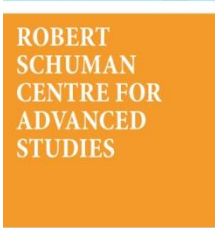




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Abstract

To address situations where commercial negotiations about access and interconnection fail, the Common Regulatory Framework requires national regulatory authorities (NRAs) to have power to resolve disputes between providers. The NRA can impose proportionate obligations. Describing dispute resolution as either a form of regulation in its own right or as simple adjudication is likely to mislead without some analysis of what is meant. There may be a tendency, when the NRA is resolving a dispute, to reflect an interventionist regulatory approach but there are markets that have effective competition and in which the regulator may properly tend towards resolving a dispute towards the adjudication end of the spectrum with a less interventionist approach.

This paper reflects on principles that have been applied in the UK and on experience in appeals to and beyond the Competition Appeal Tribunal. Because the task of judges is to tackle the grounds of appeal raised before them, courts do not provide a comprehensive guide to NRAs as to how to handle the wide range of issues that can arise. The UK Supreme Court has emphasised the need for interconnection terms to be consistent with the objectives in Article 8 of the Framework Directive and, within boundaries set by Article 8, for national contract law to be applied.

Keywords

Access, Article 4 appeals, Article 8 objectives, dispute resolution, interconnection

Opening quotations

“...the description of dispute resolution as “a form of regulation in its own right” is apt to mislead without some analysis of what is meant by it. As a national regulatory authority charged with the resolution of disputes, Ofcom has both regulatory and adjudicatory powers...”

Lord Sumption in *British Telecommunications (BT) v Telefónica* [2014] UKSC 42 at [31] and [32]

“National regulatory authorities (NRAs) should have the power to secure, where commercial negotiation fails, adequate access and interconnection and interoperability of services in the interest of end-users. In particular, they may ensure end-to-end connectivity by imposing proportionate obligations on undertakings that control access to end- users”.

From the Access Directive 2002/19/EC recital (6)

“The scheme of the Directives has been considered on a number of occasions by the Court of Justice of the European Union, notably in Case C-227/07 *Commission of the European Communities v Republic of Poland* [2008] ECR I-8403 and Case C-192/08 *TeliaSonera Finland Oyj* [2009] ECR I-10717. It can fairly be summarised as follows. The objectives of the scheme are set out in Article 8 of the Framework Directive (2002/21/EC), and in particular in Article 8.2, which assumes that consumer welfare will generally be achieved by competition and requires national regulatory authorities to promote both. The telecommunications sector is assumed to have become competitive except in those cases where a communications provider (CP) can be identified as having significant market power in a relevant market. In a competitive market, the objectives in Article 8 of the Framework Directive are to be achieved through the terms of the interconnection agreements between CPs. CPs operating in such a market are left to negotiate their own interconnection terms in good faith, with the minimum of regulatory interference. But they are required by Article 4.1 of the Access Directive to offer interconnection terms “consistent with the obligations imposed by the national regulatory authority pursuant to Articles 5, 6, 7 and 8.” Under Article 5.4 of the Access Directive, these obligations of the regulator include its obligation to secure the policy objectives in Article 8 of the Framework Directive. The result is that interconnection terms consistent with the objectives in Article 8 of the Framework Directive must be available to any CP which asks for them.”

Lord Sumption in BT v Telefónica [2014] UKSC 42 at [10] ¹

* © 2014 UK Competition Appeal Tribunal. Dr Scott is Director of Studies of the UK Competition Appeal Tribunal but views expressed here are personal and should not be taken as an indication of what the Tribunal would decide upon considering argument. He is grateful to colleagues for comments upon earlier drafts.

This paper has been presented for the first time during the Seminar “The Place of the National Judiciary in the Single Market for Telecoms”, organised in Brussels by the Florence School of Regulation, Communications and Media Area, on behalf of the European Commission, DG CNECT, on Thursday 20th November 2014 (for further details on the event: <http://fsr.eui.eu/Events/COMSnMEDIA/Conference/141120SeminarForNationalJudges.aspx>)

¹ Article 5(4), Access Directive, like other parts of the CRF, was subsequently amended by Directive 2009/140/EC – see version in the Annex of what is now Article 5(3)

Learning to resolve disputes

The language of the Access Directive is clear about the goal of securing end-to-end connectivity. Of course negotiations may fail and then, if one or more parties refer the matter to the NRA, it may pursue that goal through dispute resolution and thereby through imposing proportionate obligations. Dispute resolution has been part of the Common Regulatory Framework (CRF) from the start and the phrase “imposing proportionate obligations” may suggest a primarily regulatory function in public law. Nevertheless the term “dispute resolution” suggests adjudication between adversaries in private law albeit conditioned here by overall objectives in the CRF. As we proceed, we shall see how NRAs should promote consumer welfare, ideally through effectively competitive markets, and look at circumstances that permit an NRA to engage in regulatory intervention even when a market has been deemed to be effectively competitive.

Although it is a decade since the dispute resolution process came into use, we are all still learning how to tackle some of the issues that the process throws up. Only a small minority of determinations get appealed. That appeal from a dispute resolution determination is, by virtue of article 4 Framework Directive, transposed in the UK in sections 192 & 195(2) of the Communications Act 2003, on the merits and not simply a judicial review.² Of the appeals that reach hearing and judgment before the UK Competition Appeal Tribunal (CAT), again only a minority go further to the Court of Appeal of England & Wales. Only one case has gone to the Court of Justice of the European Union (CJEU) in Luxembourg on a reference for a preliminary ruling and only one case has gone to the UK Supreme Court.

Because the task of judges is to tackle the grounds of appeal raised before them, courts do not provide a comprehensive guide to NRAs, let alone to their sibling courts in other Member States, as to how to handle the wide range of issues that can arise. When a multiplicity of grounds is raised the court may not find it necessary to decide upon every one.

So what follows flows from the particularities of experience in the UK and, necessarily, it only provides a few pieces of a jigsaw puzzle where other pieces have yet to be cut, refined by appeals and fitted in.

The sub-title reflects one question that arises throughout the process. It is that of the extent to which dispute resolution is a matter of adjudication between the disputing parties and the extent to which it engages the NRA in its regulatory role. The CRF has always recognised, see for instance recitals (25) – (28), Framework Directive 2002/21/EC, that some markets still have a lack of effective competition which means that there may be more of a tendency, when the NRA is resolving a dispute, to reflect an interventionist regulatory approach and that there are other markets which do have effective competition and in which the regulator may tend towards resolving a dispute towards the adjudication end of the spectrum with a less interventionist approach.

