

DOSPUTE RESOLUTION IN TELECOMMUNICATION INDUSTRY

The Role of Independent National Regulatory Authorities in
Settlement of Disputes



University of Oslo
Faculty of Law

Candidate number: 8002

Supervisor: Marike Silalahi Nuth

Deadline for submission: 1 December, 2010

1 December, 2010

Number of words: 17,074

Content

1. INTRODUCTION	1
2. National Regulatory Authority: Telecommunications Dispute Resolution Provider	3
2.1 The Purpose of Chapter 2	3
2.2 National Regulatory Authority and Types Of Disputes	3
2.3 Dispute Resolution under the European Law	6
2.4 The Competence as the Proof of Best Expertise to Deal With Disputes	16
3. Dispute Resolution Procedures By Ofcom	17
3.1 The Purpose of Chapter 3	17
3.2 The Scope of Dispute Resolution Procedure	23
3.3 Transparency of The Dispute Resolution Procedure	25
3.4 Terms of the Dispute Resolution Procedure	27
3.5 Enforcement Powers	29
3.6 Assessment of Dispute Resolution Procedure Provided by Ofcom	32
4. Independence Of National Regulatory Authorities	37
4.1 The Purpose of Chapter 4	37
4.2 Normative References On Independence in EU Law	37
4.3 The Value of Independence	39
4.4 The Concept of Independence and Its Traits	43
4.4.1 The Notion Of Independence	43
4.4.2 Types of Organizational Structures of National Regulatory Authorities	44
4.4.3 Appointment of the Head of National Regulatory Authority	46
4.4.4 Terms of Office and Dismissal Rules	48
4.4.5 Financial Independence and Accountability	49
4.5 NRAs and EU Commission: Interaction or Intervention ?	51
5. Conclusion	55
References	58
Annex (1) Abbreviations	64

1. INTRODUCTION

The telecommunications sector has been subjected to significant transformations resulted from privatization and liberalization as well as fast technological development and rapid market growth. This process has been naturally followed by an increasing number of various disputes. It is no wonder that in competitive markets certain kind of relationships among service providers and consumers and also utilization of new technologies might fail. Disputes raised as a result may involve stakeholders having conflicting economic interests at risk, refusal of interconnection, non-compliance with different regulatory requirements, failure to respect contractual obligations and other issues. Diversity of new electronic communications services and infrastructure requires countries to tackle these trends through effective dispute resolution mechanism.¹ The way telecommunications disputes are handled has a great impact on the economy of each country. The failure to settle disputes promptly can unfavourably influence competition, result in delays of the introduction of new services, decrease of investment in telecom sector and hinder development of the industry.²

The subject of the presented work is the role of independent national regulatory authorities in dispute resolution. The questions raised around this issue cover several topics which have a direct influence upon an effective performance of dispute resolution function by NRAs. The subject is examined through the perspective of EU law in combination with the illustration and comparative analyzes of practice established in EU as well as outside of it. Thus, the general purpose of the study is to promote better understanding of the role of

¹R. R. Bruce, R. Macmillan, Debevoise & Plimpton, T. St. J. Ellam, H. Intven, T. Miedema, McCarthy Tétrault LLP for the International Telecommunications Union and the World Bank. Dispute resolution in the telecommunication sector: Current practices and Future Directions, October 2004, p. 1

² Module 6. Legal and Institutional Framework. <http://www.ictregulationtoolkit.org/en/Section.1254.htm>, p.165

national regulatory authorities in regard to disputes settlement between stakeholders of telecom industry.

Chapter 2 of this work analyses provisions of the European regulatory Framework for Telecoms in regard to the scope of competence of national regulatory bodies including powers to resolve disputes. Provisions regulating telecommunications disputes and procedural matters related to them are discussed as well.

Chapter 3 outlines dispute resolution procedures based on the experience of the United Kingdom. In particular, dispute settlement procedures provided by Ofcom are reviewed. The author has tried to demonstrate broad competence of Ofcom and consequently, the role it plays in settlement of disputes. Critical problems around the given issue are discussed as well.

In Chapter 4 the author analyzes concept of independent national regulatory authorities in details and tries to underline the importance of independence for regulatory enforcement as well as precisely for dispute resolution. Besides, the ways to achieve the regulatory independence are described.

Chapter 5 summarises the issues reviewed in the presented work and stresses on general factors approving the significant role of national regulatory authorities in settlement of disputes. The given part also discusses those factors which increase the importance of the regulators in respect to dispute resolution and promotes preference for procedures provided by them.

2. National Regulatory Authority: Telecom Dispute Resolution Provider

2.1 The Purpose of Chapter 2

This section reviews competence of national regulatory authorities in regard to dispute resolution, types of disputes they deal with and the European Community legislative requirements to the regulators in settlement of disputes. The purpose of the discussion on these issues is to clear up whether the Community law provides enough understanding of the role of national regulatory authorities in terms of dispute resolution. The given section outlines other functions of the regulators that the one might think are not correlated to the subject of the given thesis. But, the author thinks that only the regulators with an adequate expertise are able to play an affective role in dispute resolution. Wide competence assists national regulatory authorities to deal with disputes in a qualified manner.

2.2 National Regulatory Authority and Types of Disputes

Whenever parties to any dispute do not manage to come to an agreement voluntarily, they resort to the legal mechanism of protection provided by state that is the Court. Dispute resolution theory and practice have been subjected to major developments during several decades. As a result, at present they offer a wide range of dispute resolution techniques and procedures that apply to different kinds of disputes and various disputants.³ Thus, quite diverse dispute resolution procedures have been emerged that start to “compete” with historically traditional mechanism of legal protection – the Court. The most common alternatives to the litigation are: Arbitration; Expert Determination;

³ M.L. Moffit, R. C. Bordone Editors, *The Handbook of Dispute Resolution*, JOSEY-BASS, A Wiley Imprint, www.joseybass.com pp. 4-5

Management Review, Facilitated Negotiation; Mediation.⁴ But, according to the chosen subject of the presented work the author is interested in public administrative authorities for telecommunications that are also considered as alternative dispute resolution providers and are standing next to the court in similarity of their powers and procedures as well as in similar approaches of the European Community law to them.

The European Community law imposes positive obligation on national administrative authorities as well as on the courts to ensure effectiveness of the Community law. This duty has been established and repeatedly confirmed by case law of ECJ. At the same time, the Community law has very limited competence to impact national administrative authorities which can not be stated about national regulatory authorities for telecommunications. The European telecommunications legislation includes detailed provisions imposing different obligations on national regulatory bodies that underline their special mission in regulation of telecom industry.

The author is interested what types of disputes are wide-spread in practice. What kinds of disputes the national regulatory authorities have to deal with? The most common disputes in practice are:

- 1. Interconnection disputes;**
- 2. Cross-border disputes;**
- 3. Disputes between electronic communications service/network providers and consumers/end-users;**
- 4. Radio Spectrum Disputes.**⁵

Note: The list of disputes is not exhaustive.

1. Interconnection Disputes.

The scope of NRAs powers in interconnection disputes is very important for a proper functioning of interconnection regime in the telecom sector. They are the most

⁴ Electronic Communications Committee (ECC) within the European Conference of Postal and Telecommunications Administrations (CEPT), Dispute Resolution Settlement Procedures, Bornholm, October 2003, pp. 13-14

⁵ Ibid, pp. 6-8

difficult types of disputes. The problem here occurs around the issue of pricing network access. Access network service providers quite often misuse their position of the owner of essential facilities. In particular, to maintain their competitive advantage they make new entrants to the market dependent on them through high charges and by the very fact that new entrants can not duplicate the rights of use of essential infrastructure. Such asymmetric interconnection relationship assists the access network service provider in opportunistic behavior. For instance, it may offer discriminative contractual terms to new entrants for the same interconnection services. Consequently, these factors initiate disputes between undertakings. Interconnection disputes have a great impact on competition development. Thus, regulators have a thorough oversight on interconnection arrangements.

2. Cross-border Disputes

The complex nature of cross-border relationships (for instance, interconnection arrangements) of service/network providers may instigate disputes. The complexity is related to the differences in regulatory requirements and various legislations of the states which might result in certain clashes between interests of stakeholders.

3. Disputes between electronic communications service providers and consumers/end-users;

Disputes may be initiated by consumers from the following causes:

- Billing;
- Payment of charges;
- Service charges;
- Terms and quality of service;
- “Slamming⁶”
- False and deceptive advertising;

⁶ “Slamming” is the illegal practice of *switching* a consumer's traditional **wireline** telephone company for local, local toll, or long distance service without permission. definition given by the FCC at <http://www.fcc.gov/slamming/>

- Infringement of Privacy.

There are cases when service providers are accused of wrong billing, overcharging for services, provision of unfair contractual terms, inadequate quality of service comparing to what was offered initially. Sometimes complaints against service providers are initiated due to “Slamming,” i.e. cases when electronic communication service for a consumer is switched without appropriate consent. Some service providers try to attract consumers not at the expense of high quality services through comprehensive information, but false and deceptive advertising which results in disappointment of consumers in the end. Provision of electronic services is always related to maintenance and processing of personal data of consumers. Hence, the risks to abuse privacy increase along with the technological possibilities and in the name of them. So, when consumers are subjected to such violations they give rise to disputes. It is important to mention that consumer issues related disputes might be a matter of other institutions rather than NRAs which is for the Member States to decide.⁷

4. Radio Spectrum Disputes

Radio frequency allocation and usage are the issues from which disputes can arise. The incentive for disputes could instigate from the matters like access radio spectrum, interference to radio spectrum services or networks, pricing, licence conditions, etc.⁸

2.3 Dispute Resolution under the European Law

In the given sub-section the author wishes to discuss whether provisions given in rules of European telecom regulatory framework that deal with the dispute resolution issues improve the effectiveness of dispute resolution procedures and eliminate problems which

⁷ Supra n 2, p. 166

⁸ Electronic Communications Committee (ECC) within the European Conference of Postal and Telecommunications Administration (CEPT), Dispute Resolution Settlement Procedures, Bornholm, October 2003, pp. 6-8

are common for the Member States and outside the EU as well. New amendments to these rules will also be discussed in terms of their efficiency.

One of the general principles of the European law is the principle of national autonomy of legal proceedings which implies that the Member States have their own approaches, rules and distinctive features in relation to national dispute resolution mechanisms in telecom sector. This circumstance complicates the harmonization of European Telecommunications Directives. But it is noteworthy that the principle of national autonomy of legal proceedings is not absolute. It is balanced with the European law principle of effectiveness under which it is a positive duty of the Member States to “take all appropriate measures to ensure the fulfilment of Community obligations and a negative duty to abstain from any measure which would jeopardise the attainment of Treaty objectives.”⁹ This principle also implies the obligation of the Member States to provide their citizens with effective legal protection mechanisms if their rights under the EU law are violated. Based on this principle is it sufficiently grounded to claim that in terms of dispute resolution in telecommunications industry individual approaches and specific national procedural rules can not threaten rights of undertakings and consumers to the efficient and consistent dispute resolution? What is the role of national regulatory authorities in this respect? To respond to these questions it is necessary to determine whether normative references reflected in European Telecommunications Regulatory Framework that will be discussed below are enough clear and provide the Member States with effective solution.

What is the scope of NRAs’ competence in relation to dispute resolutions? What kind of disputes are subjected to the review and resolution under European Telecommunications Framework? The answer can be found in the following rules:

1. Framework Directive, Article 20, Article 21;
2. The Universal Service Directive, Article 34 (1);
3. The Roaming Regulation, Articles 20 and 21.

