

Regulatory Adjudication (RA) and Alternative Dispute Resolution (ADR)

The Ofcom experience

Richard Thompson, Manager – Competition Policy

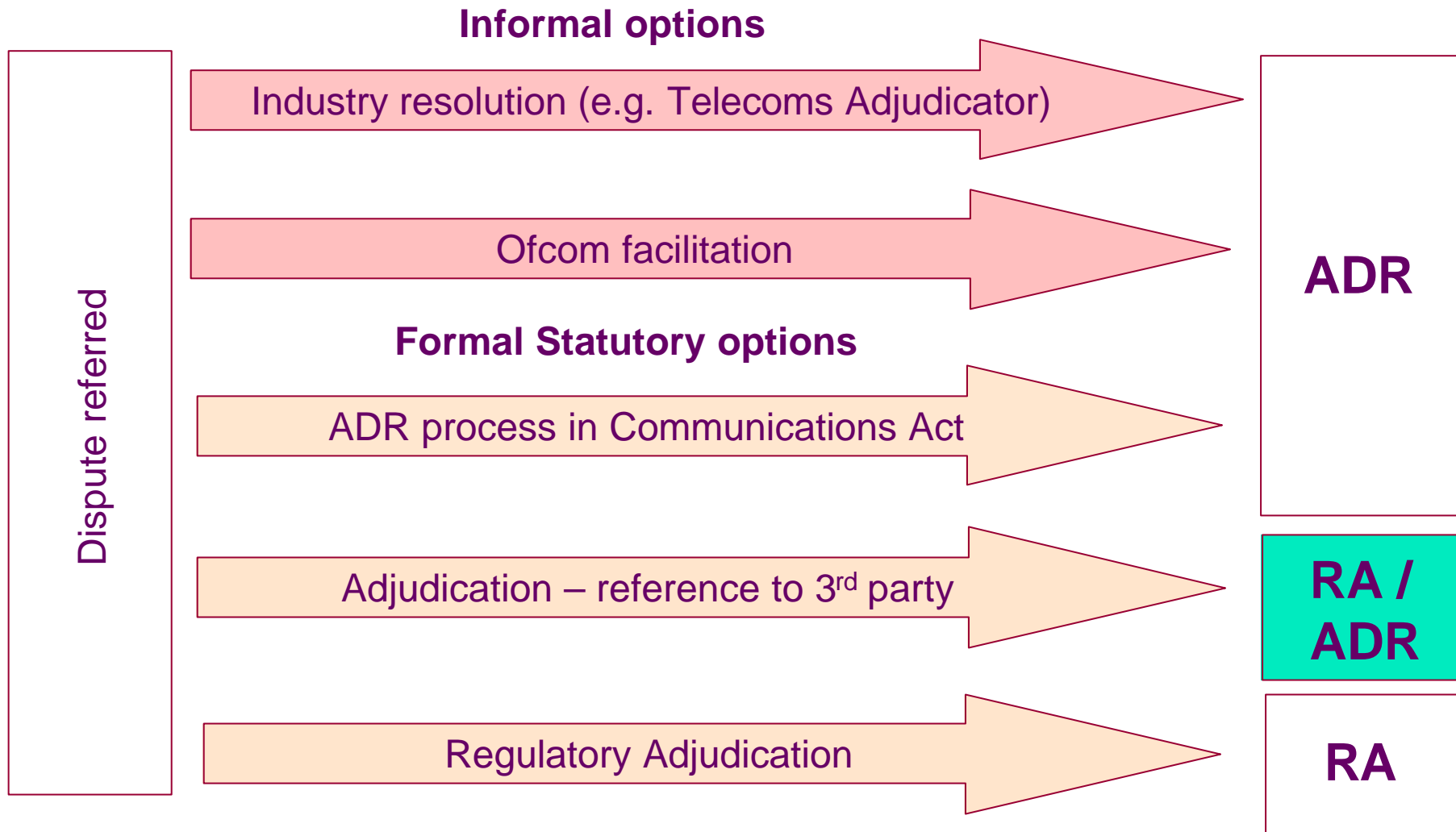
ITU European Regional Workshop on Dispute Resolution