Recital (32) Framework Directive, see Annex, not only uses the language of a “simple procedure” but it also uses the words “intervention” and “impose a solution” when it comes to ensuring that obligations imposed on parties by the CRF, who may not have the significant market power (SMP) discussed in (27), see Annex, are observed and customer benefits thereby achieved through access and interconnection. We shall see that, notwithstanding the opening words of (27), there are CRF obligations on parties without SMP as well as on those with SMP - obligations that an NRA and the courts must and will follow through in a dispute resolution process.

² See [2014] UKSC 42 at [13] and [24]; the situation is more complicated when dealing with price control matters flowing from a finding of significant market power; see s.193 in general and s.193(7) in particular.

From the point of view of the main players in the telecommunications industry, the issues raised in these cases are of great importance to the players, to the regulator and ultimately to competition and to consumers. Although costs of employing lawyers and economists to fight appeals may seem substantial, they are often dwarfed by the amounts of money in dispute. It follows that fights over what is reasonable, or cost oriented matter to the parties and ultimately to consumers and therefore require close attention from the judges concerned.

Dispute resolution: the EU CRF

For convenience, the more relevant recitals and articles from the Access Directive 2002/19/EC and the Framework Directive, as each has been amended, of the EU's CRF are set out in the Annex.

NRAs provide dispute resolution within a national transposition of those articles. As the Tribunal explained in [2008] CAT 12 at [20] in relation to the then wording of Article 5, Access Directive, providing for *Powers and responsibilities of the national regulatory authorities with regard to access and interconnection*, an initiative for NRA action could come from the NRA itself or from one or more parties in dispute but, in either case, the NRA must secure the objectives of Article 8, Framework Directive:

“Article 5(4)³... requires Member States to confer two powers on the national regulatory authority; the power to intervene either on its own initiative or at the request of the parties to a dispute in order to secure the policy objectives referred to. Both articles 20 and 5(4) refer to the policy objectives set out in Article 8 of the Framework Directive. Article 8 of the Framework Directive sets out the policy objectives and regulatory principles of which the NRAs are required to take the utmost account in carrying out their tasks under the Framework Directive and the Specific Directives.”

The CRF provides for dispute resolution as a swift alternative to using the courts without ignoring the possibility of alternative dispute resolution (ADR). However, if a series of appeals to successive levels occurs, then the process usually takes more than months in any Member State.

Setting the scene in the UK in the context of the EU

The UK NRA, the Office of Communications (Ofcom in this piece for readability, though OFCOM in the Communications Act 2003), is the body that has primary responsibility for dispute resolution under the UK transposition of article 20 Framework Directive (reproduced in Annex A) in Chapter 3 of the Act. Sections 185-191 deal with the procedure before Ofcom and then sections 192 and 195 are the transposition of article 4 dealing with appeals to the CAT. Section 196 provides for an appeal on a point of law, normally to the Court of Appeal of England & Wales, and, from there, the UK Supreme Court may choose to hear a further appeal.

On a further appeal it is not necessary for Ofcom to be the Respondent⁴ as these may be essentially *inter partes* proceedings but Ofcom may appear as an interested party as it did before the Supreme Court in *BT v Telefónica and others* [2014] UKSC 42.

³ Article 5(4), like other parts of the CRF, was subsequently amended by Directive 2009/140/EC – see version in the Annex of what is now Article 5(3) which now leaves dispute resolution to be mentioned elsewhere. This paper is not the place to discuss the nature of an NRA initiative where there is a problem in access or in interconnection that disputing parties have not referred to the NRA. However, as is clear from the case law that has followed the amendments, those entering into contracts, varying them, disputing or resolving such disputes within the CRF must take account of Article 8, Framework Directive.

⁴ As for example in *BT v Ofcom* [2012] EWCA Civ 1051 contrasted with *BT v Telefónica and others* [2014] UKSC 42 and before that *Telefónica and others v BT* [2012] EWCA Civ 1002 in which Ofcom appeared only as an interested party.

By virtue of Article 267 of the Treaty on the Functioning of the European Union (TFEU), the CAT, the Court of Appeal or the Supreme Court may refer a question to the CJEU for a preliminary ruling⁵ – the question may relate to the proper construction of the Directives constituting the Common Regulatory Framework; in relation to dispute resolution this power has only been used on one occasion. A question for preliminary was referred by the Court of Appeal to the CJEU, Case C-16/10 *The Number*, (1100), on questions associated with the Universal Service Directive 2002/22/EC. The Court (Third Chamber) ruled that:

“Article 8(1) of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users’ rights relating to electronic communications networks and services (Universal Service Directive) permits Member States, where they decide to designate one or more undertakings under that provision to guarantee the provision of universal service, or different elements of universal service, as identified in Articles 4 to 7 and 9(2) of that same directive, to impose on such undertakings **only** (emphasis added) the specific obligations, provided for in the directive, which are associated with the provision of that service, or elements thereof, to end-users by the designated undertakings themselves.”

Parties and binding effects

Almost inevitably many disputes have involved the previous PTT monopolist, once part of the British Post Office, now BT, either as a provider or as a customer; other “frequent flyers” are the mobile network operators (MNOs): Everything Everywhere (EE) (the merged entity of the operators that were owned by France Télécom, Orange, and by Deutsche Telekom, T-Mobile), Three (Hutchison 3G), Telefónica and Vodafone; also BT’s original fixed line competitor, now Cable & Wireless Worldwide. The other multiple appellant is The Number UK who operate the directory service known as 118118. These frequent appellants have recently been joined by British Sky Broadcasting, by TalkTalk, the latter having started as a fixed line operator and become a provider of a range of services often using BT infrastructure, and most recently by Gamma who provide business oriented services.⁶

Technically a determination is only binding upon the parties to the dispute that Ofcom has resolved but it is worth mentioning the following passage from a determination published on 21 August 2014:

“5.128 This determination is binding on BT, Vodafone, Telefónica and Three (Hutchison 3G). Since a subsequent dispute with similar facts is likely to result in a similar decision (given our application of the Guidance and our statutory duties, including our duty to have regard to the principle that regulatory activities should be consistent), we would expect this determination to be read across and followed in situations where a third party is facing similar questions and circumstances to these Disputes.”