⁹ A. Ottow Dispute Resolution Under the European Framework, PP. 1-2, Downloaded from www.ivir.nl/.../ottow/disputeresolutionundertheneweuframework.PDF

Member States are charged with a very broad obligation to provide dispute resolution powers to national regulatory authorities. Article 20 (1) of the Framework Directive states:

“In the event of a dispute arising in connection with existing obligations under this Directive or the Specific Directives between undertakings providing electronic communications networks or services in a Member State, or between such undertakings and other undertakings in the Member State benefiting from obligations of access and/or interconnection arising under this Directive or the Specific Directives, the national regulatory authority concerned shall, at the request of either party, and without prejudice to the provisions of paragraph 2, issue a binding decision to resolve the dispute in the shortest possible time frame and in any case within four months, except in exceptional circumstances. The Member State concerned shall require that all parties cooperate fully with the national regulatory authority.”¹⁰

As it is cited in the above mentioned provision national regulatory authorities are entitled to resolve disputes between electronic network or service providers or between such providers and other undertaking which benefit from obligations of access and/or interconnection. To fall under the scope of competence of the national regulatory authority of a certain Member State disputes must take place in the very Member State and arise in relation to the obligations determined for undertakings by the Framework Directive and the Specific Directives. These directives underline quite a wide competence of NRAs on dispute issues. The powers of NRAs in dealing with disputes are encouraged and strengthened under the obligation imposed on the Member States to require all the parties involved to cooperate fully with national regulatory authority. It implies that the Member States must take such measures which will serve effective performance of cooperation between NRA and undertakings through making this cooperation obligatory for them. Main factor underlining the powers of national regulatory authorities is that their decisions on disputes are binding for the parties.¹¹ Binding nature of decisions implies that non-performance of decisions will be followed by appropriate enforcement measures, particularly, penalties determined under national laws. The Framework Directive allows the Member States to decide whether national regulatory authorities must be entitled to decline

¹⁰ Italics and boldfaces to the texts cited from the European legislation are inserted by the author and will be applied in the presented work hereafter.

¹¹ Framework Directive, Article 20(1).

dispute resolution in certain cases. According to the article 20(2) of the Framework Directive decision-making power of NRAs on such an issue is based on and limited to the clearly determined grounds. They are:

- **Existence of other mechanisms (including mediation) to settle the dispute;**
- **Capacity of other mechanisms to provide contribution better than NRAs can do to the dispute resolution in a timely manner;**
- **Compliance with the provisions of article 8 of the Framework Directive.**

In the process of decision-making all of these grounds must be met simultaneously. Consequently, the author holds that as a result of this provision NRAs will not be able to avoid deliberately settlement of some disputes and unambiguously present its position on the matter without an appropriate reason to do so. At the same time allowance of dispute resolution by other institutions than NRAs on the ground of binding decision of the latter encourages service/network providers to settle disputes independently from regulatory intervention and assists the development of deregulation processes where it is possible and reasonable. For instance, participation of an operator with the significant market power in a dispute would not be such a case.

On the contrary, Georgian practice as a distinctive example is worthy to be illustrated and analyzed. Alternative dispute resolution mechanisms (particularly, arbitration institution) are not strange for Georgian legal system but they are not encouraged and massively followed in telecom industry. Most of disputes reviewed by arbitration institution are of clearly civil law nature. None of the Georgian normative acts in the field of electronic communications include any references to the alternative dispute resolutions. But the attempt of the undertaking with the significant market power to limit the right of its counteragent without SMP to apply to the regulator on the telecom sector-specific issues through contractual terms definitely would clash with the powers of the regulator including its power to intervene whenever sector-specific rules are roughly violated. Though, there has not been such a precedent in Georgia yet.

All the normative references in the Georgian law indicate that it is the authority of the regulator to resolve disputes between electronic communications service/network

providers.¹² At the same time under the Georgian law on Arbitration, arbitration institution is entitled to resolve a pecuniary dispute of private nature based on equality of persons which the parties can regulate.¹³ Considering that there is no prohibitive norm that would disturb telecom undertakings to agree on application of such an ADR institution, it is sufficiently grounded to say resolution of disputes in telecom industry by arbitration institution is allowed. But that is just one side of the case. Returning back to the example in which the undertaking with the significant market power tries to limit the right of its counteragent to apply to the regulator on the telecom sector-specific issues through contractual terms, the lawfulness of its act would be questioned. It is doubtless, that the counteragent dependent on the operator with significant market power must have a choice to apply either to the NRA, the ADR or the Courts. Hence, it must be a matter of choice, but not the pressure. Besides, any attempt of the undertaking with significant market power to avoid jurisdiction of the NRA on important issues that can affect the whole industry must be eliminated initially. Applying to the alternative dispute resolution providers where competition has not fully developed would not be reasonable and could cause into negative consequences for undertakings dependant on operators with significant market powers as well as for consumers. The lack for sufficient sector-specific knowledge could also be the reason of the author's sceptic perspective. In addition, undertakings involved in a dispute would have rather limited list of legal grounds to appeal the decision of the arbitration than in case of appealing the regulator's decision.¹⁴ Though, the current law on Arbitration provides more grounds to appeal than the previous one and only the future practice will show how it works. Thus, the massive application of the article 20(2) of the Framework Directive in Georgian reality seems to be feasible in the future rather than at the present time.

¹² See article 11(3)(e)(f)(g), article 36 (1) and (2) of the Law of Georgia on Electronic Communications at http://www.gncc.ge/index.php?lang_id=ENG&sec_id=7050

¹³ See Article 1(2) of the Georgian Law on Arbitration (Georgian text) at <http://www.parliament.ge/newsletter/2009/7.07.2009/kanon/1280-Is.htm>

¹⁴ Ibid, article 42 (Georgian text)

The key role of NRAs in the provision of certainty and order in telecom industry in terms of dispute resolution function is supported by the very article 20(2) of the Framework Directive. It states:

***“If after four months the dispute is not resolved, and if the dispute has not been brought before the courts by the party seeking redress, the national regulatory authority shall issue, at the request of either party, a binding decision to resolve the dispute[...]*”**

Besides, as it proceeds from above mentioned provision the parties involved in a dispute are given additional legal guarantees of protection in case alternative dispute resolution mechanisms do not work provided that one of them looking for redress has not applied to the court.

The authority of NRA as a dispute resolution provider is confirmed by the fact that the parties involved in a dispute can not override jurisdiction of the regulator and any contractual term between them that aims to avoid any intervention by NRA though the dispute resolution procedures is deemed to be annulled.

Though the article 20(1) indicates that dispute resolution procedures are initiated by an interested party, NRAs are empowered to intervene in regulation of conflicts with respect to access and interconnection issues between service/network providers even when there is no such request from their side. In particular, under the article 5(4) of the Directive 2002/19/EC of the European Parliament and Council on access to, and interconnection of, electronic communications networks and associated facilities, national regulatory authorities are entitled to do so provided that there are justifying circumstances.

Dispute resolution procedure based on article 20(1),(3),(4) of the Framework Directive does not deprive either party of the right to apply to the court.¹⁵

Article 21(1) of the Framework Directive determines NRAs' power to deal with international disputes within the EU:

“In the event of a cross-border dispute arising under this Directive or the Specific Directives between parties in different Member States, and where the dispute lies within

¹⁵ N. Th. Nikolinakos, EU Competition Law and Regulation in the Converging Telecommunications, Media and IT Sectors, Kluwer Law International 2006, PP. 233-234

the competence of national regulatory authorities from more than one Member State, the provisions set out in paragraphs 2, 3 and 4 shall be applicable.”

The author would like to discuss questions raised around cross-border disputes resolution under the Framework directive. Development of telecom industry erases the distinction between countries. Consequently, along with the technological development and enhancement of collaboration between service/network providers of different states disputes in this industry will increase.

When are the provisions of the article 21 of the Framework Directive applied? Two important components must be met in order to fall under the above mentioned provisions. These are:

- The dispute must arise between the parties in different Member States;
- The dispute lies within the competence more than one national regulatory authorities from more one than Member State;

These provisions imply that the dispute initiated between two or more undertakings from different countries would not be the case under article 21. It must fall under the competence of at least two regulators from different countries. There is no implication regarding what determines the competence of NRA. Is it territoriality or nationality of the operator that could play decisive role in definition of the competence? The answer to it is uncertain under article 21. Though, it seems that this provision serves to exclude any ambiguity regarding the competence and refers the dispute to more than one regulator.¹⁶

There are other several questions about resolution of the international dispute that the author finds worthy of attention. They are:

- Cooperation between national regulatory authorities;
- Decision making process
- Enforcement of the joint decision of national regulatory authorities.

¹⁶ Supra 4, pp. 8-9

Nothing is said about procedural aspects of above mentioned question in the Community legislation. No implication is given concerning how cooperation between NRAs must be performed. Article 21(2) of the Framework Directive states:

“[...] The competent national regulatory authorities shall coordinate their efforts[...] in order to bring about a consistent resolution of the dispute, in accordance with the objectives set out in Article 8.”

From the text of the provision it seems that any measures taken by the national regulatory authorities in compliance with the objectives of article 8 resulting in a consistent resolution of the dispute is considered to meet requirements of the Directive. Based on article 21 the initiator of the dispute is expected to submit all the relevant information to both NRAs. Thus, the investigation of the case will be held in either countries (or more than two). As a result, under the Framework directive NRAs are required to assist one another in collection and assessment of information and jointly determine what the next measures to be taken are.

It could cause certain inconvenience to the parties applying to NRAs in different Member States and participating in disputes reviewed by them jointly. Hence, effectiveness and timeliness of the dispute resolution substantially depends on at what extent both NRAs act jointly.

Another question is how the joint decision and consequently, the consistent resolution of the dispute is achieved. Consistency of the position that is the basis of the joint decision can be achieved through the contribution by the BEREC.¹⁷ The latter is empowered to provide assistance to NRAs at the request of any of them on the issues of cross-border disputes. The BEREC provides NRAs concerned with the opinion which finally is not binding and in addition, does not preclude NRAs “from taking urgent measures when necessary.” Taking into consideration this circumstance is it grounded to claim that the BEREC has enough capacity to play an effective role in consistent resolution of the dispute? Under article 21(2) of the Framework Directive NRA or NRAs concerned

¹⁷ See Article 21(1),(2) of the Framework Directive and Article 3(1)(g),(l) of the Regulation (EC) No 1211/2009 of the European Parliament And Of The Council of 25 November 2009 establishing the Body of European Regulators for electronic Communications (BEREC) and the Office

are required to refrain from taking any actions until the BEREC has issued its opinion and when it has done so the NRAs concerned “will take utmost account of the opinion adopted by BEREC.” What does the term “utmost account” imply? It includes several options. Either NRAs’ decision on dispute resolution is considerably or partially based on the opinion of BEREC or in case of a different opinion NRAs are required to give weighty grounds in their decision which will explain the reasons for partial or complete disagreement with the BEREC. NRAs’ obligation “[...] to coordinate their efforts [...] in order to bring about a consistent resolution of the dispute, in accordance with the objectives set out in Article 8” implies that neglect of BEREC’s opinion would constitute the violation of this obligation as well.

The question of joint decision-making is closely related to the enforcement of the decision. Article 21 of the Framework Directive does not provide any clear implication on how decisions are passed by NRAs concerned. It means they are given several options:

- NRAs pass a joint decision based on common reasoning;
- Based on agreement between NRAs, the participation of one of them in the dispute might be limited simply to cooperation and the power of passing a final decision might be delivered to another NRA concerned.

The ambiguity of the issue around the enforcement of the decision proceeds from above mentioned options given to NRAs. In terms of enforcement the questions whether the joint decision can be considered as a new one decision or as two equal decisions and what effects might the decision of one NRA cause in another NRA’s state is a subject of their national legislation and agreements between them.¹⁸

According to the Article 34 (1) of the Universal Service Directive Member States are obliged:

“[...] to ensure that transparent, non-discriminatory, simple and inexpensive out-of-court procedures are available for dealing with unresolved disputes between consumers and undertakings providing electronic communications networks and/or services arising under this Directive and relating to the contractual conditions and/or performance of contracts concerning the supply

¹⁸ Supra 9, p. 9

of those networks and/or services. Member States shall adopt measures to ensure that such procedures enable disputes to be settled fairly and promptly and may, where warranted, adopt a system of reimbursement and/or compensation. Such procedures shall enable disputes to be settled impartially and shall not deprive the consumer of the legal protection afforded by national law. Member States may extend these obligations to cover disputes involving other end-users.”

