



**INTERNATIONAL TELECOMMUNICATION UNION
TELECOMMUNICATION DEVELOPMENT BUREAU**

European Regional Workshop on Dispute Resolution
Geneva Switzerland, 31 August – 2 September 2004

Role Play Exercise: Introduction

Developed and
Facilitated by:

RORY MACMILLAN

Legal • Mediation

rory@rorymacmillan.com
+41 79 752 3622

Introduction to the Role Play Exercise

This role-play exercise is intended to provide an opportunity to explore various aspects of dispute resolution in the telecom sector. The setting is a meeting between stronger incumbent operator (Tokalot Telekom) against a new entrant (Wannatok Telekom) to deal with a dispute resolution procedure with the involvement of the adjudicator/mediator appointed by the sector regulator. The exercise is intended to give participants the flavour of the different roles and perspectives of parties, adjudicators, mediators and regulators in disputes, as well as insight into the various commercial, operational, technical, legal, jurisdictional, policy, power-relations and personal complexities that may arise. Every group that participates will almost certainly take a different direction with different results. No one result or solution is expected, and certainly no one result or solution would be correct or incorrect. The point is to improve understanding of underlying dynamics among the different players involved in disputes in the multi-dimensional relationships of the telecom sector.

Briefing to All Parties (Session 1)

The Parties

1. Adjudicator/mediator appointed by Telecom Authority (2 representatives)
2. Tokalot (3 representatives)
3. Wannatok (3 representatives)

Introduction to the Market and Regulatory Regime

The date is September 1, 2004 and we are in Tokland, a country in the middle of Europe with a population of 20 million and GDP per-capita somewhat below the EU average. Its two largest cities are the capital, Yatter (with 3 million), and Chatter (with 1 million). To the sound of popping champagne corks, Tokland joined the EU earlier in 2004 and is in the process of harmonizing its laws to EU regulations and directives, including in the telecom sector.

Tokland had already commenced telecom sector liberalization, of course. In January 1997, the Tokland government passed the Telecom Law, which established a regulator called the Tokland Telecom Authority (TA). In section 2 of the Telecom Law, the TA was charged with the broad mandate to “improve the quality, prices and availability of telecom services in Tokland, and develop competition in the telecom sector.” The Telecom Law has been through some revisions but is still not very detailed. It contains the following key provisions:

- **Section 8:** established a licensing regime for operating telecom infrastructure and offering telecom services.
- **Section 10:** prohibits anti-competitive behaviour such as unfair cross-subsidisation and abuse of dominant market power.
- **Section 15:** provides that in markets where a company has “significant market power” (SMP), the TA may regulate prices and conditions of infrastructure and service provision.
- **Section 25:** provides that the TA shall have the power to enforce compliance with the Telecom Law, including imposing penalties not exceeding [the equivalent of €1 million].
- **Section 26:** gave the TA the power to resolve disputes between telecom operators and service providers relating to obligations under the Telecom Law.

The TA is in the process of working with the Ministry of Telecommunications on a new draft law that will bring Tokland legislation more fully into line with the EU regime. Tokland’s EU accession terms allow it a two year grace period for transition from its current telecom licensing system to the authorization regime contemplated in the new EU framework. This is expected to involve replacement of all licenses in due course.

In 2002, the Tokland government passed the Competition Law, which prohibits anti-competitive practices, including restrictive practices and abuse of dominant market position. The Tokland Competition Authority (CA) established under the Competition Law has the power to impose extensive fines on enterprises for breaches of the Competition Law (up to 5% of annual revenues), require payments of damages for compensation, as well as declare agreements invalid on the grounds they contain restrictive terms. Being relatively young, the CA is trying to prove itself and has capacity-building budgetary support from the EU.

Tokalot Telecom

In August 1997, the Tokland government sold a 60% stake in the then-monopoly provider of fixed telecom services, Tokalot Telekom, to a strategic investor (a European telecom company). Tokalot was awarded a new license at the time of its privatization. The license was carefully negotiated by the investor with the Tokland Government in the privatization transaction. The license gave Tokalot the exclusive right to provide fixed services for four years. The license also imposed extensive requirements relating to universal service, including a significant increase in population coverage and range of services. Tokalot has generally complied well with its universal service obligations. The license also provided that the Tokland government would regulate Tokalot "in a manner that takes into account commercial reality and necessity of a reasonable return on investment."