Dispute between BT and each of Vodafone, Telefónica and Three relating to forward looking call origination charges for 080 numbers
Ofcom reference: CW/01126/04/14

Dispute resolution and SMP remedies

Disputes arise in the context of an overall expectation that operators should negotiate in good faith to provide interconnection so that customers benefit from end-to-end connectivity. Unlike the *ex ante* remedies that flow from a finding of SMP, and though disputes may arise within the framework of *ex ante* remedies, dispute resolution does **not** require such a finding of SMP. The Competition Appeal

⁵ In *BT v Telefónica* [2014] UKSC 42 at [50], referring back to [47-48], Lord Sumption explains the logic of NOT making a reference when an appeal does not turn on the point about which a preliminary ruling would be appropriate. As he says in his judgment “The recognition that the interconnection terms are the starting point does not itself warrant a reference, since the centrality of the interconnection terms in the scheme of the Directives is obvious and no convincing reason has been put forward by any of the parties or interveners for ignoring them.”

⁶ The suffixes in full registered company names, such as PLC and Limited, have been omitted.

Tribunal made that point clear in *Hutchison 3G v Ofcom* [2005] CAT 39 at [129-130] and reiterated it in *T-Mobile v Ofcom* [2008] CAT 12 at [90-91].

Recent activity before Ofcom and the CAT

To get a sense of the level of activity, Ofcom recently reported on the work of their Competition Investigations team in resolving regulatory disputes between companies.

“During 2013/14, we resolved **seven** disputes covering a wide range of topics, including BT’s tiered wholesale charges for number translation services, used to route non-geographic calls, and whether Openreach should offer a single ‘jumped’ metallic path facility – a type of equipment in the local telephone exchange. ... As at 1 April 2014 there were a further four ongoing dispute cases, three of which have since been resolved. These disputes looked at issues ranging from BT’s compliance with its cost-orientation obligations for certain wholesale products to service level agreements for local loop unbundling services.”

Extract from Ofcom’s Annual Report 2013/14

Of those seven disputes only the “Determination to resolve disputes concerning BT’s tiered termination charges in NCCNs (network charge change notices) 1101, 1107 and 1046” dated 4th April 2013 led to an appeal (CAT case number 1211). That appeal was stayed pending the decision of the Supreme Court mentioned below but it is now proceeding and is *sub judice*.

Another appeal that was also stayed is 1195, now *sub judice*, and that is against an Ofcom determination dated 2nd April 2012 as to the repayment that Vodafone has to make to BT for charges for terminating calls to 080, 0845 and 0870 numbers under the Tribunal’s judgment [2011] CAT 24 of 1st August 2011 on appeals by BT and EE against Ofcom’s determinations of disputes relating to termination charges for 080, 0845 and 0870 calls – the appeal from which went to the Supreme Court.

2014/15

Since last year Ofcom have had more disputes to handle and, so far, it has published six determinations, only one of which has been appealed to date:

- Disputes between TalkTalk and BT and Sky and BT relating to whether BT provided MPF New Provide (that is the provision of a new metallic path owned by BT but used for the provision of services by a competing provider) on fair and reasonable terms and conditions: this led to two parallel, related, determinations issued on 22nd April 2014; and also to withdrawal of TalkTalk’s appeal in 2013 on MPF New Provide, CAT case number 1221;
- Determination to resolve dispute between Gamma and BT concerning BT’s charges for Interconnect Extension Circuits: issued on 23rd May 2014; this determination was appealed by Gamma on 23rd July 2014 but stayed pending the outcome of the Ethernet appeals (see below);
- Dispute between Level 3 Communications UK Limited and BT relating to historic partial private circuit charges: determination issued in corrected form on 6th July 2014
- Determination under sections 188 and 190 of the Communications Act 2003 for resolving disputes between BT and each of Vodafone, Telefónica and Three concerning BT’s proposed origination charges for calls to 080 number issued on 21st August 2014
- Dispute between Cloud9 and Telefónica concerning additional charges for delivery of roaming calls: determination issued 30th September 2014.

As at the start of November 2014, there were two disputes currently under consideration by Ofcom: one relating to roaming under the UK transposition of Regulation (EU) No. 531/2012 and one on

termination rates for 03 numbers. Any new investigations or disputes would be announced on the website and via email alerts in the usual way.⁷

Looking back over the past decade

Since the CRF came into force there have been 25 appeals to the CAT concerning dispute resolution.

Some appeals get withdrawn fairly early on (CAT cases numbered 1057, 1063, 1064, 1167 and 1221), some once a preliminary point has been decided (CAT case number 1080), or where Ofcom acknowledge an error (CAT case number 1113); some concern Ofcom's jurisdiction rather than the substance of what is in dispute (CAT cases numbered 1057, 1171 and 1172).

Termination Rate Disputes [2008] CAT 12

Sometimes more than one party appeals in respect of the same decision by Ofcom. In one series of appeals concerned with disputes about mobile call termination, CAT cases numbered 1089-1093, there had been two determinations covering, in all, seven disputes; the appellants were BT, T-Mobile, Hutchison 3G UK and a group of fixed network operators led by Cable & Wireless.

Those cases led to a preliminary judgment on what were called the core issues, [2008] CAT 12, a judgment that should now be read in the context of the 2014 Supreme Court judgment – see below. The Tribunal found that Ofcom had made a number of errors of law in the way it went about determining the disputes in circumstances where there had been findings of SMP held by MNOs reflected in Ofcom's statement dated 1 June 2004 on Wholesale Mobile Call Termination. Ofcom had imposed price controls on calls terminated on 2G networks but – at the relevant time – not on calls terminated on 3G networks. This gave rise to disputes as to the proper charges. By the time the Tribunal heard these appeals it was also seized of appeals against the next Ofcom statement on Wholesale Mobile Call Termination, that of 2007; the Tribunal heard them all together.

The Tribunal, at [83], made it clear that the challenges raised by the appellants were fundamental and that the grounds of appeal went far beyond alleging errors of appreciation. It was not, therefore, a case in which the Tribunal needed to explore the circumstances in which it would or would not be appropriate for it to interfere with the exercise by Ofcom of its discretion.

