatory disputes
 - Expert – but is this always necessary?
 - Quick (?) and cheap
 - Sometimes essential for policy reasons
 - No incentive for SMP players to compromise
- ◆ There is room for wider use of other forms of ADR
 - In establishing the issues which are actually in dispute
 - In resolving disputes between non-dominant players
 - Consumer disputes
 - Eventually, in SMP disputes as well?
- ◆ More questions? paul@towerhouseconsulting.com