Tokalot borrowed heavily and issued further shares after its privatization and invested these funds in its network, digitalizing it, upgrading switching equipment and extending its coverage nationwide – making basic telephone service almost universally available. It also invested heavily in its subsidiaries, MobiTok and MediaTok. As a result of Tokalot's investments, Tokland now has a penetration of 40% of fixed lines (analogue and ISDN equivalents), a steady rise from 30% in 1997.

In addition to the fixed line business, Tokalot owns Tokland's second largest mobile telecom company, MobiTok, as well as the majority of MediaTok, the country's leading Internet service provider (ISP). Tokalot had consolidated group revenues of about €5 billion in 2003. Of these, 50% came from its fixed telecommunications services, 42% came from MobiTok and 8% came from MediaTok. Three years ago, revenues were about the same but 70% came from fixed telecommunications services, 27% came from MobiTok and 3% came from MediaTok.

Over time, the strategic shareholder has reduced its ownership of Tokalot shares to 25% and the Government of Tokland now holds only 15%. International and domestic shareholders hold the remaining 60%. Tokalot's share price has followed international trends in recent years, collapsing in 2001 with limited recovery since. There is whispering in the market about the possibility of a takeover.

The Fixed Voice Market and New Entrant Wannatok

With the lifting of Tokalot's exclusive rights in August 2001, the TA licensed many new fixed line service and/or infrastructure providers, but of course very few have built any infrastructure of their own. The strongest fixed line service provider is Wannatok Telekom. It has a strong base in the business sector for fixed line services and is also the only new operator to have developed a strong hold in the mass fixed telephony market. Wannatok has established a good reputation for reliable and low priced services. It had consolidated revenues of about €300 million in 2003.

Tokalot continues to be the only company with a fixed network having nation-wide coverage. Today, 25% of Tokland's subscribers use an alternative provider for long distance and international calls, and 7% for local calls. In the EU, these percentages are over 33% and 25% respectively.¹ The TA published recently the information below on fixed market share of revenues and minutes. EU averages are also shown.

	Local and Internet		Long distance		International		To Mobile	
	Revenue	Minutes	Revenue	Minutes	Revenue	Minutes	Revenue	Minutes
Tokalot	90%	90%	90%	85%	80%	60%	98%	98%
Wannatok	7%	7%	7%	10%	10%	20%	1%	1%
Others	3%	3%	3%	5%	10%	20%	1%	1%
Average EU incumbent*	81%	-	70%	-	62%	-	69%	-

* EU Ninth Report on the Implementation of the Telecommunications Regulatory Package 19.11.2003, Annex 1

Wannatok has built its services in the last three years by focusing on the international and long distance calls market. Since August 2001, Tokalot has been required to provide carrier pre-selection (CPS) allowing Tokalot customers to use Wannatok's services. Wannatok has recently suggested in the press that Tokalot

¹ EU Ninth Report on the Implementation of the Telecommunications Regulatory Package 19.11.2003 at s3.6. Available at: http://europa.eu.int/information_society/topics/ecom/all_about/implementation_enforcement/annualreports/9threport/index_en.htm

has engaged in illegal slamming activities (changing users' providers without permission) and of engaging in anticompetitive solicitation of Wannatok customers to attract them back to Tokalot. As yet, no formal complaint or request for investigation has been lodged with the TA.

Wannatok uses aggressive marketing campaigns, with slogans that portray Tokalot as expensive and unfaithful. These have included "*Costalot to Tokalot*" (about its international prices), "*Tokalot of broken promises*" (about its broadband plans) and even "*Tokalot...Stealalot?*" (after a financial scandal involving the previous CEO and CFO in May 2002). Tokalot has initiated a complaint before the Advertising Standards Board.