Under amended article 34(1) of the Universal Service Directive Member States are required to provide consumers (including end-users) with out-of-court procedures, which do not necessarily mean NRAs to be in charge of dispute resolution on consumers' related issues. There is a certain practice in the EU when consumer disputes are dealt by ADR provider institutions. Yet, national regulatory authorities are said to handle such disputes in the most European countries.¹⁹ The Recommendation of the Commission № 98/257²⁰ based on the experience of several Member States confirms:

“[...] alternative mechanisms for the out-of-court settlement of consumer disputes - provided certain essential principles are respected - have had good results, both for consumers and firms, by reducing the cost of settling consumer disputes and the duration of the procedure;”

As for Georgian practice which might be brought here for comparative illustration, disputes between end-users and service providers are reviewed by national regulatory authorities and/or the courts.²¹ Based on the Georgian law on Arbitration, disputes between end-users and service-providers could be reviewed by Arbitration institution. But, whenever any contractual term between both parties excludes possibility of an end-user to

¹⁹ L. Garzaniti, M. O'Regan (eds), Garzaniti - Telecommunications, Broadcasting and the Internet – EU Competition Law & Regulation, 3rd edition, London, Sweet & Maxwell, 2010, pp. 208-209

²⁰ The Recommendation of the Commission on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, March 30, 1998, Official Journal of the European Communities L 115/31

²¹ See article 12(1) of the Law of Georgia on Independent National Regulatory Authorities and article 63 (2) of the law of Georgia on Electronic Communications at http://www.gncc.ge/index.php?lang_id=ENG&sec_id=7050

apply to the regulator or the court, such a contractual term is doomed to be considered unlawful and against consumers' interests. Consumers are usually held economically weaker and less experience in legal issues. Georgian national regulatory authority is the body which can provide free legal assistance to consumers via Ombudsman institution. And at the arbitration institution the balance between a service provider and a consumer would not be maintained at such an extent as at the NRA.

The Roaming Regulation deals with dispute resolution issues. Article 8 of the Roaming Regulation states:

“1. In the event of a dispute in connection with the obligations laid down in this Regulation between undertakings providing electronic communications networks or services in a Member State, the dispute resolution procedures laid down in Articles 20 and 21 of the Framework Directive shall apply.

2. In the event of an unresolved dispute involving a consumer or end-user and concerning an issue falling within the scope of this Regulation, the Member States shall ensure that the out-of court dispute resolution procedures laid down in Article 34 of the Universal Service Directive are available.”

Note: Resolution of Consumers and Roaming issues related disputes might be reviewed by any competent body assigned by the Member State.

The European legislator took appropriate measures to ensure NRAs in Member States have a competence to resolve disputes relevant to the current reality and clearly determined the types of disputes to which NRAs' competence applies.

In summary, it must be mentioned that in spite of some ambiguous issues that require clearing up, the Community legislation provides sufficient mechanisms for effective dispute resolution. It is reasonable that under the European principle of national autonomy of legal proceedings, it is for the Member States to clear up details related to procedural aspects of dispute resolution. Based on examples given above and supported by normative references in the European legislation, in spite of deregulation processes national regulatory authorities are provided with the significant powers to resolve disputes.

2.4 The Competence as the Proof of Best Expertise to Deal with Disputes

In spite of the wide considerations regarding the de-regulation tendency in telecommunication industry followed after mass liberalization of the market²² from the 90s the role of National Regulatory Authorities in sector regulation have not been diminished up to now. On the contrary, it's involvement in the processes has been increased along with the sharp progress, globalization and convergence of technologies with attendant uncertainties and aspirations of service/network providers to strengthen their economical positions in the market.

NRAs are designated to perform a significant role in telecom industry which is indicated directly through the tasks determined by the article 8 of the Framework Directive.²³ These tasks are:

- ***Promotion of competition in telecom sector;***
- ***Contribution to the development of the internal market;***
- ***Promotion of interests of the citizens of the EU.***

In addition, recent amendments to the Framework Directive that I will discuss later confirm that NRAs are considered as a cornerstone of effective application of Community rules in Member States.

There was a time when NRAs were mainly considered to be government policy implementers rather than policy-makers. But nowadays due to considerably increased discretion of NRAs the concept of “regulator” implies an institution not only in charge of

²² The liberalization of the European telecommunications markets initially served for the objective “...to abolish monopolies (exclusive rights) and special rights enjoyed by incumbent operators and to remove legal barriers to entry for new players.” See Supra n 19, p. 5

²³ Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services amended by Directive 2009/140/EC of the European Parliament and of the Council

rule implementation, but also entrusted with the power to set up rules. Though, I must mention that the latter can not obscure the initial and general task of regulators to implement the government policy. As a clear example of rule-making, decisions of NRAs may be brought which are of a mixed nature. In particular, these are decisions including obligatory requisites of decision and have an effect similar to legislation. For an illustration it would be appropriate to mention a decision of NRA on an interconnection agreement between operators when one of them is an operator with SMP. The decision certainly will have influence over the whole industry, because it goes beyond the issues the NRA addresses.²⁴ I would like to bring another example from my home country, Georgia. Georgian Telecommunications National Commission is entitled to pass by-laws on different regulatory issues like **Regulations on Provision of Electronic Communications Services and Consumers Rights Protection of March 17, 2006.**

The Framework Directive provides quite explicit references to the scope of NRAs' activity. Article 2 (g) states:

“national regulatory authority means the body or bodies charged by a Member State with any of the regulatory tasks assigned in this Directive and the Specific Directives;”

Under paragraph “1” of the same Article “Specific Directives” include Directive 2002/20/EC (Authorisation Directive), Directive 2002/19/EC (Access Directive), Directive 2002/22/EC (Universal Service Directive), Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) and Regulations (EC) No 717/2007 of the European Parliament and of the Council on roaming on public mobile telephone networks within the Community and amending Directive 2002/21/EC. If summing up briefly provisions given

²⁴ Supra n 19, p.54

in the Directives, core functions (but not exhaustive) of NRAs may be divided into several general groups:

- **Control on access to the market.** It implies involvement of NRAs in procedures of licensing and authorization procedures as well as in number and frequency management. Through licensing NRAs provide legal certainty for new entrants in markets which might be especially supportive when telecommunications regulations are not comprehensive. They also shape market either by limiting the number of operators or types of services they aim to provide or on the contrary, not. Due to full competition, there is no more need for individual licenses as it used to be before. NRAs are entitled to provide general authorisations to all service providers under Authorization Directive of 2002, but can subject them to individual conditions only in certain cases which I am not going to discuss here. Though, I must note that recital 72 of the Directive 2009/140/EC of 25 November, 2009 states:

“National regulatory authorities should be able to take effective action to monitor and secure compliance with the terms and conditions of the general authorisation or of rights of use, including the power to impose effective financial and administrative penalties in the event of breaches of those terms and conditions.”

On the contrary, there is a growing need for licensing as a tool to manage radio spectrum of telecommunications. Through spectrum licensing NRAs aim to preserve market limits because of spectrum scarcity but at the same time strive for opening new markets.²⁵

- **Control on behaviour of industry players – operators.** NRAs have quite a wide discretion in this respect and it mainly includes power to monitor compliance of operators with the competition law and sector-specific rules. Therefore, this is another example of NRAs’ oversight function. NRAs’ oversight function applies to practices prohibited by articles 81 and 82 of EC Treaty. In particular, these practices are: anti-competitive

²⁵ I. Walden “Telecommunications Law and Regulation” Oxford University Press, 2009, pp. 295-296

agreements and the abuse of dominance by an undertaking which has a dominant position in a market.²⁶ In certain cases national regulatory authorities may subject operators to price caps. NRAs' controlling powers might extend to requiring operators to set cost-oriented prices.²⁷

- **Market analysis.** NRAs identify relevant markets for analysis, assess development of markets, define undertakings with SMP and choose regulatory remedies which aims to eliminate any distortion of the competition. Market assessment obviously can be considered as one of the examples of NRAs' oversight function. It is closely related to control on access to the market and behaviour of industry players. Due to its importance I have decided to underline it separately.

- **Consumer protection.** The European Commission has noted in its 1999 review that *“[...] good quality services are more likely to be provided as a result of competition between suppliers rather than from regulation, and consumers may demand services of different quality at different prices. (at 4.5.5.)”*²⁸

Yet, the Commission admitted:

*“it is considered prudent to maintain some reserve powers for NRAs to take action in the event of market failure, particularly to deal with issues of end-to-end quality in a multi-network environment where no single operator has overall control.”*²⁹

As it is stated in the Progress Report of the European Commission on The Single European Electronic Communications Market (Report 15), consumers experience the lack of information on tariff plans and contractual conditions. Quite a few countries have introduced new legislation and regulation which aim to improve consumer interests'

²⁶ Supra №19, p. 399

²⁷ Access Directive, article 13(1)

²⁸ Supra n 25, p. 206

²⁹ Ibid, p. 206

protection at this point. More concerns have been raised around quality of services and projects tackling this issue have been launched by many National Regulatory Bodies.³⁰

Thus, in spite of development of competition consumer protection remains to be a current issue. It is a core component of EU policy and recent amendments in Universal Service Directive approve it by strengthening protection mechanisms and broadening NRAs' competence in this respect.

Universal Service. It is duty of NRAs to ensure that under requirements of universal service all citizens of the Union have access to telecommunications services of a certain quality for an affordable price. This issue is closely related to consumer protection. NRAs are involved in administration of funding schemes. The latter aims to compensate designated undertakings' losses resulted by provision of universal service.

- **Dispute settlement.** NRAs play a crucial role in the resolution of disputes between competing market players as well as between service providers and end-users. I will elaborate on this issue in the next sub-units.

The competence of NRAs is not limited solely to the regulation of transmission networks and services. It covers the content of services delivered over electronic communications networks using electronic communications services. The Framework Directive does not apply to the regulation of the content of services.³¹ But the directive 2009/136/EC of the European Parliament and of the Council amending the Universal Service Directive contains some content-related provisions. The most substantial provision applies to the “neutral” net which implies end-users’ “ability to access and distribute information and to run applications and services of their choice...”³² The latter must be

³⁰ The European Commission “Progress Report On The Single European Electronic Communications Market (15th Report), Brussels 25.5.2010, SEC(2010) 630 final, pp. 55-56.

³¹ The Framework Directive, recital 5

³² Directive 2009/136/EC of the European Parliament and of the Council amending Directive 2002/22/EC on universal service and users’ rights relating to electronic communications networks and services, Directive

promoted by National regulatory authorities. As for the regulation of broadcasting content, the content of television programs is regulated by Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities.

*Note: The competences reviewed above may be shared between several national regulatory authorities. It is for Member States to decide which bodies are national regulatory authorities and whether the tasks under the Framework Directive and Specific Directives are assigned to more than one authority.*³³

In summary, it should be noted that described competences of national regulatory authorities underline expertise which NRAs are expected to reveal and often do so during decision-making process. At the same time, they definitely assist NRAs to resolve disputes via well-qualified and well-reasoned decisions. Besides, the wide range of competences assists them to act independently which is the basis for an effective, impartial and fair dispute resolution.

2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulations (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws, Official Journal of the European Union, 18.12.2009

³³ Framework Directive, recital 37, article 2 (g), article 3(1) and article 4

3. Dispute Resolution procedures By Ofcom

3.1 The Purpose of Chapter 3

In order to clarify the role of national regulatory authorities in dispute resolution it is vital to review general traits of dispute resolution procedures provided by national regulators. As the discussion given in the previous chapter shows, Community legislation does not refer to procedural details and under the principle of national autonomy of legal proceedings it provides the Member States with the discretion to determine procedural rules on their own so that the requirements of the EU law are respected. Since, it is impossible to analyze each and every European country's national approaches on this subject in details in the frames of the presented work, the author has decided to concentrate on a certain EU Member State, particularly, United Kingdom and where it is relevant to bring examples from the Republic of Georgia for illustration and comparative analyzes.

The role of national regulatory authority in dispute resolution is determined by the frames of its powers to settle disputes and extent to which dispute settlement procedures provided by it are effective. Thus, the author will define the role of national regulatory authority in dispute settlement based on the review of dispute resolution procedures provided by Ofcom, the UK telecom regulator, assessment of its powers to settle disputes and efficiency of given procedures.