The Tribunal held that the four appeals were well founded in so far as they related to certain issues in the appeals, referred to as the “core issues”, some of which were of general application:

- In particular the Tribunal found that Ofcom must approach dispute resolution having regard to all its statutory obligations (reflecting, in particular, those in article 8, Framework Directive, and sections 3 and 4 of the UK Communications Act 2003) and not focus unduly on the existence of other regulatory constraints imposed on one or other of the parties to the dispute, such as BT's end-to-end connectivity obligation. The Tribunal noted that Ofcom failed to recognise that dispute resolution is itself a third potential regulatory restraint that operates in addition to other *ex ante* obligations and *ex post* competition law, see [83] and [84]. Nowadays therefore Ofcom is careful to explain that its determinations are consistent with its statutory duties, as, for example, in paragraphs 5.129-5.131 of a determination published on 21 August 2014, mentioned above.
- The Tribunal also found that Ofcom erred in drawing too rigid a boundary between the exercise of its dispute resolution powers and its SMP-related powers. The Tribunal held that Ofcom had erred in rejecting any form of cost based analysis of the reasonableness of the price comparison. The Tribunal explained the way through, relating prices and costs in this context as follows:

⁷ <http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/open-disputes/>

“103. The Tribunal notes that Ofcom’s statements in the Disputes Determinations were made in the context of rejecting arguments put forward by the FNOs and H3G that Ofcom should set a cost based price. The Tribunal agrees with Ofcom to the extent that it decided that it was not bound, in the course of resolving a dispute referred to it under section 185, to set a price reflecting the costs of providing the service. However, the Tribunal accepts BT’s argument that the Determinations went further than this and that Ofcom erred in drawing too rigid a boundary between the exercise of its dispute resolution powers and its SMP-related powers.”

“104. Ofcom was wrong to disregard entirely the relationship between prices and costs in this case. There is an underlying assumption in the Disputes Determinations that there is no middle ground between eschewing analysis of the relationship of price to cost completely on the one hand and a full investigation of costs of the kind carried out as part of the SMP market review on the other. The Tribunal does not accept that there is such a strict dichotomy. It should be possible to carry out some investigation of costs to form a broad idea of what that relationship is. Such an assessment may or may not give rise to a cost based price. It may simply result in Ofcom concluding that the price proposed is a reasonable one even though that price was not arrived at on a cost basis. The costs are not only relevant when setting a “strictly cost based price” but are likely to be a factor to a greater or lesser extent in most cases where the dispute between the parties concerns price.”

- The Tribunal held that Ofcom had placed too much weight on the need for consistency and erred in relying on the conclusions in its statement dated 1 June 2004 on Wholesale Mobile Call Termination without properly weighing the factors which the appellants argued meant that these conclusions were no longer valid. The Tribunal said, at [99]:

“given the length of time that had elapsed since the publication of the 2004 Statement and the important changes that had occurred in the market Ofcom should have looked afresh at whether approval of the rates proposed was consistent with its wider duties.”

- The Tribunal held that Ofcom’s interpretation of the purpose of the end-to-end connectivity obligation was too narrow. The purpose of that obligation was not just to achieve interconnection, but to do so in a manner which promotes, or at least is not inconsistent with, other regulatory objectives (see [116]).
- The Tribunal provided guidance on how Ofcom should approach the task of resolving disputes in future. Of the test to be applied, the Tribunal said, at [101]:

“That test can be expressed as requiring Ofcom to determine what are reasonable terms and conditions as between the parties. The word “reasonable” in this context means two things. First it requires a fair balance to be struck between the interests of the parties to the connectivity agreement. It therefore requires the same kind of adjudication that any arbitrator appointed by the parties to determine a dispute about the reasonable rate would carry out. But secondly, because Ofcom is a regulator bound by its statutory duties and the Community requirements it also means reasonable for the purposes of ensuring that those objectives and requirements are achieved. Ofcom did not approach resolving these disputes on this basis and it therefore committed an error of law.”

The Tribunal went on later to say:

117. In any event we do not consider that it is right to interpret the use of the term “reasonable” as it is used in the end-to-end connectivity obligation in such a narrow sense as to mean the highest price which could be charged which would still result in BT not making a loss. There is no reason to give the word anything other than its ordinary meaning; the price that it is fair should prevail as between the parties taking into account all the circumstances including in particular the arguments put forward in the dispute by the parties, Ofcom’s statutory duties and the Community requirements set out in the 2003 Act (see paragraph [101] above).

Some appeals are dismissed both by the CAT and by the Court of Appeal ; for example, CAT case number 1146, *Partial Private Circuits*; the hearing in that case ran to six days and the Tribunal's judgment, [2011] CAT 5, ran to 340 paragraphs but no grounds of appeal were upheld.

***Telefónica* [2012] CAT 28**

There may be cases that flow from SMP remedies. One such was an appeal by Telefónica concerning a determination by Ofcom of a dispute between Telefónica and each of Hutchison 3G and Vodafone dated 14 September 2011 and to do with termination charges levied in October 2010 and a practice known as “flip-flopping”, by which mobile communications providers (CPs) exploited the way in which average call termination charges were calculated under Ofcom's mobile call termination statement published on 27 March 2007 (CAT case number 1189 leading to judgment [2012] CAT 28) rejecting each of Telefónica's grounds of appeal and deciding, *inter alia*, that:

- Ofcom had clearly understood that dispute resolution constituted a separate limb of regulation, distinct from the pre-existing charge control regime.
- Ofcom had given consideration to the question of whether the October 2010 charges were fair and reasonable in the light of all of its regulatory duties and objectives, and in light of the prevailing regulatory regime.
- There was no error of law on Ofcom's part in giving predominant weight to Vodafone's and H3G's putative compliance with the SMP regime, and in the absence of any error of law the weight to be attached to relevant factors was a matter for Ofcom alone.
- In the absence of any specific complaint of non-compliance with the SMP regime, Ofcom was free to decide whether to investigate that aspect of the matter, or whether to proceed on the assumption that the disputed charges, viewed in the context of the financial year as a whole, complied with the charge control. In the Tribunal's judgment, it was eminently reasonable for Ofcom to decide to proceed on the latter basis.

Ladder Pricing in the Supreme Court [2014] UKSC 42

As mentioned above, to date, only one set of appeals, (on 080, 0845 and 0870 termination charges), has gone all the way to the Supreme Court (CAT cases numbered 1151, 1168 and 1169) started in 2010 and culminated, four years later, in [2014] UKSC 42, a judgment allowing BT's appeal and restoring the Tribunal's judgment of 1 August 2011.

This is a case in which Lord Sumption, at [48], drew a clear distinction between the review of markets for SMP and consequent remedies and dispute resolution, saying:

“There is an important difference between (i) exercising a regulatory power to impose price control in order to correct market failure or control the abuse of a dominant economic position, and (ii) deciding whether a particular proposed tariff change advances consumer welfare for the purpose of determining whether there is a right to introduce it.”

