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ADR in B2B Disputes in the EU Telecommunications  
Sector: Where Does the EU Stand and What Does the  
EU Stand for?

Barbara Alicja Warwas





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## **European Regulatory Private Law: The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation (ERPL)**

A 60 month European Research Council grant has been awarded to Prof. Hans-Wolfgang Micklitz for the project “European Regulatory Private Law: the Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation” (ERPL).

The focus of the socio-legal project lies in the search for a normative model which could shape a self-sufficient European private legal order in its interaction with national private law systems. The project aims at a new-orientation of the structures and methods of European private law based on its transformation from autonomy to functionalism in competition and regulation. It suggests the emergence of a self-sufficient European private law, composed of three different layers (1) the sectorial substance of ERPL, (2) the general principles – provisionally termed competitive contract law – and (3) common principles of civil law. It elaborates on the interaction between ERPL and national private law systems around four normative models: (1) intrusion and substitution, (2) conflict and resistance, (3) hybridisation and (4) convergence. It analyses the new order of values, enshrined in the concept of access justice (Zugangsgerechtigkeit).

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## **Abstract**

This paper analyses the application of alternative dispute resolution (ADR) mechanisms to disputes arising between telecommunications undertakings under the EU Telecommunications Package, as revised on November 4, 2009. The new rules aimed at facilitating the development of the EU common telecommunications market, and were designed to increase the powers of national regulatory authorities (NRAs) across the Member States in the imposition of regulatory obligations in a coherent manner. One key reform concerned the centralisation of the dispute resolution functions of NRAs. Within the new dispute resolution prerogatives, NRAs were empowered with a right to determine their appropriateness for handling regulatory disputes between telecommunications undertakings or to decline their jurisdiction should other ADR means be available and more suitable for the resolution of regulatory disputes. This paper examines the mere development of ADR in telecommunications disputes in the UK, Ireland and Poland following the revision of the EU Telecommunications Package. Moreover, the paper analyses the effectiveness of the recent European Union (EU) policy on promoting ADR within the EU legal order against the background of the fragmented national approaches to ADR, as examined in the selected jurisdictions.

## **Keywords**

ADR in EU regulated markets, EU Telecom Package, shifting legitimacy of arbitration and ADR, business-to-business telecommunications disputes, NRAs



## Introduction

This paper analyses the application of ADR mechanisms to disputes arising between telecommunications undertakings under the EU Telecommunications Package (EU Telecom Package), as revised on November 4, 2009. The new rules aimed at facilitating the development of the EU common telecommunications market, and were designed to increase the powers of national regulatory authorities (NRAs) across the Member States in the imposition of regulatory obligations in a coherent manner. One key reform concerned the centralisation of the dispute resolution functions of NRAs. Within the new dispute resolution prerogatives, NRAs were empowered with a right to determine their appropriateness for handling regulatory disputes between telecommunications undertakings or to decline their jurisdiction, in particular with regard to the availability (and suitability) of ADR means for the resolution of regulatory disputes.

Against this background, the purpose of this paper is twofold. First, it intends to understand the new design of the dispute resolution framework under the revised EU Telecom Package together with the objectives underpinning the introduction of ADR mechanisms by means of the recent reforms. In this vein, this paper also examines the possible ambiguities resulting from the new dispute resolution framework in the EU telecommunications sector. The second part of this paper analyses the national approaches to the new provisions on dispute resolution as contained in the EU Telecom Package, specifically focusing on the various attitudes towards the suitability of ADR methods as expressed by the NRAs in the UK, Ireland, and Poland. Here, as a corollary, the paper also aims at understanding the origins of telecommunications disputes that may be particularly suitable for ADR, on one hand, and the types of ADR mechanisms that are preferred for the resolution of such disputes by the NRAs in the studied jurisdictions, on the other hand.

A further goal underlying the second part of this paper is to understand the rationality of the European Union (EU) underpinning the introduction of ADR within the telecommunications sectors in the context of recent renewed interest in arbitration and other forms of ADR at the EU level. The EU has increasingly begun to adopt policies on promoting arbitration and different ADR schemes. This involves: (1) the procedure for the recasting of the Brussels I Regulation; (2) the debate regarding the Investor-State Dispute Settlement (ISDS) mechanisms in the EU International Investment Agreements following the implementation of the Lisbon Treaty; and (3) the introduction of a number of ADR and online dispute resolution (ODR) schemes for consumer disputes. Although the advantages of ADR are straightforward, the changing EU policy regarding arbitration entails intriguing questions on the private-public interplay in the EU sectorial disputes in view of the shifting nature of legitimacy of arbitration and ADR. These issues have been examined in detail by this author in her Ph.D. thesis which, among other things, addressed the emerging public function of arbitration.<sup>1</sup> The public function of arbitration concerns, *inter alia*, the shift towards the integration of highly sensitive public policy issues into arbitration. In this view, the paper also locates ADR in the EU telecommunications sectors vis-à-vis both the emerging public function of arbitration and the recent increasing private-public interplay in the field of ADR within the EU legal order.

Regarding the selection of case studies, the range of jurisdictions differs from the original intent of the author. Originally, the choice of jurisdictions was prompted by the necessity to provide a comprehensive analysis of different approaches to ADR across a wider group of the EU Member States. However, the author quickly noticed a persistent fragmentation in terms of national approaches to ADR effectively necessitating a different methodological approach hinging on the explanation of the most conflicting and indeed radical stances to alternative means of dispute resolution in the EU

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<sup>1</sup> Warwas, Barbara Alicja, *The Three Pillars of Institutional Arbitral Liability: The Weaknesses of Current Regulations and Proposals for Further Reform*, Ph.D. thesis, Florence: European University Institute 2013.

telecommunication sectors. Therefore, the author decided to address the jurisdictions in which the implementation of the EU Telecom Package have indeed advanced the applicability of alternative means to regulatory disputes (such as the UK and Ireland), on one hand, and the Member State where the legislative actions somewhat disregarded the EU increasing trust in ADR such as Poland, on the other hand.

Finally, the significant limitations regarding the research on the resolution of business-to-business telecommunication (B2B) disputes should be stressed here. Although certain parts of this paper refer to data collected by means of interviews with practitioners, academics and members of NRA dealing with telecommunications law (such as the Section on Poland), the empirical data related to the EU telecommunications disputes in general is rather scarce. This is a function of, among other things, the confidentiality of ADR, specifically when conducted by traditional commercial service providers that do not publish statistical data on the actual participation of telecommunications companies in ADR proceedings.

### 1.1. Dispute Resolution Framework in the EU Telecom Package

National provisions on dispute resolution in the telecommunications sector in all EU Member States stem from the regulations contained in the 2002 EU electronic communication package, as revised in 2009 and now commonly referred to as the EU Telecom Package.<sup>2</sup> Specifically, two Directives from the EU Telecom Package establish a dispute resolution framework that applies to undertakings providing communications services or networks, namely: Directive 2002/21/EC of 7 March 2002 on a common regulatory framework for electronic communications networks and services (the Framework Directive) and Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities of 7 March 2002 (the Access and Interconnection Directive), as amended by Directive 2009/140/EC of 25 November 2009.<sup>3</sup> The provisions setting out dispute resolution relating to telecommunications operators within the same Member States are contained in Article 20 of the Framework Directive and are cross-referenced in recital 19 to the Access and Interconnection Directive.

Based on these provisions, in the event of a dispute arising in connection with obligations stemming from the Framework Directive or any other Directive constituting part of the EU Telecom Package, the NRAs should issue a *binding* decision to resolve a dispute within the shortest time frame possible, and in any case within four months of a dispute being submitted to them save from exceptional circumstances.<sup>4</sup> Dispute resolution procedure conducted by a relevant NRA should be issued at the request of either of the parties involved. An NRA—if permitted by relevant national provisions—may refuse to hear a dispute should other mechanisms such as mediation exist that may be more suitable for an expeditious and effective resolution of the dispute in accordance with the objectives set forth in Article 8 of the Framework Directive.<sup>5</sup> If this is the case, the NRA should duly inform the parties to the dispute. If after four months the dispute is not resolved through alternative methods, the parties may refer it back to the NRA that will then issue a binding decision in resolution of the dispute within the following four months. The dispute is to be resolved in line with the policy

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<sup>2</sup> The EU Telecom Package contains a number of rules to be implemented by the EU Member States. See the explanation of Telecoms Rules on the European Commission (EC) website at: <http://ec.europa.eu/digital-agenda/en/telecoms-rules>.

<sup>3</sup> OJ L 108, 24 April 2002 and OJ L 337, 18 December 2009, accordingly.

<sup>4</sup> See: Article 20 of the Framework Directive.

<sup>5</sup> Article 8 of the Framework Directive confirms the Community requirements regarding the functionality of the telecommunications sector that have been designed to foster effective competition in the provision of telecommunications network, services and associated facilities and services; to enhance the development of the internal market; and to promote the interests of the citizens in the EU.

and regulatory objectives as enumerated in the aforementioned Article 8 of the Framework Directive. The decision should be made public while simultaneously respecting the principle of business confidentiality. In any case, the parties retain the right to bring an action before a national court, and so regulatory dispute resolution of telecommunications disputes including alternative means remains only complementary to judicial proceedings. Although Article 20 of the Framework Directive does not hinder the parties' right to go to court, the positions of national courts in the jurisdictions studied in this paper regarding the mere interplay between ADR and court actions have not yet been confirmed.<sup>6</sup>

Additionally, Recital 32 to the Framework Directive complements the understanding of Article 20 of the same Directive. It does so by way of specifying both the rights of the aggrieved party after a dispute arises and the obligation of NRAs to resolve a referred dispute:

32. In the event of a dispute between undertakings in the same Member State [...] an aggrieved party that has negotiated in good faith but failed to reach agreement should be able to call on the national regulatory authority to resolve the dispute. National regulatory authorities should be able to impose a solution on the parties. The intervention of a national regulatory authority in the resolution of a dispute between undertakings providing electronic communications networks or services in a Member State should seek to ensure the compliance with the obligations arising out of this [Framework] Directive or the Specific Directives.

Furthermore, Recital 19 to the Access and Interconnection Directive entitles the aggrieved parties whose access to, or the use of, the network infrastructure have been denied to rely on dispute resolution mechanisms provided for in Article 20 of the Framework Directive. In sum, the EU Telecom Package introduces broad authority of national regulators in the so-called "official" resolution of telecommunications disputes and it allows the NRAs wide discretion when deciding on whether to hear a dispute or to submit it to an alternative forum. Both advantages and disadvantages of the changes adopted in the EU Telecom Package can be identified. The former relate, *inter alia*, to the elimination of the limitations to the powers of NRAs to resolve disputes concerning interconnection that were in place under the previous EU telecommunications regime,<sup>7</sup> while the latter involve the issues discussed in Section 1.3 of this paper.

The reformed EU Telecom Package provides for appeal mechanisms against the decisions of NRAs in the resolution of telecommunications disputes. Pursuant to Article 4 of the Framework Directive such appeal proceedings should take place before a court or other independent body and should be conducted effectively with regard to the merits of a dispute. If appeal proceedings lead to unsatisfactory solutions, the decision of the NRA stands. The appeal procedure is oriented towards

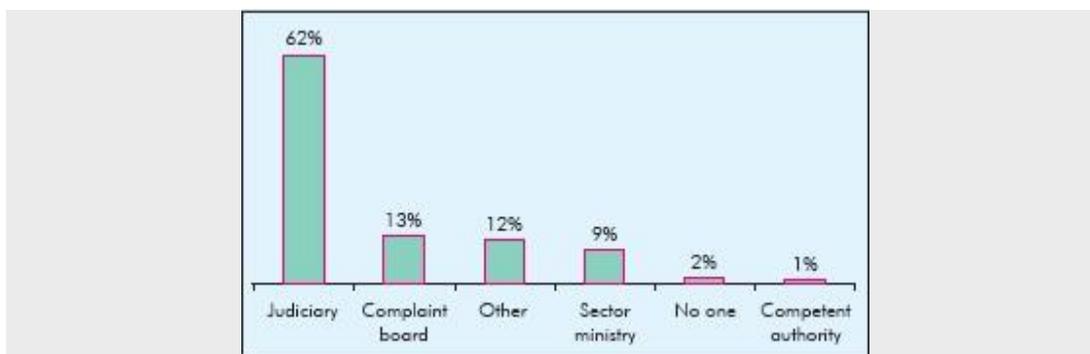
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<sup>6</sup> Recently, some authors have criticised the introduction of ADR and ODR schemes into business-to-consumer disputes at the EU level. The criticism has focused on the potential impaired access to the court system for consumers - an implied risk accompanying the outsourcing of mandatory consumer rights to private dispute resolution fora. See Eidenmüller, Horst and Engel, Martin, "Against False Settlement: Designing Efficient Consumer Rights Enforcement Schemes in Europe," forthcoming. The potential risks regarding the parties' right to access to the courts have been examined in detail by the Court of Justice of the European Union (CJEU) in *Alassini and others v Telecom Italia SpA* (Joined Cases C-317/08 to C-320/08 [2010] ECR I-2213). The CJEU analysed whether Italian law, requiring that consumers rely on mandatory online conciliation prior to initiating court proceedings, infringed the provisions of Article 34 of the Universal Service Directive. In the judgement in question, the CJEU did not find the mandatory settlement procedure contrary to the provisions of the Universal Service Directive, as—in view of the CJEU—such procedure did not affect the rights of individual parties to a dispute due to the non-binding nature of the conciliation scheme in question which did not prejudice the parties' right to bring the case in front of a court nor did it impose additional costs on the parties. Against this background, it is yet unclear what implications the encouragement of ADR in B2B telecommunications disputes will have on exercising the right to access to court proceedings by business parties.

<sup>7</sup> See the case studies regarding the limited regulatory powers in resolution of certain types of disputes under the previous EU communications framework in Germany, France, and the Netherlands, as explained in Annetje Ottow, "Dispute Resolution Under the European Framework," pp. 5-7. The paper can be downloaded at: <http://www.ivir.nl/publicaties/ottow/disputeresolutionundertheneweuframework.PDF>.

ensuring fair and accurate resolution of regulatory disputes in light of the effectiveness of the enforcement of regulatory adjudication. The courts are still commonly involved in judicial review of the NRAs' decisions but there are also other bodies to whom the parties may recourse in challenging regulatory decisions. These dynamics are illustrated in Figure 1 below.<sup>8</sup>

**Figure 1: To whom can parties appeal against a regulator's decision:**



Regarding the resolution of cross-border telecommunications disputes within the EU, a particular procedure was introduced in Article 21 of the Framework Directive largely mirroring the dispute resolution mechanisms designed for national disputes. First, NRAs are obliged to coordinate their efforts to ensure the consistency of their decision-making processes. Second, and in line with Article 20 of the Framework Directive, the usage of ADR methods is acknowledged with regard to cross-border disputes by allowing NRAs to jointly decline the resolution of disputes should other methods be more suitable for a fast determination of a dispute. Article 21.3 of the Framework Directive also provides for a time frame of four months within which a dispute should be resolved by means of alternative methods, and it authorizes NRAs to take over a dispute and resolve it in a binding fashion should the alternative means lead to an unsatisfactory solution.

Together with the introduction of the new Directive 2009/140/EC of 25 November 2009, a new Body of European Regulators for Electronic Communications (BEREC) has been created in order to coordinate and harmonise the cross-border dispute resolution practices among the Member States. BEREC is charged with the competence of issuing an opinion concerning the action to be taken by a competent NRA in accordance with the provisions of the Framework Directive and/or the Specific Directives falling within the EU Telecom Package upon a request submitted to BEREC by a competent authority. Upon making such a request, the NRA should await BEREC's opinion before taking any action to resolve the dispute unless there is a need for the NRA to take urgent measures. The first meeting of BEREC took place in January 2010.<sup>9</sup>

Some commentators claim that the provisions of Article 21 of the Framework Directive on cross-border dispute resolution—although interesting from an academic perspective—have little practical relevance because most disputes arising out of, or in relation to, the allocation of market power or the barriers to entry are purely national in their nature.<sup>10</sup> This can also be attributed to the

<sup>8</sup> Source: Rory Macmillan, "Effective Dispute Resolution: A Pressing Priority for Policy-Makers and Regulators," ITU News 10/2004, pp. 26-29, available at: <http://www.itu.int/itunews/manager/display.asp?lang=en&year=2004&issue=10&ipage=dispute&ext=html>.

<sup>9</sup> ICT Toolkit, Practice Note 3281 on the "EU Telecoms Reform Package [1]," at: <http://www.ictregulationtoolkit.org/en/toolkit/notes/practicenote/3281>.

<sup>10</sup> See Paul Brisby, "Dispute Resolution in Telecoms – The Regulatory Perspective", *Computer and Telecommunications Law Review*, 2005, Vol. 11, no. 1., pp. 4-9, p. 2.

historical organisation of monopolies at national levels.<sup>11</sup> This observation is certainly drawn from the perspective of a national regulatory regime and it seems to be in opposition to the objectives of the EU Telecom Package, in particular as enshrined in Article 8 of the Framework Directive. Such observation is, however, telling as it attests to the continued gap between, on the one hand, the many national regulatory systems characterised by self-orientation and fragmentation and, on the other hand, EU policy in the area of telecommunications that, in turn, recognizes the dynamics of the globalized telecommunication market and aims at facilitating its development beyond national borders.<sup>12</sup>

Additionally, as rightly observed by Annetje Ottow, the procedure established in Article 21 of the Framework Directive is noteworthy because it implies a number of intriguing legal questions that may have important practical implications for the resolution of cross-border telecommunications disputes.<sup>13</sup> These questions concern the following: prospective cooperation between national regulators, the exchange of confidential information and the treatment of business secrets or the possible interventions of a NRA from one Member State in the proceedings conducted in another Member State in case of disagreement with the outcome of a dispute.<sup>14</sup>

## 1.2. Community Objectives Underpinning the EU Dispute Resolution Framework in Telecommunications

In order to better understand the powers of NRAs in the resolution of disputes as well as the objectives of ADR under the reformed EU Telecom Package, it is relevant to examine the goals of the European Commission associated with the new regulatory framework in the telecommunications sector. The reforms were required as a result of the need for continuous liberalisation of telecommunications markets and for the sake of enhancing the effectiveness of telecommunications regulations at national levels in a harmonized manner. On many occasions, the Commission pointed to the necessity for NRAs to become empowered with clear, comprehensive and broad authority to issue timely and coherent decisions in the resolution of regulatory disputes.<sup>15</sup> The Commission also referred to the need for setting forth effective procedures for appeals against NRAs decisions that should in no case obstruct regulatory adjudication. The EU Telecom Package was meant to minimise both the delays and arbitrariness in decision-making that threatened the existence of the meaningful regulation in the telecommunications sector.