3.2 The Scope of Dispute Resolution Procedure

Ofcom is established under the Act of Office of Communications of 2003. The general procedural aspects of dispute resolution are outlined in the Communications Act of 2003 under which the types of disputes reviewed by Ofcom are:

- Network access disputes between communications providers;
- Network access disputes between communications provider and persons who make associated facilities available;

- Network access disputes between persons making associated facilities available;
- Disputes on access conditions;
- Disputes between communications providers that deal with rights or obligations determined in the part 2 of the Act.³⁴

The specific regulatory obligations are not handled through the dispute resolution procedures. They are tackled in the frames of initiative investigations and market reviews. The reason for that is inability of the regulator to address these issues in 4 months deadline required by the EU law. In particular, it should be noted, that disputes raised on the issues of fair and affective competition conditions laid upon operators in accordance with the Broadcasting Act are not covered by the dispute resolution powers of Ofcom.³⁵

Consumer issues related disputes are also not dealt through dispute resolution procedures by Ofcom unless they greatly involve public interest. Individual consumer complaints are reviewed by Otelo³⁶ and CICAS³⁷, adjudication schemes approved by Ofcom in case if complaint resolution mechanisms provided by service providers turn to be unsuccessful.³⁸

As for Georgia, any disputes between communications providers are referred to the Georgian National Communications Commission within its powers.³⁹ As it implies from the context of the Electronic Communications Law of Georgia powers of the regulator cover disputes raised from the failure of negotiations based on the mentioned law. Consumers' complaints including individual applications are also addressed by the national

³⁴ Section 185 of the Communications Act of 2003

³⁵ Guidelines for the handling of competition complaints, and complaints and disputes about breaches of conditions imposed under the EU Directives, July 2004, p. 7, <http://stakeholders.ofcom.org.uk/binaries/enforcement/competition-bulletins/other/guidelines.pdf>

³⁶ The telecommunications ombudsman, <http://www.otelo.org.uk/>

³⁷ The Communications & Internet Services Adjudication Scheme, <http://www.cisas.org.uk/>

³⁸ A report on Ofcom's approach to enforcement and recent activity, 12 May, 2009, pp. 11-13

³⁹ Electronic Communications Law of Georgia, article 11(3) (f)

telecom regulator. It is noteworthy that they have a choice to apply to the communications service provider, the regulator or the court.⁴⁰

When a communications provider applies to Ofcom to initiate dispute resolution procedure, so called inquiry stage sets in during which Ofcom reviews the merits of the application whether it meets its administrative priority criteria. Based on the latter the regulator makes a decision to accept the case and forward it to investigation phase or not. Submissions lacking a certain portion of the evidence will be declined. Thus, clear statements, comprehensive, exact information around the application and precise assessment of the claim matter considerably. Sometimes, at the initial stage Ofcom resolves the case informally through consultations which probably assists to avoid superfluous bureaucracy, save time and very likely to reach even agreement between the parties involved provided that the case is not too complicated.⁴¹

3.3 Transparency of the Dispute Resolution Procedure

Dispute resolution procedure conducted by Ofcom is characterized with the openness and transparency. Interactivity with the interested parties and the society is an important satellite of the entire procedure. Ofcom provides publication of the scope of the dispute so that any interested party can submit presentations and evidence. But this will not result in addition of participants to the list of the parties straightforwardly involved in the dispute.⁴² Ofcom publishes information about its investigations on the Competition Bulletin⁴³ It also updates the information regarding procedural issues which includes draft decision, changes in time-schedule, etc.⁴⁴ Whenever the issue is of a public concern, Ofcom

⁴⁰ Ibid, article 63 (2)

⁴¹ Supra 38, p. 14

⁴² M. Andenas, S. Zleptnig, Telecommunications Dispute Resolution: Procedure And Effectiveness, British Institute Of International And Comparative Law, Report, February, 2004, p. 238

⁴³ www.ofcom.org.uk/bulletins

⁴⁴ Supra 35, p. 14

consults not only with the parties involved but other stakeholders as well.⁴⁵ Under section 188 (8) of the Communications Act of 2003 Ofcom has a discretionary power to define the extent of accessibility of information to public. Particularly, it considers the matter based on the criteria of appropriateness. The abovementioned interactivity with the parties involved and other stakeholders assists Ofcom to pass a well-reasoned decision. Though, some scholars hold that the abundant participation of all stakeholders in decision-making process does not guarantee adoption of an efficient decision and it may even impact negatively the ability of the regulator to judge in a competent way.⁴⁶ The author thinks that such a risk can be eliminated and an optimum affect can be achieved due to the following factors:

- Power of Ofcom to determine the extent to which the information can be accessible to public (As a result it defines the extent to which the society can participate in decision-making);
- Availability of different, separate dispute settlement procedures determined for smaller groups as well as larger groups of the society according to the scale of concern;
- Ability of the regulator to make independent decisions;
- Ability of the regulator to collect necessary information and differentiate evidence that is essential for the relevant case from inessential one.

3.4 Terms of the Dispute Resolution Procedure

Ofcom is obliged to resolve dispute as soon as possible within 4 months time-limit unless there are certain exceptional circumstances. If Ofcom exceeds the deadline, it must publish reasons for such a delay. Timescales for resolution of disputes differ. They might be either based on statutory framework or determined by Ofcom on its own.⁴⁷ There is

⁴⁵ Ibid, p. 16

⁴⁶ Supra 42, p. 242

⁴⁷ Supra 38, p. 15

quite an important interconnection between timely submission of information by the participants of the dispute and adherence to the dispute timescale. Timely provision of clear, precise information serves for effective investigation. Thus, Ofcom often applies to its powers to collect the necessary information and is entitled to take enforcement measures against those communications providers that fail to submit requested information. Delays in the submission of information have a negative impact on above mentioned timescales.⁴⁸

The UK legislation does not define any penalties for exceeding time-limits. But, communications providers involved in the dispute can apply to the administrative court to oblige Ofcom to arrive to a decision.⁴⁹ Generally, under the Framework Directive non-adherence to 4 months deadline unambiguously would constitute the breach of the European law requirements. Neither Community law nor the Communications Act of the UK defines what exactly is implied under “exceptional circumstances” that justify excess of the terms. The author tends to think that delay in decision-making due to the collection of important information from the communications providers could serve for a justifying reason.

Time limits under the EU law seem to increase importance of all evidence submitted by the parties to the dispute as it is mentioned in Ofcom’s determination of January 25, 2007 on dispute between THUS and BT about payment terms for PPCs, IECs and IBCs. At the same time, in its decision the regulator recognizes that “Ofcom must (and does) make every effort to use the time available to gather what additional evidence it can sufficient to assist it in resolving the dispute.”⁵⁰

As to Georgia, the terms for decision-making by regulators are shorter than those determined by the European Community law. Georgian National Communications Commission resolves all types of disputes within one month unless it is prescribed

⁴⁸ Supra 35, p. 4

⁴⁹ Supra 42, p. 240

⁵⁰ Determination of Ofcom on dispute between THUS and BT about payment terms for PPCs, IECs and IBCs, January 25, 2007, p. 11, paragraph 4.6, http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw_916/

otherwise by law or applicable regulation.⁵¹ For instance, under General Administrative Code if the case is not related to the interests of a third party, it must be resolved within 15 days. In certain cases the regulator is entitled to extend the terms of decision-making, but overall terms should not exceed three month time-limit.⁵² Fast decision-making mechanisms along with free of charge dispute resolution procedures provided by Georgian regulator attract all stakeholders considerably.

One more issue which is closely related to the timescales of dispute resolution and impacts adherence to certain deadlines is Ofcom's power to determine information provided by communications providers as confidential. Under article 5(1) of the Framework Directive and accordingly, national legislation of the UK Ofcom has a broad authority to collect any information from undertakings. The information is considered confidential by Ofcom if it is required by a certain communications provider that has submitted it and Ofcom holds that publication of such information might harm commercial interests of the communications provider in question. The process of determination on whether the matter is confidential or not is quite time-consuming and it poses obstacles to adherence to the timescales.⁵³ Yet, in spite of the time restrictions due to the importance of business secrets' protection that is reflected in the Framework Directive,⁵⁴ the given information must be assessed thoroughly and treated carefully.

3.5 Enforcement Powers

European telecom directives do not mention anything about regulators' power to take interim measures. But under article 98 of the Communications Act, Ofcom is entitled to handle urgent cases which imply posing obligations on communications providers before the final decision of the dispute is adopted. The given function is a considerable mechanism

⁵¹ General Administrative Code of Georgia of 1999, article 100 (1)

www.irisprojects.umd.edu/georgia/Laws/English/code_admin_general.pdf

⁵² Ibid, article 100 (2) (3)

⁵³ Supra 42, pp. 244-245

⁵⁴ Framework Directive, article 5(1)

to safeguard competition.⁵⁵ What does constitute argent cases? A case is an urgent one when an infringement of law has caused or creates a risk of “ [...] (a) a serious threat to the safety of the public, to public health or to national security; (b)serious economic or operational problems for persons (other than the contravening provider) who are communications providers or persons who make associated facilities available; or (c)serious economic or operational problems for persons who make use of electronic communications networks, electronic communications services or associated facilities.”⁵⁶ Measures that are applied by Ofcom to communications providers having contravened a law might be:

- Obliging a communications provider to submit representation about notified matters;
- Obliging a communications provider to adhere to notified conditions;
- Rectifying effects of notified infringements.⁵⁷

During the resolution of the dispute Ofcom has quite wide competence. It is entitled to determine rights and obligations of the parties involved, terms and conditions of agreements between them, impose obligations on the parties to enter into a contract with conditions defined by Ofcom itself, require a party to the dispute to cover costs and expenses of the other party and/or Ofcom, etc.⁵⁸

Ability to enforce its decisions is crucial for the regulator. Otherwise, dispute resolution by NRA is deemed to be ineffective and will not achieve its goal to bring legal certainty and maintain order in the market. The European legislator has taken into consideration the given concern and has responded to it appropriately. Particularly, under the article 20 (1) national regulatory authority must issue a binding decision to resolve the dispute. Accordingly, non-abidance to decision of Ofcom definitely would constitute infringement of the UK law as well. Communications Act of 2003 provides for sanctions and penalties to impose on communications providers that have violated Ofcom’s

⁵⁵ A. Ottow, *Dispute Resolution Under New European Framework*, p. 14

⁵⁶ *Supra* 34, section 98 (1)

⁵⁷ *Supra* 34, section 94 (3)

⁵⁸ *Supra* 42, p. 247

regulations and requirements based on applicable law.⁵⁹ Ofcom often uses enforcement mechanisms such as financial penalty.⁶⁰

The binding nature of the regulator's decision and generally its wide discretion increases the significance and underlines the absolute necessity of the appeal procedures which serve for reviewing accuracy of the regulator's decisions and accountability of the decision-maker. Under the Competition law of the UK any person aggrieved by the decision of Ofcom may appeal to the Competition Appeal Tribunal. As usual, appealing to the CAT does not suspend the affect of the determination automatically, but the CAT may order otherwise. In such a case, the decision of Ofcom is stayed which poses obstacles to final resolution of disputes in a timely manner. That is why decision of the CAT to take interim measure like suspension of the decision of Ofcom is based on the risk of serious and irremediable damage or protection of the public interest which means it must be well-reasoned.⁶¹

In terms of enforcement of decision Georgia has faced serious problems with respect to communications provider established in Russian Federation. Though, the case is not related to the dispute between communications providers and is about an investigation initiated by the regulator itself, it has a correlation with the dispute resolution through the ability of the regulator to enforce its decisions. It confirms that in case of international dispute Georgian regulator could face difficulties in enforcement of decisions as well. Georgian National Communications Commission repeatedly fined Russian mobile operator "Megafon" for the activity in the field of electronic communications without a license and authorization on the territory of Georgia.⁶² The operator did not abide the decision and the regulator was unable to enforce determination. Meanwhile, Georgian mobile operators

⁵⁹ <http://www.ofcom.org.uk/about/policies-and-guidelines/penalty-guidelines/>

⁶⁰ <http://www.ofcom.org.uk/about/annual-reports-and-plans/financial-penalties/>

⁶¹ Ibid, pp. 252-260

⁶² №320/18; №526/18; №427/18 Decisions of the Georgian National Communications Commission, http://www.gncc.ge/index.php?info_legal_form=&info_legal_form2=&search_string_legal=%E1%83%9B%E1%83%94%E1%83%92%E1%83%90%E1%83%A4%E1%83%9D%E1%83%9C%E1%83%98&search_string_legal_full=&info_date_from=&info_date_to=&sec_id=7070&lang_id=GEO&Submit=%E1%83%AB%E1%83%98%E1%83%94%E1%83%91%E1%83%90

were subjected to serious economic damages and “Megafon” keeps on violating Georgian legislation by providing electronic communications services on the territory of Georgia (Abkhazia and South Osetia) which is approved by the information published at the official web-site of “Megafon” itself.⁶³ Georgia is a member of numerous international telecommunications organizations but none of them including ITU has a competence to resolve such a case via any enforcing mechanisms. Absence of any agreement between the Russian Federation and Georgia on application of International Arbitration excludes deployment of this mechanism. In addition, absence of diplomatic affairs between the states complicates the given situation even more.