The case concerned the flow of funds between mobile network operators and BT, as a fixed network operator, when calls are originated on a mobile network for termination on non-geographic numbers in the 08 series. BT has long had a pattern of charges for its fixed line customers in which calls to 080 numbers are free to the caller; 0845 numbers are charged at local rates and 0870 numbers at national rates. BT does not have a monopoly in the provision of such non-geographic numbers (even though it has a monopoly of delivering calls to its current customers⁸). There was no finding of BT having SMP in this market and therefore no remedy under articles 8-13, Access Directive. Mobile operators have

⁸ See [2014] UKSC 42 at [11]

tended to charge significantly more for all of these numbers when calls are originated on a mobile telephone. It follows that attractive margins can be earned.

BT provided termination of these calls to the mobile operators on the terms of its Standard Interconnect Agreement. That contract permitted BT to vary the charges subject, in a reflection of the CRF, to a determination by Ofcom in the event of dispute.⁹ Essentially, in 2009, BT decided that it would like to share in those attractive margins by devising termination rates that varied in accordance with the rates charged to their customers by the mobile operators. Understandably the mobile operators were reluctant to sacrifice their attractive margins, refused to agree and so a series of disputes went to Ofcom for resolution.

As Lord Sumption put it at [20] (the layout of which has been altered below for clarity of the principles and sub-principles):

“Ofcom decided that it would permit the changes to be made only if they were “fair and reasonable”, judged by three governing principles.

Principle 1 was that mobile network operators should be able to recover their efficient costs of originating calls to the relevant numbers.

Principle 2 was that the new charges should

- i. provide benefits to consumers, and
- ii. not entail a material distortion of competition.

Principle 3 was that implementation of the new charges should be reasonably practicable.

All three principles can be related to objectives set out in Article 8.2 of the Framework Directive. No one has challenged this as an appropriate analytical framework. Ofcom found that Principle 1 was satisfied. It found that Principle 3 was not satisfied, but it was overruled on that point by the Competition Appeal Tribunal, and there has been no appeal against its decision on that point. Accordingly the outcome of this appeal turns on the application of Principle 2. Ofcom found that Principle 2 was “not sufficiently likely to be met”.

Ofcom concluded that Principle 2 was not satisfied. It expected BT to bear the burden of positively demonstrating that the proposed tariff changes would be beneficial to consumers. In brief, as Lord Sumption said at [23], “what Ofcom decided was that although the direct and the indirect effect of BT’s proposed price changes could be expected to result in lower prices for consumers, BT should not be allowed to make the changes because it was not possible to forecast how far mobile network operators would be able to compensate themselves by increasing other charges.”

In [2011] CAT 24, the Tribunal took the opposite view in the sense that BT was entitled *prima facie* to change its charges and that, if Principles 1 and 3 were satisfied, “Ofcom could reject a proposed change only if the welfare test distinctly showed that they would adversely affect consumer welfare.”¹⁰ Ofcom and the Tribunal were agreed that the welfare test was inconclusive and the difference in the consequence flowed from a difference in how uncertainty should be handled in such cases. Each approach has risks. On the one hand one can prevent change that might turn out to be beneficial to consumers on the other one can allow change that might disbenefit consumers. What the Tribunal recognised was that an undue fetter on commercial freedom is itself a disbenefit to consumers.¹¹

It is worth expanding on why the Tribunal thought that BT was entitled *prima facie* to change its charges and on how the Supreme Court addressed each of those reasons:

⁹ There is provision for the parties to elect some other form of dispute resolution but that optional election did not happen in this case.

¹⁰ Lord Sumption at [25]

¹¹ The Tribunal at [396]

- The first reason was straightforward contractual entitlement in the Standard Interconnect Agreement subject to dispute resolution;
- The second was that this innovative approach to pricing was itself a mode of competing and that interference would restrict competition; and
- The third deserves setting out in the words of the Tribunal since it is important to note that the Tribunal does NOT contradict *Hutchison* [2005] CAT 39 at [130], reiterated in *T-Mobile* [2008] CAT 12 at [90-91], by suggesting that a finding of SMP is required before resolving a dispute. However it does caution against using dispute resolution to introduce effective price control where none of the parties' relevant prices are subject to regulatory control flowing from findings of SMP.

“442. Principle 2(ii) is concerned with the distortion of competition. We have found that the introduction of the NCCNs would not have the effect of distorting competition (see paragraphs 385 to 397 above). What is more, we consider that the imposition of a stringent test for the introduction of price changes by BT itself has the effect of distorting competition, by placing a restraint on pricing freedom not only on BT, but on any other terminating CP which might wish to introduce similar pricing structures to those contained in the NCCNs. We are mindful that price control is an intrusive form of control which, elsewhere in the 2003 Act, can only be introduced by SMP condition. None of the parties to the dispute were subject to regulatory control as regards the prices for 080, 0845 or 0870 calls nor as regards the prices for terminating such calls: see paragraphs 392 to 395 above.

443. We consider that these are powerful indicators in favour of allowing BT to introduce the new prices.”

In other words, if you want to impose price controls you need a good reason and, in this case, there was not one.

Contractual freedom

The Supreme Court noted that BT's freedom was limited by contract and regulation – in other words their freedom to vary the prices was limited both by established English law of contract and by the specifics of the CRF. That meant that BT was obliged to act:

- “in good faith and not arbitrarily or capriciously”, [37];
- “consistently with its contractual purpose”, [37]; and
- within limits which are fixed by the objectives of Article 8 Framework Directive, [37].

As Lord Sumption explained at [38]:

Ofcom “is bound to start from the parties' contractual rights and may override them only if that is required by the Article 8 objectives. However, under Clause 12 of the Interconnection Agreement, this is a conflict which cannot arise, because BT has no contractual right to require a price variation which is not consistent with the Article 8 objectives. In this case, therefore, Ofcom's function was to determine whether BT's proposed charges exceeded the limits of its contractual discretion. That depends on whether they were in fact consistent with the Article 8 objectives. This is where the three principles applied by Ofcom, including the welfare test and the competition test, come in.”

Here the prospective welfare test had been inconclusive.

His Lordship, at 43, saw the CRF as “market-oriented and essentially permissive” and therefore it was inconsistent to apply “an extreme form of the precautionary principle to a dynamic and competitive market”. He did qualify that, in [44], by adding that Ofcom should not be inhibited “from blocking a price variation which on a balance of probabilities was unlikely to be adverse, but which if things went wrong would be catastrophic”. His Lordship also said at the end of that paragraph:

“It is right to add that if and when sufficiently adverse effects were to materialise at some point in the future, Ofcom has power to intervene to address them at that stage.”