For this reason, the new EU Telecom Package centralised the regulatory, decision-making functions of NRAs by way of introducing provisions on “official” and “unofficial” dispute resolution mechanism. Official dispute resolution has been left to NRAs in the form of regulatory adjudication. Unofficial means have been “outsourced” to other, private fora under the supervisory powers of national regulators. There is little guidance, however, on the exact Community objectives in terms of reliance on ADR. What can be drawn from the aforementioned Community concerns related to dispute resolution can be summarized from the following goals:

- Flexible and timely resolution of *suitable* disputes;
- Effectiveness of ADR procedures in certain types of disputes;
- Legal certainty of dispute resolution processes.

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<sup>11</sup> Ibid.

<sup>12</sup> See Mads Adenas, Stefan Zleptnig, Telecommunications Dispute Resolution: Procedure and Effectiveness, BIICL, February 2004, available at: [http://www.ivir.nl/publicaties/ottow/BIICL\\_Telecoms\\_%20Report\\_%202004.pdf](http://www.ivir.nl/publicaties/ottow/BIICL_Telecoms_%20Report_%202004.pdf).

<sup>13</sup> Annetje Ottow, “Dispute Resolution Under the European Framework,” p. 10.

<sup>14</sup> Ibid.

<sup>15</sup> Eight Report from the Commission on the Implementation of the Telecommunications Regulatory Package European telecoms regulation and markets 2002 COM (2002)696 (2002) cited by Annetje Ottow, in: Ibid, p. 3-4

Such objectives may serve as a useful hint towards a better understanding of the terminology under the EU Telecom Package as well as the applicability of the alternative mechanisms for the resolution of disputes between telecommunications undertakings. These issues will be discussed in Section 2.3 of this paper.

### 1.3. Understanding the Practicalities of the Dispute Resolution Framework as Set Forth in the EU Telecom Package: On Definitions

Several ambiguities arise in relation to the introduction of the dispute resolution framework in the EU Telecom Package. First, neither the Framework Directive nor any other Directive falling within the EU legislative framework on telecommunications contains a definition of the word “dispute”. This has implications for the national telecommunications laws, in particular of the jurisdictions studied in this paper, which in no case expressly define what a “dispute” actually means or should imply. Such ambiguity results in uncertainty for the parties to potential disputes, especially in view of the broad discretion of NRAs in assessing the “appropriateness” of available alternative means to handle certain disputes. The Discussion Paper on Dispute Resolution in the Telecommunications Sector prepared for the International Telecommunications Unit (ITU) and the World Bank in October 2004 (the ITU Discussion Paper) has adopted a guiding, broad notion of the term “dispute” encompassing both formal procedures where claims or complaints are brought by the parties and the conflicting interests of the parties—even in cases where no formal disputes arise—that affect the dynamics of the regulated telecommunications industry.<sup>16</sup>

The second source of confusion relates to the wording of Article 20 of the Framework Directive in that it is extremely broad making reference to *any* dispute that may arise between the telecommunications undertakings in relation to the obligations under the Framework Directive in particular and the EU Telecom Package in general. Paul Brisby argues that these obligations would usually entail Significant Market Power (SMP) conditions imposed by national regulators on market players after a scrupulous market analysis.<sup>17</sup> Brisby also points to somewhat more general obligations, being a plausible cause of disputes, that derive from Articles 4(1) and 5(4) of the Access and Interconnection Directive, such as the obligations requiring the operators of communications networks to negotiate interconnection upon a request, or simply “anything relating to access and interconnection in the field of interconnections networks.”<sup>18</sup>

The ITU Discussion Paper serves as a useful tool for identifying the subject matter of “common” disputes in the telecommunications sector.<sup>19</sup> Such disputes usually fall within the following categories: (1) disputes related to liberalisation; (2) investment and trade disputes; (3) interconnection disputes; and (4) radio frequency disputes.<sup>20</sup> The first category of **disputes concerning liberalisation** relates to the reduction or termination of the incumbents’ exclusive rights vis-à-vis the incumbents’ desire to maintain their dominant position within the market.<sup>21</sup> The second group involves **investment and trade disputes** and deals with disputes raised by investors, operators

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<sup>16</sup> “Dispute Resolution in the Telecommunications Sector: Current Practices and Future Disrections,” Discussion Paper prepared by Robert R. Bruce, Rory Macmillan, Timothy St. J. Ellam, Hank Intven, and Theresa Miedema for ITU and World Bank, Published in February 2006, available at: [http://www.itu.int/ITU-D/treg/publications/ITU\\_WB\\_Dispute\\_Res-E.pdf](http://www.itu.int/ITU-D/treg/publications/ITU_WB_Dispute_Res-E.pdf), p. 3.

<sup>17</sup> Paul Brisby, “Dispute Resolution in Telecoms – The Regulatory Perspective,” p. 5.

<sup>18</sup> Ibid.

<sup>19</sup> ITU Discussion Paper, Chapter 3.

<sup>20</sup> This distinction serves only as guidance and, in no way, claims to be exhaustive. Ibid.

<sup>21</sup> ITU Discussion Paper, Chapter 3.

and service providers over “early termination of exclusive rights, licensing of new competitors, new rate-setting structures and changes to licenses.”<sup>22</sup> As stated in the ITU Discussion Paper, investment and trade disputes also entail contractual or alleged breaches of legal or policy requirements as a function of heavy-handed regulatory intervention.<sup>23</sup> These disputes are increasingly internationally-oriented, with investment disputes arising out of or in connection with bilateral investment treaties (BITs) and trade disputes stemming from the World Trade Organization trade regime and the obligations enshrined in the General Agreement on Trade in Services and related documents.<sup>24</sup>

**Interconnection disputes**, falling within the third category, encompass the most frequent type of disputes between telecommunications service providers. This is due to the highly sensitive public policy issues that such disputes involve mainly because of their impact on competition between operators of different types of access networks and the possible abuse of SMP of incumbent operators when granting access to new entrants. This is the reason why interconnection disputes attract the considerable attention of NRAs. Pursuant to the information provided by the ICT Regulation Toolkit, the interconnection disputes may concern various technical, operational, and financial issues.<sup>25</sup> More specifically, they involve the following:

- Failure by a dominant operator to develop a Reference Interconnection Offer (RIO) or standard interconnection arrangements;
- Failure to conclude negotiations on a timely basis;
- Disagreement on interconnection charges;
- Disputes over quality of interconnection services;
- Failure to comply with the terms of a negotiated interconnection agreement;
- Poaching of customers by new entrants through improper customer transfers *i.e.*, slamming; and
- Improper use of competitively sensitive customer information by incumbent operators.<sup>26</sup>

It is sufficient to stress the potential moment of emergence of interconnection disputes. The interconnection disputes usually arise either at the stage of negotiating interconnection agreements or when interconnection agreements are further implemented and executed.<sup>27</sup>

Finally, the last category of disputes concerns **radio frequency disputes** that may emerge at domestic or international level. As explained in the ITU Discussion Paper, domestic disputes of this kind may originate in harmful interference or spectrum reframing, license conditions, and pricing.<sup>28</sup> International radio frequency disputes are handled by the ITU through the Radiocommunications Bureau (known as ITU-B).<sup>29</sup>

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<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> “Functional Aspects of Regulation”, ITU downloadable paper at [www.ictregulationtoolkit.org/sectionexport/word/6.6](http://www.ictregulationtoolkit.org/sectionexport/word/6.6).  
Given the international nature of these disputes, the analysis of such disputes falls outside the scope of this paper.

<sup>25</sup> See: ICT Regulatory Toolkit, Practice Note 2560 on the “Interconnection disputes”, available at: <http://www.ictregulationtoolkit.org/en/toolkit/notes/PracticeNote/2560>.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid. See also: “Functional Aspects of Regulation”, ITU downloadable paper at: [www.ictregulationtoolkit.org/sectionexport/word/6.6](http://www.ictregulationtoolkit.org/sectionexport/word/6.6).

<sup>29</sup> “Functional Aspects of Regulation”, ITU downloadable paper at [www.ictregulationtoolkit.org/sectionexport/word/6.6](http://www.ictregulationtoolkit.org/sectionexport/word/6.6).

Additionally, Rory Macmillan in his Article on ‘Effective Dispute Resolution: A pressing priority for policy-makers and regulators’ points out the common range of disputes between telecommunications undertakings involving regulatory intervention.<sup>30</sup> Such disputes originate in the following: interconnection, abuse of dominant position, frequency allocation, pricing and numbering, service quality and licence fees.<sup>31</sup>

What emerges from the above distinctions between the common telecommunications disputes concerns not only the identification of the origins of disputes as such but also the interplay between the scope of regulatory intervention in specific types of disputes and the design of dispute resolution mechanisms entailing different approaches to “formality” as adopted in those mechanisms. It is speculated that disputes between parties with SMP will, most likely, be subject to regulatory adjudication, while disputes between parties with little market power will usually be delegated to industry-sponsored dispute resolution schemes that follow the procedures for ordinary resolution of commercial disputes.<sup>32</sup>

This observation leads us to another ambiguity stemming from the dispute resolution framework adopted in the EU Telecom Package regarding the unspecific understanding of the expression: “other *means* that would better contribute to the resolution of a dispute in a timely manner [emphasis added]” pursuant to Article 20.2 of the Framework Directive. The Framework Directive neither explains the exact meaning of, and the types of, the “other means” that would be suitable for the resolution of disputes between telecommunications operators nor does it provide for any indications on how such suitability should be measured. Article 20 of the Framework Directive mentions “mediation” among the alternatives; however, the determination of the accurate means has been left to the competent NRA while deciding on whether it is appropriate for it to handle a given dispute. When looking at the legal instruments regulating ADR within the EU legal order, particularly Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, we note that mediation is the most encouraged and, at the same time, the most specified form of ADR across the Union. In relation to other EU instruments on ADR, including Directive 2013/11/EU on Consumer ADR and Regulation No. 524/2013 on Consumer ODR of 21 May 2013, no definition of out-of-court procedures to be applied to consumer disputes is delineated.<sup>33</sup> Additionally, these instruments do not specifically determine if other, more formal ADR schemes such as arbitration, should fall within the broader understanding of extra-judicial, ADR means within the EU. The fact that both the terminology and procedures regarding the EU ADR models remain vague in relation to consumer disputes that imply significant public policy objectives convolutes the potential standards to be applied by NRAs when determining the adaptability and suitability of ADR in telecommunications B2B disputes.

All of the above prompts certain questions. What are the exact objectives—other than expeditiousness and securing the “better” outcomes of disputes—to be considered by NRAs while determining the suitability of other dispute resolution means to a pending dispute? What is the impact of commercial negotiations, specifically in view of the obligation imposed on the operators of communications networks to negotiate the interconnection access under Article 4(1) of the Access and Interconnection Directive on the emergence of a dispute within the meaning of Article 20 of the

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<sup>30</sup> Rory Macmillan, “Effective Dispute Resolution: a Pressing Priority for Policy-Makers and Regulators”, p. 26.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*, p. 28. See also: Paul Brisby, “Dispute Resolution in Telecoms – The Regulatory Perspective”, p. 5.

<sup>33</sup> Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR), OJ L 165/63, 18 June 2013; Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR), OJ L 165/1, 18 June 2013.

Framework Directive? When do commercial negotiations end and when does a “proper” dispute begin? What are the types of alternative procedures that are in fact suitable for the resolution of telecommunications disputes as opposed to regulatory adjudication? Finally, do the “other,” alternative means to be applied to telecommunications disputes in fact bear the resemblance of traditional ADR techniques that are broadly used in commercial settings? Most of these questions will be addressed in Sections 2.2 and 2.3 of this paper. It is sufficient here to preliminarily address the possible types of ADR procedures to be applied in telecommunications disputes between undertakings.

Most authors, when explaining alternative means of dispute resolution in the telecommunications sector mention “traditional” arbitration, on one side of the spectrum and mediation or negotiation, on the other. This distinction is made because of different levels of procedural “formality” that the above-mentioned mechanisms implicate. **Arbitration**, on one hand, is an increasingly formalized process. In most cases it is conducted in accordance with the particular arbitration rules which lead to a binding resolution of a dispute by a private adjudicator or a panel of adjudicators called arbitrators. **Negotiation** and **mediation**, on the other hand, entail less formal techniques related to conflict management methods applied either by parties themselves or by neutral parties known as mediators. In view of this distinction, it is alleged that negotiation and mediation can be invoked at an early stage of the dispute resolution process, particularly before a dispute is finally resolved by a competent national regulator.<sup>34</sup> On the contrary, arbitration, which offers binding outcomes, is an ultimate means for dispute resolution and so its interplay with regulatory adjudication (at least in its traditional form) is very limited.

Although the adaptability of traditional ADR methods to the resolution of telecommunications disputes has not given rise to a broader discussion among commentators, one example of so-called “final offer arbitration” (FOA)—as explained by Samuel J. Reich—requires particular attention here.<sup>35</sup> FOA encourages prompt settlements and it reduces the input of the parties to a dispute at the ultimate arbitration hearings by means of imposing on the parties the acceptance of “win or lose” solutions should the need to conduct a hearing arise. In other words, under the standard FOA scheme, the parties would meet at a preliminary hearing and agree that in the event of further adversarial discussions an arbitrator will issue a final determination in which no room for a compromise will be allowed. FOA is a scheme used frequently in the field of U.S. baseball salary arbitration. Samuel J. Reich suggests that it could be easily implemented within the telecommunications sector considering the possibility of recourse to the final authority of national regulators (charged with confirming the fairness of the process). Additionally, he argues that the public interest often involved in telecommunications disputes could serve as a deterrent factor in balancing the parties’ rights in the resolution of industry-specific disputes. This argument is not entirely convincing, especially with regard to the actual finality of the arbitrators’ determinations of telecommunications disputes vis-à-vis the broad regulatory powers of NRAs. These and other controversies stemming from the prospective use of new forms of arbitration and other ADR means in the telecommunications sector will be further discussed in Sections 2.2 and 2.3 of this paper.

There are also other techniques, such as **conciliation**, that can be used within the telecommunications sector. Conciliation, similarly to mediation and negotiation, rarely brings the parties to a final and binding resolution of their dispute, as it involves the assistance of a conciliator

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<sup>34</sup> ITU Discussion Paper, Chapter 3.

<sup>35</sup> Samuel J. Reich, Structuring Baseball's "Final Offer" Arbitration process for use in proceedings before the CRTC: A Report, available on the website of the Canadian Radio-television and Telecommunications Commission, at: <http://www.crtc.gc.ca/eng/publications/reports/reich09.htm>; and Practice Note of the ICT Regulation Toolkit on 'Final Offer Arbitration' available at the following address: <http://www.ictregulationtoolkit.org/en/toolkit/notes/PracticeNote/3280>.

who only invites the parties to make concessions to minimise the differences in their understanding and handling of a dispute.

Some “innovative” approaches to alternative means are also mentioned by commentators in relation to telecommunications dispute resolution that include hybrids of official (formal) and unofficial (voluntary) methods.<sup>36</sup> These hybrid schemes provide for the combination of regulatory adjudication (that, in these cases, is usually limited to a supervisory intervention) and private and informal techniques that derive from the objectives of traditional ADR methods. I propose to call these combined, official/unofficial means, “**delegated regulatory adjudication**,”<sup>37</sup> as opposed to pure regulatory dispute resolution, traditional ADR, and court proceedings. An example of a delegated regulatory adjudication, that is, the adjudicating of local loop unbundling (LLU) in the UK, will be examined in Section 2.1 of this paper.

Clearly, each dispute resolution scheme adopted in implementation of the EU Telecom Package allows for various levels of involvement of the official, regulatory sector.<sup>38</sup> The varied official intervention in dispute resolution is illustrated in the table below prepared and presented by Rory Macmillan at the ITU/BDT European Workshop on Dispute Resolution held between August 31 and September 2, 2004.<sup>39</sup>

**Figure 2: Involvement of the official and non-official sectors<sup>40</sup>**

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

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

Against this background, the purpose of the second part of this paper is two-fold. First, I aim at identifying the disputes between telecommunications undertakings over both regulatory obligations and commercial settings stemming from the regulatory dynamics in the telecommunications sector. I adopt a relatively broad definition of the notion “dispute”, incorporating the preliminary stages of dispute resolution schemes even prior to the submission of a formal claim or complaint by the parties. This approach, however, does not accommodate investigations conducted by NRAs, nor the

<sup>36</sup> Rory Macmillan, “Effective Dispute Resolution: A Pressing Priority for Policy-Makers and Regulators,” p. 29.

<sup>37</sup> This term has been developed jointly by the author and Marta Cantero-Gamito, a Ph.D. Candidate at the European University Institute.

<sup>38</sup> Rory Macmillan, “Effective Dispute Resolution: A Pressing Priority for Policy-Makers and Regulators,” p. 28.