The author tends to think that in cases where the states or one of them do not express its will to collaborate in order to achieve an agreement, there must be certain international dispute resolution mechanisms applied with a binding affect for both parties. It is hard to imagine above mentioned case to happen in the EU. But if such precedent happened somehow at present, it would be effectively resolved due to the active involvement of the Community institutions with the enforcing mechanisms.

3.6 Assessment of Dispute Resolution Procedure Provided by Ofcom

Thus, the author has reviewed dispute resolution procedures provided by Ofcom, British telecom regulator and in conclusion of this chapter will try to determine whether given model of dispute resolution and the powers delivered to Ofcom in the frames of this procedure confirm the special role of the regulator in settlement of disputes. The analysis will be done based on so-called Best Practice Model developed and recommended by the British Institute of International and Comparative Law. Some of the general principles of given Best Practice Model directly correlated to the issues of dispute resolution are:

- 1. “Reduce legal uncertainty through a set of clear and coherent rules that promote competition and consumer welfare;”**

⁶³ <http://english.corp.megafon.ru/about/>

2. **“Provide regulators with the means and powers necessary to exercise their tasks in accordance with the policy objectives;”**
 3. **“Ensure that disputes are resolved within the shortest possible period of time and in any case, within the statutory limits;”**
 4. **“Design clear rules on confidentiality of business secrets;”⁶⁴**
-
1. **“Reduce legal uncertainty through a set of clear and coherent rules that promote competition and consumer welfare”**

What does this principle imply and how must it be achieved? It is not correlated solely to the issue of dispute resolution, but refers generally to the whole concept of regulation by national regulatory authorities. Under given principle the regulators are expected to avoid using ad hoc approaches (unless it is not possible) to regulation through the establishment of transparent and unambiguous rules. In order to meet the given principle the regulators should issue guidelines, make its decisions (including draft decisions) and plans accessible, assist consultation that would involve third parties as well. Thus, due to these measures market participants would be protected from legal uncertainty and the regulator would issue an affective, high quality decision.⁶⁵

The author finds that Ofcom mostly meets the above mentioned principle of the Best Practice Model. It is proved by the interactivity between Ofcom, parties involved in dispute and generally the public. The principle is achieved by considerable informational assistance of Ofcom provided to different stakeholders via consultations, publications of comprehensive guidelines at its official web-site. The latter is extremely important if the

⁶⁴ Supra 42, pp. 269-275

⁶⁵ Ibid, p. 269

rules determined by legislation like the Communications Act raises questions and are ambiguous for market participants. It should be noted that Communications Act itself in certain cases requires Ofcom to prepare and publish guidelines concerning regulatory issues.⁶⁶ Besides, interactivity between the regulator and the public assists transparent process of decision-making and finally serves for well-reasoned determination.

2. “Provide regulators with the means and powers necessary to exercise their tasks in accordance with the policy objectives”

The frames of the regulator’s competence considerably determine the efficiency of its regulatory activity. If powers of the regulator are significantly limited, its role in dispute resolution is minor. The latter circumstance can pose obstacles to regulators in achievements of their goals under Article 8 of the Framework Directive. In particular, it may disturb promotion of competition, development of the internal market and promotion of interests of the citizens of the EU. Powers of the regulator might be considered sufficient especially when they have ability to investigate and intervene not only due to the request of the parties to the dispute, but on their own initiative as well. This matter particularly applies to access and interconnection disputes. Sufficiency of the regulatory powers also depends on ability to impose effective sanctions on infringers.⁶⁷

Ofcom has quite broad powers during dispute resolution procedures. It has a wide range of remedies applicable to infringers. Ofcom may issue notifications of contravention which might be followed by enforcement notifications and/or financial penalties. It also issues infringement decisions that constitute a breach of the competition law. The latter may be attended with the directions that bring the infringement to an end. The most noteworthy is that in case of regulatory breaches Ofcom may apply to the court for an injunction or order to compel compliance.⁶⁸

⁶⁶ Supra 34, section 392

⁶⁷ Supra 42, pp. 271-273

⁶⁸ Supra 38, p. 15

Broad powers of Ofcom are confirmed by its ability to collect information from communications providers and determine their confidentiality. The wide competence of Ofcom is proved by the regulator's ability to take binding interim measures before issuing the final decision on the dispute and its ability to investigate and intervene on its initiative.⁶⁹

3. "Ensure that disputes are resolved within the shortest possible period of time and in any case, within the statutory limits"

The regulation of telecom industry is effective when decisions of national regulatory authorities are taken in a timely manner. Fast decision-making process is significant for the industry which is constantly subjected to sharp changes and has a significant economic impact on it. Adherence to certain time frames can be achieved only if NRAs have strict procedural rules and timescales, adequate powers and recourses.⁷⁰

The majority of stakeholders surveyed by National Audit Office of the UK hold that Ofcom performs its consultations well, but 44 per cent of them state that Ofcom does not act in a timely manner. According to the statement of Ofcom obstacles are posed to the speed of its actions due to "the incentives on regulated bodies to appeal its decisions. Ofcom considers evidence submitted by regulated companies several months after the formal close of a consultation, as it feels not to do so could itself be grounds for appeal."⁷¹ Hence, during investigations by NRAs operators must be deprived of any opportunities to apply to tactics of delaying dispute resolution procedures. The matter is referred to the

⁶⁹ See own-initiative decision of Ofcom at http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_905/;
http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/cases-in-compliance/cw_01043/;
http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/cases-in-compliance/cw_01043/

⁷⁰ Supra 38, pp. 273-274

⁷¹ Report By The Comptroller And Auditor General, National Audit Office, HC 490, Session 2010-2011, November 2010, p. 6

cases when operators appeal decisions based on available information after having deliberately postponed submission of required information themselves.⁷²

The requirement of 4 months time limit under the Framework Directive is implemented directly in the Communications Act of the UK which provides Ofcom with sufficient powers to force operators to submit information unless the established deadline has expired. Though, it should be noted that enforcement procedures might also be time-consuming.

4. “Design clear rules on confidentiality of business secrets”

Business secrets submitted by communications providers during dispute resolution must be treated and protected so that they are not accessible to any stakeholder but the regulator. Otherwise, it may impede competition between operators. At the same time, communications providers should not use the right to have business secrets protected as an obstacle to the effective regulatory enforcement including dispute resolution procedures. Thus, a balance is required to be achieved between two important values – business secrets and transparency of decision-making process.⁷³

The author thinks that Ofcom has sufficient powers to maintain above mentioned balance due to its discretion that has been discussed above. As for the clarity and precision of the rules on business secrets, it should be noted that section 26 (4),(5),(6) of the Communications Act unambiguously determines provisions under which information is considered confidential.

⁷² Supra 38, p. 274

⁷³ Ibid, p. 276

4. Independence of National Regulatory Authorities

4.1. The Purpose of Chapter 4

Independence is a vital pre-condition an NRA to be not only an effective dispute resolution provider, but generally to be an effective regulator of telecommunications industry. The latter has been unambiguously confirmed by the EU Commission in its 14th report of 2008 on the Single European Electronic Communications Market.

The issue of regulatory independence has been repeatedly raised in annual reports of the Commission on implementation of the telecoms regulatory framework in the Member States and has been responded by the infringement procedures launched against quite a few Member States and considerable amendments to the EU legislation.⁷⁴ Hence, the author is going to elaborate on this issue in a broader perspective, because the lack of independence is equal to the non-existence of effective dispute-resolution mechanism at all.

The author aims to demonstrate the importance of independence for the regulators and industry stakeholders and underline the ways to achieve it.

4.2 Normative References On Independence in EU Law

Requirement of independence is distinctly represented in European Telecommunications legislation. Article 3.2 of the Framework Directive positively emphasizes the necessity for national regulatory authorities to be independent. Particularly, to achieve such independence Member States must ensure:

- National regulatory authorities to be legally distinct from and functionally independent of all organizations providing electronic communications networks, equipment or services;

⁷⁴ Reports 13, 14, 15 on the Implementation of the Telecommunications Regulatory Package, http://ec.europa.eu/information_society/policy/ecomms/library/communications_reports/index_en.htm

- Effective structural separation of the regulatory function from activities associated with ownership or control of undertakings providing electronic communications networks and/or services by states.

The value of independence has been further re-enforced by the European Parliament in its decision on new telecoms rules this year. Current legislative novelties aim to strengthen national regulatory authorities' independence by eliminating political intervention in their activities. Moreover, the very fact of the establishment of the body of European Regulators (BEREC) implies to support the explicit necessity to safeguard National Regulatory Authorities against unlawful external intervention which might hinder NRAs in carrying out their daily functions independently and adequately.⁷⁵ For this time special stress has been done on political independence as it is shown in recital 13 of the Directive 2009/140/EU:

“...Express provision should be made in national law to ensure that, in the exercise of its tasks, a national regulatory authority responsible for ex-ante market regulation or for resolution of disputes between undertakings is protected against external intervention or political pressure liable to jeopardise its independent assessment of matters coming before it... “

Referring back to the provisions in article 3.2 of the Framework Directive, it is noteworthy to raise a question whether they are clear enough. They do not give any explicit guidance on how the Member States must implement given requirements. There is no exact standard implied on how “functional independence” of the regulator and “effective structural separation of the regulatory function” must be achieved in practice. It is quite obvious that they are designed to reduce the possibility of conflict of interests that a regulator might face while performing regulatory and operational functions. But the question is: How? The absence of any indications around this issue in the article is apparently caused by the diversity of legislations of the Member states and the intention of the EU legislators to let these States decide on their own, considering all the specificities in their certain practices. Another question related to this issue is: At what extent could the obligation on providing “functional independence” and “effective structural separation of the regulatory function” be considered as strict? The recital

⁷⁵ Press Release ERG (09) 56, 9 December, 2009

11 of the Framework Directive states that “this requirement of independence is without prejudice to the institutional autonomy and constitutional obligations of the Member States or to the principle of neutrality with regard to the ... property ownership...” Hence, the abovementioned obligation has explicit limits and does not require the Member States to go against their Constitutional foundations.⁷⁶

4.3 The Value of Independence

Over the last 20 years there is a certain tendency of establishing regulators separate from other governmental bodies. For instance, there are about 125 countries worldwide having established regulatory authorities independent from ministerial control.⁷⁷ Such a preference for independent regulators implies that more and more states are acknowledging benefits that independent regulation can bring along. Yet, as the practice shows, in some countries governments are involved in industry regulation directly under their national legislation (for instance, through the Ministries) and in some states having separate regulators, they can not help the temptation and still tend to keep their influence over the regulators through implementation of the legislation that diminishes the scope of independence or violating national legislation which underpins formally requirement of independence. At least, this was an issue in EU Member States in 2009 and was followed by the appropriate measures launched by the Commission through the legislative amendments and infringement procedures.

Why independence of regulators is so essential? Why governments delegate power to independent authorities? At what extent independence of these authorities is a current issue and how successful they have been in establishing credibility towards all the players of telecommunications industry? What standards are required to determine the independence of the regulator? What does “independence” imply at all?

⁷⁶ Stevens D. and Valcke P. NRAs (and NCAs?): Cornerstones for the Application of the New Electronic Communications Regulatory Framework New requirements, tasks, instruments and cooperation procedures, *Communications & Strategies*, no. 50, 2nd quarter, pp. 164-167.