Geneva, 31 August - 2 September 2004

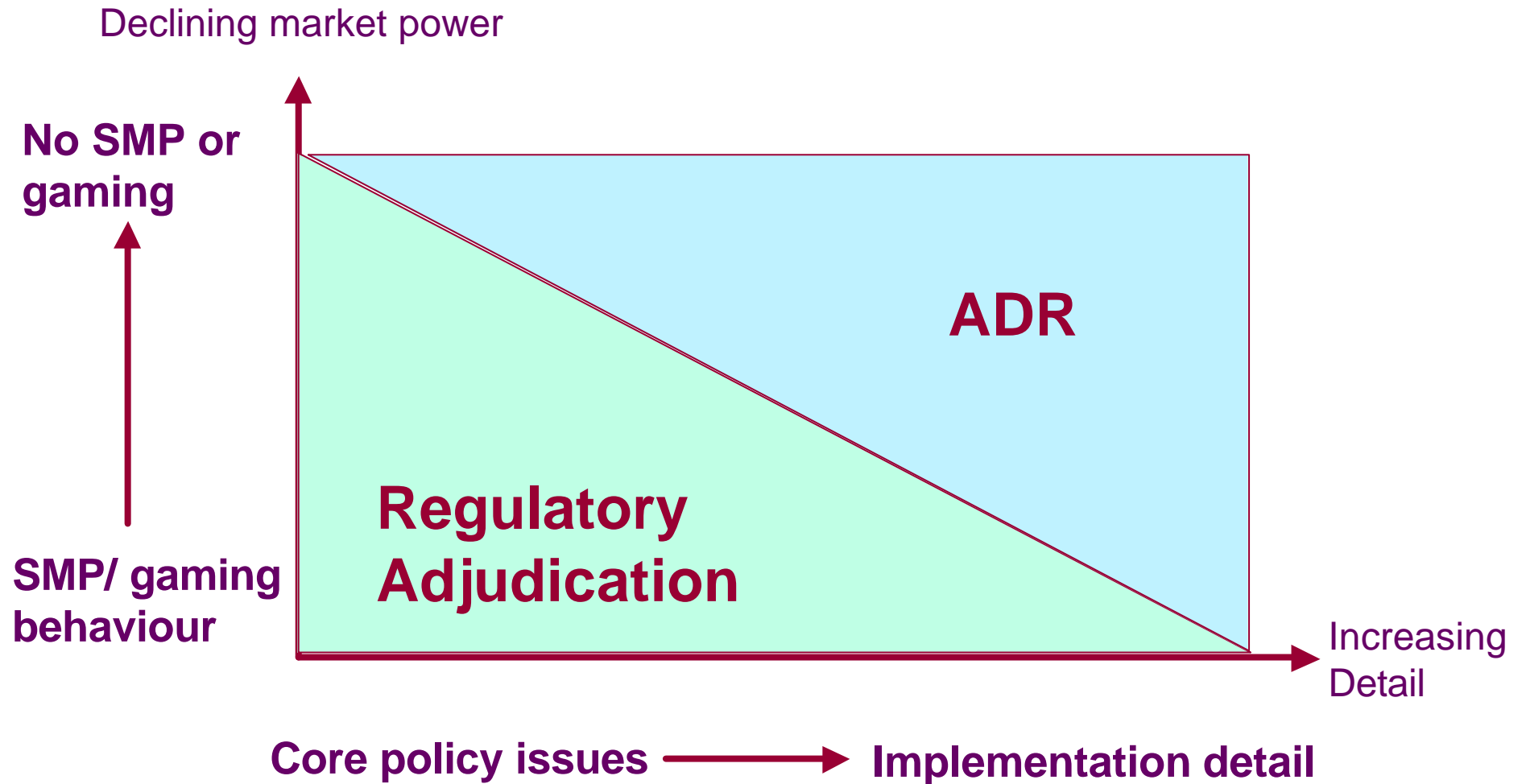
Ofcom's regulatory principles...