<sup>39</sup> Source: Rory Macmillan, Lawyer and Mediator. Extracted from Mr Macmillan’s presentation at the ITU/BDT European Workshop on Dispute Resolution, 31 August to 2 September 2004. Macmillan’s paper is available at: <http://www.itu.int/itunews/manager/display.asp?lang=en&year=2004&issue=10&ipage=dispute&ext=html>.

<sup>40</sup> Ibid.

conflicting interests of the telecommunications operators in the meaning of a dispute as adopted in the ITU Discussion Paper. Here, I also look at judicial review of the NRAs' adjudicative solutions, especially as far as the NRA's decisions to outsource certain disputes to alternative adjudicatory bodies and other discretionary powers of NRAs as identified in this section are concerned. The second objective is to analyse the procedures for the resolution of different telecommunications disputes, specifically in view of the suitability of certain alternative means for the industry-specific disputes, on one side, and for the commercial disputes that involve lesser regulatory intervention and rather stem from contractual settings of the parties engaged, on the other side. The major question to be addressed is whether industry-specific ADR as adopted in various national jurisdictions follows coherent patterns, and if not (as can be preliminary derived from the introductory part of the paper), what is the rationale of NRAs to favour one alternative mechanism over another with regard to different national regulatory models as well as diverse business cultures within the studied jurisdictions.<sup>41</sup>

## **2.1. National Perspectives**

### ***The UK***

In the UK, the regulation of the communications sector has been assigned to the Office of Communications commonly known as Ofcom.<sup>42</sup> Ofcom is an example of a converged regulator that deals with a number of specific issues emerging in different regulatory areas (such as networks and services, spectrum management, and broadcasting), in a horizontal manner.<sup>43</sup> Ofcom defines its functions of convergence as follows:

In a converged age many of the issues facing the communications issue transcend the old boundaries and therefore need a converged response. This is certainly true in competition law and economics, where Ofcom is a competition authority alongside the United Kingdom's OFT [Office of Fair Trading]. Linked to that is an ability to deal with incumbency on a scale that - albeit smaller - is more evenly matched to the regulatory affairs departments of the main incumbents, in knowledge, experience and in talent and motivation.<sup>44</sup>

Ofcom assumes various functions, one of them involving dispute resolution.<sup>45</sup> Section 185 of the UK Communications Act of 2003 (the UK Communications Act) enumerates the types of disputes that fall within Ofcom's authority, such as disputes over both the provision of network access and regulatory obligations imposed on the parties.<sup>46</sup> The prospective content of such disputes is very broadly defined, and it encompasses disputes related to terms and conditions under which the network access is provided and the terms and conditions on which *any* transaction is entered into for the purpose of complying with a regulatory obligation.<sup>47</sup>

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<sup>41</sup> See "Dispute Resolution among ICT providers" in: "Functional Aspects of Regulation", ITU downloadable paper at [www.ictregulationtoolkit.org/sectionexport/word/6.6](http://www.ictregulationtoolkit.org/sectionexport/word/6.6).

<sup>42</sup> The website of Ofcom can be accessed via: <http://www.ofcom.org.uk>

<sup>43</sup> For a comprehensive explanation of the dynamics of convergence in telecommunications markets see Rand's Technical Report on: Responding to Convergence: Different approaches for Telecommunication regulators, prepared by Constantijn van Oranje-Nassau, Jonathan Cave, Martin van der Mandele, Rebecca Schindler, Seo Yeon Hong, Ilian Iliev, Ingo Vogelsang for Dutch Independent Telecommunications and Post Regulator (OPTA), 2008, available at: [http://www.rand.org/content/dam/rand/pubs/technical\\_reports/2011/RAND\\_TR700.pdf](http://www.rand.org/content/dam/rand/pubs/technical_reports/2011/RAND_TR700.pdf).

<sup>44</sup> See: ICT Regulatory Toolkit, Practice Note 2030 on the "Case Study Converged Regulator: Ofcom [6.1.1]" available at: <http://www.ictregulationtoolkit.org/en/toolkit/notes/PracticeNote/2030>.

<sup>45</sup> For more information on the functions of Ofcom, see: *Ibid*.

<sup>46</sup> The UK Communications Act of 2003, 2003 c. 21, available at: <http://www.legislation.gov.uk/ukpga/2003/21/contents>.

<sup>47</sup> *Ibid*.

Some types of disputes have been expressly excluded from the scope of Section 185 of the UK Communications Act pursuant to paragraph 7 of Section 185. These disputes involve the following:

- Obligations imposed on communications providers under SMP conditions;
- Contraventions of Sections 125 to 127 of the UK Communications Act;
- Obligations imposed on communications providers by or pursuant to sections 128 and 131;
- The operation in the case of communications providers of section 134.

Sections 186 and 188 of the UK Communications Act, dealing with the actions of Ofcom related to “dispute reference” and the procedure for resolving disputes, accordingly mirror the European dispute resolution framework as established under the EU Telecom Package. Hence, pursuant to **ordinary procedure**, Ofcom should first determine whether it is appropriate or not to handle a dispute. In making such a determination, Ofcom should take into account the availability of alternative means and their impact on a prompt resolution of a particular dispute. In cases in which a dispute referred to ADR is not resolved within four months, Ofcom has the authority to accept the dispute should either of the parties involved refer it back to Ofcom. The UK Communications Act confers broad powers on Ofcom when it comes to setting forth the submission procedure to be followed by the parties, as well as the procedure for Ofcom related to the consideration and determination of a dispute. Ofcom should resolve the dispute within four months from the moment of issuing a determination that it constitutes the appropriate forum in terms of handling the dispute or from the day on which the parties involved in the dispute referred it back to Ofcom.

Although the respective provisions of the UK Communications Act seem to entirely mimic the dispute resolution procedure contained in the EU Telecom Package, Paul Brisby points to the existence of a loophole in Section 186 of the Act that concerns no reference to a time-limit within which Ofcom should decide on its appropriateness to hear a dispute or refer it to ADR.<sup>48</sup> According to Brisby, this was the subject of a stormy debate between the members of the industry and the UK Department of Trade and Industry at the moment when the draft UK Communications Act was being debated.<sup>49</sup>

Ofcom’s **regulatory powers in resolving disputes** have been acknowledged in Section 190 of the UK Communications Act. In principle, Ofcom can use one or more of the following prerogatives:

- Declare the rights and obligations of the parties to a dispute;
- Issue a direction fixing the terms and conditions of transactions between the parties involved in a dispute;
- Issue a direction imposing an obligation to enter into a transaction between the parties on terms and conditions fixed by Ofcom. In this case, both parties should be responsible for the enforcement of such a direction;
- Issue a direction for the purpose of giving effect to a determination by Ofcom of the proper amount of a charge with regard to which amounts have been paid by one of the parties involved in a dispute to the other, requiring the payment of sums by way of adjustment of an underpayment or overpayment. In this case, the party to whom the sums are to be paid should be responsible for the enforcement of the direction.<sup>50</sup>

Section 190 (5) of the UK Communications Act provides for the particular powers of Ofcom in cases where a dispute is referred back to Ofcom after being considered by an ADR body. Ofcom may not

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<sup>48</sup> Paul Brisby, “Dispute Resolution in Telecoms – The Regulatory Perspective,” p. 6.

<sup>49</sup> Ibid.

<sup>50</sup> These powers do not refer to the resolution of disputes relating to rights and obligations conferred or imposed by way of enactments relating to the management of radio spectrums. See: Section 190 (2) of the UK Communications Act.

only take into account the decisions already made through ADR, but it may also include in its determinations the provisions ratifying the solutions that had been previously informally reached. As reads from Ofcom's Dispute Resolution Guidelines published on December 17, 2010 (Ofcom's Guidelines of 2010), Ofcom will recognise the "without prejudice" nature of negotiations conducted in the alternative resolution of disputes in order not to disadvantage any party to the dispute.<sup>51</sup> Moreover, Ofcom will assess the outcomes of previous ADR mechanisms in view of the regulatory principles and statutory duties as set forth in the UK Communications Act. This is a fascinating example of the reliance by NRAs on ADR, as it involves a specific interplay between regulatory intervention and private, informal solutions, in particular as far as the complementary powers of NRAs and private adjudicators acting within ADR schemes are concerned.

The UK Telecommunications Act, in Sections 193-196 also deals with the appeal procedures against the decision of Ofcom. The appeals should be decided by the Competition Appeal Tribunal (CAT). Additionally, the price control matters arising in the appeals must be referred to the Competition Commission (CC) for determination. Yet again the UK Communications Act does not specify if there is a possibility for the parties to appeal against the decisions taken by means of ADR. This may suggest that the admissibility of the appeals within the ADR mechanisms should follow the dynamics and objectives of each particular alternative means of dispute resolution, as adopted for the specific case.

Dispute resolution procedures as applied or determined by Ofcom concern the following mechanisms: (1) regulatory adjudication; (2) delegated regulatory adjudication; and (3) ADR. Let us now examine the application of these mechanisms to particular types of inter-operator disputes that emerge in the UK telecommunications market.

### Regulatory adjudication

Ofcom's policy in hearing regulatory disputes is claimed to be conservative and the regulatory adjudication will likely involve cases between multiple parties or disputes in which at least one party involved is of a dominant position.<sup>52</sup> Therefore, the main factors for determining Ofcom's jurisdiction to handle a dispute concern the number of market players involved, the complexity of the case, and the position of the party involved in a dispute within the telecommunications market rather than a subject matter of a dispute that requires regulatory adjudication.

The procedure to be applied by Ofcom when handling regulatory disputes is discussed in the Ofcom's Guidelines of 2010 as revised by Ofcom's Dispute Resolution Guidelines: Ofcom's Guidelines for the Handling of Regulatory Disputes of June 7, 2011 (Ofcom's Guidelines of 2011).<sup>53</sup> The following analysis of Ofcom's regulatory adjudication does not aim at addressing all the steps of Ofcom's dispute resolution process in detail. Rather, it is directed towards a better understanding of the discretion of Ofcom in making regulatory decisions as enshrined in the UK Communications Act,

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<sup>51</sup> See Ofcom's Dispute Resolution Guidelines: Ofcom's Guidelines for the Handling of Regulatory Disputes, published on December 17, 2010, available at: <http://stakeholders.ofcom.org.uk/binaries/consultations/dispute-resolution-guidelines/summary/condoc.pdf>, Section 6.17.

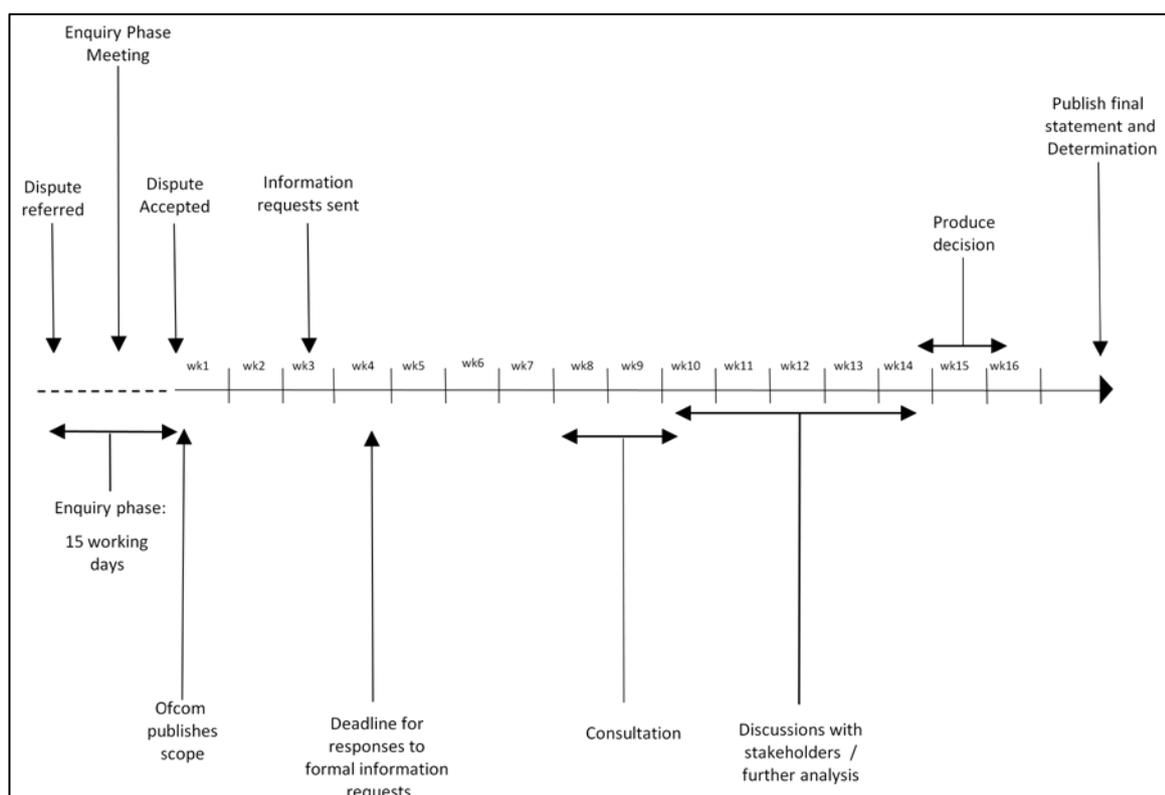
<sup>52</sup> Paul Brisby, "Dispute Resolution in Telecoms – The Regulatory Perspective," p. 9. See also: *Ibid*.

<sup>53</sup> Sections 185-191 of the UK Communications Act 2003 were amended by the Electronic Communications and Wireless Telegraphy Regulations 2011 (SI 2011/1210) that increased Ofcom's powers in resolving regulatory disputes. As a result Ofcom published a revised version of its Guidelines, Ofcom's Dispute Resolution Guidelines: Ofcom's Guidelines for the Handling of Regulatory Disputes of June 7, 2011. The revised document is available at: <http://stakeholders.ofcom.org.uk/binaries/consultations/dispute-resolution-guidelines/statement/guidelines.pdf>. See also: Payment of costs and expenses in regulatory disputes: Guidance on Ofcom's approach published on September 4, 2013, available at: <http://stakeholders.ofcom.org.uk/binaries/consultations/payment-costs/statement/guidance.pdf>.

as well as of the practical insights of Ofcom’s determinations especially in view of the ambiguities relating to the dispute resolution framework under the EU Telecom Package.

Ofcom’s assessment of every dispute submission entails two procedural steps: (1) the enquiry phase, and (2) formal proceedings. Both phases of Ofcom’s dispute resolution should be conducted within four months from the date of referral of the dispute by the parties. Figure 3 below, taken from Ofcom’s Dispute Resolution Guidelines, illustrates the key steps to be taken by Ofcom in order to issue a final determination in a timely manner.

**Figure 3: Statutory Timeline of Ofcom’s Dispute Resolution Process<sup>54</sup>**



First, within the **enquiry phase**, Ofcom will make relevant determinations on the existence of statutory grounds for it to handle the dispute. A case management team comprising members of Ofcom’s Investigation team, lawyers and other specialists such as economists or financial experts, preliminarily scrutinises each dispute.<sup>55</sup> Each team consists of a case leader acting as a point of reference for the parties involved. Section 7 of Ofcom’s Guidelines of 2010 (as reintroduced in Section 6 of Ofcom’s Guidelines of 2011) sets forth the submission requirements that should be carefully addressed by the parties, as they will constitute a factual and substantive basis for Ofcom to make relevant determinations of its jurisdiction. The submission should be made to the Investigations Programme Manager of Ofcom’s Competition Group, and it should contain the following particulars: preliminary information regarding the parties and a summary of the dispute;<sup>56</sup> the issue the dispute

<sup>54</sup> Source: the Ofcom’s Guidelines of 2010.

<sup>55</sup> Ofcom’s Guidelines of 2010, Section 3.16.

<sup>56</sup> Ibid., Section 7.8.

concerns including both a comprehensive explanation of the scope of the dispute and information regarding any justification given for the conduct or action that resulted in the dispute;<sup>57</sup> the history and evidence of any commercial negotiations conducted between the parties, as well as evidence suggesting that all reasonable steps have been taken to engage the opposing party in commercial negotiations in cases in which such a party refused to participate in the preliminary amicable dispute resolution;<sup>58</sup> reference to Ofcom's relevant statutory and Community duties as applicable in a particular case together with the explanation of the significance of the dispute for broader regulatory issues or policies;<sup>59</sup> and finally the proposed remedy in view of the technicalities of the dispute and Ofcom's remedial powers within the meaning of both Section 190 of the UK Communications Act and Ofcom's statutory duties.<sup>60</sup>

Based on the information provided in the dispute submission by the parties, Ofcom will admit its jurisdiction if it finds that all statutory requirements are met. This will involve a determination that a dispute in fact exists between the parties, that the parties named in the submission are proper parties to the dispute, and that other alternative mechanisms are not better suited for the resolution of the dispute. The Ofcom's Guidelines of 2011 confirm Ofcom's authority to hear disputes related to the provision of, and the entitlements to, network access that communications providers are required to provide under Section 45 of the UK Communications Act, and all other disputes that are not excluded by specific provisions of the Act concerning the rights and obligations under Section 45 of the Act or any of the enactments relating to the management of the radio spectrum.<sup>61</sup> Ofcom will make determinations whether the dispute referred by the parties falls within any of these categories on a case-by-case basis. For this reason, Ofcom will also examine the nature of a dispute within the enquiry phase.<sup>62</sup>

Regarding the **assessment of the proper parties to a dispute**, Ofcom will analyse if a dispute is between different communications providers, between a communications provider and a person who makes associated facilities available, or between different persons making such facilities available.<sup>63</sup> Additionally, if a dispute is referred to Ofcom under section 185(1A) of the UK Communications Act, Ofcom will examine if the dispute is one between a communications provider and a person who is identified or is a member of a class identified, in a condition imposed on the communications provider under section 45 of the UK Communications Act; or whether the dispute concerns entitlements to network access that the communications provider is required to provide to that person by or under that condition.<sup>64</sup>

Given that a detailed analysis of the ADR mechanisms to be applied in the UK telecommunications disputes will be provided in the following part of this paper, it is necessary now to only examine the objectives of Ofcom while assessing its inappropriateness to hear a dispute in view of the suitability of certain alternative means of dispute resolution. Ofcom will decline to hear a dispute if it determines that alternative means are available and suitable for a *prompt* and *satisfactory* resolution of a dispute, in accordance with Ofcom's statutory duties and the Community requirements set out in Section 4 of the UK Communications Act.<sup>65</sup> Moreover, such determinations will be made on

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<sup>57</sup> Ibid., Sections 7.9 and 7.10.