⁷⁷ InfoDev/ITU ICT Regulatory Toolkit, <http://www.ictregulationtoolkit.org/en/Section.3107.html>

Independent regulatory institutions are considered to be capable to ensure non-discriminatory treatment of all stakeholders in the liberalized telecommunications industry and thus, stimulate confidence of all players involved in regulators. An independent regulation is related to the growth of the market. It fosters effective competition by providing impartial and objective decisions.⁷⁸ This factor ultimately affects the level of investment, introduction of new services and therefore, the quality of services itself in the best possible way.

The question here could be whether independence of the regulators should be considered the only effective way to achieve supportive environment in telecommunications industry with all the relevant consequences mentioned above. According to Jon Stern, an argument in favour of independent regulation that affects the attraction of private investments applies essentially to the economies with slow growth being in need for industry investment. Such countries like Czech Republic, China, Indonesia and other (especially Asian) countries evidence that in the absence of an independent decision-making regulator it is quite possible to attract extensive investment into different utilities due to such factors like effective economic management, low indicator of international indebtedness, generally rapid growth of economy and good market expectations for investors.⁷⁹ However, Stern finds independence of regulators favourable, “because it would reduce the cost of capital and thereby, in these capital-intensive industries, reduce the costs of utility services to industrial and household users alike.”⁸⁰

Definitely, independent regulation is not the only way to achieve private investment in telecommunication industry, but it is essential and should not be underestimated. Yet, practice shows that the attracting of investors in telecommunication industry considerably depends upon a regulatory environment. Under observations of the UN Task Force on Financing ICT “The introduction and strengthening of independent, neutral sector regulation has helped to reinforce investor confidence and market performance, while enhancing consumer benefits.”⁸¹

⁷⁸ Queck R. The future of National Regulatory Authorities, Camford publishing LTD, 2000, p. 265.

⁷⁹ Stern J. What does make an independent regulator independent? Business Strategy Review, 1997, Volume 8 Number 2, p. 72

⁸⁰ Ibid, p. 73

⁸¹ The Report of the Task Force on Financial Mechanisms for ICT for Development, 2004, P. 3

The regulator strongly influenced by the government or a regulated service provider company may bring about “Regulatory capture” in industry, which was the very failure of telecom regulation in previous years.⁸² Concerns around this issue and the acknowledgment of the need of establishing a regulator independent from political interference are explicitly presented in EU legislation as the author has cited above.

Telecommunication industry is very profitable business. In 2009 when different industries faced serious economic crisis, telecom sector also experienced significant economic downturn. Yet, telecommunications market, particularly, fixed and mobile voice has revealed comparative firmness and up to now is challenging growth. Under the report of European Commission telecom sector is expected to return to “positive growth rates in 2010/2011 driven by the recovery of GDP and increased consumer spending.”⁸³ It is no surprise that there might be some attempts from market players to influence regulatory authorities’ decisions in favour of their economic interests. In this context concerns of legislators are fairly reflected in the Framework Directive obliging member states to provide functional independence of regulators from market players. Importance and value of the independent regulation increase particularly when regulated operators are under state ownership. Even mere existence of completely or partly state-owned operators can threaten the essence of regulatory independence. There are quite a few countries where some operators are still owned by the Government. State ownership can strengthen “regulatory opportunism” especially when the government changes constantly its short-term political purposes. In terms of state ownership under government’s constraint regulator can use operator’s facilities for political purposes rather than for increasing its profit. Depending what is political stand of any government (whether it is oriented primarily either on firm’s or consumers’ interests), the later might influence regulatory reforms in different ways. Government’s discretion may diminish the regulator’s credibility and its commitments particularly under state ownership. Whilst, under private ownership the regulators ability to make commitments to regulatory policy is

⁸² Melody W. H. Comment on the meaning and importance of “independence” in telecom reform, *Telecommunications Policy* Vol 21, No 3, 1997, p. 195

⁸³ European Commission, Progress Report on the Single European Electronic Communications Market (15 Report) Brussels, 25.5.2010, Sec (2010) 630 final, p. 4

enhanced. But this factor is correlated with the higher indicator of independence of regulators when ownership of regulated firm is not in the hands of the government.⁸⁴

During the policy-making process by political institutions, separation of powers among the executive, legislative and judicial bodies and thus, keeping a balance in powers' division plays a crucial role in establishing and strengthening democratic ruling in states. Delegation of powers to regulators is a less visible part of the pyramid of powers' division.

For several decades governments tend to delegate their powers to independent regulatory authorities. What is the motivation behind it? Often when the government directly or indirectly controls regulated operators, potential conflict of interests may show up. Thus, main reason for authority delegation is an attempt to limit this conflict.

Another motivation which may determine the government's decision to delegate authority to an agency might be political uncertainty and an attempt to keep strong political positions for a longer period of time. Long-term political purposes usually are not popular among electorate and do not enhance government's potential to win elections. Besides, affecting regulators' credibility and efficiency, delegation aims to relieve politicians from being criticized for unpopular decisions in policy-making process.⁸⁵ Hence, delegation of authorities to regulators serves to limit Government's failure. In this respect regulators are considered as scapegoats.

The role of independent regulators in law-making process can not be underrated. They are capable to develop and carry out the new rules and influence the course of policy-making in terms of their competence. Regulations issued by such regulators are meant to be consistent against unpredictable political changes. In order to avoid discreditation and politicization of the regulatory process regulators need to be insulated from political interference, which does not imply that regulators should be completely independent. It is not reasonable as well. "[...] A

⁸⁴ Cambini C. Rondi L. Regulatory Independence and Political Interference: Evidence from EU Mixed-Ownership Utilities' Investment and Debt, 2010, pp. 2-5

⁸⁵ Naert F. and Defloor B. Credibility and Independence in Belgian Competition and Regulatory Policies, 2006, pp. 4-8

balance is needed to ensure that the regulator is both independent and responsive to the broad policies of the government.”⁸⁶

It is quite a challenge to form a regulatory authority insulated from political intervention and at the same time to provide its accountability. The question is how to achieve it? To clarify this issue at least partially, the author would like to relate to indicators that determine the presence of regulators’ independence. But first of all, it is noteworthy to underline what is implied under the notion of independence in this respect.

4.4 The Concept of Independence and Its Traits

4.4.1 The Notion of Independence

Regulatory independence implies the ability of regulatory authority to determine its own objectives and interests, to transform these objectives and interests into actions resisting external pressure. It applies to those regulators that are governed by laws and not government decrees. The very statutes are basic sources of regulator’s legitimacy which forms the regulator’ independence and at the same time restricts it. Without legitimacy, the regulator can lose features of independence, credibility and impartiality in public eye. The scope of the regulator’s authority is also one of the important traits of independence. For instance, the authority of the regulatory body to issue wireline licenses when frequency spectrum is limited, indicates the independence of the regulator.⁸⁷ The notion of regulatory independence involves arm’s-length relationship with all stakeholders of utility industry and preserving autonomy while dealing with government.⁸⁸ One more important element of regulatory independence is

⁸⁶ Supra n 74

⁸⁷ Wu I. Traits of an Independent Communications Regulator: a Search for Indicators, Federal Communications Commission, International Bureau, 2004

⁸⁸ Jamison M.A. Survival Guide for the Independent Regulator, Public Utility Research Center, University of Florida, 2004, pp. 1-2

review of regulator's decisions by the judiciary body rather than governmental authorities or parliament. Otherwise it is impossible to achieve regulatory independence.⁸⁹

Regulatory independence should not be considered as “[...] independence from governmental policy, or usurping the power to make policy [...]” but it is related to such an independence in the frames of which it is possible to carry out policy without external pressure from politicians or operators.⁹⁰

4.4.2 Types of Organizational Structures of National Regulatory Authorities

Structural independence of regulators enhances their efficiency. Organizational structures indicate the level of independence and the way they are designed increases or reduces the possibility of political or industry capture. There is a wide range of different institutional options how to structure regulatory authorities that have been followed by various countries worldwide. I will shortly discuss most wide spread forms of regulators.

Federal Communications Commission (FCC) in the USA is an example of **independent, autonomous, quasi-judicial regulatory body**. The scope of its authority is very broad and it works similar to a court of law. It consists of 5 Commissioners. They are nominated by the President, but approved by the Senate. The primal source of Commission's budget is license fees. It is accountable only to the Congress and its decisions can be overturned solely by the Court. This model of the regulator has all standards to be considered independent; yet, the practice showed that even FCC was subjected to unlawful intervention from the Government.

Another wide-spread model is **an independent, semi-autonomous regulator or a regulatory body outside the Ministry, which is headed by an official**. An explicit example of it is Ofcom, British national regulatory body. The authority to Ofcom is delegated by the Ministry, the head of the regulator is appointed by the Secretaries of State for the Department for Culture, Media and Sport and for the Department of Trade and Industry. Certain

⁸⁹ Jamison M.A Is there a need for the internationalization of regulation? Network Industries Quarterly, vol. 11, no 2, 2009, p. 15

⁹⁰ Supra n 82, p. 197

regulatory issues were resolved by the Department of Trade and Industry (which takes into consideration the regulator's views). Decisions of the head of Ofcom can be overturned not only by the Court, but by the Appeal Tribunals of the Competition Commission. However, Ofcom that is accountable to a legislative body through above mentioned secretaries of States, has broad powers and a reputation of substantially independent regulator from political institutions.⁹¹

The third model is a **separate national regulatory authority that is an integrate part of the Ministry**. L' Autorité de Régulation des Télécommunications, (ART) in France represented such a model. General director of the regulatory institution had discretionary powers over most regulatory issues except licenses, which were issued by the Ministry. The independence of such a regulator within the Ministry was ambiguous. Within such conditions the regulator might not avoid political capture and pressure from the Ministry. Yet, although there was not a big difference between the regulator and governmental departments, it had succeeded in France and Sweden as well. At present Autorité de régulation des communications électroniques et des postes (ARCEP) fulfils functions of the national regulatory authority in France which unlike its predecessor is entitled to issue licences. The latter circumstance points at the expansion of its powers. Though, some actions of ARCEP are partly subject to the approval by the Minister of Electronic Communications.⁹²

A policymaker government ministry is another model of regulatory body. Such a model can be found in Japan which is the Ministry of Posts and Telecommunications (MPT). Regulatory power is delegated to a ministerial department. But statutory responsibilities belong to a Minister. The degree of independence of this model is questionable and probability of political pressure is very high.

The fifth model excludes presence of National regulatory bodies at all. But it does not mean that there is no regulation of relevant industries within such a model. For instance, in New Zealand the courts and the Commission of Commerce operate as regulators.

Such a mechanism does not seem to be effective; it is time-consuming and brings along quite an inconvenience for all the stakeholders of the industry. In addition, dominant service

⁹¹ <http://www.ofcom.org.uk/about/how-ofcom-is-run/ofcom-board-2/members-code-of-conduct/>

⁹² <http://www.arcep.fr/index.php?id=12&L=1>

provider company of the country took the role of the regulator at some extent, establishing its own rules of game to other players.⁹³

As the current practice and the history of the regulator's activity shows there is no absolutely optimal model of structural design of regulators which would exclude threats to regulatory independence completely. Yet, the regulator that seems to be mostly close to the optimal model is Federal Communications Commission of the USA. The structural design of regulators itself does not automatically guarantee success in achieving appropriate degree of independence. In the process of determining the structure of the regulator, different factors matter a lot. These are: political environment, constitutional safeguards, specifics of existing administrative procedures, legal requirements, and what is mostly important, clear assessment of the needs and objectives of the state.

In EU member states have introduced different types of regulators which vary by the level of separation from the Government. Though, there is a certain preference for structural separation from the Ministries directed to enhance the regulatory independence. According to the EU law structural separation from the Government is not an obligatory requisite for independence at all. If there is any requirement for structural separation, it is directly related solely to separation from the industry. Recital 13 of the Directive 2009/140/EU focuses on the necessity to establish safeguards against political pressure in national law of each member states, but it does not limit states in the ways to achieve this objective. Whether it is going to be at the expense of structural separation from the Government or not is up to the Member states. Thus, as a result, we are facing such a divergence of regulators within the EU.