Broadband Infrastructure and Services

Tokalot is also developing broadband. Through its majority-owned subsidiary, MediaTok, it has invested considerable amounts in developing various broadband media and video products in partnership with the Tokland Broadcasting Company and international cable and satellite providers, an e-government initiative with the Government of Tokland and extensive on-line shopping arrangements with supermarkets. As yet, however, these services have been held back by inadequate broadband connections across the country. The roll-out of MediaTok's services has mostly been limited to standard ISP services.

At the beginning of 2003, Tokalot announced plans to make broadband available in major cities in 2004 and 2005 and across the country as soon thereafter as possible. Until now, Tokalot has only rolled out broadband connections in a few areas of Yatter and Chatter. Broadband rollout generally in Tokland has been hindered partly by the fact that cable TV penetration is relatively low, although there are cable operators in the major cities. Some of these have been planning to upgrade their networks to allow two-way signalling at broadband speeds, but they have struggled to find the capital to do so. Chatter Cable has upgraded its network in parts of Chatter. Wannatok recently announced a partnership with Chatter Cable for provision of telephony services in upgraded areas.

The Minister for Telecommunications has announced a policy of making Tokland a world class information society and the TA has issued a consultation paper on how to develop broadband. The consultation paper requests comments on how to enhance its Access Regulation of December 2003 and enable local loop unbundling (LLU) to play a role in accelerating broadband roll-out.

Local Loop Unbundling

The CPS system has given Wannatok a (small) door into the local call market since customers can choose to use Wannatok as an alternative provider for all calls, including local (rather than only international and long distance). The CPS local call market is limited, however, and still involves paying Tokalot for its local carriage of the call. Wannatok has been interested since 2002 in entering the local retail access market, leveraging its brand to compete across the board with Tokalot. Still, however, three years after Tokalot lost its exclusivity right, Tokalot has around 98% market share of the retail access market, with the remaining 2% divided between competitors. (In the EU, over 6% of subscribers are using direct access through an alternative to the incumbent and even that is widely viewed as a lack of success until now of LLU policy.)²

Given Tokalot's position in the market, the TA has annually declared under section 15 of the Telecom Law that Tokalot has SMP in all markets for fixed voice services, as well as the markets for wholesale and retail access to the local loop. According to the TA's Access Regulation, Tokalot's SMP designation imposes certain access-related obligations upon Tokalot. The Access Regulation by-and-large reflects the provisions of the EU Access Directive, including mandating unbundling of the local loop and the following provisions:

- **Section 4:** Operators with SMP in the markets for wholesale and retail access to the local loop must negotiate and enter into agreements with competing operators for access.
- **Section 5:** The TA may impose or authorize charges for access to the local network, and such charges must be non-discriminatory and based on costs.

Several alternative fixed line providers have entered into agreements with Tokalot concerning local loop unbundling. Wannatok entered into a LLU Agreement with Tokalot in June 2003. Tokalot submitted its

² EU Ninth Report on the Implementation of the Telecommunications Regulatory Package 19.11.2003 at s3.6.

application to the TA for approval of prices for unbundled access to its local loop in July 2003. At that time, Tokalot had only rudimentary financial accounts to demonstrate its costs, and nothing more detailed has been published since. In August 2003, in accordance with its LLU Agreements, Tokalot established a LLU Liaison Committee comprised of commercial, technical and legal representatives from Tokalot and new entrants. In March 2004 the TA approved the maximum prices below which are still Tokalot's LLU prices today. Average prices in the EU are also shown.

	Full unbundling of local loop		Shared access to local loop	
	Monthly rental	Connection	Monthly rental	Connection
Tokalot	€20.0	€200.0	€10.0	€150.0
EU Average*	€11.5	€68.2	€4.2	€80.6

* EU Ninth Report on the Implementation of the Telecommunications Regulatory Package 19.11.2003, Annex 1

Fixed Retail Tariffs

Tokalot's retail access tariffs (i.e., what its retail end-user customers pay for connection and line rental) are regulated differently from its wholesale access products. They are not required to be cost-related but are subject to the price cap regime set out in Schedule A of Tokalot's license. Schedule A was negotiated intensively between the strategic investor and the Tokland government during privatization. When it expired, it was carefully renegotiated between Tokalot and the TA and in February 2002 was extended for four more years.