- *Ofcom* will operate with a **bias against intervention**, but with a willingness to intervene firmly, promptly and effectively where required.
- *Ofcom* will always seek the **least intrusive regulatory mechanisms** to achieve its policy objectives

Ofcom options...



Determining the scope for ADR



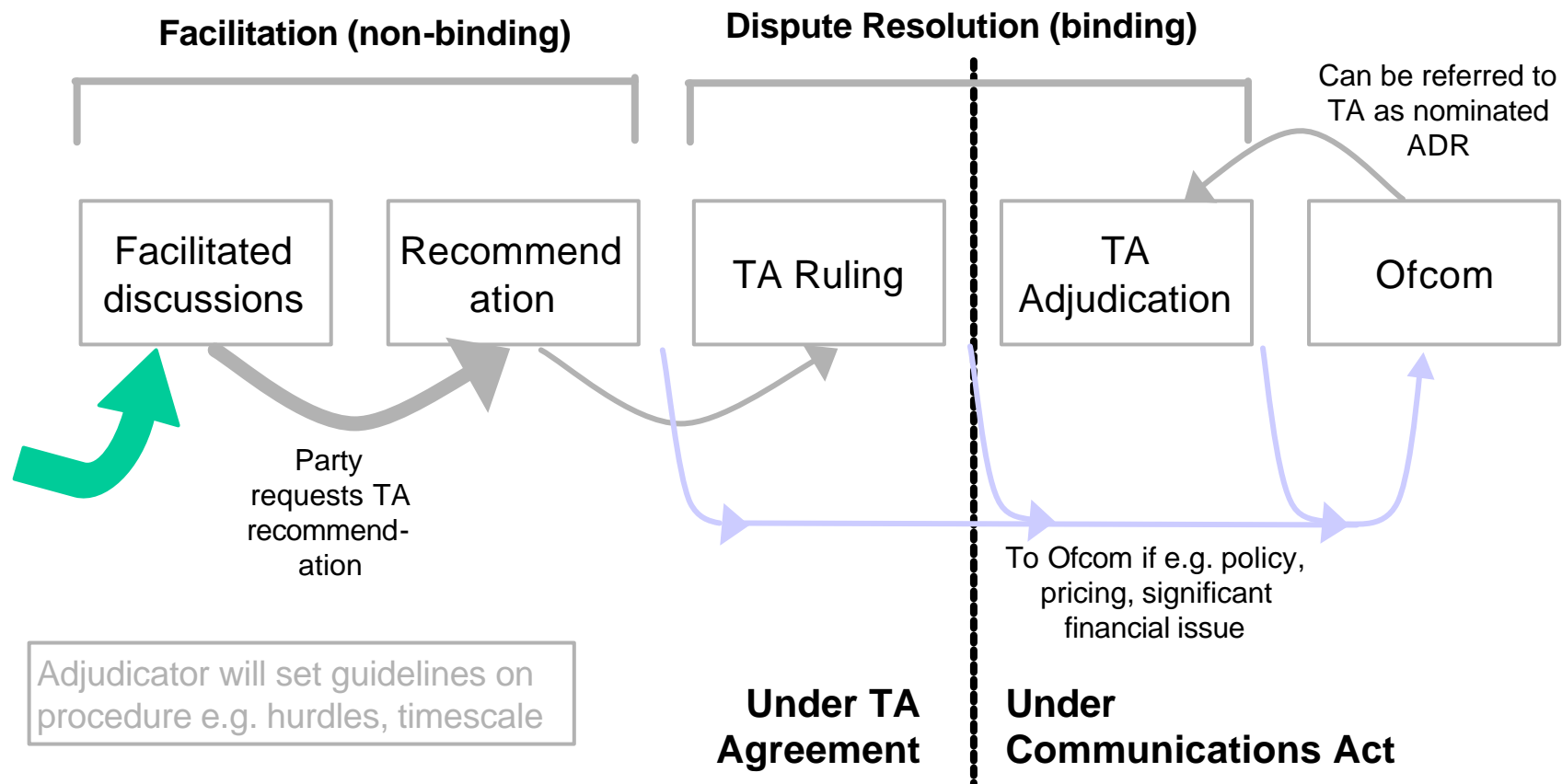
Regulatory Adjudication vs ADR

Regulatory Adjudication	Alternative Dispute Resolution
Advantages	Advantages
<ul style="list-style-type: none"> • legal certainty • access to information • uphold Community obligations 	<ul style="list-style-type: none"> • speed - weeks rather than months • lower cost - Telecoms Adjudicator ~£500K per annum • commercially focussed
Disadvantages	Disadvantages