<sup>58</sup> Ibid., Section 7.11.

<sup>59</sup> Ibid., Section 7.13.

<sup>60</sup> Ofcom's Guidelines of 2010, Sections 7.14 and 7.15.

<sup>61</sup> Ofcom's Guidelines of 2011, Section 2.5.

<sup>62</sup> Ofcom's Guidelines of 2010, Section 4.3.

<sup>63</sup> Ofcom's Guidelines of 2011, Sections 3.8.1-3.8.3.

<sup>64</sup> Ibid., Sections 3.9.

<sup>65</sup> Ibid., Sections 4.10.2 and 4.11.

a case-by-case basis in view of different motives and incentives of the parties involved to reach commercial negotiations, as well as taking into account possible discrepancies in the negotiation power of the parties.<sup>66</sup>

Section 4.17 of Ofcom's Guidelines of 2011 contains a noteworthy statement related to Ofcom's policy on admitting or rejecting referred disputes, which also poses interesting implications for the assessment of the potential suitability of ADR mechanisms for the resolution of disputes. Ofcom declares that, with regard to network access disputes referred to Ofcom under Section 185(1) of the UK Communications Act, when deciding its appropriateness in terms of handling a given dispute, Ofcom may also take into consideration its *priorities* and *available resources* existent at the time a dispute is submitted to one of its teams. This means that Ofcom is under no statutory requirement to hear network access disputes. In making determinations regarding Ofcom's priorities and available resources, Ofcom will take into account its *administrative priority criteria* and other factors to the exclusion of Ofcom's view on the merits of a dispute.<sup>67</sup> Should one of these factors come into play, it is likely that a dispute will not be referred to ADR, as it will either be heard by Ofcom itself or be subject to alternative regulatory actions (such as planned market reviews).<sup>68</sup> The lack of statutory obligation of Ofcom to hear network access disputes is a function of the changes incorporated in the UK Communications Act.<sup>69</sup> However, a question emerges here concerning whether Ofcom's policy-driven attitude towards assessing its jurisdiction in fact stays in line with the requirements contained in the EU Telecom Package, which—in principle—put Ofcom in a position to hear regulatory disputes.<sup>70</sup> Some commentators assert that Ofcom's approach to hearing and declining disputes should not be a subject of criticism, as it may enhance the effectiveness of Ofcom's broad regulatory functions.<sup>71</sup>

The last stage of the enquiry phase conducted by Ofcom involves the exchange of the non-confidential versions of the submission, the organization of the Enquiry Phase Meeting (EPM) by Ofcom, and the notifications made to the parties by Ofcom regarding its acceptance or rejection of a dispute.<sup>72</sup> The EPM requires particular attention here as it attests to Ofcom's policy on promoting the input of the parties in the effective determination of the scope of disputes and their possible prompt resolution. The EPM takes the form of an informal meeting attended by the parties' commercial and regulatory affairs representatives.<sup>73</sup> During the EPM, Ofcom confirms the facts of a dispute, its scope

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<sup>66</sup> Ibid., Sections 4.11 and 4.13.

<sup>67</sup> See Section 4.19 of the Ofcom's Guidelines of 2011 where the factors to be taken into account by Ofcom are enlisted. These factors involve the following:

- The risk to the interests of citizens or consumers as a result of the dispute (and whether that risk is immediate or not and whether it is direct or indirect);
- The resources required to resolve a dispute, given the need to do justice to the interests of all parties likely to be affected by the dispute (for example: citizens and consumers; the Parties in dispute; and third parties). Particular issues may arise where there are specific policy or specialist skills that are required to undertake a dispute;
- Whether the issue that has been identified relates directly to Ofcom's broader strategic goals or priorities (including those within Ofcom's Annual Plan);
- Whether the matters in dispute are on-going; and
- Whether there are other alternative regulatory actions (for example, planned market reviews) that are likely to achieve the same ends, or deal with the same issues, as the dispute. This could include, for example, whether other agencies may be better placed to consider the subject matter of the dispute.

<sup>68</sup> Ibid.

<sup>69</sup> These changes resulted from the implementation of the revised EU Telecom Package into the UK telecommunications law.

<sup>70</sup> Paul Brisby, "Dispute Resolution in Telecoms – The Regulatory Perspective."

<sup>71</sup> Ibid.

<sup>72</sup> Ofcom's Guidelines of 2010, Sections 5.17 – 5.25.

<sup>73</sup> Ibid., Section 5.19.

and the timetable for the resolution of the dispute provided that Ofcom has previously established its position in terms of admitting the dispute.

Although Ofcom claims not to be a mediator or arbitrator serving either of the parties involved in a dispute, the above-mentioned steps to be taken by Ofcom in terms of its jurisdiction, as well as the requirements for submission referrals as established by Ofcom within its discretionary powers, resemble the procedure that the most prominent arbitration institutions follow.<sup>74</sup> The parallels can be found in the following: Ofcom's conservative approach to formal submissions, the requirements that both parties carefully explain their positions and the nature of the dispute, the role of Ofcom's case-managers in communicating with the parties and their role in terms of the preliminary assessment of the dispute, and finally the information gathering prerogatives of Ofcom contained under Section 191 of the UK Telecommunications Act. Specifically, the existence of the EMP could be compared with a document called "Terms of Reference" that is issued at the outset of the International Court of Arbitration of the International Chamber of Commerce (ICC) arbitration proceedings aimed at ensuring that arbitrators will not exceed their jurisdiction and confirming the procedural aspects of the pending arbitration case. Some arbitral institutions such as the American Arbitration Association (AAA) with its International Centre for Dispute Resolution (ICDR) also provide for preliminary conferences or meetings with the parties in order to speed up the preliminary assessment of a dispute. This is not to claim that Ofcom's preliminary determinations of jurisdiction derive from arbitration traditions. Rather, it is relevant to point here to the crucial role of the parties themselves in the initial phase of their dispute resolution processes before Ofcom in terms of assessing the admissibility of the dispute and its further determination, similarly to the preliminary stages of traditional arbitration proceedings.

The second phase of Ofcom's dispute resolution process concerns the formal proceedings. The proceedings before Ofcom begin with the publication by Ofcom of its decision regarding the admissibility of a dispute in Ofcom's Competition and Consumer Enforcement Bulletin. In line with Section 190(2A) of the UK Communications Act, Ofcom should issue a decision with a view on the necessary promotion of efficiency, sustainable competition, efficient investment and innovation, and finally for the greatest possible benefit for the end-users of public electronic communications services.<sup>75</sup> The relevant parties to such disputes should state in their submissions how their disputes comply with these objectives.

Ofcom is under no statutory obligation to consult the parties on draft dispute determinations.<sup>76</sup> This is, however, not part of Ofcom's policy. In fact, Ofcom allows stakeholders to reflect on draft dispute resolution provisions. This "consultation process" has been recently facilitated by Ofcom in order to enhance the probability of prompt resolution of disputes, in any case within four months from the day the dispute is referred by the parties.<sup>77</sup> In approximately the eighth week of the dispute resolution process, Ofcom will publish on its website a document entitled "Dispute Consultation" in which it will set out the major arguments related to the resolution of a particular dispute. The stakeholders will then have between ten to fifteen days to submit their comments on the Dispute Consultation.<sup>78</sup> Final determinations of disputes are binding upon the parties and enforceable by a relevant court.<sup>79</sup>

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<sup>74</sup> *Ibid.*, Section 3.2.

<sup>75</sup> Ofcom's Guidelines of 2011, Section 5.28.

<sup>76</sup> See: Article 6 of the Framework Directive.

<sup>77</sup> Ofcom's Guidelines of 2011, Sections 5.33 up to 5.40.

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*, Section 5.41.

The last of Ofcom's prerogatives that requires analysis here concerns **Ofcom's discretion in recovering the costs of its regulatory adjudication** from the parties under the new provisions contained in the UK Communications Act. Ofcom's powers in this regard have been amended by the Electronic Communications and Wireless Telegraphy Regulations 2011 (SI 2011/1210) (the Regulations). Under Section 190 of the UK Communications Act as amended by the Regulations, Ofcom may require a party to cover the costs of the dispute resolution procedure after assessing both: the party's conduct prior to and following the submission referral to Ofcom concerning the party's attempts to resolve a dispute and whether Ofcom has made a decision in favour of a particular party.<sup>80</sup> Additionally, Ofcom has a right to recover the costs and expenses incurred in handling disputes under spectrum legislation or any other types of disputes provided that Ofcom had previously considered the factors set out in Section 190 of the UK Communications Act, as explained above.

This is an important reform regarding Ofcom's powers in recovering the costs and expenses related to its dispute resolution scheme. Prior to the amendments, Ofcom was authorized to claim the costs and fees from the parties only through the convoluted administrative charges provided for across the telecommunications industry pursuant to Section 38 of the UK Communications Act.<sup>81</sup> What is more, this reform was aided by the possible encouragement of the parties to rely on alternative means of dispute resolution, at least with regard to disputes that are suitable for ADR. The Department for Culture, Media, and Sport, responsible for implementing the changes related to the EU Telecom Package, in its Statement of 15 April 2011 that underpinned the Regulations expressly specified that the new provisions on costs recovery are likely to be invoked by Ofcom in cases where the parties have not engaged in ADR prior to the submission of a dispute to Ofcom (should ADR mechanisms be available to such parties).<sup>82</sup> The official policy standing behind these changes relates to the public confidence in ADR schemes in the telecommunications sector, which were said to be "cost effective and less bureaucratic than the current [Ofcom's] dispute resolution process."<sup>83</sup> This public trust in private dispute resolution mechanisms is enrooted in the history of the ADR movement in the UK that concerns the existence of a strong private – public partnership supporting the application of ADR within different public sectors in the UK.<sup>84</sup>

Moreover, the linkages between costs of regulatory adjudication and the parties' exhaustion of different ADR methods prior to the referral of a dispute to Ofcom, as expressed in the UK Communications Act, reflect general support for the role of ADR in civil litigation in the UK. A few UK judgments confirmed that in the case of a litigant's failure to participate in ADR, the court would be in a position to impose costs sanctions upon it.<sup>85</sup> Already in the decision in *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002, the Court of Appeal set forth the so-called "Halsey principles" expressing judicial support for ADR in the UK. First, the Court of Appeal stated that it might encourage the parties to engage in ADR in suitable cases. Second, it was confirmed that when exercising its discretion relating to the allocation of costs between the parties, the Court of Appeal was

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<sup>80</sup> Section 190 of the UK Communications Act.

<sup>81</sup> See Department for Business Innovation & Skills Statement: "Implementing the revised EU Electronic Communications Framework: Overall Approach and Consultations on Specific Issues," September 2010, available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/31567/10-1132-implementing-revised-electronic-communications-framework-consultation.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31567/10-1132-implementing-revised-electronic-communications-framework-consultation.pdf).

<sup>82</sup> *Ibid.*, Sections 124-126.

<sup>83</sup> *Ibid.*

<sup>84</sup> See Loukas Mistelis (2003) "ADR in England and Wales: a successful case of public private partnership," *ADR Bulletin*: Vol. 6: No. 3, Article 6. Available at: <http://epublications.bond.edu.au/adr/vol6/iss3/6>.

<sup>85</sup> See Alexander Oddy, Jan O'Neil, "Failure to engage with ADR proposals: Court of Appeals extends the Halsey principles." *Herbert Smith Freehills Alternative Dispute Resolution E-Bulletin*, 30 October 2013, available at: <http://herbertsmithfreehills.com/-/media/Files/ebulletins/20131030%20Failure%20to%20engage%20with%20ADR%20proposals%20Court%20of%20Appeal%20extends%20the%20Halsey%20principles.htm>.

authorized to consider the parties' conduct regarding their participation in ADR. As such, the Court of Appeals could deprive the successful party of some or all its costs when such a party had unreasonably refused to participate in ADR. Furthermore, the Court of Appeals defined the situations in which the parties' refusal to engage in ADR could have implications for the Court's determination that such refusal was unreasonable. These situations concerned the following:

- a. The nature of the dispute;
- b. The merits of the case;
- c. The extent to which other settlement methods have been attempted;
- d. Whether the costs of the ADR would be disproportionately high;
- e. Whether any delay in setting up and attending the ADR would have been prejudicial;
- f. Whether the ADR had any reasonable prospect of success.<sup>86</sup>

The second judgement to be analysed here concerns the decision of the Court of Appeal in *PGF II SA v OMFS Company Ltd [2013] EWCA Civ 1288*.<sup>87</sup> This remarkable judgement extended the Halsey principles in support of ADR by way of holding that even a defendant's silence vis-à-vis the invitation for mediation could be qualified as a ground for determining that the defendant's refusal to mediate was unreasonable. This, in turn, justified the costs sanctions imposed on a "recalcitrant" litigant. The Court of Appeal (Justice Briggs) stated that:

In my judgment, the time has now come for this court firmly to endorse the advice given in Chapter 11.56 of the ADR Handbook, that silence in the face of an invitation to participate in ADR is, as a general rule, of itself unreasonable, regardless whether an outright refusal, or a refusal to engage in the type of ADR requested, or to do so at the time requested, might have been justified by the identification of reasonable grounds. I put this forward as a general rather than invariable rule because it is possible that there may be rare cases where ADR is so obviously inappropriate that to characterise silence as unreasonable would be pure formalism. There may also be cases where the failure to respond at all was a result of some mistake in the office, leading to a failure to appreciate that the invitation had been made, but in such cases the onus would lie squarely on the recipient of the invitation to make that explanation good.<sup>88</sup>

Having identified the general UK courts' support for ADR, it should be clear that the recent changes to Ofcom's powers in recovering the costs of its adjudication vis-à-vis the parties who failed to engage in ADR, as conferred on Ofcom in the UK Communications Act, are in line with the general approach to encourage ADR prior to the initiation of the official proceedings (be it judicial or regulatory) by the parties in the UK. Surprisingly, Ofcom's commentary to the new provisions suggests a more moderate approach to the use of ADR prior to the submission of a dispute to regulatory adjudication. In its revised Dispute Resolution Guidelines, Ofcom states that: "costs requirements should not act to discourage Parties from referring genuine regulatory disputes for resolution where alternative dispute resolution may not be appropriate."<sup>89</sup>

The above statement implies that Ofcom will assess the suitability of ADR for regulatory disputes on a base-by-case basis, though using a narrower approach to ADR as compared to the broad and supporting attitude that was expressed by the English courts in the above-mentioned judgments. Moreover, it seems that Ofcom will likely tend to confirm its broad powers in regulatory adjudication, and decline a dispute only if the outcome of such a dispute has no significance for the regulatory dynamics in the UK telecommunications sector.

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<sup>86</sup> *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002, available at: <http://www.bailii.org/ew/cases/EWCA/Civ/2013/1288.html>, Sections 17-23

<sup>87</sup> *PGF II SA v OMFS Company Ltd* [2013] EWCA Civ 1288, available at: <http://www.bailii.org/ew/cases/EWCA/Civ/2013/1288.html>.

<sup>88</sup> *Ibid.*, Section 34.

<sup>89</sup> Ofcom's Guidelines of 2011, Section 5.53.

## Delegated regulatory adjudication

There are also certain types of disputes between communications undertakings that have been outsourced or delegated by Ofcom to various independent adjudicator schemes to promote the delivery of high quality industrialised products within different communications sectors. There exist three Adjudicator Schemes in the context of Ofcom's delegated regulatory adjudication that should be analysed below: (1) the Telecommunications Adjudicator with regard to disputes concerning LLU, (2) the Adjudicator for Broadcast Transmission Services, and (3) the Adjudicator established for the resolution of disputes between Carlton-Granada and its advertising customers with regard to the Contract Rights Renewal (CRR) Remedy.

**The Office of Telecommunications Adjudicator** (OTA) was established by Ofcom in June 2004 to “work with the industry to help develop new local loop unbundling (‘LLU’) products and processes which were fit-for-purpose and industrialised to cope with large volumes over time.”<sup>90</sup> OTA's original adjudication scheme is now employed by OTA2 that operates through the activity of several telecommunications professionals with extensive experience in different communications industries.<sup>91</sup> OTA2 is an organization independent from Ofcom and the industry. As specified on OTA2's website, its main goal is to: “deal with major or strategic issues affecting the rollout and performance of products provided by Openreach, the company which manages the UK's local telephone network and connects customers to their local telephone exchange.”<sup>92</sup>

Although OTA2 is an independent body, the framework underpinning OTA2's operation was designed entirely by Ofcom. The following documents constitute the Telecommunications Adjudication Framework: (1) Telecommunications Adjudication Scheme; (2) Scheme Agreement; (3) Adjudicator Appointment Rules; (4) Facilitation Rules; (5) Dispute Resolution Rules; (6) and Ofcom's Terms of Reference for the Telecommunications Adjudication Scheme for LLU.<sup>93</sup> The latest version of the guidelines accessible to the public used by OTA2 in their adjudication of a dispute date back to October 14, 2004.<sup>94</sup>

OTA2 will hear a dispute between British Telecommunications plc (BT) and other providers of electronic communications networks and services (operators) under various bilateral contracts (such as Access Network Facilities Agreements) entered into by the parties. In sum, the disputes to be referred to OTA2 concern disagreements between operators and BT related to the granting by BT of access to the telephone exchange, which in principle should be provided on a non-discriminatory basis. Section 2 of the original OTA Guidelines of 2004 states that the Telecommunications Adjudication Rules—once incorporated into the parties' Access Network Facilities Agreements under the so-called “Scheme Agreements”—should displace any contractual provisions contained therein. The OTA Adjudication Scheme is regarded as a voluntary, private contractual mechanism agreed on between the parties for the resolution of their disputes.<sup>95</sup> The objectives of the Adjudicator under the OTA Scheme were defined in Ofcom's Terms of Reference and concern the following:

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<sup>90</sup> See Ofcom's Review of Telecommunications Adjudication Scheme for LLU available at <http://stakeholders.ofcom.org.uk/telecoms/groups/telecoms-adjudication-scheme/review/>.