Various services are grouped together in a basket and subject to a cap on price increases based on the inflation-related retail price index (RPI). The most important basket includes the full range of Tokalot retail services such as international, long-distance, regional and local calls and access prices. Within the constraints of the ceiling of the price cap basket, Tokalot is free to change retail prices as it sees fit. There are no mandatory minimum rates. Tokalot is currently solidly within its price cap, averaging RPI – 3.5% over the last two years. Tokalot's current price cap requires an aggregate per annum reduction of RPI – 3%. The intended reductions reflected productivity and efficiency improvements anticipated to be made by Tokalot. Its current prices for retail access are:

- a monthly line rental of €11 (the EU average is €14),
- a one-off charge of €40 for a new connection, and
- a one-off charge of €20 for the takeover of an existing line.

Wannatok's Complaints to the TA

On July 1, 2004, Wannatok initiated a dispute procedure against Tokalot with the Adjudicator (see below) under section 5 of the Access Regulation and pursuant to sections 10, 25 and 26 of the Telecom Law. Wannatok complains that the margin between (a) the prices that Tokalot charges its competitors for unbundled access to local loops and (b) the prices Tokalot charges end-users for access to its fixed network, is not sufficient to enable competitors to offer competitive prices for end-user access over local networks. Wannatok argues that:

- Tokalot's wholesale access prices do not reflect costs as the Access Regulation requires,
- Tokalot's pricing for retail access is below cost, unfairly subsidized, predatory, violating the principles of competition in section 10 of the Telecom Law, and
- the result amounts to an anti-competitive margin squeeze preventing competitors from entering the fixed retail access market on a commercially sustainable basis.

The TA's Dispute Resolution Procedure

The TA established a Dispute Resolution Procedure in 2001. Given constraints on the TA's resources, as well as trends in the EU, the Dispute Resolution Procedure was revised earlier this year to increase the emphasis on exhausting negotiated solutions where possible before resorting to formal adjudication. The Procedure contains the following provisions:

- **Article 1:** The TA shall appoint an individual (the Adjudicator) to mediate or adjudicate disputes between telecom operators under section 26 of the Telecom Law.

- **Article 2:** Disputing parties may refer a dispute to the Adjudicator, or the TA board may refer complaints lodged with it to the Adjudicator. In either case, the Adjudicator shall choose which method of dispute resolution to employ, although he or she shall favour negotiated solutions where possible.
- **Article 3:** The Adjudicator shall decline to mediate or adjudicate any dispute referred by parties if it is trivial or where resolution would probably conflict with TA policy or the Telecom Law. In the latter case the Adjudicator shall refer the dispute to the TA board.
- **Article 4:** Parties in a mediation must participate in good faith and the Adjudicator may take into account the absence of good faith when making a ruling under Article 5. The Adjudicator may also make non-binding recommendations during a mediation.
- **Article 5:** The Adjudicator may make a ruling to resolve a dispute. Before a ruling, the parties must have a full opportunity to be heard and/or make written submissions. The Adjudicator's rulings are binding unless suspended or overturned by the TA board or a court. Parties may appeal to the TA board on grounds of manifest error.³
- **Article 6:** The Adjudicator should resolve disputes within four months of referral.
- **Article 7:** The parties to a dispute shall bear their own costs, as well as the expenses of the Adjudicator and costs of any advisors he or she may reasonably employ.

Today's Mediation Process

The TA board has referred Wannatok's complaints to the Adjudicator. Wannatok's complaint did not evidence extensive negotiations between the parties on the LLU issue although it indicated that Wannatok had requested meetings to discuss this and other matters. The Adjudicator has decided that it is worth trying to first to resolve the dispute by mediation rather than resorting immediately to a full adjudicatory process. Today's role play exercise is the opening of the mediation. The Adjudicator has talked briefly with each party in advance and has indicated that each will have an opportunity to set out its view of the dispute briefly at the beginning of the mediation.

³ Tokland administrative law is vague on grounds for courts overturning administrative actions. Generally, it focuses on ensuring that the administrative decision made was within the legal authority granted to the decision maker, and that it was made pursuant to an appropriate process – rather than that the decision was correct in its substance.