<ul style="list-style-type: none"> • cost ~£50K plus costs of parties ~£150K per dispute in total? • timescales - up to 4 months • Community obligations may cut across commercial objectives? 	<ul style="list-style-type: none"> • imbalance of information • scope for gaming behaviour • scope for inconsistencies

Industry resolution – ...the Telecoms Adjudicator (TA)

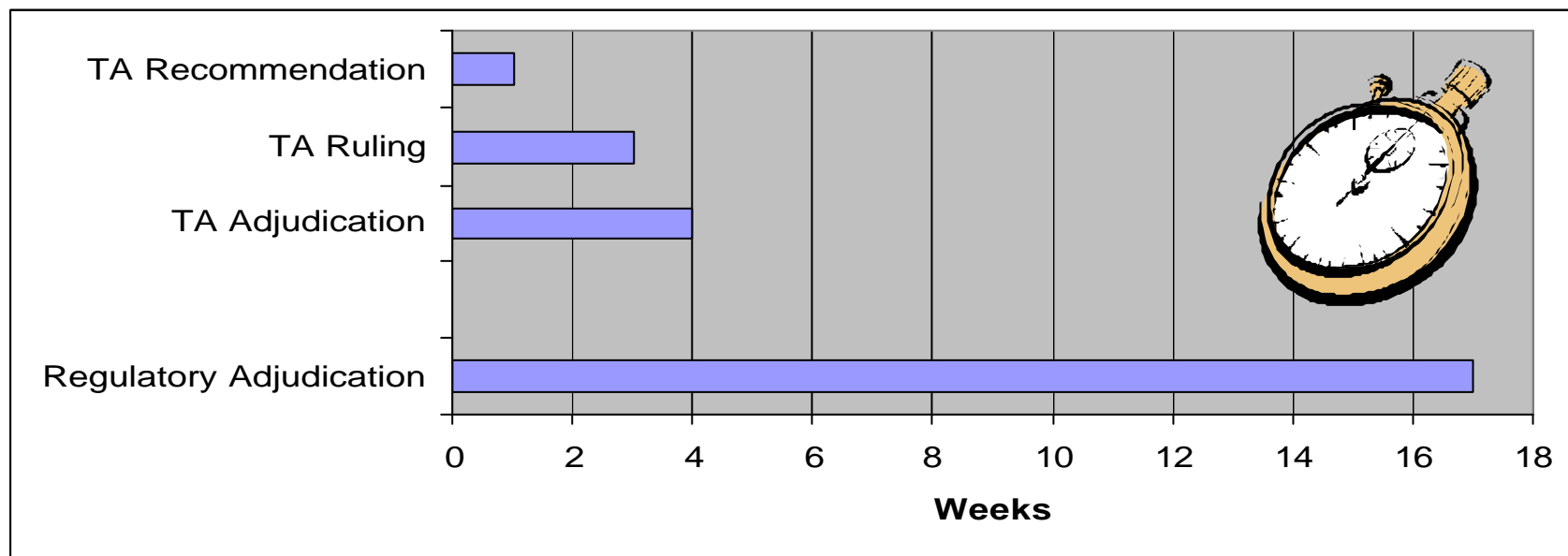
- Limited to **Local Loop Unbundling (LLU)** – at present
- **Voluntary agreement** between communications providers (not Ofcom)
- Effected through Access Network Facilities Agreement (ANF) contract between BT and other providers (as ‘side letter’)
- Agreement will effectively give **primacy to Telecoms Adjudicator scheme** over existing ANF arrangements for relevant matters e.g.
 - Dispute resolution procedures
 - Product development process
 - Only between and for parties to TA Agreement
- Ofcom able to amend scheme

Telecoms Adjudicator - How will it work ?