<sup>91</sup> It is unclear to the author (who were unsuccessful in receiving the answer from OTA2 itself) whether the existent OTA2 scheme departs from the original OTA scheme in a significant manner. In this view, the OTA original scheme is presented here as an explanation of the dynamics of the original delegated regulatory adjudication that was performed by OTA. See also: the names and bio notes of the OTA2 team at: <http://www.offta.org.uk/about.htm>.

<sup>92</sup> See OTA2 website at: <http://www.offta.org.uk>.

<sup>93</sup> The documents falling within the Telecommunications Adjudication Scheme are available at: <http://stakeholders.ofcom.org.uk/telecoms/groups/telecoms-adjudication-scheme/?a=0>

<sup>94</sup> The 2004 OTA Guidelines are available at: <http://www.offta.org.uk/ag141020041.pdf>

<sup>95</sup> Section 6 of the 2004 OTA Guidelines.

- Reasonable resource constraints (including training requirements) of Operators and BT and the ability of Operators and BT to increase resources, although the Adjudicator is able to recommend (in facilitation) or require (in Rulings and Adjudications) reasonable increases in resources;
- Efficiently incurred and reasonable costs, and the need to avoid wasteful expenditure by Operators and BT;
- Likely future demand levels and forecasts;
- Reasonable cost recovery and reasonable profit;
- The policy context as set by Ofcom/Oftel and regulatory rules (including any relevant Ofcom/Oftel guidelines) in relation to LLU and other relevant products and such policy / regulatory rules as are amended from time to time;
- Existing product / processes;
- Existing customers;
- Network security and network integrity;
- The activities and recommendations of other related groups such as the NICC and Billing Industry Forum;
- Where relevant, Ofcom's statutory duties; and
- The impact of any decision on other LLUOs, Operators and BT as well as on the Parties to the Dispute.<sup>96</sup>

The original OTA Adjudication Process resembles the regulatory adjudication scheme conducted by Ofcom. Although there is no formal distinction between the enquiry phase and formal proceedings, the Adjudicator will expect the parties to first follow the formal requirements for their submission, including obtaining clarification from the parties on whether they have previously engaged in any ADR techniques (e.g. commercial negotiations) towards resolving the dispute.<sup>97</sup> At any time, the Adjudicator may refer a dispute to facilitation (or further facilitation) should it decide that such techniques would contribute to faster and more effective dispute resolution.<sup>98</sup> Second, the Adjudicator will take into account if a referred dispute falls within the category of adjudicable disputes within the meaning of Sections 3.2 and 3.3 of the Dispute Resolution Rules.<sup>99</sup> There are two ways for submitting disputes to the Adjudicator: (1) the disputes may be referred by a party before such disputes are submitted to Ofcom, or (2) the disputes may be referred by Ofcom after such disputes have been first submitted to it for a resolution. In the first case, the Adjudicator will be expected to issue a Ruling; while in the second scenario, the Adjudicator will be requested to produce an Adjudication.<sup>100</sup>

In fact, the Adjudicator may not act as arbitrator or mediator vis-à-vis the parties, and its functions are limited to resolving a dispute as a facilitator or an independent expert.<sup>101</sup> The Adjudicator should in any case issue an independent, objective and fair determination of the dispute with regard to the principles of natural justice.<sup>102</sup> As the general commentary to the operation of OTA2 will be provided at the end of this section, we should proceed here to concentrate on an examination of the activity of another “delegated” adjudicator in the UK, namely, the **Adjudicator for Broadcast Transmission Services (OTA-BTS)**.

OTA-BTS was established in 2008 following the decision, dated March 11, 2008 of the CC, in which the CC permitted the merger of transmission companies Arqiva and National Grid Wireless

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<sup>96</sup> See The 2004 OTA Guidelines and the references to Ofcom's Terms of Reference in Section 4.5 of the Guidelines.

<sup>97</sup> See Annex 2 to the 2004 OTA Guidelines entitled: “Format for Referring Dispute to the Adjudicator”.

<sup>98</sup> Section 15 of the 2004 OTA Guidelines.

<sup>99</sup> For the information on the “adjudicable” disputes, see: Sections 3.2 and 3.3 of the Dispute Resolution Rules.

<sup>100</sup> Section 17 of the 2004 OTA Guidelines.

<sup>101</sup> Section 4.5 of the Ofcom's Terms of Reference and Section 6.1 of the Dispute Resolution Rules.

<sup>102</sup> Section 6.3 of the Dispute Resolution Rules.

(NGW) based on their agreement to a package of measures (undertakings) aimed at guarding the interests of their customers.<sup>103</sup> The CC was at the time concerned that such a merger would contribute to a lessening of competition in broadcast transmission services and it therefore encouraged the establishment of OTA-BTS to oversee the changes to, and the developments of, the broadcast transmission market.<sup>104</sup> The Adjudication Scheme of OTA-BTS is contained in Annex 2 of a document entitled “Undertakings to the Competition Commission by Macquarie UK Broadcast Holdings Limited, Macquarie MCG International Limited, Macquarie European Infrastructure Fund II, Macquarie European Infrastructure Fund III and Macquarie Capital Funds (Europe) Limited” (Undertakings) and is based on the guidelines prepared by Ofcom on October 21, 2008.<sup>105</sup> Moreover, as reads from Ofcom’s News Release of September 12, 2008, Ofcom was charged with the appointment of Mr. Alan Watson as the first Adjudicator under the OTA-BTS Adjudication Scheme.<sup>106</sup>

The Adjudication Scheme of OTA-BTS is relevant for the resolution of disputes arising out of or in connection with all television and radio transmission agreements concluded by Arqiva and its customers.<sup>107</sup> The adjudicable dispute arises when the commercial negotiations between the parties have failed.<sup>108</sup> The formal process before the Adjudicator is initiated upon the submission of a Notice of Adjudication that should meet all requirements established in Section 6 of Appendix 2 to the Undertakings. Within seven working days from the receipt of the Notice of Adjudication, the Adjudicator will publish a document including the scope of the dispute, which should then be addressed by the opposing party by way of submitting a response to such a Notice (called the Notice of Reply).<sup>109</sup> In cases in which the Adjudicator determines that the Notice of Adjudication does not satisfy the formal requirements, that the alternative means have not been previously exhausted by the parties, or that Ofcom may be appropriate to handle the dispute under the provisions of Section 186 of the UK Communications Act, the Adjudicator will decline to hear the dispute. Should none of the above apply, the Adjudicator will examine the parties’ submissions together with the supporting documents and issue its determination ordinarily within twenty working days from the date of the submission of the Notice of Reply.<sup>110</sup> The decision of the Adjudicator is—in principle—final and binding upon the parties. Even at this final stage, however, the Adjudicator may refuse to provide for a binding solution and encourage the parties to enter into commercial negotiations.

A similar but somewhat simplified adjudication scheme was established for the **Office of Adjudicator for disputes between Carlton-Granada and its advertising customers with regard to the Contract Rights Renewal (CRR) Remedy**. The CRR Adjudicator was established following the CC’s decision of May 12, 2004 on the merger of Carlton and Granada, two companies engaged in the selling of television airtime, a merger that was permitted based on the condition that these companies subject themselves to new regulatory obligations called CRR Remedy.<sup>111</sup> The CRR Remedy was to protect the rights of other companies falling within the ITV group and it involved both the advertisers,

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<sup>103</sup> See the introductory note available on OTA-BTS’s website at: <http://adjudicator-bts.org.uk>

<sup>104</sup> Ibid.

<sup>105</sup> See: The Undertakings available at: <http://adjudicator-bts.org.uk/documents/Undertakings%20-%20Non-confidential%20version.pdf>. See also: Ofcom’s Guidelines for the Adjudicator: the Arqiva Undertakings, published by Ofcom on October 21, 2008 and available at: <http://stakeholders.ofcom.org.uk/binaries/consultations/arqiva/summary/arqiva.pdf>.

<sup>106</sup> Ofcom’s News Release of September 12, 2008 available at: <http://media.ofcom.org.uk/news/2008/ofcom-appoints-adjudicator-for-broadcast-transmission-services/>.

<sup>107</sup> See specifically Section 13 of the Undertakings.

<sup>108</sup> The Section on Dispute Process as explained by OTA-BTS on its website at: <http://adjudicator-bts.org.uk/disputes.htm>.

<sup>109</sup> Ibid.

<sup>110</sup> Ibid.

<sup>111</sup> See the introductory note on the CRR website at: <http://www.adjudicator-crr.org.uk>.

who enter into agreements with the broadcasters directly, and media buyers, who conclude the sale contracts related to commercial airtime indirectly, that is, on behalf of the advertisers.<sup>112</sup>

As compared to the OTA-BTS Adjudication Scheme, the major variation of the CRR Adjudicator concerns the content of the decisions to be made by the CRR Adjudicator. Usually, the CRR Adjudicator will issue its decision pronouncing either “yes” or “no” with regard to the determination of whether Carlton or Granada acted fairly and reasonably in relation to its customers.<sup>113</sup> The decision will state its reasons whenever appropriate.<sup>114</sup> Moreover, the decisions of the CRR Adjudicator are not final, as the Adjudicator may consider it appropriate for the parties to submit an appeal against such decisions to Ofcom.<sup>115</sup> Alternatively, the parties may rely on their original contract or refuse to proceed with the execution of the said contract, should the contractual provisions that have been agreed to provide for such solutions.<sup>116</sup>

The examples of the delegated regulatory adjudication as analysed above attest to a strong regulatory supervision (exercised by Ofcom) of somewhat less formal procedures established for the resolution of certain types of regulatory disputes in the UK. All three Adjudication Schemes presented above resemble a form of expert proceedings aiming at facilitating the parties conduct in an official manner. The delegated adjudicators act in conformity with Ofcom’s guidelines for resolving disputes, and they should by no means be compared to mediators or arbitrators acting in traditional, commercial dispute resolution proceedings. What is important, however, concerns the fact that delegated adjudication schemes in all three cases encourage the use of ADR mechanisms by the parties, which should usually take the form of commercial negotiations. Moreover, the last of the studied schemes, namely, the CRR Adjudication Scheme, entails an interesting combination of private-public enforcement of commercial obligations of the parties to the agreements involving the sale of airtime. The CRR Adjudicator has the authority to determine the appeal procedure against its own decisions by means of allowing the parties to either submit their appeal to Ofcom or to rely on private contract enforcement should the provisions of commercial contract provide for such a solution. The last observation is particularly relevant given that the commercial contracts over the sale of airtime (or over advertising) still remain within the scope of regulatory contracts that have the potential to distort competition between the advertisers, broadcasters and media buyers. This would suggest that delegated regulatory adjudication does not necessarily concern only less relevant types of regulatory disputes but that it also allows private enforcement means for the sake of securing certain public service broadcasting obligations, as determined within the meaning of the provisions contained in commercial contracts.

## ADR

As the examination of Ofcom’s policy in assessing the appropriateness of ADR for the resolution of the referred disputes was analysed in the preceding part of this paper, it is now sufficient only to present both the historical treatment of ADR by Ofcom given certain objectives of the telecommunications disputes and Ofcom’s plausible preferences with regard to the outsourcing of disputes to the existent private, alternative fora. Already Ofcom’s predecessor, Oftel, in its joint statement of February 28, 2003 prepared with the Radiocommunications Agency on ‘Dispute Resolution under the new EU Directives’ (Oftel’s Statement) analysed the suitability of certain types

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<sup>112</sup> Ibid.

<sup>113</sup> Ibid.

<sup>114</sup> Ibid.

<sup>115</sup> Ibid.

<sup>116</sup> Ibid.

of disputes to ADR.<sup>117</sup> Oftel set up a framework in line with Ofcom’s current policy to decide on the applicability of alternative means to regulatory disputes. It stated that:

ADR should be used to resolve disputes between operators which are not dominant, even if there is a disparity in commercial size and bargaining power between the firms involved. In such cases, in the absence of SMP, there should nevertheless be an incentive for commercial sensible outcomes to emerge through a normal process of negotiation.<sup>118</sup>

It is unclear to the author whether Oftel considered “a normal process of negotiation” as falling within the range of available alternative means. The subsequent section of Oftel’s Statement, that is devoted exclusively to ADR, suggests the contrary. In any case, Oftel noticed that the success of ADR was dependent on the incentives of the parties involved in amicable processes.<sup>119</sup> However, Oftel clarified the practical considerations to be taken into account on a case-by-case basis when assessing the significance of ADR in regulatory disputes. The table below illustrates Oftel’s concerns in this regard.

**Figure 4: Examples of factors influencing the decision to decline to resolve a dispute by Oftel**

	ADR	Resolution by Oftel
A large number of parties are involved	✗	✓
One of the parties is dominant	✗	✓
Both parties are dominant	✓	✗
None of the parties are dominant	✓	✗
Similar disputes are resolved in other industries without the intervention of the regulator	✓	✗
There is insufficient evidence that attempts have been made to enter into commercial negotiation	✓	✗

Oftel’s policy objectives regarding its determinations of the suitability of ADR, as included in the table, were based on the following considerations: (1) the dispute did not involve a large number of parties; (2) both parties were dominant; (3) none of the parties were dominant; (4) similar disputes were resolved in other industries without the NRA’s intervention; and finally (5) there existed an evidenced plausibility that the parties had not made sufficient attempts to enter into commercial negotiations. Moreover, in its Statement, Oftel observed that parties with equal bargaining powers are more akin to reach a commercial agreement as a result of commercial negotiations. These dynamics are illustrated in the figure below.

<sup>117</sup> The joint Statement of Oftel and the Radiocommunications Agency of February 28, 2003 is available at: [http://www.ofcom.org.uk/static/archive/oftel/publications/eu\\_directives/2003/eud0203.htm](http://www.ofcom.org.uk/static/archive/oftel/publications/eu_directives/2003/eud0203.htm).

<sup>118</sup> Ibid., Section 3.11.

<sup>119</sup> Ibid., Section 3.12.

**Figure 5: Where market power is equal, parties may be more likely to reach commercial agreement**

		Complainant	
		SMP	No SMP
Target	SMP	Likely to be suitable for resolution by ADR	Likely to be suitable for resolution by Oftel
	No SMP	Likely to be suitable for resolution by Oftel	Likely to be suitable for resolution by ADR

Oftel's Statement did not specify what types of ADR the parties might potentially enter into, except from commercial negotiations. It is important to note, however, Oftel's reluctance to create a separate body within its organizational structure that would have been responsible for the resolution of disputes by means of ADR. This reluctance can be explained in consideration of the principle of economic efficiency, especially in view of the small percentage of disputes that Oftel found suitable for ADR in the two years preceding the issuance of the Statement.<sup>120</sup>

The similar policy seems to stay in line with the current Ofcom's approach to ADR. Ofcom's Guidelines of 2011 give some indications on the forms of ADR to be applied to telecommunications disputes in addition to the possible private ADR fora considered appropriate in handling regulatory disputes. Ofcom mentions mediation and arbitration as potential ADR mechanisms. Moreover, Ofcom points to a long tradition of institutions and organizations offering ADR services such as the Centre for Effective Dispute Resolution (CEDR) or the Chartered Institute of Arbitrators (CIArb). As reads from footnote 9 of Ofcom's Guidelines of 2011, Ofcom is not in a position to prefer one of the available dispute resolution services over another. Further, Ofcom's reference to specific ADR institutions should only serve as a guidance to the parties and should not be interpreted as an attempt to affect the parties' choices related to their reliance on a particular ADR regime. There are a number of prominent arbitral institutions (also providing mediation services) such as the London Court of International Arbitration (LCIA), the already mentioned International Court of Arbitration at the ICC, or the Arbitration Institute at the Stockholm Chamber of Commerce (SCC), that could potentially be used by the telecommunications industry. The Statistics of those institutions do not prove, however, that these institutions are being regularly referred to in the resolution of telecommunications disputes in practice.

Somewhat more generous information on the institutional involvement in telecommunications disputes was provided by the CIArb. Gregory Hunt, the Manager of Dispute Resolution Services at CIArb, in his presentation of September 2, 2004 delivered at the ITU premises in Geneva, pointed to

<sup>120</sup> Ibid., Section 3.15.

the continued collaboration of CIArb with various UK communications companies since the 1970's.<sup>121</sup> These companies included: Ntl, C&W, CCA, BT, Vodafone, Kingston Communications, Manx Telecom, Orange, O2, and Royal Mail.<sup>122</sup> Moreover, Gregory Hunt explained the then confirmed dispute resolution solutions to be adopted by UK businesses including: (1) BT to resort to mediation and adjudication to resolve credit vetting disputes; (2) Vodafone to use mediation and adjudication in the context of interconnection disputes; and (3) UKCTA members to resolve any commercial disputes by means of mediation or adjudication.<sup>123</sup> At the time when the presentation was delivered, CIArb was also conducting discussions with Orange and two other UK market players to use CIArb services for the resolution of interconnection disputes.<sup>124</sup> The facts presented by Gregory Hunt suggest that mediation and adjudication are more preferred dispute resolution mechanisms by the UK communications undertakings, especially as opposed to arbitration.