Anti-competitive effect of price control

He then turned to the question of there being an anti-competitive effect of price control. He was clear, at [46] about the tasks in the circumstances of this case:

- “...in resolving this particular dispute, Ofcom was not exercising a regulatory function, but resolving a dispute under the unchallenged terms of an existing agreement.”;
- “The CAT was hearing an appeal by way of rehearing on the merits. Their conclusion about the anti-competitive effects of restricting price changes and the weight to be attached to it was a factual judgment which it was perfectly entitled to make.” Since appeals from the CAT are only on a point of law, it was unappealable on this factual judgment.

Lord Sumption said, at [46]:

“According to the CAT’s analysis, the effect of not allowing BT to introduce innovative charging structures was itself anticompetitive because innovative pricing structures are an effective mode of competing. This was clearly a relevant consideration, even if it was not a conclusive one: see Article 8.2(b) of the Framework Directive. It was not a consideration taken into account by Ofcom. Since the right to introduce the proposed pricing package brought benefits for competition, the mobile network operators should have to justify their demand that the package should be rejected by pointing to some countervailing detriments to consumers disclosed by the welfare test if it were to be accepted. An inconclusive welfare test could not be enough for this purpose.”

Significant Market Power as a test

We have already seen that SMP is not necessary for Ofcom to impose obligations relating to prices in dispute resolution. At [47], the Supreme Court found it

“unnecessary to consider the CAT’s third reason for requiring the mobile network operators to show a distinct disbenefit to consumers in order to justify rejecting a proposed change to interconnection charges. This was that the rejection of BT’s proposed charges amounted to imposing price control on an entity such as BT which had not been designated as having significant market power in a relevant market.”

Lord Sumption noted that BT had sought a ruling “that the Common Regulatory Framework can never authorise Ofcom to reject a price variation unless it would leave an efficient operator unable to cover its costs.” He was unconvinced; the Article 8 objectives still come into play even without SMP but further argument on this point is for another case. This was a point that might have merited a reference to the CJEU but that was unnecessary to determining the instant case, [50]: “the centrality of the interconnection terms in the scheme of the Directives is obvious and no convincing reason has been put forward by any of the parties or interveners for ignoring them.”

As his Lordship said in [49]:

“The whole scheme of the Directives is to leave the arrangements for interconnection to the parties unless there are grounds for regulatory intervention. The permissible grounds of regulatory intervention in the case of a CP without significant market power are that the interconnection terms have been framed or are being operated in a manner which is inconsistent with end-to-end connectivity or conflicts with the Article 8 objectives. If the result of the welfare test and the competition test is that there is no positive reason to believe that the effects will be adverse, there is no justification for regulatory intervention.”

***Ethernet* [2014] CAT 14**

The most recent substantive judgment of the CAT in dispute resolution has been in the *Ethernet* set of appeals, Cases numbered 1205, 1206 and 1207 which led to [2014] CAT 14 and now to requests for permission to further appeals that suggest re-examination of what the CRF provides. This case is distinguishable from the last one in that there had been a finding of SMP from which followed a requirement that prices be cost oriented.

By way of summary of the CAT judgment:

- 1) BT appealed on six grounds, arguing that: Ofcom misinterpreted and misapplied an SMP Condition HH3.1 which imposed on BT what is commonly referred to as a *cost orientation obligation* and, had it applied the condition correctly, the overcharge found would have been considerably lower (Grounds 1 and 2); Ofcom's approach violated the principles of legal certainty (Ground 3); a number of adjustments should be made to BT's regulatory financial statements ("RFS") that would reduce the amount of the overcharge (Ground 4); Ofcom has no power to order repayment of sums 'paid without dispute' by the other CPs, albeit in breach of a cost orientation obligation (Ground 5); and, in the alternative to Ground 5, Ofcom incorrectly exercised its discretion by ordering full repayment (Ground 6).
- 2) Sky/TalkTalk appealed on three grounds: Ofcom was wrong to assess compliance with Condition HH3.1 on the basis of only the distributed stand alone cost measure and, had Ofcom applied the correct cost test, it would have found significantly higher levels of overcharging (Ground 1); Ofcom should have made a regulatory asset value adjustment to BT's RFS, which would also have increased the overcharge figure (Ground 2); and BT was wrong not to order the payment of interest on the sums to be repaid to BT (Ground 4). Sky/TalkTalk abandoned a further ground of appeal (Ground 3) following service of Ofcom's defence.
- 3) The remaining appellants appealed on a single ground, arguing that Ofcom was wrong not to order the payment of interest on the sums to be repaid by BT.

For the reasons set out in the judgment [2014] CAT 14, the Tribunal:

- allowed, in part, Ground 4 of BT's appeal insofar as it concerned the adjustment to BT's rental costs in respect of the exclusion of excess construction costs; and
- allowed Sky/TalkTalk and the remaining appellants' appeals as regards the payment of interest.

In all other respects, the Tribunal dismissed the appeals of BT and Sky/TalkTalk, and invited the parties to make written submissions as to the appropriate directions that the Tribunal should make in the light of the judgment.

Other current cases

As indicated above these are (i) a fresh dispute about 08x numbers, Case number 1195, and (ii) another appeal from a dispute resolution determination, also about such non-geographic numbers, 1211, both were stayed pending the Supreme Court's decision and are now underway again.

Details of all CAT cases are available on the website

catribunal.org.uk

Conclusion

Returning to the question of whether the task of dispute resolution is about adjudication or regulation, there are clearly elements of both in the approach taken in the CRF and therefore in the United Kingdom.

We should not lose sight of the ideal that effective and innovative competition coupled to the law of contract is the best way forward. Therefore we should not forget that, though each NRA and appellate body must maintain vigilance in the light of article 8 objectives and their duty to promote competition and consumer welfare, each should be cautious not to interfere unduly in the competitive process when imposing solutions on competing providers.

Annex Extracts from the CRF Directives as amended

Access Directive 2002/19/EC as amended

Recitals

(5) In an open and competitive market, there should be no restrictions that prevent undertakings from negotiating access and interconnection arrangements between themselves, in particular on cross-border agreements, subject to the competition rules of the Treaty. In the context of achieving a more efficient, truly pan-European market, with effective competition, more choice and competitive services to consumers, undertakings which receive requests for access or interconnection should in principle conclude such agreements on a commercial basis, and negotiate in good faith.