Telecoms Adjudicator - Timings

- No specific timing set in agreements - Adjudicator to apply own judgement
- TA scheme will result in more **rapid resolution**. - e.g. for a dispute to Ofcom under Communications Act:
 - Need to ‘exhaust opportunity for commercial negotiations’
 - Need to prepare detailed case
 - Up to 4 months for a determination



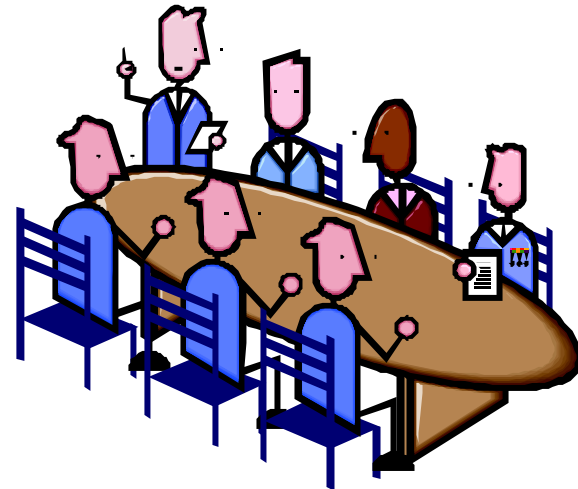
Telecoms Adjudicator - Sanctions

- Binding decisions under TA agreement **enforceable in courts**
 - Any party can request a court to enforce terms under contract law
 - Court can impose sanctions
 - Not applicable to (non-binding) facilitation rules



Ofcom facilitation

- Informal resolution of disputes through Ofcom brokered negotiation
- Can navigate through entrenched positions and alleviate gaming behaviour
- At minimum, can reduce number and/ or complexity of issues in dispute
- Positive commitment from stakeholders



ADR process in Communications Act

- Ofcom can decline to resolve a dispute if there are alternative means for resolving it
- No formal or Ofcom ‘sponsored’ ADR scheme – case by case basis
- In practice, Ofcom can’t force parties to resolve issue by ADR – if no agreement within 4 months the dispute will come back to Ofcom
- Ofcom published guidelines suggest grounds on which disputes will be referred to ADR

	ADR	Resolution by Ofcom
A large number of parties are involved	x	✓
One of the parties is dominant	x	✓
Both parties are dominant in the same market	✓	x
None of the parties are dominant	✓	x
Similar disputes are resolved in other industries without the intervention of the regulator	✓	x
No welfare loss would arise from a failure to agree	✓	x

Adjudication – reference to 3rd party

- Dispute is ‘resolved’ by Ofcom – determination requires issues in dispute to be referred to arbitration by independent 3rd party expert
- Decision of 3rd party expert is binding on parties
- Useful for detailed technical or commercial issues, or where dispute raises no questions of public policy justifying full costs of regulatory adjudication
- Potential for quicker, more speedy resolution of issues



Regulatory Adjudication

- Reference of core disputes between Communications Providers to regulator underpins whole framework
- But ADR, in lieu of formal regulatory adjudication, may be better suited to issues of detail, e.g.
 - Service Level Agreements;
 - provisioning timetables;
 - industrialisation of process.
- Resources of regulator (and stakeholders) free to address core policy concerns

Looking forward...

- Early days..... regular use of ADR still in infancy
- Still to determine:
 - what works well, what doesn't
 - are some markets/ issues more suitable for ADR?
 - success of industry schemes (Telecoms Adjudicator)
 - long term stakeholder commitment to ADR
- Ofcom is committed to pursuing aims and objectives of ADR, but prepared to use formal regulatory adjudication where required:
 - a **bias against intervention**, but with a willingness to intervene firmly, promptly and effectively where required.