Gregory Hunt explained this fact by way of presenting the advantages of mediation and “unofficial” adjudication that were not governed by law (such as arbitration), thus, allowing the parties more flexibility. Additionally, he indicated that this preference was due to the possibility of a subsequent referral of a dispute to NRA, should the ADR methods not offer satisfactory outcomes. CIArb is a dispute resolution provider known worldwide for its commitment to diligent professional conduct and for its role in training neutral parties to assume extensive expertise in specific types of disputes. This, in conjunction with the existence of CIArb’s public Code of Ethics for practitioners and broad disciplinary powers of CIArb vis-à-vis its members makes it attractive for UK telecommunication market players.<sup>125</sup> Some commentators argue that, although CIArb’s dispute resolution scheme can be relevant for a prompt and flexible resolution of disputes between the companies that do not hold SMP, CIArb has no practical authority to shape the UK telecommunications market in a way similar to Ofcom.<sup>126</sup>

#### Appeals against Ofcom’s decisions and the principles of private law

Although a detailed analysis of the appeal processes against Ofcom’s determinations falls outside the scope of this paper, it is sufficient to briefly refer here to two judgments of the CAT, in which it reflected on Ofcom’s assessment of its jurisdiction both in front of the contractual obligations of the parties and the availability of alternative means for dispute resolution. These decisions are crucial as they reflect on the plausible obligation of Ofcom to interpret the content of the terms and conditions of the parties’ contracts when determining if it is appropriate to handle a dispute under Section 185 of the UK Communications Act.

The first decision was issued by CAT in *Orange Personal Communications Services Ltd v Ofcom* [2007] CAT 36.<sup>127</sup> The judgement on the preliminary issues was rendered as a consequence of CAT’s preceding Order dated November 6, 2007 following the appeal against Ofcom’s determination of its jurisdiction under Section 185 of the UK Communications Act dated February 9,

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<sup>121</sup> The charts from the presentation are available at the ITU’s website via: [http://www.itu.int/ITU-D/treg/Events/Seminars/2004/Geneva/Documents/Hunt\\_thurs.pdf](http://www.itu.int/ITU-D/treg/Events/Seminars/2004/Geneva/Documents/Hunt_thurs.pdf).

<sup>122</sup> Ibid.

<sup>123</sup> Ibid.

<sup>124</sup> Ibid.

<sup>125</sup> Ibid.

<sup>126</sup> Paul Brisby, “Dispute Resolution in Telecoms – The Regulatory Perspective,” p. 8.

<sup>127</sup> See *Orange Personal Communications Services Limited v Office of Communications* [2007] CAT 36, Judgment on the preliminary issues, available at: <http://www.catribunal.org.uk/238-642/1080-3-3-07-Orange-Personal-Communications-Services-Limited.html>.

2007. The CAT was to determine whether Ofcom's decision to accept its jurisdiction in a dispute referred to it by BT did not exceed the statutory grounds on which Ofcom determined whether it is appropriate for it to handle the dispute. The dispute in question concerned wholesale mobile call termination rates imposed by the Appellant (Orange) to BT. Leaving aside the ambiguities of the appeal, it is relevant to describe the contractual relationship between the parties involved in the dispute, that raised certain objections on the side of Orange on the proper determination by Ofcom of the word "dispute" under the parties' contractual arrangements. BT and Orange were parties to a contract called BT's Standard Interconnection Agreement (SIA).<sup>128</sup> Orange alleged that there was no dispute between the parties as determined by Ofcom, because, *inter alia*, BT had not exhausted the dispute resolution mechanism set out in the SIA.<sup>129</sup> In other words, Orange argued that once the interconnection was established, Ofcom was not in a position to intervene in the pending commercial negotiations between the parties in relation to the contractual terms and conditions under which the interconnection was founded.<sup>130</sup> Orange also questioned Ofcom's broad interpretation of the Access and Interconnection Directive on the basis that it distorted the proper understanding of the regulatory powers of NRAs under the EU Telecom Package. Ofcom, as alleged by Orange, only had the authority to ensure that the interconnection was established and not to resolve "commercial disputes as to the terms on which interconnection [was] provided unless the dispute [threatened] the continued provision of the access."<sup>131</sup> Ofcom, on the contrary, argued that the interpretation of the provisions contained in the Access and Interconnection Directive should be broader. The CAT rejected the Appellant's view, and confirmed that Ofcom could not determine whether a dispute existed between the parties based on the contractual provisions agreed on by the parties. The CAT stated that: "the private law consequences of a failure by one or both parties to comply with the contractual provisions are not a matter for the Tribunal to determine and cannot affect the statutory jurisdiction conferred on OFCOM."<sup>132</sup> Moreover, in Section 101 of the judgment in question, CAT acknowledged that:

The fact that OFCOM as a matter of good practice encourages parties to a potential dispute to explore fully the possibility of resolving their differences first, is a very different matter from holding that OFCOM's jurisdiction depends on contractual dispute resolution mechanisms having been exhausted.

A similar reasoning was adopted in the second judgement of CAT, namely, in *British Telecommunications v Ofcom* [2011] CAT 15.<sup>133</sup> In the appeal at hand, BT also challenged the determinations made by Ofcom under Section 185 of the UK Communications Act.<sup>134</sup> In addition to the similar allegation raised in the aforementioned judgement, that is that Ofcom decided to hear a non-existent dispute between the parties, BT argued that if such disputes were proper disputes under the UK Communications Act, Ofcom should have declined its jurisdiction because the ADR mechanisms were available for the resolution of those disputes.<sup>135</sup> Aside from the facts of the case, it is necessary to consider the CAT's reasoning regarding the possible significance of the contractual provisions contained in the agreement between the parties in terms of Ofcom's determination of its jurisdiction. In the present case, BT argued that the allegations raised in *Orange* should apply to a pending appeal. The CAT rejected such argumentation and reaffirmed the principles established in *Orange*. The CAT agreed with Ofcom's claim, namely, that the fact that further commercial

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<sup>128</sup> *Ibid.*, Section 13.

<sup>129</sup> *Ibid.*

<sup>130</sup> *Ibid.*, Section 43.

<sup>131</sup> *Ibid.*, Section 50.

<sup>132</sup> *Ibid.*, Section 99.

<sup>133</sup> *British Telecommunications v Ofcom* [2011] CAT 15, available at: <http://www.cattribunal.org.uk/238-7115/Judgment.html>.

<sup>134</sup> *Ibid.*, Section 1.

<sup>135</sup> *Ibid.*

negotiations might have been still possible was not inconsistent with the existence of a dispute as such.<sup>136</sup> Moreover, BT argued that the dispute—even if found by Ofcom to be a proper dispute between the parties—should have been declined by Ofcom because ADR mechanisms (such as the continued commercial negotiations) were available. Ofcom together with the Interveners claimed that ADR for the purpose of Section 186(3) of the UK Communications Act should be interpreted as meaning arbitration or other formal ADR mechanisms rather than negotiations and that negotiation alone would require additional, future “trigger” to advance the resolution of a dispute.<sup>137</sup> In any event, Ofcom was of the opinion that the determination on the availability of ADR together with the likelihood that ADR would contribute to a prompt and effective resolution of the dispute fell within Ofcom’s regulatory powers. The CAT did not reflect on these divergent interpretations of the provisions of Section 186(3) of the UK Communications Act, but the appeal was rejected on different grounds that fall outside of the scope of the present analysis.

The above judgements of the CAT are significant for a comprehensive understanding of Ofcom’s approach to ADR while exercising its regulatory functions including dispute resolution. The CAT, in both judgements, confirmed the broad discretion of Ofcom in deciding the admissibility of each particular dispute both in consideration of the possible contrary contractual terms and conditions related to the parties’ will regarding the design of their dispute resolution as well as the actual availability and suitability of ADR for the resolution of regulatory disputes. It is clear that, in some cases, commercial negotiations may be used by recalcitrant parties to obstruct dispute resolution processes, but the arbitrariness of Ofcom in determining its jurisdiction implies important issues related to the principles of party autonomy in using alternative means for the resolution of contractual disagreements. Also, the understanding of ADR by Ofcom raises questions regarding the significance of commercial negotiations and other less official mechanisms such as conciliation or facilitation in the preliminary resolution of regulatory disputes. Are more formal mechanisms including increasingly formalized arbitration a real alternative for the communications operators to the formal adjudication proceedings conducted by Ofcom? This question will be addressed in Sections 2.2 and 2.3 of this paper.

### *Ireland*

In Ireland, the regulatory powers for the resolution of telecommunications disputes between undertakings were conferred on the Commission for Communications Regulation (ComReg).<sup>138</sup> ComReg is a converged regulation body responsible for shaping the electronic communications sectors as a whole including telecommunications, radiocommunications, and broadcasting, as well as the postal service.<sup>139</sup>

The functions of ComReg are enumerated in Section 10(1) of the Irish Communications Regulation Act of 2002, as amended by the Communications Regulation (Amendment) Act of 2007 (the Irish Communications Regulation Act).<sup>140</sup> ComReg also exercises functions under the Miscellaneous Provisions of the Telecommunications Act of 1996.<sup>141</sup> Section 10(1)(d) of the Irish Communications Regulation Act states that ComReg is in particular responsible for the investigation

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<sup>136</sup> *Ibid.*, Section 53.

<sup>137</sup> *Ibid.*

<sup>138</sup> ComReg was established on December 1, 2001. See: Communications Regulation Act 2002 (Establishment Day) Order 2002, S.I. No. 510/2002, available at: <http://www.irishstatutebook.ie/2002/en/si/0510.html>.

<sup>139</sup> The ComReg website at: <http://www.comreg.ie>.

<sup>140</sup> Full text of the Irish Communications Regulation Act of 2002 is available at: <http://www.irishstatutebook.ie/2002/en/act/pub/0020/print.html>.

<sup>141</sup> *Ibid.*

of complaints from undertakings [and consumers] regarding the supply of, and access to, electronic communications services, electronic communications networks and associated facilities and transmission of such services on these networks. Additionally, Section 12(1)(a) of the Irish Communications Regulation Act establishes the objectives of ComReg in relation to the provision of electronic communications networks, electronic communications services and associated facilities. These objectives concern the following: (1) the promotion of competition, (2) the contribution to the development of the internal market, and (3) the promotion of the interests of users within the Community.

Regarding dispute resolution functions, the Irish Communications Regulation Act specifically refers to disputes arising out of or in connection with the physical infrastructure shared by infrastructure providers.<sup>142</sup> Section 57(2) of the Irish Communications Regulation Act confirms a right of a network operator to negotiate an agreement to share physical infrastructure with other infrastructure providers, as well as the right of a network operator to serve notice on ComReg of negotiation upon the commencement of any such negotiation. In cases in which agreement is not reached within the period specified by ComReg, ComReg should take necessary steps to resolve the dispute in accordance with the procedures established and maintained by it. Moreover, the Irish Communications Regulation Act, in Section 55(5), also points to disputes between a network operator and a road authority in respect of the cost of the relocation of electronic communications infrastructure. Such disputes should be decided by agreed conciliation procedures or by arbitration under the Arbitration Acts, 1954 to 1998, as recently amended by the Arbitration Act of 2010 (in cases where the parties did not enter into an agreement providing for conciliation).

The functions of ComReg were substantially broadened under the Communications Regulation (Amendment) Act of 2007. ComReg was authorized to initiate investigations on its own initiative in cases concerning prospective abuse of market powers by the undertakings.<sup>143</sup> Moreover, if ComReg believes that an undertaking has abused a dominant position, via the 2007 Act, it has gained the authority to prove such abuse in the Courts.<sup>144</sup>

ComReg's dispute resolution functions are enumerated in Section 31 of the European Communities (Electronic Communications Networks and Services (Framework) Regulations) 2003, as amended by the European Communities (Electronic Communications Networks and Services) (Framework) (Amendment) Regulations 2007 (Framework Regulations).<sup>145</sup> Section 31 of the Framework Regulations defines a "dispute" broadly, meaning each dispute between undertakings that arises in connection with the EU Telecom Package, the present Framework Regulations or the Specific Regulations. The process to be followed by ComReg in the resolution of regulatory disputes mirrors the major objectives of the European communications framework as established in the EU Telecom Package. This means that ComReg should decide a dispute within the shortest time possible, not exceeding four months from the day the dispute was lodged with ComReg. Moreover, ComReg should enjoy broad discretion in both designing its dispute resolution procedures and in determining whether it is appropriate to handle a dispute given the availability of ADR means.

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<sup>142</sup> *Ibid.*, Section 57.

<sup>143</sup> Aubin David, Verhoest Koen [ed.], *Multi-Level Regulation in the Telecommunications Sector: Adaptive Regulatory Arrangements in Belgium, Ireland, The Netherlands and Switzerland*, Palgrave Macmillan 2014, p. 89.

<sup>144</sup> *Ibid.*

<sup>145</sup> European Communities (Electronic Communications Networks and Services)(Framework) Regulations 2003 (S.I. No. 307/2003) are available at: <http://www.irishstatutebook.ie/2003/en/si/0307.html>. European Communities (Electronic Communications Networks and Services) (Framework) (Amendment) Regulations 2007 (S.I. No. 271/2007) are available at: <http://www.irishstatutebook.ie/2007/en/si/0271.html>.

We necessarily proceed now to examine the procedures established by ComReg for the resolution of disputes between undertakings. Such procedures will be analysed within the two following categories: (1) regulatory adjudication, and (2) ADR.

### Regulatory adjudication

The resolution of formal disputes between undertakings is conducted by ComReg's Compliance Team.<sup>146</sup> ComReg's recent dispute resolution practice is based on the provisions contained in ComReg's Dispute Resolution Procedures - Framework Regulations of March 29, 2010 (Response to Consultation Document No. 09/85) (ComReg's Dispute Resolution Procedures of 2010).<sup>147</sup> The formal regulatory adjudication process begins from the day of the receipt by ComReg of a Dispute Submission that should correspond to the formal requirements as set out in Annex C to ComReg's Dispute Resolution Procedures of 2010. ComReg will determine if it is appropriate to hear or decline the dispute based on the following considerations: (1) that there is a disagreement between the parties that constitutes the basis for the dispute, (2) that negotiation has taken place between the parties but has failed (or that one party undertook reasonable steps to engage the other party in negotiation), (3) that the dispute is between undertakings as defined in Regulation 2 of the Framework Regulations, and finally (4) that the nature of the dispute is material and that it arose out of the obligations established in the EU Telecom Package, the Framework Regulations and other Specific Regulations.<sup>148</sup>

If, based on the above considerations, ComReg considers itself as the appropriate forum to handle the dispute, it will further investigate whether other ADR means are not available for the resolution of the dispute, or if the parties are not engaged in the pending legal proceedings. If this is the case, ComReg will decline to hear the dispute and will duly inform the parties of its decision in this regard. Since the analysis of ComReg's application of ADR will be analysed in the following part of this paper, it is relevant to simply highlight here ComReg's position on ADR in response to the consultations conducted prior to issuing ComReg's Dispute Resolution Procedures of 2010. ComReg's position revolves around the following statement:

When considering whether other means of resolving a dispute in a timely manner are available to the parties ComReg will consider inter alia mediation, dispute resolution processes in commercial agreements between operators, resolution by adjudication, informal contacts or negotiation; discussion at industry fora, and ComReg own initiative investigations.<sup>149</sup>

This declaration does not necessarily specify the grounds to be taken into account by ComReg in assessing the suitability of ADR to each particular dispute. It is, however, noteworthy as it points to ComReg's preferred ADR mechanisms comprising: mediation, private dispute resolution processes in commercial agreements between operators (contrary to the consideration of ComReg's UK counterpart, Ofcom), adjudications, informal means such as contacts and negotiation, discussion at industry fora and investigations initiated by ComReg itself.

If, ComReg decides to accept its jurisdiction over a dispute, it will inform the parties and expect the Respondent to submit its detailed response within ten working days. Even at this stage, ComReg may decide to decline a dispute if it finds that ADR mechanisms will be more suitable for the resolution of a dispute. In any case, ComReg may invite the parties to submit further supporting

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<sup>146</sup> ComReg's Wholesale Compliance Annual Report 2010, ComReg's Document 11/12 of February 18, 2010, available at: [http://www.comreg.ie/\\_fileupload/publications/ComReg1112.pdf](http://www.comreg.ie/_fileupload/publications/ComReg1112.pdf).

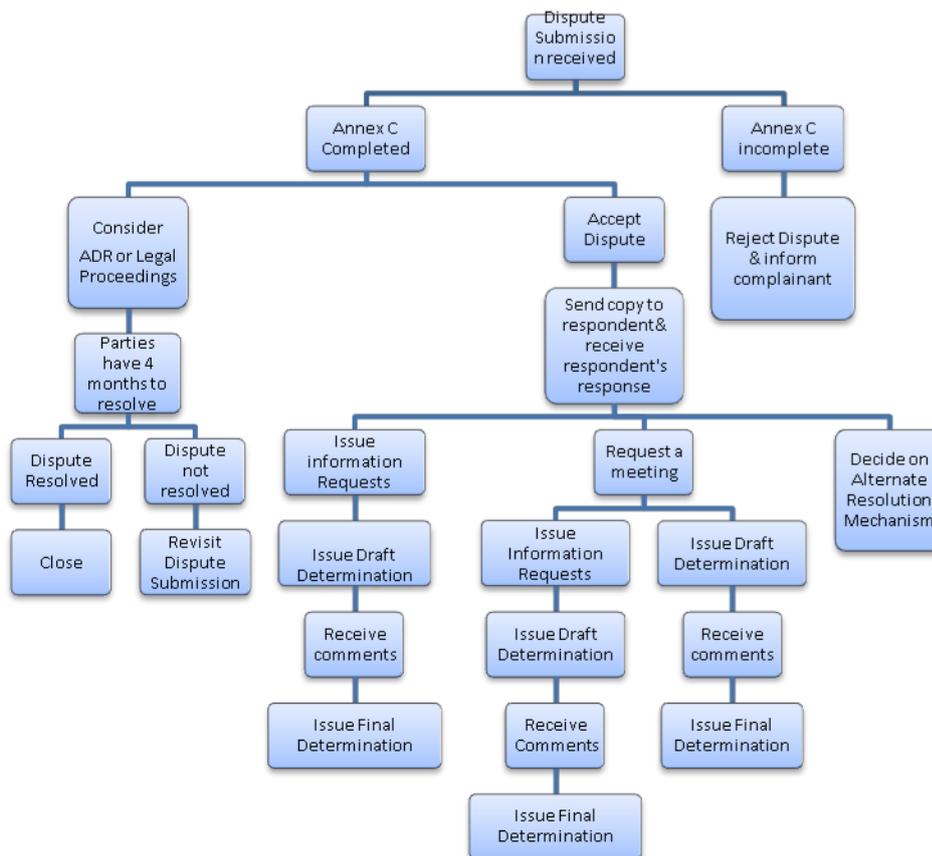
<sup>147</sup> ComReg's Response to Consultation and Decision Note, Document No. 10/18 R of March 29, 2010, available at: [http://www.comreg.ie/\\_fileupload/publications/ComReg1018R.pdf](http://www.comreg.ie/_fileupload/publications/ComReg1018R.pdf).