(6) In markets where there continue to be large differences in negotiating power between undertakings, and where some undertakings rely on infrastructure provided by others for delivery of their services, it is appropriate to establish a framework to ensure that the market functions effectively. National regulatory authorities should have the power to secure, where commercial negotiation fails, adequate access and interconnection and interoperability of services in the interest of end-users. In particular, they may ensure end-to-end connectivity by imposing proportionate obligations on undertakings that control access to end-users. Control of means of access may entail ownership or control of the physical link to the end-user (either fixed or mobile), and/or the ability to change or withdraw the national number or numbers needed to access an end-user's network termination point. This would be the case for example if network operators were to restrict unreasonably end-user choice for access to Internet portals and services.

(7) National legal or administrative measures that link the terms and conditions for access or interconnection to the activities of the party seeking interconnection, and specifically to the degree of its investment in network infrastructure, and not to the interconnection or access services provided, may cause market distortion and may therefore not be compatible with competition rules.

(8) Network operators who control access to their own customers do so on the basis of unique numbers or addresses from a published numbering or addressing range. Other network operators need to be able to deliver traffic to those customers, and so need to be able to interconnect directly or indirectly to each other. The existing rights and obligations to negotiate interconnection should therefore be maintained.

(9) Interoperability is of benefit to end-users and is an important aim of this regulatory framework. Encouraging interoperability is one of the objectives for national regulatory authorities as set out in this framework, which also provides for the Commission to publish a list of standards and/or specifications covering the provision of services, technical interfaces and/or network functions, as the basis for encouraging harmonisation in electronic communications. Member States should encourage the use of published standards and/or specifications to the extent strictly necessary to ensure interoperability of services and to improve freedom of choice for users.

(15) The imposition of a specific obligation on an undertaking with significant market power does not require an additional market analysis but a justification that the obligation in question is appropriate and proportionate in relation to the nature of the problem identified.

(16) Transparency of terms and conditions for access and interconnection, including prices, serve to speed-up negotiation, avoid disputes and give confidence to market players that a service is not being provided on discriminatory terms. Openness and transparency of technical interfaces can be particularly important in ensuring interoperability. Where a national regulatory authority imposes obligations to make information public, it may also specify the manner in which the information is to

be made available, covering for example the type of publication (paper and/or electronic) and whether or not it is free of charge, taking into account the nature and purpose of the information concerned.

(17) The principle of non-discrimination ensures that undertakings with market power do not distort competition, in particular where they are vertically integrated undertakings that supply services to undertakings with whom they compete on downstream markets.

(19) Mandating access to network infrastructure can be justified as a means of increasing competition, but national regulatory authorities need to balance the rights of an infrastructure owner to exploit its infrastructure for its own benefit, and the rights of other service providers to access facilities that are essential for the provision of competing services. Where obligations are imposed on operators that require them to meet reasonable requests for access to and use of networks elements and associated facilities, such requests should only be refused on the basis of objective criteria such as technical feasibility or the need to maintain network integrity. Where access is refused, the aggrieved party may submit the case to the dispute resolutions procedure referred to in Articles 20 and 21 of Directive 2002/21/EC (Framework Directive). An operator with mandated access obligations cannot be required to provide types of access which are not within its powers to provide. The imposition by national regulatory authorities of mandated access that increases competition in the short-term should not reduce incentives for competitors to invest in alternative facilities that will secure more competition in the long-term. The Commission has published a Notice on the application of the competition rules to access agreements in the telecommunications sector which addresses these issues. National regulatory authorities may impose technical and operational conditions on the provider and/or beneficiaries of mandated access in accordance with Community law. ...

(20) Price control may be necessary when market analysis in a particular market reveals inefficient competition. The regulatory intervention may be relatively light, such as an obligation that prices for carrier selection are reasonable as laid down in Directive 97/33/EC, or much heavier such as an obligation that prices are cost oriented to provide full justification for those prices where competition is not sufficiently strong to prevent excessive pricing. In particular, operators with significant market power should avoid a price squeeze whereby the difference between their retail prices and the interconnection prices charged to competitors who provide similar retail services is not adequate to ensure sustainable competition. When a national regulatory authority calculates costs incurred in establishing a service mandated under this Directive, it is appropriate to allow a reasonable return on the capital employed including appropriate labour and building costs, with the value of capital adjusted where necessary to reflect the current valuation of assets and efficiency of operations. The method of cost recovery should be appropriate to the circumstances taking account of the need to promote efficiency and sustainable competition and maximise consumer benefits.

Access Directive continued

Article 3

General framework for access and interconnection

1. Member States shall ensure that there are no restrictions which prevent undertakings in the same Member State or in different Member States from negotiating between themselves agreements on technical and commercial arrangements for access and/or interconnection, in accordance with Community law. The undertaking requesting access or interconnection does not need to be authorised to operate in the Member State where access or interconnection is requested, if it is not providing services and does not operate a network in that Member State.

Article 4

Rights and obligations for undertakings

1. Operators of public communications networks shall have a right and, when requested by other undertakings so authorised in accordance with Article 4 of Directive 2002/20/EC (Authorisation Directive), an obligation to negotiate interconnection with each other for the purpose of providing publicly available electronic communications services, in order to ensure provision and interoperability of services throughout the Community. Operators shall offer access and interconnection to other undertakings on terms and conditions consistent with obligations imposed by the national regulatory authority pursuant to Articles 5 to 8

...

Article 5

Powers and responsibilities of the national regulatory authorities with regard to access and interconnection

1. National regulatory authorities shall, acting in pursuit of the objectives set out in Article 8 of Directive 2002/21/EC (Framework Directive), encourage and where appropriate ensure, in accordance with the provisions of this Directive, adequate access and interconnection, and the interoperability of services, exercising their responsibility in a way that promotes efficiency, sustainable competition, efficient investment and innovation, and gives the maximum benefit to end-users.

...

3. With regard to access and interconnection referred to in paragraph 1, Member States shall ensure that the national regulatory authority is empowered to intervene at its own initiative where justified in order to secure the policy objectives of Article 8 of Directive 2002/21/EC (Framework Directive), in accordance with the provisions of this Directive and the procedures referred to in Articles 6 and 7, 20 and 21 of Directive 2002/21/EC (Framework Directive).

Article 13

Price control and cost accounting obligations

1. A national regulatory authority may, in accordance with the provisions of Article 8, impose obligations relating to cost recovery and price controls, including obligations for cost orientation of prices and obligations concerning cost accounting systems, for the provision of specific types of interconnection and/or access, in situations where a market analysis indicates that a lack of effective competition means that the operator concerned may sustain prices at an excessively high level, or may apply a price squeeze, to the detriment of end-users. To encourage investments by the operator, including in next generation networks, national regulatory authorities shall take into account the investment made by the operator, and allow him a reasonable rate of return on adequate capital employed, taking into account any risks specific to a particular new investment network project.