4.4.3 Appointment of the Head of National Regulatory Authority

Appointment of the head of the regulator is one of those issues that determine the degree of regulatory independence considerably. The more branches of the government are

⁹³ Spirelli C. Regulating the regulators? An assessment of Institutional Structures and Procedural Rules Of National Regulatory Authorities, *International Journal of Communications Law and Policy*, Issue 8, Winter 2003/2004, pp 22-27

involved in appointment process, the more the scale of independence will increase. Participation of the single governmental branch in this process reduces vastly the possibility to maintain independence. But if the leader of the regulatory authority is selected by various branches of the government, it must be arranged in such a way that none of them has excessive sway over the regulator, otherwise it is doomed to be not effective. But there is an opinion that when power is divided between executive and legislative authorities, it is hard to achieve agreement on policy matters.⁹⁴ Similarly, this could be an issue with appointment process in which all branches of Government are equally involved. Countries worldwide have different approaches to the process of appointment. Turkey is an interesting example in this respect. It represents a model under which members of collegial regulatory body are selected by different stakeholders of telecommunications industry, particularly, Ministry of Industry and Commerce, Turkish Union of Chambers and Commodity Exchanges and operators having not less than 5 per cent of market share.⁹⁵ From one point of view such an involvement of different stakeholders seems to be effective. But it might not work that good if one of the operator is state-owned, because as a result, the Ministry's choice could be influenced by interests of industry. And the Union of Chambers and Commodity Exchanges represents private sector, entrepreneurs. Another noteworthy example is Republic of Georgia, where members of collegial regulatory authority are selected and appointed with the participation of both, the President and the Parliament. Participation of more than one governmental branch is unambiguously represented here. Yet, according to the report of 2009 of Freedom House on Georgia "Despite a rule that allowed the parliamentary opposition to nominate a member to the Georgian National Communications Commission (GNCC), the panel remained subject to government influence."⁹⁶ What could be the reason of such an assessment? Let's have a closer look at it. Under article 9 of Georgian law on broadcasting candidates for the membership of the regulator are nominated by parliamentary majority and those being outside the majority as well. The President of the state selects candidates from the list formed by the parliament and

⁹⁴ Supra n 84, p. 7

⁹⁵ Module 6. Legal and Institutional Framework, <http://www.ictregulationtoolkit.org/en/Section.1254.htm>, pp 110-111

⁹⁶ Freedom Of The Press - Georgia (2009), Freedom House, http://www.freedomhouse.org/inc/content/pubs/pfs/inc_country_detail.cfm?country=7612&year=2009&pf

submits selected candidates to the legislature for approval. The legislature holds voting on each candidate and submits selected candidates to the President for the final appointment. The head of the regulator is selected by the President from the list of appointed Commissioners. The author tends to think that it would be more appropriate a final word on appointment (dismissal as well) of the head of the regulator to belong to the Legislature rather than the President. It would maintain the balance between political powers and diminish potential excessive influence of the President over the regulator. Though, achieving the balance would be hard, since, under current Georgian Constitution the President is entitled to dissolve the Parliament in certain cases determined by the Constitution.⁹⁷ Fortunately, at the very moment of my research there are some amendments drafted which hopefully could change the current picture.

4.4.4 Terms of Office and Dismissal Rules

Sometimes the regulator has to pass so called unpopular decisions which are taken by the public with hostility or decisions that are not at the pleasure of the government. In this respect the way in which the **terms of office and dismissal rules** of the regulator's officials are designed, matters a lot. It determines the degree to which the regulatory independence is sustainable. Rules on these issues must be extremely clear to avoid misuse of them by the government. Besides, when there are fixed terms, it is less likely that changes in government will affect tenure of the head (or members) of the regulator somehow. In addition, terms of office can provide certain feeling of security to the regulator's officials and encourages them to pass decisions contrary to the will of the government.

Special focus has been done on dismissal of the head of the national regulatory authority in recent amendments to the Framework Directive. Under recital 13 of the Directive 2009/140/EU:

“[...] rules should be laid down at the outset regarding the grounds for the dismissal of the head of the national regulatory authority in order to remove any reasonable doubt as to the neutrality of that body and its imperviousness to external factors. [...]”

⁹⁷ Georgian Constitution of 1995 with the status by July, 2010, article 73.1, subparagraph “P”

Discretion to specify the grounds for removal is left to the member states of EU. Mostly the grounds of removal are related to failure to perform assigned duties duly and conflict of interests. The harder it is to remove a regulatory authority officials, it is more likely them to be independent. But the starting point is to have clear rules on removal determined initially to avoid arbitrary actions of the Government against the regulator. This provision reflects concerns of EU legislators on recently revealed frequent real threats to the independence of regulators and is designed to restrict national governments from having ambiguous rules on conditions of removal and having very broad discretion to dismiss the head of the regulatory body for inappropriate reason. The harder it is to remove a regulatory authority officials, it is more likely them to be independent. In many countries like USA, Slovenia and others, there have been cases of dismissal from office just for being too frank and expressive or too active and responsive to political processes. The regulators have been fired for unpopular decisions regarding price increase, though such decisions were not only in contravention of law but required by law. Thus, the regulators' lawful aspiration for independent decision-making sometimes might be perceived by different stakeholders as a serious threat to their economic or political interests and finally it might turn into quite a dangerous activity for the regulators themselves. In such a situation formally determined rules of dismissal are considerably valuable to maintain guarantees for independence. But they do not provide a solution for any case. The leadership skills of the regulator matter a lot as well. Only the regulator with expressive leadership skills can manage to be independent. What do they imply? The real leader never avoids confrontations, faces current problems and tackles them through reviewing traditions, ideas, values that are considered dear by many. Above all, the leader forces others to do so. Leadership implies the abilities to see what is going on around, determine other's motives, foresee their actions. Understanding and admitting one's strong and weak sides also is relevant. Ability to adapt to different situations and act according to current opportunities is of a vital importance too.⁹⁸

4.4.5 Financial Independence and Accountability

⁹⁸ Jamison M.A. Leadership and the Independent Regulator, Public Utility Research Center, University of Florida, pp. 1-2 http://warrington.ufl.edu/purc/docs/paper_LeadershipIndependentRegulator.pdf

The author is going to discuss briefly one more significant indicator of independence in this chapter and that is **financial independence** of regulators. The source of the regulatory body's funding and budgeting processes have a direct impact on its autonomy and efficiency of its activity. There are two general ways widespread among states to fund a regulator's budget. First one implies the government's budget as a source of funding. The other one involves the cases when regulators form their budget though fees from the industry. Allocation of funding from government's budget allows the latter to bring greater influence over the regulation. As a result, the regulator tends to depend on government's good will and the degree of devotion to the industry. Consequently, even though the regulator might have an opportunity to pass decisions independently, it is doomed to be limited by the frames of the government's budget which may not be enough to meet the regulatory needs. In case of solely non-governmental funding sources the regulator determines the budget itself and acts according to its needs. Thus, it gains more regulatory certainty and has more independence. At a bit lesser extent the same can be stated regarding the multiple funding sources, but it depends on the proportion of government budget's involvement in funding in comparison to other resources.⁹⁹ Though the Directive 2009/140/EC does not mention funding recourses at all, in the light of independence it implies the importance of separate budget of the regulator, which is obviously reflected in recital 13 and article 1, paragraph 3), subparagraph (b).

In this chapter the author has discussed significant traits of regulatory independence, although they do not present an exhaustive list. There are some other factors that may have an influence on independence of regulators. They are: Conflict of interests, gifts, post-employment, appropriate qualification of the staff, remuneration. But the author is not going to elaborate on them.

After all, does the independent regulator imply limitless freedom of actions? Definitely not. Freedom is always related to responsibility, otherwise it might become dangerous.

⁹⁹ Supra n 84, pp. 91-92

Considerable share of danger might fall on consumers' interests. It is the case when electronic communications service providers manage to have a direct impact on the regulator and benefit from it. The latter might be followed by discriminative treatment of service providers as well and competition distortion in telecom industry. What can assist to bring a partial solution here? Accountability that is achieved through the supervision of lawfulness of regulators' activity, seems to do so. Regulators often are supervised by the governmental bodies through the annual reporting to them. Accountability to the public is of a vital importance as well. It is practiced via allowing the public to participate in consultations before passing a decision and providing access to decisions of regulators. Review by courts is a significant tool to supervise regulators activity.

4.5 NRAs and EU Commission: Interaction or Intervention?

The author would like to focus on interaction between NRAs and the European Commission in the context of independence. **Does the EU Commission intervene roughly into the activities of NRAs or the Framework Directive provide sufficient legal guarantees for NRAs to keep independence?** This issue has been disputed by many. To clear it up I will discuss the Commission's authority under the amended Framework Directive which considerably increases its power to influence NRA's decisions. If before the adoption of the Better Regulation Directive, the Commission could withdraw a draft measure proposed by NRA concerning market definition and designation of SMP operators, due to the amended article 19 (1) of the Framework Directive, it may pass a binding decision on the harmonized application of European regulatory framework. The Commission's binding decision concerns not only issues on numbering and access to 112 emergency services, but also addresses *"[...] the inconsistent implementation of general regulatory approaches by national regulatory authorities on the regulation of electronic communication markets in the application of Articles 15 and 16, where it creates a barrier to the internal market [...]."* The question here is how far does the scope of this article go? Does it cover application of remedies as well under article 7a of the Framework Directive?

Article 7a of the Framework Directive is obviously not included in the scope of Article 19 and the Commission has no power to withdraw a draft measure of NRA on this matter. Under recital 58 of the Framework Directive decisions of the Commission should be limited to ***“[...] regulatory principles, approaches and methodologies. For the avoidance of doubt, it should not prescribe detail which will normally need to reflect national circumstances, and it should not prohibit alternative approaches which can reasonably be expected to have equivalent effect.[...]”*** In addition, these decisions are expected to be limited to the list of those that do not create a barrier to the internal market. Taking into consideration the latter, does the Commission still have a say on application of remedies? 16 Member States were not quite happy with the wording of Article 19 and broaden competence of the Commission. Thus, they had an attempt to interpret it differently than the EU legislator had meant initially. In particular, under the statement of these countries:

“[...]the scope of the Commission’s decision-making powers under Article 19 of the Framework Directive by reference to Articles 15 and 16 of the Framework Directive is limited to matters concerning market definition, assessment of significant market power and the effect of market analysis on whether obligations should be imposed or not on undertakings but does not extend to the choice and design of remedies under Articles 8 of the Access Directive or Article 17 of the Universal Service Directive.”¹⁰⁰

The Commission unambiguously disagreed with the position of abovementioned Member States and issued a statement declaring that the binding decisions of the Commission on harmonisation measures ***“[...] do cover general regulatory approaches relating to the imposition, maintenance, amendment or withdrawal of obligations referred to in article 16 throughout the Framework Directive.”*** Therefore, the Commission’s binding decisions

¹⁰⁰ Statement by Austria, Bulgaria, Estonia, Finland, Germany, Ireland, Italy, Latvia, Malta, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and United Kingdom on Better Regulation Directive. Council of European Union, Brussels, November 18, 2009, downloaded from www.cullen-international.com

extend to imposition of remedies under Articles 8 of the Access Directive and Article 17 of the Universal Service Directive.¹⁰¹ The question remains: Does the abovementioned amendment to the Framework Directive broaden the Commission's powers too much? The answer partly lies within the competence of newly established BEREC and is implied by the very amended Article 19 of the Framework Directive.

Under Article 19 (3) subparagraph (a) of the Framework Directive, the Commission issues a binding decision on harmonisation measures only:

***“- [...] after at least two years following the adoption of a Commission Recommendation dealing with the same matter, and
- taking utmost account of the opinion from BEREC on the case for adoption of such a decision, which shall be provided by BEREC within three months of the Commission request;”***

In addition, it is worth mentioning that as a result of amendments the Commission takes utmost account of BEREC's opinion before issuing decisions on NRAs draft measures regarding market definition and designation of SMP operators as well. Besides, under Article 3 (3) of the Regulation (EC) No 1211/2009 of the European parliament and of the Council on establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office:

“NRAs and the Commission shall take the utmost account of any opinion, recommendation, guidelines, advice or regulatory est practice adopted by BEREC. BEREC may, where appropriate, consult the relevant national competition authorities before issuing its opinion to the Commission.”