<sup>148</sup> *Ibid.*

<sup>149</sup> *Ibid.*, Section 3.28.

documents and more details regarding their dispute, in addition to meeting with the parties to the dispute either jointly or individually. Subsequently, ComReg will prepare a draft determination to either be published on ComReg’s website or sent privately to the parties to the dispute. Parties and the industry (when applicable) will be required to comment on this draft determination within ten working days. Eventually, ComReg will issue a Final Determination (including reasons) and provide it to the parties to the dispute.

**Figure 6: ComReg’s Dispute Resolution Procedures Flowchart<sup>150</sup>**



## ADR

Already in March 1999 the Office of the Director of Telecommunications Regulation (ODTR), a predecessor of ComReg, issued a consultation document welcoming the comments of the industry regarding the resolution of disputes arising in the telecommunications sector. Subsequently, in September 1999 ODTR published a Report entitled: “Dispute Resolution Procedures” (1999 ODTR Report) that summarized the results of the consultations, by means of outlining the policy of ODTR concerning dispute resolution in general and ADR in particular.<sup>151</sup> What is important for the understanding of ComReg’s current support of ADR in the resolution of telecommunications disputes concerns the historical regulatory support of mediation and facilitation in Ireland. Stemming from a decision outlined in a 1999 ODTR Report, mediation and facilitation services were to be made

<sup>150</sup> Source: Ibid.

<sup>151</sup> A decision notice D11/99 (document no. ODTR 99/53) is available on the ComReg website via: [http://www.comreg.ie/\\_fileupload/publications/odtr9953.pdf](http://www.comreg.ie/_fileupload/publications/odtr9953.pdf).

available to parties to a dispute.<sup>152</sup> This decision stipulated that a mediation agreement was to be entered into by the parties voluntarily in accordance with the Terms of Reference of Mediation issued by ODTR.<sup>153</sup> Additionally, a facilitator was to be appointed by ODTR within ten working days from the day of entering into the mediation agreement. The then objectives of ODTR in terms of the use of the above-mentioned ADR means concerned the effectiveness of ADR in reaching a fast resolution of a dispute.

As already noticed, also ComReg supports a number of informal dispute resolution techniques within its statutory approach to regulatory adjudication. ComReg's recent Dispute Resolution Procedures of 2010 constitutes a noteworthy source of objectives concerning both the parties to potential disputes (such as operators) and the Irish NRA in terms of the application of different types of ADR mechanisms in the telecommunications sector. Let us start with an analysis of operator's attitudes towards ADR in the telecommunications sector.

Six Respondents replied to the question posed by ComReg regarding the assessment of the appropriateness of various types of ADR for the resolution of a dispute when determining the jurisdiction by ComReg.<sup>154</sup> One operator, Eircom, pointed to different **commercial negotiation** clauses contained in inter-operator agreements, and it stated that such mechanisms should be understood as ADR techniques for the purpose of ComReg's determination of the suitability of ADR for the resolution of regulatory disputes.<sup>155</sup> Eircom further noted that the existence of contractual commercial negotiation provisions should prevent ComReg from initiating its own investigations on parallel issues.<sup>156</sup>

Moreover, three out of the six Respondents identified **mediation** as a suitable alternative mechanism.<sup>157</sup> However, the remaining three Respondents expressed their dissatisfaction concerning the costs of ADR mechanisms in that—in their view—costs should be equally borne by the parties. Other parties, in turn, stated that the successful party should be entitled to the costs of mediation. Vodafone, explained that—when deciding on the appropriateness to hear a dispute by ComReg—there was a need to ensure the regulatory certainty by ComReg, in view of the actual positions of the parties to a dispute.<sup>158</sup>

An interesting response was provided by BT that enlisted five possible ADR mechanisms to be considered by ComReg. These involved the following: (1) **resolution by adjudication** for long running issues, (2) **fast track** similar to the small claims court approach, (3) **standard dispute** (contained in Regulation 31 of the Framework Regulations dispute), (4) **other routes** to resolve issues (i.e. ComReg investigations stemming from its own initiative), and finally (5) a **new regulatory remedies proposal**.<sup>159</sup>

Another Respondent, ALTO expressed appreciation for mediation provided by ComReg or other experienced mediation providers.<sup>160</sup> ALTO made it clear, however, that such mediation should not be a mandatory stage of regulatory adjudication.

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<sup>152</sup> Ibid.

<sup>153</sup> Ibid.

<sup>154</sup> See: ComReg's Dispute Resolution Procedures of 2010, Sections 3.16 – 3.22.

<sup>155</sup> Ibid., Section 3.17.

<sup>156</sup> Ibid.

<sup>157</sup> Ibid., Section 3.18.

<sup>158</sup> Ibid., Section 3.19.

<sup>159</sup> Ibid., Section 3.20.

<sup>160</sup> Ibid., Section 3.21.

Finally, the last Respondent, COLT generally expressed its positive approach to informal negotiation or mediation.<sup>161</sup> At the same time, however, it stressed that it would not support any form of arbitration in the case ComReg decided to assume it as its preferred method of dispute resolution.

When determining its own position with regard to ADR, ComReg generally agreed that commercial negotiations between the parties should constitute ADR mechanism to be assessed by ComReg when making its determination of jurisdiction.<sup>162</sup> ComReg, however, did not exclude the possibility of conducting its parallel investigations related to the issues being subject to private negotiations. Furthermore, ComReg acknowledged the broad interest of the parties in mediation. It confirmed that mediation should be a voluntary mechanisms based on a prior agreement between the parties. ComReg did not find itself appropriate to determine—by default—that a successful party to mediation proceedings should be entitled to the costs. It pointed to the private character of mediation processes in which the allocation of costs between the parties should be determined on a case-by-case basis. Moreover, when assessing the various proposals to be included in the standard ADR procedure as “authorized” by ComReg made by BT, the Irish NRA acknowledged the use of resolution by adjudication or of other informal routes, leaving aside other ADR mechanisms proposed by BT.<sup>163</sup> ComReg argued that such other ADR mechanisms—although requiring future attention—are premature given the underdevelopment of ADR in the resolution of regulatory disputes in Ireland. Finally, ComReg did not find it appropriate to exclude arbitration from the range of ADR mechanisms available in the telecommunications sector vaguely pointing to the suitability of arbitration to certain sectorial disputes. Having noted that, however, ComReg did not include arbitration in the list of potentially suitable ADR means in its final position formulated as the result of the consultations.

In practice, mediation is one of the most developed forms of ADR offered and sponsored by ComReg. ComReg will usually appoint an independent external mediator within ten days from the moment the parties agree on mediation.<sup>164</sup> ComReg also offers mediation for the resolution of cross-border disputes if the NRAs determine that such a technique may be suitable for the prompt resolution of such disputes.<sup>165</sup>

## ***Poland***

In Poland the resolution of disputes between telecommunications operators falls within the exclusive competences of the Polish regulatory authority for the market of telecommunications and postal services, that is, the President of the Office of Electronic Communications (*Urząd Komunikacji Elektronicznej* - UKE).<sup>166</sup> The President of UKE resolves inter-operator disputes pursuant to Article 28 of the Polish Telecommunications Law of 16 April 2004, in accordance with the procedural rules explained in the Polish Code of Administrative Procedure of 14 June 1960.<sup>167</sup> Inter-operator disputes exclusively concern disputes relating to the conclusion of telecommunications access agreements or the necessary modification of such agreements.<sup>168</sup> In fact, the B2B telecommunications disputes in

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<sup>161</sup> Ibid., Section 3.22.

<sup>162</sup> Ibid.

<sup>163</sup> Ibid.

<sup>164</sup> Aubin David, Verhoest Koen [ed.], *Multi-Level Regulation in the Telecommunications Sector*, p. 92.

<sup>165</sup> Ibid.

<sup>166</sup> For more information on UKE in English, please visit the website of UKE at: <http://en.uke.gov.pl/about-uke-6>.

<sup>167</sup> Article 28 of the Polish Telecommunications Law of 16 April 2004 (unofficial consolidated translation into English available on UKE’s website at: <http://www.en.uke.gov.pl/telecommunications-act-77>; and the Code of Administrative Procedure of 14 June 1960, *Journal of Laws* 1960 No. 30, item 168.

<sup>168</sup> Information provided to the author by the UKE in the official statement of December 6, 2013.

Poland are determined exclusively by means of regulatory adjudication and the application of ADR to such disputes is only marginal.

### Regulatory adjudication

Telecommunications Access Agreements (TAAs) between undertakings are subject to prior negotiations. The requirements to be met by the undertakings during such negotiations are set out in paragraph 3 of the Regulation of the Minister of Infrastructure on the Specific Requirements for Ensuring the Telecommunications Access of 21 July 2008 (the Regulation of 21 July 2008).<sup>169</sup> Pursuant to Paragraph 3 of the Regulation of 21 July 2008, telecommunications undertaking wishing to conclude an agreement for telecommunications access should send a written request to another operator for interconnection access to its network. The formal request should include, *inter alia*, technical specifications and the location of points of interconnection, the types of services provided by the mutual use of the telecommunications networks, the expected intensity and structure of interconnection traffic, and the expected date of the network connections.<sup>170</sup> Undertakings that have received such a request may either accept the proposals contained therein within thirty working days or submit its own interconnection proposal to the applicant, taking into account the content of the previous request.

The President of UKE resolves disputes related to telecommunications access either upon request of the parties involved in the negotiations for the conclusion of TAA (if any) or *ex officio*.<sup>171</sup> In cases in which the negotiations were taken up, each party may submit the request to the President of UKE in view of specifying the time-limit for closing the negotiations for the conclusion of the agreement, which should not exceed ninety days from the day when such a request was submitted to UKE.<sup>172</sup> In situations in which negotiations did not take place, were not concluded within the specified time-frame, or when the party obliged to ensure telecommunications access under its regulatory obligations refused the interconnection, any of the parties may submit a request to the President of UKE for “issuance of a decision resolving contentious issues or for determining the conditions of cooperation.”<sup>173</sup>

Such a request should include the following information: a draft TAA; the market position of the parties involved, as well as an explanation of the issues with regard to which the parties were not able to reach a settlement. In any case, the parties should be able to submit to the President of UKE their mutual positions regarding the contentious matters within fourteen days upon receiving the request of the President of UKE. In all these scenarios, the President of UKE reserves the right to issue the following decisions (1) a decision regarding the closing of the negotiations for the conclusion of the TAA, (2) a resolution of contentious issues, and finally (3) a decision on specific conditions of cooperation *ex officio*.

The dispute resolution procedure set out in Article 28 of the Polish Telecommunications Law takes the form of a conservative regulatory adjudication in the meaning of traditional administrative

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<sup>169</sup> Official Gazette No. 145, issue 919 of 8 August 2008. Polish version of the Regulation is available at the website of UKE at: <http://www.uke.gov.pl/rozporzadzenie-ministra-infrastruktury-z-dnia-21-lipca-2008-r-w-sprawie-szczegolowych-wymagan-dla-zapewnienia-dostepu-telekomunikacyjnego-1299>.

<sup>170</sup> Regulation of the Minister of Infrastructure on the Specific Requirements for Ensuring the Telecommunications Access of 21 July 2008, available in Polish at: <http://www.uke.gov.pl/rozporzadzenie-ministra-infrastruktury-z-dnia-21-lipca-2008-r-w-sprawie-zakresu-oferty-ramowej-o-dostepie-telekomunikacyjnym-1297>.

<sup>171</sup> Article 27 of the Polish Telecommunications Law.

<sup>172</sup> Article 21.1 of the Polish Telecommunications Law.

<sup>173</sup> Article 21.2 of the Polish Telecommunications Law.

proceedings. The determinations of the President of UKE can be further appealed by the parties involved pursuant to the provisions of the Polish Administrative Code.

The President of UKE will issue a decision within 90 days of the date of the submission of the request specified in Article 27(2) and (2b) of the Polish Telecommunications Law. Account must be taken of both the interest of telecommunications users and the content of obligations imposed on telecommunications undertakings. The President of UKE should, in principle, consider the technical and economic context of the proposals submitted by the parties engaged in the negotiation of a relevant TAA (when applicable). However, the Polish NRA, under the Polish Telecommunications Act, has no power to decline to resolve a dispute should the ADR techniques be more suitable for the resolution of certain regulatory disputes. The dispute resolution practices of the President of UKE aim at securing a strong regulatory position of the Polish NRA vis-à-vis communications undertakings, a function characterised by historical dynamics within the Polish telecommunications market.<sup>174</sup>

As regards disputes related to the modifications in the telecommunications access agreement, they are governed by Articles 29 and 30 of the Polish Telecommunications Act. Based on the provisions of Article 29, the procedure for the resolution of disputes related to the conclusion of telecommunications access agreements is also applicable to disputes that may arise between undertakings while modifying the scope and the content of such agreements. Moreover, the President of UKE may interfere with the content of telecommunications access agreements *ex officio* either by requiring the parties to modify the scope of agreement or—on its own initiative—by means of changing the content of a telecommunication access agreement in cases in which such modification is justified by the need to protect the interests of end users and to ensure effective competition or interoperability of services.<sup>175</sup>

The decision of the President of UKE ordinarily replaces the TAA within the scope of the official determination. In cases where the interested parties conclude a telecommunications access agreement, the decision on telecommunications access shall expire by the virtue of law in the part covered by the agreement. The decisions of the President of UKE issued as a result of a dispute between telecommunications undertakings should be immediately enforceable. All decisions on telecommunications access may be modified by the President of UKE either at the request of the party involved in a dispute or on its own initiative whenever there is a need to protect the interests of end users and to ensure effective competition or interoperability of services by means of such decisions.<sup>176</sup> The analysis below, concerning the statistical data on the dispute resolution practice of UKE, should illustrate both the broad functions of the President of UKE in the promotion of the Polish telecommunications market and the origins of disputes that arise in connection to inter-operator cooperation.

Since the creation of UKE in 2006, the number of final determinations issued by the President of UKE in relation to disputes between communications undertakings has increased as a result of the continued regulatory strategy determined by the President of UKE. According to Figure 8 below, the President of UKE issued ten final determinations in 2006, while already in 2008 the number of its final determinations amounted to 104. Additionally, already two years after the establishing of UKE, that is, in 2009, the President of UKE conducted 181 administrative proceedings related to inter-operator cooperation and it issued 208 final determinations in this regard.<sup>177</sup>

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<sup>174</sup> This information is drawn from a phone interview with Mr. Marek Konior conducted by the autor on December 19, 2013.

<sup>175</sup> Article 29 of the Polish Telecommunications Law.

<sup>176</sup> Article 28.6 of the Polish Telecommunications Law.

<sup>177</sup> The Report on the Telecommunications Market in Poland in 2009, prepared by the President of UKE, Warsaw, June 2010, available (in Polish) at: [http://www.uke.gov.pl/files/?id\\_plik=5147](http://www.uke.gov.pl/files/?id_plik=5147).

As regards the content of the decisions issued by the President of UKE in 2007, the majority of them concerned the following disputable issues: (1) the adjustments of the inter-operators agreements in view of the introduction of the interconnection flat rates; (2) the modifications of the network interconnection agreements in view of the definitions of services and settlement rates as provided in RIO 2008; (3) the modifications of the conditions of the broadband transmission of data agreements in accordance with the framework agreement of *Telekomunikacja Polska SA* of 6 May 2008; (4) the modifications of the conditions of the Bitstream Access agreements (BSA) in the context of the resignation from the BSA services with regard to a particular subscriber line; and (5) the determination of the conditions of settlements pursuant to the Mobile Termination Rate (MTR).<sup>178</sup> The decisions of the President of UKE rendered in 2008 in conclusion of dispute resolution proceedings entailed the following: (1) determinations of the conditions of cooperation in the context of the Wholesale Line Rental (WLR); (2) the adjustments of the conditions of the network interconnection agreements in view of the definitions and rates as set forth in RIO of 2006; (3) the adjustments of the conditions of network interconnection agreements in accordance with the interconnection flat rates; and (4) the determination of the conditions on settlements pursuant to MTR.<sup>179</sup>

**Figure 7: Number and types of decisions of the President of UKE issued in the period between 2006 – 2008**

YEAR	No. of Conclusive Decisions	No. of Decisions Discontinuing the Proceedings	No. of Decisions regarding the completion of negotiations for the conclusion of the agreement
2006 <sup>180</sup>	10	18	26
2007 <sup>181</sup>	38	17	38
2008 <sup>182</sup>	104	24	86

Although statistical data regarding the number of decisions of the President of UKE issued after the year 2008 is rather scarce, it is sufficient to note that the substantial amount of decisions rendered prior to this date can be explained by means of the particular dynamics of the then emerging Polish telecommunications market that required a heavy-handed regulatory supervision of the President of UKE. According to the interviewees, a substantial amount of disputes between telecommunications undertakings in Poland between the year 2006 and 2008 resulted from the then uncertainty that characterised the negotiation process of early communications framework agreements between operators.<sup>183</sup> Most disputes related to the conclusion of these framework agreements required regulatory intervention of the President of UKE to minimise any potential regulatory uncertainty and enhance market competition.<sup>184</sup> The situation changed somewhat with the appointment of Ms.