2. National regulatory authorities shall ensure that any cost recovery mechanism or pricing methodology that is mandated serves to promote efficiency and sustainable competition and maximise consumer benefits. In this regard national regulatory authorities may also take account of prices available in comparable competitive markets.

3. Where an operator has an obligation regarding the cost orientation of its prices, the burden of proof that charges are derived from costs including a reasonable rate of return on investment shall lie

with the operator concerned. For the purpose of calculating the cost of efficient provision of services, national regulatory authorities may use cost accounting methods independent of those used by the undertaking. National regulatory authorities may require an operator to provide full justification for its prices, and may, where appropriate, require prices to be adjusted.

Framework Directive 2002/21/EC

Recitals

(27) It is essential that ex ante regulatory obligations should only be imposed where there is not effective competition, i.e. in markets where there are one or more undertakings with significant market power, and where national and Community competition law remedies are not sufficient to address the problem. It is necessary therefore for the Commission to draw up guidelines at Community level in accordance with the principles of competition law for national regulatory authorities to follow in assessing whether competition is effective in a given market and in assessing significant market power. National regulatory authorities should analyse whether a given product or service market is effectively competitive in a given geographical area, which could be the whole or a part of the territory of the Member State concerned or neighbouring parts of territories of Member States considered together. An analysis of effective competition should include an analysis as to whether the market is prospectively competitive, and thus whether any lack of effective competition is durable. Those guidelines will also address the issue of newly emerging markets, where de facto the market leader is likely to have a substantial market share but should not be subjected to inappropriate obligations. The Commission should review the guidelines regularly to ensure that they remain appropriate in a rapidly developing market. National regulatory authorities will need to cooperate with each other where the relevant market is found to be transnational.

(32) In the event of a dispute between undertakings in the same Member State in an area covered by this Directive or the Specific Directives, for example relating to obligations for access and interconnection or to the means of transferring subscriber lists, 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 compliance with the obligations arising under this Directive or the Specific Directives

Article 3a.

Without prejudice to the provisions of paragraphs 4 and 5, national regulatory authorities responsible for ex ante market regulation or for the resolution of disputes between undertakings in accordance with Article 20 or 21 of this Directive shall act independently and shall not seek or take instructions from any other body in relation to the exercise of these tasks assigned to them under national law implementing Community law

...

Article 4

Right of appeal

1. Member States shall ensure that effective mechanisms exist at national level under which any user or undertaking providing electronic communications networks and/or services who is affected by a decision of a national regulatory authority has the right of appeal against the decision to an appeal body that is independent of the parties involved. This body, which may be a court, shall have the

appropriate expertise available to it to enable it to carry out its functions effectively. Member States shall ensure that the merits of the case are duly taken into account and that there is an effective appeal mechanism.

Pending the outcome of any such appeal, the decision of the national regulatory authority shall stand, unless interim measures are granted in accordance with national law

...

Article 8

Policy objectives and regulatory principles

1. Member States shall ensure that in carrying out the regulatory tasks specified in this Directive and the Specific Directives, the national regulatory authorities take all reasonable measures which are aimed at achieving the objectives set out in paragraphs 2, 3 and 4. Such measures shall be proportionate to those objectives. Member States shall ensure that in carrying out the regulatory tasks specified in this Directive and the Specific Directives, in particular those designed to ensure effective competition, national regulatory authorities take the utmost account of the desirability of making regulations technologically neutral. National regulatory authorities may contribute within their competencies to ensuring the implementation of policies aimed at the promotion of cultural and linguistic diversity, as well as media pluralism.

2. The national regulatory authorities shall promote competition in the provision of electronic communications networks, electronic communications services and associated facilities and services by inter alia:

- (a) ensuring that users, including disabled users, derive maximum benefit in terms of choice, price, and quality;
- (b) ensuring that there is no distortion or restriction of competition in the electronic communications sector;
- (c) encouraging efficient investment in infrastructure, and promoting innovation; and
- (d) encouraging efficient use and ensuring the effective management of radio frequencies and numbering resources.

3. The national regulatory authorities shall contribute to the development of the internal market by inter alia:

- (a) removing remaining obstacles to the provision of electronic communications networks, associated facilities and services and electronic communications services at European level;
- (b) encouraging the establishment and development of trans-European networks and the interoperability of pan-European services, and end-to-end connectivity;
- (c) ensuring that, in similar circumstances, there is no discrimination in the treatment of undertakings providing electronic communications networks and services;
- (d) cooperating with each other and with the Commission in a transparent manner to ensure the development of consistent regulatory practice and the consistent application of this Directive and the Specific Directives.

4. The national regulatory authorities shall promote the interests of the citizens of the European Union by inter alia:

- (a) ensuring all citizens have access to a universal service specified in Directive 2002/22/EC (Universal Service Directive);

- (b) ensuring a high level of protection for consumers in their dealings with suppliers, in particular by ensuring the availability of simple and inexpensive dispute resolution procedures carried out by a body that is independent of the parties involved;
- (c) contributing to ensuring a high level of protection of personal data and privacy;
- (d) promoting the provision of clear information, in particular requiring transparency of tariffs and conditions for using publicly available electronic communications services;
- (e) addressing the needs of specific social groups, in particular disabled users; and
- (f) ensuring that the integrity and security of public communications networks are maintained.

Article 20

Dispute resolution between undertakings

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

2. Member States may make provision for national regulatory authorities to decline to resolve a dispute through a binding decision where other mechanisms, including mediation, exist and would better contribute to resolution of the dispute in a timely manner in accordance with the provisions of Article 8. The national regulatory authority shall inform the parties without delay. If after four months the dispute is not resolved, and if the dispute has not been brought before the courts by the party seeking redress, the national regulatory authority shall issue, at the request of either party, a binding decision to resolve the dispute in the shortest possible time frame and in any case within four months.

3. In resolving a dispute, the national regulatory authority shall take decisions aimed at achieving the objectives set out in Article 8. Any obligations imposed on an undertaking by the national regulatory authority in resolving a dispute shall respect the provisions of this Directive or the Specific Directives.

4. The decision of the national regulatory authority shall be made available to the public, having regard to the requirements of business confidentiality. The parties concerned shall be given a full statement of the reasons on which it is based.

5. The procedure referred to in paragraphs 1, 3 and 4 shall not preclude either party from bringing an action before the courts.

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