Thus, the answer to the question whether the Commission intervenes roughly into NRAs' competence and consequently, affects negatively their independence, would be: No, it does not.

¹⁰¹ Martin Schraa, “Parliament and Council wrap up EU Telecom Package” EU Telecom Flash Message 110/2009, November 26, 2009, Cullen International

Active involvement of BEREC into the procedures under Articles 7 and 19 of the amended Framework Directive and generally its competence determined by the abovementioned Regulation provides the balance between powers of the Commission and NRAs.

5. Conclusion

As the one may see from the discussed issues in the presented work the role of national regulatory authorities can not be underrated in settlement of telecommunications disputes. The author deeply believes that the role of national regulatory authorities will even increase along with the growth of disputes that occur partly due to the sharp technological developments in telecom industry. Emergence of different alternative dispute resolution mechanisms will not decrease preference for the dispute to be reviewed by official administrative authorities. In spite of advantages that those alternative dispute resolution mechanisms bring along in terms of provided procedures, national regulatory authorities seem to exceed in advantageous qualities. In particular, comparing to other alternative dispute resolution mechanisms, they exceed in issues like enforcement, providing equal conditions to the parties, presence of solid sector-specific and legal expertise, etc.

The role of national regulatory authorities in dispute settlement is determined by the following factors:

- 1. Efficiency of the dispute resolution procedures provided by the regulators;**
- 2. Broad powers and competence of the regulators reinforced by law;**
- 3. Clear, precise, unambiguous rules on dispute resolution procedures;**
- 4. Independence.**

- 1. Efficiency of the dispute resolution procedures provided by the regulators**

Efficiency of dispute resolution procedures itself depends on many factors including above mentioned broad powers and competence, clear rules and independence. But, most of all it is closely related to the enforcement ability of the regulator. That is quality which distinguishes national regulatory authorities from other alternative dispute resolution providers. Binding nature of decision made by the regulators plays the key role in this respect. Effectiveness of dispute settlement procedures depends also on abidance to such requirements like adherence to the strict time frames, interactivity with the participants of the dispute and transparency of procedures.

2. Broad powers and competence of the regulators reinforced by law

It is possible to state that NRA plays a significant role in dispute settlement if it is provided with broad powers and competence. Powers to take interim measures before final decision, collecting information including confidential one, using discretion in certain cases during decision-making, passing binding directions and determinations constitute broad powers of the regulator. Due to the diverse competence of national regulatory authorities described in chapter 2 NRAs in contrast to the alternative dispute resolution providers and sometimes even the court, show solid expertise when dealing with disputes. It is important for the regulator to have all the above mentioned powers backed up and framed by law to provide enforcement from one side and to avoid arbitrary decision-making from another one.

According to the issues discussed in the previous chapters based on the Community law and annual report of the European Commission, the one might conclude that there is apparent tendency of increasing competence of the regulators. The latter once again confirms that the role of NRAs generally in the regulation of telecommunications including dispute resolution as well, is promoted by the Community law.

3. Clear, precise, unambiguous rules on dispute resolution procedures

Legal certainty in the market is achieved whenever there are clear rules concerning regulatory issues on which participants of the dispute may rely. Absence of knowledge of

the rights and obligations may negatively impact the outcome of dispute for the parties. At the same time, unambiguous rules are significant for the regulator itself to be able to enforce fully its directions and requirements into practice.

The Community law mostly is considered to provide clear enough rules on dispute resolution taking into account that details of the procedures are determined by the Member States themselves.

4. Independence

The author has paid a significant attention to the issue of independence in the previous chapter. It is hard to imagine national regulatory authorities to resolve disputes and adopt qualified, effective decisions without being independent. The value of independence is not lesser for the regulator than it is for the Court. The lack of independence may pose numerous obstacles to the development of competition, entry to the market, certainty in relationship between industry stakeholders. Threatens to the independence of the regulator from any private sector stakeholder or the government may diminish the role of the regulator generally in the telecom industry and damage its authority as well as legitimacy. Hence, there is no surprise that the Community law appropriately responded to the concerns raised by the European Commission in its annual reports discussed in previous chapters.

Thus, the author believes that the national regulatory authorities will take over the leadership in dispute resolution provision if their activity will be based on above mentioned factors.

References

Judgements /Decisions

Determination of Ofcom on dispute between THUS and BT about payment terms for PPCs, IECs and IBCs, January 25, 2007

http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw_916/

№320/18 Decision of the Georgian National Communications Commission

№526/18 Decision of the Georgian National Communications Commission

№427/18 Decision of the Georgian National Communications Commission

http://www.gncc.ge/index.php?info_legal_form=&info_legal_form2=&search_string_legal=%E1%83%9B%E1%83%94%E1%83%92%E1%83%90%E1%83%A4%E1%83%9D%E1%83%9C%E1%83%98&search_string_legal_full=&info_date_from=&info_date_to=&sec_id=7070&lang_id=GEO&Submit=%E1%83%AB%E1%83%98%E1%83%94%E1%83%91%E1%83%90

Directives/ Statutes/Regulations

Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services amended by Directive 2009/140/EC of the European Parliament and of the Council

Directive 2002/19/EC of The European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive)

Directive 2009/136/EC of the European Parliament and of the Council amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services

Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector

Regulations (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws, Official Journal of the European Union

Regulation (EC) No 1211/2009 of the European Parliament And Of The Council of 25 November 2009 establishing the Body of European Regulators for electronic Communications (EREC) and the Office

Law of Georgia on Electronic Communications

http://www.gncc.ge/index.php?lang_id=ENG&sec_id=7050

Georgian Law on Arbitration

<http://www.parliament.ge/newsletter/2009/7.07.2009/kanon/1280-Is.htm>

Law of Georgia on Independent National Regulatory Authorities and article 63 (2) of the law of Georgia on Electronic Communications

http://www.gncc.ge/index.php?lang_id=ENG&sec_id=7050

General Administrative Code of Georgia of 1999,

www.irisprojects.umd.edu/georgia/Laws/English/code_admin_general.pdf

The Communications Act of 2003 of the UK

Guidelines/Statements/Recommendations

Guidelines for the handling of competition complaints, and complaints and disputes about breaches of conditions imposed under the EU Directives, July 2004

<http://stakeholders.ofcom.org.uk/binaries/enforcement/competition-bulletins/other/guidelines.pdf>

The Recommendation of the Commission on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, March 30, 1998, Official Journal of the European Communities

Statement by Austria, Bulgaria, Estonia, Finland, Germany, Ireland, Italy, Latvia, Malta, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and United Kingdom on Better Regulation Directive. Council of European Union, Brussels, November 18, 2009
www.cullen-international.com

Reports/Press release

Electronic Communications Committee (ECC) within the European Conference of Postal and Telecommunications Administrations (CEPT), Dispute Resolution Settlement Procedures, Bornholm, October 2003

The European Commission, Progress Report On The Single European Electronic Communications Market (15th Report), Brussels 25.5.2010, SEC(2010) 630 final

Report on Ofcom's approach to enforcement and recent activity, 12 May, 2009

M. Andenas, S. Zleptnig, Telecommunications Dispute Resolution: Procedure And Effectiveness, British Institute Of International And Comparative Law, Report, February, 2004

Report By The Comptroller And Auditor General, National Audit Office, HC 490, Session 2010-2011, November 2010

The European Commission, Progress Report on the single European electronic communications market 2008 (14th Report) {SEC(2009) 376} /* COM/2009/0140 final
http://ec.europa.eu/information_society/policy/ecomm/library/communications_reports/index_en.htm

The European Commission, Progress Report on the single European electronic communications market 2007 (13th Report) {SEC(2008) 356} /* COM/2008/0153 final
http://ec.europa.eu/information_society/policy/ecomm/library/communications_reports/index_en.htm

Report of the Task Force on Financial Mechanisms for ICT for Development, 2004

Arcep's annual report 2009

Press Release ERG (09) 56, 9 December, 2009

http://erg.eu.int/doc/publications/2009/erg_09_56rev1_erg_press_release_final_091209.pdf

Freedom Of The Press - Georgia (2009), Freedom House

http://www.freedomhouse.org/inc/content/pubs/pfs/inc_country_detail.cfm?country=7612&year=2009&pf

Articles/ Journals/Working papers/ Internet Courses

R. R. Bruce, R. Macmillan, Debevoise & Plimpton, T. St. J. Ellam, H. Intven, T. Miedema, McCarthy Tétrault LLP for the International Telecommunications Union and the World Bank. Dispute resolution in the telecommunication sector: Current practices and Future Directions, October 2004

www.itu.int/ITU-D/treg/publications/ITU_WB_Dispute_Res-E.pdf

Module 6 Legal and Institutional Framework

<http://www.ictregulationtoolkit.org/en/Section.1254.htm>

A. Ottow Dispute Resolution Under the European Framework

www.ivir.nl/.../ottow/disputeresolutionundertheneweuframework.PDF

Stevens D. and Valcke P. NRAs (and NCAs?): Cornerstones for the Application of the New Electronic Communications Regulatory Framework New requirements, tasks, instruments and cooperation procedures, Communications & Strategies, no. 50, 2nd quarter

www.idate.fr/fic/revue_telech/265/C&S50_STEVENS_VALCKE.pdf

InfoDev/ITU ICT Regulatory Toolkit

<http://www.ictregulationtoolkit.org/en/Section.3107.html>

Queck R. The future of National Regulatory Authorities, Camford publishing LTD, 2000

Stern J. What makes an independent regulator independent? Business Strategy Review, 1997, Volume 8 Number 2

Melody W. H. Comment on the meaning and importance of "independence" in telecom reform, Telecommunications Policy Vol 21, No 3, 1997

Cambini C. Rondi L. Regulatory Independence and Political Interference: Evidence from EU Mixed-Ownership Utilities' Investment and Debt, 2010

laep.univ-paris1.fr/SEPIO/SEPIO101109CambiniRondi.pdf

Wu I. Traits of an Independent Communications Regulator: a Search for Indicators, Federal Communications Commission, International Bureau, 2004

Jamison M.A. Survival Guide for the Independent Regulator, Public Utility Research Center, University of Florida, 2004

Jamison M.A. Is there a need for the internationalization of regulation? Network Industries Quarterly, vol. 11, no 2, 2009

Spirelli C. Regulating the regulators? An assessment of Institutional Structures and Procedural Rules Of National Regulatory Authorities, International Journal of Communications Law and Policy, Issue 8, Winter 2003/2004

Jamison M.A. Leadership and the Independent Regulator, Public Utility Research Center, University of Florida

http://warrington.ufl.edu/purc/docs/paper_LeadershipIndependentRegulator.pdf

Martin Schraa, "Parliament and Council wrap up EU Telecom Package" EU Telecom Flash Message 110/2009, November 26, 2009, Cullen International

<http://www.fcc.gov/slamming/>

<http://www.otelo.org.uk/>

<http://www.cisas.org.uk/>

www.ofcom.org.uk/bulletins

<http://www.ofcom.org.uk/about/annual-reports-and-plans/financial-penalties/>

[http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_905/;](http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_905/)

[http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/cases-in-compliance/cw_01043/;](http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/cases-in-compliance/cw_01043/)

http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/cases-in-compliance/cw_01043/

<http://www.ofcom.org.uk/about/how-ofcom-is-run/ofcom-board-2/members-code-of-conduct/>

<http://www.arcep.fr/index.php?id=12&L=1>

<http://english.corp.megafon.ru/about/>

Secondary Literature

M.L. Moffit, R. C. Bordone Editors, The Handbook of Dispute Resolution, JOSEY-BASS, A Wiley Imprint, www.joseybass.com

L. Garzaniti, M. O'Regan (eds), Garzaniti - Telecommunications, Broadcasting and the Internet – EU Competition Law & Regulation, 3rd edition, London, Sweet & Maxwell, 2010

I. Walden “Telecommunications Law and Regulation” Oxford University Press, 2009

N. Th. Nikolinakos, EU Competition Law and Regulation in the Converging Telecommunications, Media and IT Sectors, Kluwer Law International 2006

Annex (1)

Abbreviations

EU – European Union

NRA – National Regulatory Authority

UK – United Kingdom

Ofcom – Office of Communications

CAT - Competition Appeal Tribunal

BEREC - Body of European Regulators for Electronic Communications

»