<sup>178</sup> The Report on the Telecommunications Market in Poland in 2007, prepared by the President of UKE, Warsaw, April 2008, available (in Polish) at: [http://www.uke.gov.pl/files/?id\\_plik=3233](http://www.uke.gov.pl/files/?id_plik=3233).

<sup>179</sup> The Report on the Telecommunications Market in Poland in 2009, prepared by the President of UKE.

<sup>180</sup> The Report on the Telecommunications Market in Poland in 2006, prepared by UKE, August 2007, available (in Polish) at: [http://www.uke.gov.pl/files/?id\\_plik=1751](http://www.uke.gov.pl/files/?id_plik=1751).

<sup>181</sup> The Report on the Telecommunications Market in Poland in 2007, prepared by UKE.

<sup>182</sup> The Report on the Telecommunications Market in Poland in 2009, prepared by the President of UKE.

<sup>183</sup> Phone interviews with Professor Stanisław Piątek and Marek Konior of conducted by the author on March 31, 2014 and December 19, 2013, respectively.

<sup>184</sup> *Ibid.*

Magdalena Gaj as the new President of UKE, who adopted a less interventionist regulatory model when exercising her functions.

One important factor that minimised the early adversarial nature of the Polish telecommunication market (and contributed to the subsequent decrease in the amount of regulatory disputes between communications undertakings) concerned the Settlement between the former President of UKE, Ms. Anna Strezynska, and the then *Telekomunikacja Polska SA* (currently Orange Poland), a company with a dominant market power, of 2009.

In view of both the necessity for the improvement of the cooperation between the so-called alternative operators in Poland and the advancement of the new principles of the Polish telecommunications market the then President of UKE, Ms. Anna Strezynska, on October 22, 2009 concluded a Settlement with the President of the then *Telekomunikacja Polska SA*, Mr. Maciej Witucki (the Settlement). There are at least a few relevant implications of the Settlement for the present discussion. First, the Settlement regulated the resolution of the then pending disputes between the President of UKE and *Telekomunikacja Polska SA* by way of establishing a new procedure for the resolution of these disputes that resembled a form of amicable dispute resolution technique. Second, the settlement imposed an obligation on *Telekomunikacja Polska SA* according to which it was supposed to withdraw from all its then pending court proceedings against alternative operators in Poland.

Regarding the first issue, the Settlement, in Paragraph 14, set out a procedure for the resolution of disputes arising in the context of the Settlement or out of the performance of the Settlement. The procedure provided for the creation of a Steering Committee consisting of the Directors of the Project as well as the persons indicated by both the President of UKE and the President of *Telekomunikacja Polska SA*. The Steering Committee was to issue its majority decisions in writing in conclusion of each dispute, or by means of recommendations directed towards either parties to a dispute. Dispute resolution procedure as established in the Settlement is noteworthy as it constituted isolated provisions allowing for the potential application of a specific ADR mechanism for the resolution of disputes within the Polish telecommunications market.

Concerning the withdrawal from the pending court proceedings by *Telekomunikacja Polska SA*, we should recall the provision of Article 28.7 of the Polish Telecommunications Law that states that the cases in connection to pursuing property rights as a result of non-performance or inadequate performance of obligations resulting from the decision on telecommunications access are subject to judicial proceedings. Prior to the Settlement, a number of disputes were initiated by *Telekomunikacja Polska SA* against alternative operators in civil and administrative courts. The majority of these cases related to the execution of payments in the context of telecommunications services.<sup>185</sup> In accordance with Paragraph 12 of the Settlement, *Telekomunikacja Polska SA* agreed on the effective resolution of disputes with both the President of UKE and alternative operators by means of the withdrawal of both all appeals previously initiated and all claims filed against the NRA and alternative operators. According to the commentators and in view of the Report of the President of UKE related to the execution of the Settlement of 22 October 2009, prepared in Warsaw in October 2011, already two years following the conclusion of the Settlement, *all* pending disputes were successfully withdrawn by *Telekomunikacja Polska SA*.<sup>186</sup> What is more, the amount of new disputes decreased with regard to the settlements concluded by alternative operators and *Telekomunikacja Polska SA* at the request of the former. Those settlements established new conditions of cooperation between *Telekomunikacja Polska SA* and other telecommunications undertakings, which minimised the emergence of new disputes in the context of such cooperation agreements.

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<sup>185</sup> For the full list of litigations, visit: [http://www.uke.gov.pl/files/?id\\_plik=6284](http://www.uke.gov.pl/files/?id_plik=6284)

<sup>186</sup> The Report of the President of UKE related to the execution of the Settlement of 22 October 2009, prepared in Warsaw in October 2011 is available in Polish at: [http://www.uke.gov.pl/files/?id\\_plik=9461](http://www.uke.gov.pl/files/?id_plik=9461).

## The marginal use of ADR

There is little evidence—at least to the knowledge of the author—on the applicability of ADR mechanisms to B2B disputes within the Polish telecommunications market.<sup>187</sup> Certain framework agreements available on the website of UKE include provisions referring to negotiation or conciliation procedures. These agreements concern: (1) the framework access agreement concerning full and shared access to local loop, and (2) the framework leased line agreement.<sup>188</sup> Both agreements include reference to ADR *in addition to* the availability of court proceedings or the possible submission of a dispute to regulatory adjudication conducted by UKE. To this extent, there is no evidence of a general applicability of ADR to telecommunications disputes in Poland.

## 2.2. What forms of ADR Are Applied within the Studied Jurisdictions? Is ADR in Telecommunications Markets a “Real” ADR?

The analysis of the national regulatory approaches to ADR in the UK, Ireland and Poland attests to the divergence among various NRAs regarding the assessment of suitability of ADR techniques for the resolution of regulatory disputes in the telecommunications sectors. The following conclusions emerge with regard to this examination.

From a vertical, national perspective, different NRAs tend to express their preferences for certain types of ADR techniques that usually fall within the standard regulatory functions in assessing the appropriateness of NRAs to resolve or decline a dispute. Hence, Ofcom in the UK points to more official ADR methods such as **arbitration** or **formal alternative proceedings** when explaining the possible range of dispute resolution methods available to the parties as opposed to Ofcom’s regulatory adjudication. Additionally, the presentation of Gregory Hunt, a Manager of Dispute Resolution Services at CIArb, as examined in Section 2.1 of this paper, proves the applicability of **mediation** and to some extent **“unofficial” adjudication** for disputes between the major UK telecommunications market players. It also emerges from Ofcom’s ordinary policy regarding the preliminary assessment of its jurisdiction on a case-by-case basis that **commercial negotiations** between the parties may not always be classified as a formal ADR mechanism, especially as long as the plausible obstruction of such negotiations by a recalcitrant party comes into play. Certainly, Ofcom developed noteworthy mechanisms distinguished in this paper under the term **“delegated regulatory adjudication”** and which proved relevant for the following regulatory disputes: (1) disputes concerning LLU, (2) disputes between Carlton-Granada and its advertising customers with regard to the Contract Rights Renewal (CRR) Remedy, and (3) the disputes relating to the Broadcast Transmission Services. These mechanisms—entailing different Adjudication Schemes in each particular case—shift between formal regulatory adjudication and ADR. This is so because they involve strong regulatory supervision of behalf Ofcom, on one hand, while resembling the work of a neutral party, on the other. In sum, the application of ADR in the UK falls within the broad discretion of Ofcom, and is exercised in a conservative manner, hence, not allowing the operators much autonomy regarding their choice of preferred ADR method. This is not to say that Ofcom is not supportive when it comes to the parties’ use of ADR. Rather, the operators’ will to rely on specific, private ADR mechanisms will always need to be assessed by Ofcom in terms of its suitability for a regulatory dispute, and as such it may be circumvented by Ofcom’s decisions on the appropriateness of another dispute resolution procedure for the pending case.

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<sup>187</sup> On the contrary, telecommunications disputes involving consumers are resolved through arbitration court attached to UKE.

<sup>188</sup> See the framework access agreement concerning full and shared access to local loop via: [http://www.uke.gov.pl/files/?id\\_plik=4084](http://www.uke.gov.pl/files/?id_plik=4084) and the framework leased line agreement via: [http://www.bip.uke.gov.pl/\\_gAllery/49/52/4952.pdf](http://www.bip.uke.gov.pl/_gAllery/49/52/4952.pdf).

It seems that ComReg in Ireland adopted a less interventionist approach to ADR. ComReg has preferences towards the following ADR mechanisms: **mediation; dispute resolution processes in commercial agreements between operators; resolution by adjudication; informal contacts or negotiation; discussion at industry fora; and ComReg own initiative investigations.**<sup>189</sup> It is important to stress here that ComReg is particularly concerned about the voluntarily nature of the ADR mechanism to be applied to regulatory disputes. The most frequent ADR mechanism relied upon by ComReg, namely, mediation, will always be based on the parties prior agreement and will respect the parties' private arrangements regarding the costs of mediation. Additionally, ComReg tends to support the private dispute resolution mechanisms included in commercial contracts between operators in contrast to the norm in terms of Ofcom's regulatory adjudication. It is interesting that ComReg, in its consultations on the Dispute Resolution Procedures of 2010, did not exclude the possibility of **arbitrating** certain categories of regulatory disputes given the prospective suitability of arbitration to resolve such disputes.<sup>190</sup> ComReg did not, however, explain in detail what kind of disputes would be in fact appropriate for the arbitration forum.

As compared to Ofcom and ComReg, the President of UKE in Poland did not develop any mechanism that would encourage operators to rely on ADR. This is a function of a particular (less favourable) national approach to ADR that deserves broader discussion here. Both the UK and Ireland provide examples of jurisdictions in which arbitration and ADR have had a long history of success. In Poland, on the contrary, ADR mechanisms are still not preferred dispute resolution methods. This, as confronted with the specific dynamics of the emerging telecommunications market (as in the case of Poland), may justify the distrustful attitude of the Polish NRA towards the applicability of ADR to telecommunications disputes. What is important to note here, however, involves the fact that Ofcom, although operating within the hospitable ADR framework supported by different policy statements of public authorities and judicial decisions, does not seem to fully recognise the potential of ADR in regulatory disputes.<sup>191</sup> This may be so because of Ofcom's concern related to the possible fragmentation of regulatory functions in relation to highly sensitive public policy issues that arise in the telecommunications sector. Regardless of the actual objective of Ofcom to retain its broad regulatory functions in dispute resolution, Ofcom's policy in assessing ADR provokes intriguing questions especially vis-à-vis strong public support for ADR in the UK.

Another observation regarding the application of ADR in the studied telecommunications markets concerns the more horizontal, systemic understanding of ADR in the regulatory sectors. The question to be addressed here concerns the issue of whether the ADR mechanisms as examined in the selected jurisdictions in fact resemble real ADR techniques that are traditionally applied in private, commercial settings. This question is relevant also for getting a better picture of the potential role of NRAs in stimulating the obligations of telecommunications undertakings under the terms and conditions of the commercial contracts such undertakings are bound by.

A general trend can be identified, at least with regard to jurisdictions which allow the use of ADR in telecommunications disputes such as the UK and Ireland, concerning the distinction between official, unofficial and hybrid ADR that emerged in the telecommunications markets. Official ADR involves arbitration; unofficial ADR concerns traditional private ADR means such as mediation, adjudication, negotiation or conciliation; while a hybrid ADR involves some form of delegated regulatory adjudication. Moreover, there seems to be a further distinction within the very category of unofficial ADR between less formal and more formal ADR schemes. Such distinctions do not follow a clear reasoning of NRAs. On one hand, in the case of the UK, Ofcom allows the use of ADR by the communications undertakings in a dispute that does not involve a significant imbalance of market

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<sup>189</sup> Section 2.1.

<sup>190</sup> Ibid.

<sup>191</sup> Ibid.

power, but it also allows the use of ADR in the enforcement of limited commercial obligations of the parties. On the other hand, ComReg in Ireland provides for mediation without a proper distinction between the category of disputes or undertakings that are more likely to be suitable for ADR. This confusion suggests that even unofficial ADR in the context of telecommunications regulation does not entirely correspond with the objectives of traditional ADR methods. This is so because in most cases NRA will be an ultimate authority to resolve a dispute (as in the case of Ofcom and ComReg), and also due to the fact that in some events an independent mediator or adjudicator will be appointed by NRA (as in the case of ComReg).

Finally, even the private, contractual provisions on dispute resolution contained in commercial contracts concluded by telecommunications undertakings fail in front of the dispute resolution procedures of NRAs (as in the case of Ofcom) or does not exclude a parallel regulatory investigation (as in the case of ComReg). This implies that ADR mechanisms understood in the context of regulatory adjudication are not “true” ADRs regardless of whether they are invoked with regard to industry-specific disputes or in commercial settings.

### **2.3 The Suitability of ADR for the Telecommunications Sectors in the context of the objectives of the EU Telecom Package**

The last observation from the preceding section implies the analysis of whether traditional ADR mechanisms are in fact suitable for the resolution of disputes emerging in the telecommunications markets, specifically in the context of the objectives underpinning the introduction of ADR into the EU Telecom Package. We shall first summarise the goals standing behind ADR in the revised European framework on telecommunications as presented in Section 1.2 of this paper.

The major rationale behind the introduction of ADR in the telecommunications sectors under the EU Telecom Package involved the following: (1) flexible and fast dispute resolution of suitable disputes, (2) effectiveness of ADR mechanisms, and (3) the legal (regulatory) certainty related to the use of ADR. These are also the general advantages of the ADR techniques as advertised by most private ADR service providers. The fragmented application of ADR by the studied regulatory authorities questions, however, the significance of the above-mentioned goals related to the use of ADR.

First, although ADR techniques (be it in their official or unofficial form) are usually faster and less bureaucratic than court proceedings or regulatory adjudication, it is uncertain whether the application of ADR, in view of the broad discretion of national regulatory authorities, may in fact enhance faster and more effective resolution of telecommunications disputes. This is mostly due to the possibility of referring disputes back to NRAs and additionally to the vague guidelines, stemming from the EU Telecom Package, on the suitability of ADR for particular categories of telecommunications disputes.

Second, it is yet unclear if the ADR mechanisms may in fact promote regulatory certainty in the context of the EU common telecommunications market. As stems from the analysis of the national attitudes towards ADR both the understanding and application of the ADR methods is still largely fragmented with regard to different Member States. Although the public authorities (including various EU officials) tend to increasingly support ADR (including arbitration) there is insufficient signal from those authorities as to how such alternative methods could in fact be used in order to increase legal certainty within the regulated markets and the efficacy of private dispute resolution. This acknowledges the broad autonomy of private ADR providers in applying various ADR schemes to B2B telecommunications disputes that—due to the transparency issues—fall outside the public

scrutiny, potentially hindering the effectiveness of the EU policy goals related to the promotion of ADR across the EU. This is not to say that ADR is not suitable for the resolution of regulatory disputes of various kinds. Rather, it seems that the ADR techniques could gain more practical significance (and increase the effectiveness of the EU policy goals regarding ADR) if their introduction in the EU Telecom Package was accompanied with well-defined principles related to the use of ADR and/or additional safeguards that could be offered to telecommunications undertakings in exercising their rights to conduct regulatory disputes in a private, alternative manner. Such additional safeguards could involve the provisions on transparency and accountability of private ADR providers, which could in fact strengthen the position of these providers in front of the NRAs and national courts, especially in jurisdictions where the ADR culture has not yet been developed.

### **Conclusion: What Does the EU Stand for with regard to ADR? Private – Public Interplay and the Future of ADR in the Regulated Markets**

The analysis of the national approaches to ADR provided in Section 2.1 attests to the continued fragmentation with regard to the dispute resolution procedures (including ADR) in the telecommunications markets within the Member States. This fragmentation stems from a heavy-handed regulatory adjudication with no major reliance on ADR (the case of Poland) on one hand, and the centralized dispute resolution models permitting either official ADR schemes (the case of the UK) or somewhat unofficial ADR means (Ireland), on the other hand. This diversity in implementing the EU Telecom Package suggests a discrepancy concerning a coherent understanding of the potential of ADR by EU officials, on one side, and the NRAs, on the other. It is clear that the EU Telecom Package has not (yet) contributed to the satisfactory harmonization and unity of national telecommunications law, as expected at the time of issuing the EU telecommunications reforms. This also sheds light on mere trust in private dispute resolution procedures in the telecommunications markets as expressed at the EU level.

The EU policy regarding the effectiveness of ADR in the telecommunications disputes falls within the recent increased private-public dialogue on arbitration and ADR. This dialogue implies strong public support of ADR, at least at the European level. It also entails, however, a reluctance of national authorities to allocate public policy issues related to telecommunications within ADR given different national experiences in the field of ADR. These two trends are mutually aggravating and provoke intriguing questions regarding the shift towards the integration of public policy objectives into ADR in the EU regulatory markets. Further issues emerge in this regard. Why is the public (EU) trust in private ADR regimes increasing while the regulators and some regulatory actors increasingly contest the efficacy and efficiency of those same regimes? What are the incentives for EU officials to give way to ever more room for arbitration bodies in the regulatory areas? And finally, why does the introduction of different ADR methods in regulated markets not give rise to a debate on the procedural safeguards and distinctive accountability mechanisms to be applied within those regimes? These problems, together with the questions on the future of ADR in the EU (telecommunications) markets will need to be assessed in view of future developments of the dispute resolution functions of NRAs, potentially beyond the national borders.

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